
Construction Law



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Chairman's Report

by Alan Bornstein

I am honored to serve as Chair of the Construction Law Section for the next year.

Our Construction Law Section is strong. We provide an annual CLE seminar on construction-related issues that is well attended and profitable. We provide forums in the Fall and Spring where we invite speakers to discuss and debate topical issues. Larry Vance singularly oversees the publication of our quarterly newsletter that updates members about current appellate-court opinions and legislation. Last, we are about to complete proposed jury instructions for tender to the State Committee on Jury Instructions.

The strength of our Section is a product of your efforts. We also have the good fortune that our Section has possessed effective and active leaders. We owe much to the hard work and perspicacity of my predecessors: Karl Oles, Karin Nyrop, Arne Hedeem, and Ken Yalowitz.

What do we plan for the upcoming year?

Our first goal is to do more of the same. We do not want to mess with success.

Our second goal is to conduct a forum or CLE seminar, or both, in Eastern Washington. Our Eastern Washington members are entitled to enjoy the benefits of these activities in their backyard.

Our third goal is to assist Larry Vance in producing the quarterly newsletter. The newsletter is the most recurrent tangible benefit that we members enjoy. I plan to work

with Larry so that we establish a procedure where a member is assigned a topical issue and is paired with an editor. If you wish to volunteer as a writer or editor, please contact me at abornstein@jbsl.com or (206) 292-1994.

Our fourth goal is to promote the soon-to-be completed jury instructions. These instructions will have great utility not only to those trying construction cases, but to lawyers, judges, and jurors involved in any contract case. Much of the development of contract case law arises from construction disputes due to the incredible interrelationships of, and risks inherent in, contractual relations on construction projects.

Our fifth goal is to increase our involvement with the Bar Association, legislators, and constituent groups on proposed legislation. Our members provide a deep pool of talent that must be drawn upon to comment upon and improve the quality of proposed legislation.

Our goals can only be attained with your help. I look forward to hearing from you.

Public Disclosure Act/ WISHA Consultation Reports

by Larry Vance – Winston & Cashatt

In the case of *Building Industry Ass'n of Wash. v. Dept. of Labor & Industries*, 98 P.3d 537 (2004), Division II of the Court of Appeals reversed a trial court ruling which had required the public disclosure of certain "ergonomics-related voluntary compliance reports, which were submitted to L&I."

To promote worker health and safety, the Washington Legislature allows for employers to consult with the Department of Labor & Industries under WISHA and the "consultation report" generated pursuant to these L&I consultations is not generally subject to WISHA citation by L&I. Basically, the Legislature established a voluntary

In This Issue

Chairman's Report	1
Public Disclosure Act/WISHA Consultation Reports	1
Claims/Notice of Claims/Mike Johnson Case Revisited ..	3
Claim Filing Requirements/Contract Actions	3
Account Stated/Summary Judgment	4
Editor's Letter: A Call For Simplicity	5

continued on next page

ACCOUNT STATED/SUMMARY JUDGMENT *from previous page*

compliance program that established on-site consultations with L&I representatives. The L&I visit is a consultation – not an inspection. No civil penalties will be issued unless the visit discloses a serious violation and the employer refuses or fails to correct it. [RCW 49.17.250(2)]

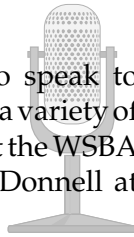
In 1991, the Legislature exempted these employer-requested consultations from public disclosure and required L&I to maintain their confidentiality.

In the *Building Industry Ass'n* case, the Building Industry Ass'n of Wash. (BIAW) and certain newspapers argued that the Legislature only exempted certain "information" in the consultation reports, but not the reports themselves. The Court of Appeals held that such a distinction would render the exemption meaningless.

Note: A Petition for Review has been filed in this case with the Washington State Supreme Court and the Petition for Review is still pending.

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Claims/Notice of Claims/Mike Johnson Case Revisited

by Larry Vance – Winston & Cashatt

In the case of *Weber Construction v. County of Spokane*, 98 P.3d 60 (Sept. 2004), Division III of the Court of Appeals revisited the issue of compliance with certain written Notice of Claim provisions contained in the Spokane County's Standard Road Specifications. The contractor (Weber) had encountered large boulders during construction of a county road. The contractor provided notice of a claim for additional costs because the large boulders were unsuitable for fill. The Standard Specifications required that in addition to written notice of claim that the contractor also provide an estimate of the costs. The contractor did not provide this cost estimate as required by the specifications. The County moved to dismiss on "jurisdictional" grounds, arguing that without the compliance with the second part of the Notice provisions, the Court had no jurisdiction to hear the case. The trial court granted the County's Motion, but Division III reversed finding that the County had actual notice of the contractor's problems and whether this actual notice constituted waiver of strict compliance was an issue of fact. The County then appealed to the Supreme Court.

The Supreme Court directed Division III to reconsider its ruling in light of the Supreme Court's 5-4 decision in the *Mike M. Johnson* case. (150 Wn.2d 375). In that case, the Supreme Court had reversed another Division III decision which had found that the County's actual notice of certain conditions did not constitute sufficient evidence of waiver of the contract's claim procedures.

On remand and reconsideration of the *Weber* case, Division III distinguished the *Weber* case from the *Mike M. Johnson* decision. In *Weber*, Division III found that the contractor had advised the County that it could not provide the required cost estimate until the County first provided the contractor with certain other information (which the County apparently also failed or refused to do). Division III basically ruled that the contractor complied as best it could under the circumstances of the County's failure to provide certain information. Alternatively, the court found that the County (by its conduct) waived strict compliance. Accordingly, Division III reversed the trial court's decision.

Note: A Petition for Review has been filed in this case as well.

Claim Filing Requirements/Contract Actions

Harberd vs. City of Kettle Falls
120 Wn.App. 498, 84 P.3d 1241 (January, 2004)
[Claim Filing Statutes]

by Elizabeth Petrie, Legal Intern – Winston & Cashatt

In *Harberd v. City of Kettle Falls*, the Division III Court of Appeals determined that the claim filing provisions in RCW §§4.96.010(1) and 4.96.020 apply to breach of contract claims, as well as tort claims. *Harberd*, 120 Wn.App. at 510. The case arose from Mr. Harberd's claim that the City reneged on an agreement to let him hook proposed housing lots (located outside of city limits) up to the City's water system. The trial court granted summary judgment on the basis that the plaintiff failed to present sufficient evidence of an implied or express contract. The Court of Appeals affirmed the trial court's decision to grant summary judgment in favor of the City on the basis that Mr. Harberd failed to properly serve his claim for damages on the City (an issue raised, but not decided by the trial court) and also held that the claim filing provisions of RCW Ch. 4.96 applied to the plaintiff's breach of contract claim.

Facts

In the years between 1983 and 1994, Mr. Harberd went to the City Council on various occasions to request water hookups for his property located outside city limits. The City Council and Planning Commission granted a number of Mr. Harberd's requests.

In March 1993, the Washington State Department of Health determined that the City's system could adequately support 1,400 hookups and that the City would be approved for a permit for that number of hookups. After approving nearly 1,400 hookups, the City passed a 90-day moratorium for approval of new hookups. This moratorium was then extended to September 1993.

In response to the DOH determination, the City imposed a new requirement, which required property owners with previously approved, but as yet unconnected water hookups, to pay the hookup fee within six months or the approved hookup would be nullified. Later, in an effort to stall development while the City updated its water system, it imposed a moratorium on all out of town water hookups, except those already under contact. After this moratorium was passed, applications for out of town water hookups were denied. In November 1997, the City adopted a comprehensive growth management plan which provided that city services would not be extended outside of the City limits.

The Planning Commission denied Mr. Harberd's request for more water hookups in 1994 based on the new

continued on next page

CLAIM FILING REQUIREMENTS/CONTRACT ACTIONS
from previous page

growth management plan. Mr. Harberd made no further requests for water hookups after he was denied in 1994.

In August of 2000, Mr. Harberd attempted to have a statutory claim of damages served on the Mayor, and the City Clerk of the City of Kettle Falls. However, neither was available at the time, so the process server attempted to serve Ms. Sanders, the Secretary/Clerk for the City's Mayor. In 2001, Mr. Harberd filed a complaint seeking damages and injunctive relief against the City for allegedly breaching an express or implied contract. The City moved for summary judgment on Mr. Harberd's claims based in part upon his failure to properly serve his claim for damages, and alleging Mr. Harberd's claim was barred by the statute of limitations.

Analysis

The court first looked at the claim filing statutes, RCW 4.96.010 and .020, (which are titled "Tortious Conduct of Local Governmental Entities.") Mr. Harberd contended that these statutes did not apply to non-tort claims such as breach of contract. However, the court concluded that notwithstanding the title of the sections, RCW Ch. 4.96 does in fact apply to contract claims. The court reached this conclusion by interpreting the "plain meaning" of the statute in light of the underlying legislative purpose.

The court noted that there are three references to 'damages' without any qualifying language in RCW 4.96.010(1); former RCW 4.96.020(1), (2); and three references to 'damages arising out of tortious conduct,' RCW 4.96.010(1); former RCW 4.96.020(3), (4). *Harberd*, 120 Wn.App. at 510. The court concluded that based on the statute's plain language there are general requirements, which apply to all damages, while more specific requirements apply only to claims arising out of tortious conduct. *Id.*

The court goes on to note the ambiguity that exists in former RCW 4.96.020(1) which provides "the provisions of this section apply to claims for damages against all local government entities" is resolved by looking at historical changes made to the claim filing statutes. *Harberd*, 120 Wn.App. at 510. This analysis revealed the Supreme Court's determination that the word 'damages' encompasses a "sum of money...for a wrong sustained as a consequence of either a breach of contract or tortious act or omission." *Id.* at 511; citing *Puget Construction Co. v. Pierce County*, 64 Wn.2d 453, 457, 392 P.2d 227 (1964).

Next, the court addressed whether Mr. Harberd's suit was barred by his failure to properly serve the City with a claim of damages. The court concluded that service upon Ms. Sanders, the Secretary/Clerk for the City's Mayor, was ineffective, as she was not authorized to accept service. Consequently, the statutory claim for damages delivered

to Ms. Sanders was insufficient to satisfy the statutory claim filing requirements and thus, Mr. Harberd's claim was barred.

Although it was a non-construction contract case, the potential implications to construction contract cases are clear. Whether this case will be followed by other Divisions of the Appellate Court is unclear.

Account Stated/ Summary Judgment

Parrott Mech., Inc. v. Rude
118 Wn. App. 859 (Oct. 2003), Division III

by Eowen Rosentrader, Legal Intern – Winston & Cashatt

In *Parrott Mechanical, Inc.*, the plaintiffs sued on a theory of "account stated." The trial court granted partial summary judgment in favor of the plaintiffs finding that because the defendants did not object to invoices submitted to them by the plaintiffs within a reasonable time an account stated was established. The trial court awarded prejudgment interest at 12 percent because the judgment amount was liquidated as set forth in the invoices. The trial court also found the defendants joint and severally liable. Defendants appealed the order of summary judgment arguing that the fact that the defendant did not complete all of the work for which it had invoiced created a disputed material fact which precludes summary judgment. The defendants also argued that holding them jointly and severally liable for the debt improperly pierced the corporate veil where piercing had not been argued by the plaintiffs.

Facts

Howard and Delvona Rude owned Parrott Mechanical, Inc., an Idaho-based construction firm until they sold it to Service Experts, Inc. (SEI) in September of 1997. After the sale, the Rudes continued to act as Parrott's president, vice president, general manager and assistant general manager of Parrott Mechanical. The Rudes were also sole owners of other corporations: Rude Enterprises, L.L.C., I.G.C. Properties, L.L.C., I.G.C. Phase Two, L.L.C., and I.G.C. Phase Three, L.L.C.

In April of 2000, Delvona Rude, acting for I.G.C., accepted a bid submitted by Howard Rude, acting on behalf of Parrott Mechanical, "to provide all electrical, heating, ventilating, air conditioning, and plumbing systems for two I.G.C. commercial buildings." The Rudes submitted Parrott invoices to Rude Enterprises through October 31, 2000 for payment of labor and materials. Each request for payment was signed by Howard Rude and submitted to Intervest Mortgage for payment.

Rude Enterprises had secured financing from Intervest Mortgage on the construction. Each invoice was paid by

Interinvest pursuant to that financing agreement based on the Parrott invoices and Howard Rude's certification that

- 1) Completion with the improvements to the date of this request has been performed in accordance with the plans and specifications submitted to the lender.
- 2) The amount requested for construction items represents dollar for dollar either work already completed on the improvements or materials delivered to the site.
- 3) All amounts previously disbursed for construction items have been paid to the parties performing the work or delivering the materials for which the amounts were requested.

Although the invoices had been certified by Howard Rude and the Rudes, Rude Enterprise subsequently failed to pay Parrott Mechanical the amounts due on the invoices. Consequently, Parrott filed a claim of lien for the amounts due plus interest, costs and attorney fees.

The Rudes argued that the invoices did not accurately represent the quality or quantity of the work completed by Parrott. However, the court held that the plaintiff was not required to prove that the invoices were a true statement of the work they had completed, they only had to establish that the invoices were "clearly intended as statements of the balances owed to Parrott by the Rudes as of the date of each invoice, and that the defendants did not object within a reasonable time."

The established law is that a claim of account stated must be supported by "a writing evidencing that a final balance of an account was rendered and... evidence of mutual assent that the amount stated is a final balance to date." Further, mutual assent is shown when "the other party to the transaction acquiesces in its correctness" or when the other party fails "to object within a reasonable amount of time."

On appeal from the summary judgment in favor of Parrott, the court found that the Rudes had both failed to object and acquiesced in the correctness of the invoices. The Rudes did not deny that Parrott had submitted invoices. Also, the Rudes had certified to Interinvest Mortgage that the invoices "represented, dollar for dollar, work performed and money owed to Parrott to date." Thus, the court found that Parrott had "established the essential elements of an account stated as a matter of law" and affirmed summary judgment in favor of the plaintiffs.

As for holding the Rudes jointly and severally liable, in their individual capacities, the court found that the defendants had mischaracterized this as "piercing the corporate veil" when in fact, the Rudes were named repeatedly in the pleadings as individuals as well as by their corporate entities. Further, Parrott alleged that the Rudes acted as individuals as officers of Rude Enterprises as well as

through their employment agreements with Parrott. The court described the Rudes' argument of piercing the corporate veil as "simply a nonissue."

Ultimately, Parrott was awarded the amounts reflected in the invoices, including sales tax and retainage although the original construction contracts provided that the contract price included sales tax. The court found that the invoices established an account stated and in doing so, a new contract was created which was binding on the parties. Thus, it was proper for the judgment to include amounts reflected in the invoices.

Editor's Letter **A Call For Simplicity**

In 1975 when I graduated from law school (many moons ago), there was a great movement afoot for legal reform. Washington had just adopted the Uniform Commercial Code; No Fault Divorce Act was being enacted, the Probate Code was being rewritten and simplified, as was the Criminal Code. The Federal Rules of Civil Procedure had recently been adopted by Washington and several other states. For a brief moment in time, the legal system appeared to be headed towards simplicity. Unfortunately, the movement did not last very long.

Each county now has its own local rules (as do all the federal courts) and the Local Rules are ten times as thick as the basic rules of civil procedure. The Department of Labor & Industries has at least three or four volumes of administrative regulations in the Washington Administrative Code (WAC) and has become mini-parliament.

The feds are no better than the states. When I first began the practice of law in 1976, the federal government (all federal agencies) used a "Standard Form 23A" Government contract. The document was basically two pages with standard provisions. Now each agency of the federal government produces a three-ring binder of contract provisions which are non-standard and incorporated by reference.

In 1984, the federal government produced the Federal Acquisition Regulations (the "FARs"), which was a one-volume set of standard federal procurement regulations promoted for use by all federal agencies. No sooner had the ink dried on these FARs and every federal agency was busy supplementing them.

The truth is that simple is better for everyone. More rules and more complexity serves no one but the bureaucrats. Uniform Arbitration Acts, Uniform Model Procurement Codes and the Uniform Commercial Code are a much better system. The present legal system with its proliferation of conflicting and non-uniform rules is destined to ruin the legal system and also threatens the economic system as well.

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As the 2005 WSBA licensing period approaches, you may be thinking of changing your membership status to more accurately reflect your current career or lifestyle. If you no longer need your active WSBA license, here's why you should consider Emeritus status.

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One or more qualified legal service organizations are present in most Washington state counties. They include Columbia Legal Services, a statewide legal services program; Northwest Justice Project, a central

statewide point of access for clients; specialized legal services programs (such as Northwest Women's Law Center, Unemployment Law Project and others); and county volunteer attorney programs. These organizations offer a wide variety of volunteer opportunities such as direct representation, mentoring, advice clinics, self-help clinics, board service, telephone advice and document preparation. Emeritus also allows for *pro bono* services for criminal cases through some public defender offices. Emeritus attorneys and judges are currently volunteering in many capacities, including the Northwest Justice Project's CLEAR intake line (one remotely, from home); the Northwest Women's Law Center Board of Directors, Columbia Legal Services administrative law case, King County Bar Association Neighborhood Legal Clinics, defense services for the Associated Counsel for the Accused in the Seattle Municipal Court's Mental Health Court, and writing wills for low-income seniors in Skagit County. We will do our best to find a niche to fit your legal expertise and time schedule.

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