No. 99119-7

SUPREME COURT
OF THE STATE OF WASHINGTON

LAKE HILLS INVESTMENTS LLC,
a Washington limited liability company,

Respondent,

v.

AP RUSHFORTH CONSTRUCTION CO., INC. d/b/a/
AP RUSHFORTH, a Washington corporation, and
ADOLFSON & PETERSON INC., a Minnesota corporation,

Petitioners.

RESPONDENT'S ANSWER TO AMICI CURIAE MEMORANDA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

RULES AND REGULATIONS

OTHER AUTHORITIES

A. INTRODUCTION

Given their size and influence in the industry, it is not surprising that petitioners AP Rushforth Construction Co., Inc. and Adolfson & Peterson, Inc. (collectively "AP")[1], have enlisted their construction industry allies to lend their weight to AP's petition for review. But amici's hyperbole that the Court of Appeals decision represents an issue of broad concern not only repeats AP's erroneous legal argument, but ignores the procedural posture and fact-specific nature from which this specific affirmative defense arose.

Missing from amici's[2] hyperbole that the decision upended established risk allocation in construction litigation is any recognition that AP's affirmative defense, alleging that it followed

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[1] AP has over 700 employees in its multi-state operations. Its revenues are not a matter of public record as it is privately held. *See* https://www.a-p.com/about (last accessed Feb. 8, 2021).

[2] As Lake Hills responds to the two amicus curiae memoranda accepted per RAP 13.4(h), the term "amici" in this Answer refers to the Associated General Contractors of Washington, the National Utility Contractors Association of Washington, the Associated Builders and Contractors of Western Washington, the Surety & Fidelity Association of America, the National Electrical Contractors Association Puget Sound Chapter, the Mechanical Contractors Association of Western Washington and the Sheet Metal & Air Conditioning Contractors National Association-Western Washington, Inc.

The brief submitted by the Associated General Contractors of Washington is cited here as "AGC Br. ___" and the brief submitted by the Surety & Fidelity Association of America is cited as "SFAA Br. ___".

Lake Hills' allegedly defective plans and specifications, became relevant only *after* the jury found that AP breached its construction contract with Lake Hills. The jury found that AP built a public plaza, the "heart and soul" of Lake Hills' project, and a garage that were marred by defective concrete due to AP's poor workmanship and its failure to follow the contract documents. Amici further ignore that the erroneous language chosen by the trial court in instructing the jury on AP's affirmative defense was the result of AP's tactical decision at trial to eschew an instruction that would have asked the jury to allocate liability in the manner amici now advocate.

The Court of Appeals thus properly reversed this judgment because the trial court's instruction erroneously told the jury that despite finding that AP breached its contractual-workmanship obligations, the jury must nonetheless absolve AP from any liability under its affirmative defense without requiring AP to prove that *all* construction defects proven by Lake Hills were attributable to its own plans and specifications. (Op. 1) The Court of Appeals decision not only followed settled law but is based on a careful analysis of this particular record, and on the instructions proposed and rejected below.

B. ARGUMENT IN RESPONSE TO AMICI

1. Amici's hyperbolic accusation of misallocation of risk in construction contracts ignores that the Court of Appeals addressed an affirmative defense that only became relevant once Lake Hills proved AP breached the contract.

This Court should reject the "sky is falling" rhetoric advanced by amici, which is divorced from the procedural posture of this case. The trial court authorized the jury to absolve contractor AP even though the jury found that owner Lake Hills met its burden of proving "[t]hat AP breached the contract by failing to construct certain areas of work in compliance with the contract documents." (Instr. 9, CP 348) Those "contract documents" include the AIA form contract, which required AP not only to "supervise and direct the Work, using [its] best skill and attention," but expressly made AP "solely responsible for . . . constructions means, methods, techniques, sequences and procedures . . ." (Ex. 1 at § 3.3.1) (emphasis added) AP also warranted to Lake Hills that the "materials and equipment furnished under the Contract will be of good quality. . . , that the Work will be free from defects . . . and . . . will conform to the requirements of the Contract Documents," which included the project plans and specifications. (Ex. 1 at § 3.5.1)

The jury in its special verdict found against AP (CP 370), establishing that Lake Hills proved that AP breached the contract because its deficient concrete work in the plaza, the pedestrian street, and the garage resulted in cracking, uneven slopes, inconsistent color, and poor finish quality. (*See* CP 343 (detailing Lake Hills' first breach of contract claim); Ex. 92; RP 1316, 1320-21, 1373-74, 1392, 1417-18) As the Court of Appeals properly noted, once Lake Hills "prove[d] its case," the burden shifted to AP to convince the jury to "deny plaintiff's right to recover, even if the allegations of the complaint are true" by establishing "an independent legal theory based on evidence extraneous to the plaintiff's case." (Op. 8-9) AP's affirmative defense that it followed Lake Hills' allegedly defective plans and specifications, if established, thus gave AP "an absolute bar to liability even when the plaintiff proves its case." (Op. 8)

While the Court of Appeals properly analyzed the instruction in the context of AP's affirmative defense, amici do not. Their discussion of risk allocation (SFAA Br. 4-5) instead treats the affirmative defense as a simple matter of whether, to use their analogy, the baker is responsible in the first instance "if the cake does not rise." (AGC Br. 7) Amici ignore that the jury found the baker responsible. Lake Hills met its burden of establishing on a more

likely than not basis that AP failed to use its "best skill and attention," and completed a project of poor quality that was not "free from defects" and that its work did not "conform to . . . the Contract Documents" as the result of its sole responsibility "over construction means [and] methods." (Ex. 1 at 3.3.1, 3.5.1)

Amicus SFAA (SFAA Br. 7-8) similarly overlooks that the jury could not have reached AP's affirmative defense unless it first found that "AP breached the contract by failing to construct certain areas of work in compliance with the contract documents." (CP 348) AP's affirmative defense thus addressed those areas of the project in which the jury found AP failed to fully follow Lake Hills' plans and specifications, or did so improperly, contrary to amici's contention that the affirmative defense would not have applied "[h]ad Lake Hills proved to the jury that AP did not follow the plans in affected areas of the project." (SFAA Br. 9)

Because AP's affirmative defense was that defective plans were the singular cause of AP's non-conforming concrete work, it was critical, as the Court of Appeals recognized, that the jury be instructed that "AP had to prove Lake Hills' defective designs 'solely' caused the plaintiff's damages." (Op. 14) Without "solely" to clarify AP's burden of proof, the jury was free to absolve AP of *all* liability if

a design error in *any way* contributed to the defective construction, even if AP's own deficient performance also caused the defect. To continue with AGC's analogy (AGC Br. 7), if Lake Hills proved that the cake did not rise because AP failed to properly mix the ingredients or set the oven too low, the trial court's instruction allowed AP to avoid any responsibility for its actions even if Lake Hills' recipe mistakenly called for 1/8 teaspoon, rather than 1/4 teaspoon, of salt.

Indeed, amici's argument underscores the prejudice from the erroneous instruction. AP's primary defense to Lake Hills' defective concrete claim—by far the largest claim at trial—was that while it admittedly failed to follow Lake Hills' plans in many respects, it had used the rebar reinforcement specified by the plans and thus its own poor workmanship, such as not properly joining the rebar through different concrete panels, was irrelevant. (Op. 10; *see* RP 1374-78, 1415) As the Court of Appeals explained, for the two areas of the project where the jury awarded Lake Hills no damages, the jury heard "evidence of both deficient performance by AP and defective plans and specifications by Lake Hills." (Op. 10) The jury could have found in AP's favor under the trial court's instruction even if it found AP's

poor workmanship in fact caused the cracked concrete if it also found that more detailed plans could have helped prevent the problem.

Contrary to amici's contention, it was thus entirely possible that the jury followed the trial court's instruction to excuse AP from *all* liability despite the fact that its "deficient performance caused some of the damage." (SFAA Br. 8) Because AP's affirmative defense came into play only after the jury found AP breached the contract, the jury should have been told that it could AP could avoid liability only if Lake Hills' plans were "solely" responsible for AP's construction defects.

2. The Court of Appeals followed established law in holding that once the jury found AP breached its contract, AP had the burden of proving that its faulty work was solely due to Lake Hills' plans and specifications.

Properly viewed in the context of an affirmative defense, the Court of Appeals did not impose on Washington contractors an "impossible standard," but held only that Instruction 9 understated AP's burden to prove its affirmative defense "that a ***single cause***, defective plans or specifications, injured Lake Hills" after Lake Hills had established that AP materially breached its contract. (Op. 13) (emphasis added) As the Court of Appeals decision is consistent with Washington precedent and construction law across the country,

amici's contention that it reflects a sea change in risk allocation between owner and contractor is a tide lacking current.

The general rule is that a contractor can avoid liability by following an owner's plans and specification only "if [the] contractor builds in a *workmanlike manner* according to [those] plans or specifications furnished by the owner." Michael T. Callahan, Et Al., *Construction Disputes: Representing the Contractor* § 20.02 (4th ed. Supp. 2021-1) (emphasis added). That is also the law in Washington.

Amici misstate the holding of *Kenney v. Abraham*, 199 Wash. 167, 90 P.2d 713 (1939) in arguing that this Court does not require a contractor to "prove that . . . the defects in the work . . . result solely from defects in the owner's plans and specifications" "in order to avoid liability." (AGC Br. 6) That is precisely what *Kenney* held: "The rule . . . that a contractor will not be responsible to the owner for loss or damage which results *solely* from the defective or insufficient plans or specifications . . . . is not applicable where there is negligence, as in the case at bar, on the contractor's part." 199 Wash. at 173 (emphasis added); *see also Valley Const. Co. v. Lake Hills Sewer Dist.*, 67 Wn.2d 910, 915, 410 P.2d 796 (1965) (citing *Kenney* and affirming the "well-settled" rule that a contractor is not

responsible for "damage which results . . . *solely* from the defective or insufficient plans or specifications") (emphasis added).

This rule articulated in *Kenney* and *Valley Constr*. is no aberration, as amici contend, but is rather so "well settled" that it is followed "in practically every American jurisdiction in which the matter has been involved." 3 Philip L. Bruner & Patrick S. O'Connor Jr., *Construction Law* § 9:59 (August 2020 Update); *see also* Callahan*, Construction Disputes* § 20.02 ("It is equally well-established that if a contractor builds in a workmanlike manner according to plans or specifications furnished by the owner, the contractor will not be responsible for damages resulting *solely* from defects in the plans or specifications . . . ."") (emphasis added); Schwarzkopf, *Calculating Construction Damages* § 1.07 (3rd ed. Supp. 2020) (both cited at Op. 14, n.42).

Amici further ignore that the WSBA's Construction Section explains (in the note to the very instruction they cite) that a "contractor will not be responsible to the owner for loss or damage that results *solely* from the defective or insufficient plans or specifications . . . .", citing the same cases relied upon by amici. *See* Wash. State Bar Assoc. Construction Section, Instruction 3.4 (citing *Maryland Cas. Co. v. City of Seattle*, 9 Wn.2d 666, 676, 116 P.2d 280

(1941); *Dravo Corp. v. Municipality of Metro. Seattle,* 79 Wn.2d 214, 218, 484 P.2d 399 (1971); *Valley Const.*, 67 Wn.2d at 915) (emphasis added).[3]

Amici's "sky is falling" hyperbole also rests on a misinterpretation of *U.S. v. Spearin*, 248 U.S. 132, 39 S. Ct. 59, 63 L.Ed. 166 (1918), a case not cited by the Court of Appeals because it addresses allocation between the government-owner and its contractor of the risk of unexpected and unforeseen site conditions in the context of a contractor's action for additional compensation. (*See* AGC Br. 4-7; SFAA Br. 4-7) *Spearin* held a government contractor was not responsible for flooding that occurred when a sewer he constructed according to plans provided by the federal government overflowed after "a sudden and heavy downpour of rain coincident with a high tide" because "*[a]ll* the prescribed requirements were *fully* complied with by [the contractor]." *Spearin*, 248 U.S. at 134 (emphasis added).

Recognized as the "war horse authority on risk allocation and defective specifications," Leaderman, *The Spearin Doctrine: It Isn't*

[3] Available at https://www.wsba.org/legal-community/sections/construction-law-section (last accessed Feb. 8, 2021).

What It Used to Be, 16 Constr. Law. 46 (1996), *Spearin* holds only that "[w]hen the Government provides specifications directing how a contract is to be performed, the Government warrants that the contractor will be able to perform the contract satisfactorily if it follows the specifications." *Hercules Inc. v. U.S.,* 516 U.S. 417, 425, 116 S. Ct. 981, 986, 134 L.Ed. 2d 47 (1996). *Spearin* thus allocates the risk of unforeseen site conditions to the party best able to discover and manage that risk.

Following *Spearin,* this Court has explained that "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." *Dravo Corp.*, 79 Wn.2d at 218 (quoting *Spearin*, 248 U.S. at 136). But recognizing that the case deals chiefly with allocation of risk, the *Dravo* Court also acknowledged that *Spearin* reflects the "governing rule" in Washington that "[w]here one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." *Dravo Corp.* 79 Wn.2d at 218 (quoting *Spearin*, 248 U.S. at 136).

The Court of Appeals did not address *Spearin* because the instant case does not involve who bears the risk of unexpected site conditions.[4] Nonetheless, to the extent its risk allocation principles are relevant, *Spearin* is consistent with the Court of Appeals decision here. In *Spearin*—unlike here—the contractor had *fully* complied with *all* the plans provided by the government that had superior knowledge of the conditions on its own land, and there was no evidence the contractor's work was in any way defective or negligently performed. Amici ignore that under the Court of Appeals decision here, the contractor in *Spearin* would have prevailed because the overflow was not caused by the contractor's negligence or a failure to follow the government's plans, but was instead caused *solely* by his adherence those plans. (SFAA Br. 6)

Amici also erroneously suggest that under the Court of Appeals decision the contractor in *Spearin* would not have recovered compensation because the damage was caused by defective plans *and* "coinciding torrential rain and high tide." (SFAA Br. 6) Again,

[4] *Spearin* also did not involve an affirmative defense by a contractor sued by an owner for defective performance, but the contractor's burden of proof when suing the government for compensation for unforeseen site conditions. The same is true of the proposed model instruction prepared by the WSBA's Construction Section. (*See* AGC Br. 6)

the Court of Appeals' holding does not address who bears the risk of damages caused by "act of god" events or other unidentified causal "factors" referenced by amici.[5] (*See* SFAA Br. 4; AGC Br. 4) That was not AP's defense here. Rather, AP claimed "that a *single cause*, defective plans or specifications, injured Lake Hills." (Op. 13) (emphasis added)

While also acknowledging that a contractor's performance generally "will be excused . . . by acts of God," the Court of Appeals resolved only whether Instruction 9 correctly allocated the burden of proof on the defective plans affirmative defense raised by AP. (Op. 11) Amici's speculation that the Court of Appeals decision "could have implications beyond when a contractor is defending a claim for defective work" (SFAA Br. 7) is entirely unfounded. *See In re Stockwell*, 179 Wn.2d 588, 600, ¶ 22, 316 P.3d 1007 (2014) ("An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the

[5] Amici also repeat AP's erroneous assertion that *White v. Mitchell*, 123 Wash. 630, 213 P. 10 (1923), "relieved a contractor of liability even where there were other contributing factors that caused defects in addition to defective plans and specifications." (AGC Br. 6) *White* in fact reversed a judgment in the contractor's favor, holding under the particular facts that "[i]t was their duty to examine into the condition of the soil and know the difficulties they might encounter." *White*, 123 Wash. at 637. (Answer to Petition at 9)

opinion was rendered.") (quoted source omitted). The Court of Appeals applied settled construction law in the specific context of AP's affirmative defense in which it sought to be entirely excused for breaching its contract based on Lake Hills' allegedly defective plans.

3. The Court of Appeals decision does not preclude allocation of damages where a contractor claims an owner's defective plans are to blame.

The Court of Appeals did not, as amici contend, interfere with the jury's ability to allocate liability between a contractor and owner according to their respective responsibility for a defect. (SFAA Br. 9; AGC Br. 8-9) Contrary to amici's dire predictions that the decision upends risk allocation in construction litigation, nothing in the Court of Appeals decision precludes a court from authorizing the jury to allocate responsibility between a contractor's deficient performance and an owner's defective plans under proper instructions in a different case or procedural context. (Op. 14, n.43: "other options are beyond the scope of the briefing in this appeal.") Both the trial court (belatedly) and the Court of Appeals recognized that by directing the jury that its "verdict should be for AP" as to any portion of the project for which AP proved that the defect "resulted from defects in the plans and specifications" (CP 348-49), Instruction 9 gave AP an "absolute" and "complete" defense to an adjudicated

breach of contract thereby precluding the very allocation amici now advocate. (Op. 8; RP 4110)

Amici again ignore the record and the procedural posture in which the issue of allocation arose below. When the trial court became concerned that its instruction understated AP's burden of proving its defective plans affirmative defense by exonerating AP for its non-performance unrelated to Lake Hills' plans and specifications, AP refused an alternative that would have accomplished the allocation that amici now advocate. The trial court recognized that "[y]ou can't have a complete affirmative defense [based on defective plans and specifications] that is also due to other causal factors," and sought to remedy this problem by asking AP if it "want[ed] to allocate in the verdict form" in a manner akin to comparative fault. (*See* RP 4110, 4114)[6] AP said it would "look at it" (RP 4114), but then never followed up with the trial court. Having made a tactical choice to pass on the very allocation amici now seek, AP has only itself to blame for advancing an "all-or-nothing" gambit for its affirmative defense. (*See* AGC Br. 8)

[6] The trial court briefly inserted the word "primarily" (rather than "solely") into Instruction 9 to address its concerns but removed it just before the jury began its deliberations. (RP 4115, 4862)

The Court of Appeals decision does not, as amici assert, "threaten[] to disrupt a vital industry" or "upset[] settled expectations of allocation of risk." (AGC Br. 9; SFAA Br. 1) The true threat to a proper allocation of risk would be to authorize an instruction directing the jury, after it found AP breached its contract, to nonetheless absolve AP of all liability if Lake Hills' plans and specifications contributed in any way to a construction defect, no matter how minor or inconsequential, and no matter how deficient AP's performance. The Court of Appeals correctly addressed that error, correctly reversing the jury's verdict.

C. CONCLUSION

This Court should reject amici's misguided arguments and deny review.

Dated this 8th day of February 2021.

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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 February 8, 2021, I arranged for service of the foregoing Respondent's Answer to Amici Curiae Memoranda, to the Court and to the parties to this action as follows:

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February 08, 2021 - 4:13 PM

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