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**No. 45035-6-II**

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

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DANIA, INC., a Delaware Corporation; NORTHWEST WA  
PROPERTIES, LLC, a Delaware limited liability company, *Appellant*,

v.

SKANSKA USA BUILDING, INC., a Delaware corporation;  
McDONALD & WETLE ROOFING, INC., a Washington corporation,  
*Respondents*.

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**BRIEF OF APPELLANT**

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## TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES .....	2
I. INTRODUCTION.....	3
II. ASSIGNMENTS OF ERROR.....	4
A. Assignments of Error.....	4
B. Issues pertaining to Assignments of Error.....	4
III. STATEMENT OF THE CASE.....	5
A. Statement of Facts.....	5
B. Procedural History.....	9
IV. ARGUMENT.....	9
A. Standard of Review.....	9
B. The Statute of Repose on the DDC roof started running in June of 2006.....	10
1. Skanska did not terminate services until at least June 20, 2006.....	11
2. Skanska’s services after December 2006 are contract work, regardless of being on the “punch list.” .....	12
3. The work done after December 2006 was roof work, thus establishing the appropriate nexus with the complaint. ....	13
4. <i>Parkridge</i> imposes no requirement to prove causation.....	15
C. The Court Erred by drawing inferences from the Barnes testimony that favor Skanska.....	17
V. CONCLUSION.....	19

## TABLE OF AUTHORITIES

### Cases

<i>1519-1525 Lakeview Boulevard Condominium Ass'n v. Apartment Sales Corp.</i> , 101 Wn.App. 923, 6 P.3d 74 (2000).....	11
<i>Hartley v. State</i> , 103 Wn.2d 768, 698 P.2d 77 (1985).....	10
<i>Hisle v. Todd Pac. Shipyards Corp.</i> , 151 Wn.2d 853, 93 P.3d 108 (2004)	9
<i>Hymas v. UAP Distribution, Inc.</i> , 167 Wn.App. 136, 272 P.3d 889 (2012) .....	17
<i>Lybbert v. Grant County</i> , 141 Wn.2d 29, 1 P.3d 1124 (2000).....	17
<i>Parkridge Assocs., Ltd. v. Ledcor Indus., Inc.</i> , 113 Wn.App. 592, 54 P.3d 225 (2002).....	passim
<i>Ruff v. King County</i> , 125 Wn.2d 697, 887 P.2d 886 (1995).....	10
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989) .....	10

### Statutes

RCW 4.16.300 .....	10, 12
RCW 4.16.310 .....	passim
RCW 4.16.326(g).....	16

### Rules

CR 56(c).....	10
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## I. INTRODUCTION

This appeal is taken from a construction defect action brought by Dania, Inc. (“Dania”) and Northwest WA Properties, LLC (“Northwest”)(collectively referred to herein as “Dania” and/or “Appellants”) based on a defectively constructed roof on the Dania Distribution Center (“DDC”). The DDC is a 301,607 square foot building owned and operated by the Appellants and used as a warehouse and delivery distribution center. Dania contracted with Skanska USA Building, Inc. (“Skanska”) as the general contractor for the construction of the DDC. Skanska was a true general contractor on this project. Dania had no contractual or other relationships with any subcontractor or service provider in the construction.

The Trial Court in this matter erred in starting the clock on the statute of repose based on substantial completion when work to the roof was not completed until six months after the dated of so-called “substantial completion.” For contractors providing final services on a project, the statute of repose begins to run from the date their last service was provided. For all others, the statute begins to run as of substantial completion. In this matter, Skanska provided services on the roof of the Dania Distribution Center through at least June 20, 2006. Skanska failed to come forward with any evidence that the work performed post-

substantial completion was not “arguably work” from which Dania’s causes of action arose. The trial Court erred in granting Skanska’s motion for summary judgment.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error.**

1. The Court erred in finding that the statute of repose under RCW 4.16.310 started to run before June 20, 2006.
2. The Court erred in failing to find that Skanska’s termination of services occurred no earlier than June 20, 2006.
3. The Court erred in finding that there was no nexus between the work performed post-substantial completion and the causes of action in this matter.
4. The Court erred in drawing an inference in favor of the moving party that no issue of fact exists on whether work done after January of 2006 caused the damage complained of in this matter.

### **B. Issues pertaining to Assignments of Error.**

1. Whether the Court should have used January of 2006 or June 20, 2006 as the date to start running the statute of repose when the evidence showed that Skanska was performing work on the roof at least until June 20, 2006?

2. Whether Skanska's unilateral designation of the work performed post-substantial completion as "punch list" work has any effect on the analysis of the statute of repose?
3. Whether the Court mistakenly included a requirement to prove causation in order to use termination of services as the trigger date for the statute of repose?
4. Whether Skanska offered any evidence from which the Court could find that the work done after January of 2006 was not the cause of the leaking?

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

#### **A. Statement of Facts.**

Dania entered into a contract with Skanska for the construction of the Dania Distribution Center in DuPont, Washington (the "DDC") in March of 2005. CP6. Skanska was the General Contractor. CP6. The DDC, was to be a concrete tilt-up warehouse of over 300,000 square feet. CP6-7.

The main construction phase on the DDC continued from that time through December of 2005. On December 21, 2005, the City of DuPont issued a Temporary Certificate of Occupancy ("TCO"). CP137. However, that TCO only permitted occupancy of a portion of the DDC, stating as follows:

Conditions: This certificate is issued to authorize use and occupancy of the Office area and for LIMITED use and storage within the warehouse area from Gridlines 13.25-17 and Gridlines A-J. No other areas of the facility shall be used or occupied for any purpose prior to issuance of a Certificate of Occupancy therefore. CP137.

Todd Barnes, the Skanska Project Manager for the Project, who signed a Declaration in support of Skanska's Motion for Summary Judgment, testified at his deposition that the TCO only allowed access to a portion of the DDC, which portion he circled in Exhibit 2 to his Deposition. CP191. The occupied portion of the DDC as of the TCO was approximately 1/5 of the total space. CP191.

In January of 2006, Dania was given permission from the City of DuPont to use the full square footage of the DDC. CP182. But even after that time, work continued on the DDC under the supervision and guidance of Skanska. A second walk-through to complete a punch list was done on February 9, 2006 and a letter dated February 14, 2006 listed items yet to be completed. CP143-45, 183.

Those lists show that, in addition to fixing bubbling problems on a portion thereof, the final layer of the roofing membrane, known as the "mineral cap sheet" remained to be installed as of the February 14, 2006 punch list. CP144. The mineral cap sheet is the uppermost layer of the

membrane that contains ceramic granules for UV protection. CP182. The mineral cap sheet was part of the originally planned construction, as seen in the specs for the cap sheet included with the original contract documents with McDonald & Wetle Roofing, Inc. (“McDonald & Wetle”), the roofing subcontractor. CP197.

In the original contract between Skanska and Dania, which was drafted by Skanska, Substantial Completion is defined. CP80. However, Skanska’s motion ignores the fact that, according to the contract, the determination of substantial completion is not objective, it is to be made by the architect by a specific process set out in section 9.8.2-9.8.4 of the contract. CP80. Once Skanska believed substantial completion had been established, the contract process required that Skanska would call in the architect (VLMK Consulting Engineers, in this case) for an inspection to determine if the building was substantially complete. CP80. If the building were “substantially complete,” the architect would issue a “Certificate of Substantial Completion,” which would trigger the transfers of warranties to Dania. CP80.

While punch list walk-throughs by the architect were done, as stated above, in December 2005 and February 2006, no Certificate of Substantial Completion was ever issued by the architect. CP205.

Notwithstanding Skanska's alleged "demobilization" on December 29, 2005, it continued to perform services at the DDC until at least June 20, 2006. Facts supporting this premise are as follows:

- Punch list walk-through done on February 9, 2006. CP143.
- Skanska Project Status Report dated April 2006 stating "Exterior paint to commence this month (May). Roofing to start June/July." CP199.
- Mineral Cap Sheet for roof completed on or about June 20-21, 2006. CP207.
- Final Completion Report for Skanska drafted June 22, 2006, and estimating "Final Completion" as of "3<sup>rd</sup> Qtr. of 06." CP113.
- At the time of the Final Completion Report, according to Mr. Barnes, Dania was in use of the full square footage, but Skanska and Mr. Barnes could not be certain as to when the final Certificate of Occupancy would be granted. CP183.
- July 2006 Skanska Project Status Report stating "Current Sub Completion- This Month: 8/15/2006" and stating that "Final Paint to be completed during second week of August." CP201.
- Final Certificate of Occupancy finally granted on July 7, 2007. CP209.

Even before the installation of the cap sheet, the roof was watertight,

according to Skanska. CP182. However, on or about November 6, 2006, Dania staff began noticing leaks in the lobby area of the office at the DDC, and at least eight other areas around the inside of the perimeter wall that were leaking. CP205, 211,212. Dania informed Skanska of the leaks, and Skanska dispatched McDonald & Wetle to make repairs. CP211- 12. Further leaks and other damage led to Dania hiring an outside contractor, Roof Doctors in 2010 to repair significant areas of the roof. CP205.

**B. Procedural History.**

This case was filed on April 4, 2012. CP1. On or about March 1, 2013, Skanska filed its motion for summary judgment. CP5-24. Oral argument was held on May 24, 2013. RP3. The Court issued its order granting Skanska's motion on that same day. CP232. Dania moved for reconsideration on June 3, 2013. CP235-43. Notice of Appeal was filed on June 21, 2013.

**IV. ARGUMENT**

**A. Standard of Review.**

This Court reviews summary judgment orders de novo and performs the same inquiry as the Trial Court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). This Court should examine the pleadings, affidavits, and depositions before the Trial Court and “take the position of the Trial Court and assume facts [and reasonable inferences]

most favorable to the nonmoving party.” *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (citing *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985)).

Here, Appellants were the nonmoving party. CP5. Thus, all facts and reasonable inferences must be viewed and drawn in the light most favorable to their position. The initial burden to prove a lack of genuine issue of material fact lies with the moving party, and *only* if the moving party meets that initial burden is the non-moving party then obligated to demonstrate the existence of a genuine issue of fact with affirmative evidence. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Summary judgment is only proper if the record before the Trial Court establishes “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

**B. The Statute of Repose on the DDC roof started running in June of 2006.**

RCW 4.16.310, otherwise known as the “statute of repose,” provides, in pertinent part, as follows:

All claims or causes of action as set forth in RCW 4.16.300 shall accrue, and the applicable statute of limitation shall begin to run only during the period within 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*.  
(emphasis added)

1. **Skanska did not terminate services until at least June 20, 2006.**

For contractors providing final services on a project, the statute of repose begins to run from the date their last service was provided. *1519-1525 Lakeview Boulevard Condominium Ass'n v. Apartment Sales Corp.*, 101 Wn.App. 923, 930, 6 P.3d 74 (2000). For all others, the statute begins to run as of substantial completion. *Id.*

In the case at hand, the Trial Court seems to have taken both the dates of substantial completion and termination of services to be nearly identical. However, doing so ignores the weight of evidence supplied showing that Skanska continued to provide services, specifically with regard to the roof, as late as June 20, 2006.

Skanska's evidence of when it "terminated" its services consists of Mr. Barnes' statement that Skanska "demobilized" on December 29, 2005, and that a warranty document was provided in late December 2005. CP27. Notwithstanding their "demobilization," the evidence submitted by Dania shows that Skanska continued providing services on site: performing walk-throughs to ascertain appropriate quality and completion (CP143); continuing to issue Project Status Reports showing ongoing work (including roof work) from April 2006 through August 2006

(CP199, 201); supervising installation and completion of the final roofing layer in June 2006 (CP199, 207); drafting “Final Completion Report” on June 22, 2006 that estimated “Final Completion” as of “3<sup>rd</sup> Qtr. of 06” (CP113); and, obtaining Final Certificate of Occupancy on July 7, 2007 (CP209).

These actions are “services” that Skanska was providing under the terms of the underlying contract with Dania. At the very least, there is a factual issue remaining to be settled as to when Skanska actually terminated its services for purposes of RCW 4.16.310. Especially given the presumption of viewing facts and drawing inferences in the light most favorable to Dania on this motion, the Trial Court should have identified these facts and denied Skanska’s motion.

2. **Skanska’s services after December 2006 are contract work, regardless of being on the “punch list.”**

Skanska argued to the trial Court that these services provided after December 2006 were merely “punch list” work, and therefore did not count when it came to analyzing the date of “termination of services.” The law makes no such distinction.

RCW 4.16.300 describes the types of work that are covered by the statute of repose. It includes “supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property.” RCW 4.16.300.

Regardless of whether Skanska's services were punch list work or contract work, the statute of repose would apply.

However, it is critical to note that the inclusion of any work on a "punch list" does not change its source. In other words, if work is being done based on a contract, defects and incomplete portions of that work will be noted on the punch list just as readily as work that has been agreed to separate from the original contract. There is no legal basis for excluding contract work from consideration as "services" under the statute of repose simply because it is listed on a punch list.

In the case at hand, we see that the cap sheet installation for the roof was included in the original specifications for the project (CP197), thus establishing the installation work for said cap sheet as part of the original contract. Therefore, until the cap sheet was installed, termination of services under the statute of repose could not occur.

**3. The work done after December 2006 was roof work, thus establishing the appropriate nexus with the complaint.**

Skanska cites the case of *Parkridge Assocs., Ltd. v. Ledcor Indus., Inc.*, 113 Wn.App. 592, 54 P.3d 225 (2002) for the principle that there must be a "nexus" between the services performed and the causes of action in order to extend the statute of repose to the date of termination of services. Skanska argued before the Trial Court that because the work on

the roof (the mineral cap sheet installation) did not have to do with watertightness, that it bears no nexus to the causes of action of Dania, which are for leaks to the roof. RP9. Skanska's analysis is flawed.

*Parkridge* does not apply the nexus requirement as one where "the exact acts of work done on a particular day are the actions that impose liability." Indeed, whether Skanska's work on the Project constitutes the legal cause of the complained of damage is the ultimate question of fact in the case (which Dania is not required to answer in responding to Skanska's motion for summary judgment on procedural issues such as the statute of repose). This is why the Trial Court uses the word "nexus" in *Parkridge*: there merely needs to be a connection, a touchpoint, or a locus at which the services performed and the cause of action overlap, not full proof of liability.

Skanska would have the analysis of a nexus be one regarding the quality challenged by the lawsuit, in this case "watertightness." Or in other words, if the "work" does not deal in "watertightness" then there is no nexus.

Neither *Parkridge* nor any other case slices the nexus determination so thinly. In Skanska's world, when you contract for a roof, you would end up with multiple statutes of repose running on that roof: one for structural integrity, one for watertightness, one for UV protection, etc.

Each based on when the portion of that roof which performs that function is completed. But the rule as stated in *Parkridge* merely requires a touchpoint. Here, the work done after substantial completion and into June of 2006 was work on the very roof which Dania first observed leaking in November 2006. That the roof may have been watertight in December 2006 has no bearing on the matter. The roof was completed in June 2006 and started leaking thereafter. The nexus is that the contracted for roof was completed in June 2006, and the cause of action for leaking accrued in November 2006, with suit being filed for said leaks in April 2012, less than six years after the termination of services on the roof.

4. ***Parkridge* imposes no requirement to prove causation.**

In order to use termination of services under RCW 4.16.310 as the start date of the statute of repose, the law does not require proof that the work performed post-substantial completion is the actual cause of the damages alleged in the cause of action. The Trial Court in this case imposed just such a requirement. RP13.

The *Parkridge* Court addressed this very issue:

[Defendant] claims that the work performed after the date of substantial completion was “warranty repairs” or “punch list” work that had no nexus to the contract and initial construction work on which the lawsuit is based. Nothing in the record supports this bare assertion. *But even if [Defendant] had*

*provided evidence to support this argument, there would be, at most, a genuine issue of material fact on the question. Summary judgment would not have been proper. Accordingly, the date of termination of services, December 5, 1994, controls, not the December 30, 1993 date of substantial completion of the project.*

*Parkridge* at 599-600 (emphases added).

Skanska wrongly suggested that, in order to use the date of termination of services as the start date for the statute of repose, Dania, as the non-moving party, was required to prove that the work performed on the roof between substantial completion and the termination of services (the installation of the mineral cap sheet) was, in fact, the direct cause of the damages complained of in the complaint. RP9. That is not the law. In order to fight its way out of the termination of services date mandated by RCW 4.16.310 and 326(g), it was incumbent upon Skanska to prove that the work performed between substantial completion and termination of services was not “arguably work” from which Dania’s cause of action arose. *Parkridge* at 600.

The Trial Court’s imposition of this requirement to prove causation at this stage effectively creates a new criteria on which to determine when the statute of repose starts to run: the completion of a particular aspect or “quality” of a system, such as watertightness. But such an analysis slices

the issue so thinly that the plain language of the statute is rendered meaningless. Going farther, and according to Skanska's favorite case, even if Skanska had provided some evidence that its post-substantial completion work on the roof was not "roof work" that had a nexus to the issues complained of, the *Parkridge* court explains and instructs that such evidence merely creates an issue of fact, the existence of which should have precluded the summary judgment motion from being granted.

**C. The Court Erred by drawing inferences from the Barnes testimony that favor Skanska.**

Integral to the summary judgment process is the axiomatic doctrine that courts view all evidence and draw all reasonable inferences from the evidence in the light most favorable to the non-moving party. *See Lybbert v. Grant County*, 141 Wn.2d 29, 34-35, 1 P.3d 1124 (2000) (*holding* that summary judgment was improper when the appellate court properly considered the evidence and inferences in favor of the non-moving party's theory of the case); *Hymas v. UAP Distribution, Inc.*, 167 Wn.App. 136, 272 P.3d 889 (2012).

Even if Dania was required to offer such proof of causation as discussed above, the Trial Court erred in making an inference in favor of the moving party regarding this evidence. Skanska presented evidence from Mr. Barnes, the project supervisor, stating that the roof was

watertight as of December 2005. RP9-10. The Trial Court then stated that there needed to be evidence from Dania that the work done on the roof after December 2005 was the cause of the damage. RP13. The inference made was that unless there was proof that the work performed after December 2005 caused the leaks, the statute of repose provided a shield for Skanska to hide behind. This inference was made in error.

The *Parkridge* court established that the burden of proving that work done post-substantial completion has no nexus to the cause of action is on the Defendant:

Here, the work [Defendant] did after the date of substantial completion and until December 5, 1994 was arguably work from which Ledcor's cause of action arose. In any event, [Defendant] failed in its burden to show the absence of a genuine issue of material fact on this issue.

*Parkridge* at 599-600.

The evidence provided by Skanska proves only that as of December 2005, there was no leaking on the DDC roof. The other evidence on record is that there was more contract work done on the roof, and then leaks began occurring in November 2006. CP205, 211-212.

On summary judgment, the proper inference the Court should have drawn from this evidence is that if a roof is watertight in December, and it starts leaking the following November, then the work done on that roof

between those two times is the most likely candidate for causation of the damage, absent any other evidence to the contrary. Instead, the Trial Court drew the inference that the work done after December 2005 was not the cause of the damage.

The Trial Court erred as it did not require Skanska to prove that the work performed post-substantial completion was not linked to the causes of action. At the very least, the Court should have found as the *Parkridge* court did, that Skanska did not show the absence of a genuine issue of material fact on this issue.

## V. CONCLUSION

The statute of repose is supposed to start running when a project is complete as contracted for by a client such as Dania. The roof on the DDC was not complete until June 20, 2006. The roof may have been watertight before that date, but it was not complete. Work on the roof continued through June of 2006, with leaks first noticed in November of the same year. Suit was filed in April of 2012, less than six years after Skanska terminated its services. The trial Court erred in granting Skanska's motion for summary judgment. This Court should reverse that ruling.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of November, 2013.

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**CERTIFICATE OF SERVICE**

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**PROOF OF SERVICE**

STATE OF WASHINGTON, COUNTY OF KING

I am employed in the County of King, State of Washington. I am over the age of 18 and not a party to the within action. My business address is: 155 – 108<sup>th</sup> Avenue NE, Suite 202, Bellevue, Washington 98004.

On the 25<sup>th</sup> day of November, 2013, I served the foregoing document(s) described below:

**BRIEF OF APPELLANT**

on the interested parties in this action by sending true copies thereof addressed to:

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\_\_\_\_\_ **(BY MAIL)** I caused said envelope(s) with first class postage prepaid to be placed in the United States mail at Bellevue, Washington.

\_\_\_\_\_ **(BY PERSONAL SERVICE)** I caused said envelope(s) to be delivered by hand to the office or the residence of the addressee as shown above.

**XXX** **(BY ELECTRONIC TRANSMISSION)** I caused a true and complete copy of the document described above to be transmitted via e-mail to the email addresses set forth below the name(s) of the person(s) set forth above.

**XXX** (STATE) I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed on the 25<sup>th</sup> day of November, 2013, at Bellevue, Washington.

  
Jessica Barcz, Legal Assistant