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Supreme Court No. 99119-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LAKE HILLS INVESTMENTS LLC, a Washington limited liability
company,

Respondent,

v.

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

Petitioners.

**BRIEF OF AMICI CURIAE THE SUREITY & FIDELITY
ASSOCIATION OF AMERICA, NATIONAL ELECTRICAL
CONTRACTORS ASSOCIATION PUGET SOUND CHAPTER,
MECHANICAL CONTRACTORS ASSOCIATION OF WESTERN
WASHINGTON, AND SMACNA-WESTERN WASHINGTON, INC.
IN SUPPORT OF PETITION FOR DISCRETIONARY REVIEW**

Garth A. Schlemlein, WSBA # 13637
SCHLEMLEIN FICK & FRANKLIN PLLC
66 S. Hanford St., Suite 300
Seattle, WA 98134
P: (206) 448-8100 F: (206) 448-8514
E: gas@soslaw.com

*Attorney for Amici The Surety & Fidelity Association of
America, National Electrical Contractors Association Puget
Sound Chapter, Mechanical Contractors Association of
Western Washington, and SMACNA-Western Washington, Inc.*

TABLE OF CONTENTS

I. INTRODUCTION1

II. IDENTITY AND INTERESTS OF AMICUS CURIAE.....1

 1. The Surety & Fidelity Association of America.....1

 2. National Electrical Contractors Association Puget Sound Chapter.....2

 3. Mechanical Contractors Association of Western Washington2

 4. SMACNA-Western Washington, Inc.....2

III. ISSUES ADDRESSED BY AMICUS CURIAE.....3

IV. STATEMENT OF THE CASE.....3

V. ARGUMENT4

 1. The Appellate Decision, If Allowed to Stand, Will Have Profound Negative Impacts on the State’s Construction Industry.4

 2. The Appellate Decision Substantially Departs From Established Precedent.5

 3. The Court’s Fairness Concerns Were Unwarranted Based on a Proper Reading of the Jury Instruction at Issue.7

VI. CONCLUSION.....9

TABLE OF AUTHORITIES

Cases

<i>Kenney v. Abraham</i> , 199 Wash. 167, 90 P.2d 713 (1939).....	6
<i>Maryland Casualty Co. v. City of Seattle</i> , 9 Wn.2d 666, 116 P.2d 280 (1941).....	4
<i>United States v. Spearin</i> , 248 U.S. 132, 39 S. Ct. 59 (1918).....	4,5, 6, 7
<i>Valley Const. Co. v. Lake Hills Sewer Dist.</i> , 67 Wn.2d 910, 918, 410 P.2d 796 (1966).....	8

I. INTRODUCTION

Amici Curiae The Surety & Fidelity Association of America (“SFAA”), National Electrical Contractors Association Puget Sound Chapter (“NECA”), Mechanical Contractors Association of Western Washington (“MCAWW”), and SMACNA-Western Washington (“SMACNA”) respectfully submit this brief in support of Petitioner AP Rushforth Construction Co., Inc. d/b/a AP Rushforth, and Adolfson & Peterson, Inc.’s (collectively “AP”) Petition for Discretionary Review. This Court should grant the Petition because the decision below is contrary to precedent of limiting a contractor’s liability when the owner’s defective plans and specifications caused defects, and upsets settled expectations of allocation of risk and liability between contractors, owners and architects (among others) on construction projects.

II. IDENTITY AND INTERESTS OF AMICUS CURIAE

A. Identity of Amici Curiae.

1. The Surety & Fidelity Association of America

SFAA is a trade association of more than 425 insurance companies that write 98 percent of surety and fidelity bonds in the United States. SFAA is licensed as a rating or advisory organization in all states and it has been designated by state insurance departments as a statistical agent for the reporting of fidelity and surety experience

2. National Electrical Contractors Association Puget Sound Chapter

The Puget Sound Chapter, NECA, formed in 1947, represents over 200 electrical contractors in the State of Washington. NECA contractors perform approximately 12 million hours of electrical construction work in the Puget Sound Region and across Washington annually. NECA Contractors employ over 12,000 union electricians throughout Washington State, who perform approximately 75% of the commercial electrical work in Washington State.

3. Mechanical Contractors Association of Western Washington

MCAWW represents approximately 100 mechanical contracting firms in Washington, along with several dozen associate members in the construction and professional services industry. MCAWW strives to improve or defend laws and regulations that affect mechanical contractors.

4. SMACNA-Western Washington, Inc.

SMACNA a trade association and a Local Chapter of the Sheet Metal & Air Conditioning Contractors National Association (SMACNA) which is located in Chantilly, Virginia. SMACNA Contractors are heating, ventilating, air conditioning (HVAC), and sheet metal experts. They are your assurance of quality in the fabrication and installation of ductwork and air handling systems.

SMACNA contractor members are HVAC-sheet metal contracting companies signatory to a bargaining agreement with the Sheet Metal Workers International (SMWIA) - Local Union 66. SMACNA contractors are engaged in the fabricating, manufacturing and/or installing of sheet metal products. The SMACNA membership is comprised of 42 contractor companies and 33 affiliate members.

The collective experience of SFAA, NECA, MCAWW, and SMACNA enable them to provide a unique perspective regarding the legal validity and ramifications of the Court of Appeal's decision. Resolution of this issue is critical to all Washington contractors performing work on construction projects, and the insurance companies who issue surety bonds necessary for these construction projects, to ensure that they be entitled to a fair trial in the event of a dispute regarding the cause of defects on a project.

III. ISSUES ADDRESSED BY AMICUS CURIAE

Whether this Court should grant review of a Court of Appeals decision that directly contradicts precedent enforcing clear, unequivocal limitations on contractors' liability for defects caused by defects in an owner's plans and specifications.

IV. STATEMENT OF THE CASE

SFAA, NECA, MCAWW, and SMACNA adopt the Statement of the Case as presented by Petitioner.

V. ARGUMENT

1. The Appellate Decision, If Allowed to Stand, Will Have Profound Negative Impacts on the State's Construction Industry.

The construction industry is one of the state's largest economic industries, bringing millions of dollars and thousands of jobs to the state's economy. The undersigned Amici respectfully submit that, if the Appellate decision stands, there will be lasting negative impacts to the construction industry in Washington. That is because, as set forth below, the Appellate Decision renders two bedrock cases – *Spearin* and *Maryland Casualty* - meaningless in all construction projects where there are multiple contributing factors resulting in defects on the project. The Appellate Court's decision allows an owner to escape all liability – even if the owner's plans admittedly caused significant defects to the project – so long as the owner can prove some other factor contributed to in any way to the defects. That is not the law in this state, nor is it an accurate statement of the law nationally, and allowing that rule to prevail would cause substantial harm to the construction industry, including amici and their members.

U.S. v. Spearin, 248 U.S. 132 (1918) has been the long-settled doctrine nationally – and the basis for the same doctrine in Washington – regarding liability as to defects caused by an owner's defective plans and specifications. This doctrine has defined the expectations amongst all

parties in the industry – owners, contractors, insurers, sureties, architects, engineers and others – as it concerns allocation of risk on construction projects. The industry-wide expectation of how risk is allocated on construction projects affects all facets of a construction project – contractor bids, contract provisions, schedule, insurance and bonding requirements. The Appellate Decision stands to drastically shift established risk allocation, which will have lasting effects on the Amici – both on current construction projects under contract (which were bid, contracted, bonded and insured under the settled expectations of *Spearin*) but also on all future construction projects.

The financial impacts of this decision will resonate to all corners of the industry – from developers, owners, designers, contractors, sub tier contractors, insurers and ultimately consumers. The Appellate decision significantly increases the liability of contractors, which, simply put, will make construction more expensive. While it may absolve owners from liability for defective plans, owners and developers will still be impacted by the increased risks and associated costs the contractors must necessarily factor when bidding projects.

2. The Appellate Decision Substantially Departs From Established Precedent.

Amici's concerns stem from the Appellate Decision's departure from the *Spearin* decision – one of the landmark construction cases, decided

over 100 years ago and recognized and adopted by nearly every jurisdiction in this country – based on a misinterpretation of *Kenney* and the American Law Reports annotation cited by *Kenney*.

The Appellate Court’s opinion cannot be reconciled with *Spearin*. In *Spearin*, Spearin entered into a contract with the United States to relocate a 6-foot storm sewer and to build a dry dock. 248 U.S. at 133. The plans and specifications set forth the dimensions, materials, and location of the sewer. However, a year after the sewer was relocated the line burst and flooded a dry dock. *Id.* at 134. It was determined that the plans and specifications were not adequate, but that event of the pipe bursting occurred after a torrential rain coinciding with high tide, which caused a backup in the sewer system that, because of an unforeseen blockage upstream from the relocated sewer, caused the sewer to burst. *Id.*

The Appellate Court’s decision, if applied to the facts of *Spearin*, would produce a different result. *Spearin* would not have been able to prove that the sewer pipe burst *solely* as a result of the plans and specifications. The sewer pipe burst because of the plans and specifications, but also because of the coinciding torrential rain and high tide, in addition to unknown blockage further up the pipe. The Appellate Court’s decision at issue, if based on the facts of *Spearin*, would have barred Spearin from asserting a defense of the implied warranty of adequacy of the plans.

This means the Appellate decision cannot be reconciled with *Spearin* and, if allowed to stand, will overturn one of the most widely acknowledged and applied construction law cases in the country.

Not only would the case overturn the application of *Spearin* as a defense to claims for defective work, but some may argue that the case would also limit contractors' ability to use the *Spearin* doctrine to recover additional compensation for extra work. The *Spearin* doctrine also applies when plans and specifications are not adequate and the contractor must perform additional work. The Appellate decision could have implications beyond when a contractor is defending a claim for defective work.

3. The Court's Fairness Concerns Were Unwarranted Based on a Proper Reading of the Jury Instruction at Issue.

The Appellate Court appears to have tried to correct a problem where there was none and now has created one that will have an adverse effect on the entire industry. The Appellate Court opined that omitting the word "solely" from Jury Instruction 9 "would let AP avoid liability for [an area of the project affected by defective plans and specifications] even if Lake Hills proved that AP's deficient performance caused some of the damage." App. Op. at 9. The Court's concerns are misplaced. Instruction No. 9, as written (without "solely") would not have allowed the contractor (AP) to escape liability if the owner (LH) proved the contractor's deficient performance caused some of the damage.

Instruction No. 9 reads:

For its affirmative defense, AP has the burden to prove that Lake Hills provided the plans and specifications for an area of work at issue, that AP followed those plans and specifications, and that the defect resulted from defects in the plans or specifications.

CP 348. Instruction No. 9 required AP to prove (1) that LH provided the plans and specifications for an area of work at issue, (2) that it followed the plans and specifications and (3) that the defect alleged by owner resulted from defects in the plans and specifications. No plausible scenario exists where – if the contractor proves each of these requirements – it would be possible that the contractor’s deficient performance caused some of the damage. If the contractor’s performance was deficient, it necessarily would have deviated in some manner from the plans or specifications. If there were no plan or specification and the contractor filled in the blanks, and in doing so caused the defect, then the instruction would not apply because the owner had not provided a plan and specification for the area of work at issue. *Valley Const. Co. v. Lake Hills Sewer Dist.*, 67 Wn.2d 910, 918, 410 P.2d 796 (1966) (In performing work not covered by the plans and specifications the contractor “assumed full responsibility for their course of action.”).

Thus, the Appellate Court's concern that AP could "escape liability" under this Instruction was entirely unfounded.

The instruction, as phrased, allowed both parties to present their cases to the jury and allowed the jury to determine, and even allocate, liability. Had Lake Hills proved to the jury that AP did not follow the plans in affected areas of the project, AP would not have escaped liability. Similarly, if there were no plan or specification for the area of work and AP negligently filled in the blanks, the instruction would not have been applicable. The Appellate Court erred by requiring AP to meet a greater burden than required under Washington law and review should be granted. Therefore, Supreme Court review of Division I's decision is necessary and appropriate.

VI. CONCLUSION

Allocation of fault based on well-established precedent is essential to an environment where developers, owners, designers, contractors and suppliers will continue to be able to competitively participate in this State's construction industry with certainty regarding allocation of risk. The Appellate Court's decision shifts nearly all of the risk to contractors for defects and threatens to disrupt one of the state's largest industries for economic growth and employment in this State. For these reasons, review should be granted.

Dated this 13th day of January, 2021.

Respectfully submitted,
SCHLEMLEIN FICK & FRANKLIN, PLLC

By: /s/Garth A. Schlemlein

Garth Schlemlein, WSBA #13637
66 S. Hanford St., Suite 300
Seattle, WA 98134
(206) 448-8100

*Attorney for Amici The Surety & Fidelity
Association of America, National Electrical
Contractors Association Puget Sound
Chapter, Mechanical Contractors
Association of Western Washington, and
SMACNA-Western Washington*

PROOF OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am employed by the law firm of Schlemlein Fick & Franklin, PLLC.

2. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and am competent to be a witness herein.

3. On the date shown below, I served one true and correct copy of the foregoing on the following parties via the method(s) indicated:

Nicholas Calvin Korst
Scott R. Sleight
Brett M. Hill
Ahlers Cressman & Sleight, PLLC
999 3rd Avenue, Suite 3800
Seattle, WA 98104-4023
nicholas.korst@acslawyers.com
scott.sleight@acslawyers.com
brett.hill@acslawyers.com

- WA SUP CT E-Filing Notification
- Legal Messenger
- E-Service Agreement:

Alan B. Bornstein
Matthew Thomas Adamson
Jameson Pepple Cantu PLLC
801 2nd Avenue, Suite 700
Seattle, WA 98104-1573
abornstein@jpclaw.com
madamson@jpclaw.com
litigationsupport@jpclaw.com

- WA SUP CT E-Filing Notification
- Legal Messenger
- E-Service Agreement:

Leonard J. Feldman
Peterson Wampold Rosato Feldman
Luna WA SUP CT E-Filing
1501 4th Avenue, Suite 2800 Notification
Seattle, WA 98101-3677 Legal Messenger
feldman@pwrfl-law.com E-Service Agreement:

Stephanie Lynn Messplay
Van Siclen Stocks & Firkins WA SUP CT E-Filing
721 45th Street N.E. Notification
Auburn, WA 98002 Legal Messenger
smessplay@vansiclen.com E-Service Agreement:

Howard Mark Goodfriend
Ian Christopher Cairns WA SUP CT E-Filing
Smith Goodfriend PS Notification
1619 8th Avenue N. Legal Messenger
Seattle, WA 98109-3007 E-Service Agreement:
howard@washingtonappeals.com
ian@washingtonappeals.com
andrienne@washingtonappeals.com

Robert Marconi
John S. Riper WA SUP CT E-Filing
Ashbaugh Beal Notification
701 5th Avenue Suite 4400 Legal Messenger
Seattle, WA 98104 E-Service Agreement
bmarconi@ashbaughbeal.com
cbrugalette@ashbaughbeal.com
tmacdonald@ashbaughbeal.com
jriper@ashbaughbeal.com

DATED THIS 13TH DAY OF JANUARY 2021

s/ Laurel Barton
Laurel Barton, Legal Assistant

SCHLEMLEIN FICK & FRANKLIN, PLLC

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Sender Name: Laurel Barton - Email: lsb@soslaw.com

Filing on Behalf of: Garth A. Schlemlein - Email: gas@soslaw.com (Alternate Email:)

Address:
66 S. Hanford St.
Ste. 300
Seattle, WA, 98134
Phone: (206) 448-8100

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