

Construction Law

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Chair's Report

By Athan E. Tramountanas – Ogden Murphy Wallace PLLC

Greetings, fellow section members. I hope everyone had a fun and relaxing summer. The Construction Law Section held another successful Summer Meeting and CLE at the WSBA Offices on June 8. As always, this was a well-attended event. It was a good opportunity to reconnect with other construction law practitioners that attended in person, and great to have participation from a number of virtual attendees. The post-CLE reception was a blast, thanks in large part to the sponsorship of McMillen Jacobs Associates.

The CLE focused on the forthcoming *Construction Law Deskbook*. We are at the very end of editing process and still hope that it will be published through the WSBA by the end of the year. Thanks to all that have contributed, and especially to committee chair Ron English.

Our next event will be an exciting Fall Forum held at Amazon's Seattle Spheres on November 1, 2018, from 5:00 – 7:00 pm. We will get a guided tour of this significant addition to the Seattle skyline and a presentation from a member of the design team. Refreshments will be provided, thanks to the kind sponsorship of FTI Consulting. There is a lot of interest in the event, so be sure to sign up promptly when the registration is open.

Other upcoming events include the Winter Dinner/Forum, which will be held in February 2019, and a CLE outside the Seattle area in Spring 2019. Keep an eye out for more details as they become available.

Finally, this is the end of my term as Section Chair. As of October 1, Jason Piskel of Piskel Yahne Kovarik PLLC will take over as Chair, Amber Hardwick of Green & Yalowitz,

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A Matter of Fact: Supreme Court Clarifies Law Regarding Vicarious Liability for Concurrent Breaches of Nondelegable Duties

By Kellen Ruwe and Evan Brown – Groff Murphy, PLLC

In *Afoa v. Port of Seattle (Afoa II)*, 421 P.3d 903, 2018 WL 3469072 (2018), the Washington Supreme Court considered whether the Port of Seattle was vicariously liable for breaches of a nondelegable duty by certain airlines on account of its own breach of the same nondelegable duty. The Court held in a 5-4 decision that the Port was not vicariously liable merely because it breached a concurrent nondelegable duty under the Washington Industrial Safety and Health Act (WISHA), Chapter 49.17 RCW, to maintain a safe workplace. For joint and several liability to attach under the circumstances, the plaintiff needed to prove that the Port exercised control over the airlines.

Plaintiff Afoa, a baggage handler at SeaTac Airport, was gravely injured when a piece of equipment fell on him. 421 P.3d at 907. Afoa sued the Port in state court, alleging the Port violated its nondelegable duty to ensure safe working conditions, both as a matter of common law and under WISHA. *Id.* Separately, Afoa sued the airlines involved in the incident in federal court. *Id.* Both the state and federal suits were dismissed on summary judgment. *Id.* Our Supreme Court reversed summary judgment of Afoa's state case and remanded, holding that the Port could be held legally responsible for Afoa's safety even though he was not a Port employee because "a jobsite owner who exercises pervasive

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UPCOMING EVENTS

Fall Forum	November 1, 2018, 5:00 pm (Amazon's Seattle Spheres)
Construction Law Deskbook	Publication in Winter 2018/2019
Spring CLE	(date and location TBA)
Mid-Year Meeting and CLE	(date and location TBA)

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PLLC will take over as Chair-Elect, and Brett Hill of Ahlers Cressman & Sleight PLLC will take over as Vice-Chair. Jennifer Beyerlein of Lane Powell PC will continue in the thankless role of Treasurer and, because Ron English has retired his post after many years of excellent service, John Evans of John Evans Law will take over as Secretary. I will continue my role as editor of the Section Newsletter. It was an honor to serve the Section on the Executive Committee and an officer for the past several years. You are left in good hands.

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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A MATTER OF FACT: SUPREME COURT CLARIFIES LAW REGARDING VICARIOUS LIABILITY FOR CONCURRENT BREACHES OF NONDELEGABLE DUTIES *from page 1*

control over a work site should keep that work site safe for all workers.” *Id.* (quoting *Afoa v. Port of Seattle (Afoa I)*, 176 Wn.2d 460, 481, 296 P.3d 800 (2013)).

The Port then asserted an “empty chair” defense at trial, arguing that the nonparty airlines were at fault. The jury awarded Afoa \$40 million, assigning 25 percent responsibility to the Port, 0.2 percent to Afoa, and the remaining 74.8 percent apportioned among the four airlines. *Id.* at 908. On review, Afoa argued that the Port was jointly and severally liable for the entire judgment, minus the 0.2 percent of fault assigned to Afoa, in light of the Port’s nondelegable duty to ensure safe working conditions at SeaTac. *Id.*

The Court began its analysis by noting that RCW 4.22.070 imposes several liability as a general rule in cases of concurrent negligence, subject to enumerated exceptions. *Id.* at 909. However, other statutes or the common law may impose vicarious liability, creating joint and several liability among concurrently negligent parties.

The Court noted that under WISHA both the Port and the airlines owed a nondelegable duty of care to Afoa, based on their rights to exercise control over the jobsite. *Id.* at 909. However, the Court determined that neither WISHA nor the common law impose vicarious liability for concurrent breaches of a nondelegable duty by others. *Id.* at 910. The Court then explained that while delegation of a nondelegable duty may give rise to vicarious liability, a concurrent breach of that nondelegable duty by a party independent subject to it does not. *Id.* “An entity that delegates its nondelegable duty will be vicariously liable for the negligence of the entity subject to its delegation, but an entity’s nondelegable duty cannot substitute for a factual determination of vicarious liability when RCW 4.22.070(1) clearly requires apportionment to ‘every entity which caused the claimant’s damages.’” *Id.* at 910–11.

The Court then addressed whether any exception to the general rule of several liability under RCW 4.22.070 applied to

Afoa’s case. One such exception exists where one concurrently negligent party acted as the “agent or servant” of another concurrently negligent party. RCW 4.22.070(1)(b). The Court expressed that if Afoa had proved to the jury that the Port retained sufficient control over the airlines to qualify them as its agents, the Port would have been vicariously liable for the airlines’ breaches. *Afoa II*, 421 P.3d at 906. However, because Afoa did not argue the issue at trial, “the jury findings [did] not support the conclusion that the Port [was] vicariously liable for the airlines’ fault.” *Id.* at 906.

Writing in dissent, Justice Stephens argued that the majority decision was contrary to the court’s decision in *Afoa I*, effectively rendering the nondelegable duty doctrine “meaningless.” *Id.* at 915. Justice Stephens found the *Afoa I* holding that the Port retained requisite control over the site to impose a duty to provide a safe work place sufficient for a finding of vicarious liability in this case. *Id.* Justice Stephens found the majority’s emphasis on the airlines’ concurrent duties to preserve workplace safety misplaced. In her view, because the Port retained control over the site, its nondelegable duty should give rise to liability not limited by the concurrent breaches of others.

General contractors and/or project owners often have nondelegable duties under WISHA to maintain a safe jobsite, and *Afoa II* clarifies a point of law that may apply when injuries occur on complex, multiparty projects. The Court’s holding regarding vicarious liability makes it clear that plaintiffs seeking joint and several liability against multiple entities that concurrently breached nondelegable duties of care under WISHA must pull their cases within the ambit of an exception to RCW 4.22.070’s general rule of proportionate liability. This is especially important where nonparties with nondelegable duties may be at fault. Concurrent breach of a nondelegable duty by one party is not sufficient to impose joint and several liability as a matter of law for the breaches of other entities subject to that duty.

Kenco Constr., Inc. v. Porter Bros. Constr., Inc.

Kenco Constr., Inc. v. Porter Bros. Constr., Inc., No. 74069-5-I, 2018 Wash. App. LEXIS 1323 (Ct. App. June 11, 2018)

By Travis Colburn – Seattle University J.D. Candidate 2018

Kenco Construction, Inc. v. Porter Brothers Construction, Inc. is an unpublished Division I decision by the Court of Appeals of Washington, decided on June 11, 2018.

The Highline School District awarded Porter Brothers Construction, Inc. the prime contract to construct Raisbeck Aviation High School. In turn, Porter Brothers subcontracted with Kenco Construction, Inc. and Totem Electric of Tacoma, Inc., to install various aspects of the project.

However, Kenco's and Totem's portions of the work were affected by problems from the start of the project: an initial undiscovered and undocumented underground power line required coordination with local utilities, which delayed the project by more than 60 days.

Thirty-one days were made up by expediting steel erection, but the resulting construction was outside of the specifications. Kenco was asked to do additional work because of the out-of-specification steel and adapt to this resulting construction, further delaying the project. Additionally, Kenco's roofing underlayment leaked and that particular building product needed to be installed three separate times.

Totem was also negatively affected by delays in predecessor work and improper jobsite preparation; additionally, Totem was frequently asked to stop and start its portion of the work.

Both Kenco and Totem submitted applications to Porter Construction for progress payments, yet Porter made only limited progress payments to each of the subcontractors. As required by their contract, both subcontractors demanded arbitration, yet Porter refused. Kenco sued Porter for breach of contract and to compel arbitration; Porter counterclaimed for breach of contract and brought additional claims against Kenco's surety. Totem had filed a separate complaint for breach of contract and *quantum meruit*. Ultimately, the separate lawsuits were consolidated.

Kenco and Totem claimed that they were not properly compensated for their work, while Porter claimed that each of the subcontractors failed to give the required contractual notice for extra compensation and that Kenco caused the delays.

The jury awarded \$1,815,914.49 to Kenco and \$1,124,095.06 to Totem. Because the jury found Porter liable, Porter's other claims were dismissed. Porter appealed the entire judgment because an instructional error in the jury instructions, with regard to the proper standard for notice requirements, "infect[ed] every aspect of the judgment."

On appeal, Porter sought reversal of the entire judgment. Porter contended that it properly withheld progress payments to Kenco, and neither Kenco nor Totem strictly complied with the notice requirements in their contracts.

On the other hand, Kenco claimed strict compliance with notice requirements were excused by Porter's conduct; likewise, Totem argued that even if it did not comply with

the notice requirements, strict compliance was impossible due to Porter's performance.

Other than justifying its breach, Kenco made numerous other arguments for reversal. Kenco claimed that the trial court erred by (1) entering inconsistent orders; (2) allowing Kenco and Totem to recover certain types of damages; (3) excluding specific forms of evidence; (4) imposing prejudgment interest; and (5), and preventing Porter from recovering from concurrent delay caused by Kenco.

The Washington Court of Appeals held that an alleged improper jury instruction, regardless of whether the instruction should have been given, did not warrant reversal because the fact finder had concluded that it could not have prejudiced Porter since the jury was asked to determine whether Kenco caused delays. The jury determined that Porter did not cause delay, and therefore Porter's recovery for concurrent delay was not warranted.

For claims based on extra work, the Court of Appeals discussed whether strict compliance with notice and claim requirements was required of both Kenco and Totem for the extra work they had each performed. Porter asserted – as an affirmative defense to its breach of contract – that Kenco's and Totem's failure to comply with the notice and claim requirements of their subcontracts warranted both summary judgment and judgment as a matter of law because strict compliance with contractual notice and claim requirements is required under Washington law.

Porter's motion for summary judgment was properly modified because even though an earlier, allegedly inconsistent, motion barred the claims of Porter for lack of required notice, a trial judge may revise an order where fewer than all the claims are adjudicated. Since Kenco sought recovery in both breach of contract and *quantum meruit*, the trial judge was warranted in modifying the order.

Porter's motion for judgment as a matter of law was also properly denied for two reasons. First, although Porter correctly identified *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375 (2003), as controlling, the court distinguished *Johnson* from the facts at issue in this case because Porter was found to have materially breached its contract with Kenco, whereas the jury found Kenco had not breached its contract with Porter. Since a party is barred from enforcing a contract it has materially breached, denial of Porter's motion was not error.

The Court of Appeals reviewed Porter's challenge to the jury instructions for two reasons. First, Porter claimed that the instructions improperly placed the burden of proof upon Porter to prove that the subcontractors did not give notice, and second, that the instructions permitted the jury to assign liability for substantial compliance with notice and claim provisions, not strict compliance.

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In the first case, Washington law places the burden of proof upon plaintiffs when a defendant's obligations are subject to a condition precedent and upon defendants when they assert an affirmative defense. Here, since Porter asserted Kenco's and Totem's failure to adhere to the contractual requirements as an affirmative defense, the burden of proof was on Porter.

Second, since Porter was found to have breached their contract with Kenco, the strict compliance requirements outlined in *Johnson* warranted the instruction on substantial compliance. Similarly, where a party interferes with the other's ability to give notice, strict compliance will be excused. See *Weber Construction, Inc., v. Spokane County*, 124 Wn. App. 29 (2004). In this case, both Kenco and Totem presented sufficient evidence for a jury to conclude that they substantially complied with the notice and claim provisions.

Porter also assigned error to the scope of damages for two reasons. First, it was error for the trial court to allow Kenco to recover losses due to delay because it failed to present the contractually required evidence that the delay affected the project's critical path. And second, Porter contends that, for Totem, it was error to recover damages using the total cost method.

In the first instance, Porter's argument failed because its first breach prevents enforcement of a delay damages limitation and because the failure to present critical path information was of no consequence, as Kenco only sought actual damages and not delay damages.

And, in the second instance, Porter argued that the total cost method was reversible error because Totem's damages were subject to the contractual limitation of liability, and there was another reasonable method to track Totem's actual losses and, Totem had subtracted from its claim costs that were unreasonable or caused by its own errors.

Here, Totem's claim was an inefficiency claim and not a delay claim. If Totem's claim was a delay claim, it would be subjected to a liquidated damages provision in the contract; however, since there was not a contractual provision that addressed inefficiency claims against a general contractor by a subcontractor, the total cost method for assessing damages was not error.

Likewise, a jury may assess total cost damages if four factors are met; Porter asserted that Totem was unable to meet the first and fourth requirements. For the total cost method to be appropriate, there first needs to be no other reasonable method for tracking direct actual losses. While Porter asserted that Totem could have tracked its damages using a measured mile analysis, Totem's expert asserted that the measured mile analysis was "completely impracticable," and therefore, a jury could conclude that the first total cost factor was satisfied.

The fourth required factor for the total cost method to be appropriate is a showing that unreasonable costs or costs that are attributable to error are subtracted from the claim.

Totem presented evidence that it had deducted hours for unproductivity and bills for "stragglings issues" such that a jury could find that the fourth element required for the total cost method to be applicable was met.

Porter next argued that the trial court erred in excluding a letter from Kenco to BEMO (a manufacturer) as settlement communication and evidence that Porter sought to make progress payments to Kenco, but Kenco's surety (RLI) refused to waive potential defenses in return.

Here, the Court of Appeals held that the trial court was well within its discretion by excluding a purported settlement letter by Kenco to BEMO. Even though it was not explicitly a settlement offer, it was not manifestly unreasonable nor an abuse of discretion to exclude it because the trial court was in the best position to gauge whether the letter was part of a settlement negotiation.

With respect to Porter's surety argument, Porter cited no authority nor directed the court to any contractual provisions. Simply, Porter was always free to pay and RLI was not obligated to accept Porter's offer. Therefore, the trial court did not abuse its discretion in excluding evidence of RLI's refusal to consent to payments.

The trial court did not abuse its discretion in granting prejudgment interest. A trial court has the discretion to deny prejudgment interest to claimants where unreasonable or unexplained delay is attributable to the claimants. In this case, Porter could not show that the delay was the result of the claimant's conduct.

Porter further assigned error to the trial court's dismissal of its bad faith and IFCA violations claims against Kenco's surety, RLI. However, these claims necessarily failed since Porter was not a party to the contract between Kenco and RLI, RLI did not owe a fiduciary duty to Porter, and third-party claimants do not have the right to sue under the IFCA. Therefore, their dismissal was not error.

Last, Porter disputed both the trial court's award of expert fees to Kenco and Totem, as well as attorney fees to Kenco, Totem and RLI.

For attorney fees, Porter conceded that RCW 39.08.030 and RCW 90.28.030 entitled Kenco and Totem to attorney fees as the prevailing party, but disputed RLI's right to attorney fees. The Court of Appeals reasoned that because a surety bond was required, the surety bond incorporated the terms of the subcontract, and the subcontract provided for attorney fees. Since RLI's fees were incurred in a lawsuit in which Porter sought performance from RLI on the surety bond, RLI was entitled to fees because a surety will stand in the shoes of a party alleged to have failed to perform and funds that would otherwise go to a surety principal, should go to the surety itself: the surety is entitled to indemnification, which is generally inclusive of attorney fees.

The award of expert fees to Kenco and Totem was reversed. In this case, the parties contemplated arbitration only;

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Advanced Technology Crumbles Competition in Construction Litigation

By Marsha J. Naegeli – NAEGELI Deposition & Trial

The advances in technology have entered every area of the legal industry, including the courtroom. When a litigation attorney must introduce testimony from a deposition into the court record, the only means of doing so in the past was to read the deposition into the record for the jury to hear. Regardless what the words typed on a piece of paper convey regarding the facts of the case, reading those words to the jury does not convey the witness's tone, facial expressions, and body language. These elements of a witness's testimony can be crucial factors a jury utilizes to weigh the validity and honesty of testimony during a trial.

Litigation attorneys have another option for submitting deposition testimony during a trial by using videotaped depositions. Videotaped depositions allow the jury to hear and see the witness as the witness provides key information about the facts of the case. By using video depositions at trial, litigation attorneys do not lose the important elements of tone, body language, and facial expressions that are lost when an attorney or another person reads words from a piece of paper to the jury.

What are the Rules for Submitting Video Depositions During a Trial?

Washington Superior Court Civil Rule 30 provides the conditions and rules for videotaping depositions. A party may videotape a deposition without leave of court upon proper notice to all parties. Failing to provide notice of the videotaping precludes the use of video equipment unless the parties agree, or a party obtains a court order. It is important to remember that if you want to secure an important witness's testimony by using video to tape a deposition within 120 days of the filing of the lawsuit or service of the complaint, you must have the consent of all parties or a court order. Video depositions do not dispense with the need for a court reporter, as CR 30 requires a stenographic record of the deposition is made simultaneously with the videotaping.

CR 30 contains specific rules for the use of a videotaped deposition at trial. A party who wishes to use videotaped depositions at trial must file a notice of the intent upon all parties, including designating the sections of the deposition to be offered into evidence during the trial. Parties have the

right to object to the videotaped deposition and argue their position during a court hearing on the matter. Therefore, attorneys who desire to use videotaped depositions should be prepared for a battle from opposing counsel, especially if the deposition is extremely damaging to the other party's case.

In addition to the detailed rules about making and offering videotaped depositions as testimony at trial, CR 30 has specific rules for the preservation and certification of the original videotaped depositions. In part, CR 30 states:

After the deposition has been taken, the operator of the videotape equipment shall attach to the videotape a certificate that the recording is a correct and complete record of the testimony by the deponent. Unless otherwise agreed by the parties on the record, the operator shall retain custody of the original videotape. The custodian shall store it under conditions that will protect it against loss or destruction or tampering and shall preserve as far as practicable the quality of the tape and the technical integrity of the testimony and images it contains. The custodian of the original videotape shall retain custody of it until 6 months after final disposition of the action, unless the court, on motion of any party and for good cause shown, orders that the tape be preserved for a longer period.

In addition to specific rules contained in CR 30, all videotaped depositions are subject to CR 32, which governs the use of depositions in court proceedings.

Is the Cost, Time, and Effort of Videotaping Depositions Worthwhile?

The impact of a witness's testimony on the jury in a construction defect case is one of the main reasons to consider using this technology. Video engages and influences jurors in ways that reading a printed deposition simply cannot accomplish. Videotaped depositions can also alleviate the boredom some jurors experience during a lengthy, technical trial.

Videotaped testimony allows the jurors to "hear and see" a witness, which can be much more compelling. When jurors view the witness providing testimony, they are far more likely to retain the information being offered by the witness. Lastly, if you have a witness who changes his or her testimony on the stand, it can be very dramatic and damaging to the opposing party to use a video of that person's testimony during a deposition to impeach the witness. In some cases, a videotaped deposition used during the trial could be the key piece of evidence that sways the jury in your favor.

Using a trial preparation and deposition service that understands all court rules related to videotaped depositions is one way to ensure your evidence can be used at trial.

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an award of expert fees was necessarily limited to arbitration proceedings. The plain and unambiguous language of the contract clearly restricted expert fees to those types of proceedings. Therefore, the award of expert fees to Kenco and Totem was reversed, since the costs were incurred in a legal proceeding.

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Technology in the Courtroom

When the facts are in favor of a litigant, that should be sufficient to win a trial. However, as many lawyers know, facts are not always enough to win a trial, especially when the facts are technical, boring, or difficult to understand. Most jurors are accustomed to receiving information instantaneously via a variety of high-tech devices. Therefore, jurors can quickly become bored and begin to daydream when presented with dry, technical facts from expert witnesses, an attorney reading testimony from a transcript, or a witness writing on a white board. When you need jurors to pay close attention to evidence, you may need to employ new ways to present the evidence to jurors.

Trial support and preparation companies are utilizing a variety of tools to assist lawyers in preparing and presenting evidence in ways that capture a juror's attention. Once you have a juror's attention, you use technology to present evidence that is compelling and persuasive.

For example, virtual reality (VR) can transport a jury anywhere without leaving their seats. You can place a juror in the passenger seat of a vehicle as it is struck head-on by another vehicle by using VR technology. The juror can "feel" the fear your client experienced at the moment of a fatal crash. You can transport your jury to the site of a building collapse that injured hundreds of victims or inside the lungs of a plaintiff who developed cancer from working with dangerous pesticides.

The use of high-tech evidence can be the courtroom strategy that tips the scales in favor of your client. Other examples of high-tech evidence that many law firms are using in the courtroom include 3D modeling, web-based video testimony, animated presentations, and the use of individual tablets for jurors. The key is to work with a trial preparation and consulting company that is on the cutting edge of utilizing technology to present evidence at trial that resonates with jurors and judges.

Marsha J. Naegeli has over 40 years of experience in the litigation services industry and is the Founder & CEO of NAEGELI Deposition & Trial, a national full service court reporting and litigation support firm. NAEGELI provides legal videography, court reporting, video conferencing, legal interpretation, document management services, trial consultation and trial presentation specializing in depositions, trials, complex litigation, aviation and medical litigation.

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January 1, 2018 – December 31, 2018

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