Supreme Court No. 94711-2
Court of Appeals No. 48644-0-II
Thurston County Superior Court Case No. 14-2-02223-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF OLYMPIA

Petitioner,

vs.

NOVA CONTRACTING, INC.,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

I. INTRODUCTION

The decision by the Court of Appeals that contract claim notice provisions are inapplicable to expectancy and consequential damages lacks any recognized legal basis in Washington. Nova's Response to the City's Petition for Review does not even attempt to defend this erroneous legal standard but rather depends upon a misapplication of the RAP and the bare allegation that the record on appeal is not fully developed.

This decision by the Court of Appeals is directly contrary to the holding in *Mike Johnson* and subsequent cases. The vast majority of public works contracts in Washington incorporate most if not all of the Washington State Department of Transportation Standard Specifications that are the subject of this Petition. Allowing such a ruling to stand uncorrected would have consequences far beyond the contract at issue in this matter. The Court of Appeals should be reversed.

II. ARGUMENT

A. The Record has been Sufficiently Developed to Fairly Consider Olympia's Argument.

Nova contends that under RAP 2.5(a), Olympia's Petition for Review should be denied because its argument that Nova's failure to follow the contractually mandated claims process bars litigation was not raised in

the Motion for Summary Judgment. However, Nova is incorrect that the absence of an argument in a Motion for Summary Judgment categorically prohibits that issue from being heard on appeal. According to RAP 2.5(a): "A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." *See Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003) ("Generally, an appellate court may affirm a grant of summary judgment on an issue not decided by the trial court provided that it is supported by the record and is within the pleadings and proof.").

Here, the record has been sufficiently developed on the issue raised by Olympia, and all undisputed material facts upon which its argument rests are in the record. As Nova admits, Olympia raised the protest noncompliance issue in its Reply in support of its Motion for Summary Judgment, to which Nova had an opportunity to respond in a Surreply, but chose not to. Because noncompliance with the claims process was incorporated into the summary judgment pleadings, this issue was heard by the trial court during summary judgment oral arguments:

> Mr. Linton: "The contract also states that if the contractor has any problem with anything that the engineer does, the contractor has to give notice of those problems to the city … At no time prior to September 4 did the contractor

> ever give any notice that it disagreed with what the city was doing in relation to the submittals ... there was no previous claim by the contractor or notice given as required by the contract that the city's previous actions in rejecting those submittals were inappropriate.[1]
>
> Mr. Cushman: "The city is now arguing - - I saw it basically, it may have been in the original brief, it was more highlighted in the reply - - that we had a duty to submit claims when we received the rejections of our submittals and when - - by not doing so we've waived our argument that the submittals were wrongly rejected."[2]
>
> Mr. Linton: "The contract specifically states if you disagree with any decision by the engineer, you have to immediately protest that in writing, and if you don't protest it any related claims for compensation or extensions of time are waived. They waived any of the actions prior to September 4th, any of the actions by the City in denying these submittals and disallowing them were waived based upon their failure to protest those decisions."[3]

Clearly, the issue of whether Nova's noncompliance with the protest procedure barred subsequent litigation was briefed and argued at the summary judgment phase. Mr. Cushman, on behalf of Nova, even accurately summarized Olympia's argument, demonstrating that Nova fully understood the argument when summary judgment was before the trial court.

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[1] Verbatim Report of Proceedings (RP) p. 5-7.
[2] RP p. 17-18.
[3] RP p. 23-24.

This issue was also fully briefed on appeal, which by itself contradicts Nova's argument that the issue cannot be heard on appeal. Olympia devoted an entire section of its appellate brief to this specific argument.[4] The Court of Appeals addressed the argument in its decision and denied it due to the nature of the relief sought by Nova [expectancy and consequential damages], not because the issue was not timely raised. That the appellate court did not deny Olympia's claim notice argument but created an exception to it further contradicts Nova's claim that the issue is not timely.[5]

Nova contends that it did not have an opportunity to fully develop the record on this issue, yet the argument was specifically presented and argued on summary judgment before the trial court and on appeal. At each stage, Nova had an opportunity to address the substance of Olympia's claim and the evidence underlying it. The facts relied upon by Olympia are already in the record and have been fully discussed at each level of litigation. Nova

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[4] *Nova Contracting Inc. v. City of Olympia*, No. 48644-0-II (Wn. Ct. App. April 18, 2017), Brief of Respondent, p. 35 – 38 (Section entitled: "Nova Waived Its Claims Concerning The Rejected Submittals By Failing To File A Timely Protest").

[5] *Nova*, 48644-0-II, at 6, fn 3. "Initially, the City argues that Nova waived all claims relating to the rejection of its submittals because Nova failed to submit a timely protest under section 1-04.5 of the contract. We disagree. Although Nova may have waived claims for the cost of work performed under the contract, **section 1-04.5 does not apply to expectancy and consequential damages**." [emphasis added.]

has been on notice since summary judgment in early 2016 that this issue was being presented by Olympia. Olympia may present this argument because the record has been sufficiently developed.

B. The Court of Appeals Decision is in Conflict with Supreme Court Precedent, Permitting Review Under RAP 13.4.

Nova incorrectly states that this appeal is governed by RAP 13.5, Discretionary Review of Interlocutory Decisions, and then challenges Olympia's ability to meet its burden under that rule. In actuality, this appeal is governed by RAP 13.4, Discretionary Review of Decision Terminating Review.[6] Under RAP 13.4(b)(1), petitions for review will be accepted by the Supreme Court if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court. Olympia's primary argument is that the Court of Appeals contradicts the seminal Supreme Court decision *Mike M. Johnson, Inc. v. City of Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003).

In *Mike Johnson*, the Supreme Court ruled that contractors must comply with mandatory contractual protest and claims provisions as a condition precedent to filing a lawsuit derived from those grievances. 150

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[6] See, July 7, 2017 Letter from Supreme Court Deputy Clerk Erin L. Lennon, p. 1: "The parties are directed to review the provisions set forth in RAP 13.4(d) regarding the filing of any answer to petition for review and any reply to answer.
The petition for review will be set for consideration without oral argument by a Department of the Court; see RAP 13.4(i)."

Wn.2d, at 377-78. In reversing the Court of Appeals on a question of whether Spokane was entitled to summary judgment, the Supreme Court found it dispositive that it was undisputed that the contractor had not complied with the contractual protest procedure. *Id.* at 391. From a policy perspective, the Supreme Court noted that to allow a contractor to litigate issues that should have been raised in the contractual claims procedure "would render contractual claim requirements meaningless. There would be no reason for compliance, as the contractor could merely assert general grievances in order to secure a later claim." *Id.*

Here, the Court of Appeals contradicted *Mike Johnson* by allowing Nova's lawsuit to continue, despite the undisputed fact that Nova did not file a protest in response to Olympia's determination to reject Nova's submittals. By allowing the Court of Appeal's decision to stand, the Supreme Court would be undercutting the legal and policy foundations of *Mike Johnson*. Under the Court of Appeals decision, a contractor's failure to comply with a mandatory claims procedure is not dispositive on summary judgment. That holding is in direct conflict with *Mike Johnson* and has serious policy implications for public works projects if left unaddressed.

C. It is Undisputed that Nova Did Not Protest Olympia's Determination to Reject Nova's Submittals. Nova is Therefore Prohibited from Bringing this Lawsuit as a Matter of Law.

Nova incorrectly summarized Olympia's argument by stating in its Response: "Olympia's argument is essentially that Nova was late in presenting its claim because it didn't initiate its claim when Olympia first wrongfully rejected submittals."[7] A brief recitation of the material undisputed facts is needed to highlight Nova's error.

Throughout August and early September 2014, several key submittals were rejected by the Olympia City Engineer.[8] Nova admits that it did not file a timely protest under 1-04.5 in response to these rejections.[9] On September 4, 2017, Olympia issued its Termination for Default because Nova had still not produced necessary submittals.[10] On September 9, 2014, Nova filed a formal protest under 1-04.5, protesting Olympia's termination of the contract.[11] It wasn't until September 19, 2014 that Nova issued a letter complaining about the submittal process and admitting that it could not complete the project with the time remaining.[12]

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[7] Nova Response to Petition for Discretionary Review, p. 9.
[8] Clerk's Papers [CP 74-75, 119-150.]
[9] See, Deposition Excerpt of Dana Madsen, p. 34 ln. 20-25, p. 35 ln. 1-2 [CP 479.]
[10] CP 156-158.
[11] CP 301.
[12] Nova Letter, September 19, 2014 [CP 306-314.]

Nova is arguing that because it formally protested the Termination for Default, a question of material fact exists as to whether it failed to protest Olympia's determination to reject its submittals earlier in the summer. But, these are two separate issues, and the only one relevant to Olympia's argument is that Nova failed to protest the rejected submittals.

Olympia is not arguing that Nova was late in protesting the Termination for Default. Olympia is arguing that Nova never protested the rejected submittals, which by the terms of the contract resulted in Nova accepting the rejections and barring any subsequent litigation concerning the rejected submittals.[13]

It is undisputed that Nova did not lodge a protest in response to the rejected submittals before Olympia issued its Notice of Default. Any protest under the contract required that Nova submit a written notice and detailed protest information.[14] Neither of these contract requirements for a valid

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[13] 1-04.5 states: "By not protesting as this Section provides, the Contractor also waives any additional entitlement **and accepts from the Engineer any written or oral order (including directions, instructions, interpretation, and determinations)**. [emphasis added.] [CP 90.]

[14] 1-04.5 further requires: "If in disagreement with anything required in a change order, another written order, or an oral order from the Engineer, including any direction, instruction, interpretation, or determination by the Engineer, the Contractor shall:
1. **Immediately** give a signed written notice of protest ...;
2. Supplement the written protest within 14 calendar days with a written statement and supporting documents providing the following: . . . . [list of five specific items]" [CP 90.] [Emphasis Added.]

protest were met. Furthermore, Nova admitted in its original complaint that the basis of its claims are the rejected submittals – not the Notice of Termination:

> 3.3 The City failed to evaluate and approve submittals properly, rejecting proper submittals. This imposed substantial additional administration and document processing costs on Nova, as Nova had to reprepare and resubmit submittals which should have been approved in their original versions. Further, this refusal to approve submittals ultimately made it impossible for Nova to perform the work. This is a total and material breach of contract entitling Nova to its full contractual expectancy and to reasonably foreseeable consequential damages.[15]

By its own admission, Nova's lawsuit is based upon the City Engineer's multiple determinations over a two month period to reject Nova's submittals.[16] Yet it is undisputed that Nova did not protest Olympia's rejection of Nova's submittals at any time during the submittal process, which by the express terms of the contract, waives any subsequent litigation arising under those decisions.[17] That Nova filed a protest later in response to Olympia's decision to issue a Termination for Default has no

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[15] Complaint for Breach of Contract – p. 4, [CP 4.]
[16] See, Nova Submittal Timeline [CP 74-75] listing each submittal and is acceptance or rejection between June 10, 2014 and September 8, 2014.
[17] 1-04.5 [CP 90.]

bearing on Olympia's argument that litigation based upon the City Engineer' rejection of submittals is prohibited under the contract in accordance with *Mike Johnson*. The contract requires "immediate" written notice.[18] The fact that no such notice was given is illustrated by the belated protest filed by Nova on September 19, 2014 – the same day the 15 day cure period ran out for termination.[19] By that time Nova had run out of time to cure.

In *Mike Johnson*, this Court, in considering identical contractual language, determined that failure to provide a protest in strict compliance with the contract was fatal to the contractor's claims:

> The contracts further provided that MMJ accept all requirements of a change order by endorsing it, writing a separate acceptance, or not protesting it as required by section 1-04.5. *Id.* MMJ's failure to protest constituted "full payment and final settlement of all claims for contract time and for all costs of any kind, including costs of delays, related to any work either covered or affected by the change." [20]

Thus, the failure by Nova to protest was an acceptance of the City Engineer's rejection of submittals and Nova cannot belatedly resurrect a

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[18] *Id.*

[19] See, Nova Letter September 19, 2014, [CP 306-314.] Details the repeated rejections of Nova's submittals and the failure of Nova to protest.

[20] 150 Wn.2d at 380.

claim based upon those rejected submittals by protesting Olympia's Termination for Default.

III. CONCLUSION

Nova's response to Olympia's Petition For Review is based solely upon two procedural arguments.

First, Nova employs an improper application of RAP 13.5. Nova characterizes the Petition as one for review of an Interlocutory Order. This is facially incorrect. The controlling RAP is 13.4.

Second, Nova claims that the issue of Nova's failure to comply with contract claim notice provisions were not presented to the trial court or the Court of Appeals. This too is incorrect as shown by the arguments presented to the trial court and the improper ruling by the Court of Appeals that contract claim notice provisions to not apply to claims for expectancy and consequential damages.

There is no basis for the ruling by the Court of Appeals that simply because a contractor claims consequential and expectancy damages it can therefore override contract claim notice provisions. The Court of Appeals cites no authority for such a proposition and there is none. This is why Nova must resort to applying the wrong RAP and its procedural arguments about

whether the record is fully developed. The decision by the Court of Appeals is indefensible in light of this Court's holding in *Mike Johnson*.

Respectfully submitted this 8th day of August, 2017.

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