

Construction Law

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Chair's Report

By Amber Hardwick – OAC Services, Inc.

Dear fellow section members,

I hope everyone is staying safe during these challenging times. The impacts from COVID-19 are unprecedented in the modern era and certainly not contemplated when most parties entered into construction contracts. I have every confidence that our membership will be a credit to the WSBA as we assist our clients through complex delay and cost issues.

Remember to use the Construction Section listserv as a resource in working through these issues. We have an active listserv where members have already delved into Governor Inslee's proclamations as they relate to the construction industry, and what this has meant to construction projects in Washington. Here are some topics that have been addressed so far:

- Proclamation 20-25 "Stay Home, Stay Healthy," dated March 25, as extended.

- Essential Critical Infrastructure Exception and Governor's Guidance Memo dated March 25.
- Phase 1 Construction Restart notice dated April 24.
- FAQs on Construction Restarted dated April 29.
- Phase 2 Restart is expected to continue the current Phase 1 requirements to more construction projects.

Due to COVID-19, our section elections have been extended.

We received great responses that have been vetted by our elections committee. Be on the lookout for your ballot—voting will be done online through the WSBA process.

Our next upcoming event is the annual Summer Meeting and Midyear CLE. It will be held on June 12 and—because of current social distancing requirements—will be via videoconference. To continue our recent tradition, we will follow the CLE with a video-conferenced happy hour. It won't be the same as seeing everyone face to face, but it will be good to connect the best way we can.

Stay safe!

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MARK YOUR CALENDARS!

JUNE 12

**Summer Meeting
Midyear CLE**

Online Video Conference

6 hrs general credit | 1 hr ethics credit

Construction Law Section 2019 - 2020

EXECUTIVE COMMITTEE

Chair: Amber Hardwick
OAC Services, Inc.
2200 1st Ave S Ste 200
Seattle, WA 98134-2078
ahardwick@oacsvcs.com

Chair-Elect: Brett Hill
Ahlers Cressman, & Sleight PLLC
999 3rd Ave Ste 3800
Seattle, WA 98104-4023
brett.hill@acslawyers.com

Vice-Chair: Colm Nelson
Stoel Rives LLP
600 University St Ste 3600
Seattle, WA 98101-4109
colm.nelson@stoel.com

Secretary: Allison Murphy
Groff Murphy PLLC
300 E Pine St
Seattle, WA 98122-2029
amurphy@groffmurphy.com

Treasurer: Jennifer Beyerlein
Lane Powell PC
1420 5th Ave Ste 4200
Seattle, WA 98101-2375
beyerleinj@lanepowell.com

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EXECUTIVE COMMITTEE MEMBERS

Term Ending 2020

Todd Henry
Inslee Best Doezie & Ryder, P.S.
10900 NE 4th St Ste 1500
Bellevue, WA 98004-8345
thenry@insleebest.com

Seth Millstein
Pillar Law PLLC
1420 5th Ave Ste 3300
Seattle, WA 98101-2426
seth@pillar-law.com

Bryce Sinner
Landerholm PS
PO Box 1086
Vancouver, WA 98666-1086
bryce.sinner@landerholm.com

Term ending 2021

Lena Holohan
1191 2nd Ave Ste 400
Seattle, WA 98101-2997
lena.holohan@arup.com

Bart Reed
Stoel Rives LLP
600 University St Ste 3600
Seattle, WA 98101-4109
bart.reed@stoel.com

Paige Spratt
Schwabe Williamson Wyatt PC
700 Washington St Ste 701
Vancouver, WA 98660-3338
pspratt@schwabe.com

Term Ending 2022

Brian Guthrie
Ashbaugh Beal LLP
701 5th Ave Ste 4400
Seattle, WA 98104-7031
bguthrie@ashbaughbeal.com

Rick Wetmore
Dunn & Black, P.S.
111 N Post St Ste 300
Spokane, WA 99201-4911
rwetmore@dunnandblack.com

Masaki James Yamada
Ahlers Cressman & Sleight PLLC
999 3rd Ave Ste 3800
Seattle, WA 98104-4023
masaki.yamada@acslawyers.com

Newsletter Editor

Athan Tramountanas
Ogden Murphy Wallace PLLC
901 Fifth Ave, Suite 3500
Seattle, WA 98164
(206) 829-2709
athant@omwlaw.com

BOG Liaison

Kyle Sciuchetti
Miller Nash Graham & Dunn
500 Broadway St, Ste 400
Vancouver, WA 98660
(360) 619-7033
kyle.s@millernash.com

Young Lawyers Liaison

William Young
Schlemlein Fick & Franklin, PLLC
66 S Hanford St Ste 300
Seattle, WA 98134-1867
(206) 448-8100
way@soslaw.com

Recap of WSBA Construction Section Winter Forum

By: Bart W. Reed, Stoel Rives LLP, Program Chair

THIS YEAR'S WSBA Construction Section Winter Forum, held on Feb. 6, at Cutter's Restaurant in Seattle, showcased an entertaining and informative presentation by Professor John A. Strait, emeritus professor of law and professional ethics counsel, Seattle University School of Law, and current Distinguished Practitioner in Residence. After a social hour and dinner, the attendees enjoyed a lively discussion regarding the topic for the evening's program, *Ethics of Communication and Negotiation*.

Professor Strait provided his perspective on common, and even less frequently considered, ethical quandaries that may arise in transactions and disputed claims in the construction law context. Helpful to this exercise was an examination of specific rules of professional conduct and their application to certain factual hypotheticals, such as how to deal with and address communications between represented and unrepresented parties, threats of blackmail and extortion in settlement negotiations, and the (blurred) lines between puffery and fraud.

Professor Strait delivered a delightfully engaging presentation and facilitated many questions on the various topics of ethical concern. For those attending, it was an evening of good thought and conversation among section members.

Special thanks and recognition to Lien Research, www.lienresearch.com, for its sponsorship of the pre-dinner social hour and drinks, as well as the informational and marketing materials provided to the attendees during the program.

And, another note of appreciation for Professor Strait's time, helpful resources, and valuable insight for consideration on the topic of legal ethics. For more information, Professor Strait can be contacted at the Seattle University School of Law, 206-398-4027 or straitj@seattleu.edu. ■

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Remind Me to Not Practice Law in Illinois: Interesting Non-Construction Case

Athan E. Tramountanas, Ogden Murphy Wallace PLLC

DIVISION I recently reviewed a trial court's denial of a motion for limited admission of an attorney pro hac vice. The case involved a dispute between two limited partnerships and some dissenters to the partnership's merger, but that is just background to the fireworks in *1501 First Avenue South Limited Partnership v. Litowitz*, No. 79861-8-I, 2020 WL 1917503, at *1 (Wash. Ct. App. Apr. 20, 2020).

The group of dissenters retained an attorney from Illinois named Douglas Litowitz to represent its interests, in addition to its in-state counsel. Mr. Litowitz took a lead role representing the dissenters during the dispute, but did not apply for pro hac vice admission until five days before a scheduled court proceeding. The trial court looked at the following actions by Mr. Litowitz in considering whether to grant the pro hac vice request:

- Mr. Litowitz telephoned opposing counsel and called its client a “fraudulent f[*]k,” and said that it “was going to f[*]king pay these limited partners everything.”
- Mr. Litowitz told opposing counsel that it “had better f[*]king sleep with one eye open, because I’m f[*]king coming for you.”
- Mr. Litowitz called opposing counsel a “LIAR” and stated he was “going back to the [state] bar and will pull [opposing counsel’s] license.”
- Mr. Litowitz stated an intent to use the litigation process as a vehicle to harass the opposing party by threatening to talk to the party, its principals, and “All the way down to associates, litigants, ex-wives, and anyone else.”
- In an email, Mr. Litowitz threatened opposing counsel, stating he would “GO TO THE BAR AND THE PRESS.”
- Mr. Litowitz followed up on these threats by filing an unsubstantiated bar complaint against opposing counsel. He also shared a confidential offering memorandum with the *Puget Sound Business Journal*.

1501 First Avenue South Limited Partnership (“1501 First”) opposed the pro hac vice admission based on Mr. Litowitz’s conduct. Mr. Litowitz responded that the described conduct “happens every day in every courthouse in America” and that 1501 First only opposed his admission because he was “the strongest lawyer for the Chinese.”

At the hearing on the motion, Mr. Litowitz explained that his behavior was common to all attorneys “from Chicago.” Here are some of his quotes from the hearing for added color:

So there was a fight between me and opposing counsel, there was. And I did use some—a curse word. I’m from Chicago. We use curse words. I’ve broken up fights in the Northern District Courthouse. You know, it’s a little bit of a different culture, but—and it’s a little more rough and tumble.

The Chinese are watching this case, hundreds of them, to see what will happen. If you’re going to be distracted by this and you’re going to say, “Well, we shouldn’t let people into the great state of Washington to be a lawyer because of some accusation from somebody that he denied service,” I mean, think about the ramifications of that.

There’s plenty of Washington lawyers pro hac’ing in Illinois. Do you want the Illinois Courts to start looking at every Washington lawyer that pro hacs into Illinois? From Walgreens and Boeing and, you know, all the major corporations in Illinois?

The trial court denied the motion for Mr. Litowitz’s pro hac vice admission.

Unfortunately, the trial court did not state its reasons for denying the motion. APR 8(b)(ii)(1) requires the trial court to “state its reasons” for denying a motion for admission pro hac vice. Division I reversed the trial court on those grounds. The decision makes clear that the Court of Appeals was not suggesting that the trial court needed to allow Mr. Litowitz to practice in Washington upon remand: “To be clear, however, on remand the superior court has full authority to rule on the merits of the request after proceeding as it deems fit.” ■

Incorporations by Reference: A New Standard? *Edifice Construction Co. v. Arrow Insulation, Inc., et al.* 2020 WL 812129 (Div. 1, February 18, 2020)

by Todd Henry — *Inslee Best Doezie & Ryder, P.S.*

WHEN DIVISION I of the Court of Appeals issued its unpublished decision in *Edifice Construction*, its holding caused no small amount of concern for both contractors and project owners, who routinely use “incorporations by reference” to add additional information, terms, and requirements to their written construction agreements. Owners regularly incorporate items like geotechnical and other reports into prime contracts by reference, and in turn, prime contractors incorporate the terms of their agreements with project owners into their subcontracts.

The *Edifice* court affirmed a King County trial court’s decision that a general contractor was not able to compel arbitration with its subcontractors pursuant to the dispute resolution procedures of the project’s prime contract, holding that the prime contract had not—effectively incorporated into the subcontractors’ agreements by reference. The *Edifice* court relied on language from *Western Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488 (2000) for the proposition that an incorporation by reference must be “clear and unequivocal” and that it must be shown that the parties “had knowledge of and assented to the incorporated terms.” The court observed that *Edifice* had not provided any showing that its subcontractors “knew of and assented to the terms of the main contracts.” The court distinguished the *Ferrellgas* case by observing that the contract at issue in that case, an American Institute of Architects agreement, was a “standard form used by owners and contractors.” The court observed that *Edifice* had made no showing that its subcontractors would have been familiar with the provisions of the prime contract on which *Edifice* relied.

The *Edifice* court did not cite to or distinguish other cases that have taken a more expansive view of incorporations by reference. For example, in *3A Industries, Inc. v. Turner Construction Co.*, 71 Wn. App. 407 (1993), Division I analyzed the incorporation by reference of a project’s prime contract’s disputes provisions, and whether those provisions required

the subcontractor to arbitrate all disputes involving the subcontract. Since the project at issue was a public works job, the subcontractor asserted it was not bound by the incorporation of the prime contract’s arbitration requirements, and that RCW 39.08 allowed the subcontractor to pursue a bond claim in court.

The *3A Industries* court distinguished a number of Federal Miller Act cases cited by the subcontractor, and pointed to the specific language of the incorporation by reference that indicated that the prime contractor would have the “same rights and remedies against the Subcontractor as the Owner ... has against Turner...” It is that language, which the court interpreted as a specific agreement about dispute resolution, that resulted in the court holding that the subcontractor was “effectively bound ... to submit to arbitration” via the incorporation by reference.

Similarly, in *Sime Const. Co. v. WPPS*, 28 Wn. App. 10 (1980), a subcontractor contended that the notice provisions of the prime contract had not been incorporated by reference into its subcontract. When *Sime* failed to provide a 15-day notice (as required by the prime contract) for a specific drawings-related delay claim, the claim was rejected as untimely. Though *Sime* recovered at trial on a number of other claims, the trial court ruled its drawings-related claim was barred by its failure to adhere to the notice provisions incorporated by reference into its subcontract. *Sime* appealed.

The *Sime* subcontract included what the court termed a “general and unlimited” incorporation of the prime contract (perhaps not too different from that at issue in *Edifice*), which was so non-specific that it even omitted the prime contract’s date. However, citing to a Ninth Circuit case, the *Sime* court held that in instances of such “general” incorporation, “both the contract specifications and procedural provisions of the prime contract are incorporated by reference.” And, on that basis, the court held that *Sime* was required to adhere to the 15-day notice requirement included in the prime contract, and affirmed the trial court’s denial of recovery on that claim.

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Incorporations by Reference: A New Standard?

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It may be that the *Edifice* decision perhaps muddies the waters a bit on what proof a party must now demonstrate in order to show the other contracting party is bound by an incorporation by reference. Interestingly, at least part of WSDOT's recent case against Seattle Tunnel Partners (STP) involved what notice was provided to STP by two geotechnical report documents incorporated into STP's design/build contract by reference. It was WSDOT's contention, both before that project's Disputes Resolution Board and the trial court that those documents gave STP notice of the presence of the steel well casing that STP asserted caused the damage to its tunnel boring machine, which in turn resulted in the long delay in the completion of the Seattle Waterfront Tunnel project. At trial, the jury made a specific finding in that case that the steel well

casing was not a "differing site condition," although the Special Verdict Form was silent on whether the lack of a differing site condition resulted from any notice STP received via documents incorporated by reference. Who can say whether or not an *Edifice*-like contention by STP that WSDOT was bound to show STP's "knowledge and assent" to the content of the two geotechnical reports would have made any difference. It is an interesting thing to contemplate.

It remains to be seen how trial courts will reconcile *Edifice*-like assertions with earlier decisions like *Sime* and *3A Industries*. However, given that *Edifice* has recently petitioned the Washington Supreme Court for review, perhaps some guidance, important to all players in the construction industry, will be forthcoming. ■

JUNE 12 SEMINAR Alternative Procurement and Coronavirus Impacts

By Ron English, Seattle Schools, general counsel, retired

The Construction Section, in partnership with Stoel Rives, will present its annual full day seminar on June 12, on Alternative Procurement for Construction and Coronavirus Impacts for 6.0 hours general credit and 1.0 hour ethics credit. The seminar will include a focus on alternative procurement approaches, such as public private partnerships, design build, and developments in GC/CM contracting. There also will be a discussion of highlights from the Seattle Tunnel Litigation. In the spirit of COVID-19, the seminar will be held remotely as a webinar and registrants will safely be able to attend from the comfort of their own homes or offices.

Recognizing the huge impacts of COVID-19, a presentation of impacts specific to the construction industry and workforce will be given. The popular Judicial Panel will present perspectives on how the pandemic has changed trial and appellate practice and how they will continue to evolve.

Fri, June 12, 2020
8:25 am - 4:30 pm

6 hrs general credit
1 hr ethics credit

As usual, there will be a discussion of case law and legislative developments and one hour on ethics issues.

To sign up, follow this link: wsbaconstructionlaw2020.eventbrite.com

This is a publication of a section of the Washington State Bar Association. All opinions and comments in this publication represent the views of the authors and do not necessarily have the endorsement of the WSBA or its officers or agents.

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

State Construction, Inc. v. City of Sammamish/Hartford Fire Insurance

By Seth Millstein — Pillar Law PLLC

On Jan. 13, 2020, Division I issued an unpublished opinion regarding the timeliness of claims by subcontractors on public work projects in Washington, *State Construction, Inc. v. City of Sammamish, Porter Brothers Construction, v. Hartford Insurance Company*, No. 78753-5-I. Judge Andrus authored a detailed opinion, examining state bond and retention claims in significant detail. The case was subsequently published on Feb. 19, 2020. State Construction (“State”) recently petitioned the Washington Supreme Court for review. To date there has been no action by the court.

At its core, this case is not complicated. Judge Andrus provides a detailed review of issues surrounding public works claims, for retention under RCW 60.28 and payment/performance bonds under RCW 39.08. The question came down to whether State’s claims were timely.

The facts were not overly complicated. Porter Brothers Construction, Inc. (“Porter”) contracted with the City of Sammamish (“City”) to construct a Community & Aquatic Center (“Project”) using a standard form AIA owner-contractor agreement. Porter next subcontracted with State to certain excavation and utilities work. Porter obtained a payment and performance bond from Hartford, who then filed a UCC against Porter, attaching collateral for debts owed, including future receivables, including retainage funds.

On Feb. 21, 2017, the Sammamish City Council passed a resolution recognizing the Project was substantially complete as of April 1, 2016. On March 27, 2017, State filed its notice of a lien claim against the retention fund and Hartford’s bond. On April 28, 2017, State sued the City, Porter, and Hartford. State and Hartford filed cross-motions for summary judgment. Hartford contended State’s claims were time-barred under RCW 39.08.030 and RCW 60.28.011(2). The trial court agreed, granting Hartford’s motion and dismissing State’s claims. The trial court also awarded in excess of \$20,000 in attorney fees to Hartford under RCW 39.04.240.

State appealed on two primary grounds: (1) the City failed to notify State of the date of substantial

completion, in violation of due process; (2) even if its claims were untimely, State is still entitled to be paid out of the retention fund because Porter unlawfully assigned the retainage funds to Hartford.

Including two cites to the Washington Construction Law Deskbook in a chapter authored by Robert Olson (*ed. note: plug for the WSBA Construction Law Section-authored deskbook!*), Judge Andrus provided a detailed look at cases surrounding both RCW 39.08 and RCW 60.28. In the process, she addressed each of State’s grounds for appeal, holding that the trial court properly ruled in dismissing State’s claims as untimely.

As to the first point, RCW 60.28.011(2) states that the trigger date for claims is “completion of the contract.” State argued that the trigger date should be “completion of the contract *work*.” State pointed to the language of RCW 39.08.030, which contains the word “work.” State argued that additional work performed, after “completion of the contract,” should extend the deadline for acceptance. State also argued that it “substantially complied” with the bond statute, while acknowledging it filed its claim 34 days—rather than 30 days—after the City’s acceptance of the project. Division I disagreed, stating that anyone claiming the benefits of a statutory lien must also demonstrate strict compliance with time deadlines. While other Washington cases address different notice defects (such as address or mailing means), none allow an untimely notice to be resuscitated.

As to the retention fund, the question was whether State served its notice within 45 days of the “completion of the contract work” pursuant to RCW 39.08.030. Hartford argued that State’s lien was sent almost one year late, and that the City’s certification is legally conclusive, meaning it cannot be factually challenged by State. State argued that the trigger dates should be the same for retention and bond claims. State pointed to a practice tip in a publication from a nonprofit organization that assists government agencies that stated: “the trigger date for retainage releases will be the same for the trigger date for filing claims.” Division

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State Construction, Inc. v. City of Sammamish/Hartford Fire Insurance*Continued from page 6*

I agreed with Hartford stating: “The problem with relying on an Internet summary of the law, however, is that it may be incorrect.” Judge Andrus noted that the retainage statute does not refer to all contract work, but merely *the* contract work. Among other sources, Judge Andrus cited to the Construction Law Deskbook §10.3, in that the contract itself typically defines completion of contract work, as it did here, making State’s claims ripe for dismissal.

As to State’s due process claim, regarding receipt of notice of completion of the project, Division I reviewed a U.S. Supreme Court Case called *Matthews v. Eldridge*, 424 US 319, 96 S. Ct. 893 (1976). *Matthews* addressed burdens of additional government action to the risks of an “erroneous deprivation” of a private interest. Division I held that State demonstrated no unreasonable risk of “deprivation” from a lack of notice that the Project was complete. State had multiple methods of checking up on the status, including filing a notice on the Project’s retention sooner rather than later. Judge Andrus again cited to the Deskbook: “it is safer to submit claim upon completion of subcontract work than waiting for completion of the main contract.” See §10.4(2).

Last, Judge Andrus addressed the assignment issue. Recall that, among other things, Porter had assigned its interest in retention funds to Hartford. RCW 60.28.011(1) (a) states that the retainage fund is a “trust fund for the protection and payment” of claims arising under the contract. State contended that this assignment was therefore unlawful. Division I disagreed.

First, Judge Andrus discussed a distinction. The assignment in this case was only for amounts due to Porter after all taxes and timely liens were paid. Had State obtained a judgment prior to the assignment,

State could have attached those funds. But, here, State obtained a stipulated judgment against Porter *after* the assignment, making Hartford’s interest superior. Second, since State’s retention claim was not timely in the first place, this point was moot.

Division I also upheld the award of attorney fees in Hartford’s favor. Hartford had timely offered to settle for \$0.00 pursuant to RCW 39.04.240 and RCW 4.84.280. Since State received \$0.00 and a fee award in this situation is mandatory, Division I held the trial court ruled correctly on this issue.

State timely petitioned for review by the Washington Supreme Court. State’s petition leads with this argument: “the case presents issues of first impression” since it “requires statutory construction of ambiguous and conflicting laws, and the Court of Appeals decision adversely affects the due process rights of every contractor, subcontract, and material man working on public projects in Washington.” State labels the Project’s acceptance “back-dating” by more than 45 days, and argues this rendered a forfeiture.

Hartford’s response leads with this statement: State’s petition “is yet another attempt to belatedly cure [State’s] failure to timely file its statutory retainage claim within the time period established by RCW 60.28.011(2).” In a footnote, Hartford notes that State’s petition does not address dismissal of the payment bond claim under RCW 39.08.030(1)(a).

We look forward to seeing how this interesting issue pans out. We intend to keep you posted in a subsequent article. ■

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January 1 – December 31, 2020

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Athan E. Tramountanas
 Ogden Murphy Wallace, PLLC
 901 Fifth Ave, Ste 3500 | Seattle, WA 98164
 (206) 829-2709 | athant@omwlaw.com