

Construction Law

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Chair's Report

By Athan Tramountanas – Short Cressman

It is my honor to serve as chair of the Construction Law Section for the 2017-2018 term. The chair-elect is Jason Piskel, and the vice-chair is Amber Hardwick. We hope to continue the fine work of the Section board and meet the needs of our section, while liaising with the WSBA at large. We have a dedicated team of board members that are looking forward to providing you with CLE content, topical forums, and opportunities to meet your colleagues in less formal settings.

Over the next year, our goal is to complete work on a *Washington Construction Law Deskbook*. The chapters are all drafted and are in the process of being peer edited before going off to the WSBA for its internal review and publication. Many thanks to Ron English for leading this effort.

On top of the deskbook, we will continue to have our winter dinner / CLE, our midyear CLE / Section meeting, and law student writing competition. We are also looking to hold a Construction Law CLE in the Tri-Cities. Keep an eye out for emails from the WSBA or the Construction Law list serv more details on these programs

First on the schedule will be our fall forum on November 8. We will have an attorney from the American Institute of Architects (AIA) talk to us about the 2017 changes to the AIA Document A201 General Conditions. CLE credits are pending. The forum will be held at the WSBA office in downtown Seattle at 5:30, with refreshments and food. Details will be forthcoming shortly. Thanks to Jennifer Beyerlein and Bart Reed for organizing this event. We hope to see everyone at this event.

Subcontractors on Washington Public Projects Can Now Get Their Retainage Money Sooner

By Brett Hill – Ahlers & Cressman PLLC

Subcontractors on public projects in Washington state will no longer be required to wait until final acceptance of the project to get their retainage money. Changes to RCW 60.28.011, which went into effect on July 23, 2017 and apply only to Washington public projects, allow subcontractors to get their retainage sooner.

Under prior law, a subcontractor could only get its retainage prior to final acceptance if the general contractor provided a retainage bond to the public owner to secure a release of the general contractor's retainage and the subcontractor then provided a similar retainage bond to the general contractor in the amount of its own retainage. If the general contractor decided to not provide a retainage bond to the owner, the subcontractor would be forced to wait until final acceptance of the project before it could get paid its retainage.

This meant that some subcontractors had to wait for years after their work was completed before the project was accepted and they received their retainage money. Retainage represents 5 percent of the subcontractor's total billings on a public project in Washington – and this is typically a large portion of the subcontractor's total profit on the job. This extended delay can be very frustrating for subcontractors and, thus, this legislation was supported by many subcontractor trade organizations in Olympia.

The new statute will allow a subcontractor to request that the general contractor submit a bond to the owner for that portion of the general contractor's retainage pertaining to the subcontractor. The general contractor may withhold the subcontractor's portion of the bond premium from the amounts that would then be paid to the subcontractor for their

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UPCOMING EVENTS

Fall Forum	November 8, 2017 (WSBA Conference Center)
Fall CLE	Tri Cities (date and location TBD)
Winter Forum	Dinner Meeting and CLE (Date and Location TBD)

SUBCONTRACTORS ON WASHINGTON PUBLIC PROJECTS CAN NOW GET THEIR RETAINAGE MONEY SOONER

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retainage. Once the bond is accepted by the owner and the funds are released to the general contractor, the subcontractor can obtain its retainage funds from the general contractor if it then provides the general contractor with a retainage bond.

The result of all this is that the subcontractor can get its retainage sooner under the new statute, but it must pay for the bond premium on the bond that the general contractor provides to the owner and the bond premium required for the retainage bond that it provides to the general contractor. Although the bond premium costs will be deducted from the subcontractor's retainage, this statute has been viewed as a "win" for subcontractors, and especially those who have had to wait for extended periods of time to get their retainage money.

The general contractor is required to provide the retainage bond to the owner for the subcontractor's retainage unless (1) the subcontractor refuses to pay the subcontractor's portion of the bond premium; (2) the subcontractor refuses to provide the general contractor with a retainage bond; or (3) the bond is not "commercially available."

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The Donatelli Saga

By Michael J. Bond – *Shedler Bond*

This paper describes the *Donatelli* case, its origin, the reported and unreported court decisions, and its impact on the law governing claims against design professionals in Washington. What a long strange trip it's been!

The case began with a 2002 contract to engineer two adjoining short plats located in unincorporated King County. Mr. Donatelli was the developer. He hired D. R. Strong Consulting Engineers of Kirkland (DRS) to provide the civil engineering and surveying necessary to obtain project approval. I represented the engineers.

King County issued its Preliminary Approval for the short plats on October 2, 2002. A Preliminary Approval grants tentative approval of the short plat subject to completion of improvements yet to be fully designed. Under King County Ordinance, the build out must be completed or bonded and the plat recorded within 60 months; that deadline was October 2, 2007.

Donatelli's contract with DRS called for six phases of services, culminating in the filing of the final plat map once the storm, water, sewer and roads were built. The contract included a limitation of damages, prevailing party attorney fees, and it promised the work would be completed "in accordance with generally accepted professional engineering and surveying practice."

Three King County departments, Seattle Public Utilities for the water, and a local sewer district reviewed the plans. Donatelli took the plans in to each of these agencies. As usual, each of them had comments requiring revisions, none of which were out of the ordinary.

The County's plan review was completed in 15 months, which was typical as real estate development in Western Washington then was red hot. Problems with the work of Donatelli's other design consultant, shifting requirements of the permitting agencies, his own financial circumstances, and the financial crisis that began in 2007 impacted the project work. Working as his own general contractor, he began construction in early 2006.

In January 2007, he borrowed \$750,000 from a hard money lender at 12 percent. By January 10, 2007, the improvements were built and DRS filed the final plat map. In mid July, the Fire Marshall noted Donatelli had not taken out the required permit for the hydrant he installed. The Fire Marshall – not the engineer – is the one who carries the plans in for recording once he is satisfied, and in addition to the permit issue, he imposed a new requirement for a wider road, which of course was already built. While DRS, Donatelli, the Fire Marshall and the King County roads department argued about it, the plat expired unrecorded on October 2, 2007.

This was a problem.

DRS obtained a new Preliminary Approval in February 2008, and that must be some kind of record. With all permit issues resolved, the plat was ready to record, again, in August

2008. But by then the worldwide financial crisis was in full bloom, bank liquidity evaporated, the market value of lots like those Donatelli had developed fell by 50% or more, and no lender wanted to touch the project. He stopped making payments on his loan, and in May 2009 he lost the project to a short sale foreclosure, and he filed suit against his engineers at DRS to recover his financial losses.

Donatelli's complaint alleged breach of contract, negligence, negligent misrepresentation and a violation of the Consumer Protection Act. The gist of his claim was DRS promised to get him a recorded plat within 1 ½ years for fees not to exceed \$50,000, they failed to do so, and he lost it all as a result. The alleged misrepresentations were as to the time to completion and the estimated fees. My preliminary analysis was that both negligence claims were barred by *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994), and I thought the CPA claim wasn't viable either.

In *Berschauer/Phillips*, the court adopted a pure form of what we used to know as the Economic Loss Rule. It says claims for financial loss arising from a construction project where there has been no personal injury or catastrophic property damage are limited to contract remedies. The *Berschauer/Phillips* court applied this rule to affirm summary judgment dismissing claims for negligence and negligent misrepresentation brought against an owner and its design team for delay and impact damages on a school construction project. I know it well as I represented the defendant architect in that case.

After completing written discovery, I took Mr. Donatelli's deposition and he said the DRS engineers had completed all six phases of services under the contract. His only complaint was he didn't get a recorded plat and the fees were more like \$100,000. In fact, the fees paid to DRS were \$92,000 under the contract and four additional services amendments.

Thinking the trial court would be more inclined to grant summary judgment if he knew the contract claim remained, in 2010 we filed a motion to dismiss the negligence claims using a stock *Berschauer/Phillips* brief, one I've used successfully many times; in addition we sought dismissal of the CPA claim. Judge Jim Rogers said he thought I was right on the law but he believed the law was changing, and he denied the motion to dismiss the negligence claims. He entered summary judgment dismissing the CPA claim.

A few weeks later, Donatelli voluntarily dismissed the claim for negligent misrepresentation. They thought Judge Rogers' comments about the CPA claim meant that claim was doomed anyway. The dismissal became important later.

In opposition to our motion, Donatelli filed declarations of two of his contractors. They said, essentially, DRS oversaw the construction work and served as construction managers, an assertion DRS denied, in part, because no such service was

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THE DONATELLI SAGA from previous page

called out under its contract. I didn't depose or otherwise respond to these declarations as I concluded the testimony was not relevant to the legal issue, which was whether claims for financial loss on a construction project with no personal injury or property damage were recoverable in negligence. Plus they created a disputed issue of fact.

We sought review in the Court of Appeals. Commissioner Verelen, as he was then, ruled the error in denying summary judgment was obvious and granted our motion for discretionary review.

After we filed our opening brief in the Court of Appeals, the Supreme Court issued its decisions in *Linda Eastwood, dba Double KK Farm v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 241 P.2d 1256 (2010) and *Affiliated FM Insurance v. LTK Consulting Services, Inc.*, 170 Wn.2d 442, 243 P.2d 521 (2010). These opinions changed the name of the economic loss rule to "Independent Duty." Some said calling it "economic loss" was confusing because even those suffering personal injuries had economic losses. Although the decision in *Berschauer/Phillips* explicitly was not overruled, the name of the rule and its application may have changed.

The new formulation of the rule says an independent duty was one whose origin could be traced to a source independent of the contract. In *Eastwood Farms*, the tort of waste arose independent of the parties' contract, a lease agreement. In *Affiliated FM Ins.*, the duty of reasonable care arose independent of the engineer's contract because a fire caused catastrophic property damage and a risk of personal injury. Of course, nobody asked me about it at the time.

If they had, I would have told them the economic loss rule was not applicable in either case. In *Eastwood Farms*, no party raised it – probably because there was a lease and not a contract, and property damage was alleged – but nevertheless Judge Houghton injected it in her opinion for the Court of Appeals. In *Affiliated FM Ins.*, the parties claimed property damage from a fire on the Monorail that was occupied by passengers and clearly a serious risk of personal injury existed.

I was unable to persuade the Court of Appeals these decisions changed nothing in the context of claims for financial loss without a personal injury or property damage, and Judge Rogers' denial of our motion for summary judgment was affirmed in July 2011 by unpublished opinion. Two lawyers not associated with the case filed a motion to publish, which was granted. So, we petitioned the Supreme Court which accepted review and affirmed. The decision is reported at 179 Wn.2d 84, 312 P.3d 620 (2013).

The court's opinion had two holdings. First, the court declared the independent duty rule could not apply because there was a dispute about what services DRS contracted to perform. The two contractors swore DRS was on site nearly every day as the construction manager, while DRS argued no such services were called out under the contract or performed in the field. The court said they could not say whether there

was a duty independent of the contract because there was a dispute about what was in the contract. Calls to my mind the Aflac duck. Second, they held a claim of misrepresentation, like the tort of fraud, arose independent of the contract. The court was unaware of the fact that claim was voluntarily withdrawn before the appeal began.

Following remand, I took the depositions of the two contractors. After authenticating the signatures on the two declarations they signed, they recanted the testimony. They said DRS was not on site nearly every day, one of them never even spoke to DRS on site, and they were unable to say why they signed the declarations, which were not true.

Three weeks later, Donatelli filed a motion for summary judgment asking the trial court, now Judge Bruce Heller, to declare 1) an independent duty clearly existed to permit the claims of negligence and negligent misrepresentation to move forward, and 2) the limitation on damages under the contract was unenforceable. And the evidence in support of their motion included the two original and now recently recanted contractor declarations! After retrieving the top of my head from the ceiling of my office, we responded with a request for sanctions for filing a motion that relied on what was then known to be false testimony.

Because this story is too long already, I can report Judge Heller denied my request for sanctions, but he entered summary judgment dismissing the claim of negligence, and he ruled the limitation of damages was enforceable. He also allowed Donatelli to amend his complaint to add the claim for negligent misrepresentation back into the case. Dang!

Judge Heller's 2015 memorandum opinion said the analysis for duty must begin, as the *Donatelli* decision said, with an analysis of what services the engineer agreed to perform. Finding that Donatelli made no claim other than what he alleged DRS agreed or allegedly undertook to perform, Judge Heller concluded Donatelli identified no basis that was independent of the alleged contract on which to impose a duty.

Donatelli amended his complaint, reasserting the claim that DRS misrepresented the time to completion and fees to complete the work. We filed *another* motion for summary judgment arguing that claims of misrepresentation must allege a presently existing fact, not a statement about something that would happen in the future. Neither the time to completion nor the fee estimate were presently existing facts.

Donatelli argued the Supreme Court's decision already decided the issue when it held the claim arose independent of the contract. Judge Heller noted the Supreme Court didn't decide whether misrepresentation must allege misrepresentation of presently existing facts. *Nor could they* as Donatelli had dismissed that claim before we commenced the appeal. Judge Heller granted summary judgment and dismissed the claim for negligent misrepresentation.

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THE DONATELLI SAGA *from previous page*

Donatelli attempted to appeal these two summary judgments, and review was denied. So, *five years* after my first attempt, all claims but one were dismissed.

We tried the case to a jury in August 2015 on a single claim for breach of contract, and the claimed breach was the alleged failure to file the final plat map before the plat expired. But the final plat map was filed in January 2007 and the plat didn't expire until that October. For some reason, Donatelli abandoned every other claim of breach of contract raised in the preceding six years of litigation. Judge Heller clearly signaled if the jury didn't toss the case he was inclined to rescue DRS on post-trial motion. The jury took less than 30 minutes to conclude 12-0 there was no breach of contract.

We filed a post-trial motion to recover our attorney fees and costs pursuant to the contract's prevailing party attorney fees clause. Reminding me of the admonition, *l'audace, l'audace, toujours l'audace*, but this time more like Wily Coyote than a French general, Donatelli asked for an offset for his own attorney fees as the prevailing party in the appeal. I had asked for recovery of the bargain basement hourly rate the insurer was paying me and when Donatelli claimed *his* attorneys' reasonable rate was \$380 per hour, I revised my claim, stipulating that \$380 per hour was a reasonable rate. Another Acme anvil fell from the sky. Judge Heller denied Donatelli's claim for an offset and adjusted my rate up to \$300 per hour, still low but well above what the insurer had paid me.

In a last futile gasp, Donatelli appealed the summary judgments and the award of attorney fees. The Court of Appeals affirmed all rulings and granted us additional attorney fees in an unpublished decision. Eight years after filing suit, the claim is resolved. Now the challenge is to collect.

What can be learned from all this? Interlocutory appeals are time consuming and subject to new decisions that may impact your case. Don't believe everything the other side gives you when they use declarations of witnesses in support of their case.

I asked the court to clarify the bounds of the new independent duty rule. But the unpublished final opinion affirmed the rulings on what is essentially a procedural basis without clarifying how the courts should apply the new rule. In the end, I believe the gist of the economic loss rule we fought for in *Berschauer/Phillips* survives: in construction project claims with no personal injury or property damage, the contract between the parties will dictate the outcome.

And above all, there is value in persistence. Beep-beep!

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Washington Supreme Court Affirms Brightwater Decision Regarding Application of *Olympic Steamship* to Sureties

By: Bart W. Reed – Stoel Rives LLP

On July 6, 2017, the Washington Supreme Court confirmed that the equitable rule announced in *Olympic Steamship*—providing for attorney fees where the insurer compels the insured to take legal action—applies to performance bond sureties on public projects.¹ In *King County v. Vinci Construction Grands Projects/Parsons RCI/Frontier-Kemper*, the court affirmed the trial court's award of over \$14 million in attorney fees and costs against sureties of a public works contract.²

In 2006, King County contracted with a joint venture of three construction companies to build the piping/conveyance system for the new Brightwater wastewater treatment project. The joint venture contractor submitted a performance bond from five surety companies. Under the contract, if the contractor was in default, the sureties were obligated to step in and remedy the default. When the project was delayed, King County declared the contractor in default and asked the sureties to cure. They refused, claiming that the contractor was not in default.

At trial, the sureties adopted the contractor's defense that no default had occurred. The jury, however, sided with King County, awarding \$130 million in damages (the largest commercial jury verdict in Washington state history) against the contractor and sureties, jointly and severally. Relying on *Olympic Steamship* and *Colorado Structures*,³ which applied the *Olympic Steamship* rule to sureties, the trial court awarded over \$14 million in attorney fees and costs against the sureties (believed to be the largest attorney fee award in Washington history). The trial court rejected the sureties' argument that King County's fees should be allocated between "contractor" and "surety" issues on the ground that, by adopting all of the contractor's defenses, the sureties had prevented such an allocation.

The contractor and sureties appealed the award of fees, arguing that RCW 39.04.240⁴ provided the exclusive fee remedy for public works contracts, thus barring the equitable rule announced in *Olympic Steamship*. They further argued that, even if *Olympic Steamship* applied, the fees should be segregated between the contractor and surety claims. The Washington Court of Appeals affirmed the trial court's judgment in its entirety.⁵ The Washington Supreme Court granted the sureties' petition for review.⁶

The Supreme Court held that the rule announced in *Olympic Steamship* applied to the suretyship context, affirming its prior plurality opinion in *Colorado Structures*. Moreover, the court held that the fee remedy in RCW 39.04.240 did not exclude other remedies in public works contracts.

Thus, the court affirmed the award of fees because King County was forced to assume the burden of legal action to obtain the benefit of the performance bond. Moreover, the trial court did not abuse its discretion in declining to segregate the attorney fees because the sureties adopted the entirety of the contractors' defenses against breach, and the issues of breach and coverage under the bond shared a "common core of facts."

This case has important implications for contractors and performance bond sureties. Sureties will face the prospect of attorney fees in cases where, as here, the owner is compelled to take legal action to obtain the benefit of the bond. Moreover, sureties may be jointly and severally liable for the full award of fees where the breach and coverage claims are intertwined and indistinguishable.

Bart W. Reed is an attorney with the Construction & Design Group in the Seattle office of Stoel Rives LLP and may be reached via email at bart.reed@stoel.com.

- 1 *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991) (plurality opinion).
- 2 *King Cty. v. Vinci Constr. Grands Projects/Parsons RCI/Frontier-Kemper*, No. 92744-8, 2017 WL 2876138 (Wash. July 6, 2017) (en banc).
- 3 *Colo. Structures, Inc. v. Ins. Co. of W.*, 161 Wn.2d 577, 598, 167 P.3d 1125 (2007).
- 4 RCW 39.04.240 applies the attorney fee award provisions of RCW 4.84.250 through RCW 4.84.280 to public works contracts.
- 5 *King Cty. v. Vinci Constr. Grands Projects/Parsons RCI/Frontier-Kemper*, 191 Wn. App. 142, 184, 189, 364 P.3d 784 (2015).
- 6 *King Cty. v. Vinci Constr. Grands Projects/Parsons RCI/Frontier-Kemper*, 186 Wn.2d 1008, 380 P.3d 459 (2016).

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