No. 99119-7

SUPREME COURT
OF THE STATE OF WASHINGTON

LAKE HILLS INVESTMENTS, LLC,
a Washington limited liability company

Respondent,

v.

AP RUSHFORTH CONSTRUCTION CO., INC. d/b/a/ AP RUSHFORTH, a Washington corporation, and ADOLFSON & PETERSON INC., a Minnesota corporation,

Petitioners.

BRIEF OF AMICI CURIAE ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON, NATIONAL UTILITY CONTRACTORS ASSOCIATION OF WASHINGTON, AND ASSOCIATED BUILDERS AND CONTRACTORS OF WESTERN WASHINGTON IN SUPPORT OF PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

Amici Curiae Associated General Contractors of Washington ("AGC"), National Utility Contractors Association of Washington ("NUCA"), and Associated Builders and Contractors of Western Washington ("ABC") respectfully submit this brief in support of Petitioner AP Rushforth Construction Co., Inc. d/b/a AP Rushforth, and Adolfson & Peterson, Inc.'s (collectively "AP") Petition for Discretionary Review. This Court should grant the Petition because the decision below is contrary to precedent limiting a contractor's liability for defects when the contractor follows the owner's plans and specifications, and is contrary to Washington's public policy that allocates risk and liability between contractors, owners and architects (among others) on construction projects.

II. IDENTITY AND INTERESTS 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 three chapters of the AGC serve more than 1,000 general contractors, subcontractors, construction suppliers and industry professionals. AGC members perform both private-sector and public-sector construction and are

involved in all types of construction in the state, including office, retail, industrial, highway, healthcare, utility, educational and civic projects.

The construction industry's contribution to the state's economy is significant. A 2012 University of Washington annual study confirmed that, in 2011, more than 192,800 workers were employed by contractors, construction services and material suppliers in the state, and the workers in the construction industry comprised 8.3% of the state's private-sector workforce. When the construction industry grows, the state's economy exponentially grows with it. For each dollar invested in new construction, an additional $1.97 in economic activity is generated throughout the state. 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 has been more than just another association; it has become the driving force for Washington State's utility industry for almost 40 years. Since then, NUCA has spearheaded extensive changes that have strengthened the industry, not only for its members, but also for every utility contractor in the state. NUCA had significant involvement in the "Call Before You Dig" law (HB857), the Public Works Trust Fund (SB4404) regulation in the early 1980s, as well as, working with

AGC, the amendments to RCW 36.01.050. 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.

3. Associated Builders and Contractors of Western Washington

ABC, founded in 1982, is one of 69 Associated Builders and Contractors chapters representing commercial, residential, and industrial construction across the country. ABC's chapter represents over 340 Washington state general contractors, subcontractors, suppliers, and industry professionals, including woman and minority owned businesses, both union and open shop. ABC advocates for pro-business policies and legislation. With strong support from the national chapter, ABC has engaged in a number of key policies that have helped its members stay competitive, particularly around issues concerning training and apprenticeship, labor and employment, and tax and fiscal policy.

ABC's 340 member companies provide roughly 10,000 living wage jobs in Washington's construction economy and generate over $3.2 billion in revenues annually that flow through the economy of Washington.

The collective experience of AGC, NUCA, and ABC enable them to provide a unique perspective regarding the legal validity and ramifications of the Court of Appeal's decision.

III. ISSUES ADDRESSED BY AMICI CURIAE

Whether this Court should grant review of a Court of Appeals decision that contradicts precedent that contractors are not liable for defects to the extent caused by a deficiency in an owner's plans and specifications, and where that decision is inconsistent with public policy in Washington that had properly allocated risk and liability between contractors, owners and architects (among others) on construction projects?

IV. STATEMENT OF THE CASE

AGC, NUCA, and ABC adopt the Statement of the Case as presented by Petitioner.

V. ARGUMENT

The Court of Appeals, Division I, concluded, despite the well-established *Spearin* Doctrine, applied in Washington in *Maryland Casualty*, that the jury should have been instructed that AP (contractor) must prove the defects on the project were *solely* caused by Lake Hills' (owner) defective plans and specifications. App. Op. at 6-14. The Appellate Court's decision renders *Spearin* and *Maryland Casualty* meaningless on all construction disputes where defects result from multiple contributing factors. The Appellate Court's decision allows an owner to escape all liability, even if the owner's plans caused defects, so long as the owner can prove some other factor contributed in any way to the defects. This is not

the law or policy in Washington. Review should be granted.

1. A Contractor Is Not Liable for Defects Caused by the Owner's Plans and Specifications

"If the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." *Maryland Casualty Co. v. City of Seattle,* 9 Wn.2d 666, 116 P.2d 280 (1941). On most construction projects, the owner hires a design professional to prepare the plans and specifications (the recipe) and hires a contractor to construct the work in accordance with the plans and specifications provided to the contractor. If the contractor fails to follow the plans and specifications and that failure results in defects to the project, the owner has the right to assert claims against the contractor for the consequences of failing to follow the plans and specifications. Conversely, if the contractor constructs the project per the plans and specifications, the contractor should not be liable for any defects in the work that resulted from the owner's defective plans or specifications.

Washington courts have long recognized that contractors are not liable for defects caused by the owner's defective plans and specifications. *See Dravo Corp. v. Municipality of Metro. Seattle,* 79 Wn.2d 214, 220, 484 P.2d 399 (1971) (quoting *United States v. Spearin,* 248 U.S. 132, 39 S. Ct.

59 (1918)); *Teufel v. Wienir,* 68 Wn.2d 31, 36, 411 P.2d 151 (1966) (a contractor is not liable if the failure is due to the design being improper).

The Construction Section of the Washington State Bar Association also agrees with this rule, adopting a pattern instruction tracking the rule set forth in *Maryland Casualty* and *Spearin.* Neither *Spearin*, *Maryland Casualty* nor the WSBA pattern instruction require the contractor to prove the defects to the project were caused "solely" by defects in the plans and specifications. In fact, if the contractor is required to prove the defect was "solely" caused by defects in the plans and specifications, this will result in an impossible standard because, under *Maryland Casualty* and *Spearin*, the contractor must already prove that the defective plans and specifications caused the defect.

Not only did the Appellate Court's decision disregard this longstanding rule, it also misinterpreted *Kenney v. Abraham*, 199 Wash. 167, 90 P.2d 713 (1939), in reaching its decision. The *Kenney* court never opined, or even suggested, that a contractor must prove that, in order to avoid liability, that the defects in the work must result solely from defects in the owner's plans and specifications. The *Kenney* court cited an American Law Reports annotation that included the "solely" language but the *Kenney* court did not adopt this rule in its decision. Rather, the Court held that the "apt authority" was *White v. Mitchell,* 123 Wash. 630, 634-35,

213 P. 10 (1923), a case which did not use the word "solely" and relieved the contractor of liability even where there were other contributing factors that caused defects in addition to defective plans and specifications.

Here, the Appellate Court abandoned this Court's reasoning in *Maryland Casualty*, wrongly interpreting the *Kenney* case to require the contractor to prove the defects in the project resulted "solely" from the owner's plan and specifications. *Kenney* does not provide for this result.

Contractors should not bear the burden of demonstrating that absolutely no other factor contributed even nominally to the defects in the work. Instruction No. 9 properly placed the burden on AP to prove (1) that Lake Hills provided the plans and specifications for the area of work at issue, (2) that AP followed the plans and specifications for the area of work, and (3) that the defect resulted from a deficiency in the Lake Hills plans and specifications. CP 348.

The instruction is consistent with *Spearin*, *Maryland Casualty*, and the understanding of the construction industry. This rule is most easily explained with an analogy to a chef that is baking a cake. If the owner provides the recipe (the plans and specifications), and the chef follows the recipe, then the chef is not responsible if the cake does not rise. The Appellate Court's decision adds an additional element of proof that unnecessarily increases the contractor's burden and requires the contractor

to disprove all other causes, after it has already proven that it followed the owner's plans and specifications.

The instruction allowed both parties to make their case to the jury and allowed the jury to determine, and even allocate, liability based on the evidence. The Appellate Court erred by requiring AP to meet a greater burden than required under Washington law and review should be granted by this Court.

2. Washington Public Policy Favors Allocation of Risk on Construction Projects.

The state of Washington has a strong public policy favoring allocation of risk and responsibility in construction disputes. *See Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 826-27, 881 P.2d 986 (1994) ("it is in this industry that we see most clearly the importance of the precise allocation of risk as secured by contract") .

The Appellate Court's decision extinguishes the ability of parties to a construction contract to allocate risk. Rather than allocating risk, the Appellate Court's decision forces a contractor into an "all-or-nothing" effort to avoid liability to the owner where the contractor shows the owner's defective plans indisputably caused or contributed to defects in the work. App. Op. at 8. This is not the law in Washington and is inconsistent with allocation of risk or causation concepts.

Construction projects are complex, with numerous parties providing work and services to the project, such as plans, specifications, labor and material, any of which may play a part in defects in the work. Proper and fair allocation of fault is essential to ensure an environment where developers, owners, designers, contractors and suppliers will continue to be economically able to participate in this State's construction industry. The Appellate Court's decision shifts nearly all of the risk of liability for defective work to contractors and threatens to disrupt a vital industry, as contractors will be forced to weigh the risk and benefits to working in this State.

VI. CONCLUSION

The Court of Appeals, Division I, ignored clear precedent limiting a contractor's liability for defects when the contractor follows the owner's plans and specifications provided by the owner. This decision has significant ramifications in the construction industry and changes the allocation of risk on projects. For these reasons, review should be granted.

Dated this 13th day of January, 2021.

Respectfully submitted,

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