Construction Law Newsletter

From the Oregon State Bar Construction Section
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In this issue

FROM THE CHAIR

Daniel L. Duyck
Duyck & Associates, LLC

Our section is a steady section. As outgoing chairperson, I have nothing dramatic to report.

Dan

This year the section presented yet another well-attended CLE, published three newsletters on an upgraded website, and exhibited continuing fiscal responsibility, so nothing new. Please be aware that executive committee meetings are open to all, volunteers are never left without a task, and anyone can submit an article for the newsletter. Best of luck to the new chairperson, Tyler Storti.

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ORS 701.131: IS IT REALLY AS HARSH AS IT LOOKS?

Sandra Fraser
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At first glance, it may seem Oregon law takes a harsh stance against contractors who perform work without valid licensing, even barring them from standard collection practices such as recording liens or filing claims for payment with the Oregon Construction Contractors Board (CCB) or in Oregon courts. *See* ORS 701.131. However, exemptions built into the statute often provide litigants the opportunity to create questions of fact, allowing many claims to survive summary judgement and proceed to trial, even in situations where the contractor clearly violated licensing regulations.

Sandra

1. Legal Requirements for Valid Licensure & Penalties for Failure.

ORS Chapter 701 provides the statutory requirements with which contractors must comply in order to legally perform work on residential or commercial construction projects. The law requires contractors to post a minimum surety bond and furnish the CCB with evidence of public liability, personal injury, and property damage insurance before the board will issue licenses. *See* ORS 701.081(1) (requiring residential contractors to obtain surety bond in the amount of $20,000 and general liability insurance in an amount no less than $500,000 as prerequisite to obtaining license). A contractor must also qualify as an independent contractor under ORS 670.600, classified either as nonexempt (employer with employees) or exempt (no employees) in order to obtain a license. ORS 701.035(1), (2). A contractor with one or more employees or that utilizes one or more workers supplied by a worker leasing company must be classified as nonexempt. ORS 701.035(2)(a). A contractor licensed as exempt must reapply to the Board in the correct class upon hiring employees or utilizing workers supplied by a worker leasing company. ORS 701.035(3).

The penalty for failing to maintain a valid license as required by ORS 701.131 is severe:

> [A] contractor may not perfect a construction lien, file a complaint with the Construction Contractors Board or commence an arbitration or a claim in a court of this state for compensation for the performance of any work or for the breach of any contract for work that is subject to this chapter[.]

ORS 701.131(1).

Historically, courts have strictly construed this statute for licensed or improperly endorsed contractors:

> The barring of claims by unregistered builders likewise is in the interest of the public as a means to enforce the consumer safeguards ORS chapter 701 was designed to afford ... A builder may choose ... to ignore the law and operate without registration. If he does so, however, he may not call upon the courts to help him collect his pay.

Roelle v. Griffin, 59 Or App 434, 439 (1982); *see also Wills v. Harris*, 57 Or App 712, 715 (1982); *Edwards v. Perry*, 130 Or App 165 (1994).

2. 1989 Amendments to ORS 701.

In 1989, the Oregon legislature expanded the reach of ORS 701 to address a state investigation which found that a significant percentage of contractors (over 25% in most cases) failed to comply with income tax, and unemployment and workers' compensation insurance requirements. House Bill 2558 added ORS 701.075 (renumbered to ORS 701.046 in 2007), which required applicants for a contractor's license to certify, under oath, that they had or did not need workers' compensation insurance, unemployment insurance, relevant tax withholding account numbers, and other information which would help to insure the applicants conformed with statutory requirements. ORS 701.075 also required an applicant to "conform to the information provided by the applicant on the application and to the terms of the applications." ORS 701.075(2); ORS 701.046(5). The Bill amended ORS 701.131(3) to add to the list of activities which could bar a contractor from collecting payment: falsely swearing to information

submitted to the board; or knowingly violating the provisions of ORS 656.029 (Obligation of person awarding contract to provide coverage for workers under contract), ORS 670.600 (Independent contractor defined) or ORS 701.046 (License application).

These changes, while expanding the requirements under which a contractor must operate in order to be validly licensed, fail to clearly define the term "valid," leaving it open for interpretation as to ***when*** a contractor's failure to abide by licensing requirements invalidates the license. A contractor must have a valid license properly endorsed for the work performed at the time the contractor bids or enters into the contract and continuously while performing the work for which compensation is sought. ORS 701.131(1). Thus, if a contractor violates a licensing requirement during the course of a project, such as hiring employees while classified as exempt, or allowing liability insurance policies to lapse, the question arises as to when the contractor becomes invalidly licensed – upon the occurrence of the violation, or only upon a finding by the CCB that results in suspension of the contractor's license?

The Oregon Court of Appeals found that, in those instances in which the contractor's license is suspended by the CCB (a process in which the CCB discovers and investigates a possible violation, provides time for due process and a hearing, and thereafter suspends the license) during the performance of work on a project, the contractor is barred as a matter of law from bringing a claim for payment on that work. *See Parthenon Constr. & Design, Inc. v. Neuman*, 166 Or App 172 (2000). The issue not yet answered by the courts is whether a contractor's license violations during a project which are not discovered until after completion would invalidate the license at the time the violation occurred, precluding any claim for unpaid work on that project. Consequently, absent a license suspension from the CCB during the course of a project, a claim brought by an otherwise non-complying contractor will most likely survive summary judgment, requiring a costly trial to resolve the question. This is primarily due to careful wording of ORS 701.131(3) and the exceptions in ORS 701.131(2) which provide broad leeway for a judge or arbitrator to find questions of fact precluding summary judgment.

3. Exemptions of ORS 701.131(2).

ORS 701.131(2) provides courts discretion to decline to apply the statute in those instances where enforcement of the bar would result in substantial injustice to the unregistered builder. In order to qualify for exemption under ORS 701.131(2), a contractor must be unaware of whatever requirement is lacking which leaves the contractor unlicensed, invalidly licensed, or, as set out in ORS 701.131(2)(b), with a lapse in the license. Once the contractor becomes aware of a deficiency, the issue must be cured within 90 days and any license lapse cured by backdating. *See* ORS 701.131(2)(b). Finally, if these conditions are met, the courts look to whether enforcement against the invalidly licensed contractor would result in substantial injustice. *See Coe v. McElligott*, 86 Or App 272 (1987) (the bare fact that owner received a completed job does not constitute substantial injustice).

The court's opinion in *Parthenon Constr. & Design* confirms that any exemption under ORS 701.131(2) is conditioned on the contractor's lack of knowledge of the requirement. The contractor in *Parthenon Constr. & Design* appealed the trial court's allowance of summary judgment against the contractor after the court found that ORS 701.065 barred its claims. The record showed that the contractor's license lapsed twice during the course of the project, and that in each instance, the CCB notified the contractor it would terminate its registration if

the contractor failed to reinstate insurance coverage, and when the contractor failed to do so, the CCB terminated the contractor's license until receipt of proof of coverage. Despite the fact that the license lapses were short in duration, both under 90 days, and the duration of the project exceeded two years, the court strictly construed the licensing requirements ("registered continuously") and affirmed the summary judgment. In so finding, the court opined that the contractor had to have been aware of the license issue due to the notices sent by the CCB.

Consequently, absent a record from the CCB or other administrative entity related to licensing violations, whether a contractor is "aware" of a violation becomes a question of fact. This holds true for contractors with discrepancies in license applications, or those who improperly classify themselves as exempt, because ORS 701.131(3) requires that a contractor "knowingly" provide false information or violate ORS 656.029 (Obligation of person awarding contract to provide coverage for workers under contract) or ORS 670.600 (Independent contractor defined) in order to be precluded from pursuing a claim. Given the unsettled law on this issue, a practitioner would be wise to include the cost of a trial in a preliminary budget for a client considering ORS 701.131 as a defense to a contractor's claim.

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UNIQUE CONSIDERATIONS FOR CLAIMS AGAINST DESIGN PROFESSIONALS

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On most construction projects in Oregon and elsewhere, architects, engineers and other design professionals are important players in the process. When things go wrong on a project – whether involving cost overruns, delays, construction defects or otherwise – design professionals may be blamed by one or another of the other project participants. Where such claims against design professionals are being evaluated by the claimant's and design professional's attorneys, it is important to keep in mind a number of laws, procedures and strategic considerations that are uniquely applicable to such design professionals. Failure to recognize and consider these concepts and principles can lead to undesirable consequences for unwary practitioners and their clients.

Tyler

1. Statute of Limitations

Statutes of limitation are often among the first issues analyzed by prudent attorneys when a new case arrives on their desk. Limitations considerations are always important, and that is especially true in the design professional context, since such claims are subject to a unique statute (ORS 12.135(3)) that differs from the statutes of general application that provide the limitations periods applicable to claims against contractors, developers and owners.

The Oregon Supreme Court recently confirmed in *Goodwin v. Kingsmen Plastering, Inc.*, 359 Or 694, 702 (2016):

> ORS 12.135(3)(a) . . . sets out the statute of limitations that applies to actions against architects and engineers 'to recover damages for injury to a person, property or to any interest in property' that arises out of the construction, alteration, or repair of an improvement to real property.

In turn, ORS 12.135(3)(a) provides, in relevant part:

> Notwithstanding subsections (1) and (2) of this section, an action against a person registered to practice architecture under ORS 671.010 to 671.220, a person registered to practice landscape architecture under ORS 671.310 to 671.459 or a person registered to practice engineering under ORS 672.002 to 672.325 to recover damages for injury to a person, property or to any interest in property, including damages for delay or economic loss, regardless of legal theory, arising out of the construction, alteration or repair of any improvement to real property must be commenced before the earliest of:
>
> (A) Two years after the date the injury or damage is first discovered or in the exercise of reasonable care should have been discovered;
> (B) Ten years after substantial completion or abandonment of the construction, alteration or repair of a small commercial structure, as defined in ORS 701.005, a residential structure, as defined in ORS 701.005, or a large commercial structure, as defined in ORS 701.005, that is owned or maintained by a homeowners association, as defined in ORS 94.550, or that is owned or maintained by an association of unit owners, as defined in ORS 100.005; or
> (C) Six years after substantial completion or abandonment of the construction, alteration or repair of a large commercial structure, as defined in ORS 701.005, other than a large commercial structure described in subparagraph (B) of this paragraph.

To avoid any doubt as to its breadth, ORS 12.135(3) applies "regardless of legal theory" alleged by the plaintiff. ORS 12.135(3)(a). Subparts (3)(B) and (C) set forth the statutes of ultimate repose that mirror those outside deadlines (six or ten years after substantial completion, depending on the type of structure) applicable to claims against *non*-design professionals as provided in ORS 12.135(1).

The truly unique limitations period applicable to design professionals is subpart (3)(A). Under that plain language, the "start" date for the running of the two-year statute of limitations is (1) "the date the injury or damage is first discovered," or (2) "the date the injury or damage ... in the exercise of reasonable care should have been discovered." ORS 12.135(3)(A) (emphasis added). A body of case law has developed in Oregon detailing how courts interpret and apply other statutes of limitation applicable to other claims and defendants, but this particular subpart of ORS 12.135(3) applicable to design professionals has not been the central focus of appellate decisions to date. Some practitioners,

often citing the plain language of this subpart and/or legislative history, have argued that courts should take a narrower view of what is required to trigger the commencement of this particular two-year period. For example, some have argued that the "first discovery" of "property damage" standing alone, and possibly even without knowledge that would potentially connect that damage to a particular design professional's work (as is sometimes required in other contexts to commence a limitations period), should be sufficient to trigger the limitations period. It remains to be seen how the appellate courts will address this particular statute if a reported decision raises the issue.

2. Notice of Defect Applicability

In matters involving allegations of construction defects, a nearly ubiquitous early step in pursuing a claim is to send a notice of defect pursuant to ORS 701.565 *et seq*. to start the process. In many contexts involving a variety of construction-related claims, sending a notice of defect and otherwise complying with the other procedural requirements of that statutory scheme are conditions precedent to the ability to initiate a lawsuit or arbitration. *See, e.g*., ORS 701.565(1), ORS 701.595. The statute also includes a provision that in certain circumstances contemplates tolling the statute of limitations pending (and for a short time after) the service of a notice of defect to allow the statutory process to conclude.

But attorneys advising clients who are considering potential claims against both contractor and design professional parties should not assume that the notice of defect statutes apply equally to those claims, especially if there are potential statute of limitations problems. That is because the notice of defect statutory requirement does not apply to claims against design professionals and the above-described limitation period applicable to claims against design professionals likely would not be tolled pending the notice of defect process.

ORS 701.565(1) provides for "an owner" sending a notice of defect to a "contractor, subcontractor or supplier," which terms are defined in ORS 701.560 and appear throughout the ensuing sections of the statute. None of those sections mention architects, engineers or design professionals. The inapplicability of the notice of defect statute to architects is confirmed in ORS 701.600, which provides that those sections do not apply to "claims against a person registered under ORS 671.010 to ORS 671.220," which sections govern registered architects and architecture firms.

As a result, an unwary owner intending to pursue construction defect-related claims against, for example, a contractor and an architect must send a notice of defect to the contractor but need not send one to the architect. More importantly, even if the limitations period applicable to the claim against the contractor may be tolled pursuant to ORS 701.585, the claimant could not rely on a similar tolling as to the claim against the architect. In that situation, the claimant and its counsel would be wise to take every appropriate precaution to preserve a timely claim against the design professional while also satisfying the necessary conditions precedent to pursuing the contractor.

3. Pleading Requirements

Another pre-lawsuit consideration to be evaluated before filing an action against a design professional in Oregon is the unique certification by the plaintiff's attorney that is required by ORS 31.00. Failure to do so can lead to undesirable consequences, including dismissal.

ORS 31.300 applies to "design professionals", which term is defined to mean architects,

landscape architects, professional engineers or land surveyors registered under ORS chapter 671 or 672, or who is licensed to practice in one of those professions in another state. ORS 31.300(1). The statute requires that a "complaint, cross-claim, counterclaim or third-party complaint asserting a claim against a design professional that arises out of the provision of services within the course and scope of the activities for which the person is registered or licensed may not be filed unless the claimant's attorney" includes in the pleading the required certification. ORS 31.300(2).

The certification must provide that "the attorney has consulted a design professional with similar credentials who is qualified, available and willing to testify to admissible facts and opinions sufficient to create a question of fact as to the liability of the design professional." ORS 31.300(2). The certification must also contain a statement that the consulting design professional is available and willing to testify that (a) the alleged conduct failed to meet the standard of professional skill and care ordinarily provided by other design professionals with similar credentials, experience and expertise and practicing under the same or similar circumstances; and (b) the alleged conduct was a cause of the claimed damages, losses or other harm. *Id*.

Failure to include a compliant certification risks dismissal of the claim. ORS 31.300(4) provides that "upon motion of the design professional, the court shall enter judgment dismissing any complaint, cross-claim, counterclaim or third-party complaint against any design professional that fails to comply with the requirements of this section."

To the same extent that claimants' attorneys should be careful to include the certifications, attorneys defending design professionals should take care to ensure that the pleadings against their client satisfy ORS 31.300 and applicable pleading standards. A shortcoming in that regard could provide a basis to seek early dismissal or, at a minimum, might provide a means through which to compel the claimant to provide more detail about the alleged claim. Given the absence (in the normal course) of pretrial expert discovery in Oregon, a certification and detailed allegations of ultimate fact are important components of understanding the nature and basis of claims against design professionals early in the case to allow a more informed evaluation of potential liability.

Keeping in mind these unique statutory provisions and procedural requirements is essential when representing design professionals or others pursuing claims against design professionals in Oregon.

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WASHINGTON'S SUMMARY PROCEDURE FOR REMOVAL OF A FRIVOLOUS CONSTRUCTION LIEN

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In 1991, the Washington legislature enacted a statute – RCW 60.04.081 – designed to provide a property owner, lender, general contractor, or other party in interest a mechanism for removal of a construction lien that is "frivolous and made without reasonable cause." Further, under this statute, if the court determines that a construction lien is "clearly excessive," the court is authorized to reduce the lien to the


Curt

amount that the court determines to be reasonable.

This article discusses the procedural requirements under RCW 60.04.081, and discusses the high standard that has been imposed by courts in relation to removal of a construction lien under this statute. This article also discusses the advantages and disadvantages of utilizing the procedure under RCW 60.04.081.

1. Procedural Requirements under RCW 60.04.081

Under RCW 60.04.081 (1), the party challenging the lien (hereinafter "applicant") files a motion, affidavit, and order to show cause with the Superior Court in the county where the liened property is located. The motion must state the grounds upon which relief is sought, and the affidavit must provide "a concise statement of the facts upon which the motion is based." *Id*. The affiant must be either the applicant or the applicant's attorney. *Id*.

The order to show cause must clearly state that if the lien claimant fails to appear at the time and place set forth in the order for the hearing on the motion, the lien will be released, and the lien claimant will be ordered to pay the applicant's costs, including reasonable attorney fees. RCW 60.04.081 (2).

The hearing date must be a date no earlier than six days, nor later than fifteen days, following service of the motion, affidavit, and order on the lien claimant. RCW 60.04.081 (1). The motion may be filed at any time after the subject construction lien has been recorded, even before a lien foreclosure suit has been filed. If the lien claimant has already filed a suit to foreclose the lien, the motion, order, and affidavit are filed under that case. If no suit has been filed to foreclose the lien, then the applicant pays a filing fee (currently $35), and the clerk assigns a cause number to the motion or application. RCW 60.04.081 (3). The court, of course, has discretion to modify the date of the hearing for various reasons. For example, a judge may not be available to conduct a hearing within such an expedited time frame.

In some cases, there may be a hearing on whether to even issue the order to show cause. This situation may arise where a lien foreclosure suit has already been filed, both the applicant and lien claimant are represented by counsel, and the lien claimant's counsel has indicated opposition to issuance of the order to show cause. Since courts will rarely ever decide a contested matter on an *ex parte* basis, a hearing will likely be set to decide whether to issue the order to show cause.

Assuming that the court issues an order to show cause and the matter proceeds to a hearing on the merits, the court will need to decide, in accordance with the standard discussed in the next section below, whether the lien is frivolous and made without reasonable cause, or whether it is clearly excessive. Evidence for the hearing is presented by affidavit or declaration along with exhibits. Given the summary nature of the proceeding, it is unlikely that a court will permit live testimony at the hearing, even if a court were given advance notice of a party's intent to present live testimony.

As part of its ruling, the Court is required under RCW 60.04.081 (4) to award attorney fees to the party who prevails. Accordingly, if the applicant fails to show that the lien is frivolous and without reasonable cause or fails to show that the lien is clearly excessive, the applicant must pay the reasonable attorney fees and costs of the lien claimant.

2. Case Law

Neither RCW 60.04.081, nor any of the Washington construction lien statutes, define the words "frivolous and made without reasonable cause." However, there is sufficient case law interpreting RCW 60.04.081 which establishes the standard for courts to follow.

That standard is a very high one. In *Williams v. Athletic Field, Inc*., 172 Wn 2d 683, 699 (2011), the Washington Supreme Court held that a frivolous lien is one that "presents no debatable issues and is so devoid of merit that it has no possibility of succeeding." In *S.D. Deacon Corp. v. Gaston Bros. Excavating, Inc*., 150 Wn App 87, 95 (2009), the Court held that "[t]he determination to be made when a lien claim is alleged to be frivolous is analogous to deciding whether an appeal is frivolous; the claim of lien must present no debatable issues and it must be so devoid of merit that no possibility of sustaining the lien exists." The Court of Appeals went on to state that the parties' contractual dispute at issue in that case "is not the type of dispute that can be resolved in a summary proceeding." *Id*.

Further, in *Pac Industries, Inc. v. Singh*, 120 Wn App 1, 5 (2003), the Court noted that "[e]very frivolous lien is invalid, but not every invalid lien is frivolous." (citing *In Intermountain Elec., Inc. v. G-A-T Bros. Constr.*, 115 Wn App 384, 394 (2003)).

In *Singh*, the court held that the management and coordination services performed offsite were not lienable, holding that such work did not meet the definition of labor under the lien statute, because the work did not improve the subject property and was not performed at the site. *Singh,* 120 Wn App at 9. However, the court declined to hold that the lien was frivolous, noting that "[t]here is a debatable issue of law because no Washington authority holds that a person providing development services cannot file a lien under chapter 60.04 RCW." *Id.* at 10.

The standard for summary judgment is much different than the standard under RCW 60.04.081, as illustrated by the case of *Blue Diamond Group v. KB Seattle 1, Inc.*, 163 Wn App 449, 455 (2011), in which the court upheld the trial court's order dismissing the lien claimant's lien foreclosure action on summary judgment. The lien claimant in the *Blue Diamond* case performed the same type of services as did the lien claimant in the *Singh* case – offsite management and coordination services. The *Blue Diamond* court held that such work was not lienable, and in fact cited the *Singh* case in support of that holding, but unlike the *Singh* court, the *Blue Diamond* court ordered that the lien be released. *Id*. at 455.

3. Discussion

The procedure under RCW 60.04.081 is a valuable tool but must be used under the right circumstances. Clearly, the primary risk in challenging a lien under RCW 60.04.081 is the risk of the applicant being ordered to pay the lien claimant's attorney fees if the challenge is not successful. Even though a court will review the amount of the prevailing party's attorney fees to determine if the fees are reasonable and may conduct a separate hearing regarding the amount of attorney fees, the attorney fees awarded may be a significant amount. Further, an unsuccessful challenge can illuminate the weaknesses of the applicant's alleged defenses to the lien and add momentum to the lien claimant's case.

These risks need to be weighed against the obvious benefit of a successful challenge—complete removal of the lien, or reduction in the amount of the lien if the court has found that the amount of the lien is clearly excessive. Another option, of course, as illustrated by the *Singh* case, *supra*, and *Blue Diamond* case,

supra, is for the applicant to file a summary judgment motion in an appropriate case, unless the applicant is convinced that they can satisfy the high standard for summary dismissal of a lien under RCW 60.04.081.

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ANNUAL OREGON CONSTRUCTION CASE LAW UPDATE

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DUTY TO DEFEND: A general contractor is an additional insured to the extent that a subcontractor is required to secure AI insurance for the subcontractor's work. The anti-indemnity statute, ORS 30.140, limits an insurer's duty to defend just as it limits an indemnitor's duty to defend. *Security Natl. Ins. Co. v. Sunset Presbyterian Church*, 289 Or App 193 (2017).

A subcontract required Subcontractor to add General Contractor as an additional insured party on its liability insurance policies for liability arising out of General Contractor's actions. Insurer provided Subcontractor with a blanket additional-insured endorsement that added as an insured anyone that Subcontractor was required by contract to insure.


Gary

Insurer argued that it had no duty to defend General Contractor because the additional-insured provision of the subcontract violated ORS 30.140, which forbids construction clauses that require indemnification for an indemnitee's own negligence. The court of appeals agreed that ORS 30.140 applies to insurers, but stated that as long as the unlawful portion of an insurance or indemnity provision can be excised, the lawful portion remains enforceable. Because the clause requiring Subcontractor to insure General Contractor was partially valid, the court of appeals held that the trial court had erred in finding that Insurer had no financial obligation to General Contractor.

The court of appeals also held that ORS 30.140 limits an insurer's duty to defend just as it limits an indemnitor's duty to defend, and that therefore Insurer's duty to defend corresponded to General Contractor's potential liability arising out of Subcontractor's fault.

DUTY TO DEFEND: Owner's claims against a general contractor that include allegations of a subcontractor's negligence and the general contractor's failures relating to selecting the subcontractor, its supervision, or other duties with regard to the subcontractor are sufficient to trigger the subcontractor's insurer's duty to defend the general contractor as an additional insured. Also, extrinsic evidence outside the court's recognized "four-corners rule" for determining whether a party is an additional insured will not be considered. *PIH Beaverton LLC v. Red Shield Ins. Co.*, 289 Or App 788 (2018).

General Contractor subcontracted with Subcontractor to build hotels. After construction, the owners sued General Contractor for negligent work. General Contractor tendered the defense of the actions both to its insurers and to Subcontractor's insurer, relying on General Contractor's status

as an "additional insured" on Subcontractor's policy. Subcontractor's insurer declined to defend General Contractor, and General Contractor's insurers later brought this suit against Subcontractor's insurer to recover their costs to defend General Contractor.

The trial court entered, and the court of appeals affirmed, a limited judgment declaring that Subcontractor's insurer owed a duty to defend General Contractor in the construction-defect actions. The general rule is that if there is doubt about whether a complaint states a cause of action covered by insurance, that doubt will be resolved in the insured's favor as long as there is a *possibility* of coverage. Additionally, any ambiguity will be resolved in favor of the insured even if there are also other, noncovered claims that clearly fall outside the policy.

Subcontractor's insurer wanted to introduce extrinsic evidence about a policy condition limiting coverage to only Subcontractor's "ongoing operations." The court of appeals declined to review extrinsic evidence because it was outside the court's recognized exception to the "four-corners rule" of contract interpretation. Under the four-corners rule, courts will compare only the allegations in the complaint against the insurance policy's terms, without considering extrinsic evidence. The complaint did not allege when injury had occurred, so it was unclear from the four corners whether the injuries were covered during ongoing operations. The court left the definition of "ongoing operations" for another day.

ARBITRATION: An arbitration provision in a contract between an owner and a contractor may apply to subcontractors through a "flow-down" provision in the contract, but only if it is clear from the contract that the owner intended to bind itself to arbitration with subcontractors.

***EWEB v. MWH Americas, Inc.*, 293 Or App 41 (2018).**

Owner's improvements failed after construction, and Owner filed a complaint against Contractor, which filed third-party claims against Subcontractors. Owner also asserted direct claims against Subcontractors. One Subcontractor filed a petition to compel arbitration of Owner's claim against it and to stay the lawsuit pending arbitration. It argued that Owner had to arbitrate with Subcontractors under a "flow-down" provision in the prime contract, by which Contractor was required to bind its Subcontractors to the prime contract's terms and conditions to the same extent that Contractor was bound to Owner. The court of appeals affirmed the trial court's dismissal of the petition, finding that the prime contract did not create an enforceable agreement to arbitrate between Owner and Subcontractors.


Alexander

Although the prime contract stated that in disputes between the "parties," either "party" may request arbitration, the only "parties" were Owner and Contractor; first, because the prime contract defined "Owner" and "Contractor" as named entities and the use of a definite article, "the parties," suggested a reference to those previously defined parties; second, because "Subcontractor" was a defined term in the Prime Contract but was omitted from the provision on litigation, though it would have been easy to include if Owner had intended to include subcontractors in its dispute-resolution provisions; and third, because the method of picking arbitrators

described a process in which only *two* parties were selecting arbitrators.

Further, the flow-down provision in the prime contract applied only to work to be performed by Subcontractors and to the obligations that Subcontractors had toward Contractor. Because there was no reference to Subcontractors' obligations to Owner, the flow-down clause did not reflect Owner's intent to be bound by those same provisions vis-a vis Subcontractors.

DISCOVERY OF EXPERT WITNESSES: Expert witnesses who are personally or directly involved in events relevant to a case may be asked deposition questions related to the experts' personal knowledge of the events, even if the questions call for an opinion or require current application of their expert knowledge and training. Such testimony does not qualify as protected "expert testimony" that is exempt from pretrial discovery under the Oregon rules. *Ransom v. Radiology Specialists of the Northwest*, 363 Or 552 (2018).

Plaintiff filed a medical negligence action, alleging that two radiologists employed by defendant had negligently misread her imaging studies when the radiologists first examined them in 2013. In 2016, during their depositions, radiologists denied any recollection of their 2013 review, but plaintiff asked each of them to review the studies and testify about their present-day interpretations. The witnesses refused to answer on the grounds that it sought expert testimony that is not discoverable under ORCP 36 B.


Vanessa

The Oregon Supreme Court, in a 4-3 decision, issued a peremptory writ of mandamus, commanding the trial court to withdraw its order barring the current-opinion questions, and to require the depositions to proceed. Although Oregon does not allow pretrial expert discovery, witnesses who have been personally or directly involved in events relevant to a case are not exempt from testifying about information for which they have personal knowledge, even if they will be expert witnesses at trial.

The court distinguished between "participating experts," who are actors in the underlying action, and "nonparticipating experts," who acquire or develop facts or opinions in anticipation of litigation or for trial. While plaintiff would not be allowed to depose "nonparticipating experts," the court concluded that plaintiff was entitled to ask "participating experts" about matters in which they were directly involved – even if those questions "call for their opinion or require current application of their expert knowledge and training." A spirited dissent argued that the court's distinction was unnecessary and a significant departure from existing practice.

BUSINESS RECORDS AS EVIDENCE: Value or replacement-cost information that is obtained from third parties that do not have a legal duty to provide the value or cost information is not admissible under the business-records exception to the hearsay rule. *Morgan v. Valley Property and Casualty Ins. Co.*, 289 Or App 454 (2017).

Owners' insurance adjuster contracted with three independent analysts to help develop and pursue Owners' property insurance claim after Owners' warehouse and its contents were destroyed in a fire. One analyst prepared an

inventory spreadsheet listing all the personal property destroyed in the fire and the replacement-cost value for each item. To obtain the replacement-cost information, another analyst performed research on the Internet, conducted telephone conversations with vendors, and made visits to local stores. Insurer unsuccessfully sought to exclude the spreadsheet as hearsay, and the jury awarded Owners the maximum amount allowed under the policy limits.

The court of appeals found the spreadsheet to be inadmissible hearsay and reversed and remanded. The business-records exception contains two levels of hearsay: the supplier of information and the person recording the information. The business-records exception applies only when *both* the supplier of information and the recorder are engaged in that business or acting under a duty in relation to the business. The analysts' reliance on third parties for property values prevented the spreadsheet from qualifying as a business record because the suppliers of that information provided it voluntarily, and not under any duty to report.

STATUTE OF LIMITATIONS ON DESIGN CLAIMS: The two-year statute of limitations against design professionals is triggered from the time plaintiff "becomes aware of the substantial possibility that it ha[s] been damaged" and applies regardless of plaintiff's legal theory and regardless of whether plaintiff knows the "full extent" of its damages. *T-Mobile W. LLC v. Johnson Broderick Eng'g LLC*, No. 3:15-CV-798-PK, 2017 WL 8292977 (D Or Nov. 21, 2017), *report and recommendation adopted*, 2018 WL 1434815 (D Or Mar. 21, 2018).

Plaintiff contracted with Engineer for structural engineering and design services to build an equipment platform in one of Plaintiff's buildings. Engineer completed its work in 2005. In early 2008, after receiving complaints about the platform, Plaintiff hired an independent structural engineer ("Expert") to assess Engineer's work to identify areas that were structurally deficient. Expert determined that a limited portion of Engineer's work was deficient, and that the deficiencies "should be addressed as soon as possible." At Plaintiff's later request, Expert produced two different designs that were intended to address the limited structural deficiencies in Engineer's work. In 2010, Plaintiff used one of the designs to extensively reconstruct the equipment platform.

In 2015, Plaintiff discovered water damage to the building caused the platform and sued Engineer. Plaintiff claimed that it first knew of its claims about the more extensive design defects of Engineer when the water intrusion was discovered. Engineer filed a motion for summary judgment, seeking a finding from the court that Plaintiff's claims were barred by the two-year statute of limitations

The US District Court found that all of Plaintiff's claims were time-barred by the two-year statute of limitations for claims against design professionals in ORS 12.135(3)(a)(A). The court stated that Plaintiff knew or should have known of its claims against Engineer as early as 2008 when it received Expert's report stating that Engineer's work was structurally deficient, even if in a more limited respect. Further, even if Plaintiff did not discover the full extent of the damage until 2015, when Plaintiff first performed destructive testing, "as a matter of Oregon law * * * a plaintiff need not know the full extent of the damages it has suffered as a result of a defendant's conduct before an applicable limitations period begins to run." When Plaintiff incurred costs in 2010 to remediate some other defects in the platform purportedly caused by Engineer, Plaintiff had "actual knowledge" of its potential claims

against Engineer and those claims became time-barred two years later.

DUTY OF GOOD FAITH AND FAIR DEALING: A claim for breach of a contract does not automatically give rise to a claim for breach of good faith and fair dealing. Oregon law requires a showing of something "more than" mere breach of contract to maintain a claim for breach of good faith and fair dealing. *Veloz v. Foremost Ins. Co. Grand Rapids, Mich.*, 306 F Supp 3d 1271 (D Or 2018).

Owner brought suit against Insurer for breach of contract and breach of duty of good faith and fair dealing after Insurer refused to cover damages relating to the flooding of Owner's rental property caused by a burst water main. The US District Court reviewed the policy's exclusions from coverage and found that damage caused by the burst water main was not excluded under the policy. "[N]ot every breach of the duty of good faith claim requires a breach of contract" and not every breach of contract is necessarily also a breach of the duty of good faith. But "most states require something beyond mere breach to state a breach of the duty of good faith claim."

The court found that under Oregon law, not every breach of contract – such as breaches that are accidental, inadvertent, or caused by honest mistake – will constitute a breach of the duty of good faith. The court then rejected Owner's claim for breach of the duty of good faith because: (1) Insurer had adopted a plausible (albeit incorrect) reading of the contract language, and (2) Owner failed to present evidence of "something beyond the mere breach of contract" that is required to support a claim for breach of the duty of good faith and fair dealing.

CONSTRUCTION LENDING: Generally, a construction lender has no duty to the owner even if it substantially participates in construction or development activities, including site inspections. A lender could be liable, however, if the lender voluntarily assumed activities or duties above those traditionally associated with the role of a lender. *Claus v. Columbia State Bank*, No. 03:16-CV-01509-AC, 2018 WL 1832871 (D Or Apr. 17, 2018).

Owners obtained a construction loan from Lender to build a residential subdivision. Lender conducted a project analysis, which included an extensive and confidential review of the proposed Contractor. Lender's analysis of Contractor was never shared with Owners. Nevertheless, based on Lender's analysis, Lender insisted that Owners retain Contractor. Contractor failed in its work and eventually walked away, leaving unpaid subcontractors. Owners sued Lender for negligently administering the construction loan, arguing that Lender had insisted on using an uncreditworthy general contractor.

The US District Court dismissed the claim with leave to amend. In the absence of special circumstances, loan contracts represent arm's-length transactions, and creditor-debtor relationships do not impose a higher or a fiduciary standard of care. In the construction-loan context, Oregon follows the "majority rule" that no duty is imposed on a lender of a construction loan to exercise reasonable care in its inspections, even if the borrower pays for the inspections, unless the lender voluntarily undertakes to perform inspections on the owner's behalf. Here, Lenders alleged insistence on the choice of contractor did not give rise to a special relationship. But Owners were allowed to amend to allege facts that Lender had voluntarily assumed activities or duties above those traditionally associated with the normal role of a financial lender.

EMPLOYER LIABILITY LAW: Under ORS 654.305 (Employer Liability Law), "work" includes not only the activity performed by the employee, but also the location and manner in which the work is performed. Further, liability can be imposed on any indirect employer that retains or exercises sufficient control over the risk-creating activity *or* injury-producing instrumentality. *Quirk v. Skanska USA Bldg., Inc.*, No. 3:16-cv-0352-AC, 2018 WL 2437537 (D Or May 30, 2018).

Employee of Subcontractor sued General Contractor for his injuries on a construction project. General Contractor had retained Subcontractor to install new piping in a cleanroom. Under the subcontract, General Contractor was to coordinate construction activities among subcontractors, including setting the time, order, and priority of the performance of Subcontractor's work. The subcontract incorporated General Contractor's standard code of conduct and safety requirements, and provided that General Contractor could implement additional safety measures at Subcontractor's expense.

Employee was injured when he fell into a trench on the project site that representatives from General Contractor allegedly had failed to cover.

The US District Court declined to dismiss Employee's claim on summary judgment under Oregon's Employer Liability Law (the "ELL"), ORS 654.205. Even if Employee's work at the time was not inherently dangerous, "work" under the ELL includes not only the task itself, but also the surrounding environment. A jury could find that performing work in this active construction zone and in an area with an uncovered trench could constitute an activity involving risk or danger.

The court also found that, even assuming General Contractor did not have control over Employee's own work, it did exercise control over the injury-producing instrumentality (i.e., the uncovered trench). A jury could find that General Contractor was engaged in a common enterprise and had the right to control the risk-producing activity because General Contractor retained some responsibility for jobsite safety over Subcontractor, including the right to require additional safety measures related to Subcontractor's work.

HB 4144 AND CONSTRUCTION CONTRACTORS BOARD: Allows an individual with at least eight years of full-time work experience in residential or small commercial construction to obtain a license as a contractor with a residential general contractor or residential specialty contractor endorsement without having to complete the training required by ORS 701.122 and without having to pay any fee to the Construction Contractors Board for the license or endorsement. Applicants under the new rules must still pass the licensing exam required by ORS 701.122 and pay other applicable fees. Work performed under this type of license must be done through a sole proprietorship owned by the licensee. Signed into law April 3, 2018. Effective January 1, 2019.

OREGON DEPARTMENT OF JUSTICE OPINION LETTER: Private third-party inspections programs that supplant a jurisdiction's building inspector violate the Oregon Constitution. While some aspects of public building inspections (i.e., "ministerial" aspects) can be delegated to third-party inspectors, "discretionary" or "legislative" functions may not be delegated. Delegation of entire inspection programs, whether full-building or full-system, are not permissible. *See* Or Dep't of Justice Opinion Letter (Feb. 16, 2018).

VIOLATION OF PROTECTIVE ORDER: Attorneys' failure to require an expert to execute a nondisclosure agreement required by a protective order is evidence of "willful noncompliance" of the protective order. *Elizabeth Lofts Condo Owners' v. Victaulic Co.*, 293 Or App 572 (2018).

Attorneys in a separate, earlier construction defect case were under a protective order that subjected "qualified persons" – including the parties' expert witnesses – to sign a specific nondisclosure agreement before reviewing confidential documents. Attorneys failed to have one of their experts sign the nondisclosure agreement, and instead wrote the expert an e-mail instructing him to review the protective order and agree to be bound by it. The protective order and nondisclosure agreement remained binding after the earlier case concluded.

Years later, in a products liability case, the expert that respondents had retained in the earlier defect case disclosed one of the earlier party's confidential documents in a deposition, in violation of the protective order. The aggrieved party learned of the disclosure and sued to hold Attorneys in contempt for violating the protective order. The court of appeals found that plaintiff had established a *prima facie* showing of contempt, which requires: (1) proof of an existing, valid court order; (2) the contemnor's knowledge of that order; and (3) the contemnor's willful noncompliance with that order. "Willful noncompliance" means that the act "was done intentionally and with knowledge that the breach or violation was forbidden conduct as outlined in the valid order." Here, there was "evidence that respondents disclosed confidential documents without an executed nondisclosure agreement * * *[and] a trier of fact could infer that [Attorneys] made the disclosure willfully."

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