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No. 74023-7-1

COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

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MERCER PLACE II CONDOMINIUM OWNER'S ASSOCIATION,

Plaintiff/Appellant,

v.

MCGLYNN PLASTERING, INC.,

Defendant/Respondent.

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BRIEF OF RESPONDENT

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## **I. INTRODUCTION**

The trial court correctly ordered to dismiss, on Defendant/Respondent McGlynn Plastering, Inc.'s ("McGlynn") motion for summary judgment, Plaintiff/Appellant Mercer Place II Condominium Owner's Association ("Mercer") claim for breach of a construction contract and warranties against Defendant/Respondent McGlynn Plastering, Inc.'s ("McGlynn"). Mercer's claim is time-barred under RCW 4.16.326(1)(g). Although the trial court cited RCW 4.16.310 for its decision, a judgment is not subject to reversal because the court may have given a wrong or insufficient reason, when the judgment is nonetheless correct. The trial court did not abuse its discretion when it denied Mercer's oral motion for a continuance under CR 56(f). Mercer failed to comply with the formal requirements of that rule by submitting a supporting affidavit. Mercer also failed to show what evidence it would establish through the additional discovery and how that evidence would raise a genuine issue of material fact.

## **II. ANSWER TO ASSIGNMENT OF ERROR**

### **A. Answer to Assignment of Error**

The trial court did not err in entering the order of August 28, 2015, granting McGlynn summary judgment and dismissing Mercer's breach of

construction contract and warranties claim against McGlynn, on the grounds that the claim was time-barred. CP 79-81.

**B. Issues Pertaining to Answer to Assignment of Error**

1. Is Mercer's Claim Time-Barred under RCW 4.16.326(1)(g)?
  - a. Did McGlynn Waive Its Affirmative Defense That the Discovery Rule of Accrual Does Not Apply to Mercer's Claim, under RCW 4.16.326(1)(g), When Mercer Did Not Plead that Any of the Alleged Construction Defects Caused by McGlynn were Latent Defects and When McGlynn Did Raise that Defense in Its Very First Substantive Filing in the Trial Court?
  - b. Is a Nexus Between a Construction Service and a Plaintiff's Cause of Action Required Before that Service May Be Used to Establish a Termination of Services Date for Purposes of RCW 4.16.326(1)(g) and When the Service is that of the Defendant's and Not Another Contractor's?
  - c. Is There a Nexus between McGlynn's Unpaid-For Final Report and Mercer's Claim for Purposes of RCW 4.16.326(1)(g)?
2. Did the Trial Court Abuse Its Discretion When It Denied Mercer's Oral Motion under CR 56(f) for a Continuance?

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

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

McGlynn augments Mercer's Statement of Facts with the following undisputed facts:

In late 2006, Mercer contacted McGlynn to repair the exterior stucco siding on its building that had been water damaged. CP 42:22-25. McGlynn provided Mercer with two signed bids, one bearing the date "December 13, 2006," CP 45-47, and another with the date "December 13, 2006 rev. 1/30/2007." CP 76-77. Mercer then hired McGlynn to perform the repairs, CP 23:25-26; 43:5-8, although there is no evidence in the record which of the two bids Mercer accepted. Mercer placed in the record, through the declaration of its counsel, two Construction Agreement forms bearing McGlynn's letterhead. CP 60:20-25 to 61:1-5. However, both are undated and unsigned. CP 68 & 75. One does not mention Mercer at all. CP 63-68. None of the bids or the unsigned Construction Agreement forms contain language that requires McGlynn to provide any form of report to Mercer. CP 45-47; 63-68; 70-75; 76-77.

Mercer also hired an engineering firm, Swenson Say Faget, to provide project management oversight and either that firm or Mercer hired other contractors to repair other portions of their building. CP 23:25-26 to 24:1-3.

McGlynn worked on the project from April 2, 2007 until March 31, 2008, and finished all its work on the property by that latter date. CP 24:4-6 & 20-21. Its final bill, bearing the words “100% COMPLETE,” is dated March 31, 2008. CP 26. Mercer paid that final bill in April 2008. CP 43:18.

Over a year after McGlynn finished its work, Mercer contacted McGlynn’s primary shareholder, Kevin McGlynn, to document McGlynn’s work on the property. CP 23:7-8. According to Mercer’s President, Stephen Adams, Mercer sought a:

Final Report containing assurances about [McGlynn’s] work, along with a plan for a maintenance schedule. Mercer Place needed that Final Report so that it could determine the maintenance schedule for the Mercer Place II Condominium building (including inspections), determine the expected lifespan of McGlynn's work, and so that it could provide a copy to any real estate agent whose potential buyer would be concerned about the quality and type of work McGlynn performed.

CP 43: 20-26. As a result, Mr. McGlynn prepared a letter dated September 15, 2009, characterized in the letter itself as a “final report and recommendation for the continued maintenance of the exterior cladding” at the building (“Final Report”). CP 28-30 & 48-50. Mr. McGlynn sent the Final Report to Mercer’s President, Stephen Adams, among others, in an email dated September 16, 2009. CP 42:20-21 & CP 51. This was 17 months after Mercer had paid McGlynn’s final bill. CP 43:18.

In its Statement of the Case, Mercer characterizes some of the contents of the Final Report as a warranty. Appellant's Brief at 3. However, that is a legal conclusion unsupported by the undisputed facts: the Final Report was not supported by any consideration. Mercer did not pay McGlynn for the Final Report. CP 24:12. McGlynn's final bill makes no mention of a report. CP 26-27. Instead, Mr. McGlynn prepared the report as a matter of courtesy to Mercer. CP 24:12-13.

According to Mr. Adams, there was visible exterior cracking of the stucco on its building in 2014, which led it to commission an inspection of the building that same year. CP 44:9-10. Mercer represents, as matter of fact, that it discovered damage "in *early* 2014." Appellant's Brief at 7 (emphasis added). However, the record does not support that representation: Mr. Adams avers only that there was visible cracking on some unspecified date in 2014. CP 44:9-10. Mercer also represents, as a matter of fact, that the date of termination of services was September 16, 2009, the date Mr. McGlynn emailed his Final Report to Mercer. Appellant's Brief at 7. However, whether the Final Report can be used to establish a termination of services date for purposes of RCW 4.16.326(1)(g) is the precise question of law that is at issue in this appeal.

**B. Procedural History and Mercer's Claims**

Mercer filed its Complaint against McGlynn on May 6, 2015.

CR 1. For its Claim for Relief in the Complaint, Mercer alleges in full:

**IV. CLAIM FOR RELIEF**

4.1 The Contract between McGlynn and Mercer Place II was a valid and binding contract.

4.2 In the Contract, McGlynn promised and expressly warranted that it would, among other things, perform work that was free from defects.

4.3 The work that McGlynn negligently performed on the Mercer Place Condos was not free from defects and was not in accordance with the plans and specifications, resulting in a breach of McGlynn's warranty.

4.4 As a result, McGlynn breached its warranties and its contract with Mercer Place II, causing Mercer Place II to suffer damages in an amount to be proven at trial.

CP 4:23-25 to 5:1-7. Mercer alleged that it had hired Dimensional Building Consultants LLC ("DBC") to investigate damage to its building and that DBC's investigation "revealed extensive and excessive cracking of the stucco plaster on the exterior of the Mercer Place Condos negligently installed by McGlynn" as well as "discontinued application of the water-resistive barrier installed by McGlynn." CP 3:21-26 to 4:1.

For its first substantive filing in the trial court, McGlynn moved for summary judgment on the grounds that Mercer's claim was time barred

under RCW 4.16.310. CP 19:7-9. However, in describing the statute, McGlynn's Motion paraphrased RCW 4.16.326(1)(g): "the applicable statute of limitations expires, regardless of discovery, six years after substantial completion of construction or termination of services, whichever is later." CR 20:5-8. McGlynn argued that Mercer could not use the Final Report to establish a post-substantial completion termination-of-services date, for purposes of that statute, because that Report lacked a nexus to Mercer's lawsuit. CP 20:19-26 to 21:1-3. McGlynn's Rebuttal Brief in Support of Its Motion for Summary Judgment made explicit reference to RCW 4.16.326(1)(g) and quoted the language of that statute. CP 54:20-26 to 55:1-4.

At the hearing on McGlynn's Motion for Summary Judgment, the trial court agreed with McGlynn, and ruled orally as follows

THE COURT: All right.

I'm persuaded that the argument of the moving party is supported by the case law. I'm not persuaded that the letter of September of 2009 extends the substantial compliance or termination, or the parties' understanding that it was terminated, quite frankly.

RP 21:6-12.

Mercer's counsel then orally sought a continuance under CR 56(f), which the trial court denied:

MR. ALVORD: Your Honor?

THE COURT: Yes?

MR. ALVORD: May I make the oral motion under 56(f) that you delay your ruling until we have a chance to update documentation from Mr. McGlynn that may bear on that issue? As I said, this is very early in the litigation process.

THE COURT: I appreciate the tactical issue that you're confronted with, but I don't think it's going to change the application of the law.

MR. ALVORD: With due respect, Your Honor, we won't know that without obtaining the documents.

THE COURT: I understand. All right. I've signed the order granting the motion.

RP 21:13-15 to 22:1.

#### **IV. SUMMARY OF ARGUMENT**

The trial court correctly ordered to dismiss Mercer's claim for breach of a construction contract and warranties against McGlynn, on McGlynn's motion for summary judgment. Mercer's claim is time-barred under RCW 4.16.326(1)(g). Although the trial court cited in its order RCW 4.16.310 for its decision, it is clear that it was basing its order on the substance of RCW 4.16.326(1)(g).

Mercer's claim is barred under RCW 4.16.326(1)(g). McGlynn did not waive its affirmative defense that the discovery rule does not apply to Mercer's claim for purposes of that statute. Mercer did not plead that any of the alleged construction defects caused by McGlynn were latent

defects. Consequently, Mercer is not entitled to rely on the discovery rule of accrual. In the absence of any allegation that the defects were latent, McGlynn did not need to raise a defense under RCW 4.16.326(1)(g).

In any event, McGlynn did raise that defense in its very first substantive filing in the trial court, its Motion for Summary Judgment. Even though McGlynn did not cite RCW 4.16.326(1)(g) by number and incorrectly referred RCW 4.16.310, it correctly paraphrased the language of RCW 4.16.326(1)(g).

The Court of Appeals has squarely held, based on the language RCW 4.16.300, to which RCW 4.16.326(1)(g) refers, that a nexus is required between a contractor's post-substantial completion service and the plaintiff's cause of action for the date of that service to serve as the termination-of-services start date for the six year period provided under RCW 4.16.326(1)(g). Contrary to Mercer's argument, that requirement applies to a service for which a defendant contractor is responsible, and not just to the services of other subcontractors. In this case, McGlynn's unpaid Final Report does not have a sufficient nexus to Mercer's breach of contract and warranties claim. McGlynn's breach, if any, necessarily took place during construction, long before the Final Report was sent. Consequently, under RCW 4.16.326(1)(g), Mercer was required to bring its claim no later than six years after substantial completion on March 31,

2008, which was also necessarily the date of termination of its services. Mercer agrees that the substantial completion date was March 31, 2008. Appellant's Brief at 6. Its Complaint here, filed May 6, 2015, is more than six years later and, therefore, is time-barred under RCW 4.16.326(1)(g).

Finally, the trial court did not abuse its discretion when it denied Mercer's oral motion for a continuance under CR 56(f). Mercer failed to formally comply with the rule when it failed to submit the requisite affidavit stating reasons why it cannot present by affidavit facts essential to justify its opposition to McGlynn's Motion for Summary Judgment. The trial court properly denied Mercer's motion when it failed to state what evidence would be established through the additional discovery, as required by this Court's case law. Mercer's vague reference to "update documentation from Mr. McGlynn" is insufficient. In addition; Mercer failed to state how any such documentation from Mr. McGlynn would raise a genuine issue of material fact, as also as required by this Court's case law.

## **V. ARGUMENT**

### **A. Standard of Review**

This Court reviews a summary judgment order de novo. *Miller v. Likins*, 109 Wn. App. 140, 144, 34 P.3d 835 (2001). A moving defendant meets its initial burden on summary judgment by either setting out its

version of the facts and alleging that there is no genuine issue as to the facts as set out or by pointing out that the nonmoving plaintiff lacks sufficient evidence to support its case. *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689 (1993). The inquiry then shifts to the plaintiff to set forth specific facts demonstrating a genuine issue for trial. *Weatherbee v. Gustafson*, 64 Wn. App. 128, 132, 822 P.2d 1257 (1992). An order granting summary judgment should be affirmed if no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one of such nature that it affects the outcome of the litigation. *Greater Harbor 2000 v. City of Seattle*, 132 Wash.2d 267, 279, 937 P.2d 1082 (1997). This Court considers the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Schaaf v. Highfield*, 127 Wash.2d 17, 21, 896 P.2d 665 (1995).

## **B. Discussion**

### **1. Mercer's Claim Is Time-Barred under RCW 4.16.326(1)(g)**

The trial court correctly ordered to dismiss Mercer's claim for breach of a construction contract and warranties against McGlynn, on McGlynn's motion for summary judgment. Mercer's claim is time-barred under RCW 4.16.326(1)(g). Although the trial court cited in its order

RCW 4.16.310 for its decision, it is clear that it was basing its order on the substance of RCW 4.16.326(1)(g). This brief will discuss both statutes in turn.

RCW 4.16.310, the statute cited by the trial court, provides:

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. The phrase “substantial completion of construction” shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use. Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is later, shall be barred: . . .

RCW 4.16.310 is a statute of repose, which “terminates a right of action after a specified time, even if the injury has not yet occurred.” *1000 Virginia Ltd. P’ship v. Vertecs Corp.*, 158 Wn.2d 566, 574-75, 146 P.3d 423 (2006). The Washington Supreme Court has held that this statute requires a two-step analysis: “First, the cause of action must accrue within 6 years of substantial completion of the improvement; and second, a party then must file suit within the applicable statute of limitation, depending on the type of action.” *Del Guzzi Const. Co., Inc. v. Global NW, Ltd., Inc.*, 105 Wn.2d 878, 883, 719 P.2d 120 (1986).

In *1000 Virginia*, the Washington Supreme Court held that the discovery rule of accrual “applies in the case of actions for breach of construction contracts where latent defects are alleged.” 158 Wn.2d at 582. Under a discovery rule of accrual, a cause of action accrues “when the plaintiff discovers, or in the reasonable exercise of diligence should discover, the elements of the cause of action. *Id.* at 575-76.

However, RCW 4.16.326(1)(g) provides that the statute of limitations will expire six years after substantial completion or the termination of the services, whichever is later, “regardless of discovery.”

That statute reads, in specific terms:

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

....

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

(emphasis added). RCW 4.16.300, to which both RCW 4.16.310 and RCW 4.16.326(1)(g) refer, provides that:

RCW 4.16.300 through 4.16.320 shall apply to all claims or causes of action of any kind against any person, arising from such person having constructed, altered or repaired any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property. . . .

In the absence of RCW 4.16.326(1)(g), the discovery rule of accrual would apply to contract actions that are based on the services enumerated in RCW 4.16.300 and alleged latent defects. *1000 Virginia*, 158 Wn.2d at 582.

In its Motion for Summary Judgment, McGlynn referred to RCW 4.16.310, but in describing that statute, paraphrased RCW 4.16.326(1)(g): “the applicable statute of limitations expires, regardless of discovery, six years after substantial completion of construction or termination of services, whichever is later.” CR 20:5-8. McGlynn contended that the September 15, 2009, Final Report lacked a nexus to Mercer’s lawsuit, so that it may not be used to establish a post-substantial completion termination-of-services date, for purposes of the statute, as described. CP 20:19-26 to 21:1-3 & 56: 24-26 to 57:1-16.

McGlynn argued that because it had finished all its work on the property on March 31, 2008, Mercer was required, but failed, to bring its claim within six years of that date. CP 20:3-10 & 57:17-26. The trial court orally ruled that it was “persuaded that the argument of the moving party is supported by the case law.” RP 21:7-9. For the reasons that follow, the trial court was correct. Even though the trial court cited RCW 4.16.310 in its order granting McGlynn’s Motion, rather than RCW 4.16.326(1)(g), it is well settled that when “a judgment is correct, it will be sustained on any appropriate ground within the established facts.” *Upjohn v. Russell*, 33 Wn. App. 777, 782, 658 P.2d 27 (1983), and will “not be reversed because the court may have given a wrong or insufficient reason.” *Gomez v. Sauerwein*, 180 Wn.2d 610, 626, 331 P.3d 19 (2014).

**a. McGlynn Did Not Waive Its Affirmative Defense That the Discovery Rule of Accrual Does Not Apply to Mercer’s Claims, under RCW 4.16.326(1)(g), as Mercer Did Not Plead that Any of the Alleged Construction Defects Caused by McGlynn were Latent Defects and as McGlynn Raised that Defense in Its Very First Substantive Filing in the Trial Court**

Contrary to Mercer’s contention, McGlynn did not waive its affirmative defense under RCW 4.16.326(1)(g) that the discovery rule does not apply to Mercer’s claim. In the first instance, Mercer’s Complaint is bereft of any allegation that the construction defects it

alleged were latent defects. This Court held in *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 143 Wn. App. 345, 356, 177 P.3d 755, 761 (2008), that a party may not rely on the discovery rule of accrual if it fails to plead latency. In *Harmony*, general contractor Ledcor claimed that subcontractor Serock breached its subcontract with Ledcor. *Id.* at 351. On appeal, Serock contended that all of Ledcor's claims for breach of contract were barred by the statute of limitations. *Id.* Ledcor never alleged that any of its claimed defects in Serock's work were latent. *Id.* at 356. Ledcor argued on appeal that it should be relieved of any duty to plead latency, and allowed to rely on the discovery rule of accrual, because it had justifiably believed that that rule was not available due to RCW 4.16.326(1)(g). This Court rejected that argument, reasoning that, "To hold that Ledcor could rely upon the discovery rule in this case effectively would be to allow Ledcor to eliminate RCW 4.16.326(1)(g) as one of Serock's available affirmative defenses by failing to properly allege latent defects in its initial pleadings." *Harmony*, 143 Wn. App. at 357. That reasoning applies equally to this case.

Following *Harmony*, Mercer is not entitled to rely on the discovery rule of accrual because it did not plead latency. In the absence of any

allegation that the defects were latent, McGlynn did not need to raise a defense under RCW 4.16.326(1)(g).<sup>1</sup>

In any event, McGlynn did raise that defense in its very first substantive filing in the trial court, its Motion for Summary Judgment. As discussed above, even though McGlynn in that Motion did not cite RCW 4.16.326(1)(g) by number, and incorrectly referred to a different statute, it accurately paraphrased the language of RCW 4.16.326(1)(g). McGlynn's also made explicit reference to RCW 4.16.326(1)(g) and quoted the language of that statute in its Rebuttal Brief in Support of its Motion for Summary Judgment. CP 54:20-26 to 55:1-4. To the extent that Mercer is suggesting that McGlynn should have raised the defense on a pleading prior to its Motion for Summary Judgment, there is no rule that a defendant cannot seek summary judgment on its affirmative defenses before pleading those defenses.

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<sup>1</sup> This Division's unpublished decision in *Harbour Homes, Inc. v. America 1st Roofing & Builders, Inc.*, 158 Wn. App. 1017 (2010), is in accord: "Because Harbour failed to plead latent defects in its complaint or amended complaint, it is precluded from relying on the discovery rule." McGlynn is aware that that unpublished decisions may not be cited as authority. GR 14.1(a). However, McGlynn offers *Harbour Homes* not as authority, but as an illustration of the soundness of McGlynn's reasoning.

**b. A Nexus Between a Construction Service and a Plaintiff's Cause of Action is Required Before that Service May Be Used to Establish a Termination of Services Date for Purposes of RCW 4.16.326(1)(g) Even When the Service is That of the Defendant's and Not Another Contractor's**

The Court of Appeals has squarely held that a nexus is required between a contractor's post-substantial completion service and the plaintiff's cause of action for the date of that service to serve as the termination-of-services date, for purposes of both RCW 4.16.310, the statute of repose, and RCW 4.16.326(1)(g). In *Parkridge Associates, Ltd v. Ledcor Indus., Inc.*, 113 Wn. App. 592, 597, 54 P.3d 225 (2002), the Court was called upon to determine if a third-party defendant subcontractor's post-substantial completion service qualified to establish the termination of services date, for purposes of determining whether the third-party plaintiff general contractor's claim was timely under RCW 4.16.310, the statute of repose. The *Parkridge* Court agreed with the subcontractor's contention that "there must be a nexus between the services performed and the cause of action." 113 Wn. App. at 599. As the Court held, 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." *Id.*

Mercer argues that the “arising out of” language in RCW 4.16.300, on which the *Parkridge* Court relied, does not apply to RCW 4.16.326(1)(g), because while RCW 4.16.300 refers to RCW 4.16.310, it does not refer to RCW 4.16.326(1)(g): “RCW 4.16.300 through 4.16.320 shall apply to all claims . . . arising from such person having constructed . . . .” Appellant’s Brief at 18. However, Mercer forgets that RCW 4.16.326(1)(g) itself expressly refers to RCW 4.16.300:

(1) Persons engaged in any activity defined in *RCW 4.16.300* may be excused, in whole or in part, from any . . . liability for those defined activities . . . for the following affirmative defenses:

. . . .

(g) . . . In contract actions the applicable contract statute of limitations expires, regardless of discovery, six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in *RCW 4.16.300*, whichever is later;

RCW 4.16.323 (emphasis added). Thus, the Court in *Dania, Inc. v. Skanska USA Bldg. Inc.*, 185 Wn. App. 359, 372, 340 P.3d 984 (2014), cited both RCW 4.16.300 and *Parkridge*, to apply a nexus requirement to determine whether the post-substantial completion service of a subcontractor qualified to establish the date of termination of services, under RCW 4.16.326(1)(g), for purposes of determining the timeliness of the plaintiff owner’s claim against a defendant general contractor.

Mercer suggests that the nexus test only applies to projects with multiple trades, so that the timeliness of a claim against a defendant contractor does not depend on the later service of an unrelated contractor. Appellant's Brief at 17. However, that suggestion is belied by the language of RCW 4.16.300, which does not so limit the services in that statute to the services of other contractors only. Indeed, the opposite is true: the statute speaks of "claims or causes of action . . . against any person, arising from *such* person having constructed," etc. In other words, the statute requires a nexus between the claim and the service, even when the service is that of the defendant's. In addition, the service at issue in *Parkridge* was the own service of the third-party defendant subcontractor, while the service at issue in *Dania* was the service of a subcontractor who had performed work for which the defendant general contractor was contractually responsible, in the first instance, to the plaintiff owner. Thus, contrary to Mercer's argument, the nexus requirement applies to a defendant contractor's own service, and not just to the services of other unrelated subcontractors.

**c. No Nexus Exists Between McGlynn's Unpaid-For Final Report and Mercer's Breach of Contract and Warranty Claims for Purposes of RCW 4.16.326(1)(g)**

McGlynn's unpaid-for Final Report does not have a sufficient nexus to Mercer's breach of contract and warranties claim. Mercer argues that the Report qualifies as the "administration of construction contracts" under RCW 4.16.300. That is not so. The phrase "administration of the construction contract" is defined by statute as "the periodic observation of materials and work to observe the general compliance with the construction contract documents, and does not include responsibility for supervising construction methods and processes, site conditions, equipment operations, personnel, or safety on the work site." RCW 18.08.320(2). It constitutes the "practice of architecture," which is defined to include "administration of the construction contract." RCW 18.08.320(12). Here, however, McGlynn is a sider, and not an architect. The Final Report simply was not the "administration of construction contracts."

If anything, Mercer was attempting to obtain from McGlynn a free reserve study for the building components installed stucco siding installed by McGlynn. Under RCW 64.34.380(2)-(3), "unless doing so would impose an unreasonable hardship, a condominium association must

prepare and periodically update a “reserve study,” which under RCW 64.34.382(1)-(2), must contain a building component list and estimate anticipated major maintenance, repair, and replacement costs. Such reserve studies must be prepared by a “reserve study professional.” RCW 64.34.380(2)-(3). Again, McGlynn is a sider, not a reserve study professional.

In *Dania*, the Court of Appeals tested the nexus of service at issue to the defect complained of, a leaking roof. 185 Wn. App. at 375. The Court should follow *Dania* by testing the nexus of the Final Report to the defects alleged by Mercer, namely, “extensive and excessive cracking of the stucco plaster on the exterior of the Mercer Place Condos negligently installed by McGlynn,” and the “discontinued application of the water-resistive barrier installed by McGlynn.” CP 3:21-26 to 4:1. These alleged defects and McGlynn’s ensuing alleged breach, if any, necessarily took place during construction, before the Final Report was sent. There is no nexus that would allow Mercer to use the Final Report to establish the date of termination of services. Indeed, as a free piece of work, any warranty contained in the Final Report is not supported by consideration. *See e.g., Taylor v. Stimson*, 52 Wn.2d 278, 280, 324 P.2d 1070 (1958) (promises must be supported by consideration to be enforceable).

McGlynn both substantially completed its work and terminated its service on March 31, 2008. Under RCW 4.16.326(1)(g), Mercer was required to bring its claim no later than six years after that date. Therefore, its Complaint, filed May 6, 2015, is time-barred.

**2. The Trial Court Did Not Abuse Its Discretion When It Denied Mercer Place's Oral Motion under CR 56(f) for a Continuance**

The trial court did not manifestly abuse its discretion when it denied Mercer's oral motion for a continuance under CR 56(f). Mercer had sought the continuance "to update documentation from Mr. McGlynn that may bear on that issue."

CR 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that, for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

This Division has held that:

Denial of a motion for continuance will be upheld absent a showing of manifest abuse of discretion.

The trial court can deny a continuance under CR 56(f) if "(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material

fact.” *Only one of the qualifying grounds is needed for denial.*

*Gross v. Sunding*, 139 Wn. App. 54, 67-68, 161 P.3d 380 (2007) (citations omitted) (emphasis added). The proper standard is whether discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court’s discretion. *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990).

Formal compliance with CR 56(f) is required. This Division’s decision in *Turner v. Kohler*, 54 Wn. App. 688, 693-95, 775 P.2d 474 (1989) (citations omitted), is instructive:

On appeal, Turner contends that his failure to formally comply with CR 56(f) is not a bar to relief.

There are relatively few Washington cases addressing CR 56(f). However, it is essentially the same as Fed. R. Civ. P. 56(f). Therefore, we look to decisions and analysis of federal rules for guidance in interpreting the state rule.

Most federal courts considering the issue agree that a party must comply with Fed. R. Civ. P. 56(f) to preserve his or her contention that summary judgment should be delayed.

In limited situations, the federal courts have shown leniency to parties who have not formally complied with Fed. R. Civ. P. 56(f). These include situations in which the party opposing the motion for summary judgment: (1) appeared pro se; (2) was incarcerated; (3) honored the district court's order limiting discovery to one issue and moved to strike those portions of the other party's affidavits which addressed additional issues; (4) moved to compel production of certain documents before the motion for summary judgment was heard; or (5) filed a letter stating

that needed evidence was in the defendants' possession and the parties had previously agreed to complete the defendants' discovery before the plaintiff began his discovery. None of these exceptions applies.

Here, Mercer failed to formally comply with CR 56(f). It failed to submit any affidavit showing why it cannot present by affidavit facts essential to justify its opposition to McGlynn's Motion for Summary Judgment. None of the grounds for leniency identified in *Turner* applies. Following *Turner*, the trial court properly denied Mercer's oral motion.

Moreover, Mercer's oral motion failed to state why it had not sought discovery after McGlynn moved for summary judgment. Mercer also failed to state what evidence would be established through the additional discovery. Mercer's vague reference to "update documentation from Mr. McGlynn" is insufficient. In addition, Mercer failed to state how any such documentation from Mr. McGlynn would raise a genuine issue of material fact. Any single one of these failure is was grounds for denying its motion. The trial court properly exercised its discretion when it denied the motion.

**VI. CONCLUSION**

For all of the reasons stated above, the Court should affirm the trial court's order granting McGlynn summary judgment against Mercer.

DATED: March 16, 2016.

Respectfully submitted,



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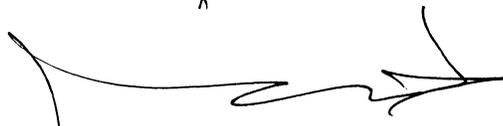
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**CERTIFICATE OF SERVICE**

I certify that I caused to be mailed a copy of the foregoing **BRIEF OF RESPONDENT**, postage prepaid, on March 16, 2016, to the following counsel of record at the following address:

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