Construction Law

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Chair's Report

By Athan E. Tramountanas – Ogden Murphy Wallace, PLLC

Exciting things are happening for the WSBA Construction Law Section. On March 1, we held our Fifth Annual Dinner Meeting and CLE. This popular event was another sell-out, where we had a great meal and saw first-hand how Building Information Modelling (BIM) worked from University of Washington Professor Dr. Carrie Sturts Dossick. It was great to see fellow section members and, thanks to the kind sponsorship of NAEGELI Deposition and Trial, raise a glass of good cheer. Special recognition goes out to Bob Olsen for his efforts in organizing this event.

Every year, the Construction Law Section endeavors to hold a CLE for construction law attorneys outside the Seattle area. This year, we held the CLE on April 27 in Kennewick, with sponsorship by the Benton Franklin Legal Aid Society. Thanks to everyone for coming out to the CLE and thanks to our speakers Paul Cressman, Jr., John Evans, Kerry Lawrence, Amber Hardwick, Seth Millstein, Jason Piskel, and Rob Crick. Thanks especially to John and Amber for their efforts in organizing the event, and to Kerry for being the boots on the ground. We are always happy to connect with section members and are looking forward to our next "road" CLE.

Our next event will be the annual Summer Meeting and CLE at the WSBA Offices on June 8. Depending on the WSBA's newsletter publication schedule, this event is either in the near future or in the rear-view mirror. Post-event fellowship is sponsored by McMillen Jacobs Associates. The topic of the CLE is the new *Construction Law Deskbook* that section members have been working hard to produce for the past couple years. If all goes according to plan, WSBA will publish the Deskbook and make it available for purchase by the end of the year. This is due to a herculean effort by Ron English, so

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UPCOMING EVENTS

Mid-Year Meeting and CLE	June 8, 2018 (WSBA Conference Center)
Fall CLE	(date and location TBA)
Fall Forum	(date and location TBA)
Construction Law Deskbook	Publication in Fall 2018

Claimants Do Not Need to Include Bond Principals When Foreclosing Liens

By Athan E. Tramountanas – Ogden Murphy Wallace, PLLC

The Washington Supreme Court has recently held that, where a lien release bond is obtained by a general contractor, a lien claimant is not required to name the general contractor as a party to a lien foreclosure suit. In *Inland Empire Dry Wall Supply Co. v. Western Surety Co.*, 189 Wn.2d 840 (2018), a drywall supplier placed a mechanics' lien on a construction project. To release the project property, the general contractor obtained a lien release bond, naming the contractor as the "Principal," the provider of the bond as the "Surety," and the drywall supplier/lienholder as the "Obligee." The drywall supplier then sued to foreclose its lien, naming the Surety as a party defendant, but not the general contractor. The Surety then argued for summary judgment dismissal of the lawsuit for failing to name the general contractor as a defendant, which the Surety argued was a necessary and indispensable party.

The Supreme Court held that the general contractor is not a necessary party to a lien foreclosure lawsuit where the contractor has obtained a lien release bond. The court noted that the Surety is able to dispute the validity and valuation of the lien on its own behalf and that a remote contracting party, like the drywall supplier, may not have any direct claim against a general contractor. This was a unanimous decision by the court.

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please give a big thanks to Ron and to all the authors and peer editors that have worked so on this project.

The Summer Meeting is normally when a Section Chair's term is over and when new officers are installed. Because of change in the Section bylaws mandated by the WSBA, however, new officers will not take over until October. This means that Chair-elect Jason Piskel will need to wait a few more months before assuming the mantle, and it means that the Construction Section history books will forever reflect that I was the longest-serving Section Chair in the modern era. I will try to stay humble.

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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Construction Site-Adjacent: Hazards, Injuries, and Safety

By William J. Martin – AIA, NCARB, Robson Forensic

After many years of depressed activity the construction industry is experiencing a renewed vigor. Along with a positive economic boost for the industry, the resumption of construction activity will also bring a predictable increase in construction-related injuries. While there is tremendous awareness of site safety for construction workers, there is less awareness to the hazards created when construction activities conflict with the more routine world adjacent to construction sites.

People in the general public often move about construction site-adjacent areas with little to no awareness of the complex projects underway. Unlike the personnel on a construction site, the general public has not been trained to stay safe around ongoing construction; for this reason, adjacent areas must be maintained as predictable environments that conform to the public's usual rules and expectations. If the construction site and the area around the construction site are not maintained properly, people may be needlessly harmed by hazardous conditions that could have been avoided with an appropriately diligent approach to jobsite safety.

Safety Planning & Execution

The safety of people outside the construction site starts with the construction manager or general contractor's safety plan. The scope of the safety plan includes jobsite safety issues inside and outside of the fence. A well-prepared, well-executed safety plan will address adjacent areas and will specifically charge an individual with monitoring the condition of areas around the jobsite.

It is standard practice for the jobsite superintendent or another jobsite supervisor to make a job walk at the beginning and end of the day. During those daily walks, safety issues should be noted and addressed. Issues that commonly turn up during these job walks include tools and materials that need to be relocated or secured; temporary traffic control measures that need adjustments; and walkways that may require maintenance / repair or protection from falling items. When preparing a jobsite hazard analysis, the safety of the general public cannot be overlooked.

Issues in Pedestrian & Vehicular Safety

Roadways and walkways must be maintained in a safe condition through the use of temporary walkways, temporary traffic controls, shoring, and covers. Pedestrian hazards must be eliminated or prominently marked if they cannot be eliminated. Shipping containers are commonly used for covered walkways to protect pedestrians from falling tools or materials, but their use is also associated with slip and trip hazards at the transitions and internal walking surfaces. Steel plates that are used to cover open excavations are thick enough to pose a tripping hazard if the edges are not dressed properly and require tapered ramps if they are within a foreseeable pedestrian path.

Additionally, areas adjacent to construction sites must be appropriately lit, especially where a temporary enclosure blocks daylight or light from adjacent lighting.

Because construction sites involve regular deliveries, heavy equipment, and unusual access patterns, the hazard analysis must address traffic controls, especially temporary traffic controls for times when safety dictates partial or complete street and walkway closures. Safe alternate routes must be provided and the altered traffic patterns must be clear and understandable. When heavy materials or equipment are being hoisted, street and walkway closures may be necessary to prevent exposure to hazards associated with any kind of problem with the hoist.

Applicable Codes

The established standards for walkway safety, edge protection, and traffic control do not change because the walkway, parking lot, or roadway is next to ongoing construction. However, additional standards do exist to address the specific requirements for maintaining safety during construction work.

The U.S. Army Corps of Engineers publishes EM 385-1-1, the Safety and Health Requirements Manual. This document is a comprehensive manual for workplace safety, and it includes specific requirements for separating construction

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activities from other activities. The manual requires fencing, signage, traffic controls, and lighting, depending upon the proximity to other activities, exposures, and an analysis of the actions required to eliminate potential hazards. This manual applies specifically to construction projects on U.S. government reservations, but it should not be overlooked as a source for the standards of care for construction facilities, including safety adjacent to ongoing construction.

The American Society of Safety Engineers, in conjunction with the American National Standards Institute, publishes A10.34, Protection of the Public on or Adjacent to Construction Sites. This standard addresses protection of the general public directly and concisely sets forth the standards of care for separation of construction activities from adjacent areas. Each project must have Public Hazard Control Plan. The purpose of this plan is to evaluate potential hazards and reduce or eliminate them. In order to reduce overlap and gaps, responses to potential hazards must be coordinated across all trades involved in the project. A10.34 addresses noise levels, including sudden or loud impact noises that can create hazards or startle people, as well as emissions of dusts, smoke, fumes and other airborne hazards. It also sets forth standards relevant to excavation or operations that cause ground vibrations. It requires the person or firm controlling the project to prepare the Hazard Control Plan, and requires the use of properly qualified personnel to inspect and monitor hazard prevention activities.

The Manual for Uniform Traffic Control Devices (MUTCD), published by the Federal Highway Administration and the American Traffic Safety Services Association, includes a chapter entitled Temporary Traffic Control. The MUTCD is cited by both the Corps of Engineers Manual and A10.34 for the standards that apply to temporary roadways and walkways. The use of flaggers, temporary signage, cones, barrels, and tubular markers all must conform to the requirements of the MUTCD. Temporary pavement markings, channelization, pedestrian controls and protections, temporary walkways and ramps are all addressed by the MUTCD.

A Basis for Addressing & Mitigating Potential Hazards

Maintaining a safe, secure construction site includes paying an appropriate level of attention to adjacent areas and uses. Each circumstance is different, so these standards may not cover all possible hazards or methods of addressing hazards. However, a contractor or construction manager who uses these standards as the basis for addressing and mitigating potential hazards will create far fewer dangers for people whose only relationship to the project is physical proximity. Diligently applying the standards of care for safety adjacent to a construction site will not prevent all problems, but failure to do so increases the likelihood of injuries, including catastrophic injuries, to members of the general public.

Division I Rules On Where a County Can Sue or Be Sued

By Athan E. Tramountanas – Ogden Murphy Wallace PLLC

In *Frank Collucio Constr. Co. v. King County* (May 7, 2018), Division I of the Washington Court of Appeals interpreted a statute, RCW 36.01.050, governing the venue of actions brought by or against counties. The court held that, while the statute says a contractor can bring suit in a neighboring county and that clauses in public works contracts naming the party county as proper venue are against public policy, the party county can sue a defendant within the county if the defendant resides in that county's boundaries.

King County brought an action against the Frank Collucio Construction Company (FCCC) on the North C reek Interceptor Sewer Improvement Project for breach of contract in King County Superior Court. The complaint alleged proper venue in King County "because defendant FCCC resides in King County, Washington." FCCC filed a separate injunctive and declaratory relief lawsuit against King County in Snohomish County Superior Court. Snohomish County Superior Court dismissed the suit. FCCC filed a counterclaim in the pending King County Superior Court action and moved to transfer venue. King County Superior Court denied the motion but entered an order for certification under RAP 2.3(b)(4).

The statute at issue was amended in 2015 to add a third subsection that addressed venue clauses in public works contracts:

RCW 36.01.050
Venue of actions by or against counties.

(1) All actions against any county may be commenced in the superior court of such county, or in the superior court of either of the two nearest judicial districts. All actions by any county shall be commenced in the superior court of the county in which the defendant resides, or in either of the two judicial districts nearest to the county bringing the action.

(2) The determination of the nearest judicial districts is measured by the travel time between county seats using major surface routes, as determined by the administrative office of the courts.

(3) Any provision in a public works contract with any county that requires actions arising under the contract to be commenced in the superior court of the county is against public policy and the provision is void and unenforceable. This subsection shall not be construed to void any contract provision requiring a dispute arising under the contract to be submitted to arbitration.

FCCC argued that RCW 36.01.050(3) gives public works contractors the absolute right to have their claims heard in an adjoining county. King County argued that the 2015 amendment did nothing to change the language in RCW 36.01.050(1), allowing counties to commence actions "in the superior court of the county in which the defendant resides." Division I ruled in favor of King County, holding that the plain and unambiguous language of the statute allowed the lawsuit to proceed in the superior court where FCCC resides, even if that is the superior court of the party county.

FCCC and amici argued that as a matter of public policy, a public works contractor must have the right to bring claims against a county in an adjoining county. Sticking with the "plain and unambiguous language" of the statute, however, Division I admonished that "[p]ublic policy arguments should be 'addressed to the Legislature, not to the courts.'"

Division III Takes up Statute of Limitations On Claims Against a Truss Manufacturer

By Athan E. Tramountanas – Ogden Murphy Wallace PLLC

In a recent unpublished decision, the Division III Court of Appeals considered the statutes of limitations for consumer protection act and UCC sales claims by a contractor and client against a truss manufacturer. The case, *Schilling v. ProBuild Company, LLC*, (May 8, 2018), involved the construction of a custom house in Union Gap, and roof trusses with an insufficient design to carry the required dead load.

The contractor in the case, Artisan, Inc., contracted with ProBuild Company, LLC to manufacture the roof trusses. The project designer did not enumerate the load requirements for the trusses, but through Artisan's relationship with ProBuild's salesman, the mutual understanding between Artisan and ProBuild was that high-end homes by Artisan would require a 15-pound dead load. ProBuild's salesman initially specified that the trusses would be manufactured with the expected 15-pound dead load. When the truss designs were sent to the plant for manufacturing, however, ProBuild's plant supervisor, who had a practice of changing design specifications to reduce costs, lowered the specifications to a 12-pound dead load.

The final design specifications, as reduced by the plant supervisor, were certified by an independent engineer on June 1, 2007. Artisan did not review the certified truss design – which indicated the 12-pound dead load – other than to confirm the presence of an engineer's stamp. The house was completed in spring of 2008. Shortly after moving in, the Shillings noticed cracks in the ceiling. They contacted Artisan, who came to the site and repaired the cracks, but they kept reappearing. Artisan eventually hired an engineer, who in 2011 concluded that the trusses used on the house did not meet industry standards. The Schillings and Artisan together initiated suit against ProBuild in early 2012, alleging violations of the Consumer Protection Act and breaches of implied and express warranties under chapter 62A.2 RCW, UCC Sales.

The court held that, while the discovery rule applies to claims under the Consumer Protection Act, Artisan should have known the trusses were not adequately designed when it received (and did not review) the certified truss design. Since the CPA has a four-year statute of limitations, the CPA claim was time barred. The UCC claim also has a four-year statute of limitations, which begins to run at the delivery of the goods. While an allegation of fraudulent concealment could toll the statute of limitations, the court held there was no concealment here because the certified design showed the 12-pound dead load specification. The court thus held the UCC claim was also time barred, and affirmed dismissal of the plaintiffs' claims.

Fifth Annual Dinner Meeting – Another Success

By Robert Olson – Schlemlein Fick & Scruggs, PLLC

The Section held its fifth annual dinner meeting/mini CLE at Cutter's Crabhouse in the Pike Place Market on Thursday evening, March 1, 2018. A lively crowd of 36 members socialized over drinks before dinner with a bar generously hosted by **NAEGELI Deposition and Trial** (www.NAEGELIUSA.com), "a premier national firm which specializes in court reporting, legal videography, video conferencing, trial preparation, transcription, copying and scanning and language interpreters in over 200 languages."

The CLE portion of the event was entitled – **What is BIM and why should construction lawyers care about it?** The short answer to that intriguing question is that BIM stands for Building Information Modeling, defined as digital technology that establishes a computable a way of representing all the physical and functional characteristics of a facility and its related project/life-cycle information. BIM is now widely used by members of the design team on large complex commercial construction projects.

Making this subject understandable was **Dr. Carrie Sturts Dossick**, a professor of Construction Management at the University of Washington, College of Built Environment, and Executive Director of the Center for Education and Research in Construction (CERC). She has a Ph.D. in civil engineering from Columbia University and is also a professional engineer who spent four years as a consulting engineer before joining the UW faculty in 2005. She has focused her career on researching, authoring and lecturing on BIM and related topics. Dr. Dossick was joined by one of her Ph.D. students, **Bita Astanah Asl,** who has first-hand knowledge and experience with using BIM.

Together, they presented an informative hour-long slide show that covered a short history of BIM, its various uses and challenges, and a demonstration on how it is prepared. They were joined at the end by construction attorney **Robert Olson,** who explained how the American Institute of Architects (AIA) has structured its new contract forms to handle the legal issues and risks of using BIM and digital documents.

Those attending received one hour of CLE credit. Considering that the libations were provided and dinner and the CLE credit cost only $50, the event was one of the all-time great bargains for Construction Law Section members. We intend to continue the tradition next year. We hope you can join us.

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2018
Construction Law Section Membership Form
January 1, 2018 – December 30, 2018

❒ Voting Membership: I am an active WSBA member. Please enroll me as a voting member. My $25 annual dues are enclosed.

❒ Non-voting membership: I am not an active WSBA member. Please enroll me as a subscriber member so I can participate and receive your informational newsletter. My $25 is enclosed.

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