

**Supreme Court No. 94711-2
Court of Appeals No. 48644-0-II**

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

**City of Olympia,
Petitioner**

v.

**Nova Contracting, Inc.,
Respondent**

RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

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1. Introduction and Statement of the Procedural History

This case arises from the Court of Appeals reversal and remanding of a summary judgment order dismissing Nova Contracting, Inc.'s (referred to herein as "Nova") claim that the Respondent, City of Olympia, violated the Warranty of Good Faith and Fair Dealing by unreasonably exercising its contractual discretion in the review and evaluation of submittals on a public contract in a manner that completely prevented project performance within the available time. Below, the Trial Court granted a Motion for Summary Judgment brought by the City of Olympia in which it asserted that (1) its termination of its contract with Nova for default was proper as a matter of law and therefore (2) Nova was liable for liquidated damages to the City of Olympia. (CP 49-66.) The Motion for Summary Judgment did not raise the issue the City of Olympia now presents for review – whether Nova's claim against the City had been properly and timely presented under the claim provision in the contract. The City did attempt to inject that issue into the Summary Judgment proceeding in Reply, after Nova had responded to the issues that had been raised in the Summary Judgment. (See Reply, CP 439-440). However, the Trial Court properly did not reach those untimely raised issues in its decision (RP 26-31.)

The Court of Appeals reversed the Trial Court on the issues it did reach (rejection of Nova’s argument that the City of Olympia breached the warranty of good faith and fair dealing, despite facts in the record supporting that claim, and granting summary judgment on the City of Olympia’s counterclaim for breach of contract, again despite the existence of disputed issues of material fact in the record). In reversing the Trial Court, the Court of Appeals did not reach, and was silent on, the argument now raised by the City of Olympia – that Nova failed to follow the required claim procedures and has therefore waived its claim under the principles announced in *Mike M. Johnson v. County of Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003) and successfully invoked by the City of Olympia itself in *Realm Inc. v. City of Olympia*, 106 Wn. App. 1, 277 P.3d 679 (2012). This silence was proper because that issue, and that argument, was not timely raised below and was therefore not properly an issue on review. It would have been reversible error for the Court of Appeals to do what the City of Olympia is contending it should have – affirmed the Trial Court decision on “other grounds” on the basis of its *Mike M. Johnson* argument.

The absence of this argument below will be glaringly apparent if this Court compares the arguments, the cited cases, and the asserted legal principles in the Motion for Summary Judgment to those in the Petition for

Discretionary Review. *Mike M. Johnson* is the seminal case on the argument now asserted by the City of Olympia, but it was not cited in the Motion for Summary Judgment. Olympia was very aware of this decision and its implications because it had recently prevailed on that basis in a dispute with another contractor on work of the same kind as that in this contract. (Realm and Nova are competitors, and competed for the work at issue in the *Realm* case.) This absence of citation and argument indicates that the issues on which discretionary review is sought are not ripe for review as they were not properly presented below. (RAP 2.5(a) – which provides for three exceptions, none of which apply here).

The proper outcome here is for this Court to deny review and allow the remand to the Trial Court. The City of Olympia could thereafter properly raise the issues and arguments presented in its Petition for Discretionary Review in a manner that allows Nova to respond and develop the record showing that those issues, like the ones previously decided, present triable issues of fact.

2. Issues Presented for Review

Nova disagrees with the implications of the issues as presented by Olympia. Olympia's first issue asks whether a Contractor can ignore a "contractually mandated claim procedure." Nova agrees that a contractor

cannot do so under *Mike M. Johnson v. County of Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003). However, Nova did not ignore the claim procedure. Rather Nova complied with it. (See Declaration of Jordan Opdahl (CP 273-314), especially Exhibit D (CP 293-314)). Even if Nova arguably failed, Olympia did not properly raise this contention below. Nova must be given a full and fair opportunity to respond to this argument, which requires remand to the Trial Court.

Second, Olympia is contending that Nova is asserting some special exception to *Mike M. Johnson* based on the warranty of good faith and fair dealing. While this is an interesting counter-argument, and one that may have merit based on the special equities involved under the warranty of good faith and fair dealing, Nova has not yet made it because Nova has never been presented with the *Mike M. Johnson* argument in a manner that would allow such response. However, that counter-argument would not be the first and only counter-argument available to Nova if and when Olympia properly presents its *Mike M. Johnson* defense to Nova's claim. Nova's first counter-argument would be that it could have performed the contract if it had been given a notice to proceed instead of a termination and, therefore, it had no claim for breach of the warranty of good faith and fair dealing until that moment, and it immediately and properly invoked the claim procedure at that time. Therefore, Nova complied with the

contractually mandated claim procedure. Nova's second counter-argument would be that Olympia's behavior, which resulted in a total failure of this contract, was a total and material breach of contract, excusing Nova of its own contractual obligations, including (presumably) claim paperwork. (See WPI 302.03.)

3. Statement of the Case

This case arises from the Woodland Creek Culvert Improvement Project in Olympia, Washington. The project was awarded to Appellant Nova Contracting by Respondent City of Olympia. However, it was never completed and is now not being pursued by the City. Nova produced evidence that the failure of this project was the result of the City of Olympia Department of Public Works' mismanagement of the project, especially its unreasonable exercise of discretion when requiring and evaluating submittals. (CP 246-247, 249-253, 274, 277-278, and 316-320.) The scope of work was relatively small and could have been performed in less than one month. This should not have been a difficult project. (CP 246, 275, and 316.) Nova presented evidence that Nova could and would have performed the contract if it had been given authorization from Olympia to proceed at any time up to and slightly after the date on which Olympia wrongfully terminated Nova. (CP 246-249;

277; 279-280.) Immediately upon wrongful termination, Nova submitted its claim in the form required by the contract documents, and follow up with the additional claim documentation required by the contract documents. (CP 293-314). Thus Nova complied with the mandatory claim presentation requirements in the contract.

The City of Olympia appears to be arguing that Nova should have filed its claim the moment Olympia wrongfully rejected a submittal, even though the initial submittal rejections did not prevent timely contract performance because there was still ample time left for performance. That is a novel and imaginative argument, requiring that contractors not only be scrupulous communicators, but also unerring fortune tellers. Olympia can bring it below, and Nova will respond to it there. In any case, not having been raised below, it is not a proper basis for discretionary review.

4. Argument

Under RAP 13.5(b)(1) and (2), discretionary review may be accepted **only if** both the “error prong” (obvious or probable error) and the “effect prong” (renders further proceedings useless, alters the status quo, or substantially limits the freedom of a party to act) are satisfied.

Olympia cannot satisfy either prong. First, there is no obvious or probable error in the Court of Appeals decision in this case. In fact, if the

Court of Appeals had done what Olympia asserts it should have, then the Court of Appeals would have committed reversible error by deciding an issue not properly raised below and therefore not properly on review. Second, Olympia cannot demonstrate any prejudicial effect. In fact, a remand to the Trial Court is the proper way to address the issues raised in Olympia's Request for Discretionary Review because those issues have not yet been properly brought to the Trial Court for determination.

4.1 This Court should deny discretionary review because the Court of Appeals did not commit obvious or probable error.

Olympia is seeking review of the Court of Appeals decision remanding this matter back to the Trial Court following a reversal of the Trial Court's ruling on the two issues raised by Olympia in its Motion for Summary Judgment. Olympia's argument is that it was error for the Court of Appeals not to affirm the Trial Court on other grounds, specifically on grounds not raised by the City of Olympia in its Motion for Summary Judgment (claim waiver under *Mike M. Johnson*, 150 Wn.2d 375 (2003)). This Court should decline review as (1) it was not error for the Court of Appeals not to reach an issue not properly raised below and (2) even though the issue was not raised below, there is sufficient evidence below to make it a subject of genuine and material factual dispute.

RAP 2.5(a) provides that:

Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

The contractual defense (claim procedure requirements and compliance) raised by Olympia to Nova's claim is (1) not jurisdictional, (2) not the basis for a CR 12 (b)(6) failure to state a claim defense (the stated claim is breach of contract) and (3) does not present Constitutional issues. Further, while the record includes some tangential facts which, as seen below, are sufficient to deny the argument, Nova was not given a full and fair opportunity to address this issue and develop the record below. The presence of such material facts as there are in this record is largely the result of blind luck. The record would be more complete, even replete with contrary facts, if Nova were given an opportunity to develop a record on this issue, which can only occur on remand. Thus, while there may be

sufficient facts to fairly deny Olympia the result it seeks, there has not been a fair opportunity for Nova to prepare the record and therefore there are not sufficient facts to fairly rule in favor of Olympia on further review.

Despite the lack of opportunity Nova had to develop the record, which was developed for another purpose and in response to a completely different argument than that now raised, there are facts in the record which establish that there is a material factual dispute even about the claim presentation issue Olympia is trying to sneak into this case. Summary judgment can be imposed "...where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). "The court must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if, from all of the evidence, reasonable persons could reach but one conclusion." *Marincovich* at 274; CR 56(c). Therefore, summary judgment is appropriate when there is no issue of material fact or law, and when a party is entitled to judgment as a matter of law. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P. 2d 886 (1995); see also CR 56(c).

Olympia's argument is essentially that Nova was late in presenting its claim because it didn't initiate its claim when Olympia first wrongfully rejected submittals. This argument is already different from that raised in

Mike M. Johnson, 150 Wn.2d 375 (2003) and *Realm*, 168 Wn. App. 1 (2012), where the contractors not only failed to submit a *timely* claim, they failed to submit any claim in the *required form*. The evidence here establishes that Nova did submit its claim documentation, including all follow-up documentation, in the proper form. (CP 293-314). Olympia's argument is that Nova's claim documentation was late.

However, this timing issue involves a factual dispute. A party has a claim, triggering any duty it has to present the claim, either when the other party has failed to perform some obligation the other party had under a contract or when some objective circumstances (such as unforeseen conditions) trigger some conditional contract clause. In this case, Nova's allegations involve a failure of Olympia to perform in a manner that allowed Nova to perform within the contract time (breach of the warranty of good faith and fair dealing), thus depriving Nova of the benefit it was entitled to receive under the contract. That is, this case involves the performance (or non-performance) of Olympia.

A party's performance of a contract "is always a question of fact, a matter of degree, and a question that must be determined relative to the circumstances of each case." Arthur Linton Corbin, Corbin on Contracts § 704, at 318 (1960). Nova asserts that Olympia failed to perform. Olympia denies that. This is a disputed material fact. Nova further asserts that if

Olympia had allowed Nova to proceed up to, and even for a short time after, the date on which Olympia terminated Nova, then Nova would have been able to fully perform the contract, thus gaining the full benefit of the contract. Olympia did not breach the warranty of good faith and fair dealing until it acted in a manner that deprived Nova of the benefit of the contract, and Olympia did not do that until it issued its termination letter to Nova. Therefore, while Olympia's earlier wrongful rejections of submittals were annoying and presented scheduling difficulties for the project, they were not breaches of contract or claim events triggering Nova's obligation to initiate the contractual claim provision. Nova initiated the claim provision as soon as a triggering claim event (a breach of the warranty of good faith and fair dealing) occurred. Therefore, Nova's claim on this project was not just formally correct, it was timely, and the Court of Appeals, had it reached that issue despite it not being properly raised below, should not have concluded as Olympia asserts. It was not error for the Court of Appeals to ignore the *Mike M. Johnson* argument, but it would have been error if the Court had done what Olympia is seeking in its Petition for Review.

4.2 This Court should deny discretionary review because the Court of Appeals decision did not have any prejudicial effect.

The “effect prong” sets a high bar for discretionary review. The prejudicial effect of the alleged error must be severe enough to overcome the default principle that trial court errors are most efficiently corrected in a single appeal after final judgment. *See* Geoffrey Crooks, *Washington Survey: Discretionary Review of Trial Court Decisions under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1547 (1986) (“The appellate system operates with a plain and intentional bias against interlocutory review.”).¹

“[A] trial court order denying a motion to dismiss ... is generally insufficient to satisfy the effect prong.” *State v. Howland*, 180 Wn. App. 196, 206, 321 P.3d 303 (2014). The risk of expensive or protracted litigation is also generally insufficient to justify discretionary review; the proceedings must truly be worthless, such as where a successful appeal would result in the dismissal of all claims, ending the case, e.g., *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 818 P.2d 1362 (1991). Similarly, arguing that the issue is likely to be appealed at the end of the case, possibly resulting in two trials, is not enough, particularly where

¹ Mr. Crooks was, at the time, Commissioner of this Court, writing from 10 years’ experience handling motions for discretionary review.

accepting interlocutory review might arguably result in **two appeals** (and still a second trial). *See Crooks*, at 1549-50.

Although a party may believe and sincerely argue that an eventual appeal is inevitable, it frequently is not so. Pretrial issues often are rendered moot by the result of trial. Other times the whole lawsuit settles. Most cases in which pretrial discretionary review has been sought but denied probably do not, in fact, return later on appeal.

Crooks, at 1550.

To satisfy the effect prong, a party must demonstrate that a court's decision has an effect beyond the immediate litigation.

[W]here a trial court's action merely alters the status of the litigation itself or limits the freedom of a party to act in the conduct of the lawsuit, even if the trial court's action is probably erroneous, it is not sufficient to invoke review under RAP 2.3(b)(2). Errors such as these are properly reviewed, if necessary, at the conclusion of the case where they may be considered in the context of the entire hearing or trial.

Howland, 180 Wn. App. at 207.

Olympia has not been prejudiced by the Court of Appeals decision remanding this case back to the Trial Court. In fact, remand benefits Olympia because Olympia has not properly presented this issue to the Trial Court (the extent of the previous presentation being a short section and a footnote in its Reply in Support of Motion for Summary Judgment (CP 439-440), which was properly disregarded by the Trial Court and the

Court of Appeals as a late argument to which Nova had not been given an opportunity to respond). If Olympia wishes to raise a *Mike M. Johnson*, it can and should do so on remand, but that issue is not a proper basis for Supreme Court review on the current record.

5. Conclusion

This case is not ripe for review. The only issue raised in the Petition for Review, a *Mike M. Johnson* defense Olympia wishes to assert, was not properly raised below. Nova has not been given a full and fair opportunity to respond to it below. The record below (while suggestive and possibly sufficient to deny Olympia the defense), is far from complete on this issue, as it has never been developed for this issue. The best way to handle this *Mike M. Johnson* defense is to remand this case and allow the parties to develop the record on it. This Court should deny Olympia's motion for discretionary review and remand to the Trial Court for further proceedings.

Respectfully submitted this 24th day of July, 2017.



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