// Construction Law Newsletter

Published by the Section on Construction Law of the Oregon State Bar

ISSUE No. 13 January, 1999

Construction Law Newsletter

MESSAGE FROM THE CHAIR

Milton C. Lankton
Davis, Wright, Tremaine LLP

The Annual Meeting of the Construction Law Section was held at the Wells Fargo Tower in Portland on October 30, 1998. The following officers were elected: *Chair:* Milt Lankton (Davis, Wright, Tremaine — Portland); *Chair-Elect:* Chuck Pruitt (Lane, Powell, Spears, Lubersky—Portland); *Secretary;* Dave Bartz (Schwabe, Williamson, Wyatt — Portland); *Treasurer:* Rod Mills (Seifer, Yates & Mills — Portland). *Executive Committee Members-at-large:* David Douthwaite (AGC—Wilsonville, second term); Bob O'Halloran (Allen, Yazbeck, O'Halloran & Hanson — Portland, second term); Ken Jones (Speer, Hoyt, Jones, Poppe & Wolfe—Eugene, second term); Roger Lennenberg (Grant & Lennenberg — Portland, first term); and Dana Anderson (Department of Justice — Salem, first term).

After the election, Chuck Schrader of Tarlow, Jordan & Schrader made an excellent CLE presentation concerning the new AIA contract forms. Chair, Milt Lankton, presented a plaque to Immediate Past Chair, Chris Carson, in appreciation of his distinguished service to the Construction Law Section.

A CLE is in the planning stages for the Spring of 1999, dealing with issues involved in litigation concerning high tech plant construction. Details will be announced later.

The next meeting of the Executive Committee will be Friday, March 5, 1999. Contact Milt Lankton to confirm the location.

AMERICAN ARBITRATION ASSOCIATION WEB SITE AND ADR DISK

By Robert L. O'Halloran
Allen, Yazbeck, O'Halloran & Hanson, PC

Construction practitioners should acquaint themselves with the American Arbitration Association web site. The address is *www.adr.org*.

This web site is relatively easy to navigate and currently contains nine different sub-areas of assistance in ADR practice, from AAA membership, AAA rules and procedures and publications, to downloadable text of the Federal Arbitration Act, the Administrative Dispute Resolution Act of 1996, the Uniform Arbitration Act, as well as hypertext links to the most recent (and downloadable) versions of all 50 state arbitration statutes.

The construction focus area includes rules and procedures on construction industry dispute resolution procedures, as well as downloadable forms for arbitration and mediation of construction disputes, including region-specific forms for Construction Industry Demand for Arbitration, Answering Statement and Submission Agreement.

Although the "roster of neutrals" section sounds promising, there are no biographies or even any names at present, so practitioners must still go through the AAA in order to gain names of information about panel members.

The web site also contains links to various other organizations or educational resources relating to alternative dispute resolution. The web site directory includes addresses of the regional offices, as well as names and an E-mail directory for the AAA employees in each office.

The site also has downloadable versions of current AAA rules and procedures, as well as other forms besides simply construction. You may download a complete ADR package from the FTP site.

Alternatively, you may contact the AAA and ask for the "ADR disk" on construction, a Windows 950 disk containing the construction industry arbitration rules, forms of arbitration demand, answering statement, submission agreement, drafting guides with various alternative arbitration and mediation provisions dealing with such issues as conditions precedent to arbitration, discovery, venue, bifurcation or consolidation, arbitrator selection, arbitrator powers and remedies, and award variations (such as the high-low "baseball" award).

The ADR disk also includes rules for the resolution of employment disputes, international arbitration rules, a guide to partnering, and several articles of note. The combined resources of the AAA web site and the ADR disk put a great deal of helpful ADR information on your desktop at no cost. Don't miss out.

A JURY TRIAL – IN A LIEN FORECLOSURE?

Thomas J. Murphy
Furrer & Scott LLC

"Rules? For a knife fight?"

- *Butch Cassidy and the Sundance Kid*

The conventional wisdom holds that a construction lien foreclosure action, like a mortgage foreclosure, is purely equitable and is to be tried to the court. Admittedly, that is the usual practice. It is not the rule, however.

There is a limited right to a jury trial in a lien foreclosure action. ORS 87.060(3) provides:

> "In a suit to enforce a lien perfected under ORS 87.035, the court shall allow or disallow the lien. If the lien is allowed, the Court shall proceed with the foreclosure of the lien <u>and resolve all other pleaded issues</u>. If the lien is disallowed, and a party has made a demand for a jury trial as provided for in subsection (4) of this section, the court shall impanel a jury to decide any issues triable of right by a jury. All other issues in the suit shall be tried by the Court." (Emphasis added).

This statutory provision seems to indicate that the trial court, sitting without a jury, must first hear enough of the evidence in the case to decide whether or not the lien is valid. If so, the court (without a jury) decides "all other pleaded issues" -- which would include any counterclaims, regardless of their nature. Only if the lien is disallowed is a jury to be impaneled. This could mean that much of the case could be tried twice, particularly if the validity of a lien hinges on debt issues.

The handful of reported Oregon cases that deal with the role of a jury in a lien foreclosure action have not followed that potentially unwieldy procedure. In *DeWitt-Erickson Construction v. Moran Construction Co.*, 86 Or App 474, 739 P2d 1071 (1987), the plaintiff alleged claims for foreclosure of a construction lien and for breach of contract. The parties stipulated that the claims be tried together; the breach of contract was tried to a jury and the lien claim was simultaneously tried to the court. *Id.*, 86 Or App at 476. The opinion does not state explicitly which party requested a jury, though its reasoning suggests that it was the plaintiff:

> "By pleading a separate claim for breach of contract and agreeing to try the claims together, plaintiff took itself out of ORS 87.060(3) on the legal issues. Its <u>right to a jury trial</u> did not arise from failure of the lien, but from the independent contractual claim." (Emphasis added).

It seems unlikely that the Court of Appeals would analyze the issue in terms of the plaintiffs "right" to a jury trial unless the plaintiff had exercised that right by requesting a jury. The jury in *DeWitt-Erickson v. Moran* returned a verdict in favor of the plaintiff; the trial court disallowed the lien because it found that the plaintiff had not substantially performed, but nevertheless entered judgment in favor of the plaintiff based upon the verdict; the Court of Appeals affirmed. In *Becerril v. Hakanson*, 97 Or App 583, 776 P2d 1306 (1989), the plaintiff sought foreclosure of a construction lien. The defendants counterclaimed for damages, alleging that the plaintiff had abandoned the project and had performed in an unworkmanlike manner.

"Defendants requested a jury trial on their counterclaim. The trial court ordered that the jury hear all of the claims and render an advisory verdict on the validity of the lien. See ORCP 51D. The jury awarded plaintiff damages on both claims and found against defendants on their counterclaim. After the verdict, the trial court disallowed plaintiffs lien but ruled that plaintiff was entitled to damages under both claims."

The Court of Appeals affirmed, observing in a footnote:

"When the court disallowed the lien, but then entered judgment in plaintiffs favor, it necessarily made the jury's determination its own as to the amount of damages." *Id.,* 97 Or App at 585, n1.

Most recently, in *Westwood Corporation v. Bowen,* 108 Or App 310, 815 P2d 1282 (1991), the plaintiff brought an action to foreclose a construction lien and for breach of contract. The defendant owner filed counterclaims alleging breach of contract for deficient workmanship and late completion of the project. Trying to paraphrase the outcome would not do it justice.

"The parties stipulated that the unpaid amount under the construction contract between Bowen and Westwood was $945,000.00. The lien foreclosure, contract claim and counterclaims were tried simultaneously, the lien foreclosure to the court pursuant to ORS 87.060(3) and the others to a jury. The jury found that the damages caused by Westwood's breach of contract were $903,280.00. The Court found Bowen's damages for the same breach to be only $48,000.00, concluded that Westwood had substantially performed and allowed the lien. The single judgment entered by the Court included a net judgment of $41,720.00 ($945,000.00 less $903,280.00) for Westwood on the contract claims, as well as a foreclosure judgment for Westwood for $897,000.00 ($945,000.00 less $48,000.00) on its lien claim, plus attorney fees under ORS 87.060(5)."

Predictably, the defendants contended on appeal that the trial court was bound by the jury's finding on the issues of the contractor's breach and the amount of the resultant damages. The Court of Appeals rejected that contention, holding:

"The issue in this case is whether the factual question is for the judge, the jury or both. It is of no assistance in resolving, that issue to say that the question is within the exclusive province of the first one that happens to answer it. If, as ORS 87.060(3) makes clear, the Court must answer the question in connection with the lien foreclosure, the law of the case doctrine does not transfer that authority or responsibility to the jury simply because it had to answer the same question of fact in connection with the separate contract claims.

". . .Without their *res judicata* and law of the case underpinnings, there is little left to Bowen's and bank's constitutional arguments, except a heavy reliance on coincidence. There is no constitutional right to a jury trial in equitable proceedings (citation omitted), and, if the lien claim alone had been tried, the court, not a jury, would clearly have had the authority and duty to make a finding on the factual issue that it decided. Because of the legal claims, however, a jury made findings concerning the same fact issues, and Bowen and bank reasoned that the court's subsequent finding was a 'reexamination' of the jury's finding, in violation of Article VII (amended), section 3. We do not agree. The court did not re-examine a finding in an action at law; it made a separate finding in an equitable proceeding in which the jury's finding enjoyed no constitutional insulation and to which its finding was legally irrelevant."

Id., 108 Or App at 315-318.[1]

The holdings in these cases are somewhat confusing. They do, however, adhere to the requirement of ORS 87.060(3) that, in the trial of a lien foreclosure action, a jury verdict on *any* pleaded issue is binding only if the trial court determines that the lien is invalid. If the court upholds the lien, then it is the province of the court -- not the jury -- to render

[1] Both parties petitioned for review by the Oregon Supreme Court. (Westwood's petition for review was in all probability a precaution only). Before the Supreme Court decided whether to allow review, the petitions for review were dismissed by the parties' stipulation. 312 Or 589 (1992). Thus, some doubt may remain as to the effect of the Court of Appeals' decision as binding precedent.

a final determination of the parties' rights and liabilities. This applies equally to counterclaims which, if brought as a separate action, would clearly have been triable to a jury.

There may be no clear alternatives to this issue of trying an entire case twice. If the lien issues are well defined and limited, then attorneys may want to consider a truncated trial or stipulated controversy. The only other option appears to be trying the two "cases" together.

A JURY TRIAL—ON A COUNTERCLAIM!

Susan Z. Whitney
Stewart, Sokol & Gray LLC

As one of the lawyers for Bowen at trial and on appeal in the *Westwood v. Bowen* case, I was asked to review Tom Murphy's article and make a few comments.

1. Tom correctly refers to a "suit" to foreclose a lien, which is the term used in ORS 87.060(3). The procedure laid out in ORS 87.060 applies only to that part of the case which is part of the suit to foreclose. Counterclaims and counterclaim issues are legal in nature and, if pleaded separately, are not part of the suit to foreclose – not part of "all other pleaded issues" to be resolved by the court.

The court simply has no power or authority to make any determination as to the value or merit of any counterclaims, whether or not it holds the lien to be valid, if the counter-claimant has requested a jury trial. This principle was understood and noted in *DeWitt-Erickson* and *Becerril*. I respectfully disagree with Tom's conclusion that "it is the province of the court ... to render a final determination of the parties' rights and liabilities," including counterclaims.

2. Significantly, the *Westwood* court ignored ORS 87.070, which states that

> "Any contractor may recover, upon a lien perfected by the contractor, only the amount due to the contractor according to the terms of the contract."

Presumably, if the jury's determination on the counterclaims is necessary to calculate the amount due under the contract, the court has to wait until the jury makes its decision on the counterclaims before entering judgment on a valid lien.

3. *DeWitt-Erickson* and *Becerril* were, in my opinion, correctly decided. *Westwood* was not. The trial and appellate courts were, with all *due* respect, confused and unfocused. Their most serious error, besides allowing the lien judge to decide a counterclaim and ignoring ORS 87.070, was in failing to recognize and understand that a lien, like a mortgage, is only the security for a debt.

There can't be a suit to foreclose on the security without a decision on the underlying debt. No court would think of entering a judgment against a homeowner on a mortgage separate from the judgment on the underlying promissory note. What would prevent someone from suing on the mortgage and then suing on the debt later, and recovering twice?

A homeowner who has counterclaims against its mortgage company for damages for fraud or whatever would certainly have the right to a jury trial on those claims. The homeowner would also certainly have the right to offset amounts awarded by the jury against any recovery by the mortgage company in the foreclosure action. And no court would even think of saying that you can owe *more* on your mortgage than you do on the note. Yet all this is exactly what the *Westwood* court said and did.

4. Proceedings to foreclose construction liens are to conform as nearly as possible to mortgage foreclosure proceedings. ORS 87.060(7). There's a very interesting provision in Chapter 88, which says in pertinent part that "during the pendency of an action for the recovery of a debt secured by any lien ... , a suit cannot be maintained for the foreclosure of the lien, ... unless judgment is given in such action that the plaintiff recover the debt." ORS 88.040.

This statute was not invoked in *Westwood* (nor do I think it would it have helped, given the courts' confusion). It certainly provides a strong basis for the argument that the separately pleaded contract claims and counterclaims must be tried first to a jury. Then the court can do its own thing on the lien, mindful that the only function of the lien is "to satisfy the debt secured thereby." ORS 88.010.

RESPONSE TO MS. WHITNEY

Thomas J. Murphy
Furrer & Scott LLC

First, Susan's distinction between a "suit" to foreclose a construction lien and an "action" on a counterclaim is creative, but strained. Although Oregon's Construction Lien Law has not been amended to update the reference from "suit" to "action," it is nonetheless a "civil *action*". ORCP 2 (emphasis added)

> "The complaint fixes the nature of the action, and the court, sitting in equity, has jurisdiction to resolve all issues in the case, both legal and equitable, including legal defenses and counterclaims."

Jackson County Federal Savings & Loan Ass'n. v. Urban Planning, Inc., 95 *Or* App 598, 605 (1989). This was an "action" for judicial foreclosure of two trust deeds and a personal-property security interest. (Hold on -- there's another shoe to drop in regard to the *Urban Planning* case.)

Westwood v. Bowen was a civil action, brought pursuant to Oregon's Construction Lien Law, in which counterclaims (of a nature traditionally deemed "legal" rather than equitable) were pleaded.

Second, Susan also selectively edits the first sentence of ORS 87.070. She inserts a period in place of a comma. What the sentence is really about is adjusting a prime contractor's gross claim on a lien to account for the liens of subcontractors and suppliers, so that the prime only recovers the net due.

Yes, as between the owner and the contractor, that amount will usually be determined by reference to their express contract (if they have one). That begs the question of -- who does the determining?

To draw out Susan's analogy to a mortgage foreclosure (more on that later), a mortgage can be foreclosed only for the balance of the debt secured thereby. An action on the debt, standing alone, would be triable to a jury. If the determination of that balance is wrapped into a mortgage foreclosure, though, the plaintiff does not have a right to a jury trial.

Third, Susan does raise an intriguing point: Is there a constitutional right to a jury trial on a traditionally legal counterclaim in an action to foreclose a construction lien?

In "a traditionally-equitable action" (at least one for foreclosure of a mortgage or trust deed), the answer is pretty clearly "yes." According to *Jackson County:*

> "(A) party who desires a jury trial on a legal defense or counterclaim brought in an equitable proceeding is entitled to one, unless the right is waived by the party's failure to assert it." 95 Or App at 605.

Thus, the question becomes -- is there a viable distinction for this purpose between a mortgage foreclosure and a construction lien foreclosure? On a little bit of reflection, the best answer I can come up with is -- maybe.

The right to a jury trial (Oregon Constitution, Article I, § 17), applies only to three types of cases:

> (a) those in which the right to a jury trial existed at common law;
>
> (b) those in which the right to a jury trial is secured by statute; and
>
> (c) those in which the right to a jury trial was recognized by rule of court prior to the adoption of the Oregon Constitution in 1859.

State ex inf. Brown v. Sengstacken, 61 *Or 455*. I believe (a) and (c) may be inapplicable, since construction liens did not exist at common law, while mortgages go 'way back. To the extent (b) is applicable, the statute can determine to what extent a jury is (and is not) available. That's what ORS 87.060(4) does.

However, it has also been stated that a jury trial is guaranteed in those classes of cases in which that right was customary at the time the Oregon Constitution was adopted *or in cases of like nature*. *Molodyh v. Truck Insurance Exchange*, *304 Or 290* (1987). If a construction lien foreclosure is deemed a "case of like nature" to a mortgage foreclosure, why is a jury trial available on a legal counterclaim in the latter but not in the former? This position may find some support in the last sentence of ORS 87.060(7), which states that the proceedings in a construction lien foreclosure are to conform as nearly as possible to those in a mortgage foreclosure.

If there is a right to a jury trial on legal counterclaims in a construction lien foreclosure action, then the trial court was clearly wrong in disregarding the jury's verdict on the counterclaim in *Westwood v. Bowen.*

According to Article VII, § 3 of the Oregon Constitution, "no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict." From the Court of Appeals' opinion in *Westwood v. Bowen,* it is impossible to decipher to what extent the constitutional issue was briefed and debated in either the trial or appellate court.

That opinion does record one seemingly blatant error by the trial court, though -- the plaintiff recovered $41,720 ***twice,*** once on its lien foreclosure claim and again on its breach-of-contract theory. Check the math in the second paragraph on page 313 of the official reporter.

Fourth, Susan really should stick to her good arguments. I think she's stretching ORS 88.040 far beyond its stated scope. That statute provides that, if a creditor first brings an action on a debt (say a promissory note) which is secured by a mortgage or trust deed, then before that action is concluded by judgment and execution is returned unsatisfied, the creditor cannot bring a separate action ("suit") for foreclosure of the mortgage or trust deed. It doesn't say anything about a jury trial on the debt claim when that claim is "wrapped into" the foreclosure action (as is usually the case).

Despite some flourishes, I didn't write my article as an editorial, only a comment on the three reported Oregon appellate cases which address jury trials in construction lien foreclosures. *Westwood v. Bowen* may have been wrongly decided. It is also the prevailing law in Oregon, until it is overruled.

Litigators who are contemplating trial in construction lien cases must take due note of its precedential impact, no matter how curious or odious they may find it. Those resisting a construction lien foreclosure who wish to ensure their right to a jury trial on claims against the lienholder would do well to consider bringing those claims in a separate action, rather than as counterclaims, then moving to consolidate the two actions for trial only pursuant to ORCP 53A and UTCR 2.090.

CASE NOTES

A-C Construction, Inc. v. Bakke Corporation, 153 Or App 41 (1998)

Guy A Randles
Stoel Rives LLP

The Oregon Court of Appeals recently embellished Oregon lien law while showing the lengths to which it is willing to go to protect the interests of subcontractors. In ***A-C** Construction, Inc. v. Bakke Corporation*, 153 Or App 41, P2d ___ (1998), defendant Bakke was the prime contractor on a project to construct a substation. Plaintiff A-C was invited to bid for the excavation portion of the project. A-C's bid contained a number of exclusions and conditions, but Bakke issued a purchase order simply requiring A-C to perform its work in accordance with the plans and specifications under the prime contract.

During the course of the project, disputes arose about the scope of A-C's work and the terms of payment. Bakke insisted that the terms of its purchase order governed, while A-C was adamant that the terms of its bid applied. At the conclusion of the project, and without having paid its sub-subcontractors and suppliers, A-C filed a lien against the project based upon its bid. Bakke refused to pay the lien, in part based upon the scope issue and partly because it had received complaints that A-C had not paid its bills on the project. Instead, Bakke chose to bond off the lien, one of its options under the prime contract. At trial, A-C's lien was held enforceable, but at a fraction of the amount originally claimed by A-C under its bid. Bakke appealed on a number of grounds.

On appeal, the Court of Appeals upheld the trial court's finding that Bakke's purchase order did, in fact, govern the parties' obligations. The good news ended there for Bakke, though. Because it relied upon its bid rather than the Bakke purchase order as the basis of its lien calculation, A-C had significantly overstated the amount of lien. Bakke argued that this overstatement invalidated A-C's bid. However, the Court of

Appeals found that the overstatement resulted from a good faith dispute about whether A-C's bid or Bakke's purchase order governed. In the absence of intentional overstatement or "culpable negligence," the Court held that the good faith overstatement did not invalidate A-C's lien.

Bakke also challenged A-C's right to foreclose on its lien because it had failed to pay its suppliers and sub-subcontractors. Bakke argued that the terms of the prime contract, which required payment for all labor and materials as a condition of payment, was incorporated into its purchase order. However, the Court of Appeals found that the purchase order's flow-down clause had to be strictly construed according to its terms. Since the purchase order only required that all of A-C's work be done "according to plans and specifications" of the prime contract, the general conditions of the prime contract did not apply to A-C. As a result, A-C had no obligation to pay its sub-subcontractors and suppliers as a condition of payment and A-C was entitled to enforce its lien.

Next, the Court of Appeals excused A-C's improper inclusion of both lienable and non-lienable charges in its lien. Instead of invalidating the lien because it failed to segregate the lienable items, the Court held that the owner knew or could have easily ascertained from an inquiry, *i.e.*, "asking a simple question" what portion of A-C's lien was improper. Consequently, the A-C lien was not invalid.

Finally, A-C based its lien claim amount on its alleged bid price, not the "reasonable value" of the work as normally required under Oregon law. The Court turned aside this Bakke defense as well. While acknowledging the "reasonable value" rule governed in a lien claim against the owner, the Court noted that Bakke had bonded off the lien. As a result, the real dispute became one only between A-C and Bakke's surety. Since the real party in interest was Bakke, not the owner, the Court determined that the subcontract value could be the basis of the lien.

Subcontractors are rarely the beneficiaries of such judicial benevolence; the case has been appealed to the Oregon Supreme Court. However, the Court's opinion underscores the importance of having signed subcontracts and purchase orders which clearly define the parties' obligations and the conditions of payment.

Bend Tarp and Liner, Inc. v. William Bundy and the Whitcomb Group,, **154 Or App 372 (1998).**

John A. Berge
Bryant, Lovlien & Jarvis PC

This case involved the sufficiency of a polyethylene liner installed in a pond prepared by defendants on defendants' golf course located in Bend, Deschutes County, Oregon Plaintiff instructed defendants to prepare the pond by creating a suitable slope and placing sufficient clean topsoil material on the surface to avoid damaging the tarp once installed. A representative for plaintiff, Mr. Elliott, made several trips to the site and discussed with representatives from defendants the preparation of the pond. Mr. Elliott testified at trial that when, in his opinion, the surface of the pond was suitable for installation of the liner, he so informed defendants. However, plaintiff, at all times, contended that it was not contractually responsible for the preparation of the pond, nor was it contractually responsible for issuing a determination as to when the pond was "ready" for the liner installation

The liner was installed and fixed to the island green by constructing "boots" at plaintiffs direction and affixing those "boots" to the railroad ties used to support the retaining wall around the island green. The liner was affixed to the outer edge of the pond by covering a portion of the liner with dirt and rocks Defendants then began filling the pond in the afternoon and evening, and upon return the next day, observed that a portion of the retaining wall around the island green had collapsed outward into the pond and the liner had ripped in a parallel direction to the retaining wall

It was plaintiffs opinion, supported by the testimony of retained engineers at trial, that the retaining wall had not been constructed properly and, therefore, failed as a result of the outward pressure created by the soil behind the retaining wall It was defendants' contention that plaintiff had not allowed sufficient slack in the liner to account for any stretch due to the settling of the fill material while the pond was being filled In essence, the liner was never intended to hold the weight of any water; it was only intended to act as a membrane between the water and the soil in

order to minimize or eliminate seep into the soil. Photographs were introduced at trial by both parties in support of each party's position.

Defendants also introduced testimony through the owner of the water company supplying defendants' water for their golf course (also an engineer) that although some water leaked through the tear in the tarp as a result of the collapsing retaining wall, after repair of the tarp, an unacceptable amount of water continued to leak through the tarp. This witness based his calculation on the fact that he metered the amount of water being sold to defendants and had previously advised defendants to place a flow meter at the pond's pumping station in order to determine the volume of water actually pumped out of the pond to the golf course. After subtracting loss due to evaporation, this witness testified that the tarp was leaking at an unacceptable rate and essentially providing no material benefit to defendants.

Plaintiffs engineers testified that, in their opinion, any failure and corresponding loss of water was due to the collapsing retaining wall which was constructed improperly by defendants as opposed to a defective tarp, or a defectively installed tarp.

As is clear from the court of appeals' decision, the trial court chose to believe the evidence presented by defendants in concluding that insufficient slack was allowed in the tarp to account for stretch and settling when the pond was filled. The trial court, based on this evidence, concluded that as the liner had failed to provide any substantial benefit, plaintiff was in breach of its contractual obligations and, therefore, not entitled to foreclose its construction lien. Further, the trial court awarded damages to defendants on defendants' counterclaims for pond preparation costs and water loss.

On appeal, an appellate expert hired by plaintiff contended that defendants had essentially admitted or that the evidence was uncontroverted that the tarp had provided some material benefit to defendants. The appellate attorney based this conclusion on one sentence from defendants' trial memorandum and the fact that the liner was still located in the bottom of the pond. Thus, plaintiffs appellate attorney argued that under either a quantum meruit theory or an offset theory, plaintiff was entitled to, at a minimum, an offset against the damages awarded to defendants for the admitted or uncontroverted benefit conferred upon defendants as a result of the tarp being installed and allowed to remain in place

The court of appeals responded by refusing to consider whether plaintiff was entitled to recover, as a matter of law, on its quantum meruit claim or its claimed offset. The court of appeals reasoned that under existing authority, if a party chooses to test whether, as a matter of law, there was any evidence to support the opposing party's position, such claim must be raised and preserved at trial. This position is analogous to the directed verdict motion required in jury trials before the court may consider a motion for judgment notwithstanding the verdict, or before the issue may be raised on appeal.

In Falk v. Amsberry v. Larsen, 290 Or 839, 626 P2d 362 (1981), the Oregon Supreme Court chose to adopt the same standard used in civil cases tried to a jury. Essentially, if a party is of the opinion that there was no evidence to support the opposing party's position, either because an objection to the evidence was overruled or there simply was no evidence offered, it is incumbent upon the party making such claim to move for a directed verdict as a matter of law prior to submission to the jury. The court reasoned that if such a motion was necessary in order to preserve the claim for appeal in civil cases tried to a jury, a like requirement would be appropriate in civil cases tried to the court. If it is a party's intent to argue on appeal the trial court judge erred in not dismissing a claim as no evidence was presented to support the claim, it was necessary to bring that to the attention of the trial court judge and allow the trial court judge to rule on that issue. If the trial court judge did not have an opportunity to rule on the issue, the court of appeals did not want to be in a position of reviewing the alleged error.'

[1] One issue argued on appeal was whether the court of appeals was to review on a de novo standard or a legal standard. The underlying claims raised by plaintiff would ordinarily be reviewed for errors of law. However, plaintiff argued on appeal that as this was a construction lien case, it should be reviewed de novo. The court of appeals apparently disagreed when the court of appeals stated, "A party that contends it is entitled to prevail on a claim or issue as a matter of law must ask the trial court to withdraw the claim or issue from the fact finder, whether the case is tried to a jury or to the court." As plaintiff was contending that no evidence existed to support defendants'

The interesting aspect of Footnote 2 in the subject case is that instead of a party saying no evidence supports the opposing party's contention and, therefore, it must be dismissed, plaintiff was arguing for the converse; defendants have continued to use and have admitted within their trial brief that they are receiving some benefit or that the tarp is performing as expected and, therefore, plaintiff should be entitled to, at a minimum, the reasonable value of the tarp, if not the full contract price.

Again, these issues were certainly controverted at trial as is stated within the court of appeals' decision, It is my opinion that the court is essentially saying that unless you have an admission, or alert the court's attention to the fact that the opposing party has expressly or impliedly admitted it received some benefit and, therefore, the claiming party is entitled to an affirmative recovery or some offset, that issue will not be preserved for appeal.

One reason for the confusion may be that plaintiff chose to use an appellate expert to handle the appeal and perhaps that appellate expert, not having tried the case, did not fully comprehend all that occurred at trial. The court is saying that defendants denied having received any material benefit from the tarp as a result of the tarp leaking far in excess of its specifications. Defendants did state in their trial memorandum that, after repairing the tear in the tarp near the retaining wall collapse, it performed as expected. In essence, after providing sufficient slack, the tarp did not pull down the retaining wall again, or tear as a result of too much tension.

It is my belief that the court of appeals was sending a strong message to all appellate advocates. That message was "do not take the position on appeal that there was insufficient evidence (evidence to which a motion to strike had been made and rejected by the trial court judge) or no evidence to support the opposing party's position unless the record supports that contention."

In summary, although the issue was presented to the court in an unusual fashion—that being a party contending that its claim should be awarded as a result of no opposing evidence, as opposed to a party contending that the opposing party's claim should be dismissed as a result of no affirmative evidence—the court was merely restating a general rule of appellate procedure which has applied to civil cases tried to juries for quite some time, and has been specifically applied to civil cases tried to the court since the Falk decision in 1981.

---

position that the tarp failed to confer any substantial benefit, it was incumbent upon the trial court judge to find in plaintiffs favor on its quantum meruit theory, or on its request for an offset against any damages obtained by defendants. However, even if plaintiffs contention on appeal was factually accurate, a question of fact would still have remained as to the value of the benefit conferred. The only evidence introduced was the square foot price of the tarp and the contract price between the parties. No other evidence was offered to establish what, if any, value defendants received as a result of the liner being installed in their pond.

L.S. Henriksen Construction, Inc. v. Shea, 155 Or App 156 (1998).

Alan L. Mitchell
Furrer & Scott LLC

In an action for breach of contract, account stated and unjust enrichment, the court ruled that the plaintiff subcontractor could not include an unjust enrichment claim against the owner in the same action as the subcontractor's claims against the prime contractor.

Although this was initially a construction lien case, the plaintiff never foreclosed on its lien claim. Instead it brought an action for breach of contract, account stated and unjust enrichment (AKA quantum meruit). The action named the prime contractor, the owner and the owner's agent as defendants on all three counts.

The Court of Appeals, citing to *Tum-A-Lum v. Patrick*, 95 Or App 719 (1989), held that the plaintiff subcontractor could not make unjust enrichment claims against the owner because the subcontractor had not exhausted all remedies against the contractor. Without exhaustion, the court held, there could be no "unjust enrichment" by the owner.

The court also rejected the subcontractor's argument that naming all of the parties in the same action was sufficient. Instead, the court ruled that

initiating a remedy was not equivalent to exhaustion of that remedy.

NOTE: Faced with this situation, subcontractors may want to include an equitable lien, constructive trust or similar remedy against owners. *See e.g., Burness v. Honeyman* 72 Or 498 (1914) (permitting an equitable claim against an owner in the absence of a construction lien claim).

NEW AG'S MODEL PUBLIC CONTRACT RULES MANUAL

Dana A. Anderson
Assistant Attorney General

The Oregon Attorney General's Model Public Contract Rules Manual, which provides guidance to state and local public contracting agencies, has now been released. The manual contains OAR Chapter 137 model rules, effective on October 6, 1998, on Public Procurement (Division 30), Public Improvement Contracts (Division 40) and Architectural/Engineering and related services (Division 35).

For the first time within Oregon Administrative Rules, the subject of negotiated construction contracts is addressed comprehensively. Division 40 includes a new series of rules on "*Alternative Contracting Methods,*" *OAR* 137-040-0500 through 137-040-0590, which specifically address Design/Build and Construction Manager/General Contractor (CM/GC) forms of contracting, as well as implement statutory authority to negotiate a construction contract with the low bidder when all bids exceed the agency's cost estimate.

The manual also includes reprints of relevant statutes, administrative rules and several other appendices of reference materials, including commentary to the rules. Copies may be obtained from the Oregon Department of Justice at (503) 378-5555.

Practice Tip: Not all state and local public contracting agencies have adopted the AG's Model Rules. Those that have done so may not have adopted the October 1998 version. See, for example, *OAR* 125-030-0002 by which the Oregon Department of Administrative Services (DAS) adopts Divisions 30 and 40 of the Model Rules dated January 1995. Many other state agencies operate under DAS delegated contracting authority and will not be operating under the new Model Rules until such time as DAS may formally adopt them by amending the above reference.

WEB SITES OF INTEREST

Alan L. Mitchell
Furrer & Scott LLC

The following is a list of some of the construction-related web sites that I have discovered in my web travels. If you have other interesting web sites, please send them to me and I will include them in future issues.

constructionconsultant.com. This is the home page for Pacific Construction Consultants, Inc., a California company that assists in construction disputes and claims. This page includes links to the *Construction Claims Monthly* newsletter plus *a* listing of other construction and construction law related web sites.

www.constructlaw.com/clrindex.html. This site includes the full text of articles from the *Construction Law Review* publication.

www.hklaw.com/publications/newsletters. This site, published by the Holland & Knight law offices includes the full text of articles in the *Construction Law Letter* newsletter.

www.starpayne.com/consites.htm. This page lists a large number of web links, many of which are related to government construction pages such as the US Army Corps of Engineers and the US Dept. of Transportation.

Here are some other web sites that I have found which relate specifically to Oregon law.

www.publications.ojd.state.or.us. This is the Oregon Judicial Department's official web site. It includes very recent opinions of both the Supreme Court and the Court of Appeals (plus, for those who speak a language I do not understand, the opinions of the Oregon Tax Court).

www.wolfnet.com/~dhillis/STATE1.HTM#OR

This site includes the Oregon Constitution, the Oregon Revised Statutes, the Oregon Administrative Rules (yes, the CCB rules are out-dated), case law since July 1997 and Attorney General opinions.

Finally, a useful tool for searching the web is to use *www.metacrawler*. This is a search engine that searches some of the other search engines such as Yahoo, Altavista, etc. For a small fee, you can download a program called WebSeeker that searches virtually all of the search engines. This program can be found at *www.bluesquirrel.com*. This same company also has a program entitled LawSeeker that may be especially useful.

U of O Interview Program

On March 5, 1999, the University of Oregon School of Law will be hosting its fifth annual Portland Interview Program at the Governor Hotel in Portland.

If you would like to participate, contact Jo Smith at 222-9601 in Portland. You can also speak with Merv Loya, Assistant Dean & Director of Career Services, or Joanne Snyder, both of whom can be reached at 220-2183 or (541) 346-3847. Participating firms will receive resumes in mid-February.

Note from the Editor

Alan L. Mitchell
Furrer & Scott LLC

Greetings from the new editor of our section's newsletter. Not only am I new to this newsletter, I am also fairly new to the bar, as many of you know. Perhaps because of my "youth" in our profession and with this newsletter, I hope to be able to help breathe some new life into our section's newsletter.

In this spirit, I ask all the members of our section (and anyone else who is interested) to spend a moment or two thinking about our newsletter.

The first question is whether you even want a newsletter. I hope answer to this question is yes, but I am interested in whether there are any opposing opinions.

If we want a newsletter, the next question is what do you want and/or expect from it. I personally like the mix of short articles and case updates together with various notes of interest. Humor would also be appreciated.

My personal goal is to publish the newsletter on a more regular basis, at least annually and perhaps even semi-annually or quarterly. So far, I am told that I have free rein as the editor.

Of course, in order to publish a newsletter, we need articles. Further, unless the section membership wants to read (or ignore) a series of articles written by only one or two persons, we need submissions for publication. If you have ideas for articles, let me know (I may be able to find an author). Even better, if you have already written an article, please send it to me.

One idea is to have a "Point/Counterpoint" section. This would be a section where two authors would write their comments about a given issue. The articles by Tom Murphy and Susan Whitney in this newsletter are an excellent example of this concept. Of course, the differing articles do not have to be published in the same newsletter. Thus, if you would like to write a comment on a previous article, please feel free to do so. In this regard, I will likely provide a copy of your article to the previous author before your piece is published.

Another idea is to have a "Letters to the Editor" section, where we would publish your comments about just about anything. For me, these can be one of the most interesting parts of a newsletter; especially if there is a contentious issue from a prior newsletter.

Please feel free to give me a call (620-4540) or drop me a letter or e-mail (*www.furrer-scott.com*). This newsletter is the "voice" of our section; I hope it will be a voice that we want to listen to.

OREGON STATE BAR
Construction Law Section
5200 S.W. Meadows Road
P.O. Box 1689
Lake Oswego, OR 97035-0889

BULK RATE
U.S. POSTAGE
PAID
Portland, Oregon
Permit No. **341**