No. 98395-0

COA No. 79407-8-I

SUPREME COURT
OF THE STATE OF WASHINGTON

EDIFICE CONSTRUCTION COMPANY, INC., a Washington corporation,

Petitioner,

v.

SAK & PATCH, INC., AQUAGUARD WATERPROOFING LLC, ARROW INSULATION, INC., COMMERCIAL INDUSTRIAL ROOFING, INC., HIGHPOINT CONSTRUCTION INC., et al,

Respondents.

ANSWER OF RESPONDENT HENDERSON MASONRY, INC. TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Petitioner, Edifice Construction Company, Inc. ("Edifice") served as the general contractor for a townhouse development in Seattle, Washington. The owners initiated arbitration against Edifice over alleged construction defects, and Edifice in turn sued its subcontractors, including the Respondent, Henderson Masonry, Inc. ("Henderson"), in King County Superior Court and filed a motion to compel arbitration. The subcontracts did not contain arbitration provisions, but Edifice claimed the subcontracts incorporated the main contract between Edifice and the owners, and therefore, the subcontractors were bound by the main contract's arbitration provision.

Henderson argued that it had not agreed to arbitrate, and the superior court agreed, denying Edifice's motion. The Court of Appeals affirmed, holding that because there was no evidence Henderson knew of or assented to the arbitration clause found in the main contract, it could not be compelled to arbitrate. Edifice now contends that the Court of Appeals erred by considering whether the subcontractors were aware of the arbitration provision.

II. COUNTERSTATEMENT OF ISSUES

This case does not present any issue that warrants this Court's review under RAP 13.4(b). However, if review were accepted, the issues before this Court would be:

1. The contract at issue purports to incorporate a separate agreement that includes a mandatory arbitration clause. But the record suggests that the respondents did not learn of the incorporated arbitration requirement until they received the notice of arbitration. Are knowledge of and assent to terms found in a separate contract required?

2. Alternatively, the Court of Appeals held that Edifice's appeal must be denied because Edifice failed to provide an adequate record for review as required under RAP 9.2. Edifice has not addressed this issue in its petition. Does the failure to provide an adequate record under RAP 9.2 preclude review?

III. COUNTERSTATEMENT OF THE CASE

A. The Main Contract

On April 25, 2010, Six Degrees Capital Development LLC and Kenneth Woolcott (the "Owners") contracted with Edifice for construction of a townhome development located at 222 West Highland Drive, Seattle, WA (the "Property"). CP 40. The Owners and Edifice used modified American Institute of Architects contracts (the "Main Contract"). The Main Contract required the parties to submit to binding arbitration in the event of a dispute, though the Owners and Edifice substantially modified the arbitration clause from the AIA standard language. CP 161.

B. The Subcontract

Edifice entered subcontracts for the construction of the Property. Henderson was responsible for the masonry work. CP 210-21. All subcontractors but one, Bob Johnson Woodworking, LLC, agreed to a subcontract drafted by Edifice (the "Subcontract"). CP 164-297.

Notably, the Subcontract contained no arbitration clause, though it included a mediation clause and a forum selection clause requiring disputes to be heard in King County Superior Court. CP 213-14.

The Subcontract purported to incorporate the Main Contract to the extent it did not conflict with the terms of the Subcontract. CP 210. To the extent there was a conflict, the Subcontract states that terms of the Subcontract prevail. CP 210. As Edifice notes, the Subcontract also included a Pass-Through Clause allowing the subcontractors' claims to pass through Edifice to the Owners and vice-versa. CP 214. A copy of the Main Contract was not included as an attachment, and there is no evidence that it was otherwise provided.

C. Superior Court Procedural History

The Owners initiated arbitration proceedings against Edifice on September 4, 2018. CP 298. Edifice issued a Notice of Intent to Arbitrate to Henderson on September 11, 2018. CP 312. Other subcontractors received

similar notices. CP 300-25. Edifice then filed a complaint in King County Superior Court against thirteen subcontractors. CP 1.

On November 6, 2018, Edifice filed a motion to compel arbitration and requesting a stay of the superior court action. CP 24. Henderson contested the motion to compel, arguing that it did not agree to arbitration and that the Subcontract required any disputes to be heard in King County Superior Court.[1] CP 353. On November 26, 2018, the superior court denied Edifice's motion to compel arbitration. CP 451.

D. Appellate Procedural History

On appeal, Henderson again argued that it did not agree to binding arbitration, expanding this argument to note that there could not have been a meeting of the minds regarding arbitration because there was no evidence the subcontractors were aware of the terms of the Main Contract.[2] The Court of Appeals agreed, noting that "Indeed, based on the record, Respondents were not aware of the AlA forms used in the main contracts until Edifice sent the Notices of Intent to Arbitrate." Edifice Constr. Co., Inc. v. Arrow

[1] Each of the Respondents, Aquaguard Waterproofing, LLC; Arrow Insulation, Inc.; Seattle Painting Specialists, Inc.; Bob Johnson Woodworking, LLC; David Rich Hentzel Jr.; and Automated Equipment Co., joined Henderson in opposing Edifice's motion. CP 327-420.
[2] On appeal, Henderson asserted that its argument regarding its lack of knowledge of the incorporated Main Contract provisions arose from and was an extension of its initial claim that there was no meeting of the minds regarding mandatory arbitration. Indeed, if the subcontractors were unaware of the Main Contract, there could not have been any meeting of minds as to provisions within the Main Contract. The Court of Appeals agreed and exercised its discretion to consider the argument. Edifice at * 4 n. 4.

Insulation, Inc., No. 79407-8-I, 2020 WL 812129, at *6 (Wash. Ct. App. Feb. 18, 2020). The Court of Appeals affirmed the denial of Edifice's motion to compel. Id.

The Court of Appeals also held that Edifice's motion must be denied because it failed to include information in the record that would be necessary to grant Edifice relief:

> We note that, even if the subcontracts had incorporated the main contracts, we would still affirm. While the parties dispute the scope of the Pass-through clause, we assume for the sake of this point that Edifice's broader interpretation that the clause applies "[i]n the event of any dispute or claim between Contractor and Owner which directly or indirectly involves the work performed or to be performed by Subcontractor" is correct. Edifice, however, failed to include in the record the expert report specifying the construction defects the Owners alleged in the dispute. Without this information, we cannot determine whether the dispute directly or indirectly involves work completed by Respondents. As the party presenting the issue for review, Edifice bore the burden of providing an adequate record. See RAP 9.2. While Edifice acknowledged that the record lacked this information, it declined to supplement.

Id. at * 6, n. 5.

IV. REASONS WHY REVIEW SHOULD BE DENIED

The Court of Appeals correctly held that terms of an incorporated document should not be enforced unless the parties had knowledge of and assented to those incorporated terms. Edifice's basis for discretionary review is its erroneous claim that the opinion conflicts with Supreme Court and intermediate appellate decisions. RAP 13.4(b)(1-2). As discussed below, the Court of Appeals' holding is consistent with Washington law, the widely accepted view on incorporated terms, and the broader principles of contract law. Because the Court of Appeals' decision is not contrary to Washington law, Edifice's petition should be denied under RAP 13.4(b).

A. The Court of Appeals Correctly Denied Edifice's Motion to Compel Because Absent Knowledge and Assent of the Main Contract's Arbitration Provisions, there was no Meeting of the Minds to Arbitrate.

Because there is no evidence Henderson was aware of the Main Contract's arbitration provision, the Court of Appeals concluded that Henderson did not know of or assent to arbitration, and affirmed the denial of Edifice's motion to compel. Edifice at *6. But according to Edifice, knowledge of and assent to incorporated terms are immaterial, and the only question for courts to consider is whether the contract states an intent to incorporate. Edifice's argument is contrary to established law and does not warrant review.

Mutual assent is one of the bedrock principles of contract law. See Saluteen-Maschersky v. Countrywide Funding Corp., 105 Wn. App. 846, 851, 22 P.3d 804 (2001) ("For a contract to exist, there must be a mutual intention or 'meeting of the minds' on the essential terms of the agreement."). This "meeting of the minds" requirement applies even to terms incorporated by reference. See W. Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc., 102 Wn. App. 488, 494–95, 7 P.3d 861 (2000) ("It must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms.") (citing 11 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 30:25, at 233-34 (Richard A. Lord ed., 4th ed.1999)).

As the party claiming incorporation, Edifice had the burden of proving Henderson's intent to be bound by the Main Contract's arbitration provisions. Baarslaq v. Hawkins, 12 Wn. App. 756, 760, 531 P.2d 1283 (1975). The Court of Appeals correctly concluded that Edifice failed to meet its burden.

The Court of Appeals noted that there was no evidence the Main Contract was ever provided to the subcontractors: "Indeed, based on the record, Respondents were not aware of the AlA forms used in the main contracts until Edifice sent the Notices of Intent to Arbitrate." Edifice at *6. The Main Contract was not included as an attachment. Nor did the

Subcontract identify the Main Contract as a widely available AIA form, though even if it had, the arbitration clause in the Main Contract is not AIA standard—it was a highly modified version drafted between the Owners and Edifice. There is no other evidence the subcontractors received the Main Contract.

Based on this record, the Court of Appeals concluded that Henderson did not know of or assent to the terms of the Main Contract and there was no meeting of the minds as to arbitration. Consistent with Washington law, the Court of Appeals affirmed the denial of Edifice's motion to compel arbitration.

B. Courts Throughout the United States Require Proof of Knowledge and Assent Before Enforcing Incorporated Terms. The Court of Appeals' Holding is Widely Accepted, not an Outlier as Edifice Suggests.

Edifice attempts to paint the Court of Appeals and Ferrellgas' "knowledge and assent" requirement as an outlier. It is not. Jurisdictions across the country require knowledge and assent of incorporated terms before they will enforce those incorporated terms.

The Supreme Court of Appeals of West Virginia addressed facts similar to our own in State ex rel. U-Haul Co. of W. Virginia v. Zakaib, 232 W. Va. 432, 444, 752 S.E.2d 586 (2013). There, U-Haul sought to compel arbitration based on a provision in an incorporated addendum. Because the

addendum containing the arbitration provision was not provided until after the contract was signed, the court refused to compel arbitration:

> Under these circumstances, there simply is no basis upon which to conclude that a U–Haul customer executing the Rental Agreement possessed the requisite knowledge of the contents of the Addendum to establish the customer's consent to be bound by its terms, which terms include the arbitration agreement sought to be enforced by U–Haul in this case.

Zakaib, 752 S.E.2d at 597.[3]

The Superior Court of Connecticut examined the necessity of knowledge and assent when it rejected the purported incorporation of a document not yet in existence:

> The critical concern in determining the validity of the terms of a document incorporated by reference is whether the contracting parties knew of and assented to the additional provisions. This meeting of the minds and mutuality of assent are the most basic ingredients of a contract. Hence, the courts, while willing to enforce incorporated terms, will do so only when the whole writing and the

[3] Zakaib notes that some courts have held the failure to read incorporated terms is no defense. Zakaib, 752 S.E.2d at 597. Here, Henderson did not fail to read the Main Contract. Instead, like Zakaib, the Main Contract was not provided.

> circumstances surrounding its making evidence the parties' knowledge of and assent to each term.

Hous. Auth. of City of Hartford v. McKenzie, 36 Conn. Supp. 515, 518–19, 412 A.2d 1143, 1145 (Super. Ct. 1979). A string citation taken from Zakaib provides more examples of courts requiring knowledge and assent of incorporated terms.[4] Ferrellgas and the Court of Appeals' knowledge and

[4] Zakaib provides the following string cite of cases requiring knowledge and assent of incorporated terms:

> Accord One Beacon Ins. Co. v. Crowley Marine Servs., Inc., 648 F.3d 258, 268 (5th Cir.2011) ("Terms incorporated by reference will be valid so long as it is 'clear that the parties to the agreement had knowledge of and assented to the incorporated terms.'... Notice of incorporated terms is reasonable where, under the particular facts of the case, '[a] reasonably prudent person should have seen' them."); PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1201 (2d Cir.1996) (recognizing that the common law requires the parties to have had knowledge of and assented to the incorporated terms, also requiring that the incorporated document be referred to and described sufficiently so that it may be identified beyond all reasonable doubt); Lamb v. Emhart Corp., 47 F.3d 551, 558 (2d Cir.1995) ("In order to uphold the validity of terms incorporated by reference it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms."); Hertz Corp. v. Zurich Am. Ins. Co., 496 F.Supp.2d 668, 675 (E.D.Va.2007) (recognizing that "it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms," stating that the identity of the secondary document must be readily ascertainable, and holding that "it cannot be said that the parties had agreed on the terms of a rental agreement at the time"); United States v. Agnello, 344 F.Supp.2d. 360, 369 n. 6 (E.D.N.Y.2004) (requiring that it "be clear that the parties to the agreement had knowledge of and assented to the incorporated terms"); Ingersoll–Rand Co. v. El Dorado Chem. Co., 373 Ark. 226, 233, 283 S.W.3d 191, 196 (2008) (stating that the incorporated document "must be described in such terms that its identity maybe ascertained beyond reasonable doubt.... Furthermore, it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms"); Taubman Cherry Creek Shopping Ctr., LLC v. Neiman–Marcus Grp., Inc., 251 P.3d 1091, 1095 (Colo.Ct.App.2010) ("Pursuant to general contract law, for an incorporation by reference to be effective, 'it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms.'"); Housing Auth. of Hartford v. McKenzie, 36 Conn.Supp. 515, 518–19, 412 A.2d 1143, 1145 (1979) ("The critical concern in determining the validity of the terms of a document incorporated by reference is whether the contracting parties knew of and assented to the additional provisions. The meeting of the minds and

assent requirements are consistent with widely accepted and established law of incorporation.

C. Edifice's Petition Cites Many Cases, but None Hold that Courts May Not Consider Lack Knowledge and Assent of Incorporated Terms.

Edifice asserts that when a contract purports to incorporate a separate document, courts may not consider whether the non-drafting party had knowledge of the incorporated terms, citing Washington State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co., 176 Wn.2d 502, 517, 296 P.3d 821, 829 (2013); Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 801, 225 P.3d 213 (2009); Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005); and other cases on contract interpretation.

However, none of the cases cited by Edifice address circumstances where knowledge of incorporated terms was at issue. To the extent the cases

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> mutuality of assent are the most basic ingredients of a contract. Hence, the courts, while willing to enforce the incorporated terms, will do so only when the whole writing and the circumstances surrounding its making evidence the parties' knowledge of and assent to each term."); Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J.Super. 510, 533, 983 A.2d 604, 617 (N.J.Super.Ct.App.Div.2009) ("In order for there to be a proper and enforceable incorporation by reference of a separate document, the document to be incorporated must be described in such terms that its identity may be ascertained beyond doubt and the party to be bound by the terms must have had 'knowledge of and assented to the incorporated terms.' "); Western Washington Corp. of Seventh–Day Adventists v. Ferrellgas, Inc., 102 Wn. App. 488, 7 P.3d 861 (2000) (quoting Williston and finding extrinsic evidence indicated that one of the parties was aware of the incorporated terms prior to signing the agreement).

Zakaib, 752 S.E.2d at 597 n. 12.

cited by Edifice are relevant, they are fully consistent with the Court of Appeals' decision.

For example, Huber and Satomi stand for the proposition that parties to a contract may "clearly and unequivocally incorporate by reference into their contract some other document." Satomi, 167 Wn.2d at 801. This is not in conflict with the Court of Appeals' decision. To the contrary, the court explicitly acknowledged that parties may incorporate terms by clear and unequivocal reference. Edifice at *5 (citing Satomi, 167 Wn.2d at 801). But here there was no clear and unequivocal intent. Notwithstanding language in the Subcontract purporting to incorporate the Main Contract, the Main Contract's terms were known only to Edifice. By definition, there can be no meeting of the minds or unequivocal intent as to unknown terms. See In re Marriage of Obaidi & Qayoum, 154 Wn. App. 609, 616-17, 226 P.3d 787 (2010) (holding that there was no meeting of the minds where terms were unknown and the agreement written in a language one party did not understand); cf. Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 176, 94 P.3d 945 (2004) (noting that contracts where key terms are unknown and parties only "agree to agree" are not enforceable). Thus, requiring knowledge of and assent to incorporated terms is fully consistent with allowing parties to "clearly and unequivocally incorporate by reference."

There is a similar lack of support for Edifice's claim that courts may not consider extrinsic evidence of knowledge and assent to incorporated terms. Knowledge and assent are a necessary component of any agreement to incorporate and cannot be brushed aside. McKenzie, 36 Conn. Supp. at 518–19. Not only do other jurisdictions permit consideration of evidence of knowledge and assent to incorporated terms, they require it. Id. The cases Edifice does cite regarding extrinsic evidence are distinguishable, as none deal with lack of knowledge and assent to incorporated terms. Furthermore, Edifice's reliance on the objective theory of contracts is misplaced. That theory concerns interpretation of the contract as signed. Max L. Wells Tr. by Horning v. Grand Cent. Sauna & Hot Tub Co. of Seattle, 62 Wn. App. 593, 602, 815 P.2d 284 (1991). Edifice is not seeking to enforce the Subcontract—it is seeking to enforce an arbitration clause found in a separate, unattached agreement to which Henderson was not a party. Incorporation necessarily requires courts to look beyond the contract, and Edifice cannot pick and choose where courts may look. If Edifice asks the courts to enforce provisions outside of the Subcontract, it is only reasonable to ask whether there was knowledge of and assent to those terms.

Even assuming Edifice is correct, Edifice also ignores the fact that Henderson successfully argued (and the superior court implicitly agreed) that the Subcontract was ambiguous at best as to whether the parties could

be required to arbitrate. CP 354. "[W]here ambiguity exists, extrinsic evidence may be considered in ascertaining the intentions of the parties." Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc., 168 Wn. App. 56, 65, 277 P.3d 18 (2012). Edifice has not shown a conflict with established Washington law.

D. The Subcontract was Implicitly Found by the Superior Court to Bar Arbitration, not to Require It. Because the Subcontract May Be Reasonably Read to Bar Arbitration, the Lack of Knowledge and Assent of Potentially Contrary Terms in the Main Contract Is Critical, and Necessitates Denial of Edifice's Motion.

The subcontractors' ignorance of the Main Contract's terms is only one facet of the lack of agreement to arbitrate. Though the Court of Appeals did not reach the question, the superior court implicitly agreed that the Subcontract is ambiguous at best whether arbitration is even permitted.

The Subcontract does not contain an arbitration provision. Instead, it contains a forum selection clause requiring disputes to be heard in King County Superior Court. CP 214. To the extent the Main Contract contains conflicting provisions, such as an arbitration clause, the Subcontract states that the Subcontract terms will prevail. CP 210. Thus, the Subcontract's forum selection clause is reasonably read to require superior court litigation, prevailing over any conflicting Main Contract arbitration provisions.[5]

[5] Edifice disagrees, arguing that the Subcontract's pass-through clause allows the Main Contract's arbitration clause to survive its apparent conflict with the forum-selection clause. Henderson disagrees with Edifice's interpretation and asserts that, at the very least,

Citing the forum selection clause, Henderson argued in superior court that it did not agree to mandatory arbitration. The superior court did not enter formal findings, but its denial of Edifice's motion implicitly found that the Subcontract is at least ambiguous as to whether arbitration is permitted. Thus, Henderson had a reasonable basis to believe the Subcontract precluded arbitration, and without knowledge of the Main Contract, it would have no reason to anticipate anything other than litigation in superior court.

When incorporated terms are potentially contrary to terms of the contract itself, it is critical that non-drafting parties have knowledge of and assent to the incorporated terms. That lack of knowledge only emphasizes that there was no meeting of the minds and that the Court of Appeals did not err in denying Edifice's motion to compel arbitration.

E. Public Policy Weighs in Favor of Requiring Knowledge and Assent of Incorporated Terms.

The knowledge and assent requirement serves an important role in assuring that parties are aware of the terms of their bargain. Overturning the Court of Appeals' decision would have implications well beyond the interpretation of arbitration clauses or rights of subcontractors. Allowing

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the language is ambiguous. Because Edifice drafted the Subcontract, any ambiguities are construed in Henderson's favor. Rouse v. Glascam Builders, Inc., 101 Wn.2d 127, 135, 677 P.2d 125 (1984).

drafters to bind parties to unseen, incorporated documents will reward drafters for not including material terms in contracts, and shift burdens to non-drafting parties, often lacking in bargaining power and expertise. Other jurisdictions have concluded that these dangers are significant. See Zakaib, 752 S.E.2d at 597 (discussing dangers of incorporation).

Nor are there contravening public policy concerns that weigh in favor of Edifice's claims. To the contrary, the law already recognizes that drafters of contracts are required to set forth terms in clear and unambiguous language. See Rouse, 101 Wn.2d at 135 (holding that ambiguities are construed against the drafter). Requiring drafters to ensure that all parties are aware of incorporated terms is entirely consistent with existing law.

F. Edifice Fails to Address the Inadequacy of the Record, Which was the Court of Appeal's Alternate Basis for Denial.

The Court of Appeals noted that even if the arbitration clause applied, it would still affirm because the record provided by Edifice is inadequate to permit review. Edifice at * 6 n. 5 (citing RAP 9.2). "An insufficient appellate record precludes review of the alleged errors." In re Det. of Morgan, 161 Wn. App. 66, 83, 253 P.3d 394 (2011)(rev'd on other grounds). Because Edifice's petition fails to address this alternative ground for denial, the Court should deny review.

V. CONCLUSION

Because there is no conflict between the Court of Appeals' decision and published Washington law, the issues raised by Edifice do not require review by this Court under RAP 13.4(b). Henderson respectfully requests that the Court deny the Petition for Review.

RESPECTFULLY SUBMITTED this 11th day of May, 2020.

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DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on May 11, 2020, I served a true and correct copy of the foregoing Answer of Respondent Henderson Masonry, Inc. to Petition for Discretionary Review to parties via the Washington State Appellate Court's Online Filing System.

s/ Alyssa Kashuba
Alyssa Kashuba, Paralegal

MURPHY ARMSTRONG & FELTON LLP

May 11, 2020 - 3:15 PM

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