Construction Law

Published by the Construction Law Section of the Washington State Bar Association

Volume 47 | Winter 2018-2019 | Number 4

Chair's Report

By Jason Piskel – Piskel Yahne Kovarik PLLC

To open my first Chair's Report, I want to thank Athan for his year plus of service as the chair of the previous session and also for his ongoing work as editor of this newsletter.

Our new governance year began this last October, and the plans we have made promise to make it an exceptional one. The section will hold its midyear CLE on June 7, 2019 at Lane Powell's office in Seattle. This will amount to considerable savings for the session, freeing up resources to be used on other items such as section membership activities like the recent visit to the Amazon Spheres.

Bart Reed is preparing the winter forum which will take place at Cutters in Seattle and will include a presentation by Bill Endelman on FHA and ADA compliance (please look for emails regarding this event). Also, on March 22, 2019, we will be holding a Construction Law Section seminar in Spokane County in partnership with the Spokane County Bar Association. With that in mind, please save the date and plan a trip to the beautiful Inland Northwest.

Last but not least, this year you can expect to see the publishing of the *Construction Law Deskbook*. This invaluable resource was spearheaded by Ron English and will prove to be an asset to any practitioner's library. I look forward to a great year, and as always, please don't hesitate to contact me with any concerns or requests you may have regarding the section.

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Fall Forum 2018

Amazon BioSpheres

By Amber Hardwick – Green & Yalowitz, PLLC

Each year, the Construction Law Section offers a Fall Forum for members with a focus on new or interesting construction. This year was no exception.

This year's Fall Forum took place at the Amazon Spheres, located on Lenora and 6th Avenue in the Denny Triangle. Amazon's Spheres were completed in January 2018. The Spheres comprise the center of Amazon's Seattle headquarters.

Generally, the Amazon Spheres are only accessible to Amazonians. Occasionally, the Spheres open to the public for guided tours through the 40,000 plants from 700 species.

On November 1, 2018 the Spheres hosted approximately 75 members of the WSBA's Construction Law Section. Space

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UPCOMING EVENTS

Construction Law Deskbook	Publication in early 2019
Winter Dinner Forum	Seattle (Cutters), March 14, 2019
Spring CLE	Spokane (location TBD), March 22, 2019
Mid-Year Meeting and CLE	Seattle (Lane Powell), June 7, 2019

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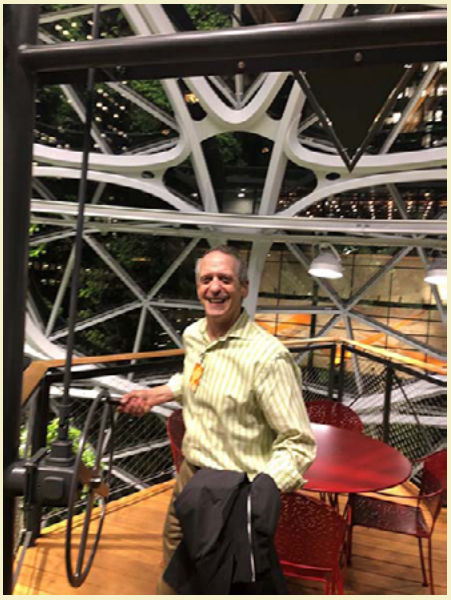
was limited and attending members were those lucky enough to sign up early. Those who arrived late found that security was so tight, it required an identification, a badge and a special chaperone just to gain entrance.

Attendees were treated to catering by Sea Creatures. We enjoyed refreshments in front of living walls two-to-three stories tall and mingled with colleagues from all over the state and a few from the Portland area.

The presentation kicked off with the architect and engineer of record: NBBJ and MKA Engineers. NBBJ presenters, John Savo and Dale Alberda, gave construction lawyers an inside perspective on the challenges associated with developing an unorthodox work space in a botanical garden in the center of Amazon's campus. Among other things, section members received insight into the new design technologies and special considerations impacting the three-block development. The project designers described securing alley vacations which, in turn, allowed the buildings to be angled to face the Spheres allowing more light to reach the Spheres. The designers also described ways the project achieved Amazon's program to create a community, rather than just a campus. The result is a mix of community, public commercial, and



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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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Washington Supreme Court Expands Contractor Notice Obligations

By Brett M. Hall – Ahlers Cressman & Sleight PLLC

The Washington Supreme Court dealt another blow to public works contractors in Washington state. In a case recently issued by the Court, *Nova Contracting, Inc. v. City of Olympia*, __ Wn.2d ___, 426 P.3d 685 (2018), the Court expanded contractors' obligations when providing notice on public works construction projects. The case involved Nova Contracting and the City of Olympia. Nova was the low bidder on the contract. Nova alleged that the City of Olympia did not want Nova to win the job and intentionally hindered Nova's ability to perform the job. The facts alleged by Nova involved the City's improper and apparently punitive rejection of submittals on the job and the City's eventual wrongful termination of Nova. Of significance in the case is that Nova never actually began work on the job. All that Nova had done at the time of termination was begin mobilizing its equipment on site. The Court of Appeals found that Nova had alleged sufficient facts to establish that the City violated the duty of good faith and fair dealing by improperly rejecting Nova's submissions and had breached the contract with Nova by improperly terminating.

The Washington Supreme Court reviewed the Court of Appeals decision in *Nova* and reversed. The Washington Supreme Court said that the WSDOT Standard Specifications that were incorporated in the City of Olympia contract required Nova to give notice of a claim if it would be alleging that the City of Olympia had breached the contract by wrongfully rejecting Nova's submittals. The Supreme Court seems to take a simplistic approach that the contract required notice, and Nova had no recourse if it did not give notice. What makes this case different than any of the other prior notice cases interpreting the WSDOT Standard Specifications is that this case involved a situation where the contractor was not making a claim for additional time or money on the job. Here Nova was only making a claim for its lost profits on the existing contract that was improperly terminated by the City of Olympia. WSDOT Standard Specifications are drafted to address situations where there is a claim for additional money or time. The notice specifications make numerous references to claims for additional time or money and require documentation related to those types of claims. The initial notice requirement also states the contractor must provide notice to the owner before doing the extra work: "immediately … before doing the work." However, Nova had not done any work on site. Nonetheless, the Washington State Supreme Court still held that Nova was required to give the initial notice.

The Washington Supreme Court held that Nova's claim for lost profits – or expectation damages – was barred because it failed to follow the notice and claims procedures when the City breached the duty of good faith and fair dealing. Nova apparently needed to be clairvoyant and understand that the multiple rejected submittals would later be found by a court to violate the duty of good faith and fair dealing and that it may need to later make a claim that the City improperly terminated the contract. This is the only way that Nova would have known that it needed to start making claims for each of the rejected submittals.

Comment: Contractors who are doing work on projects that incorporate the WSDOT Standard Specifications now need to be aware that they must follow the notice and claims procedure not only for claims for additional time or money, but for any claim for which they may need to seek legal recourse for in the future – including claims that the public agency is violating the terms of the contract. Absent doing that, the contractor may be at risk of losing that legal right in the future.

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private corporate spaces which invite pedestrians to visit even after hours.

Structural engineer Jay Taylor of MKA Engineers described some challenges associated with the structurally unique domes. Amazon's own Senior Manager of Horticultural Services, Ron Gagliardo, concluded the presentation with a discussion on the plants from 50 countries housed in the biosphere.

The presenters then gave an exclusive design tour of the Spheres. We broke off into smaller groups led by an architect, an engineer or an horticulturalist. I was lucky enough to be in Mr. Taylor's tour group as he walked about 12 lawyers through the unique ways the project achieved compliance with codes, what the models predict will happen in an earthquake event, and how the complex web of glass and steel evenly distributed loads. I know where I would like to be when the big one hits.

The tour revealed that the Amazon Spheres are more than mere biospheres. They are also magnificent pieces of engineering. They are meeting spaces including a "bird's nest," a suspension-type bridge, and islands surrounded by water. Each meeting space provides a unique sense of privacy designed to encourage collaboration.

It was an awe-inspiring evening. Thanks to all who attended, for your part enhancing our construction bar. A special thanks to FTI Consulting, a forensic and litigation consulting firm, for co-sponsoring the refreshments. The 2018 Fall Forum was organized by Jennifer Beyerlein and Amber Hardwick, with the help of several folks at Amazon.

Announcing the 2019 WSBA Construction Law Section Writing Competition

The Construction Law Section proudly announces the 2019 WSBA Construction Law Section Writing Competition. This is the fifth time we have sponsored this event, where law students are invited to write on a construction law topic. This year, the selected topic is:

> *Lost profits are frequently claimed as an element of damages in a breach of contract case in construction law. In the past 50 years, our Supreme Court has provided very little guidance as to what constitutes "lost profits" in such cases. Therefore, based on guidance from other jurisdictions, and existing case law in our state, what are the key elements of "lost profits" available to successful claimants in construction law cases in Washington?*

Section members will be engaging in law school outreach in the beginning of the year. If you know of any law students in Washington who are interested in construction law, please encourage them to participate. Questions can be directed to Executive Committee member Seth Millstein at Pillar Law PLLC (*seth@pillar-law.com*).

The 2018 winning submission came from Archie Roundtree, a 3L at Seattle University School of Law. Mr. Roundtree's submission in included in full below.

Archie Roundtree receiving his Writing Competition award from past chair Athan Tramountanas at the 2018 Midyear Meeting and CLE.

Federal Pre-emption: Flawed Analysis

The Chicago Housing Authority v. Destefano and Partners, Ltd.

By Archie Roundtree, Jr. – 3L, Seattle University School of Law

Introduction

In 1992, the United States Supreme Court, in *Cipollone v. Liggett Group, Inc.*, issued a finding that Section 4 of the Federal Cigarette Labeling and Advertising Act (1965 Act), does not preempt a claim "based on allegedly fraudulent statements made in respondents' advertisements."[1] The decision established that the doctrine of preemption does not shield entities from state-law damage claims based on "express warranty, intentional fraud and misrepresentation, conspiracy."[2] Despite the ruling in *Cipollone*, courts have applied the doctrine of preemption to defendants in damage claims alleging breach of contract, and misrepresentation of material fact. This paper will address why the Appellate Court of Illinois in *The Chicago Housing Authority v. Destefano and Partners, Ltd*, erred in its finding that the Chicago Housing Authority (CHA) breach of contract claim was preempted and barred by federal law.

I. Summary of *The Chicago Housing Authority v. Destefano and Partners, Ltd.*

The issue in *The Chicago Housing Authority* was twofold. First, whether the 1965 Act preempted a claim against Destefano and Partners, Ltd. (Destefano), for fraudulent misrepresentation? Second, whether the concealment of material facts subject Destefano to a "state-law duty to disclose such facts"?[3] The circuit court granted a motion for summary judgment to defendants on the grounds federal law preempted Chicago Housing Authority claim. CHA immediately appealed the decision.

A) Court Decision

The Appellate Court of Illinois decided the case based on federal supremacy—holding that "allowing the state-law claim would interfere with Congress' goal, CHA's breach of contract claim is preempted under the obstacle preemption doctrine."[4] The decision of the court was based on a flawed analysis of the obstacle preemption doctrine. The doctrine provides that in order to determine whether state law "interferes with the objectives of federal law or is an obstacle to the accomplishment of the federal purpose," it is first "necessary to determine the purpose of the federal law and how that purpose is impacted by the operation of state law.[5]

B) ADA

The Americans with Disabilities Act of 1990 as Amended § 12101(b)(2), states the purpose is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[6] The ADA is not applicable in *The Chicago Housing Authority*, because the lawsuit did

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not evolve from a claim of discrimination against individuals with disabilities. Most importantly, there is "no indication [within the ADA] of congressional intent to preempt" state law that governs breach of contract claims against construction design contractors.[7] The ADA objective of providing "enforceable standards addressing discrimination" is not impacted by the operation of state law.[8]

C) Breach of Contract

The CHA sued Destefano for breach of contract, resulting from the company's failure to comply with the terms of the construction agreement. Destefano and Partners signed a contract certifying that its design, work and construction, was in compliance with state and uniform federal housing accessibility standards, including "the American with Disabilities Act of 1990 [(ADA) (42 U.S.C. § 12101 et seq. (2006))], as amended, Section 504 of the Rehabilitation Act of 1973, as amended and as implemented in 24 CFR Part 8 and the Fair Housing Act Design Manual, and the design and construction requirements of the U.S. Department of Housing and Urban Development." [9] CHA reasonably relied on the representations of Destefano.

The Appellate Court of Illinois rejected CHA's contract breach claim, holding that "the breach of contract claim was a de facto indemnity claim and, therefore, was preempted."[10] In making its decision, the court ignored the clear wording of the construction contract, state laws governing the agreement, and Supreme Court precedence. Furthermore, the court erred in evoking the obstacle preemption doctrine, because the court did not demonstrate a conflict between state and federal law, and did not demonstrate that CHA's breach of contract lawsuit obstructed the objective of the ADA. Rulings by Washington state courts support the application of state law in *The Chicago Housing Authority.*

II. Washington State Courts

The Ninth Circuit held that "obstacle preemption occurs [only] where state law stands as an obstacle to the purposes and objectives of Congress."[11] The Ninth Circuit "reversed the district court grant of summary judgment in favor of the plaintiffs" who made a claim of express preemption.[12] Other courts have reached similar conclusions in such cases.

The Washington Supreme Court in *Estate of Becker v. Avco Corp.*, held that "state laws are not superseded by federal law unless that is the clear and manifest purpose of Congress."[13] Mr. Becker died as a result of a plane crash. His estate sued Technology Industries Inc. (FTI), attributing the cause of the crash to a faulty carburetor. FTI successfully argued in the Court of Appeals that state law was preempted by the Federal Aviation Administration Authorization Act. Becker's estate petitioned the Washington Supreme Court which held that "it only finds federal preemption if federal regulations are so pervasive as to indicate that Congress intended to preempt that area of law."[14] The Court's reasoning in *Becker,* also apply in *The Chicago Housing Authority.* There is no indication in the legislative history of the ADA that Congress intended to exempt entities from suing construction and design contractors for breach of contract. The fact that Destefano signed a contract to construct a project to comply with the accessibility standard of the ADA does not put the construction contract under the purview of the federal statute. The *Becker* Court commented "that a regulation must not only be pervasive, but must comprehensively regulate an area of law to have preemptive effect."[15]

A) Third Circuit

A similar case to *Becker* was decided by the Third Circuit, in *Sikkeelee v. Precision Airmotive Corp*. In *Sikkeelee,* Pilot David Sikkeelee lost his life in a plane crash minutes after takeoff from the county airport. Sikkeelee's wife brought a lawsuit against Precision Airmotive Corp., claiming the carburetor from the engine caused it to malfunction, which resulted in the crash. The lawsuit specified an engine design defect that caused fuel to leak from the carburetor to the engine. Similar to *Becker*, the defendant prevailed in District Court on a motion for summary judgment claiming state law was preempted by the Federal Aviation Act (FAA). The case was immediately appealed to the Third Circuit. After the court carefully analyzed Article VI of the Constitution, the FAA, and the intent of Congress, it reasoned that cases involving claims of preemption "start with the presumption that the historic powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[16]

The Court of Appeals found that neither the FAA, nor the implementing aviation design regulations "signal an intention [by Congress] to preempt state products liability law."[17] Likewise, there is no evidence in the text of the ADA, or implementing ADA Title II regulations, of an intention by Congress to preempt state-law breach of construction contract claims. The Third Circuit found there is no evidence that when Congress enacted the FAA, it "intended to create federal standards of care for manufacturing and design defect claims."[18] Likewise, with the ADA, there is no evidence Congress intended to create federal standards of care for construction and design defect claims.[19] There are specific remedies for CHA's breach of the construction contract claim under Washington state.

III. Washington State Law

Under Washington state law, a "[b]reach of contract is actionable if the contract imposes a duty, the duty is breached, and the breach proximately causes damages to the claimant."[20] CHA could assert a claim of negligent misrepresentation in accordance with Restatement of Torts (2d) §552. To prevail in a fraud claim, the plaintiff must show

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> clear, cogent, and convincing evidence[;] … a representation of an existing fact; its materiality; its falsity; the speaker's knowledge of its falsity; his intent that it shall be acted upon by the person to whom it is made; ignorance of its falsity on the part of the person to whom it is addressed; the later's reliance on the truth of the representation; his right to rely upon it; and his consequent damage.[21]

Washington courts have recognized that a party that "supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information."[22] In *Larson v. Union Investment Loan Co.*, the court viewed the agreement "reasonably in the contemplation of the parties at the time of the making of the contract" and as such, held the breaching party is responsible for the "the natural and proximate results flowing from its breach."[23] Upon entering into the restated design agreement, CHA reasonably relied on Destefano to fulfill its obligations under the contract. Destefano breached its material obligation under the agreement by failing to ensure the construction project and design conformed to federal accessibility requirements. The company then sought to escape liability for the breach of contract by seeking refuge under the federal preemption doctrine. The Appellate Court of Illinois affirmed the "the circuit court's order dismissing … [the] breach of contract claim."[24] However, the court either ignored, or failed to consider that the Supreme Court in 1992, had already decided on contractual claims of "false statements of material fact," and concealment under state-law.[25]

IV. United States Supreme Court

In *Cipollone*, the United States Supreme Court sided with the plaintiff and rejected the defendant's assertion that plaintiff's claim was preempted. Asserting the jurisdictional boundaries between state and federal law, and commenting on behalf of plaintiff, the Court stated "[t]he predicate of this claim is a state-law duty not to make false statements of material fact or to conceal such facts."[26] The predication of the breach of contract claim in *The Chicago Housing Authority*, is the same as *Cipollone*. Supreme Court precedence for a decision in favor of CHA was established in *Cipollone*. Based on Supreme Court precedence and Washington state case law, CHA would have prevailed in a Washington court, and been entitled to damages as a result of the economic loss stemming from Destefano's breach of contract.

The Washington court would likely apply the Economic Loss Rule, which bases liability on the agreed upon terms in the contract. CHA was seeking "damages in the form of expenses and cost incurred to bring the project in conformance with the applicable state and federal laws, regulations, and guidelines."[27] The damages would likely be granted because CHA is seeking to gain the benefit of its contractual bargain. Additionally, CHA may be entitled to Direct Damages. In *Floor Exp., Inc v. Daly*, the court held that "a party injured by a breach of contract may recover all damages that accrue naturally from the breach including any incidental or consequential losses the breach caused."[28]

Conclusion

Based on the foregoing, the Appellate Court of Illinois erred in holding that "CHA's breach of contract claim is preempted under the obstacle preemption doctrine."[29] There is no expressed or implied language in the ADA, to support the contention that Congress intended to preempt state law under the circumstances of CHA's breach of contract claim.

1 *Cipollone v. Liggett Grp.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L.Ed.2d 407 (1992)

2 *Id.*

3 *Chi. Hous. Auth. v. DeStefano & Partners, Ltd.*, 2015 IL App (1st) 142870, 399 Ill. Dec. 96, 45 N.E.3d 767

4 *Id.*

5 *Types of Preemption Analysis*, WNECLAW, https://www.wneclaw.com/conlaw/typesofpreemption.html (last visited Mar. 10, 2018).

6 AMERICANS WITH DISABILITIES ACT OF 1990, 1990 Enacted S. 933, 101 Enacted S. 933, 104 Stat. 327, 101 P.L. 336, 1990 Enacted S. 933, 101 Enacted S. 933

7 *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016)

8 AMERICANS WITH DISABILITIES ACT OF 1990, *supra* note 6.

9 *Chi. Hous. Auth., supra* note 3

10 *Id.*

11 *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Becerra*, 870 F.3d 1140 (9th Cir. 2017)

12 *Id.*

13 *Estate of Becker v. Avco Corp.*, 187 Wn.2d 615, 387 P.3d 1066 (2017)

14 *Estate of Becker, supra* note 13

15 *Id.*

16 *Sikkelee, supra* note 7.

17 *Id.*

18 *Id.*

19 *Id.*

20 Rodney L. Umberger, Jr., James L. Robenalt, and William Kaster, *State of Washington Construction Law Compendium*, USLAW, http://www.uslaw.org/files/Compendiums2015/Construction/Compendium_Construction_Washington_2014.pdf (last visited Mar. 10, 2018).

21 *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 457 P.2d 603 (1969)

22 Restatement of Torts (2d) §552, COLUMBIAEDU, http://www.columbia.edu/~mr2651/ecommerce3/2nd/statutes/RestatementTorts.pdf (last visited Mar. 10, 2018).

23 *Larson v. Union Investment Loan Co.*, 10 P.2d 557 (Wash. 1932)

24 *Chi. Hous. Auth., supra* note 3.

25 *Cipollone, supra* note 1.

26 *Id.*

27 *Chi. Hous. Auth., supra* note 3

28 *Floor Exp., Inc. v. Daly*, 158 P.3d 619 (Wash. Ct. App. 2007)

29 *Chi. Hous. Auth., supra* note 3.

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2019

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