Construction Law

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CHAIR'S REPORT

By Colm Nelson – Stoel Rives LLP

Dear Fellow Section Members,

The WSBA Construction Law Section is pleased to announce a return of the quarterly newsletter and in-person events. As you know, Athan Tramountanas has edited the newsletter for as long as many of you have been members of the Section, over 10 years. That is an enormous lift for one person and we all appreciate his efforts and time. Thank you, Athan!

Last month, the Section had its first in-person event since the inception of the pandemic. Members of the Section gathered for drinks and appetizers at Smith Tower. It was wonderful to see so many of you and I look forward to more in-person events later in the year and next year. A big thanks to HKA Global for its sponsorship. As an aside, please make sure your spam filters are not inadvertently sweeping up emails distributed via the Construction Section's list serve. Many members did not receive notice of the Smith Tower event for this reason.

"In the past, the Section has been a forum for lawyers to connect. I hope we can continue that tradition."

As part of our outreach to law students, we are seeking WSBA approval for a Lunch with a Lawyer program. This is not a formal mentor-mentee program, but rather an outreach to connect lawyers and students in an effort to foster interest in the Section. If approved by the

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In This Issue

STEVE GOLDBLATT IN MEMORIAM

By Ron English

Steve Goldblatt passed away on February 7. He served the Construction Law Section for nearly 30 years, providing the annual legislative update at the June seminar each year. Steve was associate professor emeritus and former chair of the Department of Construction Management at the University of Washington, and a huge California Bears fan. He taught a Construction Law class for many years, directly impacting many construction professionals in this area. Steve was licensed in California, and a special category of legal educator was created for him by the WSBA, so he wouldn't have to take the bar exam in Washington, but could still be a member of the Section.

Steve was well known as a charter member of the Dispute Resolution Board Foundation, having served as mediator and arbitrator, and chair or member of dozens of DRBs for public projects in Washington. He also contributed to public construction efforts, serving on the Seattle School District's Building Excellence Programs Oversight Committee, a contributing author to the original RCW 39.10 (Alternative Public Works Contracting) legislation in 1994, and first chair of Sound Transit's Citizen Oversight Panel in 1997.

We will miss his good cheer whenever he was at a meeting, greeting everyone, as well as his snacks of vegetables and fruits.

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2021 - 2022

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Chair's Report

WSBA, more information will follow about the program in the next newsletter. We may expand the outreach to young lawyers as well.

The Section hosted our annual mid-year CLE as a webinar on Friday, June 10, 2022. Co-chaired by Ron English and Bart Reed, this CLE was focused on construction law updates, public works issues and judicial perspectives on litigation. Attendance was excellent this year, and we appreciate all who attended.

Thank you to those who have drafted articles in the past and/or who have previously volunteered for the Section, including past chairs Brett Hill and Ron English, who remain actively engaged. Please continue to write articles and present!

"...I hope all our members and their families are happy and healthy and have found ways to navigate successfully through these challenging times."

Lastly, I hope all our members and their families are happy and healthy and have found ways to navigate successfully through these challenging times. In the past, the Section has been a forum for lawyers to connect with one another and build relationships, even friendships. As we work from home and/or transition back to the office, I hope this Section can continue that tradition. We will all be better for it. ■

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Supreme Court Clarifies Reasonableness Analysis for Covenant Judgments

Woods v. Milionis Construction, Inc. (198 Wn.2d 105, 492 P.3d 813 (2021))

By Seth Millstein

On Aug. 5, 2021 the Washington Supreme Court handed down a 35-page opinion involving what Justice Stephens called "the 'familiar' covenant judgment arrangement" in *Woods v. Milionis, Inc. et al*, No. 98791-2. The *Woods* case is highly instructive for any attorney considering this path forward in a construction defect ("CD") case, followed by an assignment and subsequent bad faith claim against the carrier.

In 2015, Anna and Jeffrey Woods ("Woods") contracted with Milionis Construction, Inc. ("MCI") to build a single-family residence in Newman Lake, Washington. Judge Fearing, who dissented from the other two Court of Appeals judges on the panel, referred to the project as a "dream house turned into a nightmare."

In this case, the "nightmare" arrived on several levels for the Woods. First, there was the issue of faulty workmanship, leaving the house "substantially incomplete," and "open to the elements going into the winter months," coupled with multiple structural defects. Second, the "nightmare" involved what occurred during litigation.

The Woods sued MCI and its principal in 2016. MCI's insurer, Cincinnati Specialty Underwriters ("Cincinnati") appointed panel counsel to defend its insured. Expert evaluations varied, regarding remediation of damages and cost to complete. Plaintiffs' expert arrived at $2.7 million as the cost to complete and repair. Defendants' expert estimated the same work would cost $1.2 million. However, with $800,000 remaining in the contract, the total amount due could also arrive at around $400,000.

The highest settlement authority Cincinnati provided after the *third* mediation was $60,000, less than twenty percent of panel counsel's requested authority. The parties still agreed to a settlement of $399,000, contingent on Cincinnati's agreement to fund it.

Cincinnati refused, claiming that the damages in question were excluded from MCI's policy. Still, Cincinnati did increase settlement authority from $60,000 to $100,000, attaching a "familiar" refrain to this new offer: a declaratory action would be filed in federal court if the Woods refused to settle.

The Woods were not impressed, and they rejected the offer. Cincinnati filed for declaratory relief. Three months prior to arbitration in the underlying CD case, Cincinnati moved for summary judgment regarding coverage responsibilities. Cincinnati's motion was based on perhaps the most "familiar" coverage limitation we all face: the "your work" exclusion bars coverage for damage to MCI's own work. Cincinnati also argued its policy excluded coverage for "derivative liability" for subcontracted work since MCI failed to verify its subcontractors' liability insurance. Cincinnati's motion regarding its duty to defend was denied. The court also found questions of fact regarding its duty to indemnify since the underlying suit "has not yet concluded."

Prior to arbitration, Plaintiffs spent $200,000 to repair certain defects, increasing their potential net recovery; Plaintiffs also received the results of a forensic accounting, which further increased MCI's exposure. One week before arbitration, Woods and MCI entered into a covenant judgment. The parties stipulated that damages were $1.7 million. Shortly after, the parties filed a joint motion in Spokane County Superior Court for entry of the stipulated judgment. A reasonableness hearing occurred one month later. Cincinnati filed a nonparty motion to intervene several days prior, allowing Cincinnati to argue that the real settlement value of the case was $399,000. The Woods countered that their damages exceeded $2 million, further noting liability was undisputed, and MCI was not judgment proof. Ultimately the trial court granted the motion in light of the nine *Chaussee* factors, agreeing that $1.7 was a reasonable settlement amount.

The *Woods* case is highly instructive for any attorney considering this path forward in a construction defect ("CD") case, followed by an assignment and subsequent bad faith claim against the carrier.

Cincinnati appealed. In a 2-1 unpublished opinion, the Court of Appeals panel held that the trial court abused its discretion.

The Washington Supreme Court unanimously reversed the Court of Appeals' decision, holding instead that the trial court did not abuse its discretion when it: (a) properly conducted the reasonableness hearing; (b) evaluated varied and conflicting evidence of contract damages; and (c) evaluated

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Woods v. Millionis Construction, Inc.

plaintiffs' extracontractual claims as well as allowable attorney fees.

For a plaintiff's attorney or personal counsel for defense, before considering the covenant judgment route, it is critical to review the entire *Woods* decision. Justice Stephens provided a comprehensive roadmap for the process, starting with the reasonableness hearing under RCW 4.22.060, diving into the *Chaussee* factors, and the shifting of burdens that occur in such cases. The Supreme Court specifically noted *Water's Edge Homeowners Association v. Water's Edge Associates*, 152 Wn. App. 572, 216 P.3d 1110 (2009). That case related to accusations of collusion in a subsequent bad faith action against the carrier, when a covenant judgment for $8.75 million was deemed *unreasonable* in a case where defense counsel predicted a "worst case scenario" of $250,000-$350,000. *Id*. at 599. In *Woods*, the situation was nowhere near comparable. The Woods presented competent evidence that their damages could well exceed $2 million. Then, during the reasonableness hearing, the trial court took into account the merits of liability and defense theories (*Chaussee* factors two and three), and the fact MCI was not judgment proof, etc., noting that "no single *Chaussee* factor" controls the trial court's ultimate determination.

It seems as if the only contrary argument Cincinnati could muster was that a lack of "serious negotiating" suggested "bad faith" in this case. Our Supreme Court was not impressed, nor was it impressed with the two judges who ruled in favor of overturning the trial court's reasonableness hearing. If two-thirds of the Court of Appeals can "misapprehend" issues in these areas, any practitioner can too, making it essential to review *Woods* carefully if you are considering a jog down this "familiar" path. ■

Supreme Court Decision Cautions Care in Termination

Conway Const. Co. v. City of Puyallup (197 Wn.2d 825, 490 P.3d 221 (2021))

By Matthew Gurr – Groff Murphy PLLC

In *Conway Const. Co. v. City of Puyallup*, 197 Wn.2d 825, 490 P.3d 221 (2021), the Supreme Court of Washington considered several issues related to whether the City of Puyallup properly terminated a contract for default. As a matter of first impression, the court also considered whether the city was entitled to an offset of costs for defective work discovered after termination.

The overall takeaway in this case is that there may be a potential shift toward contractor-friendly decisions by a court that tends to favor public owners. However, it could be that the actions of the City, in failing to meet with the contractor, or even review Conway's attempts to cure prior to termination, were especially concerning to the court. Regardless, it provides further framework for contractors performing under public contracts and reinforces the implied duty of good faith and fair dealing, as well as the burden placed on a public entity to show that its default termination of a contract is justified.

Conway arose from a public works project, in which the city of Puyallup contracted with Conway to build the nation's first arterial roadway with pervious concrete. The contract incorporated the Washington State Department of Transportation's ("WSDOT") Standard Specifications for Road, Bridge, and Municipal Construction (the "Standard Specifications"). The city also drafted a second contract, specific to the public works project (the "Public Works Contract").

...there may be a potential shift toward contractor-friendly decisions by a court that tends to favor public owners.

During performance of the contract, several issues arose. The City of Puyallup issued multiple nonconformance reports to Conway, stating that some of Conway's work did not meet contract specifications. The City subsequently issued a notice of suspension, identifying nine contract violations. Under the terms of the contract, Conway had 15 days to remedy the alleged

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violations. Conway took steps to cure the issues, including attempts to meet with the Puyallup city engineer. However, the City's engineer repeatedly refused to meet, or discuss the violations with Conway. Eventually, the City issued a final notice of termination for default and withheld further payment to the contractor. Several months after the termination, the City also found defective concrete panels that needed to be replaced.

Conway sued the City, arguing that the termination to default was improper and should be converted into a termination for convenience. At trial, the court found that the termination was, in fact, one for convenience. The City of Puyallup appealed the decision. The Court of Appeals mostly affirmed the trial court's ruling.

The court began its analysis by distinguishing between a termination for convenience and a termination for default:

"[a] termination for default must be based on good cause, such as the contractor's failure to meet the requirements of the contract." *See 5860 Chi. Ridge, LLC v. United States,* 104 Fed. Cl. 740, 755 (2012). "By contrast, a termination for convenience clause in a contract gives a public entity the "the right to terminate, 'at will,'" assuming no bad faith or abuse of discretion." *John Reiner & Co. v. United States*, 163 Ct. Cl. 381, 390, 325 F.2d 438 (1963).

The court further noted that the two types of termination resulted in two different financial consequences for Conway. If terminated for default, Conway would be forced to pay the City for costs incurred in completing the project. On the other hand, if terminated for convenience, the contractor would be entitled to payment for work performed up until its date of termination.

In turning to the two contracts underlying the project, the court determined that the Public Works Contract prevailed over the Standard Specifications. As such, the terms of the Public Works Contract governed the termination. The court found this to be a crucial distinction because the Standard Specifications allowed Conway to remedy defects prior to the City issuing a default termination, while the Public Works Contract did not include a remedial provision. Further, the Public Works Contract "termination for default" clause stated that once the City determined that sufficient cause existed to terminate the contract, the City must provide written notice to the contractor and its Surety, indicating that the contractor breached the contract. The contractor would then have 15 days to cure the breach. Of particular importance, if the remedy provided was not to the satisfaction of the City of Puyallup, the city engineer possessed the authority to terminate the contract.

In applying the Public Works Contract, the parties disputed the correct standard for termination. The City argued that the trial court should only have asked whether the City was satisfied with Conway's attempts to remedy the breach. On the other hand, Conway argued that the appropriate test was whether Conway neglected or refused to correct the defective work. By this standard, if Conway made any attempt at all to provide a remedy for the breach, the termination was improper.

The court determined that both parties' termination standards were correct. In so doing, the court found that the contract required that Conway show that it did not neglect its duty to remedy defective work. However, the contract also required that the City be reasonably satisfied with the contractor's attempt to cure. The City was further required to act in good faith when deciding whether it was "satisfied" with the contractor's efforts. In reviewing the trial court's findings, the court determined that the city engineer's failure to meet with Conway, or discuss the breach, equated to bad faith on the part of the City. As such, the City withholding its "satisfaction" from the contractor's attempt to cure was unreasonable.

Next, the court turned to the act of termination. The court noted that it was the City's burden to prove whether the termination was justified. In applying the standard put forth in the Public Works Contract, the court found that Conway did not, in fact, neglect its duty to cure the defective work. As a result, the City did not have the right to unreasonably withhold its satisfaction with Conway's efforts. Because the City failed to meet its burden of proof, the termination was converted to one for convenience.

On first impression, the court addressed the issue of whether the City was entitled to an offset for defective work found after the

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Conway Construction Co. v. City of Puyallup

termination, where the City failed to provide notice to Conway of the defective work. In finding against the City, the court applied the plain language of the Public Works Contract. The contract required that the City give notice to Conway of any defective work, which the City failed to provide. The City also did not give Conway an opportunity to cure the defective work. As such, the City was not entitled to an offset of costs.

Lastly, the court determined that Conway was entitled to attorney fees. The court first noted that RCW 39.04.240, allowed for attorney fees for public work contracts under specific circumstances. Regardless, the court found that Conway was eligible for attorney fees under provisions of the contract. In applying the "Disputes and Claims" clause, the plain language required that the prevailing party in any lawsuit pursuant to the contract be entitled to an award of its cost of defense. The Court reasoned that Conway was entitled to fees because RCW 39.04.240 was not an exclusive fee provision, nor did the contract clause waive Conway's right to fees under RCW 39.04.240. ■

Supreme Court Clarifies the *Spearin* Defense

Lake Hills Investments, LLC v. Rushforth Construction Co., Inc. (198 Wn.2d 209, 494 P.3d 410 (2021))

By Mark Barak – Stoel Rives LLP

The Washington Supreme Court recently issued an important opinion regarding the application of the *Spearin* doctrine in Washington, reversing the Court of Appeals in *Lake Hills Investments, LLC v. Rushforth Construction Co.*, 198 Wn.2d 209, 494 P.3d 410 (2021). The court clarified the law regarding the defensive use of the doctrine, and practitioners should take note.

Lake Hills Investments, LLC is the developer of a multi-phased, mixed use project in Bellevue known as Lake Hills Village. Rushforth Construction Co., Inc. was the general contractor for four phases of the project. In 2014, Lake Hills notified Rushforth that it was in breach of contract due to all four phases being behind schedule and multiple defects in the work. Rushforth countered that Lake Hills' "concept" for the project was defective and the plans and specifications for the project were not viable. Lake Hills filed suit. Rushforth ceased working and counterclaimed, alleging underpayment.

The court clarified the law regarding the defensive use of the doctrine, and practitioners should take note.

The jury found that Rushforth's work contained defects in six of the eight areas alleged. However, the jury also found that Lake Hills was responsible for the majority of the delays and had underpaid on the project. Rushforth ultimately received an award of $9.2 million, $5.8 million of which was for attorney fees and costs. Both parties appealed.

The Court of Appeals focused on Jury Instruction 9, which was for the *Spearin* defense of defective plans or specifications. The affirmative defense arose from the allegation that although Rushforth's work may have contained defects, Rushforth should not be liable for the defective work if Lake Hills' plans or specifications were defective and Rushforth properly followed them. The Court of Appeals held this jury instruction misstated the law because the defense applies only where construction defects result *solely* from defective or insufficient plans or specifications.

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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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That is, the Court of Appeals found that in order to be successful in its affirmative defense, Rushforth needed to prove that Lake Hills' defective designs were the sole cause of any of the defects. Jury instruction 9 did not contain the word "solely" (or, as the court noted, some other acceptable modifier).

The Supreme Court accepted review only on Jury Instruction 9. Although the court's focus was on whether Jury Instruction 9 needed to have the word "solely" in it, the bigger issue is whether the implied warranty of design accuracy serves as a complete shield from liability for a contractor, or whether a contractor's deficient work and failure to follow the plans and specifications permits a finding against the contractor. Citing *Paetsch v. Spokane Dermatology Clinic*, PS, 182 Wn.2d 842, 849, 348 P.3d 389 (2015), which, in turn, quoted *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012), the Supreme Court explained that prejudice is presumed if the instruction contains a clear misstatement of the law. However, if the instruction is merely misleading, then prejudice must be demonstrated by the party claiming such prejudice—Lake Hills, in this case.

The court discussed the owner's implied warranty of the adequacy of the plans and specifications, as well as the contractor's requirement to build in accordance with those plans and specifications. Typically, if a contractor follows the owner's plans and specifications, it will not be responsible for defects resulting from those plans and specifications. However, the contractor must, among other things, establish that it performed the work in exact accordance with those plans and specifications.

After discussing a number of cases on the topic throughout the years, the court concluded that although a contractor will not be excused simply because unforeseen difficulties are encountered, the contractor is not responsible for damages when there are errors in the specifications. But the court went on to say that although the affirmative *Spearin* defense could be a complete shield, it only is a complete shield if the damage or defects were solely due to the design. The contractor is not entitled to a complete defense if the damage or defects were caused by a combination of design defect and deficient performance.

The *Lake Hills* decision clarified that the *Spearin* defense in Washington is not necessarily an all-or-nothing proposition.

The court found that Jury Instruction 9 was potentially misleading because it failed to inform the jury that it could apportion liability to the parties by determining what percentage was caused by defective specifications and what percentage was caused by defective work. However, the court also found that Lake Hills failed to prove that it was prejudiced by the potentially misleading instruction. The court cited Jury Instruction 7, which instructed the jury to treat the claims of each party as a separate lawsuit, and Jury Instruction 8, which, when combined with the special verdict form, gave the jury the opportunity to award Lake Hills damages for breach of contract.

The court reversed the decision of the Court of Appeals, and remanded only to consider issues related to the trial court's award of attorney fees (as the Court of Appeals did not address the attorney fees due to reversing the Superior Court's decision on other grounds).

The *Lake Hills* decision clarified that the *Spearin* defense in Washington is not necessarily an all-or-nothing proposition. It operates as a complete defense only if the defects arise solely from the plans and specifications, but there is a middle ground in cases involving fault on both sides. Interestingly, while not at issue in this case, the Supreme Court noted in dictum that a contract could allocate the liability differently by, for example, containing a warranty by the contractor that the owner's plans and specifications are correct. ■

Court of Appeals' Decision Warns Disappointed Bidders to Act Fast or Lose Opportunity for Relief

PELLCO Construction, Inc. v. Cornerstone General Contractors, Inc.
(19 Wn. App. 2d 1024, 2021 WL 4523088 (2021))

By Emily Yoshiwara – Groff Murphy PLLC and Evan Brown – Stoel Rives LLP

In *PELLCO Construction, Inc. v. Cornerstone General Contractors, Inc.*, 19 Wn. App. 2d 1024 (2021), 2021 WL 4523088 (unpublished), review dismissed, 199 Wn.2d 1002, 504 P.3d 825 (2022), the Washington Court of Appeals, Division I, addressed several important issues relating to whether and when the Washington appellate courts will consider a moot bid protest appeal on public interest grounds. The clear takeaway is that even where a bid protest presents novel issues of statutory interpretation, the courts are unlikely to consider an otherwise moot appeal.

The clear takeaway is that even where a bid protest presents novel issues of statutory interpretation, the courts are unlikely to consider an otherwise moot appeal.

Although the appeal presented a significant issue of statutory interpretation, the case was decided on justiciability grounds. The court's decision reinforces the well-established rule that a disappointed bidder seeking to enjoin award of a public contract must promptly seek emergency relief, including an emergency stay or other injunctive relief, to prevent the contracting agency from executing the challenged contract and thereby rendering a bid protest moot. Although this can present a practical challenge, it is crucial to avoid dismissal of an appeal as moot. While there are exceptions to the general rule that an appellate court will not consider a moot appeal, the court's decision in *PELLCO* demonstrates that they are few and rarely applicable.

PELLCO arose from a GC/CM project to build a concert hall for Inglemoor High School in Kenmore, Washington. The GC/CM had bid on a combined bid package for which it would perform some work with its own forces and subcontract other work, and was awarded the package as the low bidder. The appellant, PELLCO, was a disappointed bidder that protested the award on grounds that the GC/CM did not customarily perform the work and therefore was ineligible to bid under RCW 39.10.390, which prohibits a GC/CM from bidding on subcontract work if such work is not customarily performed or supplied by the GC/CM. The school district denied the protest and indicated it would award the subcontract to the GC/CM.

PELLCO brought an action in King County Superior Court seeking to enjoin execution of the subcontract, but the court denied a preliminary injunction. Notably, the appellant did not seek an emergency stay from the Court of Appeals to preserve the dispute for appeal. With no injunction or stay in place, the GC/CM and school district executed the subcontract. Under longstanding law, this rendered the protest moot. See *Dick Enterprises, Inc. v. Metro. King Cnty.*, 83 Wn. App. 566, 569, 922 P.2d 184 (1996).

PELLCO sought review from the Court of Appeals despite conceding that the dispute was moot after execution of the subcontract. It therefore had to overcome the general presumption against review of moot disputes and issuance of advisory opinions. PELLCO argued that the exception for "matters of continuing and substantial public interest," *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972), should apply because its appeal sought statutory interpretation of RCW 39.10.390, which PELLCO argued was critical to future GC/CM procurements.

The court began its analysis by noting that the public interest exception applies only where the public interest in the moot issue is "overwhelming." 2021 WL 4523088 at *2 (quoting To-Ro *Trade Shows v. Collins*, 144 Wn.2d 403, 416, 27 P.3d 1149 (2001)). It then applied the following five-factor test derived from *Sorenson and Westerman v. Cary*, 125 Wn.2d 277, 892 P.2d 1067 (1994):

> In determining whether there is sufficient public interest to justify issuing an advisory opinion, courts consider several criteria: 1) the public or private nature of the question presented; 2) desirability of an authoritative determination for the future guidance of public officers; 3) likelihood of future recurrence; 4) the level of genuine adverseness and quality of advocacy; [and] 5) the likelihood the issue will escape review due to short-lived facts.

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Lake Hills Investments, LLC v. Rushforth Construction Co., Inc.

2021 WL 4523088 at *2.

With respect to the first factor, PELLCO argued that there was a public interest because of the amount of taxpayer dollars spent on public contracting. However, the court determined that because PELLCO's protest served its own commercial interest in the work on which it bid, it presented an issue of a private nature. However, because the appeal also involved a public procurement statute, it also presented an issue of public interest. On balance, this factor did not weigh heavily in favor of review because the nature of the issue was both public and private.

In addressing the second factor, PELLCO argued that the court should consider the issue so as to provide guidance to public officers bound by the same procurement statute. However, PELLCO presented no evidence that any public officer was seeking such guidance, arguing in essence that court should provide an advisory opinion simply to clarify the statute. The court rejected the argument.

With respect to the likelihood of recurrence and escape of future review, the court noted that "[w]hile the standing of a disappointed bidder is fleeting, bidders are not without remedy." 2021 WL 4523088 at *3. The court noted that a protesting bidder denied an injunction by the trial court can seek an emergency stay in the appellate court to prevent execution of the contract during the pendency of the appeal. But PELLCO failed to seek such relief despite an opportunity to do so and thereby failed to preserve the case for appeal. Accordingly the court noted that "PELLCO's failure to seek relief while its case was justiciable does not mean the issue will evade review in the future." *Id.*

A disappointed bidder must act swiftly as its standing is "fleeting."

With respect to genuine adverseness and the quality of advocacy, the court limited the applicability of the factor because a hearing on the merits had been conducted by the trial court. This minor factor was the only one weighing in favor of the public interest exception.

On balance, the court determined that the factors weighed against application of the public interest exception such that the court would accept a moot case. Should the underlying statutory interpretation question arise again, a protesting bidder should expect to seek emergency injunctive relief not only from the trial court but from the appellate court as well if the trial court denies the relief. A disappointed bidder must act swiftly as its standing is "fleeting." A bidder should not expect the public interest exception to the rule against advisory opinions to provide a fallback if appropriate emergency relief is not timely sought on appeal. ■

Supreme Court Addresses WISHA Liability for Staffing Agencies

Dep't of Lab. & Indus. v. Tradesmen Int'l, LLC (198 Wn.2d 524, 497 P.3d 353 (2021))

By Jedidiah Blake – Oles Morrison Rinker & Baker LLP

In *Department of Labor & Indusries v. Tradesmen International, LLC*, 198 Wn.2d 524, 497 P.3d 353 (2021), the Washington Supreme Court consolidated two cases involving separate staffing agencies to determine whether "in a joint employment context, staffing agencies may be liable employers for safety violations under WISHA."

Staffing Agency Tradesman International (Tradesman) contracted with Dochnahl Construction (Dochnahl) to provide temporary workers. Under the contract, Tradesman was responsible for providing wages and insurance for the workers and Dochnahl was responsible

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for directing and controlling Tradesman employees. The contract included a safety clause which required that Dochnahl provide a safe environment that complied with federal Occupational Safety and Health Administration ("OSHA") standards. Dochnahl also had to provide safety training or equipment as needed and Tradesman had the right to inspect a jobsite for safety hazards.

After inspecting the site, Tradesman assigned a worker to a Dochnahl jobsite on Federal Avenue in Seattle in April 2016. Without notifying Tradesman, Dochnahl reassigned the worker to another jobsite on Palatine Avenue that Tradesman did not inspect. After inspecting the site, the Department of Labor & Industries ("L&I") found the Tradesman employee working near an unsafe trench and unsafe scaffolding and cited Tradesman for two Washington Industrial Safety and Health Act ("WISHA") violations. On appeal, the Board of Industrial Insurance Appeals overturned the citations finding that Tradesman was not a liable employee because it did not control the worker or the work environment. The superior court and Court of Appeals affirmed the Board's decision.

Similarly, Laborworks Industrial Staffing Specialists (Laborworks), another staffing agency, contracted with Strategic Materials (Strategic) to provide temporary workers for Strategic's recycling plant. Under the contract, Laborworks provided the wages and insurance for the workers and Strategic provided supervision, control, and a safe work environment compliant with OSHA standards. Strategic would also provide safety training or equipment as needed. Generally, Laborworks provides an L&I blood-borne pathogens online training to its workers. When inspecting the recycling plant, Laborworks noted that employees would be exposed to needles and glass and so needed safety equipment. Laborworks also generally offers hepatitis B vaccinations to employees for the risk of blood-borne pathogen exposure.

Laborworks employees were assigned to the plant, and in August 2016 L&I inspected the plant and discovered that a Laborworks employee had been poked by a needle in July. After investigating, the Department found that several Laborworks employees worked onsite without receiving blood-borne pathogen training or a hepatitis B vaccination. Laborworks received five citations for WISHA violations. The Board reversed the citations finding that Laborworks did not control the workplace. The superior court reinstated the citations, but the Court of Appeals reversed and vacated them.

In determining employer liability under WISHA, the Board and the courts look to federal OSHA law and the economic realities test. The economic realities test is a list of factors that the court uses to determine whether the staffing agency or the host employer should be cited:

1) who the workers consider their employer;

2) who pays the workers' wages;

3) who has the responsibility to control the workers;

4) whether the alleged employer has the power to control the workers;

5) whether the alleged employer has the power to fire, hire, or modify the employment condition of the workers;

6) whether the workers' ability to increase their income depends on efficiency rather than initiative, judgment, and foresight; and

7) how the workers' wages are established.

The *Tradesman* decision clarifies the standard for liability for staffing agencies under WISHA and how it is to be applied.

Here, the court held that control of the workers and control of the physical work environment are the primary considerations for determining employer liability under OSHA and WISHA. Specifically, the court looks at the specific safety hazard involved in the violation and then determines the putative employer's level of control over the work being performed, the workers, and work conditions on site; ability to abate the hazards; and level of knowledge about the particular hazard. This standard is applied on a case-by-case basis.

The court held that Tradesman was not a liable employer under WISHA because Dochnahl had sole responsibility to direct and control Tradesmen employees on the site. Further, Dochnahl moved the employee to another jobsite that Tradesmen did not get to check so Tradesmen had no ability to

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identify or abate the hazards that the Department uncovered.

In contrast, L&I cited Laborworks for inadequate safety training, inadequate provision of vaccinations, and inadequate medical record keeping. The court held that these citations were for conditions within Laborworks' control. The violations had less to do with hazards at the worksite and more to do with the preparation of workers for their temporary work assignments. Therefore, the court reinstated the WISHA citations.

The *Tradesman* decision clarifies the standard for liability for staffing agencies under WISHA and how it is to be applied. Courts will look to the employer that controls the employee relative to the hazard at issue and examine several factors including the level of control over the worksite and the ability to abate the hazard. ■

Thanks everyone!
Stay safe, and be well.

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