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NO. 64199-9-1

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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BRE PROPERTIES, INC.  
Appellant,

vs.

NORTHWEST TOWER CRANE SERVICE, INC.,  
Respondent

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**APPELLANT'S REPLY BRIEF & RESPONSE  
TO CROSS BRIEF OF NWTC**

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COURT OF APPEALS  
DIVISION I

**ORIGINAL**

## TABLE OF CONTENTS

Reply Brief of Appellant .....	1
I. Response to Issues Pertaining to Assignment Of Error .....	1
II. Response to NWTC’s Statement of the Case and Statement of Facts .....	2
III. Authority .....	6
A. NWTC’s failure to act as a reasonable prudent Crane erector and its breach of contractual duty to LCL constitutes negligence. ....	6
1. Irrelevant of Gary Campbell’s testimony, NWTC had a duty to perform a 360 test required by statute and its contract with LCL. ....	6
2. NWTC’s failure to report the “popping noise” did constitute negligence because NWTC had a duty to report safety concerns and hazards; it failed to exercise the appropriate level of care that a reasonable prudent crane erector would and should have exercised. ....	10
3. NWTC’s contractual duty included not only to “assemble and dismantle” the tower crane, but to also perform appropriate tests in accordance to its contract, inform LCL as to irregularities, and to exercise a general duty of care. ....	12
4. NWTC incorrectly argues that there is no evidence that it breached its duty and that NWTC did “nothing wrong” and therefore was not negligent. ....	13
B. LCL/MKA’s failure to inspect the crane is not a superseding cause to NWTC’s work.....	15
C. NWTC reads its contractual duties too narrowly and further	

misconstrues its contractual obligations .....	16
1. NWTC incorrectly argues that it was not required to perform a 360 load test because the NWTC-LCL contract specifies NWTC’s duty to abide by all laws, rules, regulations, ordinances, and ordrr.....	16
a. NWTC had a contractual duty to conduct a 360 pre-operational load test.....	16
b. NWTC’s argument that the party who signs the pre-operation record test is the party responsible for the test does not relieve it from its contractual and regulatory obligations. ....	18
2. In an effort to relieve its liability, NWTC incorrectly asserts that LCL paid Morrow to conduct pre-operation tests.....	20
3. If NWTC is found to be negligent, NWTC does owe LCL a duty to indemnity, as specified by the NWTC-LCL contract. ....	21
D. <i>U.S. v. Spearing</i> is not applicable to the present case. ....	22
E. NWTC does not include LCL as an additional insured; NWTC does not include LCL in its policy, but only on its certificate of liability insurance. ....	23
F. Res Judicata regarding BRE and LCL .....	23
1. Res Judicata and claim preclusion require that the “same parties” be litigating the same case. BRE was not a part in the <i>In Re Tower Crane Collapse</i> matter, and therefore NWTC’s argument that claim preclusion applies is incorrect.....	23
2. LCL could not have asserted BRE claims in the <i>In Re Tower Crane Collapse</i> suit because BRE was not a party to the suit.....	24

IV.	CONCLUSION .....	25
	APPELLANT BRE’S REPLY TO RESPONDENT / CROSS APPELLANT NWTC’S OPENING BRIEF .....	27
I.	Assignment of Error and Issues Presented .....	27
	A. Issues Pertaining to Assignment of Error .. .....	27
II.	Statement of the Case .....	28
III.	Authority .....	30
	A. Standard of Review .....	30
	B. BRE properly disclosed its list of possible primary witnesses, pursuant to Court Order, and therefore did not violate King County LCR 26(b). .....	31
	C. BRE did not violate the Court’s Case Order or discovery rules to any extent, let alone acting “willfully” or intentionally to avoid disclosing witnesses and abusing discovery rules.....	32
	D. NWTC continues to incorrectly rely on <i>Blair</i> and <i>Lancaster</i> , both cases are distinguishable from the present case. ....	34
	E. NWTC incorrectly claims that BRE cannot prevail on its claim against LCL, or any other party, because BRE purposefully chose not to disclose liability witnesses. BRE properly disclosed its witnesses. ....	36
	F. NWTC failed to move to confer in accordance with CR 26 (i) and LCR(e) .....	36
IV.	Conclusion .....	37

## TABLE OF AUTHORITIES

### STATE CASES

<u><i>Aircraft Radio Industries v. M.V. Palmer, Inc.</i></u> , 45 Wash. 2d 737, 277 P.2d 737 (1954). . . . .	32
<u><i>Blair v. TA Seattle</i></u> , 150 Wash.App. 904, 210 P.3d 326 (Div. I, 2004). . . . .	28, 29, 34
<u><i>In re Estate of Black</i></u> , 153 Wn.2d 152, 170, 102 P.3d 796 (2004). . . . .	23
<u><i>Lancaster v. Perry</i></u> , 237 Wash. App. 826, 113 P.2d 1 (Div. 1, 2005). . . . .	34
<u><i>Northern Pac. Ry. Co. v. Snohomish County</i></u> , 101 Wn.686. 688, 172 P. 878 (1918) . . . . .	24
<u><i>Rivers v. Washington State conference of Mason Contractors, et al.</i></u> 145 Wn. 2d 674, 686-87, 41 P.3d 1175 (2002) . . . . .	30, 33, 35
<u><i>Qualls v. Golden Arrow Farms</i></u> , 47 Wash.2d 599, 288 P.2d 1090 (1955). . . . .	16
<u><i>Wash. State Physicians Ins. Exch. &amp; Ass’n v. Fisons Corp.</i></u> , 122 Wn.2d 299, 346, 858 P.2d 1054 (1993). . . . .	33
<u><i>West v. Thompson</i></u> , 14 Wn.App.573, 580, 183 P.3d 346 Wn. App. (Div.II, 2008). . . . .	25
<u><i>White v. Kent Medical Center, Inc.</i></u> , 61 Wn.App. 163, 167, 810 P.2d 4 (1991) . . . . .	1
<u><i>Woodhead v. Discount Waterbeds</i></u> , 78 Wn. App. 125, 131, 896 P.2d 66 (1995) . . . . .	35

### FEDERAL CASES

<u><i>National Hockey League v. Metro Hockey Club, Inc.</i></u> , 427 U.S. 639, 96 S.Ct. 2778, 47 L.Ed.2d 747 (1976) . . . . .	35
<u><i>U.S. v. Spearin</i></u> , 248 U.S. 132, 39 S.Ct. 59 (1918). . . . .	22,23

### STATE STATUTES

WAC 296-155-625 . . . . .	7, 17, 19
WAC 296-155-625(a) . . . . .	7
WAC 296-155-525 (5)(b) . . . . .	19
WAC 296-155-625 (5)(d) . . . . .	7
WAC 296.155.525 (5)(f) . . . . .	18

**RULES**

CR 26 through 37 ..... 30, 36  
CR 26 ..... 33  
CR 26(e) ..... 27, 31  
CR 26(i) ..... 30, 36  
KCLCR 26(b) ..... 31  
KCLCR 26(b)(1) ..... 27, 29  
KCLCR 26(e) ..... 30, 36  
KCLCR 36(e) ..... 36  
KCLCR 37(e) ..... 30, 36  
KCLCR 37(f) ..... 37

## REPLY BRIEF OF APPELLANT

Appellants BRE Properties, Inc., (“BRE”) and Lease Crutcher Lewis (“LCL”), by their attorney, Mark J. Dynan, submit this reply brief in response to the brief submitted by the respondent, Northwest Tower Crane Services, Inc., (“NWTC”), and in further support of its appeal.

### I. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Respondent, NWTC, first continues to assert that claim preclusion was an appropriate basis for the trial court to grant summary judgment in its favor.<sup>1</sup> Nevertheless, NWTC *cannot* establish the necessary and required elements required to assert claim preclusion because BRE was never a party to the *In Re Tower Crane Collapse* matter and none of the claims asserted by BRE in its complaint had ever been litigated. NWTC itself agrees that the Order of Dismissal issued by the lower court did not specify a specific ground upon which summary judgment was granted.<sup>2</sup> Additionally, it is a well established principle that a party cannot raise new issues in its rebuttal, which NWTC did by raising the issue of issue preclusion in its reply brief.<sup>3</sup> NWTC improperly raised the defense of

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<sup>1</sup> *Respondent's Brief at 1.*

<sup>2</sup> *Id.*

<sup>3</sup> *White v. Kent Medical Center, Inc.*, 61 Wn. App. 163, 167, 810 P.2d 4 (1991); *Respondent's Brief at 1.*

issue preclusion in its reply brief, even though the subject matter of the present case is not the same subject matter of *In Re Tower Crane Collapse*. The trial court improperly granted NWTC summary judgment.

NWTC further contend that BRE/LCL have failed to establish any material issues of fact and that the trial court did not abuse its discretion by granting summary judgment in its favor.<sup>4</sup> This brief, along with appellant's initial brief and respondent's reply brief clearly establish that a dispute as to numerous material facts in this matter exists. As a result, the trial court improperly granted summary judgment in favor of the respondents, NWTC. The dispute as to the material facts in the present matter should have been afforded to a jury.

## **II. RESPONSE TO NWTC'S STATEMENT OF THE CASE AND STATEMENT OF FACTS**

While NWTC argues that the primary reason for the tower crane collapse was a "a crack in the base that developed due to repetitive cyclical loading upon a cranes base that was too weak to support the loads imposed upon it..."<sup>5</sup> it fails to acknowledge its own failure to conduct appropriate and necessary pre-operational tests, in addition to its own miscommunication with LCL when it failed to inform LCL of potential

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<sup>4</sup> *Respondent's Brief at 2.*

<sup>5</sup> *Respondent's Brief at 5.*

safety hazards and concerns.<sup>6</sup> NWTC fails to acknowledge breach of contract it entered into with LCL and negligence on its part by failing to conduct itself as a reasonable crane erector should and would, primarily by simply focusing blame on design engineers.

More importantly, disputes as to the material facts in the present matter clearly exist. The issues of whether NWTC acted in accordance with its contract with LCL and whether it acted as a reasonable crane erector are only a few of the many issues at dispute in this case. These facts should have been presented to a jury, rather than being dismissed. NWTC argues that the tower crane collapse would have occurred, without regard to the allegations made against it, and that “no reasonable jury would find otherwise.”<sup>7</sup> NWTC is not one to determine what a jury would decide, rather, a jury should have at least been afforded the opportunity to review the present case on its merits. BRE/LCL presented numerous facts to establish that NWTC failed to abide by its contractual obligations as specified in its contract with LCL, in addition to its breach of utilizing reasonable care. Nevertheless, the trial court proceeded to improperly grant summary judgment in favor of NWTC.

NWTC failed to inform LCL of the dangerousness of the “popping” noise that occurred before the erection of the crane. NWTC

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<sup>6</sup> CP 310-315.

<sup>7</sup> *Respondent's Brief at 3.*

contends that it followed the plans it was given, yet fails to admit that it did breach its contractual obligation of not only abiding by all safety guidelines as required by law, but also failed to inform LCL of any safety concerns or hazards as required by contract. NWTC admits that it opposes or contests certain facts and arguments; there is no question that a dispute as to the material facts in the present case exists.<sup>8</sup>

NWTC erroneously contends that BRE disclosed no liability experts to support their liability arguments, as required by the applicable case scheduling order.<sup>9</sup> BRE properly disclosed its list of primary witnesses by the case scheduling deadline of May 11, 2009.<sup>10</sup> NWTC asserts that because BRE used many of the experts that LCL used in the *In Re Tower Crane Collapse* matter, it failed to disclose appropriate witnesses in a timely manner.<sup>11</sup> NWTC asserts no legal precedent as to why BRE would not be able to use similar experts. As NWTC states in their motions to the lower court more than 80 depositions were taken in the consolidated matter. CP 505. Furthermore, NWTC fails to acknowledge specific reservations BRE listed in its disclosure of primary witnesses, which included its ability to utilize experts as it related to other

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<sup>8</sup> *Respondent's Brief at 5.*

<sup>9</sup> *Respondent's Brief at 8.*

<sup>10</sup> *See Appellant's Response to Respondent/Cross-Appellant's Opening Brief*

<sup>11</sup> *Id.*

party's answers or responses in discovery.<sup>12</sup> NWTC also fails to acknowledge that BRE listed that it may use *any* of its listed lay witnesses as expert witnesses.<sup>13</sup> There is no question that BRE properly disclosed its witnesses in a timely manner.

NWTC is correct in that it contracted with LCL to provide "all labor necessary to assemble and disassemble tower cranes".<sup>14</sup> NWTC was a specialty contractor that LCL retained to assist with the installation and placement of the crane into service.<sup>15</sup> NWTC was however also responsible for taking appropriate safety precautions, which included informing LCL as to safety concerns or hazards, in addition to performing all pre-operating safety tests, as specified in its contract with LCL.<sup>16</sup> NWTC simply states that it "merely puts them up [cranes] and takes them down pursuant to the plans provided by the hiring entity...and the owner of the crane..."<sup>17</sup> NWTC further argues that LCL and MKA decided to use an uncommon steel frame.<sup>18</sup> However, NWTC had a duty to inform LCL of any potential safety hazards as it related to its job duties, regardless of LCL and MKA's decision to use a steel foundation.

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Respondent's Brief at 13.*

<sup>15</sup> *Appellant's Brief at 6.*

<sup>16</sup> *Appellant's Brief at 31-33.*

<sup>17</sup> *Respondent's Brief at 12.*

<sup>18</sup> *Respondent's Brief at 13.*

Lastly, BRE's presentation of the facts in the present matter clearly differs dramatically from that of NWTC's presentation. In an effort to avoid repeating BRE/LCL's version of the facts in the present matter, it should be noted that both parties' assertion of factual allegations should have survived summary judgment and been presented to a jury.

Consequently, the trial court improperly granted NWTC's Motion for Summary Judgment and should have further allowed a jury to review the facts in the record, as unquestionable, a dispute as to material facts presently exists.

### III. AUTHORITY

**A. NWTC's failure to act as a reasonable prudent crane erector and its breach of contractual duty to LCL constitutes negligence.**

**1. Irrelevant of Gary Campbell's testimony, NWTC had a duty to perform a 360 test required by statute and its contract with LCL.**

While NWTC argues that LCL "cherry-picks" crane expert Gary Campbell's testimony, it fails to show how it would be relieved of its contractual and regulatory duties to conduct appropriate pre-operational tests, including a 360 load test.<sup>19</sup>

The contract between NWTC and LCL specifically states the following:

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<sup>19</sup>*Respondent's Brief at 31.*

“Subcontractor agrees to take necessary safety and other precautions, at all times, to prepare for and perform the work in a safe manner...subcontractor shall take all necessary safety precautions pertaining to its work and the conduct thereof, including but not limited to, compliance with all applicable laws, ordinances, rules, regulations and orders issued by public authority, whether federal, state, local, or other...”<sup>20</sup>

Because the contract between LCL and NWTC specifies that NWTC is required to comply with *all* applicable laws, ordinances, rules, and regulations, there is no question that WAC 296-155-525 (specifically, cranes and derricks) applies to NWTC. There is nothing in WAC 296-155-525 to suggest that it should and would not apply to NWTC’s work as it related to its contract with LCL, but rather, the statute provides that “tower cranes shall be erected, jumped, and dismantled under the immediate supervision of *a competent person, designated by the employer.*”<sup>21</sup> NWTC was under a contractual and regulatory duty to conduct a 360 load test, which it failed to do, independent of Campbell’s testimony.<sup>22</sup>

NWTC argues that Campbell, in his deposition, fails to state NWTC is and was a “qualified person” under the applicable ASME B30.3B-2004 standard as applied in WAC 296-155-525.<sup>23</sup> NWTC further asserts that Campbell could not come to the conclusion that NWTC was

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<sup>20</sup> CP 280-281.

<sup>21</sup> WAC 296-155-525(a)

<sup>22</sup> WAC 296-155-525 5(d) requires that tower cranes shall be “positioned whereby they can swing 360 degrees without either the counterweight or jib striking any building, structure or other object...”

<sup>23</sup> *Respondent’s Brief at 31.*

“responsible” for conducting the 360-test.<sup>24</sup> At the same time however, NWTC fails to acknowledge the fact that Campbell can also *not say* that NWTC was not responsible for conducting the pre-operational 360 test. NWTC heavily relies on Campbell’s testimony (while later in its brief attempts to discredit it) and further fails to acknowledge its duty provided by contract and statute. NWTC’s contract with LCL clearly required it to perform requisite safety tests, specifically pre-operation tests, and comply with *all* code requirements.

More importantly, the interpretation of Campbell’s testimony creates a clear dispute of material fact, which should have survived summary judgment. NWTC argues that Campbell failed to “use the magic words” as to establishing its negligence.<sup>25</sup> NWTC attempts to imply that because Campbell did not use specific words, that it should be relieved of its contractual and regulatory duties. This is not the case. The issue of whether Campbell’s testimony is one that is credible and reliable is one to be presented to a jury. It is not NWTC’s decision to determine which portions of Campbell’s testimony should be followed and relied upon. NWTC incorrectly asserts that LCL relies on a “cherry-picked” testimony of Campbell, while in its brief, LCL does not cite to Campbell’s testimony

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<sup>24</sup> *Id.*

<sup>25</sup> *Respondent’s Brief at 38.*

in establishing that NWTC had a tort duty to perform a proper 360 load test.<sup>26</sup> The interpretation of Campbell's testimony should have been conducted by a jury, it is not the right of NWTC to determine Campbell's credibility.

NWTC attempts to simply dismiss that it had a duty to conduct requisite pre-operational tests as per contract and statute. NWTC states that LCL's argument regarding the 360 test is a "red herring," rather than displaying how it was not under a contractual duty to operate proper safety tests as related to its sub-contracting work.<sup>27</sup> Rather than citing to its contract with LCL, NWTC attempts to dismiss LCL's claim by stating LCL does not have any actual factual basis for its claims and further misrepresents facts to the Court.<sup>28</sup> NWTC goes so far to ignore the testimony of its own expert, Jimmy Don Wiethorn, who stated that the 360 load test should have been completed.<sup>29</sup> LCL, however, clearly cites to provisions in the LCL-NWTC that particularly show that NWTC had a duty to perform pre-operation safety tests, which would include conducting an appropriate 360-test.<sup>30</sup> LCL's arguments are far from a "red herring," because it properly cites to the NWTC-LCL contract. NWTC

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<sup>26</sup> *Appellant's Brief at 36-38.*

<sup>27</sup> *Respondent's Brief at 34-36.*

<sup>28</sup> *Id.*

<sup>29</sup> CP 321-323.

<sup>30</sup> *Appellant's Brief at 32.*

argues that LCL measured the crane base, and therefore NWTC should not be held responsible.<sup>31</sup> The question of whether LCL measured the crane base or not does not relieve NWTC from its contractual and regulatory duties as specified in its contract with LCL. The aforementioned issues clearly establish that a dispute of material facts did and do exist, specifically with regards to whether a 360 test should have been conducted by NWTC. Thus, the trial court should not have granted summary judgment to NWTC.

**2. NWTC's failure to report the "popping noise" did constitute negligence because NWTC had a duty to report safety concerns and hazards; it failed to exercise the appropriate level of care that a reasonable prudent crane erector would and should have exercised.**

NWTC contends that LCL fails to provide any material facts to establish that NWTC had a duty to inform LCL of the "popping noise" that occurred prior to the crane collapse.<sup>32</sup> It further argues that Campbell testified that NWTC's recommendation was "discretionary," and therefore NWTC's failure to provide appropriate recommendations did not constitute a failure to exercise care.<sup>33</sup> NWTC cites to Campbell's testimony in attempting to establish that it did not have a duty to inform LCL about the "popping noise," however at the same time argues that

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<sup>31</sup> *Respondent's Brief at 35.*

<sup>32</sup> *Respondent's Brief at 36.*

<sup>33</sup> *Respondent's Brief at 36-37.*

Campbell's testimony is "pure speculation" and that Campbell "does not have experience in the fields of visual acuity or psychology."<sup>34</sup> Contrary to NWTC's assertions, it is NWTC that attempts to "cherry-pick" specific portions of Campbell's testimony, without speaking to the issue of what is specified in its contract with LCL. The LCL-NWTC contract provisions specifically state:

"Subcontractor shall promptly provide contractor with any written notice of any safety hazard or violation found anywhere on or adjacent to the construction site."<sup>35</sup>

NWTC employees had concerns about the safety of the crane at the time of the loud popping noise.<sup>36</sup> For example, employee Shaffer expressed concern that the crane base had deflected. Additionally, Chad Peterson, in his opinion, said something seemed amiss. NWTC employees expressed their concerns to NWTC President, Deb Weber. Yet, not a single individual, on behalf of NWTC, decided to inform LCL about the questionable and dangerous loud "popping noise." It was NWTC's responsibility and duty, per its contract, to inform LCL of "any safety hazard and violation," and NWTC, without question, failed to do so.

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<sup>34</sup> *Respondent's Brief at 38.*

<sup>35</sup> *Appellant's Brief at 33.*

<sup>36</sup> CP 312-315.

**3. NWTC's contractual duty included not only to "assemble and dismantle" the tower crane, but to also perform appropriate tests in accordance to its contract, inform LCL as to irregularities, and to exercise a general duty of care.**

While NWTC is correct in asserting that a sub-contractor's liability is limited to acts arising from the work performed pursuant the sub-contract, NWTC fails to acknowledge that it *did not* act in accordance to the contract it entered into with LCL.<sup>37</sup> Rather, NWTC incorrectly argues that its duties were limited to the "assemble and dismantle" of the tower crane base.<sup>38</sup> Although NWTC did not design or manufacture the crane, it did fail to abide by its contractual and regulatory duties. NWTC had the duty to abide by all ordinances, regulations and laws, which require it to perform appropriate pre-operational tests. It also had the duty to inform LCL as to any safety concerns, hazards, and irregularities with regards to its work. NWTC failed to properly conduct the 360 pre-operational load test and further failed to inform LCL about the concerning "popping" noise, regardless of whether the popping noise occurred as a result of its work. Had NWTC upheld its contractual obligations, the crane would not have collapsed. In an effort to avoid liability, NWTC interprets its contractual duties extremely narrowly. NWTC was responsible for also abiding by code requirements, requirements that went along with

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<sup>37</sup> *Respondent's Brief at 39.*

<sup>38</sup> *Id.*

assembling and dismantling the crane. NWTC was not simply *only* responsible for assembling the tower crane.

**4. NWTC incorrectly argues that there is no evidence that it breached its duty and that NWTC did “nothing wrong” and therefore was not negligent.**

In arguing that NWTC did not fail to “do anything it was required to,” NWTC simply reiterates a summary of facts, in its opinion.<sup>39</sup> NWTC fails to acknowledge that LCL disputes almost each and every one of these factual allegations and consequently, a clear dispute of material facts should have survived summary judgment. In its brief, NWTC provides an outline of its own factual summary of facts. Clearly a factual dispute of material facts exists because LCL/BRE dispute those facts as follows:

- Although NWTC did not have design input regarding MKA’s designed base, it did have a duty to conduct applicable pre-operational tests and inform LCL as to any safety concerns and hazards.
- NWTC was responsible and did take part in the crane erection plans as a sub-contractor; it acted as part of a team to erect the crane.
- Although LCL or MKA may not have indicated that NWTC did not fail to perform its work, NWTC’s own employees expressed safety hazards and concerns that were never communicated to LCL and should have been as per NWTC’s contract with LCL.

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<sup>39</sup> *Respondent’s Brief at 42-43.*

- LCL never stated that NWTC employees are engineers; nevertheless, NWTC's employees had a duty to conduct safety tests and further inform LCL of potential safety hazards, regardless of their roles.
- Even if NWTC used LCL measurements to order its shims, the issue in this appeal is NWTC's failure to conduct required pre-operational tests and inform LCL as to potential dangers.
- While LCL may have measured the mast of the tower crane on the day of crane erection, NWTC should have conducted a 360 load test to ensure that the assembly of the crane would be conducted safely and properly.
- Simply because LCL surveyors measured the base after the "popping noise," that does not mean NWTC did not have a duty to discuss the popping noise with LCL; it does not relieve NWTC of its contractual duties.
- Irrelevant as to the duties of LCL, Morrow, and MKA, NWTC had its own duty to perform appropriately under its contract. It did not.

LCL's position is that NWTC did "do something wrong." The facts above are in dispute and should have survived summary judgment. NWTC goes on to assert that LCL's claim is nothing but speculation and that LCL and MKA employees failed to state that NWTC participated in any wrongdoing.<sup>40</sup> NWTC fails to discuss the opinions of its own employees, as they expressed significant concern as to the "popping" noise that took place before the crane collapse. NWTC also fails to discuss

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<sup>40</sup> *Respondent's Brief at 44.*

why NWTC president failed to take any action once it was informed of the abnormal and potentially dangerous popping noise. NWTC failed to abide by its contract; it failed to disclose concerns about the popping noise and to conduct applicable tests as related to its work. How can NWTC assert that it did “nothing wrong”?

In its brief, NWTC argues that its duty is limited to its contractual obligations.<sup>41</sup> While it is true that NWTC’s duty is limited to its contractual obligations, it fails to acknowledge *what* its contractual obligations include. NWTC cites *Graham v. Concord Constr., Inc.*, stating that *Graham* provides, “if the contractor performs in accordance with the owner’s plans and specifications, it is not liable for damages.”<sup>42</sup> Again, NWTC goes onto argue that its duties are limited to the “assembling” and “dismantling” of the crane.<sup>43</sup> It ignores the lengthy contract obligations it had with LCL, obligations that include a duty to disclose safety concerns in addition to a duty to abide by all applicable laws, ordinances, statutes and rules.

**B. LCL/MKA’s failure to inspect the crane is not a superseding cause to NWTC’s work**

Although NWTC argues that LCL/MKA’s failure to inspect the crane superseded NWTC’s work, NWTC’s duty to conduct pre-operational tests

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<sup>41</sup> *Respondent’s Brief at 39.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

would have been tested *after* MKA's inspection. Where an intervening cause or act is one that is not anticipated as reasonably likely to happen, "original negligence cannot be said to be the proximate cause of the final injury...since the chain of causation is broken."<sup>44</sup> LCL/MKA's alleged failure to inspect the cranes is not an intervening superseding cause since the load testing would have been completed *after* MKA's inspection, when the crane was fully assembled. Had NWTC properly completed the load testing at the tie, instability would and could have been detected appropriately.

**C. NWTC reads its contractual duties too narrowly and further misconstrues its contractual obligations**

**1. NWTC incorrectly argues that it was not required to perform a 360 load test because the NWTC-LCL contract specifies NWTC's duty to abide by all laws, rules, regulations, ordinances, and orders.**

**a. NWTC had a contractual duty to conduct a 360 pre-operational load test.**

NWTC incorrectly states that it was not required, by contract or by any other means, to conduct a 360 test pre-operational test.<sup>45</sup> NWTC's assertion is in clear conflict with its contract with LCL. The NWTC-LCL contract specifies the following as to NWTC's duties:

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<sup>44</sup> *Qualls v. Golden Arrow Farms*, 47 Wash.2d 599, 288 P.2d 1090 (1955).

<sup>45</sup> *Respondent's Brief at 45.*

“take all necessary safety precautions pertaining to its work and the conduct thereof, including but not limited to compliance with all applicable laws, ordinances, rules, regulations and orders issued by a public authority...”<sup>46</sup>

As specified by the above language from the NWTC-LCL contract, there is no reason for NWTC to believe that WAC 296-155-525 (cranes and derricks) does not apply to it because NWTC is required to comply with *all* applicable laws, ordinances, rules and regulations. Why NWTC would think otherwise is questionable. NWTC argues that because Campbell testified that NWTC was not a “qualified person,” that somehow suggests that NWTC should be relieved of its duty to abide by statute and conduct appropriate pre-operational tests.<sup>47</sup> Furthermore, the issue as to whether NWTC had a contractual duty to conduct a pre-operational 360 load test is one that should have survived summary judgment because it is one of the primary material issues of fact at dispute in the present case.

NWTC themselves admit that as per their contract with LCL, “subcontractor shall request, coordinate, and attend all required inspections.”<sup>48</sup> NWTC should have “requested, coordinated, and attended all required inspections,” as specified in its contract with LCL. There is no question as to whether NWTC was required, by its contract, to conduct a

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<sup>46</sup> CP 280.

<sup>47</sup> *Respondent's Brief at 45-47.*

<sup>48</sup> *Respondent's Brief at 46.*

360 pre-operational load test. It failed to do so, breaching its contractual obligations to LCL.

NWTC further argues that experts Dethlefs and Lewis are not crane construction experts, and that both, in their testimonies, could not opine that NWTC was responsible for performing a 360-test.<sup>49</sup> However, the issue on appeal is whether a dispute of material facts exists and whether the trial court properly granted summary judgment in favor of NWTC.

**b. NWTC's argument that the party who signs the pre-operation record test is the party responsible for the test does not relieve it from its contractual and regulatory obligations.**

First, NWTC continues to argue that the party who signs the record of the pre-operation test is the party responsible for the test, and therefore, WAC 296-155-525(5)(f) does not apply to it.<sup>50</sup> NWTC however, fails to not only consider the potential policy considerations behind implementing the statute to promote safety, but also fails to acknowledge its contractual duties under the LCL-NWTC contract. NWTC is required to abide by *all*, not some, laws, rules, regulations, orders and ordinances as it relates to its conduct and work with cranes and derricks. If NWTC was somehow

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<sup>49</sup> *Respondent's Brief at 48-49.*

<sup>50</sup> *Respondent's Brief at 49-50.*

exempt from abiding by particular statutes, it would have been specified so in the NWTC-LCL contract and additionally in WAC 296-155-525. NWTC further should have known that LCL relies on its information, and that it would be responsible for testing and taking proper and adequate safety precautions as per its contract. NWTC was required to inspect and accept work of Morrow, or in the alternative, speak up if it detected problematic issues. NWTC was also required to perform appropriate tests necessary per code, specifically with regards to its duties in assembling and dismantling the crane. Morrow and LCL did sign the record of the pre-operational test, but that does not relieve NWTC from conducting pre-operational tests as it related to its duties, or informing LCL about safety hazards. NWTC clearly breached its contract with LCL.

Second, the NWTC-LCL contract specifically states that, “non-familiarity with a requirement shall not relieve the subcontractor from full responsibility for compliance...subcontractor is required to abide by all applicable laws, ordinances, rules, regulations and orders....”<sup>51</sup> There is no question that WAC 296-155-525 should not be included. Additionally, WAC 296-155-525(5)(b) does not specify that it only applies to certain individuals/parties dealing with the maintenance of cranes. NWTC was responsible for pre-operational testing. More importantly, however, there

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<sup>51</sup> CP 288.

is no question that the issue is a factual dispute that should have survived summary judgment at the lower level.

**2. In an effort to relieve its liability, NWTC incorrectly asserts that LCL paid Morrow to conduct pre-operation tests.**

NWTC argues that LCL paid Morrow to conduct the pre-operation test, implying that NWTC was in no way responsible to conduct pre-operation tests as related to its duties as a subcontractor.<sup>52</sup> NWTC cites to the Morrow-LCL contract, which does indeed specify the requirement of a Morrow service technician to be present during the erection, climbing, dismantlement etc.<sup>53</sup> NWTC, however, does not speak to the portion of the NWTC-LCL contract that specifies that subcontractors, as in NWTC, are required to work and pay for all tests applied to their work. NWTC itself cites to the following provision:

“Subcontractors 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.”<sup>54</sup>

NWTC further fails to specify any contractual provision that states Morrow shall and will be the only person responsible for the 360 test, and/or any pre-operational tests. NWTC continues to attempt to relieve its liability under its contract with LCL. NWTC argues that it is only required

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<sup>52</sup> *Respondent's Brief at 53.*

<sup>53</sup> *Respondent's Brief at 28-29.*

<sup>54</sup> *Respondent's Brief at 46.*

to “assemble and dismantle the crane,” but with assembling and dismantling should come the use of proper and reasonable care, ensuring that such assembling and dismantling passes all pre-operational tests. NWTC clearly had a duty to work and procure and pay for all tests as specified in its contract.

NWTC improperly argues that it had no duty to inspect the crane base. To the contrary, it had a duty to “examine all supporting and adjacent surfaces, and report any defects or conflicts with the Contract Documents to Contractor...”<sup>55</sup> Consequently, there is no question as to whether NWTC had a duty to perform an examination of defects and conflicts.

**3. If NWTC is found to be negligent, NWTC does owe LCL a duty to indemnify, as specified by the NWTC-LCL contract.**

Even if the lower court judges were correct in their decision to grant NWTC’s Motion for Summary Judgment, the issue of indemnification remains unresolved. NWTC argues that *Dixon v. Fiat-Roosevelt Motors, Inc.*, provides that “the 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.”<sup>56</sup> In the present case, NWTC must defend its case because it is potentially liable to LCL as

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<sup>55</sup> CP 289.

<sup>56</sup> *Respondent’s Brief at 59.*

per the NWTC-LCL contract. NWTC is correct in that that the right to indemnity arises when liability becomes fixed. In its brief, LCL asserts that “if LCL provides that NWTC was negligent, NWTC will be liable to LCL for defense costs and damages.” Simply put, NWTC has promised to “defend, indemnify, and hold contractor...harmless from any and all...liabilities or by third parties arising from, or connected with, services performed under this subcontract by subcontractor...” by way of its contract.

**D. *U.S. v. Spearin* is not applicable to the present case.**

As specified in its opening brief, LCL agrees that NWTC is correct to the extent that it cannot be held liable for the portions of its work merely involving the specifications provided to it by LCL.<sup>57</sup> However, NWTC fails to acknowledge that it *can and should* be contractually liable for its failure to abide by applicable legal and regulatory standards in addition to its breach of contract. MKA, LCL, and Morrow’s duties and responsibilities do not relieve NWTC of its own duties and responsibilities. NWTC argues that in accordance with the *Spearin* doctrine, if NWTC complies with all specifications, and the system ultimately fails, then NWTC is not responsible.<sup>58</sup> NWTC *did* fail to comply with the specifications of its contract, which could have prevented

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<sup>57</sup> *Respondent’s Brief at 40.*

<sup>58</sup> *Respondent’s Brief at 40-42.*

the crane collapse; it failed to not only conduct appropriate pre-operational tests but also ignored a questionable safety concern and hazard. *Spearin* simply cannot apply to NWTC's case.

**E. NWTC does not include LCL as an additional insured; NTWC does not include LCL in its policy, but only on its certificate of liability insurance.**

In its response, NWTC quickly dismisses the fact that it fails to list LCL as an additional insured.<sup>59</sup> NWTC cites to its Certificate of Liability insurance, and further states that because LCL is listed as an additional insured on the certificate, NWTC did include LCL as an additional insured. Nevertheless, NWTC failed to include LCL on its policy, as an additional insured. NWTC has yet to acknowledge LCL as an additional insured.

**F. Res Judicata regarding BRE and LCL**

**1. Res Judicata and claim preclusion require that the “same parties” be litigating the same case. BRE was not a party in the *In Re Tower Crane Collapse* matter, and therefore NWTC's argument that claim preclusion applies is incorrect.**

Claim preclusion prevents the same parties from litigating a second lawsuit on the same claim or any other claim.<sup>60</sup> There is no question that BRE was not a party to the *In Re Tower Crane Collapse* matter, therefore it could not litigate a second lawsuit on the same matter or claim. NWTC

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<sup>59</sup> *Respondent's Brief at 59.*

<sup>60</sup> *In re Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004).

argues that BRE essentially presents the same theory of liability as did the plaintiffs in *In Re Tower Crane Collapse*, primarily because BRE shared experts with LCL.<sup>61</sup> Simply because BRE utilizes the same witnesses as LCL, it does not go to show that BRE's claim in the present matter is identical and cannot be pursued. One of the requirements in a res judicata suit is the, "concurrence of identity of person and parties."<sup>62</sup> BRE was not a party to the first suit and therefore the concurrence of identity element fails to exist. NWTC's defense of claim preclusion is not applicable to the present case and the trial court improperly granted summary judgment in NWTC's favor.

**2. LCL could not have asserted BRE claims in the *In Re Tower Crane Collapse* suit because BRE was not a party to the suit**

In its brief, NWTC agrees that it never argued or claimed the issue of the amount of BRE's property damage.<sup>63</sup> NWTC fails to acknowledge that neither LCL nor BRE asserted claims against NWTC based on damages to BRE's property. LCL/BRE could not have introduced the issue of property damages in the previous suit because BRE was not a party in the previous suit. LCL's claims in the BRE matter cannot be barred under the doctrine of res judicata.

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<sup>61</sup> *Respondent's Brief at 63-64.*

<sup>62</sup> *Northern Pac. Ry. Co. v. Snohomish County*, 101 Wn.686, 688, 172 P. 878 (1918).

<sup>63</sup> *Respondent's Brief at 61.*

Additionally, NWTC attempts to argue issue preclusion as a defense. It is a well established principle that the court will not consider issues raised for the first time in a reply brief.<sup>64</sup> NWTC improperly raised the defense of issue preclusion when asserting its claim preclusion defense.

#### IV. CONCLUSION

The trial court's decision to grant summary judgment in favor of NWTC was erroneous for several reasons. First, NWTC's defense based on claim preclusion should not have been considered by the trial court because neither the claims brought by BRE nor the third-party claims brought by LCL met the required elements of claim preclusion based on long-standing Washington law. Second, NWTC breached its contract with LCL when it not only failed to conduct the 360 pre-operational load test, as required by law, but when it also failed to inform LCL about the danger of the "popping" noise that occurred before crane erection. Third, NWTC's breach was a proximate cause of the tower crane collapse because had it abided by its contractual duties with LCL, conducting a pre-operational test and informing LCL of potential safety hazards could have prevented the collapse of the tower crane. Finally, NWTC's acts or failures to act were negligent, as NWTC failed to exercise the level of care

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<sup>64</sup> *West v. Thompson*, 14 Wn.App.573, 580, 183 P.3d 346 Wn. App. (Div.II, 2008).

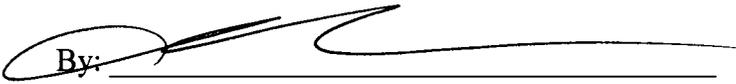
that a reasonable prudent crane erector would and should exercise in a safe erection of a tower crane.

NWTC has failed to meet its burden for summary judgment dismissal because clearly, substantial disputes of material facts exist. NWTC had the last best chance to see the design flaw, yet it continues to shift the blame to the design engineer without acknowledging its own failure to follow contractual and regulatory duties. The dispute as the material facts that exist in this matter should have been afforded to a jury for review. The trial court's grant of summary judgment was erroneous. BRE/LCL respectfully requests that this Court reverse the trial court's order.

DATED this 24 day of May, 2010.

Respectfully submitted,

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**APPELLANT BRE'S REPLY TO RESPONDENT/CROSS-  
APPELLANT NWTC'S OPENING BRIEF**

**I. ASSIGNMENT OF ERROR AND ISSUES PRESENTED**

Appellant, BRE Properties, Inc. ("BRE"), disputes each and every Assignment of Error asserted by Respondent/Cross-Appellant, Northwest Tower Crane Services, Inc. ("NWTC"). The trial court properly denied NWTC's Motion to Exclude BRE's witnesses.

**A. Issues Pertaining to Assignment of Error**

**Issue 1:** NWTC asserts that BRE failed to disclose expert or liability witnesses by the deadline imposed by the Court's Case Management Schedule, in violation of King County LCR 26(b)(1). However, BRE submitted its disclosure of primary witnesses on May 11, 2009, as specified by the Case Schedule.<sup>65</sup> In its disclosure, BRE further provided that expert witnesses had not been designated (and would be provided per CR 26(e)), that BRE reserved the right to call any of the witnesses in its disclosure to offer an expert opinion, and that BRE further reserved the right to call any and all witnesses identified in any other

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<sup>65</sup> CP 913.

party's answers and responses to any other party's discovery requests (in an effort to utilize Lease Crutcher Lewis ("LCL") witnesses.

**Issue 2:** NWTC incorrectly continues to rely on the *Blair* case to establish that BRE failed to abide by the Court's Case Schedule.<sup>66</sup> *Blair* is entirely distinguishable from the present case because BRE submitted its disclosure of witnesses.

**Issue 3:** NWTC asserts that BRE "willfully" failed to disclose its witnesses. BRE not only disclosed its witnesses, but specifically included reservations in its disclosure, which NWTC fails to discuss. The question of whether BRE "willfully" failed to disclose witnesses is irrelevant because BRE properly provided a disclosure of primary witnesses on May 11, 2009.

## II. STATEMENT OF THE CASE

First, NWTC fails to provide an appropriate "statement of the case" in their opening brief; rather it incorporates its "statement of the case" from its response to our initial brief, which does not speak to the issue of BRE's disclosure of primary witnesses what so ever.<sup>67</sup>

Second, contrary to NWTC's assertions, BRE properly filed its disclosure of possible primary witnesses on May 11, 2009, pursuant to and

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<sup>66</sup> CP 507-508.

<sup>67</sup> *Respondent/Cross-Appellant's Brief at 70.*

as specified by the Court's Case Scheduling Order. In an effort to avoid repetitive and unnecessary costs to all parties, BRE reserved the right to call "any and all witnesses in other party's answers and responses to discovery."<sup>68</sup> BRE relied on many of LCL's witnesses and NWTC has yet to provide substantive legal argument or bases to assert that BRE cannot do so. BRE did not purposefully attempt to refrain from disclosing its witnesses, as NWTC argues. BRE provided all known witnesses appropriately and in a timely manner, pursuant to Court Order and in accordance to LCR 26(b)(1). Furthermore, NWTC was well aware of all possible and potential witnesses as a result of the *In Re Tower Crane Matter*.

Third, NWTC argues that BRE willfully failed to disclose its witnesses. The question of whether BRE acted "willfully" is irrelevant as BRE properly disclosed its witnesses on time and in accordance with discovery rules. As it did at the lower level, NWTC argues that the *Blair* and *Lancaster* decisions prevent "tactical non-disclosure" of witnesses. Both *Blair* and *Lancaster* do not apply to BRE as BRE disclosed its witnesses on time and in accordance to discovery rules. NWTC failed to depose and proceed with discovery with regards to most witnesses for

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<sup>68</sup> CP 913.

approximately two months.<sup>69</sup> Evidently, NWTC not suffer any prejudice or harm. NWTC submitted its Motion to Exclude BRE's witnesses without making a conscious effort to proceed with discovery and depose BRE's witnesses. NWTC waited approximately six weeks to bring its motion.

Finally, counsel for NWTC failed to coordinate as to the meet and confer requirements of CR 26(i) and LCR 37(e).<sup>70</sup> As a result, the trial court correctly denied NWTC's Motion to Exclude.

### III. AUTHORITY

#### A. Standard of Review

The "abuse of discretion" standard governs review for noncompliance with court orders.<sup>71</sup> A discretionary determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or excised on untenable grounds, or for untenable reasons.<sup>72</sup>

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<sup>69</sup> CP 916.

<sup>70</sup> CR 26(i) requires a conference of counsel with regards to any motion or objection in relation to Civil Rules 26 through 37, as does LCR 37(e).

<sup>71</sup> *Rivers v. Washington State Conference of Mason Contractors, et al.*, 145 Wn. 2d 674, 686-87, 41 P.3d 1175 (2002).

<sup>72</sup> *Id.* at 684-85; citing *Burnet v. Spokane Ambulance*, 131 Wn. 2d 484, 494-95, 933 P. 2d 1036 (1997).

**B. BRE properly disclosed its list of possible primary witnesses, pursuant to Court Order, and therefore did not violate King County LCR 26(b).**

The trial court properly denied NWTC's Motion to Exclude because there is no question that BRE failed to abide by discovery rules, specifically King County Local Rule 26. To the contrary, BRE provided disclosure of its primary witnesses by the May 11, 2009 deadline pursuant to Court Order; why NWTC thinks otherwise is questionable.

NWTC is incorrect in asserting that BRE failed to abide by the Court's Case Scheduling Order. BRE provided a complete disclosure of primary witnesses. In addition to providing a complete disclosure of primary witnesses, BRE provided all the requisite information of relevant witnesses. Rather than ignoring the issue of expert witnesses, as NWTC asserts, BRE specified that expert witnesses had not been designated and such information would be provided in accordance to CR 26(e). In an effort to avoid repetitive and unnecessary costs to all parties, BRE also went as far as to ensure it included reservations, which would allow BRE to call the witnesses it provided as experts and liability witnesses and use "any and all witnesses identified in any other party's answers and responses to any other party's discovery requests." NWTC fails to cite any substantive law with regards to BRE's utilization of LCL's witnesses. To

the contrary, “any party can take the testimony of any person...by deposition...”<sup>73</sup> Thus, the trial court was correct in dismissing NWTC’s Motion to Exclude

**C. BRE did not violate the Court’s Case Order or discovery rules to any extent, let alone acting “willfully” or intentionally to avoid disclosing witnesses and abusing discovery rules.**

NWTC’s assertions are heavily based on the argument that BRE purposefully and willfully held back information for the sake of tactics.<sup>74</sup> BRE submitted its disclosure of witnesses by the case scheduling deadline, and therefore it did not hold back *any* information. BRE not only acted in accordance with the case scheduling deadline, but also with all discovery rules. Contrary to NWTC’s argument, BRE did make a clear and conscious effort to respond to appropriate deadlines, and did so on May 11, 2009, submitting its disclosure of primary witnesses. It is NWTC’s tactical attempt to ensure substantive evidence regarding liability is not heard. NWTC had ample time and notice of potential expert witnesses with regards to the present matter.

If NWTC was concerned about being able to depose BRE witnesses, it would have actively moved to depose such witnesses rather than failing

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<sup>73</sup> *Aircraft Radio Industries v. M.V. Palmer, Inc.*, 45 Wash.2d 737, 277 P.2d 737 (1954).

<sup>74</sup> CP 507-509.

to do so for approximately six weeks.<sup>75</sup> NWTC's argument that BRE conducted a "willful violation" does not have any merit provided that BRE submitted its disclosure of primary witnesses and its intention regarding expert witnesses and reservations. BRE did not purposefully fail to respond to court deadlines, or work in an effort to damage NWTC's ability to examine witnesses. The trial court properly denied NWTC's Motion to Exclude.

It is an established principle that broad discovery is permitted under CR 26.<sup>76</sup> Even "fair and reasoned resistance to discovery is not sanctionable."<sup>77</sup> A "willful" or "deliberate" violation is one made without reasonable excuse or justification.<sup>78</sup> In the present case, there was no violation on behalf of BRE. BRE provided its disclosure and addressed the issues as to experts and reservations in a timely manner, it did not willfully or deliberately fails to provide disclosure as NWTC makes the case out to be. Even if the Court finds that BRE acted "willfully" to avoid disclosing

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<sup>75</sup> CP 913-914.

<sup>76</sup> *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 346, 858 P.2d 1054 (1993).

<sup>77</sup> *Id.* at 346.

<sup>78</sup> *See Rivers*, at 674, 686-87.

its witnesses, a party's "reasonable excuse or justification" in failing to respond to court order can be excused.<sup>79</sup>

**D. NWTC continues to incorrectly rely on *Blair* and *Lancaster*, both cases are distinguishable from the present case.**

As it did at the lower level, NWTC essentially presents identical arguments, asserting that BRE's "tactical non-disclosure"<sup>80</sup> is impermissible under the standards set forth in *Blair* and *Lancaster*.<sup>81</sup> *Blair* and *Lancaster* correctly outline policies against willful violations of discovery processes. Nevertheless, the facts and circumstances in both *Blair* and *Lancaster* cases are inapplicable to the present case because BRE did not "willfully" fail to respond to Court's Orders in any way, but in actuality did respond to the Court's Order on time. In *Blair*, plaintiff repeatedly failed to timely disclose possible witnesses and further offered no explanation or failure to do so. Furthermore, the plaintiff in *Blair* filed a disclosure of witnesses well after the Court's deadline.<sup>82</sup> Similarly, in *Lancaster*, the defendant did not move for CR 35 examination of the plaintiff until after the disclosure deadlines had passed and the trial court

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<sup>79</sup> *Id.*

<sup>80</sup> CP 509.

<sup>81</sup> *Blair v. TA Seattle*, 150 Wash. App. 904, 210 P.3d 326 (Div. I 2009); *Lancaster v. Perry*, 237 Wash. App. 826, 830, 113 P.3d 1 (Div. I 2005).

<sup>82</sup> *See Blair* at 901.

entered an order excluding any undisclosed witnesses.<sup>83</sup> Additionally, Lancaster outlined the principle that before evidence is excluded for a discovery violation, the trial court must (1) find that the part's violation was willful, (2) find that the violation substantially prejudiced the opposing party, and (3) consider, on the record, whether lesser sanctions would sufficiently address the violation.<sup>84</sup> Washington Courts have found "willful" failure in cases where parties have failed to respond to interrogatories, to issue joint-status reports, have misled with false claims, have ignored orders regarding service, and have gotten multiple warnings with regards to missing deadlines.<sup>85</sup> BRE did not act "willfully" in ignoring the Court's Schedule, NWTC was not prejudiced because it did not continue with discovery for approximately six weeks and was well aware of potential witnesses from the *In Re Tower Crane Collapse* matter, and the lower court failed to sanction BRE, let alone offer lesser sanctions. The trial court acted properly when it dismissed NWTC's Motion to Exclude.

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<sup>83</sup> See *Lancaster* at 2.

<sup>84</sup> *Id.* at 3.

<sup>85</sup> See *Rivers* at 691-92; See also *Woodhead v. Discount Waterbeds*, 78 Wn. App. 125, 131, 896 P.2d 66 (1995); *National Hockey League v. Metro Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778, 47 L.Ed.2d 747 (1976).

**E. NWTC incorrectly claims that BRE cannot prevail on its claim against LCL, or any other party, because BRE purposefully chose not to disclose liability witnesses. BRE properly disclosed its witnesses.**

In its brief, NWTC argues that, “without any liability witnesses whatsoever, lay or expert, BRE’s negligence claims against all parties, including LCL, must fail.”<sup>86</sup> The issue in the present matter is whether the Court properly dismissed NWTC’s Motion to Exclude BRE’s witnesses. Additionally, NWTC fails to acknowledge the fact that BRE specifically states that it shall be allowed to call witnesses provided in its disclosure to the Court on May 11, 2009, as liability or expert witnesses. NWTC asserts that LCL should have moved to strike BRE’s unsupportable claims, which is outside the scope of the present appeal.

**F. NWTC failed to move to confer in accordance with CR 26(i) and LCR 37(e).**

Both CR 26(i) and LCR 36(e) require that counsel meet and confer before the court will “entertain any motion or objection with respect to Civil Rules 26-37.”<sup>87</sup> Counsel for NWTC failed to abide by the meet and confer requirements of both CR 26(i) and LCR 36(e), as evidenced by counsel’s failure to provide a certification to show that conference

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<sup>86</sup> *Respondent/Cross-Appellant’s Brief at 77.*

<sup>87</sup> CR 26(i); LCR 37(e).

requirements were met.<sup>88</sup> Counsel for NWTC should have moved to arrange a conference before bringing its motion. This Court should affirm the trial court's dismissal of NWTC's Motion to Strike as it failed to abide by the above meet and confer requirements.

#### IV. CONCLUSION

NWTC is right in that BRE was and is not a naïve plaintiff to neglect and be unaware of its duty to disclose witnesses; BRE properly disclosed all witnesses on May 11, 2009, as required by the lower court. It did not "willfully" fail to disclose such witnesses as NWTC asserts in its brief. NWTC fails to establish that BRE should be unable to use LCL's witnesses and further, improperly goes as far to argue that BRE's claims are invalid.

This Court should affirm the lower court's denial of NWTC's Motion to Exclude BRE's witnesses and ORDER that BRE properly disclosed its witnesses and should therefore be allowed to utilize such witnesses at trial.

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<sup>88</sup> CR 26(i) requires that any motion seeking an order to compel discovery or obtain protection shall include certification that the conference requirements have been met; LCR 37(f) also requires a "certificate of compliance"

DATED this 24 day of May, 2010

Respectfully submitted,

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NO. 64199-9-1

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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BRE PROPERTIES, INC.  
Appellant,

vs.

NORTHWEST TOWER CRANE SERVICE, INC.,

Respondent

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**ERRATA SHEET  
REGARDING APPELLANT'S REPLY BRIEF & RESPONSE  
TO CROSS BRIEF OF NWTC**

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Mark J. Dynan, WSBA #12161  
**GIERKE CURWEN, P.S.**  
Attorneys for Petitioner LCL

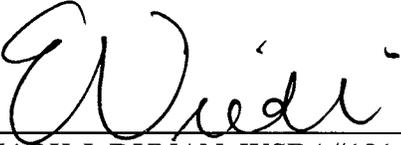
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ORIGINAL

It has come to the attention of counsel, based on BRE's Reply Brief, that the incorrect Clerk's Papers were referenced and this filing is to correct that error.

DATED this 24 day of May, 2010.

Respectfully submitted,  
**GIERKE, CURWEN, P.S.**

By   
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NO. 64199-9-1

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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BRE PROPERTIES, INC.  
Appellant,

vs.

NORTHWEST TOWER CRANE SERVICE, INC.,

Respondent

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**APPELLANT'S PROOF OF SERVICE REGARDING  
APPELLANT'S REPLY BRIEF & RESPONSE  
TO CROSS BRIEF OF NWTC & ERRATA SHEET**

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