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ORIGINAL

No. 62601-9-I

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

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WARD PLACE TERRACE PARTNERSHIP,

*Appellant,*

v.

BEE CONSULTING, LLC,

*Respondent.*

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FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
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**REPLY BRIEF OF APPELLANT WARD PLACE TERRACE  
PARTNERSHIP**

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Eileen I. McKillop  
OLES MORRISON RINKER & BAKER LLP  
701 Pike Street, Suite 1700  
Seattle, WA 98101-3930  
Phone: (206) 623-3427  
Fax: (206) 682-6234  
Attorneys for Appellant

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## I. INTRODUCTION

The central arguments of Petitioners' opening brief regarding the trial court's granting of Bee Consulting, LLC's ("Bee") Motion for Summary Judgment is that the trial court improperly relied on the October 5, 2007 order entered in the HOA's Developer lawsuit against Gary Hall to find, as a matter of law, that the Partnership never entered into a contract with Bee to perform any work under the Settlement Agreement despite a written Engineering Proposal. All the essential elements of the agreement are contained in Bee's Engineering Proposal and the trial court improperly considered Bee's arguments raised for the first time in its reply brief concerning the parol evidence rule.

The law of the case doctrine is inapplicable because the parties are different in the two lawsuits, the causes of action are different, and the trial courts are different. The issue decided in the HOA Developer Lawsuit was whether Gary Hall breached a settlement agreement with the HOA—not whether the Partnership contracted with BEE. Moreover, the trial court's conclusion in the HOA Developer Lawsuit that Hall did not contract with BEE "in all respects" required by the Settlement Agreement does not establish that the Partnership never contracted with BEE. The Engineering

Proposal contains all of the essential elements of the agreement and the six year statute of limitations on a written contract applies. Lastly, Bee Consulting's claim that the Partnership's indemnity claim is time barred by the statute of limitations is incorrect. The time limit on a claim for indemnity is governed by the statute of repose and a statute of limitations. Under RCW 4.16.310, the Partnership's indemnity claim did not accrue until the Association settled its claims against the Partnership in the underlying action in September 2008, which was well within six years of substantial completion of the repair project. Therefore, the Partnership's claims against Bee Consulting are not time barred.

## **II. ARGUMENT**

### **A. BEE CONSULTING'S ARGUMENT BASED ON THE LAW OF THE CASE DOCTRINE IS WITHOUT MERIT.**

Bee Consulting does not address Gary Hall's arguments concerning the law of the case doctrine. Instead, Bee Consulting merely reasserts its contention that Gary Hall's testimony in defense of the separate Developer Lawsuit that (1) he was never sued as a partner and, (2) he was never a partner in Ward Place Terrace Partnership, and Judge Hilyer's Order finding him liable as a Partner for a breach of the Settlement Agreement by not retaining Bee consulting "in all respects specified in the Settlement

Agreement” somehow supports Judge Heller’s decision in which he found, as a matter of law, that no contract was ever entered between Bee Consulting and the Partnership.

The trial court’s ruling the HOA Developer Lawsuit did not address the issue of whether the Partnership contracted with Bee, or that the Engineering Proposal constitutes a written contract between the parties, or whether the six year statute of limitations applies. The law of the case doctrine is limited to judicial rulings made in the same case involving the same parties.<sup>1</sup> Here, neither the Partnership nor Bee Consulting was a party in the Developer Lawsuit. Moreover, the trial court in the Developer Lawsuit did not even consider the issue of whether the Partnership entered into a contract with Bee Consulting. Judge Hilyer merely ruled that Gary Hall breached the settlement agreement with the Association by not retaining Bee Consulting “in all respects specified in the Settlement Agreement...” Judge Hilyer did not rule that Gary Hall or the Partnership did not enter into a contract with Bee Consulting at all.

It would be unfair and unjust if Gary Hall’s testimony in the Developer Lawsuit that he was not sued as a Partner and that he

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<sup>1</sup> *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992).

was never a Partner in the Ward Place Terrace Partnership could be used against him in the Partnership's lawsuit, after litigating and losing this defense in the Developer Lawsuit and the trial court ruling that he was liable to the Association as a Partner. Moreover, Gary Hall's answers to the Association's requests for admissions were directed to him as an alleged "shareholder" of Ward Street Terrace A and B, LLC. Gary Hall's answers to the Association's requests for admissions were not directed to him as a "Partner" of Ward Place Terrace Partnership. Thus, Gary Hall's denial of Requests for Admissions 6, 11, 12, were as an alleged "shareholder" of Ward Street Terrace A and B, LLC. The trial court properly dismissed the Association's claim finding that Gary Hall was never a shareholder of Ward Place Terrace A and B, LLC. Thus, Gary Hall's answers to the Association's requests for admissions in the Developer Lawsuit can not support the trial court's ruling in the Partnership lawsuit that the Partnership did not contract at all with Bee Consulting.

Allowing Bee Consulting to use Gary Hall's defenses to the Developer Lawsuit as a basis to support its summary judgment is unfair and unjust because the Order it relies on is itself inconsistent, and finds Gary Hall liable to the Association as a Partner. It is the

trial court's ruling in the Developer Lawsuit finding Gary Hall liable as a Partner that is the basis for the Partnership's claims against Bee Consulting for breach of contract and indemnity.

The trial court's ruling in the Developer Lawsuit that Gary Hall breached the Settlement Agreement by not retaining Bee Consulting in all respects specified in the Settlement Agreement did not establish as a matter of law that the Partnership never contracted with Bee Consulting. Thus, the trial court clearly erred when it dismissed the Partnership's claims against Bee Consulting based on Judge Hilyer's ruling in the Developer Lawsuit.

**B. THE PARTNERSHIP'S BREACH OF CONTRACT CLAIM IS GOVERNED BY THE SIX YEAR STATUTE OF LIMITATIONS.**

BEE argued on summary judgment that its contract with the Partnership was only oral and that the claim was barred by the three year statute of limitations on oral contracts. In opposition to Bee Consulting's motion for summary judgment, the Partnership presented Bee Consulting's written Engineering Proposal to Gary Hall and Bee Consulting's invoices to Gary Hall for its work under the Engineering Proposal. The Partnership argued that BEE's Engineering Proposal and its General Conditions, and the invoices, constitute a written contract and that the claim is governed by the

six year statute of limitations on a written contract. BEE argued for the first time in its reply memorandum that parol evidence is necessary to determine the identity of the parties and the scope of the work, and thus the three-year statute of limitations for oral contracts applied.

The Partnership objected to the court's consideration of Bee Consulting's new arguments raised for the first time in its reply memorandum, citing CR 56(c) and Washington case law.<sup>2</sup> Accordingly, the trial court erred in considering BEE Consulting's parol evidence rule arguments raised for the first time in its reply brief. However, parol evidence is admissible to construe a written contract and to determine the intent of the parties.<sup>3</sup> Here, Bee Consulting's Engineering Proposal and its invoices to Gary Hall establish all of the essential elements of a written contract and fall within the six-year statute of limitations. BEE's Engineering Proposal explicitly names Gary Hall, and the Proposal was sent directly to Gary Hall. BEE's president testified that Gary Hall contacted BEE to assist with the repair of water intrusion at the Ward Place Terrace Condominiums. Furthermore, Bee's

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<sup>2</sup> *Molloy v. City of Bellevue*, 71 Wn. App. 382, 385, 859 P.2d 613 (1993), citing *White*, 61 Wn. App. at 169.

<sup>3</sup> *Findlay v. United Pacific Ins. Co.*, 129 Wn.2d 368, 374, 917 P.2d 116 (1996).

Engineering Proposal sets forth the scope of work that Bee agreed to provide (“details for all decks, doors, windows, roof, patios, cladding materials, and other areas of waterproofing concern”); the number of engineering visits (two); “continuous” communication with the architect and contractor; reviewing details with subcontractors (training); and the general conditions of BEE’s work (which includes an indemnity agreement). Contrary to Bee’s contention, whether the Engineering Proposal states on its face word for word everything that Gary Hall testified in his Declaration that he contracted with Bee to do is immaterial to the issue of whether a written contract existed between the Partnership and Bee Consulting for purposes of the statute of limitations.

It is clear that all of the essential elements of the agreement are contained in BEE’s Engineering Proposal and the trial court erred in ruling that the three year statute of limitations on oral contracts applies and bars the Partnership’s claims.

**C. THE PARTNERSHIP’S INDEMNITY CLAIM DID NOT ACCRUE UNTIL SEPTEMBER 2008.**

Bee intentionally misrepresents the arguments that were made to the trial court on summary judgment. Bee’s motion for summary judgment was based on the incorrect assumption that only an oral contract existed between the Partnership and Bee.

The Partnership opposed the motion submitting that the Engineering Proposal and its general conditions constitute a written contract for purposes of the statute of limitations. Bee argued for the first time in its reply memorandum that because the contract claim against Bee is barred by the three year statute of limitations on oral contracts, that the Partnership's contractual indemnity claim is also barred. Bee also argued for the first time in its reply that any cause of action arising out of the indemnity claim accrued at the time suit was filed, and that all of the claims against Bee are barred. Thus, the trial court should not have considered Bee's arguments which were raised for the first time in its reply.

Bee also attempts to use the language of the indemnity agreement to argue that the duty to indemnify accrues when the Association filed its lawsuit against Gary Hall. None of these arguments were raised to the trial court. The court should not consider Bee's arguments which were raised for the first time on appeal. Furthermore, there is nothing in the language of the indemnity agreement that supports Bee's interpretation and it is contrary to well established case law that holds that an indemnity claim does not accrue until the indemnitor pays or is legally

obligated to pay a third party for damages.<sup>4</sup> Bee's argument that the Partnership's indemnity claim accrued at the time the Association filed suit in January 2004 is without merit and is not supported by any legal authority. The Partnership's indemnity claim accrued in September 2008, when Gary Hall entered into a settlement with the Association. Under RCW 4.16.310, the Partnership's indemnity claim against Bee Consulting is not time barred.

**D. THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES AND COSTS TO BEE UNDER THE ENGINEERING PROPOSAL.**

BEE Consulting attempts to distinguish the ruling in *Wallace* that the *Herzog*<sup>5</sup> rule does not apply where the party seeking fees did not intend to form a contract, by arguing on appeal that the issue is not the existence of the proposal itself, just the scope of the services to be performed under the proposal. BEE argued in its motion for summary judgment that there is no evidence of any written contract between Ward Place Terrace Partnership and BEE Consulting, and that the Engineering Proposal was with Landmark Homes. According to Bee, the Partnership and Bee never intended

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<sup>4</sup> *Parkridge Assoc., Ltd. v. Ledcor Industries, Inc.*, 113 Wn. App. 592, 598, 54 P.3d 225 (2002).

<sup>5</sup> *Herzog Aluminum, Inc. v. General America Window Corporation*, 39 Wn. App. 188, 192, 692 P.2d 867 (1984).

to form a contract. Like *Wallace v. Kuehner*, 111 Wn. App. 809, 46 P.3d 823 (2002), the trial court ruled that the Partnership was not a party to the Engineering Proposal containing an attorney fee provision, and BEE Consulting has no independent right to recover fees under a contractual attorney fee clause. Thus, this court should reverse the trial court's award of attorney's fees and costs to BEE as a prevailing party, and vacate the Judgment entered on the attorney fee award.

**E. BECAUSE THE TRIAL COURT'S DECISION DISMISSING THE PARTNERSHIP'S CLAIM WAS BASED ON THE ORDER ENTERED IN THE DEVELOPER LAWSUIT, THIS COURT MUST DECIDE THE ISSUES OF WHETHER THAT ORDER SHOULD ALSO BE REVERSED.**

The trial court in the Partnership Lawsuit clearly erred when it relied on the court's order granting the Association motion for summary judgment in the Developer Lawsuit. Because the trial court relied on the decision by the trial court in the Developer Lawsuit to grant Bee Consulting's motion for summary judgment, this court should address the Partnership's arguments that the court erred when it ruled that Gary Hall is personally liable as a Partner for breach of the Settlement Agreement. The HOA's Complaint only asserts claims against Gary Hall as a "shareholder" of Ward Place Terrace A and B, LLC. The HOA's Complaint did

not name Gary Hall as a partner of the alleged Ward Street Terrace Partnership. The HOA failed to direct summons for service upon Gary Hall in his capacity as a partner in the alleged partnership. A partner who is not served is not bound by any judgment entered.<sup>6</sup> A judgment for personal liability will not be entered against a partner who has not been personally served.<sup>7</sup> The trial court had no jurisdiction over Gray Hall as an alleged Partner and its ruling that Gary Hall is liable as a Partner was clearly in error and should be reversed. Therefore, the trial court's reliance on this ruling in the Partnership action was in error and should be reversed.

The evidence also establishes a material question of fact as to the scope of the repairs required under the Settlement Agreement. The trial court erroneously interpreted the Settlement Agreement to include any damage caused by improper construction found during the intermediate repair remediation. At the very least, the evidence raised a material question of fact as to the scope of the repairs under the Settlement Agreement. Thus, the court should reverse the trial court's decision in the Partnership lawsuit

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<sup>6</sup> *Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces*, 36 Wn. App. 480, 674 P.2d 1271 (1984).

<sup>7</sup> *Id.*

which relied on the order granting the Association's motion for summary judgment in the Developer Lawsuit.

**F. IF THIS COURT REVERSES THE TRIAL COURT'S DECISIONS, THEN THE PARTNERSHIP IS ENTITLED TO AN AWARD OF FEES AND COSTS.**

If this court reverses the trial court's decision dismissing the Partnership's claims on summary judgment, then the Partnership is entitled to an award of its attorney's fees and costs at the trial court level and on appeal. The General Conditions of BEE's Engineering Proposal contain a prevailing attorney fee clause which entitles the Partnership to an award of attorney's fees and costs. The prevailing attorney fee provision is enforceable and the Partnership is entitled to its attorney's fees and costs as a prevailing party.

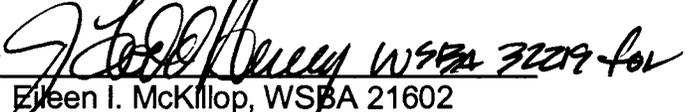
**III. CONCLUSION**

This court should reverse the trial court's granting of BEE Consulting's motion for summary judgment and vacate the Judgment entered against the Partnership, and award the Partnership its attorney's fees and costs.

DATED this 31<sup>st</sup> day of July, 2009.

OLESON MORRISON RINKER & BAKER LLP

By

 WSBA 32209-601

Eileen I. McKillop, WSBA 21602

Attorneys for Appellant

**ORIGINAL**

No. 62601-9-1

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REPLY BRIEF OF APPELLANT WARD PLACE TERRACE  
PARTNERSHIP

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**CERTIFICATE OF SERVICE**

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Eileen I. McKillop  
OLES MORRISON RINKER & BAKER LP  
701 Pike Street, Suite 1700  
Seattle, WA 98101-3930  
Phone: (206) 623-3427  
Fax: (206) 682-6234  
Attorneys for Appellant

I, Diana T. Woodruff, hereby declare under penalty of perjury and in accordance with the laws of the State of Washington as follows:

1. I am a citizen of the United States and over the age of 18 years and am not a party to the within cause;

2. I am employed by the law firm of Oles Morrison Rinker & Baker LLP. My business and mailing address is 701 Pike Street, Suite 1700, Seattle, Washington 98101-3930.

3. I caused to be served via ABC Legal Messengers Service no later than July 31<sup>st</sup>, 2009, a copy of the following document(s) on the following parties:

**Attorneys for Respondent Bee Consulting, LLC**

Kenneth G. Yalowitz, Esq.  
Green & Yalowitz, PLLC  
1420 Fifth Avenue, Suite 2010  
Seattle, WA 98101-4087

-and-

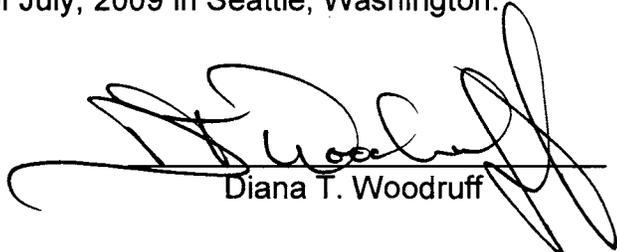
**Original to: WASHINGTON STATE COURT OF APPEALS,  
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Washington State Court of Appeals – Division I  
One Union Square  
600 University Street  
Seattle, WA 98101-1176

Entitled:

1. Reply Brief of Appellant Ward Place Terrace Partnership;  
and
2. Certificate of Service.

DATED this 31<sup>st</sup> day of July, 2009 in Seattle, Washington.



Diana T. Woodruff