No. 99154-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON
(Court of Appeals No. 79657-7-I)

EVANSTON INSURANCE COMPANY,
an Illinois corporation, and an Assignee of Western Refinery Services, a Washington Corporation,

Petitioner,

v.

PENHALL COMPANY,
a California corporation,

Respondent.

RESPONDENT PENHALL COMPANY'S ANSWER TO EVANSTON'S PETITION FOR REVIEW IN THE WASHINGTON SUPREME COURT

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I. INTRODUCTION

This case does not merit Supreme Court review under RAP 13.4(b). The core question here is not who has the best case; it is whether this case is important enough for this Court's consideration. It is not. The cases Evanston relies upon to argue that Division One's decision[1] here conflicts with other appellate decisions do not support Evanston's proposition. Rather, it is a simple matter of Division One correctly determining the trial erred when granting Evanston's motion for summary judgment, which Evanston does not like. As Division One summarized: "[S]ummary judgment on liability was improper. Evidence in the record demonstrated questions of fact."[2]

In its Petition for Review, Evanston advances various indemnity-based arguments, premised on incorrect claims Penhall "recommended" and sold WRS a "product;" that Penhall breached an express warranty; and that Penhall had a "duty to defend" WRS in the arbitration action filed by property owner, Morse Square. There was no arbitration provision in the contract between WRS and Penhall. Penhall never undertook a duty to

[1] *Evanston Ins. Co. v. Penhall Co.,* 13 Wn. App. 2d 863, 468 P.3d 651 (2020).

[2] *Evanston,* 13 Wn. App. 2d at 871.

defend. Penhall did not recommend or sell a product. "Construction contracts are not governed by the UCC."[3]

Penhall warranted materials and workmanship, but "Penhall was not a waterproofing consultant for Morse or WRS and was not hired to analyze the leak problem and recommended a best option. Penhall chose System C only in the sense that it was the only water proofing process it installs."[4] Penhall's indemnity condition was for "damages it directly caused,"[5] and included no duty to defend. Why would any subcontractor agree to defend a general contractor for the latter's potentially defective work, particularly against claims by an owner whose property—a concrete parking deck in this case—was built without expansion joints and with defective placement of steel reinforcement,[6] and where someone else directed the subcontractor where to perform?[7]

There is no evidence Penhall's materials or workmanship were defective (at minimum it is a question of fact); and Penhall's work directly damaged nothing. WRS inspected Penhall's work and said it "looked

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[3] *Urban Dev., Inc. v. Evergreen Bldg. Prods., LLC*, 114 Wn. App. 639, 645, 59 P.3d 112 (2002).

[4] 13 Wn. App. 2d at 871-872.

[5] 13 Wn. App. 2d at 875. CP 795.

[6] CP 972-973.

[7] CP 834-835, 893.

good."[8] And there is considerable evidence of Morse's and WRS's own responsibility for the continued leaking. Division One's decision does not conflict with decisions of any court. And the inventive public interest statement Evanston makes based on construction spending, the number of firms, labor costs and the purported "ubiquity and necessity of indemnity agreements and warranties" is amphigoric under the facts of this case. In fact, Washington's public policy is expressed in its anti-indemnification statute, RCW 4.25.115, barring indemnification agreements in construction matters except to the extent of the indemnitor's own fault.

II. PARTY FILING ANSWER

Penhall Company, defendant below and prevailing party in Division One.

III. RELIEF REQUESTED

Division One correctly evaluated the record and reversed the trial court's summary judgment in Evanston's favor. The court did not misconstrue or misapply any decision of this Court or of other appellate courts. Penhall respectfully requests this Court deny Evanston's Petition.

IV. COUNTERSTATEMENT OF ISSUES

1. Does Division One's decision conflict with the *Barbee, Fortune View*, and *Urban Development* cases as required for review under

[8] 13 Wn. App. 2d at 868.

RAP 13.4(b)(1) and (2)? No. Penhall did not have an "implied duty to defend" and these decisions do not hold otherwise.

2. Does Division One's decision that Penhall can challenge the amount of Evanston's settlement payment to Morse conflict with any decisions of the courts of appeal, meriting review under RAP 13.4(b)(2)? No. Estoppel is inapplicable under the facts of this case.

3. Does Division One's decision that declined to find Penhall had a duty to defend WRS against claims by the project owner based on implied indemnity raise issues of substantial public interest under RAP 13.4(b)(4)? No. It would be absurd to impose on all subcontractors warranting their workmanship a duty to defend general contractors, particularly when project scope and design are the responsibility of others, not the subcontractor.

V. COUNTERSTATEMENT OF THE CASE

In 2014 Morse Square hired WRS to work on Morse's new (incomplete) parking garage deck because the deck leaked when it rained.[9] Neither Morse nor its design professionals considered waterproofing during deck design or construction.[10]

[9] CP 788, 838, 879.

[10] CP 767-68, 837, 847.

Morse Square provided no information to WRS (or to Penhall) about the deck's design or construction.[11] Initially, Morse Square wanted only to pave with asphalt, but Loren Vanderyacht, manager of WRS's paving division, responded "I said no, asphalt won't do it because it's not completely impermeable, so you need a waterproofing membrane to go under it. I said let me call Penhall. I know that they do that."[12] Vanderyacht knew of Penhall's work on Washington State bridges.[13]

Morse Square, without consulting an engineering or design professional to assess why the deck leaked and what was needed to correct the problem, signed a contract with WRS:[14]

Approximate Quantity	Unit of Measure	Description	Unit Price	Total Price
3,300	Sq Yd	1) Install waterproof membrane system. 2) Overlay with 1 ½" Class G asphalt		$117,820
		Add $6,900 for a double coat seal coat after paving.[15]		
		Pricing is based on 30,000 pound gross weight limit.		

[11] CP 903.

[12] CP 889, 899-900.

[13] CP 890. Penhall is not a waterproofing specialty contractor as Evanston suggests. Petition at p. 1. In its brief before the Court of Appeals, Evanston said Penhall held itself out as a "nationwide leader in waterproofing." Brief of Respondent at p. 5. This assertion was likewise untrue. Penhall holds itself out as a leader in concrete cutting, breaking, excavation, and grinding. CP 773 & Appendix I.

[14] CP 628-29, 791, 836, 838, 847-48.

[15] "WRS and Morse … declined to install a double seal coat over the asphalt … because the 'system was working' and they 'didn't need to spend the $6900 for anything additional.'" 13 Wn. App. 2d at 868.

		Price includes a two year warranty on the waterproofing membrane		

The Morse / WRS contract contained an arbitration clause.[16]

Per Penhall's representative Joe Metcalf, WRS's Vanderyacht called and said he "had a Petromat project." Metcalf drove up and walked the property. Metcalf was not there as a design professional. "This initial walkthrough lasted only 10-15 minutes."[17] Metcalf said "we could put a membrane down. We do it on bridges. We could do that. But Petromat would not be a suitable thing . . . [It] is more of a reflective crack type thing … designed for asphalt, not concrete."[18]

Penhall provided a proposal that contemplated a subsequent formal contract, but WRS accepted the proposal as the contract. It provided:[19]

> SCOPE OF WORK: Penhall Company will provide the following Items of work ….

Item	Description	UOM	Qty of Units	Unit $	Total Each
PC-1	Additional mobilization / Paving Shift (est)	Ea		$2,800.00	
PC-2	Waterproofing Method System C	SY	3300	$16.36	$53,988.00
Total All Work					$53,988.00

[16] CP 792.

[17] 13 Wn. App. 2d at 867.

[18] CP 770-71.

[19] CP 794-95. Appendix D to Evanston's Petition. Emphasis added.

> PC-2: ...**Limits of the fabric reinforcement must be clearly marked and communicated to Penhall's crew…. Deck must be blown or vacuum swept clean (By others) ....**
>
> **EXCLUSIONS: … surface preparation, repairing damaged waterproofing or damaged asphalt overlay, Testing (By others) must be performed prior to asphalt paving.…Crack sealing ….**

The WRS / Penhall contract had no attorney fee provision and no agreement to arbitrate.[20] The only mention of "indemnity" in Penhall's proposal was: "Nothing in resulting subcontract shall require the Subcontractor to indemnify any other party from any damages (including … attorney's fees) to persons or property for any amount exceeding the degree Subcontractor directly caused such damages," noted by the Court of Appeals as a "condition."[21]

Penhall's work was limited to installing System C Membrane, a process developed by the State of Washington Department of Transportation ("WSDOT") for use on highway bridges.[22] System C is not a proprietary product – it is not a "product" in the legal sense at all, despite Evanston's repeated reference to Penhall's application of System C as a "product" and the legal argument Evanston makes flowing from its mischaracterization. System C is a formulation and set of instructions

[20] CP 794-95.

[21] 13 Wn. App. 2d at 867.

designated by WSDOT for on-site preparation of a mixture of liquid asphalt and melted rubber, over which a paving fabric is placed.[23] Division One correctly called it a "process."[24] "The membrane is made by applying a layer of heated granulated rubber with an asphalt oil binder to a surface and putting a fabric layer over so the mixture bonds with the fabric."[25] 1.5 inches of asphalt pavement is then applied over the membrane. Penhall applied the rubber-liquid asphalt mix and fabric. WRS paved over with asphalt.[26] WRS's Vanderyacht inspected Penhall's membrane application before WRS covered it with asphalt, and testified Penhall's work "looked good."[27] Vanderyacht also testified Morse considered a "double seal" coat over WRS's asphalt as provided in WRS's contract with Morse Square, but after observing Penhall's work, "we came to the conclusion that this system is working and we don't need to spend the $6900 for anything additional."[28]

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[22] CP 910-11, 914.

[23] CP 73, 211-16, 909-11. 13 Wn. App. 2d at 867.

[24] *Id.* at 8: "WRS knew Penhall used the System C process for bridges. Penhall was willing to apply the process to the parking garage deck." *Id.*

[25] 13 Wn. App. 2d at 867.

[26] CP 911.

[27] CP 892, 898. Also, Bill Parks of FDT, with whom Morse later contracted to fix the leaks observed FDT's removal of WRS's asphalt and Penhall's membrane: "Asphalt is well bonded….It took a good amount of effort … to remove all the asphalt [and] underlying membrane." CP 1063.

[28] CP 902. *See also* 13 Wn. App. 2d at 868.

Evanston makes much of the fact Penhall provided a warranty for materials and workmanship.[29] But there was no evidence the materials Penhall used or its workmanship were defective; indeed the evidence was otherwise.[30] Furthermore, "[t]he bid explicitly excluded some items of work, including crack sealing and surface preparation, and indicated that testing by others must occur before asphalt is paved over the membrane. … The contract did not contain an arbitration provision or a provision for attorney fees."[31] Penhall never contracted to "waterproof the parking deck" as Evanston claims – Penhall subcontracted with WRS to apply the System C only over that part of the deck area others designated.[32] As Division One found:

> Under the contract, Penhall was to apply the membrane where directed. Penhall was not responsible to independently determine where to apply the membrane or how to integrate it with the buildings attached to the parking garage. Morse or WRS was to make those determinations. It is clear the membrane did not cover the entire horizontal surface, leaving edges exposed, and areas where water could

[29] 13 Wn. App. 2d 875. Also, there were no "warranty repairs" (Evanston's words, Petition at 5), if by that Evanston means repairing defective or damaged System C. Division One correctly described Penhall's repair efforts: "WRS and Penhall both performed repairs…." *Id.* at 868. "Evanston mischaracterizes Penhall's statement that System C was the wrong product. When the deck leaked after completion of the paving, Penhall made efforts to stop the leaks." *Id.* at 872.

[30] *See supra*, note 27 and accompanying text.

[31] 13 Wn. App. 2d at 867.

[32] The testimony conflicted about who determined where System C was to go. WRS's Vanderyacht testified the membrane and asphalt were applied in areas designated by Morse's Rick Westerop. CP 893. Westerop testified WRS told Penhall where to put the membrane. CP 834-35. Neither said Penhall selected the area of application.

> enter the cracked concrete from beyond the membrane. … questions of fact exist as to breach and causation.[33]

Penhall also was not hired to treat and fill cracks,[34] which—as it turned out—was fatal to the success of the project.[35]

When the deck leaked after WRS and Penhall finished, Morse hired waterproofing design consultant, Mike Caniglia of Wetherholt and Associates, to make recommendations.[36] Caniglia described numerous transition points vulnerable to leaks, and cracks.[37] FDT's manager, Bill Parks, noted similar problems.[38] Transitions and crack repair were not in Penhall's scope of work. Caniglia identified other contributing conditions, including surface prep—also excluded from Penhall's scope.[39] He noted no preliminary testing of the System C membrane's adhesion. Typically he recommends such testing. Testing was not in Penhall's scope, though testing was "required by [WRS's] contract with Penhall."[40] Caniglia made recommendations and Morse hired FDT.

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[33] 13 Wn. App. 2d at 873

[34] *Id*.

[35] *Id.*

[36] CP 833.

[37] CP 1448-1451.

[38] CP 1063-1064. Morse Square contract with F.D. Thomas ("FDT") "to fix the leaks" after WRS and Penhall left the project. 13 Wn. App. 2d at 868.

[39] CP 1457. 13 Wn. App. 2d at 873.

[40] CP 1455-1456. 13 Wn. App. 2d at 873.

FDT's Scope of Work was considerably more extensive than that of WRS and Penhall. FDT's scope covered a larger area and included integrating the coating system with existing buildings and other structures. It included asphalt removal, concrete preparation, and crack detailing. Then a primer coat, a base coat, and a protective coat were applied.[41] Unlike Penhall's warranty limited to workmanship, FDT warranted a "watertight" building for five years.[42] Although FDT's contract with Morse initially allowed for sealing 1,500 lineal feet of cracks, FDT ground and filled 3,456 feet of cracks that were at least 1/16th inch wide, and "strip coated" narrower cracks more than twice that length.[43]

Leaking persisted. When Jarkko Simonen, P.E., a structural engineer retained by Penhall, visited the site in August 2018, he saw:

> considerable cracking on the top side as well as underside of the elevated parking deck. The top side cracks were mirroring through the waterproof membrane or appeared to have been routed and sealed prior to application of the installed coating. Most of the cracks observed on the topside penetrate the entire thickness of the parking deck. Through-depth cracks allow water to pass through the deck in the absence of an effective method of sealing the cracks. This conclusion appears to be confirmed by my observation of formation of stalactites on the underside of the parking deck…and of cars parked under the column lines that showed stains consistent with leaks coming through the

[41] CP 1062-1064, 1087-1089.

[42] CP 1090.

[43] CP 1064.

concrete above.[44]

Why did leaks persist? There is little indication Evanston sought to understand the problem. Evanston's strategy was simply to pursue Penhall. Mr. Simonen, however, observed site conditions that included a concrete deck designed and built with no expansion joints, and problems with the placement of steel reinforcement bars during construction. These conditions caused crack widening and water infiltration through cracks under stress of car movement. Simonen explained the typical crack repair, which is to rout and fill each with an elastic sealant material.[45] Simonen opined the extent of cracking in the concrete deck made it challenging for liquid applied unreinforced membranes (like the System C Membrane) to function effectively.[46] It was a poor design choice given the inherent conditions of the deck. Caniglia reached similar conclusions.[47]

This explains the statement by Penhall's Metcalf, heavily relied on by Evanston, made in hindsight, that Morse's parking deck was not the right application for Membrane System C. But as Division One observed, design was not Penhall's job:

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[44] CP 971-972.

[45] CP 973.

[46] *Id.*

[47] CP 1442-1447.

> Penhall was not a waterproofing consultant for Morse or WRS and was not hired to analyze the leak problem and recommend a best option from many…. Evanston mischaracterizes Penhall's statement that System C was the wrong product….
>
> The statement from Penhall was not an admission it breached the contract or the warranty. In that same communication, Penhall denied that System C failed and denied that the workmanship was inadequate. It noted contemporaneously that the structural problems with the parking garage might be the cause of leaks, something System C could not address. Viewed in the light most favorable to the nonmoving party, this statement by Penhall does not support summary judgment on liability.[48]

VI. LEGAL AUTHORITY AND ARGUMENT

A. Division One's Decision Does Not Conflict with *Barbee, Fortune View,* or *Urban Dev,*[49] and Therefore Does Not Merit Review Under RAP 13.4(b) (1) or (2). Evanston's Claim that Penhall Owed WRS a "Duty to Defend" based on "Implied Indemnity" Fails as A Matter of Law.

Evanston claims Division One "ignored [Evanston's] claim for implied indemnity and instead focused singularly on the issue of express, contractual indemnity … [and the] Court of Appeals' opinion plainly conflicts with *Barbee, Urban Dev.* and *Fortune View Condo. Ass'n.*" Evanston is wrong. *Barbee, Urban Dev.* and *Fortune View Condo. Ass'n*

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[48] 13 Wn. App. 2d at 877. *See also* CP 956-961.

[49] Petition at 10 & 11. *Cent. Wash Refrigeration, Inc. v. Barbee,* 133 Wn.2d 509, 946 P.2d 760 (1997). *Fortune View Condo. Ass'n v. Fortune Star Dev Co.,* 151 Wn.2d 534, 90 P.3d 1062 (2004). *Urban Dev., Inc. v. Evergreen Bldg. Prods., LLC,* 114 Wn. App. 639,

59 P.2d 112 (2002).

have no application here.

For one thing, each of these cases involved the sale of a "good," subject to RCW 62.A.2. In contrast, Membrane System C is a process, as the Court of Appeals correctly described it. System C involves the formulaic on site application of liquid asphalt and melted rubber, over which a paving fabric is placed, pursuant to a set of instructions designated by WSDOT.[50] "The membrane is made by applying a layer of heated granulated rubber with an asphalt oil binder to a surface and putting a fabric layer over so the mixture bonds with the fabric."[51] The Court of Appeals properly called it a "process."[52]

Furthermore, none of these cases discuss a "duty to defend." *Barbee* held "a contractual relationship under the U.C.C., with its implied warranties, provides sufficient bases for an implied indemnity claim when the buyer incurs liability to a third party as a result of a defect in the goods which would constitute a breach of the seller's implied or express warranty." *Barbee,* 133 Wn.2d at 516. Implied indemnity is "based on a 'contract between two parties that necessarily implies the right.'" *Porter v. Kirkendoll,* 5 Wn. App. 2d 686, 701 n.8, 421 P.3d 1036 (2018) (quoting

[50] CP 73, 211-216, 909-911.

[51] 13 Wn. App. 2d at 867.

[52] *Id.* at 871-872: "WRS knew Penhall used the System C process for bridges. Penhall was willing to apply the process to the parking garage deck."

Fortune View Condo. Ass'n v. Fortune Star Dev. Co., 151 Wn.2d 534, 544, 90 P.3d 1062 (2004)). There is nothing in the contract between WRS and Penhall that implies Penhall had a "duty to defend" WRS for anything. *Fortune View* simply held that an express warranty made by a manufacturer through advertising could support an implied indemnity claim by a general contractor that did not itself purchase the allegedly defective product; while leaving intact that part of the Court of Appeals' decision in *Urban Dev.* that held: "Urban Development [the general contractor] was not an intended beneficiary of any warranties made by the subcontractors, there is no basis for indemnification claims against those parties, and those claims were properly dismissed."[53] Here, Penhall's indemnity, "written in language of limitation," was limited to "damages [Penhall] directly caused."[54] And that limited express statement included no duty to defend. Washington's courts have long held that a contractual allocation of risk will not be disrupted by claims in equity:

> There is a beneficial effect to society when contractual agreements are enforced and expectancy interests are not frustrated. In cases involving construction disputes, the contracts entered into among the various parties shall govern their economic expectations. The preservation of the contract represents the most efficient and fair manner in which to limit liability and govern economic expectations in the construction business.

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[53] *Urban Dev.*, 114 Wn. App. at 642.

[54] 13 Wn. App. 2d at 875.

Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 828, 881 P.2d 986 (1994).

B. Division One's Determination Penhall Is Not Estopped From Challenging WRS's Settlement With Morse "as the proper measure of damages for its breach of contract with WRS" Does Not "conflict[] with other decisions …."[55]

In this section of its Petition, Evanston identifies two cases with which, Evanston contends, Division One's decision conflicts. The first is *U.S. Oil and Ref. v. Lee & Eastes*, 104 Wn. App. 823, 16 P.3d 1278 (2001). Evanston argues, based on this case, that Penhall, having declined to defend WRS against Morse's arbitration claims, Penhall is "estopped" from challenging the reasonableness of Evanston's settlement payment.

Division One correctly distinguished *U.S. Oil*. That court did not reject or override it. Division One said: "WRS overstates *U.S. Oil*. … The party who had a duty to indemnify and insure U.S. Oil against third party claims declined a tender of defense …. The court did not allow that party to challenge a settlement … 'in the complete absence of any evidence suggesting the settlement was unreasonable.'"[56] "But even if the trial

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[55] Petition at p. 11.

[56] 13 Wn. App. 2d at 874. Here, Penhall presented considerable evidence of unreasonableness. *See* Penhall's Appellate Brief at pp. 31-32 and CP references cited therein. Moreover, Evanston defended WRS for ten months without reserving rights. Then, when mediation was imminent, Morse Square was demanding $575,000; and Evanston had not adequately developed its insured's defenses, Evanston issued an untimely declination, informing WRS: "Evanston is not agreeing to indemnify …" *Id.* & CP 1028. Presumably advised by coverage counsel to settle—through whom Evanston

court here had found a complete absence of any evidence suggesting the settlement was unreasonable, the facts here differ from *U.S. Oil* in significant ways." Those ways were: "the contract [between WRS and Penhall] does not include an express provision requiring Penhall to defend;"[57] and there is no basis to "imply a duty to defend."[58]

Regarding the absence of an implied duty to defend, Division One said that even if the "ABC Rule" might otherwise apply,[59] it would be inequitable to apply the rule in this case—for two reasons. First, although Penhall "warrantied its work for 'workmanship and materials' in several written communications with WRS," WRS's warranty running to Morse was broader.[60] "Penhall did not contract with Morse and it did not warranty WRS's work. The duties were not identical. … And it is clear that WRS and Penhall had potentially adverse positions as to who may have caused Morse's damages."[61]

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agreed to settle—Evanston conditioned payment on Morse's agreement to assist with "future litigation against Penhall." CP 639-40.

[57] 13 Wn. App. 2d at 875.

[58] *Id.*

[59] Penhall respectfully, but vigorously, contends the ABC Rule does not apply at all is because the Rule's third requirement—that "C" (Morse Square in this case)—must not be connected with the wrongful act of A (allegedly Penhall) to B (WRS). *See* Penhall's Appellate Brief at pp.13-14; 18-19; and 27-28 (describing Morse's contribution to and connection with its leaking parking deck).

[60] 13 Wn. App. 2d 875-876.

[61] *Id.*

Second, "the contract between WRS and Morse provided for mediation and binding arbitration," but the earlier-entered contract between WRS and Penhall did not.[62]

Most importantly, as Penhall argued below and Division One agreed: "Enforcing the WRS/Morse agreement to arbitrate against Penhall, who had not agreed to it, would be forcing Penhall to surrender its constitutional right to a jury trial …."[63]

The second case Evanston relies on for its claim the decision below conflicts with other decisions is *David Terry Inves., LLC-PRC v. Headwaters Dev. Grp., LLC*, 13 Wn. App. 2d 159, 463 P.3d 117 (2020). In *David Terry*, Division Three bound an individual to the arbitration agreement his LLC made with others where the individual sought to recover funds he invested through his LLC. Evanston is mistaken, again.

First, as set forth in Penhall's opposition to Evanston's Motion for Reconsideration at 15-16, Evanston did not properly present its estoppel theory below.

Second, equitable estoppel is not an affirmative claim; it is a defense that arises when a person's statements are inconsistent with a

[62] *Id.* at 876.

[63] *Id.* at 877, citing WASH. CONST. art. I, § 21.

claim afterward asserted.[64] Penhall never expressed agreement to arbitrate, let alone later change its mind, and there is no evidence Penhall even knew of the arbitration clause printed in miniscule type on the back of WRS's later-entered contract with Morse. Third, *David Terry* involved multiple claims arising out of a single contract, which the court found were "intimately intertwined," and the court declined to separate the individual from his LLC, where the individual sought to recover funds invested through his LLC. In the present case, there is no similar positioning of the parties; there are no similar facts; and there were two separate contracts—one between Morse and WRS with an arbitration provision and another between WRS and Penhall without such a provision. If WRS had wanted to bind Penhall to WRS's arbitration agreement to Morse, WRS could have proposed such a term be added to WRS's contract with Penhall. WRS did not do so.

C. Nothing About This Case Merits Review by This Court on "Substantial Public Interest" Grounds Under RAP 13.4(b)(4)

Evanston's argument in this section of its Petition—that review by this Court is warranted under RAP 13.4(b)(4) because, in other cases with different facts and circumstances, the "availability [sic] implied indemnity claims based on express warranties" has been recognized; and "the same is

[64] *Estate of Hall v. Hapo Fed. Credit Union,* 73 Wn. App. 359, 362, 869 P.2d 116 (1994).

a substantially important public interest"—is, in the first instance, a repeat of Evanston's preceding "conflict" argument. Penhall has addressed that argument. In the second instance, Evanston's Petition makes unsupported claims about the "construction industry's" means and methods of allocating risk and use of warranties. Evanston wants this Court to mandate that if a general contractor's work does not solve an owner's problem, then whatever subcontractor performed on the project becomes the guarantor of the project's overall success, and must step in to defend and indemnify the general—regardless of the parties' underlying contractual agreements. Evanston's argument seems to be that if a subcontractor gives a materials and workmanship warranty, that warranty is also a guaranty of project scope and design, regardless of the subcontractor's lack of involvement in scope and design; and, that a subcontractor must arbitrate, and thereby relinquish its constitutional right to a jury, whenever the general agrees to arbitrate its disputes with the owner. That is an absurd and unfair result. It also is absurd to suggest that just because WRS found itself in arbitration with Morse, and its insurer Evanston issued an untimely disclaimer, Penhall had a moral obligation to step in as WRS's de-facto insurer and defend and settle on WRS's behalf.

Respectfully submitted this 25th day of November 2020.

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CERTIFICATE OF SERVICE

I, Kay M. Sagawinia, affirm and state that I am employed by Karr Tuttle Campbell in King County, in the State of Washington. I am over the age of 18 and not a party to the within action. My business address is: 701 Fifth Ave., Suite 3300, Seattle, WA 98101. On this day, I caused to be served a true and correct copy of the foregoing upon the following:

Anthony R. Scisciani, III	☐	Via U.S. Mail
Scheer, Holt, Woods & Scisciani	☐	Via Hand Delivery
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Seattle, WA 98101	☐	Via Overnight Mail
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Attorneys for Plaintiff		

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct, to the best of my knowledge. Executed on this 25th day of November 2020, at Seattle, Washington.

s/ Kay M. Sagawinia
Kay M. Sagawinia
Assistant to Jacquelyn A. Beatty and
Robert A. Radcliffe

KARR TUTTLE CAMPBELL

November 25, 2020 - 3:44 PM

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