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Chair's Report

by Tom Wolfendale

Greetings, Section Members! As your new Chair, I am privileged to serve you and the Section for the next year. For those of you in attendance at our Midyear CLE and Annual Meeting, you know that we had a great program and have a wonderful set of new officers and council members to help guide our activities over the next year. Our departing chair, Rob Crick, did a simply splendid job in his extraordinary term of office due to Bylaw changes, and he parted the office with an appropriate sledge hammer gavel and gift certificate as tokens of the Council's esteem.

As you know, the Section's principal mission is to provide educational opportunities for our members on construction-related topics involving, but not limited to, court decisions and legislative action. In fulfilling this mission, we recognize that the Section has a very wide range of attorneys involved in every aspect of private and public construction law issues, from conception of projects through to completion, including dispute resolution if need be. With that in mind, we will continue the practice of forums during the course of the year in addition to our annual Midyear CLE. With the advent of webinar through the Bar Association, we hope to expand the opportunities for all of you to "attend" and participate in these activities even if you are not able to be "on site" at the event.

As always, the Section's excellent newsletter provides up-to-the-minute analyses of the latest construction-related cases and legislative happenings.

In the forthcoming year, the Section will be working on new model contracts and model jury instructions. You should know that the WSBA Board of Governors was very enthusiastic and praised our recent past efforts to prepare two Model Residential Construction Contracts for use by industry participants. The two model contracts are: 1) Lump Sum Contract, where the owner agrees to pay the contractor a specified amount for completing the scope of work without requiring a detailed cost breakdown; and 2) Cost Plus Contract, where the owner pays for the actual cost of the work, plus a fee for the contractor's services. These contracts are now accessible on the WSBA website under our Section link.

Also, your Section council will look to potential modification of the Bylaws to add participation by new attorneys to the bar, so as to sustain the future growth and service of this Section. Our goal will be to expand on the diversity of our Section in all possible ways.

Hopefully, this coming year we will take the Section council meetings "on the road" to different parts of the state, aided by televideo and other methods. This will be an effort to include as many practitioners as possible regardless of location to facilitate participation in Section activities. Naturally, our meetings, regardless where held, are open to any Section member, and we welcome new volunteers to the service of the Section.

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Enjoy the newsletter and feel free to contact me any time regarding Section business at Thomas.Wolfendale@klgates.com and (206) 370-8386.

Best wishes,
Tom Wolfendale

Arbitration/Commencement of Litigation/Does Not Necessarily Constitute a Waiver of Right to Arbitrate

Verbeek Properties v. Greenco Environmental
159 Wn. App. 82, 246 P.3d 205 (Div. 1, December 20, 2010)

by Joseph Scuderi – Cushman Law Offices – Olympia, Washington

Reversing the trial court, Div. I Court of Appeals held:

(1) That a contractual arbitration clause is not waived by seeking to remove a lien under RCW 60.04.081; and

(2) That once the existence of a contractual arbitration agreement is established, determination of arbitrability is determined by the arbitrator.

The Verbeeks owned a wrecking yard that they had operated for many years and sought to sell. Learning the site was contaminated, they hired Greenco, an environmental contractor, to remediate the soil. The Verbeeks became dissatisfied with work performed by Greenco and stopped paying. Greenco filed a lien. Verbeek filed a motion to dismiss the lien as frivolous under RCW 60.04.081. While that motion was pending, Verbeek filed a summons and complaint under a new cause number against Greenco alleging fraud, negligent misrepresentation, Consumer Protection Act violations, declaratory relief, and against Greenco's surety bond.

The trial court denied Verbeek's frivolous lien motion. Verbeek offered to stay the pending trial litigation pending arbitration. Greenco refused, answered the complaint and brought a counterclaim to foreclose the lien. Greenco asserted that Verbeek waived arbitration by proceeding to court. The trial court agreed with Greenco and denied a motion by Verbeek to proceed to arbitration.

The Court of Appeals reversed. "Washington courts apply a strong presumption in favor of arbitration." *Verbeek*, 159 Wn. App. at 87 (*citing to Heights at Issaquah Ridge Owners Assn'n v. Burton Landscape Group, Inc.*, 148 Wn. App.

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Arbitration/Commencement of Litigation/Does Not Necessarily Constitute a Waiver of Right to Arbitrate *from previous page*

400, 405, 200 P.3d 254 (2009). "Courts must indulge every presumption in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or like defense to arbitrability." *Id*. (*citing to Heights*, 148 Wn. App. at 407).

Determination of whether the parties complied with arbitration provisions under the Uniform Arbitration Act were for the arbitrator, and the trial court exceeded its authority in ruling on the issue. The appellate court ruled that omitting a demand for arbitration in the initial pleadings is not an affirmative election to forgo arbitration. The Division I court rejected arguments made regarding *Westcott Homes, LLC v. Chamness*, 146 Wn. App. 728, 192 P.3d 394 (2008). *See Verbeek*, 159 Wn. App. at 88. The appellate court suggested that even under the *Westcott* case the matter should have gone to the arbitrator for determination of arbitrability (but there was no indication in that opinion the argument was made in that matter).

Arbitration/Contractual Waiver of Right to Judicial Review/ Unenforceable

Optimer International, Inc. v. RP Bellevue, LLC
170 Wn.2d 768, 246 P.3d 785 (January 13, 2011)

by Joseph Scuderi – Cushman Law Offices – Olympia, Washington

Affirming the Court of Appeals, Div. I's decision to reverse and remand to the trial court, the Washington State Supreme Court held in an unanimous decision:

(1) A lessee could not waive the limited right of judicial review of an arbitration award under the Washington Arbitration Act (WAA) in effect when the lease was formed;

(2) Parties may not waive the limited right of judicial review of arbitration awards under the WAA, disapproving *Harvey v. University of Washington*, 118 Wn. App. 315, 76 P.3d 276 (2003); and

(3) Determination of attorneys' fees and expenses were premature by landlord and tenant.

This case arises from a lease between landlord RP Bellevue and commercial tenant Optimer International which had an arbitration provision.

The Supreme Court pointed out that arbitration in Washington is a creature of statute and that no common law arbitration exists. Under the language of the Washington Arbitration Act (WAA), "parties were not free to either enlarge or diminish judicial review of arbitration awards established by statute." *See Optimer Int'l*, 170 Wn.2d at 773. The Supreme Court also specifically disapproved *Harvey* "insofar as it suggest that parties may waive judicial review of arbitration awards under the WAA." *See Optimer Int'l*, 170 Wn.2d at 774 (*referring to Harvey*, 118 Wn. App. at 320-21).

Because the ruling did not determine the prevailing party, the Supreme Court denied both parties' request for fees and expenses as premature.

The WAA, former chapter 7.04 RCW, was repealed by Laws of 2005, chapter 433, § 50. The Washington State Legislature adopted the Revised Uniform Arbitration Act (RUAA), Laws of 2005, chapter 433 (codified as Chapter 7.04A RCW). The Supreme Court noted that the RUAA made the prohibition on waiver or variation of judicial review explicit. *Optimer Int'l*, 170 Wn.2d at 772 (*citing to* RCW 7.04A.040(3)).

Query: The *Optimer Int'l* decision gives a bright line rule on drafting arbitration clauses—attempts to modify judicial review will not be recognized or enforced. For practical purposes, arbitration decisions are rarely overturned under the limited WAA and RUAA judicial review standards. The *Optimer Int'l* opinion, however, is silent on whether it has any effect on parties modifying judicial review of other forms of arbitration in Washington, such as Superior Court Mandatory Arbitration Rules ("MAR"), Chapter 7.06 RCW. MAR, while allowing parties to modify the amounts in controversy and other matters under MAR 8.1, does not expressly allow modification of judicial review provisions (trial de novo under MAR 7.1 and RCW 7.06.050).

Contractor's Tort Duty of Due Care/ Property Damages vs. Economic Loss

Jackson v. City of Seattle
158 Wn. App. 647, 244 P.3d 425 (Div. I, November 22, 2010)

by Joseph Scuderi – Cushman Law Offices – Olympia, Washington

Reversing the trial court, Division I Court of Appeals held:

(1) That the city stormwater code did not impose any duty to third parties on contractors;

(2) That contractors do owe a common law duty of care to homeowners when installing a water line; and

(3) That the economic loss rule did not apply to preclude homeowners' negligence claims.

The appellant homeowners, Jackson, purchased a home in Seattle located on a steep hillside. The prior homeowner had problems with a water line and engaged contractors to install a new water line to the home using a trenchless bored method. The line connected with the home and then to the city water main at the top of the hill.

In November 2006, a sinkhole formed at the top of the hill above the home, now owned by Jackson, near the water main. The sinkhole was reported and backfilled by the city. The sinkhole reformed later but was not reported or filled again. In December 2006, during a heavy rain, a city catch basin clogged and water began to pool in the sinkhole. The pooling water then burst from it, scouring a path down the hill to the Jackson property. The path roughly followed the waterline previously installed by the contractors. The landslide caused considerable damage to the Jackson's property and home.

Jackson sued the City and the contractors involved. Jackson settled with the City. The contractors moved for summary judgment, which was granted by the trial court. The trial court ruled the contractors owed no duty to Jackson.

The Court of Appeals ruled that because the City of Seattle stormwater code lacked language expressing a purpose to protect a particular class of persons, it did not create a duty for the contractors to Jackson. In addition, the code in question specifically stated it was not intended to be enforced against any party other than the City.

The Court of Appeals did, however, find that the contractors could be liable to the homeowner under a common law theory of liability. *See Jackson*, 158 Wn. App. at 655-57 (*citing to Davis v. Baugh Industrial Contractors, Inc.*, 159 Wn.2d 413, 417, 150 P.3d 545 (2007) and to Restatement (Second) of Torts § 385 (1965)). The appellate court held that "a builder or construction contractor is liable for injury or damage to third persons as a result of negligent work, even after completion and acceptance of that work, when it was reasonably foreseeable that a third person would be injured due to negligence." *Id.* at 656, (*citing to Davis*, 159 Wn.2d at 417).

The Court of Appeals also rejected that the economic loss rule barred Jackson's negligence claims. The contractors argued that *Stuart v. Coldwell Banker Comm. Group, Inc.* barred claims for negligent construction. *See Jackson*, 158 Wn. App. at 659 (*citing to Stuart*, 109 Wn.2d 406, 745 P.2d 1284 (1987)). But the appellate court pointed out that in *Stuart*, the Supreme Court was concerned with preventing the consumer using tort theory to obtain compensation for a defective "product" which did not meet market-based expectations. The Court of Appeals held *Stuart* did not reject claims for tort liability when a "product" does not meet safety standards that create unreasonable risks of harm.

The Court of Appeals also noted that what Jackson suffered was not an internal deterioration, but a loss stemming from violence or collision with external objects (a landslide) susceptible of a tort remedy. The Court noted if the new waterline had not functioned properly and had to be reinstalled, that would have been an economic loss. Jackson's loss was damage to his home and landscaping caused by a landslide. "When a defective product injures something other than itself, such as a person or other separate property, the loss is not merely an economic loss and tort remedies are appropriate." *Jackson*, 158 Wn. App. at 660 (*citing to Stienke v. Russi*, 145 Wn. App. 544, 556, 190 P.3d 60 (2008), *review denied*, 165 Wn.2d 1026, 203 P.3d 381 (2009)).

Residential Construction/Express vs. Implied Warranties/Waiver/ Contractual Provision Shortening Statute of Limitations

Mattingly v. Palmer Ridge Homes, LLC
157 Wn. App. 376, 238 P.3d 505 (Div. II, August 5, 2010)

by Joseph Scuderi – Cushman Law Offices – Olympia, Washington

Affirming in part and reversing in part the trial court, Division II Court of Appeals held:

(1) That a third-party warranty purchased through the builder was procedurally unconscionable and unenforceable;

(2) That there were material issues of fact on when construction was completed precluding a summary determination on whether buyers brought

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Residential Construction/Express vs. Implied Warranties/Waiver/Contractual Provision Shortening Statute of Limitations *from previous page*

action within the one-year contractual limitation period;

(3) That the home was not completed until builder completed the punch list;

(4) That the issuance of a contractual certificate of substantial completion waived builder's implied warranties; and

(5) That the issuance of a contractual certificate of substantial completion did not waive express warranties.

The Mattinglys entered a contract with Palmer Ridge to purchase a lot and erect a custom home on it. While there were negotiations regarding the construction contract, the Mattinglys alleged that the warranty booklet for a 2-10 warranty program was not provided to them by Palmer Ridge. Division II agreed that the warranty program was procedurally unconscionable relying on two out-of-state cases: *Baker v. Osborne Dev. Corp*, 159 Cal.App.4th 884, 894-96, 71 Cal.Rptr.3d 854 (2008); and *Burch v. State ex rel. Washoe County*, 118 Nev. 438, 443-44, 49 P.3d 647 (2002). *See Mattingly*, 157 Wn. App. at 389.

The construction contract limited the ability of the homeowners to sue for one year "beyond the completion of the project or cessation of the work." The appellate court noted, "[w]hile the term 'completion' does not encompass the incomplete, the definition of 'substantial completion' does." *Mattingly*, 157 Wn. App. at 394. Thus the appeals court treated completing the punch list was necessary to make the project complete. Given that there was a dispute over the completion date of the home and because the punch list was not done the home was not complete, the trial court erred over dismissing the Mattinglys' causes of action not otherwise barred by the agreement.

The Court of Appeals held that based on the language of the contract documents, implied warranties were waived by the Mattinglys. "Once Palmer Ridge finished construction, the Mattinglys signed a certificate of substantial completion...explaining they accepted the project as is." *Mattingly*, 157 Wn. App. at 396. The court held a reasonable person would understand an "as is" clause to "waive implied warranties, including the warranty of habitability." *Id.*, (*citing to Warner v. Design & Build Homes, Inc.*, 128 Wn. App. 34, 40-41, 114 P.3d 664 (2005) and *Olmsted v. Mulder*, 72 Wn. App. 169, 178, n. 3, 863 P.2d 1355 (1993)).

The Court of Appeals, however, held that an "as is" clause in an agreement does not waive express warranties. The "as is" clause did not expressly disclaim preprinted express warranties and, therefore, could not be fairly read as disclaiming them. *See Mattingly* 157 Wn. App. at 398 (*citing to Olmsted*, 72 Wn. App. at 178).

Lien Claims/Pre-claim Notice Requirement/Issue Created When Lien Claimant Works for Unlicensed Contractor/Frivolous Lien Issues

Gray v. Bourgette Construction, LLC
160 Wn. App. 334, 249 P.3d 644 (Div. I, February 28, 2011)

by Joseph Scuderi – Cushman Law Offices – Olympia, Washington

Affirming, Division I Court of Appeals upheld the trial court in ruling:

(1) That if there are disputed law and facts over whether a construction lien is frivolous under RCW 60.04.081, then it is not frivolous; and

(2) If a claim is made that a lien is frivolous under RCW 60.04.081, then attorney fees are mandatory to the prevailing party.

The Grays, homeowners, disputed that Bourgette, a construction subcontractor, was not hired by a property owner, licensed contractor, or common law agent and thus had to give written notice of the right to claim a lien under RCW 60.04.011 (which Bourgette failed to do). The Grays sought to have the lien dismissed as frivolous under RCW 60.04.081. The Grays' general contractor was not a licensed contractor. This unlicensed contractor contracted with Bourgette to provide services and materials for approximately 11 months on the project. There was evidence in the record that Grays were aware of Bourgette's involvement in the project and they had numerous interactions with this subcontractor. *See Gray*, 160 Wn. App. at 339.

Once the trial court found that there were disputed facts which precluded summary determination of a frivolous lien, the lien was not frivolous as a matter of law. "Every frivolous lien is invalid, but not every invalid lien is frivolous." *Gray*, 160 Wn. App. at 342 (*citing to Intermountain Elec. v. G-A-T Bros. Const., Inc.*, 115 Wn. App. 384, 394, 62 P.3d 548 (2003)). The ultimate burden to show a lien is frivolous rests with the party challenging the lien. The Grays failed to meet that burden.

The appeals court also held that the prevailing party under a frivolous lien challenge under RCW 60.04.081 is entitled to fees as a matter of right. *See Gray*, 160 Wn. App. at 344-45.

Editor's note: By invoking the frivolous lien provisions of the Lien Act, the homeowners (Grays) triggered the mandatory attorney fee provisions of the frivolous lien section of the Lien Act. As the homeowners in this case painfully

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Lien Claims/Pre-claim Notice Requirement/Issue Created When Lien Claimant Works for Unlicensed Contractor/Frivolous Lien Issues *from previous page*

discovered, the mandatory nature of said attorney fee provisions is not a one-way street.

Another point worth briefly noting: In this case, the homeowners framed the contractor registration issue as a "pre-claim notice" requirement defense. However, a subcontractor who works for an unlicensed prime contractor also creates an issue regarding whether the subcontractor even has a right to assert a lien claim at all (regardless of whether the subcontractor has provided pre-claim notice to the homeowner). Under RCW 60.04.021 a lien is only authorized if the lien claimant provides labor, materials, or other lienable services "at the instance" of either the owner, or agent or construction agent of the owner. If the subcontractor is working for an unlicensed prime contractor, unless the prime contractor also happens to be the common-law agent of the owner, then the subcontractor potentially has no right to assert any lien rights (regardless of whether pre-claim notice was provided by the subcontractor to the owner).

Limiting Third-Party Industrial Insurance Immunity Under Title 51 RCW/Expanding the Duty of Design Professionals/Narrowing the Definition of a "Construction Project"

Michaels, et al. v. CH2M Hill, Inc.
2011 WL 2077653 (Wash.) (May 26, 2011)

by Casey L. Lund, Attorney & Craig L. Friedrichs, Law Clerk – Winston & Cashatt – Spokane, Washington

The Supreme Court of Washington recently analyzed the contours of the scope of duty and immunity of a third party under the Industrial Insurance Act ("IIA") of RCW Title 51 in *Michaels et. al. v. CH2M, Hill Inc*. In May of 2011, the Supreme Court held that a third-party design professional, CH2M Hill, Inc. ("CH2M"), was not immune from liability under RCW Title 51 and was negligent for its role in the May 10, 2004, failure of a digester at the Spokane wastewater treatment plant which resulted in the death of one man and the injury of two others. Importantly, the *Michaels* court reinforces the legislative policy that courts should liberally construe the terms of the IIA in favor of workers and should apply immunity to non-governmental third parties only in limited situations.

Facts

In 1998, the City of Spokane hired CH2M to serve as an engineering consultant on a 10-year project to upgrade and retrofit the Spokane Riverside Park Water Reclamation Facility. During the project, CH2M was also contracted to provide "on-call" services for ongoing plant operations. In 2004, the sewage plant was experiencing difficulty keeping its digesters warm enough to support the process of turning raw sewage into commercial fertilizer. In order to maintain proper temperature in the digester tanks, the sewage was being circulated out of the digesters, through heaters, and back into the digester tanks. Meanwhile, cold raw sewage was also circulated directly into the digester tanks.

In an attempt to better control the temperature in the digesters to facilitate the heating process, Kelly Irving, the onsite program manager for CH2M, suggested using valves to separate the heated sewage from the cold raw sewage. City employees subsequently suggested using "skillets" instead of valves. CH2M accepted the suggestion.

Mr. Irving made recommendations as to where the skillets should be placed, and the changes were made over the next few days. Unfortunately, the installation of the skillets did not merely change some regular pattern of flow, it also necessitated a change in the valving used by the plant operators to transfer sludge between the digesters. The plant superintendent, operations supervisor, and the maintenance supervisor were unaware that the installation of the skillets would change the valving used by the city plant operators for the transfer of sludge between digesters.

A few days after installation of the skillets, the sewage plant shift supervisor became concerned that Digester 3 was becoming too full and that some of the contents in Digester 3 needed to be transferred to Digester 2. The plant superintendent was concerned that the overfull digester could leak sludge into the nearby Spokane River. The superintendant asked three employees, Cmos, Evans and Michaels, to help divert the sludge from Digester 3 away from the river. Cmos and Evans were on top of the digester dome when it collapsed. Tragically, Mr. Cmos fell into the digester and was killed while Evans and Michaels suffered serious injuries.

Thereafter, the cause of the accident was discovered to be (1) a blocked overflow pipe, (2) a malfunctioning monitoring system inside the digester, and (3) the final failed attempt to transfer sludge out of the digester. It was also concluded that the pumping of liquid beyond the maximum design level and into the dome was the principal and sufficient cause of the accident.

Legal Background

While the city was found to be negligent, it was entitled to immunity as the employer of the injured parties under the IIA of RCW Title 51. The Washington Legislature adopted the IIA in order to reduce the incidence of civil actions against employers and to come up with a concise, no-fault mechanism to provide relief to disabled workers. Except

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Limiting Third-Party Industrial Insurance Immunity Under Title 51 RCW/Expanding the Duty of Design Professionals/Narrowing the Definition of a "Construction Project" *from previous page*

under limited circumstances, third-party tortfeasors are not included in this compromise of swift no-fault compensation for civil suit. The IIA provides in relevant part:

> If a third person, not in a worker's same employ, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title, the injured worker or beneficiary may elect to seek damages from the third person. RCW 51.24.030(1). Notwithstanding 51.24.030(1), the injured worker or beneficiary may not seek damages against a design professional who is a third person and who has been retained to perform professional services on a ***construction project***, or any employee of a design professional who is assisting or representing the design professional in the performance of professional services on the ***site of the construction project***. RCW 51.24.035(1) (emphasis added). The immunity provided by this section does not apply to the negligent preparation of design plan and specifications. RCW 51.24.035(2).

At trial, the issue was whether CH2M, as the third party, was liable for negligence to the plaintiffs for their injuries. The trial court found that Irving and CH2M did not perform any engineering analysis of the effects the flow separation and the skillets would have upon the city's operation of the digesters. After a 3-week trial, the judge found in favor of the plaintiffs. CH2M was ordered to pay more than $6.5 million in damages.

On appeal, CH2M argued to the Supreme Court that it was immune from liability based on RCW 51.24.035, contending that CH2M had been retained to perform construction services on a construction project. CH2M asserted that the entire plant was a construction project entitling it to immunity under subsection .035(1). Additionally, CH2M asserted that the firm had not prepared design plans and specifications, and thus, the exclusion from immunity under .035(2) was inapplicable. The plaintiffs, on the other hand, insisted that the working sewage plant was not a "construction site" as contemplated by the legislature and that CH2M negligently prepared design plans and specifications. The court held that "the specific design work done to redirect the sludge to address the temperature problem was part of CH2M's 'on-call' contract for plant operations and would have been needed whether or not there was any construction occurring on the [plant]."

The Supreme Court agreed with the trial judge's interpretation of RCW 51.24.035(1), and pointed out that RCW Title 51 does not define the terms "construction project" or "site of a construction project." In absence of a legislative definition, the *Michaels* court interpreted the dictionary definition of "construction" and "project" to be limited to the space of ground occupied by a building being put together to form a complete integrated object. Thus, the court found that statutory immunity is limited to the buildings being constructed, not the entire area of the campus.

Consequently, although there was some "construction" taking place on the project as part of the 10-year retrofit agreement, the "construction" was deemed separate from the on-call work performed by CH2M where the accident occurred, and, as such, the immunity of RCW 51.24.035 was not triggered by CH2M's design work to address the temperature problems with the digesters.

The Supreme Court also agreed with the trial court's finding that CH2M's proposal to separate the sewage flows constituted negligent preparation of a design plan within the meaning of RCW 51.24.035(2). CH2M attempted to argue that because it had not drafted plans or specifications (they had only provided oral advice), that they had not negligently prepared design plans or specifications. The Supreme Court, echoing a similar argument that was rejected by the Kansas Supreme Court[1], held that verbally recommending a change in the piping and the locations of the skillets was tantamount to preparing written plans and specifications.

Having rejected the immunity argument, the court found that CH2M did in fact owe a duty to the plaintiffs and expanded the duty of care owed by engineers (as stated in *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 455-56, 243 P.3d 521 (2010)). In the *Michaels* holding, the court opined:

> We recently held that an engineer's duty of care extends to safety risks of physical damage to the property on which the engineer works. Affiliated did not include a claim for personal injury. At least since the time of Hammurabi's code, construction design professionals had a duty not to cause injury or death because of a collapse of a building and we see no reason why tort law would give less protection to workers on that property than to the property itself.

The duty owed by CH2M extended "at the least to those working on the property at the time the designs were being implemented." Although CH2M attempted to argue that plaintiffs' negligence claims were untenable, the court was unconvinced and affirmed the ruling of the trial judge.

Effect of *Michaels* on Duty of Third Parties Under IIA

The concurring opinion of Chief Justice Madsen sheds some insight into what the *Michaels* decision may represent for the scope of duty of a third-party engineering firm moving forward.

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Chief Justice Madsen agreed with the majority opinion that the engineering design and preparation had been negligent. However, she disagreed with the majority's narrow interpretation of the words "construction" and "project." She insists that the dictionary definition of those words is best interpreted to encompass a broader area, namely the entire campus of the 10-year undertaking. The narrow interpretation of those words, she insists, actually serves to diminish the protection of the statute provided to workers by narrowing the scope of the design professional's duty to injured workers.

A broader interpretation would correspondingly broaden the scope of the duty of a third party to the employees on a job site. Where a construction project is seen as a long-term undertaking that spans an entire campus, and a court finds that a design professional has a contractual or common law duty to ensure work site safety, that duty will extend to the entire project and persist through the duration of the project. However, where those terms are narrowly interpreted as it was done by the majority, a court is likely to limit the scope of the design professional's duties accordingly.

Consequently, while the majority narrowly interprets the definition of "construction project" and "site of a construction project" thereby allowing less statutory immunity to the third-party engineering firm, they potentially limit the duty owed by that third-party firm as a court would be likely to limit duty in a negligence case

Conclusion

The *Michaels* court bolsters the legislative policy that the IIA is to be liberally construed in favor of the worker, with doubts resolved in favor of the worker, in order to minimize the economic loss and injury of Washington's workforce. The court also recognized that the right to sue a third-party tortfeasor is a valuable right to employees. In the end, the *Michaels* holding reinforces the notion that third-party immunity under RCW Title 51 is judicially limited and serves as a cautionary reminder to all design professionals that statutory protection is not a firewall to negligent advice or performance.

1 *See Edwards v. Anderson Eng'g, Inc.*, 284 Kan. 892, 894, 166 P.3d 1047 (2007).

Editor's note: The following article originally appeared on Ahlers & Cressman, PLLC's Construction Law Blog website on March 7, 2011. It appears with the permission of the author.

Is the Construction Defect Notice Statute (RCW 64.50.020) Subject to a Constitutional Challenge?

Posted By: John P. Ahlers | Mar 07, 2011 | Topics: Construction News and Notes

A recent Washington Supreme Court case dealing with medical malpractice has placed the constitutionality of Washington's construction defect statute in question.

In *Waples v. Yi*, 169 Wn.2d 152, 234 P.2d 187 (2010) the Supreme Court held that RCW 7.70.100, which requires 90 days' written notice to a healthcare provider prior to commencing a medical malpractice lawsuit against that provider, violated the constitutional separation of powers doctrine and is, therefore, invalid. RCW 7.70.100 provides:

> *No action based upon a healthcare provider's professional negligence may be commenced unless the defendant has given at least 90 days' notice of the intention to commence the action.*

The court, reasoning that this statute usurped the judiciary's power to dictate how cases would be handled, concluded, "Requiring notice adds an additional step for commencing a suit to those required by CR 3(a)" at 159.

The Construction Defect Notice Requirement found in RCW 64.50.020(1) is very similar to the Malpractice Notice Requirement in RCW 7.70.150 in terms of its intrusion on the Court's power to set the procedures by which a civil action is commenced. RCW 64.50.020 (1) requires:

> *In every construction defect action brought against a construction professional, the claimant shall, no later than 45 days before filing an action, serve written notice of claim on the construction professional.*

Construction defect claims, like medical malpractice claims, are fundamentally negligence actions rooted in the common law tradition. Accordingly, court rules and in particular CR 3 (a) applies to such cases. *See Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 980 (2009) (explaining that a medical malpractice claim is not a "special proceeding" excluded by the civil rules under CR 81).

Thus, RCW 64.50.02(1) conflicts squarely with the court's fundamental function and inherent power to decide

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how actions are commenced. RCW 64.50.02(1) adds an additional step for commencing a suit under CR 3(a).

The notice requirement of RCW 64.50.0200 (1) like the notice requirement of RCW 7.70.150, "does not address the primary rights of either party and deals only with the procedures to affect those rights." *Waples* 169 Wn.2d at 161.

RCW 64.50.020(1) involves procedural law and should not prevail over CR 3(a) without infringing on the judiciary's right to set procedures. Thus, the constitutionality of the construction defect notice requirement has been placed in question.

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