

3 Key Takeaways From Wash. Spearin Doctrine Ruling

By **Geoff Palachuk** (October 5, 2020)

A contractor sued for breach of contract for defects will often assert an affirmative defense that the owner supplied deficient plans or specifications under the Spearin doctrine.

Because that defense operates to completely shield the contractor from liability, the Washington Court of Appeals recently reaffirmed the maxim that a successful Spearin defense requires the contractor to prove its alleged breaches were caused solely by those deficient or incomplete plans and specifications.

That rule is based on the long-standing precedent first discussed by the U.S. Supreme Court in *United States v. Spearin*.^[1]

The most recent expression by the Washington appellate court in *Lake Hills Investments LLC v. Rushforth Construction Co. Inc.* illustrates how the Spearin doctrine remains a viable defense for contractors in limited circumstances.

The Lake Hills case involved a large multiphase commercial development project in Bellevue, Washington, just outside of Seattle. The owner, Lake Hills, sued the general contractor, AP Rushforth, for breach of contract, based on various construction defects throughout the project.

AP claimed that Lake Hills had materially breached first, and AP asserted multiple affirmative defenses to excuse AP's breaches. The case involved tens of millions of dollars in disputed claims, including about \$20 million at issue during trial. In part, Lake Hills argued that AP breached the contract and owed about \$11.5 million for defects and \$4 million for delays and liquidated damages.

AP argued the Spearin doctrine shielded AP from liability for defects, based on allegedly deficient plans and specifications. AP also claimed that Lake Hills cut and withheld payments for several month during the project, which constituted a prior material breach. For those underpayments and withholdings, AP sought approximately \$3 million. AP also blamed the owner for multiple delays to the project.

The trial lasted over two months. The jury returned a mixed verdict, awarding Lake Hills a portion of its alleged damages and awarding AP almost all the allegedly withheld payments. Part of the jury's verdict included the assessment and apportionment of liquidated damages against AP, based on delays attributable to the owner or contractor, respectively.

AP did not timely complete the project, which AP constructed in several phases, and delays ranged from 300-500 days for multiple phases. But the jury only found AP liable for a small portion of those liquidated damages.

Despite the mixed verdict on multiple contract claims and the apportionment rule in Washington, AP was awarded nearly all its attorney fees for the trial. Both parties cross-appealed.

The three primary issues on appeal included the jury instruction for the Spearin defense, an



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affirmative defense for apportionment of delays and whether the owner's alleged underpayments were a prior material breach sufficient to excuse the contractor from performance. As analyzed below, the Lake Hills case provides several key takeaways for Washington practitioners and construction attorneys around the country:

- A contractor may utilize the Spearin defense to excuse the contractor for its construction breaches only where the allegedly deficient plans and specifications were the sole cause of that contractor's breaches.
- To determine the proper assessment of liquidated damages under the majority rule, a fact-finder may apportion delay days to specific project participants, based on the relative fault of those parties causing the delays, but only where permitted by the contract.
- One party's continued underpayments might constitute a breach of the duty of good faith and fair dealing under Washington law, but only where such withheld payment constitute a material breach and depending on the facts of the particular case.

Each of those three sections are discussed in more detail below. Finally, the fourth section provides the disposition of the case and addresses future issues that might arise.

Application of the Spearin Defense

Generally, when an owner like Lake Hills provides building plans and specifications as part of a contract, the owner impliedly warrants that the plans and specifications will be workable and sufficient for the contractor to build the project.

Under Washington law, an alleged breach of that warranty can be the basis of a contractor's affirmative defense where the owner is seeking damages from the contractor. The Spearin doctrine is a defense for contractors in limited circumstances.

In Lake Hills, AP alleged that affirmative defense based upon Lake Hills' implied warranty and claimed that Lake Hills' plans and specifications were deficient. AP argued the allegedly defective plans and specifications caused all of the defects in AP's work. The jury returned a mixed verdict on the issue.

One of the jury instructions directed the jury to consider whether "AP breached the contract by failing to construct certain areas of work in compliance with the contract documents," and whether "Lake Hills was damaged as a result of AP's breach."

The jury found in favor of Lake Hills and held AP liable for multiple breaches of contract. AP asserted the Spearin defense, however, claiming that Lake Hills' defective plans and specifications caused the construction breaches and should shield AP from liability or damages. A successful affirmative defense by AP would deny Lake Hills' right to recover on the issue, even if Lake Hills proved that AP's work was defective.

During trial, AP carried the burden of proof to establish that its various construction

breaches were a result of Lake Hills' allegedly deficient plans and specifications.

On appeal, Lake Hills argued the trial court erred as a matter of law because AP's burden of proof should have been that the construction breaches resulted solely from the defective or insufficient plans or specifications.

The trial judge did not include the word "solely" in the jury instructions, which permitted AP to argue that any alleged defect in the plans and specifications, regardless of how minor, served as an absolute bar to AP's contractual liability. Lake Hills argued that jury instruction was a misstatement of Washington law. The court of appeals agreed, reversed, and remanded for a new trial.

Synthesizing several prior Washington cases, the court of appeals held that a contractor can be relieved from liability only by proving the alternate proximate cause of the allegedly defective plans and specifications solely caused the contractor's breach. AP's affirmative defense rested on the theory that Lake Hills' allegedly defective plans and specifications caused AP's various construction defects and the damages to Lake Hills.

The court held: "To be relieved of all liability for its breaches, AP had to prove Lake Hills' defective designs 'solely' caused the plaintiff's damages." The court found that this holding most closely aligned with Washington precedent and the standards acknowledged by commentators on construction law.

The case presents important issues for owners and developers on both public and private projects. Under Washington law, designs and specifications must be workable and sufficient, but the standard is not perfection.

Lake Hills reaffirmed the long-standing rule that a contractor may be shielded from liability only by proving that an alleged defect in the plans and specifications was the sole cause of the contractor's construction breaches. That holding also reflects the jurisprudence of several decisions by the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit, two courts that handle the majority of construction case in the U.S.

The Strong Majority Rule of Delay Apportionment

Overlapping critical path delays that are partly caused by a contractor and partly by an owner — i.e., concurrent delays — typically nullify the assessment of liquidated damages. But a contractor generally will be held liable for liquidated damages if the contractor cannot establish proof of concurrent or owner-caused delays affecting the critical path.

Delays that affect the critical path extend the overall length of construction. Where the parties' contract provides for the allocation of fault for delays, therefore, a trier of fact must analyze each delay day in order to apportion fault.

The Lake Hills court clarified the rule for apportionment of liquidated damages, and held that factfinders can apportion delay days between the contracting parties, where allowed by contract, depending on each party's respective fault for causing delays.

At trial, Lake Hills sought to assess liquidated damages of \$2,500 per day for delays on each phase that were caused by the conduct of AP or its agents. The jury instruction at issue allowed the factfinder to excuse AP for any delays that AP, alone, did not cause.

Although the law typically requires that a general contractor like AP carry the burden of

proving such delays were the fault of concurrent or owner-caused delays, the jury instruction provided AP with a negative burden of proof focused on contractor-caused delays.

The Washington court of appeals acknowledged that negative phrasing. Without addressing the issues related to each party's respective burden of proof, however, the court reasoned that the parties' contract allowed apportionment of delays. The court determined that liquidated damages could be assessed under the contract by "examining each day of delay, identifying the cause of delay, and adding or subtracting delay days based on the conduct of each party and its agents."

The court adopted the modern rule of "a 'strong majority' of jurisdictions" that a factfinder can apportion liquidated damages between the contracting parties, where allowed by contract, depending on the relative allocation of fault in causing those delays.

The jury was instructed to excuse AP from any delay days "not solely caused by AP." But the court of appeals determined that instruction did not reflect the parties' contract. The court reasoned that "[t]he instruction let the jury excuse AP from any day of delay caused by anything other than itself, including its own agents."

The jury instruction also did not account for any delays caused by AP's agents, subcontractors, material suppliers, consultants, etc., which normally constitute delays attributable to the general contractor.

The trial court provided the narrower and negatively phrased jury instruction, and the jury ultimately found "AP was not the 'sole' cause of 90 percent of the delay on the project."

The court of appeals held the instruction "misled the jury without misstating the law," but the court also determined that Lake Hills suffered no prejudice. In the absence of any prejudice to Lake Hills, the court upheld the jury instruction.

The takeaway from the court's holding is that delay days may be apportioned to the contracting party found at fault for the cause of delay. That rule had not truly been clarified in Washington since the 1980s. However, the decision in Lake Hills also should not change a contractor's burden of proof at trial.

In order to overcome or nullify the assessment of liquidated damages during trial, a contractor must establish proof of either concurrent or owner-caused delays that affect the critical path. Only then, where the delays are attributable to such concurrent or owner-caused delays, a factfinder may apportion delay days to determine the proper assessment of liquidated damages.

Whether Underpayment Can Excuse a Contractor From Quitting

The court also examined whether an owner's continued underpayment and partial withholding could excuse the contractor from quitting the project. Lake Hills had partially withheld payments from AP over several months during multiple phases of construction. Eventually, AP quit the job.

The court of appeals considered whether such prior underpayment by Lake Hills could excuse AP's decision to leave the project. With a narrow and fact-specific holding, the court determined AP could be excused for quitting.

At trial, AP argued that Lake Hills hindered and interfered with AP's ability to perform, and that Lake Hills could not thereby assert a breach for AP's failure to meet its contractual obligations. AP's argument was predicated on each party's duty of good faith and fair dealing.

AP introduced evidence that Lake Hills withheld portions of payment for multiple months, and AP proposed a jury instruction that would allow it to prove that interference or hindrance of AP's work could excuse AP from performing.

Only a prior material breach would typically excuse the other party's failure to perform, and the court of appeals reaffirmed this principle by acknowledging "[t]he jury should have been instructed that only a material breach of the duty of good faith and fair dealing by Lake Hills could excuse performance by AP." The thrust of the analysis is materiality of the alleged breach.

The court held the jury instruction misstated the law by omitting "material," but the court also held that error was harmless because the jury entered a finding consistent with AP's theory of the case. During trial, AP argued that Lake Hills engaged in underpayments to starve AP of financial resources and force AP off the job.

The jury seemingly agreed, according to the court of appeals, because the jury awarded AP the majority of the sum sought for withheld payments. The court of appeals determined that the jury's verdict was consistent with a finding of material breach, and the absence of the word "material" in the instruction was, therefore, harmless.

The court took care to emphasize that its holding on that issue should be viewed narrowly, based on "the particular facts and arguments before the jury" and the "very particular facts presented" during trial.

The court's holding nevertheless provides an important takeaway for construction attorneys, because contractors or subcontractors may argue that any hindrance or interference with that contractor's work constitutes a breach sufficient to excuse performance. But that is not an accurate statement of the law.

Under Washington law, like most other jurisdictions, only a material hindrance or material interference — under a specific term of the contract — will constitute breach. The court's fact-specific analysis in Lake Hills does not change the law requiring materiality for an alleged breach, nor the law surrounding each party's respective duty of good faith and fair dealing.

Unless a contractor or subcontractor can tie the alleged interference to a specific contractual term, and provide proof of materiality, then such interference probably does not constitute a breach of contract.

Disposition and Future Issues

The court ultimately reversed and remanded for a new trial, based on the Spearin analysis discussed in Section 1. The court also denied AP's cross-appeal and vacated the trial court's award attorney fees. Although the court analyzed other potentially erroneous jury instructions, the court declined to reverse the instructions for liquidated damages or prior material breach.

There is no indication whether either party will seek further appeal to the Washington

Supreme Court, but this decision addressed many of the contractual issues faced by Washington practitioners and construction attorneys throughout country. The legal issues surrounding liquidated damages, in particular, have produced varied results in Washington courts.

There is minimal guidance on liquidated damages from the Washington State Supreme Court, in the context of construction projects, and that issue might be ripe for clarification in the future. Some of the other narrow holdings in the Lake Hills decision might also be considered for adjudication by the supreme court if either party petitions for review.

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[1] United States v. Spearin, 248 U.S. 132 (1918).