

FILED
SUPREME COURT
STATE OF WASHINGTON
5/18/2020 4:13 PM
BY SUSAN L. CARLSON
CLERK

FILED
SUPREME COURT
STATE OF WASHINGTON
5/28/2020
BY SUSAN L. CARLSON
CLERK

No. 98318-6

WASHINGTON STATE SUPREME COURT

STATE CONSTRUCTION, INC.,

Petitioner,

v.

CITY OF SAMMAMISH, a governmental entity, PORTER BROTHERS
CONSTRUCTION, INC., a Washington corporation, HARTFORD FIRE
INSURANCE COMPANY, a corporation, and Bond No. 52BCSDL1582,

Respondents.

**BRIEF OF ASSOCIATED BUILDERS AND CONTRACTORS OF
WESTERN WASHINGTON AS AMICUS CURIAE IN SUPPORT
OF PETITIONER'S PETITION FOR REVIEW**

Terry R. Marston II, WSBA No. 14440
MARSTON LEGAL, PLLC
11400 98th Avenue N.E., Ste. 201
Kirkland, Washington 98033
Telephone (425) 861-5700

Attorneys for amicus curiae
Associated Builders and Contractors
of Western Washington

I. IDENTITY OF AMICUS

Amicus Curiae Associated Builders and Contractors of Western Washington ("ABC") is a group of approximately 340 member companies, large and small, from across western Washington formed to represent the interests of its members and of the construction industry as a whole. ABC's membership comprises principally general contractors, subcontractors and specialty fabricators. ABC's member companies provide roughly 10,000 living wage jobs and over \$3.2 billion in annual revenue that flows through Washington's economy.

II. THE ISSUE

The Court of Appeals in *State Construction v. Hartford*, No.78753-5-1, (2020) was asked to determine what the phrase "completion of the contract work" in RCW 60.28.011¹ means. The quoted phrase is ambiguous. It could mean four different things on a construction project arising on four different dates. From earliest to latest they are: (a) substantial completion,

¹ RCW 60.28.011 Retained percentage—Labor and material lien created

Every person performing labor or furnishing supplies toward the completion of a public improvement contract has a lien upon moneys reserved by a public body under the provisions of a public improvement contract. However, the notice of the lien of the claimant must be given within forty-five days of completion of the contract work, and in the manner provided in RCW 39.08.030. (Emphasis added.)

(b) substantial completion as certified by the project's owner, (c) final completion, and (d) completion with the owner's acceptance of the work. Other than "substantial completion," the concepts are self-explanatory.

The doctrine of "substantial completion" arose out of a need for a standard by which to determine the level of completion of a construction contract that entitled the contractor to his fee (subject to any holdbacks for minor incomplete work)² and to determine the level of completion of a construction contract necessary to avoid the imposition of penalties for late completion.³ The concept is now most often stated as the level of completion when the work can be "used for its intended purpose."⁴

² For example, in *State ex rel. Tarr v. Mayor & Council of Crete*, 32 Neb. 568, 49 N.W. 272 (Neb. 1891).

³ For example, in *Wilson v. Galt*, 18 Ill. 431, 435-36, 1857 WL 5599, 8 Peck 431 (Ill. 1857).

⁴ Substantial performance/completion Washington citations:

Substantial completion occurs when the entire improvement, and not just a component part, may be used for its intended purpose. The fact that additional contract work remains, including punch list work, does not affect the conclusion that a project is substantially complete if it is otherwise fit for occupancy.

Dania, Inc. v. Skanska U.S. Bldg. Inc., 185 Wash.App. 359, 340 P.3d 984, 990 (2014) (internal citations omitted).

"There is a substantial performance of a contract to construct a building where the variations from the specifications or contract are inadvertent and unimportant and may be remedied at relatively small expense and without material change of the building; but where it is necessary, in order to make the building comply with the contract, that the structure, in whole or in material part, must be changed, or there will be damage to parts of the building, or the expense of such repair will be great, then it cannot be said that there has been a substantial performance of the contract."

J&J Elec., Inc. v. Gilbert H. Moen Co., 9 Wn.App. 954, 966, 516 P.2d 217 (1973)

When, as here, statutory language is ambiguous, courts perform statutory construction to determine what interpretation is most likely to carry out the intent of the legislature. *WSDOT v. State Employees Insurance Board*, 97 Wash.2d 454, 458-59, 645 P.2d 1076, 1078 (1982). Statutory construction requires consideration of certain factors—and disregard of others. As described by this Court, statutory construction, is performed as follows:

[T]he primary objective of statutory construction is to carry out the intent of the legislature. The intent must be determined primarily from the language of the statute itself. If, however, the intent is not clear from the language of the statute, the court may resort to statutory construction. Such statutory construction may involve a consideration of the legislative history, other statutes dealing with the same subject, and administrative interpretation of the statute. In any event, the interpretation adopted should be the one that best advances the legislative purpose.

Id. (internal citations omitted).

Accordingly, the first inquiry is whether the intent of the legislature can be clearly determined from the language of the statute. If it cannot, the Court must engage in statutory construction, considering legislative history, other statutes dealing with the same subject, and administrative interpretations to find the interpretation best advancing the legislative

purpose. The Court of Appeals should have considered (1) the purpose of the statute, (2) its legislative history, and (3) other statutes dealing with the same subject. It did not. It mistakenly relied on factors unrelated to the intent of the legislature and, by doing so, arrived at an erroneous conclusion.

II. THE ERROR

The Court of Appeals ruled that Petitioner's retainage claim was untimely and void on the following grounds. It ruled that "completion" ordinarily means "substantial completion" (citing a construction law treatise).⁵ It said parties to a construction contract (such as the owner and prime contractor) may define the date of completion of the work as either the date of substantial completion or the date of final completion (again citing the treatise).⁶ It implied, but did not state, that the prime contract between the owner and its prime contractor defined completion of the work

⁵ "Unless otherwise defined by the contract to mean "final completion[,]" the date on which the work is 100 [percent] complete, 'completion' ordinarily is understood to mean 'substantial completion'—the date on which all material elements of the work are sufficiently complete in conformance with the contract so that the owner can use the work for its intended purpose. " *Id.* at 18 (citing as authority, 5 Bruner & O'Connor on Construction Law § 15:14).

⁶ "It appears well-established that parties [to the prime contract, i.e., the owner and prime contractor] may contractually select as the date of completion of the work either the date of substantial completion or the date of final completion. 5 Bruner & O'Connor on Construction Law § 15:14 (2019 Update)." *Id.* at 17.

as substantial completion. It said the owner's architect, under the terms of the prime contract, was required to certify the date of substantial completion.⁷ It said the architect's certificate determined the date of substantial completion.⁸ It said this certificate was "conclusive," that the date of substantial completion certified could not be challenged even by a third-party to that contract.⁹ And, finally, it said Petitioner did not dispute that the work was substantially complete by the certified date.¹⁰

It is respectfully asserted that, contrary to the Court of Appeals' ruling, there is no "ordinary" understanding of the word "completion" in construction contracting and that the meaning of the word will vary depending on the context. If, in fact, there was an ordinary meaning, the Court would have had no need to perform the statutory construction it purported to have done and would have had no need to consult the terms of the owner's construction contract to determine the meaning.

⁷ Under the prime contract, "the City's architect was required to inspect the work and issue a "Certificate of Substantial Completion." *Id.*

⁸ "This certificate would have established the date of substantial completion" *Id.*

⁹ "[T]he City's certification [of "substantial completion"] is legally conclusive and cannot be challenged factually by State Construction." *State Constr.*, p. 16.

¹⁰ "Even if the City's certification were not legally conclusive, State Construction has not established a genuine issue of material fact that the substantial completion date provided by the City was not the date of "completion of the contract work" for purposes of RCW 60.28.011 (2)." *Id.* at 19.

There is no known legal authority for the Court's assertion that parties to a construction contract may define the meaning of terms used by the legislature in a statute. The court itself cited none.

There is no known legal authority for the Court's assertion that an architect's certification of the date of substantial completion is *conclusive* and cannot be challenged by a person in the Petitioner's position. Again, the court itself cited none.

There appears to have been no consideration of the fact that the legislature knew how to use the phrase "substantial completion" when that was its intent. For instance, RCW 4.16.300 states, "All claims or causes of action as set forth in RCW 4.16.300 2 shall accrue, and the applicable statute of limitation shall begin to run only during the period within six years after substantial completion of construction" (Emphasis added.)

III. THE ADVERSE CONSEQUENCES

Under Washington law, public property cannot be foreclosed upon and sold as a means of securing payment for goods and services consumed in the construction of public construction projects. To remedy this situation (and, thereby, encourage work on public projects), the legislature enacted two statutes, one was the public works bond claim statute (RCW 39.08) and

the other the retained percentage statute (RCW 60.28). Under the former, unpaid subcontractors, suppliers and tradespeople could make claims against a payment bond the prime contractor was obliged to provide. Under the latter, the same people could make claims against a fund established through the withholding of 5% of every payment earned by the prime contractor over the course of the project. The plain legislative purpose underlying these statutes, including RCW 60.28, was to increase the likelihood that persons providing goods and services on a public construction project would be paid.

The Court of Appeals was required to consider this as it evaluated what the legislature intended by its use of the phrase “completion of the contract work” as the trigger for submitting claims against the retained percentage. There is no mention in its decision that it did.

The Court’s ruling that “completion of the contract work” means a date certified by the architect does not enhance the likelihood of a claimant recovering payment; it substantially undermines it.

- There is no requirement that an architect’s certificate of substantial completion be published so a claimant would know when its time to make a claim was expiring.

- There is no requirement that an architect's certificate of substantial completion be prepared prior to the expiration of 45 days from the date certified, so that a claimant would have all or any days remaining available to it to provide its claim before the 45 days expired.
- Even if the architect both certified substantial completion on the date it arose and made that certification public, some claimants would be denied the ability to make claims against the retained percentage because
 - Their work was performed partially or entirely after the certified date of substantial completion—or even after the expiration of 45 days after the date of substantial completion (for example, landscape work).
 - Some payments by the general contractor are not due until after the date of substantial completion, even if the work was performed earlier than that.
 - Denials of change order requests to the prime contractor could be deferred until after 45 days from the date of

substantial completion to avoid the prime contractor's exposure to retained percentage claims.

- The owner may impose liquidated delay damages or impose backcharges long after the date of substantial completion resulting in non-payment of the general contractor and, in turn, non-payment of subcontractors and suppliers long after their opportunity to make a claim had expired.

It is not likely the legislature would desire such consequences, but the analysis by the Court of Appeals was silent regarding such concerns.

In this case, the Petitioner appears not to have disputed whether the work was in fact substantially complete by the date certified. But, if the Court of Appeals decision is not overturned, other litigants likely will. We can foresee a limitless stream litigants and expert witnesses debating whether the date of substantial completion was earlier or later than the date certified.

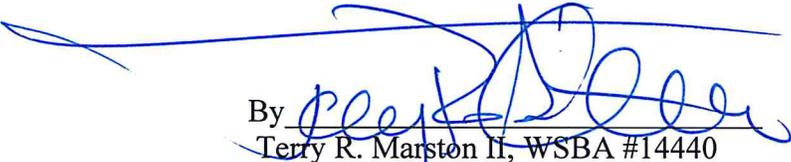
IV. CONCLUSION

The Court of Appeals did not properly perform statutory construction. Instead of addressing the purpose of the statute, reviewing

legislative history, and considering other statutes dealing with the same subject, it deviated from the rule of law and expressly deferred to a concept of “completion of the contract work” it says it found in a prime contract between the project owner and its contractor. Such analysis is not only erroneous, it undermines the purpose of the statute, and will generate needless added litigation. For these reasons, Associated Builders and Contractors of Western Washington respectfully joins in Petitioner’s request that this court grant review of the Court of Appeals’ decision in this case.

Dated this 18th day of May, 2020.

MARSTON LEGAL, PLLC

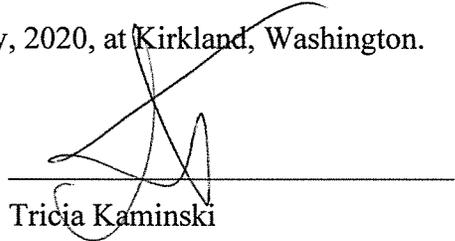
By 

Terry R. Marston II, WSBA #14440
Attorneys for Associated Builders and
Contractors of Western Washington

DECLARATION OF SERVICE

I, Tricia Kaminski, hereby declare under penalty of perjury under the laws of the State of Washington that, on the 18th day of May, 2020, I caused the foregoing document to be filed with the Supreme Court of Washington via electronic filing and that on that date a true and correct copy of the same was served on all counsel of record through the Washington State Appellate Courts' Portal.

SIGNED this 18th day of May, 2020, at Kirkland, Washington.



Tricia Kaminski

MARSTON LEGAL, PLLC

May 18, 2020 - 4:13 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 98318-6
Appellate Court Case Title: State Construction, Inc. v. Hartford Fire Insurance Company

The following documents have been uploaded:

- 983186_Briefs_20200518161123SC526400_3973.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was Brief of ABC in Support of Amicus.pdf
- 983186_Motion_20200518161123SC526400_2963.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was Motion for Leave to File Brief.pdf

A copy of the uploaded files will be sent to:

- Whansen@Williamskastner.com
- afriedrich@williamskastner.com
- doug@rainieradvocates.com
- emorris@williamskastner.com
- matthew@rainieradvocates.com
- morgan@rainieradvocates.com
- pfriedrich@williamskastner.com

Comments:

Sender Name: Tricia Kaminski - Email: tricia@marstonlegal.com

Filing on Behalf of: Terry Ray MarstonII - Email: terry@marstonlegal.com (Alternate Email: tricia@marstonlegal.com)

Address:
11400 98th Avenue NE
Suite 201
Kirkland, WA, 98033
Phone: (425) 861-5700

Note: The Filing Id is 20200518161123SC526400