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No. 59823-6-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

WASHINGTON STATE MAJOR LEAGUE BASEBALL STADIUM  
PUBLIC FACILITIES DISTRICT and THE BASEBALL CLUB OF  
SEATTLE, L.P.,

Appellants,

vs.

HUBER, HUNT & NICHOLS-KIEWIT CONSTRUCTION, a  
Washington joint venture; HUNT CONSTRUCTION GROUP, INC., a  
foreign corporation; and KIEWIT CONSTRUCTION COMPANY, a  
foreign corporation,

Respondents/Cross-Appellants,

vs.

LONG PAINTING, INC., a Washington corporation, HERRICK STEEL,  
INC., a California Corporation

Cross-Respondents.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2007 OCT 26 PM 4: 26

REPLY BRIEF OF CROSS-APPELLANTS

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ORIGINAL



**TABLE OF AUTHORITIES**

3A Industries, Inc. v. Turner Construction Company, 1 Wn.App. 407 (1994)..... 4

Martin v. Municipality of Metropolitan Seattle, 90 Wn.2d 39, 42, 578 P.2d 525 (1978)..... 2

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**I. THE ISSUES AND ARGUMENTS RAISED BY  
HERRICK AND LONG SHOULD NOT BE  
CONSIDERED PURSUANT TO RAP 2.5.**

Cross Respondents Herrick Steel and Long Painting assert that Hunt-Kiewit's third party claims against them are time barred, irrespective of whether the Mariners' claims against Hunt-Kiewit are time barred. Stated differently, Herrick and Long contend that there is no exception to RCW 4.16.040 that would apply to Hunt Kiewit's claims against the subcontractors. See, e.g. Brief of Herrick Steel at p. 2.

However, it is undisputed that neither Herrick Steel nor Long Painting filed any briefing with the trial court to articulate the issue and arguments they make now. Both Herrick and Long could have filed their own motions to articulate the independent, separate basis for dismissal that they raise now, but chose not to. Now, they seek to raise these arguments for the first time.

The reason that Herrick and Long were dismissed was because Hunt Kiewit was dismissed. And to the extent that the Mariners claims are time barred, Hunt Kiewit acknowledges that its third party claims would be too. It would have been a sheer waste of judicial resources and the parties' time and money to require Herrick and Long to file motions for summary judgment in order to obtain the same relief that Hunt Kiewit

acknowledges was due based upon the decision of Judge Spector regarding the Mariners' claims.

The issues raised and arguments now made by Herrick and Long simply were not raised in the trial court, and therefore should not be considered by this Court pursuant to RAP 2.5. "Failure to raise an issue before the trial court generally precludes a party from raising it on appeal." Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); see Wingert v. Yellow Freight Systems, Inc., 146 Wn.2d 841, 853, 50 P.3d 256 (2002) ("arguments not raised in the trial court generally will not be considered on appeal"). Specifically, courts have "declined to pass on the rights of parties where relief asked for on appeal was not part of either the prayer for relief or the theory of the case presented to the trial court." Martin v. Municipality of Metropolitan Seattle, 90 Wn.2d 39, 42, 578 P.2d 525 (1978).

For example, in Seattle-First Nat. Bank v. Shoreline Concrete Co., 91 Wn.2d 230, 240, 588 P.2d 1308 (1978), the Court refused to consider respondents' arguments that a plaintiff's fault should be a damage-reducing factor in a strict liability action. The court explained that "Respondents, having failed to raise this issue before the trial court, are precluded from raising it for the first time on appeal." *Id.* This Court

should refuse to consider Herrick and Long's issues and arguments for the same reason.

**II. THE RECORD IS NOT SUFFICIENTLY DEVELOPED FOR THIS COURT TO GRANT THE RELIEF REQUESTED BY HERRICK AND LONG.**

Although RAP 2.5(a) provides that "[a] party may present a ground for affirming a trial court decision which was not presented to the trial court" the rule also provides that the record must be "sufficiently developed to fairly consider the ground." For example, the Wingert Court refused to consider a newly presented federal preemption analysis because the record had not been developed to provide sufficient facts. See Wingert, 146 Wn.2d at 853.

No such grounds are present here. There is an insufficient record for this Court to fully consider whether Hunt Kiewit's claims against Herrick and Long are time-barred independent of the Mariners' claims. Herrick and Long erroneously contend that there is no debatable basis for Hunt Kiewit to contend that RCW4.16.040 does not apply to its third party claims against Herrick and Long. This is incorrect. If the Mariners' claims are reinstated, any liability and/or obligations that Hunt Kiewit ultimately has to the Mariners "flows down" to Herrick and Long pursuant to the contractual framework for the project.

In particular, Hunt Kiewit's claims against Herrick and Long are contingent upon Hunt Kiewit's liability to the Mariners. As stated in Hunt Kiewit's third party claims, "the allegations of the Plaintiffs, *if true*, constitute a breach of the subcontract..." by both Herrick and Long. CP 38, ¶ 45, CP 39, ¶ 53. Hunt Kiewit's contingent claims are consistent with the fact that the general obligations of Hunt Kiewit to the Mariners "flow down" to Herrick and Long. For example, the prime contract provides in relevant part:

By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assumes toward the Owner and Architect....Each subcontract agreement... shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner.

CP 136, Article 5.3.1. Washington recognizes the validity of such "flow down" clauses. See, e.g. 3A Industries, Inc. v. Turner Construction Company, 1 Wn.App. 407 (1994).

The subcontracts between Hunt Kiewit and Herrick and Long provide the legal frame for Hunt Kiewit's third party claims. In particular, Hunt Kiewit represents to the Court that there are flow-down provisions in each of its subcontracts with Herrick and Long that correspond to the

flow-down requirements in the Prime Contract. The subcontract provisions state:

The Subcontractor assumes toward the Contractor all obligations and responsibilities that the Contractor assumes toward the Owner and others, as set forth in the Prime Contract, insofar as applicable, generally or specifically, to Subcontractor's Work.

Thus, in the event that this Court reverses the trial court, the contractual framework requires that Herrick and Long "assume all the obligations and responsibilities" which Hunt Kiewit has towards the Mariners.

The foregoing illustrates how the record is insufficient for this Court to affirm the dismissal of Herrick and Long, if the dismissal of the Mariners' claims are reversed. The flow-down argument, among others, was never considered by the trial court because the issue of Herrick and Long's liability was simply never considered independent of the Mariners' claims. As a result, the record on review is not adequately developed for the Court to fully consider this issue. That is the exact reason for the preclusive effect of RAP 2.5. Hunt Kiewit is entitled to have its arguments and authority fully considered by the trial court, and not for the first time on appeal.

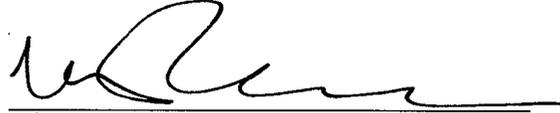
**III. HUNT KIEWIT'S CROSS APPEAL IS NOT FRIVOLOUS IN ANY RESPECT.**

The Court should reject Long Paintings request for fees and costs on appeal. As explained above, Hunt Kiewit has a valid argument why its third party claims against Herrick and Long survive, independent of the Mariners. Although such argument may be debatable, that is initially for the trial court to decide. Hunt Kiewit's cross appeal is not frivolous.

Dated this 26th day of October, 2007.

Respectfully submitted,

GROFF MURPHY PLLC

A handwritten signature in black ink, appearing to read 'D. Groff', written over a horizontal line.

David C. Groff, WSBA #04706

Michael P. Grace, WSBA #26091

*Attorneys for Respondents*

**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be served on October 26, 2007,  
true and correct copies of:

**REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS**

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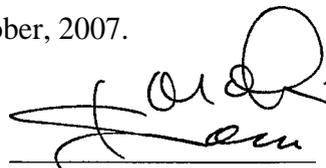
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DATED this 26<sup>th</sup> day of October, 2007.

  
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