Construction Law

Published by the Construction Law Section of the Washington State Bar Association

Volume 44 Summer 2015 Number 2

Chair's Report

By John P. Evans – John Evans Law, PLLC

Fellow Construction Law Section Members,

I am both pleased and honored to serve the section and its members as chair for the next year. During my six years on the council, the section has exceled in offering its members CLE's and forums, multiple model construction contracts and an excellent newsletter providing up-to-date analysis of the latest construction-related cases, developments, and legislative activities.

Over the next year it is our goal to see that the council continue to serve you, the section members. In that light, you are encouraged to reach out to section council members and let us know how we can better serve you. We are always open to learn of issues or topics that our members would like to see addressed during CLE's and forums.

Our departing chair, Scott Sleight, did a great job over the last year and we all owe him a debt of gratitude for his service. During Scott's term, the council drafted a model design services contract, established a law school construction writing scholarship, and held a spring and fall forum along with two CLE's.

We are very excited about the upcoming year. Look for the section to continue its annual fall and winter forums, a spring CLE in Vancouver/Portland and our midyear CLE in early June as usual.

We also welcome three new council members, Bart Reed of Stoel Rives, Janelle Brennan of Garco Construction and Diane Utz of Watt, Tieder, Hoffar & Fitzgerald who bring a diverse background to the council and will help us to continue to provide high-level service to the membership and the Bar.

Finally, make sure to check out our section webpage at www.wsba.org. There you will find section announcements, past newsletters, our model contracts, contact information for council members, and much more. Once again, thank you for allowing me to serve as Chair and I look forward to working with all section members through the next year.

Complaint Exhibits: Attach at Your Own Risk

By Jessica L. Fjerstad – Johannessen & Associates, P.S

Parties increasingly attach documents to complaints, perhaps in an attempt to avoid dismissal or encourage some other early resolution. What is permitted under the Superior Court Civil Rules ("CR") and the Civil Rules for Courts of Limited Jurisdiction ("CRLJ")? If allowed, what should you consider before attaching a document to a complaint or other pleading?.

CR 10 and CRLJ 10 govern the form of pleadings. These rules provide that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." CR 10(c); CRLJ 10(b). The Washington Supreme Court addressed this rule in a 2012 case, noting that an "instrument" is "[a] written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note, or share certificate." *P.E. Systems, LLC v. CPI Corp.*, 176Wn.2d 198, 204 (2012) ("*P.E. Systems*") (quoting *Black's Law Dictionary* 869 (9th ed. 2009)). Therefore, CR 10 and CRLJ 10 only allow the attachment of certain documents to a complaint (or any other pleading), such as a contract, and that contract then becomes a part of the pleading for all purposes. Notably, attachment of written instruments to pleadings under this rule is permissive and not mandatory. Before filing a complaint in one of our state's superior or district courts, one should verify that there are no local court rules that modify the permissive language of CR 10(c) and CRLJ 10(b).

It is logical that attaching a contract to a complaint (e.g., one that pleads breach of contract) is permitted. But the rules are less clear when it comes to other documents. Again, both versions of CR 10(c) and CRLJ 10(b) mention attachment of "written instruments," but do not necessarily provide that *only* written instruments may be attached. We may apply "inclusio unius est exlusio alterius" (the inclusion of one is the exclusion of another) to conclude that by mentioning

continued on next page

In This Issue

Complaint Exhibits: Attach at Your Own Risk

from previous page

"written instruments," the rule excludes attachment of any other documents to pleadings.

The Supreme Court in *P.E. Systems* did not specifically address whether other exhibits may be attached. The Court merely ruled that "exhibits that stretch the definition of 'written instrument,' such as affidavits, are extrinsic evidence that may not be considered as part of the pleadings." *P.E. Systems*, 176 Wn.2d at 204-05 (citing *Rose v. Bartle*, 871 F.2d 331, 339 n. 3 (3d Cir. 1989)). Certainly, a defendant is free to file a motion to strike, based on either Rule 10 or on evidentiary grounds, arguing that an attachment does not fall within the definition of an "instrument." If not stricken before trial and not included in a plaintiff's exhibits to be offered at trial, defense counsel should seek, as part of a motion in limine, to prohibit the plaintiff from publishing the document (i.e., show it to the jury) until after the plaintiff lays a proper foundation and formally admits the document in evidence.

Even if CR 10(c) and CRLJ 10(b) allow parties to attach documents other than written instruments, it may not be wise to do so.

For example, documents attached to certain motions or responses may transform them into a summary judgment motion. The Court addressed this in *P.E. Systems*. In that case, after one party repudiated a contract, the other sued. *Id.* at 200. The defendant attached the contract to its Answer to the complaint and then moved for a judgment on the pleadings. *Id.* at 202. The plaintiff responded to the motion, attaching another copy of the contract and a copy of a PowerPoint presentation. *Id.* Without considering the PowerPoint exhibit, the lower court granted the defendant's motion for judgment on the pleadings. *Id.*

While the Supreme Court ultimately determined that the lower court did not consider the extrinsic evidence, the Court explained that attachment of extrinsic evidence will convert a motion on the pleadings into a motion for summary judgment. *Id.* at 206. The trial court would then be precluded from granting summary judgment if there are genuine issues as to any material fact. CR 56; CRLJ 56.

Aside from transforming a motion to a summary judgment motion, attaching documents to a complaint or answer can be a risky strategy. First, there must be a balance between adequately and thoroughly pleading your case and overwhelming the judge or opposing party with unnecessary documentation. Courts may frown upon multiple, unnecessary attachments. We often see a variety of non-instrument items attached to complaints (e.g., e-mails, letters, and invoices), and they are not always necessary. Second, these exhibits frankly may offer little if anything at that stage of the litigation process other than to better inform, and perhaps better arm, the other party. By attaching a document to a complaint, the plaintiff makes anything contained in that document an allegation, to which the opposing party now

continued on next page

Construction Law Section 2014-2015

Officers

John Evans, Chair
John Evans Law, PLLC
1001 4th Ave., Ste. 4400
Seattle, WA 98154
206-389-1527

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

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

Ron J. English, Secretary
Seattle Public Schools Office of General Counsel
MSC 32-151
P.O. Box 34165
Seattle, WA 98124-1165
(206) 252-0651
renglish@seattleschools.org

Annmarie Petrich, Treasurer
Attorney at Law
1900 Nickerson St., Ste. 209
Seattle, WA 98119-1650
(206) 282-1262
annmarie@abpetrich.com

Past Chairs
Ron English (2005-06)
Bob Olson (2006-07)
Andrew Maron (2007-08)
Bryan Caditz (2008-09)
Robert H. Crick, Jr. (2009-11)
Thomas H. Wolfendale (2011-12)
Joseph Scuderi (2012-13)
Thomas P. Larkin II (2013-14)
Scott Sleight (2014-15)

Council Members

Term Ending 2016

Sherman Knight
Knight Mediation
5400 Carillon Pt.
Kirkland, WA 98033-7357
(425) 576-8777
knight@mediate.com

Mark Berg
P.O. Box 13410
Seattle, WA 98198-1006
(206) 310-9482
mark.berg@alaskaair.com

Roy Lundin
Oseran Hahn Spring Straight & Watts PS
10900 NE 4th St., Ste. 1430
Bellevue, WA 98004-8357
(425) 455-3900
rlundin@ohswlaw.com

Term Ending 2017

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

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

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

Term Ending 2018

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

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

Special Projects Chair

Jason Piskel (2015-16)

BOG Liaison

Keith Black
13302 53rd Ave NW
Gig Harbor, WA 98332-8865
(253) 851-7401
keithmblack.law@gmail.com

Young Lawyers Liaison

Daniel Berner
Cushman Law Offices, P.S.
924 Capitol Way S
Olympia, WA 98501-1210
(360) 534-9183
danielberner@cushmanlaw.com

Complaint Exhibits: Attach at Your Own Risk
from previous page

can cite in support of a motion to dispose of the lawsuit. Third, if not careful, the party attaching the exhibit might unwittingly create an issue of fact, particularly if the facts disclosed in the exhibit conflict in some way with the facts alleged in the complaint, thereby possibly precluding an early resolution to their case. Because the facts stated in the exhibit are considered as though alleged in the complaint, such a result would have been avoided by a careful recitation of the relevant terms or information contained in the exhibit. Lastly, the allegations in the pleading, including the attached exhibit, might be deemed a judicial admission or an admission by a party opponent. *See, e.g.*, Karl B. Tegland, *Courtroom Handbook on Washington Evidence*, § 801:21 (2013-2014 ed.).

Cases are disposed of on motions or proceedings, and documentation can be introduced at that time. Initial pleadings are for alleging facts, not necessarily for proving them. You need not prove every fact in your initial pleading, and you need not attach every document to your complaint or answer. If you do, consider all issues before doing so and anticipate how it might benefit or disadvantage your client and your case.

Are Progress Payments Made to a General Contractor Held in Trust?

Hartford Fire Ins. Co. v. Columbia State Bank

By Andrew S. Fuller – University of Washington, J.D. Candidate 2016

The Washington Court of Appeals, in *Hartford Fire Insurance Company v. Columbia State Bank*, recently issued a decision impacting the rights of subcontractors and insurers regarding progress payments issued to a general contractor.[1] In that case, Division II unanimously held that progress payments are not held in trust for the benefit of subcontractors or the performance bond surety absent an express statement by the general contractor or other evidence showing intent that the proceeds of the progress payments be held to satisfy those obligations.

At issue were claims by an insurer that issued performance and payment bonds for a general contractor who failed to complete its work on a contract for the General Services Administration. Hartford Fire Insurance Company ("Hartford") issued the performance and payment bonds. An Indemnity Agreement between Hartford and the general contractor included a "Trust Fund" provision that stated that all proceeds given "under contracts relating to or for which a Bond has been issued shall be impressed with a trust for the purpose of satisfying the obligations of the Bond Underwritten for said contract and this Agreement and shall be used for no other purpose until all such obligations have been fully satisfied." After signing this indemnity agreement with Hartford, the general contractor subsequently opened a commercial line of credit and business loan with Columbia State Bank ("Columbia"). The business loan agreement required that the general contractor deposit all proceeds from the operation of its business into a "control account" at Columbia from which the bank was authorized to pay down the contractor's unpaid loan balance on a daily basis.

When the general contractor was unable to complete the work, Hartford took steps to take over the project pursuant to the performance bond. Hartford notified GSA that it would be completing the project and sent a letter to Columbia with notification of the trust fund language in Hartford's Indemnity Agreement with the general contractor. GSA agreed to send future payments to Hartford, but not before a progress payment of about $100,000 was deposited in the general contractor's "control account" at Columbia. Columbia immediately applied this payment to the general contractor's outstanding loan balance pursuant to the business loan agreement.

After taking over the project, Hartford began making payments to the subcontractors under its bond obligations. Hartford then sent a letter to Columbia requesting release of the progress payment erroneously deposited into the contractor's control account. Columbia refused, responding that it had no obligation to return the funds. Hartford subsequently filed suit for misappropriation of trust funds, wrongful setoff, conversion, and declaratory relief. The insurer alleged that after the contractor's failure to perform, Hartford was contractually entitled to recover progress payment funds deposited into the contractor's bank account, and alternately, that Hartford had an equitable lien on the funds.

Both parties moved for summary judgment, with Columbia arguing that the progress payment was not a trust fund deposit and that the bank had no way of knowing Hartford's claim to the funds at the time of the deposit. The superior court granted Columbia's motion for summary judgment and dismissed Hartford's complaint with prejudice. The case was heard by Division II after Hartford appealed the superior court's grant of summary judgment for Columbia and denial of its own motion for summary judgment.

The court ruled against Hartford and upheld summary judgment, holding that the contract language did not create an express trust and that no equitable lien existed. In discussing the contractual language, the court focused on the fact that the primary objective in contract interpretation is to ascertain the mutual intent of the parties at the time the contract was executed. While the provision in the Indemnity Agreement was titled "Trust Fund" and stated that payments received would be "impressed with a trust" to satisfy the bond obligations, it did not expressly indicate that the progress payments would be held in trust, nor was there any other evidence that the parties contemplated that project payments would be held to satisfy bond obligations. The court found that interpreting the language of the Indemnity Agreement to establish an im-

continued on next page

Are Progress Payments Made to a General Contractor Held in Trust? *from previous page*

mediate trust would have absurd results because it would bar the general contractor from using progress payments to fund the ongoing project. Instead, the court held that the language provided for the creation of an express trust in the future, after Hanford made payment on the bonds. Since no trust existed at the time the project payment was deposited into the control account at Columbia, Hartford had no right to the funds. Therefore, Columbia rightfully applied the progress payment funds to its unpaid loan.

The court also dismissed Hartford's second claim, that an equitable lien against the progress payment arose under principles of equitable subrogation. Equitable subrogation allows a party who satisfies another's obligation to recover from the party liable for the extinguished obligation. However, the right to be indemnified does not arise until money has actually been expended so the right of enforcement under equitable subrogation becomes available only after the surety suffers a loss by making payments under the bond.[2] In this case Hartford had not yet paid out any obligations under the performance bond at the time the progress payment was deposited in the control account, so its claim to an equitable lien failed and the court upheld the lower court's ruling in Columbia's favor.

1 *Hartford Fire Ins. Co. v. Columbia State Bank*, 183 Wn. App. 599, 334 P.3d 87 (2014).

2 *Id*. at 611 (quoting *In re Massart Co.*, 105 B.R. 610, 612 (W.D. Wash. 1989)).

In Memoriam

Robert J. Burke 1946-2014

Robert "Bob" Burke worked as a talented and dedicated attorney for 35 years following a distinguished career in the military. Bob led Oles Morrison as Managing Partner for more than 20 years. During his tenure, he was involved in numerous noteworthy projects and resolved many complex construction disputes on behalf of contractors, owners and design professionals. He also represented clients in federal procurement and government contract law matters. Prior to becoming an attorney, Bob was an infantry officer in the Army (with qualifications as a Paratrooper, Pathfinder, and Green Beret) and later rose to the rank of Colonel as a Judge Advocate General in the Army Reserves. Bob's dedication to his firm and clients was surpassed only by his dedication to his family. His colleagues are honored to have known a man of such great integrity and will miss him greatly.

Stephen L. Nourse 1949-2015

Stephen Nourse, an active athlete and sportsman, was a prominent construction attorney in the Pacific Northwest. Stephen served in the U.S. Marines as an executive officer on the carrier Intrepid and also as a tank commander before becoming an attorney. Mr. Nourse specialized in heavy construction litigation and worked at Carney Badley Spellman for 28 years after it merged with his previous firm, Nourse & Associates. Stephen served as chair of Carney's construction department and was President of the firm from 2010 through February 2015. A mentor to many attorneys, his peers selected him as a "Super Lawyer" many times over and he received many other awards throughout his career. Steve is survived by his wife, Jane Gilbertsen; son, Brent (wife, Marie); and his three grandchildren: Emma, Peter and Jack.

William Boland 1932-2015

William "Bill" Boland worked for 33 years at the Attorney General's Office after graduating from Seattle University and the University of Washington School of Law. Nationally recognized for his expertise in contract law, Bill wrote a 1,200-page book, Construction Contract Law, with fellow attorney Deborah Cade. Bill was thoughtful, quiet and gentle. He loved animals and when he was not working he liked to read, fish, and play golf. Bill is survived by his wife, Winnie, and his two sons, Tom and Jim.

Update to Stoel Rives Lien Law Treatise

Karl Oles and Bart Reed, construction and design attorneys in the Seattle office of Stoel Rives, have recently updated their publication, *The Construction Lien in Washington: A Legal Analysis for the Construction Industry*. The 2015 update to the treatise includes references to recent Washington case law impacting lien, bond and retainage rights and claims. The updated treatise can be downloaded for free at *www.stoel.com/construction_lien_law*. Copies for personal use may also be printed. We are grateful to Mssrs. Oles and Reed for writing and now updating this useful work.

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

2014-2015
Construction Law Section Membership Form

October 1, 2014 – September 30, 2015

❒ Please enroll me as an active member of the Construction Law Section.
My $25 annual dues are enclosed.

Name _____

Firm Name _____

Address _____

City/State/Zip _____

Telephone _____

E-mail Address _____

Please send this form to:

Construction Law Section
Washington State Bar Association
1325 Fourth Avenue, Suite 600
Seattle, WA 98101-2539

office use only

Date _____ Check # _____ Total $_____