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SUPREME COURT
STATE OF WASHINGTON
11/13/2018 2:27 PM
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No. 96236-7

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

FRANK COLUCCIO CONSTRUCTION COMPANY,

Petitioner,

v.

KING COUNTY,

Respondent.

**KING COUNTY'S ANSWER TO BRIEF OF AMICI CURIAE
ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON
AND NATIONAL UTILITY CONTRACTORS ASSOCIATION
OF WASHINGTON**

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INTRODUCTION

The brief of amici curiae Associated General Contractors of Washington and National Utility Contractor's Association of Washington in support of Frank Coluccio Construction Company's ("FCCC") petition for review does not address the RAP 13.4(b) factors and largely repeats the same merits arguments offered by FCCC. Nothing in amici's brief changes the inescapable conclusion that, even after the 2015 amendment to Washington's venue statute, a county remains authorized to commence an action in "the county in which the defendant resides." RCW 36.01.050(1). Given the unambiguous language of the statute, the Court of Appeals ruling confirming as much raises no issue of substantial public interest warranting determination by this Court.

ARGUMENT

This Court has previously recognized that the statutory language permitting a county to sue a defendant in the county where the defendant resides is "straightforward and unambiguous." *Save Our Rural Env't v. Snohomish Cty.*, 99 Wn.2d 363, 366-67, 662 P.2d 816 (1983). Nothing about this language was changed when subsection 3 was added to RCW 36.01.050. Indeed, there is no reference in subsection 3 to any of the terms of subsection 1. Amici's arguments regarding legislative intent are therefore irrelevant, and there is no need for this Court to revisit the same

unambiguous statute that the Court of Appeals properly applied. *See* Amici Br. at 5-7.

Amici attempt to inject ambiguity into RCW 36.01.050 by misstating what was before the Court of Appeals. *Id.* at 7-8. The issue was not “whether it is permissible under the statute” for the County to include certain litigation timing provisions in public works contracts. *Id.* at 7. Instead, the issue was whether RCW 36.01.050(1) authorized the County to file suit where it did. The Court of Appeals correctly answered that question. Amici’s attempt to create an ambiguity where none exists should be rejected.

Amici’s arguments regarding the priority of action rule, Amici Br. at 8-10, boil down to a suggestion that this Court should adopt a new rule barring application of the priority of action rule to second-filed duplicative lawsuits initiated by contractors against counties. But amici offer no legal support for subjecting the priority of action rule to an interest group exception. There is none.

The priority of action rule is not a mere “technicality” or “archaic procedural rule” that can be disregarded when a contractor files a duplicative lawsuit in an authorized venue. Amici Br. at 7, 8. To the contrary, the rule is well established and has been applied many times to override venue choices in second-filed suits that are statutorily

authorized.¹ And amici have offered no support (nor even one citation to the record) for the assertion that the County employed a “preemptive strike” in this case. The claim is false.

When FCCC raised this issue before the Court of Appeals, the County, with citations to the record, demonstrated it did no such thing. *See* Respondent’s Brief.² The Court of Appeals considered this argument and found the priority of action rule applied. Amici’s use of the phrase “preemptive strike” without any citation to record support or applicable law provides no basis to grant discretionary review.

Finally, amici’s arguments regarding an “impartial trial” in King County are improper. Amici Br. at 10-11. This Court normally does not consider issues raised only by amici. *See Richmond v. Thompson*, 79 Wn. App. 327, 343, 901 P.2d 371 (1995). FCCC made no argument under

¹ *See Seattle Seahawks, Inc. v. King Cty.*, 128 Wn.2d 915, 913 P.2d 375 (1996); *City of Yakima v. Int’l Ass’n of Fire Fighters, AFL-CIO, Local 469*, 117 Wn.2d 655, 675-76, 818 P.2d 1076 (1991); *In re Guardianship of Freitas*, 53 Wn.2d 722, 726-29, 336 P.2d 865 (1959); *State ex rel. Greenberger v. Superior Court of King Cty.*, 134 Wash. 400, 401-02, 235 P. 957 (1925); *Schaaf v. Retriever Med./Dental Payments Inc.*, 199 Wn. App. 1045, 2017 WL 2840298 (2017) (unpublished); *Bunch v. Nationwide Mut. Ins. Co.*, 180 Wn. App. 37, 321 P.3d 266 (2014); *Atl. Cas. Ins. Co. v. Or. Mut. Ins. Co.*, 137 Wn. App. 296, 153 P.3d 211 (2007); *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass’n*, 111 Wn. App. 586, 606-09, 49 P.3d 894 (2002).

² It is worth noting that FCCC admitted in its appeal brief that the litigation timing provisions about which it complains “may serve legitimate interests of the County (and of its contractors) to generally delay litigation until post contract/ADR-completion.” Amended Opening Br. at 31. This admission acknowledges that the purpose of these provisions is not to gain some sort of venue-related advantage in pre-emptive litigation with contractors. It is also simply not the case that the County is usually the plaintiff in lawsuits with its construction contractors. *See* Answer to Brief of Amici Curiae on Appeal at 11-12 (filed October 5, 2017).

RCW 4.12.030(2) in its opening brief before the Court of Appeals and therefore waived that issue. *See, e.g., Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). FCCC confirmed this waiver by arguing that its appeal was subject to de novo review. *See* FCCC’s Amended Opening Brief at 15-16. Decisions under the first subsection of RCW 4.12.030 are reviewed de novo, but decisions under the second subsection (“impartial trial cannot be had”) are reviewed for abuse of discretion. *See Moore v. Flateau*, 154 Wn. App. 210, 214, 225 P.3d 361 (2010). This argument therefore also provides no basis for this Court to accept review.

CONCLUSION

Neither amici nor FCCC has raised any issues of substantial public interest that warrant review by this Court. FCCC’s petition should be denied.

DATED: November 13, 2018

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CERTIFICATE OF SERVICE

I certify that at all times mentioned herein, I was and am a resident of the state of Washington, over the age of 18 years, not a party to the proceeding or interested therein, and competent to be a witness therein. My business address is that of Stoel Rives LLP, 600 University Street, Suite 3600, Seattle, Washington 98101.

On November 13, 2018, I caused a true and correct copy of the foregoing document to be served upon the following parties via email:

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DATED at Seattle, Washington, this 13th day of November, 2018.

s/ Eileen McCarty

Eileen McCarty, Legal Practice Assistant

STOEL RIVES LLP

November 13, 2018 - 2:27 PM

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Appellate Court Case Number: 96236-7
Appellate Court Case Title: Frank Coluccio Construction Company v. King County
Superior Court Case Number: 16-2-20773-0

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