

No. 82311-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL BROOM; KEVIN BROOM; and ANDREA BROOM,

Respondents,

vs.

MORGAN STANLEY DW INCORPORATED and  
KIMBERLY ANN BLINDHEIM,

Petitioners.

ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON  
BRIEF OF AMICUS CURIAE

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On Behalf of  
Associated General Contractors of Washington

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

The Associated General Contractors of Washington (hereinafter the AGC) serves the interests of prime contractors, specialty contractors, material suppliers, equipment manufacturers, and other professional service providers who are engaged in the construction industry throughout the State of Washington. AGC members include both union and nonunion contractors who are involved in all types and aspects of construction, including public works projects, private projects, and residential construction projects throughout the State of Washington, and in other jurisdictions as well.

Unfortunately, on typical construction projects of any size or magnitude there are often a large number of claims and disputes which must be resolved quickly and as inexpensively as possible. The construction industry has also long relied heavily upon various methods of alternative dispute resolution, including specifically arbitration. The construction industry has also routinely used various standard form construction agreements. Many of the standard form agreements contain or incorporate binding arbitration provisions for the resolution of the myriad of claims and disputes which typically arise in connection with construction projects. Parties to construction disputes have also long relied heavily upon arbitrators and arbitration panels who are often non-

lawyers, who are often not necessarily knowledgeable upon the law, but upon whom the parties rely heavily upon for their expertise in the construction industry. Parties to construction disputes also need final resolutions of their disputes. As a result, serious consideration needs to be given by the Court to the practical application of the legal standard for trial court review of arbitration awards.

The AGC of Washington has long made available a standard form subcontract agreement to its members which agreement contains an arbitration provision as a method of dispute resolution for claims and disputes. (See Appendix 1 hereto)

The AGC and the construction industry have a vital interest in ensuring that arbitration remains an alternative for and not a prelude to litigation. More importantly, the AGC and the construction industry have a vital interest in keeping arbitration as a quick, inexpensive and final resolution of the many claims and disputes which routinely arise on construction projects.

## **II. ARGUMENT**

In this case, the lower court determined that an arbitration award (decision) should be vacated due to an error of law evident from the face of the arbitrators' award. The overriding issue in this case is whether

arbitration awards should be vacated by a court upon the basis of an error of law perceived by the court to have been made by the arbitrator(s) and to be evident from the face of the arbitration award. The AGC believes that the lower court applied an incorrect standard of review, but, more importantly, that continued application of this antiquated and incorrect standard of review will not only harm the use of arbitration in the construction industry, but will also potentially harm the arbitration process as a whole.

**A. Parties Utilize Arbitration Based On An Assumption That Courts Will Allow Arbitrators Appropriate Authority To Make Awards Without Expansive or Intrusive Review.**

Arbitration is a very widely used form of alternative dispute resolution, used for a number of reasons, including the following:

1. It is generally regarded as being less expensive and provides a much faster resolution of disputes.
2. It is also generally regarded as less formal, and the parties get the benefit of having a claim or other dispute decided by arbitrators who are knowledgeable and familiar with the customs and usages of the particular industry or transaction.
3. Arbitration also reduces the substantial case load of the judicial system.

4. Arbitration decisions are generally regarded as final and binding, and because the grounds for challenging an arbitration award are very limited, the parties do not have to endure a lengthy and often expensive appeal process

When parties agree to arbitration, it is intended as "substitute" for, and not a prelude to, litigation. Thorgaard Plumbing & Heating Co., Inc. v. County of King, 71 Wn.2d 126, 130-132, 426 P.2d 828 (1967). In agreeing to arbitrate, the parties consent to whatever reasonable uncertainties may arise in the process. Godfrey v. Hartford Casualty Insurance Company, 142 Wn.2d 885 (2000); 1 Domke On Commercial Arbitration, § 38:7. As noted in one court's decision:

[M]istakes of judgment and mistakes of either fact or law are among the contingencies parties assume when they submit disputes to arbitrators. Allstate Insurance v. Fioravanti, 299 A.2d 585, 589 (Pa. 1973).

A contrary holding would basically mean that arbitration proceedings, instead of being a quick and easy method of obtaining the resolution of the myriad of disputes which inevitably arise on construction projects, would be merely a necessary step in the course of litigation, causing delay and expense and settling nothing finally.

Arbitration tribunals are not generally required to apply principles of substantive law or established Rules of Evidence. Domke, § 30:2.

Unless required by the parties' arbitration agreement or applicable rules of arbitration, the arbitrators are not required to provide a reason for their decision, and the award is generally not open to review by courts for any error in findings of fact and applying law. Domke, § 38:7.

Many arbitrators and arbitration panels are comprised of non-lawyers who cannot be expected to necessarily determine or follow a strict application of law. As such, a clear error of law standard is inconsistent with the arbitration process, which is geared for deciding disputes by arbitrators consistent with their perception of equity and fairness, and not necessarily following the strict legal principles and/or rules of law which a court may apply.

The construction industry has historically utilized arbitration as a method of alternative dispute resolution. Many groups in the construction industry, including both the AGC and AIA [American Institute of Architects] have sponsored and provided standard form contract agreements to their members and the construction industry. Many of the standard form agreements in the construction industry contain arbitration provisions. Unless parties expressly or impliedly specify that the arbitrator(s) are required to decide their disputes or claims by application of a specific law or rule, the arbitrators are free to resolve the dispute on the basis of the arbitrators' own sense of justice in the case and whatever

the arbitrators perceive as fair and just. 1 Domke On Commercial Arbitration §30:2 (2009).

The law is well-settled that a court may generally not review any of the findings of fact or applications of law by arbitrator, since they involve matters of judgment, and it would be contrary to the intent of an arbitration agreement for a court to interfere. The courts should not review claims of legal or factual error in arbitration using the same standard as the appellate courts used to review the decision of the lower court. Judicial review of arbitration awards based on errors of law or errors of findings of fact implicates a judicial process, and thus defeats the primary objective of providing an alternative to judicial dispute resolution.

**B. The Court Below Applied An Incorrect Standard Of Review Regarding A Motion To Vacate The Arbitrators' Decision.**

The grounds for review or vacation of an arbitration award or decision are statutorily enumerated by the Legislature and are purposely very narrow. (See RCW 7.04A.230) The statutory grounds enumerated for vacation of arbitration award do not include "clear error of law." AGC need not repeat at length the arguments made by the Appellant in this matter concerning the so-called "error on the face of the award" standard of review. However, AGC does wish to point out that the history and the application of such standard appears to have its genesis in Washington's

original 1869 territorial statute pertaining to arbitration, which has simply been repeated over and over without proper analysis of its continued validity. As noted by Justice Felix Frankfurter, often the repetition of legal phrases simply becomes accepted as a legal formula without a basis beyond the repetition:

The phrase "assumption of risk" is an excellent illustration of the extent to which uncritical use of the words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, indiscriminately used to express different and sometimes contradictory ideas.

Lyons v. Redding Construction Company, 83 Wn.2d 86, 90, 515 P.2d 821 (1973) (citing Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 68-69 (1942)). This is true of some Washington courts' continued repetition of the "error on the face of the award" standard of review for arbitration awards.

Such repetition must be carefully analyzed based on the history of Washington's arbitration legislation. In 1943, the Washington Legislature repealed the old arbitration statute and enacted a more "modern" Arbitration Act. In enacting the 1943 arbitration statute, the Legislature **deleted** the provision regarding vacation of an arbitration award on the basis of the clear error of law or fact. Nevertheless, despite the Legislature's repeal of the earlier statutory language, our Washington

courts continued to apply the old standard "error in fact or law," and the courts apparently engrafted the standard that the error must be evident on the face of the award.

Although this standard for review concerning vacation of arbitration awards continues to be raised by the Washington courts, more recent Washington court decisions appear to acknowledge that it is an incorrect standard, and properly note that a reviewing court is restricted to the narrow statutory grounds for setting aside arbitration awards (which does not include clear error of law or fact on the face the award).

For example, in the case of Boyd v. Davis, Justice Utter, in his concurring opinion, pointed out that the 1922 Remington Code provided that a party could challenge an arbitration award where the arbitrators had committed an error of fact or law, but that all cases adopting the "error of fact or law" doctrine rely on "the provisions of this repealed statute." 127 Wn.2d 256, 267, 897 P.2d 1239 (1995). Justice Utter went on to note that the current statute is substantially different and for this reason, all cases referring to the error in fact or law standard contained in the former provision, are neither persuasive nor controlling authority.

It is noteworthy that in 1992 the California Supreme Court reversed and overruled the earlier case law in its own state which basically had also been incorrectly applying the same "error of law evident on the

face of the award” standard. In Moncharsh v. Heily & Blase, the Supreme Court of California traced the origin and history of the so-called “error of law” standard of review and then held as follows:

Those decisions permitting review of an award where an error of law appears on the face of the award causing substantial injustice have perpetuated a point of view that is inconsistent with modern view of private arbitration and are therefore disapproved.

832 P.2d 899, 916 (Cal. 1992).

The California Supreme Court pointed out that there is risk that the arbitrator will make a mistake; however, that risk is acceptable for two reasons. First, by voluntarily submitting to arbitration, parties basically have agreed to bear this risk in return for quick, less expensive, and conclusive resolution of their dispute. Secondly, the parties tolerate the risk of an erroneous decision because the Legislature has reduced the risk to the parties in such a decision by providing for judicial review in circumstances involving serious problems with the award itself, or with the fairness of the arbitration process. Moncharsh, 832 P.2d at 904-905.

In summary, fundamentally, this case presents the issue of the proper scope of judicial review of arbitration awards with regard to the application of the law by the arbitrators. In this case, an arbitration panel determined that most of the claimants’ claims were barred by certain statute of limitations. It appears from the Court of Appeals’ unpublished

opinion, that the claimants did not initially raise the argument, before the arbitration panel, that the statutes of limitations do not apply to arbitration proceedings. Rather, the first time the issue was apparently raised by the claimants was on a motion for reconsideration before the arbitration panel. (See, Court of Appeals opinion, p. 3)

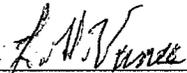
Amicus respectfully submits that, even assuming that the trial court was correct that “in Washington, statutes of limitation do not bar a claimant from pursuing a claim submitted to arbitration,” it does not necessarily follow that the court can or should vacate the arbitration award or decision based on the arbitrators’ application of an “erroneous rule of law.”

Arbitration panels are often composed of non-lawyers. Arbitrators are not required to follow strict application of law. Indeed, one of the primary perceived benefits of arbitration is that the arbitrators are generally free to apply their own brand of justice and equity to the case. Vacating arbitration awards or decisions based upon the arbitrators’ perceived misapplication of a rule or principle of law undermines the arbitration process. And as previously noted: “[m]istakes of judgment and mistakes of either fact or law are among the contingencies parties assume when they submit disputes to arbitration.” Allstate Ins. Company v. Fioravanti, 299 A.2d 585, 589 (Pa. 1973). Most importantly, as stated

recently by this Court, arbitration is attractive because it is more expeditious and is a more final alternative to litigation. Godfrey, 142 Wn.2d at 892.

Permitting parties to challenge arbitration awards or decisions on the basis of perceived errors of law (whether perceived to be evident from the face of the arbitration award or otherwise) is basically at cross purposes with the primary benefit of arbitration (which is finality).

DATED this 10<sup>th</sup> day of December, 2009.

  
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LAWRENCE H. VANCE, WSBA No. 6726  
On Behalf of Associated General  
Contractors of Washington

## APPENDIX 1

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THE ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON



SUBCONTRACT FORM  
2006 Edition

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This document has important legal consequences. Prior to its completion or modification, consultation with an attorney is encouraged. This document, unmodified, may not be appropriate in all circumstances.

**THIS AGREEMENT WAS PREPARED TO FAIRLY ALLOCATE RESPONSIBILITIES, RISKS AND EXPENSES ARISING OUT OF THE PERFORMANCE OF THIS WORK, AND IS MADE AND ENTERED INTO BY AND BETWEEN:**

**Contractor:**

**Address:**

**Telephone:**

**Subcontractor:**

**Address:**

**Telephone:**

Contractor, for full, complete, and faithful performance of this Subcontract, agrees to pay Subcontractor:

(a) Lump Sum in the amount of:

\_\_\_\_\_

\_\_\_\_\_ Dollars (\$ \_\_\_\_\_), or

(b) Unit Prices as set forth on the attached Unit Price Addendum which on the basis of Owner's estimated quantities will yield a gross contract price of approximately:

\_\_\_\_\_

\_\_\_\_\_ Dollars (\$ \_\_\_\_\_).

remedies, purchase such insurance in the name of Subcontractor and deduct the cost of same from payments due Subcontractor.

**R. INSURANCE**

Subcontractor shall obtain and keep in force during the term of this Subcontract comprehensive general liability insurance with dollar limits and coverage equal to, or greater than the types and amounts of coverage noted at the front of this Subcontract. Subcontractor shall furnish to Contractor evidence of this insurance in the same form as described in Article (Q) including the provision regarding notice of cancellation or reduction in coverage. Such insurance shall include contractual liability coverage applicable to the indemnity provisions of this Subcontract.

Subcontractor shall provide insurance and a certificate of insurance which provides that Subcontractor's insurance: (1) names Contractor and Owner as additional insureds without qualification, limitation or reservation; (2) is endorsed to be primary and non-contributory with any insurance maintained by Contractor or Owner; (3) contains a waiver of subrogation against Contractor and Owner; and (4) contains a severability of interest provision in favor of Contractor and Owner.

**S. LOWER-TIER SUBCONTRACTORS**

Any lower-tier subcontractor shall be bound to Subcontractor to the same extent Subcontractor is bound to Contractor and to the same extent Contractor is bound to Owner. This form may be used for lower-tier subcontracts and when so used, the term Contractor shall mean Subcontractor and the term Subcontractor shall mean lower-tier Subcontractor.

**T. MODIFICATIONS**

No modification to, or waiver of any rights under, this agreement shall be valid or binding on the parties to this Subcontract unless the same be in writing. Failure of Contractor to insist upon strict performance of any term or condition of this Subcontract, or to exercise any option herein conferred on one or more instances, shall not be construed to be a waiver of such performance or option, or of any other covenants or agreements, on subsequent occasions, but the same shall be and remain in full force and effect.

**U. DISPUTES**

1. **Pass-through Claims:** In the event of any dispute or claim between Contractor and Owner which directly or indirectly involves the work performed or to be performed by Subcontractor, or in the event of any dispute or claim between Contractor and Subcontractor caused by or arising out of conduct for which Owner may be responsible, Subcontractor agrees to be bound to Contractor and Contractor agrees to be bound to Subcontractor to the same extent that Contractor is bound to Owner by the terms of the Main Contract and by any and all procedures and resulting decisions, findings, determinations, or awards made thereunder by the person so authorized in the Main Contract, or by an administrative agency, board, court of competent jurisdiction or arbitration. If any dispute or claim of Subcontractor is prosecuted or defended by Contractor together with disputes or claims of Contractor's own, and Subcontractor is not directly a party, Subcontractor agrees to cooperate fully with Contractor and to furnish all documents, statements, witnesses, and other information required by Contractor for such purpose and shall pay or reimburse Contractor for all expenses and costs, including reasonable attorneys' fees incurred in connection therewith, to the extent of Subcontractor's interest in such claim or dispute.

Subcontractor agrees to be bound by the procedure and final determinations as specified in the Main Contract and agrees that it will not take, or will suspend, any other action or actions (including but not limited to any arbitration(s) or action(s) commenced pursuant to the Federal Miller Act, state lien statutes, Bond or Retainage Act(s)) with respect to any such claims and will pursue no independent litigation with respect thereto, pending final determination of any dispute resolution procedure between Owner and

Contractor. It is expressly understood and agreed that as to any and all claims asserted by Subcontractor in connection with this project arising from the actions or fault of Owner, Contractor shall not be liable to Subcontractor for any greater amount than Owner is liable to Contractor, less any markups or costs incurred by Contractor. As to any claims asserted by Subcontractor for or on account of acts or omissions of Owner or its agents or design professionals, at the sole option of Contractor, Subcontractor agrees to prosecute such claims in Contractor's name. For any amount recovered or collected (whether through proceedings or settlement) by Subcontractor, Contractor shall be entitled to 10% of such amount received or collected as its mark-up for such claims. Subcontractor shall have full responsibility for preparation and presentation of such claims and shall bear expenses thereof including attorneys' fees.

2. Arbitration: All other claims, disputes, and other matters in question between Contractor and Subcontractor arising out of, or relating to, the Main Contract or this Subcontract, the breach thereof, or work thereunder (for which a dispute resolution procedure is not otherwise provided in the Main Contract), shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining, unless the parties mutually agree otherwise. Contractor and Subcontractor agree to be bound by the findings and award of such arbitration finally and without recourse to any court of law other than for the enforcement of the arbitrator's decision.

3. Mediation: As a condition precedent to the hearing of any trial or arbitration, the parties to this Subcontract shall submit any and all disputes between them to non-binding mediation with the assistance of an experienced mediator. The parties shall each designate a representative with full settlement authority who will participate for at least four hours in the mediation. The parties shall bear equally all expenses, exclusive of attorneys' fees, associated with the mediation.

#### V. INDEMNIFICATION

Subcontractor shall defend, indemnify and save harmless Contractor, its officers, employees and agents from every claim, risk, loss, damage, demand, suit, judgment and attorney's fee, and any other kind of expense arising out of injury to or death of any and all persons, or arising out of property damage of any kind, whether tangible or intangible, or loss of use resulting therefrom, arising out of or in any manner connected with the Work performed under this Subcontract.

Subcontractor's indemnity obligations hereunder do not extend to liability resulting from the sole negligence of the Contractor, its agents or employees.

If the claim, suit, or action for injuries, death, or property damage is caused by or results from the concurrent negligence of (a) the Subcontractor or its officer, employee or agent and (2) the Contractor, its officers, employees or agents, this indemnity provision shall be enforceable only to the extent of the negligence of the Subcontractor, its officers, employees, or agents.

**FOR PURPOSES OF THE FOREGOING INDEMNIFICATION PROVISION ONLY, AND ONLY TO THE EXTENT OF CLAIMS AGAINST SUBCONTRACTOR BY CONTRACTOR UNDER SUCH INDEMNIFICATION PROVISION, SUBCONTRACTOR SPECIFICALLY WAIVES ANY IMMUNITY IT MAY BE GRANTED UNDER THE WASHINGTON STATE INDUSTRIAL INSURANCE ACT, TITLE 51 RCW. THE INDEMNIFICATION OBLIGATION UNDER THIS SUBCONTRACT SHALL NOT BE LIMITED IN ANY WAY BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE TO OR FOR ANY THIRD PARTY UNDER WORKERS' COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS.**

Defense cost recovery shall include all fees (of attorneys and experts), and costs and expenses incurred in good faith. In addition, Contractor shall be entitled to recover compensation for all of its in-house expenses (including materials and labor) consumed in its defense.