

Court of Appeals No. 50227-5-II

IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

MAUREEN HAY, et al.,
Appellants,

v.

AAA FRAMING CORPORATION, et al.,
Respondents.

INITIAL BRIEF OF APPELLANTS

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I. INTRODUCTION

This is a construction defect case. The Homeowners, Appellants, settled with Highmark Homes LLC, the developer of their homes, and took an assignment against Respondents, the various contractors who performed construction services on the project.

This case presents the important question of whether Washington general contractors can enter into a master contract with contractors which shall be controlling and binding on all projects as stated in the master contracts and whether or not there is a statutory obligation by contractors to build homes in compliance with the “minimum” standards in the applicable building codes.

Further, this case presents the opportunity for the Court to clear up the ambiguity of whether or not the firm and defined building codes required by RCW 19.27 are to be followed and are codified into construction contracts and whether or not contractors are required to follow approved plans by cities or county building codes or if they can just ignore the approved plans and citations.

II. STATEMENT OF THE CASE

The Appellants are primarily first-time homeowners who purchased single family homes from the Developer Highmark Homes, LLC (hereinafter “Highmark”) and reside in a community named Valley Haven

(hereinafter “VH”) in Fife. (CP 517) The president of Highmark is Tom Tollen. Mr. Tollen is a real estate broker and owner of his own Windermere business, located in Lake Tapps, Washington. (CP 1544) In June 2008 he expanded into residential construction. On June 3, 2008, he created Defendant Highmark for the purpose of purchasing foreclosed properties. To perform the construction Highmark retained multiple contractors, including Respondents S&S Home Repair, Inc. (hereinafter “S&S”), ABSI Builders, Inc. (hereinafter “ABSI”), AAA Framing Corporation (hereinafter “AAA”), and Best Quality Framing (hereinafter “BQF”) to frame the homes, install the windows and install T1-11 siding on the sides and rear of the homes. (CP 1699-1700; 1913-1921; 1499-1503; 1745-1751; 1808 – 1960; & 1688-1695)

Respondents’ discovery responses confirm Respondents constructed and sold the homes between 2012 and 2013. By the winter of 2013, without the homes making it through one winter, defects appeared at multiple homes, including:

1. Failure to install flashing and building paper resulting in exterior water penetration into wall cavities, resulting in interior growth of plant/mushrooms and proliferation of animal life. The following photos, taken at *different houses*, are representative.

2. Failure to secure the structural components into the studs and columns causes progressive damage, including interior wall and staircase separation. The following photographs, taken at multiple homes, are representative.

3. Failure to install penetration wrap and flashing causes exterior water penetration at windows. The following photos, taken at different homes, are representative.

4. Failure to install building paper behind the siding panels and installing them without required flashing results in water penetrating behind the siding. (CP 422-504)

The homeowners employed three construction professionals: Martin Flores as to exterior envelope issues, Robb Dibble as to structural safety concerns and Michael Johnson as to the cost of repairs. (CP 422-431; 386-420; & 496-504)

The Appellants have alleged that there are defects in how the T1-11, framing, and windows were installed at the Valley Haven houses. Highmark's expert agrees that these areas were not installed correctly and must be repaired. *Id.* While disputed, the Appellants are asserting they are entitled to approximately four million dollars for repair costs.

Although Highmark could only locate 2 of the 4 Respondents' contracts, it was Highmark's standard policy to enter into master contracts

with each contractor, covering each and every project the contractor worked on, and then to enter into individual pricing agreements per home. (CP 1649-1700; 1485-1486; & 1908-1911) Mr. Tollen testifying that:

Highmark always enters into written contracts with subcontractors who perform work on Highmark projects. Highmark's subcontracts contain provisions requiring the subcontractor to defend and indemnify Highmark, make Highmark an additional insured, and require the subcontractor to give a warranty for its work.

(CP 1913-1921 and 1499-1503)

However, of the four contractors remaining in the case Mr. Tollen was only able to locate S&S and ABSI contracts. CP 1913-1921 and 1499-1503. The ABSI contract specifically dictated that the master contract applied to all projects it worked on for Highmark. The contract reading,

ITEM 1 Master Agreement: The parties hereto agree that from time to time from the date hereof until this Agreement is terminated that Contractor will contract with Subcontractor for the furnishings of materials and/or the performance of various work on projects being constructed by Contractor. The parties further agree that this Agreement shall be the master agreement between them and as such shall control the rights, privileges, duties and responsibilities between them, which arise out of Subcontractor furnishing any materials for and/or performing any work on Contractor's construction projects.

(CP 1913, Pg.1 Item 1)

The contract also required ABSI to follow all plans and applicable building codes reading,

ITEM 3. SCOPE OF WORK AND PRICE: Subcontractor agrees to perform, supply and finish in a thorough and workmanlike manner, in compliance with all applicable national, state and local building codes and regulations and to the reasonable satisfaction of Contractor, the specific materials to be furnished and/or work to be performed per the agreed upon price. Subcontractor shall supply all equipment, tools, utilities, machinery, scaffolding and safety devices, etc. as required, at its own expense.

It shall be the Subcontractor's responsibility to perform field measurements, verify dimensions on drawings, be informed of all applicable building codes, and to obtain the appropriate inspections and certifications.

Subcontractor shall submit in writing all proposed substitutions or variation from the plans, specification, and/or scope of work. Before proceeding, the Contractor must authorize any and all substitutions or variations in writing

(CP 1913, pg. 1 Item 3)

S&S' contract also dictated the master subcontract applied to all projects. The contract reading:

1. GENERAL PROVISIONS

1.1 Contractor wishes to utilize the services of Service Provider to provide services to Contractor and/or property owners ("Owner") introduced by Contractor. Based upon the nature of the services provided by Service Provider, it is anticipated that it will be impractical to enter into a separate agreement for services each time Contractor desires to use Service Provider.

1.2 Contractor requires that Service Provider meet certain terms and conditions before Contractor uses Service Provider's services. These terms and conditions are set forth in this agreement.

1.3 In order to expediate the use of Service Provider's services each time they are needed, the parties agree to enter into and comply with this Master Service Agreement prior to any actual services being performed. It is the intent of the parties that these terms and conditions apply to any provision of services by Service Provider regardless of whether these terms and conditions are referenced in any purchase order, subsequent contract memo, etc. during the term of this contract.

1.4 This Master Service Agreement shall be in full force and effect from the date of signing unless canceled in writing by either party with thirty days' notice. The cancellation of this agreement shall not negate any term or condition, such as the indemnity or insurance requirements.

(CP 1499, Pg. 1)

The S&S contract also required it to perform its work free from defects.

3. WARRANTY AND REPRESENTATIONS

The Service Provider represents and warrants that all materials, labor and/or systems furnished by the Service Provider in connection with the construction of all work performed shall be free of *defect* for a period of one year for workmanship and systems for two years.

(CP 1500, Sec. 3)

The S&S contract also required the contractors in Section 2.2 of the contract addresses additional insured coverage. It reads as follows:

2.2 Upon execution of this Master Service Agreement, and prior to Service Provider's commencing (in the broadest possible sense of the word) any work or services, the Service Provider shall carry general liability insurance and the Service Provider shall provide Contractor with a Certificate of Insurance naming Contractor as an additional insured

hereunder. ***The coverage available to Contractor as an additional insured, shall not be less than shown under this contract and providing coverage for completed operations, products liability, and contractual liability.***

(CP 1499, Sec 2.2)

Section 2.8 goes on to identify the coverage required under the contract. This includes coverage in the amounts of \$2,000,000 general aggregate and \$1,000,000 per occurrence. (CP 1501, Sec 2.8)

On February 19, 2015, Highmark tendered to S&S' insurers, Nevada Capital Insurance Company and Navigators Insurance Company, defense and indemnity of this matter as an additional insured under S&S' policies. (CP 1879-1880; 1882-1883)

On March 27, 2015, North American Risk Services, on behalf of Nevada Capital Insurance Company, denied Highmark's tender, stating that it "...does not have a duty to indemnify or defend Highmark Homes and/or Tom Tollen because the policy does not contain an additional insured endorsement scheduling Highmark Homes, LLC and/or Tom Tollen as additional insured." (CP 1885-1887)

On September 9, 2015, Navigators Insurance Company declined coverage on the basis of the number of homes in the project.

The above-cited endorsements exclude coverage under S&S' Navigators policy if the work was done on a project with more than 10 dwellings. Based upon, but not limited to, the above, we must respectfully disclaim coverage for

your client. It is our position that we do not have a duty to defend or indemnify Highmark for claims arising out of the above matter.

(CP 1889-1893)

To date no insurer for S&S has accepted Highmark's tender, or provided it coverage. (CP 1877)

In evaluating the means and method of construction employed by the Defendant, and reaching conclusions whether an aspect of its work is "defective", Appellants' experts rely on the following applicable metrics: (i) 2009 International Residential Code, (ii) the Building Plans, and (iii) the building material manufacturers' installation requirements. Each applies to Respondents' work and each is violated in multiple ways.

(i) 2009 International Residential Code: Pursuant to RCW 19.27.031, known as the "Washington State Building Code", the minimum standards of construction applicable to Respondents' work are identified in the (2009) IRC. Pursuant to IRC 101.2, the IRC applies to the construction and alternation of one and two family homes.

The building plans for the project confirm the 2009 IRC's application to Respondents' work. (CP 344-349) The construction must comply with the IRC. This fact is confirmed on the first page of Respondents' building plans, at the upper left hand corner. *Id.*

Pursuant to the 2009 IRC 101.3, the IRC's purpose is to establish minimum requirements to safeguard the public. [Emphasis added]. Pursuant to IRC 113.4, it is actually unlawful for the project to be constructed in violation of any provision of the IRC. Appellants' experts confirm Respondents failed to comply with IRC provisions, and these failures cause and contribute to property damage.

The IRC also has requirements the Respondents' T1-11 siding installation violates:

703.1 Exterior walls shall provide the building with a weather resistant exterior wall envelope.

703.1.1 The exterior wall envelope shall be designed and constructed in a manner that prevents the accumulation of water within the wall assembly by providing a water resistant barrier behind the exterior veneer.

As confirmed by expert testimony, in addition to violating T1-11 siding requirements, the installation violates IRC 703.1 and 703.1.1. As to 703.1.1, to be clear, the problem isn't just that the barrier is installed incorrectly, in certain locations it's entirely omitted. (CP 422-504)

(ii) Building Plans: In addition to the IRC's application to Respondents' work, the building plans the Defendants claim they relied on during construction also dictated the 2009 building code applied.

Prior to commencing construction in the City of Fife, a developer must get a building permit from the Building Department. To get a permit

Highmark was required to submit the building plans it intended to rely on during construction. The IRC also confirms the requirement the project be built to code, at 106.1:

Construction documents shall...show in detail that they will conform to the provisions of this Code and relevant laws, ordinances, rules and regulations.

Contractors are not permitted to deviate from the plans. IRC 106.4 states “Work shall be installed in accordance with the approved construction documents...” Appellants’ experts confirm Respondents’ work does not comply with the building plans, resulting in and contributing to ongoing property damage.

In addition to the IRC and the building plans, product manufacturer installation requirements also apply to Respondents’ work.

(iii) Product Manufacturer Requirements: Where a construction product manufacturer identifies proper means and methods for installing its products, recognized construction industry standards and good construction practice mandate following the instructions. The IRC also requires compliance with manufacturer installation requirements.

IRC 106.1.2 requires as follows:

Manufacturer’s installation instructions, as required by this code, shall be available on the job site at the time of inspection.

IRC 612.1 requires as follows:

Windows and doors shall be installed and flashed in accordance with the fenestration manufacturer's written installation instructions.

The T1-11 manufacturer, LP Building Products, provides contractors with detailed installation requirements, including the following:

1. Apply siding in a manner that prevents moisture intrusion and water buildup.

2. Ensure all exposed wood substrate are sealed in a manner that prevents moisture intrusion and water buildup.

3. Install behind each siding panel a properly installed, breathable water resistive barrier.

4. Ensure all openings (window/door penetrations) are properly sealed or flashed with a water resistive barrier and in a manner that prevents moisture intrusion or buildup.

5. If the panels are intended to function as "shear walls" (as is this case), use a double nailing procedure.

6. Ensure all gaps are sealed with a high quality sealant with a minimum service life of 30 years.

After acquiring the project's building plans, reviewing questionnaires completed by each owner, including speaking with the City of Fife building officials, reviewing its files, and reviewing Respondents' production, the experts inspected the homes. The analysis included

destructive investigation at five randomly selected homes. Appellantss’ experts spent more than 450 hours performing analysis. This doesn’t include additional time spent considering work performed at VH with defective work performed by Highmark at other, unrelated communities.

The experts employed an inspection technique often referred to as “destructive analysis.” This process is best described as peeling back layers of an onion. It includes the careful physical removal of building components, with the goal of identifying the means and methods of construction employed at each stage of construction. It includes comparing and contrasting what’s seen with what’s required by the IRC, the building plans and manufacturers’ requirements. The experts made a total of 15 destructive “openings”.

The experts’ analysis confirms Respondents’ siding, window and sliding door related work fails to adhere to the minimum standards identified in the IRC and the building plans, and fails to comply with the siding and window manufacturers’ installation requirements.

III. DISCUSSION

A. Standard of Review

1. The trial court’s decision on summary judgment is reviewed *de novo*.

The appellate court reviews summary judgment *de novo*. *Becerra* *Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 194 (2014) (quoting

Rivas v. Overlake Hosp. Med. Ctr., 164 Wn.2d 261, 266 (2008)). The appellate court reviews the evidence in the light most favorable to the nonmoving party. *Becerra Becerra*, 181 Wn.2d at 194. As to CTIC's motion for summary judgment, which the trial court granted, the evidence must be reviewed in a light most favorable to the Keys.

B. Assignment of errors relating to ABSI

1. Highmark's master contract with ABSI applied to the homes at the Valley Haven project

The elements of a breach of contract are well-settled. "A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant." *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6, 9 (1995).

As shown above, ABSI contract applied to all projects reading,

The parties' hereto agree that from time to time from the date hereof until this Agreement is terminated that Contractor will contract with Subcontractor for the furnishings of materials and/or the performance of ***various work on projects being constructed by Contractor***. The parties further agree that this Agreement shall be the master agreement between them and as such shall control the rights, privileges, duties and responsibilities between them, which arise out of Subcontractor furnishing any materials for and/or performing any work on Contractor's construction projects.

(CP 1913, pg. 1 Item 1) (Emphasis added)

Although no explanation was given by the trial Court for the dismissal of ABSI, it appears it did so because it did not believe master contracts between contractors are enforceable. However, the Defendants did not cite any case law to support this proposition and Washington law dictates master contracts are enforceable. See *Iron Gate Partners 5, LLC v. Tapio Constr., Inc.*, 2017 Wash. App. LEXIS 445 and *Irwin- Yaeger, Inc v. State Cmty. College Dist. 17*, 2015 Wash. App. LEXIS 1139.

The trial Court erred when it ruled the master contracts and the obligations therein did not apply to VH.

2. ABSI had a contractual obligation to build the project in compliance with the 2009 building codes and breached its obligations to Highmark

The master subcontract entered into by Highmark and ABSI clearly required ABSI to follow all applicable building codes. The contract reading,

Subcontractor agrees to perform, supply and finish in a thorough and workmanlike manner, in compliance with all applicable national, state and local building codes and regulations and to the reasonable satisfaction.

According to RCW 19.27.020 to “promote the health, safety, and welfare” of homeowners contractors are required to meet “the minimum standards and requirements for construction...” Contractors are required to follow the applicable building codes, RCW 19.27.020 (1) and RCW 19.27.031. In

this case the applicable code was the 2009 Residential Building Code and Respondents failed to comply with the code. (CP 422-504)

As testified to by Appellants' experts Highmark failed to do so, thus Respondent breached its contract and the trial Court erred when it granted summary judgment in favor of ABSI on this issue.

3. ABSI had a statutory obligation to build the project in compliance with the 2009 building codes and breached its obligations to Highmark

RCW 19.27 et seq. applies to this matter, and is known as the State Building Code Act. RCW 19.27.020 identifies the purpose of the "Act" as follows:

To promote the health, safety and welfare of the occupants or the users of buildings and structures and the general public by the provisions of building codes throughout the state. Accordingly, this chapter is designed to effectuate the following purposes, objectives, and standards: (1) To require minimum performance standards and requirements for construction and construction materials, consistent with accepted standards of engineering, fire and life safety. (2) To require standards and requirements in terms of performance and nationally accepted standards....

Pursuant to RCW 19.27.031 ABSI was required, without deviation, to ensure its construction work complied in all respects with the building codes in effect, i.e., 2009 International Residential Code and Uniform

Building Code. The notes corresponding to 19.27.031 state “(2) It is in the state’s interest and consistent with the state Building Code act to have in effect provisions regulating the construction of single and multiple-family residences.... (4) The legislature finds that Building Codes are an integral component of affordable housing....” *Id.*

In addition to 19.27.031, the applicable International Residential Building Code also required the Defendant follow the applicable Building Codes. The 2009 IRC 106.4 states “Work shall be installed in accordance with the approved construction documents....” Appellants’ and Respondents’ experts confirm Respondents’ work does not comply with the building plans or the Building Code, and that the work is resulting in and contributing to ongoing property damage. The Respondents’ approved building plans also confirm the Respondents were required to ensure its construction complied in all respects to accepted industry standards and, more specifically, the applicable Building Codes.

Washington law allows us to infer and imply certain essential terms of the contract, including a promise the construction was free of defects requiring costly repairs. In addition to the reasonable conclusion purchasers of new construction rely upon their builder/seller to, at a minimum, follow Washington laws, Washington common law also identifies this requirement. In *Eastlake Const. Co. v. Hess*, 102 Wash.2d 30, 51 (1984) the

Supreme Court confirmed that when a contractor submits a bid, “he is, in effect, representing that he will perform that job in a workmanlike manner[.]”). The expectation that an owner of a newly built home is reasonable in his/her belief the seller/builder complied with Washington law is further supported by following authority; *Howe v. WA Land Yacht*, 77 Wash.2d 73, 84 (1969) (“It is elementary...that the laws of this state...enter into and become a part of the articles of incorporation.”); 25 DeWolf & Allen, Wash. Practice: Contract Law and Practice, Sect. 7.3 (1998 & Supp. 2006) (“The general rule in Washington is that a contract that is contrary to the terms or policy of an express legislative enactment is illegal.”); *Taylor v. Stevens County*, 111 Wash.2d 159, 164-65 (1988) (The purpose section of the State Building Code Act, RCW 19.27, is to require that minimum performance standards and requirements for building and construction materials be applied consistently throughout the state.); *Brower Co. v. Garrison*, 2 Wash. App. 424, 429 (1970) (“Necessary implications are as much a part of an agreement as though the implied terms were plainly expressed”) citing *Suess v. Heale*, 68 Wash.2d 962, 966 (1966) (“The policy of the law is to supply in contracts what is presumed to have been inadvertently omitted or to have been deemed perfectly obvious by the parties, the parties being supposed to have made those stipulations which as honest, fair, and just men they ought to have made.”). *Byram v. Thurston*

County, 141 Wash. 28, 39 (1926) (“[W]hatsoever it is certain a man ought to do, the law will suppose him to have promised to do.”); *see also Mahler v. Szucs*, 135 Wash.2d 398, 414 (1998) (“[B]oth insurer and insured...are bound by the common law duty of good faith and fair dealing as well as the statutory duty to practice honestly...”); 17 CJS Contracts 330 “Unless a contract otherwise provides, the law applicable thereto at the time of its making, including the law of the place where it is entered into, and where the law of the place where it is to be performed, as the case may be, is as much a part of the contract as though it were expressed or referred to therein, for it is presumed that the parties had such law in contemplation when the contract was made.” *Dopps v. Alderman*, 12 Wash.2d 268 (1942) (“In accordance with a well-established rule, a statute which affects the subject matter of a contract, in contemplation of law, is incorporated into and becomes a part thereof, *provided, of course, that the statute is in effect at the time the contract is made.*”).

Undoubtedly, ABSI will once again claim this position is an end around the “implied warranty of workmanship” but that argument should fail. First, the Courts have rightly rejected the implied warranty of workmanship as it is an undefined and undetermined standard that would allow parties to insert or argue whatever standard they want into a contract. Such a vague standard would be highly objectionable and problematic.

However, the Uniform Building Code sets forth specific standards and guidelines which all contractors know and are aware of. ABSI cannot truly believe it is allowed to go out and build structures - however dangerous and unsafe - as long as they pass a governmental building inspection. Such a position is preposterous, shifts the costs and burdens of ensuring quality residential construction to the government (or consumers), and would cause a major health and safety risk in every structure in Washington. This is especially true as city and counties have zero exposure or liability if contractors fail to construct a project to code. *See Georges v. Tudor*, 16 Wn. App. 407, 556 P.3d 564 (1976); and *see also Moore v. Wyman*, 85 Wn. App. 710, 715-716, 934 P.2d 707(1997) and *Pointe at Westport Harbor Homeowners' Ass'n v. Eng'rs Nw. Inc.*, 2016 Wash. App. LEXIS 949.

Washington Courts have repeatedly held that the fact a governmental agency issues a building permit or inspects a building has no relevance to the issue of whether work performed is defective. *See Georges v. Tudor*, 16 Wn. App. 407, 556 P.3d 564 (1976):

[T]he City owed no duty to appellant individually in issuing the building permit or in inspecting the Olympic Block Building. To hold otherwise would cause the City to become a guarantor of each and every construction project- a task not only beyond the scope of the building codes as enacted, but also one that the City is incapable of performing.

Id. at 410. *See also Moore v. Wyman*, 85 Wn. App. 710, 715-716, 934 P.2d 707(1997) (holding that absent normal exceptions to the public duty doctrine, government owes no duty to third parties as a result of having conducted a building inspection). Instead, the obligation to comply with the various building laws and codes remains with the builders and owners of the project:

[N]o duty is owed by local government to a claimant alleging negligent issuance of a building permit or negligent inspection to determine compliance with building codes. The duty to ensure compliance rests with individual permit applicants, builders, and developers...[L]ocal government owes no duty to ensure compliance with the codes.

Atherton Condominium Apartment-Owners Ass'n Board of Directors v. Blume Development Co., 115 Wn.2d 506, 530, 799 P.2d 250 (1990) (quoting *Taylor v. Stevens County*, 111 Wn.2d 159, 168, 759 P.2d 447 (1988)).

ABSI's argument it has no obligation to build the homes to the plans and specifications approved by the city and in compliance with RCW 19.27 is not only nonsensical - it attempts to set a dangerous precedent which will endanger homes and the families that live therein.

4. ABSI has a duty to defend Highmark and breached its obligation

ABSI mistakenly asks this Court to apply the actual liability standard in deciding whether it has an obligation to indemnify Highmark.

In *Northern Pacific Rail Co. v. National Cylinder Gas Division of Chemetron Corporation*, 2 Wn. App. 338, 467 P.2d 884 (1970), the court held that National Cylinder had to indemnify Northern Pacific for any claim that arose out of any activity connected with the welding operation performed by them, irrespective of the fault leading to that claim. In Northern Pacific Rail, an employee of Northern Pacific was injured during a train rail welding operation. The trial court rejected National Cylinder's argument that they did not have to indemnify Northern Pacific under the actual liability standard. Instead, the trial court held that National Cylinder had a duty to indemnify Northern Pacific under a theory of causation. The Court of Appeals affirmed the lower court, reasoning that the indemnification agreement, "concerned itself solely with the occurrence of an incident which would later give rise to a claim or lawsuit." The Court of Appeals said the language of the indemnity agreement was broad enough to include any work/activity performed under the terms of the contract. If the parties wanted to, "they could clearly and simply have provided in the agreement that the obligation to indemnify would be subject to fault on the part of National in connection with some phase of the welding operation." Therefore, the court said failure of the indemnitor to defend the action when the subject matter of the suit is within the scope of the indemnity agreement is itself a breach of contract and entitles the indemnitee to recover from the

indemnitor the amount of any reasonable settlement made in good faith. *Id.* citing to *Bosko v. Pitts & Still, Inc.*, 75 Wn.2d 856, 454 P.2d 229 (1969); *Clow v. National Indem. Co.*, 54 Wn.2d 198, 339 P.2d 82 (1959); *Hering v. St. Paul-Mercury Indem. Co.*, 50 Wn.2d 321, 311 P.2d 673 (1957); *Evans v. Continental Cas. Co.*, 40 Wn.2d 614, 245 P.2d 470 (1952); *Dowell, Inc. v. United Pac. Cas. Ins. Co.*, 191 Wn. 666, 72 P.2d 296 (1937); 28 WASH. L. Rev. 239 (1948); *see also* Annot. 49 A.L.R.2d 694 (1956) and 44 Am.Jur.2d Insurance § 1525.

This is precisely what happened in this case. The Court entered an order stating the construction failed to comply with the plans and the applicable codes and Highmark tendered the order and requested ABSI accept the tender. *See* Highmark Homes Opposition to ABSI motion for summary Judgment Pgs. 8 -9, Lns. 16- 9. ABSI breached its obligations and the Court should deny ABSI's motion.

Northern Pacific Rail also contrasted the application of the actual liability standard in tort based indemnity claims to indemnity claims made in contract. ABSI argues that a settlement agreement will not be enforced absent a showing of actual liability on the part of the indemnitor. *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wash.2d 745, 912 P.2d 472 (1996) citing to *Nelson v. Sponberg*, 51 Wn.2d 371, 318 P.2d 951 (1957). However, the facts in Gilbert and Nelson are distinguishable from this case.

In both of those cases the Court was discussing the, “liability of joint tortfeasors whose obligations were not based on a contract between the parties.” *Northern Pacific Rail Co. v. National Cylinder Gas Division of Chemetron Corporation*, supra. Since the holding of Nelson as reasoned in Gilbert was for a tort based indemnity claim, it is not applicable to the facts of this case, and the holding in Northern Pacific Rail should control. Therefore, Highmark does not have to show ABSI’s actual liability. Rather, Highmark only has to show that ABSI’s defective construction is a proximate cause of the damage to the Valley Haven project, and that such defective construction was the type of damage that the parties contemplated when entering the indemnity agreement.

Again, the indemnity provision of the contract between Highmark and ABSI states:

Subcontractor shall not be required to indemnify Contractor for liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of Contractor. To the extent that such bodily injury or property damage is caused by the concurrent negligence of (a) Contractor or Contractors agents or employees and (b) Subcontractor or Subcontractors agents or employees. Subcontractors shall only be required to indemnify Contractor to the extent of the negligence of Subcontractor and/or its agents or employees.

(CP 1913 Pg. 1 Item 1)

This provision, as the one entered into by Northern Pacific Rail and National Cylinder, is broad enough to cover any and all work performed by ABSI at Valley Haven. Additionally, the indemnification provision uses the terms; “loss, damage, suits, claims...” which demonstrates that Highmark contemplated ABSI would indemnify it absent a showing of actual liability at the time the parties entered their agreement. Based on the foregoing, ABSI cannot argue that it does not have to indemnify Highmark absent a showing of actual liability where it’s defective construction is the proximate cause of damage to the Valley Haven project.

C. Assignment of errors relating to S&S

1. Highmark’s master contract with S&S applied to the homes at the Valley Haven project

The master contract entered into between Highmark and S&S clearly applied to this project as it states:

1. GENERAL PROVISIONS

1.1 Contractor wishes to utilize the services of Service Provider to provide services to Contractor and/or property owners (“Owner”) introduced by Contractor. Based upon the nature of the services provided by Service Provider, it is anticipated that it will be impractical to enter into a separate agreement for services each time Contractor desires to use Service Provider.

1.2 Contractor requires that Service Provider meet certain terms and conditions before Contractor uses Service Provider’s services. These terms and conditions are set forth in this agreement.

1.3 In order to expedite the use of Service Provider's services each time they are needed, the parties agree to enter into and comply with this Master Service Agreement prior to any actual services being performed. It is the intent of the parties that these terms and conditions apply to any provision of services by Service Provider regardless of whether these terms and conditions are referenced in any purchase order, subsequent contract memo, etc. during the term of this contract.

The clear and unambiguous language dictates the master contract applied to the Valley Haven project and the trial Court erred.

2. S&S had a contractual obligation to build the project in compliance with the 2009 Building Codes and breached its obligations to Highmark

The elements of a breach of contract are well-settled. "A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant." *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6, 9 (1995). See *Iron Gate Partners 5, LLC v. Tapio Constr., Inc.*, 2017 Wash. App. LEXIS 445 and *Irwin- Yaeger, Inc v. State Cmty. College Dist. 17*, 2015 Wash. App. LEXIS 1139.

S&S' contract with Highmark required it to construct all projects in compliance with the applicable Building Codes. The contract states:

The Service Provider represents and warrants that all materials, labor and/or systems furnished by the Service Provider in connection with the construction of all work performed shall be free of defect for a period of one year for workmanship and systems for two years.

As testified to by Appellants' experts Highmark failed to do so, thus Respondent breached its contract and the trial Court erred when it granted summary judgment in favor of S&S on this issue.

3. S&S had a statutory obligation to build the project in compliance with the 2009 building codes and breached its obligations to Highmark

Please see section 1.3 above and arguments contained therein for this section.

4. S&S had a contractual obligation to purchase insurance and it breached its obligations to Highmark

As to the insurance procurement breaches, although S&S provided the certificate of insurance, it failed to meet the second contractual requirement – actually providing the coverage. Highmark tendered to S&S' insurers. Both denied coverage. One simply said that there was no endorsement naming Highmark as an additional insured. The other said there was no coverage for this project because of its size.

This is clearly a breach of the subcontract. S&S was supposed to make sure that Highmark would have the required coverage for the project. Instead, Highmark was told that there was no coverage. Thus, S&S failed to meet its contractual duty. As S&S breached its contract, its request to have this claim dismissed should have been denied.

5. S&S has a duty to defend and indemnify Highmark and breached its obligation

Please see section 1.4 above and arguments contained therein for this section.

D. There is a Question of Fact Regarding Whether There was a Written Contract Between Highmark and BQF and AAA Framing containing construction obligations regarding Defense, Indemnity, Warranty, Insurance, and Attorney's Fees Provisions and Obligations.

BQF and AAA assert that there is no evidence that it had a contract with Highmark, and therefore it has no contractual responsibility to defend or indemnify Highmark, warrant its work, name Highmark as an additional insured, or owe attorney's fees. However, there is evidence that there was a contract between Highmark and AAA and Best Quality: Mr. Tollen's Declaration. In that Declaration, Mr. Tollen expressly states that "...I remember there was a contract with Best Quality Framing #1, LLC..." and that it had defense and indemnity provisions, a warranty, and a requirement that Best Quality name Highmark as an additional insured. March 14 Decl. Tollen, para. 4. . (CP 1649-1700; 1485-1486; & 1908-1911)

Under Washington law "the burden of proving the existence of a contract is on the party asserting its existence. *Johnson v. Nasi*, 50 Wn.2d 87, 91, 309 P.2d 380 (1957). *Hash by Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507, 508 (1988). Mutual assent must exist for there to be a contract. *Yakima County (W. Valley) Fire Prot.*

Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 388-89, 858 P.2d 245 (1993). Mutual assent “may be deduced from the circumstances,” *Kintz v. Read*, 28 Wn. App. 731, 735, 626 P.2d 52 (1981), including among other things “the ordinary course of dealing between the parties.” *Ross v. Raymer*, 32 Wn.2d 128, 137, 201 P.2d 129 (1948). Importantly, “signatures of the parties are not essential to the determination.” See *Urban Dev., Inc. v. Evergreen Bldg. Prods., LLC*, 114 Wn. App. 639, 651, 59 P.3d 112 (2002) (signatures not essential elements of a written *contract*).

In a case with almost identical facts to this matter, the Court of Appeals has ruled summary judgment is improper. *Jacob’s Meadow Owners Ass’n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 750-751, 162 P.3d 1153, 1158, 2007 Wash. App. LEXIS 2107, *4 (Wash. Ct. App. 2007)

In *Jacob’s Meadow*, the contractor moved for summary judgment at the conclusion of the Plaintiffs’ case arguing the Plaintiffs “had not offered evidence sufficient to prove that a written contract containing an indemnity provision existed between the parties. The trial court denied the motion” and the Court of Appeals agreed with the trial Court’s ruling. *Id.* at 766. The Court of Appeals holding plaintiffs “proffered the following evidence tending to support the reasonable inference that there existed a written contract between the parties, containing an” indemnity agreement. *Id.* At trial Plaintiffs, “offered into evidence an unsigned document entitled ‘subcontract agreement,’” which contained “both an indemnification clause and a prevailing party clause.” And the principal of the company testified “the company used essentially the same contract with each of the subcontractors who worked on the...” the project.

This is precisely what happened in this case. Mr Tollen has testified, numerous times, that it was standard practice for all the contractors to sign a master agreement and that he knows BQF and AAA did so in this case. . (CP 1649-1700; 1485-1486; & 1908-1911)

1. AAA failed to meet its burden to show it did not enter into a master subcontract

To rebut Mr. Tollen’s testimony AAA produced the cleverly drafted declaration of Mr. Isidro Garcia. However, Mr. Garcia does not testify that there wasn’t a master subcontract but rather “no written contract between AAA and Highmark for this labor.” Mr. Tollen testified that the pricing was often done via a conversation or even a text but that does not change the fact the work was still covered under the terms of the master subcontract.

The agreement reads:

ITEM 1. MASTER AGREEMENT: The parties’ hereto agree that from time to time from the date hereof until this Agreement is terminated that Contractor will contract with Subcontractor for the furnishings of materials and/or the performance of various work on projects being constructed by Contractor. **The parties further agree that this Agreement shall be the master agreement between them and as such shall control the rights, privileges, duties and responsibilities between them**, which arise out of Subcontractor furnishing any materials for and/or performing any work on Contractor’s construction projects.

AAA does not dispute nor could it that it performed work on the project. (CP 1808-1860) A jury could easily determine from Mr. Tollen’s testimony that AAA entered and agreed to the terms in the master contract.

The Court should deny AAA's motion and let a jury decide what the terms of the contract were.

2. BQF failed to meet its burden to show it did not enter into a master subcontract

Mr. Tollen's Declaration creates an inference in Highmark's favor that there was a written contract with Best Quality containing these provisions. Further, if the jury concludes that there was a written contract with Best Quality that contained an indemnity provision it follows that Best Quality may also owe Highmark attorney's fees pursuant to that provision. *See Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 760, 162 P.3d 1153, 1163 (2007) (recognizing attorney fees are recoverable pursuant to a contractual indemnity provision). It would therefore be inappropriate to grant summary judgment on the basis that no such contract or obligations existed.

It would seem especially inappropriate to grant summary judgment on this basis when no one from Best Quality actually contradicts Mr. Tollen. There is no declaration from anyone at Best Quality saying that there was no contract, and that Mr. Tollen is incorrect or lying. As it stands, the only competent evidence before this Court is Mr. Tollen's testimony, which makes it clear there was a contract. (CP 1688-1695) All Best Quality offers

to is its attorney's presumption that Mr. Tollen must be wrong, with nothing from Best Quality to actually back up that presumption.

Best Quality attaches excerpts from Mr. Tollen's deposition testimony in an attempt to attack his credibility and establish that there was no contract. However, it is well-settled that is the jury that gets to weigh credibility. *Faust v. Albertson*, 167 Wn.2d 531, 543, 222 P.3d 1208, 1215 (2009), as amended (Aug. 6, 2009) ("Credibility determinations lie with the jury, and it was entitled to weigh these conflicting statements..."). *Millies v. LandAmerica Transnation*, 185 Wn.2d 302, 319, 372 P.3d 111, 120 (2016) ("The weight of evidence and questions of credibility are the province of the finder of fact."). Best Quality is free at trial to argue to the jury, using Mr. Tollen's testimony, that Mr. Tollen is mistaken. However, any criticisms of Mr. Tollen's testimony go to the weight of his testimony. It is the jury who gets to make the ultimate decision regarding the credibility of that testimony. It would be inappropriate for this Court to make that credibility determination by granting Best Quality's Motion on this issue.

It must also be noted that Best Quality, even in attacking Mr. Tollen, still fails to resolve this question of fact. This is because in that same deposition testimony that Best Quality relies upon, Mr. Tollen continues to affirm the existence of the contract with Best Quality. . (CP 1649-1700;

1485-1486; & 1908-1911) The reasonable inference in Highmark's favor is that there was a contract with Best Quality and now it is lost.

It must be remembered that a contract does not become ineffective simply because it is lost. In *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 162 P.3d 1153 (2007), a siding subcontractor asserted that the general contractor had "...failed to present evidence sufficient to conclude there was a written contract between [the general contractor] and [the siding subcontractor] containing an agreement by [the siding subcontractor] to indemnify [the general contractor]. *Id.* at 765. The general contractor submitted evidence that there had been a contract. The Court, acknowledging that it was viewing the evidence in the light most favorable to the general contractor, found there was sufficient evidence to create a reasonable inference that there had been a written contract containing an indemnity obligation. *Id.* See also *Lutz v. Gatlin*, 22 Wn. App. 424, 427, 590 P.2d 359, 361 (1979) (applying the statute of limitation for written contracts to a lost contract).

There is a clear issue of fact as to whether a master contract was entered between BQF and Highmark. The trial Court erred and this Court should reverse the trial Court and remand the issue back to the trial Court for a jury to decide.

RESPECTFULLY SUBMITTED this 12th day of July, 2017.



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CERTIFICATE OF SERVICE

I, Todd K. Skoglund, declare as follows:

1) I am a citizen of the United States and a resident of the state of Washington. I am over the age of 18 and not a party to the within entitled case. I am a partner at the law firm of Casey & Skoglund PLLC, whose address is 130 Nickerson Street, Suite 210, Seattle, WA, 98109.

2) By the end of the business day on July 12, 2017, I caused to be served in the manner described below, the foregoing document:

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Court of Appeals – via Washington State Appellate Court’s eFiling Portal

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of July, 2017.

A handwritten signature in black ink, appearing to read "Todd Skoglund", written in a cursive style.

Todd K. Skoglund, WSBA #30403

CASEY AND SKOGLUND PLLC

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