Supreme Court No. 99119-7

SUPREME COURT OF THE STATE OF WASHINGTON

LAKE HILLS INVESTMENTS LLC,
a Washington limited liability company

Respondent,

v.

AP RUSHFORTH CONSTRUCTION CO., INC. d/b/a/ AP RUSHFORTH, a Washington corporation, and ADOLFSON & PETERSON INC., a Minnesota corporation,

Petitioners.

REPLY TO ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

While this matter plainly raises issues of substantial public interest, as Lake Hills' submission confirms, the issues raised by Lake Hills in support of conditional cross-review were correctly decided by the Court of Appeals in accordance with Washington precedent.[1] The Court should therefore grant review solely as to the issue presented by AP.

II. REASONS WHY CROSS-REVEW SHOULD BE DENIED

A. The Court Of Appeals' Decision Correctly Identifies And Applies This Court's Precedent Requiring A Presumption Of Prejudice When A Jury Instruction Misstates The Law.

Lake Hills contends that the Court of Appeals' decision conflicts with Washington precedent requiring a presumption of prejudice when a jury instruction misstates the law (Ans. 15), yet it inexplicably ignores the case cited by the Court of Appeals in support of its analysis. In *Paetsch v. Spokane Dermatology Clinic, P.S.*, 182 Wn.2d 842, 348 P.3d 389 (2015) – cited by the Court of Appeals at Op. 5 n.9 and Op. 23 n.76 – this Court expressly held that the presumption of prejudice from a misstatement of law can be "overcome" by "showing that the error was harmless." *Id.* at 849 (citing *Griffin v. W. RS, Inc.*, 143 Wn.2d 81, 91-92, 18 P.3d 558 (2001)).

[1] This reply uses the same abbreviations as AP's Petition for Review ("Pet."). In addition, "Ans." refers to Lake Hills' Answer to Petition for Review.

Lake Hills ignores *Paetsch* and relies instead on cases that merely apply the presumption of prejudice to different facts.[2]

Nor is *Paetsch* alone in so holding. In *Owens v. Anderson*, 58 Wn.2d 448, 364 P.2d 14 (1961), the Court held: "The presumption of prejudice which arises out of the giving of an erroneous instruction [citing cases], may be overcome if the record, including all other instructions, when taken as a whole reveals that the jury could not have been misled or confused by it. [Citing cases.]" *Id.* at 453 (bracketed text in original; quoting *Patterson v. Krogh*, 51 Wn.2d 73, 79, 316 P.2d 103 (1957)). Even in criminal proceedings, the Court has likewise held that an erroneous instruction is harmless "if it has no effect on the final outcome of the case." *State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984). If the law were otherwise, the presumption would not be a presumption – it would instead be a conclusive basis for reversal – and harmless errors in jury instructions would mandate reversal in all cases. That is not the law in Washington, nor should it be.

The Court of Appeals correctly applied the presumption of prejudice to the unique facts in this case. Lake Hills' complaint regarding Jury

[2] Lake Hills cites *Flyte v. Summit View Clinic*, 183 Wn. App. 559, 333 P.3d 566 (2014), *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 281 P.3d 289 (2012), *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), and *Thola v. Henschell*, 140 Wn. App. 70, 164 P.3d 524 (2007). The first three cases involve vastly different circumstances than this matter, while the final case says nothing about erroneous or prejudicial jury instructions.

Instruction 15 is that it did not state, as requested by Lake Hills, that only a *material* breach of the duty of good faith and fair dealing could excuse performance by AP. Ans. 15; Op. 21. But as the Court of Appeals noted, AP's *sole theory of the case* was that Lake Hills deducted substantial sums from AP's invoices without any proper basis to do so which left AP unable to pay its subcontractors. Op. 23-24. The jury specifically found for AP on this claim and awarded AP damages in excess of $5 million. CP 374, 378-80. As the Court of Appeals also noted, failing to pay AP for its work was – and could only be – "the very essence of a material breach." Op. 24. Far from flipping the presumption of prejudice on its head, as Lake Hills erroneously claims, the Court of Appeals correctly held that the verdict itself conclusively rebutted any presumption of prejudice. That holding is entirely consistent with controlling precedent.[3]

[3] While AP submits that the propriety of the Court of Appeals' prejudice analysis is sufficient grounds to decline to address this issue on conditional cross-review, AP does not waive – and hereby preserves – its argument that the trial court's Jury Instruction 15 was correct. The instruction is taken nearly verbatim from WPI 302.08, and it accurately states Washington law. *See, e.g., Jones Assocs., Inc. v. Eastside Properties, Inc.*, 41 Wn. App. 462, 471, 704 P.2d 681 (1985) ("Proof of a party's interference with the performance of the other party's obligation under the contract will work to discharge the other party's duty."); *Wolk v. Bonthius*, 13 Wn.2d 217, 219, 124 P.2d 553 (1942) ("One of the parties to a contract cannot avail himself of nonperformance where the nonperformance is occasioned by his acts."); *Payne v. Ryan*, 183 Wash. 590, 595, 49 P.2d 53, 55 (1935) ("if one party prevents the other from performing some requirement of the contract, such prevention will operate as a complete waiver of the requirement in question"). These and other similar authorities confirm that there is no conflict with Washington precedent that would warrant granting cross-review on this issue.

B. The Court Of Appeals' Decision Does Not Conflict With Washington Precedent Regarding Misleading Jury Instructions That Are Allegedly Urged Upon The Jury In Closing Argument.

Lake Hills' argument regarding Jury Instruction 16 similarly lacks merit. When an instruction is misleading, as opposed to legally erroneous, "prejudice must be demonstrated." *Anfinson*, 174 Wn.2d at 860. While Lake Hills argues that the Court of Appeals' decision conflicts with this legal principle (Ans. 17), the Court of Appeals once again correctly identified and followed this Court's precedent. Op. 19-20 (citing *Anfinson*). That, alone, is sufficient to deny cross-review.

Instead, Lake Hills' argument is that the Court of Appeals did not correctly apply this legal principle where a misleading jury instruction is mentioned in closing. Ans. 18 (citing RP 4972). The Court of Appeals correctly concluded that Lake Hills' argument was both circular and conclusory. Lake Hills argued that it was clearly prejudiced by Jury Instruction 16 because the jury ruled in favor of AP on 90% of the alleged delay on the project. Op. 20 (citing Appellant's Br. at 32). As the Court of Appeals correctly noted, the jury accepted the testimony of AP's experts on the cause of the delay except with regard to 21 days of delay that were caused by a subcontractor. *Id*. Those 21 days of delay were thus charged to AP – and not to Lake Hills – even though they were caused by another party. On this record, the Court of Appeals correctly held that Lake Hills

had not demonstrated prejudice, as Washington law requires, because the jury's findings reflect a credibility determination rather than prejudice from a misleading instruction. *Id.* The Court of Appeals' analysis is premised on the relevant facts, which are fatal to Lake Hills' prejudice argument. Here again, there is no conflict with Washington precedent.[4]

C. The Court Of Appeals' Decision Also Does Not Conflict With Washington Precedent Requiring Instructions That Inform The Jury Of The Applicable Law.

Lastly, Lake Hills asserts that the Court of Appeals wrongly rejected its argument that the jury should have been instructed that a non-breaching party waives a material breach defense if it continues to accept the benefit of the breaching party's performance with full knowledge of the breach. Ans. 19-20. This argument fails on two separate and independent grounds.

[4] While AP again submits that the propriety of the Court of Appeals' prejudice analysis is sufficient grounds to decline to address this issue on conditional cross-review, AP once again does not waive – and hereby preserves – its argument that the trial court's Jury Instruction 16 was correct. Under Washington law, "a plaintiff cannot recover liquidated damages for a breach to which he has contributed, and there can be no apportionment of liquidated damages where both parties are at fault." *Baldwin v. Nat'l Safe Depository Corp.*, 40 Wn. App. 69, 72, 697 P.2d 587 (1985). Accordingly, when delays overlap such that it is unduly difficult to apportion responsibility, liquidated damages are not recoverable. *Id.* at 72-73. The principal treatise relied upon by Lake Hills also clearly states that "when delay is concurrent and apportionable, liquidated damages may not be assessed in any amount for that delay." 5 Philip J. Bruner & Patrick J. O'Connor Jr., *Construction Law* § 15:82. Jury Instruction 16 is consistent with this body of law. The instruction is also consistent with the controlling language of the parties' contract, which states that AP would not be responsible for any delays caused by "an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes[.]" Ex. 1 at LH00027106-07. In contrast, AP would be responsible for any delays caused by its failure to timely schedule purchase orders. *Id.* This language confirms that AP would only be responsible for delays that were within its sole control. Here again, there is no conflict with Washington precedent that would warrant granting cross-review on this issue.

First, Lake Hills' proposed jury instruction does not accurately state Washington law. In Washington, continued performance under a contract is not in and of itself sufficient to prove waiver. *See Byrne v. Bellingham Consol. Sch. Dist. No. 301, Whatcom Cty*., 7 Wn.2d 20, 36, 108 P.2d 791 (1941) (election to proceed with work did not constitute a waiver). Rather, waiver of contractual rights by a party's conduct "'requires unequivocal acts of conduct evidencing an intent to waive.'" *Mike M. Johnson, Inc. v. Cty. of Spokane*, 150 Wn.2d 375, 386, 78 P.3d 161 (2003) (quoting *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 142, 890 P.2d 1071 (1995)). Thus, in *Mike M. Johnson*, this Court held that negotiating with the intent to hold the other party to their obligations precludes a finding of waiver. *Id.* at 392.

Lake Hills' proposed instruction on continued performance omits this crucial limitation regarding when a waiver may be found and instead assumes that waiver is automatic when there is continued performance. CP 3719. Had the trial court given Lake Hills' proposed instruction, it would have misstated Washington law. The trial court was not required to give an erroneous instruction. *See Hendrickson v. Moses Lake Sch. Dist.*, 192 Wn.2d 269, 278, 428 P.3d 1197 (2018) ("A trial court need not give a legally erroneous instruction.") (citing cases). Lake Hills' proposed instruction also would have had the effect of directing the jury to find waiver

as a matter of law because AP did not immediately halt work on the Project. As the trial court correctly noted, this would have been an impermissible comment on the evidence. RP 4875.

Second, even if Lake Hills' proposed jury instruction were legally accurate (which the Court of Appeals assumed without deciding (Op. 25)), the trial court's refusal to give the instruction did not preclude Lake Hills from arguing its theory of the case that AP had waived its breach of contract claim. As the trial court noted, the jury instructions as a whole permitted Lake Hills to argue that there was no breach and that "these breaches that AP's complaining about weren't material, because AP continued to perform." RP 4875. Lake Hills in fact argued to the jury that "[t]he contract allows off-sets if there [is] defective or late work." RP 5010. Further, Jury Instruction 15 allowed Lake Hills to argue it did not interfere with or prevent AP's ability to timely complete the contract, as evidenced by AP's continued performance for over a year.[5]

Longenecker v. Brommer, 59 Wn.2d 552, 368 P.2d 900 (1962), the sole case cited by Lake Hills in this portion of its Answer (Ans. 19), does not address any of the foregoing issues. Instead, the issue in *Longenecker*

[5] Jury Instruction 15 states in relevant part: "If AP proves by a preponderance of the evidence that Lake Hills interfered with or prevented AP from completing its work in its entirety within the time required and/or completing the project in its entirety, then AP was excused from performing its duty of the same." CP 356.

is "waiver of the right of rescission." *Id*. at 557 (citing secondary authorities regarding the right of rescission). No such issue was present here because neither party requested rescission. The Court of Appeals' decision therefore does not (and cannot) conflict with *Longenecker*. To the contrary, the Court of Appeals *correctly* held, consistent with Washington precedent, that the trial court did not abuse its discretion in rejecting Lake Hills' proposed waiver instruction.

III. CONCLUSION

For the above reasons, the issues that Lake Hills presents for conditional cross-review do not raise any conflict with Washington precedent that would warrant review under RAP 13.4(b)(1) and (2). The Court should grant review solely as to the issue presented by AP.

DATED: 12/29/2020

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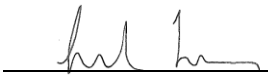

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December 29, 2020 - 9:42 AM

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