No. 96236-7

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 76334-2-I
(Consolidated with No. 76638-4-I)

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

FRANK COLUCCIO CONSTRUCTION COMPANY,

Appellant,

v.

KING COUNTY,

Respondent.

AMENDED BRIEF OF AMICI CURIAE ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON AND NATIONAL UTILITY CONTRACTORS ASSOCIATION OF WASHINGTON IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

Amici Curiae Associated General Contractors of Washington ("AGC") and National Utility Contractor's Association of Washington ("NUCA") respectfully submit this brief in support of Appellant Frank Coluccio Construction Company ("Coluccio").

II. IDENTITY AND INTERESTS OF AMICI CURIAE

A. Identity of Amici Curiae.

1. Associated General Contractors of Washington

AGC, in existence since 1922, is the state's largest, oldest, and most prominent construction industry trade association, representing and serving the commercial, industrial and highway construction industry. The AGC serves more than 1,000 general contractors, subcontractors, construction suppliers and industry professionals. AGC members have built and are presently constructing many of the state's most significant public works projects.

2. National Utility Contractors Association of Washington

Founded in 1978, NUCA of Washington has been more than just another association; it has become the driving force for Washington State's utility industry for almost 40 years. NUCA has 79 member-contractors performing an estimated $300 million in utility and road construction

annually in Washington. NUCA members employ between 4,000-4,500 individuals.

The collective experience of AGC and NUCA enable them to provide a unique perspective regarding the legal validity and ramifications of the Court of Appeal's decision. Resolution of this issues is critical to all Washington contractors performing work for various counties.

B. Interest of Amici Curiae.

Amici and their respective members routinely engage in efforts to promote legislation that protects their members' rights, especially in the case of public works contracting. Contractors have virtually no bargaining power with respect to a public works contract.[1] There is no mechanism for a contractor to negotiate provisions of the contract but rather the contract is offered on a "take it or leave it" basis.

The purpose behind RCW 36.01.050 has long been one of fairness. It is to provide a party litigating against a county with an alternative forum

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[1] This fact was recognized in the legislative "Staff Summary of Public Testimony" in support of the venue bill:

> The purpose of the bill is to preserve statutory rights of contractor on county public works projects to bring actions against counties in neighboring jurisdictions when legal disputes occur. Existing state law provides plaintiffs this right in disputes with counties. However, counties have been including clauses in public works contractors that require contractor to waive their statutory rights under law as a condition to getting a contract. Contractor do not have the ability to negotiate these clauses. This about the appearance of fairness.

S. B. Rep. H.B. 1601, 64th Leg., Reg. Sess. (Wash. 2015) (emphasis added).

without the need to demonstrate bias or impartiality in any other forum while still balancing the county's protections and not requiring the county to be sued in an inconvenient, distant county. In 2015, as promoted by Amici and their members, RCW 36.01.050 was amended to further strengthen the contractor's right to a fair trial against a county. Washington counties were routinely including venue clauses as part of their public works contracts. These venue selection clauses required contractors to waive their right under RCW 36.01.050 and forced contractors to litigate their matters in the county's home court. The amendments to RCW 36.01.050 (RCW 36.01.050(3)) state that any such provision is "against public policy" and "void and unenforceable."

In this recent action between Coluccio and King County, King County has taken a new approach in circumventing the protections of RCW 36.01.050 through its dispute resolution provisions that will inevitably become the model followed by other counties. Counties can simply include an array of pre-suit requirements for contractors in their contract specifications and then sue the contractor while the contractor is tied up in the pre-suit process. The decision by the Court of Appeals rubber stamps this approach and will most certainly result in rendering RCW 36.01.050(3) meaningless.

III. ISSUES ADDRESSED BY AMICUS CURIAE

1. Whether the Court of Appeals' decision that applied the priority of action rule over RCW 36.01.050, even though King County controlled the dispute resolution process and the timing of when Coluccio could file suit, subverts the public policy underpinning RCW 36.01.050?

2. Whether litigation-timing terms that act as *de facto* RCW 36.01.050(3) venue selection clauses violate public policy?

3. Should RCW 36.01.050(1)'s first sentence and RCW 36.01.050(3)'s public policy supersede priority-of-action rule, allowing the Snohomish County court to retain jurisdiction notwithstanding the first-filed King County action?

IV. STATEMENT OF THE CASE

Amici adopts the Statement of the Case as presented by Coluccio in its Petition for Review.

V. ARGUMENT

This Court has expressed that "cases relating to venue and involving a claimed violation of a statutory right, or in which a statutory right had been claimed erroneously, together with cases raising pertinent issues of law, should be considered by this court on an application for certiorari." *Russell v. Marenakos Logging Co.*, 61 Wn.2d 761, 765, 380 P.2d 744, 747 (1963). Here, the Court of Appeals' decision denies Coluccio (and other

parties that face litigation with a county) the statutory right granted by RCW 36.01.050 to have its claims against King County litigated in the courts of a different county. Thus, issues of venue, a violation of a statutory right, and pertinent issues of law and public policy are implicated. Review should be granted.

1. The Legislative Intent Behind RCW 36.01.050 Provides For Coluccio To Bring Its Action In Snohomish County Rather Than King County's Own Superior Court.

This is a case of first impression addressing the recent amendments to RCW 36.01.050, that is intended to provide a mechanism for a party engaged in a dispute with a county to have its action heard in a county other than the county involved in the action. Prior to the recent amendments, Division I stated the purpose of the statute is follows,

> The solicitude of the statute [RCW 36.01.050] is for the fairness of the forum **to the other party, not to the county**… The legislation reflects a recognition of the power of the sovereign and the weakness of the individual….

Briedablik, Big Vly., Lofall, Edgewater, Surfrest, N. End Comm'ty Ass'n v. Kitsap Cy., 33 Wn. App. 108, 118, 652 P.2d 383 (1982) (*overruled on other grounds*) (emphasis added).

Consistent with this purpose, the recent amendments confirm that the intent behind RCW 36.01.050 is to preclude counties from forcing contractors to litigate in the county's own courts. RCW 36.01.050(3)

mandates that "[a]ny provision in a public works contract with any county that requires actions arising under the contract to be commenced in the superior court of the county is against public policy and the provision is void and unenforceable." (emphasis added). The legislative comments also confirm the purpose of the statute is to ensure fairness.[2] This provision allowing the action to be commenced in an adjoining county allows litigants to avoid "be[ing] required to appear in the superior court of the same county [whose] officials exercise financial control over the budgets of the court." *Briedablik,* 33 Wn. App. at 119.

Here, despite this language, the Superior Court Order [App. 369-372] and Court of Appeals decision 76334-2-I at issue conclude that although Coluccio commenced suit in an adjoining county (Snohomish County), Coluccio is required to litigate its case against King County *in*

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[2] Staff Summary of Public Testimony…. This bill solves a very straightforward issue with no substantive change to the law. The law currently allows parties contracting with a county to file suit in neighboring counties. This bill is only meant to ensure that contractors can avail themselves of this existing law and **to stop counties from subverting the intent of that law.**

This bill is about fairness. Bargaining power between contractors and counties is heavily in favor of the counties. When a project is announced contractors may only submit a bid and then the lowest bid is selected. There is no way to negotiate away venue clauses, so these clauses are forced on any contractor who wants the bid.

If you get to the point where you finally see a judge, you should have the option to see a judge who is not on the payroll of the other party.

H. B. Rep. H. B. 1601, 64th Leg. Reg. Sess. (Wash. 2015).

King County simply because King County filed first. The court arrived at this conclusion by applying the "priority of action" rule. If allowed to stand, this ruling, despite the unequivocal purpose of RCW 36.01.050, permits King County to subvert a century-old statute premised on fundamental notions of fairness in favor of a court rule that equates to a technicality—which party filed first.

2. The Plain Language of RCW 36.10.050 Gives Rise To More Than One Reasonable Interpretation.

The Court's "fundamental objective when interpreting a statute is 'to discern and implement the intent of the legislature.'" *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305–06, 268 P.3d 892 (2011) (internal citations omitted). Notwithstanding Division I's prior acknowledgement that RCW 36.01.050's purpose was to lessen the inherent disparity of power between an entity or individual and a county, Division I declined to consider this legislative intent in Coluccio's case, asserting the plain language of the statute was clear and therefore did not require the inquiry.

The right granted by this amendment, at the very least, gives rise to an ambiguity as to whether it is permissible under the statute for a county to place litigation prerequisites in public works contracts that apply only to the contractor, which then allow the county to always file first and force the other party to litigate in the county's own venue — i.e., *de facto* venue

clauses. Division I's refusal to consider the legislative intent of RCW 36.01.050 in favor of the application of the "who filed first" archaic procedural rule flies directly in the face of the public policy underpinning this statute and renders it completely meaningless.

3. Applying the Priority of Action Rule Here Does Not Further Its Purpose.

The priority of action rule's purpose is to avoid unseemly and expensive jurisdictional conflicts. *Atl. Cas. Ins. Co. v. Oregon Mut. Ins. Co.,* 137 Wn. App. 296, 302, 153 P.3d 211 (2007). No such jurisdictional conflicts are present here. What is present are several public policy implications if the priority of action rule is applied in this case: (a) the application of the "priority of action" rule in this case conflicts with the underlying intent and public policy purposes of RCW 36.01.050; (b) the circumstances surrounding the filing of the complaint strongly suggest that it was filed as a preemptive strike, which precludes application of the rule; and (c) there is reason to believe that an impartial trial cannot be had in King County and venue should have been transferred pursuant to RCW 4.12.030.

a. The Public Policy Purposes of RCW 36.01.050 Should Prevail Over the Priority of Action Rule.

Without the ability to enforce its venue provision as mandated by RCW 36.01.050(3), King County relied upon the more general priority of action rule to nevertheless circumvent RCW 36.01.050. King County,

while actively engaging in mediation with Coluccio, filed suit in King County knowing that Coluccio was contractually precluded from filing suit until the mediation was completed and substantial completion of the project was achieved. The process the County created as part of its dispute resolution process (where conditions precedent are *only* imposed on the contractor), guarantees that the County will always win the "race to the courthouse." This practice is, in effect, the same mandate that RCW 36.01.050(3) expressly prohibits as violative of public policy.

If the County's actions are condoned by the Court, every county in Washington will be encouraged to follow in the footsteps of King County and frustrate the purpose of RCW 36.01.050. Therefore, review by this Court is necessary.

b. <u>The Priority of Action Rule Does Not Apply When Used as a "Preemptive Strike" – As King County Did Here.</u>

The "priority of action" rule provides that the first-filed case will generally prevail when cases with identical subject matter, parties, and relief are filed in multiple counties. *Seattle Seahawks, Inc. v. King Cty.*, 128 Wn.2d 915, 917, 913 P.2d 375, 376 (1996). The "priority of action" rule is not enforced where the circumstances surrounding the filing of the complaint suggest that it may have been filed as a preemptive strike intended to preserve a favorable forum for the filing party.

Here, King County filed its action in King County as a strategic preemptive strike during the required mediation and *before* Coluccio was contractually entitled (able) to file suit against the County (which on its face is an act of bad faith). Such a race to the courthouse and preemptive strike are precisely the tactics that warrant a departure from the "priority action" rule. Thus, again, review of this matter is warranted.

c. The Trial Court Should Have Exercised Its Discretion In Transferring Venue On The Basis That There Is A Reasonable Concern That An Impartial Trial Against King County Cannot Be Had.

This Court has stated that a trial court must exercise its discretion on the issue of venue based on a number of factors including to "whether an impartial trial can be had." *Russell,* 61 Wn. 2d at 765. Upon appropriate showing, the trial court can transfer the case to another county for any of the reasons set forth in RCW 4.12.030. *Id.* at 766. King County Superior Court's refusal to do so was a manifest abuse of discretion, as the "forwarding of the ends of justice [were] ignored." *Id.*

The interests of justice clearly are not furthered by allowing a county to force another party to litigate its claims in the county's own courts where the outcome of the trial could have a direct impact on the resources allocated to that court. The Court's reliance on the priority of action rule in refusing to transfer the action to another county upon a showing that an impartial

trial could not be had and failure to consider the clear public policy was an abuse of discretion. Review should be granted.

VI. CONCLUSION

To allow the Superior Courts' orders and Division I's decision to stand would adopt a rule that would reward a county who (a) requires by contract that a contractor satisfy certain procedural requirements, including mediation, prior to filing suit, and then (b) surreptitiously files suit during the required procedural steps as a preemptive strike. Amici urge a ruling that prevents subversion of the public policy underpinning RCW 36.01.050, and allows an entity or individual bringing an action against a county a fair and unbiased trial.

Dated this 29th day of October, 2018.

Respectfully submitted,

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By *__/s/ Ceslie A. Blass__*

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I certify that on the 29th day of October 2018, I caused a true and correct copy of this document to be served on the following in the manner indicated below:

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/s/ Jana Wattenberg

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