Construction Law

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Chair Report

By Marisa Bavand – Groff Murphy

My, how time flies. It is hard to believe that the WSBA Construction Law Section held its annual midyear meeting and CLE at this time last year, and that I was passed the baton as our section's chair. On June 9, I will have the pleasure of passing it forward to Athan Tramountanas as the section's chair for the 2017-2018 term. It has been my privilege and extreme pleasure to serve as chair and work with all your Construction Law Section council members. Your council continues to work to provide meaningful educational seminars throughout the state, to spark interest with law students through the annual law school writing competition and scholarship, and generally to work hard so we can all get to know each other better.

Please do not forget to mark your calendars for the Section's June 9th annual all-day CLE to be held at the WSBA Conference Center at Fourth and Union in Seattle (and via web attendance). This year's program will take you on a unique journey through key Revised Code of Washington statutes that every construction lawyer must know. This will be a fast-moving CLE platform. We have shortened speaker time to squeeze in more content and to keep things interesting. You will recognize a few speaker faces but will also get to meet quite a few new speakers. And back by popular demand, we will also have three King County judges to discuss the dos and don'ts of trying construction cases. Look for a postcard in your mail and email blasts from the WSBA and sign up early. The WSBA conference room has limited space so you will want to be sure to get your seat. And be sure to stay for the CLE after-party!

Wishing you all a happy, prosperous, and litigious year ahead!

Marisa Bavand

In This Issue

2017 Midyear Announcement

This year's midyear CLE and Section council election are June 9, 2017, at the WSBA Conference Center, 1325 Fourth Avenue, Suite 600, Seattle, WA 98101. The CLE focus is statutes affecting construction. Ron English and Jason Piskel return as the co-chairs.

As always, the CLE will kick off with Paul Cressman's case law update, which includes cases covering termination for convenience, implied warranty claims, and lien and bond claim issues. Judd Lees with talk about the Top 10 employer mistakes in prevailing wage compliance. Jennifer Beyerlein will kick off a series a brief presentations by discussing statutory limitation periods; a talk about awarding public contracts comes next by Ron English and Steve Goldblatt; and Jason Piskel will give the annual legislative update. Section Chair Marissa Bavand will hold the elections and introduce the new council.

For the second year in a row, there will be a judicial panel giving their insights on litigating complex construction cases. Judges Andrus, Rogers, and Rogoff will provide insightful and dynamic perspectives. Marianna Valasek-Clark will discuss statutory condo issues, including timing traps and notice requirements. Best topic title of the year goes to Karl Oles and Bart Reed who will be presenting "Lien on Me" – a scenario presentation of RCW 60.04 mechanic's liens. Grant Lingg will close the CLE with an hour of ethics for the construction lawyer. Should be another great CLE and we look forward to seeing lots of section members. Please be sure to also extend the "out" notation in your calendar to later in the evening as the section is providing a reception directly following the CLE at the conference center. The reception will feature hosted appetizers, beer, and wine that is sponsored by McMillen Jacobs Associates (Henry Spieker) and Naegeli Court Reporters. We thank those companies for the generous assist to the reception.

Please register online at: *https://www.mywsba.org/OnlineStore/ProductDetail.aspx?ProductId=11764097&page=sem&mt*. If this link is too cumbersome go to wsbacle.org and enter 1781 in the search field.

UPCOMING EVENTS

Midyear CLE	June 9, 2017 (WSBA Conference Center)
Fall CLE	Tri Cities, September 29, 2017 (tentative) (exact date and location TBD)
Fall Forum	(Date and Location TBD)

Coverage Case Involving Defective Construction Allowed to Proceed Against Property Insurance

By Athan Tramountanas – Short Cressman & Burgess

Judge Leighton of the U.S. District Court, Western District of Washington, at Tacoma, recently issued an order allowing a coverage claim for property damage at a condominium to proceed against property insurers in *Eagle Harbour Condo. Ass'n v. Allstate Ins. Co.*, 2017 U.S. Dist. LEXIS 54761 (April 10, 2017). In this case, the condominium association asserted that wind-driven rain and inadequate construction allowed water to penetrate the condominium buildings' sheathing and framing, causing decades of deterioration and decay (the Bainbridge Island condominium complex was constructed in the late 1970's/early 1980's). Six insurance companies insured the buildings over the relevant periods, and most were "all-risk" policies. They argued, broadly, that their policies excluded coverage for weather-related water damage, and even if they did not, wind-driven rain is not a fortuitous, covered peril.

The court denied the insurers' motions for summary judgment. The court employed the "efficient proximate cause rule" – when two or more distinct perils cause a loss and at least one is covered, the court determines whether a covered peril is the predominant cause. Two policies excluded repeated water seepage deterioration, but did not specifically exclude wind-driven rain. Because the condominium association argued that wind-driven rain (in conjunction with inadequate construction) caused the damage, the court held wind-driven rain was a covered peril so long as it was also a "fortuitous, covered peril."

Under the fortuitous loss rule, if a peril is not excluded and fortuitous, its resulting loss is covered. An all-risk policy covers all losses except those that are expressly excluded and those an insured subjectively knew would occur – *i.e.*, a non-fortuitous loss. The rule hinges on whether a policyholder knew about a loss that was not otherwise excluded from the policy. For a loss to be non-fortuitous, the insurer must demonstrate that the insured actually knew of a "substantial probability" that the loss would occur. Here, an insurer argued the loss was not fortuitous because it was caused by rain – and the association members must have known that it rains on Bainbridge Island. The court held that a reasonable juror could conclude that the association's loss was caused by inadequate construction and latent defects, repeated seepage of water, rot or deterioration, or wind-driven rain, and therefore summary judgment was not appropriate.

Fourth Annual Dinner Meeting – Another Success

By Robert Olson – Schlemlein Goetz Fick & Scruggs, PLLC

The Section held its fourth annual dinner meeting / mini CLE at Cutter's Crabhouse in the Pike Place Market on Thursday evening, March 2, 2017. A lively crowd of 31 members socialized over drinks before dinner with a bar generously hosted by **Inventus** (www.inventus.com), a consulting firm helping clients effectively manage the selection and production of electronically stored information (EIS) during the legal discovery process.

The CLE portion of the event was presented by Washington attorneys **Larry Johnson** (*www.e-dataevidence.com*) and **Tom Howe** (*www.howelawfirm.com*), both seasoned trial lawyers with deep technical backgrounds. They have been referred to in a *law.com* article as "among the top 200 e-discovery lawyers in the world," providing legal/technology consulting and expert witness services to major national law firms, Fortune 500 legal departments, e-discovery vendors, and state and federal government agencies.

Their practical and entertaining presentation style makes them highly sought-after speakers. They lived up to their billing as they alternated speaking and literally raced through an hour-long, information-packed PowerPoint presentation giving their *Top 10 Construction Law Electronic Discovery Tips.* You can access the 106 presentation slides and resources they cited by downloading the link: http://howelawfirm.com/Events.

Those attending received one hour of CLE credit. Considering that the libations and dinner and the CLE credit cost only $50, the event was one of the all-time great bargains for Construction Law Section members. We intend to continue the tradition next year. We hope you can join us.

The following article was the winning submission in the 3rd Annual WSBA Construction Law Section Writing Competition. Interested 2L and 3L students in the three Washington law schools were invited to write no more than 2,200 words on one of four construction law topics chosen by the Construction Law Section Council. Tom Wolfendale chaired the competition committee with help from others in the Section. The committee selected the submission of Jacob Lervold, a 3L from University of Washington as the winner. Archie Roundtree, Jr., a 2L at Seattle University, came in second place. Mr. Lervold's winning submission is included in full below. Thanks to Tom for your work on this project, and congratulations to Jacob and Archie.

The Influence and Aftermath of *King County v. Constr. Grands Projets*

By Jacob Lervold – 3L, University of Washington

Introduction

In 2015, the Washington State Court of Appeals for Division One issued a strong reminder about a contractor's potential liability in construction contracts. The $155 million judgment against the contractor jumps off the page, grabbing the attention of contractors and owners about the significant liability that one may face when dealing with unknown subsurface conditions. But, this ruling teaches another lesson, that in Washington it appears you can no longer prove a differing site condition (DSC) claim through inferences. This paper discusses how *King County v. Vinci Constr. Grands Projets* may have shut the door to proving a DSC claim through inferences about subsurface conditions and what this means for contractors moving forward.

I. Summary of *King County v. Vinci Constr. Grands Projets*

In *Vinci Constr. Grands Projets*, the Court of Appeals faced the issue of whether King County (County) or Vinci Construction Grands Projets, Parsons RCI, and Frontier-Kemper, JV (collectively VPFK) would be liable for the delay in the tunneling for the Brightwater project. 191 Wash. App. 142 (2015). The trial court granted three partial summary judgment orders in favor of the County, and VPFK appealed. *Id.* at 148. But, only one of these summary judgments is relevant to this paper.

A) The Differing Site Condition Claim

The relevant summary judgment is the trial courts dismissal of VPFK's DSC claim. The contract contained a "Differing Site Condition Clause" which allowed an equitable adjustment by the contractor if it encountered site conditions different from those indicated in the contract. *Id.* at 151-52. "At issue here is a Type I Differing Site Condition[ ], defined as [s]ubsurface or latent physical conditions at the site which differ materially from those indicated in the Contract Documents." Id. at 152 (footnote and quotes omitted). VPFK argued the trial court erred in dismissing its DSC claim regarding

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the frequency of soil transitions. Id. at 165. The court stated the law that applies to proving a DSC claim is

> "The general rule may be deduced from the decisions that where plans or specification lead a public contractor reasonably to believe that conditions indicated therein exist, and may be relied upon in making his bid, he will be entitled to compensation for extra work or expense made necessary by conditions being other than as so represented."

Id. at 165 (citing *Maryland Cas. Co. v. City of Seattle*, 9 Wash. 2d 666, 670 (1941)). The court then analyzed *Basin Paving Co. v. Mike M. Johnson, Inc*. and cited its holding as "recovery is … limited to when the condition complained of could not reasonably have been anticipated by either party to the contract." *Id*. at 166 (citing 107 Wash. App. 61, 65 (2001) (internal quotes and citation omitted)).

After reviewing the general rule and other decisions, the court went on to state that there are four requirements to bringing a DSC claim. *Id*. These requirements are:

1) the contract documents indicated certain conditions,
2) the contractor reasonably relied on those indications when making its bid,
3) actual conditions materially differed from those indications when making its bid, and
4) the materially different conditions were not foreseeable.

Id. Applying this test, the court found VPFK failed to prove the first element. *Id*. at 167.

For the first element, the court reasoned that VPFK "failed to demonstrate that the contract documents specifically indicated the frequency of transitions between plastic and non-plastic soils." *Id*. VPFK conceded that the contract did not explicitly state the frequency of transitions. *Id*.

VPFK argued that "even though there was no explicit representation in the Contract Documents about the frequency of transitions in the soil, a question of fact remains about whether its assumptions about the soil conditions amounted to a reasonable interpretation of the Contract Documents." *Id*. at 167-68. VPFK stated that "neither the Contract Documents nor case law require an express representation about ground conditions in order to pursue a differing site conditions claim. Rather, VPFK asserts, all that is required is an indication, which may be proven by inferences and implications." *Id*.

The court replied that Washington does not recognize this additional element of reasonable interpretation, but if it did, VPFK's claim still failed because there was no express or implicit mention to the number of transitions. *Id*. at 168. The court noted that if the Contract Documents are silent about the subsurface, not indicating one way or the other, then it cannot support a DSC claim. *Id*. (citing *Renda Marine, Inc. v. United States*, 66 Fed. Cl. 639, 651 (2005)).

VPFK also argued that the County is liable for its interpretation of the Contract Documents. *Id*. at 168-69. The court reasoned that Washington courts "have rejected differing site condition claims where the public works contract disclaimed liability for information it provided about subsurface information or gave no information about subsurface information." *Id*. (citing *Basin Paving Co*., 107 Wash. App. 61 and *Dravo Corp. v. Municipality of Metro. Seattle*, 79 Wash. 2d 214 (1971)). The court found persuasive that the Contract Documents specifically stated that bidders should make their own interpretations about soil conditions and contained a provision which shifted the burden to the contractor for assumptions. *Id*. at 169.

The burden shifting clause stated:

> The Contractor may make its own interpretations, evaluations, and conclusions as to the nature of the geotechnical materials, the difficulties of making and maintaining the required excavations, and the difficulties of doing other work affected by geotechnical conditions, and shall accept full responsibility for making assumptions that differ from the baselines set forth in the [Geotechnical Baseline Report].

Id. Additionally, the court noted a "Warranty Statement" in the Geotechnical Baseline Report which warned bidders that the locations of the various soil types will vary. *Id*. The court upheld the trial courts ruling for the County on the first element because the contract did not explicitly state the frequency of transitions and the contract shifted liability about assumptions to VPFK. *Id*. at 169-70.

II. The Spearin Doctrine

Washington State along with almost all other jurisdictions have adopted the Spearin Doctrine. *See e.g. Maryland Cas. Co*., 9 Wash. 2d at 676; Donald E. Campbell, *Construction Law in a Nutshell*, 47 (2015). In 1918, Justice Brandeis in *Spearin v. United States* created the influential Spearin Doctrine when stating:

> Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. Thus one who undertakes to erect a structure upon a particular site, assumes ordinarily the risk of subsidence of the soil. But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work ….

248 U.S. 132, 135-36 (1918) (citations omitted). Since then, the Spearin Doctrine has become a "fundamental principle that, as between the owner and contractor, the party in control of the detailed design impliedly warrants to the non-controlling party the adequacy of the design." Philip L. Bruner & Patrick J. O'Connor, Jr., *Construction Law* § 3:5 (2016).

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When it comes to unpredictable subsurface conditions, contractors traditionally bore the risk of the subsurface conditions being different than expected. *See generally, Foster Constr. C. A. & Williams Bros. Co. v. United States*, 193 Ct. Cl. 587, 435 F.2d 873, 887 (1970); Bruner & O'Conner, supra, §14:1. Because of this, contractors faced significant risk when it came to unknown subsurface conditions and raised the amount of their bids. *Foster Constr. C. A. & Williams Bros. Co.*, 193 Ct. Cl. at 887. The government began using DSC clauses to bring down the bids by allowing for increased compensation due to unexpected subsurface conditions. *Id*. The way these DSC clauses work is that "[b]idders are thereby given information on which they may rely in making their bids, and are at the same time promised an equitable adjustment under the changed conditions clause, if subsurface conditions turn out to be materially different than those indicated in the logs." *Id*.

In Washington, courts have traditionally used a specific test for analyzing a DSC claim. The Washington Practice Series defines this test as "[W]here plans or specifications lead a public contractor reasonably to believe that conditions indicated therein exist, and may be relied upon in making his bid, he will be entitled to compensation for extra work or expense made necessary by conditions being other than as so represented." 33 Wash. Prac., Wash. Construction Law Manual § 9:25 (2016-2017 ed.) (citing *Dravo Corp. v. Municipality of Metro. Seattle*, 79 Wash. 2d 214, 218, 484 P.2d 399 (1971) (quoting *Maryland Cas. Co. v. City of Seattle*, 9 Wash. 2d 666, 670, 116 P.2d 280 (1941)). Furthermore, the Federal Court of Claims has repeatedly recognized the test for a differing site condition claim requires the court to construe the contract as a reasonably prudent contractor would. *See e.g. Travelers Cas. and Sur. Co. of America v. United States*, 75 Fed.Cl. 696, 712 (2007).

III. Shifting away from allowing inferences in DSC claims

The new four-part test as interpreted in *Vinci Constr. Grands Projets* moves away from allowing arguments in a DSC claim to prove subsurface conditions through inferences and implications in the contract. In *Maryland Cas. Co.*, the Washington State Supreme Court first stated the traditional rule when faced with a contractor that argued they were due increased compensation under a DSC claim. 9 Wash. 2d 666. The contractor argued that certain specifications in the contract constituted an implied warranty that certain underground conditions would exist based upon using certain materials and construction techniques. *Id*. at 670-76. Here, the court entertained an argument using inferences to prove an implied warranty about certain subsurface conditions. *See generally, id*.

In *Vinci Constr. Grands Projets*, the court states the first element of the four-part test as "the contract documents indicated certain conditions." The court went on to argue that for this element, Washington would not recognize a reasonable interpretation analysis that used inferences in the contract to assume an implied warranty of subsurface conditions. The previous rule stated "reasonably to believe that conditions indicated therein exist." With the previous rule, no court stated whether the word indicated would include reasonable inferences. However, in *Maryland Cas. Co.*, the court recognized and analyzed an argument based on inferences made about subsurface conditions. One could argue that because *Maryland Cas. Co.* was the first Washington case to state the rule and allowed for an argument about an implicit implied warranty through inferences, that the court intended for the rule to allow for a contractor to prove an implied warranty of subsurface conditions through inferences. The argument about using inferences is consistent with numerous cases by the Federal Court of Claims, where the court looked at the contract as a reasonably prudent contractor would. But, *Vinci Constr. Grands Projets*, very succinctly says Washington does not allow this argument.

A) Contractors should be aware of making any inferences about subsurface conditions and the inclusion of burden shifting clauses.

Contractors should not make any inferences about subsurface conditions and should be aware of burden shifting clauses. Before *Vinci Constr. Grands Projets*, a contractor could argue about inferences they made about subsurface conditions to prove a DSC claim, but now, that argument may no longer be valid with the new test. Moving forward, contractors in calculating the amount of risk they are assuming should not make any assumptions about subsurface conditions from the contract. No matter how obvious the inference may appear, the court will not likely construe the contract as a reasonable contractor would for a DSC claim.

Furthermore, Washington enforces burden shifting clauses. In *Vinci Constr. Grands Projets*, the court found persuasive the fact the contract disclaimed liability about any assumptions it made about subsurface conditions. Contractors need to be aware of any type of burden shifting clause because a carefully worded disclaimer about subsurface conditions will most likely prevent a contractor from recovery in a DSC claim.

Lastly, one could argue that owners have an added layer of protection by the court not allowing for inferences and enforcing burden shifting clauses that did not appear in the original Spearin Doctrine. The Spearin Doctrine did not allow the government to use certain types of burden shifting clauses, which Vinci Constr. Grands Projets recognizes and enforces. Furthermore, by not allowing inferences about representations in the contract, it allows an owner to possibly mislead a contractor when they implied certain conditions therein to exist.

Conclusion

Proving a DSC claim became even harder after *Vinci Constr. Grands Projets*. It has never been easy to prove such a claim in Washington, but without allowing inferences and enforcing disclaimers, contractors carry even more risk. Originally, DSC clauses were meant to allow a contractor to rely on the governments reports about subsurface conditions, but after Vinci Constr. Grands Projects, a contractor will second guess such reliance and increase bids.

Washington Supreme Court Finds Coverage for Pollutants Under Efficient Proximate Cause Rule

By Athan Tramountanas – Short Cressman & Burgess

In *Xia v. Probuilders Specialty Insurance Co. RRG*, 2017 WL 1532219 (April 27, 2017), the Washington Supreme Court held that a general liability policy may provide coverage for excluded damages caused by pollutants if the pollutants are caused by a contractor's negligent acts. This case involved a townhouse purchased by the plaintiff from a developer. When the townhouse was constructed, an exhaust vent attached to the hot water tank had not been installed correctly and discharged carbon monoxide directly into the townhouse. The plaintiff became ill and sued the developer, alleging the developer caused her illness by failing to properly install the vent and failing to discover the disconnected venting.

The developer's general liability insurance company denied coverage. The plaintiff settled with the developer for stipulated damages, and received an assignment of the developer's rights against the insurance company. The trial court dismissed the plaintiff's case against the insurance company. The appellate court upheld the dismissal, holding the pollution exclusion applied. The Supreme Court accepted review.

The court first reviewed whether the pollution exclusion applied to carbon monoxide caused by an improperly attached exhaust vent. Applying the rule from *Quadrant Corp. v. American States Insurance Co.*, 154 Wn.2d 165, 110 P.3d 733 (2005), the court stated, "[u]ltimately, what matters most is whether the occurrence triggering coverage originates from a pollutant acting as a pollutant." Distinguishing this case from another, where injuries were caused by a backflow of diesel oil but would have been the same if the backflow was water instead of oil, the court held that the plaintiff's damages were caused by a pollutant (carbon monoxide) acting as a pollutant.

The court held, however, that a genuine issue of fact existed about whether the insurance company had a duty to defend under Washington's efficient proximate cause rule. The rule of efficient proximate cause provides coverage "where a covered peril sets in motion a causal chain[,] the last link of which is an uncovered peril." *Xia, quoting Key Tronic Corp., Inc. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wn.2d 618, 625, 881 P.2d 201 (1994). Here, utilizing the "eight corners" rule (i.e., looking at the face of the insurance policy and the complaint), the Court held the efficient proximate cause of the plaintiff's injuries as alleged was the developer's negligent installation of the hot water tank. The negligent installation of the tank was a covered claim. Thus, a jury could hold that the excluded peril was caused by an initial covered peril, and the Supreme Court reversed the appellate court's decision.

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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
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October 1, 2016 – September 30, 2017

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