Construction Law

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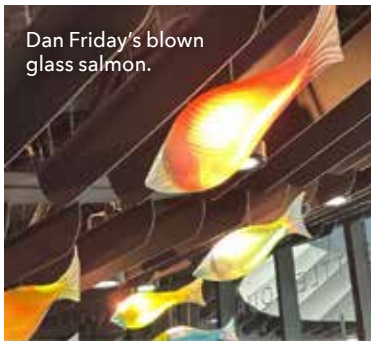
CHAIR'S REPORT

By Seth Millstein, Pillar Law PLLC

SO FAR, the Construction Section has had a great year. We recently completed our annual "field trip" to the brand new Seattle Aquarium on March 27, 2025. The event was organized and hosted by LMN Architects, who warmed us up prior with a look at its "Fab Shop" on 1st Ave. Our hosts for the event included Howard, Hanna, and Osama, who were outstanding. For anyone who has not visited our new aquarium, it's hard to put it into words. Every detail is stunning. The complexity of putting it all together, logistically, was entertaining to even consider. As were the details of sourcing and production. The many details we learned included this gem: Professionals were consulted about the type of paint used and the colors for the "coral" in the aquarium itself, which was made of concrete, with great effort by artisans–using toothbrushes and picks, etc.–to try to replicate the look of real coral. Or that the carpeting was made of recycled nets and lines. The design team worked to incorporate various Indigenous cultural elements and symbols throughout the building, including several art installations from local Lummi glass artist, Daniel Joseph Friday. Every detail was thoroughly considered; the result is stunning, obvious from the second you step inside. There when you look up you'll see Friday's hand-blown glass salmon, illuminated and suspended in the entry way.

Next up is our mid-year CLE. Please mark your calendar for June 13, 2025. Seyfarth has graciously agreed to host this year, and we'll be offering attendance via "hybrid mode." In-person attendance is limited to the first 60. You will be receiving a formal "blast" shortly. We look forward to seeing you there for another full day as our yearly tradition continues in June.

Sincerely,
Seth



Dan Friday's blown glass salmon.

Construction Law Section Mid-Year CLE

Friday June 13, 2025

BUILDING ON CHANGE: Navigating the Evolving Landscape of Construction Law

Presentations include:

- Annual case law and legislative updates
- "View from the Bench" judicial panel
- Changes in change-order and retainage law
- Emerging risks in construction law
- Cybersecurity threats
- The future of construction claims and contracts
- Avoiding ethical problems, emphasis on Construction Law

In This Issue

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CONSTRUCTION LAW SECTION
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Aucoin v. C4Digs, Inc.

By Evan A. Brown, Stoel Rives LLP

The Washington Supreme Court recently denied review of *Aucoin v. C4Digs, Inc.*, 32 Wn. App. 2d 103, 555 P.3d 884 (2024), a case expanding the concept of a construction worksite to locations "adjacent to the acknowledged workplace" for purposes of determining the scope of a contractor's tort duties to workers. Division I of the Court of Appeals held that the contractor's duty to provide a safe workplace extends to such adjacent areas if work is taking place there and the contractor has the right to control the manner of that work. That decision stands in light of the Supreme Court declining review.

The facts of the case are unfortunate. The contractor was building on a lot next to a steeply sloped street. A subcontractor was receiving delivery of a load of pavers for the project, but the designated and permitted unloading area for deliveries was occupied at the time. The delivery took place on the adjacent street, away from the project site. During the delivery, a forklift fell and killed a worker. The worker's family brought a wrongful death lawsuit against, *inter alia*, the subcontractor and general contractor. The contractors asserted that they had no duty to maintain a safe workplace in adjacent areas outside of the construction site. The trial court agreed and dismissed the claims on summary judgment.

"[I]f there is control … there is duty."

On appeal, Division I reversed, holding that the contractors' statutory and common law duties to maintain a safe workplace extend to areas outside of the construction site as long as the contractors have and retain the right to control the work performed in those areas. The court based its decision on prior case law indicating that the fundamental basis for a contractor's duty to maintain a safe workplace is the contractor's right and ability to control the manner in which work is performed. Such control involves "authority over work conditions and the ability to implement safety precautions." 32 Wn. App. 2d 103, 115, 555 P.3d 884 (2024). As Division I succinctly put it, "if there is control … there is duty." *Id.* at 113.

The court rejected contrary arguments from the respondent contractors. The general contractor argued that the duty to maintain workplace safety in adjacent areas should not extend to employees of other

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Aucoin v. C4Digs, Inc.

entities like material suppliers. It also argued that it lacked control over work in the adjacent area, but the court noted that there was evidence that the contractor had exerted some control over the areas by redirecting other deliveries in that area. At least on summary judgment, the court found this sufficient to defeat dismissal. The court notably distinguished case law in which the contractor had not yet started work and therefore had not yet assumed control of the project; in this situation, control over the manner of delivery was left to the delivering supplier.

Division I held that the contractors failed to establish for purposes of summary judgment that they did not have the right to control the delivery work on the adjacent street where the worker was killed. The project was already underway at the time of the incident and the evidence was sufficient to create at least questions of fact as to the right to control the manner of delivery. As such, Division I reversed the lower court's summary judgment.

The *Aucoin* case indicates that the scope of the duty to maintain a safe workplace on construction projects turns on practical and legal questions of control over activities rather than control over a designated worksite. While the two are often the same, contractors should be aware that their duties may extend to deliveries or other activities taking place offsite if the contractor can control the manner of those activities. ■

Vision Landscapes, LLC v. Ron E. Amundson

By Seth Millstein, Pillar Law PLLC

On February 3, 2025, Division I issued an unpublished opinion regarding operation of a CR 68 offer in a lien foreclosure matter in *Vision Landscapes, LLC v. Amundson, No.* 86113-1-I, 2025 WL 384494 (Wash. Ct. App. Jan. 1, 2025).

Vision provided landscaping services to Ron and Edel Amundson at their property in Medina, Washington. The Amundsons disputed the final invoice and did not pay in full. Vision therefore recorded a claim of lien against the property, and subsequently filed a timely foreclosure action. On summary judgment, the trial court dismissed Vision's breach of contract claim and its lien claim against the Amundsons personally. The trial court also dismissed the lien against Parcel A of the property where it found no work was performed. As to the final disputed amounts, the Amundsons submitted a CR 68 offer of judgment for $30,000. Notably, the offer did not include attorney fees. Vision then filed a motion for an award of fees totaling $114,000. Vision sought fees under both RCW 60.040.181(3) and (4). After various reductions, the trial court awarded Vision fees of $59,000, and Vision appealed.

Division I started by a review of the deductions. Vision was unsuccessful according to the trial court on its dismissed breach of contract claim, and an unsuccessful opposition to the Amundsons' motion for a protective order, neither of which the Amundsons argue are proper for review after Vision accepted the offer of judgment. Division I agreed, noting that there is no case directly on point in Washington, but that it could follow the federal counterpart of CR 68 which is virtually identical.

With one exception, Division I held it could not review the trial court's ruling on the fee order, and remanded to the trial court for further explanation of its award of attorney fees consistent with this opinion. The court then went through the classic analysis, starting with "lodestar" under *Berryman* and *Bowers*, next citing to *Absher* that "[a]n award of substantially less than the amount requested should indicate at least approximately how the court arrived at the numbers, and explain why discounts were applied." *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 848, 917 P.2d 1086 (1995). The court noted that the trial court can and should "explain[] why segregation of time between successful and unsuccessful claims" is required, and whether it all arises from "discrete severable claims" or not, which in this case the trial court failed to do, noting that the trial court has the ability to reduce fees on a percentage basis if it chooses, but it must explain its reasoning.

Finally, under RCW 60.04.081(4), the "frivolous lien statute," this question too was remanded. The court then denied fees on appeal, stating that both parties prevailed on major issues.

The upshot for practitioners lies more in what was not stated in this opinion than what was. The key here is to be *very wary* of CR

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The WSBA Construction Law Section Executive Committee generaly conducts meetings on the second Wednesday of each month.

CONSTRUCTION LAW SECTION EXECUTIVE COMMITTEE MEETING

Date: June 11, 2025

Time: 12:00 PM - 1:00 PM

Location:
Video Conference Only

USE THIS LINK or **CALL IN**

Call-In: 253-215-8782
or 669-444-9171

Use Code: 295521

Please contact committee members for more details on this and upcoming meetings.

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Vision Landscapes, LLC v. Ron E. Amundson

68 offers that do not include attorney fees. This is a trap for the unwary. More importantly, it is not as simple as tendering an offer under CR 68 that includes all fees, since then a different argument may arise if the offer is rejected. Then the court can engage in an inquiry as to what was reasonable at the time, and compare this to the actual rejected offer, which may lead to a whole different inquiry that may be equally as complicated. CR 68 offers in lien cases can be very valuable. The key is to measure twice and cut once. ■

DWP General Contracting, Inc. v. Wilson Architects, PLLC, et al.

By Will Young, McKinstry

Although decided on evidentiary grounds, Division II's recent unpublished opinion in *DWP General Contracting, Inc. v. Wilson Architects, PLLC, et al.*, No. 59099-9-II (Mar. 4, 2025), discussed interesting questions regarding an architect's potential liability to a general contractor under negligence and legal malpractice theories arising from the architect's role in preparing a change order to the owner-contractor contract.

DWP General Contracting, Inc. contracted with a project owner to build an apartment project. The contract (which DWP drafted) required DWP to substantially complete the project within 180 days after the start of construction. The contract did not include a waiver of consequential damages.

One year after construction started, DWP had completed approximately 60 percent of the project. Around that time, the owner stopped making payments, leading to a work stoppage.

Wilson Architects, PLLC was the project architect. Ryan Wilson was "an intern architect working on the project." At the owner's request, Ryan Wilson met with DWP to discuss the work stoppage, offering "to act as a mediator between the two parties and to manage the construction going forward."

Ryan Wilson helped DWP and the owner negotiate procedures for DWP to resume work and drafted a corresponding change order to their contract. DWP's president participated in the change order negotiations. DWP and the owner executed the change order Ryan Wilson drafted, which incorporated the agreed-upon restart procedures and other terms DWP requested. However, the change order did not modify the original contract price or 180-day substantial completion deadline, nor did it include a waiver of consequential damages, because neither DWP nor the owner requested these terms.

DWP completed the project approximately 15 months after the original 180-day substantial completion deadline. The owner then sued DWP to recover lost profits due to project delays. The owner prevailed at trial, and the jury awarded him approximately $500,000 in damages.

DWP, in turn, sued Wilson Architects, PLLC and Ryan Wilson individually to recover the $500,000 judgment amount. DWP claimed the architects were responsible for DWP's liability to the owner because they were negligent in drafting the change order, and their actions "constituted the unauthorized practice of law" resulting in legal malpractice liability.

The parties filed cross-motions for summary judgment. Although the trial court found "Wilson had 'engaged in activities that normally would be done by an attorney,' … the court was unconvinced DWP had any evidence to support its claim that Wilson proximately caused DWP's damages." The trial court granted the architects' motion, denied DWP's motion, and dismissed DWP's claims.

The dispositive issue on appeal concerned the causation element common to both DWP's negligence and legal malpractice claims. If the court "assume[d] without deciding that Ryan [Wilson] engaged in the

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unauthorized practice of law when he drafted the [change order]," the court required DWP to show there was evidence in the record that the project owner "would have agreed to waive the $500,000 in consequential damages that he later pursued and won at trial" if the issue had been raised during change order negotiations.

The court found there was no evidence in the record that the project owner would have agreed to waive consequential damages or extend the substantial completion deadline. While the record contained declarations from DWP's president and DWP's expert witness suggesting as much, the court found their testimony was too speculative. Conversely, the court found the owner's deposition testimony "was consistent with the plain language of the change order," demonstrating the owner did not intend to waive consequential damages or change the original contract deadline. Finally, and critically, the court emphasized "the plain language of the change order [DWP's president] signed … clearly states that the [change order] did not change the original construction deadline." Accordingly, the court affirmed the trial court's dismissal of DWP's claims because it determined the record lacked evidence to establish a causal link between the architects' involvement in preparing the change order and DWP's damages.

Although the court did not reach the issue of whether an architecture firm or its individual employees may be liable to a contractor for negligence or unauthorized practice of law/legal malpractice arising from their involvement in the change order process, the *DWP* opinion presents interesting liability questions and illustrates the importance of deliberate contract drafting, particularly with respect to consequential damages. ■

WE NEED YOUR INPUT!

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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Durbin v. City of Univ. Place

By Evan A. Brown, Stoel Rives LLP

In the recent unpublished case, *Durbin v. City of Univ. Place*, 33 Wn. App. 2d 1025, 2024 WL 5055510 (2024), the Washington Court of Appeals, Division II, addressed the propriety of a *lis pendens* recorded by homeowners against their neighboring property during a dispute over the scope of an easement. Division II's opinion is instructive as to timing of a *lis pendens* in the course of a property rights dispute and the potential consequences of getting that timing wrong.

The appellant Durbins purchased a home built by Mykland Construction, which also owned and was developing the neighboring property. The Durbins had an access easement over the neighboring property, and they alleged that Mykland had told them they were going to build one build one home on the neighboring property that would also use the easement. However, Mykland subsequently tried to subdivide its neighboring property and build two homes, both of which would utilize the easement. When the city approved Mykland's short plat, the Durbins appealed to the superior court.

Mykland brought a summary judgment motion seeking declaratory judgment that the easement was valid and in full force and effect. The superior court granted the motion, finding the easement valid. At this point, while a parallel action under the Land Use Petition Act ("LUPA") was pending, the Durbins recorded a *lis pendens*—a recorded instrument providing notice of a property dispute and freezing the owner's interest in the property—against the neighboring property. The Durbins did not prevail in the LUPA action and afterward released the *lis pendens*.

Mykland sought, and was awarded, damages and attorneys' fees for the wrongful filing of a *lis pendens* under RCW 4.28.328(3). That statute provides for recovery of damages where the owner of the affected property prevails and the claimant fails to establish "substantial justification" for filing the *lis pendens*. It also gives the court discretion to award attorneys' fees and costs for the same. In awarding fees, the court in *Durbin* noted that the *lis pendens* was "particularly inappropriate" because the court had already issued declaratory judgment in favor of Mykland.

If the title dispute has been resolved but parallel actions or other issues in the case remain pending, recording a *lis pendens* may be considered wrongful.

On appeal, Division II affirmed, holding that the pendency of a LUPA action was not proper grounds for recording a *lis pendens* because it involved a land use decision rather than a dispute over title to property. With respect to the property dispute, the court had

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already issued judgment against the Durbins *prior to* their recording the *lis pendens*. Because the outcome of the LUPA action could not change that judgment, Division II agreed that the *lis pendens* was not substantially justified.

Although the *Durbin* decision is unpublished and bound by its facts, it provides helpful guidance. Practitioners should be careful regarding the timing of a *lis pendens* filing, as it carries the risk that the opposing party will be awarded damages and attorneys' fees. If the title dispute has been resolved but parallel actions or other issues in the case remain pending, recording a *lis pendens* may be considered wrongful. ■

Tulalip Tribes of WA v. Lexington Insurance Co., et al.

By Seth Millstein, Pillar Law PLLC

The issue of "all risk" policies for business interruptions cause by government-mandated COVID-19 closures was against addressed by Division I. On March 31, 2025, Division I issued a published opinion in *Tulalip Tribes of WA v. Lexington Insurance Co., et al, No.* 86115-8-I (Wash. Ct. App. Mar. 31, 2025).

The Tulalip Tribes sought coverage under their "all risk" insurance policies for business interruptions caused by government-mandated COVID-19 closures. The Tribes' insurers, including Lexington and Alliant, denied the claims, arguing that COVID-19 did not cause "direct physical loss or damage" to the properties in question, required by the policy terms. The trial court dismissed the Tribes' claims under CR 12(b)(6), and the dismissal was upheld on appeal.

The appellate court ruled that the presence of COVID-19 did not meet the standard of "direct physical loss or damage" because the properties remained functional and usable, even if use was restricted. This decision aligned with precedent set in *Hill & Stout, PLLC v. Mutual of Enumclaw Ins. Co.*, 200 Wn.2d 208, 515 P.3d 525 (2022), where similar claims were denied under Washington law.

The upshot for Division I was fairly simple, relying on classic cannons of construction for insurance policies. Though policies are construed against the carrier in the event of ambiguities, the policy must also be read as a whole so as to "be given a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." *Queen Anne Park Homeowners Ass'n v. State Farm Fire & Casualty Co.*, 183 Wn.2d 485, 489, 352 P.3d 790 (2015). A term is considered ambiguous only "when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable." *Am. Nat'l Fire Ins. Co. v. B&L Trucking & Construction Co.*, 134 Wn.2d 413, 428, 951, P.2d 250 (1998).

Here, the policy at issue required "direct physical loss or damage" to covered property. The Tribes argued these terms were not defined in isolation and that the policies don't require "direct physical loss" to the structure of the building. The carriers argued under *Hill & Stout* that "some external physical force that causes direct physical change to the properties" is required. In *Hill & Stout*, for the insured to prevail, it would have to show that relevant policies might allow coverage for a situation where the insured was "physically *deprived of* the use of its business property as an immediate result of Governor Inslee's proclamations." But our Supreme Court disagreed since Hill & Stout (a dental office) was still able to *physically* use the property – just not the way it wanted.

The Tribes argued that in *Hill & Stout* the court did not address whether COVID-19 can cause physical alteration to the property, via the *virus*. The Tribes contended they properly argued that "the COVID-19 virus caused physical damage to plaintiffs' injured property by transforming physical objects, materials or surfaces into 'fomites (objects or materials which are likely to carry infection).'" Division I called this the "fomites" theory, which Division I disagreed with when considering that the Tribes' property was still functional and able to be used and that the Tribes were not prevented from entering. Division I described the Tribes' loss as being "more akin to an abstract or intangible loss, which is insufficient to establish direct physical loss or damage."

After a good deal of additional analysis, Division I agreed with the trial court: the Tribes' complaint was properly dismissed under CR 12(b)(6). ■