Construction Law

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

Volume 41 | Spring 2012 | Number 1

Chair's Report

by Tom Wolfendale – K&L Gates LLP – Seattle, Washington

Dear Section Members:

This probably will be my last report as your Chair. At the outset, I must state it has been a privilege and a pleasure to serve you in this capacity. I cannot thank enough all of the Section Council members and Section members who have made possible the forums, CLEs, model contract drafting, newsletters and jury instruction drafting, among many other tasks.

As I write, we have just concluded a very successful all day Spring CLE on construction law in the Tri-Cities. My special thanks to Alicia Berry and Kerry Lawrence for their efforts in making this happen. As a result of this success, I am hopeful that next year we can do a similar program in Spokane and return to the Tri-Cities in 2014.

I believe the continued vitality of this Section will depend on integrating young attorneys into our work, which has been reflected this year by the addition of the WYLD representative, Amber Hardwick, to our Council. In addition, I urge the Section to continue geographic diversity in its programming to reach as many of our colleagues as possible. Finally, I urge continuation of new initiatives, such as the pending design-build model contracts and the culmination of the jury instruction project. By the way, in the Tri-Cities, I heard again how appreciative practitioners are regarding our past efforts that resulted in the model residential construction contracts.

I wish you all the very best and look forward to welcoming Joe Scuderi as the new Chair in June and to serving as the past Chair for the coming year.

Best wishes,
Tom Wolfendale

Your Input Is Needed!

The Construction Law Section Newsletter works best when Section members actively participate. We welcome your articles, case notes, comments, and suggestions concerning new developments in public procurement and private construction law. Please direct inquiries and submit materials for publication to:

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Arbitration/Consolidation of Arbitration Proceedings/Award of Lost Profits and Trial Court Award of Prejudgment Interest/Appellate Review

Cummings, et al. v. Budget Tank Removal & Environmental Services, LLC
163 Wn. App. 379, 260 P.3d 220 (2011)

by Marisa Bavand – Groff Murphy, PLLC – Seattle, Washington

I. Facts

Budget Tank Removal & Environmental Services ("Budget"), a contractor specializing in removal and remediation of contamination caused by old petroleum tanks, entered into two separate contracts with two separate parties (Cummings and Dougherty) for work on two separate projects. 163 Wn. App. at 382. For both projects, Budget provided a cost estimate for removal of underground tanks and in both instances its projections were wildly incorrect.

Budget initiated arbitration seeking the unpaid balance and Dougherty filed counterclaims. Cummings, who was represented by the same attorney as Dougherty, initiated a separate arbitration against Budget and Budget asserted counterclaims. *Id.* Both actions proceeded using different arbitrators. Subsequently, Dougherty and Cummings moved the superior court to consolidate the matters into one action. *Id*. Over Budget's objections, the superior court ordered consolidation.

At the conclusion of the arbitration, Budget was found liable to Dougherty and Cummings. *Id*. at 383. The superior court confirmed the award and Budget appealed the portion of the decision relating to Dougherty; the Cummings award was not contested. Budget asserted that consolidation should not have been ordered, that the arbitrator misinterpreted the contract, and that the superior court should not have modified the award to add more prejudgment interest.

II. Issues On Appeal

A. Reviewability of consolidation.

Because it related to the jurisdiction of the appellate court, the first issue addressed was whether consolidation was even reviewable. RCW 7.04A.280(1) designates specific orders from which an appeal may be taken; none of which include an order directing consolidation. *See* RCW 7.04A.280(1)(a)-(f).

The court acknowledged this but focused on a second provision in the statute. Section (2) provides that "[a]n ap-

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peal under this section must be taken as from an order or judgment in a civil action." RCW 7.04A.280(2). Given this language, the court reasoned the more proper interpretation of the statute was to treat the orders listed in Section (1) as triggering events, not limitations on what is reviewable. "By its plain language, the statute designates orders from which appeal can be taken, not which orders may be reviewed on appeal." 163 Wn. App. at 384. When appealing from a judgment, an order directing consolidation can be reviewed. *Id.*, *citing In re the Marriage of Angelo*, 142 Wn. App. 622, 175 P.3d 1096 (2008). Consolidation was, therefore, properly before the appellate court in *Budget*.

B. Was consolidation proper?

Having found jurisdiction, the court then turned to whether consolidation should have been ordered. Arbitrations may be consolidated so long as certain prerequisites are met. RCW 7.04A.100. These include (1) at least one party shared between the various arbitrations, (2) the claims arise from the same transaction or series of transactions, (3) common issues of law or fact, and (4) no undue prejudice. RCW 7.04A.100(1)(a)-(d). It was undisputed that Budget was a party to both arbitrations so the first requirement was met. Budget did not press subsection (d), the issue of prejudice, on appeal.

Subsection (b), the requirement that the arbitrations arise "in substantial part from the same transaction or series of related transactions" was strongly contested. Budget argued that these were "*different* customers with *different* transactions ... in *independent* disputes." *Id.* at 385 (emphasis in original). Dougherty and Cummings countered by arguing that the matters were related because Budget operated a similar *modus operandi* of low-balling estimates, conducting inadequate testing, over-excavating and drafting self-serving records of notice allegedly being given to the customer. *Id.* at 385-86. The court agreed with Dougherty and Cummings, finding "the materials submitted to the trial court did demonstrate a pattern of similar facts ...." *Id.*

C. Overturning the award.

Budget also argued that the award should be vacated because the court misinterpreted the contract. *Id.* at 389-90. Review of this argument is limited in two ways. First, the superior court is limited by statute as to what it may review when confirming an arbitrator's award. *Id.* at 388, citing RCW 7.04A.230(d). Second, the appellate court can only review the portions of the award that the superior court reviewed. *Id.*

This proved problematic for Budget because the superior court found the first 40 pages of the arbitrator's opinion to concern unreviewable issues. It, therefore, limited its consideration to the remaining two pages. Because it did so, the appellate court was similarly confined to those two pages.

Concerning the two remaining pages of the arbitrator's decision, the appellate court noted that the superior court's authority is quite narrow. In order for a superior court to overturn the arbitrator's decision, the alleged error must appear "on the face of the award." *Id.*, *citing In re Estate of Norberg*, 101 Wn. App. 119, 123-24, 4 P.3d 844 (2000). Such manifest errors include giving relief that is not authorized by law, such as punitive damages. The actual interpretation of the contract is not reviewed on appeal. *Id.*

Budget's arguments were premised on the fact that Dougherty's damages were speculative and that prejudgment interest was not available because the sum was not liquidated. *Id.* at 390. This type of argument, however, concerns modicums of proof and findings of fact, which are not reviewable. The arbitrator found the sum was liquidated and neither the superior court nor appellate court could overturn such a determination.

D. Modification of award.

The final issue on appeal was the superior court's modification of the arbitrator's award. In this instance the superior court awarded $23,301.83 for additional interest from the time of the initial order to the time the final order was entered. The appellate court reversed, finding that "a trial court 'does not have authority to go behind the face of an award and determine whether additional amounts are appropriate.'" *Id.* at 392, *quoting Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). The court stated that the arbitrator's failure to increase the award may have been an oversight or it may have been a conscious decision. *Id.* Given this uncertainty, and the fact that neither party had included the interim award in the appellate record, the court reversed the award of the additional $23,301.83.

Owner Is Not a Necessary Party in RCW 60.04 Lien Foreclosure

by William A. Linton – Inslee Best Doezie & Ryder P.S. – Bellevue, Washington

In *Diversified Wood Recycling, Inc. v. Harold Johnson,* 161 Wn. App. 891, 251 P.3d 908 (2011), and its companion case, *Diversified Recycling, Inc. v. Harold Johnson*, 161 Wn. App. 859, 251 P.3d 293 (2011), the Court of Appeals, Division I, determined that the contractor's failure to join the owner as a party defendant was not fatal to the contractor's RCW 60.04 lien foreclosure action. The Court of Appeals held that the only effect of failing to name the owner of the property as a defendant was that the owner's interest was not affected by the foreclosure.

The appeals in these cases were filed by a father and son, both named Harold Johnson. The younger Johnson ("Junior") hired Diversified Wood Recycling, Inc. ("Diversified") to clear brush and trees from the property and then refused to pay. Diversified filed its lien foreclosure action and personally served Junior at his Puyallup address believing he was the owner of the property based upon county records that indicated "Harold Johnson" was the owner of the property. Junior answered the complaint claiming that the property had been purchased by the older Harold Johnson ("Senior") in 2006 and then conveyed to Senior's wholly owned holding company, Kuleana, LLC ("Kuleana"), in 2007 prior to Diversified filing its lien foreclosure action. Senior was the registered agent for Kuleana at the same registered address in Puyallup where Junior had been served.

At trial, Junior asserted two significant defenses: First, he claimed the lien expired because Diversified failed to serve the owner of the property within 90 days as required by RCW 60.04.141. Second, Junior claimed failure to join the owner as a party is fatal to any lien foreclosure action under RCW 60.04.

Failure to Serve the Property Owner. An action to foreclose a contractor's lien must be filed within eight (8) months under RCW 60.04.141. The lien will expire unless the action is filed and is then served "upon the owner of the subject property within ninety days of the date of filing the action." Senior and Junior claimed at trial that the property was actually owned by Kuleana. The name "Harold Johnson" used by both father and son without any other designation in the public records resulted in the trial court ruling that "the two Harold Johnsons merged their identities in the public record." As a result of this finding and others, the trial court determined that Junior was the common law agent of Senior and, therefore, the owner of the property was timely served.

In considering this issue the Court of Appeals observed that the term "owner" is not defined anywhere in the statute. It confirmed prior case law requiring strict compliance with the statute including service on the owner of the property within 90 days. However, the Court also ruled that the term "owner" "appears to mean the record holder of the legal title" to the property.[1] Thus in order to avoid dismissal, Diversified was required to show that service upon Junior at the Puyallup address constituted service upon the "owner."

The trial court had made several key findings in this regard. First, it ruled that Harold Johnson purchased the property in 2006 and then conveyed the property to Kuleana in early 2007. It also found that subsequent to the conveyance to Kuleana, Diversified properly filed its notice of lien. The trial court also ruled that "Harold Johnson" was the registered agent of Kuleana and that Diversified served "a Harold Johnson" at the address of the registered office of Kuleana.

The trial court found it significant that both Junior and Senior maintained their offices and the offices of Kuleana at the same Puyallup address. Both Senior and Junior testified that the "Harold Johnson" referred to in documents filed with the Secretary of State referred to Senior rather than Junior. The trial court was not convinced. It ultimately found that Senior was the sole member and registered agent of Kuleana and that Junior was the common law agent of Senior. Therefore, the trial court ruled service on Junior was service on Senior. It should be noted that the trial court considered the testimony of Junior and Senior to the contrary as "preposterous."

The trial court stated in its ruling that having the same business address, signing the contract with Diversified without any indication that Junior was signing in a representative capacity and representing that Junior was the owner of the property indicated that the two Johnsons were "manipulating their identities" to their advantage.

The Court of Appeals upheld the trial court and distinguished prior contrary case law, commenting in particular that *Schumacher Painting Co. v. First Union Management, Inc.*, 69 Wn. App. 693, 850 P.2d 1361, *review denied* 122 Wn.2d 1013 (1993), might have been decided differently if the names of the purported owner and the actual owner were identical as in this case.

The casual observer might leave the analysis at this point. However, it must be noted that the Court of Appeals differed from the trial court on a critical point concerning the identity of the "owner" and whether the owner was a party to the foreclosure action. The trial court had stated in its oral decision: "Fact: we don't have the property owner in this suit." The Court of Appeals found that the written findings and conclusions did not contain this finding of fact and, therefore, "the issue as to whether the property owner was 'in this suit' remains open." As discussed below, this

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Owner Is Not a Necessary Party in RCW 60.04 Lien Foreclosure *from previous page*

ruling is significant in relation to the ultimate relief available to Diversified from its foreclosure sale.

Failure to Join the Property Owner. The trial court ruled that failure to join the property owner as a party does not invalidate a lien foreclosure action. The Court of Appeals ruled that the provisions of RCW 60.04.171 providing that "[i]n any action brought to foreclose a lien, the owner shall be joined as a party" does not mean that the owner must be joined or the action must be dismissed. Rather the Court of Appeals interpreted that provision to require that "[t]he 'owner' is the only entity whose joinder the court must permit in any lien foreclosure action." The court then held "[t]he issue presented in this appeal is whether a foreclosure action and judgment must be dismissed where the owner is not joined as a party. We conclude the answer is no." Thus, the failure to join Senior or Kuleana as parties did not require dismissal.

Senior's Motion to Intervene. In his separate appeal, Senior claimed that he should have been allowed to intervene after the trial court entered its final judgment. The Court of Appeals upheld the trial court's denial of Senior's motion due to timeliness.

The Court of Appeals went on to analyze an apparent discrepancy between the legal description of the real property subject to the Diversified lien and the description of the real property conveyed to Kuleana. As noted by the Court of Appeals, Senior's appeal brief "repeats the bare assertion that the property described in the claim of lien was not only the planned unit development property owned by Kuleana but also adjacent property owned by Senior." Apparently, the lien foreclosed by the trial court included a significant amount of property retained by Senior. According to Senior (and contrary to his trial testimony), he purchased "several hundred" acres of property in 2006 and only conveyed 100 acres to Kuleana.

The Court of Appeals noted that the trial court's judgment for foreclosure did not provide the specific identity of the owner of the property. The Court of Appeals refused to address the issue because "[a]n owner who does not intervene before judgment and does not present a good reason for being allowed to intervene postjudgment will generally be left to devise a collateral attack upon the judgment. That is what happened here." Thus, the ruling in the Junior appeal that effectively invalidated the trial court's finding that "we don't have the property owner in this suit" is a critical one. There is no specific mention in the final judgment as to whether the interests of Senior or Kuleana were foreclosed.

This is further borne out by the Court of Appeals commenting upon the possible foreclosure of Senior's interest in the property under the "doctrine of virtual representation." The Court of Appeals commented: "We do not rule out the possibility that in a collateral attack by Senior and Kuleana, a court might find their claims precluded under the *Garcia* line of cases." *See Garcia v. Wilson*, 63 Wn. App. 516, 520, 820 P.2d 964 (1991).

Thus by not addressing the issue and leaving it up to Senior and Junior to attempt to clear their title to the property, the Court of Appeals effectively threw a critical cloud over the interests (if any) still held by Senior and Kuleana.

1 The Court of Appeals cited *Washington Practice* and the legislative history concerning the 1991 amendments that deleted the definition of "owner" as being either the record holder of either the legal or beneficial title. *See* 27 Marjorie Dick Rombauer, *Washington Practice: Creditor's Remedies – Debtors' Relief* § 4.52, at 347 n.1 (2004).

B & O Taxes/Speculative Builder Exception/Ownership of Property

State of Washington Dept. of Revenue v. Nord Northwest Corporation
164 Wn. App. 215 (Div. 1, 2011)

by Amber Hardwick – Green & Yalowitz, PLLC – Seattle, Washington

Summary: Under WAC 458-20-170(2)(a), a "speculative builder" owes no tax on the value of construction services it performs on real property it owns. The WAC continues to identify "attributes of ownership." Division One held the attributes of ownership do not apply when substantial evidence demonstrates the builder's only ownership interest is as a member of an LLC.

In 1998-1999, Nord Northwest Corp., a licensed construction contractor, entered into purchase and sale agreements to purchase the Stanwood and Bellingham property. In order to finance the purchase, Nord formed two LLCs – one for each property – including additional investors. With the Stanwood LLC, Nord never held title and simply assigned the purchase and sale agreements to the LLC. For the Bellingham LLC, Nord initially held title but transferred it to the LLC after formation. The LLCs obtained construction loans and retained Nord to perform construction of the condominiums.

Nord performed the construction, invoiced the respective LLCs, and the LLCs paid Nord for the construction. Even though the LLCs held legal title to the real property, Nord treated itself as a speculative builder under WAC 458-20-170. As such, Nord paid no B&O taxes on the construction services rendered.

After construction, the Department of Revenue ("DOR") audited Nord and issued a notice of tax assessment.

Nord appealed the assessment to the Board of Tax Appeals. Nord, representing himself, argued the second

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sentence of WAC 458-20-170(2)(a), which sets forth several "attributes of ownership," including:

> (i) The intentions of the parties in the transaction under which the land was acquired; (ii) the person who paid for the land; (iii) the person who paid for improvements to the land; (iv) the manner in which all parties, including financiers, dealt with the land.

Nord presented evidence that the LLC members intended him to own for purposes of the tax breaks and that the parties dealt with the land through Nord. Nord conceded in closing argument that "[Nord] knew we didn't own the property" and "we don't own the property" but contended, for purposes of the statute, his construction company fit within the definition of a speculative builder. *Id.* at 222, 226. The Board of Tax Appeals agreed that Nord was a speculative builder owing no taxes. The Board reasoned that Nord either "satisfied the attributes of ownership set out in WAC 458-20-170" or "held a beneficial interest in the real property under the resulting doctrine." *Id.* at 222.

Thurston County Superior Court reversed the Board's determination and Nord appealed. *Id.* Division I affirmed the superior court's reversal and reinstated the assessment. *Id.* at 223, 234.

Division I found that, under WAC 458-20-170(1)(a), a prime contractor is a "builder that constructs a house on real property of or for *consumers* ... [who] must pay retail business and occupation tax and ... must collect and remit retail sales tax on the gross amount of the sale." *Id.* at 224-25. In contrast, a builder constructing a house on property owned by the builder is a "speculative builder" who owes no such taxes. *Id.* at 225. The "overwhelming undisputed evidence" demonstrated the LLCs owned the real property. *Id.* at 226. Though Nord held an ownership interest, the law and the WAC distinguishes an owner of a business entity from the entity itself. *Id.* at 230.

The court held the "attributes of ownership" factors are only relevant when necessary to distinguish *actual ownership* from some other interest. *Id.* at 228.

> The attributes of ownership provision recognizes that a formal transfer of title to real property may not be enough to show ownership of property where the substance of the transaction indicates that the real property was transferred for some other purpose.

Id. at 227. For example, WAC 458-20-170(2)(b) identifies an exception for circumstances wherein an owner only sells the property to a builder for the purpose of avoiding the B&O taxes. *Id.* at 227. Further, under the law of real property, a title transfer that requires cancellation or reconveyance upon a debt's repayment is a mortgage, not ownership. For these reasons, the "attributes of ownership" factors should only be applied when courts must look beyond the deed to determine the true nature of a builder's ownership interest. Since Nord did not hold title to the properties, the Board should not have considered the factors.

Division I further held that even applying the attributes of ownership factors, the Board erred. The Board interpreted the LLC members' capital contributions as "loans" to find that Nord had the "attributes of ownership." *Id.* at 231-32. The evidence did not support the Board's finding. There was no evidence members anticipated being repaid by Nord for their contribution. *Id.* at 233. To the contrary, the record indicated that minority LLC members were "equity" investors, not lenders. Although the LLC members intended Nord to control the development and specifically set the entities up to seek the tax advantages available to speculative builders, the court held the members intended to own the properties and were not lenders. *Id.* at 233-34.

In summary, Division I read the statute in context with the regulatory and statutory scheme as a whole and held the Board erred by applying the "attributes of ownershi p" in the face of "overwhelming undisputed evidence" the LLCs owned the real property. *Id.* at 226, 234.

The Supreme Court and the Independent Duty Doctrine: Clear as Mud?

by John H. Guin – Law Office of John H. Guin, PLLC – Spokane, Washington

In *Elcon Constr., Inc. v. Eastern Washington University*, No. 83690-6 (Wa. Mar. 29, 2012) (J. Johnson), the Washington Supreme Court continued to try to define the scope of the "independent duty doctrine," which it introduced a little over a year ago to replace the "economic loss rule" as a means of determining when a party can sue for economic losses outside the confines of a contract. *See Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380 (2010).

The *Elcon* case arose out of a well replacement project at EWU. The contractor, Elcon, obtained the contract for the work following a public bid process. As part of that process, the bid documents included the typical "Examination of Site and Conditions" language, which required the bidders to take reasonable steps to ascertain the nature of the work and the conditions of the project site. *Elcon Constr., Inc.*, No. 83690-6, slip op. at 2-3.

Prior to bid, Elcon requested information from EWU regarding any information about other wells and about the geology. Even though EWU had a three-year old report from a consultant that contained information about the

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The Supreme Court and the Independent Duty Doctrine: Clear as Mud? *from previous page*

hydrology for the area, Eastern only provided a well log for one of the wells and a video of the other well. With this information, Elcon submitted the low bid and was awarded the contract. *Id*. at 3-4.

Elcon subcontracted the drilling work to Intermountain Drilling, who did not conduct an independent investigation when bidding the project, but rather, relied upon the information obtained from EWU and on various Department of Ecology well logs online. *Id*. at 4.

Soon after work started, it became apparent that significantly more drilling would be required. When Elcon requested additional compensation, EWU elected to terminate the contract for convenience. EWU later issued a termination for cause letter upon learning of damage to the first replacement well. *Id*. at 5.

Elcon's initial complaint included a breach of contract claim, which was arbitrated, and Elcon received an affirmative award. Elcon later amended its complaint to include tort claims, "which included fraud in the inducement for not providing the Golder Report and interference with a business relationship for sending a copy of the termination for cause letter to Elcon's surety." *Id*. at 7. The trial court dismissed the intentional interference claim for lack of proof and the fraud claim on the basis of the economic loss rule. The Court of Appeals affirmed, "holding all Elcon's tort claims barred by the economic loss rule." *Id*.

The Supreme Court affirmed the dismissal of the claims, but noted that the use of the independent duty doctrine was "a misapplication" in this case. *Id*. at 9. The Court noted that the doctrine had only been applied "to a narrow class of cases, primarily limiting its application to claims arising out of construction on real property and real property sales." *Id*. at 10.

In the case at hand, the Court determined that the independent duty doctrine had not previously been used to bar a claim for fraud, "and we see no basis to utilize it in this case." The Court explained that fraud claims were "outside the doctrine's scope" and were "to be based on established tort precedent." *Id*. at 11.

Even though the doctrine was inapplicable, the Court still affirmed the dismissal of the tort claims for failure of proof.

Two justices concurred in the result only. Because the tort claims failed "for want of sufficient evidence," the concurring opinion felt that any discussion about the application of the independent duty doctrine was unnecessary. *Elcon Constr., Inc.*, No. 83690-6, concurring slip op. at 1 (J. Madsen). The concurring opinion raised serious concerns about the independent duty doctrine, stating that it does not provide "an effective tool" to determine when parties should be held to their "agreed-upon remedies" in a contract. *Id*. at 4.

Corporations/Defunct Corporation/ Personal Liability

Plese-Graham, PPC v. Loshbaugh
164 Wn. App. 530 (Division III, October 27, 2011)

by Helaine Honig – Seattle City Attorney's Office – Seattle, Washington

For several years, Ed Loshbaugh & Sons, Inc., a general contractor, performed work for Plese-Graham, LLC, a real estate developer. In 2009, experiencing financial difficulties, Loshbaugh failed to pay a subcontractor, who then filed a lien against Plese-Graham's property. After several claims were made against its bond, Loshbaugh lost its contractor's license and ceased operations. Thereafter, Plese-Graham paid the subcontractor, obtained a lien release, and secured the verbal agreement of Robert Loshbaugh (the corporation's president, shareholder and director) to sign a promissory note in favor of Plese-Graham for the amount of the payment. There was conflicting evidence as to whether Loshbaugh agreed to sign in his individual or corporate capacity since Plese-Graham prepared two notes, one for Loshbaugh's signature, and one for the corporation's. The payees on both notes were Rod and Linda Plese. Loshbaugh never returned either note.

While the parties corresponded, Loshbaugh & Sons' corporate license expired and the company was administratively dissolved, leaving the company with no assets to pay Plese-Graham. Plese-Graham (but not the Pleses, individually) sued the corporation together with Loshbaugh and his wife. In a mandatory arbitration proceeding, all defendants were found jointly and severally liable to Plese-Graham in the amount of the payment, plus interest. Loshbaugh, solely in his individual capacity, appealed the arbitrator's ruling to the superior court. Following cross motions for summary judgment, the superior court joined the Pleses as parties, granted Plese-Graham's motion, and entered judgment for the full amount plus attorney's fees and costs.

The Court of Appeals reversed, finding material issues of fact preventing summary judgment. The issues on appeal were (1) the late joinder of the Pleses as parties plaintiff; (2) the appropriateness of granting summary judgment to Plese-Graham, which was not the designated payee on the note; (3) whether Loshbaugh could be held individually liable; and (4) the assessment of fees and costs under RCW 7.06.060(1).

On the joinder issue, the Court of Appeals ruled that Rule 17(a) permits joinder of a real party in interest even after trial, so long as the defendant is not prejudiced; that since the issue of lack of joinder was initially raised by

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Loshbaugh, he could not thereafter complain that the Pleses were joined; and that there was unchallenged evidence that the Pleses were third-party donee beneficiaries of the agreement between Plese-Graham and Loshbaugh, such that either could enforce the agreement to deliver the note.

The trial court's conclusion that Loshbaugh was jointly and severally liable on the note was based on RCW 23B.02.040, which holds individuals purporting to act for a corporation jointly and severally liable for liabilities created at a time when they knew there was no incorporation. Based on the Supreme Court decision in *Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wn.2d 356, the Court of Appeals stated that the statute applies both to pre-incorporation transactions and post-dissolution actions, but that the dissolution must be actual and not *de facto*, as Plese-Graham asserted. Also, the individual must act with knowledge that the dissolution had occurred (lest the actions be simply a "winding up" transaction under RCW 23B.14.050(1)), and the other party must not be aware of the dissolution. Because the evidence of whether either party acted with knowledge of the dissolution was in dispute, summary judgment on this issue was inappropriate.

Although not raised below, the Court of Appeals also concluded that it was not appropriate to pierce the corporate veil on the theory that Loshbaugh was using the company to violate or evade a duty since although Loshbaugh & Sons' demise left Plese-Graham unpaid, that was not the sort of intentional fraud, misrepresentation, or manipulation of the corporation that would support a disregard of the corporate form.

Finally, on the question of fees and costs, the court concluded that since Loshbaugh's position did not improve after trial de novo in that he remained liable for the same principal amount plus interest, with the only difference being that he owed the amount to a different, affiliated party, the joinder of the Pleses was not a basis for reversing the assessment. However, since the court found that summary judgment was improper, the assessment of fees and costs was premature and was reversed on that basis.

Course of Dealing Is Key to Determining Terms of Oral Agreement

Spradlin Rock Products, Inc. v. Public Utility Dist. No. 1 of Grays Harbor County
164 Wn. App. 641, 266 P.3d 229 (2011).

by Scott R. Sleight – Ahlers & Cressman PLLC – Seattle, Washington

On November 1, 2011, the Court of Appeals, Division II, issued a decision that provides guidance on three issues of particular relevance to the construction industry: (1) the role of course of dealing in interpreting an oral contract and determining terms; (2) proof required to survive a motion to dismiss a contractor's lost profits claim; and (3) entitlement to prejudgment interest.

1. Background.

The contractor, Spradlin Rock Products, Inc. ("Spradlin") held a small works contract with the Grays Harbor County PUD to furnish labor, materials and equipment within the PUD's jurisdiction during the years 2007 and 2008. The contract had a total not to exceed cost of $200,000. The contract contained a set hourly cost for labor and listed fixed hourly rates, inclusive of operator costs, for four pieces of equipment.

On December 2, 2007, a massive windstorm in Grays Harbor County left 98% of its residents without electricity. The PUD issued an emergency declaration under which it requested that Spradlin clear roads so that repair crews could access damaged power lines. The parties did not specify the compensation to be paid to Spradlin, "but the PUD orally agreed to cover Spradlin's expenses, plus a reasonable profit." At this time, Spradlin had already reached its $200,000 limit for small works projects.

On three separate occasions, Spradlin invoiced the PUD for the storm cleanup. On the first occasion, the PUD requested that Spradlin reformat its invoices to comply with FEMA requirements and charge the small works rates for the four pieces of equipment listed in Spradlin's small works contract, which Spradlin agreed to do. No other issues were raised. Spradlin's second invoicing was rejected due to lack of detail and formatting issues. The PUD approved Spradlin's third submission of invoices and paid Spradlin $1,578,051.12. Although the PUD reserved the right to "review additional documentation to check for any mistakes in Spradlin's billing," it did not object to labor rates, equipment rates, or other surcharges in the invoices. Spradlin also submitted invoices for additional work it performed, which invoices became the subject of the parties' dispute.

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Later, FEMA denied the PUD's claims for reimbursement and in turn, the PUD refused to pay any of Spradlin's remaining invoices and terminated Spradlin's small works contract.

The central issue in the litigation was whether Spradlin was entitled to be paid the labor and equipment rates for the unpaid / disputed invoices based upon the PUD's prior payment of these same rates in the previously paid invoices. A partial summary judgment order became critical on this issue. The summary judgment order provided in part:

> As evidenced by the negotiation, modification, and subsequent payment of invoices, a valid contract existed between [Spradlin] and [the PUD] at the prices and rates detailed in the paid written invoices. The charges and rates contained in the written invoices were in effect during the entire period of [Spradlin's performance].

On the first day of trial, the trial court entered an order in limine preventing the PUD from presenting evidence that contradicted the prices and rates in the paid invoices. For its unpaid invoices, Spradlin was awarded a jury verdict of $4,162,500 in unpaid compensation, $659,149.60 in prejudgment interest and $25,000 in attorneys' fees, which the PUD appealed.

2. The Parties' Course of Performance Established PUD's Agreement to Be Bound by the Rates and Charges in Spradlin's Invoices.

On appeal, the PUD argued that the trial court erred by granting partial summary judgment prohibiting the PUD from arguing the reasonableness of Spradlin's rates and charges after the PUD paid four Spradlin invoices without challenging the rates or charges. The PUD primarily argued that the parties' small works contract should have controlled the interpretation of the oral contract for repair of storm damage. Division II disagreed with the PUD's position, and while acknowledging that interpretation of an oral contract is generally not appropriate for summary judgment because the existence of an oral contract and its terms usually depends on the credibility of witnesses, the court ruled that in this instance summary judgment as to the oral agreement was appropriate because the parties did not dispute the existence of an oral contract for Spradlin to perform clearing work in exchange for the PUD paying Spradlin's costs, plus a reasonable profit. The court relied extensively on the parties' course of performance to reject the PUD's contention that it should have been able to challenge the reasonableness of the rates and charges in Spradlin's unpaid invoices:

> But the PUD's own statements demonstrate that the PUD reserved the right only to check the supporting documentation for mistakes: it did not reserve the right to question the amount Spradlin billed unless there was a mistake found on review of the documentation supporting the paid invoices. Spradlin supplied this documentation to the PUD. This later documentation included certified payrolls, timesheets, rental invoices, and trip tickets. Nothing in the documentation contradicted or indicated a mistake in the earlier submitted and paid rates and charges.
>
> Further, at no time did the PUD question or contest Spradlin's labor rates, equipment rates, or overhead charges that were clearly indicated on the paid invoices before it terminated its contract with Spradlin. Because the trial court limited its summary judgment ruling to the rates and charges clearly indicated on the paid invoices and the PUD has not raised a genuine issue of material fact about those rates and charges, we hold that summary judgment was proper.

While recognizing that construction contracts are governed by the common law and not by the Uniform Commercial Code, the court cited to UCC Article 2 for the proposition that a party's course of performance may be relevant in interpreting the meaning of an agreement. Division II held that the PUD's course of performance in paying Spradlin's invoices showed its agreement to be bound by the rates and charges contained in those invoices, thus undermining any later claim that the material issue of fact existed about whether the PUD agreed to those rates:

> Accordingly, the four invoices the PUD paid without objection became part of the contract between the PUD and Spradlin and clarified the meaning of the parties' oral argument that the PUD would pay Spradlin its costs, plus a reasonable profit.

An interesting part of the decision is the court's treatment of the PUD's argument that Spradlin's unpaid invoices were not performed pursuant to the PUD's emergency declaration and thus the invoices paid under the work authorized pursuant to the PUD's emergency declaration did not apply to Spradlin's uncompensated work. The court chastised the PUD, stating that if Spradlin's work was not performed under the PUD's emergency declaration, then the PUD's contract with Spradlin would constitute an illegal contract for failure to comply with the applicable bidding requirements.

Accordingly, this course of performance established Spradlin's entitlement to the same rates for the unpaid invoices. The *Spradlin* decision will be particularly useful for parties attempting to establish entitlement based upon

continued on next page

Course of Dealing Is Key to Determining Terms of Oral Agreement *from previous page*

an interpretation of a contract that is supported by the parties' prior course of dealing and performance.

3. Burden of Proof for Lost Profits.

While many construction contracts contain a mutual waiver of consequential damages, which typically extend to waiver of lost profits, the *Spradlin* decision provides guidance as to the burden of proof necessary to survive dismissal of a lost profit claim in instances where no such mutual waiver is present. Division II held that Spradlin presented sufficient evidence of lost profits to survive a motion to dismiss. Spradlin's lost profit claim was based on a pending project that Spradlin would have been eligible to bid on but for the PUD's wrongful termination of the small works contract. The court noted that a plaintiff may recover lost profits if the evidence establishes lost profits with reasonable certainty. In contrast to the frequently cited Washington case precluding recovery of speculative lost profits, *Golf Landscaping, Inc. v. Century Construction Co.*, 39 Wn. App. 895 (1984), Division II held that Spradlin's continuous business relationship with the PUD since 2000 gave it a reasonable basis to believe it would have received an award of the pending project under a renewed small works contract with the PUD. Division II held that this was not speculative and that Spradlin was not required to establish with absolute certainty that, but for the PUD's breach of their contract, it would have been awarded that pending project:

> Washington courts abide by the principle that "the wrongdoer shall bear the risk of the uncertainty which [its] own wrong as created."

The court's ruling on Spradlin's lost profit claim clearly is indicative that Division II was not impressed with the PUD's treatment of Spradlin and provides guidance to the evidentiary standard necessary to survive a motion to dismiss a lost profits claim.

4. Prejudgment Interest Is Awardable Irrespective of Whether a Claim Is Disputed.

The *Spradlin* decision also provides a helpful reminder regarding the law governing entitlement to prejudgment interest. It is well-established in Washington that prejudgment interest is awardable on a liquidated claim. A claim is liquidated where the evidence furnishes data which makes it possible to compute the amount with exactness without reliance on opinion or discretion. The key is the character of the original claim, not the court's ultimate method for awarding damages, which makes prejudgment interest allowable. It does not matter if a claim is disputed.

In this case, Spradlin was entitled to an award of prejudgment interest because the PUD's counsel stipulated during closing that it owed a specific damage amount (less than the amount claimed by Spradlin) on unpaid invoices. Because the PUD presented a different proposed damages amount to the jury in closing argument, this alternative damages amount liquidated the Spradlin damages claim, thus entitling Spradlin to prejudgment interest.

5. Conclusion.

The *Spradlin* decision clearly reinforces the risk of paying nothing on a contractor's claim based upon the existence of disputed portions of that claim. It further establishes that a contracting party that takes a position inconsistent with its earlier conduct faces an uphill challenge.

Mechanics' Liens/Release of Lien Bond/Proof of Validity of Lien

Stonewood Design, Inc. v. Heritage Homes of WA, dba Infinity Homes
No. 65608-2-1, 2011 WL 5341445
(Wash. Ct. App. Div. I Nov. 7, 2011)

by Kerry C. Lawrence – Herrig & Vogt, LLP – Seattle, Washington

Stonewood was a subcontractor to Infinity. At the request of Infinity, Stonewood installed tile in the home of Mr. and Mrs. Gretsh. A quality dispute arose and Infinity withheld money from Stonewood. Stonewood recorded a claim of lien and commenced 1) an action against Infinity for the balance owed, and 2) to foreclose upon the lien against the property. A lien release bond was recorded. At trial Stonewood entered into evidence the lien and the bond. The jury found in favor of Stonewood and the court found Stonewood had "proved the facts necessary to execute upon the release of lien bond." The judgment provided that Stonewood "is entitled to execute upon the bond." Infinity and Gretsh appealed, asserting "is entitled to execute upon the bond" did not fulfill the statutory requirement for a "judgment upon the lien" because the trial court had not specifically "foreclosed" the lien, citing *DBM Consulting Engineers v. United States Fidelity & Guarantee Co.*, 142 Wn. App. 35, 41, 170 P.3d 592 (2007). The Court of Appeals disagreed, stating that such a construction would "elevate form over substance," and noting that the decision in *DBM* had turned on the fact that DBM in that case had failed to pursue its claim of lien against the property owner at trial, receiving only a monetary judgment against the owner before then commencing a separate action against the lien release bond surety.

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