

Construction Law

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



Volume 51 | Number 1

WINTER 2023

CHAIR'S REPORT

By Jennifer McMillan Beyerlein – Lane Powell PC

As the new Chair of the Construction Law Section, I have the privilege of sharing with Section members events to look forward to in 2023 as well as remind members of the benefits of being members of the Section. First, however, I want to thank Colm Nelson for his year of service as chair of the previous session and also for his work as current editor of this newsletter.

As it is now 2023, as a Section we hope to get back to pre-pandemic life with more in-person functions. Prior to the pandemic, our Section was thriving with well-attended in-person CLEs, forums, and social events. Since our tour of the Amazon Spheres in November 2019, the Section has only held one in-person event at the Smith Tower.

Our goal for 2023 is to bring the Section back together in person as much as possible.

Bart Reed is currently planning the next Winter Forum event. As in years past, the goal is to host the Winter Forum at Cutters with a mini-CLE event and dinner. Once the date and speakers are set, be on the lookout for event details—ideally to be held in March.

Save the Date

The Construction Section annual **Road Trip CLE** this year travels to Kennewick, Washington. Our Section is partnering with the Benton Franklin Counties Bar Association to deliver **Government Contracts 101** on **Thursday, March 23**. The Road Trip CLE is planned for **6.5 credits**.

The always anticipated and well-attended **Construction Law Section Annual Seminar** is scheduled for **Friday, June 2**, and will cover everything you want to know about pass through claims. The event will be held at the office of Lane Powell in person with a social hour afterward. It will, as always, also be available virtually. Be on the lookout for a flyer from the WSBA in March.

Construction Section Benefits

There are a variety of benefits available to Section members that we have rolled out over the past few years. Below is a highlight of some of the newer benefits, along with a reminder of existing benefits that may have been forgotten.

Lunch with Lawyers

Some may recall that in our effort to highlight construction as an area of practice within Washington law schools, the Section supported a writing competition for any 2L student attending a Washington law school. Although we awarded a significant monetary prize to the top two submissions, the competition did not garner as much attention as hoped. As such, the

In This Issue

Chair's Report.....	1
Velazquez Framing, LLC v. Cascadia Homes, Inc.	3
SOP, LLC v. DWP Gen. Contracting, Inc. et al.....	5
Take Notice of the Latest Case in the Mike M. Johnson Line.....	6
Preferred Contractors Insurance Company, Risk Retention Group, LLC v. Baker and Son Construction Company, et al.....	7
WA Supreme Court Holds That One-Year Limitation Period in Residential Construction Contract Unconscionable.....	9

Continues on page 2...

Construction Law Section 2022 - 2023

EXECUTIVE COMMITTEE

Chair: Jennifer Beyerlein
Lane Powell PC
1420 5th Ave Ste 4200
Seattle, WA 98101-2375
beyerleinj@lanepowell.com

Chair Elect: Bart Reed
Stoel Rives LLP
600 University St Ste 3600
Seattle, WA 98101-4109
bart.reed@stoel.com

Vice-Chair: Seth Millstein
Pillar Law PLLC
1420 5th Ave Ste 3300
Seattle, WA 98101-2426
seth@pillar-law.com

Secretary: Allison Murphy
Groff Murphy PLLC
300 E Pine St
Seattle, WA 98122-2029
amurphy@groffmurphy.com

Treasurer: Elizabeth (Ellie) Perka
Lane Powell PC
1420 5th Ave Ste 4200
Seattle, WA 98101-2375
PerkaE@lanepowell.com

Past Chairs
Ron English (2005-06)
Bob Olson (2006-07)
Andrew Maron (2007-08)
Bryan Caditz (2008-09)
Robert H. Crick, Jr. (2009-11)
Thomas H. Wolfendale (2011-12)
Joseph Scuderi (2012-13)
Thomas P. Larkin II (2013-14)
Scott Sleight (2014-15)
John Evans (2015-16)
Marisa Bavand (2016-17)
Athan Tramountanas (2017-18)
Jason Piskel (2018-19)
Amber Hardwick (2019-20)
Brett Hill (2020-21)
Colm Nelson (2022-2023)

COMMITTEE MEMBERS AT-LARGE

Term Ending 2023

Todd Henry
Inslee Best Doezie & Ryder, P.S.
10900 NE 4th St Ste 1500
Bellevue, WA 98004-8345
thenry@insleebest.com

Bryce Sinner
Landerholm PS
PO Box 1086
Vancouver, WA 98666-1086
bryce.sinner@landerholm.com

Scott W. Campbell
Wallace Campbell PLLC
1700 7th Ave Ste 2100
Seattle, WA 98101-1360
scampbell@wallacecampbell.com

Term Ending 2024

Lena Holohan
1191 2nd Ave Ste 400
Seattle, WA 98101-2997
lena.holohan@arup.com

Paige Spratt
Schwabe Williamson Wyatt PC
700 Washington St Ste 701
Vancouver, WA 98660-3338
pspratt@schwabe.com

Geoffrey Palachuk
Perkins Coie
1201 3rd Ave Ste 4900
Seattle, WA 98101-3095

Term Ending 2025

Brian Guthrie
Miller Nash LLP
2801 Alaskan Way, Suite 300
Seattle, WA 98121
Brian.Guthrie@MillerNash.com

Erin Varriano
John L Scott
11040 Main St Ste 200
Bellevue, WA 98004-6363

Masaki James Yamada
Ahlers Cressman & Sleight PLLC
1325 Fourth Avenue
Suite 1850
Seattle, WA 98101-2573
masaki.yamada@acslawyers.com

Newsletter Editors

**Colm Nelson
& Evan Brown**
Stoel Rives LLP
600 University Street, Ste. 3600
Seattle, WA 98101

**BOG Liaison
Serena Sayani**
Stokes Lawrence PS
1420 5th Ave Ste 3000
Seattle, WA 98101-2393
serena.sayani@stokeslaw.com

Kevin Fay
4018 131st Pl SE
Bellevue, WA 98006-5136
kevinfaybog@yahoo.com

**Young Lawyers Liaison
Travis Colburn**
Ahlers Cressman & Sleight PLLC
1325 4th Ave Ste 1850
Seattle, WA 98101-2571

...continued from page 1

Chair's Report

Council decided to end the writing competition for the upcoming year. Instead, in December, the Section launched Lunch with Lawyers. Lunch with Lawyers is a new program designed to allow law students to connect with practicing construction attorneys in the community, and receive a free lunch. We will be advertising the program at each of the three law schools. There are currently 10 Section members who have volunteered their time to talk to students about their practice over lunch. Please visit the Section website for more details on the program and how to volunteer.

Forms

Over the past year, the Section has updated several of the model residential form construction contracts. These contracts were prepared by Section members as a public service to the construction industry and its residential consumers and contractors. We currently have forms for design-build and design-bid-build agreements, both lump sum and cost plus, as well as design services agreements. These are available to members in both Word and PDF formats. Additional forms available on the website include Interim and Final Lien Waiver forms as well as a Settlement and Mutual Release of All Claims.

Construction Jury Instructions

Also available to members through the member portal of the Construction Section website is the WSBA Construction Law sample jury instructions. If you have a construction case headed to trial, these jury instructions may be a helpful guide in your preparation.

Thanks to everyone for participating in the Section. We look forward to seeing you at future events—whether in person or virtual. Please feel free to contact me at any time with ideas for new events or initiatives for the Section. ■

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

Washington State Bar Association
CONSTRUCTION LAW SECTION
1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539

Velazquez Framing, LLC v. Cascadia Homes, Inc. No. 56513-7-II (Wash. App. 2022)

By Seth Millstein

On December 6, 2022, Division II issued a published opinion concerning pre-lien notices for second-tier subcontractors performing labor. Specifically, the court in *In Velazquez Framing, LLC v. Cascadia Homes, Inc.*, No. 56513-7-II (Wash.App. 2022) was asked to analyze the interplay between RCW 60.04.021 and RCW 60.04.031(1), and the legislative history surrounding the 1991 amendments to RCW 60.04.

In this case, Cascadia constructed a residence on a property it owned in Lakewood. Cascadia initially hired a framing subcontractor who in turn orally subcontracted the work to Velazquez Framing. Cascadia was aware of Velazquez's role at all times. Ultimately, Velazquez was not paid, triggering the recordation of a timely lien with the Pierce County Auditor's Office. Velazquez's lien for the full amount owed, \$18,462.67, an amount including both its labor and materials, despite providing no prelien notices.

Velazquez timely filed suit seeking foreclosure. On summary judgment, Cascadia prevailed in dismissing Velazquez's complaint, arguing that RCW 60.04.031(1) required Velazquez to provide a prelien notice for both labor and materials because no exceptions applied. Velazquez responded that notice was not required in this case, at least for its labor, because of the interplay between RCW 60.04.021 and RCW 60.04.031(1), and that it could easily separate the debt owing for labor versus material. Notably, segregation was never addressed by the trial court or Division II. Instead, Division II agreed with the trial

court that dismissal of Velazquez's claim was appropriate. It also held that Velazquez's motion for reconsideration, arguing Velazquez was a "laborer" under RCW 60.04.031(2), was correctly denied.

The heart of the issue involved whether, first, the absence of the word "labor" in .031 meant a prelien notice for labor was not required; second, what to make of the stated exceptions to prelien notice requirements expressly stated in .031.

RCW 60.04.021 states:

Except as provided in RCW 60.04.031, any person furnishing **(1) labor, (2) professional services, (3) materials, or (4) equipment** for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner. *(Bold font and numbers 1-4 added for clarity above).*

RCW 60.04.031 states:

(1) Except as otherwise provided in this section, every person furnishing **(1) professional services, (2) materials, or (3) equipment** for the improvement of real property shall give the owner or reputed owner notice in writing of the right to claim a lien. *(Bold font and numbers 1-3 added for clarity above).*

Three arguments appeared to favor Velazquez's argument concerning its ability to lien for labor without a prelien notice.

1. Absence of the word "labor" in RCW 60.04.031(1). If the Legislature intended to require notices for

labor, it would have included the word "labor" in RCW 60.04.031(1), as it did in .021. But it chose not to, meaning notice is not required prior to lien for labor.

2. Legislative history. In 1991 when the Legislature last updated RCW 60.04, the committees of both chambers stated that the purpose was to protect unsuspecting homeowners from paying twice. It also noted an exception for "labor" liens, stating: "A notice of the right to claim a lien is required to establish a lien for material and equipment supplied for the project (**not labor liens**)." (emphasis added).

3. RCW 60.04.900. "RCW 19.27.095, 60.04.230, and 60.04.011 through 60.04.226 and 60.04.261 are to be liberally construed to provide security for all parties intended to be protected by their provisions."

Division II disagreed with these points.

As to point #1, the absence of the word "labor" in .031, the panel found that the express exception in this section trumps the absence of the word "labor" in .021. Otherwise, the following express exception in RCW 60.04.031(2)(c) would be "utterly superfluous."

(2) Notices of a right to claim a lien shall not be required of:

...

(c) Subcontractors who contract for the improvement of real property directly with the prime contractor, except as provided in subsection (3)(b) of this section.

As to point #2, legislative history,

Continues on page 4...

the panel focused on the legislative intent to protect owners. It reasoned away the comment about “not labor liens” by saying this must have informed *only* the exception in RCW 60.04.031(2)(b) which provides an exemption from the prelien notice requirement for “**Laborers** whose claim of lien is based solely on performing labor.” (Emphasis added).

As to point #3, liberal construction, though Velazquez’s briefing contained more than one full page on this issue, as well a long line of cases emphasizing this point, Division II largely steered clear. Instead, Division II held that, because “labor” does require a prelien notice, those who fail to provide such notice must not have been “intended to be protected.” Counsel for Velazquez recently filed for certiorari from our Supreme Court to review.

Velazquez raises several practical points. First, to date, the prevailing wisdom was that prelien notices for labor performed on any tier was not required. RCW 60.04.031 primarily targets material suppliers, because material cannot “speak” and announce itself, where

as those performing labor can. This creates constructive knowledge of the identity of subcontractors providing labor allows an owner to institute protective measures, even without receipt of a prelien notice, such as obtaining waivers and issuing joint-checks, etc. One unanswered question arising out of *Velazquez* is whether the no-lien-for-labor-without-notice rule applies only to *second-tier* subcontractors, or if it also applies to first-tier subcontractors, where an exception governs. The panel also made short shrift of distinctions on commercial versus residential projects, other than noting that—on commercial projects—first-tier subcontractors who contract directly with the prime do not need notices.

The simple upshot here is that practitioners need to be extremely careful with all liens below that of first-tier subcontractors. While there are obvious arguments in Division I or III that labor remains lienable, even without a notice, it would be extremely ill-advised to lien for any work below the first-tier level without a prelien notice. This obviously removes significant leverage and seems to undercut

what is stated in RCW 60.04.900.

Finally, though it did not impact the outcome of the case, footnote number two is noteworthy. It addresses comments Cascadia inserted about the jobsite being littered with “garbage” and “[i]n other words, because the framers appeared Hispanic to its agent, they all looked alike” to Cascadia. Division II cited to a recent Supreme Court decision called *Henderson v. Thompson*, involving racism in the judicial system. Despite a full-page footnote here, excoriating Cascadia, Division II simply ended by “instructing” Cascadia to “refrain from interjecting these arguments into our proceedings,” followed by ruling firmly in Cascadia’s favor.

Reading this lengthy footnote in isolation one would guess that—in a case with good arguments on both sides—Division II would have ruled against Cascadia. Like the author of this article though, your guess would have been wrong. If our Supreme Court chooses to consider this case on certiorari, it will be an interesting one to watch, and we will keep Section members updated. ■

While there are obvious arguments in Division I or III that labor remains lienable, even without a notice, it would be extremely ill-advised to lien for any work below the first-tier level without a prelien notice.

SOP, LLC v. DWP Gen. Contracting, Inc. et al., No. 56061-5-II, (Wash. Ct. App., Div. II, Dec. 13, 2022)

By Evan A. Brown – Stoel Rives, LLP

The recent unpublished decision by Division II of the Washington Court of Appeals in *SOP, LLC v. DWP Gen. Contracting, Inc. et al.*, No. 56061-5-II (2022) provides useful, if non-precedential, guidance on the interpretation of warranty language and tort liability for construction defects. The case provides something of a cautionary

The case provides something of a cautionary tale with respect to multi-phased construction among affiliated entities...

tale with respect to multi-phased construction among affiliated entities and showcases some of the difficulties with negligence claims raised against a contractor or developer in Washington for latent construction defects under the independent duty doctrine.

The case arose from construction of the Seasons on the Park Apartments in Battle Ground, Washington. The project was divided into two development phases, which were constructed separately by related entities. The first phase was built by Gold Medal Development Group pursuant to a written contract with a special purpose limited liability company. The contract included express warranty provisions warranting the quality of the work. The second phase was built by an affiliated but different company, Gold Medal Multi Family, for a second special purpose entity. However, there was no written contract for construction of the second phase.

After construction, the owner entities sold both the Phase 1 and Phase 2 properties. The purchase and sale agreement for Phase 1

provided that it would be sold “as is” but with assignment of all warranties. It also gave the buyer the option to purchase Phase 2 “on the same terms” as the purchase of Phase 1. The buyer of Phase 1 did not exercise the option to buy Phase 2, but assigned the option to another entity in a subsequent sale of Phase 1. This subsequent buyer exercised the option to buy Phase 2, after which both Phases again were sold twice.

Ultimately, both Phases were sold to plaintiff and appellant SOP, LLC in October 2014.

In 2019, SOP discovered construction defects in the Phase 2 property, allegedly including lack of proper flashing and insulation. Shortly thereafter, SOP sued the developers, contractor, and original owner, all of which were related entities. SOP asserted claims for breach of contractual warranty and for negligence seeking compensation for the construction defects. The defendants moved for summary judgment on both, which the trial court ultimately granted.

The Phase 1 construction contract included express warranties, but there was no written contract for Phase 2 and, apparently, no other evidence of warranties made for Phase 2. Accordingly, SOP’s breach of warranty claim was predicated on the allegation that the option to buy Phase 2 on the same terms as the Phase 1 purchase effectively extended the Phase 1 warranties to the Phase 2 property. Neither the trial court nor the appellate court found the argument persuasive because (1) the purchase and sale agreements

for both phases were “as is,” excepting only “representations and warranties *specifically included in [each] Agreement*” (emphasis added); and (2) the language assigning warranties for each Phase was specific to the warranties “on the Property.” The courts interpreted the language of the agreements as therefore assigning warranties separately for Phase 1 and Phase 2. Since there was no evidence of warranties specific to Phase 2, the Court of Appeals upheld summary judgment dismissing SOP’s warranty claims for Phase 2.

The Court of Appeals also upheld the trial court’s dismissal of SOP’s negligence claim on grounds that SOP could not establish a violation of an independent duty to avoid quality defects. Under the independent duty doctrine, a contractor or designer may be liable in tort for construction defects, despite a written construction contract, if defective work violated an independent tort duty. As the court acknowledged, fairly recent case law has established that a designer or contractor has an independent duty to avoid risks of harm to persons or property. *E.g., Pointe at Westport Harbor Homeowners’ Ass’n v. Eng’rs Nw., Inc.*, P.S., 193 Wn. App. 695, 702-03, 376 P.3d 1158 (2016); *Affil. FM Ins. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 449, 243 P.3d 521 (2010) (lead opinion). However, the court stated that, “[i]n contrast, a party does not owe a duty in tort independent of the contract where the construction defect simply affects a structure’s quality.” 2022

Continues on page 6...

WL 17590865, at *5. The court then went further, reasoning that SOP's claim failed because SOP "presented no evidence that the defects in Phase 2 caused or could cause significant safety risks to a large number of people." This arguably describes a tort duty more limited in scope than prior cases.

Notably, the Court did not address its earlier decision in *Nichols v. Peterson NW, Inc.*, 197 Wash. App. 491, 505, 389 P.3d 617, 624 (2016), in which it held that a contractor may have violated its independent tort duty to avoid risks of harm to persons or property by installing roof flashing in a manner that allowed for water intrusion and mold. It is unclear whether there was any allegation of similar risks in the *SOP* case, but the defects alleged by *SOP* included missing flashing causing "moisture intrusion." It is clear that the court did not believe the record supported a finding that there was a consequent risk of substantial magnitude. Based on the court's reasoning, practitioners evaluating potential negligence claims for constructions defects will want to assess how substantial a risk of harm to persons and/or property those defects present, and what evidence can be marshaled to show the risk. ■

TAKE NOTICE OF THE LATEST CASE IN THE MIKE M. JOHNSON LINE

Gregg v. JRCC, Inc. et al.

(No. 37855-1-III, Wash. Ct. App., Div. III, Apr. 7, 2022)

By Evan Brown - Stoel Rives LLP

Since Washington's Supreme Court decided the landmark case *Mike M. Johnson, Inc. v. County of Spokane* in 2003, Washington courts have repeatedly held that parties to construction contracts must strictly comply with contractual notice, claim, and dispute resolution procedures unless the other party has waived the obligation to strictly comply. Despite this, non-compliance with such provisions remains common on construction projects and presents an issue in most construction claims litigation. Non-compliant parties and their counsel have had to dig deep for creative arguments to escape the strictures of *Mike M. Johnson* and its progeny. Recently, the Washington Court of Appeals, Division III, rejected one such argument in an unpublished opinion in the case *Gregg v. JRCC, Inc.*, No. 37855-1-III (Apr. 7, 2022).

The facts of *Gregg* are fairly simple. The owner of a liquor store contracted with a remediation contractor to replace floor tiling damaged by a leaky ice machine. The owner was dissatisfied with the work and verbally asked the contractor to repair it. After the contractor attempted repairs, the owner remained dissatisfied. The owner apparently terminated the contractor and hired a replacement contractor to complete the project. The owner then demanded the original contractor pay the costs incurred for the replacement contractor and, when the contractor refused, brought a lawsuit for breach of contract.

However, the contract between the parties included the following claim notice requirement:

[As] [a] condition precedent in any lawsuit, the Customer must first present any claim in writing to the contractor and provide the contractor a reasonable opportunity to correct or complete any work which the Customer claims to be defective and require correction or completion.

The contractor moved for summary judgment dismissing the owner's claim on grounds that the owner had not complied with this provision, and the trial court granted the motion.

The owner made the creative argument that non-compliance with the condition precedent should be excused because it would operate as a forfeiture of a fundamental right and was not an essential part of the parties' bargain. To sidestep the argument, the Court of Appeals took an unusual interpretive stance: despite express language saying that claim presentation and opportunity to cure was a condition precedent, the court determined that it did not actually create a legal condition precedent. Instead, the court treated the provision as a notice provision and affirmed dismissal of the claim under the *Mike M. Johnson* rule.

Gregg is just the latest of many cases requiring strict compliance with notice procedures, but it is notable because the court seemingly treated the *Mike M. Johnson* rule as one applying to notice provisions as a class generally, regardless of whether they are framed in the language of a condition precedent. It is unclear whether the owner's argument regarding forfeiture might prevail on different facts. What is clear is that contractors and owners alike need to be cognizant of the notice, claim, and dispute resolution provisions of their contracts and should take care to comply. ■

Preferred Contractors Insurance Company, Risk Retention Group, LLC v. Baker and Son Construction Company, et al.

In this August 11, 2022, opinion, the Washington Supreme Court addressed the following question:

When a contractor's liability insurance policy provides only coverage for "occurrences" and resulting "claims-made and reported" that take place within the same one-year policy period, and provide no prospective or retroactive coverage, do these requirements together violate Washington public policy and render either the "occurrence" or "claims-made and reported" provisions unenforceable?

The court answered this question in the affirmative.

Baker and Son was a building contractor. One of Baker's employees accidentally caused the death of a Mr. Cox in 2019. In 2020, Baker and Son learned that Mr. Cox's widow was pursuing a claim for wrongful death, and it promptly notified its commercial general liability (CGL) insurer. The insurer, Preferred, responded that there was no coverage because the policy included both an "occurrence" limitation and a "claims-made and reported" limitation. The accident (occurrence) was in 2019 but there was no report in that year, so the 2019 policy did not provide

coverage. Baker and Son reported the claim in 2020, but there was no loss occurrence in that year, so the 2020 policy did not provide coverage either.

Preferred commenced a declaratory action in federal court. Baker and Son responded by challenging Preferred's insurance contract as violating Washington's public policy. The federal court certified the issue to the Washington Supreme Court.

Washington courts respect freedom of contract in general but have held insurance contracts unenforceable on grounds of public policy. The Supreme Court identified a relevant policy in RCW 18.27.050, which requires Washington contractors to prove financial responsibility, something they usually do by carrying liability insurance. The statute's stated purpose is to protect the public.

There is no obvious connection between the premise that "contractors must be financially responsible" and the conclusion that "Preferred's CGL policy is unenforceable." To bridge the gap, the court relied on *Mutual of Enumclaw Ins. Co. v. Wiscomb*, 97 Wn.2d 203 (1982). In *Wiscomb*, it was held that a family exclusion in an automobile liability policy was unenforceable because it violated

the public policy embodied in RCW Chapter 46.29, which requires Washington drivers who have been involved in an automobile accident to demonstrate "financial responsibility" through insurance or otherwise. The *Wiscomb* court concluded there was a "strong public policy" in favor of protecting innocent victims of automobile accidents. Then it held that a policy excluding coverage for injuries to family members struck "at the heart" of that policy because it left injured family members with no insurance benefits.

The court might have concluded that because *Wiscomb* failed to carry insurance satisfying the statutory policy, he should have been required to demonstrate financial responsibility by other means. Instead, the court held that *Wiscomb's* insurer was required to cover a loss that it had expressly excluded from coverage. One factor supporting this result was the court's comment that no insurer offered automobile liability coverage in Washington without a family exclusion clause, so *Wiscomb* had no practical way to satisfy the statute. This comment was important in *Progressive Casualty Ins. Co. v. Jester*, 102 Wn.2d 78 (1984), where the court upheld an exclusion in a motor vehicle liability

Continues on page 8...

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:

Colm P. Nelson | Evan A. Brown
Stoel Rives LLP
600 University St, Ste 3600 | Seattle, WA 98101 | (206) 624-0900
colm.nelson@stoel.com | evan.brown@stoel.com

**Preferred Contractors Insurance Company, Risk Retention Group, LLC
v. Baker & Son Construction Company, et al.**

policy because the insured had the option to pay extra for a policy without the exclusion.

In the Baker and Son case, the court concluded that the policy clauses requiring the “occurrence” and “report” to fall within the same policy year undermined public policy because it left an innocent victim without the benefit of insurance. There was no allegation that alternative forms of insurance were unavailable. To the contrary, the court noted, “it would be an oversimplification to say that all claims-made or all occurrence policies are the same.” Nevertheless, the policy limitations were held to be unenforceable.

It might be asked, if the policy was so defective, why did the Department of Licensing accept it when it allowed Baker and Son to register as a contractor? Why should the insurance company be required to provide coverage it had not bargained for? An important factor appears to have been the court’s view that the Preferred policy was fundamentally unfair because it provided no coverage for the common scenario in which an occurrence in one year was followed by a claim in the following year. Maintaining insurance from year to year, as Baker and Son did, did not cure this gap in coverage. The court may have thought that Baker and Son were misled about the scope of coverage they had bought. The court said, “we cannot enforce insurance provisions that render coverage so narrow it is illusory” and “insurers should not issue policies that essentially cause contractors to default on their

...if a court concludes that a party with dominant bargaining power has taken unfair advantage in a business relationship, it has an incentive to look for a remedy.

statutorily mandated financial responsibility.”

There are two lessons to be learned here. First, Preferred’s policy created significant gaps in Baker and Son’s coverage, gaps that

could not be cured by renewing the policy, gaps of which Baker and Son may have been unaware. When purchasing insurance, a contractor should be careful to understand what it is getting and not getting. Second, if a court concludes that a party with dominant bargaining power has taken unfair advantage in a business relationship, it has

an incentive to look for a remedy. This is particularly the case in Washington, where courts have little hesitation in imposing liability on insurance companies to promote what they perceive as public benefits. ■

2023 Construction Law Section Membership Form

January 1 – December 31, 2023

Voting membership: I am an active WSBA member. Please enroll me as a voting member.
My \$25 annual dues are enclosed.

Non-voting membership: I am not an active WSBA member. Please enroll me as a subscriber member so I can participate and receive your informational newsletter.
My \$25 is enclosed.

Name _____

Firm Name _____

Address _____

City/State/Zip _____

Telephone _____

Email Address _____

Please send this form to:

Construction Law Section
Washington State Bar Association
1325 Fourth Avenue, Suite 600
Seattle, WA 98101-2539

office use only

Date _____ Check # _____ Total \$ _____

WA Supreme Court Holds That One-Year Limitation Period in Residential Construction Contract Unconscionable

On October 27, 2022, the Washington Supreme Court issued a decision holding that a one-year limitation period within a residential construction contract was substantively unconscionable and thus unenforceable.

In *Tadych v. Noble Ridge Construction*, 519 P.3d 199 (2022), Gregory and Sue Tadych filed a breach of contract action against their home builder, Noble Ridge Construction. The Tadychs entered into a contract with Noble Ridge for a custom-built home. The contract contained a warranty provision, which provided in part:

Any claim or cause of action arising under this Agreement, including under this warranty, must be filed in a court of competent jurisdiction within one year (or any longer period

Noble Ridge, who assured them that there were no issues to be concerned about and promised to repair the unlevel flooring.

For the next two years, the Tadychs continued to experience problems with their home. Each time the Tadychs would inform Noble Ridge of the issues, the contractor repeatedly promised to complete all necessary repairs. However, no repairs were ever performed. In April 2017—over two years after the Tadychs first noticed issues in their home—they hired another construction expert who concluded the home suffered from several construction defects, including water intrusion, code violations, poor structural framing, and poor structure ventilation.

The same year, the Tadychs sued Noble Ridge for breach of contract.

established rights, and whether such rights were curtailed by the clause. The Court held that the one-year suit limitation deprived the Tadychs of the typical six-year statute of limitations established by RCW 4.16.310. Under this statute, any cause of action arising from or relating to construction or repair to real property must be brought within six years after completion of the work (or termination of construction services, whichever is later). The court held that the limitation in the Tadychs' contract effectively abolished the six-year limitations period provided by RCW 4.16.310. The Tadychs' suit would have been viable under the statutory provision, but their period under which to bring a suit had been significantly shortened by the contract.

The [WA Supreme] Court held that the one-year suit limitation deprived the Tadychs of the typical six-year statute of limitations established by RCW 4.16.310.

stated in any written warranty provided by the Contractor) from the date of Owner's first occupancy of the Project or the date of completion as defined above, whichever comes first.

Any claim or cause of action not so filed within this period is conclusively considered waived.

The Tadychs moved into their home in April 2014. In February 2015 (less than one year after they moved in), they began experiencing issues in their home—they discovered their home had shifted and the floors were unlevel. The Tadychs hired a construction expert to investigate these problems. The Tadychs and their expert met with

However, Noble Ridge moved for summary judgment, pointing to the one-year contractual limitation period in the contract that waived all claims not brought within one-year of the owner's first occupancy. The trial court granted Noble Ridge's motion and the Court of Appeals affirmed.

However, in a 5-4 decision, the Supreme Court reversed the Court of Appeals, remanding the case back to trial court. The Supreme Court found that the one-year suit limitation in the Tadychs' construction contract was substantively unconscionable. The court focused on the effect of the contract clause on statutorily

The court also recognized that the one-year limitation period "unduly benefits the contractor at the expense of the homeowner's right to bring a legitimate claim," making the provision one sided in the contractor's favor with no benefit to the homeowner. In addition, the court noted that the Tadychs are laypersons and that there was no indication that the limitation period was bargained for or negotiated. As such, the provision was substantively unconscionable and void and unenforceable.

The *Tadych* decision raises uncertainty as to the enforceability of any one-year contractual

Continues on page 10...

Continued from page 9

WA Supreme Court Holds That One-Year Limitation Period in Residential Construction Contract Unconscionable

limitation clause. Although the court did not put forward a brightline rule, the reasoning in *Tadych* could potentially be applied to any limitations clause in a construction contract that establishes a limitations period less than the six-year statutory standard. The court was also silent on the applicability of this decision to transactions between sophisticated businesses, where there may be more equal bargaining position. The *Tadych* decision may have an impact on the enforceability of contractual limitation and warranty clauses, and contractors and developers should be cognizant of any contractual terms that may be affected by the court's decision. ■

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

CONSTRUCTION LAW SECTION EXECUTIVE COMMITTEE MEETING

Date: March 8, 2023

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

Meeting ID: 812 5830 6719

Passcode: 704802

Please contact committee members for more details on upcoming meeting dates and locations.

WSBA Sections

JOIN NOW!

Connect with others in the legal profession.

WHY JOIN?

Membership in one or more of the WSBA's sections provides a forum for members who wish to explore and strengthen their interest in various areas of the law.

BENEFITS

- Continuing education
- Professional networking
- Resources and referrals
- Leadership opportunities
- Career advancement
- Opportunities to affect change in the legal system

PRACTICE AREAS

With 29 sections, you'll likely find several that align with your practice area and/or interests. Learn more about any section at www.wsba.org/aboutsections.

NEW MEMBERS FREE

Newly admitted members can join *one section for free* during their first year.

LAW STUDENT DISCOUNT

Law students can join any section for \$17.66.

MEMBERSHIP YEAR

January 1 to December 31.

JOIN NOW, ONLINE!

<https://www.wsba.org/aboutsections>



WSBA Sections

Administrative Law
Animal Law
Antitrust, Consumer Protection and Unfair Business Practices
Business Law
Civil Rights Law
Construction Law
Corporate Counsel
Creditor Debtor Rights
Criminal Law
Dispute Resolution
Elder Law
Environmental and Land Use Law
Family Law
Health Law
Indian Law
Intellectual Property
International Practice
Juvenile Law
Labor and Employment Law
Legal Assistance to Military Personnel
Lesbian Gay Bisexual and Transgender (LGBT) Law
Liquor, Cannabis, and Psychedelics Law
Litigation
Low Bono
Real Property, Probate and Trust
Senior Lawyers
Solo and Small Practice
Taxation
World Peace Through Law