

# Construction Law

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## Chair's Report

I am excited and honored to serve the section as Chair for the 2016-2017 session. I have had the pleasure as serving on the Council over the past several years, and can assure you that you have a dynamic group of board members intent on providing section members with exceptional CLE programs, relevant newsletters addressing new case law developments, topical forums, and contracts forms essential to members' construction practice.

In the upcoming year, you can expect the same and more from your Council. We are planning a fall forum with an industry expert addressing a current construction project redefining the Pacific Northwest, a November 2016 joint Washington-Oregon Bar Association Construction Law Section CLE in Vancouver, Washington, and our usual June Midyear CLE. The Council welcomes members to provide suggestions on topics for the Midyear CLE. Just send me an email if you have a topic or speaker to recommend.

Of particular note for the coming year, the Council has taken on the mammoth task of authoring a Construction Law Deskbook. The Deskbook will provide our members with a thorough guide to legal principles at the heart of our practice, and will be authored by a team of exceptional volunteer members of the section. We are excited to offer what promises to be an excellent resource to the section. Many thanks to Ron English for heading up this project.

We will also continue to offer a scholarship for law students. Last year, Council members visited Washington law schools and publicized our section's \$2,500 writing scholarship. We received multiple entries and awarded the scholarship to Julian Aprile from Seattle University School of Law. The scholarship program has proven to be a great outreach to law students.

This year we also welcome three new Council members, Colm Nelson, Rick Wetmore, and Zak Tomlinson, who bring a diverse background to the council and will help us continue to provide high-level service to the membership and the Bar.

Lastly, a big thank you to John Evans for his service as Chair of the section last year. John, your time and energy were much appreciated.

Thank you for allowing me to serve as Chair and I look forward to working with all section members through the next year.

Warm regards, Marisa Bavand

## Thank you, Anmarie!

The Board would like to thank Anmarie Petrich for her many years of service as the Construction Law Section Treasurer. Due in no small part to her efforts, the Section grew and prospered. We will miss her contributions greatly.

The Board has selected Jennifer Beyerlein as the new Section Treasurer in accordance with Section Bylaws.

## Midyear CLE Recap

By Jason Piskel – Pickel Yahne Kovarik, PLLC

Another informative midyear CLE and annual meeting for the Section took place on June 10, 2016 in Seattle. The presentations kicked off with Paul Cressman delivering a case law update. New cases included issues regarding termination for convenience and the independent duty doctrine. Up second, Steve Goldblatt providing his update on the legislative happenings in Olympia. Steve discussed the new public works and contracting laws on bid thresholds and job order contracting. Co-chair Ron English delivered a presentation

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### UPCOMING EVENTS

**Fall Construction Law CLE – November 4, 2016,**  
The Heathmen Lodge, Vancouver, WA

### In This Issue

Chair's Report .....	1
Thank you, Anmarie! .....	1
Midyear CLE Recap .....	1
Mid Year CLE 2017: Call for Topics .....	2
You Can Cite to Unpublished Opinions Filed After March 1, 2013.....	3
Washington's Independent Duty Doctrine: A Misguided Expansion of Tort Liability in Construction Cases .....	3
Words (Not Pages) Matter in King County .....	5

## MIDYEAR CLE RECAP from previous page

on construction damages by looking at several widely used general conditions clauses. Doug Oles came next with a lively discussion regarding clauses that limit damage recovery. His materials are well drafted and express the arguments for and against such clauses. Following that, Jesse Franklin and Brad Lewis discussed inefficiency claims with illustrative examples.

Terry Marston provided insightful comments and materials regarding quantifying damages for delay. He described the unique issues surrounding court favor and disfavor of the *Echealy* calculation. Megan Wells provided an accountant's view of audit clauses. She stuck around to join Doug Oles, Terry Marston, and Jesse Franklin for a panel discussion moderated by Ron English of a hypothetical claim. Then Brett Hill gave a brief discussion of the Section's residential contract forms that are available for public use.

A major highlight of the seminar was a panel discussion from King County judges. The Honorable Beth Andrus, Honorable Jim Rogers, and Honorable Judith Ramseyer provided the attendees with a great discussion of judicial perspectives with respect to commercial and construction disputes in the courtroom. Thanks to some probing questions and provocative answers, it was the liveliest session of the day. Chris Soelling had the good fortune to follow that presentation with an interactive and lively discussion considering ethics and persuasion technics.

The midyear meeting for the section said thanks to outgoing Chair John Evans, and welcomed incoming Chair Marissa Bavand. Elected to the executive committee were Jason Piskel, Vice-Chair, Ron English, Secretary, and Annmarie Petrich, Treasurer. New Council Members were also elected: Rick Wetmore, Colm Nelson, and Zak Tomlinson. Welcome.

At the end of the CLE, the Section held a social event at Trace in the W hotel. Section members were joined by students from Seattle University and University of Washington. An enjoyable time was had by those able to attend. It was great to meet students interested in construction law. Diane Utz did a commendable job getting people to mingle, socialize, and use their drink tickets. The Section looks forward to another great midyear CLE next year, and hopes you can join us.

Co-Chair Jason T. Piskel

## Midyear CLE 2017: Call for Topics

The Section is currently in the process of developing the agenda for next June's Spring CLE. We are reaching out to the Section for their ideas for topics they would like to see discussed. Please email your ideas to co-chairs Ron English (rjenglish@yahoo.com) or Jason Piskel (jason@pyklawyers.com).

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## You Can Cite to Unpublished Opinions Filed After March 1, 2013

By Athan Tramountanas – Short Cressman & Burgess PLLC

On June 2, 2016, the Washington Supreme Court adopted proposed amendments to GR 14.1 – Citation to Unpublished Opinions. Under the new GR 14.1, unpublished opinions of the Court of Appeals still have no precedential value, but litigants may cite to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as non-binding authority. The party that cites the unpublished opinion must identify it as a non-binding authority, and must file and serve a copy of the opinion as an appendix to the pleading that cites to it.

These changes to the rule went into effect September 1, 2016:

### GR 14.1 – CITATION TO UNPUBLISHED OPINIONS

(a) **Washington Court of Appeals.** ~~A party may not cite as an authority an unpublished opinion of the Court of Appeals.~~ Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports. Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

(b) **Other Jurisdictions.** A party may cite as an authority an opinion designated “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like that has been issued by any court from a jurisdiction other than Washington state, only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court. ~~The party citing the opinion shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited.~~

(c) **Citation of Unpublished Opinions in Subsequent Opinions.** Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss unpublished opinions in their opinions.

(d) **Copies of Unpublished Opinions.** The party citing an unpublished opinion from a jurisdiction other than Washington shall file and serve a copy of the opinion as an appendix to the pleading in which the authority is cited.

### Comment

RCW 2.06.040 provides that all cases having precedential value shall be published as opinions of the court. The statute further provides that each panel shall determine whether a decision has sufficient precedential value to be published, and those which do not shall not be published.

## Washington’s Independent Duty Doctrine: A Misguided Expansion of Tort Liability in Construction Cases

By Julian Aprile – 3L, Seattle University School of Law

*This article was the winning submission in the Second Annual WSBA Construction Law Section Writing Competition. The Section invited interested 2L and 3L students in the three Washington law schools to write no more than 2,200 words on one of three construction law topics of current interest. Tom Wolfendale chaired the competition committee with help from others in the Section. The committee selected the submission of Julian Aprile of Seattle University as the winner. Mr. Aprile’s submission follows in full below. Thanks to Tom for his work on this project, and congratulations to Julian!*

In the context of construction cases, the independent duty doctrine, formerly called the economic loss rule,<sup>1</sup> “presents courts with the unique task of determining whether the circumstances are such that the court ought to bar a tort claim.”<sup>2</sup> It is difficult to disagree that Washington’s “independent duty doctrine jurisprudence is woefully unclear.”<sup>3</sup> After summarizing the recent history of the independent duty doctrine, this essay argues that the Washington courts should adopt the view of Washington State Supreme Court Chief Justice Madsen, who is “not convinced that the ‘independent duty’ approach is an improvement in determining when parties will be held to their contract remedies.”<sup>4</sup>

### The Economic Loss Rule

Prior to 2010, Washington courts used the economic loss rule to maintain “the ‘fundamental boundaries of tort and contract law.’”<sup>5</sup> For plaintiffs, bringing a claim in tort has the advantages of allowing claims to be brought after the statute of limitations would have run on corresponding contract claims and allowing recovery of punitive damages.<sup>6</sup> However, the economic loss rule prevented a contract party from using a tort claim to reap benefits that were outside of the scope of parties’ bargain by restricting plaintiffs to contractual remedies for economic losses.<sup>7</sup>

Specifically, in “construction cases, the economic loss rule has previously been used to eliminate claims based on negligence for damage just to the product (or structure).”<sup>8</sup> Tort law applied to separate injuries to people or damage to accessory structures.<sup>9</sup>

### The Independent Duty Doctrine/Rule

In 2010, the Washington State Supreme Court decided that “[t]he term ‘economic loss rule’ has proved to be a misnomer”<sup>10</sup> because it led to the mistaken impression that tort recovery was barred in all cases of economic loss.<sup>11</sup> The court said that tort claims may arise from contractual relationships even if the losses are economic and that the existence of a

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WASHINGTON'S INDEPENDENT DUTY DOCTRINE: A MISGUIDED EXPANSION OF TORT LIABILITY IN CONSTRUCTION CASES  
from previous page

contract is not a sufficient reason for limiting relief to contractual remedies.<sup>12</sup> Furthermore, there should be a case-by-case inquiry about the existence of an independent tort duty, and “[a]n injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract.”<sup>13</sup> Conversely, when “considerations of common sense, justice, policy, and precedent” lead the court to believe that no independent duty exists, there is no tort remedy.<sup>14</sup> Thus, the court held that the term “independent duty rule” was a more appropriate name for the doctrine it sought to apply.<sup>15</sup>

In cases when a defendant has both contractual and independent tort duties, determining whether the harm is covered by a contract remedy or gives rise to a tort claim “is a factual question of proximate causation.”<sup>16</sup> First, it is up to the court to decide, as a matter of law, “the duty of care and the risks of harm falling within the duty’s scope,” and then the jury decides if the “injury was within the scope of the risks of harm . . . the defendant owed a duty of care to avoid.”<sup>17</sup>

Additionally, in 2010, the Washington State Supreme Court applied the independent duty rule in a case where there was no contractual privity between the plaintiff insurance company and the defendant engineering firm (The Seattle Monorail Case).<sup>18</sup> The engineering firm’s recommended design for a Seattle Monorail train caused a fire, and the court held that, as part of providing professional engineering services, the firm had a “tort law duty of reasonable care encompassing safety risks of physical damage” to the plaintiff’s insured’s property interests.<sup>19</sup>

In The Seattle Monorail Case, the court likely applied the independent duty rule in the absence of a contract between the parties because, when “public safety is implicated, the fact that the loss is purely commercial is immaterial.”<sup>20</sup> Indeed, the court seemed to be concerned about public safety when it imposed a duty of care on the engineering firm: “this case reminds us that a fire can ignite as a result of an engineer’s work, imperiling people and property.”<sup>21</sup>

In contrast, when public safety is not at issue, and a contract exists between the parties, the independent duty rule may be more limited.<sup>22</sup> In a 2013 case, in which a plaintiff developer made claims of negligence and negligent misrepresentation against an engineering firm, the Washington State Supreme Court described these limitations:

To determine whether a duty arises *independently* of the contract, we must first know what duties have been assumed by the parties *within* the contract. If a contract term (such as a term defining the scope of the parties’ contractual duties) is ambiguous, the trial court must ascertain the intent of the parties.<sup>23</sup>

The court went on to say that the independent duty rule is unable to “provide an analytical framework when

the scope of contractual duties are in dispute.”<sup>24</sup> As of 2013, the bad news for parties to construction projects is that the independent duty rule may not be a useful defense against construction defect claims unless the court finds that there are no common law duties.<sup>25</sup>

Finally, in an unreported 2015 case, the United States District Court for the Western District of Washington said that Washington law does not recognize a duty of a design professional to a contractor in the absence of a contract between the parties.<sup>26</sup> Relying on The Seattle Monorail Case, the plaintiff subcontractor’s theory was that “Washington courts . . . impose a duty of care to third parties on several classes of professionals.”<sup>27</sup> However, the court said that The Seattle Monorail Case “appears to carve out a source of liability for engineers, specific to the facts of that case.”<sup>28</sup>

### Chief Justice Madsen on Construction Cases

The day the Washington State Supreme Court re-named the economic loss rule, in her concurring/dissenting opinion in The Seattle Monorail Case, Chief Justice Madsen tried to clarify the application of the rule in the context of construction cases.<sup>29</sup> Chief Justice Madsen explained that the economic loss rule applied “in the context of the interrelated disciplines and agreements that generally exist with respect to a construction project, even without direct privity between each of the design professionals, contractors and subcontractors, and inspectors that may be involved in development and construction of a building.”<sup>30</sup> The multiple parties involved in a construction project “typically rely on a network of contracts to allocate their risks, duties, and remedies.”<sup>31</sup> Chief Justice Madsen also pointed out that, “[e]ven though a subcontractor may not . . . directly negotiate with the engineer or architect, it has the opportunity to allocate the risks of following specified design plans when it enters into a contract with a party involved in the network of contracts.”<sup>32</sup>

Following this line of reasoning, Washington courts should not allow tort law to “rewrite the contract by re-allocating the risks of loss, potentially giving a windfall to the party who prevails under a tort theory for remedies otherwise limited or unavailable under [a] contract.”<sup>33</sup> If tort remedies are allowed to co-exist with contract remedies:

The construction industry in particular would suffer, for it is in this industry that we see most clearly the importance of the precise allocation of risk as secured by contract. The fees charged by architects, engineers, contractors, developers, vendors, and so on are founded on their expected liability exposure as bargained and provided for in the contract.<sup>34</sup>

Indeed, design services will likely become more expensive if courts continue to increase design professionals’ potential liability under the independent duty rule.<sup>35</sup>

### Conclusion

Part of the problem with the independent duty rule is that the Washington State Supreme Court changed its focus from

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WASHINGTON'S INDEPENDENT DUTY DOCTRINE: A MISGUIDED EXPANSION OF TORT LIABILITY IN CONSTRUCTION CASES  
from previous page

looking at the type of losses involved, under the economic loss rule, to determining what common law tort duties might exist.<sup>36</sup> The economic loss rule involved a simple analysis: "Is the plaintiff seeking to recover solely pecuniary losses in nonintentional tort? If yes, then the rule applies (subject to narrow exceptions, if any)."<sup>37</sup> In contrast, under the independent duty approach, "tort claims are presumptively permissible (regardless of the nature of the underlying loss) unless entirely duplicative of contract terms."<sup>38</sup>

Chief Justice Madsen is correct in pointing out that the independent duty rule "springs from the wrong analytical starting point."<sup>39</sup> When a contractual relationship exists, the court should first determine if the dispute falls within the scope of the contract, and if it does, then the court has no real reason to allow remedies outside of the contract.<sup>40</sup> No matter what the source of professional obligations may be, "whether under the written contract, additional oral terms, or by assumption, the alleged failure to carry them out does not implicate the independent duty doctrine."<sup>41</sup> If there is no personal injury or property damage, then tort claims should be barred.<sup>42</sup>

*Julian Aprile is a graduate of the University of Washington and is currently a 3L at Seattle University School of Law. He is the Business and Marketing Editor of the SU Law Review, and his favorite subject in law school is legal writing. Before law school Julian owned and operated a martial arts school in Gig Harbor, Washington. He is currently working as a legal intern at the Allen Institute, and he would like to work in a Seattle law firm after graduation in May 2017.*

- 1 See generally David K. DeWolf et al., 25 WASH. PRAC., CONTRACT LAW AND PRAC. § 14:2 (3rd ed. 2014); Matthew King, 33 WASH. PRAC., WASH. CONSTR. LAW MANUAL § 16:14 (2008 & Pocket Part Supp. 2015–16).
- 2 Benjamin J. McDonnell, *Finding a Contract in the "Muddle": Tracing the Source of Design Professionals' Liability in the Construction Context Under Washington's Independent Duty Doctrine*, 48 GONZ. L. REV. 627, 654 (2012–2013).
- 3 *Key Dev. Inv., LLC v. Port of Tacoma*, 173 Wn. App. 1, 33 (2013) (Quinn-Brintall, J. concurring).
- 4 *Affiliated FM Ins. Co. v. LTK Consulting Serv., Inc.*, 170 Wn.2d 442, 464 (2010) (Madsen, C.J. concurring/dissenting).
- 5 *Alejandre v. Bull*, 159 Wn.2d 674, 682 (2007) (quoting *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 826 (1994)).
- 6 See Katherine Heaton, Comment, *Eastwood's Answer to Alejandre's Open Question: The Economic Loss Rule Should Not Bar Fraud Claims*, 86 WASH. L. REV. 331, 336 (May, 2011).
- 7 See *Alejandre*, 159 Wn.2d at 683–84.
- 8 King, *supra* note 1, at 420.
- 9 See *id.*
- 10 *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 387 (2010).
- 11 See *id.* at 387–88.
- 12 See *id.* at 388–89.
- 13 *Id.*
- 14 *Id.*
- 15 See *id.* at 394.

- 16 *Eastwood*, 170 Wn.2d at 395.
- 17 *Id.*
- 18 See *Affiliated FM Ins. Co.*, 170 Wn.2d at 447.
- 19 *Id.* at 443.
- 20 McDonnell, *supra* note 2, at 660.
- 21 *Affiliated FM Ins. Co.*, 170 Wn.2d at 452.
- 22 See McDonnell, *supra* note 2, at 660.
- 23 *Donatelli v. D.R. Strong Consulting Eng'rs, Inc.*, 179 Wn.2d 84, 92 (2013) (emphasis in original).
- 24 *Id.*
- 25 See King, *supra* note 1, at 45 (Pocket Part Supp. 2015–16).
- 26 See *Pacific Boring, Inc. v. Staheli Trenchless Consultants, Inc.*, No. C14-187RSM, 2015 WL 5794260, at \*10 (W.D. Wash. Oct. 5, 2015).
- 27 *Id.*
- 28 *Id.*
- 29 See *Affiliated FM Ins. Co.*, 170 Wn.2d at 469–73 (Madsen, C.J. concurring/dissenting).
- 30 *Id.* at 469.
- 31 *Id.* at 472.
- 32 *Id.*
- 33 McDonnell, *supra* note 2, at 664–65.
- 34 *Affiliated FM Ins. Co.*, 170 Wn.2d at 470 (Madsen, C.J. concurring/dissenting) (quoting *Berschauer/Phillips Constr. Co.*, 124 Wn.2d at 826–27).
- 35 See McDonnell, *supra* note 2, at 665; *Affiliated FM Ins. Co.*, 170 Wn.2d at 453.
- 36 See McDonnell, *supra* note 2, at 627.
- 37 Marc C. Schneier, *Washington `Court: Independent Duty Doctrine Does Not Necessarily Preclude Tort Claims by Owner Against Its Engineer, as Scope of Contract Obligations Is Uncertain*, 35 CONSTR. LITIGATION REPORTER NL 2 (Thomson Reuters, New York, N.Y.) Jan. 2014.
- 38 *Id.*
- 39 *Donatelli*, 179 Wn.2d at 105 (Madsen, C.J. dissenting in part).
- 40 See *id.*
- 41 *Id.* at 116–17.
- 42 See *id.* at 117–18.

## Words (Not Pages) Matter in King County

By Athan Tramountanas – Short Cressman & Burgess PLLC

As of September 1, 2016, instead of page limits for motions filed in King County, there are word limits. Local Civil Rule 7(b)(5)(B)(vi) states the initial and opposing briefs must not exceed 4,200 words, and the reply brief must not exceed 1,750 words. The word count does not include the caption, table of contents or authorities (if any), and the signature block. The signature block must include a certification of the number of words, in substantially the following form: "I certify that this memorandum contains \_\_\_\_\_ words, in compliance with the Local Civil Rules."

For summary judgment, Local Civil Rule 56(c)(3) now provides that moving and opposing briefs shall not exceed 8,400 words, and reply briefs shall not exceed 1,750 words. Again, the word count does not include the caption, table of contents or authorities (if any), and the signature block. The signature block must include the same certification: "I certify that this memorandum contains \_\_\_\_\_ words, in compliance with the Local Civil Rules."

This is a publication of a section of the Washington State Bar Association. All opinions and comments in this publication represent the views of the authors and do not necessarily have the endorsement of the WSBA or its officers or agents.

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### 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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## 2016-2017 Construction Law Section Membership Form

October 1, 2016 – September 30, 2017

- Please enroll me as an active member of the Construction Law Section. My \$25 annual dues are enclosed.

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