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IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

Supreme Court Case No. 96276-6

MAUREEN HAY, et al.,
Petitioners,

v.

AAA FRAMING CORPORATION, et al.,
Respondents.

**RESPONDENT AAA FRAMING'S ANSWER TO PETITION
FOR REVIEW**

Anthony R. Scisciani III, WSBA No. 32342
ascisciani@scheerlaw.com
Matthew C. Erickson, WSBA No. 43790
merickson@scheerlaw.com
Scheer Law Group, LLP
701 Pike Street, Suite 2200
Seattle, WA 98101
206-262-1200
Attorneys for Third-Party
Defendant/Respondent AAA Framing
Corporation

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A. IDENTITY OF ANSWERING PARTY

This answer to Petition for Review is submitted on behalf of Defendant/Respondent AAA Framing Corporation (hereinafter “AAA”).

B. COURT OF APPEALS DECISION

In an unpublished decision dated July 3, 2018, the Court of Appeals denied appellants’ appeal of the trial court’s summary judgment dismissal of contractor Highmark Homes LLC’s third-party claims against several subcontractors including AAA Framing Corporation. The Court held that the trial court did not err in granting summary judgment dismissing Highmark’s breach of contract claims against AAA for defective construction, failure to defend and indemnify, or failure to procure insurance.

The Court held that the appellants failed to offer evidence that AAA’s work was defective, hence there was no question of fact regarding breach. The Court also held that Highmark failed to present evidence: (1) that the Hay claims were tendered to AAA for defense; (2) that AAA procured liability insurance for Highmark; or (3) that the liability insurer denied coverage.

C. ISSUES PRESENTED FOR REVIEW

Petitioners ask this Court to review: (1) whether it was error for the Court of Appeals to hold that a master construction contract was not valid

and enforceable under Washington law; and (2) whether it was error for the Court to hold that RCW 19.27 does not need to be followed in construction contracts.

However, neither of these issues were actually decided. The Court of Appeals only held that there was insufficient evidence in the record to support petitioners' breach of contract claim against AAA. Petitioners are asking this Court to review issues that the Court of Appeals never reached. The Petition for Review should be denied.

D. COUNTERSTATEMENT OF THE CASE

This case arises from the construction and sale of twenty-nine single family homes located in a neighborhood called "Valley Haven" in Fife, Washington (hereinafter "Project"). Highmark and its owner purchased the lots and acted as general contractor in their development. (CP 1645-54). As the general contractor, Highmark hired subcontractors, including AAA, to perform construction labor on the subject homes. (CP 1656-62). AAA provided framing labor on twelve of the twenty-nine homes. (CP 1801).

Highmark asserts breach of contract claims against AAA for its work at Valley Haven based on the allegation that Highmark and AAA had a written contract. AAA denies there was a written contract. (CP 1801). Highmark has been unable to locate or produce the contract or

recall specific details about the formation of the contract. (CP 1783-4; CP 1788-92, 2143).

Not only does Highmark fail to offer any evidence that a written contract existed, it fails to offer any evidence that AAA's work was defective or otherwise improper to begin with.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

The Petition for Review should be denied because petitioners have failed to demonstrate that this case presents an issue of substantial public interest. The Supreme Court may grant review and consider a Court of Appeals opinion only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

The petitioners are not seeking review under RAP 13.4(b)(1) - (b)(3). They specifically state that they are seeking review under the substantial public interest provision (13.4(b)(4)). (Pet. 1-2). Petitioners do not (and would not be able to) allege that the Court of Appeals'

decision presents a significant constitutional question or that it is in conflict with a Supreme Court decision or published Court of Appeals decision.

1. The Petition Does Not Raise an Issue of Substantial Public Interest

Review should be denied because petitioners have completely failed to show an issue of substantial public interest in this case. An issue of substantial public interest is one that has the potential to affect a number of proceedings in the lower courts and where review will avoid unnecessary litigation and confusion on a common issue. See, e.g., *State v. Watson*, 155 Wn.2d 574, 577 (2005) (Court of Appeals' holding regarding impropriety of ex parte communication concerning drug sentencing was of substantial public interest because it had the potential to affect a significant number of other drug offender sentencing proceedings).

a. The Court of Appeals Never Reached the Issues Claimed by Petitioners

The Court of Appeals' decision was very limited in scope and does not raise an issue of substantial public interest. Contrary to petitioners' claims, the Court of Appeals never decided whether AAA and the other subcontractors breached a valid and enforceable master construction contract, or whether RCW 19.27 must be followed in such contracts.

Petitioners are erroneously attempting to reframe the issues in order to meet the substantial public interest requirement necessary for review.

As to AAA, the Court held that there was insufficient evidence of defective construction necessary to assert a breach of contract claim to begin with. “The summary judgment record contains only a general reference to [...] AAA performing framing and siding work in the housing development.” (Op. 18-19). In turn, the Court did not address whether the master construction contract was enforceable as against AAA. It held that the record contains insufficient evidence to assert a breach of contract claim against AAA based on its work at the Project. For this same reason, the Court of Appeals did not address whether RCW 19.27 requires AAA to perform work in compliance with specific building codes. The record does not contain any evidence of defective work that could possibly raise an issue of failure to comply with the building codes.

The Court of Appeals also held that there was insufficient evidence to support a contractual claim against AAA for failure to defend and procure insurance for petitioners.¹ This is because there is no evidence that Hay tendered to AAA, that AAA procured liability insurance, or that the insurer denied coverage. In turn, the Court did not reach the issue of

¹ Petitioners do not seek review of AAA’s alleged failure to defend and/or procure insurance for petitioners. Hence, this issue is not actually before the Court.

whether AAA was contractually obligated to defend and procure insurance for petitioners. There is no evidence in the record to support such a claim.

The record does not contain any evidence of defective work by AAA or other evidence that would support a breach of contract claim. The Petition for Review should be denied.

It should also be noted that the Court of Appeals already engaged in a substantial public interest assessment when determining whether to publish its decision. *See* RAP 12.3(d). The fact the Court decided not to publish is further evidence that the case does not raise an issue of substantial public interest.

2. The Court of Appeals' Decision is Not Contrary to Established Legal Precedent and Does Not Raise a Constitutional Question

Petitioners do not assert any of the other bases for review listed in RAP 13.4(b). Nothing in the record can be construed as giving rise to a constitutional question and the petitioners do not contend that the Court of Appeals' decision is contrary to established precedent. In turn, petitioners have no basis to seek review from this Court under RAP 13.4(b)(1)-(3).

3. The Court of Appeals' Decision Was Correctly Decided

Notwithstanding petitioners' failure to meet any of the four grounds for review under RAP 13.4(b), review should also be denied because Court of Appeals' decision is correct.

The Court of Appeals affirmed the Superior Court's decision granting AAA's Motion for Summary Judgment dismissing Highmark's claims against AAA for breach of contract, breach of warranty, and breach of duty to defend and indemnify.

a. No Breach of Contract

For a contract to exist, there must be a mutual intention or "meeting of the minds" on the essential terms of the agreement. *McEachren v. Sherwood & Roberts, Inc.*, 36 Wn. App. 576, 579 (1984). The burden of proving a contract, whether express or implied, is on the party asserting it, and he must prove each essential fact. *Cahn v. Foster & Marshall, Inc.*, 33 Wn. App. 838, 840 (1983).

Petitioners cannot make a claim for breach of express contract because they cannot (and never did) produce a written contract between AAA and Highmark. Petitioners cannot make a claim for breach of implied contract because they failed to offer any evidence to support the existence of such a contract between AAA and Highmark. Petitioners do not claim that an implied contract even exists.

Petitioners failed to offer any evidence supporting the existence of a contract between AAA and petitioners. In turn, the Court of Appeals correctly affirmed the Superior Court's Order dismissing the claims against AAA.

b. No Breach of Warranty

AAA did not breach an implied warranty to Highmark. In Washington, service contracts are not governed by the Uniform Commercial Code (UCC), therefore, where a construction contract contains no terms regarding warranties, an implied warranty of workmanlike performance is not implicit. *Urban Dev., Inc. v. Evergreen Bldg. Prod.'s, LLC*, 114 Wn. App. 639, 646 (2002) (court upheld the dismissal of general contractor's breach of warranty and breach of contract claims against some subcontractors that provided only services). AAA provided only services to Highmark. The only documentation in the record relating to AAA's work consists of framing labor invoices. There is no evidence in the record of an agreed upon scope of work or, therefore, that there were problems with any part of AAA's work. Highmark insisted that AAA provide framing labor in strict accordance with Highmark's instructions, which AAA did. In turn, there is no implied warranty.

Petitioners failed to offer any evidence supporting the existence of a warranty between AAA and petitioners. The Court of Appeals correctly affirmed the Superior Court's order dismissing the claims against AAA.

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c. No Breach of Duty to Defend or Indemnify

AAA did not have a duty to defend or indemnify Highmark. There is no evidence in the record of an agreement with those terms as to AAA, and Washington does not recognize a cause of action for implied indemnity or defense in non-UCC construction contracts. The Court of Appeals correctly affirmed the Superior Court's Order dismissing the claims based on breach of duty to defend and indemnify.

E. CONCLUSION

In light of the above, AAA respectfully requests that the Petition for Review be denied.

RESPECTFULLY SUBMITTED this 4th day of October, 2018.

SCHEER LAW GROUP

By 

Anthony R. Scisciani, III, WSBA No. 32342
Matthew C. Erickson, WSBA No. 43790
Attorneys for Third-Party
Defendant/Respondent AAA Framing
Corporation

CERTIFICATE OF SERVICE

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

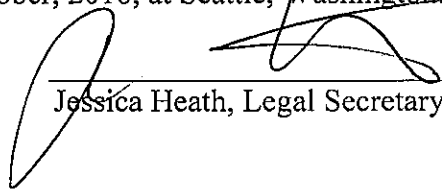
I am employed by the law firm of Scheer Law Group LLP.

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 competent to be a witness herein.

On the date set forth below I served the document(s) to which this is attached, in the manner noted on the following person(s):

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
<u>CO/ Appealants</u> Todd Skoglund <i>Casey & Skoglund PLLC</i> 130 Nickerson Street, Suite 210 Seattle, WA, 98109.	<input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Legal Messenger <input checked="" type="checkbox"/> Email todd@casey-skoglund.com chris@casey-skoglund.com sarah@casey-skoglund.com
<u>CO/ S&S Home Repair</u> John Drotz Petra N. Ambrose <i>Clement & Drotz, PLLC</i> 100 West Harrison Street, Suite N350 Seattle, WA 98119	<input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Legal Messenger <input checked="" type="checkbox"/> Email jdrotz@clementdrotz.com pambrose@clementdrotz.com bjohnson@clementdrotz.com mtibke@clementdrotz.com
<u>CO/ BOF & ABSI</u> Marianna Valasek-Clark Steven Jager <i>Jager Law Office PLLC</i> 600 Stewart Street, Suite. 1100 Seattle, WA 98101	<input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Legal Messenger <input checked="" type="checkbox"/> Email marianna@jagerclark.com steven@jagerclark.com Jamic@jagerclark.com LisaP@jagerclark.com

DATED this 4th day of October, 2018, at Seattle, Washington



 Jessica Heath, Legal Secretary

SCHEER LAW GROUP

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- merickson@scheerlaw.com
- msilver@clementdrotz.com
- sarah@casey-skoglund.com
- todd@casey-skoglund.com

Comments:

Sender Name: Melanie Barnhill - Email: mbarnhill@scheerlaw.com

Filing on Behalf of: Anthony Robert SciscianiIII - Email: ascisciani@scheerlaw.com (Alternate Email:)

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Seattle, WA, 98101
Phone: (206) 262-1200

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