Supreme Court No. 96236-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FRANK COLUCCIO CONSTRUCTION COMPANY,

Petitioner,

v.

KING COUNTY,

Respondent.

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

This venue dispute arises out of the breach of contract lawsuit King County brought against Frank Coluccio Construction Company (FCCC) in King County Superior Court. FCCC responded by bringing its own mirror image breach of contract lawsuit against King County in Snohomish Superior Court, and then filing identical counterclaims in King County's action. Although King County filed suit first, FCCC asserted that venue of the parties' dispute was proper in Snohomish County under RCW 36.01.050(3).

Washington's venue statute for counties authorizes a county to commence an action "in the county in which the defendant resides." RCW 36.01.050(1). The state's general venue statute allows a plaintiff to bring an action "in any county in which the defendant resides." RCW 4.12.025(1); *see Moore v. Flateau*, 154 Wn. App. 210, 214-25, 225 P.3d 361 (2010). Statutes have authorized venue in the county of the defendant's residence since before Washington became a state.

In 2015, the legislature added a new subsection to RCW 36.01.050. The amendment renders void and unenforceable, as against public policy, certain forum selection clauses in county public works contracts. *See* RCW 36.01.050(3). Although nothing in the amendment supersedes or changes the statute's first subsection, FCCC moved under RCW 4.12.030

to transfer King County's action to Snohomish County, arguing that under RCW 36.01.050, it had "an absolute statutory and public policy right to have its claims against King County heard by the Snohomish County Superior Court."

The trial court rejected this argument, as did the court of appeals. The court of appeals held that the plain and unambiguous language of RCW 36.01.050(1) gives a county the right to file a lawsuit against a public works contractor in the county where the contractor resides. *See Frank Coluccio Constr. Co. v. King Cty.*, 3 Wn. App. 2d 504, 515-17, 416 P.3d 756 (2018) (*FCCC v. King Cty*.) Given the unambiguous language of the statute, the ruling raises no issue of substantial public interest warranting determination by this Court.

Similarly, no issue of substantial public interest is raised by FCCC's companion arguments based on Section 9.2.A of the parties' contract. Section 9.2A is primarily a litigation-timing device, not a venue clause. It is a provision that FCCC admits "may serve legitimate interests of the County (and its contractors)."[1] It provides no basis for the creation of a common law rule that would override RCW 36.01.050(1) and give public works contractors control over venue in contract disputes with

[1] *See* Appellant FCCC's Amended Opening Brief (Washington Court of Appeals Case Nos. 76334-2-I, 76638-4-I) (FCCC's Br.) at 31.

counties.[2] The so-called "limiting application" of RCW 36.01.050 proposed by FCCC amounts to a wholesale rewriting of the statute, and there is no support in the facts or the law for such relief.

ARGUMENT

This Court has previously characterized as "straightforward and unambiguous" the statutory language that permits a county to sue a defendant in the county where the defendant resides. *See 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. This is not surprising. The two subsections deal with entirely different issues: Subsection 1 is a *statutory* venue provision; subsection 3 addresses *contractual* forum selection clauses. *See Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 55-57, 134 S. Ct. 568, 187 L. Ed. 2d 487 (2013) (discussing the difference between contractual forum selection clauses and statutory venue provisions). The trial court and the court of appeals properly refused to conflate the two.

[2] FCCC previously argued that Section 9.2A warranted "giving a contractor sued by a county in its home court a *statutory right* to require venue-transfer to an adjoining judicial district." *See* FCCC's Br. at 30 (capitalizations omitted, italics in original). FCCC needs to go to the legislature, not the courts, for a new statutory right.

Per the statutory authorization of RCW 36.01.050(1), King County filed suit in the county where FCCC admits it resides. Because it failed to establish that King County's action was brought in the wrong county, FCCC was not entitled as a matter of right to a transfer of King County's action to Snohomish County. *See* RCW 4.12.030(1); *Ralph v. Weyerhaeuser Co.*, 187 Wn.2d 326, 338, 386 P.3d 721 (2016). The court of appeals properly affirmed the trial court's denial of FCCC's motion to transfer venue.

There is absolutely no evidence in the record supporting FCCC's contention that King County has "in recent years" adopted an "approach" of using "litigation-timing conditions precedent to assure owner-county venue of major-contract-claim disputes." Petition for Review at 5 (capitalization and bolding omitted). FCCC points to the Brightwater litigation, *id.* at 6, but ignores that the Brightwater contracts were made and the litigation commenced before forum selection clauses were voided by statute. *See King County v. Vinci Constr. Grands Projets/ParsonRCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 624, 398 P.3d 1093 (2017) (noting the suit was filed in 2010). FCCC's speculation about King County's future approach to disputes with contractors is just that: pure speculation. It does not establish an issue of present public interest.

With respect to FCCC's arguments based on procedural and substantive unconscionability, the court of appeals had no obligation to consider issues raised for the first time on appeal. As the court pointed out, FCCC did not argue unconscionability in its motion to transfer venue or its motion for reconsideration. *FCCC v. King County*, 3 Wn. App. 2d at 517-18, 416 P.3d 756.[3] Instead, as FCCC itself admits, its "fundamental argument was always whether [Section 9.2A] de facto operated as an RCW 36.01.050(3)-proscribed 'provision requir[ing]' King County venue." Petition for Review at 11 (capitalization and bolding omitted).

Finally, the court of appeals committed no error in rejecting FCCC's request for the creation of an exception to the priority of action rule when a public works contractor is sued by a county in its own court. *See FCCC v. King Cty.*, 3 Wn. App. 2d at 519, 416 P.3d 756. It is telling that FCCC does not present any argument with respect to its proposed "Issue No. 3." There is no substantial public interest in this issue.

CONCLUSION

The petition for review is an exercise in hyperbole in search of an actual problem. FCCC has raised no issues of substantial public interest that warrant review by this Court. Its petition should be denied.

[3] There was no mention of "unconscionable" or "unconscionability" in either of those documents. Nor was there any mention of this issue in the complaint FCCC filed in Snohomish County or in the counterclaims FCCC filed in King County.

DATED: September 24, 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.

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