NO. 98318-6

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE CONSTRUCTION, INC.,

Petitioner,

vs.

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

Respondents.

RESPONDENT HARTFORD FIRE INSURANCE COMPANY'S OMNIBUS ANSWER TO BRIEFS OF AMICUS CURIAE FILED BY THE AMERICAN SUBCONTRACTORS ASSOCIATION OF WASHINGTON AND THE ASSOCIATED BUILDERS AND CONTRACTORS OF WESTERN WASHINGTON

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I. INTRODUCTION AND RELIEF REQUESTED

The American Subcontractors Association of Washington ("ASA") and the Associated Builders and Contractors of Western Washington ("ABC") (collectively, "Amici") have filed amicus briefs favoring Petition State Construction, Inc.'s ("State Construction") interpretation of the lien filing requirements of RCW 60.28 et seq.

Based upon their interpretation of the Court of Appeals' decision, the Amici argue that the Court of Appeals erred when it improperly conflated "substantial completion" with "completion of the contract work" as required by the retainage statute. *See* ASA Br., at 2; *see also* ABC Br., at 4 – 5. This, they argue, "upends the settled structure of the retainage statute (RCW 60.28 et seq.) and creates unnecessary uncertainty, especially for innocent unpaid subcontractors." ASA Br. at 2.

The Briefs filed in support of State Construction's petition largely overlap. Therefore, Respondent Hartford Fire Insurance Company ("Hartford") provides this omnibus answer[1] to the Briefs to clarify that: (1) the Amici's interpretation of the Court of Appeals' decision is incorrect; (2)

[1] RAP 13.4(h) states that an answer to amicus curiae memorandum should not exceed 10 pages. In the interest of judicial economy and efficiency, Hartford hereby submits an omnibus answer to both amicus curiae briefs, which, combined, is far less than the 10 pages allotted for each answer.

the legislature, not this Court, is the proper venue in which to amend RCW 60.28 et seq. to impose additional notice requirements; and (3) the Court of Appeals expressly addressed the Amici's argument that the public owner should be required to provide notice prior to the commencement of the 45-day lien period under RCW 60.28.011(2).

II. ARGUMENT

A. The Court of Appeals Did Not Conflate Substantial Completion with the Completion of the Contract Work.

The Court of Appeals never held that the term "completion of the contract work" is to be considered the date that the contract was "substantially completed" thereby commencing the 45-day period in which a claimant, like State Construction, must file notice of its retainage lien under RCW 60.28.011(2).

In drafting RCW 60.28 et seq. and RCW 39.08 et seq., the legislature included numerous triggering events for retainage claims, bond claims, and the release of the retainage:

(1) "completion of the contract work" commences the 45-day period for providing notice of retainage liens; RCW 60.28.011(2);

(2) "completion of the contract with an acceptance of the work by the affirmative action of the board" commences

the 30-day period for filing a bond claim; RCW 39.08.030(1)(a);

(3) "After completion of all contract work other than landscaping," and following a request from the contractor, the public owner must release a portion of the retainage within 60 days; RCW 60.28.011(3)(a);

(4) "Sixty days after completion of all contract work the public body must release and pay in full the amounts retained during the performance of the contract"; RCW 60.28.011(3)(b);

Neither the legislature, nor the Court of Appeals, defined an exact point in the construction schedule which would serve as the benchmark for those triggering events. Rather, the legislature and the courts defer to the public owner to certify the dates on which those triggering events occur.

The legislature's intent in that regard is set forth in RCW 60.28.030, wherein it requires the public owner to provide the following certification in the event of a lawsuit filed against the retainage:

> That the public body shall not be required to make any detailed answer to any complaint or other pleading but need only certify to the court the name of the contractor; the work contracted to be done; the date of the contract; ***the date of completion and final acceptance of the work***; the amount retained; the amount of taxes certified due or to become due to the state; and all claims filed with it

> showing respectively the dates of filing, the names of claimants, and amounts claimed. Such certification shall operate to arrest payment of so much of the funds retained as is required to discharge the taxes certified due or to become due and the claims filed in accordance with this chapter.

RCW 60.28.030 (emphasis added).

The Court of Appeals correctly captured the legislature's intent in deferring to the public owner to designate the "date of completion" and the date of "final acceptance of the work" when it stated, as follows:

> While the retainage statute may allow a local government to contractually deem the date of "completion of the contract work" to be the date of final acceptance, rather than the date of substantial completion, we find nothing in the language of the statute mandating that outcome.

Slip Op., at 17.

Here, it was not the Court of Appeals that designated April 1, 2016, as the date of "substantial completion." Rather, it was the City of Sammamish ("City") that designated April 1, 2016, as the date of "substantial completion" and "completion of the contract work" for the purposes of RCW 60.28 et seq.

In its certification, the City could only identify two dates with regard to the completion of the project: (1) the date of completion and (2) the date of final acceptance. The City certified that the contract work was completed on April 1, 2016, and the project was accepted on February 21, 2017. Slip

Op., at 3 – 4. It was the City that concluded that the contract work was completed on April 1, 2016, not the Court of Appeals.

Indeed, the Court of Appeals simply restated over a century of Washington law deeming the City's certification to be conclusive, absent fraud or collusion. *Id*., at 16; *see also Denny-Renton Clay & Coal Co. v. National Surety Co.*, 93 Wash. 103, 160 P. 1 (1916), and *Pearson v. Puget Sound Machinery Depot*, 99 Wash. 596, 169 P. 961 (1918).

The Amici claim that there is no modern support for the holding that the public owner's certification is conclusive. ABC Br., at 6; ASA Br., at 8. Notably, neither amicus brief provides any authority in Washington, or beyond, which contradicts the well-settled law in Washington that a public owner's certifications are deemed conclusive absent fraud or collusion.

ABC states that 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." ABC Br., at 5. This is true, there are multiple forms of 'completion' that occur during a construction project. However, that is the exact reason why the public owner and contractor are vested with the exclusive right and discretion to select and certify the "date of completion." If, instead, the public owner's certification was subject to second guessing, the cost of litigation arising out of the wave of retroactive legal challenges to such certification would significantly increase the cost

of litigation and contract administration at the expense of the public owner and taxpayers.

Moreover, it is the public owner, the entity in charge with managing the progress of the entire project, who is most qualified to determine the date upon which the contract work was completed, not a subcontractor attempting to revive an untimely lien claim. The operative statute, as currently written, provides certainty and predictability to the public works contracting process and should be upheld.

Moreover, the Court of Appeals never adopted "substantial completion" as the date of "completion of the contract work." Instead, the Court of Appeals measured the timing of State Construction's notice of lien against the 45-day period commencing on the date that City designated as the date of "completion of the contract work." Under that analysis, State Construction's retainage lien was untimely.

State Construction, and now the Amici, seek to correct State Construction's dilatory conduct in securing its lien rights by changing the commencement of the 45-day period to the date on which the owner sends the "Notice of Completion" to the Department of Revenue as required by RCW 60.28.051. ASA Br., at 5. There is no language in the statutory scheme or case law supporting that interpretation. Therefore, to the extent

the Amici seek to alter the statute, their arguments are more appropriately addressed to the legislature, not this Court.

B. The Legislature is the Proper Venue in Which to Amend RCW 60.28 Et Seq.

ASA contends that the 45-day period in which to file a lien should not commence until the public owner provides notice to the "department of revenue, the employment security department, and the department of labor and industries of the completion of contracts...." ASA Br., at 6; RCW 60.28.051.

The legislature, however, does not impose a requirement on public owners to provide publicly available notice prior to commencing the 45-day lien filing period. Indeed, the legislature has had ample opportunity to amend the statute to include this general requirement, yet it has not done so. In fact, with regard to one specific method of contracting—the General Contractor/Construction Manager method—the legislature contemplated and imposed this additional notice requirement on public owners:

> If the work performed by a subcontractor on the project has been completed within the first half of the time provided in the general contractor/construction manager contract for completing the work, the public body may accept the completion of the subcontract. The public body must give public notice of this acceptance. **After a forty-five day period for giving notice of liens, and compliance with the retainage release procedures in RCW 60.28.021, the public body may release that portion of the retained**

> **funds associated with the subcontract.** Claims against the retained funds after the forty-five day period are not valid.

RCW 60.28.011(11) (emphasis added).

Importantly, despite considering and imposing public notice as a prerequisite for commencing the lien period under this specific contracting procedure, the legislature chose not to amend RCW 60.28.011(2), or any other section within the statutory scheme, to impose the same requirement on the public owner to notify all subcontractors of the designated completion date. As set forth in the next section, neither the legislature nor this Court, need impose those additional requirements because, as noted by the Court of Appeals, there are numerous methods available to subcontractors to protect their lien rights. However, to the extent there is any argument to be made regarding imposing this additional burden, that decision should be left to the legislature and not this Court.

C. Subcontractors Have Numerous Methods Available to them to Protect their Lien Rights Without Having to Impose Additional Requirements on the Public Owner

Contrary to the assertions by the Amici, subcontractors and other claimants have numerous methods available to them to secure their lien rights. Indeed, the Court of Appeals expressly considered the methods available to potential lien claimants:

> Subcontractors have multiple ways to protect their interest in the retainage fund, including negotiating with the contractor for advance notice of the lien filing deadline,

> tracking the contractor's progress on the project and requesting records from the public owner as to the status of the contractor's progress, or filing lien claims regularly throughout the project. Courts have noted on several occasions that a claimant need not wait until project completion and acceptance to file a claim. *Airefco, Inc. v. Yelm Cmtv. Schs. No. 2*, 52 Wn. App. 230, 232-34, 758 P.2d 996 (1988); *see also Pearson*, 99 Wash, at 598-600; *Title Guar. & Sur. Co. v. Coffman, Dobson & Co.*, 97 Wash. 211, 213-15, 166 P. 620 (1917) (unnecessary to wait until end of project to file claim); *Dennv-Renton*, 93 Wash. at 110 ("This works no hardship upon a reasonably prudent laborer or materialman. He is not required to wait for completion or acceptance of the work. He can file his claim as soon as he finishes furnishing labor or materials."); WASHINGTON CONSTRUCTION LAW DESKBOOK § 10.4(2), at 10-29 (acknowledging that it is safer to submit claim upon completion of subcontractor work instead of waiting for main contract completion). State Construction had methods by which it could protect its private interest in the retainage fund without imposing new notice requirements on the City.

Slip Op., at 20 – 21.

Additionally, and in contrast to the Amici's arguments that subcontractors require "public notice" to know when they may file notice of a lien, the Court of Appeals noted that "[t]he public works contracts and certificates of substantial completion are available to the public...." *Id*., at 21 – 22.

The construction contact and associated documents are as readily available, if not more so, to the subcontractor than the RCW 60.28.051 Notice of Completion sent from the owner to the Department of Revenue, Department of Employment Security, and the Department of Labor &

Industries. Remarkably, the Amici never explain why linking the lien commencement period to the RCW 60.28.051 Notice of Completion would provide enhanced notice to subcontractors. State Construction, and now the Amici, are asking this Court to impose a notice burden on the public owner, which was not imposed by the legislature, without examining how such notice would benefit subcontractors or burden public owners.

The Court of Appeals examined this exact balancing of burdens and noted that subcontractors have ample ability to manage the risks associated with protecting their lien rights while not imposing additional burdens on the public owner:

> Given the subcontractors' ability to manage the risk associated with filing a timely notice of lien, and the burden a notice requirement would pose on public bodies managing large construction projects, we conclude that State Construction's due process rights were not violated by the City when it failed to notify it that Porter Brothers had achieved substantial completion under the contract.

Slip Op., at 22.

In light of the Court of Appeals' analysis, and the fact that the legislature has never imposed an additional notice requirement on a public owner, the Amici's arguments that this Court should interpret the law to require such a burden is improper. Again, if the Amici would like to impose this additional burden on the public owner, they should lobby the legislature to amend the statute.

D. Liberal Construction of RCW 60.28 Et Seq. Does Not Alter the Legal Requirement that All Lien Statutes Must be Strictly Construed

ASA makes the general statement that RCW 60.28 et seq. "is to be liberally construed to provide security for all parties intended to be protected by its provisions." ASA Br., at 7. That general statement, however, cannot be applied to enlarge the period in which a claimant must file notice of its lien. In that regard, RCW 60.28 et seq., like all lien statutes, must be strictly construed. *Shope Enterprises, Inc. v. Kent Sch. Dist.*, 41 Wn. App. 128, 133, 702 P.2d 499, 502 (1985) ("The rule may seem draconian, but lien statutes are in derogation of the common law and will be strictly construed.").

In fact, the "liberal construction" of the lien statutes permits a claimant to take the exact actions that State Construction failed to take in this case—filing notice of a lien immediately upon furnishing labor or materials. *Denny-Renton*, 93 Wash. at 110 ("He can file his claim as soon as he finishes furnishing labor or materials. Such has been our liberal construction of the statute since January 8, 1910.").

Contrary to the assertions by the Amici, a general statement that the lien statutes are to be "liberally construed" cannot either impose burdens on a public owner that were not included in the statute by the legislature or

enlarge or change the period in which a claimant must file notice of their lien. To be sure, the Court of Appeals correctly noted this exact requirement in response to State Construction's substantial compliance argument:

> Finally, State Construction asks the court to conclude that it "substantially complied" with the bond statute by filing a lien claim 34 days—rather than 30 days—after the City's acceptance of the Project. **This argument runs contrary to well-established law that a person claiming the benefits of a statutory lien must demonstrate strict compliance with the time deadline in the statute.** *Kinskie v. Capstin*, 44 Wn. App. 462, 464, 722 P.2d 876 (1986); *see also Shope Enters., Inc. v. Kent Sch. Dist.*, 41 Wn. App. 128, 131, 702 P.2d 499 (1985) (courts strictly construe time deadlines in lien statutes).

Slip Op., at 14.

The Court of Appeals is correct, RCW 60.28 et seq., and the timing requirements for filing a lien, must be strictly construed. Without some indication from the legislature that a public owner must provide publicly available notice prior to commencing the 45-day period for filing a notice of lien, a general statement that the statute is intended to protect all beneficiaries cannot enlarge the applicable lien filing period or impose a burden on the public owner which is absent from the statute.

III. CONCLUSION

As noted in Hartford's Omnibus Objection to the Motions for Leave to File Amicus Briefs, the Amici, in large part, simply echo the arguments made by State Construction at the trial court and at the Court of Appeals.

Those arguments were rejected in both lower courts and are similarly without merit here. Neither the trial court nor the Court of Appeals conflated "substantial completion" with "completion of the contract work." Rather, both courts, in accordance with over a century of unchallenged law, agreed that the City's certification that April 1, 2016, was the date of completion is legally binding on all claimants. To be sure, numerous claimants properly filed notice of their liens prior to the end of the 45-day period. Contrary to the Amici's arguments, State Construction's failure to timely filed its lien is not the fault of an ambiguous statutory scheme; rather, it results from State Construction's neglect and, as noted by the Court of Appeals, its reliance on an incorrect internet summary of the law.[2]

Amici propose completely changing the statutory scheme so that the 45-day period no longer commences on the date that the owner designates as the "completion of the contract work," and, instead, commences when the owner provides the Notice of Completion to various state agencies under RCW 60.28.051. To the extent that the Amici seek to amend RCW 60.28 et seq., the proper avenue for such change is through legislature, not this Court.

[2] "State Construction's President, Phuong Busselle, testified that she relied…on an Internet summary of the law…that [was] incorrect." Slip Op., at 16-17.

DATED this 12th day of June, 2020.

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DECLARATION OF SERVICE

I, Vanessa Stoneburner, declare that on June 12th, 2020, I emailed a copy of the foregoing document to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED THIS 12th day of June, 2020, at Seattle, Washington.

/s/ Vanessa Stoneburner
Vanessa Stoneburner

WILLIAMS KASTNER

June 12, 2020 - 11:32 AM

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