Construction Law

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Chair's Report

By Brett Hill – Ahlers Cressman & Sleight PLLC

Dear Fellow Section Members,

As we begin year two in a global pandemic it is worth reflecting on the Section's accomplishments despite the challenges that we have faced during the last 12 months. The pandemic hit just a couple months before our planned mid-year CLE last year. We were able to quickly pivot the CLE to a Zoom format. Surprisingly, we did not see any drop-off in attendance and we were able to attract attendees and speakers from all over the state. The Road Trip CLE was held in Vancouver, Washington (virtually, of course) and it had much larger attendance than prior Road Trip CLEs. We are hoping our CLEs this year will have similar success.

We are currently in the final planning stages for our **mid-year CLE** for 2021 that will be held on **June 11**. The title of the CLE is "Navigating a Financially Troubled Project During Uncertain Times" and there will be speakers covering several timely topics—like a panel discussion on COVID-19-related construction claims for additional compensation and insurance coverage for COVID-19 losses. We will also have legislative and case law updates, the always popular judges panel, and an ethics presentation. The plan is to hold this CLE via Zoom and we are happy to announce that the CLE will be offered at a reduced price (like the CLE last year) to all attendees. Building off our successful Zoom happy hour after the mid-year CLE last year, we will have another post-CLE social hour—this time with our own sommelier! You should be receiving an email with the details for this CLE and how to register in your inboxes soon, if you have not received it already.

In addition to our mid-year CLE this year, we are bringing back our traveling **Road Trip CLE**. This year, the CLE will be held in Olympia and the plan is for it to be held in August. This CLE typically follows the format of a construction law 101 program. This year this CLE will cover the anatomy of a construction project, from initial contract drafting, project administration, claims, and dispute resolution mechanics. We are looking for speakers for this CLE. If you are interested, please reach out to Paige Spratt or Joe Scuderi.

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Our **annual writing competition** for law students is currently underway with submissions due by the end of April. The winners of the competition will receive prize money and will be published in the Section newsletter. If you know any current law students, please encourage them to participate.

We hope the next 12 months will be much different and that we will soon be seeing you in person at Section dinner meetings and in-person CLEs. In the meantime, your Section will continue to have you covered with great events and opportunities!

In This Issue

Blake Decision May Delay Civil Trial Dates

By Athan Tramountanas – Ogden Murphy Wallace PLLC

In *State v. Blake*, No. 96873-0, slip op. (Wash. Sup. Ct. Feb. 25, 2021), the Washington Supreme Court held that RCW 69.50.4013, the statute criminalizing drug possession, is unconstitutional in its entirety. The decision applies retroactively, meaning any person previously convicted of drug possession under RCW 69.50.4013 will have their conviction vacated.

According to the Washington State Defense Trial Lawyers, the *Blake* decision will have a significant impact on the scheduling of civil cases because courts will be busy diligently addressing petitions for release and resentencing. Not only will those currently serving time for drug possession be entitled to have their cases reviewed, but inmates serving time for other crimes whose sentences were determined using points derived from prior felony drug possession convictions will be entitled to resentencing. Roughly 70 percent of all inmates in the Department of Corrections system have prior possession felonies on their record.

…the scheduling impacts from *Blake* will require more patience from our membership as we continue to persevere through these already challenging times.

Courts were already facing a backlog of criminal cases due to COVID-19. The *Blake* decision will exacerbate the issue, requiring civil judges to rotate to criminal calendars to address the backlog. This may impact the scheduling of civil trials. While ensuring the constitutional rights of Washington residents is always of paramount importance, the scheduling impacts from *Blake* will require more patience from our membership as we continue to persevere through these already challenging times.

Washington State Bar Association
CONSTRUCTION LAW SECTION
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Lack of a Registration Bond Leads to Dismissal of a Lawsuit

Abacus Fine Carpentry, LLC v. Wilson, No. 80324-7-I, slip op. (Wash. Ct. App. Feb. 8, 2021)

By Christal Harrison-Delgado – Ogden Murphy Wallace PLLC

In *Abacus Fine Carpentry, LLC v. Vivian H. Wilson and Russell D. Wilson*, the question presented to the court was one of statutory interpretation involving the following language in the Contractor Registration Statute at RCW 18.27.040(1): "A cancellation or revocation of the bond or withdrawal of the surety from the bond automatically suspends the registration issued to the contractor until a new bond or reinstatement notice has been filed and approved as provided in this section." Division I of the Washington State Court of Appeals agreed with the plaintiffs' interpretation of the word "automatic" in the statute, which means no action is required by the Department of Labor and Industries ("Department") to suspend a contractor's registration.

Here, Vivian and Russell Wilson [not THE Russell Wilson] (collectively, the "Wilsons") hired Abacus Fine Carpentry, LLC ("Abacus") in 2016 to work on the cabinets in their residence. Abacus held itself out as a licensed construction professional even though Abacus' bond was canceled in 2010 for nonpayment of the premium. Nationwide Mutual Insurance Company ("Nationwide") sent the Department and Abacus a notice of the bond cancellation, and Abacus admitted it did not maintain a valid contractor's bond during 2010-2019.

In 2018, Abacus sued the Wilsons for money owed on the cabinet project, and the Wilsons filed a motion for summary judgment to dismiss Abacus' claims. The Wilsons asserted that Abacus was barred from pursuing collection based on Chapter 18.27 RCW due to Abacus' failure to maintain a contractor's registration bond. The trial court denied the Wilsons' motion, and Division I of the Washington State Court of Appeals granted discretionary review.

The court had to determine the meaning of "automatic" as used in RCW 18.27.040(1). The Wilsons asserted that, "without a valid bond, a contractor automatically loses its registration through operation of law, meaning no action by the Department is required." Abacus asserted that "automatic" meant that "the Department had no discretion in suspending the contractor's registration, but that Department action is still required before a suspension becomes effective against the contractor."

The court agreed with the Wilsons' interpretation of the statute and concluded that "the statute suspends a contractor's license by operation of law when they no longer have a bond." The court also stated that the Wilsons' interpretation was "reinforced" by the definition of "registration suspension" in RCW 18.27.010(9), which means: "[E]ither an automatic suspension as provided in this chapter, or a written notice from the [D]epartment that a contractor's action is a violation of this chapter and that the contractor's registration has been suspended for a specified time, or until the contractor shows evidence of compliance with this chapter." According to the court, "[t]his definition indicates that an automatic suspension is distinct from written notice by the Department that suspension has occurred."

Abacus argued that the lapse of its bond was "an honest mistake" and that it relied on the Department's website regarding the status of its bond, which incorrectly stated Abacus' bond status. However, the court determined that Abacus "did not assess or otherwise confirm their bond status to any degree sufficient to discover their bond's cancellation for nearly a decade, including missing or disregarding the notice of cancellation that Nationwide sent to them." The court further stated that "[i]t is reasonable, and consistent with the express purpose of the RCW chapter on Registration of Contractors, to hold these business professionals to a standard that may require more effort than merely relying on a website to confirm the status of their own bond and license."

The court further stated that **"It is reasonable, and consistent with the express purpose of the RCW chapter on Registration of Contractors, to hold these business professionals to a standard that may require more effort than merely relying on a website to confirm the status of their own bond and license."**

Applying Statute of Repose to Greenwood Gas Line Explosion

Puget Sound Energy, Inc. v. Pilchuck Contractors, Inc., No. 80162-7-I, 2020 WL 6395578 (Wash. Ct. App. November 2, 2020)

By Seth Millstein – Pillar Law PLLC

Puget Sound Energy, Inc. v. Pilchuck Contractors, Inc., involved litigation surrounding a deactivated gas service line at 8409 Greenwood Avenue North in Seattle. As anyone living in the Seattle area may remember, in the early hours of March 9, 2016, gas leaked from the ground and ignited, causing an explosion that destroyed several businesses in the Greenwood area.

The issue for Division I to decide in this case was whether Washington's construction statute of repose is subject to exceptions, allowing for the possible elimination of a strictly defined statutorily limitation period. In other words, even though certain work took place in 2004, can an event in 2016 still allow a viable cause of action in Washington?

While the fact pattern involves a dramatic event – an early morning explosion ripping through a Seattle neighborhood – the court's analysis involved a simple question, involving double (*triple* and possibly *quadruple*) negatives. Does work *not* performed *not* constitute an improvement, and therefore does such work *not* fall under the applicable statute and therefore *not* bar plaintiff's action?

Puget Sound Energy, Inc. ("PSE") is a public utility company that provides electricity and natural gas service to customers in the Puget Sound region. In 2001, PSE entered a Master Service Agreement ("MSA") with Pilchuck Contractors, Inc. ("Pilchuck"). The MSA required Pilchuck to "defend, indemnify and hold harmless PSE from and against any and all Claims and Losses" arising from Pilchuck's conduct as PSE's contractor.

In September 2004, PSE contracted Pilchuck to perform work on the 8400 block of Greenwood Avenue. Specific standards governed Pilchuck's work including (1) disconnect the service line from all sources and supplies of gas, (2) purge the line of existing natural gas, (3) seal the line at the end of each expansive foam, (4) cut and cap the line, and (5) remove any above-ground portion of the retired and activated line. Pilchuck finished the work later in September and was paid in full. PSE's customers on this block started receiving gas service through a newly installed service line shortly after.

Nearly 12 years later, on March 9, 2016, the ignition of a leak occurred, triggering the explosion. An investigation found that the gas leak was caused by external physical damage to the gas service line that the contractor had failed to cut and cap as documented, and this caused the explosion at issue.

In 2018, PSE sued Pilchuck for breach of contract, breach of warranties under the MSA, and fraud. The trial court granted summary judgment in favor of Pilchuck, agreeing that PSE's claims were barred by the statute of repose.

On appeal, Division I examined RCW 4.16.300 and .310. Together, these sections bar certain claims arising from construction of any improvement on real property that have not accrued within six years after substantial completion of construction. The court used a three-step analysis regarding whether the statute must bar PSE's claim in this case.

1. *Do Plaintiff's claims fall within the statute's scope?*

The court first looked at the definition in 4.16.300. Specifically, the court asked whether Pilchuck's work amounted to construction, alteration, or repair of an "improvement to real property." The answer here was yes: deactivation, even if improperly performed, qualified as an improvement. The next question is whether such work involved an "improvement to real property" since Pilchuck's work was subject to removal. PSE argued that actions *not taken* cannot constitute an improvement to real property. The court disagreed: "The fact that Pilchuck did not complete its work does not cause it not to be an 'improvement upon real property' for the purposes of the statute of repose."

"There's no success like failure –
And that failure's no success at all."
– Bob Dylan

The court noted that RCW 4.16.300 was drafted to include "all claims or causes of action of any kind" meaning it is broad and sweeping in nature. Thus, since PSE hired Pilchuck to retire a gas service line, which meant altering an improvement to real property, and Pilchuck represented to PSE it had done so, Pilchuck's work "would certainly fall within the scope of the statute of repose."

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Puget Sound Energy, Inc. v. Pilchuck Contractors, Inc.

The fact the work was *not* done, as PSE argued, does not remove it from the purview of the statute of repose. Underscoring its position, the court noted that RCW 4.16.300 intentionally chose to use the phrase "arising from" construction activities. Such wording further broadened an already broadly worded statute. After determining the statute of repose indeed applied, the rest of the court's analysis was simple.

2. *Did Plaintiff's claims accrue during the permissible period?*

The court quickly disposed of PSE's argument that the work was "never substantially completed" because it never fully completed its work. PSE started serving customers using the new gas line and treated the subject line as abandoned in 2004. The court concluded this section, answering this second part of its analysis in the negative, stating: "The specific project of retiring the subject gas service line was substantially complete because the line was being 'used … for its intended use,' which, in this instance, was disuse."

3. *Was Plaintiff's suit filed in a timely manner?*

The third step in the court's analysis was also "no," meaning PSE's claim was time-barred.

The final question was whether there is a "fraud exception" to the statute of repose. In response, the court went back to the Legislature's choice of wording, expressly including "all claims or causes of action of any kind … arising from … construction." Division I decided this was so "broad and sweeping" that no such exception exists.

The take away for practitioners is simple: there is no restriction of the application of the discovery rule in Washington "even for latent defects" for work subject to removal that was not properly performed.

Lyrics from a Bob Dylan song come to mind when reading this case:

"[T]here's no success like failure
And that failure's no success at all."

PSE, despite creative arguments, received the same message from Division I in *Pilchuk*.

Editor's note: The author asked me to invite anyone who knows the full title of this Dylan song, without using the internet to research it, to email him at seth@pillar-law.com. I suppose he is willing to go with the honor system. The first correct respondent will be given space in the next newsletter to write about their favorite construction law case.

Arbitration Clause May Allow an Arbitrator to Decide Arbitrability of a Dispute

Benjamin Woolley v. El Toro.com, LLC, No. 81218-1-I, slip op. (Wash. Ct. App. Jan. 25, 2021)

By Christal Harrison-Delgado – Ogden Murphy Wallace PLLC

The issue presented to the court in *Benjamin Woolley v. El Toro. com, LLC* was whether a limited liability company operating agreement delegated the question of arbitrability to an arbitrator. Division I of the Washington Court of Appeals concluded that it did, based on the plain language of the agreement, and that the trial court erred in determining the arbitrability of the parties' claims.

Here, the parties entered into a limited liability company operating agreement (the "Operating Agreement"), which contained an arbitration clause. The arbitration clause stated the following:

> 18.7 Arbitration. Except as otherwise provided in Section 18.3(b), if any dispute shall arise between the Interest Holders as to their rights or liabilities under this Agreement, the dispute shall be exclusively determined, and the dispute shall be settled, by arbitration in accordance with the commercial rules of the American Arbitration Association. The arbitration shall be held in Louisville, Kentucky before a panel of three arbitrators, all of whom shall be chosen from a panel of arbitrators selected by the American Arbitration Association (or such other independent

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Benjamin Woolley v. El Toro.com, LLC

dispute resolution body to which they shall mutually agree). Each of the parties to the dispute shall select one arbitrator and the two arbitrators so selected shall select a third arbitrator. If the two arbitrators are unable to agree on the third arbitrator, the third arbitrator shall be selected by the American Arbitration Association (or such other independent body to which they shall mutually agree). The decision of the arbitrators shall be final and binding upon the Interest Holders and the Company and judgment upon such award may be entered in any court of competent jurisdiction. The costs of the arbitrators and of the arbitration shall be borne one-half by each of the parties. The costs of each party's counsel, accountants, etc., as well as any costs solely for their benefit, shall be borne separately by each party.

Each of the interest holders hereby acknowledges that this provision constitutes a waiver of their right to commence a lawsuit in any jurisdiction with respect to the matters which are required to be settled by arbitration as provided in this section 18.7.

The plaintiff later brought several claims against the defendants in the Snohomish County Superior Court. These claims pertained to the plaintiff's ownership interest in the defendant entities and the characterization of payments made by the defendant entities to the plaintiff. The defendants brought similar claims against the plaintiff in arbitration and filed a motion in the Snohomish County Superior Court case to stay the claims pending the resolution of the arbitration proceeding. The plaintiff filed a cross-motion regarding the arbitrability of the claims. The trial court continued the hearing on the pending motions, and the parties engaged in discovery in both the superior court action and the arbitration proceeding.

The parties later provided the trial court with supplemental briefing on their cross-motions, and a hearing was set. However, the trial court continued the hearing based on a clerical error. The same day that the trial court hearing was set, the American Arbitration Association ("AAA") panel conducted an evidentiary hearing on whether the defendants' claims fell within the scope of the arbitration provision of the operating agreement. The AAA panel issued an order concluding that the plaintiff had signed the operating agreement and was bound by the arbitration provision. The panel further determined that the defendants' claims were arbitrable.

The trial court requested a copy of the AAA order and held oral arguments on the parties' cross-motions. The trial court granted in part and denied in part the defendants' motion to compel arbitration. The defendants appealed and argued that the arbitrability of the claims was a question for the arbitrator, not the trial court.

Division I of the Washington Court of Appeals agreed with the defendants and stated that "parties to an agreement may contract to delegate the question arbitrability to the arbitrator." The court further stated that "[i]f a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue." As a result, once the trial court concluded that the operating agreement was effective, "the threshold question of arbitrability was no longer before the court based on the plain language of that agreement." Thus, the court concluded that the "the trial court erred when it determined that, while the arbitration provision was signed and binding as to [the plaintiff], the arbitrability of certain claims should not be determined by the arbitrator."

WE NEED YOUR INPUT!

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:

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Warranty Work Does Not Extend 90-Day Period to Record Lien

Brashear Electric, Inc. v. Norcal Properties, LLC, No. 37379-7-III, slip op. (Wash. Ct. App. March 11, 2021)

By Bryce Sinner – Landerholm, PS

Is the 90-day deadline to record a claim of lien extended by a contractor performing warranty work? In *Brashear Electric, Inc. v. Norcal Properties, LLC*, Division III of the Washington Court of Appeals answered the question, holding that warranty work *does not* extend the 90 days to record a claim of lien.

I. Facts

Brashear Electric, Inc. was a subcontractor on two adjacent projects—one owned by Norcal Properties, and the other by Blue Bridge Properties. Both projects had essentially identical contract terms, including a one year warranty. Brashear completed work on the Norcal project in June 2017 and the Blue Bridge project in September 2017.

In January 2018, more than 90 days after Brashear's last work on either project, a leak was discovered in the Norcal building's roof. The leak was initially suspected to relate to Brashear's installation of an AHU, and the prime contractor directed Brashear to address the issue in accordance with the warranty provision. A Brashear electrician caulked around the leak as a temporary fix, and also repaired a loose light connection on the Blue Ridge building. However, closer inspection revealed that Brashear was not responsible for the roof leak.

Following the warranty work, Brashear promptly recorded liens against the Norcal and Blue Bridge properties for $12,830.81 and $36,278.50, respectively, and then filed an action to foreclose on the liens. Norcal and Blue Bridge sought summary judgment, arguing that warranty work does not extend the 90-day period to record a claim of lien. The trial court ruled in their favor, and Brashear appealed.

II. Analysis

Division III affirmed the trial court's ruling. Drawing on both the text and purpose of Washington's lien statute, the court held that labor performed to remedy one's own nonconforming work is not lienable, and thus that warranty work does not extend the 90-day period in which to record a lien claim.

A. Strict Versus Liberal Construction of Washington's Lien Statutes

To analyze whether warranty work extends the 90-day deadline to record a lien, the *Brashear* court first addressed whether the issue is controlled by a strict or liberal construction of the lien statute. *Williams v. Athletic Field, Inc.*, 172 Wn.2d 683 (2011), the seminal case on this point, provides that the lien statute is to be construed strictly to determine the threshold question of *whether* persons or services are protected by the lien statute and, if the statute is applicable, construed liberally in favor of protection for contractors. *See id*. at 696.

...the court held that labor performed to remedy one's own nonconforming work is not lienable...

The question of whether warranty work extends the 90-day deadline boils down to whether the services were protected by the lien statute and the *Brashear* court therefore applied a strict construction of the lien statute.

B. Is Warranty Work Protected by the Lien Statutes?

The deadline to record a lien runs 90 days after the claimant stops furnishing "labor, professional services, materials, or equipment." RCW 60.04.091. Furnishing labor is defined as "any labor … for the improvement of real property." RCW 60.04.011(4). And "improvement" includes "[c]onstructing, altering, *repairing*, remodeling, demolishing, clearing, grading, or filling in, of, to, or upon" real property. RCW 60.04.011(5)(a) (emphasis added).

Turning to whether Brashear was entitled to the protection of the lien statute, the court observed that while "warranty work certainly involved labor," the question was whether the warranty work involved "repairing" real property. Or more directly, "does 'repairing' extend to correcting one's own nonconforming work?" For the following three reasons, the *Brashear* court determined it does not.

First, the court considered the dictionary definition of "repair," which is "to restore by replacing a part or putting together what is torn or broken." While this

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definition strongly suggests that the thing to be "restored" once worked properly, "nonconforming work" suggests the opposite—that the work was never properly performed to begin with. Thus, the court held, strict construction of the word "repairing" does not encompass correcting one's own nonconforming work.

Second, the principle of "noscitur a sociis" provides that a single word in a statute should not be read in isolation. And when applied to words in a series, courts should consider the "meaning naturally attaching to them from the context" and adopt a definition that best harmonizes each word with those surrounding it. The court held that the word "repairing," along with the series of words surrounding it—constructing, altering, remodeling, demolishing, clearing, grading, or filling in—is best harmonized by recognizing that contractors are hired and paid to do each of these things. Contractors are not, however, hired and paid to correct their own nonconforming work, suggesting that warranty work is not subject to the protections of the lien statute.

Lastly, the court applied the rule that a statute must be construed to effect its legislative purpose, while avoiding unlikely, absurd, or strained consequences. Because a lien is intended to secure payment for money owed, and a contractor is not paid to correct nonconforming work, the court held that warranty work is not lienable.

Interestingly, despite focusing on the fact that warranty work is intended to remedy one's own nonconforming work, the fact that Brashear was not ultimately responsible for the roof leak had no apparent impact on the court's analysis.

Conclusion

The *Brashear* opinion is plain spoken—"We strictly construe 'repairing' to exclude a contractor's correction of its own work and conclude that performing warranty work does not extend the 90 days to record a claim of lien." When advising clients as to the 90-day lien recording deadline, construction law practitioners must now analyze whether the work was performed under a warranty obligation, whether it was to correct non-conforming work, and whether the contractor was entitled to payment for the work.

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