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CONSOLIDATED NO. 64199-9-1

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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IN RE: TOWER CRANE COLLAPSE,

Appellant,

v.

NORTHWEST TOWER CRANE, ET, AL,

Respondent

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**BRIEF OF RESPONDENT**

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**ORIGINAL**

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## **BRIEF OF RESPONDENT**

### **I. IDENTITY OF THE RESPONDENT**

Respondent is Northwest Tower Crane Service, Inc. ("NWTC" or "Respondent"), who was one of many various third-party defendant subcontractors that was sued by third-party plaintiff Lease Crutcher Lewis ("LCL") as an allegedly responsible party with respect to the collapse of the Bellevue Tower 333 tower crane.

### **II. ASSIGNMENT OF ERROR**

Respondent NWTC disputes the Assignment of Error asserted by Appellant LCL and notes that LCL's claims have been independently dismissed by two trial court judges. Initially, Judge Trickey first dismissed LCL's claims in this IN RE TOWER CRANE COLLAPSE matter on April 2009. *CP 1135—1142*. A subsequent case based on the same facts, referred to as BRE PROPERTIES, was filed and summary judgment argued after the IN RE TOWER CRANE COLLAPSE matter. Due to a delay in the entry of the order of dismissal here, the latter BRE PROPERTIES matter was appealed before the IN RE TOWER CRANE COLLAPSE matter. There, trial court Judge Inveen also independently dismissed all claims against NWTC in August 2009. Both dismissals have been appealed by LCL. The IN RE TOWER CRANE and BRE PROPERTIES appeals were consolidated on June 10, 2010 under Cause No. 64199-9-1.

Respondent NWTC contends that the trial court presided over by Judge Trickey (and the trial court presided over by Judge Inveen that dismissed appellants' claims in the BRE PROPERTIES matter) did not abuse its discretion by granting summary judgment in favor of NWTC based on the fact that appellant failed to establish any material issues of fact sufficient to avoid dismissal. Two trial court judges have now determined that no issues of material fact exist sufficient to establish liability on the part of NWTC.

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

#### **A. Introduction**

##### **1. LCL and MKA Solely Responsible—Miscommunication on Part of LCL and MKA resulted in Grossly Under-Designed Crane Base**

Lease Crutcher Lewis (LCL), the general contractor, hired Magnusson Klemencic Associates (MKA), a structural engineering firm, to design a non-traditional steel crane base to support the tower crane utilized during construction of the Bellevue Tower 333 project (the Project). Due to a colossal miscommunication between the LCL and MKA regarding how to resist the tower crane's overturning moment, the steel crane base was designed to be much weaker than it needed to be, unless the tower crane was simultaneously supported by a tie-in brace connecting the tower crane's mast to a concrete building-core structure about five-stories above the crane base. However, no such five-story

building-core structure was constructed by LCL and no tie-in was installed connecting the crane to the building core. This catastrophic error was caused by the colossal miscommunication between LCL and MKA. As discussed in the Statement of Facts section below, LCL and MKA employees have testified that NWTC had no involvement in the LCL-MKA communications or miscommunications.

The immediate cause of the tower-crane collapse was a crack in the base due to repetitive cyclical loading upon a crane base that was too weak to support the loads imposed upon it without the support of the tie-in to the five-story building-core structure. The crack developed after the crane was put into operation. The crane was put into operation and used for nine weeks before the based failed and the collapse occurred.

The proximate cause of the collapse was the LCL-MKA miscommunication that resulted in the five-story concrete building-core structure not being constructed and a tie-in brace to the crane mast not being installed as required. NWTC was not required to be onsite, nor was it requested to be onsite, during the nine week period the crane was in operation and under the control of LCL. NWTC had no further contact after that point. There simply is no issue of material fact linking NWTC to the cause or proximate cause of the collapse. No reasonable jury would find otherwise.

**2. NWTC Warned LCL to Have an Engineer Inspect the Base: MKA Failed to Properly Evaluate**

On the day the crane was erected, the base made a strange “popping” noise. NWTC employees, who are union ironworkers, told LCL that it should have the crane base inspected and evaluated by the structural engineer who designed the crane base. Although NWTC and LCL concurred that the safest course of action was to finish erecting the crane so it would be balanced, NWTC explicitly instructed LCL that the base must be inspected by the designing engineer as soon as possible. As is well demonstrated in the Statement of Facts section below, NWTC employees are not engineers and had no knowledge of how the crane base was designed or supposed to function. The erection plans provided to NWTC did not indicate a supporting tie-in was to be installed. NWTC followed the plans it was given.

LCL followed NWTC’s recommendation and had MKA inspect the crane base two days later. However, MKA failed to notice that the supporting tie-in brace—that its design had anticipated would connect the crane mast to building structure—was not present. Incredibly, it failed to notice that the five-story concrete building-core structure that was supposed to support the crane by attachment via the tie-in didn’t even exist. LCL had failed to construct the five-story core of the building as

MKA's design required and MKA didn't even notice! Clearly, NWTC was not the cause or proximate cause of the collapse and its dismissal should be upheld.

**3. NWTC was Not a Cause or Proximate Cause of the Collapse**

LCL employees have testified that they had no complaints about the work performed by Respondent Northwest Tower Crane ("NWTC"), the crane-erection subcontractor. MKA employees have testified that they had no complaints about the work performed by NWTC. Plaintiffs' construction-management and construction-safety experts have testified they had no complaints about the work performed by NWTC. As demonstrated below, no fact witness or "qualified" expert has testified that NWTC caused, or was the proximate cause, of the tower-crane collapse. The claims against NWTC are merely premised upon attorney conjecture, which is not evidence sufficient to avoid summary-judgment dismissal.

**4. The Only Evidence is the Speculative and Unsupported "Expert Opinion" Testimony of Gary Campbell and the Speculation and Conjecture of LCL's Attorneys**

Appellant misrepresents to the court that "NWTC does not challenge the expertise or helpfulness of the opinions of LCL's crane expert Gary Campbell." *Appellant's Brief at 33*. This misrepresentation is patently false. Appellant is well aware of the fact that voluminous pages of written and oral argument submitted to two different trial court judges

have clearly established beyond doubt that NWTC challenges both the expertise and helpfulness of Mr. Campbell's alleged "expert" opinion. Moreover, NWTC twice moved to strike Campbell's testimony.

Disturbingly, appellant's brief frequently indicates that respondent does not oppose or does not contest certain facts or arguments. Respondent opposes such representations and informs this Court that the facts, testimony, documents, and argument below comprise the basis of its contention that the two summary-judgment dismissals were proper.

## **B. Procedural History**

### **1. Consolidated Lawsuits**

In the fall of 2006, a commercial complex was being constructed in Bellevue, Washington called the Bellevue Tower 333 project ("the Project"). *CP 52*. On November 16, 2006, the tower crane used in the construction of the Project collapsed causing the death of one individual and extensive property damage. *CP 52*. As a result, in April and May of 2007 four lawsuits were filed regarding the tower crane collapse by the Estate of Ammons (regarding an individual who was killed in the collapse), Brickman Civica, Intelligent Results, and Plaza 305 (regarding various property owners and affected businesses damaged by the collapse). These four plaintiffs sued only the general contractor, Lease

Crutcher Lewis (LCL), and the structural engineer, Magnusson Klemencic Associates (MKA). *CP 28*.

LCL brought five subcontractors into the suit via a third-party complaint: Bureau Veritas (BVNA); Caliper Inspections; Leibherr; Northwest Tower Crane (NWTC); and S&S Welding. *CP 40*. MKA named these five subcontractors and two others—Morrow Equipment Company and Ness Crane—as potential non-parties at fault. In response, the four plaintiffs amended their Complaints to protect against empty chairs, sued the seven subcontractors directly, and moved to consolidate their four actions. The cases were consolidated as IN RE TOWER CRANE COLLAPSE and assigned Cause No. 07-2-33136-1 SEA. The Honorable Judge Trickey became the assigned individual calendar judge. The four plaintiffs diligently prosecuted their cases. Approximately 40 experts and 40 lay witnesses were deposed. Extensive discovery was completed and metallurgical testing performed.

## **2. Case Scheduling Order and Disclosure of Experts**

The Case Scheduling Order for the consolidated cases was issued by Judge Trickey on April 9, 2008. *CP 1867*. It required LCL to disclose primary witness no later than November 3, 2008 and rebuttal witnesses no later than December 3, 2008. *Id.* LCL's Disclosure of Primary Witnesses did not identify any crane expert in general nor did it identify Gary

Campbell in particular. *CP 1873*. LCL's crane expert Campbell was not disclosed until December 3, 2008 in LCL's Disclosure of Rebuttal Experts. NWTC moved to strike expert Campbell for failure to comply with the case schedule order on January 12, 2009, and the court reserved ruling on the issue at the time. *CP 212*.

### **3. March 25, 2009: Summary-Judgment Hearing**

NWTC filed two motions seeking dismissal of the claims against it on February 23, 2009. LCL was the only party to oppose NWTC's motions. The first motion sought dismissal of the affirmative claims for construction-delay damages alleged by LCL based in negligence pursuant to the economic loss doctrine. That motion was granted on March 25, 2009. *CP 720*. LCL's appeal and assignment of error did not include the dismissal of LCL's affirmative claims for damages based on negligence and that order of dismissal should not be disturbed on appeal.

The second motion was for summary-judgment dismissal of any and all claims for negligence or breach of contract alleged against NWTC. LCL was the only party to oppose the motion. Judge Trickey indicated that the motion was "barely" denied. The only issue of material fact the court found was that one out of a handful of expert metallurgists, MKA's expert metallurgist John Barsom, stated he believed a five inch crack existed in the crane base on the day of erection. Even if all the other

metallurgists, including LCL's own metallurgist, disagreed, the jury could believe MKA's metallurgist Barsom rather than the others. If the jury believed a five-inch crack existed on the day of erection, then the court indicated they could believe NWTC should have noticed that crack when it erected the crane on the crane base. Judge Trickey stated:

So I think that there is a material question of fact under the contract whether or not there is sufficient inspection going on, as the crane was erected to see this five-inch crack. I think that LCL can rely on the MKA expert.

I think that [to] resolve all inferences in the favor of non-moving party that is enough to defeat the [NWTC] summary judgment, barely.

*RP dated March 25, 2009, p. 63, ln. 20 – p. 64, ln. 2. (Emphasis added.)*

At the time of the hearing, additional metallurgical testing was being conducted to scrutinize the unique and questionable opinion of MKA's expert metallurgist Barsom. NWTC requested, and was given, the right to file a motion for reconsideration if Barsom's opinion regarding the existence of a five-inch crack on the date the crane was erected changed after the testing was concluded. *Id. at p. 65, lns. 4-11.*

Additionally, after rendering its decision, the court also discussed the timelines of the disclosure of LCL's crane expert Campbell. Judge Trickey stated:

I am really hard-pressed to see [Campbell] as a rebuttal witness. I am not going to reach the issue of any kind of sanction for the trial. But, I have to say that I agree with

Northwest Tower [] Crane. It is almost incomprehensible to the court how the first thing that LCL wouldn't do is retain a tower crane expert, in a tower crane collapse case.

I think that the appropriate sanction here is to exclude his declaration for purposes of the summary judgment motion, reserving the issue of any further sanctions for trial, because there is obvious prejudice to the Northwest Tower [] Crane.

*Id.*, p. 64, *lns.* 5-17.

#### **4. April 20, 2009: Reconsideration Hearing Regarding Summary-Judgment**

The additional metallurgical testing conclusively demonstrated that the opinions of MKA's expert metallurgist Barsom were incorrect and that there was no five-inch crack in the crane base on the day the crane was erected. As a result, MKA withdrew Barsom as a testifying expert. Consequently, NWTC filed a motion for reconsideration. *CP 776*. To ensure the record was complete, NWTC also filed separate motions to dismiss claims against it premised in negligence and for breach of contract. *CP 1046; CP 1057*. Oral argument on these motions was heard the morning of April 20, 2009, the first day of trial, where Judge Trickey dismissed NWTC as follows:

We are back on the record in the Tower Crane matter. I wanted to take some time to think through my decision on Northwest Tower [] Crane Services' motion to reconsider the Court's denial of the summary judgment motion.

I think LCL was correct to a certain extent, when I denied the motion initially. I had focused on Mr. Barsom's position and the visibility, alleged visibility of the crack.

I didn't go through the other theories that were argued. So I think that all of them are properly before me now. In any event, summary judgment motions themselves are really interlocutory in nature. That is why we have CR 54(b), for example, that says that you have to certify something is final before it can be appealed.

Otherwise, it is essentially subject to [] modification, until such time as a judgment is entered or a claim is dismissed.

Having said that, with regard to the Barsom retraction or the [Mothershead] identification of Barsom -- however you want to characterize it -- I think that there is no evidence that now would permit any trier of fact to associate any visible crack with anything that Northwest Tower [] Crane did or didn't do.

I think that the negligence claim is properly dismissed, as a matter of law.

So to the extent that this is motion to reconsider that, that motion is granted.

I don't think that there is any evidence, any factual evidence of any other negligence involving Northwest Tower [] Crane, vis-a-vis by the claims by the plaintiffs in this case.

All of the negligence claims are dismissed.

With regard to the breach of contract issue, I am aware that Lewis [v.] Scott case. I have read the contract carefully.

LCL doesn't make arguments about interpreting and construing the contracts. But that must mean to me that there is some ambiguity in the contract for which there is a necessity for extrinsic evidence and how to interpret the contract.

When I reached that phase, there is no affirmative evidence that the allegation, the arguments of LCL about referring to WACs, or the load test, all of that, there is no affirmative evidence for which a trier of fact is to conclude that Northwest Tower [] Crane breached its contract.

Northwest Tower [] Crane sites from Campbell and Campbell goes the other way. I don't think that it is enough to make arguments that the contract should be construed a certain way to have it go to the jury.

I will grant both motions and dismiss Northwest Tower [] Crane.

*RP dated April 20, 2009, p. 38, ln. 13—p. 40, ln. 19 . (Emphasis added.)*

Thus, after reviewing the voluminous materials and multiple motions submitted by both parties, including the statements and opinions rendered by crane expert Campbell, the Court properly dismissed NWTC because there simply was no evidence supporting the claims alleged against NWTC. In fact, each of the seven subcontractors was dismissed on the merits by Judge Trickey with prejudice. The original defendants, LCL (the general contractor) and MKA (the structural engineer), were not dismissed. Consequently, LCL and MKA settled their claims with the first-party plaintiffs. As a result, the only claims remaining were LCL's construction delay or affirmative claims against MKA, which were eventually resolved short of trial.

## **5. Subsequent Actions**

In addition to the four consolidated lawsuits, two additional lawsuits were subsequently filed by BRE Properties (another property owner) and Travelers Insurance (subrogated interest regarding the cost of the damaged tower crane). BRE and Travelers both sued LCL, MKA, and a handful of subcontractors, including NWTC, directly. As it did in the IN RE TOWER CRANE COLLAPSE matter, LCL asserted claims against the subcontractors, including NWTC. Travelers dismissed its claims after NWTC and the other subcontractors were dismissed in the IN RE TOWER CRANE COLLAPSE matter, BRE Properties did not. Trial court Judge Inveen independently dismissed the claims of BRE Properties and LCL's against NWTC in August 2009. Both dismissals have been appealed by LCL. The court consolidated the IN RE TOWER CRANE COLLAPSE and BRE PROPERTIES appeals on June 10, 2010 under cause number 64199-9-1.

Very recently, four additional plaintiffs have filed suit against LCL and MKA just prior to the statute of limitations cutoff. None of these plaintiffs sued NWTC or any of the other subcontractors. LCL has asserted third-party complaints against NWTC in those four actions.

**C. Statement of Facts**

**1. Parties**

**a. First-Party Plaintiffs**

Matthew Ammon was at home in his apartment when the Project's tower crane collapsed and crushed him. Plaza 305 is a low-rise office building adjacent to the Tower 333 Project on the south. Intelligent Results was a tenant of the Plaza 305 building. Brickman Civica (Brickman) is the owner of the Civica Building which is located directly south of the Plaza 305 building. They sued LCL, the general contractor, and MKA, the structural engineer for damages sustained due to the tower crane collapse. *CP 28.*

**b. LCL: General Contractor**

LCL was the general contractor in control of the Tower 333 Project. After LCL was sued by the four plaintiffs, it asserted third-party claims against five third-party defendants: BVNA; NWTC; Caliber Inspection; S&S Welding; and Liebherr. *CP 40.*

**c. MKA: Structural Engineer**

MKA was the engineer of record and designer of the Tower 333 building. It was separately engaged by LCL to design the steel base that supported the tower crane. After MKA was sued by the four plaintiffs, MKA asserted affirmative defenses that identified seven potential at-fault

entities, including the five subcontractors sued by LCL plus Morrow Equipment Company and Ness Crane.

**d. Morrow: Crane Owner/Lessor to LCL**

Morrow owned the Leibherr manufactured tower crane and leased the tower crane to LCL. *CP 312-317; 318-320; 321-323 (Weber Decl.; Harr Decl.; Phinizy Decl.)* The tower crane was assembled on Saturday, September 9, 2006. *Id.* Morrow representative, B.A. Phillips, was overseeing the erection process. *Id.* Morrow provided the plans and crane configurations to NWTC employees, who are ironworkers, to assemble the crane according to the plans. *Id.* Morrow (or a crane-operator subcontractor) operates the crane. NWTC does not operate the crane. *Id.*

**e. NWTC: Crane Erection Company/Ironworkers**

NWTC is a construction subcontractor that primarily specializes in erecting and dismantling tower cranes and manlifts. *CP 312 (Weber Decl. at ¶ 3.)* NWTC was not originally sued by the consolidated plaintiffs. The first-party plaintiffs subsequently sued NWTC (and the other third-parties) to prevent the possibility of empty chairs at trial.

NWTC is a construction subcontractor that provides the labor necessary to assemble and disassemble tower cranes. It does not design, manufacture, maintain, own, lease, and generally does not even transport the tower cranes it assembles. It merely puts them up and takes them

down pursuant to the plans provided by the hiring entity (here LCL) and the owner of the crane (here Morrow). *CP 312-317 (Weber Decl. at ¶ 4.)*

With respect to the Tower 333 project, NWTC was hired by LCL to erect and dismantle the tower crane intended to service the project pursuant to the plans provided by LCL and the crane owner, Morrow. *CP 885; 312-317 (NWTC Subcontract at p. 1, ¶ 3.; Weber Decl. at ¶ 6-7).* NWTC did not own, design, manufacture, lease, or maintain the subject crane owned by Morrow. The plans called for the tower crane to be erected onto a custom steel base. NWTC was not hired, and did not assist in the design, manufacture, or maintenance of the steel base foundation designed by MKA. It did not even know the identity of the structural engineer, MKA, at the time. *CP 312-317 (Weber Decl.)* NWTC was not hired, nor is it licensed, to provide any engineering or other design services. *Id.* NWTC was not hired, nor is it licensed, to provide any surveying services. LCL had in-house surveying crews that performed the survey measuring to ensure that the base was level and the tower mast was plumb. *Id. at 314.*

LCL and its design and manufacturing professionals are responsible for the crane base. NWTC is responsible for assembling the crane on the base provided. *CP 312-317; 324-325; 318-320; 321-323 (Weber Decl.; McKenney Decl.; Harr Decl.; Phinzy Decl.)* LCL's Grant

Willman testified that LCL is responsible for providing NWTC with a crane base to assemble the crane onto and to make sure the base is ready for NWTC. CP 354-363. NWTC's scope of work is to assemble the crane upon the base LCL provides. CP 360 (*Deposition Transcript of Grant Willman, hereinafter "Willman Dep." at pp. 152-153:11-25 and 1-25.*)

**2. Design of Tower Crane Base for the Tower 333 Project**

**a. LCL and MKA Decided to Use an Uncommon Steel Frame Base**

Generally, tower cranes are erected upon concrete bases. Two previous attempts to develop the site had been started and stopped such that several floors of an underground garage were present when the subject Project began. LCL determined that the location of the previous concrete crane base would be insufficient for the work required on the new building plan, thus, a new location for the tower crane was needed. The new location was on top of the floors of the underground garage, which were too weak to support the weight of a traditional concrete base and a tower crane. CP 312-317; 318-320; 321-323 (*Weber Decl.; Harr Decl.; Phinizy Decl.*)

**b. Miscommunication between LCL and MKA**

MKA and LCL had a brainstorming session on June 15, 2006. LCL's Grant Willman was present along with MKA's structural engineer Doug Loesch. They decided MKA would design an H-shaped steel crane

base on the top deck of the existing parking structure, which would be connected into the building's vertical support columns that were strong enough to support the weight of the crane. This plan spared the expense of demolishing and replacing the parking structure. NWTC had nothing to do with the design of the crane base, was not present at this meeting, and was not requested to attend or provide input regarding the design of the crane base. *CP 312-317; 318-320; 321-323 (Weber Decl.; Harr Decl.; Phinzy Decl.)*

A design idea called "Alternative F" was discussed at the June 15, 2006 meeting. *CP 365-370 (Alternative F)*. It called for the strength of the crane base to be supplemented by an initial tie-in brace between the crane mast and an adjacent structure, such as the building's concrete elevator core, approximately five stories above the crane base. *Id.* The existence of the tie-in brace would eliminate the crane's "overturning moment" such that the base would not have to resist the overturning forces. Thus, the base itself could be much weaker if a tie-in were utilized than it would need to be without one. LCL alleges that the Alternative F design was rejected because the building core was not high enough to provide a tie-in position for the crane in its initial assembly position. *CP 356 (Willman Dep. at p. 62:1-25)*. At the same time, however, LCL's Grant Willman admits that had he been more clear in his memo confirming the June 15, 2006 meeting, perhaps the miscommunication would not have occurred. *CP 362 (Willman Dep. at pp. 158-159:16-24 and 1-14)*.

MKA's Doug Loesch stated that based on the June 15, 2006 design meeting and his communications with LCL, he believed the building core would be built up by LCL such that Alternative F would be implemented when the crane was erected. *CP 372-387*. Therefore, he designed a steel frame base assuming that the tower crane would exert no overturning moment on the base due to a tie-in connection being installed between the crane tower and a five-story, concrete, building-core structure. *CP 386-387 (Loesch Dep. at pp. 397-398:16-24 and 1-4)*.

Such a base could be designed to be weaker than a base that would not have the benefit of supplemental support from a tie-in brace. Mr. Loesch essentially contends that no one at LCL informed him that the tie-in would not be implemented on the tower crane in its initial assembly position. *CP 384 (at pp. 302-303:23-25 and 1-2)*. Consequently, MKA designed a crane base that required the installation of an initial tie-in brace connecting the tower crane to a five-story, concrete, building-core structure in order to properly support the subject tower crane.

**c. Erection Plans Indicated Crane was to be Freestanding and Without an Initial Tie-In Brace**

LCL's Grant William testified that the plans provided to NWTC for the erection of the crane, and the bid provided by NWTC to LCL, all indicated that the initial configuration of the crane would be "free standing on foot anchor" and without the implementation of any tie-in brace when erected. *CP 359-360 (Willman Dep. pp. 148-151:14-25, 1-25, 1-25, and*

1-25.) These were the plans that were distributed to NWTC by LCL and the crane's owner, Morrow. *Id.* NWTC erected the crane according to the plans provided. *CP 312 (Weber Decl. at ¶ 4.)*

NWTC had no idea an initial tie-in brace to a five-story concrete building-core structure was contemplated by the structural engineer, Doug Loesch at MKA; it only knew what the plans said. If the plans had called for an initial tie-in configuration, a completely different assembly procedure would have been required, a different bid would have been written, assembly would have taken two days rather than one, and NWTC would have had to charge LCL more money to do the job. *CP 312 (Weber Decl. at ¶ 15).* And, most glaringly, NWTC would have noticed that there was no five-story, concrete, building-core structure to attach the tie-in to. *Id.* LCL's Willman is not aware of anyone ever providing NWTC with the Alternative F plans. *CP 360 (Willman Dep. p. 151:11-13.)*

**d. LCL and MKA Employees Confirm NWTC Not Involved with Design**

LCL's Grant William testified that NWTC did not have anything to do with the design of the base or the construction of the base. *CP 360 (Willman Dep. p. 153:8-25.)* MKA's Doug Loesch confirmed that NWTC was not involved in designing the crane base. *CP 374 (Loesch Dep. at p. 16:18-20.)* Further, Mr. Loesch testified that he did not "have any criticism or complaint whatsoever about the work performed by [NWTC]." *Id. at p. 15:11-15.* Assistant engineer Humphrey also testified she had no criticism of NWTC. *CP 393 (Humphrey Dep. p. 279:9-14.)*

**e. Experts Testify that NWTC Not Involved or Responsible for Miscommunication between MKA and LCL**

Allan Hauck is the department head of the Construction Management Department at California Polytechnic State University. He was jointly retained by the first-party plaintiffs in the IN RE TOWER CRANE COLLAPSE matter. He testified that he believed the MKA-LCL miscommunication caused the crane collapse. He further testified that, “I do not believe there was any contribution from NWTC to that misunderstanding” (the MKA-LCL miscommunication). *CP 403 (Hauck Dep. p. 80:4-14.)* Expert Hauck further testified that he believed NWTC was not responsible for the crane collapse at the Bellevue Tower 333 Project. *Id.* (at. 81:17-20).

Construction-safety expert Kurt Stranne was jointly retained by the Plaintiffs in the IN RE TOWER CRANE COLLAPSE matter. Expert Stranne did not have any opinion that NWTC violated any duties or standards of care. *CP 407 (Stranne Dep. p. 72:5-14.)* Similarly, LCL’s construction expert, John Putnam, did not have any opinion that NWTC violated any duties, standards of care, or contributed to the cause of the crane collapse. *CP 413 (Putnam Dep. pp. 154-155:17-25 and 1-2.)*

**3. NWTC’s Pre-Crane-Erection Involvement in the Tower 333 Project**

**a. “Base Tower” used as Template for Steel Base Two Weeks before Day of Erection**

The “base tower” is the first mast section of the tower crane installed on the “crane base.” The names “base tower” and “crane base” can be confusing. The subject base tower was manufactured by Liebherr, stands approximately 38 feet tall, and was painted yellow. It is separate and distinct from the steel base designed by MKA, which is shaped like an “H” and is reddish in color. *CP 312 (Weber Decl. at ¶ 8.)* The base tower was delivered to the job site while the MKA designed base was under construction to ensure the bolt-hole pattern of the base tower would properly match the bolt-hole pattern being constructed on the steel base.

**b. NWTC Was Not Responsible for the Crane Base**

NWTC had no involvement in the design, manufacture, or installation of the crane base. *CP 360; 418; 430; 435 (Willman Dep. p. 153:3-25; Kragseth Dep. p. 157:8-20; Akre Dep. pp. 94-95:20-25 and 1-17; Weber Dep. p. 32:6-19).* NWTC was not responsible to check the welding on the crane base foundation. *CP 450 (Hagwood Dep. p. 146:21-25).* NWTC was not responsible for determining whether additional inspection or testing of the crane base was required after the tower was assembled. *CP 419 (Kragseth Dep. p. 159:12-16).* LCL employees testified that LCL was responsible for constructing the tower crane base frame, sequencing and coordinating the design, construction, and inspection of the base foundation. *Id. (at pp. 156-157:7-25 and 1-19).*

**c. NWTC Had Shims Manufactured based upon LCL's Measurements to Ensure its Base Tower was Level**

After the manufacture of the crane base was completed, LCL's on-site survey engineers measured or "shot the elevation" to make sure it was level. *CP 443; 420 (Hagwood Dep. p. 121:8-25; Kragseth Dep. p. 164:1-19)*. The data from the LCL survey engineers was then used to determine the thickness of shims needed for the crane base. *CP 420 (Kragseth Dep. p. 164:13-19)*. The information was provided to NWTC who had the shims manufactured by a fabrication shop. *CP 438; 312 (Weber Dep. p. 47:3-24; Weber Decl. at ¶ 9)*.

NWTC employee Eric McKenney installed the shims two days before the crane was erected and adjusted them pursuant to the instruction of the LCL surveyors until the base tower was plumb. *CP 324-325 (McKenney Decl.)* After NWTC installed the shims, the LCL surveyors determined that the shims were plumb and looked "good." *CP 420-421 (Kragseth Dep. pp. 165-166:1-25 and 1-11)*. NWTC was not responsible for determining whether the base tower was plumb. *Id. (at p. 166:12-20)*. NWTC does not employ surveyors or structural engineers and was not responsible for taking measurements of the crane base. *CP 448; 418 (Hagwood Dep. p. 140:23-25; Kragseth Dep. p. 157:12-20)*.

**4. Tower Crane Assembly on September 9, 2006**

**a. Erection of the Mast of the Tower Crane**

The tower crane was assembled on Saturday, September 9, 2006. The crane was owned by Morrow. Its representative, B.A. Phillips, was

overseeing the erection process. Morrow provides the plans and jib configurations and NWTC assembles the crane according to the plans. NWTC employees are union ironworkers. They are not surveyors or engineers. NWTC had no engineer on its crew or staff. NWTC doesn't operate the crane. *CP 312-317; 318-320; 321-323 (Weber Decl.; Harr Decl.; Phinzy Decl.)*

The NWTC crew divided into two groups. One group worked on the ground to unload the crane pieces from the delivery trucks and to do preliminary assembly. The other was on the crane and attached the preassembled pieces to the crane as it was assembled. *Id. (Harr Decl.; Phinzy Decl.; Weber Decl.)* After the crane's mast was erected, but before the counter jib was installed, LCL's surveying crew "shot" the tower again to ensure that it was plumb. *CP 460-462 (Hagwood Dept. of L&I Transcript pp. 566-568:2-25, 1-25, and 1-4.)*

**b. Rotation of Counter-jib and Machine Deck Caused a Loud 'Popping' Noise to Occur at Crane Base**

Once the counter jib and machine deck were installed, the crane was rotated 180 degrees to allow the front jib to be raised into position and attached. While the crane was rotating a loud popping sound was heard at the base. LCL's Kyle Kragseth ordered the NWTC team to come down

from the crane, and halt the assembly. *CP 421 (Kragseth Dep. p. 169:10-14.)*

**c. Inspection of the Crane Base after Popping Noise**

LCL was the general contractor and was responsible for the safety of the entire job site. *CP 421 (Kragseth Dep. p. 169:18-25.)* LCL's Jon Hagwood was in charge that day. Representatives from Morrow, LCL, and NWTC gathered around the crane base and visually inspected the base. *CP 446 (Hagwood Dep. pp. 130-131:5-25 and 1-17.)* LCL Employee Craig Harr stated that the crane base was so "odd" that no one at LCL knew how it was going to react. *CP 479 (Craig Harr Dep. pp. 126-127:2-25 and 1-4.)* Various workers looked at the steel base and saw slip joints, grout pads, and some cracked plywood that had been used to build a form for the pouring of the grout pad. *CP 446 (Hagwood Dep. pp. 130-131:5-25 and 1-17.)* The welds appeared to be intact and did not appear to have any defects when inspected by LCL's Craig Harr. *CP 319; 322; 479 (Jeff Harr Decl. at ¶ 9; Phinizy Decl. at ¶ 10; Craig Harr Dep.) 127:2-4.)*

**d. LCL States That the Base was "Stamped" by an Engineer and Purposefully Designed to Deflect**

There was concern regarding whether the crane base was designed properly. Dan Schaefer from NWTC spoke to who is assumed to be Jon Hagwood (a large African-American LCL site superintendent). Schaefer expressed concern that the crane base had deflected. Another NWTC employee, Chad Peterson also expressed his opinion that something seemed amiss. *CP 484 (Schaefer Dep. p. 35:1-25.)* Jon Hagwood told

them the base was specifically designed to deflect. *Id.* (at p. 33:2-19). He told Schaefer that, “We went to school for this and we know what were doing.” Schaefer felt Hagwood was implying they were stupid. *Id.* (at p. 35:18.24). Hagwood told the NWTC employees that the base had been designed by the engineer to move and that it was functioning as designed. CP 322; 483 (*Phinizy Decl.* at ¶ 10-14; *Schaefer Dep.* p. 33:2-19.)

Another NWTC employee, William Phinizy, had a further conversation with a female LCL employee with blonde shoulder-length hair, about 5’6” tall, and average weight. He does not recall her name or title, but she appeared to be some sort of a design professional. He told her, as he had told Jon Hagwood, that he had concerns about the base deflection. She told Mr. Phinizy that she gets paid \$150,000 per year to design this stuff and that LCL knows what it’s doing. CP 323 (*Phinizy Decl.* at ¶ 15.)

The Morrow representative, B.A. Phillips, was present at the base when Dan Schaefer demanded LCL have an engineer come look at the base before the crew re-ascended the crane. CP 497 (*Phillips Dep.* p. 60:14-21). A thin Caucasian man with a white hard hat, who Phillips assumed was an engineer, examined the base while they ate lunch. CP 493 (at 33-34:20-24). After lunch LCL employee Craig Harr told them that “nothing was found to be wrong” and they went back to work. CP 494 (at 39-40:23-11).

**e. LCL Surveyors Measure Crane Base after Popping Noise**

LCL surveyors measured the crane base after the popping noise. NWTC employee Gator Rasmussen assisted the LCL surveyors by holding a ruler in place as instructed. LCL assistant superintendent Craig Harr observed the process and states there was an elevation difference of one inch from beam to beam. *CP 470 (Craig Harr Dep. p. 54:1-7.)* Craig Harr knew MKA had engineered the base but did not attempt to call its engineers on a Saturday. He felt this task was Jon Hagwood's responsibility and left it to Hagwood to call MKA. *CP 477 (at 118:12-20).* LCL's Jon Hagwood did call the crane base designers, structural engineers, MKA, to come and inspect. Hagwood testified that he did not expect NWTC employees, workers who were not structural engineers, to verify that MKA had designed the crane base properly. *CP 448 (Hagwood Dep. p. 141:5-9.)*

**f. LCL's Hagwood Speaks with NWTC's Dave Weber: LCL Instructed to have Crane Base Inspected by Engineer**

NWTC employees Jeff Harr and Dan Schaefer called NWTC president Dave Weber, to advise him of what happened. Mr. Weber asked who was present, what had been found, and what had been decided. LCL's Jon Hagwood and NWTC's Dave Weber then spoke on the phone. *CP 446; 312-317 (Hagwood Dep. pp. 131-132:24-25 and 1-24.; Weber Decl.)* Hagwood confirmed the base had been designed by an engineer.

They agreed that the crane was in a precarious position because it was very unbalanced. Attaching the front jib to the crane would serve to balance out the crane. Dave Weber told Jon Hagwood that he should call the engineers to inspect the base. *CP 312-317 (Weber Decl.)*

**g. Jon Hagwood Made the Decision to Finish Assembly to Balance Crane and Called MKA to Investigate**

LCL's site superintendent Jon Hagwood gave the orders to continue assembly of the crane, because with the weight of the counter-jib pushing the crane to lean to one side, the crane was in its most vulnerable position of falling down at that point. *CP 476; 423; 446 (Craig Harr Dep. p. 114:9-24; Kragseth Dep. pp. 174-175:4-25 and 1-14; Hagwood Dep. pp. 133:6-17.)* NWTC's Dave Weber did not have authority over the Project, and it was Jon Hagwood who supervised the crane assembly process at that point. *CP 476 (Craig Harr Dep. pp. 116-117:16-25 and 1-20.)* Additionally, Dave Weber made no representation about whether the base was adequate before or after the popping noise. *CP 477 (Craig Harr Dep. p. 118:6-11.)*

That same day, immediately after the crane was assembled, Jon Hagwood called Gretchen Humphrey, an MKA assistant structural engineer who was working with lead structural engineer Doug Loesch on the crane base design team to discuss the loud "pop" which emanated from the crane base. *CP 390 (Humphrey Dep. p. 261:6-13.)* Mr. Hagwood

requested that someone from MKA come and inspect the crane base the following week. *CP 423 (Kragseth Dep. p. 177:6-25.)*

**5. Activity after Tower Crane Assembly**

**a. MKA's Visual Inspection of the Crane Base After the Popping Noise**

At the request of LCL, MKA's Doug Loesch visually inspected the base the following week when he came to visit the site. *CP 423 (Kragseth Dep. p. 177:6-25.)* Mr. Loesch never took any measurements of the base to see if the base comported with the calculated deflections. *CP 381 (Loesch Dep. p. 281:12-18.)* Also, LCL did not conduct a comprehensive crane-base inspection. *CP 423-424 (Kragseth Dep. pp. 176-179:20-25, 1-25, 1-25, and 1-8.)* MKA's Gretchen Humphrey told Kyle Kragseth that the base appeared normal and told LCL to repair the areas around the crane base where the grout had been broken on the day of assembly. *Id.* Incredibly, Mr. Loesch did not notice that there was no "Alternative F" tie-in brace connected to the crane and that there was no five-story building core to which the tie-in brace even could be attached. *CP 377-378 (Loesch Dep. pp. 212-214:16-25, 1-25, and 1-16.)*

**b. Morrow's Load Testing and Certification of the Crane**

Morrow conducted a load test two days after the crane was erected. *CP 473 (Craig Harr Dep. pp. 104:19-21.)* NWTC's duties were simply to attach weights to the hook of the crane as directed by Morrow's technician. *CP 413 (Putnam Dep. pp. 155-156:3-25 and 1-10.)* Morrow

and LCL certified the crane for operation. B.A. Phillips signed for Morrow and Craig Harr signed for LCL. *CP 473; 487-490 (Craig Harr Dep. pp. 104-105:22-25 and 1-9.; Morrow Crane Equipment Certificate)*. NWTC was not asked to sign the crane-certification form; only Morrow and LCL were required to sign. *Id.* Craig Harr understood the Certificate to mean that the load test had been performed to a specific standard with a Morrow technician on-site performing the test. *CP 473 (Craig Harr Dep. p. 105:14-17.)* He also read and understood the purpose of the Certification before he signed it and stated he would have asked Jon Hagwood for clarification if he didn't. *Id. (at p. 105-106:18-25 and 1-8)*.

Paragraph 3 of the Certification applies to stationary cranes. It requires the lessee's representative to confirm that foundations were adequately installed and base section leveled. B.A. Phillips indicated that LCL was the lessee. *CP 500-501 (Phillips Dep. pp. 85-86:2-25 and 1-2.)* Even though the base was made of steel rather than concrete, Phillips indicates LCL still needed to confirm it was adequately installed and level. *Id.*

**c. Crane Usage for Nine Weeks**

After the day of assembly, Jon Hagwood never followed up with NWTC regarding MKA's investigation of the crane base after the loud popping noise because there was no concern with the crane base and thus nothing to report. *CP 447 (Hagwood Dep. pp. 137:2-21)*. If MKA had told Mr. Hagwood that NWTC needed to do some additional work or modification to the crane because of the condition of the steel foundation,

Mr. Hagwood would have told NWTC to do it. *CP 448 (at p. 138:7-12)*. Mr. Hagwood did not call NWTC to come back and do any work or modification to the crane after speaking with MKA about their visual inspection. *Id. (at p. 138:13-22)*. After the crane was assembled NWTC left the site and had no responsibility to measure the base or conduct testing. *CP 450 (at p. 147:11-18)*. The crane was used for nine weeks before it collapsed due to wear and tear on the crane base because the crane base required the support of a tie-in brace to a five-story, concrete, building-core structure in order to function properly. NWTC was not required to be onsite, nor was it requested to be onsite, during the nine week period the crane was in operation and under the control of LCL. LCL and MKA were the ones who discussed the Alternative F plan regarding the five-story, concrete, building-core-structure tie in. None of the subcontractors, including NWTC, were ever privy to such discussions or information. *CP 312-317; 318-320; 321-323 (Weber Decl.; Harr Decl.; Phinzy Decl.)*

**6. LCL Employees Testify NWTC did Nothing Wrong and Did Not Violate its Contractual Duties**

LCL's Senior Project Superintendent Jon Hagwood testified that he had no complaints with the work performed by NWTC. *CP 450 (at p. 147:19-24)*. He stated, "I have a lot of respect for Weber and his crew. I think they are professionals in the industry. I've worked with them for years and think they are true professionals." Jon Hagwood's replacement, Scott Akre, testified that he was not aware of any manner in which

NWTC's work did not comply with its contract. *CP 429 (Akre Dep. p. 92-93:9-25 and 1-22.)* He further explained that if NWTC's work did not comply with its contract, he would have notified NWTC in a writing that identified any non-conforming issues. This did not occur. *Id.*

**7. Contract Documents**

**a. LCL-NWTC Contract**

The LCL-NWTC subcontract describes NWTC scope of work as follows:

Provide all erect and dismantle of Tower Crane per the attached quote by Northwest Tower Crane Service, Inc.

*CP 1010 (NWTC contract paragraph 3.)*

The LCL-NWTC subcontract also contains language applicable to whichever subcontractor signs the form contract provided by LCL. The boilerplate language located at page 5, paragraph K of the subcontract is limited to each subcontractor's specific scope of work as follows:

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, peace, tests, inspections, and privileges required in the prosecution of its work, except that the General Building Permit only will be obtained and paid for by others. Subcontractor shall request, coordinate, and attend all required inspections.

*CP 1014 (NWTC-LCL Contract, p. 5 of 17) (Underline added.)*

**b. LCL-Morrow Contract**

The Morrow-LCL contract states:

Morrow requires a Service Technician to be present during the erection, climbing, dismantlement, and retorquing. Morrow will provide a technician at the rate of \$1000.00 per ten (10) hour day, on straight time only.

*CP 988 (Morrow-LCL contract at MOR 004622.)* Morrow technician B.A. Phillips testified that a Morrow service technician, such as himself, performs the pre-operational test. *CP 964-969.*

**8. Additional Insured Endorsement**

NWTC did, in fact, name LCL as an additional insured on its commercial general liability policy. *CP 1839-1842 (Certificate of Liability Insurance endorsement).*

**IV. AUTHORITY**

**A. Standard of Review**

A *de novo* standard of review is applicable for review of a summary-judgment dismissal. However, summary judgment should be denied only “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Young v. Key Pharmaceuticals, Inc., 112 Wn. 2d 216, 770 P.2d 182 (1989). LCL may not rest upon mere allegations, but must instead set forth specific facts showing the existence of a genuine issue for trial. CR 56(e); Ruffer v. St. Frances Cabrini Hosp., 56 Wn. App. 625, 628, 784 P.2d 1288. A “fact” is a reality rather than

supposition or opinion. Grimwood v. University of Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 517 (1988). Appellant cannot rely on speculation but must assert specific facts to defeat summary judgment. Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wash. 2d 1, 13, 721 P.2d 1 (1986).

Here, no facts have been established that NWTC breached its contract, acted negligently, or was the cause or proximate cause of the crane collapse. Two trial-court judges have now dismissed Appellant's claims against NWTC with prejudice upon motion for summary judgment. First, Judge Trickey dismissed NWTC in the instant consolidated IN RE TOWER CRANE COLLAPSE matter. *CP 1135*. Second, Judge Inveen dismissed NWTC in the subsequent matter. There simply are no issues of material "fact." The suppositions and opinions of Appellant's attorneys, in the absence of material fact, are insufficient to defeat a motion for summary judgment.

## **B. Negligence**

### **1. Legal Standard**

In a negligence action, the plaintiff must prove the: (1) existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. Degel v. Majestic Mobile Manor, Inc., 129 Wn. 2d 43, 48, 914 P.2d 728 (1996). Negligence is the failure to exercise reasonable or ordinary care; "that degree of care which an ordinarily careful and prudent person

would exercise under the same or similar circumstances or conditions.”

Gordon v. Deer Park Sch. Dist. No. 414, 71 Wn. 2d 119, 122, 426 P.2d 824 (1967).

**2. No Evidence that NWTC had a Tort Duty to Perform a 360 Degree Test—LCL’s Expert Campbell Testified NWTC Not a “Qualified Person”**

There is no evidence that NWTC was required to perform a 360-degree load test under either: (a) any standard of care applicable to Washington State tower-crane erectors; or (b) the LCL-NWTC subcontract. The only “evidence” LCL has provided is the “cherry picked” and misstated declaration and deposition testimony of its crane expert Gary Campbell. To the contrary, however, when cross examined at his deposition Mr. Campbell actually testified that: (1) NWTC was not responsible for the crane base, but only the tower crane itself that sits above the base; (2) NWTC was not a “qualified person” under the applicable ASME B30.3B-2004 standard such that the 360-degree load-test requirement did not apply to NWTC; (3) the 360-degree load test was the joint responsibility of LCL and Morrow; and (4) ultimately, he “can’t say that [NWTC] were or were not” responsible for the 360-degree load test. *CP 1095-1103 (Campbell Dep.)*.

First, Campbell’s transcript shows he admits that NWTC was not responsible for anything below the first section of the tower crane’s mast (i.e. the crane base) other than ensuring that crane was properly bolted to the crane base.

Scheer: ... If Mr. Wiethorn's opinion was that Northwest Tower Crane had an obligation to make sure the base section was properly affixed to the steel foundation, and then responsibility from that point up, above that, would you agree with Mr. Wiethorn on that?

Campbell: I would.

Q Is there anything else that you think Northwest Tower Crane had responsibility for below the base section other than making sure that it was properly affixed to the steel foundation?

A No.

*CP 1096 (Campbell Dep. at p. 19:11-23.)* Consequently, Campbell agrees that NWTC is only responsible for the yellow tower crane that sits above the crane base, not the red crane base beneath the yellow tower crane.

Second, Campbell was clear that the party responsible for the 360-degree load test would have to be a "qualified person" as follows:

Scheer: Who's responsible under the code for doing that test?

Campbell: The, the qualified person.

*CP 1098 (Id. at pp. 86:22-87:4.)* Upon further questioning, Campbell also admitted that NWTC would not be a "qualified person" under the ASME B30.3 standard as follows:

Scheer: What about if there's a deflection limit or deflection criteria for a non-standard or asymmetrical frame?

Campbell: I think that's where we're in a gray area in who looks at things like that.

Q ... as an expert in this case, would you agree that a qualified person under that standard would be required to know what the deflection limits and criteria are in order to be a qualified person under the standard?

A Yes.

Q Dave Weber didn't know what the deflection limits and criteria were; did he?

MR. DYNAN: Object to the form. Assumes facts not in evidence.

A I don't know that he did. I have not seen that he did.

Q Are you aware of anybody providing him with deflection limits or deflection criteria for the MKA designed steel frame base for that tower crane?

A No, I don't.

*CP 1102-1103 (Id. at pp. 173:1-176:6.)* Here, LCL has provided no evidence that anyone at NWTC was ever given any information regarding the crane base's deflection criteria or limits provided by Morrow to MKA.

Third, when questioned by counsel for Plaintiff Brickman Civica, Campbell testified that it was LCL and Morrow who were responsible for the 360-degree load test:

Anderson: And you would agree that that is a joint responsibility of both Morrow and Lease Crutcher Lewis; correct?

Campbell: I, I do.

*CP 1100 (Id. at p. 100:11-17.)*

Fourth, Campbell ultimately admitted he has no valid expert opinion on the issue:

Q Does that give you any indication as to who's responsible for performing the test and certifying the test?

A Probably more so Morrow. ...

Q Do you have an understanding of what Northwest Tower Crane's responsibility was for that testing protocol, what their actual job was?

A Probably to provide the test weights and assist in the rigging of those weights.

Q To attach them to the hook; right?

A Correct. ...

Q Are you aware of any other responsibility that Northwest Tower Crane had for that lifting and testing process?

A No. ...

Q Can you agree with me, sir, that Northwest Tower Crane was not responsible for certifying the test of that crane?

MR. DYNAN: Objection to the form. Been asked and answered.

Q Go ahead and answer.

A I can't say that they were or were not.

Q Okay. If you think they had any responsibility for certifying that test, I want you to show me what you're looking at or what you're thinking about or what regulation that you say that the erector whose responsibility it was to attach weights that they were instructed to attach to that crane, was otherwise responsible for that certification of the test. Is there anything you can point to that says they're responsible for that?

A No, I can't.

*CP 1098-1099 (Id. at pp. 87-90:all lines) (Emphasis added).*

Thus, LCL's crane expert's actual testimony is that there is no support for the opinions in his declaration. LCL's statements and representations to this court regarding the veracity of its expert's declarations is suspect. Mr. Campbell simply cannot support the opinions that appellant's attorneys attribute to him.

**3. LCL Argument regarding 360-Test is a Red Herring: LCL Actually Measured the Crane Base Deflected on the Day of Erection**

LCL again misrepresents facts to this court when it says "as a result, there were no measurements as to whether the crane foundation was "displaced or distressed" in its most vulnerable conditions..." *Appellant's Brief at 26*. To the contrary, LCL's assistant site superintendent Craig Harr testified that LCL's own surveying crew measured the deflection of the crane base on the day of erection, which is when a tower crane is in its

most vulnerable condition. Mr. Harr observed the process and stated there was an elevation difference of one inch from beam to beam. *CP 470 (Craig Harr Dep. p. 54:1-7.)*

The argument regarding the failure to perform a 360-degree test is a red herring because LCL had all the deflection measurement information it needed on the day of erection. In fact, it had all the information a 360-degree test would have provided before MKA—the “qualified person” with knowledge of the relevant deflection criteria and limits—arrived to perform its crane-base inspection two days later.

ANSI B30.3-1990 Chapter 3-1 states:

After erection the structural support or foundation to which the crane is attached shall be tested before placing the crane in service... 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.

Consequently, the irrefutable fact is that: (1) before placing he crane into service measurements were taken regarding the "displaced or distressed" position of the tower crane when it was in its most vulnerable condition on the day of erection; (2) LCL's own surveying crew measured and recorded the displacement; (3) LCL, MKA, and Morrow were the “qualified persons” who had knowledge of the applicable deflection criteria and limits; (4) NWTC did not have any knowledge regarding the applicable deflection criteria and/or limits such that it was not a “qualified person”; (5) NWTC repeatedly instructed LCL to have its engineers (i.e. “qualified persons”) inspect and evaluate the base as soon as possible;

(6) MKA evaluated the crane base as required by ANSI B30.3-1990 Chapter 3-1 and advised it was functioning properly; and (7) LCL did not notify NWTC of the results of MKA's evaluation because there was nothing to report.

Therefore, it is clear that there are no issues of material fact indicating that NWTC breached any duty of care or that it caused the tower crane collapse. The true cause of the collapse was the miscommunication between LCL and MKA regarding the fact that the crane base required a five-story, concrete, building-core tie-in brace. The miscommunication continued when LCL failed to inform MKA regarding the deflection criteria measurements it had taken when MKA evaluated the crane base two days later. LCL had not told NWTC of the identity of the structural engineering firm, MKA. Incredibly, MKA failed to notice that the requisite five-story, concrete, building-core tie in was not present when it evaluated the crane base! Judge Trickey and Judge Inveen both clearly recognized this when they independently dismissed NWTC with prejudice upon its motions for summary judgment.

**4. No Evidence that NWTC's Recommendation to Install the Jib after "Popping" Noise Constituted Negligence: LCL's Expert Campbell testified such a Recommendation was "Discretionary"**

Appellants provide no material facts that NWTC violated a tort duty when it recommended that the jib be assembled to balance the crane after the "popping" noise occurred. In fact, LCL's own expert, Gary

Campbell, testified that NWTC's recommendation was "discretionary" as follows:

Scheer: But we certainly agree, or you would agree with me that you need to either balance it or take it down so that you don't have a huge overturning moment imposed on the base?

Campbell: That's absolute. You could not leave it the way it was.

...

Q It's a discretionary decision; isn't it?

A Sure.

Q -- who makes the call on that? The guy erecting the crane; right?

A Usually the tech or erection foreman, the guy who's up there that's comfortable or not with what he's doing. ...

Q What you're saying is they're both hazardous, they both have hazards, they both have dangers, correct?

A Absolutely.

Q And they both have benefits?

A Absolutely.

Q It's a discretionary call to the person in the field and whoever's in charge of making that decision what's best under the circumstances?

A Yes.

*CP 1097; 1101-1102 (Campbell Dep. at pp. 76:22-77:14 and pp. 169:16-172:16.)*

Critically, although Campbell says that he would have disassembled the counter jib, he does not testify that the decision to continue to assemble the crane violated any standard of care. His criticism comes from the fact that he believes MKA "may" have done a better job of inspecting the crane base if the jib and counter jib were not attached when it came to inspect. This is the quintessence of inadmissible speculation.

There is no evidence whatsoever from MKA or anyone else that MKA failed to notice that a five story concrete building core and a huge metal tie-in brace were missing merely because NWTC recommended installing the jib in order to balance the crane to LCL's jobsite superintendent Jon Hagwood on the day of erection. Mr. Campbell's opinion's regarding what may or may not have been in the head of the MKA engineers when they inspected two days after the "popping" noise is pure speculation. He has no expertise in the fields of visual acuity or psychology. LCL's arguments, although imaginative, are not based in law or supported by any factual evidence. Absent demonstration by LCL of a material issue of fact, the trial courts' summary-judgment dismissals must be upheld.

**5. Gary Campbell's Declaration Fails to Provide the Required "Magic Word" Testimony Regarding: (1) Applicable Standard of Care; (2) Specific Violation of Standard on a "More Probable than Not Basis"; and (3) Causation Related to Violation of Standard—it is Rank Speculation**

A critical review Gary Campbell's declaration shows that he (a) skirts around the critical elements required in a liability-expert declaration and (b) avoids using the "magic words" every expert and attorney knows are needed to render a proper expert opinion. This is yet another of appellant's credibility issues.

First, Mr. Campbell merely states he believes certain NWTC actions were "in error." He does not simply: (1) state what the standard of

care is for a tower-crane erector; or (2) describe how the standard was allegedly violated. Second, none of his opinions are rendered on a “more probable than not basis.” His basis is “error” which has no legal effect whatsoever as far as respondents have been able to discern through researching the issue. Third, he never states that it is his opinion that the acts he believes were “error” caused or contributed to the collapse of the crane on a more probable than not basis. This omission is insurmountable. Such an omission can only be interpreted as a purposeful avoidance of the true issues at hand.

#### **6. NWTC’s Duty Limited to Its Contractual Obligations**

A subcontractor's liability is limited to those acts of negligence arising from work performed pursuant to the subcontract. See; Palin v. Gen. Constr. Co., 47 Wash. 2d 246, 251, 287 P.2d 325 (1955). Stated differently, a subcontractor is not liable for damages in the performance of the work under the contract if the contractor performs in accordance with the owner’s plans and specifications. Graham v. Concord Constr., Inc., 100 Wash. App. 851, 855, 999 P.2d 1264 (2000).

Here, NWTC’s duties were to “assemble and dismantle” the tower crane on the custom base that was designed by the structural engineers at MKA and manufactured by LCL and various welding subcontractors. NWTC did not own, design, manufacture, lease, or maintain the subject

crane owned by Morrow. No witness has testified that NWTC was involved with or had any duties regarding the design, manufacture, or maintenance of the steel base foundation designed by MKA. LCL's site superintendent Hagwood stated he did not expect NWTC's union ironworkers—workers who were clearly not structural engineers—to verify that MKA's work was correct. LCL was responsible for the base; NWTC's duties were limited to assembling a tower crane on it.

**7. The U.S. v. Spearin Doctrine Bars NWTC's Liability Because NWTC Built and Assembled the Crane Per the Engineer's and General Contractor's Specifications, Plans, and Orders**

It is well-settled that if an owner or its architect, engineer, or other agent designed a specification (such as selection of a product or a necessary means to comply with the design specification), the subcontractor complies with all specifications, and the system ultimately fails, then the subcontractor is not responsible for the failure or its consequences because the subcontractor met the specifications called for and the failure is therefore considered a failure of design. U.S. v. Spearin, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918); Tyee Const. v. Pac.NW Bell Tel. Co., 3 Wn. App. 37, 472 P.2d 411 (1970) (contractor not liable for damage to conduits for power lines resulting from operation necessary to fulfill requirements of contractee's plans); Weston v. New Bethel Church, 23 Wn. App. 747, 598 P.2d 411 (1979); Teufel v. Weiner, 68 Wash. 2d 31, 411 P.2d

151 (1966) (contractor not liable for leak of curtain wall where wall was constructed according to specifications which called for an improper design).<sup>1</sup>

These cases stand for the proposition that, “where a [sub]contractor is required to build in accordance with specific plans and specifications, the agent of the owner providing the plans impliedly guarantees that the plans are workable and sufficient.” Tyee, 3 Wn. App. at 40. The Spearin doctrine has been applied in Washington courts to relieve a party from negligence liability as well as construction-defect claims. See Weston, 23 Wn. App. 747, 598 P.2d 411.

Here, MKA designed the crane base. LCL, MKA, and Morrow all worked to develop the crane erection plans. It is undisputed that NWTC had no involvement or duty regarding the crane-base design or the crane-erection plans. Further, there has been no testimony or evidence to demonstrate that NWTC did not properly follow the crane-erection plans. According to the Spearin Doctrine, if NWTC complies with all

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<sup>1</sup> See also Ward v. Pantages, 73 Wash. 208, 131 P. 642 (1913) (failure of a plumbing and heating system installed by subcontractor in conformity with architect’s plans and specifications would not defeat right of subcontractor to mechanics lien); Huetter v. Warehouse and Realty Co., 81 Wash. 331, 142 P. 675 (1914) (contractor excused from completing contract for large fill and viaduct, whose walls collapsed during construction state, where city’s engineer’s plans and specifications were defective); Novelty Mill Co. v. Heinzerling, 39 Wash. 244, 81 P. 742 (1905) (contractor not liable for collapse or weakening of piers, where contractor followed contract, and where damage was caused by contract’s defective requirements).

specifications, and the system ultimately fails, then NWTC is not responsible for the failure or its consequences because NWTC met the specifications called for and the failure is considered a failure of design. Because NWTC assembled the tower crane pursuant the plans, it did not violate a duty to LCL or anyone else. There is no issue of material fact to the contrary.

**8. No Evidence that NWTC Breached Any Duty—LCL’s Own Employees and Experts Have Testified that NWTC Did Nothing Wrong**

In order to avoid NWTC’s motion for summary judgment dismissal, LCL was required to demonstrate that some issue of material fact existed that showed NWTC was the cause or proximate cause of the collapse. Two trial court judges have independently dismissed NWTC because no such evidence exists. The following is a summary recap of the statement of facts:

- NWTC had no design input or duties regarding the MKA designed base. NWTC did not even know MKA’s identity and did not need to know. LCL communicated directly with its design professional MKA.
- LCL, MKA, and Morrow were responsible for the crane erection plans. NWTC was not. Morrow provided the plans to NWTC.
- NWTC was responsible for assembling the tower crane on the base LCL provided pursuant to the crane-erection plans. NWTC erected the tower crane pursuant to the plans.

- No LCL or MKA employees indicate NWTC failed to properly perform its work. No LCL employees indicate NWTC failed to properly perform its contractual duties.
- LCL did not expect NWTC to review or approve MKA's work. NWTC employees are union ironworkers, not engineers or surveyors.
- LCL surveyors did all the surveying. LCL surveyors measured the base after the base was manufactured, recorded their measurements, and forwarded them on to NWTC. NWTC used the LCL measurements to order shims.
- LCL surveyors measured the base after NWTC installed the shims under the base tower legs. LCL measured the base tower and determined it was plumb.
- LCL measured the mast of the tower crane on the day of erection after the mast was assembled, but before the counter jib and machine deck were installed, and determined it was plumb.
- LCL surveyors measured the base after the popping noise and transmitted the results to LCL's assistant superintendent Craig Harr. NWTC assisted by holding the surveyor's ruler as instructed.
- LCL represented the base had been designed by competent engineers and that it had specifically been designed to move and deflect.
- NWTC nevertheless instructed LCL to have the engineers who designed the base come check and inspect to ensure it was manufactured and functioning properly.
- LCL had the engineers come and inspect. MKA failed to see that a five-story concrete building core and the required tie-in assembly were not present as its design had contemplated.
- LCL and Morrow certified the crane after conducting a load test. NWTC's only duty was to attach weights to the crane's hook as instructed by Morrow.

As the above summary recap of relevant facts demonstrates, NWTC did everything that was required of it. All one has to do is ask the

LCL and MKA employees, none of whom have alleged any wrongdoing on NWTC's part. The claims against NWTC are nothing more than speculation and conjecture on the part of LCL's attorneys.

**9. LCL's and MKA's Failure to Inspect the Crane Base After NWTC's Crane Assembly Superseded NWTC's Work**

An intervening cause is a force that operates to produce harm after the defendant has committed the act or omission. State v. Souther, 100 Wn. App. 701, 710, 998 P.2d 350 (2000). If a defendant's acts were superseded by the action of the plaintiff or a third party as a matter of law, summary judgment may be granted in favor of the defendant.

Even assuming the Court finds a duty existed that NWTC breached, the Court should find that MKA's subsequent failure to notice that the crane was erected without the supporting tie-in brace attached to a five-story concrete building core was an intervening cause.

Further, LCL's Mr. Kragseth stated that NWTC had no duty to maintain or inspect the crane after it was erected, but LCL did. *CP 418-419 (Kragseth Dep. p. 157: 17-20; 159-160:12-1)*. Additionally, MKA developed no inspection or monitoring protocols and LCL's inspector failed to notice a 4+ inch visible crack in the base days before the collapse occurred.

**D. Breach of Contract**

**1. Legal Standard**

A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. Northwest Independent Forest Mfrs. v. Department of Labor and Industries, 78 Wn. App. 707, 712, 899 P.2d 6 (1995). Here, as discussed below, there is no evidence that NWTC violated any contractual duty or that and any such “breach proximately caused damage to [LCL].” See, Northwest Independent Forest Mfrs. at 712.

**2. No Evidence Exists that Suggests NWTC was Contractually Obligated to Perform a 360-Degree Load Test or any other Pre-Operation Test**

**a. LCL’s Expert Campbell Testified NWTC Not a “Qualified Person” and thus No Duty to Perform 360-Degree Load Test**

As argued in Section IV., B., 2. above regarding appellants’ negligence claims, there similarly is no evidence that NWTC was required to perform a 360-degree load test under the LCL-NWTC subcontract. The only “evidence” LCL has provided is the “cherry picked” and misstated declaration and deposition testimony of crane expert Gary Campbell. To the contrary, however, Mr. Campbell actually testified that: (1) NWTC was not responsible for the crane base, but only the tower crane itself that sits above the base; (2) NWTC was not a “qualified person” under the applicable ASME B30.3B-2004 standard such that the 360-degree load-

test requirement did not apply to NWTC; (3) the 360-degree load test was the joint responsibility of LCL and Morrow; and (4) ultimately, he “can’t say that [NWTC] were or were not” responsible for the 360° load test. *CP 1095-1103 (Campbell Dep.)*.

The LCL-NWTC subcontract describes NWTC scope of work as follows:

Provide all erect and dismantle of Tower Crane per the attached quote by Northwest Tower Crane Service, Inc.

...

*CP 1010 (NWTC contract paragraph 3.)*

The LCL-NWTC subcontract’s language further limits NWTC’s responsibilities to its scope of work as follows:

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, peace, tests, inspections, and privileges required in the prosecution of its work, except that the General Building Permit only will be obtained and paid for by others. Subcontractor shall request, coordinate, and attend all required inspections.

*CP 1014 (NWTC-LCL Contract Paragraph K.) (Underline added.)*

LCL’s crane expert, Gary Campbell, testified at his deposition as follows:

Scheer: ... If Mr. Wiethorn's opinion was that Northwest Tower Crane had an obligation to make sure the base section was properly affixed to the steel foundation, and then responsibility from that point up, above that, would you agree with Mr. Wiethorn on that?

Campbell: I would.

Q Is there anything else that you think Northwest Tower Crane had responsibility for below the base section other than making sure that it was properly affixed to the steel foundation?

A No.

*CP 1096 (Campbell Dep. at p. 19:11-23.)* (Respondents direct the Court to Section IV., B., 2. above for additional relevant testimony of LCL's crane expert Campbell.) Consequently, Campbell agrees that NWTC is only responsible for the yellow tower crane above the crane base, not the red crane base below the tower crane. That plainly means that pre-operational testing of the crane base, which sits below the yellow tower crane that NWTC erected, is not a component of NWTC's scope of work. In addition to Mr. Campbell's lack of opinion testimony, no lay witness or other expert witness has testified that NWTC is responsible for any pre-operation testing. Appellants' breach-of-contract allegations are based exclusively on the claims manufactured by LCL's attorneys.

**b. Experts Dethlefs and Lewis Are Not Crane or Construction Experts—Ultimately Both Testified they could Not Opine that NWTC was Responsible for Performing a 360-degree Load Test**

LCL has cited to the testimony of its structural engineer Dethlefs and the first-party plaintiffs' metallurgist Lewis. However, a review of

Dethlefs' and Lewis' deposition transcripts show that neither testified it was NWTC's duty to perform a 360-degree load test. Dethlefs patently admitted, "I'm not sure which party is ultimately responsible for the test." *CP 1825 (Dethlefs Dep. at p. 65:17-20.)*

Lewis was retained as an expert metallurgist. He admitted he has never designed a tower crane base, has no experience erecting tower cranes, has no formal education regarding tower cranes, has not developed industry standards for tower cranes, is not familiar with the standard of care for tower crane erectors such as NWTC, and does not have an understanding regarding what NWTC was required to do on the Tower 333 project. *CP 1831 (Lewis Dep. at p. 155:4-157:19.)* The first time he ever saw the ASME B30.3 standards for cranes was working on this case and he spent less than one hour looking at them. *Id. (at p. 155:4-157:19.)* Lewis stated that he is not an expert in construction management or construction-communication protocols. *CP 1834 (at p. 183:15-25.)* He has had no training or education in construction safety." *Id.* Lewis stated he is not holding himself out as a construction expert and that his role in this case is that of a metallurgist. *CP 1835 (Id. at p. 189:13-14.)*

In other briefing, LCL has previously misquoted Lewis claiming he stated NWTC was "foolish" not to directly ask MKA what it planned to do about the base deflection noted on the day of erection. (*Id.* at p. 183:5) To the contrary, Lewis' transcript stated, "had [NWTC] put the pieces together what the deflection meant and not sent it out to everybody that was in the decision chain, to me seems foolish. *CP 1834 (Id. at p. 183:2-*

5.) First, there is no evidence NWTC had “put the pieces together” because NWTC was never given the MKA design criteria or deflection limits. Second, Lewis did not know the facts at his deposition and assumed NWTC knew who MKA was. When Lewis was asked to assume NWTC did not know who the engineer was, Lewis admitted that “If [NWTC] did not know who [MKA] were, then I would see [sic] that [NWTC] did not have a duty to inform them.” *CP 1836 (Id. at pp. 191:19-192:3.)* Lewis’ testimony is not provided on a more probable than not basis. At best, it is merely hypothetical guesswork of a non-expert.

**c. WAC Regulation 296-155-525(5)(f) States that the Party Who Signs the Record of the Pre-Operation Test is the Party who is Responsible for the Pre-Operation Test**

As argued below, it is questionable whether the WAC regulations cited by LCL even apply to NWTC. For the purpose of argument, even if the WAC regulations apply, they indicate that it is LCL and Morrow who are responsible for any pre-operation tests, not NWTC. WAC 296-155-525(5)(f)(ii) states that:

A record of each test shall be made and signed by the person responsible for conducting the test.

*CP 954-956.*

Here, there is no question that Morrow’s B.A. Phillips and LCL’s Craig Harr signed the record of the pre-operational test. *CP 958-961*

*(Morrow Equipment Crane Certification and Acceptance Report.)* B.A.

Phillips testified that Morrow completed the report as follows:

Bendele: The form says "crane certification." Who's certifying the crane, to your knowledge?

Andrews: Object to the form. Lacks foundation.

Phillips: The technician is filling out the paperwork. Whether you say we're certifying it or not, I guess it falls into the definition, term.

Q You put your signature on the second page?

A Yes, I did. ...

Q And is it always the lessee that signs the crane Certification and Acceptance Report?

A Yes.

Q Northwest Tower Crane doesn't sign this Certification and Acceptance Report; does it?

A They didn't rent the crane.

Q No other trades need sign off on the Certification and Acceptance Report?

A No.

Q Northwest Tower Crane help you prepare this report?

A No.

Q Any other trades help you prepare this report?

A No. ...

Q What's your understanding of why you need to get LCL's signature at the bottom?

MS. ANDREWS: Object to the form.

MR. LARKIN: Object to the form.

A Because -- How do I word this? So they're privy to the information that was at hand and I don't change something later down the road.

Q Isn't it true that once LCL signs this report they're responsible for the crane and you only come back and touch it when called?

MR. LARKIN: Object to the form.

MS. ANDREWS: Object to the form. Lacks foundation. Go ahead and answer, if you're able to.

A To the best of my ability -- or to the best of my knowledge, yes.

*CP 964, 968-969 (Deposition Transcript of B.A. Phillips p. 82:8-84-2.)*

Larkin: Now, what all did you do on that Monday again?

Phillips: We installed the hoist rope and the trolley travel rope and performed the load test where I set the limits for each weight that the crane can pick in its respective gear.

Q And did anything unusual happen during that process?

A No, it went really smooth.

Q How long were you on site that day?

A Usually a load test takes about four hours, so I would guess about four, four and a half hours.

*CP 966 (Deposition Transcript of B.A. Phillips p. 48-11-19.)* LCL's project manager Craig Harr signed the report on behalf of LCL and testified as follows:

Bendele: And what was your understanding of what you were certifying and accepting?

MR. JONES: Object to form.

MS. CHURAS: Join.

A That the, that the load test had been performed to a specific standard with a Morrow technician on-site

performing the test. That was my belief when I was signing off on it.

Q Is it your practice to read documents before you sign them?

A Uh-huh.

Q Did you read this document before you signed it?

A Probably scanned over it, yeah.

Q If you had questions about the purpose or the effect of this document, would you have taken it to Jon Hagwood before you signed it?

A Don't understand the question.

Q If you didn't understand what the document said or what its purpose was, would you go to Jon Hagwood and ask him?

A Yeah, yes.

Q So, you understood the purpose of this document before you signed it?

A The crane certification, yes.

*CP 973-974 (Deposition Transcript of Craig Harr p. 105:10-106:8.)*

Therefore, the applicable WAC provision indicates that LCL and Morrow were “responsible for conducting the test.” Morrow’s B.A. Phillips testified that LCL signs the report so it is privy to the information at hand. LCL’s Craig Harr testified that he understood the report to mean that the load test had been performed to a specific standard with the Morrow technician on-site performing the test. No one has testified that NWTC ever has anything to do with the pre-operational test or resultant report—it simply is not within NWTC’s scope of work. NWTC’s union

ironworkers merely hang weight on the crane's hook as instructed by the Morrow service technician.

**d. Morrow's Contract with LCL Required a Morrow Technician to be Present—LCL Paid Morrow to Conduct the Pre-Operation Test**

The Morrow-LCL contract states:

Morrow requires a Service Technician to be present during the erection, climbing, dismantlement, and retorquing. Morrow will provide a technician at the rate of \$1000.00 per ten (10) hour day, on straight time only.

*CP 988 (Morrow-LCL contract at MOR 004622, at paragraph 2.)*

Here, B.A. Phillips testified that a Morrow service technician, such as himself, performs the pre-operational test. *CP 964, 968-969.* The Morrow-LCL contract required LCL to pay for a service technician, such as B.A. Phillips, to be present during the erection of the crane. Therefore, LCL paid Morrow to have B.A. Phillips conduct the pre-operational test, which means that the pre-operation test is part of Morrow's work. Consequently, the pre-operation test is not a part of NWTC's work. NWTC's work was to assemble the crane and hang weight on the hook, not to test it or operate the crane or the crane base.

**e. Procurement of and Payment for Items Outside NWTC's Scope of Work Not Required by LCL-NWTC Contract**

Also unavailing is LCL's argument that NWTC agreed to "procure and pay for" the 360-degree load test. Nowhere in NWTC's subcontract is there a requirement to conduct the load test or pay for it. *CP 1010-1045*. The terms of the Subcontract Agreement plainly limit NWTC's responsibilities to its "work," which according to LCL's own crane expert Campbell did not include anything below the base section of the yellow tower crane other than affixing the crane to the red crane base. Also, as demonstrated above, according to LCL crane expert Campbell NWTC was not a "qualified person" and thus not required to perform the 360-degree test.

**f. WAC Regulation 296-155-525(5)(f) Does Not Require a 360 Degree Pre-Operation Test**

WAC 296-155-525(5)(f)(i) states that:

The test shall consist of suspending a load of not less than 110% of the rated capacity for 15 minutes. The load shall be suspended from the furthest point of the length of the boom (jib) to be used. The results of this test shall be within the manufacturer's recommendations and/or specifications.

*CP 954-956*.

Here, although the WAC regulation at one point does refer to the ANSI B30.3-1990 Chapter 3-1 standard, "the" test called for by the WAC regulations is a simple load test with no rotation requirements. The 360-degree pre-operational test which plaintiffs refer to, and that is described

in a portion of ANSI B30.3-1990 Chapter 3-1, is specifically omitted from WAC 296-155-525(5)(f). If the WAC regulation were supposed to include a 360-degree pre-operation test in addition to a simple load test, it would so state. The fact that the 360-degree pre-operation test was specifically omitted means that it is not required. Even assuming, *arguendo*, that the 360-degree test was required, it was not NWTC's responsibility.

**g. NWTC had no Duty to Inspect the Crane Base**

In addition to LCL crane expert Campbell's deposition testimony, the Subcontract agreement shows that NWTC had no contractual duty to inspect the MKA designed crane base because the base was not part of NWTC's materials, supplies or equipment. Nor was the base within NWTC's care, custody, or control. LCL does not cite to any contractual terms to support its argument that the crane base was part of NWTC's "work" nor does it cite to any deposition testimony. In fact, all the deposition testimony (including that of 10 LCL employees) indicated that NWTC had no responsibility for the MKA designed crane base.

**3. LCL and MKA Both Confirmed the Crane Base was Designed to Deflect such that NWTC was Aware of No "Safety Hazard or Violation"**

Appellants' argue that NWTC violated Paragraph U. of the LCL-NWTC subcontract sufficient to constitute a breach of contract that was the proximate cause of the crane collapse. This is another LCL-attorney

argument that is not supported by any of the ten LCL witnesses that were deposed. The operative language of the contract states as follows:

Subcontractor shall promptly provide Contractor with written notice of any safety hazard or violation found anywhere on or adjacent to the construction site.

*CP 1016 (Emphasis added.)*

Here, NWTC was not told that the crane base would experience any deflection whatsoever before it erected the crane. Thus, on the day of erection it was initially concerned that the crane base had deflected to any degree. However, LCL site superintendent Jon Hagwood and a female LCL engineer (the one who stated that she earns \$150,000 a year to do her job and that LCL knows what it's doing) both informed NWTC that the crane base was in fact designed to deflect. *CP 321-323 (Phinizey Decl.)* MKA's lead structural engineer Doug Loesch affirmatively testified that he did in fact design the crane base to deflect as LCL reported to NWTC. *CP 372-387 (Loesch Dep.)*

Moreover, Morrow's crane technician Buford Phillips testified that a skinny engineer in a white hat inspected the crane base at lunch on the day of erection and that afterwards LCL's assistant superintendent Craig Harr represented that engineer determined the crane base was functioning as designed. *CP 492-502 (Phillips Dep.)* Two days later, MKA's lead

engineer Doug Loesch also evaluated the crane base and stated it was functioning as designed. *CP 372-387 (Loesch Dep.)*

Thus, the NWTC ironworkers were not aware that there was a safety hazard, much less a safety violation. They reacted properly given their initial assumption that the crane base should not have any deflection whatsoever because they had not been made aware of the fact that the crane base had been designed to deflect. LCL and MKA did not communicate any such facts to NWTC because the NWTC ironworkers did not need to know such information—it simply was not part of NWTC’s scope of work. Once NWTC was given that information on the day of erection, they understood for the first time that the deflection in the crane base was supposed to be there. Moreover, two different engineers evaluated the crane base and reported it was functioning properly. How do LCL's attorneys expect NWTC’s ironworkers to appreciate a safety hazard or violation existed when: (1) the ironworkers were explicitly told the noted deflection was an intended part of the design; and (2) two sets of inspecting engineers, including the structural engineer who designed the base, did not notice any safety hazard or violation?

As thoroughly discussed above, NWTC was never given any deflection criteria or limits at any time. NWTC was not only unaware that the crane base was designed to deflect, it was never given any information

regarding how much or how far the crane base was supposed to deflect. Simply put, the crane base was completely outside of NWTC's scope of work. As LCL's expert Campbell testified, NWTC is responsible for erecting and dismantling the yellow crane that sits on top of the red crane base. NWTC's only duty regarding the base is to ensure the tower crane is properly bolted to it. It is LCL and MKA who are responsible for the red crane base that sits underneath the yellow tower crane.

Even if there were a technical violation of the LCL-NWTC contract, there is no evidence that the written concerns of NWTC's ironworkers would have had any effect on the investigations performed by LCL's engineer in the white hat or MKA's lead structural engineer Doug Loesch. Mr. Loesch manifestly missed the fact that a five-story, concrete, building-core tie-in brace was missing on the day he evaluated the crane base. It strains credulity to argue that the lack of a written report from uneducated union ironworkers—stating that they noticed the crane base deflected as Loesch had designed—would have lead Loesch to an epiphany such that he would have then noticed that the five-story concrete structure that his design called for was not present. This is especially true given the fact that LCL called Loesch to the crane site for the express purpose of inspecting and evaluating the deflection in the crane base noted on the day of erection.

**4. NWTC Did Name LCL as an Additional Insured on Its CGL Policy**

NWTC did name LCL as an additional insured on its commercial general liability policy. *CP 1839-1842 (Certificate of Liability Insurance endorsement)*. This argument has no basis and is plainly refuted.

**5. NWTC Currently Owes LCL No Duty to Defend or Indemnify**

“The duty to defend is determined by the facts known at the time of the tender of defense.” Parks v. Western Wash. Fair Ass'n, 15 Wash. App. 852, 855, 553 P.2d 459 (1976). “[T]he facts at the time of the tender of defense must demonstrate that liability would eventually fall upon the indemnitor, thereby placing it under a duty to defend.” Dixon v. Fiat-Roosevelt Motors, Inc., 8 Wash. App. 689, 693-94, 509 P.2d 86 (1973). NWTC has been dismissed on summary judgment on two occasions by two independent trial court judges. Clearly, there was no demonstration that liability would eventually fall on NWTC such that it was under a duty to defend.

Second, the right to indemnity arises when liability becomes fixed. Parkridge Associates, Ltd v. Ledcor Industries, Inc., 113 Wash. App. 592,

605, 54 P.3d 225 (2002). Liability in this case has never been fixed against NWTC. Furthermore, RCW 4.24.115 states:

A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including moving and demolition in connection therewith, purporting to indemnify against liability for damages arising out of bodily injury to persons or damage to property:

(1) Caused by or resulting from the sole negligence of the indemnitee, his agents or employees is against public policy and is void and unenforceable;

(2) Caused by or resulting from the concurrent negligence of (a) the indemnitee or the indemnitee's agents or employees, and (b) the indemnitor or the indemnitor's agents or employees, is valid and enforceable only to the extent of the indemnitor's negligence and only if the agreement specifically and expressly provides therefor, and may waive the indemnitor's immunity under industrial insurance, Title 51 RCW, only if the agreement specifically and expressly provides therefor and the waiver was mutually negotiated by the parties. This subsection applies to agreements entered into after June 11, 1986.

Therefore, absent a determination of fault against NWTC, it has no obligation to indemnify LCL per Washington statute. Here, no determination of fault has ever been made against NWTC.

## V. CONCLUSION

Appellants' close their opening brief by claiming, "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." This argument is preposterous. It is not supported by any LCL or MKA employee. All one has to do is read the deposition transcripts of the LCL and MKA employees. LCL employees Hagwood, Akre, Kragseth, and Harr have all testified and none of them had any issues with the work NWTC performed and knew that NWTC's employees were union ironworkers. No NWTC employee was a structural engineer and none were capable or qualified to oversee or verify MKA's work even if they wanted to. MKA employees Loesch and Humphrey both testified they have no issues with the work NWTC performed. Nor are appellants' claims supported by any expert witness testimony. First-Party Plaintiffs' construction-management expert (Hauck) and construction-safety expert (Stranne) had no issues with the work NWTC performed. LCL's construction expert Putnam had no issues with the work NWTC performed. Critically, the deposition cross-examination of LCL expert Campbell showed his opinion testimony to be baseless and unsupported. Therefore, there is no material issue of fact to warrant reversal of NWTC's dismissal.

Appellants' argument is based on the speculation and conjecture of LCL's attorneys whose goal was to assert third-party claims and throw mud at seven different subcontractors to see if something would stick. Each and every subcontractor sued by LCL was dismissed on the merits on summary judgment. NWTC has the distinction of being independently dismissed on two occasions by two different trial-court judges.

LCL clearly knew that NWTC was not an engineering firm and that it had nothing to do with the design or fabrication of the crane base. NWTC also knew that it had no engineering expertise and, therefore, insisted that LCL have the crane inspected by the engineers who designed it after the "popping" noise occurred on the day of erection. NWTC never represented to LCL that it had competently inspected or approved the crane base, and NWTC was under no duty to do so. NWTC never represented to LCL that the crane base was sound or that it had been properly engineered. Rather, NWTC realized it was not capable of such an inspection and analysis. NWTC fulfilled any duty it had by: (1) not representing that it was capable of competently inspecting the crane base; and (2) clearly and firmly communicating to LCL in no uncertain terms that LCL was to have whoever engineered the crane base inspect the base as soon as possible. LCL did have the structural engineer

of record, Doug Loesch of MKA, inspect the base and he stated it was functioning as he intended and designed!

Moreover, the crane was in full operation for nine full weeks after NWTC erected it. NWTC was not required to be onsite, nor was it requested to be onsite, during the nine week period the crane was in operation and under the control of LCL. NWTC had no further contact after that point. Between the time it was erected, and the time it collapsed, the crane base was inspected and observed several times by the engineers at MKA who designed the base. They gave the crane base an ongoing clean bill of health. Additionally, LCL tasked an employee, project manager Wilbur Wasson, with the specific job of inspecting the crane base on a regular basis. Mr. Wasson was even given a checklist of things to look for and never noticed a crack in the base.

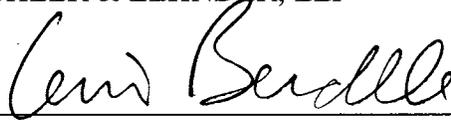
Therefore, there can be no question that the proximate cause of the crane collapse was: (1) the massive miscommunication between LCL and MKA regarding the tie-in brace; and (2) LCL's and MKA's failure to fulfill their duties to properly inspect the crane base given their knowledge of the design criteria and deflection limits.

NWTC's union ironworkers had no duty whatsoever to "catch" the error by LCL and MKA and this Court should uphold the sound and independent summary-judgment dismissals granted by Judge Trickey and

Judge Inveen. Under the facts of this case, no reasonable juror could conclude that NWTC was in any way a legal proximate cause of the accident.

RESPECTFULLY SUBMITTED June 25, 2010.

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**CERTIFICATE OF SERVICE**

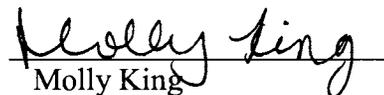
The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the date given below I caused to be served, by e-mail and Legal Messenger, the foregoing **BRIEF OF RESPONDENT** was (a) filed with the Court of Appeals Division I and (b) served upon the following persons:

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