NO. 94711-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NOVA CONTRACTING, INC.,

Respondent,

vs.

CITY OF OLYMPIA;

Petitioner.

MEMORANDUM OF *AMICUS CURIAE* WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS IN SUPPORT OF PETITIONER

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I. INTRODUCTION

There are times when the Court of Appeals has so deviated from accepted jurisprudence that a *per curiam* reversal is needed to maintain the stability that Washington law deserves. Last month was one such occasion. *Business Servs. of Am. II, Inc. v. Wafertech, LLC*, No. 94088-6 (Wash. July 27, 2017) (per curiam). This case is another.

The public works contract at issue undisputedly contained the following language: "*Full compliance* by the Contractor with the provisions of this section is *a contractual condition precedent* to the Contractor's *right to seek judicial relief*." WSDOT Std. Specifications § 1-09.11(2), at 1-101 (2012), *available at* http://www.wsdot.wa.gov/publications/manuals/fulltext/M41-10/SS2012.pdf [hereinafter "WSDOT SS"]. (emphasis added). That same section also included this language:

> The Contractor agrees to waive any claim for additional payment if the written notifications provided in Section 1-04.5 are not given, or if the Engineer is not afforded reasonable access by the Contractor to complete records of actual cost and additional time incurred as required by Section 1-04.5, or if a claim is not filed as provided in this section.

Id. § 1-09.11(2) at 1-99. Despite this language, the Court of Appeals below concluded that Respondent Nova Contracting could pursue judicial relief based on the contract even though it agreed that Nova had not complied with Section 1-04.5's notice provisions. *Nova Contracting, Inc. v. City of Olympia*, No. 48644-0-II, slip op. at 6 n.3 (Wash. Ct. App. Apr. 18, 2017).

The Court of Appeals' conclusion is plainly erroneous. If there is no genuine dispute that Nova failed to comply with Section 1-04.5's protest provision, then under this Court's clear precedent, Nova cannot pursue "judicial relief." *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 770-72, 174 P.3d 54 (2007); *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, 386-91, 78 P.3d 161 (2003) [hereinafter *MMJ*]. The Court of Appeals' cursory analysis, unsupported by any citation, is squarely at odds with *America Safety* and *MMJ*. The Washington State Association of Municipal Attorneys (WSAMA) submits this memorandum of *amicus curiae* to persuade this Court to grant the City of Olympia's petition and issue a *per curiam* reversal.

II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

WSAMA is a nonprofit Washington corporation whose membership is comprised of the attorneys who represent cities and towns in this state, and that provides education and training in the areas of municipal law to its members.

This case concerns the meaning and effect of the Standard Specifications published by the Washington State Department of Transportation. WSDOT has declared that the Standard Specifications were "developed to serve as a baseline for the work that is delivered to the public by the Washington State Department of Transportation." WSDOT SS, at p. i. Additionally, standard specifications (including the very ones at issue here) are often incorporated by municipalities in their public works contracts, as demonstrated in various appellate decisions. *See Am. Safety*, 162 Wn.2d at 764 n.3; *MMJ*, 150 Wn.2d at 378; *Realm, Inc. v. City*

of Olympia, 168 Wn. App. 1, 5, 277 P.3d 679 (2012); *Diamaco, Inc. v. Aetna Cas. & Sur.*, 97 Wn. App. 335, 343, 983 P.2d 707 (1999); *Carl T. Madsen v. Babler Bros.*, 25 Wn. App. 880, 881 n.2, 610 P.2d 958 (1980). *American Safety* and *MMJ* are two examples in which this Court enforced provisions from the very same Standard Specifications at issue here (albeit earlier versions, but still containing the same operative language) and held that the terms of the specifications barred suits in their entirety. *Am. Safety*, 162 Wn.2d at 771-72; *MMJ*, 150 Wn.2d at 392. Municipalities around the state represented by WSAMA members continue to incorporate WSDOT Standard Specifications into their public works contracts because of the certainty and clarity they provide. But the Court of Appeals' decision undermines this certainty and erodes this clarity. For this reason, WSAMA submits this memorandum as *amicus curiae* and asks this Court to reverse.

III. STATEMENT OF THE CASE

This case arises out of a public works contract that adopted the Standard Specifications. CP at 72. The lawsuit surrounds the City of Olympia's response to submittals by Nova Contracting. CP at 103-14. The City rejected various submittals, and Nova did not file a protest to the rejections within 15 days thereafter. CP at 479. These facts appear to be undisputed. Nova sued Olympia based in large part on its contention the City wrongfully rejected the submittals, and the trial court granted summary judgment to the City. But the Court of Appeals reversed, holding that Nova could proceed on a theory of "expectancy and consequential damages" because the protest procedure in the Standard

Specifications "does not apply" to those categories of relief. *Nova Contracting*, slip op. at 6 n.3. More specifically, the Court of Appeals allowed Nova to proceed on a theory that the City violated the duty of good faith and fair dealing as "applied to the City's consideration of Nova's submittals." *Id.* at 10. And because, in the Court of Appeals's view, the evidence was disputed as to whether the City properly exercised its discretionary authority under the contract to reject the submittals, summary judgment was improper. *Id.* at 13-14.

IV. ARGUMENT

WSAMA recognizes that Nova Contracting disputes whether Olympia sufficiently argued waiver in the trial court to preserve the issue for appellate review. *See* Resp. to PRV at 1-3.) WSAMA's concern, however, is what the Court of Appeals' decision actually says, namely that it "disagreed" with Olympia's argument that Nova waived its right to pursue judicial relief on arguments not properly protested under the Standard Specifications. *Nova Contracting*, slip op. at 6 n.3.

It is that decision is what this Court is asked to review, *see* RAP 13.4,[1] and this Court certainly has the power to correct a mistaken application of law by a lower court regardless of how well developed an argument was made below. *E.g.*, *Hanson v. City of Snohomish*, 121

[1] Respondent's answer to the petition for review treats the Court of Appeals decision as an interlocutory order that can be reviewed only if the "obvious error" or "probable error" criteria under RAP 13.5 are met. Resp. to PRV at 6-7. This is mistaken. A Court of Appeals decision on the merits is a "decision terminating review," which is categorically distinct from an interlocutory decision. *Compare* RAP 13.3(a)(1) *to* RAP 13.3(a)(2). The considerations governing review of decisions terminating review are spelled out in RAP 13.4(b), not RAP 13.5. And because a "decision of the Court of Appeals … in conflict with a decision of the Supreme Court," … or "a published decision of the Court of Appeals" are appropriate bases to grant review, this case fits the criteria of those decisions warranting Supreme Court review. RAP 13.4(b)(1)-(2).

Wn.2d 552, 557, 852 P.2d 295 (1993). For example *Hanson* announced a bright-line rule that a conviction, even if reversed on appeal, conclusively establishes probable cause to defeat claims of malicious prosecution, false arrest, and false imprisonment. *Id.* at 558-60. It did so despite the fact that "[n]either the parties, the trial court, nor the Court of Appeals considered" the issue. *Id.* at 556. The Court justified its action by noting RAP 2.5's "general rule … that an issue or theory which is not presented to the trial court will not be considered on appeal … 'is not inexorable and has its limitations.'" *Id.* at 557 (quoting *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 621, 465 P.2d 657 (1970)).

Independent from *Hanson*, it is apparent from this record that the City of Olympia based its motion, at least in part, on Nova's failure to comply with the contractual notice provisions. But most critically, the Court of Appeals considered Olympia's argument and "disagreed" with it. *Nova Contracting*, slip op. at 6 n.3. That alone provides the basis for this Court to review and reverse. And that is what the Court should do.

A. The Standard Specifications plainly prohibit any recovery of consequential damages, and the Court of Appeals mistakenly invented that relief here.

In a single footnote, the Court of Appeals dismissed the Standard Specifications' notice provisions because of the type of relief Nova sought:

> Initially, the City argues that Nova waived all claims relating to the rejection of its submittals because Nova failed to submit a timely protest under section 1-04.5 of the contract. We disagree. *Although Nova may have waived claims for the cost of work performed under the contract,*

> *section 1-04.5 does not apply to expectancy and consequential damages*.

Nova Contracting, slip op. at 6 n.3 (emphasis added). The Court of Appeals did not cite any authority for its conclusion that "section 1-04.5 does not apply to expectancy and consequential damages." *Id.* What is most striking about the Court of Appeals' position is that the Standard Specifications categorically *exclude* both types of damages:

> 3. No claim for anticipated for anticipated profits on deleted, terminated, or uncompleted Work will be allowed.
>
> 4. No claim for consequential damages of any kind will be allowed.

WSDOT SS 1-09.4, at p. 1-89. Exclusionary clauses are presumptively enforceable when the party against whom the clause is to be enforced is not a consumer. *Am. Nursery Prods. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.2d 477 (1990). "[I]f the general commercial setting indicates a prior course of dealing or reasonable usage of trade as to the exclusionary clause," then courts will uphold the clause's plain language. *Id., followed in Puget Sound Fin. v. Unisearch, Inc.*, 146 Wn.2d 428, 439-41, 47 P.3d 940 (2002). Neither party appears to dispute that the WSDOT Standard Specifications are the industry norm for public works contracts, meaning the above exclusionary clauses are patently enforceable.

Despite this, the Court of Appeals has now created precedent that can be cited to suggest a contractor to a public works contract governed by the Standard Specifications can bring a claim against a municipality for consequential and expectancy damages. *See* GR 14.1(a) (permitting

unpublished opinions to be cited in Washington courts). Review is necessary to correct this mistake. RAP 13.4(b)(1)-(b)(2).

B. The lower court's opinion deviates from Supreme Court and Court of Appeals precedent to permit a contractor to seek judicial relief even if it fails to satisfy the requisite conditions precedent.

It is well established that parties to a contract may impose conditions precedent that operate as prerequisites to a promisee acquiring a right. *Ross v. Harding*, 64 Wn.2d 231, 236, 391 P.2d 526 (1964). The nonoccurrence of a condition precedent does not expose the promisee to liability, but it will "prevent[] the promisee from acquiring a right, or deprive[] him of one." *Id.* Specific to this case is the condition precedent set forth in the Standard Specifications before a contractor may seek any form of "judicial relief": "*Full compliance* by the Contractor with the provisions of this section is *a contractual condition precedent* to the Contractor's *right to seek judicial relief*." WSDOT SS § 1-09.11(2), at p. 1-101) (emphasis added). The Specifications further provide that in order to comply with Section 1-09.11(2), the contractor must have previously issued an immediate protest when it received any "order[,] … direction[], instruction[], interpretation[], and determination[]"with which it disagreed and then have supplemented the same protest within 15 days with more detailed information. WSDOT SS § 1-04.5, at 1-21 *thru* 1-22. "By failing to follow the procedures of Sections 1-04.5 and 1-09.11, the Contractor completely waives any claims for protested Work." *Id.* § 1-04.5, at 1-22.

The Court of Appeals' cursory footnote ignores these principles by concluding that Nova still had a "right to seek judicial relief," *id.*, even if it did not satisfy all conditions precedent to seeking relief in the courts.

Nova Contracting, slip op. at 6 n.3. That is not the law. "Washington law requires contractors to follow contractual notice procedures, unless those procedures are waived." *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 142, 890 P.2d 1071 (1995) (citations omitted).

This Court has upheld dismissals of similar lawsuits in their entirety when the contractor failed to strictly comply with the WSDOT notice of claim provisions. *Am. Safety*, 162 Wn.2d at 771-72; *MMJ*, 150 Wn.2d at 392. Nowhere in either *American Safety* or *MMJ* did this Court carve out an exception for the notice, protest, and claim procedure based solely on whether the contractor was seeking consequential or expectancy damages. Should the Court of Appeals' decision be allowed to stand, contractors will be able to disregard notice provisions by seeking alternative remedies. Again, that is not the law. *Absher Constr.*, 77 Wn. App. at 142. Reversal is necessary to rectify this deviation in the law.

V. CONCLUSION

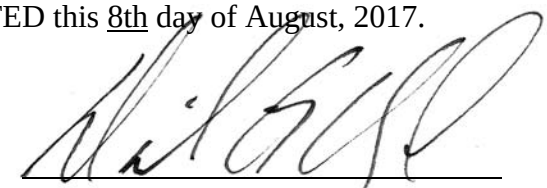
This Court will grant discretionary review:

> (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.

RAP 13.4(b)(1)-(2). The decision below meets both of these criteria.

For the reasons set forth above, and as requested by the City of Olympia, WSAMA respectfully requests this Court grant review and summarily reverse the Court of Appeals' decision.

RESPECTFULLY SUBMITTED this 8th day of August, 2017.



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