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64199-9

NO. 64199-9-1

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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BRE PROPERTIES, INC.  
Appellant,

vs.

NORTHWEST TOWER CRANE SERVICE, INC.,  
Respondent

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**BRIEF OF APPELLANT**

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Mark J. Dynan, WSBA #12161  
Robert L. Bowman, WSBA #40079  
**GIERKE CURWEN DYNAN &  
JONES, P.S.**  
Attorneys for Petitioner LCL

Suite 400, Building D  
2102 North Pearl Street  
Tacoma, WA 98406-1600  
(253) 752-1600

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## I. INTRODUCTION

Lease Crutcher Lewis (“LCL”), a Washington partnership and BRE Properties, Inc. (“BRE”), a Washington corporation, (collectively “BRE/LCL”)<sup>1</sup>, asks this Court to reverse the trial court’s “Order Granting Northwest Tower Crane’s Motion for Summary Judgment Dismissal of All Claims with Prejudice” dated August 25, 2009.

Respondent, Northwest Tower Crane Services, Inc. (“NWTC”), a Washington corporation, moved for summary judgment dismissal of all claims asserted by BRE and LCL under the legal theory of claim preclusion, and alternatively, NWTC argued the court should dismiss the claims for lack of evidence establishing NWTC was a proximate cause of the tower crane collapse.

In response to NWTC’s motion for summary judgment BRE/LCL presented unrefuted facts clearly establishing that NWTC breached numerous contractual promises it made to LCL as its crane erection subcontractor, and that further NWTC breached the duties required of a reasonable crane erector under a theory of negligence. The trial court’s ruling is erroneous and unsupported by the admissible evidence presented by the parties.

More significantly, NWTC failed to meet its legal or factual burden under the theory of claim preclusion. In short, neither BRE nor

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<sup>1</sup> On July 14, 2009, BRE as part of its settlement agreement to dismiss all claims against LCL agreed to assign its rights to its claims against NWTC to LCL.

LCL had ever litigated claims against NWTC for the claims asserted by BRE as a result of the tower crane collapse. BRE was not a party to the IN RE TOWER CRANE COLLAPSE matter, and thus the longstanding requirement to assert a defense of claim preclusion in Washington of concurrence of identity of persons and parties was lacking. Even though there was no factual dispute as to this required element of claim preclusion, the trial court nonetheless granted NWTC's motion for summary judgment.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignment of Error**

The trial court erred by granting NWTC's Motion for Summary Judgment Dismissal of All Claims despite the presentation of unrefuted facts demonstrating NWTC's failure to establish the required elements of claim preclusion.

In addition, the trial court erred in granting NWTC's motion when there was significant and unrefuted evidence that NWTC breached numerous provisions of its subcontract with LCL for the erection of the tower crane, as well as its duties as a reasonable crane erector under a theory of negligence.

### **B. Issues Pertaining to Assignment of Error**

1. Did the trial court abuse its discretion by granting summary judgment dismissal to the moving party on the basis of claim preclusion when that party failed to establish the required elements of that defense?

2. Did the trial court abuse its discretion by improperly considering NWTC defense of issue preclusion, which was argued for the first time in its reply brief?

3. Did the trial court abuse its discretion by granting summary judgment when LCL/BRE presented significant and unrefuted evidence of NWTC's numerous contractual breaches and conduct which fell significantly below the negligence standards of a reasonable crane erection company?

### **III. STATEMENT OF THE CASE**

#### **A. Introduction**

Appellant BRE/LCL seeks reversal of the trial court's order granting NWTC's motion for summary judgment entered on August 25, 2009. As outlined below, BRE/LCL provided unrefuted facts to demonstrate that NWTC breached its contractual obligations to LCL as its crane erection specialist. Further, based on industry standards and regulations, as testified to by NWTC's own tower crane expert, NWTC negligently failed to ensure the conduct of the appropriate pre-operational tests required of a reasonable crane erector. Finally, the required elements to support the legal theory of claim preclusion as a basis for NWTC's motion for summary were not established, as none of the claims asserted by BRE in its complaint had ever been litigated. The trial court's ruling was unsubstantiated and contradicted by substantial evidence presented to the trial court.

B. Factual History

This case arises out of the November 2006 collapse of a tower crane at the Tower 333 construction project site in Bellevue, Washington.<sup>2</sup> During the project LCL served as the general contractor and hired engineering firm Magnusson Klemencic Associates (“MKA”) to design a steel foundation to support the tower crane.<sup>3</sup> Due to project constraints related to restarting a previously mothballed construction project, MKA suggested and LCL agreed to use a steel foundation to support the crane rather than founding the crane on a traditional concrete base, which would have involved cutting through several existing concrete floors of the preexisting parking structure.<sup>4</sup>

Concurrent with hiring MKA for the crane base design, LCL also retained Morrow Equipment Company (“Morrow”) to supply the leased Liebherr crane and to provide crane drawings depicting various tower crane schematics for the site.<sup>5</sup> The multiple drawings, both preliminary and “for construction”, produced by Morrow varied based on a number of factors including, among others, the position of the crane on the project site, the height of the tower crane, the lift capacity of the crane, the installation and dismantling sequence, and the forces exerted by the tower

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<sup>2</sup> CP 7.

<sup>3</sup> CP 4.

<sup>4</sup> CP 263-264.

<sup>5</sup> CP 388.

crane on the base under a variety of operational conditions.<sup>6</sup> These drawings were produced by Morrow to ensure both the designed base would adequately support the crane and to detail the steps required to erect the crane.<sup>7</sup>

Every expert who has analyzed the collapse of the crane agrees that the steel beams forming the crane's foundation were inadequate to support the crane as erected.<sup>8</sup> While there is vigorous debate as to why MKA selected the particular beams for its design or failed to notice the lack of tie-in from the crane to the building's core, those failures were not the subject of NWTC's motion for summary judgment nor of this appeal, but have been described briefly to provide the context of NWTC's role in the crane collapse.

During the same time period that LCL retained Morrow and MKA to assist with the tower crane portion of the project, LCL also retained several other specialty subcontractors to assist with installation of the tower crane. These specialty subcontractors performed a variety of discrete functions on the project ranging from fabrication of the steel base, performance of inspections, as well as the assembly, erection, testing of the crane to place it into service.

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<sup>6</sup> CP 388.

<sup>7</sup> CP 456.

<sup>8</sup> CP 389.

1. Agreement by NWTC to provide crane erection services.

NWTC was one of the specialty subcontractors LCL retained to assist with the installation and placement of the crane into service. LCL entered into a subcontract with NWTC that required NWTC to “erect and dismantle of Tower Crane,” pursuant to the contract and incorporated attachments.<sup>9</sup> NWTC made numerous promises in the subcontract, including the following obligations:

**A. Existing Conditions and Requirements:**

Subcontractor acknowledges its responsibility, prior to entering into the Subcontract, to investigate and familiarize itself, without limitation, with all laws, ordinances, and regulations applicable to the work under this Subcontract...<sup>[10]</sup>

**K. Government Requirements/Inspections:**

Subcontractor shall comply with all statutes, ordinances, codes, laws and other regulations and requirements of all authorities having jurisdiction over the work, or any part thereof; give notices to said authorities as required for the inspection of Subcontractor’s work and procure and pay for all permits, licenses, fees, tests, inspections, and privileges required in the prosecution of its work...<sup>[11]</sup>

**N. Indemnification:** Subcontractor shall defend, indemnify and hold Contractor...harmless from any and all claims, demands, losses and liabilities to or by third parties arising from, resulting from, or connected with, services performed or to be performed under this Subcontract...<sup>[12]</sup>

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<sup>9</sup> CP 274-290.

<sup>10</sup> CP 275.

<sup>11</sup> CP 278.

<sup>12</sup> CP 278.

**U. Safety:** Subcontractor shall promptly provide Contractor with **written notice** of any safety hazard or violation found anywhere on or adjacent to the construction site.<sup>[13]</sup>

**Subcontract Special Conditions:**

**1. Insurance-1.1.4:** Certificates of insurance evidencing the above coverages shall be filed with Contractor within five (5) working days of award of Subcontract and prior to commencement of the work and should read as follows: “It is hereby understood and agreed that Lease Crutcher Lewis (Contractor), Tower 333 (Owner), LMN Architects (Architect) have been added as primary additional insureds.”<sup>[14]</sup>

**15. Defects and Conflicts:** Subcontractor **shall examine all supporting and adjacent surfaces**, and report any defects or conflicts with the Contract Documents to Contractor in writing prior to installing any material. The installation of any material constitutes the Subcontractor’s **complete acceptance of all substrates as compatible with the work** under this Subcontract.<sup>[15]</sup>

**2. First Phase of Tower Crane Erection**

In late August 2006, approximately two weeks before the tower crane was erected, a crew from NWTC came to the jobsite and set the initial lower section of the tower crane upon the MKA-designed steel crane foundation.<sup>16</sup> Once this initial nearly 40 foot section of the tower

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<sup>13</sup> CP 280. (emphasis added).

<sup>14</sup> CP 285.

<sup>15</sup> CP 289 (emphasis added).

<sup>16</sup> CP 265.

crane was placed on the steel foundation LCL's surveyors took measurements of that section to determine whether the foundation was level and the base section was plumb to within the crane manufacturer's required L/500 specification for "plumbness."<sup>17</sup> The L/500 standard means that for every 500 inches of vertical height the tower crane can lean no more than 1 inch from absolute vertical to remain within the L/500 standard.<sup>18</sup> After determining these measurements and finding them to be outside of this L/500 specification, the LCL survey team forwarded these measurements to NWTC in order to fabricate shims that would be placed underneath the feet of the tower crane to bring the tower section within L/500.<sup>19</sup> NWTC subsequently installed those shims approximately one week later, and LCL's surveyors determined that the base section was plumb.<sup>20</sup>

In NWTC's motion for summary judgment there was an inference that because the surveyors who took measurements of the tower crane were LCL employees that somehow NWTC is less liable for the tower crane collapse.<sup>21</sup> First, LCL did not on its own initiative take survey measurements of the tower crane base. LCL surveyors were on the

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<sup>17</sup> CP 265.

<sup>18</sup> CP 292.

<sup>19</sup> CP 265.

<sup>20</sup> CP 265-266.

<sup>21</sup> CP 451, 455-456.

construction site daily and would assist NWTC when asked to take surveys of the tower crane.<sup>22</sup> LCL has never denied that their surveyors were used to take measurements of the tower crane, and most significantly there has never been an allegation that LCL surveyors did not perform these duties adequately.

### 3. Completion of Tower Crane Erection

On September 9, 2006, a crew from NWTC led by Jeff Harr and Dan Schaefer initially installed the vertical components of the tower crane and then began to set the counter jib (horizontal section) on to the vertical mast.<sup>23</sup> Just after NWTC had hung the counter jib on the mast, but before hanging the main jib, there was a loud “bang” or “pop.”<sup>24</sup> After hearing the noise, LCL’s Kyle Kragseth radioed to all of the NWTC crewmembers who were working on the crane’s mast to come down to the ground.<sup>25</sup> Those who had been on the crane’s mast reported that the crane had moved when the noise occurred.<sup>26</sup> Approximately 15 people from NWTC and LCL gathered on the ground, and everyone was visually examining the foundation beams.<sup>27</sup> According to Dan Schaefer there was no clear

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<sup>22</sup> CP 298-299.

<sup>23</sup> CP 267.

<sup>24</sup> CP 268.

<sup>25</sup> CP 269.

<sup>26</sup> CP 271.

<sup>27</sup> CP 270.

consensus from the group as to what caused the noise.<sup>28</sup> Many in the group saw that a piece of plywood that had been used as a form for a grout pad just beneath the “feet” of the tower crane foundation had been crushed,<sup>29</sup> presumably due to the weight of the crane’s newly added counter jib pushing down on the crane foundation.<sup>30</sup> Some of the grout in that grout pad had also cracked and crumbled.<sup>31</sup>

However, Schaefer was not convinced of this explanation, and because of his unease he decided to call NWTC president Dave Weber to describe what occurred and to get his opinion.<sup>32</sup> Specifically Schaefer testified in his deposition:

I told him [Weber] that, you know, something happened on this base, and it just didn’t feel right, just didn’t seem right. And he told me that, you know, we are going to see a lot of these different kinds of bases come along because it was just prior to that one we did one, it was a Liebherr designed cross frame with no weights on it, a couple of weeks earlier. And he just said that, you know, we’re going to have to put our faith in the engineers who come up with this. And that was about all the conversation me and Dave had.<sup>33</sup>

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<sup>28</sup> CP 310-311.

<sup>29</sup> CP 272.

<sup>30</sup> CP 273.

<sup>31</sup> CP 273.

<sup>32</sup> CP 312-313.

<sup>33</sup> CP 312-313.

In spite of Schaefer's unease regarding the loud bang and the apparent excessive deflection of the crane base there is no evidence that he, in his role as lead foreman for NWTC's crew ever created a written report outlining his concerns as required by the subcontract.

Shortly after Schafer's conversation, Jon Hagwood, the senior construction site superintendent for LCL also had a telephone conversation with Dave Weber about the situation.<sup>34</sup> By the time Hagwood, who at the time of the loud bang was in a construction office adjacent to the site, spoke to Weber, Weber testified that he felt he had a good understanding of the situation based on his prior call with Schaefer.<sup>35</sup> Weber later testified that, "the crane was out of balance and on a steel base which I didn't have a lot of experience or involvement in building—any, to be exact. So my concern was to get the crane balanced out."<sup>36</sup> Weber's recommendation to LCL was to allow its team to continue the erection of the tower crane "because the crane was in an unsafe mode being partially erected."<sup>37</sup> Coupled with his recommendation to continue the erection Weber also asked that Hagwood have the engineers to come out the following week to examine the base.<sup>38</sup> Although Weber was clearly

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<sup>34</sup> CP 300.

<sup>35</sup> CP 293.

<sup>36</sup> CP 294.

<sup>37</sup> CP 301.

<sup>38</sup> CP 294.

concerned as to the safety of the tower crane there is no evidence he ever put his concerns in writing as required by the subcontract.

Further, Weber firmly believed that he had the ability to stop the work and dismantle the crane if the situation dictated:

Q: In your mind, if you had felt that the situation was of the gravity when Dan Schaefer called you, you could have said, "Let's stop this; let's take a look at it; let's dismantle the crane," any of those?

A: Absolutely.

Q: Okay.

A: We already had stopped it.

Q: Exactly. But you could have had the crane dismantled as well at that point?

A: Correct. But there's risk in that too.<sup>39</sup>

Moreover, both Dan Schafer and Jeff Harr from NWTC's field crew testified that they too had the ability to stop the crane erection for safety concerns.<sup>40</sup> Jeff Harr testified that not only could he stop the erection process, but testified that he was part of a crew that had done so five or six times before.<sup>41</sup>

There is no evidence to support that Hagwood was heavy handed or exerted undue pressure on NWTC to continue the erection of the tower

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<sup>39</sup> CP 295.

<sup>40</sup> CP 314-315 and CP 317.

<sup>41</sup> CP 317.

crane. Hagwood fully acknowledged, as the site superintendent for the general contractor, he had control over the entire construction site, and he had the authority to stop the erection of the tower crane.<sup>42</sup> Hagwood further testified, however, that he is not an engineer or a “qualified” tower crane expert.<sup>43</sup> Hagwood accepted Weber’s recommendation, stating “Northwest Tower Crane made the decision to continue on with the erection of the crane. And based upon them being the experts, I didn't second guess their decision.”<sup>44</sup> Moreover Hagwood testified that even as the senior person on the site for LCL that day, he had no independent authority to order the continued erection of the crane. Specifically Hagwood was asked:

Q: So, if a decision were made to whether to disassemble the tower crane or continue the assemble of the tower crane, in terms of Lease Crutcher Lewis making a decision on that, you would have been the person to make that decision?

A: No.

Q: Who was the most senior person at Lease Crutcher Lewis who was going to make the decision that day?

A: Lease Crutcher Lewis would not make that decision. We employed Northwest Tower Crane who has the expertise and knowledge to erect tower cranes, to this tower crane. So, we make sure that the site is available,

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<sup>42</sup> CP 302-303.

<sup>43</sup> CP 304.

<sup>44</sup> CP 305.

traffic control is in place; they come in and then it's their responsibility to erect the tower crane.<sup>45</sup>

Hagwood relayed Weber's recommendation to continue to the NWTC crew, and the erection of the crane continued which, according to Morrow's technician, "went very smoothly."<sup>46</sup>

4. Post Erection Load Testing and MKA inspection.

Morrow technician BA Phillips stated that after the crane was erected on Saturday he and a team from NWTC arrived the following Monday morning to finish rigging the crane and conduct load testing.<sup>47</sup> Phillips principally conducted this load test with the assistance of an NWTC crew. Phillips testified that as part of the test the crane was rigged with loads representing 100 percent of its maximum load capabilities.<sup>48</sup> NWTC was responsible for attaching these maximum weight loads onto the hook of the crane.<sup>49</sup>

In the meantime Hagwood did, however, make arrangements for MKA's engineers to visit the jobsite later that week so those engineers could investigate the cause of the noise and the spalled grout.<sup>50</sup> The

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<sup>45</sup> CP 306.

<sup>46</sup> CP 319.

<sup>47</sup> CP 320.

<sup>48</sup> CP 320.

<sup>49</sup> CP 307.

<sup>50</sup> CP 308.

timing of when these engineers or engineer from MKA came to the site to inspect the base is not definitive. Neither assistant superintendent Kyle Kragseth nor Jon Hagwood from LCL have consistent recollection as to when this occurred.<sup>51</sup> As well, the engineers themselves, Gretchen Humphrey and Doug Loesch, do not have clear recall as to when they visited the site and looked at the base. They may have looked at the base that Monday or Tuesday after a regularly scheduled owner's meeting, but conclusive evidence is lacking.<sup>52</sup>

What is clear however is that Dave Weber of NWTC lacked confirmed knowledge or details of any inspection from the engineers, or if it even occurred prior to sending his crew to the job site Monday morning to assist with the load test.<sup>53</sup> This was in spite of the fact that his decision to allow the crane erection to continue two days prior was predicated on an evaluation of the base by the MKA engineers. Under Weber's authority, a NWTC crew loaded a suspect crane with weights representing the crane's maximum capacity without an assurance that it was safe.<sup>54</sup> Moreover, it has since become apparent that the load test of the crane did not include a 360-degree load test, described in detail below, as required

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<sup>51</sup> CP 377 and CP 379.

<sup>52</sup> CP 381 and CP 384 -385.

<sup>53</sup> CP 296.

<sup>54</sup> CP 295.

by law.<sup>55</sup> All evidence indicates that no one from NWTC informed LCL either that this test would not be conducted, or that the test was required by law to be conducted.

5. Summary of Relevant Expert Opinions

a. Information that would have been available to LCL and MKA had 360-degree load test been conducted

NWTC does not dispute it did not conduct a 360-degree load test or make sure that Morrow conducted such a test. LCL's structural engineering expert Richard Dethlefs has opined that conducting a 360-degree test could have prevented the collapse of the tower crane.<sup>56</sup> In brief, the 360-degree test requires that the crane lift a load at 110 percent of its maximum intended pick weight and swing that load in a 360 degree arc, stopping every 45 degrees for ten minutes and measuring "deflection," or the change in the levelness of the foundation.<sup>57</sup> This "deflection" was required, both by law and by manufacturer specifications, to meet the criterion of "L/500."<sup>58</sup> According to Dethlefs, if the 360-degree test had been conducted, "certain configurations in the 360 degree arc of the crane that would have created loading conditions on the foundation that would have caused it to deflect in excess of the L/500 levelness criteria."<sup>59</sup> Had

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<sup>55</sup> CP 322-323.

<sup>56</sup> CP 348-350.

<sup>57</sup> CP 349.

<sup>58</sup> CP 349.

<sup>59</sup> CP 349.

those measurements of deflection in excess of L/500 been communicated to MKA's structural engineers, those engineers would have realized that the foundation was deflecting excessively and then could have instructed LCL on how to stabilize the foundation.<sup>60</sup>

- b. NWTC's decision to continue erection and load testing of the crane after the "bang".

LCL's crane erection expert, Gary Campbell, has opined that "the prudent thing" to have done at the time of the noise during erection would have been to "remove the counter deck and get the crane back to simply vertical position."<sup>61</sup> Campbell opines that NWTC's decision to continue the erection was "the wrong way to go."<sup>62</sup> Campbell also questions the primary justification advanced for continuing the erection, that of balancing the crane:

the theory with everyone has been "we're going to balance out the tower." Well, you attach the heel section, and then the assist crane has to raise the jib to allow it to reach the pendant bars. That raising of the jib while it's heeled adds more backward moment until you get it attached and lay it down and let it bring it back.<sup>[63]</sup>

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<sup>60</sup> CP 349; see also CP 351-352; CP 353; CP 354-355; CP 356-357.

<sup>61</sup> CP 362.

<sup>62</sup> CP 363.

<sup>63</sup> CP 364-365.

Continuing with the erection also adds “several thousand more pounds” to the already problematic foundation.<sup>64</sup>

With respect to causation, Campbell opines that the crane’s outcome “would have been different”<sup>65</sup> had NWTC decided to remove the counter deck and refused to erect the crane until the engineer had identified the problem with the foundation:

If you refuse to build the crane until somebody has determined what the problem is, there's a lot more scrutiny and involvement. You don't get that false sense that everything's okay, because it's obviously standing here.<sup>[66]</sup>

Even if NWTC justifies continuing the erection of the crane to balance out an unstable condition, Campbell believes it was an error to load test the crane prior to having confirmation of an inspection by the engineers.<sup>67</sup> Campbell’s opinion that placing maximum loads on a crane with no confirmation was not reasonable based on the concerns of NWTC’s crew after hearing the loud bang. Campbell opines that failing to conduct the appropriate load test, as with continuing to erect the crane on a suspect base led to a false sense of security that the crane was safe.<sup>68</sup>

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<sup>64</sup> CP 366.

<sup>65</sup> CP 367.

<sup>66</sup> CP 367.

<sup>67</sup> CP 419.

<sup>68</sup> CP 420.

Further, Campbell stated that NWTC's failure to produce any written reports as required by its subcontract based on the safety concerns raised by their crewmembers after the loud bang and visual inspection of the crane was not in accordance with the subcontract.<sup>69</sup> Campbell opined that the lack of any required written reports by either NWTC's field crew or president provided inadequate information for the design engineers to thoroughly conduct their follow up investigation.<sup>70</sup>

C. Procedural History

On November 16, 2006, the crane collapsed instantly killing Matthew Ammon and damaging nearby buildings. In October 2007, the plaintiff Ammon Estate sued MKA and LCL, alleging both parties had negligently caused the collapse of the tower crane. In addition, three plaintiffs, Plaza 305, Brickman Civica, and Intelligent Results ("Property Damage Three"), who owned or leased property that had been damaged by the crane followed suit shortly after. Those three property plaintiffs joined the Estate of Matthew Ammon in a consolidated matter entitled IN RE TOWER CRANE COLLAPSE (King County Cause No.: 07-2-33136-1). In this consolidated matter defendant LCL brought its own third-party

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<sup>69</sup> CP 419.

<sup>70</sup> CP 419.

claims against NWTC based on claims alleged by the Ammons Estate and the Property Damage Three, among others, for negligence, breach of contract, indemnity, and contribution.<sup>71</sup>

In the IN RE TOWER CRANE COLLAPSE matter NWTC moved for summary judgment, which the court denied on March 25, 2009.<sup>72</sup> It is noteworthy that NWTC lost this summary judgment even with the benefit of excluding the testimony of LCL's tower crane expert Gary Campbell.<sup>73</sup>

After its summary judgment was defeated even without the testimony of LCL's crane expert, NWTC filed a Motion for Reconsideration after one of the metallurgical experts in the case changed his opinion as to the presence of a prefabrication crack in the crane base.<sup>74</sup> Although the retraction by the metallurgist was a direct benefit to several defendants, it had no impact as to the liability of NWTC. The trial court however, granted this motion on April 20, 2009, in spite of the undisputed breaches of contract and the significant evidence of NWTC's negligent conduct that remained even after eliminating this metallurgist's opinion.

On April 28, 2008, BRE separately filed a complaint alleging negligence against multiple parties for causing the crane collapse leading

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<sup>71</sup> CP 324-337.

<sup>72</sup> CP 338-340.

<sup>73</sup> CP 398.

<sup>74</sup> CP 341.

to damage to its property.<sup>75</sup> BRE was also a property owner whose apartment building, the Pinnacle at BellCentre, was damaged by the collapsing crane, and as a point of context, Matthew Ammon, the only fatality resulting from the crane collapse, was a resident of this apartment building. Based on the claims alleged by BRE, LCL brought its own third-party claims against NWTC for negligence, breach of contract, indemnity, and contribution.<sup>76</sup> BRE was never a litigant in the consolidated IN RE TOWER CRANE COLLAPSE matter. None of the third-party claims against NWTC for damage to BRE properties were ever asserted or litigated by LCL in the IN RE TOWER CRANE COLLAPSE matter.

On June 12, 2009 NWTC moved for summary judgment dismissal of all claims asserted against it in the BRE complaint and LCL third party complaint. There were two principle bases on which NWTC moved for summary judgment. The first basis was that the claims brought against it in the BRE matter were barred by claim preclusion. In the alternate, NWTC argued that its conduct involving the erection of the tower crane was not a proximate cause of the crane collapse.

NWTC alleged that, because BRE was relying on experts named by other plaintiffs as opposed to naming additional experts to support its claims, BRE's claims were barred by the doctrine of claim preclusion.<sup>77</sup>

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<sup>75</sup> CP 3-9.

<sup>76</sup> CP 30-49.

<sup>77</sup> CP 443-473.

NWTC admits however, that BRE was not a party to the IN RE TOWER CRANE COLLAPSE matter.<sup>78</sup> Concurrence of identity of parties has been a requirement to establish claim preclusion for nearly one hundred years in Washington.

NWTC also asserted the defense of claim preclusion against LCL. LCL's claims against NWTC in this matter were predicated on the damage to BRE's property, which were independent claims from those being alleged by the plaintiffs in the IN RE TOWER CRANE COLLAPSE matter.<sup>79</sup> Neither BRE nor LCL had ever asserted claims in the IN RE TOWER CRANE COLLAPSE matter against NWTC for negligence, breach of contract or contribution based on damages to BRE's property. In addition to concurrence of identity of parties, Washington law also requires concurrence of subject matter.

As a fallback position from its assertion that BRE's and LCL's claims should be dismissed under a theory of claim preclusion, NWTC, in its motion for summary judgment, argued that "no facts have been established that NWTC breached its contract, did anything wrong, or was the proximate cause of the crane collapse. There are simply no issues of material 'fact.'"<sup>80</sup> Without repeating the aforementioned detailed fact pattern it is quite clear that NWTC breached its contract in numerous

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<sup>78</sup> CP 466.

<sup>79</sup> CP 403-404.

<sup>80</sup> CP 467.

instances. Further, NWTC's own expert testified that the 360-degree test was required and should have been performed.<sup>81</sup> Failure to conduct this required test was not only a breach of contract but was also negligent under the standards of a reasonable crane erector.

Notably, nowhere in its motion or reply did NWTC refute the factual evidence offered by LCL showing in multiple instances of where NWTC breached its contractual promises to LCL or was negligent based on the standards of a reasonable crane erector. NWTC instead chose to argue that its acts or omissions were not a proximate cause of the collapse.

While it is true that MKA's errors in designing the crane base were a proximate cause of the crane collapse, Washington law recognizes that there can be multiple proximate causes for an injury and the question that a jury should decide is whether an intervening or superceding act was foreseeable. NWTC asserted that when the MKA engineers visited the site after the loud bang occurred that its own contractual breaches and negligent acts or omissions were superceded, thereby relieving NWTC of liability.<sup>82</sup>

Finally, in its reply briefing filed July 7, 2009, NWTC attempted to insert the defense of issue preclusion in addition to its claim preclusion and lack of proximate cause arguments initially argued in its motion for

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<sup>81</sup> CP 322-323.

<sup>82</sup> CP 471.

summary judgment.<sup>83</sup> Notwithstanding NWTC's failure to provide any legal analysis or meet its burden of proving the underlying elements of issue preclusion, Washington has long held that the moving party cannot raise new issues in its reply brief because the nonmoving party has no opportunity to respond. For this reason LCL will not address the merits of NWTC's issue preclusion arguments.

Despite NTWC's numerous breaches of contract and conduct which fell significantly below the standards of a reasonable crane erection specialist, as well as the inadequacy of NWTC's arguments related to claim preclusion, the trial court on August 25, 2009, issued an order granting summary judgment for NWTC dismissing all claims by all parties with prejudice.

#### IV. ARGUMENT

##### A. Standard of Review

Whether the trial court should have dismissed all claims against NWTC is a question of law and is reviewed *de novo*. Review of a summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court.<sup>84</sup> CR 56(c) only allows summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.<sup>85</sup> On a summary judgment

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<sup>83</sup> CP 423-424.

<sup>84</sup> *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003).

<sup>85</sup> CR 56(c).

motion, the moving party bears the initial burden of showing the absence of an issue of material fact.<sup>86</sup> Summary judgment must be denied if the record shows any reasonable hypothesis, which entitles the non-moving party to relief.<sup>87</sup>

B. The trial court committed either obvious or probable error when it granted NWTC's motion against BRE when there was no dispute that BRE was not a party to the first suit.

The trial court erred in granting NWTC's motion for summary judgment pursuant to claim preclusion when it was undisputed that BRE was not a party to the first suit and its claims had never been litigated. Claim preclusion prevents the same parties from litigating a second lawsuit on the same claim or any other claim arising from the same transaction or series of transactions that could have been, but was not, raised in the first suit.<sup>88</sup>

The 1918 case of *Northern Pac. Ry. Co. v. Snohomish County* still holds as the litmus test for claim preclusion in Washington.<sup>89</sup> That court held in order to “make a judgment res judicata in a subsequent action there

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<sup>86</sup> *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (citations omitted).

<sup>87</sup> *White v. Kent Medical Ctr.*, 61 Wn. App. 163, 175, 18 P.2d 4 (1991).

<sup>88</sup> *In re Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004).

<sup>89</sup> *Northern Pac. Ry. Co. v. Snohomish County*, 101 Wn. 686, 688, 172 P. 878, 878 (1918).

**must** be a concurrence of identity in four respects: (1) of subject matter; (2) of cause of action; (3) of persons and parties; and, (4) in the quality of the persons against whom the claim is made.”<sup>90</sup>

These four requirements from 1918 remain in effect today as the starting point for any party such as NWTC who wants to assert the defense of claim preclusion. In short there is no basis for NWTC’s claim preclusion assertion: BRE was not a party to the IN RE TOWER CRANE COLLAPSE matter. No further analysis is necessary. BRE’s claims against NWTC cannot be dismissed on a theory of claim preclusion.

C. The trial court erred in granting NWTC’s motion for summary judgment pursuant to claim preclusion when it was undisputed that LCL’s third-party claims against NWTC based on the distinct claims alleged by BRE had never been litigated.

The trial court committed either obvious or probable error when it granted NWTC’s motion against LCL when there was no dispute that the third-party claims asserted by LCL were filed on the basis of BRE’s claims for property damage to its building. These claims were not the subject of the prior suit and dismissal based on claim preclusion was in error.

Utilizing the framework from *Northern Pac. Ry. Co. v. Snohomish County* discussed in the previous section the requirement for concurrence

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<sup>90</sup> *Id.* (emphasis added).

of subject matter is not met. As discussed previously, the prior matter involved three property plaintiffs and one wrongful death plaintiff. Associated with each of these distinct claims were cross complaints filed by LCL and joined by the aforementioned plaintiffs against multiple subcontractors including NWTC. None of these cross complaints were filed on the basis of BRE's claims against LCL. Neither LCL nor BRE in the IN RE TOWER CRANE MATTER ever asserted claims against NWTC for negligence, breach of contract, or contribution based on damages to BRE's property. The subject matter of the current matter is not the same as the subject matter of the IN RE TOWER CRANE COLLAPSE matter, and therefore applying the framework set out by NWTC in *Northern Pac. Ry. Co. v. Snohomish County*, the elements of claim preclusion asserted against LCL are not met.

Moreover, NWTC's assertion of claim preclusion against LCL does not meet the definition of claim preclusion as provided for in *In re Estate of Black* allowing preclusion of a claim "that could have been, but was not, raised in the first suit."<sup>91</sup> There is no question that LCL could not have made a claim against NWTC for negligence, breach of contract or contribution based on the property damage claims of BRE when BRE was

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<sup>91</sup> *In re Estate of Black* at 170.

not a party to the IN RE TOWER CRANE COLLAPSE matter. Consistent with *In re Estate of Black* LCL claims in the BRE matter cannot be barred under the doctrine of claim preclusion.

D. The trial court erred in considering the theory of issue preclusion in granting NWTC's motion for summary judgment when it was argued for the first time in NWTC's reply briefing.

The trial court committed either obvious or probable error when it granted NWTC's motion against LCL to the extent that it considered the legal theory of issue preclusion as a basis for its ruling. In its reply briefing filed July 7, 2009, NWTC attempted to argue the defense of issue preclusion in addition to its claim preclusion and lack of proximate cause arguments initially argued in its motion for summary judgment.<sup>92</sup>

The court in *White v. Kent Medical Center, Inc.* held, "it is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment. Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond. It is for this reason that, in the analogous area of appellate

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<sup>92</sup> CP at 423-424.

review, the rule is well settled that **the court will not consider issues raised for the first time in a reply brief.**<sup>93</sup>

NWTC attempted to insert this argument by asserting that res judicata meant both theories: issue and claim preclusion. This argument would be much stronger had NWTC in its motion for summary judgment even mentioned the elements required for issue preclusion, which are different than claim preclusion. Moreover, per *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, it is the burden of the moving party to prove the elements of issue preclusion.<sup>94</sup> NWTC failed to provide the framework or any analysis of issue preclusion, and therefore to the extent that the trial court considered these arguments it committed error.

E. The trial court erred in granting NWTC's motion for summary judgment when there was significant and undisputed evidence that NWTC breached its subcontract with LCL in multiple instances.

NWTC does not dispute that it entered into a valid and enforceable contract with LCL requiring it to perform certain acts and take certain precautions as it erected the tower crane at the Tower 333 jobsite. A breach of contract is actionable "if the contract imposes a duty, the duty is

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<sup>93</sup> *White v. Kent Medical Center, Inc.*, 61 Wn. App. 163, 167, 810 P.2d 4 (1991) (emphasis added) (citations omitted).

<sup>94</sup> *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998)

breached, and the breach proximately causes damage to the claimant.”<sup>95</sup>  
In determining whether a contract imposes a duty, courts give the words in the contract their “ordinary, usual, and popular meaning” unless “the entirety of the agreement clearly demonstrates a contrary intent.”<sup>96</sup>

There is no evidence on the record showing that the parties to this subcontract had any other intent than for it to be a fully integrated expression of their intent. Any extrinsic testimony concerning NWTC’s obligations or performance of the contract will not be admissible at trial because NWTC and LCL reduced their agreement to a writing. A trial court may not consider inadmissible evidence when ruling on a summary judgment motion.<sup>97</sup> In Washington, extrinsic evidence is not admissible for the purpose of adding to, modifying, contradicting, or varying the terms of a written contract.<sup>98</sup> Absent fraud, accident, or mistake, parties to a contract are bound by it as signed.<sup>99</sup>

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<sup>95</sup> *NW Indep. Forest Mfrs. v. Dep’t of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995) (citing *Larson v. Union Investment & Loan Co.*, 168 Wn. 5, 10 P.2d 557 (1932)).

<sup>96</sup> *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005).

<sup>97</sup> *Ebel v. Fairwood Park II Homeowners’ Ass’n*, 136 Wn. App. 787, 790, 150 P.3d 1163 (2007).

<sup>98</sup> *Id.* at 791 (citing *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990)).

<sup>99</sup> *Mutual of Enumclaw Ins. Co. v. Patrick Archer Const., Inc.*, 123 Wn. App. 728, 741, 97 P.3d 751 (2004).

Though NWTC moved for summary dismissal of the contract claims, NWTC did not actually discuss any of the provisions of contract it contends it did not breach. In fact, neither party has asserted that the contract between LCL and NWTC was not a fully integrated contract. NWTC's motion relied on statements taken out of context elicited via leading deposition questions posed to LCL and NWTC employees rather than the actual terms of contract at issue.<sup>100</sup> That extrinsic evidence concerning NWTC's obligations would not be admissible at trial, and was improperly considered by the trial court in granting summary judgment.

1. NWTC breached its promises to investigate, understand, and comply with all of the laws and regulations applicable to the erection of the tower crane on the asymmetrical steel foundation.

In the LCL-NWTC subcontract, NWTC promised to “investigate and familiarize itself, without limitation: with all laws, ordinances, and regulations applicable to the work under this Subcontract,”<sup>101</sup> and to “comply with all statutes, ordinances, codes, laws, and other regulations and requirements of all authorities having jurisdiction over the work”.<sup>102</sup> This meant that NWTC had to “procure and pay for all . . . tests required in the prosecution of its work”.<sup>103</sup>

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<sup>100</sup> CP 451; CP 454-455; CP 462.

<sup>101</sup> CP 275.

<sup>102</sup> CP 278.

<sup>103</sup> CP 278.

One of the regulations that applied to NWTC's work under the subcontract provides: "Tower cranes erected on a new foundation shall be tested in accordance with ANSI B30.3-1990 Chapter 3-1."<sup>104</sup> Chapter 3-1 provides:

After erection the structural support or foundation to which is the crane base is attached, shall be tested before placing the crane in service. The test shall be conducted with the rated load placed at maximum radius permitted by site conditions. . . . When the support is asymmetrical, the superstructure shall be rotated through 360 degrees with ten-minute stops at the starting position and at each 45-degree position. If any part of the support structure becomes displaced or distressed, all crane operations shall stop until an evaluation is made by a qualified person.<sup>105</sup>

NWTC could not be sure that it had properly erected the tower crane until that crane had been properly load tested, and the crane could not have been properly load tested until it was rotated through 360 degrees with 10-minute stops at the starting position and each 45-degree position. NWTC agreed to "procure and pay for" this test, and had an unfettered opportunity to ensure this test was conducted by Morrow, as NWTC was present and participated in the stunted load test that was conducted. Nonetheless, NWTC did not ensure that this test was performed.

As a result, there were no measurements as to whether the crane

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<sup>104</sup> WAC 296-155-525(f).

<sup>105</sup> CP 358-359 (emphasis added).

foundation was “displaced or distressed” in its most vulnerable conditions, conditions that engineering expert Dethlefs has opined would have showed deflection significantly beyond the allowable L/500 criterion. Had this information been conveyed to MKA’s engineers, those engineers would have been required to compare the foundation as built (without a tie-in in the initial stage of erection) against their design assumptions (foundation with a tie-in in the initial stage of erection). This could easily have prevented the collapse.

2. NWTC breached its promise to provide written notice addressing its safety concerns.

With respect to safety, NWTC promised to “at all times be responsible for providing a safe work site and be responsible for the safety of all personnel, equipment, and materials within Subcontractor’s care, custody, or control.”<sup>106</sup> NWTC promised to “promptly provide Contractor with written notice of any safety hazard . . . found anywhere on or adjacent to the construction site.”<sup>107</sup> And with respect to the crane foundation itself, NWTC promised to “examine all supporting and adjacent surfaces, and report any defects or conflicts with the Contract Documents to Contractor in writing prior to installing any material.”<sup>108</sup>

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<sup>106</sup> CP 280.

<sup>107</sup> CP 280.

<sup>108</sup> CP 289.

“[I]nstallation of any material” by NWTC was to constitute NWTC’s “complete acceptance of all substrates as compatible with the work under this Subcontract.”<sup>109</sup>

There is little doubt based on the record that on the day of the crane erection and subsequent loud bang NWTC had significant concerns about the safety of the crane base. Yet, in spite of these concerns there is no evidence that NWTC ever produced any required written notice outlining its concerns. Not only was this a clear breach of the subcontract, but much more significantly, without a written report from a qualified tower crane specialist detailing events surrounding the loud bang, the potential causes, and the heightened level of concern of NWTC as to overall integrity of the crane base, the MKA engineers who came to the jobsite the following week to look at the base had no specific written information as to the nature of NWTC’s concerns or its unease about the base.

3. NWTC has failed to explicitly name LCL as an additional insured on its commercial general liability policy.

In the subcontract, NWTC promised that “Contractor . . . shall be named as [an] additional insured[] with respect to work performed by . . . the Subcontractor on behalf of the Contractor.”<sup>110</sup> The promised coverage

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<sup>109</sup> CP 289.

<sup>110</sup> CP 284.

was to be “primary as respects Contractor”<sup>111</sup> and worth at least \$2,000,000 per occurrence.<sup>112</sup> Unfortunately, NWTC failed to explicitly name LCL as an additional insured, and NWTC’s insurers have not yet acknowledged that LCL is actually an additional insured on NWTC’s policy.<sup>113</sup> Until LCL receives the coverage NWTC promised to provide, LCL has the right to look to NWTC for the benefit of the bargain it made: \$2,000,000 in primary insurance coverage, plus defense costs.

4. NWTC has thus far failed to defend and indemnify LCL for the damages caused by NWTC’s negligence.

Finally, NWTC promised to “defend, indemnify, and hold Contractor . . . harmless from any and all . . . liabilities to or by third parties arising from, or connected with, services performed or to be performed under this Subcontract by Subcontractor. . . to the fullest extent permitted by law”.<sup>114</sup> The only limitation on this duty was that the duty to indemnify “shall not apply to liability . . . caused by, or resulting from, the sole negligence of . . . Contractor . . . [and] only to the extent of negligence of Subcontractor”.<sup>115</sup> Moreover, these promises “shall include Contractor’s . . . personnel related costs, reasonable attorney fees, court

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<sup>111</sup> CP 284.

<sup>112</sup> CP 285.

<sup>113</sup> CP 260-261.

<sup>114</sup> CP 278.

<sup>115</sup> CP 279.

costs, and all related expenses.”<sup>116</sup> If LCL proves that NWTC was negligent, as argued in detail below, NWTC will be liable to LCL for these defense costs and any damages that LCL is required to pay as a result of NWTC’s negligence.

F. The trial court erred in granting NWTC’s motion for summary judgment when there was significant and undisputed evidence that NWTC negligently failed to conduct the 360-degree test as required by law and to halt the erection of the tower crane after the loud noise that occurred during erection.

To prove an actionable claim for negligence, the plaintiff must show (1) the existence of a duty to the plaintiff, (2) a breach of that duty, (3) a resulting injury, and (4) the breach as the proximate cause of the injury.<sup>117</sup>

1. NWTC had a duty to ensure that the 360-degree load test was performed independent of the Subcontract and independent of the general duty to exercise ordinary care.

NWTC’s failure to perform the 360-degree load test was not only a contractual violation; it was a violation of the regulatory requirements applicable to the erection of tower cranes in Washington. To determine whether a defendant owes a duty of care based upon a regulatory violation, courts in Washington ask whether the regulation was intended, at least in part, to do four things:

- (1) to protect a class of persons that includes the person whose interest is invaded; (2) to protect the particular

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<sup>116</sup> CP 279.

<sup>117</sup> *Crowe v. Gaston*, 134 Wn.2d 509, 514, 951 P.2d 1118 (1998).

interest invaded; (3) to protect that interest against the kind of harm that resulted; and (4) to protect that interest against the particular hazard from which the harm resulted.<sup>118</sup>

At least one of the purposes of the regulation requiring that tower cranes be subject to a 360-degree load analysis is to help prevent physical injury and property damage to innocent bystanders from falling tower cranes set on insufficient asymmetrical foundations. NWTC therefore owed an independent duty to make sure that test was conducted, the breach of which is actionable if it proximately caused damage.

However, even if NWTC's violation of this regulation does not impose a duty separate and apart from the duty to exercise ordinary care, the breach of a duty "imposed by statute, ordinance, or administrative rule... may be considered by the trier of fact as evidence of negligence."<sup>119</sup> Thus, NWTC's failure to comply with that regulation provides, at minimum, evidence of NWTC's negligence that was sufficient to deny summary judgment.

Finally, given the language in the Subcontract, NWTC should have been aware that LCL would rely upon NWTC to make sure that all tests required by law and necessary for ensuring the foundation could adequately support the crane would be conducted. These facts made it foreseeable to NWTC that, if it did not either conduct those tests or inform

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<sup>118</sup> *Mathis v. Ammons*, 84 Wn. App. 411, 416, 928 P.2d 431 (1996) (citing Restatement (Second) of Torts § 286 (1985)).

<sup>119</sup> RCW 5.40.050.

LCL that it expected some other party to conduct those tests, the tests would not be completed. Thus, NWTC had a duty to those who would be placed in danger by an inadequately tested crane and foundation to ensure that those tests were completed.

2. NWTC failed to exercise the level of care that a reasonable prudent crane erector would exercise when it recommended that the crane be fully erected after the noise that occurred during erection.

NWTC does not challenge the expertise or helpfulness of the opinions of LCL's crane expert Gary Campbell. As explained, Campbell has opined that it was imprudent to continue with the erection after the loud noise, that doing so was more dangerous because it put added loads on the already problematic foundation, and that doing so had the effect of deemphasizing the importance of the problem to the structural engineer. Campbell opines that the outcome would have been different had NWTC done what a reasonably prudent crane erector would have done: refused to continue the erection until MKA had identified the problem.

NWTC also breached several other professional duties. Crane erection expert Campbell opined that NWTC had the professional duty (as opposed to a regulatory or contractual duty) to make sure that the 360-degree test was conducted.<sup>120</sup> NWTC also had the responsibility as crane erector to be aware of the L/500 criterion, a criterion present in the same

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<sup>120</sup> CP 368.

regulation that imposes the 360-degree test requirement.<sup>121</sup> NWTC failed to measure the tower crane for compliance with this criterion after the “bang” or during the load test, and structural engineers Dethlefs and Kevin Lewis both testified that the crane would not likely have satisfied the L/500 criterion had it been so measured.<sup>122</sup> NWTC also failed to make MKA or LCL aware of the significance of deflection beyond L/500 at any point. Kevin Lewis testified NWTC had a duty to so explain, could not expect LCL to effectively utilize that information without having the significance of the L/500 criterion explained, and was “foolish” in failing to notify MKA directly to ask what MKA planned to do about the excessive deflection.<sup>123</sup>

G. NWTC’s negligence<sup>124</sup> was a proximate cause of the damage to BRE.

Generally, an intervening act is not a superseding cause “where the intervening act (1) does not bring about a different type of harm than otherwise would have resulted from the defendant's conduct; and (2) does not operate independently of the situation created by the defendant's conduct.”<sup>125</sup> Only when the intervening negligence is “so highly

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<sup>121</sup> CP 417-421.

<sup>122</sup> CP 370-371.

<sup>123</sup> CP 372.

<sup>124</sup> The same proximate cause analysis that applies to LCL’s negligence claims also applies to its claims for breach of contract.

<sup>125</sup> *Anderson v. Dreis & Krump Mfg. Corp.*, 48 Wn. App. 432, 444, 739 P.2d 1177 (1987).

extraordinary or unexpected that it can be said to fall without the realm of reasonable foreseeability as a matter of law” will it be held to supersede defendant's negligence.<sup>126</sup> The foreseeability of an intervening act “is ordinarily a question of fact for the jury.”<sup>127</sup>

In *Herberg v. Swartz*, a hotel owner was cited for several fire code violations two months before a fire occurred at that hotel.<sup>128</sup> Some of the uncorrected violations caused the fire to move more quickly through the hotel, allowing the fire to get out of control and leading the City of Yakima to hire a demolition expert to stop the fire. That expert negligently delayed his work, the fire burned longer than it should have, and, eventually, a wall of the hotel collapsed onto a nearby business. The hotel owner was sued by the owner of the business, and the hotel owner sought to prove that the negligence of the City and demolition expert superseded his negligence. The trial court refused to even let him put on *evidence* of his superseding cause theory, and the Supreme Court affirmed that decision.<sup>129</sup>

NWTC contends that MKA’s failure to notice, on the day MKA visited the site after erection of the crane, that the crane had been erected

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<sup>126</sup> *Smith v. Acme Paving Co.*, 16 Wn. App. 389, 396, 558 P.2d 811 (1976) (“There may, of course, be more than one proximate cause of an injury”).

<sup>127</sup> *Anderson*, 48 Wn. App. at 443.

<sup>128</sup> *Herberg v. Swartz*, 89 Wn.2d 916, 578 P.2d 17 (1978).

<sup>129</sup> *Id.* at 928 (“Since the trial court correctly determined that appellant could reasonably have foreseen the need for assistance by both the City and a demolition team, the proffered evidence was irrelevant and properly excluded.”).

without a tie-in, is a superseding cause that should relieve it of liability for its negligent conduct. While negligent, that conduct cannot meet the high burden necessary for summary judgment on the superseding cause issue. First, the harm caused by MKA's failure to notice the lack of a tie-in is precisely the same as the harm that would have resulted from NWTC's conduct: the collapse of the crane. Second, MKA's failure does not operate independently of NWTC's failures. To the contrary, NWTC's failure to conduct the tests required by law and failure to recommend halting the erection after the loud noise occurred, and failure to put their safety concerns in writing all contributed to MKA's failure and the crane's collapse. Had NWTC not so failed, MKA would have had far more information to work with during the site visit – including knowledge of significant excess deflection. That knowledge likely would have caused MKA's engineers to realize the discrepancy between its incorrect design assumptions and the relative weakness of the as-built foundation. Under these circumstances, like those involving the negligent demolition man in *Herberg*, MKA's intervening negligence was not so highly extraordinary or unexpected that it must be said to fall outside the realm of reasonable foreseeability as a matter of law. These are questions of fact for a jury.<sup>130</sup>

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<sup>130</sup> The issues of fact that remain as to NWTC's negligence also defeat NWTC's motion to dismiss as it pertains to LCL's contribution claim, because that motion is based solely on the premise that NWTC bears no fault for the collapse of the crane.

H. The rule from *U.S. v. Spearin* is inapplicable to this case and is not a defense for NWTC's negligence.

In its motion for summary judgment NWTC contended that the rule recited in *U.S. v. Spearin* prevents NWTC from being liable for any of the harm caused by the crane collapse because NWTC did not participate in the design of the crane foundation.<sup>131</sup> In *Spearin*, the Court pointed out that when a contractor is bound to build according to plans and specifications prepared by the owner, “the contractor will not be responsible for the consequences of defects in the plans and specifications.”<sup>132</sup> Thus, NWTC is correct to the extent that it cannot be held liable for the portions of its work merely involved following the specifications provided to it by LCL.

However, LCL’s claims against NWTC are not based upon those portions of NWTC’s work. LCL’s claims are based upon NWTC’s deviations from what it agreed to do (breach of contract) and upon NWTC’s deviations from the various applicable standards of care (negligence). In other words, NWTC was not “following specifications” when it failed to procure the necessary tests and made the imprudent recommendation to continue erecting the crane notwithstanding the apparently flawed design. The *Spearin* rule is not a license to ignore the

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<sup>131</sup> CP 468-469.

<sup>132</sup> *U.S. v. Spearin*, 248 U.S. 132, 39 S.Ct. 59 (1918); see also *Weston v. New Bethel Missionary Baptist Church*, 23 Wn. App. 747, 753, 598 P.2d 411 (1978) (“when, as in the subject case, a contractor is required to build in accordance with plans and specifications furnished by the owner, it is the owner, not the contractor, who impliedly guarantees that the plans are workable and sufficient.”).

law, to ignore contractual duties, or to simply remain silent in the face of facts indicating an imminent and preventable tragedy.

## V. CONCLUSION

The trial court's decision to grant summary judgment to NWTC was clearly erroneous. NWTC's arguments based on claim preclusion should have been disregarded by the trial court as neither the claims brought by BRE nor the third-party claims brought by LCL met the required elements of claim preclusion based on Washington case law. Further, there are multiple instances in which NWTC breached its subcontract with LCL to safely erect the tower crane. None of these breaches of contract have been refuted by NWTC, and there is ample evidence that these breaches were the proximate cause, or at a minimum, a proximate cause of the tower crane collapse. Moreover, independent of NWTC's multiple breaches of its contractual promises, NWTC's acts or failures to act were negligent, as NWTC failed to exercise the level of care that a reasonable prudent crane erector would exercise in the safe erection of a tower crane.

In short, NWTC has failed to meet its burden for summary judgment dismissal on any of its proffered legal theories. NWTC attempts to shift blame to the design engineer attempts to overlook NWTC's critical role in the process. In essence NWTC was contracted to act as a check and balance system, an independent third party adding a layer of oversight and independent verification that the crane was safe. They did not. They expressed multiple concerns about the integrity of the base during the

erection of the tower crane. They had limited experience with this type of crane base, and yet chose not to err on the side of caution. They failed to ensure the conduct of a pre-operational test that experts stated would have revealed excess deflection in the base. NWTC was the last best chance to see the design flaw.

There were multiple proximate causes to this collapse, but there is no doubt that NWTC's failure to abide by the contract and perform testing as required of a reasonable erector contributed to the crane collapse. There was clearly enough evidence indicating the trial court's grant of summary judgment was erroneous. LCL/BRE respectfully requests that this Court reverse the trial court's order.

DATED this 4th day of December, 2009.

Respectfully submitted,

**GIERKE, CURWEN, DYNAN & JONES, P.S.**

By 

Mark J. Dynan, WSBA # 12161  
Robert L. Bowman, WSBA # 40079  
Attorneys for Petitioners BRE Properties and  
Lease Crutcher Lewis

**GIERKE, CURWEN, DYNAN & JONES,  
P.S.**

2102 North Pearl Street  
Suite 400, Building D  
Tacoma, WA 98406-1600

NO. 64199-9-1

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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BRE PROPERTIES, INC.  
Appellant,

vs.

NORTHWEST TOWER CRANE SERVICE, INC.,

Respondent

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**APPELLANTS' PROOF OF SERVICE REGARDING  
BRIEF OF APPELLANT**

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Mark J. Dynan, WSBA #12161  
**GIERKE CURWEN DYNAN & JONES,**  
P.S.  
Attorneys for Appellant

Suite 400, Building D  
2102 North Pearl Street  
Tacoma, WA 98406-1600  
(253) 752-1600

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I , Mark J. Dynan counsel for Appellants hereby certify that on December 4, 2009, a copy of the Brief of Appellant was filed with the court and was delivered to the office of Respondents' counsel at the address below:

Mark P. Scheer, WSBA #16651  
Levi Bendele, WSBA #26411  
SCHEER & ZEHNDER LLP  
701 Pike Street, Suite 220  
Seattle, WA 98101

DATED this 4<sup>th</sup> day of December, 2009.

Respectfully submitted,

**GIERKE, CURWEN, DYNAN & JONES, P.S.**

By 

Mark J. Dynan, WSBA # 12161  
Attorney for Appellants

**GIERKE, CURWEN, DYNAN & JONES,  
P.S.**  
2102 North Pearl Street  
Suite 400, Building D  
Tacoma, WA 98406-1600