

No. 74023-7-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

MERCER PLACE II CONDOMINIUM OWNER'S ASSOCIATION,

Plaintiff/Appellant,

v.

MCGLYNN PLASTERING, INC.,

Defendants/Respondents.

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 STATE OF WASHINGTON
 COURT OF APPEALS
 DIVISION ONE
 [Signature]

APPELLANT'S BRIEF

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A. INTRODUCTION

McGlynn Plastering performed stucco repair work on Mercer Place's condo building in 2007-2008, and, as part of completing its contract, issued a final report containing maintenance instructions and warranties of quality in September 2009. Mercer Place discovered defects in the work in 2014, less than six years after substantial completion, and filed this breach of contract/breach of warranty action against McGlynn in May 2015, less than six years after McGlynn's issued its final report.

Before answering the complaint and before any discovery was conducted, McGlynn moved for summary judgment based solely on the statute of repose, RCW 4.16.310. The trial court granted the motion and denied Mercer Place's request for a continuance to conduct discovery.

B. ASSIGNMENT OF ERROR

The trial court erred in granting McGlynn's motion for summary judgment dismissing Mercer Place's complaint as barred by the statute of repose, RCW 4.16.310.

Issues Pertaining to Assignment of Error

1. Can a defendant rely on the affirmative defense of RCW 4.16.326(1)(g) if it fails to plead it or cite it as a basis for its summary judgment motion?
2. If McGlynn was entitled to rely on RCW 4.16.326(1)(g) despite not pleading it or asserting it as a basis for its motion

for summary judgment, was Mercer Place's action timely under that statute?

- a. Does the affirmative defense of RCW 4.16.326(1)(g) require a "nexus" between the last service provided and the cause of action asserted, when the plain language of the statute has no such requirement and only one contractor worked on the project?
 - b. If the affirmative defense of RCW 4.16.326(1)(g) requires a nexus between the last service provided and the cause of action, even when only one contractor worked on the project, did McGlynn's provision of a final report in September 2009 containing new warranties of quality have some connection to Mercer Place's claims for breach of contract and breach of warranty?
3. Was Mercer Place entitled to a CR 56(f) continuance to conduct discovery into the facts surrounding the parties' contract and McGlynn's submission of its final report?

C. STATEMENT OF THE CASE

1. Statement of Facts

In late 2006, Mercer Place contacted McGlynn to see about fixing water damage to the condo's exterior stucco. CP 42:22-25. Mercer Place and McGlynn eventually entered into a written agreement for McGlynn to perform the repair work. CP 43:5-8. The parties also agreed that McGlynn would provide a final report regarding its work. CP 43:19-22.

McGlynn started work in the spring of 2007 and was mostly done by March 31, 2008. CP 43:11-17; CP 48-50. But McGlynn did not provide

its agreed final report to Mercer Place until September 2009.¹ CP 43:25-44:8. Mercer Place did not consider the contract completed until it received the final report from McGlynn. CP 44:7-8.

As a result of Mercer Place's phone calls and emails to McGlynn, McGlynn sent the final report on September 16, 2009. CP 51. The final report contained new warranties regarding the quality of the products used and work performed, including how long materials should last; observations of the condominium building and the quality of McGlynn's work and materials; and the planning schedule for maintenance on the building. CP 48-50.

Specifically, McGlynn stated that "the following is our final report and recommendations for the continued maintenance of the exterior cladding of Mercer Place..." CP 48. The final report represented and warranted that McGlynn had installed stucco assemblies, with flashing and membranes, "to the highest of standards" and that the exterior urethane sealants "should have a lifespan exceeding 8-9 years or more." CP 49. McGlynn warranted in its final report that "we believe the building will perform to industry standards for many years to come," CP 49-50.

¹ McGlynn sent what it described as its "final billing" to Mercer Place on March 31, 2008. CP 44:5-6 However, Mercer Place was unable to obtain McGlynn's final report on the condominium building for more than a year after McGlynn sent that bill. CP 44:3-8.

But the stucco and urethane sealants did not last eight or nine years and the building did not perform for “many years to come” as McGlynn had warranted in the final report. CP 44:9-14. Instead, an inspection of the condominium building in 2014 confirmed extensive cracking of the stucco, along with significant other water damage to non-visible portions of the underlying building structure. CP 44:9-14; RP 13:6-15. Before the inspection, Mercer Place was not aware of the significant damage to its building, nor could it have been. CP 44:11-14.

2. Procedural History

Mercer Place sued McGlynn in May 2015, alleging that McGlynn breached its warranties and its contract with Mercer Place. CP 4:24-5:7. McGlynn did not file an answer to the Complaint or assert any affirmative defenses, but moved almost immediately for summary judgment, claiming that the six-year statute of repose, RCW 4.16.310, defeated Mercer Place’s claims, because the date of substantial completion was March 31, 2008. CP 19. McGlynn, however, did not assert, or cite, the affirmative defense provided by RCW 4.16.326(1)(g) as a basis for its motion, instead relying only on the statute of repose in RCW 4.16.310.²

² McGlynn did discuss the statute for the first time in its reply brief, but only after Mercer Place had pointed out that RCW 4.16.326(1)(g) was not the basis for the summary judgment motion. CP 38:5-10; CP 54.

McGlynn also did not attach a copy of its contract with Mercer Place to its motion for summary judgment, CP 23-24, nor had the parties conducted any discovery in the case. CP 36:13-14. In opposition, Mercer Place asserted that its claim both accrued within the statute of repose and was filed within the applicable statute of limitations. CP 33-44.

On August 27, 2015, the Court *sua sponte* emailed counsel and requested “a copy of the contract at issue in this case” and also asked “is there a certificate of occupancy and if so, what is the date of that certificate?” CP 90-94. Plaintiff’s counsel responded that “[t]here is no Certificate of Occupancy because DPD does not require one for repair/remodel work such as the work at issue, which was performed while the residents lived in the building. The building was constructed in the early to mid 1990s.” CP 90-94.

In response to the Court’s email, Mercer Place filed the only versions of its agreement with McGlynn in its possession: two undated, unsigned “Construction Agreements” prepared by McGlynn. CP 60-77.

Stephen Adams, Mercer Place’s president during McGlynn’s work, stated in his declaration opposing McGlynn’s motion for summary judgment that “[a]s part of McGlynn’s work on [Mercer Place’s building], we agreed that McGlynn would provide Mercer Place with a Final Report

containing assurances about its work, along with a plan for a maintenance schedule.” CP 43:19-22.

However, the trial court stated that it was “not persuaded that the [Final Report] extends the substantial compliance [sic] or termination [of McGlynn’s services], or the parties’ understanding that it was terminated, quite frankly.” RP 21:8-12. Mercer Place’s counsel then made an “oral motion under [CR] 56(f) that you delay your ruling until we have a chance to update documentation from Mr. McGlynn that may bear on that issue?” However, the trial court denied that oral motion, stating “I appreciate the tactical issue that you’re confronted with, but I don’t think it’s going to change the application of the law.” RP 21:19-21. The trial court then granted McGlynn’s motion for summary judgment and signed the order dismissing Mercer Place’s claims with prejudice on the basis that “the Plaintiffs failed to file suit before expiration of the statute of repose as stated in RCW 4.16.310.” RP 79.

3. Relevant Timeline

The following timeline is provided to aid the Court’s analysis:

- March 31, 2008: Substantial Completion
- September 16, 2009: Termination of Services. McGlynn issues final report containing additional warranties of quality.

- Early 2014: Mercer Place discovers damage.
- May 2015: Mercer Place files its complaint.

D. ARGUMENT

1. Standard of Review.

This Court reviews orders granting summary judgment *de novo*, thus performing the same inquiry as the trial court. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012). Accordingly, the Court views the facts and reasonable inferences from those facts in the light most favorable to the nonmoving party. *Id.* In this case, that is Mercer Place. Applying this standard of review, the Court should reverse the trial court’s grant of summary judgment.

2. The Relationship between the Statute of Repose, the Statute of Limitations for Written Contracts, and the Affirmative Defense of RCW 4.16.326(1)(g).

Mercer Place’s claim is timely under all three of the above-referenced statutes, but it is worth understanding how they fit together.

The construction statute of repose, RCW 4.16.310, bars construction-related actions that do not *accrue* within six years of substantial completion or “termination of the services enumerated in RCW 4.16.300, whichever is later.” The “services enumerated” in RCW 4.16.300 include, among other things, “construction services,” “supervision . . . of

construction,” and “administration of construction contracts for any construction.”

The statute of repose, RCW 4.16.310, only requires that the claim *accrue* within the applicable six year period, not that any action be filed within that time. *See, Dania v. Skanska USA Bldg., Inc.* 185 Wn. App. 359, 367, 340 P.3d 984 (2014) (“[o]nce the claim has accrued, ‘that is the end of the statute of repose inquiry. Whether an accrued claim is timely filed is a different question, involving the statute of limitation, not the statute of repose.’”).

Here, Mercer Place’s claim *accrued* no later than early 2014 when it discovered the damage to its building.³ Thus, whether the six-year period of repose is measured from March 31, 2008 - the asserted date of substantial completion - or from the later termination of services in September 2009, Mercer Place’s claim accrued within the statute of repose. The statute of repose, RCW 4.16.310, therefore, cannot extinguish Mercer Place’s claim.

In contrast to a statute of repose, statutes of limitation generally run from the time a claim accrues, and the statute of limitations for actions on written contracts is six years. RCW 4.16.040. *Dania, supra*, 185 Wn. App.

³ The record does not contain the exact date in 2014 when Mercer Place discovered the damage. But the trial court was required to take all inferences in favor of Mercer Place. Such an inference would be that it was in early 2014, before March 31. And indeed, the facts on remand will bear this out – that the damage was discovered in February 2014.

at 367. In construction contract cases involving latent defects, courts apply the discovery rule of accrual, which determines when the statute of limitations begins to run. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 578-79, 146 P.3d 423 (2006). Thus, since Mercer Place's contract claim accrued not later than 2014, when it discovered the damage, it would have until 2020 to file within the statute of limitations. This is the traditional, "two-step analysis" applied to statute of repose/statute of limitations issues. See, *Parkridge Associates, Ltd. v. Ledcor Indus., Inc.*, 113 Wn. App. 592, 598, 54 P.3d 225 (quoting *Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc.*, 105 Wn.2d 878, 883, 719 P.2d 120 (1986)).

In 2003, however, the legislature enacted RCW 4.16.326(1)(g), which provides defendants with an affirmative defense to avoid the discovery rule of accrual and the two-step analysis:

(1) Persons engaged in any activity defined in RCW 4.16.300 may be excused, in whole or in part, from any obligation, damage, loss, or liability for those defined activities under the principles of comparative fault for the following affirmative defenses:

* * * * *

(g) To the extent that a cause of action does not accrue within the statute of repose pursuant to RCW 4.16.310 or that an actionable cause as set forth in RCW 4.16.300 is not filed within the applicable statute of limitations. In contract actions the applicable contract statute of limitations expires, regardless of discovery, six years after substantial completion of construction, or during the period

within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later.

This defense states that construction-related claims accrue and the statute of limitations begins to run automatically, whether discovered or not, upon the later of substantial completion or termination of services. The legislation was intended to reduce a builder's potential exposure from 12 years, under the traditional two-step analysis, to six years, thus creating greater certainty for insurers. *Dania, supra at 369*. The affirmative defense terminates a construction contract claim six years after substantial completion or termination of services, whichever is later. *Id.*

3. Because McGlynn Did Not Plead or Assert the Affirmative Defense of RCW 4.16.326(1)(g), the Traditional Two-Step Analysis Applies.

Because it is an affirmative defense, a defendant must affirmatively plead or assert RCW 4.16.326(1)(g), otherwise the traditional two-step analysis applies. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 582 (2006) (if the defendant fails to plead RCW 4.16.326(1)(g) as an affirmative defense, then the discovery rule of accrual can apply).

Here, McGlynn did not plead RCW 4.16.326(1)(g) as an affirmative defense because it did not answer Mercer Place's Complaint. McGlynn also did not cite the statute in its motion for summary judgment, relying solely instead on the statute of repose, RCW 4.16.310. CP 18. As a result,

McGlynn waived the affirmative defense as a basis for its summary judgment motion. Affirmative defenses that are not properly pleaded are deemed waived. *Harting v. Barton*, 101 Wash. App. 954, (2000) (in dispute over farm lease, lessee waived objections to lack of notice of default and lessors' failure to pursue mediation); *DeYoung v. Cenex Ltd.*, 100 Wash. App. 885 (2000) (plaintiffs' failure to plead satisfaction or payment, as defense to defendant's counterclaim on promissory note, waived the defense); *Henderson v. Tyrrell*, 80 Wash. App. 592, *as amended on denial of reconsideration*, (1996) (fault of third party deemed waived); *Rainier Nat. Bank v. Lewis*, 30 Wash. App. 419, (1981) (failure of consideration deemed waived).

McGlynn submitted no evidence that Mercer Place's claim failed to *accrue* within six years of substantial completion or termination of services. Indeed, the only evidence before the trial court was that the claim accrued in 2014, before both milestones. Thus, under the traditional two-step analysis, the statute of repose is no bar and the trial court should have denied the motion for summary under the statute of repose.

4. Even if McGlynn was entitled to rely on RCW 4.16.326(1)(g) despite not asserting it, Mercer Place's claim is timely under that statute because it was filed within six years of McGlynn's termination of services in September 2009.
 - a. *RCW 4.16.326(1)(g) Contains No Requirement of a "Nexus" Between the Last Service Provided and the Plaintiff's Cause of Action when Only One Contractor Worked on the Project; This Court Should Not Read Such a Requirement Into It.*

Under RCW 4.16.326(1)(g), a claim for breach of a written construction contract must accrue and be filed within six years of substantial completion or "termination of services enumerated in RCW 4.16.300, whichever is later." The "services enumerated" in RCW 4.16.300 include "construction services," and "administration of construction contracts." RCW 4.16.326(1)(g) does away with the "accrual" inquiry and allows builders to be excused for liability on contract actions if the claim is not filed within six years of substantial completion or termination of services, whichever is later. In other words, the defense deems accrual to automatically occur, and the limitations period to automatically commence, upon the later of substantial completion or termination of services. Nothing in the statute, however, states that the final services rendered must be the services giving rise to the plaintiff's cause of action, and this Court should not read such a "nexus" requirement into the statute, especially when only one contractor works on the project. Doing so turns a fairly straightforward

date/year calculation into a factual and metaphysical inquiry as to the relationship between the last service performed and the nature of plaintiff's claim. The relationship between the final service performed and the plaintiff's claim is no more relevant than the relationship between the actual last physical task resulting in substantial completion and plaintiff's claim. It is thus arbitrary to impose a "nexus" requirement for termination of services, but not for substantial completion.

The "nexus" requirement appears in only two cases, and only one of those dealt with RCW 4.16.326(1)(g).

Parkridge Associates, Ltd. v. Ledcor Industries, Inc., 113 Wn. App. 592, 54 P.3d 225 (2002), presented this Court with a case addressing application of the statute of repose, RCW 4.16.310, not the affirmative defense of RCW 4.16.326(1)(g). In *Parkridge*, Ledcor, a general contractor, was sued by the project owner and, in turn, sued its subcontractor, Freeman. The project's substantial completion date was December 30, 1993, but Ledcor claimed Freeman continued to perform services until December 5, 1994, which Freeman disputed along with the nature of its work after substantial completion. The project owner sued Ledcor in November 1999 and Ledcor filed its third-party complaint against Freeman in August 2000, which was more than six years after substantial completion, but less than six years after the disputed date of termination of

services. Freeman moved for summary judgment under the statute of repose, which the trial court granted.

This Court reversed, holding that “[c]onsidering all facts and reasonable inferences in the light most favorable to Ledcor, we agree that the relevant date for summary judgment purposes is December 5, 1994, the date of ‘termination of [enumerated] services’ under the statute of repose.” *Id.* at 597.

In opposing summary judgment, Ledcor submitted evidence that Freeman provided services to the project for nearly a year after substantial completion. Freeman argued in opposition that there must be a nexus between the services performed and the cause of action, and that such nexus was missing because its final services consisted of “warranty work” or “punch list” work that was unrelated to the contract and initial construction work on which the lawsuit was based.

In holding that the termination of services date applied, this Court agreed with the concept of a nexus based on the language of RCW 4.16.300, which says that the statute of repose, RCW 4.16.310, applies to claims “arising from” various services. This Court relied upon *1519-1525 Lakeview Boulevard Condominium Ass’n v. Apartment Sales Corporation*,⁴

⁴ 101 Wn. App. 923, 6 P.3d (2000) aff’d by 144 Wn.2d 570, 29 P.3d 1249 (2001).

which held that, on projects with multiple trades, for contractors providing final services, the statute of repose ran from those final services, and for all other contractors on the project, it ran from substantial completion. In other words, if the claim was against a contractor providing final services after substantial completion, the statute of repose ran from the termination of those services; hence the nexus. One could not, on the other hand, assert a timely claim against a contractor that did no work after substantial completion based on the final services performed by an unrelated contractor after substantial completion.

As noted, the *Parkridge* Court did not address RCW 4.16.326(1)(g), which had not been enacted yet. The only case to discuss a final services nexus requirement in connection with the affirmative defense of RCW 4.16.326(1)(g) is the recent Division II case of *Dania, Inc. v. Skanska USA Bld., Inc.*, 185 Wn. App. 359, 340 P.3d 984 (2014). In that case, Dania hired Skanska as its general contractor and Skanska subcontracted the roofing work to M&W. The project was substantially complete in January 2006, but M&W provided additional services until June, 2006. Dania sued both Skanska and M&W in April 2012, which was more than six years after substantial completion but less than six years after M&W's final services on the roof. Skanska moved for summary judgment under the statute of repose, RCW 4.16.310. Skanska contended that deposition testimony

showed that the final roof services were unrelated to its cause of action, and therefore the substantial completion date was the proper date from which to calculate the six-year period, and therefore Dania's claim was barred. The trial court agreed and granted the motion for summary judgment, but Division II reversed.

The *Dania* Court concluded that Dania's claim (like Mercer Place's claim here) clearly accrued within the statute of repose, so that was not the issue. Rather, the issue presented (as here) was application of RCW 4.16.326(1)(g), and whether Dania had timely filed its action timely under that statute. The parties did not dispute that substantial completion was in January 2006 and that Dania filed its complaint more than six years after that date. Thus, unless the termination of services date applied, Dania's complaint was untimely.

In analyzing this issue, the *Dania* Court cited *Parkridge*, the statute of repose case, for the proposition that for contractors providing "final services" on a project, "the limitations period begins to run from the date their last service was provided, so long as that service gave rise to the cause of action." *Dania*, 185 Wn. App. at 371-72 (citing *Parkridge Assocs., Ltd. v. Ledcor Indus., Inc.*, 113 Wn. App. 592, 599-600, 54 P.3d 225 (2002)).

The *Dania* opinion rejected the idea that the plaintiff must present evidence of a "causal link" between the final services and the cause of

action, but agreed that there must be some connection between the cause of action and the final service, or else a contractor's liability could be extended by any other contractor's subsequent work on a project, citing the *1519-1525 Lakeview Blvd* case. *Dania*, 185 Wn. App. at 374. This rule is obviously sound when there are multiple contractors on a project, but not when there is only one, as here.

Judge Maxa filed a concurring opinion in *Dania* in which he rejected outright the concept of nexus as not found in the statute:

I believe that the statements in the majority opinion and in *Parkridge* reflect an erroneous interpretation of the term "services" as used in construction contract statutes. RCW 4.16.326(1)(g) provides that the statute of limitations begins to run at the "termination of the services enumerated in RCW4.16.300." Nothing in RCW 4.16.326(1)(g) states or even implies that the "services" it references must be the services giving rise to the plaintiff's cause of action.

The court in *Parkridge* referenced the "plain language of RCW 4.16.300." 113 Wash.App. at 599, 54 P.3d 225. But the services enumerated in that statute are, among others, "claims or causes of action of any kind against any person, arising from such person having constructed, altered or repaired any improvement upon real property." RCW 4.16.300.

In other words, under RCW 4.16.326(1)(g) the statute of limitations starts running at termination of construction services. Nothing in RCW 4.16.300 states or even implies that the services referenced in RCW 4.16.326(1)(g) must be the services giving rise to the plaintiff's cause of action.

Moreover, the “arising out of” language in RCW 4.16.300 only applies to the statute of repose section of the statute, and does not reference RCW 4.16.326(1)(g): “RCW 4.16.300 through 4.16.320 shall apply to all claims . . . arising from such person having constructed”⁵ Thus, the “arising from” language that his Court based its reasoning on with respect to the statute of repose in *Parkridge* is, by its terms, inapplicable to RCW 4.16.323(1)(g).

Regardless, in both *Dania* and *Parkridge*, the court of appeals reversed summary judgment on the so-called nexus issue, because the issue was, at a minimum, one of fact. Moreover, the purpose of the nexus requirement, as articulated in *Parkridge* and *Dania*, is solely to “protect... those who perform other earlier services from remaining exposed to liability until all services are completed by all contractors.” *Dania, supra* at 372 (citing *1519-1525 Lakeview Blvd., supra*). Here, McGlynn, as the only contractor on the project, did not require such protection: Mercer Place does not contend that final services provided by a contractor other than McGlynn extended the applicable statutory period.

Instead, Mercer Place contends that McGlynn provided final services on its project—even warranting anew the work that it had

⁵ RCW 4.16.310 (underline supplied).

performed by stating that it was “of the highest quality” and would last for a certain number of years—when it sent the final report on September 15, 2009. CP 41:1-2.

- b. *Even if the Court Reads a “Nexus” Requirement into RCW 4.16.326(1)(g), it is Satisfied Here.*

McGlynn’s preparation and delivery of the final report containing additional warranties of quality in September 2009 constitutes “construction services” or “administration of construction contracts” under RCW 4.16.300. Despite McGlynn’s bald contention in its motion for summary judgment that no nexus existed between the final report and Mercer Place’s claims, the final report provided one of the primary bases for Mercer Place’s claims: in the final report, McGlynn warranted that the stucco—the same stucco that cracked and that forms part of the basis for this suit—was installed to “the highest of standards.” CP 49. McGlynn also warranted that the urethane coating should last for more than eight or nine years. CP 49. However, that coating cracked after only five or six years. CP 44:9-14. Both of those breaches of warranty—and of the underlying contract—formed part of the basis for this suit: Mercer Place cited the final report’s warranties at length in its Complaint, CP 3:8-20, and alleged that “McGlynn breached its warranties and its contract with Mercer Place...” CP 5:6. Even if one views the final report as a separate contract, Mercer Place’s claim must be

allowed to proceed because this action was filed within six years of the day McGlynn issued it.

At a minimum, a genuine issue of material fact exists regarding whether McGlynn's provision of final services in preparing its final report started the statutory period running. The trial court thus erred in granting McGlynn's motion for summary judgment.

5. The trial court erred in denying Mercer Place's oral motion for CR 56(f) continuance because the parties had not yet conducted any discovery.

Appellate courts review a denial of a CR 56(f) motion for abuse of discretion. *Pitzer v. Union Bank of Cal.*, 141 Wn.2d 539, 556, 9 P.3d 805 (2000). A trial court may deny a CR 56(f) motion for continuance only when "(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact." *Pitzer*, 141 Wn.2d at 556.

When a party provides the trial court with a "good reason" why it cannot obtain material evidence in time for a summary judgment proceeding, "the court has a duty to accord the parties a reasonable opportunity to make their record complete before ruling... especially where the continuance of the motion would not result in a further delay of the

trial.” *Cofer v. Pierce Cty.*, 8 Wn. App. 258, 263, 505 P.2d 476 (1973). When the evidence a party states it can obtain would present a genuine issue of material fact, the trial court’s failure to grant a continuance “constitutes an abuse of discretion.” *Cofer*, at 263. As such, courts remain “hesitant to cut litigants off from their right to a trial by means of a summary judgment, when they have had neither the opportunity nor the occasion to take advantage of CR 56(f). *Bernal v. Am. Honda Motor Co., Inc.*, 87 Wn.2d 406, 416, 553 P.2d 107 (1976).

Here, Mercer Place’s counsel moved orally⁶ at the summary judgment hearing for a CR 56(f) continuance, “until we have a chance to update [the] documentation from Mr. McGlynn that may bear on that issue [raised by the trial court regarding whether the September 2009 letter extended the date of termination of services].” RP 21:15-18. Prior to moving for the continuance, Mercer Place’s counsel noted that the contracts Mercer Place submitted to the trial court were all “unsigned, undated” because “we

⁶ Division Two stated in dicta that an “an oral request for a continuance does not appear to comply with the requirement in CR 56(f) that such a request be made by affidavit.” *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 368, 966 P.2d 921 (Div. 2, 1998). However, the case the *Burmeister* court relied upon in making that statement, from Division One, involved an affidavit that did not even mention CR 56(f) or request a continuance. *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474, 477 (Div. 1, 1989). Division 3 has also noted that strict adherence to the form of a CR 56(f) motion per the rule is less important than the “primary consideration” of doing “justice.” *Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671 (Div. 3, 2003). Here, Mercer Place’s counsel explicitly invoked CR 56(f) and asked for the opportunity to take discovery. RP 21:15-18.

haven't done any discovery, we haven't gotten McGlynn's documents; we don't know what's within those." RP 11:15-23.

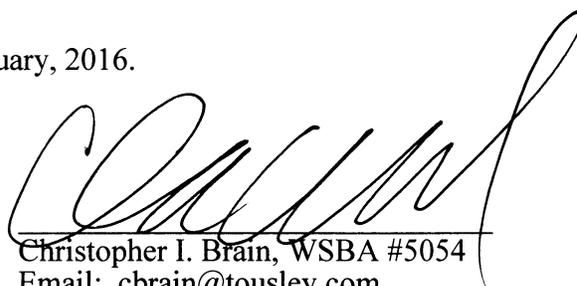
As a result, Mercer Place provided the trial court with a good reason not to grant summary judgment on an undeveloped record: discovery had not yet occurred.⁷ By denying Mercer Place's CR 56(f) motion, the trial court cut off Mercer Place's right to trial in this case and denied it an opportunity to conduct discovery. That discovery would have elucidated the process by which McGlynn created the final report and McGlynn's contested claim that it was a standalone "favor" to Mercer Place. CP 21:1-2. Instead, the Trial Court should have allowed Mercer Place to pursue discovery to show that the final report was an integral, agreed-upon part of the underlying contract between the parties, which, as its very name confirms, terminated McGlynn's provision of services to Mercer Place in September 2009.

⁷ McGlynn had not even answered when it filed its motion for summary judgment.

E. CONCLUSION

For the foregoing reasons, the Court should reverse the order dismissing Mercer Place's complaint and remand for further proceedings.

DATED this 16th day of January, 2016.

A handwritten signature in black ink, appearing to read 'C. Brain', is written over a horizontal line.

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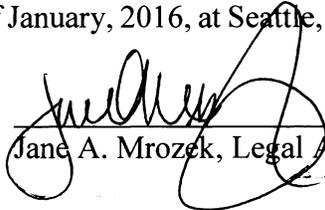
CERTIFICATE OF SERVICE

I, Jane A. Mrozek, hereby certify that on the 13th day of January, 2016, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

Gordon Klug, WSBA #21449 Smith Freed & Eberhard 705 2 nd Avenue, Suite 1700 Seattle WA 98104	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> Electronic Mail
Chin See Ming, <i>pro hac vice</i> Smith Freed & Eberhard 111 SW 5 th Avenue, Ste. 4300 Portland OR 97204 <i>Attorneys for Plaintiff/Appellant</i>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> Electronic Mail

I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 13th day of January, 2016, at Seattle, Washington.



Jane A. Mrozek, Legal Assistant