

No. 34174-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

KEYSTONE MASONRY, INC.

Respondent/Plaintiff,

v.

GARCO CONSTRUCTION, INC., a Washington corporation;
TRAVELERS CASUALTY & SURETY COMPANY, a
domestic/foreign insurance company; TRAVELERS CASUALTY &
SURETY COMPANY OF AMERICA, a domestic/foreign insurance
company; and SUMNER SCHOOL DISTRICT #320, a municipal
school district,

Petitioners/Defendants.

BRIEF OF RESPONDENT KEYSTONE MASONRY, INC.

CHISM, THIEL, McCAFFERTY,
CAMPBELL & STEINMARK, PLLC

Randal S. Thiel, WSBA #18320
Chelsey T. Westfall, WSBA #34632

1601 Fifth Avenue, Suite 2210
Seattle, WA 98101
(206) 728-0260

Attorneys for Respondent
Keystone Masonry, Inc.

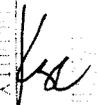
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8. Hickey v. City of Bellingham, 90 Wn.App. 711 (1998).
9. Myers v. Boeing Co., 115 Wn.2d 123 (1990).
10. Russell v. Marenakos Lodging Company, 61 Wn.2d 761 (1963).
11. State ex rel. Verd v. Superior Court, 31 Wn.2d 625 (1948).
12. Streater v. White, 26 Wash. App. 430 (1980).

Washington Statutes

RCW 4.12.030(3)

RCW 4.12.025(1)

RCW 4.12.025(2)(b)

RCW 60.28.030

RCW 4.12.090

I. ASSIGNMENTS OF ERROR

Respondent Keystone Masonry, Inc. (“Keystone”) respectfully submits that the trial court did not commit error by entering its November 18, 2005 Order denying appellants’ (hereinafter “Garco”) Motion to Change Venue from Pierce County Superior Court to Spokane County Superior Court, and its request for reasonable attorneys’ fees and costs.

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The venue provision in dispute arose from a “Miscellaneous” provision contained within the Subcontract Form document entered into between Keystone and Garco. The Subcontract Form was for masonry work to be performed by Keystone on the public works project known as the Bonney Lake High School located in Bonney Lake, Washington. The project owner is Sumner School District #320 of Sumner, Washington. The project architect is Erickson McGovern, PLLC of Tacoma, Washington. Keystone is located in Yelm, Washington.

Although Garco has raised issues for review, Keystone’s arguments are supported by several distinct and separate legal bases, which the trial court considered in denying Garco’s Motion to Change Venue. Those arguments are:

1. After considering the convenience of all witnesses for each party, a change of venue to Spokane County Superior Court is not authorized under RCW 4.12.030(3).

2. Pursuant to RCW 4.12.025(1), an action may be brought in any county, if there be more than one defendant, where one of the defendants resides.

3. Pursuant to RCW 4.12.025(2)(b), the venue of any action against the defendant corporation Garco, at the option of Keystone, shall be in the county where the work was performed for Garco.

4. Washington public works lien statute provides that a lien against the retainage fund shall be enforced by an action to foreclose the lien in the superior court of the county where the lien was filed pursuant to RCW 60.28.030.

5. Enforcing the venue provision in the parties' agreement is against public interest, and is fundamentally unfair and unreasonable since it amounts to forum shopping by Garco in Spokane County.

B. STANDARD OF REVIEW

Whether the trial court erred in denying Garco's request for a transfer of venue lies within the sound discretion of the trial court, and is reviewable only on a showing of manifest abuse of that discretion. *Russell v. Marenakos Lodging Company*, 61 Wn.2d. 761, 765 (1963); *Bechtel*

Civil and Minerals, Inc. v. South Columbia Basin Irrigation District, 51 Wn.App. 143, 145 (1988); *Baker v. Hilton*, 64 Wn.2d 964, 965-66 (1964). An abuse of discretion is not shown unless the discretion has been exercised upon grounds, or to an extent, clearly untenable or manifestly unreasonable. *Baker*, at 965-66.

In this case, the trial court did not abuse its discretion.

II. STATEMENT OF THE CASE

Garco and Keystone entered into a Subcontract Form containing a “Miscellaneous” provision relating to venue. Garco’s Appellate Brief, pp. 2-3. President of Keystone, Steve Borman, signed the Subcontract Form on July 2, 2003 in Yelm, Washington. (CP 40) The subcontract was not signed by Garco at that time, and Mr. Borman returned it to Garco. (CP 41) All of the subcontract work performed by Keystone was in Bonney Lake, Pierce County, Washington. (CP 41)

Keystone brought suit in the superior court for Pierce County, Washington alleging claims for breach of contract, foreclosure of its claim against project retainage, and suit against the payment bond (CP 1-5). Keystone placed venue in Pierce County, Washington (a) where the project was located, (b) where the subcontract was performed, (c) since multiple corporate defendants were doing business in the state of

Washington, and (d) since numerous witnesses either resided in or near Pierce County. (CP 29-38)

Notwithstanding the legal basis for Keystone to file its lawsuit in Pierce County, Garco challenged venue and the trial court, after considering briefing and oral argument, denied Garco's Motion to Change Venue and request for attorneys' fees. (CP 76-77)

III. ARGUMENT

The thrust of Garco's argument on appeal is that Pierce County Superior Court is not the proper venue for this lawsuit, notwithstanding that the Bonney Lake High School is located in Pierce County, Keystone performed all of the subcontract work in Pierce County, the project owner and architect are located in Pierce County, and the vast majority of all witnesses are located in or near Pierce County. Keystone successfully argued to the trial court, amongst other points, that enforcing the venue provision was against public interest, and would be fundamentally unfair and unreasonable since it amounts to forum shopping by Garco. (CP 35-37) Section E below sets forth Keystone's convincing argument. Garco's argument is limited to its contention that Keystone must show fraud or unfairness in the negotiation of the venue provision. Keystone submits that Garco did not present a dispositive Washington Supreme Court to support its argument, but rather relied on appellate cases for its

proposition. Garco further does not address the trial court's decision making ability after exercising its discretion in considering the parties' oral and written arguments. On the other hand, Keystone advanced several Washington Supreme Court cases for the proposition that the trial court could exercise its discretion with reference to whether an impartial trial could be had, the convenience of witnesses and whether the ends of justice would be forwarded. *See, Russell v. Marenakos Logging Co.*, 61 Wn.2d 761 (1963); *Myers v. Boeing Co.*, 115 Wn.2d 123 (1990). (CP 35-36) After considering the applicable law and hearing further legal arguments by counsel, the trial court correctly found that Pierce County was the proper venue for Keystone's lawsuit arising from work on the Bonney Lake High School.

A. After Considering The Convenience Of All Witnesses For Each Party, A Change Of Venue To Spokane County Superior Court Is Not Authorized Under RCW 4.12.030(3).

RCW 4.12.030(3) states:

The court may, on motion, in the following cases, change the place of trial when it appears by affidavit, or other satisfactory proof:

- (3) That the convenience of witnesses or the ends of justice would be forwarded by the change; or, ...

In considering a motion to transfer venue, the trial court may consider the distances various witnesses would be required to travel as

well as the efficiency of available transportation facilities. *Hickey v. City of Bellingham*, 90 Wn.App. 711, 719 (1998). Due consideration must also be given by the court to the convenience of witnesses for each party. *Bartels v. Hall*, 11 Wn.2d. 58, 66 (1941).

The Declaration of James T. Walsh submitted by Garco in support of its underlying motion identified 9 witnesses that he deems are primary witnesses at trial. (CP 15) On the other hand, the Declaration of Steve Borman submitted by Keystone attaches a personnel list of 71 persons with personal knowledge of the project work by Keystone. (CP 39-45) Mr. Borman further declares that at least 10 of those persons are likely to be called at trial. (CP 40) Moreover, Mr. Borman identifies an additional 10 persons with personal knowledge of the project and who may be called at trial. (CP 40) Those material witnesses include Steve Borman, president of Keystone, Charles Vaughan, vice-president of Keystone and project superintendent, Joshua Wills, project manager, Gregg Craun, project foreman, Nanacy Hart, project assistant, and other employees with personal knowlege, Tom Beckenhauer, Trent Venters, Dave Parsons, Ben Griffin, Blaine Bunce, Robert Tuller, Jim Martin, Tom Hester, Scott Willoughby and Rory Chessie. (CP 42-44) With the exception of Mr. Wills, all of these persons are located in or near Pierce County. (CP 42-45) Moreover, Mr. Boreman identified 9 additional material witnesses

and their role in the construction of the project, which would also relate to the performance of Keystone's subcontract work. (CP 40) Considering the location of all witnesses by each party, and the fact that the vast majority of witnesses are located in or near Pierce County, RCW 4.12.030(3) dictates that the venue of the lawsuit should be in Pierce County and the ends of justice would not be forwarded by a change to Spokane County.

B. Pursuant To RCW 4.12.025(1), An Action May Be Brought In Any County, If There Be More Than One Defendant, Where One Of The Defendants Resides.

RCW 4.12.025(1) states:

(1) An action may be brought in any county in which the defendant resides, or, if there be more than one defendant, where some one of the defendants resides at the time of the commencement of the action. For the purpose of this section, the residence of a corporation defendant shall be deemed to be in any county where the corporation:

(a) Transacts business; (b) has an office for the transaction of business; (c) transacted business at the time the cause of action arose; or (d) where any person resides upon whom process may be served upon the corporation.

Notwithstanding the statutory law of RCW 4.12.025(1), it is also well established in Washington that a county in which a defendant corporation transacts business is an appropriate county to bring an action for monetary damages. *Davidson v. Weyerhaeuser Co.*, 36 Wn.App. 150, 152 (1983). In this case, the project owner and defendant School

District is located in Bonney Lake, Pierce County, Washington. Defendant Garco further transacted business in Pierce County at the time the cause of action arose. Pursuant to RCW 4.12.025(1)(a) and (c), Keystone is permitted to file its lawsuit in Pierce County, Washington since, not only one, but multiple defendants either transacted business, resided in or are located in Pierce County.

C. Pursuant To RCW 4.12.025(2)(b), The Venue Of Any Action Against The Defendant Corporation Garco, At The Option Of Keystone, Shall Be In The County Where The Work Was Performed For Garco.

RCW 4.12.025(3) further provides:

- (3) The venue of any action brought against a corporation, at the option of the plaintiff, shall be: (a) In the county where the tort was committed; (b) in the county where the work was performed for said corporation; (c) in the county where the agreement entered into with the corporation was made; or (d) in the county where the corporation has its residence.

In *State ex rel. Verd v. Superior Court*, 31 Wn.2d 625, 632 (1948) the defendant, a corporation, had its mill and registered office in Clallam County. The plaintiff brought an action in King County for damages. The court held that the plaintiff had the statutory right to bring the action in King County since the corporation was doing business in that county, and that the venue should not be changed to Clallam County.

Accordingly, RCW 4.12.025(3) includes an entirely separate basis for Keystone to file its lawsuit in Pierce County. RCW 4.12.025(3)(b)

allows Keystone, at its option, to file its lawsuit in Pierce County because the subcontract work was performed by Keystone for Garco in Bonney Lake, Pierce County, Washington.

D. The Washington Public Works Lien Statute Provides That A Lien Against The Retainage Fund Shall Be Enforced By An Action To Foreclose The Lien In The Superior Court Of The County Where The Lien Was Filed Pursuant To RCW 60.28.030.

The Washington public works lien statute, RCW 60.28.030, expressly states that an action to foreclose the lien “shall be enforced by action in the superior court of the county where filed, ...”

Keystone’s Complaint alleges a claim for the foreclosure of its lien against the project retainage and payment bond. (CP 1-5) Keystone’s claim was filed in Pierce County, Washington with the School District. (CP 41) As such, the venue of Keystone’s lawsuit foreclosing its retainage and bond claim shall be Pierce County, Washington, where the claim was filed pursuant to RCW 60.28.030.

Garco contends that enforcement of RCW 60.28.030, which mandates filing the lawsuit in Pierce County, would render the venue provision meaningless. Obviously, Keystone has advance several arguments that provide a judicial basis for the lawsuit to be filed in Pierce County. Foreclosure of the lien against the retainage is not the only claim brought by Keystone, and certainly did not provide the single reason for

filing the lawsuit in Pierce County. Again, RCW 60.28.030 provides yet another statutory right for Keystone to file its lawsuit in Pierce County in further support of the public interest.

E. Enforcing The Venue Provision In The Parties' Agreement Is Against Public Interest, And Is Fundamentally Unfair And Unreasonable Since It Amounts To Forum Shopping By Garco In Spokane County.

This project was constructed for the School District in Bonney Lake, Pierce County, Washington. All of the project contracts, including Keystone's subcontract, were performed in Pierce County. Virtually all of the material witnesses, with the exception of a few Garco employees, either live in or near Pierce County neighboring communities. (CP 42-44) Keystone did not formally negotiate or revise its subcontract with Garco (CP 40). It would be against public interest to litigate this case in Spokane County. The only basis offered by Garco to change the venue to Spokane County is a venue provision in the parties' contract. Given that Garco is a business with corporate headquarters in Spokane, the contractual venue provision amounts to forum shopping and disregards the statutory venue laws which place the lawsuit in Pierce County. The ends of justice and judicial economy certainly would not be forwarded by a change of venue to Spokane County. Changing the venue to Spokane

County, where only the defendant Garco resides and is headquartered, would be fundamentally unfair.

Garco's argument does not address the statutory and legal reasons considered by the trial court, and completely hinges on the concept that Keystone failed to present evidence to invalidate a forum selection clause. However, as set forth in *Baker*, "[T]he legislature has placed the matter of a change of venue within the sound discretion of the trial court, and, in the absence of clear abuse of that discretion, this court will not interfere with the handling of trial matters." *Baker*, 64 Wn.2d at 487-8.

The trial court was asked to consider the convenience of the witnesses, the statutory basis under RCW 4.12.030(3), 4.12.025(1), 4.12.025(2)(b) and 60.28.030, and whether the venue provision under the circumstances was against public interest, and fundamentally unfair and unreasonable. (CP 29-38; CP 39-45) Garco has not demonstrated how the trial court after duly considering all of these legal bases clearly abused its discretion in denying the underlying Motion to Change Venue.

While Garco contends that its forum selection clause is enforceable under the "Little Miller Act" and should require a transfer of venue to Spokane County, Garco's conclusion is not supported by Washington law. Washington's payment bond statute and/or retainage statute, RCW 39.08 and RCW 60.28, do not provide any separate basis requiring this lawsuit

to be transferred to Spokane County. The basis for denying the change of venue, as set forth above by Keystone, did not rely on the lawsuit being filed against the bonding companies and/or sureties. Keystone's reliance on RCW 60.28.030 is that the public works lien statute expressly states that an action to foreclose the lien "shall be enforced by action in the superior court of the county where filed,..."

F. The Superior Court Did Not Error By Denying Garco's Request For Costs And Attorney Fees, And Keystone Should Be Entitled To An Award Of Its Costs And Attorney Fees On Appeal.

Notwithstanding that the trial court ruled in favor of Keystone (denying Garco's Motion to Change Venue), Garco incredibly now requests an award of reasonable costs and attorney fees pursuant to RCW 4.12.090(1). Under RCW 4.12.090(1), attorney fees are not awarded unless the court "finds that the plaintiff could have determined the county of proper venue with **reasonable diligence,...**" (emphasis added) Keystone submits that not only did it successfully prevail at the trial court, it duly considered all applicable legal bases and arguments prior to opposing Garco's Motion to Change Venue. Keystone's reasoning and legal bases were obviously considered by the trial court and resulted in the denial of Garco's motion. (CP 76-77)

Keystone has also incurred substantial costs and attorneys' fees responding to Garco's Motion to Change Venue, responding to Garco's Motion for Discretionary Review, and now responding to Garco's appeal. A decision that Garco is entitled to an award of attorneys' fees after losing its underlying Motion to Change Venue, and then requiring Keystone to incur additional attorneys' fees defending its successful arguments on appeal, would be unjust. Garco's request should be denied.

IV. CONCLUSION

Based on the foregoing, the trial court did not clearly abuse its discretion denying Garco's Motion to Change Venue, and the trial court's decision should be upheld.

Dated this 30th of May, 2006

CHISM, THIEL, McCAFFERTY,
CAMPBELL & STEINMARK, PLLC

By: Randal S. Thiel
Randal S. Thiel, WSBA #18320
Chelsey T. Westfall, WSBA #34632

CERTIFICATE OF SERVICE

On the 30th day of May, 2006, I served the within document
described as **BRIEF OF RESPONDENT KEYSTONE MASONRY, INC.**

on all interested parties to this action as follows:

By Facsimile and Overnight Mail

William M. Symmes
Witherspoon, Kelley, Davenport & Toole, P.S.
1100 U.S. Bank Building
422 W. Riverside Avenue
Spokane, WA 99201-0300

Messenger Delivery

Alan Douglas Judy
Karr, Tuttle & Campbell
1201 Third Avenue, Ste. 2900
Seattle, WA 98101-3284

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Jennifer Lehne
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