

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
86210-9
No. 81029-0 2011 DEC 29 P 3: 29

BY RONALD R. CARPENTER
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON
CLERK

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

Appellants,

v.

HUBER, HUNT & NICHOLS-KIEWIT CONSTRUCTION, a
Washington joint venture; ET AL.,

Respondents/Cross-Appellants,

v.

LONG PAINTING, INC. and HERRICK STEEL, INC.,

Cross-Respondents.

CROSS-RESPONDENT LONG PAINTING, INC.'S RESPONSE TO
AMICUS CURIAE BRIEF BY THE ASSOCIATED GENERAL
CONTRACTORS OF WASHINGTON

Richard L. Martens, WSBA # 4737
Steven A. Stolle, WSBA # 30807
Attorneys for Cross-Respondent Long Painting, Inc.

Martens + Associates | P.S.
705 Fifth Avenue South, Ste. 150
Seattle, Washington 98104-4436
(206) 709-2999

ORIGINAL

I. INTRODUCTION

The Associated General Contractors of Washington (“AGC”) has submitted an amicus curiae brief which is, in part, adverse to both Long Painting Company (“Long Painting”) and Herrick Steel, Inc. (“Herrick”). By letter dated December 21, 2011, the Court, while recognizing that the motion for leave to file an amicus was untimely, granted the motion and provided the other parties to this appeal additional time to file responses to the AGC’s brief. The following is Long Painting’s response.

II. ARGUMENT

On the merits, Long Painting does not take serious issue with the AGC’s position on application of the statute of repose in this case, as the AGC’s position is consistent with, albeit not identical to, the position of Long Painting. Since the portion of the AGC’s brief concerning the statute of repose is only directed to HK’s position vis-a-vis the Mariners, Long Painting will not respond to it. Instead, Long Painting addresses the portion of the AGC’s brief submitted in support of HK’s conditional cross-appeal against Long Painting and Herrick.

A. **The AGC’s Position Does Not Represent the Interests of Its Membership.**

Dues paying AGC members such as Long Painting who also work as sub-tier contractors have a strong interest in application of the limitations statutes at issue to terminate stale claims. And the AGC’s

support for HK's position on the so-called flow down provisions of the subcontracts at issue is diametrically opposed to the position of at least one of its own members, Long Painting. This calls into serious question just whose interests the AGC is actually representing here.

In fact, the AGC's brief largely restates the same arguments already asserted in briefing by HK. This is readily apparent from simple comparisons of their briefs. *See* AGC brief, Sec. C, pp. 10-13; *compare* HK brief, Sect. IV.A., pp. 41-46, *and* HK Reply p. 2 fn. 2. The AGC even relies on the same unpublished, non-binding, non-authoritative and non-persuasive Delaware Superior Court case relied upon by HK, *Pennisula Methodist Homes and Hospitals, Inc. v. Architects Studio, Inc.*, Cause No. C.A. 83C-AU-118, 1985 WL 634831 (Del.Super. 1985). *See* AGC brief, pp. 11-12. While it now appears that citation of this unpublished decision is allowed by the Rules of Civil Procedure for the Superior Court of the State of Delaware, Rule 107(d)(4)(b), it remains a mystery to Long Painting why this Court should consider or give any weight at all to an unpublished Delaware state trial court ruling applying Delaware law – which differs significantly from Washington law.

While HK's desire to keep both Long Painting and Herrick tied up in this litigation for as long as HK is involved is understandable, other members of the AGC have an equally understandable interest, based on long-standing Washington law, in having their contracts enforced as

written, rather than twisted to the present needs of HK to deprive its subcontractors of their statutory rights under RCW 4.16.310, 4.16.326(g), and/or 4.16.040.

B. The AGC Improperly Asks this Court to Deprive Long Painting of Its Rights Under the Claims Limitations Statutes at Issue Without Considering the Language in the Subcontract.

Much of the AGC's brief is simply beside the point. The issue in this case concerning the so-called flow down provisions of the subcontracts HK entered into with Long Painting and Herrick is not, as framed by the AGC, *whether* contractors in the construction industry can allocate risk by contract. Rather, the issue is *how* risk was allocated under the terms and conditions of these particular subcontracts and whether that allocation forced Long Painting, *sub silentio*, to waive the legislative protections of the statute of repose and/or statutes of limitations. To determine that, the Court necessarily must consider the pertinent contractual language. But the AGC skips this step, starting with the bare assumption that the contractual language supports its position, then asking this Court to give it "full effect" to deprive Long Painting of the applicability of any of the limitations statutes at issue. *See* AGC Brief, pp. 2-3, 10-12.

Here, the AGC argues that "the party who is best able to control the risk (i.e., the subcontractor who performs the work) should likewise be

the one to bear the risk.” AGC brief, pp. 10-11. But that rather trite axiom simply begs the question of *what* risk is being allocated for what period of time and whether that implicates a party’s right to rely on the claim limitation statutes. Is it the risk of errors in performance of the work; the risk of errors in the plans and specifications; the risk of design and/or manufacturing defects in the materials used; the risk of errors in communication between and among the owner, architect, general contractor and/or subcontractor; or the risk that the general contractor may have unwittingly contracted with a party having immunity from the applicable statute of limitations? Only the first of these risks was under the control of Long Painting. Thus, the issue before this Court is not whether the “contractual ‘flow-down’ provisions [should be] given full effect so that risk may be fairly allocated on construction projects,” as there is no dispute that the terms of the contracts at issue should be given their full effect unless they violate public policy. AGC Brief, p. 2. Rather, the issue presently before the Court is what effect the contractual flow down provisions in the subcontracts at issue have on the contractual rights and obligations of the parties to those subcontracts. In other words, this is a fairly straightforward matter of contract interpretation.

The AGC argues, without analysis, that giving “full effect” to the contractual flow down language apparently would result in this Court holding that Long Painting is stripped of the protections of the limitations

statutes passed by the Legislature. That is simply not true. The AGC presents no analysis whatsoever of the contractual flow down provisions at issue in this case, relying instead solely on strained public policy arguments teased out of two distinguishable cases from non-Washington courts. In effect, the AGC is asking this Court to ignore the actual contractual flow down language at issue and simply issue a result-driven opinion favorable to HK. This does not comport with well-settled law in this state concerning the construction and interpretation of contracts, nor does it comport with well established public policy as determined by the Legislature in the limitations statutes at issue.

The Legislature enacted the limitations statutes at issue, RCW 4.16.040, 4.16.310, and 4.16.326(g), specifically to cut off the risk of liability regardless of how the risk was allocated by contract. The enacted statutes are the public policy of this state. *J.M. Arthur & Co. v. Burke*, 83 Wash. 690, 693, 145 P. 974 (1915) (“The statute [of limitations] is a declaration of public policy which the courts can do no less than respect.”). Thus, the AGC’s argument is not supported by the public policy of this state – as expressed by the Legislature – nor does it provide any reasoned basis for tying the legal fate of Long Painting in this case to that of HK.

Whether HK can avoid application of the limitations statutes at issue through the flow down provisions in the subcontracts at issue is not

analyzed in the AGC's brief, and the legal authority relied upon by the AGC is no more persuasive than its policy argument concerning risk allocation. Because the contractual flow down provisions at issue and the cases cited by the AGC were all previously cited by HK and thoroughly analyzed and distinguished in Long Painting's prior briefing, Long Painting refers the Court to its primary brief, Sec. C, pp. 26-42, rather than repeating that briefing here. Suffice for purposes of this responsive brief, the AGC is effectively asking this Court to radically change the law in Washington concerning how contractual flow down provisions are interpreted and applied in favor of a position for which it cites no pertinent Washington legal authority – or any pertinent legal authority.

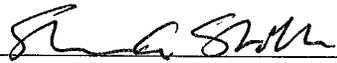
III. CONCLUSION

The AGC appears in this case in support of one party, HK, whose membership as a joint venture in the AGC is unknown, against the Mariners on the one hand and at least one of its dues paying members, Long Painting, on the other. The AGC's interpretation of the contractual flow down provisions of the subcontracts at issue – in lockstep with HK – is not supported by sound public policy, not supported by binding or authoritative case law, and not supported by its own membership. Rather, they are asserted simply to save HK's conditional and rather far-fetched claims against Long Painting and Herrick in this one case. Accordingly, this Court should decline the AGC's and HK's invitation to change the

existing law in Washington concerning the interpretation and application of contractual flow down provisions. The trial court's dismissal of HK's claims against Long Painting based on the running of the statute of repose should be affirmed.

RESPECTFULLY SUBMITTED THIS 29th day of December,
2011.

Martens + Associates | P.S.

By 
Richard L. Martens, WSBA # 4737
Steven A. Stolle, WSBA # 30807
Attorneys for Cross-Respondent
Long Painting, Inc., whose true name is
Long Painting Company

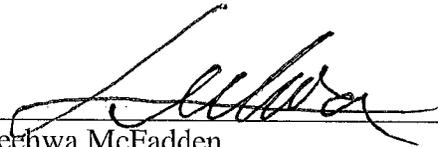
CERTIFICATE OF SERVICE

I certify that on the day and date indicated below, I caused to be filed and served the foregoing on behalf of Cross-Respondent Long Painting, Inc., whose true name is Long Painting Company on the following counsel as indicated below.

<p>Counsel for Appellants John Parnass, Esq. Zachary Tomlinson, Esq. Davis Wright Tremaine LLP 1201 Third Avenue, Suite 2200 Seattle, Washington 98101</p>	<input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<p>U.S. Mail Telefax Hand Delivery via ABC Overnight Delivery E-mail with Recipient's Approval</p>
<p>Counsel for Respondents/Cross-Appellants Huber, Hunt & Nichols-Kiewit Construction; Hunt Construction Group, Inc.; and Kiewit Construction Company David C. Groff, Esq. Michael Grace, Esq. Groff Murphy PLLC 300 E. Pine Street Seattle, Washington 98122</p>	<input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<p>U.S. Mail Telefax Hand Delivery via ABC Overnight Delivery E-mail with Recipient's Approval</p>
<p>Counsel for Third Party Defendant/Cross Respondent Herrick Steel, Inc. William J. O'Brien, Esq. Law Offices of William J. O'Brien 999 Third Avenue, Suite 805 Seattle, Washington 98101</p>	<input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<p>U.S. Mail Telefax Hand Delivery via ABC Overnight Delivery E-mail with Recipient's Approval</p>
<p>Counsel for Associated General Contractors of Washington Todd C. Hayes, Esq. Harper Hayes PLLC 640 University Street, Suite 2420 Seattle, Washington 98101</p>	<input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<p>U.S. Mail Telefax Hand Delivery via ABC Overnight Delivery E-mail with Recipient's Approval</p>

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 29th day of December, 2011 at Seattle, Washington.



Leehwa McFadden
Paralegal for Martens + Associates | P.S.