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SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE MAJOR LEAGUE BASEBALL STADIUM
PUBLIC FACILITIES DISTRICT and THE BASEBALL CLUB OF
SEATTLE, L.P.,

Appellants,

vs.

HUBER, HUNT & NICHOLS-KIEWIT CONSTRUCTION, a
Washington joint venture; HUNT CONSTRUCTION GROUP, INC., a
foreign corporation; and KIEWIT CONSTRUCTION COMPANY, a
foreign corporation,

Respondents/Cross-Appellants,

vs.

LONG PAINTING, INC., a Washington corporation, HERRICK STEEL,
INC., a California Corporation

Cross-Respondents.

**BRIEF OF AMICUS CURIAE ASSOCIATED GENERAL
CONTRACTORS OF WASHINGTON**

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I. IDENTITY AND INTEREST OF AMICUS

The Associated General Contractors of Washington (“AGC”) has existed since 1922 and is the State’s largest, oldest and most prominent construction industry trade association. The three chapters of the AGC serve more than 1,000 general contractors, subcontractors, construction suppliers and industry professionals. Many of these members perform public works projects for the state’s various agencies and local governments. AGC members perform both private and public sector construction. They are involved in virtually all types of construction in the state, including office, retail, industrial, highway, healthcare, utility, educational and civic projects. Construction is a significant sector of the state’s economy, and provides significant jobs to Washington citizens.

AGC members have a substantial interest in having the construction statute of repose interpreted fairly and consistently, both on public and private works projects. The certainty and protection afforded by the statute of repose has a direct impact on the cost of insurance and surety bonds, which ultimately is reflected in the price of construction for public and private owners alike.

As the issues before this Court have the potential to affect the interests of this important segment of the state’s economy and numerous public works contracts, the AGC submits this brief in support of the

position of Respondents Huber, Hunt & Nichols-Kiewit Construction Joint Venture, the general contractor/construction manager for the Safeco Field project. AGC requests that this Court affirm the decision of the trial court.

II. ARGUMENT AND AUTHORITY

This brief addresses two primary issues.

First, this Court should hold the construction statute of repose bars the PFD's claims against Hunt Kiewit. Although claims brought for the benefit of the State are exempt from the *statute of limitations*, the Legislature expressly determined that this same exemption should not apply to the *statute of repose*. Given that Legislative directive, the Court should not enforce terms in a public works contract that have the effect of nullifying the effect of the statute of repose in claims brought for the benefit of the state.

Second, the AGC and its members have a substantial interest in having contractual "flow-down" provisions given full effect so that risk may be fairly allocated on construction projects. In particular, the AGC and its members have a broad interest in having flow-down clauses apply to transfer the risk and protections provided by statutes of limitation and repose. Accordingly, if this Court remands the PFD's claims against Hunt Kiewit, the Court should likewise reverse and remand the trial court's

dismissal of Long Painting and Herrick Steel, based upon the flow-down provisions in Hunt Kiewit's subcontracts with those parties.

A. THE COURT SHOULD GIVE EFFECT TO THE LEGISLATURE'S DIRECTIVE THAT THE STATUTE OF REPOSE APPLIES TO ACTIONS BROUGHT FOR THE BENEFIT OF THE STATE

It is undisputable that the statute of repose applies to actions brought for the benefit of the state:

Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is later, shall be barred. . . . The limitations prescribed in this section apply to all claims or causes of action as set forth in RCW 4.16.300 brought in the name or for the benefit of the state which are made or commenced after June 11, 1986.

RCW 4.16.310 (emphasis added). The statute of repose thus "provides an absolute bar to the commencement of any action which has not accrued within 6 years of substantial completion of construction," *Donovan v. Pruitt*, 36 Wn. App. 324, 327, 674 P.2d 204 (1983), even if the plaintiff is suing for the benefit of the state.

The statute of repose did not always say this. Rather, the Legislature amended the statute to expressly apply to state-benefitting lawsuits as a direct response to this Court's decision in *Bellevue School District No. 405 v. Brazier Construction Co.*, 103 Wn.2d 111, 120, 691 P.2d 178 (1984). In that case, the Court held that construction claims brought by a school district against a contractor were exempt from the

statute of limitations, based on the then-existing language of RCW 4.16.160 and RCW 4.16.310. *Brazier*, 103 Wn.2d at 124. The Court reasoned that the exemption from limitations periods in the pre-1986 version of RCW 4.16.160 applied to all limitations periods within Chapter 4.16 RCW. Because RCW 4.16.310 limited actions and was a statute within Chapter 4.16 RCW, the Court reasoned that lawsuits for the benefit of the State were immune from the statute of repose. The *Brazier* Court thus concluded that “[a]bsent express legislation directing otherwise,” a lawsuit for the benefit of the State “should not be barred by the limitation period of RCW 4.16.310.” *Brazier*, 103 Wn.2d at 120.

The “express legislation” was quick to arrive. In 1986, the Legislature amended the statute of repose so that it would apply equally to actions brought “for the benefit of the state.” See Laws of 1986, ch. 305, §§ 701-02, Final Legislative Report, 49th Leg., 1986 Reg. Sess., SSB 4630, ch. 305, at 194 (“[T]he builder limitation statute applies equally to all construction claims, whether brought by an individual, a school district, a municipal subdivision, or the state.”). The bill report for the companion House Bill summarized the change:

The rule announced in the decision in *Bellevue School District v. Brazier* is legislatively reversed. The six year ‘accrual’ requirement in construction cases is made applicable to the state.

House Bill Report, HB 573, 49th Leg., 1986 Reg. Sess. In other words, the Legislature specifically amended the statute of repose so that the state would *not* have an unlimited amount of time to bring construction claims.

This Court has at least twice acknowledged this “legislative reversal” of *Brazier*. In *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 211, 875 P.2d 1213 (1994), the Court noted that *Brazier* was “superseded by statute.” In a concurring opinion in *Duke v. Boyd*, 133 Wn.2d 80, 91 n.2, 942 P.2d 351 (1997), Justice Talmadge explained that “the Legislature overruled [*Brazier*] in 1986. See LAWS OF 1986, ch. 305, §702.”

The Legislature’s decision to overturn *Brazier* is a public policy decision that this Court should not disregard. As noted in the preamble to the Tort Reform Act (which included the above revision to RCW 4.16.310), the Legislature revised the statute of repose in part to avoid the possibility of “unlimited risk” to participants in construction projects. ESSB 4630 § 100. Reducing risk in turn lowers the cost of insurance and, as a result, the cost of the public construction projects that require that insurance.

Ten years after amending the statute of repose, the Legislature enacted the Stadium Act to create a Public Facilities District to build

Safeco Field.¹ As required by law, the stadium contract was put out for public procurement. The contract was not negotiated; it was drafted by the PFD and offered on a take-it-or-leave-it basis.

Nowhere does that contract say the *statute of repose* does not apply to the Safeco Field project. Nonetheless, the PFD contends that Article 13.7 renders the statute of repose inapplicable by pinpointing accrual of any cause of action at substantial completion, regardless of whether the statute of limitation applies. The AGC urges the Court to reject this argument for at least two reasons.

First, the purpose of Article 13.7 is to pinpoint accrual for the purpose of applying the applicable *statute of limitation*. If the PFD's claim is exempt from the statute of limitation, then Article 13.7 has no purpose and the Court should disregard it.

Second, and more importantly, applying Article 13.7 to a claim that is not subject to a statute of limitation would effectively nullify the *protection* that the statute of repose affords to contractors. In that sense, enforcing Article 13.7 would impermissibly violate an express legislative enactment:

¹ The Stadium Act does not address the statutes of limitation or repose. But certainly nothing in the Stadium Act authorized the PFD to "contract around" the statute of repose.

When a state agency enters into a contract that is completely outside of its authority, i.e., *ultra vires*, or enters into a contract that violates public policy or a statutory scheme, the contract is void and unenforceable.

South Tacoma Way, LLC v. State, 146 Wn. App. 639, 650, 191 P.3d 938 (2008) (internal citations omitted).

As Hunt Kiewit explained in its brief to this Court, applying Article 13.7.1 in the absence of a corresponding statute of limitations would transform that provision from a “shield” into a “sword.” That provision, from an AIA industry standard contract, is designed to limit the contractor’s liability, not expand it. Applying Article 13.7.1 when the owner is not subject to a corresponding statute of limitation would deny the public works contractor the protections of the statute of repose and subject it to potentially unlimited liability. Neither case law nor sound public policy supports such an interpretation.

B. IMPORTANT PUBLIC POLICY CONSIDERATIONS SUPPORT STRICT ENFORCEMENT OF THE STATUTE OF REPOSE TO ACTIONS BROUGHT FOR BENEFIT OF THE STATE

When a claimant fails to timely assert claims, the opposing parties can be severely prejudiced by the delay. Evidence can be lost or destroyed, and the opposing parties are denied the opportunity to present a full and meaningful defense. Memories fade. Witnesses disappear. Moreover, insurance policies can be lost, and insurance coverage that may

have been available—for the benefit of *both* parties—can expire or be exhausted. Each of these problems can arise when claimants sleep on their rights or fail to timely assert claims—or when the protections of the statute of repose are denied.

The lack of a statute of repose would also provide a negative incentive for public owners to be vigilant in inspecting and maintaining public facilities. If there is no deadline to file a claim, there is no incentive to timely perform these important functions. *See Lakeview Blvd. Condominium Ass'n*, 144 Wn.2d 570, 577, 29 P.3d 1249 (2001) (“The longer the owner has possession of the improvement, the more likely it is that the damage was the owner’s fault or the result of natural forces. The limitations encourage periodic inspection and maintenance.”).

In contrast, no sound public policy is served by allowing public entities like the PFD to circumvent the protections that the statute of repose affords. To the contrary, if public entities are able to contract around the statute of repose—whether intentionally or not—public contractors will face unlimited risk; they will become uninsurable. Yet the Legislature intended exactly the opposite when it passed the Tort Reform Act of 1986 (of which the RCW 4.16.310 amendment was a part)—the Legislature sought to “create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance.”

ESSB 4630 § 100, at 2. Exposing public contractors to unlimited and uninsurable liability is the very scenario that the Legislature was trying to avoid when it decided to make RCW 4.16.310 applicable to public projects:

The legislature also finds that general liability insurance is becoming unavailable or unaffordable to many businesses, individuals, and nonprofit organizations in amounts sufficient to cover potential losses. High premiums have discouraged socially and economically desirable activities and encourage many to go without adequate insurance coverage.

ESSB 4630 §100, at 2; *see also* House Bill Report, HB 2039 (“[The bill] helps create greater certainty for insurers, thereby allowing more affordable insurance premiums. Many small businesses are being forced out of business by the high cost of liability insurance. Those who remain in business are forced to pass the increased cost on to customers. The bill is a step in the right direction.”).

If contractors are unable to obtain affordable liability insurance for public works construction, the cost of public construction will inevitably rise. That increase will be passed on to taxpayers, and competition and innovation will ultimately decrease. Those results would be the exact opposite of what the Legislature intended in passing the Tort Reform Act of 1986.

Sound public policy is served by strictly enforcing the Legislature's intent to apply the statute of repose to actions brought for benefit of the state. The AGC therefore urges the Court to reject the PFD's contention that it has the ability to contract around the statute of repose and is, in effect, "above the law." The Court should strictly enforce the Legislature's intent to equally apply the statute of repose to private parties as well as actions brought for benefit of the state.

C. THE FAIR ALLOCATION OF RISK IN CONSTRUCTION CONTRACTS REQUIRES THAT SUBCONTRACT FLOW-DOWN PROVISIONS APPLY TO STATUTES OF LIMITATION AND REPOSE

Hunt Kiewit served as "general contractor/construction manager" for the Safeco Field project. The GC/CM delivery method is an "alternative public works contracting procedure" authorized in RCW 39.10 *et. seq.* The contract delivery method is selected by the public owner, not the contractor. Under this method, the GC/CM is required by law to subcontract a significant amount of the work on the project—at least 70%. *See* RCW 39.10.390 ("The value of subcontract work performed and equipment and materials supplied by the general contractor/construction manager may not exceed thirty percent of the negotiated maximum allowable construction cost.").

One of the most basic and fundamental principles of contractual risk allocation is that the party who is best able to control the risk (*i.e.*,

the subcontractor who performs the work) should likewise be the one to bear the risk. And logically, the more that a general contractor subcontracts, the more important it is to effectively allocate the associated risk to those who are performing the work. As such, general contractors rely heavily on the use of flow-down clauses to effectively allocate such risk to subcontractors, particularly on large public works projects like Safeco Field.

Hunt Kiewit has taken the position that if the PFD's claims against Hunt Kiewit are time barred, then so too are Hunt Kiewit's claims against the PFD. And as set forth above, the AGC agrees that the PFD's claims against Hunt Kiewit are time barred by the statute of repose. However, in the event that the Court disagrees and remands the PFD's claims against Hunt Kiewit to the trial court, then the Court should likewise hold that Hunt Kiewit's third party claims against the subcontractors survive pursuant to the contractual flow-down provisions.

As pointed out by Hunt Kiewit in its briefing, other jurisdictions hold that flow-down provisions operate to ensure that a subcontractor remains liable to a prime contractor even when the claims against the subcontractor would otherwise have been time-barred. *See Hunt Kiewit Brief*, at 45-46 (citing *Martin County v. R.K. Stewart & Son, Inc.*, 306 S.E.2d 118 (N.C. Ct. App. 1983)). Also instructive is *Peninsula Methodist*

Homes and Hospitals, Inc. v. Architect's Studio, Inc., No. C.A. 83C-AU-118, 1985 WL 634831 (Del. Super. Aug. 28, 1985). There, the court held that a subcontractor had “waived its defense of statute of limitations” through the flow-down clause and rejected the subcontractor’s argument that the general contractor’s claim was barred by the statute of limitations. *Id.* at *4-5. The court reasoned that the subcontractor had agreed to assume “all the obligations and responsibilities that the general contractor owed the owner” and, as such, had “accepted the limitation period governing the [Owner] contract or, in effect, waived its defense of statute of limitations.” *Id.* at *5.

The *Peninsula* court’s analysis makes sense. Application of contractual flow-down clauses to statutes of limitation and repose allow the parties to apply a consistent legal framework to each party’s obligations under the contract, thereby fairly and effectively allocating responsibility and risk. By allowing contractual rights and obligations to flow up and down the chain of privity, flow-down clauses provide important protections to all parties to the contract, including the public owners. In particular, by allocating the risk of defective subcontractor work to the subcontractor that performed the work, the insurance coverage available to remedy any covered defects is maximized.

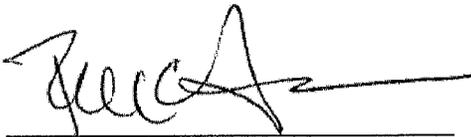
General contractors are required by law to provide surety bonds and general liability insurance on public projects. To the extent that the liability of contractors on public works projects is increased—either by denying the protection of the statute of repose or by allowing subcontractors to escape liability for defective work—so too is the liability of their sureties and insurers. To compensate for their increased exposure on public works projects performed “for benefit of the state,” sureties and insurers would have to increase their premiums for those products. Such costs would inevitably be passed along to the general public through higher prices for public works projects.

III. CONCLUSION

The Legislature's 1986 revision to RCW 4.16.300 and .310 makes clear that the statute of repose applies to actions brought for benefit of the state. Appellants' arguments would undermine the express legislative purpose in applying the statute of repose to actions for the benefit of the state—to shield public contractors from stale claims. Appellants' position would also promote uncertainty in the public works construction industry, create indefinite risk to public works contractors and their sureties and insurers, and would ultimately increase the costs of public works construction. For these reasons, this Court should affirm the trial court's decision.

Dated this 12th day of December, 2011.

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By: 

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CERTIFICATE OF SERVICE

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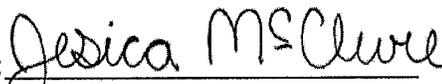
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- The case number is: 81029-0
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