Supreme Court No. 96236-7
(COA No. 76334-2-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KING COUNTY,

Respondent,

v.

FRANK COLUCCIO CONSTRUCTION COMPANY,

Petitioner.

ON APPEAL FROM THE COURT OF APPEALS FOR THE STATE OF WASHINGTON, DIVISION 1
NO. 76334-2-I

PETITION FOR REVIEW

Sam E. Baker, WSBA 3872
Bradley L. Powell, WSBA 11158
OLES MORRISON RINKER & BAKER LLP
701 Pike Street, Suite 1700, Seattle, WA 98101-3930
Phone: (206) 623-3427 /Fax: (206) 682-6234
Email: baker@oles.com; powell@oles.com
Attorneys for Appellant

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I. IDENTITY OF PETITIONER

Project owner King County (**County**) sued petitioner/contractor Frank Coluccio Construction Company (**Coluccio** or **FCCC**) in its Superior Court on December 7, 2016. Days later Coluccio sued King County in Snohomish County, obtaining a TRO enjoining a County-threatened contract-termination. Prior to a scheduled preliminary injunction hearing, another Snohomish County judge dismissed Coluccio's action based on the priority-of-action rule. Coluccio appealed.

King County judge Beth Andrus denied Coluccio's venue-change motion but certified her order under RAP 2.3(b)(4) ("a controlling question of law") and discretionary review was granted based thereupon. Coluccio's two appeals were consolidated.

II. COURT OF APPEALS DECISION SOUGHT TO BE REVIEWED

Attached (Appendix [**App.**] 1-14) is Division I's May 7, 2018-filed Published Opinion (**Opinion**) terminating review. Its July 30, 2018-filed Order Denying Motion for Reconsideration is at App. 15.

III. ISSUES PRESENTED FOR REVIEW

Issue No. 1. RCW 36.01.050 (App. 16) was amended in 2015 to add section (3):

> (3) Any provision in a public works contract with any county that requires actions arising under the contract to be commenced in the superior court of the county is against public policy and the provision is void and unenforceable. This section shall not be construed to

> void any contract provision requiring a dispute arising under the contract to be submitted to arbitration.

App. 16

The County-Coluccio contract includes a term (General Term and Condition [**GTC**] 9.2A.1-3 [App. 17-19]) barring Coluccio from suing the County until *fulfillment of three "conditions precedent."* The first mandates "[c]ompliance with all [Contract] provisions." Two and three are more specific litigation-timing requirements, denying Coluccio *any court-access until following both*: (2) completion of such ever Alternative Dispute Resolution (**ADR**) procedures as the County requires, the timing and nature of which are controlled by the County; and (3) the County's issuing either a Certificate of Substantial Completion or Final Acceptance.

Coluccio has consistently contended below and on appeal (joined in the latter by amici contractor organizations) that these litigation-timing terms operate to enable King County (and other counties dictating such terms) to violate public policy and assure that its contractors will **never** have the opportunity to sue it first in an adjoining county (an option otherwise available under RCW 36.01.050(1)) if the County either: (a) deems contractor-performance and/or contract "compliance" to be deficient (thereby occasioning county-withholding of required completion-certificates); or (b) if (as here) it extends ADR proceedings to, or through, a *time after which* it has already sued the contractor in its own court. In sum, from

litigation-outset Coluccio has argued that GTC 9.2A-like provisions give county-owners de facto control over **where** as well as **when** contract-dispute litigation will occur, because if a county disputes contractor performance-adequacy/completion, it won't certify such. The result is to deny the contractor court-access and leave the owner-county solely able to sue contractor first in its own superior court.[1] Thus, Catch-22 arises: to prove satisfactory performance, the contractor must *successfully* litigate, but is allowed to do so *only after being sued by the county in its own superior court.*

Thus, the primary RAP 13.4(b)(4) "issue of substantial public interest that should be determined by the Supreme Court" is whether or not litigation-timing terms—such as those embodied in GTC 9.2A—constitute RCW 36.01.050(3)—"void[ed] and unenforceable"—because against "public policy"—"provision[s] in a public works contract ... requir[ing] actions arising under the contract to be commenced in the superior court of the [owner] county."

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[1] Under RCW 4.12.025 ("Action to be brought where defendant resides—...—Residence of corporations ...") (1), "An action may be brought in any county in which the defendant resides," and "the residence of a corporation shall be deemed to be in any county where" it "(a) transacts business; (b) has an office for the transaction of business; (c) transacted business at the time the cause of action arose." Thus, any corporation contracting with a county, i.e., "transact[ing] business" there, ipso facto is deemed its resident and therefore subject to suit in its superior court under the second sentence of RCW 36.01.050(1).

Issue No. 2. If review is accepted and issue No. 1 is answered affirmatively, a further issue arises: given that (as Coluccio concedes) litigation-timing terms may serve legitimate purposes (such as delaying litigation *by both owner and contractor* until post-performance and ADR-completion), should GTC 9.2A's terms be deemed wholly "void" under RCW 36.01.050(3)? Or rather, as Coluccio urges, should those terms be given a Restatement (Second) of Contracts (1981) (**Restatement**) § 208 "limit[ing] application"? Coluccio argues in favor of a limiting application giving a contractor a right to automatically require, when sued by an owner county in its own superior court, transfer of venue to an adjoining judicial district. This result vindicates both the salutary ends of (rather than one-sided applications of) litigation-timing provisions and RCW 36.01.050(3)'s "public policy voiding" terms mandating owner-county venue.

Issue No. 3. If review is accepted and issue No. 1 is answered affirmatively, and a "limiting application" is deemed an appropriate resolution of Issue No. 2, a further issue arises: should RCW 36.01.050(1)'s first sentence and (3)'s "public policy" be held to trump the priority-of-action rule, allowing the Snohomish County court to retain jurisdiction notwithstanding the first-filed (preemptive strike) King County suit?

IV. STATEMENT OF THE CASE

A. CONTRACTORS IN 2015 PERSUADED THE LEGISLATURE THAT FAIRNESS AND "PUBLIC

POLICY," I.E., THE PUBLIC INTEREST, REQUIRED AMENDING RCW 36.01.050 TO BAR PUBLIC WORKS-CONTRACT PROVISIONS "REQUIR[ING]" OWNER-COUNTY VENUE.

The brief of amici curiae Associated General Contractors ([**AGC**] with 1,000-plus members) and the National Utility Contractors Association ([**NUCA**] with 79 member contractors) summarizes RCW 36.01.050(3)'s enactment's genesis:

> In 2015, as promoted by Amici and their members, RCW 36.01.050 was amended to further strengthen the contractor's right to an impartial and fair trial against a county. Washington counties, recognizing an advantage in public works contracting, were routinely including venue clauses as part of their public works contracts, requiring contractors to waive their right under RCW 36.01.050 (RCW 36.01.050(3)) to bring their action in an impartial county and forcing contractors to litigate their matters in the venue chosen by the county, most often the county's own county. The amendments to RCW 36.01.050 (RCW 36.01.050(3)) state that any such provision is "against public policy" and "void and unenforceable." This amendment is consistent with protecting the interests of the entity or individual filing suit against the county and preventing the county from subverting the intent of RCW 36.01.050. [2]

B. KING COUNTY'S APPROACH IN RECENT YEARS OF USING LITIGATION-TIMING CONDITIONS PRECEDENT TO ASSURE OWNER-COUNTY VENUE OF MAJOR CONTRACT-CLAIM DISPUTES IS A MATTER OF SUBSTANTIAL PUBLIC INTEREST.

King County has developed a signature GTC 9.2A-approach: preemptively suing its contractors in its own superior court when facing major contractor-claims, thereby gaining plaintiff-status in its home-

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[2] April 14, 2017 Brief of AGC/NUCA Amici, p. 2.

court. Indeed, continuously since April 2010—except for the months of August-November 2016—this firm has represented contractors in mega cases, first Brightwater[3] and now this one—instigated (1) by the instant County outside-counsel (2) well prior to work-completion with (3) tens of millions of claim-dollars at stake and (4) either during or prior to contract-mandated ADR proceedings.

This King County mode of litigation control greatly disturbs, and vitally affects the litigation-interests of, the public-contracting construction industry. As stated at pages 2-3 of the AGC/NUCA Amici Brief:

> In this recent action between Coluccio and King County, King County has taken a new approach in circumventing the protections of RCW 36.01.050 through its dispute resolution provisions and a preemptive strike. Determining proper venue and allowing a county to subvert the policy and purpose behind RCW 36.01.050 based solely on who wins a sprint to the courthouse undermines the fundamental notions of fair play and professional conduct. Amici, therefore, supports Coluccio's efforts to protect RCW 36.01.050 and the public policy supporting it.

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[3] King County v. Vinci Const. Grands Projects, 191 Wn. App. 142, 364 P3d 784 (2015), *review granted sub no.* King County Mut. Ins. Co., 186 Wn.2d 1008, 380 P.3d 459 (2016).

C. KING COUNTY SPECIFIED A PERFORMANCE METHOD WHICH COLUCCIO DEEMED UNSAFE. *DURING A THREE-DAY MEDIATION SEEKING RESOLUTION*, KING COUNTY DELIVERED A "NOTICE OF DEFAULT" AND SUED (A PREEMPTIVE STRIKE) ALLEGING FCCC'S DEFICIENT PERFORMANCE.

Coluccio suspended tunneling-work and submitted expert reports that Differing Site Conditions (**DSC**) rendered the contractually-specified method both unproductive and unsafe. *See* Snohomish County Clerk's Papers (**SC-CP**) 368-408, 433-436. **During** a contractually required mediation, King County sued in its own superior court and delivered a notice of default. King County Clerk's Papers (**KC-CP**) 1-7; and 407, ¶ 7.

D. DAYS LATER COLUCCIO SUED THE COUNTY IN SNOHOMISH COUNTY (SC-CP 445 *ET SEQ.*), OBTAINING A TRO AND "FIND[ING]" OF A "LIKLIHOOD THAT COLUCCIO WILL PREVAIL ON THE MERITS," IT "BEING JUSTIFIED IN CEASING WORK" (SC-CP 250-254).

E. BEFORE A SCHEDULED PRELIMINARY INJUNCTION-HEARING, ANOTHER SNOHOMISH COUNTY JUDGE DISMISSED COLUCCIO'S COMPLAINT BASED ON THE PRIORITY-OF-ACTION RULE (SC-CP 9-10).

F. COLUCCIO UNSUCCESSFULLY SOUGHT A VENUE-CHANGE TO SNOHOMISH COUNTY, ARGUING THAT GTC 9.2A'S LITIGATION-TIMING TERMS EFFECTIVELY—AND IMPERMISSIBLY—REQUIRED KING COUNTY VENUE.

Coluccio's venue-change motion papers (KC-CP 93-106, 252-258) argued, inter alia, that GTC 9.2A's litigation-timing terms improperly "sought to eliminate Coluccio's statutory protections by contractually

preventing Coluccio from suing during the project" (KC-CP 93), thus allowing the County sole access to sue in its own superior court "before the Contract permitted Coluccio to [sue]" (KC-CP 96), such "contractual[] bar[] from initiating litigation" (KC-CP 99) producing an "inequitable" and "absurd result" (CP-100) inconsistent with statutory construction principles. In short:

> The legislature did not intend to prohibit counties from contractually requiring use of their own courts, only to allow those counties to compel litigation in these same courts simply by virtue of filing suit first.

KC-CP 101. GTC 9.2A's litigation-timing terms thus constituted an attempted "workaround to achieve the home field advantage [the County] so desperately sought" which was rendered "void" by RCW 36.01.050(3) (KC-CP 104) and its "public policy and legislative mandate to prevent counties from forcing contractor suits to be heard in the county's own courthouse" (KC-CP 93).

G. THE TRIAL COURT RECOGNIZED THAT COLUCCIO'S ARGUMENT THAT GTC 9.2A "INEQUITABLY" GAVE THE COUNTY SOLE-COURT ACCESS, VIOLATING RCW 36.01.050(3)'S "PUBLIC POLICY," IMPLICITLY RAISED AN *UNCONSCIONABILITY* ISSUE. ***SHE REJECTED THE ARGUMENT BUT CERTIFIED IT FOR APPEAL UNDER RAP 2.3(b)(4) AS "INVOLV[ING] A CONTROLLING QUESTION OF LAW."***

Judge Andrus' order denying venue-change pertinently states:

> FCCC's statutory right to select the venue [under RCW 36.01.050(1)] is restricted by [GTC] 9.2A(2) and (3) of the contract. In other words, FCCC's statutory right to select the venue does not exist until it has received a certificate of completion for the entire contract. FCCC argues that it had no

> option but to accept this language because public works contracts are "take-it-or leave-it" agreements. But FCCC has provided no authority for the proposition that these provisions are unenforceable or unconscionable."[4]

This was correct: Restatement § 178 "When a Term Is Unenforceable on Terms of Public Policy" dovetails with § 208 "Unconscionable Contract or Terms" ("the [§ 208] policy also overlaps with [§ 178] rules which render particular ... terms unenforceable on grounds of public policy"[5]). Indeed, Judge Andrus' implicitly equating "evidence" of "unenforceab[ility]," based on public policy-violation, with "evidence" of "unconscionab[ility]," was spot-on. As stated in 25 Wash. Practice Contract Law and Practice § 9.5 (3d ed.) "Unconscionability—Application of Restatement": "Unconscionable contracts or clauses are deemed void because they display one or more violations public policy."[6]

Coluccio unsuccessfully sought reconsideration (KC-CP 447-449), re-urging that GTC 9.2A litigation-timing terms operated as a proscribed "provision requir[ing]" owner-county venue and was therefore void—notwithstanding the contract-*inclusion* which *is itself the very predicate for applying the voiding statute*! *See* KC-CP 423, ll. 13-17; 425, ll. 15-427, l. 13; and 429, ll.1-6. Coluccio also, in response to the trial court's sua sponte asserting a lack of evidence of unconscionability (because Coluccio did not have to sign the contract), cited Cobb v. Snohomish County, 64 Wn.App 451, 464, 829 P.2d 169 (1991), a land use-permit

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[4] Emphasis added.

[5] Restatement § 208, *comment a "Scope."*

[6] Emphasis added.

case voiding a county code provision giving applicants "no choice but to accept the terms that are dictated".

Reconsideration-denial led to Coluccio's RAP 2.3(b)(4)-certification motion. Noting the court's having "twice ruled that GTC 9.2 was an enforceable litigation-timing device" (KC-CP 623) barring any contractor suit filed pre-ADR/work completion, Coluccio sought RAP 2.3(b)(4) certification as to the following:

> **Controlling Question of Law**
>
> Coluccio submits that the venue change-order turns upon the following controlling question of law: does giving effect to the second step [i.e., the litigation-timing condition precedents to be met by the contractor] of GTC 9.2's "Contractor May Not Sue Anywhere Without Post-Performance County-Enablement, But County May Sue in King County Anytime"-rule effectively gut RCW 36.01.050(3), which denial of effect produces both disharmony between sections (1) and (3) [and] violates public policy and the above-reviewed statutory construction principles?
>
> Plainly, the Court's Order's negative answer to this question, based on its reasoning that it is proper for GTC 9.2 to impose contractual conditions giving the County control of the starting gun for any contractor right to sue, shows that resolution **of this issue is a "controlling question of law."**[7]

The trial court granted FCCC's requested RAP 2.3 certification.[8] Coluccio sought discretionary review under 2.3(b)(1) ("obvious error"), (b)(2) ("probable error"), and (b)(4) ("controlling question of law"). Division I's May 17, 2017 letter-order granted discretionary review exclusively under (b)(4) ("the certification is well taken" [at 2 and 4 of

[7] KC-CP 462, ll. 12-23 (emphasis added).

[8] KC-CP 629-631.

5], there being no need to "consider whether review is otherwise warranted" [at 4 of 5].

H. THE COUNTY NEVER DISPUTED THAT GTC 9.2C ("VENUE AND JURISDICTION SHALL VEST SOLELY IN KING COUNTY") WAS VOID. RATHER, THE FUNDAMENTAL ARGUMENT WAS ALWAYS WHETHER GTC 9.2A.1-3 DE FACTO OPERATED AS AN RCW 36.01.050(3)-PROSCRIBED "PROVISION REQUIR[ING]" KING COUNTY VENUE.

There was **never** an issue as to whether GTC 9.2C, the contract's formal "forum selection" and "venue" clause ("Venue . . . shall vest solely in King County"), was valid—everybody agreed that RCW 36.01.050(3) voided it. Rather the County asserted that RCW 36.01.050(3) "deals only with forum selection clauses" and "merely voids forum selection clauses."[9] Coluccio asserted contrarily that (1) RCW 36.01.050(3) expressly voided "<u>any</u> provision in a public works contract ... that <u>requires</u> actions ... to be commenced in the superior court of the [owner] county,"[10] **and (2) GTC 9.2A was applied by the County so as to impose such a proscribed "require[ment.]"** That is, the County cannot do indirectly—what the legislature has prohibited directly, i.e., violate public policy.

This is pertinent because, as now developed, the reader of the Opinion is given not the slightest clue that this is an issue—let alone the fundamental issue—arising out of Coluccio's appeal.

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[9] County Respondent's Brief, pp. 15. 12.

[10] Emphasis added.

I. THE OPINION NOWHERE ACKNOWLEDGES, ADDRESSES OR DECIDES THE "CONTROLLING [GTE 9.2A LITIGATION-TIMING] QUESTION OF LAW" CERTIFIED BY THE TRIAL COURT AND ON THE BASIS OF WHICH DISCRETIONARY REVIEW WAS GRANTED.

Coluccio's appeal argument is succinctly summarized in its Amended Opening Brief's (**Brief**) three principal argument headings:

> V.C. UPHOLDING GTC 9.2'S LITIGATION-TIMING TERMS VIOLATES RCW 36.01.050 BY IMPERMISSIBLY "REQUIR[ING]" A KING COUNTY VENUE, EFFECTIVELY RENDERING SECTION 1'S FIRST SENTENCE AND (3) NUGATORY AND PRODUCING AN ABSURD FLYING IN THE FACE OF LEGISLATIVE INTENT.
>
> V.D. GTC 9.2'S LITIGATION-TIMING TERMS ARE SUBSTANTIVELY UNCONSCIONABLE BECAUSE (1) VIOLATIVE OF RCW 36.01.050(3)'S "PUBLIC POLICY" AND (2) HARSHLY ONE-SIDED IN GRANTING THE COUNTY SOLE ACCESS TO JUDICIAL RELIEF PRE-CONTRACT/ADR COMPLETION.
>
> V.E SO AS TO AVOID ANY UNCONSCIONABLE RESULT, GTC 9.2'S LITIGATION-TIMING TERMS SHOULD BE SUBJECTED TO A RESTATEMENT 208 "LIMIT[ING] APPLICATION" GIVING A CONTRACTOR SUED BY A COUNTY IN ITS HOME COURT A STATUTORY RIGHT TO REQUIRE VENUE-TRANSFER TO AN ADJOINING JUDICIAL DISTRICT.

This three-pronged argument mirrors Coluccio's Brief's Assignments of Error and Issues presented.

To compare the substance of this appeal-argument (and related error/issue statements) with the Opinion is to see ships passing in the

night. **Nowhere does the Opinion even acknowledge as an appeal issue, let alone address on the merits and decide, whether RCW 36.01.050(3)'s public policy-proscription may properly be applied to void litigation-timing conditions precedent such as those included in GTC 9.2.** The closest the Opinion gets is at 7 where it quotes the trial court's statement/conclusions that: (1) GTC 9.2A is a condition precedent which required FCCC to complete ADR before suing; (2) it is in a contract that FCCC signed and therefore cannot be invalid (!!!); and (3) Coluccio "has provided no legal authority for the proposition that these provisions are unenforceable or unconscionable," the trial court having apparently concluded that RCW 36.01.050(3) itself provided no such authority in this case of first impression.

The Opinion states neither acceptance or rejection of the trial court's implicit ruling that a contract provision cannot be statutorily void if it is included in an executed contract. **Nor does it acknowledge the existence of or engage the merits of Coluccio's GTC 9.2A-as-applied-is-a-void-"provision"-argument which constituted the heart of Coluccio's trial and appellate court filings.**

The issue of "unconscionability" was implicitly injected into the litigation (as the trial court expressly recognized) by Coluccio's argument that GTC 9.2A was "inequitable" and against public policy, because it gave King County sole court-access pre-ADR/work completion. Moreover a ruling that GTC 9.2A's litigation-timing terms violated RCW 36.01.050(3)'s public policy would ipso facto also render them

unconscionable (*see* Restatement §§ 178 and 208, and 25 Wash.Prac. § 9.5). It was thus reversable error that the Opinion at 12 declined to consider Coluccio's argument and authorities addressing the issue of unconscionability.

V. RAP 13.4(B)(4)-REVIEW SHOULD BE ACCEPTED.

RAP 13.4(b)(4) states three elements: (1) **issues** of (2) **substantial public interest** that (3) should be decided **by the Supreme Court.** We address these in reverse order.

A. THE SUPREME COURT SHOULD DECIDE THE "CONTROLLING QUESTION OF LAW AS TO WHICH THERE IS A SUBSTANTIAL GROUND FOR A DIFFERENCE OF OPINION" WHICH WAS RAP 2.3(b)(4)-CERTIFIED TO THE COURT OF APPEALS, BUT WHICH THE OPINION WHOLLY SIDESTEPS, CREATING NO STATE DECISIS-PRECEDENT BUT ONLY AMBIGUITY, CONFUSION AND MISCHIEF FOR PUBLIC CONTRACTING-LITIGATION.

We ask this Court to compare the trial court's RAP 2.3(b)(4)-certified "controlling question" (KC-CP 462), and Coluccio's Amended Opening Brief's *wholly consistent* elaborating Issues Statement (at 6), and supporting argument (summarized in its argument headings [*see* i-iii], **with the Opinion and *its* analysis.** To reiterate, they are ships passing in the night.

Perhaps the most basic statement of the issue raised by Coluccio's trial court and appellate filings is this: can RCW 36.01.050(3)'s proscription voiding as against public policy "any provision in a public works contract ... require[ing] actions ... to be commenced in the

[owner-county's] superior court"[11] be properly applied to other than a formal venue selection clause such as GRC 9.2C? Specifically, can it be applied to void a litigation-timing condition precedent such as GTC 9.2A 1-3 which operates de facto to give King County sole contractual control not just of when, **but where venue will lay.**

Coluccio argued that the answer is yes (its Brief's extensive supporting authority/analysis is merely highlighted below). As noted, the County argued contrarily that (3) "deals only with forum selection clauses" and "merely voids forum selection clauses."[12] And where does the Opinion come down on this dispute? Actually, it does not—its reader is given no indication that this is even an issue. The Opinion provides three descriptions of the applicability of (3): six times it is said to apply to "venue provisions" (at 2, 5, 7, and 9); once it is said to apply to a "venue clause" (at 3); and once it is said to pertain to a "venue selection provision (at 12). These observations are correct so far as they go, i.e., obviously (3) applies to such formal venue terms. But, as to both the existence and proper resolution of the issue raised by Coluccio, i.e., does (3) have a properly broader application to GTC 9.2A-like clauses, the Opinion is silent.

This creates a problem in terms of stare decisis:

> . . . Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without

[11] Emphasis added.

[12] County's Respondent's Brief, pp. 15, 12.

violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court.[6] "An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered." *Continental Mutual Savings Bank v. Elliot,* 166 Wash. 283, 300, 6 P.2d 638 (1932).

[6] *See Pacific Steamship Co. v. Peterson,* 278 U.S. 130, 49 S.Ct. 75, 73 L.Ed. 220 (1928) (A general expression respecting a particular issue that was not raised is not dispositive in a subsequent case in which the issue is raised, nor does it prevent the determination of the proper construction of a statute relating to that issue.) *See also Hizey v. Carpenter,* 119 Wash.2d 251, 830 P.2d 646 (1992); *Johnson v. Funkhouser,* 52 Wash.2d 370, 374, 325 P.2d 297 (1958); *Rainer Nat'l Bank v. McCraken,* 26 Wash.App. 498, 510, 615 P.2d 469 (1980) *review denied,* 95 Wash.2d 1005 (1981).

ETCO, Inc. v. Dept. of Labor & Ind., 66 Wn.App. 302, 397, 831 P.2d 1133 (1992).[13] As similarly stated in 18 Moore's Federal Practice Third Edition (LexisNexis 2017) § 134.04[5] "Stare Decisis Requires Actual Decision of the Issue":

> In order for a decision to be given stare decisis effect with respect to a particular issue, that issue must have been actually decided by the court. Thus, the Supreme Court has stated: "questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.[14]

Which brings us to the above-referenced *ambiguity, confusion and mischief* created by the Opinion. The GTC 9.2A litigation-timing condition precedent-issues remain unaddressed and undecided by the Opinion but are not going anywhere soon—unless review is accepted.

[13] Emphasis added.

[14] Emphasis added, notes omitted.

The next time King or any other county forces venue into its own superior court, by suing first while its contractor is denied court-access under a litigation-timing term, that contractor can obviously raise the argument of unconscionability (i.e., GTC 9.2A is unconscionable because it violates public policy by giving the county sole court-access) because the Opinion expressly refuses to consider it. But, then again, how about the fact that Coluccio raised the issue that (3) has a proper application extended beyond just plain venue clauses? Was that issue decided? The Opinion nowhere acknowledged, addressed or in any way analyzed it—just as it ignored the fact that King County commenced its action by way of a preemptive strike early in the course of a three-day mediation.

We are not being paranoid in assuming that King or any other county will argue in such a newly-arising case that the Opinion implicitly rejected Coluccio's broader-application and public policy arguments, and that rejection of those arguments necessitates rejection of the related/flip-side unconscionability argument (i.e., violation-of-public policy ipso facto equals unconscionability).

We believe that the better argument is that the Opinion provides no such stare decisis or precedential effect. But, there is Opinion-ambiguity aplenty to support a contrary argument, and it is the direct result of the *confusion and opportunity for litigation-mischief created by the Opinion's failure to forthrightly acknowledge, address or decide Coluccio's arguments.* For this reason, review should be accepted for **decision by the Supreme Court.**

B. SUBSTANTIAL PUBLIC INTEREST IS EVIDENCED BY THE LEGISLATURE'S ENACTMENT, AT THE BEHEST OF THE CONTRACTING-INDUSTRY SEGMENT OF THE PUBLIC, AND THE FILING OF THE AMICI CURIAE BRIEF.

See Amici Brief and the legislative "Staff Summary of Public Testimony" supporting (3)'s enactment.[15]

C. COLUCCIO'S BRIEF'S AUTHORITY AND ANALYSIS EVIDENCES BOTH ISSUES DESERVING REVIEW AND SUBSTANTIAL GROUNDS FOR A DIFFERENCE OF OPINION.

Because the Opinion does not address or decide the merits of Coluccio's actual arguments, there is no "there" in the Opinion for us to rebut or except to (other than the failure to decide). Nevertheless, we hope it will be helpful to Coluccio's cause to briefly highlight its substantive argument, analysis and authority.

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[15] PRO: The purpose of the bill is to preserve statutory rights of contractors on county public works projects to bring actions against counties in neighboring jurisdictions when legal disputes occur. Existing state law provides plaintiffs this right in disputes with counties. However, counties have been including clauses in public works contracts that require contractors to waive their statutory rights under law as a condition to getting a contract. Contractors do not have the ability to negotiate these clauses. This is about the appearance of fairness. The county being sued is also paying the salary of the judge. Suing is a serious matter which could bankrupt a small company. To ensure fairness, it is important that a contractor be able to file a lawsuit in an adjoining county.

S. B. Rep. H.B. 1601, 64th Leg., Reg. Sess. (Wash. 2015); emphasis added.

At heart, Coluccio's Brief makes a statutory construction argument. While the Opinion discusses construction principles at 8-9, it omits reference to the three principally relied upon by Coluccio. **First, "[i]t is generally true that specific venue statutes control over general venue statutes."**[16] **Second, "remedial statutes [are construed] liberally in accordance with the legislative purpose behind them."**[17] **Third, a statute should be interpreted to avoid inconsistent and absurd results.**[18] Also, the Opinion ignores Coluccio's noting that (3)'s last sentence expressly but **solely** excludes arbitration clauses from its application, implicitly implying its application is broader than to mere formal venue clauses.[19] Coluccio argued that section (3) was a specific venue statute controlling section (1)'s second sentence of general application, which specific venue provision was being denied its intended remedial effect by the appealed-from ruling, creating an absurd—and unconscionable—result, by allowing the County to use GTC 9.2A to **indirectly do what it could not do directly, i.e., dictate King County venue. Washington, Restatement and other authority** so precluding anti-public policy results by indirect-means are developed at Brief 25-28.

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[16] Brief, at 18, quoting Eubanks v. Brown, 170 Wn.App. 768, 772, 285 P.2d 901 (2012) (citations omitted).

[17] Brief, at 19, quoting Faciszewski v. Brown, 187 Wn.2d 308, 320, 386 P.3d 711 (2017) (citation omitted).

[18] Brief, at 18-19, citing State v. Postema, 46 Wn.App. 512, 731 P.2d 13, 731 P.2d 13 (1987).

[19] Brief, at 22.

Washington unconscionability cases barring giving one contracting party sole access to court or judicial remedies are at Brief 28-30.

Finally, at Brief 30-33, Coluccio reviews Restatement § 208's providing for "limit[ing] the application of any unconscionable term so as to avoid any unconscionable result." Coluccio there suggested such a "limiting application" of GTC 9.2A, which is unreferenced and unanalyzed by the Opinion.

VI. CONCLUSION

We ask that review be granted to decide the controlling question of law certified by the trial court which raises issues of substantial public interest ignored by the Opinion but which are appropriate for decision by the Supreme Court.

This 24th day of August, 2018.

OLES MORRISON RINKER & BAKER LLP

By: /s/ Sam E. Baker, Jr.
Sam E. Baker, WSBA 3872
Bradley L. Powell, WSBA 11158
Attorneys for Appellant, Frank Coluccio Construction Company

CERTIFICATE OF SERVICE

I certify that on the 24th day of August, 2018, I caused a true and correct copy of **APPELLANT FRANK COLUCCIO CONSTRUCTION COMPANY'S PETITION FOR REVIEW** to be served on the following in the manner indicated below:

Attorneys for King County: Karl F. Oles, WSBA #16401 David R. Goodnight, WSBA #20286 J. Scott Pritchard, WSBA #50761 Stoel Rives LLP 600 University Street, Suite 3600 Seattle, WA 98101	[X] Via Eservice [ ] US Mail, Postage Prepaid [ ] Hand Delivery/ [ ] Legal Messenger [ ] Facsimile [ ] Email: karl.oles@stoel.com david.goodnight@stoel.com scott.pritchard@stoel.com
Attorneys for King County: Mary DeVuono Englund, WSBA #17122 Senior Deputy Prosecuting Attorney Office of the Prosecuting Attorney Civil Division King County Courthouse 516 3rd Avenue, Suite W400 Seattle, WA 98104	[X] Via King County Eservice [ ] US Mail, Postage Prepaid [ ] Hand Delivery/ [ ] Legal Messenger [ ] Facsimile [ ] Email: mary.englund@kingcounty.gov
Attorneys for King County: Jerry L. Taylor, WSBA #40739 Senior Deputy Prosecuting Attorney King County Prosecuting Attorney Office 500 4th Avenue, Floor 9 Seattle, WA 98104	[X] Via King County Eservice [ ] US Mail, Postage Prepaid [ ] Hand Delivery/ [ ] Legal Messenger [ ] Facsimile [ ] Email: jerry.taylor@kingcounty.gov

Attorneys for Amici Curiae

John P. Ahlers
Ahlers & Cressman PLLC
999 3rd Ave Ste 3800
Seattle, WA 98104-4023

[X] Via King County Eservice
[ ] US Mail, Postage Prepaid
[ ] Hand Delivery/
[ ] Legal Messenger
[ ] Facsimile
[ ] Email:
jahlers@ac-lawyers.com

By: /s/ Christine J. Smith
Christine J. Smith

4811-6047-0896, v. 1

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

FRANK COLUCCIO CONSTRUCTION COMPANY, Appellant, v. KING COUNTY, Respondent.	No. 76334-2-I (Consolidated with No. 76638-4-I) PUBLISHED OPINION FILED: May 7, 2018

SCHINDLER, J. — RCW 36.01.050 governs the venue of actions by or against a county. RCW 36.01.050(1) states "All actions by any county shall be commenced in the superior court of the county in which the defendant resides, or in either of the two judicial districts nearest to the county bringing the action." In 2015, the legislature amended the statute to add a new subsection, RCW 36.01.050(3).[1] RCW 36.01.050(3) states, "Any provision in a public works contract with any county that requires actions arising under the contract to be commenced in the superior court of the county is against public policy and the provision is void and unenforceable." In February 2015, King County awarded a public works contract to Frank Coluccio Construction Company (FCCC). The contract included a provision that states venue "shall vest solely in the King County . . . Superior Court." On December 7, 2016, King County filed a breach of

[1] LAWS OF 2015, ch. 138, § 1.

contract lawsuit against FCCC in King County Superior Court. FCCC's principal business office is in Seattle. On December 15, FCCC filed a lawsuit against King County in Snohomish County Superior Court. Citing the 2015 amendment to RCW 36.01.050, FCCC argued the right to venue in Snohomish County. Snohomish County Superior Court dismissed the lawsuit. FCCC filed a counterclaim in the King County lawsuit and a motion to transfer venue to Snohomish County. King County agreed the public works contract venue provision is void but argued it filed the lawsuit in the county where FCCC resides. The court denied the motion to transfer venue. FCCC appeals the Snohomish County Superior Court order granting the motion to dismiss its lawsuit against King County and the King County Superior Court order denying the motion to transfer venue to Snohomish County. We hold the 2015 amendment renders the public works contract venue provision unenforceable but does not abrogate the mandate under RCW 36.01.050(1) that a county shall file a lawsuit against a contractor in the county in which the contractor resides. We affirm the order granting the motion to dismiss and the order denying the motion to transfer venue to Snohomish County.

North Creek Interceptor Sewer Improvement Project

In 2014, King County approved the request for proposal and bidding requirements and contract for the North Creek Interceptor Sewer Improvement Project. The contract required the contractor to use "Open Face Shield Tunneling" (OFST) and a specific dewatering system for the project. The contract set milestone dates for the completion of certain stages of the project. The "General Terms and Conditions"

address "LITIGATION," including the mandatory litigation condition precedent of a certificate of completion and a venue provision.

9.2 LITIGATION

A. As a mandatory condition precedent to the initiation of litigation by the Contractor against the County, Contractor shall:

1. Comply with all provisions set forth in this Contract;

2. Provide the Project Representative written notice of intent to participate in an Alternate Dispute Resolution (ADR) process agreeable to both parties within twenty-one (21) days from the date the Contractor received a written determination from the Appeal Officer on a submitted Appeal; or absent a written response by the Appeal Office, within eighty-one (81) days following the receipt of the Appeal by the Appeal Officer. The ADR process may be postponed by the County for the purpose of administrative efficiency to allow for all RCOs,[2] Claims and Appeals to be processed pursuant to the Contract as provided in Articles 5, 6, and 9, so that all disputed Appeal determinations can be addressed in one ADR process. The ADR process must be initiated for all disputed Appeals within 300 days after issuance of the Certificate of Substantial Completion for the entire Project; and

3. Receive the Certificate of Substantial Completion for the entire Contract or Final Acceptance if a Certificate of Substantial Completion for the entire Contract is not issued.

B. Any litigation brought against the County shall be filed and served on the County within 365 days from either the issuance of the Certificate of Substantial Completion for the entire Contract or Final Acceptance if no Certificate of Substantial Completion of the entire Contract is issued. The requirement that the parties participate in ADR does not waive the requirements of this subparagraph.

C. Venue and jurisdiction shall vest solely in the King the [sic] County Superior Court.

[2] Requests for change orders.

The contract states, "Failure to comply with these mandatory condition time requirements shall constitute a waiver of the Contractor's right to pursue judicial relief for any Claim arising from work performed under this Contract." Section 9.2(D).

Frank Coluccio Construction Company (FCCC) bid on the North Creek Interceptor Sewer Improvement Project. FCCC is a Washington corporation with its principal office located in Seattle.

King County awarded the North Creek Interceptor Sewer Improvement Project contract to FCCC in February 2015. The contract required completion of the first milestone by September 23, 2016. FCCC started work on the project on April 26, 2016.

In September 2016, FCCC suspended tunneling operations. On October 6, King County notified FCCC its work did not meet the requirements of the contract. King County demanded a "Corrective Action Plan" that identified "specific steps, methods and modifications that FCCC will adopt to make its performance compliant." FCCC requested a change in the project specifications to allow the use of a different type of tunneling method and a "different type of tunnel boring machine, with the added costs to be borne by the County." King County did not agree to change the project specifications. FCCC and King County scheduled a mediation for early December 2016.

King County Lawsuit Against FCCC in King County Superior Court

On December 7, King County filed a lawsuit against FCCC in King County Superior Court for breach of contract. The complaint alleged, "Venue is proper in King County Superior Court pursuant to RCW 36.01.050 and RCW 4.12.025 because

defendant FCCC resides in King County, Washington."[3] The lawsuit sought a declaratory judgment that FCCC was in default and damages.

On December 8, King County issued a notice of default. The notice states King County will terminate the contract unless FCCC provides a Corrective Action Plan.

FCCC Lawsuit Against King County in Snohomish County Superior Court

On December 15, FCCC filed a lawsuit against King County for injunctive and declaratory relief and damages in Snohomish County Superior Court. FCCC alleged breach of contract because the OFST method was not feasible.

Dismissal of Snohomish County Lawsuit

King County filed a motion to dismiss the lawsuit filed in Snohomish County Superior Court. FCCC argued because the venue provision in the contract was void and unenforceable under the 2015 amendment to RCW 36.01.050,[4] FCCC had the statutory right to file the lawsuit against King County in Snohomish County.

King County agreed the venue contract provision was void under the recent amendment to the statute. But King County asserted it filed the lawsuit against FCCC in the county where FCCC resides as mandated under RCW 36.01.050(1). "FCCC resides (has its home office and does business) in King County, so a suit against FCCC in King County was perfectly proper."

The Snohomish County Superior Court granted the motion to dismiss. The order states:

> The Court hereby ORDERS as follows:
> 1. Defendant's Motion to Dismiss is GRANTED.

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[3] RCW 4.12.025(1) states that a corporation resides in the county where it has an office for the transaction of business.

[4] LAWS OF 2015, ch. 138, § 1.

> 2. This matter is hereby DISMISSED without prejudice to Plaintiff's right to pursue its claims and remedies against King County in the first-filed lawsuit in King County.
> 3. The Snohomish County court is willing to hear this matter if the King County court concludes that venue is proper here.

FCCC filed an appeal on January 6, 2017 of the Snohomish County Superior Court order.

FCCC Counterclaim and Motion To Transfer Venue

On January 6, 2017, FCCC filed a counterclaim to the lawsuit filed in King County Superior Court. The counterclaim seeks breach of contract damages, a declaratory judgment that FCCC is not required to use the OFST method, and an injunction to prevent King County from terminating the contract.

FCCC filed a motion to transfer venue to Snohomish County Superior Court. RCW 4.12.030 permits a change of venue where it appears:

> (1) That the county designated in the complaint is not the proper county; or
> (2) That there is reason to believe that an impartial trial cannot be had therein; or
> (3) That the convenience of witnesses or the ends of justice would be forwarded by the change.

FCCC argued the 2015 amendment prohibited venue in King County. FCCC argued venue in King County Superior Court was not proper because "RCW 36.01.050 grants public works contractors an unqualified right to have their claims against a county heard by an adjoining county's superior court."

King County conceded the contract venue provision was void under RCW 36.01.050(3). But King County pointed out the legislature did not modify the mandatory language of RCW 36.01.050(1). Because there is no dispute FCCC resides in King

County, King County asserted venue was proper under RCW 36.01.050(1).

> FCCC resides (has its home office and does business) in King County, and as such, the County's choice of venue in King County was authorized (indeed mandated) by the applicable venue statute.[5]

The court denied the motion to transfer venue to Snohomish County Superior Court. The court ruled the contract provision that venue "shall vest solely in the King County . . . Superior Court" is unenforceable under RCW 36.01.050(3). The court rejected the argument that FCCC had the statutory right to determine venue in the lawsuit filed by King County against FCCC. The court ruled RCW 36.01.050(1) authorized King County to file the lawsuit against FCCC in King County Superior Court because FCCC is a resident of the county. The court also notes that FCCC's right to file a lawsuit against King County is subject to the contract condition precedent.

> Under RCW 36.01.050(1), FCCC has a right to elect to file in Snohomish County but this right is restricted by Paragraph 9.2(A)(2) and (3) of the contract. In other words, FCCC's statutory right to select the venue does not exist until it has received a certificate of completion for the entire contract. FCCC argues that it had no option but to accept this language because public works contracts are "take-it-or leave-it" agreements. But FCCC has provided no legal authority for the proposition that these provisions are unenforceable or unconscionable. FCCC accepted these provisions when it chose to bid on this project—knowing full well how risky underground tunneling projects can be.

On reconsideration, FCCC argued the decision was contrary to RCW 36.01.050(3) and public policy. The court denied the motion for reconsideration but entered an order for certification under RAP 2.3(b)(4).[6] We granted discretionary review of the order denying FCCC's motion to transfer venue and ordered consolidation with

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[5] Footnote omitted.

[6] RAP 2.3(b)(4) states the appellate court may accept discretionary review where the superior court certifies that "the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation."

the appeal of the Snohomish County order dismissing the lawsuit filed by FCCC against King County.

Appeal of Order Denying Motion To Transfer Venue

FCCC contends the King County Superior Court erred in denying the motion to transfer venue to Snohomish County Superior Court. FCCC asserts RCW 36.01.050(3) gives public works contractors the absolute right to have their claims heard in an adjoining county. The Associated General Contractors of Washington and National Utility Contractors Association of Washington filed an amicus brief in support of FCCC's argument. King County asserts the 2015 amendment does not change the plain and unambiguous language of RCW 36.01.050(1) that authorizes a county to file a lawsuit against a public works contractor in the county where the contractor resides.

The meaning of a statute is a question of law we review de novo. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002); W. Plaza, LLC v. Tison, 184 Wn.2d 702, 707, 364 P.3d 76 (2015). Our fundamental objective in construing a statute is to ascertain and give effect to the intent of the legislature. City of Spokane v. Rothwell, 166 Wn.2d 872, 876-77, 215 P.3d 162 (2009).

Statutory interpretation begins with the plain meaning of the statute. Nat'l Elec. Contractors Ass'n, Cascade Chapter v. Riveland, 138 Wn.2d 9, 19, 978 P.2d 481 (1999); Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). We discern plain meaning from the ordinary meaning of the language, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. Lake, 169 Wn.2d at 526. "While we look to the broader statutory context for guidance, we 'must not add words where the legislature has

chosen not to include them.' " Lake, 169 Wn.2d at 526 (quoting Rest. Dev., Inc. v. Cananwill, Inc., 150 Wn.2d 674, 682, 80 P.3d 598 (2003)). We "construe statutes such that all of the language is given effect." Rest. Dev., 150 Wn.2d at 682. We interpret statutory provisions in relation to each other to harmonize all provisions. Cannabis Action Coal. v. City of Kent, 180 Wn. App. 455, 477, 322 P.3d 1246 (2014); C.J.C. v. Corp. of Catholic Bishop of Yakima, 138 Wn.2d 699, 708, 985 P.2d 262 (1999). If the statute is unambiguous after we review the plain meaning, our inquiry is "at an end." Lake, 169 Wn.2d at 526.

RCW 36.01.050 governs venue in actions by or against counties. RCW 36.01.050(1) states:

> All actions against any county may be commenced in the superior court of such county, or in the superior court of either of the two nearest judicial districts. All actions by any county shall be commenced in the superior court of the county in which the defendant resides, or in either of the two judicial districts nearest to the county bringing the action.

In July 2015, the legislature amended RCW 36.01.050 to add a new subsection to prohibit the inclusion of a venue provision in a public works contract that requires "actions arising under the contract to be commenced" in the superior court of that county. LAWS OF 2015, ch. 138, § 1; RCW 36.01.050(3).

As amended, RCW 36.01.050 provides:

> (1) All actions against any county may be commenced in the superior court of such county, or in the superior court of either of the two nearest judicial districts. All actions by any county shall be commenced in the superior court of the county in which the defendant resides, or in either of the two judicial districts nearest to the county bringing the action.
>
> (2) The determination of the nearest judicial districts is measured by the travel time between county seats using major surface routes, as determined by the administrative office of the courts.
>
> (3) Any provision in a public works contract with any county that requires actions arising under the contract to be commenced in the

> superior court of the county is against public policy and the provision is void and unenforceable. This subsection shall not be construed to void any contract provision requiring a dispute arising under the contract to be submitted to arbitration.

FCCC argues that because RCW 36.01.050(1) gives a public works contractor the right to file suit against King County in the two nearest judicial districts, the language of the new subsection precludes King County from filing a lawsuit against a contractor in King County Superior Court. Because FCCC's argument ignores the plain and unambiguous language that mandates a county file a lawsuit against a contractor in the superior court of the county where the contractor resides, we disagree.

RCW 36.01.050(3) unambiguously prohibits the inclusion of a venue provision in a public works contract that requires "actions arising under the contract to be commenced" in that county as "void and unenforceable." RCW 36.01.050(3) also states, "This subsection" shall not be construed to void any provision "requiring . . . arbitration." While RCW 36.01.050(3) specifically addresses venue provisions in a public works contract, it does not refer to or alter the plain and unambiguous language of RCW 36.01.050(1). RCW 36.01.050(1) states, "All actions by any county shall be commenced in the superior court of the county in which the defendant resides, or in either of the two judicial districts nearest to the county bringing the action." The legislature did not change, modify, or alter the language of RCW 36.01.050(1).[7]

[7] The case FCCC cites, Briedablik, Big Valley, Lofall, Edgewater, Surfrest, North End Community Ass'n v. Kitsap County, 33 Wn. App. 108, 652 P.2d 383 (1982), is inapposite. Briedablik addressed the right to bring an action against a county in an adjoining county under former RCW 36.01.050 (1963) and the statute authorizing change of venue, RCW 4.12.030. Briedablik, 33 Wn. App. at 109. The court held the two statutes conflict and the statute governing actions by a contractor against a county controlled. Briedablik, 33 Wn. App. at 118-19. In Save Our Rural Environment v. Snohomish County, 99 Wn.2d 363, 367, 662 P.2d 816 (1983), the Washington Supreme Court held that "in actions by or against a county a trial court may continue to exercise its discretion under RCW 4.12.030. To the extent Briedablik is contrary to this view, it is overruled."

FCCC and amici cite legislative history to argue the legislature intended to prevent a county from filing a lawsuit against a public works contractor in the superior court of that county. But we look to the legislative history to determine legislative intent only if the statute is ambiguous. Rest. Dev., 150 Wn.2d at 682; see also City of Olympia v. Drebick, 156 Wn.2d 289, 295, 126 P.3d 802 (2006) (a reviewing court resorts to aids such as legislative history only when the language of the statute is not plain and unambiguous); Lake, 169 Wn.2d at 526 ("If the statute is unambiguous after a review of the plain meaning, the court's inquiry is at an end.").[8]

FCCC and amici also argue that as a matter of public policy, a public works contractor must have the right to bring its claims against a county in an adjoining county. Public policy arguments should be "addressed to the Legislature, not to the courts." Blomster v. Nordstrom, Inc., 103 Wn. App. 252, 258, 11 P.3d 883 (2000); Doe v. Wash. State Patrol, 185 Wn.2d 363, 384, 374 P.3d 63 (2016); State v. Costich, 152 Wn.2d 463, 479, 98 P.3d 795 (2004); Triplett v. Dep't of Soc. & Health Servs., 166 Wn. App. 423, 433, 268 P.3d 1027 (2012); Donohoe v. State, 135 Wn. App. 824, 851 n.20, 142 P.3d 654 (2006); Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd., 154 Wn.2d 224, 247, 110 P.3d 1132 (2005); Burkhart v. Harrod, 110 Wn.2d 381, 385, 755 P.2d 759 (1988); State v. Brown, 94 Wn. App. 327, 341-42, 972 P.2d 112 (1999); Cazzanigi v. Gen. Elec. Credit Corp., 132 Wn.2d 433, 449, 938 P.2d 819 (1997).

We hold the plain and unambiguous language of RCW 36.01.050(1) gives a county the right to file a lawsuit against a public works contractor in the county where the contractor resides. Because RCW 36.01.050(1) mandates a county shall file suit

[8] We note the bill report that amici cites describes the amendment as "simple" and states the amendment "solves a very straightforward issue with no change to the law." H.B. REP. ON H.B. 1601, at 2, 64th Leg., Reg. Sess. (Wash. 2015).

against a defendant in the county where the defendant resides and the 2015 amendment adding subsection (3) does not refer to, alter, or change the language of RCW 36.01.050(1), the King County Superior Court did not err in denying the motion to transfer venue.

In the alternative, FCCC claims the litigation condition precedent in the contract is procedurally and substantively unconscionable and violates RCW 36.01.050(3).

RAP 2.3 governs discretionary review. RAP 2.3(e) gives us the discretion to determine the scope of discretionary review and specify the "issues as to which review is granted." We granted review to address the order denying the motion to transfer venue where the public works contract included an unenforceable forum selection provision under RCW 36.01.050(3). We decline to consider other issues for which we did not grant discretionary review. State v. LG Elecs., Inc., 185 Wn. App. 123, 151-52, 340 P.3d 915 (2014); aff'd 186 Wn.2d 1, 375 P.3d 636 (2016).

In addition, FCCC did not argue in the motion to transfer venue or the motion for reconsideration that the litigation condition precedent was procedurally or substantively unconscionable. We also note the order denying the motion to transfer venue states FCCC argued it had no option but to accept the language of the contract but "provided no legal authority for the proposition that these provisions are unenforceable or unconscionable." We do not consider issues raised for the first time on appeal. RAP 2.5(a); Roberson v. Perez, 156 Wn.2d 33, 39, 123 P.3d 844 (2005).

Appeal of Order Dismissing Lawsuit Filed in Snohomish County

FCCC asserts the Snohomish County Superior Court erred in dismissing the lawsuit against King County under the priority of action rule.

We review de novo application of the priority of action rule. Atl. Cas. Ins. Co. v. Or. Mut. Ins. Co., 137 Wn. App. 296, 302-03, 153 P.3d 211 (2007). Under the priority of action rule, the court that obtains jurisdiction of a case first "retains the exclusive authority" over the action "until the controversy is resolved." Sherwin v. Arveson, 96 Wn.2d 77, 80, 633 P.2d 1335 (1981). "The reason for the doctrine is that it tends to prevent unseemly, expensive, and dangerous conflicts of jurisdiction and of process." Sherwin, 96 Wn.2d at 80.

The priority of action rule does not automatically apply when parties file two similar cases in different counties. Am. Mobile Homes of Wash., Inc. v. Seattle-First Nat'l Bank, 115 Wn.2d 307, 317, 796 P.2d 1276 (1990). The rule applies "only when the cases involved are identical as to subject matter, parties and relief." Sherwin, 96 Wn.2d at 80; Am. Mobile Homes, 115 Wn.2d at 317. Where the identity of the parties, subject matter, and relief are not met, courts consider equitable factors to determine whether the priority of action rule applies. Am. Mobile Homes, 115 Wn.2d at 320-21 (the Washington Supreme Court considered equitable factors because the two cases did not involve identical parties or relief).

Here, the parties are identical and the subject matter of the two lawsuits is the same. Citing American Mobile Homes, FCCC asserts we must consider equitable factors. FCCC contends the relief requested in the lawsuit filed against King County is

not the same as the relief requested in the counterclaim filed in King County Superior Court. We disagree.

In the Snohomish County Superior Court lawsuit, FCCC sought injunctive relief to prevent King County from terminating the contract based on refusal to use the OFST method. The counterclaim FCCC filed in the King County Superior Court lawsuit requested the same injunctive relief—"[i]njunctive relief barring the County from terminating or enforcing any termination of [FCCC] based on its refusal to use the unsafe OFST methodology." The court did not err in dismissing the Snohomish County lawsuit under the priority of action rule.

Alternatively, FCCC asks us to create an exception to the priority of action rule where a county sues a public works contractor first in its own county. We decline to create an exception to the well established priority of action rule.

We affirm the Snohomish County Superior Court order granting the motion to dismiss and the King County Superior Court order denying the motion to transfer venue.

WE CONCUR:

FILED
7/30/2018
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

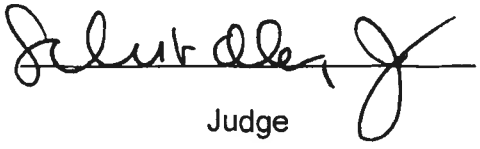
FRANK COLUCCIO CONSTRUCTION COMPANY, Appellant, v. KING COUNTY, Respondent.	No. 76334-2-I (Consolidated with No. 76638-4-I) ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO FILE REPLY TO ANSWER

Appellant Frank Coluccio Construction Company filed a motion for reconsideration of the opinion filed on May 7, 2018. Respondent King County filed an answer to the motion. Appellant Frank Coluccio Construction Company filed a motion for permission to reply to King County's answer to the motion for reconsideration. Now, therefore, a majority of the panel

ORDERS that the motion for reconsideration is denied. It is hereby further

ORDERED that the motion for permission to reply to King County's answer to the motion for reconsideration is denied.

FOR THE COURT:



Judge

Research References

Treatises and Practice Aids

13 Wash. Prac. Series § 5518, County Entity and Power to Sue and be Sued.

Notes of Decisions

Discrimination 2

2. Discrimination

County was not shielded in employment discrimination action from the administrative actions of its prosecutor or deputy prosecutors merely because their part of the county function lay in the prosecutor's office. Broyles v. Thurston County (2008) 147 Wash.App. 409, 195 P.3d 985. Civil Rights ⇐ 1736

County, rather than county prosecutor, was the proper party in action for hostile work environment and retaliation, brought under Law Against Discrimination (LAD), in connection with conduct of county prosecutor and other employees of prosecutor, by female plaintiffs formerly employed as deputy prosecuting attorneys (DPAs). Broyles v. Thurston County (2008) 147 Wash.App. 409, 195 P.3d 985. Civil Rights ⇐ 1736; Counties ⇐ 67

36.01.050. Venue of actions by or against counties

(1) All actions against any county may be commenced in the superior court of such county, or in the superior court of either of the two nearest judicial districts. All actions by any county shall be commenced in the superior court of the county in which the defendant resides, or in either of the two judicial districts nearest to the county bringing the action.

(2) The determination of the nearest judicial districts is measured by the travel time between county seats using major surface routes, as determined by the administrative office of the courts.

(3) Any provision in a public works contract with any county that requires actions arising under the contract to be commenced in the superior court of the county is against public policy and the provision is void and unenforceable. This subsection shall not be construed to void any contract provision requiring a dispute arising under the contract to be submitted to arbitration.

[2015 c 138 § 1, eff. July 24, 2015; 2005 c 282 § 42, eff. July 24, 2005; 2000 c 244 § 1; 1997 c 401 § 1; 1963 c 4 § 36.01.050. Prior: 1854 p 329 § 6; No RRS.]

Research References

ALR Library

93 ALR 500, Right to Lay Venue of Action Against Municipality in County Other Than that in Which it is Situated.

Treatises and Practice Aids

1 Causes of Action 2d 603, Cause of Action Against Governmental Entity for Injury Caused by Condition of Public Building.

4 Wash. Prac. Series CR 82, Venue.

14 Wash. Prac. Series § 6:9, Action by or Against a County.

14 Wash. Prac. Series § 6:11, Actions Against Public Officers.

6. Contractor shall notify the County of its disagreement with the denial or deemed denial of the Contractor's Appeal within twenty-one (21) days after the deemed denial or receipt of the denial. Failure to notify the County constitutes acceptance of the denial or deemed denial and the Contractor waives any right to any adjustment in Contract Price and/or Contract Time with respect to the Appeal.

9.1 CONTRACTOR'S BURDEN OF PROOF ON CLAIM

A. The Contractor shall have the burden of proof to demonstrate entitlement and damages.

B. If the Contractor, on behalf of itself or its Subcontractors and Suppliers seeks an adjustment in the Contract Price or Contract Time not supported by Project cost records meeting the requirements of §00700 ¶3.10, *Cost Records*, the Claim is waived.

C. Compliance with the record keeping requirements set forth in this Contract is a condition precedent to recovery of any costs or damages related to or arising from performance of the Contract Work. If the County establishes non-compliance of the record-keeping requirement set forth in §00700 ¶ 3.10, *Cost Records*, no adjustment shall be made to the Contract Price and/or Contract Time with respect to that Claim.

D. No Claim submitted to Alternate Dispute Resolution (ADR) or pursued by the Contractor in litigation shall seek damages greater than those set forth in the Contractor's Claim, except for accrual of any interest owing under applicable law.

9.2 LITIGATION

A. As a mandatory condition precedent to the initiation of litigation by the Contractor against the County, Contractor shall:

1. Comply with all provisions set forth in this Contract;

2. [illegible] into an Alternate Dispute Resolution (ADR) process agreeable [illegible] parties [illegible] time during Contract Time but no later than [illegible] (60) days after issuance of the [illegible] of Substantial Completion for the entire Project or Final Acceptance if a Certificate [illegible] Completion for the entire Contract is not issued; and complete the ADR process within 240 days after issuance of Substantial Completion for the entire Project or Final Acceptance if no Certificate of Substantial Completion for the entire Contract is issued; and

3. Receive the Certificate of Substantial Completion for the entire Contract or Final Acceptance if a Certificate of Substantial Completion for the entire Contract is not issued.

B. Any litigation brought against the County shall be filed and served on the County within 365 days from either the issuance of the Certificate of Substantial Completion for the entire Contract or Final Acceptance if no Certificate of Substantial Completion of the entire Contract is issued. The requirement that the parties participate in ADR does not waive the requirements of this subparagraph.

C. Venue and jurisdiction shall vest solely in the King the County Superior Court.

D. Failure to comply with these mandatory condition time requirements shall constitute a waiver of the Contractor's right to pursue judicial relief for any Claim arising from work performed under this Contract.

to Section 01062, Attachment A, Permits, shall take precedence over provisions of any other Division;

5. Detail drawings, as modified by Change Orders;
6. Drawings, as modified by Change Orders;
7. Appendix to Section 01062, Attachment A, Permits, in Volume 2
8. Geotechnical Baseline Report (GBR);
9. Geotechnical Data Report (GDR);
10. All other sections in Division 0 not specifically identified herein by Section; and
11. Affidavits, Certifications and bonds (§00410; §00420, §00425).

B. In the event there is a conflict, inconsistency, or ambiguity within the Contract Document and EPA requirements, EPA requirements shall take precedence.

3. Provision 3.8 SCHEDULE OF WORKING HOURS. DELETE Paragraph 3.8 C from Section 00700, in its entirety, and REPLACE with the following:

A. The Contractor shall provide written request to perform any Work outside the regular working hours specified in this Contract. The written request must be received by the Project Representative a minimum of 48 hours in advance of the proposed Work. The revised working hours must be approved by the Project Representative prior to proceeding with any Work outside the regular working hours. Any Work performed after regular working hours, shall be performed without additional expense to the County, except as otherwise provided in the Contract Documents.

4. ADD the following NEW provision at the end of Article 3:

"3.28 PROJECT LABOR AGREEMENT (PLA)

This Contract is subject to the terms and conditions contained in the Project Labor Agreement for the North Creek Interceptor Sewer Improvement Project. The PLA is attached hereto and incorporated into the Contract. Contractor agrees to comply with all terms and conditions contained in the PLA and have incorporated any and all costs associated with compliance with the PLA into the Contract Price."

5. Provision 7.9 WARRANTY AND GUARANTY. DELETE Paragraph 7.9 B from Section 00700, in its entirety, and REPLACE with the following:

B. Unless there are specified interim milestones as identified in Section 01014, the warranty for all work shall commence with the issuance of a Certificate of Substantial Completion for the Project. If there are interim milestones the warranty period shall start as specified in Section 01740. The warranty duration shall be the longer period of; one year from the issuance of Substantial Completion, or the duration of any special extended warranties required elsewhere in the Contract, or the duration offered by a supplier or common to the trade.

6. Provision 9.2 LITIGATION. DELETE Paragraph 9.2 A. 2 from Section 00700, in its entirety, and REPLACE with the following:

2. Provide the Project Representative written notice of intent to participate in an Alternate Dispute Resolution (ADR) process agreeable to both parties within twenty-one (21) days from the date the Contractor received a written determination from the Appeal Officer on a submitted Appeal; or absent a written response by the Appeal Office, within eighty-one (81) days following the receipt of the Appeal by the Appeal Officer. The ADR process may be postponed by the County for the purpose of administrative efficiency to allow for all RCOs, Claims and Appeals to be processed pursuant to the Contract as provided in Articles 5, 6, and 9, so that all disputed Appeal determinations can be addressed in one

ADR process. The ADR process must be initiated for all disputed Appeals within 300 days after issuance of the Certificate of Substantial Completion for the entire Project.

7. **ADD the following NEW provision to Article 10: MISCELLANEOUS:**

10.11 TRANSMITTAL OF CONTRACT DOCUMENTS

A. Email is not a replacement for Contract required documents. All documents must be addressed to the designated Project Representative. The Project Representative will provide to the Contractor the email address that the Contractor shall use when transmitting electronic documents.

B. The following documents, when required by Contract shall be submitted as a pdf document and transmitted to the Project Representative using the required email address:

1. Letters, memo, transmittals
2. Submittals
3. Request for Information (RFI)
4. Contract Clarification Request (CCR)
5. Request for Change Order (RCO)
6. Request for Change Proposal (RCP)

C. When information is transmitted digitally, one exact replica of the pdf documents (original documents) shall be hand-delivered or mailed to King County within seven calendar days.

D. The following documents, when required by Contract, are not acceptable for digital transmission. These documents shall be processed using paper. These include:

1. Change Orders
2. Product samples
3. Color samples
4. full size shop drawings

E. When the contract uses digital communication, the Project Representative may send documents digitally to the Contractor's designated representative after appropriate address are provided. (Section 00700 3.3).

F. The Contract requirements for accuracy and completeness of information shall apply to all documents transmitted digitally.

G. The date a party receives documents transmitted via e-mail will be as indicated by the party's "Date Received" stamp.

END OF SECTION

OLES MORRISON RINKER & BAKER, LLP

August 24, 2018 - 3:19 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	76334-2
Appellate Court Case Title:	Frank Coluccio Construction Company, Appellant v. King County, Respondent
Superior Court Case Number:	16-2-20773-0

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