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**COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON**

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MARGARET P. DALY and "JOHN DOE" DALY, wife and husband, dba  
MARGARETANGELO INTERIORS, and COLONIAL AMERICAN  
CASUALTY & SURETY COMPANY, a Maryland corporation,

Appellants/Defendants,

vs.

FLOOR EXPRESS, INC.,

Respondent/Plaintiff

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AMICUS CURIAE BRIEF BY ASSOCIATED GENERAL  
CONTRACTORS OF WASHINGTON IN SUPPORT OF APPELLANT  
MARGARET P. DALY'S PETITION FOR APPELLATE REVIEW

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## **I. IDENTITY AND INTEREST OF AMICUS**

The Associated General Contractors of Washington (AGC) represents more than 1000 general contractors, subcontractors, material suppliers and construction related associates in the State of Washington and as such has a substantial interest in construction related appeals.

## **II. STATEMENT OF THE CASE**

Appellant Margaret Daly was the general contractor for Mother Joseph, an extended care health facility in Olympia, Washington. Appellee Floor express was the flooring subcontractor at Mother Joseph. Floor Express recommended a certain type of flooring be used at Mother Joseph. Margaret Daly withheld a portion of the contract balance from Floor Express and cancelled some work, because the flooring recommended by the subcontractor was deemed unsuitable for the facility and was installed defectively. This damaged Margaret Daly's business relationship with Mother Joseph.

The subcontractor, Floor Express, brought a lawsuit against the general contractor, Margaret Daly, for unpaid balances for installed flooring and for the cost of restocking the flooring that was canceled. (CP 7-10.) The general contractor countersued the subcontractor for the cost of

replacing the flooring and removing and replacing cabinetry that was installed over the floor. (CP 15-18.)

Margaret Daly's claims against the subcontractor totaled \$50,655.42. (CP 15-18; 71-77; 78-81; 196-200; 595-603.). Daly and Mother Joseph entered a joint prosecution and defense agreement. That agreement provided that Daly would prosecute a breach of contract claim against Floor Express seeking all damages caused by Floor Express' breaches at her own expense, and share any recovery with Mother Joseph according to a formula agreed upon between Mother Joseph and Daly. Daly also agreed to indemnify Mother Joseph from any other claims arising through the general contractor. Mother Joseph agreed to indemnify Daly from any claims that could be brought in the future by any third parties related to the floors. (CP 223-225; 426-435; 595-603; RP 12/2/05, p 16, l. 21 - p 18, line 24; p 20, line 2 - p 21, line 18.)

Litigation proceeded. On the first day of the scheduled trial, Floor Express presented a "trial brief," which was unnoted, without authority or supporting affidavits, advancing for the first time the theory that Mother Joseph was a necessary party and that Daly, the general contractor, had no standing to sue its subcontractor for breach, since the defective floor and

materials injured Mother Joseph, and not Daly. (CP 296-302; RP 11/17, p. 28, l. 13 - p. 29, l. 1.)

The Trial Court ultimately ruled that, as a matter of law, in any breach of contract claim involving alleged defects in construction, the owner of the project is a necessary party even if there is no dispute between the owner and the general contractor as to defects. The Trial Court ruled that the Owner is the only proper party to assert a claim for defective work on a construction project, regardless of the contractual relationships and privity of contract involved. (RP 11/17, p. 30, l. 6., *passim.*)

### **III. AMICUS CURIAE POSITION SUMMARY OF ARGUMENT**

The AGC, as amicus curiae, supports reversing the Trial Court's position. Liquidating, and pass-through agreements are routinely and widely used in the construction industry in this state. Some projects can involve numerous entities in the chain of contract and requiring that all of them be joined to prosecute claims would be unwieldy and impractical. The Trial Court erred in not honoring the liquidating and pass-through agreement in this case and in not allowing the general contractor to

prosecute its own claims and the owner's pass-through claims against the subcontractor.

#### IV. ARGUMENT

A. **Liquidating And Pass-Through Agreements Are Common And Routinely Used In Washington State.**

Construction projects typically involve large numbers of entities including an owner, owner representatives, architects, engineers, general contractor, frequently construction managers, and numerous subcontractors and material suppliers. The contractual agreements often vary widely between the differing parties, often with incompatible dispute resolution and venue clauses. The failure of any one entity to perform can have substantial impacts on the others, many of whom have no direct contractual relationship with the breaching or responsible party. The use of liquidating and pass-through agreements allow the claims of parties not in privity of contract with one another to be resolved by an action focusing on the specific complaint and harm incurred. The non-responsible parties need not be dragged in. With the increase of alliances, teaming, partnering and design-build relationships, it is anticipated the use of such agreements will only increase. This is a positive development for the construction industry and for the judicial system because such liquidating and pass-

through agreements help reduce the cost of dispute resolution.

Liquidating and pass through agreements help resolve claims between parties on construction projects. These agreements simplify litigation by helping to reduce the number of parties in litigation.

Typically these agreements work in the other direction than the case at bar: a general contractor sues the owner on behalf of a subcontractor, and agrees to pass on the damages recovered from the owner, generally less a mark up and a cost of prosecution, to the subcontractor. They are routinely used by subcontractors to bring claims against owners when there are allegations of defective plans and specifications by an owner, or other claims of owner caused delay or impact. Pass-through claims are quite ordinary when a subcontractor is pursuing a recovery through the general contractor against an owner. The reciprocal should also hold true when an owner has a complaint over a subcontractor's performance. (RP 12/2/05; p. 31, l. 13; p. 33, l. 23; p. 38, l. 22; p. 39, l. 24).

In this case the general contractor agreed with the owner that the floors installed by the general's subcontractor were defective. It made more sense in this case for the general contractor, in direct privity with the

subcontractor, to pursue the owner's pass-through claims. The alternative is for the owner to bring a claim against the general and the general to claim against the subcontractor. Only two, rather than three, primary parties are required in the case if a liquidating and pass through agreement is used.

When a problem arises on a construction project, the litigation should focus on the responsible breaching party, not every party in privity. General contractors typically want to maintain their business relationships with the non responsible parties and focus recovery efforts on the party who is responsible. It is difficult to maintain those business relationships with on-going adverse litigation. Liquidation and pass through agreements such as this one allow injured non-responsible parties to work cooperatively together and focus their efforts on the breaching responsible party. This is good business policy.

**B. Such Agreements Result In Judicial Economy**

**1. Fewer parties in the chain of contract need to be dragged into the litigation.**

Why should an owner face a trial when the party with whom it has a contract has admitted that the work of its subcontractor is defective and is promising to recover the cost of cure from the responsible subcontractor

on the owner's behalf? Judicial economy, benefitting all parties and the court, is served by such a liquidating and pass-through agreement as was entered into here. From a practical viewpoint, due to technical knowledge and experience, a general contractor is often in a better position to bring a claim against a subcontractor over defective work than the owner. From a legal prospective, the owner cannot bring claims against a party with whom it is not in contract. Berschauer Phillips v. Seattle School District, 124 Wn.2d 816, 821, 881 P.2d 986 (1994).

The Trial Court's rule, if adopted by the Appellate Court, would preclude the practical application of pass-through agreements routinely used and relied upon in the construction industry in this state. In some projects the chain of privity can be long. If it were necessary to have active litigation between every party in that chain it would force the parties to name every entity in the chain. Instead, the industry utilizes pass-through agreements to simplify that process.

The Trial Court Judge recognized that subcontractors bring claims through the general contractor against owners, but did not believe the process could be applied in the other direction: an owner's claim being passed through a general contractor against a subcontractor. (RP 12/2/05,

p 31, ll. 1 - 7.) There is no legal justification for this distinction. Pass through claims work both up and down the chain of contract. They greatly simplify the alignment of parties that actually have to come to Court. This reduces the number of parties to the litigation.

**2. Avoidance of inconsistent results and multiple lawsuits.**

A pass-through agreement which joins parties with one identical interest in the person of one nominee, to sue the party at fault is the best solution. The next alternative, apparently favored by the Trial Court, is requiring all parties to appear in the case. Sometimes the various agreements at issue have different jurisdiction and venue provisions. This leads to the possibility of multiple suits by multiple parties in multiple forums over one issue.

Multiple suits increase the danger of inconsistent results. Different agreements and contracts often have differing dispute resolution and venue provisions that prevent all parties being joined in one suit. An injured party may need to sue a party in privity in a different venue and proceeding even though that party, although contractually responsible, may not be the cause of the damage. The intermediary company must then defend, while at the same time pursuing the claim against the party that caused the

problem in yet another venue. Liquidating and pass-through agreements avoid this.

C. **The Principle of Standing Adopted by the Trial Court Conflicts with a Contractors' Right under Washington Law to Adjudicate Its Claims Against a Subcontractor for both Its Direct and Consequential Damages in a Single Lawsuit.**

"[E]xcept in the middle of a battlefield, nowhere must men coordinate the movements of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as in a huge construction project."

Blake Construction Co. v. J.C. Coakley Co., 431 A.2d 569 (D.C. App 1981).

Construction projects typically involve not only a myriad of parties but also a myriad of contracts, since each contractor, subcontractor and materialman has its own contract with the party above it. Each of those contracts generally has its own disputes clause, and the dispute resolution mechanism in any one party's contract may conflict with the mechanism in any other. Some may require arbitration. Some may require litigation. Some may require venue in the forum where the project is located. Some may require venue in a distant forum.

So when the actions of one subcontractor affect not only the prime contractor for whom that sub is working but also other parties to the

project, it may be impossible to gather all the affected parties into a single forum. In the present case Daly took the pragmatic step of executing a contract with the owner authorizing Daly to adjudicate the owner's pass-through claim against Floor Express. That joint prosecution agreement should have eliminated any issue over Daly's entitlement to adjudicate the owner's pass-through claim at trial of this suit. "[A] creditor/assignor can assign his or her claim against a debtor for purposes of collection. Such an assignment transfers legal title to the claim, so the assignee can sue in his or her own name." DeBenedictis v. Hagen, 77 Wn. App. 284, 289-90, 890 P.2d 529 (1995).

But even without that pass-through agreement the trial court's dismissal order would have been error. In any breach of contract action the nonbreaching party may recover all damages reasonably within the contemplation of the parties as a foreseeable result of a breach.

Generally, an injured party damaged by a breach of contract may recover all damages that accrue naturally from the breach and be returned to "as good a pecuniary position as he would have had if the contract had been performed."

Eastlake Constr. Co. v. Hess, 102 Wn.2d 30, 39, 686 P.2d 465 (1984); *see also* Parker v. Tumwater Family Practice, 118 Wn. App. 425, 431, 76 P.3d 764 (2003); *see* Panorama Village v. Golden Rule Roof, 102 Wn.

App. 422, 430, 10 P.3d 417 (2000) ("In breach of contract cases, the injured party has a right to recover all damages that accrue naturally from the breach, including any incidental or consequential losses caused by the breach.")

Damages recoverable for a breach of contract are those which "may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it".

This corresponds with the general rule governing damages for breach of contract: that the aggrieved party should be put in the same economic position it would have attained had the contract been performed.

Crest Inc. v. Costco Wholesale Corp., 128 Wn. App. 760, 764, 115 P.3d 349 (2005) (quoting from Hadley v. Baxendale, 9 Ex. 341, 354, 156 Eng. Rep. 145, 151 (1854)).

When breach by a subcontract causes harm to the project's owner for which the owner demands indemnity from the prime, the prime's legal exposure to the owner is consequential damage for which the prime is entitled to sue the sub. So long as the prime contractor is able to establish that damage to the owner was a reasonably foreseeable consequence of the

subcontractor's breach, the prime is entitled to plead and prove at trial against the sub both the existence and amount of that consequential damage to the prime. Neither joinder of the owner in the prime's lawsuit against the sub, nor even consent of the owner to prosecution of the prime's consequential damage claim against the sub, is required.

By denying Daly its entitlement to pursue and prove in this suit its consequential damages from Floor Express's breach, the trial court departed from well established Washington law and imposed concepts of standing and necessary party that threaten the customary, essential and (until now) legally undisputed ability of a prime contractor to adjudicate in a single lawsuit the totality of its damages, including its exposure to liability to third parties, foreseeably resulting from a subcontractor's breach.

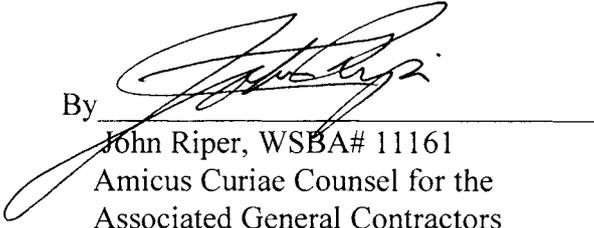
## **V. CONCLUSION**

The AGC requests the Appellate Court reverse the Trial Court decision in this matter as it pertains to liquidating, pass-through, and joint prosecution agreements. Such agreements provide a means of simplifying the pursuit of claims, lowering costs, and preserving working relationships. The primary reason for such an agreement is to bring and

focus the claim against the responsible party. Such agreements should be encouraged by the Courts of the State of Washington.

Respectfully Submitted this 12<sup>th</sup> day of <sup>December</sup> ~~November~~, 2006.

By



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