

Construction Law

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Chair's Report

Greetings and welcome to 2017! The Construction Law Section had an active 2016 with numerous continuing legal education programs, dynamic speakers and social events. It has been rewarding to see our membership continue to grow and for your Council members to continue to invest their personal time and energy to provide educational programs and outreach. Since our last newsletter in August 2016, the Section put on its Fall Forum and its first Washington-Oregon Construction Law Section joint CLE in Vancouver, Washington. During the Fall Forum, Sound Transit Chief Financial Officer Brian McCarten provided insight on Sound Transit funding and expansion plans. With the passage of Sound Transit 3 – a \$54 billion measure – we can expect significant additional construction projects in the Seattle area in the coming years.

The Council has also been making a concerted effort to provide more diverse and dynamic CLE programs. The WA-OR Construction Law Section joint CLE was a prime example. Held in early November, speakers from both Washington and Oregon presented on various construction-related issues and the legal differences between the states. We will continue our efforts in promoting new and exciting programs in 2017. We are already planning our Midyear CLE in June during which speakers will discuss legal implications of various construction-related statutes. We are mixing things up this year by stepping away from the typical one-hour, one-topic and one-speaker format to keep things more dynamic and interesting. We will also be featuring a three-judge panel that will speak to construction law cases, questions, and issues. This was a highly successful and regarded session at last year's Midyear CLE and is not to be missed.

As I write this, I have received about four emails from paralegals and associates at my office as well as one from a client regarding the highs and lows of electronic discovery. If your practice is anything like mine, you have had adapt to using the other side of your brain and to get a handle on the technological challenges currently in demand to practice law. These challenges arise well before a case is filed. I find myself constantly addressing questions regarding how and what to advise clients regarding document retention policies, document maintenance, and litigation holds. The answers are different depending on the client so what factors are important to consider? Once litigation has been initiated we as attorneys now have to wade through a minefield of decisions related to document harvests, search terms, limiting custodians in production, deduping documents, and production sets. Do

you host in-house or use a web-based hosting system? How you answer these questions has a significant impact on cost, your use of the documents, and your compliance (or non-compliance) with the Civil Rules. Moreover, an attorney's understanding of these issues is paramount to set cost expectations for the client. Luckily, your Section is offering some help. On March 2, 2017, the Section will host its annual Dinner Meeting at Cutters in Seattle. Our speaker will address how to plan for and execute e-discovery both prelitigation and during litigation. This is a great opportunity to learn from an expert to understand what you need to know and most importantly, what questions to ask when dealing both with your clients and with vendors. Please save the date be on the lookout for an e-blast notice from WSBA with registration information for this event.

As always, make sure to check out our section webpage at www.wsba.org/Legal-Community/Sections/Construction-Law/ for newsletters, model contracts, and upcoming events. Wishing you and yours a healthy, happy, and prosperous new year.

Marisa Bavand

UPCOMING EVENTS

- Winter Forum: Dinner Meeting and CLE**
March 2, 2017 (Cutter's Crabhouse)
Mid-Year CLE June 9, 2017 (WSBA Conference Center)
Spring CLE (Date and Location TBD)

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Save the Date

The Section is proud to announce its Fourth Annual Dinner Meeting and CLE

Thursday, March 2, 2017
Cutter's Crabhouse
2001 Western Ave., Seattle, WA
5:30 to 8:30 p.m.

The event will feature a reception followed by dinner and a CLE presentation (approval pending for one hour of CLE credit). We hope to have the reception sponsored by a major vendor.

Look for details and a notice from the Bar Association in early February to sign up. We anticipate the cost will be only \$50, a great value. Save the date now. Space will be limited and last year we reached capacity quickly. We hope to see you there.

Presentation

Evidence Matters! Electronic evidence matters even more these days. Do you understand the means and methods, rules, and risks on preserving, producing, and obtaining electronic evidence? Do you know how best to use that evidence to make a persuasive presentation?

Two experienced and knowledgeable Washington lawyers will answer these questions and provide valuable guidance in the form of Top 10 Construction Law E-Discovery Tips. You will learn how to advise your clients and collect, review, produce, and present electronic evidence relevant to construction law issues in an efficient and cost-effective manner. You will see demonstrations and real-world examples to show how the use of computer, smartphone, and social media evidence can determine the outcome of a case.

Speakers

Washington attorneys Larry Johnson (www.e-dataevidence.com) and Tom Howe (www.howelawfirm.com) are seasoned trial lawyers with deep technical backgrounds. They have been referred to in a law.com article as "among the top 200 e-discovery lawyers in the world," providing legal/technology consulting and expert witness services to major national law firms, Fortune 500 legal departments, e-discovery vendors, and state and federal government agencies.

Their practical and entertaining presentation style makes them highly sought-after speakers. In addition to speaking at CLEs throughout the United States and Canada, they have also authored numerous articles on the law and technologies involved in e-discovery.

Construction Law Section 2016-2017

Officers

Marisa Bavand, Chair
Groff, Murphy PLLC
300 E. Pine St.
Seattle, WA 98722-2029
(206) 628-9500
mbavand@groffmurphy.com

Athan Tramountanas, Chair-elect
Short Cressman & Burgess PLLC
999 3rd Ave., Ste. 3000
Seattle, WA 98104
(206) 682-3333
athant@sclblaw.com

Jason Piskel, Vice-chair
Piskel Yahne Kovarik PLLC
522 W Riverside Ave Ste 410
Spokane, WA 99201-0519
(509) 321-5930
jason@pyklawyers.com

Ron J. English, Secretary
Seattle Schools, General Counsel,
retired
15624 111th NE
Bothell, WA 98011
206-321-2455
rjenglish@yahoo.com

**Jennifer McMillan Beyerlein,
Treasurer**
Lane Powell PC
1420 5th Ave., Ste. 4200
Seattle, WA 98111-9402
(206) 223-7000

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Council Members

Term Ending 2017

Amber L. Hardwick
Green & Yalowitz, PLLC
1420 5th Ave., Ste. 2010
Seattle, WA 98101-4800
(206) 622-1400

Brett Hill
Ahlens & Cressman PLLC
999 3rd Ave., Ste. 3800
Seattle, WA 98104-4023
(206) 287-9900
bhill@ac-lawyers.com

Term Ending 2018

Janelle Brennan
Garco Construction, Inc.
4114 E Broadway Ave.
Spokane, WA 99202-4531
(509) 789-1505
janelleb@garco.com

Diane Utz
Watt, Tieder, Hoffar & Fitzgerald
1215 4th Ave., Suite. 2210
Seattle, WA 98161-1016
(206) 204-5800 x5812
dutz@watttieder.com

Bart Reed
Stoel Rives LLP
600 University St., Ste. 3600
Seattle, WA 98101
(206) 624-0900
bart.reed@stoel.com

Term Ending 2019

Richard Wetmore
Dunn & Black, PS
111 N Post St Ste 300
Spokane, WA 99201-4911
(509) 455-8711
rwetmore@dunnandblack.com

Colm Nelson
Foster Pepper PLLC
1111 3rd Ave Ste 3000
Seattle, WA 98101-3292
(206) 447-6470
colm.nelson@foster.com

Zak Tomlinson

Pacifica Law Group
1191 2nd Ave Ste 2000
Seattle, WA 98101-3404
(206) 245-1700
zak.tomlinson@pacificallawgroup.com

Special Projects Chair

Jason Piskel (2015-16)
Piskel Yahne Kovarik, PLLC
522 Riverside Ave. #410
Spokane, WA 99201
(509) 321-5930
jason@pyklawyers.com

BOG Liaison

Dan Bridges
McGaughy Bridges Dunlap PLLC
3131 Western Ave, Suite 410
Seattle, Washington 98121
(206) 445-1987
dan@mcbdlaw.com

Young Lawyers Liaison

Sean Skillingsstad
Assistant Attorney General
Labor and Industries Division
PO Box 40121
Olympia, WA 98504
(360) 709-6468
seans@atg.wa.gov

DOSH Fall Protection Rules

By Sean Skillingstad – Assistant Attorney General

Falls are the leading cause of work-related injuries and deaths across all industries in Washington. The Federal Occupational Safety and Health Administration has determined that Washington's fall protection standards are less effective than the federal counterparts, and as such, DOSH is amending its fall protection rules.

The focus of the new rulemaking is on residential construction, and specifically: ambiguous language with regards to skylights and wall openings, the use and strength of warning lines, alternatives to conventional fall protection-catch platforms and safety watch systems and trigger height.

No decisions have been made regarding new standards. Industry stakeholders are encouraged to participate in the rulemaking process. No-cost, confidential consultation services are available to builders through Labor & Industries upon request. Avoid costly litigation and contact your clients today!

More information about L&I's Consultation Program can be found at: <http://www.lni.wa.gov/Safety/Consultation/About.asp>.

More information about Fall Protection Rulemaking can be found at: <http://www.lni.wa.gov/Safety/Rules/WhatsNew/FallProtection2016/default.asp>.

In Memoriam

The Washington construction bar lost another giant recently, Paul Cressman Sr. Paul was born in Pennsylvania and moved west in 1927. He attended Roosevelt High School and then the University of Washington. His time at the University was interrupted by four years of active duty in the United States Army Quarter Master Corps during World War II. In 1947, he graduated from the University of Washington, School of Law, and was hired in September 1949 by Rumens, Griffin, & Short, which later became Short Cressman & Burgess. Paul loved the practice of law, and the people who practiced with him. Throughout his life he was a mentor to both old and new attorneys, and he will be greatly missed by all those who knew him.

Liquidated Damages Case Reaffirms Two-Part Test

By Emily Miner – 3L, Seattle University School of Law

Liquidated damages can be a useful tool to protect yourself in the event of a contract breach. In a 2015 Division I Court of Appeals decision, the court upheld a liquidated damages provision in an employment contract. The case, *Salewski v. Pilchuck Veterinary Hospital*, 189 Wn. App. 898 (2015), involved a veterinary hospital seeking to enforce an arbitration award made in its favor after a dispute involving a liquidated damages provision of the non-compete clause of the contract. The Court of Appeals affirmed the trial court's decision that the liquidated damages provision was enforceable because it reasonably anticipated the unpredictable financial harm that would result from a violation of the non-compete agreement.

The non-compete agreement included a provision that stated that the employee would agree to pay liquidated damages in the amount of \$300,000 for any violation of the non-compete agreement. When it was discovered that the employee did in fact breach the non-compete agreement, the veterinary hospital sued to enforce the liquidated damages provision.

The employee argued that the liquidated damages provision was not enforceable because it was not based on any formula and did not resemble any actual damage that might befall the veterinary hospital if a veterinarian were to leave the practice and compete directly. The court rejected employee's argument, finding that Washington courts were loath to interfere with the rights of the parties to contract as they please between themselves. Though the court acknowledged that the contract may be an unfortunate one for the delinquent party, it was not the duty of courts to relieve parties from the consequences of their own improvidence.

The court held that liquidated damages clauses are favored and enforceable if they do not constitute a penalty or are otherwise unlawful. The two-part test for the enforceability of liquidated damages requires that: (1) the amount fixed must be a reasonable forecast of just compensation for the harm caused by the breach, and (2) the harm must be such that it is incapable or very difficult to ascertain. The key inquiry is whether the specific liquidated damages were reasonable at the time of contract formation.

This means that the actual damages that occurred are not relevant to the inquiry of the reasonableness of liquidated damages provisions. Courts determine the reasonableness of the liquidated damages amount by analyzing how challenging it is to estimate the financial harm that would be caused by the breach. Accordingly, the greater the prospective difficulty of estimating possible damages, the greater the range of reasonableness used in assessing the liquidated damages provision.

Court of Appeals Decision on Quantum Meruit Recovery

By Ron J. English

The Court of Appeals, Division III, has issued a decision addressing the application of quantum meruit recovery where the contractor fails to provide timely notice. In *General Construction Company v. Grant County PUD No. 2*, 195 Wn. App. 698, 380 P.3d 636 (2016), the court heard an interlocutory appeal on whether a contractor's quantum meruit claims were barred, where the contractor failed to comply with contract notice requirements.

The owner relied on *Mike M. Johnson v. Spokane County*, 150 Wn.2d 375, 78 P.3d 161 (2003), to reject the contractor's claims. *Johnson* held that contract notice requirements must be followed by contractors, absent an unequivocal waiver of the requirements by the owner. The contractor relied on *Bignold v. King County*, 65 Wn.2d 817, 399 P.2d 611 (1965), which held that a contractor who failed to give contractual notice, but who gave actual notice and complied with direction from the owner, was allowed to recover. That court allowed recovery in quantum meruit as "an appropriate basis for recovery when substantial changes occur which are not covered by the contract and were not within the contemplation of the parties, if the effect is to require extra work and materials or to cause substantial loss to the contractor."

The GCC majority concluded that the doctrine of quantum meruit remains viable after *Johnson* for matters not included with the contract. The court reconciled an apparent conflict between *Bignold* and *Johnson*, discerning the following rule: "First, for work within the scope of the contract, the terms of the contract must be complied with unless there is evidence that [the owner] waived compliance with the notice and claim requirements. For work outside of the contract, and changed work within the scope of the contract where GCC satisfied the contractual notice and claim provisions, quantum meruit applies and entitles GCC to compensation."

The court then rejected the contractor's quantum meruit claim, because the added effort was clearly part of the contractor's contractual responsibility to protect the work in progress.

The concurring opinion disagreed with the majority's reasoning, arguing that the two cases are irreconcilable, that the distinction between work "on the contract" and work "outside the contract" is sometimes difficult and nonsensical and that *Johnson* effectively overruled *Bignold*.

Comment: In attempting to reconcile *Bignold* and *Johnson*, the GCC decision appears to broaden application of quantum meruit recovery, to include situations where the changed work is within the scope of the contract, so long as the contractor satisfied the contractual notice and claim provisions. However, both the majority and concurring opinions fail to take into account the full rationale in *Bignold*. That decision relied on actions of the owner to impede the contractor. Just prior to the language quoted above, the decision states that the owner's engineer issued arbitrary and capricious orders, noting

"[I]n every construction contract there is an implied term that the owner or person for whom the work is being done will not hinder or delay the contractor, and for such delays the contractor may recover additional compensation." The *Bignold* decision goes on to state: "[M]oreover, the conduct of the appellant, ... unquestionably required the contractor to perform extra work which would not otherwise have been necessary, and it is only just that there be compensation therefor." Thus *Bignold* ultimately turned on the conduct of the owner, not on whether the work was within the scope of the contract, and is not inconsistent with the *Johnson* decision. Quantum meruit recovery is a viable source of recovery after *Johnson*, but its application should not be extended to include changed work within the scope of the contract.

Contractor Liability Changes

By Sean Skillingstad – Assistant Attorney General

LNI is rewriting its guidelines for DOSH enforcement and consultation staff when assessing an upper-tier contractor's compliance with WISHA as it applies to a lower-tier contractor or its employees. The new guidelines will also apply to owners/developers acting as general contractors under *Weinert v. Bronco National Co.*, 58 Wn. App. 692, 795 P.2d 1167 (1990).

The Washington Supreme Court has held that the liability of a general contractor to employees on the worksite is "per se" liability. See *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 122, 52 P.3d 472 (2002). Washington courts have explained that general contractors have a nondelegable, specific duty to ensure compliance with all applicable WISHA regulations for "every employee on the jobsite," not just its own employees. *Stute*, 114 Wn.2d at 456, 463-64; accord *Kamla*, 147 Wn.2d at 122. Thus, a general contractor's duty to protect workers on the jobsite extends to "any employee who may be harmed by the employer's violation of the safety rules." *Afoa v. Port of Seattle*, 176 Wn.2d 460, 471, 296 P.3d 800 (2013).

The Department interprets these statements from the Washington Supreme Court to mean that if there is a serious violation by a lower-tier contractor, a parallel citation to an upper-tier contractor may be issued. Because the general contractor has authority to influence working conditions on a construction site, the general contractor has ultimate responsibility under WISHA for job safety and health at the job site. As a matter of policy and prosecutorial discretion, the Department is still determining to what extent it will exercise the broad prosecutorial power implied in the phrase "per se liability."

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WASHINGTON STATE BAR ASSOCIATION
Construction Law Section
1325 Fourth Avenue, Suite 600
Seattle, WA 98101-2539

Your Input Is Needed!

The Construction Law Section Newsletter works best when Section members actively participate. We welcome your articles, case notes, comments, and suggestions concerning new developments in public procurement and private construction law. Please direct inquiries and submit materials for publication to:

Athan Tramountanas
Short Cressman & Burgess PLLC
999 Third Avenue, Suite 3000
Seattle, WA 98104
athant@scblaw.com

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October 1, 2016 – September 30, 2017

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Washington State Bar Association
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