98395-0

COA No. 79407-8-I

SUPREME COURT
OF THE STATE OF WASHINGTON

EDIFICE CONSTRUCTION COMPANY, INC., a Washington corporation,

Petitioner,

v.

SAK & PATCH, INC., AQUAGUARD WATERPROOFING LLC, ARROW INSULATION, INC., COMMERCIAL INDUSTRIAL ROOFING, INC. HIGHPOINT CONSTRUCTION INC., et al,

Respondents.

PETITION FOR DISCRETIONARY REVIEW

Claude Bosworth
Kevin Clonts
Rizzo Mattingly Bosworth PC
1300 SW Sixth Ave., Suite 330
Portland, OR 97201
Telephone: 503-229-1819
Facsimile: 503-229-0630
Email: cbosworth@rizzopc.com
Email: kclonts@rizzopc.com

Anna S. Raman
Chelsea Thorne
MacMillan, Scholz & Marks, PC
900 SW Fifth Ave., Suite 1800
Portland, OR 97204
Telephone: 503-224-2165
Facsimile: 503-224-0348
Email: araman@msmlegal.com
Email: cthorne@msmlegal.com

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES:

TABLE OF CASES AND AUTHORITIES CONT'D

RULES:

OTHER AUTHORITIES:

A. IDENTITY OF THE PETITIONER

Petitioner is Edifice Construction Company, Inc. ("Edifice"), the Plaintiff in the King County Superior Court action and the Appellant in Division I.

B. CITATION TO THE COURT OF APPEALS DECISION

The decision for which review is sought is *Edifice Construction Company, Inc. v. Arrow Insulation, Inc., et al.*, 79407-8-I, 2020 Wash. App. LEXIS 359, 2020 WL 812129 (Div. I, Feb. 18, 2020). A copy of the decision is attached to this petition as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

Does a subcontract incorporate by reference the main contract when the subcontract explicitly states that the parties agree "[t]o be bound by all laws, government regulations and orders, and all provisions of the Main Contract," and that the "parties further agree" that the main contract is "incorporated herein by this reference and expressly made a part of this Subcontract"?

Does the objective theory of contracts require a finding of incorporation by reference when a contract explicitly states that "parties further agree" that another contract is "incorporated herein by this reference and expressly made a part of this Subcontract"?

D. STATEMENT OF THE CASE

This is a petition for review of Division I's decision to affirm the trial court order denying Edifice's motion to compel certain subcontractor defendants to comply with their Subcontract terms and participate in an ongoing arbitration of construction defect claims. Division I premised the affirmation on the following incorrect assumption: "The trial court denied Edifice's motion to compel arbitration with regard to Respondents, determining that the subcontracts did not incorporate the main contracts, which included arbitration provisions."

Division I's assumption is incorrect for two reasons. First, the subcontractors did not argue to the trial court that the subcontracts failed to incorporate the Main Contract by reference. Second, the trial court made no determinations of fact, either on or off the record, in support of its orders and, therefore, did not make a finding regarding incorporation by reference.

This matter arises from the construction of a multi-unit building located at 222 West Highland Drive, Seattle, commonly referred to as Kerry Park Court ("Project"). CP at 2. Six Degrees Capital Development LLC ("Six Degrees") and Kenneth Wolcott are the Project owners (collectively "Owners"). *Id*. The Project was constructed in two phases, referred to as "Phase I" and "Phase II."

Edifice was the general contractor for both phases. Edifice and owner Six Degrees entered into the Phase I Main Contract on April 25, 2010, using a modified AIA Standard Form of Agreement Between Owner and Contractor. CP at 33, 40-102. On or about October 1, 2012, Edifice and Six Degrees Capital Development LLC entered into the Phase II Main Contract, which incorporated Phase I Main Contract's modified AIA Standard Form Agreement terms. CP at 33, 103-163. Both Main Contracts incorporated the AIA standard form Document A 201-2007 General Conditions of the Contract for Construction.

Article 13.2 of both Main Contracts requires claims to be submitted to mediation and binding arbitration. CP at 52, 114. Section 15.4 of AIA Document A201 of both Main Contracts also requires binding arbitration. *Id*.

Edifice entered into standard subcontracts with the Subcontractors ("Subcontracts"). CP at 164-186, 210-221, 243-258, 273-285. Paragraph 2, on the first page, of the Subcontracts explicitly incorporates by reference the Main Contract:

> "In consideration therefore, the Subcontractor agrees as follows:
>
> "1. To furnish and perform all work as described in Paragraph 3 hereof, for the construction of Kerry Park Court, Job No. 9070, 222 West Highland Drive, Seattle, WA 981119, for Six Degrees Capitol Development, LLC,

> hereinafter called Owner, in accordance with the Contract dated April 25th, 2010 between the Owner and the Contractor, and the general and special Conditions of said Contract, and in accordance with the drawings and specifications and Addenda November 01, 2010 for said construction by SkB Architects, all of which documents in their entirety are hereinafter referred to as the Main Contract and have been made and remain available to the Subcontractor.
>
> "2. To be bound by all laws, government regulations and orders, and all provisions of the Main Contract, and to be bound by the Additional Provisions in Paragraphs (A) through (DD), Attachment "A" Indemnification Addendum, and Attachment "B" Insurance Addendum, Attachment "C" Subcontractor Application for Payment, Attachment "C1" Schedule of Third Party Obligations, Attachment "D" Final Release of Lien and Waiver of Claims, Attachment "E" Letter of Guarantee, Attachment "F" Project Work Rules, for Kerry Park Court, Job No. 9070 and all provisions for the main contract and all documents of which it consists. The parties further agree that all of the above mentioned laws, regulations, orders, subcontract and main contract documents are incorporated herein by this reference and expressly made a part of this Subcontract."

CP at 164, 210, 243, 273.

Paragraph W of the Subcontract Additional Provisions again incorporates by refence the Main Contract:

> "PASS-THROUGH CLAIMS: In the event of any dispute or claim between Contractor and Owner which directly or indirectly involves the work performed or to be performed by Subcontractor, or in the event of any dispute or claim between Contractor and Subcontractor caused by or arising out of conduct for which Owner may be responsible, Subcontractor agrees to be bound to Contractor to the same extent the Contractor is bound to Owner by the terms of the Main Contract and by any and all procedures and resulting

> decisions, findings, determinations, or awards made thereunder by the person so authorized in the Main Contract, or by an administrative agency, board, court of competent jurisdiction or arbitration. If any dispute or claim of Subcontractor is prosecuted or defended by Contractor, pursuant to this paragraph, Subcontractor agrees to cooperate fully with Contractor and to furnish all documents, statements, witnesses, and other information required by Contractor for such purpose and shall pay or reimburse Contractor for all expenses and costs, including reasonable attorney fees incurred in connection therewith, to the extent of Subcontractor's interest in such claim or dispute.
>
> Subcontractor agrees to be bound by the procedure and final determinations as specified in the Main Contract and agrees that it will not take, or will suspend, any other action or actions with respect to any such claims and will pursue no independent litigation with respect thereto, pending final determination of any dispute resolution procedure or litigation between Owner and Contractor […]"

CP at 155, 169, 176, 210, 243, 273.

Edifice moved to compel all of the Project subcontractors into arbitration per the Subcontract. Approximately half of the subcontractors ("Subcontractors") opposed Edifice's motion. These Subcontractors argued that either Paragraph W could not pass-through claims of an owner against the subcontractors because Washington law only allowed "claims of a subcontractor to be passed-through the prime contractor against the owner" or, in the alternative, that Paragraph Y, providing that all other claims would be decided in King County Superior court, conflicted with Paragraph W, so Paragraph Y should apply. CP 357-358. The trial court, without fact finding

or stated basis for its decision, entered various orders compelling the subcontractors who did not oppose the motion into arbitration and denying Edifice's motion to compel as to the Subcontractors. CP 439-443, 451-455, 461-465. The trial court made no findings of fact.

In response to Edifice's motion to compel, no Subcontractor argued that the Subcontracts did not incorporate the Main Contract. To the contrary, the Subcontractors conceded that "Paragraph two of the subcontract contains a broad reference to the main contract between Edifice and the owner." CP 356. Subcontractors raised the argument that there was no incorporation by reference for the first time on appeal. Appendix, Appellate Opinion at p. 4.

Division I's stated basis for upholding the trial court order was that, although the explicit terms of the Subcontracts state that they incorporate by reference the Main Contract, "Edifice has not offered any evidence that [the Subcontractors] knew of or assented to the terms of the main contracts." Appendix, Appellate Opinion at p. 5.

The Court of Appeals, Division I denied a motion to publish the Opinion on March 10, 2020.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Supreme Court review of Division I's decision is necessary and appropriate because (1) it is in direct conflict with this Court's decisions in

Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co., 176 Wn.2d 502, 296 P.3d 821 (2013) (en banc), *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 225 P.3d 213 (2009) (en banc), and *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493 115 P.3d 262 (2005); and (2) it is in direct conflict with multiple Court of Appeals decisions. RAP 13.4(b).

1. Division I's Decision Conflicts with Other Incorporation by Reference Caselaw

Division I's decision is contrary to this Court's caselaw. In all prior cases, this Court has applied explicit incorporation by reference language in a contract without requiring parties to submit extrinsic evidence of the parties' intent. No Washington Supreme Court decision has required a party to introduce evidence extrinsic from the contract's language that the parties intended to incorporate the referenced document or had knowledge of the referenced document's terms. Division I's decision and rationale necessarily would require any party seeking to establish incorporation by reference to collect and submit evidence extrinsic from the actual written terms of the contract.

In *Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 176 Wn.2d 502, 296 P.3d 821, 829 (2013) (en banc), this Court found that a subcontract incorporated

by reference a prime contract based solely upon the subcontract's language. This Court began its analysis by noting "[c]ontract interpretation is a question of law for the court when it is unnecessary to rely on extrinsic evidence." *Id*. at 517. Immediately thereafter, and without any extrinsic evidence, this Court held that the "subcontracts incorporate by reference the prime contract documents. In general, '[i]f the parties to a contract clearly and unequivocally incorporate by reference into their contract some other document, that document becomes part of their contract.'" *Id*. at 517-518, (citing *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 801, 225 P.3d 213 (2009) (en banc); *Santos v. Sinclair*, 76 Wn. App. 320, 325, 884 P.2d 941 (1994)).

In upholding the subcontract's prime contract incorporation language, this Court further noted: "Incorporation by reference and flow-down provisions in prime contracts that bind subcontractors are enforced by courts 'in a wide variety of contexts.'" *Id*. at 518 (quoting 1 G. CHRISTIAN ROUX, CONSTRUCTION CONTRACTS DESKBOOK § 20:2 (2012)).

Likewise, in *Satomi Owners, supra*, an opinion in which multiple cases were consolidated for purposes of appeal, this Court found incorporation by reference by relying solely upon the language found in the contracts at issue:

> "In *Satomi* and *Blakeley*, the warranty addendum expressly and unequivocally states that it is an addendum to the condominium purchase and sales agreement. Similarly, in *Leschi*, the limited warranty's arbitration provisions are clearly and unequivocally incorporated into the purchase and sale agreement by two of its addenda. We hold, therefore, that the transactions in each case include the purchase and sale agreements and the warranties, as incorporated by reference."

Satomi Owners, supra, 167 Wn.2d at 801-02.

The Division I opinion at bar also runs directly counter to other opinions of the Court of Appeals. In *3a Indus. v. Turner Constr. Co.*, 71 Wn. App. 407, 869 P.2d 65 (1993), Division I found that a subcontract incorporated by reference the main contract even though that subcontract's incorporation language was less explicit and clear than the Subcontracts' language here. Division I required no extra-contractual proof of intent. In *Turner v. Wexler*, 14 Wn. App. 143, 538 P.2d 877, 881 (1975), Division III found that a contract incorporated by reference an earlier contract because it stated the earlier contract would remain in "'full force and effect except as modified herein.' The reference to the 1965 contract acted to incorporate its provisions into the 1969 contract and made its terms binding upon all parties." *Id*. at 149. Division IIII required no extra-contractual proof of intent.

Likewise, Division III has found incorporation by reference of a sub-subcontract of the main construction contract's terms based only on the language of the sub-subcontract. The sub-subcontract provided:

> A. Subcontract documents include all the below listed items, all of which are incorporated herein and made part hereof by reference thereto.
>
> > 1. The Contract between the Owner and the Contractor dated and the conditions thereof (general, supplementary and other conditions).

Sime Constr. Co. v. Wash. Pub. Power Supply Sys., 28 Wn. App. 10, 14, 621 P.2d 1299, 1302 (1980). Based solely upon the contract language, and without extra-contractual evidence of intent or knowledge, the court held that the "sub-subcontract incorporates by reference, without qualification, the terms of the prime contract." *Id*. at 14.

Western Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc., 102 Wn. App. 488, 492, 7 P.3d 861 (2000) is the only reported case that has language that extra-contractual evidence that the parties "knew of or assented to the terms of the" incorporated document might be relevant to this issue; however, that case also found incorporation by reference based solely upon the contract language. That opinion contains the following:

> "Incorporation by reference allows the parties to 'incorporate contractual terms by reference to a separate . . . agreement to which they are not parties, and including a separate document which is unsigned.' 11 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 30:25, at

> 233-34 (Richard A. Lord ed., 4th ed. 1999) (footnotes omitted). 'But incorporation by reference is ineffective to accomplish its intended purpose where the provisions to which reference is made do not have a reasonably clear and ascertainable meaning.' WILLISTON, *supra*, at 234. Incorporation by reference must be clear and unequivocal. *Santos v. Sinclair*, 76 Wn. App. 320, 325, 884 P.2d 941 (1994). 'It must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms[.]" WILLISTON, supra, at 234.'"

Id., at 494-95.

Even so, the first paragraph after the above-quoted passage is:

> "Here, the Trade Contract provides that the work will be performed in accordance with the 'Project Contract Documents' or the 'Contract Documents.' Thus, the Trade Contract clearly and unequivocally incorporates the 'Contract Project Documents' and the 'Contract Documents.' But the question is what do these terms mean."

Id. at 495.

When the two paragraphs are read together, it is clear the *Ferrellgas* court first found incorporation by reference *based solely on the contract's explicit language*, but then needed to determine what the contract meant by using the terms "Contract Project Documents" and "Contract Documents." The remainder of the opinion parses through the meaning of those terms in that particular transaction.

Further, though this Court has referenced the *Ferrellgas* decision, when it did so, it did not adopt any requirement that a party "offer[ ] evidence that [other parties] knew of or assented to the terms of the"

incorporated document, as Division I held in this matter. To the contrary, this Court summarized *Ferrellgas* as follows:

> "In *Western Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 492, 7 P.3d 861 (2000), a contract between the subcontractor and general contractor provided that the subcontractor was '"to perform the Work … in accordance with the Project Contract Documents,"' and agreed '"to perform and complete such Work in accordance with Contract Documents."' (Alteration in original.) The Court of Appeals concluded that the contract clearly and unequivocally incorporated these documents. *Id*. at 495.
>
> "The contracts here are even clearer about what is incorporated and plainly extend to provisions in the incorporated documents governing procedural matters. As noted, Section 11(f) in the subcontracts states that the subcontractor assumes the same obligations and responsibilities toward the general contractor that the general contractor assumes to the owner "as set forth in the Prime Contract, insofar as applicable, generally or specifically, to" the subcontractor's work. In addition, the subcontracts specifically provide that the 'Prime Contract documents shall be considered a part of the Subcontract by reference thereto' and the subcontractors agreed to be bound to Hunt Kiewit 'by the terms and provisions' of the prime contract 'so far as they apply to the' work under the subcontracts. CP at 521, 525, 1789, 1804. These provisions clearly and unequivocally incorporate by reference provisions in the prime contract, including the limitation and accrual provision in the prime contract."

Wash. State Major League Baseball Stadium Pub. Facilities Dist., supra, at 519-20.

/ / /

2. Division I's Decision Conflicts with Other Caselaw Regarding the Objective Manifestation Theory of Contracts

Washington follows the "objective manifestation theory" of contract interpretation, under which the focus is on the reasonable meaning of the contract language to determine the parties' intent. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Division I's decision would require a party seeking to establish incorporation by reference to submit extracontractual evidence of the parties' intent, in contravention of this Court's decisions applying the objective manifestation theory of contracts.

This Court has instructed Washington courts to give contract terms "their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent." *Id*., at 504. The contract is analyzed as a whole, and particular language is interpreted in the context of other contract provisions. *See Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 669-70, 15 P.3d 115 (2000).

In *Multicare Med. Ctr. v. Dep't of Soc. & Health Servs.*, 114 Wn.2d 572, 790 P.2d 124, 132-33 (1990), this Court further explained:

> "To determine the mutual intentions of contracting parties, we follow the objective manifestation theory of contracts. Thus, the unexpressed subjective intention of the parties is irrelevant; the mutual assent of the parties must be gleaned from their outward manifestations. To determine whether a party has manifested an intent to enter into a contract, we

> impute an intention corresponding to the reasonable meaning of a person's words and acts. Accordingly, if the Hospitals, judged by a reasonable standard, manifested an intention to agree to the arrangements in question, that agreement is established regardless of the Hospitals' real, but unexpressed, intent."

Id. at 586-87 (citations omitted).

The rule that intention is determined by the parties' actual outward manifestation as expressed in the contract's terms is a bedrock principal that Division I's decision has abandoned. "Our courts follow the objective theory of contracts, which requires 'that we impute to a person an intention corresponding to the reasonable meaning of his words and acts. Petitioner's unexpressed impressions are meaningless when attempting to ascertain the mutual intentions of the parties.'" *Santos v. Dean*, 96 Wn. App. 849, 854, 982 P.2d 632, 635 (1999) (quoting *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn. App. 1, 7, 937 P.2d 1143 (1997)).

"Under the objective theory of contract interpretation, we must attempt to ascertain the intent of the parties from the ordinary meaning of the words within the contract. Under the context rule, we may consider extrinsic evidence to determine the specific words and terms used, but not to show an intention independent of the instrument." *Nye v. Univ. of Wash.*, 163 Wn. App. 875, 882-83, 260 P.3d 1000, 1004 (2011).

"Washington follows the objective theory of contracts, focusing on the objective manifestations of the agreement rather than the less precise subjective intent of the parties not otherwise manifested. Absent fraud, deceit or coercion, a voluntary signatory is bound to a signed contract even if ignorant of its terms. Therefore, the parties are bound by the contract as signed and the parol evidence cannot change the contract, only aid in its interpretation." *Wells Tr. v. Grand Cent. Sauna & Hot Tub Co.*, 62 Wn. App. 593, 602, 815 P.2d 284, 290 (1991) (citations omitted).

F. CONCLUSION

The Court should accept review for the reasons indicated in Section E, reverse Division I, and return this matter to the Superior Court to order Subcontractors to participate in ongoing arbitration.

Dated this 9th day of April, 2020.

RIZZO MATTINGLY BOSWORTH PC

s/Kevin Clonts

Claude Bosworth, WSBA #42568
Email: cbosworth@rizzopc.com
Kevin Clonts, WSBA #45900
Email: kclonts@rizzopc.com
Of Attorneys for Appellant Edifice Construction

MACMILLAN, SCHOLZ & MARKS, PC

Anna S. Raman, Pro Hac Vice
Email: araman@msmlegal.com
Chelsea Thorne, WSBA No. 49740
Email: cthorne@msmlegal.com

Of Attorneys for Appellant Edifice Construction

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on April 9, 2020, I served the foregoing Petition for Review by the Supreme Court of Washington on the following parties:

X via Court of Appeals Division I Online Filing System

s/Kevin Clonts
Kevin Clonts, WSBA #45900

Appendix A

FILED
2/18/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EDIFICE CONSTRUCTION COMPANY, INC., a Washington corporation,

Appellant,

v.

ARROW INSULATION, INC., a Washington corporation; SEATTLE PAINTING SPECIALISTS, INC., a Washington corporation; HENDERSON MASONRY, INC., a Washington corporation; DAVID RICH HENTZEL, JR., an individual; AUTOMATED EQUIPMENT CO. DBA AUTOMATED GATES AND EQUIPMENT CO., a Washington corporation,

Respondents,

SAK & PATCH, INC., a Washington corporation; AQUAGUARD WATERPROOFING LLC, a Washington limited liability company; COMMERCIAL INDUSTRIAL ROOFING, INC., a Washington corporation; HIGHPOINT CONSTRUCTION INC., a Washington corporation; INLAND WATERPROOFING SERVICES, INC., a Washington corporation; SHAMROCK METAL SYSTEMS, INC., a Washington corporation; EMERALD AIRE, INC., a Washington corporation; BOB JOHNSON WOODWORKING, LLC, a Washington limited liability company,

Defendants.

No. 79407-8-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: February 18, 2020

CHUN, J. — Edifice Construction seeks to compel subcontractors Henderson Masonry Inc., Arrow Insulation Inc., Seattle Painting Specialists Inc., David Rich Hentzel Jr., and Automated Equipment Co. (collectively, Respondents)[1] to arbitrate construction defect claims. The trial court denied Edifice's motion to compel arbitration with regard to Respondents, determining that the subcontracts did not incorporate the main contracts, which included arbitration provisions. For a court to find incorporation by reference, it must be clear that the parties had knowledge of and assented to the incorporated terms. Because Edifice failed to meet its burden to show that Respondents had knowledge of and assented to the main contracts' terms, we affirm.

I. BACKGROUND

This case concerns contracts for construction of a residential building in Seattle (Project). Edifice served as the general contractor and Six Degrees Capital Development LLC and Kenneth Woolcott were the Project owners (Owners). The Project had two phases, Phase I and Phase II.

On April 25, 2010, Edifice and Six Degrees entered into a contract for Phase I. They used a modified American Institute of Architects (AIA) Document A102-2007 form. They entered into a contract for Phase II on October 1, 2012, this time using a modified AIA Document A103-2007 form.[2] Both contracts

[1] In its Reply brief, Edifice clarified that it does not appeal the trial court's order as it relates to Bob Johnson Woodworking, LLC.

[2] The Respondents acknowledge that the Phase I and Phase II contracts are substantially similar.

(collectively, the main contracts) include a "Binding Dispute Resolution" clause requiring the parties to submit to binding arbitration.

To complete the construction, Edifice contracted some of the work to subcontractors. Paragraph 2 in each subcontract provides that the subcontractors agree as follows:[3]

> To be bound by all laws, government regulations and orders, and all provisions of the Main Contract, and to be bound by the Additional Provisions in Paragraphs (A) through (DD) . . . and all provisions for the main contract and all documents of which it consists. The parties further agree that all of the above mentioned laws, regulations, orders, subcontract and main contract documents are incorporated herein by this reference and expressly made a part of this Subcontract.

The subcontracts also contained a Pass-through clause providing, in part:

> In the event of any dispute or claim between Contractor and Owner which directly or indirectly involves the work performed or to be performed by Subcontractor, or in the event of any dispute or claim between Contractor and Subcontractor caused by or arising out of conduct for which Owner may be responsible, Subcontractor agrees to be bound to Contractor to the same extent the Contractor is bound to Owner by the terms of the Main Contract and by any and all procedures and resulting decisions, findings, determinations, or awards made thereunder by the person so authorized in the Main Contract, or by an administrative agency, board, court of competent jurisdiction or arbitration.

On September 4, 2018, the Owners sent Edifice a Notice of Intent to Arbitrate for alleged defects in the construction of the Project. Edifice, in turn, sent Notices of Intent to Arbitrate to several subcontractors on September 11, 2018. Edifice additionally filed a lawsuit against the involved subcontractors in

---

[3] The subcontractors each signed two subcontracts, one corresponding with the Phase I main contract and another corresponding with the Phase II main contract. The parties agree that the subcontracts at issue are substantially similar. Except for Bob Johnson Woodworking, LLC, all of the subcontractors signed the same form of agreement.

King County Superior Court on September 25, 2018.

On November 6, 2018, Edifice moved to compel arbitration. Subcontractor Henderson Masonry filed the initial opposition to the motion. Several other subcontractors, including the other Respondents, joined Henderson Masonry in opposing the motion.

On November 26, 2018, the trial court issued an order denying Edifice's motion to compel arbitration as to Respondents. Edifice appeals.

II. ANALYSIS

Edifice argues that the subcontracts require arbitration because they expressly incorporated the main contracts. Respondents contend that the subcontracts did not incorporate the main contracts because Edifice failed to show that they knew of and assented to the terms of the main contracts.[4] We agree with Respondents.

We review de novo a trial court's decision denying a motion to compel arbitration. Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 797, 225 P.3d 213 (2009).

---

[4] Edifice argues that Respondents claim for the first time on appeal that they did not know of or assent to the incorporated terms, and that we should thus not consider the argument. But Respondents' contention relates to its argument that the subcontracts did not incorporate the main contract, which they made to the trial court. If an argument raised for the first time on appeal arguably relates to an issue raised in the trial court, we may exercise our discretion to consider newly-articulated theories for the first time on appeal. Mendoza v. Expert Janitorial Services, LLC, 11 Wn. App. 2d 32, 48 n.14, 450 P.3d 1220 (2019). Additionally, even if Respondents did raise the issue for the first time on appeal, they argue that the trial court could not compel arbitration because Edifice did not put forth sufficient evidence to establish an agreement to arbitrate. Under RAP 2.5(a)(2), a party may raise for the first time on appeal the error that the opposing party failed to establish facts upon which we can grant relief. Accordingly, we address Respondents' argument.

Parties to a contract may incorporate by reference terms of another contractual agreement to which they are not both parties. W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc., 102 Wn. App. 488, 494, 7 P.3d 861 (2000). "Incorporation by reference must be clear and unequivocal." Ferrellgas, 102 Wn. App. at 494. Where "the parties to a contract clearly and unequivocally incorporate by reference into their contract some other document, that document becomes part of their contract." Satomi, 167 Wn.2d at 801. The parties do not need to physically attach a document to a contract to incorporate it by reference. Ferrellgas, 102 Wn. App. at 498-99. Still, it must be clear that the parties had knowledge of and assented to the incorporated terms. Ferrellgas, 102 Wn. App. at 494-95. The party claiming incorporation by reference bears the burden of proving it. Baarslag v. Hawkins, 12 Wn. App. 756, 760, 531 P.2d 1283 (1975).

Respondents concede that the subcontracts "purport[] to incorporate provisions of the Main Contract." But they correctly assert that Edifice has not offered any evidence that they knew of or assented to the terms of the main contracts. Edifice relies on Ferrellgas to argue that it did not need to attach the main contracts to the subcontracts to incorporate them. Yet Edifice still needed to meet its burden of demonstrating that Respondents knew of and assented to the incorporated terms. In Ferrellgas, the party met this burden by showing that, though it did not attach the incorporated contract, the opposing party knew the incorporated contract was an AIA Document A201 form and that this was "a standard form used by owners and contractors." 102 Wn. App. at 497. Based on

this evidence, the court determined that the other party was aware of the general conditions of the incorporated contract. Ferrellgas, 102 Wn. App. at 497.

By contrast, Edifice presents no evidence that Respondents saw the main contracts, knew what AIA forms the main contracts involved, or that the AIA forms used were standard in the industry. Indeed, based on the record, Respondents were not aware of the AIA forms used in the main contracts until Edifice sent the Notices of Intent to Arbitrate. Because Edifice does not meet its burden to show that the subcontracts incorporated the main contracts, and does not assert any other contractual basis for arbitration, we determine the trial court did not err by denying Edifice's motion to compel arbitration.[5]

Affirmed.

Chun, J.

WE CONCUR:

Mann, ACJ

Dwyer, J.

[5] We note that, even if the subcontracts had incorporated the main contracts, we would still affirm. While the parties dispute the scope of the Pass-through clause, we assume for the sake of this point that Edifice's broader interpretation that the clause applies "[i]n the event of any dispute or claim between Contractor and Owner which directly or indirectly involves the work performed or to be performed by Subcontractor" is correct. Edifice, however, failed to include in the record the expert report specifying the construction defects the Owners alleged in the dispute. Without this information, we cannot determine whether the dispute directly or indirectly involves work completed by Respondents. As the party presenting the issue for review, Edifice bore the burden of providing an adequate record. See RAP 9.2. While Edifice acknowledged that the record lacked this information, it declined to supplement.

RIZZO MATTINGLY BOSWORTH PC

April 09, 2020 - 11:16 AM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Edifice Construction Company, Appellant v. Sak & Patch, Inc., et al, Respondents (794078)

The following documents have been uploaded:

- PRV_Petition_for_Review_20200409111348SC850325_9104.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Edifice - Petition for Review 04.09.20.pdf

A copy of the uploaded files will be sent to:

- Dan@danjdonlan.com
- MDT@MAFlegal.com
- Nina.Cordova@libertymutual.com
- SGW@Leesmart.com
- Topping.MichaelD@gmail.com
- amk@maflegal.com
- anna.raman@chockbarhoum.com
- ascisciani@hwslawgroup.com
- bfallon@fallonmckinley.com
- cmanley@rizzopc.com
- david.b.jensen@zurichna.com
- gtrabolsi@gandtlawfirm.com
- jdrotz@clementdrotz.com
- john.barhoum@chockbarhoum.com
- jparisi@clementdrotz.com
- jpm@maflegal.com
- kristi@fmwlegal.com
- lyee@rmlaw.com
- mclifton@rmlaw.com
- msilver@clementdrotz.com
- mstaskiews@smithfreed.com
- psheely@smithfreed.com
- recordsmanagement@rizzopc.com
- sclement@clementdrotz.com
- scott.noel@libertymutual.com
- sgriffin@davisrothwell.com
- spierce@davisrothwell.com
- tracy.frazier@chockbarhoum.com
- vf@leesmart.com

Comments:

Sender Name: Cody Manley - Email: cmanley@rizzopc.com
Filing on Behalf of: Kevin Robert Clonts - Email: kclonts@rizzopc.com (Alternate Email:)

Address:
1300 SW 6TH AVE STE 330
Suite 330
Portland, OR, 97201
Phone: (503) 229-1819

Note: The Filing Id is 20200409111348SC850325