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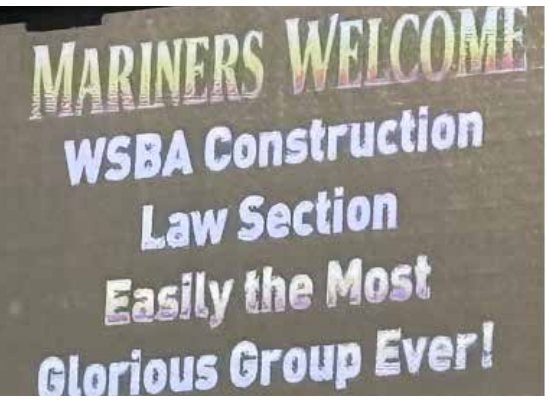

CHAIR'S REPORT

By Seth Millstein, Pillar Law PLLC

By the time you read this, my term will be over; it'll be a wrap. It's been a great year. We pulled off another excellent Midyear CLE. My thanks to an outstanding panel of speakers and great hosts. We also had our first summer field trip. On July 21, about 40 Section members filled a few rows at T-Mobile Park to watch the M's lose to the Brewers. But, from what I hear, the Section is now being credited for what happened after. The M's basically did not stop winning, and apparently (according to sources), this was all because of this centerfield scoreboard posting in between innings that flashed for no more than 10 seconds. But it definitely made the difference in the M's incredible 2025 season.

Other accomplishments this year include our new LinkedIn page, which is up and running and looks great. You can check it out here. Thanks go to Cynthia Park for keeping the page up and running.

My only regret this year is that we did not get to do another volunteering project. Last year about a dozen of us helped build a few tiny houses in SODO for Sound Foundations. This year, our schedules did not mesh. We're looking for new volunteer opportunities involving (extremely light) construction projects. If anyone has an idea, please email me: seth@pillar-law.com.

As I said before, we have an incredible Section. This year, I was fortunate to meet other Section leaders and "workshop" issues. Many of their concerns and issues were the opposite of ours. On my way out the door, I'd like to say "cheers" to such a cohesive and engaging executive committee and membership. You all helped make this year so memorable and successful.

On a much more somber note, I'd like to take a moment and pay respects to A. Shawn Hicks. I knew Shawn for nearly 20 years. He passed away on Whidbey Island at the age of 67 in late July, unexpectedly. Shawn was incredibly helpful to me over the years. His knowledge of construction law was incredible, and he was always willing to lend a hand and draw on his insights to help. Sincerest condolences to Shawn's family as they continue to move forward.

Sincerely,
Seth

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CONSTRUCTION LAW SECTION
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Court of Appeals Confirms That Contractor Denied Intervention in Lien Foreclosure Suit Can Immediately Appeal

By Brian Esler, Miller Nash LLP

The Legislature made it clear in Washington's construction lien statute (RCW 60.04.171) that all lien foreclosure actions arising out of the same project should be joined in one lawsuit. Filing a motion to intervene in a pending foreclosure lawsuit will also stay the normal eight-month deadline for filing a lien foreclosure lawsuit (at least until the motion is finally decided). And the lien statute says that the trial court should always allow such intervention unless to do so would create an undue delay or cause incurable hardship to other parties. But what happens if the trial court judge nonetheless denies the motion to intervene? Especially as the eight-month deadline may have run by then, such denial could mean that a contractor has lost any right to foreclose its lien. Division I of the Court of Appeals recently addressed this issue in an unpublished opinion in *BN Builders, Inc. v. Dep't of Lab. & Indus.*, No. 70142–8–I (July 7, 2014).

Although federal courts have unanimously held that a party whose motion to intervene is denied has an automatic right of appeal, Washington law on this issue is surprisingly muddled.

When a trial court gets things wrong, the normal path for correction is to appeal. But when one of our clients recently had its motion to intervene in a lien foreclosure lawsuit wrongfully denied and sought to appeal that decision as a matter of right, a commissioner in Division I of the Washington Court of Appeals rejected the appeal. The commissioner held that the trial court's denial of the client's motion to intervene in the underlying lien foreclosure suit was not a final judgment or a decision terminating the action, so our client had no automatic right to appeal that order under RAP 2.2. While the commissioner did allow our client to submit further briefing on whether it might nonetheless be entitled to discretionary review under RAP 2.3, such review is seldom granted.

Although federal courts have unanimously held that a party whose motion to intervene is

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denied has an automatic right of appeal, Washington law on this issue is surprisingly muddled. Nonetheless, we moved to modify the commissioner's ruling. Ultimately, we were successful and a panel of three judges from the Court of Appeals overruled the commissioner and confirmed that a contractor whose motion to intervene is denied does have an automatic and absolute right to appeal the trial court's decision denying intervention. The Court of Appeals' opinion in *BN Builders* will also now provide some guidance and authority for other contractors or lien claimants who find themselves in a similar situation. As the case settled soon thereafter, this may be the only authority available on this issue for some time. ■

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

CONSTRUCTION LAW SECTION EXECUTIVE COMMITTEE MEETING

Date: December 7, 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

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

West Coast Self Storage LLC v. Dep't of Revenue, No. 86506-4-I (Sept. 2, 2025)

By Evan A. Brown, Stoel Rives LLP

Division I of the Washington Court of Appeals recently issued its opinion in *West Coast Self Storage LLC v. Dep't of Revenue*, No. 86506-4-I (Sept. 2, 2025), addressing whether an entity providing development and construction management services for certain self-storage facilities was required to pay retail business and occupation ("B&O") tax and retail sales tax on payment received on grounds that the work constituted construction-related services subject to RCW 82.04.051. Although unpublished and applying statutory language that had been amended since the relevant events, the opinion provides some guidance to practitioners advising clients providing hybrid services for or related to construction projects.

Appellant West Coast Self Storage ("West Coast") had entered into an affiliation agreement with Catalyst Storage Partners LLC and then several development agreements and construction management agreements for five projects to develop and build self-storage facilities in Western Washington. Under the development agreements, West Coast would provide development services like site identification and evaluation, site coordination, engaging with contractors for procurement of construction services, negotiating the construction contract, and obtaining building permits, in addition to site acquisition services like preparing a purchase and sale agreement and real estate package. Under the construction management agreements, West Coast was also to serve as construction manager to monitor and administer certain aspects of the construction. At least one of the construction management agreements specified that West Coast was not a licensed contractor and was not responsible for actual construction of the project, characterizing the services as "oversight and advisory" in nature.

West Coast apparently paid the "service and other" B&O tax and did not pay retail sales tax on amounts it received under the development and construction management agreements for the projects. The Department of Revenue ("DOR") later audited West Coast and determined that the services performed for the projects were subject to retail sales tax in addition to retail B&O tax. DOR assessed back taxes and penalties against West Coast. West Coast sought review of the decision and assessments under the Administrative Procedure Act, and the superior court certified it for review by the Court of Appeals.

The court noted that construction services are defined as retail sales for tax purposes under RCW 82.04.050(2)(b) which includes "services rendered in respect to" construction under RCW 82.04.051, first adopted in 1999. RCW 82.04.051(2) further provides that "[a] contract or agreement under which a person is responsible for both services that would otherwise be subject to tax as a service under RCW 82.04.290(2) and also constructing, building, repairing, improving, or decorating activities that would otherwise be subject

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to tax under another section of this chapter is subject to the tax that applies to the predominant activity under the contract or agreement."

Notably, in 2020—several years after the audit period at issue in the case—the Legislature amended RCW 82.04.051 in 2020 to *expressly exclude* "services such as … land development or management," which is defined to include:

> site identification, zoning, permitting, and other preconstruction regulatory services provided to the consumer of the constructing, building, repairing, improving, or decorating services. This includes, but is not limited to, acting as an owner's representative during any design or construction period, including recommending a contractor, monitoring the budget and schedule, approving invoices, and interacting on the behalf of the consumer with the person who has control over the work itself or responsible for the performance of the work.

RCW 82.04.051(1), (4)(a). Because this amended language was not applicable to the time period at issue, the court's opinion should not be read as a decision that the particular sorts of development and construction management services at issue here are necessarily subject to retail B&O and sales tax going forward. However, the court's analysis is instructive as to how one should approach "gray area" services under the statutes.

West Coast argued that the 2020 amendment should apply retroactively, as it cured ambiguity in the statute. The court rejected the argument on grounds that the legislative history showed that the Legislature intended the amendment to remove barriers for affordable housing development, not to address any perceived ambiguity in the prior statutory language.

To apply RCW 82.04.051, the court then assessed whether the services provided under the development agreements and CMAs should be considered together as a single taxing event such that RCW 82.04.051(2) would apply to all of those services in the aggregate. The Board determined, and the court agreed, that because the parties intended that West Coast would be awarded both the development and construction management agreements subject to the affiliation agreement as part of overall efforts to develop the projects and sites, the services should be considered together for purposes of RCW ch. 82.04.

[The court] framed and applied a test based on the language of RCW 82.04.051, which requires that the services be (1) "directly related" to construction and (2) "performed by a person who is responsible for the performance of" construction.

Based on the pre-amendment statutory language, the court then held that West Coast's services qualified as services "rendered in respect to construction." It framed and applied a test based on the language of RCW 82.04.051, which requires that the services be (1) "directly related" to construction and (2) "performed by a person who is responsible for the performance of" construction. The court held that West Coast's construction management services in particular were "directly related" to construction in that they were "relevant and logically connected to construction." The court held that West Coast was "responsible for the performance" of construction services because it was "responsible to ensure that a third party" performed the actual construction and, even for the projects where its role was characterized as administrative oversight, was "required to both supervise and direct the construction work."

The court then held that all of West Coast's services were performed for the fundamental purpose of constructing the projects, and therefore that all such services should be taxed as retail. Under RCW 82.04.051(2), where an activity involves both construction and non-construction services, the character of the taxing event is to be determined by which is the "predominant activity." In addition to its decision that the construction management agreements were for the purpose of construction, the court reasoned that the purpose of the development agreements also was to construct self-storage facilities, noting that payment was tied to certain construction milestones like receipt of the building permit and final approval

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West Coast Self Storage LLC v. Dep't of Revenue

of construction. As such, the court agreed the provisions of RCW 82.04.051 applied because West Coast had provided construction services, which were the predominant activity at issue with respect to the various agreements.

As discussed above, the Legislature's 2020 amendment likely limits the applicability of the court's holding, or at least seems likely to impact the analysis. However, the court's articulation of the relevant tests and analyses based on its distillation of the statutory language provides helpful guidance for future edge cases involving "services rendered in respect to" construction. Excepting the services expressly excluded in RCW 82.04.051(2)—which now includes "land development or management"—this analysis is helpful to evaluate whether retail B&O and sales tax should be paid for construction-related services performed by a non-builder. ■

Whaleys v. Ohio Security Insurance Company, No. 86200-6-I (June 16, 2025)

By Seth Millstein, Pillar Law PLLC and Nathan Parks (incoming 1L at Gonzaga University)

On June 16, 2025, Division I of the Washington Court of Appeals issued an unpublished opinion on *Whaley v. Ohio Security Insurance Co.*, No. 86200-6-I , affirming the trial court's grant of summary judgment in favor of the insurance carrier. The case centered on the interpretation and enforcement of protective safeguard endorsements in a commercial property insurance policy following a kitchen fire at a leased restaurant space.

Brad and Amy Whaley, plaintiffs, owned a building in Burlington, Washington, which they leased as Café Burlington. In December 2019, a fire caused heat and smoke damage to the premises. The Whaleys filed a claim under their insurance policy with Ohio

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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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Security Insurance Company, who denied the Whaleys' claim, citing policy exclusions resulting from noncompliance with fire safety safeguard conditions. The trial court granted summary judgment in favor of the insurer, and the Whaleys appealed.

Division I affirmed, noting that the policy included a protective safeguard endorsement that required the Whaleys to maintain a compliant fire suppression system in accordance with both Underwriters Laboratories Standard 300 (UL 300) and National Fire Protective Association 96 (NFPA 96). Additionally, the endorsement required the system to be inspected semi-annually and cleaned quarterly by independent contractors. The policy stated that any such incident was excluded from coverage if the protective safeguards where not maintained, or if the policyholder knew of any impairment of the protective safeguards and did not notify Ohio Security Insurance.

This case reinforces enforcement of clear, unambiguous exclusionary principles when claim coverage hinges on protective safeguard compliance.

The Whaleys were aware of deficiencies in their fire suppression system before the fire. An inspector indeed inspected, and issued a yellow tag, indicating that the system was not compliant but remained operational. The inspection report detailed various deficiencies. The City of Burlington also conducted an inspection, issuing a notice of deficiency, requiring correction within 30 days. The Whaleys acknowledge receiving such reports, and there was evidence the required repairs were completed prior to the fire triggering the claim at issue.

After the fire, the City's Fire Marshal investigated and found that several of the system deficiencies contributed to damages. Ohio Security retained a consultant who confirmed the fire suppression system's noncompliance, noting the failure to address known deficiencies likely delayed suppression and increased damages.

The Whaleys alleged breach of contract and bad faith, arguing that the fire suppression system was operational at the time of the fire and that the exclusions were either ambiguous or unenforceable without proof of prejudice. They also contended that Ohio Security failed to conduct a reasonable investigation before denying their claim.

The Court of Appeals rejected each claim. First, the court found that the policy language was unambiguous and explicitly excluded coverage where the insured failed to maintain protective safeguards or failed to notify the insurer of known impairments. The court emphasized that "impairment" did not require total inoperability, and that substantial noncompliance with relevant requirements was sufficient. Because the Whaleys were aware of these deficiencies and took no steps to notify their insurer, the exclusion applied.

Second, the court rejected the Whaleys' argument that a showing of actual prejudice was required. It noted that prejudice is only needed where the breach relates to post-loss claims handling (e.g., late notice or failure to cooperate).

As stated the court affirmed, holding that exclusions were enforceable. The fact that the system worked "to some degree" did not mean it was in "complete working order," as required under the policy. Nor did the exclusions mandate that noncompliance cause the fire; instead, the exclusions were triggered by the existence of known and unremedied impairments.

The Whaleys argued that Ohio Security acted in bad faith by relying on "questionable" legal interpretations and failing to conduct a balanced investigation. Again, the court disagreed, noting that Ohio Security had promptly retained an independent investigator, consulted with the fire marshal, and reviewed the pre-loss inspection reports. There was no evidence that the insurer failed to investigate relevant facts or ignored evidence favorable to the insureds.

This case reinforces enforcement of clear, unambiguous exclusionary principles when claim coverage hinges on protective safeguard compliance. There was nothing noteworthy in Division I's analysis, other than it reinforces the fact that Washington will not create ambiguities or read around clearly written exclusions to suit a policy holder. While Washington has extremely strong consumer protections for insureds, courts will still uphold clearly written policy provisions, including exclusions. ■

King County v. Walsh Constr. Co. II, LLC, No. 86503-0-I (Aug. 4, 2025)

By Evan A. Brown, Stoel Rives LLP

Division I of the Washington Court of Appeals recently issued an unpublished opinion in *King County v. Walsh Constr. Co. II, LLC*, No. 86503-0-I (Aug. 4, 2025), resolving a limited follow-on appeal after the court decided the primary appeal (which decision we covered in this newsletter in the Winter 2024 issue) and King County voluntarily dismissed its claims against Walsh Construction Co. II, LLC ("Walsh"). In this case, the court considered whether a subcontractor, Mears Group Inc. ("Mears"), could qualify as a prevailing party for purposes of awarding attorneys' fees, costs, and expenses under the indemnity provisions of the subcontract. The court determined that under the language of the provisions, Mears did not prevail because there was no determination of fault triggering the indemnity provision. Although bound by the parties' subcontract language, the opinion is instructive to practitioners drafting, evaluating, or advising on indemnity provisions.

King County originally asserted claims against Walsh that Walsh had passed through to Mears for indemnity and defense under the subcontract. The subcontract provided the following with respect to Mears's indemnity obligations:

> To the fullest extent permitted by law, *Subcontractor shall indemnify, defend* (with counsel reasonably satisfactory to Contractor), *and save harmless* Owner, Owner's Representative, Architect/ Engineer, Contractor, and Contractor's surety, … *from and against any and all suits, actions, legal or administrative proceedings, claims, debts, demands, damages,,* [sic] *liabilities, judgments, fines, penalties, interest, reasonable attorney's fees, costs and expenses of whatever kind or nature (hereafter "Indemnified Claims") to the extent caused by any fault or negligence whether active or passive of Subcontractor,* or anyone acting under its direction, control, or on its behalf or for which it is legally responsible, in connection with or incident to the Subcontractor's Work or, to the extent due to Subcontractor's fault, arising out of any failure of Subcontractor to perform any of the terms and conditions of this Subcontract; without limiting the generality of the foregoing, the same shall include injury or death to any person or persons (including Subcontractor's employees) and damage to any property, regardless of where located, including the property of Owner and Contractor. *Subcontractor's obligation to provide a defense for an Indemnified Party shall arise regardless of the merits of the matter and shall continue until a final determination of fault is made.* Notwithstanding any provision in the Contract Documents to the contrary, Subcontractor's obligation to indemnify, defend and hold harmless an Indemnified Party shall apply only to Indemnified Claims arising during performance of the Subcontractor's Work and only to the extent caused by the negligence or other fault of Subcontractor or those for whom Subcontractor is legally liable. *The prevailing party shall be entitled to recover from the non-prevailing party the actual attorney fees and court costs and all other costs, expenses and liabilities incurred by the prevailing party in an action brought to enforce all or any part of this Indemnification Article…*

Slip op. at 3 (emphases in original). Walsh tendered to Mears indemnity and defense for King County's claims under this provision. Mears denied indemnity and accepted defense only under a reservation of rights that included language purporting to reserve the right to seek attorneys' fees, costs, and expenses from Walsh.

After the Court of Appeals reversed a summary judgment decision in King County's favor, King County dismissed its claims against Walsh. Walsh, in turn, dismissed the indemnity claims against Mears. However, Mears then sought an award of attorneys' fees, costs, and expenses under the language quoted above on grounds that it had prevailed as to the indemnity claims.

Applying common principles of contract interpretation, the court agreed with Walsh that Mears was not a prevailing party within the meaning of the contract language simply because Walsh had voluntarily dismissed the claims. The court noted that our Supreme Court has held that voluntary dismissal of claims does not necessarily mean the opposing party has prevailed for

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purposes of awarding attorneys' fees under a prevailing party fees provision. The court then distinguished an earlier case, *Walji v. Candyco Inc.*, 57 Wn. App. 284, 787 P.2d 946 (1990), in which the court affirmed an attorneys' fees award to the defendant after a voluntary dismissal, on grounds that the voluntary dismissal there had followed a loss in arbitration.

The court noted that Walsh's voluntary dismissal occurred simply because King County's voluntary dismissal eliminated the basis for indemnity under the subcontract, and therefore that "Mears did not prevail in any practical sense." Slip op. at 14. In other words, Mears only technically prevailed in that it was no longer subject to the indemnity claim; it had not really defeated it. But the court also indicated that based on the language of the subcontract, the indemnity obligation was not defeated because there was never a finding as to fault. See slip op. at 9. Because fault was never determined due to the voluntary dismissal, the indemnity claim was never really decided and the attorneys' fees component was never triggered. Although perhaps a controversial reading of the subcontract language, it is worth noting that the court found this argument persuasive in addition to the practicalities that seem to have driven the decision. ■

Rob's Electric Inc. v. The Ashley House, No. 86097-6-I (June 9, 2025)

By Seth Millstein, Pillar Law PLLC and Nathan Parks (incoming 1L at Gonzaga University)

In the matter of *Rob's Electric Inc. v. The Ashley House*, No. 86097-6-I (June 9, 2025), Division I affirmed the summary judgment in favor of The Ashley House. The case turned on whether attorney fees, costs, and interest are lienable services.

Rob's Electric Inc. was hired as a subcontractor by Square Peg Construction LLC to remodel property owned by The Ashley House in Shoreline. Rob's recorded a lien, subsequently paid and released. But Rob's then placed a second lien on the building, claiming it was still owed for attorney fees, costs, and interest, which were not paid. The Ashley House prevailed on summary judgment in seeking the second lien's removal.

The Ashley House moved for summary judgment on the grounds that "RCW 60.04.021 does not allow a lien for attorney fees, costs, and interests." Rob's presented two arguments on appeal. First, Rob's argued an issue of genuine material fact existed when it allocated its payment "first toward unpaid interest, then to collection costs, and the remainder to unpaid labor and material." But there was no evidence to support this argument according to Division I. Second, the superior court "abused its discretion when it denied its motion to amend its complaint to add a claim for a money judgment to its lawsuit." But, when a motion to amend is made after a summary judgment, the court must determine if the motion could have been made earlier. Here, Division I held that if Rob's had been allowed to amend their complaint it would have changed the whole case leading to undue delay. There was no bona fide reason Rob's Electric could not have made such an amendment earlier in the trial. Therefore, Division I found that the superior court did not abuse its discretion in denying Rob's motion to amend.

The upshot of this case is simple: Lien claimants may not record a lien for attorney fees, costs and interest.

The upshot of this case is simple: Lien claimants may not record a lien for attorney fees, costs and interest. Put differently, RCW 60.04 liens were designed to allow security for improvements to the property. Fees, costs and interest, while compensable under the statute, are not an "improvement" by any stretch under RCW 60.04.011(5). Finally, if you intend to move to amend, don't wait. Move early; not after an adverse ruling on summary judgment. ■