

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,

Appellants,

vs.

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

Respondent.

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**BRIEF OF RESPONDENT**

**SKANSKA USA BUILDING INC.**

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**ORIGINAL**

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## I. INTRODUCTION

The sole legal issue on this appeal is whether the commencement date of the Statute of Repose on Appellant Dania, Inc.'s and Northwest WA Properties, LLC's ("Dania" or "Appellant") claim was the date of Substantial Completion of the Dania Distribution Center ("DDC" or "Project") or a later date when Skanska USA Building Inc. ("Skanska") provided services that undisputedly do not give rise to the cause of action.

The applicable law is clear. In Washington, a construction defect claim must be filed within six years of substantial completion or termination of services, whichever is later. However, the termination of services prong extends the Statute of Repose only if there is a causal link between services performed after substantial completion and the cause of action.

The evidence in the record does not show a nexus between the work performed after Substantial Completion and Dania's cause of action. Three undisputed facts that are determinative: (i) Dania's cause of action is for the roof of the DDC leaking (CP 2-4) (see ¶¶14, 17, 21, and 25); (ii) the Project was Substantially Complete as of January 1, 2006 (CP 137 (TCO), 141 (2-Year Warranty); 154-163 (Dania lease) and 204 (Dania admission)); and (iii) the work Skanska performed after Substantial Completion was installation of a mineral cap sheet on the roof for UV protection, which was unrelated to making the roof "water tight." (CP 141 (roof warranty) and 182 (deposition testimony)).

The Trial Court properly ruled that the Statute of Repose commenced on Substantial Completion of the DDC and dismissed Dania's lawsuit because it was filed more than six years after Substantial Completion.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR**

Dania assigns errors to purported "findings" by the Trial Court. However, the Trial Court did not make "findings." Rather, the Trial Court made the legal determination that the Statute of Repose commenced as of January 1, 2006, based on the undisputed facts in the record. Dania's complaint was dismissed as untimely because it was filed on April 4, 2012, more than six years after Substantial Completion.

## **III. COUNTERSTATEMENT OF THE CASE**

### **A. Background Facts**

On March 17, 2005, Dania, Inc., as owner, entered into a contract with Skanska, as general contractor, for the construction of the DDC located at 1350 Wharf Road in Dupont, Washington. (CP 6, 26, 29). The Project is a 301,607 square-foot concrete tilt-up warehouse with a 148,000 square-foot parking lot. (CP 7, 26).

Skanska entered into a Subcontract with McDonald & Wetle, Inc. ("M&W") for all required labor, material, equipment, supervision and coordination necessary for a complete roof system on the DDC. (CP 6, 26, 94).

**B. Construction Timeline**

Skanska prepared a Project Completion Report, (CP 7, 26, 109) summarizing key Project milestones. Section 3 – “Construction Period” of the Completion Report provides:

- Design Start Q3 '04
- 100% Design Drawings Q2 '05
- Construction Start 6/1/05
- Structural Steel Start Sept. '05
- Structural Steel Completion Oct. '05
- **Building Enclosed** **Nov. '05**
- Mechanical Completion Nov. '05
- Final Completion 3<sup>rd</sup> Qtr. Of 06
- **Temporary Certificate of Occupancy** **12-22-06**  
(sic)<sup>1</sup>
- **Building Occupancy** **Jan. '05** (sic)<sup>2</sup>
- Final Certificate of Occupancy TBD
- **Building Opening** **1-1-06**
- **Total Construction Period** **6 months**

(CP 8, 26, 103) (emphasis added). Dania has not challenged any of these dates. While Dania’s architect did not issue a Certificate of Substantial Completion, there is no dispute that Substantial Completion was achieved

<sup>1</sup> Actually issued on December 21, 2005. See Exhibit D to Barnes Declaration.

<sup>2</sup> The reference to 2005 is clearly a typographical error and it is undisputed the correct date is January 2006

as of January 1, 2006. The total construction period took six months, from June 1, 2005 to December 29, 2005. (CP 8, 113). On December 21, 2005, the City of Dupont issued Dania a Temporary Certificate of Occupancy (“TCO”). (CP 8, 26, 137). On December 20, 2005, the day before the City issued the TCO, Skanska advised Dania through email that: “you can start moving stuff in whenever you want. We are having the cleaners come through one last time at the office on the 28<sup>th</sup>, if you want this moved up just let us know.” (CP 8, 27, 139).

M&W, the roofing and Division 7 moisture protection and insulation contractor (CP 8, 94) submitted its two-year warranty certificate dated December 21, 2005, stating:

McDonald & Wetle, Inc. does hereby warrant the labor and workmanship performed on the built-up roofing and sheet metal for a period of 2 years from the date of the completion.

**Effective dates: DEC. 30<sup>TH</sup> 2005 TO DEC 30<sup>TH</sup> 2007**

This warranty covers, without cost to owner and upon notice from owner, covering labor and materials, prompt repairs will be made to built-up roofing system and sheet metal installed under this contract.

**We do hereby warrant the work performed by us is in a watertight condition** without exclusion as to cause of leak except by actions of man occurring after date of Substantial Completion; roofing substrate movement greater than allowed by structural design criteria; fire; lightning;

and other unusual phenomena of the elements.

(CP 9, 141) (emphasis added). This commencement date was consistent with Section 9.8.2 of the General Conditions to the Contract, which provide that warranties commence on the date of Substantial Completion (CP 80). It is undisputed that the roof warranty certificate was submitted on December 21, 2005 (CP 9, 141, 143) and that Dania did not object to the warranty commencement date of December 30, 2005. (CP 143). No contention was made at that time by Dania that the roof was not watertight as of December 30, 2005.

On December 29, 2005, Skanska demobilized from the Project. (CP 9, 27). Only punchlist items remained to be performed. (CP 9, 113, 143-145).

Dania's 10-year lease for the DDC and obligation to pay \$80,000 per month in rent began on January 1, 2006 ("Lease") (CP 9, 154-163). Under the Lease, Dania accepted the condition of the building. (CP 9, 158 (See Lease provision 6.3)). Dania had a lease in another building that expired in January 2006 and relocated materials from those premises to the DDC. (CP 10, 27, 147).

On January 4, 2006, Dania inquired with Skanska about keys and which loading docks to use to unload containers the subsequent week. (CP 10, 27, 149-150). Skanska responded that same day that keys were available to Dania and that "[t]he loading docks on the east side would be preferable for containers until the landscaping is complete. However,

there should be adequate space to use the north side if it makes the most sense for unloading.” (*Id.*).

Based on these undisputed facts, as of January 1, 2006, the Project was ready to be used for its intended purpose by Dania. Only punchlist items remained to be completed. (CP 10, 143-145).

Dania’s appellate brief states that the TCO permitted occupancy of only a portion of the Project. While the point that Dania is attempting to make is not clear, it is undisputed that this was due to racking that Dania – not Skanska – was to install. (CP 137, 147, 181-182). The racking had to be installed in order to determine the final locations of the fire extinguishers, necessary for full occupancy. (CP 181-182). It is undisputed that Dania’s self-installed racking was the only completion task to be performed in order for Dania to receive full occupancy. (CP 182 (Barnes Dep. pg. 18)).

On February 14, 2006, Dania’s architect performed a final punchlist walkthrough and issued its final punchlist. (CP 10, 143-145). According to the final punchlist, the Warranties and Guarantees, including the “Roofing: 2-year, Unconditional Written Guarantee from Roofing Subcontractor,” were already submitted to and accepted by Dania. (*Id.*)

The Prime Contract defines Substantial Completion as “the stage in the progress of Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can utilize the Work for its intended use.” (CP 10-11, 80 (A201 §9.8.1)).

Dania's opposition to Skanska's motion for summary judgment, admits this definition was met as of January 1, 2006: "[i]n January of 2006, Dania moved into the DDC after getting permission from the City of DuPont to do so" and Dania "was given permission from the City of Dupont **to use the full square footage of the DDC.**" (CP 165, 204) (See also App. Brief, pg. 6). (emphasis added).

### C. Procedural History

Dania filed this lawsuit on April 4, 2012, more than six years after Substantial Completion. Dania's allegations against Skanska are solely for the roof leaking. (CP 2-4) (see ¶¶14, 17, 21, and 25).

Skanska moved to dismiss Dania's lawsuit as time-barred. Dania filed a CR 56(f) motion to delay consideration of the motion so that Dania could conduct discovery into the contentions raised in Skanska's motion for Summary Judgment. (CP 218). On April 25, 2013, Dania deposed Todd Barnes, Skanska's Project Manager. Mr. Barnes was asked a series of questions about cap sheet work that was performed after Substantial Completion on June 20, 2006:

Q: Now, you said that a cap sheet was installed on the roof in the summer of 2006. Can you tell me, what is a cap sheet?

A: It's the final layer of the roofing membrane.

Q: What makes it different than any other layer of roofing membrane?

A: I couldn't tell you the technical qualities, but it's got ceramic granules, and those are mainly there for UV protection.

Q: Without the cap sheet layer, was the roof still watertight?

A: Correct, yes.

(CP 182). Dania presented no evidence rebutting Mr. Barnes' testimony that the cap sheet was for UV protection and that the roof was watertight without the cap sheet. This testimony is the only evidence in the record regarding the relation of the cap sheet work to Dania's claim against Skanska for the roof leaking.

#### **D. Undisputed Facts**

The legal issue that the Statue of Repose commenced running as of Substantial Completion is resolved on the following undisputed facts in the record:

- The Project was Substantially Complete as of January 2006 (See CP 137 (TCO), 141 (2-Year Warranty), 154-163 (Dania lease), and 165 204 (Dania admission of moving in to full square footage));
- All work related to making the roof water tight occurred prior to Substantial Completion (CP 141 (warranty) and 182 (deposition testimony));
- The warranty for the roof was submitted to Dania on December 21, 2005 and commenced as of December 30, 2005 (CP 141), without any objection by Dania that the roof was not complete or that the

warranty coverage period should not commence as stated in the warranty (CP 143); and

- The mineral cap sheet work performed on June 20, 2006 was for UV protection and unrelated to making the roof water tight. (CP 182).

#### **IV. ARGUMENT AND AUTHORITY**

##### **A. Standard of Review: De Novo.**

This Court reviews de novo a trial court's order granting summary judgment. *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 210 P.3d 308 (2009) citing *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 693, 169 P.3d 14 (2007). In so doing, this Court engages in the same analysis as the trial court. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 224 P.3d 795, (2009) citing *Margola Assocs. v. City of Seattle*, 121 Wn.2d 625, 634, 854 P.2d 23 (1993). In conducting this de novo review, this Court examines the evidence—and only that evidence—in the record before the trial court when the summary judgment motion and any responsive memoranda were filed. *Boguch*, supra. citing *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 147, 787 P.2d 8 (1990).

##### **B. The Statue of Repose on Dania's Claim Commenced Running at Substantial Completion.**

###### **1. It is Undisputed the Project was Substantially Complete as of January 1, 2006.**

While Dania attempts to create confusion on this issue by arguing that its own Architect did not issue a Certificate of Substantial

Completion, it is undisputed that the Project was Substantially Complete as of January 1, 2006. Dania fails to counter any of the facts establishing Substantial Completion.

Instead, because Dania cannot dispute Substantial Completion occurred as of January 1, 2006, Dania attempts to create a factual issue as to the date on which the Statute of Repose commenced by arguing that Skanska performed services after Substantial Completion.

Skanska does not dispute that it performed services after Substantial Completion. Skanska agrees that it performed punch-list work after Substantial Completion, including installation of the cap sheet on June 20, 2006. (CP 207). Dania is attempting to create a factual dispute where there is none.

Skanska does dispute, however, that the cap sheet installation performed on June 20, 2006, extended the commencement of the Statute of Repose.

2. **The Statute of Repose Is Extended Only Where Services Performed After Substantial Completion Have a Nexus to the Cause of Action.**

RCW 4.16.310 bars any construction defect claim not filed within six years of Substantial Completion or termination of services, whichever is later. *See* also RCW 4.16.326(g). In order for a claimant to extend the commencement of the Statute of Repose to the later date of termination of services, there must be a nexus between the services performed after the date of Substantial Completion and the cause of action:

Ledcor argues and provides evidence that the work Freeman performed at Parkridge until December 5, 1994 [after Substantial Completion] qualifies as “services” for purposes of RCW 4.16.300. In response, Freeman argues that there must be a nexus between the services performed and the cause of action.

We agree with both contentions. The plain language of RCW 4.16.300, describing actions or claims “arising from” various services, shows that the services considered in this assessment must be those that gave rise to the cause of action.

*Parkridge Assocs., Ltd. v. Ledcor Indus., Inc.*, 113 Wn.App. 592, 599, 54 P.3d 225 (2002).

If there is no nexus between the services performed after Substantial Completion and the cause of action, then the Statute of Repose commences at Substantial Completion. The Merriam-Webster dictionary defines “nexus” as “a causal link.” *Merriam-Webster’s Collegiate Dictionary* 783 (1993). In order for Dania to use a later “termination of services” prong (i.e. to June 20, 2006, when the cap sheet was installed,) to extend the commencement of the Statute of Repose, there must be evidence of a causal link between that later work and Dania’s claim against Skanska for the roof leaking.

Here, based on the evidence submitted by Skanska and Dania, there is absolutely no evidence in the record showing a nexus between the June 20, 2006 cap sheet work and Dania’s claim for the roof leaking. The

evidence that is in the record shows the contrary. The evidence is undisputed that the roof was “watertight” as of January 1, 2006 and that the cap sheet is for UV protection, which is unrelated to making the roof water tight. There is simply no evidence creating a nexus between the June 20, 2006 cap sheet work and Dania’s claim. Dania cannot extend the start date of the Statute of Repose to June 20, 2006.

3. **The Evidence Does Not Establish A Nexus Between Work Performed After January 2006 and Dania’s Claim As Required By *Parkridge* and RCW 4.16.310.**

Rather than point to evidence in the record creating a nexus between the cap sheet work for UV protection and Dania’s claim the roof leaked, Dania argues, without citation to legal authority, that all that matters is that the cap sheet work is part of the roof. *See* App. Brief, pg. 14. *Parkridge* and the definition of the word “nexus” (a causal link) do not support this contention.

Dania ignores “[t]he plain language of RCW 4.16.300, describing actions or claims ‘arising from’ various services, which means that the services considered in this assessment must be those that gave rise to the cause of action.” *See Parkridge Assocs., Ltd. v. Ledcor Indus., Inc.*, 113 Wn.App. 592, 599, 54 P.3d 225 (2002). “[T]here must be a **nexus between the services performed and the cause of action.**” *Id.* (emphasis added). Clearly, under RCW 4.16.300, and *Parkridge*, there must be a nexus between post-Substantial Completion services and the subject cause of action to extend the Statute of Repose to the termination of services

prong. Here, there is no evidence establishing any nexus between the June 20, 2006 cap sheet work for UV protection and Dania's claim the roof leaked.

As recognized in *Lakeview Boulevard Condominium Association v. Apartment Sales Corporation*, 101 Wn. App. 923, 6 P.3d 74 (2000), the interpretation of RCW 4.16.310 should not be made so as to "render the alternative trigger for running of the statute ('Substantial Completion') superfluous." *See Id.* 101 Wn. App. 930-931. Dania's position that the "nexus" need only be that the work performed after Substantial Completion merely "touched" or "overlapped" seeks to do just that. Termination of services always occurs after Substantial Completion on a construction project. Otherwise, there would be no such thing as "punchlist" work. *See Id.*, 101 Wn. App. at 930 ("If all services must have terminated before the six-year period begins to run, there could be no services left to perform that would move a project from a state of 'Substantial Completion' to full completion.") Under Dania's theory the standard for "nexus" would be arbitrarily based on the location of that later work rather than a causal link.

The common definition of the word nexus—a causal link—is contrary to Dania's argument. *See Merriam-Webster*. Here, there is simply no evidence that there is a causal link between the cap sheet work for UV protection and Dania's claim the roof leaked. The unrefuted evidence in the record shows the requisite causal link does not exist.

**C. The Testimony of Todd Barnes is Not Refuted.**

Dania contends Skanska had the burden of proving a negative by showing the cap sheet work performed on June 20, 2006 did not cause the roof to leak. Dania again fails to provide authority for this proposition.

The difference between this case and *Parkridge* is that the evidence in *Parkridge* created a nexus between the services performed after substantial completion and the cause of action (“In any event [defendant] failed to show the absence of a genuine issue of material fact on this issue.”) *Parkridge* at 599-600. Here, Skanska has demonstrated the absence of a genuine issue of material fact on whether there is the requisite nexus. There simply is no evidence whatsoever showing a causal link. Here, “Once the moving party satisfies its burden on summary judgment of showing an absence of material fact (which Skanska has done) the nonmoving party (here, Dania) must present evidence (not conjecture) that demonstrates that facts are in dispute. *See Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132 (1989). If the nonmoving party (Dania) fails to controvert facts in support of a motion for summary judgment **those facts “are considered to have been established.”** *Central Washington Bank v. Mendelson-Zeller*, 113 Wn.2d 346, 354 (1989) (emphasis added).

Thus, Dania’s argument that Skanska had the burden to prove the June 20, 2006 cap sheet work did not cause the roof to leak is incorrect. Skanska presented evidence that the June 20, 2006 cap sheet work was for UV protection and unrelated to water tightness and that the roof was

watertight as of the earlier date of Substantial Completion. Dania presented no competing evidence.

It is important to point out that Dania had every opportunity to present evidence establishing the required nexus. Dania requested a CR 56(f) continuance of Skanska's motion for summary judgment, to which Skanska stipulated, allowing Dania to conduct discovery and identify evidence showing a nexus between the installation of the cap sheet and Dania's claim the roof leaked. Nonetheless, the following testimony from Todd Barnes, Skanska's Project Manager, remains unrefuted:

Q: Now, you said that a cap sheet was installed on the roof in the summer of 2006. Can you tell me, what is a cap sheet?

A: It's the final layer of the roofing membrane.

Q: What makes it different than any other layer of roofing membrane?

A: I couldn't tell you the technical qualities, but it's got ceramic granules, and those are mainly there for UV protection.

Q: Without the cap sheet layer, was the roof still watertight?

A: Correct, yes.

(CP 182). While Dania named an expert witness to testify in support of its claims in this matter (VR 9:2-3), Dania did not present any declaration or

evidence from its expert witness that the roof was not water tight as of Substantial Completion or to show a nexus between the installation of the cap sheet and the alleged roof leakage. (*Id.*)

In contrast, Dania accepted the roof warranty providing that the roof was complete and “watertight” as of Substantial Completion and accepted commencement of the roof warranty on December 30, 2005. The Trial Court did not make an improper inference against Dania, the non-moving party. There was no inference to make because the evidence was clear and unrefuted. Dania, at most, argued speculatively that the installation of the cap sheet may have caused the roof to leak, but provided no supporting evidence whatsoever. Dania offered conjecture (and only through the argument of counsel at oral argument) that the installation of the cap sheet *may* have caused the roof leakage. Dania must provide evidence, not conjecture. There is simply no evidence showing a nexus between the cap sheet work and Dania’s claim the roof leaked.

## V. CONCLUSION

The Statute of Repose requires that a claim be filed within six years of Substantial Completion or termination of services, whichever is later. It is undisputed that Substantial Completion occurred as of January 1, 2006, yet Dania filed its complaint more than six years after that date, on April 4, 2012.

In order for Dania to rely on the termination of services prong of RCW 4.16.310, it must point to evidence of a nexus (a causal link) between the work performed after Substantial Completion and Dania’s

claim the roof leaked. The record contains no evidence of the requisite nexus. It is undisputed the roof was watertight without the cap sheet and all work to make the roof water tight was performed prior to Substantial Completion. It is undisputed the cap sheet installed on June 20, 2006, was for UV protection.

Without evidence of a nexus, the termination of services prong is not available and the Statute of Repose commenced running as of Substantial Completion, which had undisputedly occurred as of January 1, 2006. The Trial Court thus properly ruled that Dania's claim the roof leaked was time barred.

DATED this 26<sup>th</sup> day of December, 2013.

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**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused this document to be served upon designated counsel of record in the manner noted below:

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<input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Email	<input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Email

DATED this 26<sup>th</sup> day of December, 2013, at Seattle, Washington.

  
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Kaycee Espe

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