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NO. 70142-8-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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BNBUILDERS, INC., a Washington corporation,

Appellant,

v.

WASHINGTON STATE DEPARTMENT  
OF LABOR & INDUSTRIES,

Respondent.

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**BRIEF OF *AMICUS CURIAE* AGC OF WASHINGTON**

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

*Amicus Curiae* the Associated General Contractors of Washington (hereinafter the “AGC”) has existed since 1922 and is the State's largest, oldest, and most prominent construction industry trade association. The three chapters of 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 civil projects. Construction is a significant sector of our State’s economy and employs a significant number of Washington’s citizens.

AGC joins together to enhance the performance and representation of its members, with the goal of promoting the respect and integrity of the industry and to improve the quality of life in our communities. AGC is the recognized leader in industry safety and is committed to ensuring its members have all the resources they need to create and maintain safe working environments that exceed industry standards. AGC’s safety program is tasked with improving workplace health and safety through numerous services and programs, including training and on-site visits for

its safety-conscious members. In that respect, AGC has a substantial interest in having the Department of Labor and Industries' ("L&I" or the "Department") industrial safety and health standards properly and fairly interpreted against construction industry employers. The certainty and protection afforded by the correct interpretation of Washington's general occupational health standards and Industrial Safety and Health Act (the "Act") has a direct impact on both the industry and consumers.

## **II. ISSUE OF CONCERN TO AMICUS CURIAE**

1. Whether a contractor's reasonable reliance on a Good Faith Survey performed by an accredited asbestos survey meets the legal standards imposed on employers by RCW 49.17.180(6) of Washington's Industrial Safety and Health Act (the "Act")?

Here, the Board of Industrial Insurance Appeals (the "Board") and trial court improperly found that Appellant BNBuilders, Inc. ("BNB") committed serious asbestos-related violations of the Act. The Board determined that, despite BNB's reasonable reliance on a GFS performed by an accredited asbestos firm, BNB should have known of the existence of asbestos later-discovered in project materials. In doing so, the Board and trial court improperly applied a strict liability standard, essentially directing contractors to discredit GFSs performed by accredited asbestos firms whose expertise qualifies them to identify asbestos prior to

contractors commencing construction work. Absent reversal of the trial court's ruling, costs to contractors and project owners (i.e., the end user) will needlessly increase without corresponding improvement for worker safety. For this predominate reason, AGC submits this Amicus Brief in support of the position of BNB.

### III. ARGUMENT

#### A. **Contractors have the right to rely on good faith surveys in developing their project plans.**

*Amicus curiae* respectfully requests that the Court reverse the trial court's ruling because it imposes a strict liability standard on contractors contrary to the clear statutory language of the Act.

L&I has promulgated safety and health standards regarding asbestos in the workplace to protect Washington's employees from its health hazards. RCW 49.26.010-050; WAC 296-62-07701 – 07753. With that interest in mind, L&I requires that contractors obtain an independent, GFS prior to commencing construction work, indicting the existence of any asbestos-containing material in the project. That rule provides, in pertinent part, that:

“[n]o contractor may commence any construction, renovation, remodeling, maintenance, repair, or demolition project without receiving a copy of [a good faith inspection report] required by WAC 296-62-07721(2)(b). Any contractor who begins any project without the copy of the written report or statement will be subject to a mandatory fine of not less than two hundred fifty dollars per day. Each day the violation continues will be considered a separate violation.”

WAC 296-62-07721(2)(e).

WAC 296-62-07721(1)(c)(ii)(A) requires that the good faith survey (“GFS”) be conducted by an accredited inspector.

To impose a fine, the Board must establish a prima facie case that the contractor “knew or, through the exercise of *reasonable diligence*, could have known of the violative condition.” RCW 49.17.180(6); *SuperValu, Inc. v. Dep’t of Labor & Indus.*, 158 Wn.2d 422, 433, 144 P.3d 1160 (2006) (emphasis added). “Reasonable diligence involves several factors, including an employer’s obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent occurrence.” *Erection Co., Inc. v. Dept. of Labor and Indus.*, 160 Wn. App. 194, 206-07, 248 P.3d 1085, 1091 (2011) (internal citations omitted). As a matter of law, the Department has promulgated GFS standards by which contractors must comply regarding asbestos testing: contractors must obtain a GFS, performed by an accredited asbestos firm, prior to commencing any construction work.

Here, BNB took reasonable and diligent steps to obtain and rely upon a GFS from an independent, accredited asbestos firm. Despite these efforts, certain worksite materials were later-determined to contain asbestos upon which the Board issued violations against BNB. Merely demonstrating the existence of asbestos in the materials is not sufficient to meet the Board’s burden. The Board must show BNB’s actual knowledge of the hazardous condition, or that in the

exercise of reasonable diligence BNB would have revealed the condition.

Because the Department has determined *per se* that reliance on a GFS performed by an accredited asbestos firm is reasonable, BNB's demonstrated reliance on such survey cannot form the basis of any violation. Imposing such requirements on contractors establishes a strict liability standard contrary to existing law, rendering meaningless the requirement to obtain a GFS in the first place.

Moreover, AGC notes the Department's flawed briefing, wherein it cites two BNB Project employees that had specific knowledge of the asbestos-containing material on the job site, thereby implicating BNB's actual knowledge of the hazardous condition. *See* Resp. Bf. 20. Assuming, *arguendo*, the accuracy of this allegation, it is not enough under the Act to support a finding against BNB. It is undisputed that these two employees were laborers—unaccredited per the Act's own requirements to make a determination as to the asbestos or non-asbestos nature of the Project materials. It was reasonable for BNB to rely on the GFS, rather than its employees' unqualified, non-expert opinions.

**B. Imposing a strict liability standard on contractors presents significant uncertainty as to the adequacy of asbestos testing in the industry.**

The purpose of the Act is to assure safe and healthy working conditions for every man and woman working in the State. RCW 49.17.010. Personal injuries and illnesses arising out of hazardous workplace conditions impose a substantial burden on both employers and employees, including lost production



and wages, medical expenses, and insurance benefits. RCW 49.17.010. The Department's asbestos regulations, including the requirement that contractors obtain a GFS performed by an independent, accredited asbestos company, were enumerated with this purpose in mind.

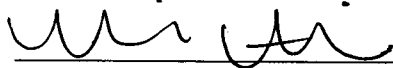
Industry standard is for contractors to rely on GFSs conducted by an accredited firm. GFSs identify, evaluate, and qualify asbestos containing material prior to commencement of any project work. A general contractor is a lay person in this position, understanding and looking for only the basic elements of a GFS: that it was done by an accredited asbestos inspector, and the materials sampled/not sampled and test results thereof. If the Board's decision is upheld, contractors will question obtaining and relying on GFSs, concerned that such practices will not protect them against asbestos violations. The requirement to obtain a GFS will essentially become meaningless. Contractors, themselves, will attempt to adequately test and protect employees from hazardous conditions despite the requisite expertise to do so. The adequacy of asbestos testing will decline, resulting in reduced employee confidence for workplace safety.

#### **IV. CONCLUSION**

For the foregoing reasons, the AGC of Washington respectfully requests that this Court reverse the trial court's ruling and vacate the Board's citations issued against BNB.

DATED this 20th day of March, 2014.

GROFF MURPHY, PLLC

A handwritten signature in black ink, appearing to read "Michael P. Grace", written over a horizontal line.

Michael P. Grace WSBA # 26091

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**CERTIFICATE OF SERVICE**

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on March 20, 2014, caused to be served the foregoing brief in the below-described manner:

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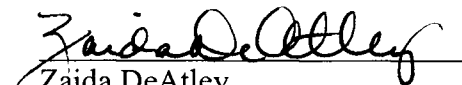
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