

# Construction Law



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## Greetings from the Chairman

Welcome to our old and new members and thanks for your support! Here is a quick preview of some of our 2004 activities.

On June 11, the Section will present its annual CLE in Seattle. Topics are expected to include a legislative and case law update, insurance coverage and cost, conflicts in the claims process, recent developments relating to claims notice, claims for delay, practical ways to avoid and solve disputes, the Leonard study, and the effect of pay when paid clauses. Save June 11 on your calendar for interesting information and a chance to catch up with your colleagues.

The Section will also hold one or more evening forums. Topics and times will be announced soon.

The Section Board will be working on a set of standard terms and procedures for public project bid protests. Public agencies around the state use a wide variety of procedures that can be confusing to contractors, courts, and to the agencies themselves. The Board's idea is to propose a set of minimum standards suitable for small projects, supplemented with additional procedures suitable for larger projects. If you want to contribute to this process, please contact a member of the Board.

The Section is in solid financial shape. I look forward to seeing you at one or more of our events this year.

*Karl Oles, Chairman*

## Property Damage/Waiver of Subrogation/Off-Site Fabrication/Building Contents

*by L.H. Vance, Jr. – Winston & Cashatt*

The Washington Court of Appeals (Div. III) has held that a waiver of subrogation clause in an owner/contractor agreement protected an off-site fabricator and also applied to building contents loss, as well as damage to the building being constructed.

The waiver of subrogation clause was apparently patterned after an AIA standard waiver of subrogation provision which stated in relevant part that:

The owner and contractor waive all rights against (1) each other and the subcontractors, sub-subcontractors, agents and employees of each other, and (2) separate contractors, if any ... for damages caused by fire or other perils to the extent covered by insurance obtained pursuant to this paragraph or any other property insurance applicable to the work.

The facts of the case indicate that during the winter following the project's completion, the metal storage building collapsed due to a heavy snowstorm. The building was not only destroyed, but the hay inside was damaged (nothing worse than damaged hay). The owner's property insurance paid for the damage to the building and the "damaged" hay.

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The property insurer then commenced a subrogation action against the off-site fabricator of the building. The suit was brought in the name of the insured-owner. The building fabricator argued that the claim was barred by the waiver of subrogation provision. The Court of Appeals found that the fabricator was *not* a subcontractor within the meaning of the waiver of subrogation provision. However, the Court found that the off-site fabricator was either an "agent" of the contractor or a "separate contractor" within the meaning of the contract clause and thus protected from the property insurer's subrogation suit. The Court also held that the contents of the building were also within the scope of protection of the waiver of subrogation clause.

*Note:* The court's ruling regarding the contents of the building also being covered by the waiver of subrogation is not universally adopted by other jurisdictions.

## Discovery/Experts (Testifying vs. Consulting)/ Exclusion of Testimony

by Elizabeth Petrie, Law Clerk – Winston & Cashatt

***Stevens v. Gordon*, 118 Wn.App. 43, 74 P.3d 653 (Aug. 2003), Division III.**

In *Stevens v. Gordon*, 118 Wn.App. 43, 74 P.3d 653 (Aug. 2003), Division III, a personal injury action arising from a motor vehicle accident, the defendants sought review of an arbitration award by the trial court. The trial court granted summary judgment in favor of the plaintiff on the issue of liability and entered judgment on a verdict in favor of plaintiff. The court of appeals affirmed the judgment and found that the trial court had properly excluded the testimony of a medical expert that had been listed as a consulting expert during arbitration.

In October 2001, Mr. Gordon disclosed Dr. Stephen Sears as an expert witness he intended to call at the time of trial. Dr. Sears examined Ms. Stevens and concluded that there was no way to determine what percentage of her symptoms were attributable to the accident with Mr. Gordon and submitted his opinion. However, Mr. Gordon became dissatisfied with Dr. Sears after deposing another expert, Dr. Rinaldi. Mr. Gordon then sent a letter to plaintiff's counsel, on January 28, 2002, which stated:

Given the very favorable testimony of Dr. Rinaldi, at this time I will not be submitting Dr. Sears' report at the arbitration...I reserve the right to still call Dr. Sears should this matter go to trial. I will provide you ample notice of that decision, however.

*Stevens*, 118 Wn.App. at 48.

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*DISCOVERY/EXPERTS (TESTIFYING VS. CONSULTING)/  
EXCLUSION OF TESTIMONY from previous page*

On February 25, Mr. Gordon's counsel received a letter from Dr. Sears which stated that he agreed with Dr. Rinaldi's conclusions.

The case was arbitrated without the testimony of Dr. Sears in March of 2002. After an unfavorable arbitration ruling, Mr. Gordon demanded a trial de novo. In April 2002 Mr. Gordon's counsel wrote to Ms. Stevens' counsel notifying them that he intended to call Dr. Sears to testify at trial. On May 15, 2002 the court granted Ms. Stevens' motion to exclude Dr. Sears' trial testimony, which argued that he had not been included in answers to interrogatories and had been shielded from discovery by his status as a consulting expert.

As a consulting expert, Dr. Sears' opinions and even his identity were protected as he was considered part of Mr. Gordon's team and his opinion was treated as work product. Additionally, as a consulting expert, Dr. Sears could not be called by the opposing party at trial. The court stated "By invoking *Mothershead*, Mr. Gordon protected Dr. Sears from any attempts to obtain deposition testimony or to present Dr. Sears' report or testimony at arbitration." *Stevens*, 118 Wn.App. at 50; *Mothershead v. Adams*, 32 Wn.App. 325, 647 P.2d 525 (1982).

Consequently, the trial court found that "the principles of fundamental fairness rebelled against last minute discovery occasioned by converting this consulting expert into a testifying expert." *Stevens*, 118 Wn.App. at 50. And that by shielding Dr. Sears from discovery until six weeks before trial, Mr. Gordon had delayed discovery as to this witness, and it was "fundamentally unfair to subject Ms. Stevens to last minute discovery." Considering also that the cut off date for discovery had passed on December 24, 2001, the appellate court affirmed the decision of the trial court to exclude Dr. Sears' testimony at trial. The trial court's exclusion of the expert's testimony was affirmed on appeal.

In his dissent, Judge Kato noted that there was no evidence presented showing that Dr. Sears could not have been deposed in the six weeks prior to trial, or that such timing of a deposition would have made trial preparation more difficult. He went on to state that the trial court had "abused its discretion in refusing to allow the defendants to call their expert medical witness at the time of trial solely because he was designated a consulting expert prior to the arbitration." *Stevens*, 118 Wn.App. at 60.

Although a non-construction case, the court's decision has obvious implications for construction cases and the use of experts for mandatory arbitration cases and "appeals" of those cases.

## Notice and Claim Requirements/ Actual Notice Insufficient/ Evidence of Waiver

by John Guin – Winston & Cashatt

In *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375 (2003), a divided Washington State Supreme Court addressed the consequence of failing to comply with the highly technical notice and claim requirements of the Washington Department of Transportation's Standard Specifications. In a 5-4 decision, the majority determined that the contractor failed to comply with the detailed notice and claim requirements in Section 1-04.5 of the WDOT Standard Specifications, and as a result, the contractor forfeited its claims for additional compensation.

The claims arose from a change order issued by Spokane County at the beginning of two successive road and sewer construction projects in the Spokane Valley. The change order involved widening one of the streets on the first project and adding curbs and gutters. The utility and grading work for the affected street had already been performed, so the change order required the contractor to go back to the street and perform the additional work. The changed work required deeper cuts at the edges of the roadway. As soon as the contractor began performing the extra work, it encountered buried telephone lines. The projects were essentially shut down for a month and a half while the County determined how to resolve the utility conflicts.

During the delay period, the contractor sent a dozen written notices to the County that its work was being delayed and that the contractor expected additional compensation for the disruption. **As the disrupting events were ongoing, these written notices did not include specific time or cost estimates.**

The County eventually denied the contractor's requests for additional compensation and the matter proceeded to litigation. On summary judgment, the trial court dismissed the claims for additional compensation based on the contractor's failure to comply with Section 1-04.5. Section 1-04.5 requires that a contractor: (a) provide immediate written notice of any claim; and (b) within 15 days thereafter, provide a detailed cost estimate and a schedule analysis to support the claim, among other information. Johnson appealed the decision, and Division III of the Court of Appeals overruled the trial court, finding that the County's actual notice of the claims and its conduct in negotiating with Johnson constituted evidence of a waiver of the notice and claim requirements of the contract. The County then appealed to the Supreme Court, who accepted discretionary review of the case.

The five-member majority of the Supreme Court held that an owner's actual notice of a claim is not an exception

*continued on next page*

*NOTICE AND CLAIM REQUIREMENTS/ACTUAL NOTICE  
INSUFFICIENT/EVIDENCE OF WAIVER* from previous page

to enforcement of the contractual notice and claim requirements. The majority acknowledged that an owner can waive such provisions through words or conduct but held that there was insufficient evidence of the County's waiver to overcome summary judgment.

A strongly worded dissent pointed out the factual, legal, and practical flaws in the majority's decision. The dissent argued that the majority failed to construe all facts in favor of Johnson, which facts contained evidence of the County's actual notice of the claims, the County's lack of prejudice, and the County's conduct in waiving the notice and claim requirements. The dissent also argued that the evidence of the County's actual notice, coupled with the lack of prejudice to the County, was sufficient evidence for a jury to excuse strict compliance with the notice and claim requirements. *Mike M. Johnson*, 150 Wn.2d at 400-02 (Chambers, J. dissenting). The dissent relied on the established cases of *Bignold v. King County*, 65 Wn.2d 817 (1965) and *Lindbrook Constr., Inc. v. Mukilteo Sch. Distr. No. 6*, 76 Wn.2d 539 (1969) for its application of an actual notice plus prejudice standard. Finally, the dissent expounded on the serious consequences of the majority's short-sighted decision:

Under the majority's holding today, an owner can demand additional work outside the scope of the original contract, observe the contractor perform that work, discuss the work with the contractor, and yet deny fair compensation for services rendered if, within 15 days, and before the owner's plans are even completed, the contractor fails to submit a written request for additional time for the demanded work or fails to produce an itemized invoice in a precise technical format.

In other words, the majority's opinion ignores the practical side of construction claim situations, where the cost and schedule impact of an event or series of events may not be known within 15 days of the event or events.

The implications of the *Mike M. Johnson, Inc. v. Spokane County* decision to the construction industry are unknown at this time. The majority does not purport to overrule or modify the decisions in *Bignold v. King County* and *Lindbrook Constr., Inc. v. Mukilteo Sch. Distr. No. 6*, so these cases still stand as legal precedent that an owner may not direct a contractor to perform extra or changed work and then avoid paying for such work on a technicality. While the majority appears to believe that it was clarifying the law, at best, the majority's decision creates more confusion in the application of the law, as litigating parties will now be arguing whether the facts of their particular case are more similar to *Mike M. Johnson* or to *Bignold* and *Lindbrook*.

## Construction Defect Claims/ Condominiums

by L.H. Vance, Jr. – Winston & Cashatt

The Washington Legislature has recently passed a new bill apparently attempting to deal with construction defect litigation regarding condominiums. The bill seeks to change numerous provisions in the Condominium Act. Some of the provisions in the new legislation include:

- (1) Section 2 contains a provision regarding non-recoverability of consequential, special or punitive damages "except as provided for in this Chapter or by other rule of law." (Another loophole?)
- (2) Section 5 contains two provisions regarding establishing that the measure of damages may be limited to "loss in market value" where cost to repair the defects is "clearly disproportionate to the loss of market value." (Lots of market value experts?)
- (3) Section 6 has some provisions regarding exclusion or modification of implied warranties.
- (4) Section 7 deals with statutes of limitation for certain claims under the Condominium Act and a provision that says that the time limitation in the Act "may not be reduced by oral or written agreement."
- (5) Section 8 establishes a committee to study certain issues with condominiums and construction defects, including "ways to reduce the problem of water penetration in residential condominiums." The Committee is also directed to study the use of ADR dispute resolution and independent third-party inspections during construction. The Committee's report is to be delivered to judiciary committees of House and Senate no later than December 2004, and the report is to contain not only the Committee's findings, but also proposed legislation implementing third-party inspections and ADR procedures.
- (6) The Act also contains extensive provisions regarding "minimum coverage standards" for "qualified warranties" and "exclusive remedies" where a "qualified warranty" is provided. (Looks like maybe more fertile ground for litigation?)
- (7) Additional provisions regarding "building envelope" warranty requirement, "materials and labor" warranties and other warranty provisions.

**Bottom Line: You better familiarize yourself with this piece of legislation!**

## Bond/Retainage Claims/Temporary Labor/Non-Coverage

by Elizabeth Petrie, Law Clerk – Winston & Cashatt

### *Better Financial Solutions, Inc., v. Caicos Corp.*, 117 Wn.App. 899, 73 P.3d 424 (July, 2003), Division 2.

In *Better Financial Solutions, Inc., v. Caicos Corp.*, 117 Wn.App. 899, 73 P.3d 424 (July, 2003), Division II, the court concluded that a temporary labor services provider is neither a laborer or subcontractor; thus it is not a proper claimant under the bond statute for contractors on public works projects, R.C.W. 39.08.010, or the retainage statute, R.C.W. 60.28.011.

Here, Better Financial Solutions, Inc. (BFS) made a claim, under R.C.W. 39.08.010 and 60.28.011, "against Caicos Corporation's payment bond and the retainage fund held by the Metropolitan Parks District of Tacoma (Metro), for compensation related to its services on the Dickman Mill Park Restoration Project." *Caicos*, 117 Wn.App. at 902. The trial court granted summary judgment in favor of BFS, concluding that it was a subcontractor and thus was a proper claimant under the lien statutes. The court of appeals reversed the decision of the trial court, finding that BFS was not a laborer or subcontractor and was not entitled to a lien against the bond or retainage fund.

The primary contractor, Caicos Corporation (Caicos), was required to post a payment/performance bond for the contract amount, which it did. Caicos proceeded to award a subcontract to MK Construction (MK) for the project's concrete work. MK being a small contractor entered into an agreement with BFS to supply temporary labor to assist with the project.

BFS is a temporary labor services provider, who provides laborers to small contractors who need them to help perform a particular job. BFS does not provide supplies or materials, nor does it assist in the actual construction of the project, or bear any costs associated with it. BFS's services include paying each employee's industrial insurance premium and unemployment insurance, filing returns with the Department of Labor and Industries and the state Employment Security Department, and withheld amounts required for federal tax, Medicare, and FICA purposes.

The agreement between MK and BFS left "full control over the means and methods of work and procedures to be used" to MK and disclaimed BFS's responsibility for labor activities. After completion of the project MK owed BFS \$20,249.69 under the agreement. BFS did not sue MK for the amount owed, but only brought a claim under the payment/performance bond and retainage fund.

In order to recover from a payment/performance bond, the claimant must be a member of the class protected by the statute, namely a laborer or subcontractor. Both the bond and retainage statutes specify the protected class. The bond statute for contractors on public works projects, R.C.W. 39.08.010 requires that the contractor "pay all la-

borers, mechanics, and subcontractors and materialmen, and all persons who supply such person or persons, or subcontractors with provisions and supplies for the carrying on of such work." The retainage statute, R.C.W. 60.28.011 allows a lien to be brought by "[any] person performing labor or furnishing supplies toward the completion of public improvement contract" against the contractor's retainage bond.

The court followed the reasoning of a recent Division I decision, and concluded that BFS was not a laborer under either statute. *Better Financial Solutions, Inc. v. Transtech Elec., Inc.*, 112 Wn.App. 697, 51 P.3d 108 (2002). The court recognized that "[s]uppliers of labor are not, and cannot logically be, laborers as well. Laborers are the individuals who actually perform work at the job site." Citing *Transtech*, 112 Wn.App. at 705-06.

BFS attempted to align itself with three cases in which it was found that the protected class included a "person claiming to have furnished labor." See *Bishop v. T. Ryan Contracting Co.*, 106 Wn. 254, 180 P. 126 (1919); *Ledingham v. City of Blaine*, 105 Wn. 253, 177 P. 783 (1919); and *National Surety Co. v. Bratnobar Lumber Co.*, 67 Wn. 601, 122 P. 337 (1912). The court rejected these cases just as the court did in *Transtech* because they were factually different from this case and involved claimants who had performed actual labor or furnished supplies to the project.

The court also looked at the wording of the statute and held that "all persons who furnish labor" refers to persons who do actual labor, rather than those who provide laborers who then do the actual work. R.C.W. 60.28.011(2), (12)(b).

With this, the court concluded that BFS was not within the protected class as a provider of labor, and went on to determine whether BFS could be viewed as a subcontractor under the statutes.

The court recognized that a subcontractor "(1) performs or takes from the prime contractor a specific part of the labor or material requirements of the original contract and (2) has a substantial and important relationship with the prime contractor." *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wn.App. 719, 723, 741 P.2d 58, review denied, 109 Wn.2d 1009(1987). *Farwest* also noted that "subcontractors perform on site." *Farwest*, 48 Wn.App. at 726. Moreover, the court explained that a person/entity "is not a subcontractor unless his function bears some nexus with the project's physical construction." *Caicos Corp.*, 117 Wn.App. at 909.

The agreement between MK and BFS indicates that BFS did not want the control or other responsibility that a

*continued on next page*

**BOND/RETAINAGE CLAIMS/TEMPORARY LABOR/NON-COVERAGE** from previous page

subcontractor usually undertakes, and wanted no part in the on-site construction of the project.

Additionally, the court recognized that a supervisory role may confer subcontractor status. See *Farwest*, 48 Wn.App. at 726. Although BFS did send an employee to check that the labor provided was acceptable, these visits were not sufficient to establish on-site supervision BFS and thus, there was no "nexus between the supervision and the project's construction." , 117 Wn.App. at 910. The court went on to note that "any supervision by BFS was qualitatively different than that required to confer subcontractor status." BFS also tried to achieve supervisory status by arguing that because Mr. Kercheval, of MK, was a previous employee of BFS, his supervision of the project was that of BFS. The court rejected this argument.

Consequently, because the court concluded that BFS was neither a laborer or subcontractor, it was not a proper claimant under R.C.W. 39.08.010 or 60.28.011 and could not recover from the payment/performance bond or the retainage fund.

Next, BFS argued that Caicos had breached a contract with BFS which obligated Caicos to issue joint checks to BFS and MK. However, this issue was not raised at trial and thus the court would not consider it on appeal.

Finally, the court rejected Caicos' claim for attorney fees because "[n]either statute provides for an award of fees to the defendant in an action against the contractor's bond or on the retainage lien." *Caicos*, 117 Wn.App. at 913.

**Additional Insured Coverage/  
Validity/Invalidity (Oregon)**

by L.H. Vance, Jr. – Winston & Cashatt

In *Walsh Constr. Co. v. Mutual of Enumclaw*, 109 Or. App. 400 (2003), the Oregon Court of Appeals invalidated additional insured arrangements in construction contracts (whereby one party is obligated to procure insurance for losses arising in whole or in part from another's fault or negligence).

Many states have so-called anti-indemnity statutes, which prohibit indemnification for another's sole or partial negligence as relates to third-party personal injury and property damage claims. However, most states have permitted the shifting of this risk or loss by way of additional insured coverage. Oregon's anti-indemnity statute went much further than the anti-indemnity statutes in most other states, including Washington. The Oregon statute apparently underwent numerous statutory amendments which convinced the court that the Oregon legislative intended to prohibit not only "direct" indemnity for one's own potential or sole negligence, but also prohibit "indirect" indemnity (through additional insured coverage).

An appeal to the Oregon Supreme Court has been filed. As of the date of this article, the Oregon Supreme Court had not yet decided whether to accept review of the case.

**2003-2004**

October 1, 2003 – September 30, 2004

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