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No. 65833-6-I

(King County Superior Court No. 08-2-29583-4 SEA)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

LEDCOR INDUSTRIES (USA), INC.,
a Washington Corporation,

Petitioner,

vs.

S.Q.I., INC., a Washington corporation; BORDAK BROTHERS,
INC., an Oregon corporation, *et al.*

Respondents.

BRIEF OF RESPONDENT SQI, INC.

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I. INTRODUCTION

RESPONDENT SQI, Inc. ("SQI"), a defendant below, responds to and opposes Ledcor Industries (USA) Inc.'s ("Ledcor's") and Admiral Way LLC's appeal of the trial court's dismissal of Ledcor's and Admiral Way LLC's indemnity claims against SQI and other subcontractors as untimely under the construction statute of repose.

Contrary to Ledcor's and Admiral Way LLC's argumentative assertions, the trial court did not "err in resolving disputed fact issues" or conclude that the date of substantial completion occurred when the Certificate of Occupancy was issued. Under the construction statute of repose, RCW 4.16.310, a claim must accrue within six years of "substantial completion" of construction or "termination of services," whichever is later. "Substantial completion" is defined as the "state of completion reached when an improvement upon real property **may be used or occupied for its intended use.**" *Id.* It is undisputed that as of April, 2003, units of the Admiral Way condominium were sold for immediate occupancy. Consequently, the trial court determined the building was "substantially complete" by **April, 2003**, because the building was **in fact** being "used or occupied for its intended use." The Certificate of

Occupancy and the Architect's punch list were but one component of the trial court's decision.

The trial court also correctly determined that the "termination of services" prong of the statute did not extend the limitations period with regard to SQI. There is no dispute that SQI completed its original roof installation work by **August, 2002**. In 2005 SQI signed a new and separate contract with Ledcor to repair roof damage caused by work performed by other trades. On summary judgment, neither Ledcor nor Admiral Way LLC submitted evidence establishing that their indemnity claims arose out of SQI's 2005 repair work rather than its original 2002 installation work. Ledcor and Admiral Way LLC concede that their indemnity claims accrued on **July 28, 2009**, more than six years after the building was substantially complete and SQI's original roof installation work was terminated. The trial court correctly ruled that Ledcor's and Admiral Way LLC's indemnity claims are time-barred as a matter of law.¹

II. ASSIGNMENTS OF ERROR

SQI does not assign error to the trial court's dismissal of Ledcor's and Admiral Way LLC's indemnity claims against the

¹ SQI joins the Briefs of Respondents filed by Bordak Brothers, Inc. ("Bordak"), Exterior Metals, Inc., and Skyline Sheet Metal, Inc. ("Skyline"), as all respondents have a common interest in upholding the trial court's decision regarding the expiration of the statute of repose. The facts, authority and argument in the Briefs

subcontractor defendants as untimely under the construction statute of repose, RCW 4.16.310.

III. COUNTER-STATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is the definition of “substantial completion” for purposes of the construction statute of repose, RCW 4.16.310, established by statute or by agreement?
2. Did the trial court err in dismissing Ledcor’s and Admiral Way LLC’s indemnity claims against the subcontractor defendants as untimely under the “substantial completion” prong of the construction statute of repose when it is undisputed that units of the condominium building at issue were sold for immediate occupancy by **April, 2003**, and when Ledcor’s and Admiral Way LLC’s indemnity claims accrued more than six years later?
3. Did the trial court err in dismissing Ledcor’s and Admiral Way LLC’s indemnity claims against SQI under the “termination of services” prong of the construction statute of repose when neither Ledcor nor Admiral Way LLC presented evidence at summary judgment establishing that their indemnity claims arose out of SQI’s 2005 repair work rather than its original

of Respondents are adopted and incorporated as if fully stated herein.

2002 installation work?

IV. STATEMENT OF THE CASE

A. Factual History

1. SQI's roof installation work at the Admiral Way project was complete by August, 2002.

This case arises out of the construction of the Admiral Way Condominiums located in Seattle, Washington. *CP 169; 183*. The project includes 69 residential units and commercial space. *Id.* Admiral Way LLC was the owner/developer of the project. *Id.* Ledcor was the general contractor. *Id.*

SQI entered into a subcontract with Ledcor to install a Malarky built-up roofing system on a portion of the project on April 20, 2001. *CP 1198*. SQI submitted its last bill for original installation work on March 29, 2002. *CP 4128*. SQI signed its last "Conditional Release, Waiver of Lien & Claims and Certification" on August 20, 2002. *CP 4130-4141*. These facts were not disputed by Ledcor on summary judgment.

Instead, Ledcor argued that repair work performed by SQI in 2005 constituted a "continuation" of its original 2001 contract, tolling the statute of repose with regard to its indemnity claim. *CP 1088-1089*. The documents produced by Ledcor in support of this

contention reveal only that SQI was called back out in 2004-2005 to assess and correct roof damage caused by other trades, such as the defective rooftop paver system installed by co-defendant Scapes & Co., which had voided the Malarky roof warranty. *CP 1161-1200*. SQI superintendent John Fortune testified that SQI entered into (and was paid for) a separate and distinct 2005 contract with Ledcor to perform the work necessary to re-instate the warranty:

Q And this is a subcontract bid by SQI dated April 29, 2005, that was prepared by Steve Gardner and it was for reroof work to bring the existing roofing back into the warranty compliance per Marlarkey?

A Correct.

Q Have you seen this actual document?

A Yes.

Q And can you explain to me what work had to be done to bring the roofing back into warranty by Malarkey?

A Well, the area where the pedestals and pavers were at, the contractor who installed it didn't install it per -- you know, properly and it did damage to the roof system in that area and it had to be reroofed.

CP 3655-3656. Ledcor did not argue on summary judgment that SQI's 2005 repairs related to or even *addressed* alleged defects in SQI's original roof installation work. Nor did Ledcor contend that its indemnity claim was based on defects in the 2005 repair work. *CP*

666-685; CP 1078-1204, CP 1298-1308; 3193-3216.

2. The Admiral Way Project was “substantially complete” by April, 2003.

The Certificate of Occupancy for the Admiral project was issued on March 14, 2003. CP 1018; 1820. Units were marketed in March, 2003, and sold in April, 2003. CP 1027-1028; 1060-1061. At his deposition in the underlying claim, Admiral Way LLC proprietor Marc Gartin testified:

Q. So according to my records, you sold the first unit in approximately April of 2003, that’s what the unit closed?

A. Correct.

Q. So does that help you with respect to your recollection of when you began marketing the units for sale?

A. I think we started marketing them in March of 2003.

...

Q. Do you know if the first sale was an advance sale or if it was turnkey?

A. It was turnkey.

Id. In other words, units were sold for **immediate occupancy** by April, 2003. Neither Ledcor nor Admiral Way LLC submitted evidence on summary judgment establishing that only *some* of the

units were being marketed or sold because others were not ready. There is no dispute that as of April, 2003, the building was **in fact** being “used or occupied for its intended use.”

Ledcor and Admiral Way LLC argue that the trial court should not have applied the **statutory** definition of “substantial completion.” Rather, Ledcor and Admiral Way LLC propose that the date of “substantial completion” should have been **determined by the architect**, Carl Pirscher, under Section 9.8 of the General Conditions of the Prime Contract. *CP 469*. After the Certificate of Occupancy was issued by the City of Seattle, Mr. Pirscher submitted “more than one hundred pages of punch lists and Field Directives” to be completed before he would decree that the project was “substantially complete.” *CP 1094-1159; CP 452-463*. Significantly, not one of Mr. Pirscher’s punch list items or Field Directives address work performed by SQI. *Id.* To this day Mr. Pirscher has not issued a “certificate of substantial completion” for the Admiral Way project, as he claims he “is not aware whether Ledcor ultimately completed all the work identified in the Punch Lists.” *CP 545-46*. Instead, it is Ledcor’s position that the date of “substantial completion” was established in a Construction Agreement Addendum dated February 10, 2004, in which Ledcor and Admiral LLC decided to agree that

“the Project is complete with the exception of the items listed in the Punch List....” *CP 526-529.*

SQI maintains that the court must apply the statutory definition of “substantial completion.”

B. Procedural History

1. The Admiral HOA Litigation

The Admiral Way Homeowners Association (Admiral “HOA”) hired construction consultant Trinity/ERD (“Trinity”) to conduct an investigation of the Admiral Way building envelope. *CP 566-597.* In July, 2007, the Admiral HOA filed a construction defect lawsuit against Admiral Way LLC. *CP 599-606.* Admiral Way LLC subsequently brought a third party claim against general contractor Ledcor. *CP 615-630.*

Ledcor filed a separate lawsuit alleging various claims against its subcontractors on August 29, 2008, including Bordak Brothers, Inc. (“Bordak”) and SQI. *CP 1969-1980.* An Amended Complaint asserting breach of contract, indemnity and warranty claims was filed on September 23, 2009. *CP 1685; 1703-1705.* Admiral Way LLC and Ledcor settled the Admiral HOA’s lawsuit on July 28, 2009. *CP 664-665.* The trial court granted Admiral Way LLC’s motion to intervene in the subcontractor action, and Admiral Way LLC filed its

Complaint on January 14, 2010. *CP 1869-1896*.

2. Bordak's Motion for Summary Judgment and SQI's Joinder

On August 14, 2009, Bordak filed a Motion for Summary Judgment to dismiss Ledcor's claims for breach of contract, breach of warranty, and indemnity as untimely under the statute of limitations and the statute of repose. *CP 168-180*. SQI filed a partial joinder in Bordak's motion with regard to Ledcor's indemnity and breach of warranty claims only. *CP 420-422*. The motion was ultimately continued to January 29, 2010, and additional briefing was allowed. SQI pointed out in a supplemental brief that Ledcor had previously filed a motion in the underlying HOA litigation in which it took the position that the date of substantial completion of the project was indeed March 14, 2003, the date the Certificate of Occupancy was issued. *CP 693; 187; 1005-1006; 1011-1012*. SQI also identified extrajudicial caselaw establishing that "warranty" or "punch list" work performed by a subcontractor subsequent to completion of a construction project is *extra-contractual work* that does not affect the commencement of the statute of repose on original construction. *CP 978-990*.

At the January 29, 2010, hearing, the trial court dismissed

Ledcor's breach of warranty claim. On February 1, 2010, the court denied the balance of Bordak's Motion for Summary Judgment and SQI's partial joinder. *CP 1034-1038*. That same day, SQI submitted additional briefing in response to the trial court's inquiry at oral argument, establishing that Admiral Way condominium units were **marketed** in March, 2003, and **sold for occupancy** in April, 2003. *CP 1004-1033*. On February 10, 2010, Bordak filed a Motion for Reconsideration of the trial court's ruling on Ledcor's indemnity claim, which SQI joined. *CP 1039-1047*.

In its opposition to the Motion for Reconsideration, Ledcor argued that the 2005 contract between SQI and Ledcor tolled the commencement of the statute of repose with respect to SQI's work at the Admiral Way project. *CP 1078-1204*. The 2005 contract and between SQI and Ledcor was for *repair* work only, to bring the roof (which had been damaged by other trades) back under warranty. *CP 1214-1230*. Ledcor made no effort to establish or argue that SQI's 2005 repair work addressed defects in the original roof installation. Nor did Ledcor or Admiral Way LLC contend that their indemnity claims were related to the 2005 repair work in any way.

SQI subsequently filed a Supplemental Reply to Ledcor's and Admiral Way LLC's additional briefing, in which it again brought to

the court's attention uncontroverted evidence that the building was **in fact** being "put to its intended use" as of April, 2003 (occupancy), and that SQI's 2005 contract to repair roof damage was **not**, as Ledcor suggested, part of a "continuing subcontract." *CP 1290-1297; 4125-4126*. On June 4, 2010, the court agreed, ruling that Ledcor's indemnity claims against SQI and Bordak Brothers were untimely and barred under the statute of repose. *CP 1550-1552*. In dismissing the claims, the trial court stated that "it specifically concurs with the analysis set for at pp. 3-6 of SQI's Supplemental Brief." *CP 1552*. The court therefore agreed that "as of April, 2003, it is undisputed that the building was in fact being "put to its intended use. The statute of repose period commenced no later than April, 2003, and expired six years later. As Ledcor and Admiral Way LLC's indemnity claims accrued outside this time period, they are barred as a matter of law." *CP1552; CP1292-1295* (footnote omitted).

Ledcor then filed a "Motion for Reconsideration," or, in the alternative, for Certification under CR 54(b) of the Order granting *Bordak's* Motion for Reconsideration, and for stay of the proceedings in the trial court pending appeal. *CP 1553-1569*. On June 22, 2010, the court denied Ledcor's "Motion for Reconsideration," stayed

the action and certified the Order dismissing Ledcor's indemnity claims against Bordak and SQI for immediate appeal under CR 54(b). *CP 2089-2092*. On July 2, 2010, the court entered an Order clarifying and modifying its June 4, 2010, Order granting Bordak's Motion for Reconsideration to expressly include SQI's partial joinder, confirming that Ledcor's and Admiral Way LLC's indemnity claims against SQI were dismissed. *CP 2093-2095*.

On July 16, 2010, the trial court replaced its June 22, 2010, Order with an Order finding that Ledcor's and Admiral Way LLC's indemnification claims against the remaining subcontractors were also untimely under the substantial completion prong of the construction statute of repose. *CP 2096-2098*. The court again certified the dismissal of the indemnity claims for immediate appeal, but allowed the remaining subcontractor defendants two weeks to file summary judgment motions to dismiss Ledcor's and Admiral Way LLC's indemnity claims against them. *Id.* Those motions were ultimately granted. *CP 3737-3740; CP 3734-3736; CP 3922-3928*. The trial court subsequently entered a consolidated order certifying the various orders dismissing Ledcor's and Admiral Way LLC's indemnity claims for immediate review. *CP 4038-4046*.

This court accepted discretionary review on February 10,

2011.

V. ARGUMENT

A. STANDARD OF REVIEW

CR 56(c) provides for judgment if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

A cause of action must be dismissed if the defendant can demonstrate that the plaintiff is unable to establish a critical element of its claim. *Celotex v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986), *cert. denied*, 484 U.S. 1066, 108 S.Ct. 1028, 98 L.Ed.2d 992 (1988). All facts and reasonable inferences are considered most favorably to the nonmoving party. *Craig v. Washington Trust Bank*, 94 Wn.App. 820, 824, 976 P.2d 126 (1999). The motion should be granted only if, from all the evidence, a reasonable person could reach but one conclusion. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

An appellate court engages in the same inquiry as the trial

court when reviewing an order for summary judgment. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wash.2d 337, 341, 883 P.2d 1383 (1994). The court must examine the entire record.

An appellate court would not be properly accomplishing its charge if the appellate court did not examine all the evidence presented to the trial court, including evidence that had been redacted. The *de novo* standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion. This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party... and the standard of review is consistent with the requirement that the appellate court conduct the same inquiry as the trial court.

Folsom, 135 Wn.2d at 663.

In this case, Plaintiffs' indemnity claims against SQI fail as a matter of law because they did not accrue within the six-year statute of repose, RCW 4.16.310. The undisputed evidence establishes that units at the Admiral Way condominiums were sold for immediate occupancy as of April, 2003. The trial court correctly concluded that the building was "substantially complete" at that time. "Substantial completion" is defined by statute, not by Ledcor's architect or by contract, as the "state of completion reached when an improvement upon real property may be **used or occupied for its intended use.**" RCW 4.16.310 (emphasis added). The building was in fact "being used or occupied for its intended use" more than six

years before Ledcor's and Admiral Way LLC's indemnity claims accrued. The trial court correctly dismissed the claim on summary judgment.

B. FOR PURPOSES OF THE STATUTE OF REPOSE, "SUBSTANTIAL COMPLETION" IS DEFINED BY STATUTE AS "THE STATE OF COMPLETION REACHED WHEN AN IMPROVEMENT UPON REAL PROPERTY MAY BE USED OR OCCUPIED FOR ITS INTENDED USE."

The construction statute of repose applies to actions or claims arising from the construction of improvements on real property. It provides, in relevant, part that:

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 (emphasis added). Statutes of repose are "of a different nature than statutes of limitation." *Rice v. Dow Chem. Co.*, 124 Wash.2d 205, 211, 875 P.2d 1213 (1994). "A statute of limitation bars plaintiff from bringing an already accrued claim after a

specific period of time. A statute of repose terminates a right of action after a specified time, even if the injury has not yet occurred.” *Id.* at 211-12 (citations omitted). “RCW 4.16.300 and .310 were adopted to protect architects, contractors, engineers, surveyors and others from extended potential tort and contract liability.” *Meneely v. S.R. Smith, Inc.*, 101 Wn.App. 845, 854, 5 P.3d 49 (2000), citing *Hudesman v. Meriwether Leachman Assocs., Inc.*, 35 Wn.App. 318, 321, 666 P.2d 937 (1983).

It is settled law in Washington that an indemnity claim **accrues** when the party seeking indemnity “pays or is legally adjudged obligated to pay damages to a third party.” *Parkridge v. Ledcor*, 113 Wn.App. 592, 54 P.3d 225 (2002), quoting *Central Washington Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 517, 946 P.2d 760 (1997).

In this case, the trial court found that the Admiral Way condominiums were “substantially complete” for purposes of the statute of repose no later than April, 2003. The statute defines “substantial completion” as the “state of completion reached when an improvement upon real property **may be used or occupied for its intended use.**” RCW 4.16.310 (emphasis added). Not only was the Certificate of Occupancy for the Admiral Way project issued on

March 14, 2003, but Admiral units were marketed for **sale** in March, 2003, and the first unit **sold as turnkey** in April, 2003. CP 1820; 1060-1061. The uncontroverted evidence establishes that the building was **in fact** being “used or occupied for its intended use” as of April, 2003: **occupancy**. Ledcor’s and Admiral Way LLC’s indemnity claims did not accrue until July, 2009, more than six years later.

1. The statutory definition of “substantial completion” is mandatory.

The definition of “substantial completion” contained in the statute of repose is imperative:

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.

RCW 4.16.310 (emphasis added). The court must give words in a statute their plain and ordinary meaning unless a contrary intent is evidenced in the statute. *In re Estate of Little*, 106 Wn.2d 269, 283, 721 P.2d 950 (1986). “[E]ach word of a statute is to be accorded meaning.” *State ex rel. Schillberg v. Barnett*, 79 Wn.2d 578, 584, 488 P.2d 255 (1971). Statutes are to be construed so “no clause, sentence or word shall be superfluous, void, or insignificant.” *Kasper v. City of Edmonds*, 69 Wn.2d 799, 804, 420 P.2d 346

(1966), *quoting Groves v. Meyers*, 35 Wn.2d 403, 407, 213 P.2d 483 (1950). A court “is required to assume the Legislature meant exactly what it said and apply the statute as written.” *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997); *HomeStreet, Inc. v. State, Dept. of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009).

It is well settled that the word “**shall**” in a statute is presumptively imperative and operates to create a duty. *Crown Cascade, Inc. v. O’Neal*, 100 Wn.2d 256, 261, 668 P.2d 585 (1983); *State v. Q.D.*, 102 Wn.2d 19, 29, 685 P.2d 557 (1984), citing *State v. Bryan*, 93 Wn.2d 177, 183, 606 P.2d 1228 (1980). The word “**shall**” in a statute thus imposes a **mandatory requirement** unless a contrary legislative intent is apparent. *Bryan*, 93 Wn.2d at 183, quoting *State Liquor Control Bd. v. State Personnel Bd.*, 88 Wn.2d 368, 377, 561 P.2d 195 (1977).

The legislature has thus mandated that “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.” RCW 4.16.310. The legislature did state that “substantial completion” **may** mean as the state of completion reached when an improvement may be “used or occupied for its intended use.” Nor did the legislature state that

“substantial completion” **means** the state of completion reached when an improvement may be “used or occupied for its intended use.” The legislature used the word **shall** and the word is imperative. No room is provided for private parties to add to, modify or amend the statutory definition via private contract.

Consequently, Ledcor’s argument that it may substitute its own definition of “substantial completion” contained in its contract with Admiral Way LLC,² or that the Court must be swayed by the architect’s opinion on when the building is “substantially complete,” is unavailing. Courts may not add words or clauses to an unambiguous statute. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The statute of repose is clear: “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.” Undisputed evidence establishes that the Admiral Way condominiums were **in fact being** “used or occupied for their intended use” no later than April, 2003. *CP 1060-1061*. The trial

² Section 9.8 of the General Conditions of the Prime Contract directed the lead architect, Carl Pirscher, to issue a Certificate of Substantial Completion based on when he believed the project to be substantially complete. CP 429, 469. The Prime Contract defined “substantial completion” as “[t]he stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended purpose.” CP 469. Of course, under this definition there it is undisputed that the Owner, Admiral Way LLC, **was** “occupying or utilizing the Work for its intended purpose:” i.e. selling the condominium units for immediate

court correctly concluded that the Admiral Way condominiums were “substantially complete” as of that date for purposes of the statute of repose. The decision did not turn on the issuance of the Certificate of Occupancy or the architect’s punch list. Ledcor’s indemnity claims are therefore untimely.

2. There is no Washington authority for the proposition that a party may toll the statute of repose by contract.

Ledcor attempts to sidestep the statutory definition of “substantial completion” by arguing that it may toll the statute of repose period by agreement. Ledcor relies on two Washington cases that purportedly allow parties to modify **statute of limitations** periods by contract: *Southcenter View Condo. Owners' Ass'n v. Condo. Builders, Inc.*, 47 Wn.App. 767, 773, 736 P.2d 1075 (1986) and *Yakima Asphalt Paving Co. v. Washington State Dept. of Transp.*, 45 Wn.App. 663, 665-66, 726 P.2d 1021 (1986). These cases acknowledge only that parties may agree to a shorter *statute of limitations* period:

Parties to a contract can agree to a shorter limitations period than that called for in a general statute. *Order of United Comm'l Travelers of Amer. v. Wolfe*, 331 U.S. 586, 608, 67 S.Ct. 1355, 1365, 91 L.Ed. 1687 (1947). A contract limitation period prevails over the general statute of limitations unless prohibited by statute or public policy, or unless the provision is unreasonable.

occupancy.

Ashburn v. Safeco Ins. Co. of Amer., 42 Wn.App. 692, 713 P.2d 742 (1986). As a general proposition, a statute of limitations cannot enlarge the time for the commencement of an action when the time limitation therefor is fixed by contract. *Lane v. Department of Labor & Indus.*, 21 Wn.2d 420, 151 P.2d 440 (1944).

Yakima Asphalt, 45 Wn.App. at 655-56. *Southcenter and Yakima* do not address extending a *statute of repose* period via contract.

Ledcor relies on *McRaith v. BDO Seidman, LLP*, 909 N.E.2d 310 (Ill.App.Ct.2009), and similar cases, to establish that other jurisdictions have allowed parties to toll a statute of repose period by agreement. The *McRaith* Court held that a tolling agreement extending a statute of repose period is valid provided the action was not tolled indefinitely. *Id.* at 322-24. Under this reasoning, however, Ledcor's argument fails. First, Ledcor's contract with Admiral Way LLC imposes no time limits on when the architect may determine the project "substantially complete." In fact, the architect still hasn't done so and nearly 10 years have passed since SQI finished its initial installation work. This open ended approach contravenes the policy and purpose behind Washington's construction statute of repose, which is to prevent stale claims and place a reasonable time limitation on the liability exposure of construction industry professionals. *Bellevue Sch. Dist. No 405 v. Brazier Constr. Co.* 103 Wn.2d 111, 120, 691 P.2d 178 (1984). Certainly Washington

Courts would not condone exposing a subcontractor to potential liability for 7, 10, 12 years or more after their work on a construction project is complete, in deference to a contractual statute of repose period that cannot be triggered until an agent of the *owner* or *general contractor* decides it will be. Even under *McRaith* this result is not “reasonable.”³

More importantly, neither Ledcor nor Admiral Way LLC advanced this argument at the trial court level. “On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.” RAP 9.12. An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal. *Sneed v. Barna*, 80 Wn.App. 843, 847, 912 P.2d 1035 (1996); *Sourakli v. Kyriakos, Inc.*, 144 Wn.App. 501, 509, 182 P.3d 985 (2008). Ledcor and Admiral Way LLC should not be permitted to conveniently reframe their position in derogation of the rules of

³ Nor should the Court apply the doctrine of *equitable tolling* to extend the statute of repose in this case. “Equitable tolling ‘permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed.’ ‘Appropriate circumstances generally include ‘bad faith, deception, or false assurances by the defendant, and the exercise of diligence by the plaintiff.’” “Courts typically permit equitable tolling to occur only sparingly, and should not extend it to a ‘garden variety claim of excusable neglect.’” *Benyaminov v. City of Bellevue*, 144 Wn.App. 755, 760-61, 183 P.3d 1127, (2008) (citations omitted). This Court should similarly not extend the doctrine to Ledcor’s “garden variety” indemnity claim, especially when there is zero evidence of “bad faith, deception or false assurances” on the part of SQL.

appellate procedure.

Moreover, the contract between Ledcor and SQI *does not contain* an agreement to toll the statute of repose. Ledcor tries to argue that the provision in its contract with Admiral Way LLC which allows the architect issue a certificate of substantial completion amounts to some sort of *tolling agreement*, and that SQI is somehow bound by this provision. The architect may have the authority to issue a certificate of substantial completion for the purpose of establishing the commencement of warranties or allowing Ledcor to get paid (*CP 469, 470*), but *not* for the purpose of extending the statutorily mandated repose period protecting all subcontractor defendants from open-ended, indefinite exposure to liability. Ledcor is pushing the statute, and its own contract, too far.⁴

C. THE TRIAL COURT PROPERLY DETERMINED THAT THE CONDOMINIUM BUILDING WAS “SUBSTANTIALLY COMPLETE” AS OF APRIL, 2003, BECAUSE IT WAS IN FACT BEING USED OR OCCUPIED FOR ITS INTENDED USE

The trial court correctly determined that the Admiral Way condominiums were “substantially complete” as of April, 2003, because the uncontroverted evidence established that condominium

⁴ Indeed, section 9.9 of Ledcor’s contract with Admiral Way LLC contains an entire separate section governing “Partial Occupancy or Use,” which was apparently contemplated by the parties.

units were sold as of that date for immediate occupancy. Ledcor presented no facts on summary judgment that only some units were sold because others were not ready. The evidence established that units were marketed as “turnkey” even though some punch list items remained to be completed.

The determination of “substantial completion” for purposes of the statute of repose does not turn on the completion of punch list items. In *1519-1525 Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corp.*, 101 Wn.App. 923, 6 P.3d 74 (2000), *aff'd*, 144 Wn. 2d 570, 29 P.3d 1249 (2001), the court considered both the issuance of a Certificate of Occupancy and the fact that units had been marketed to prospective purchasers as relevant to the determination of “substantial completion:”

Lakeview also argues the trial court erred in holding that issuance of the certificate of occupancy by the City of Seattle established the date of substantial completion. The court actually mentioned two events: “In this case, substantial completion, I believe, did occur when the condos were being marketed and a certificate of occupancy had been issued.” We agree that in this case, at the point both events had occurred in August 1990, the project was substantially completed. **Only “punch list” items remained, and the record does not indicate that work yet unfinished rendered the project not substantially complete, i.e., not fit for occupancy.** The fact that additional work was done later by contract with the purchasers does not alter the fact that in August 1990 the project was substantially complete.

1519-1525 Lakeview Blvd., 101 Wn.App. at 923. Requiring the building to be “fully complete” rather than “substantially complete” would render the legislature’s choice of words and use of the term “substantial” meaningless. Again, statutes must be construed so “no clause, sentence or word shall be superfluous, void, or insignificant.” *Kasper*, 69 Wn.2d at 804.

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.

1519-1525 Lakeview Blvd., 101 Wn.App. at 930

Armed with the statutory definition of “substantial completion,” the trial court’s reasoning is clear. Units of the Admiral Way Condominiums were sold for immediate occupancy by April, 2003.⁵ The building was “substantially complete” because it was *in fact* being used or occupied for its intended use at that time. Ledcor’s and Admiral Way LLC’s indemnity claims accrued when they settled the Admiral Way Condominium Owners’ claims on July 28, 2009, more than six years later. Any cause of action which has not accrued within six years after substantial completion of construction, or termination of services, whichever is later, is barred under the

⁵ *Actual* use or occupancy is not *required* for construction to be deemed “substantially complete.” *1519-1525 Lakeview Blvd.*, 101 Wn.App. at 931.

statute of repose. *1519-1525 Lakeview Blvd.*, supra. Ledcor's and Admiral Way LLC's untimely indemnity claims against the subcontractor/defendants were correctly dismissed.

Ledcor and Admiral Way LLC go to great lengths to argue that "questions of fact" prevented the trial court from determining the date of "substantial completion" on summary judgment. Certainly Ledcor and Admiral Way LLC cannot dispute that units of the Admiral Way condominiums were being sold turnkey. They have only the architect's punch list to go by.

The court cannot allow mere *repair* work or *warranty* work to toll the statute of repose. To allow the statute of repose start running anew each time a repair is made would subject a subcontractor to ongoing, open-ended liability:

'To allow the statute of repose to toll or start running anew each time a repair is made would subject a defendant to potential open-ended liability for an indefinite period of time, defeating the very purpose of statutes of repose. . . .'

. . . to allow the statute of repose to run from the date of Defendant's last repairs to the foyer would be tantamount to resetting the starting date of the statute of repose for the installation of the EIFS. The repose period began to run in November 1991 when defendant completed construction of the house and received a certificate of compliance.

Bryan v. Don Galloway Homes, Inc., 556 S.E.2d 597, 601 (N.C.

2001), quoting *Monson v. Paramount Homes, Inc.*, 515 S.E.2d 445, 450 (N.C. App. 1999).

There is no authority in Washington for the proposition that repair work or warranty work tolls the statute of repose on original construction. Nor is it likely the legislature would ever condone such a result, especially for a large, multi-year construction project such as this one, which involves a lengthy list of punch list or repair items.

The court is constrained by the definition of “substantial completion” that the legislature *did* provide: “the state of completion reached when an improvement on real property **may be** used or occupied for its intended use.” RCW 4.16.310 (emphasis added). The sole question before the trial court was thus, *when was the building complete enough so that it could be used or occupied for its intended use?* No matter what the architect’s opinions were or how long the punch list was, the Admiral Way condominiums were “substantially complete” by April, 2003, because that is when the building **was** being used or occupied for its intended use.

D. LEDCOR PRESENTED NO EVIDENCE TO THE TRIAL COURT THAT ITS INDEMNITY CLAIM AROSE OUT OF SQI’S 2005 REPAIR WORK RATHER THAN SQI’S 2002 ORIGINAL CONSTRUCTION

The statute of repose states that:

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.**

RCW 4.16.310 (emphasis added). The “termination of services” calculation for the period of repose is determined by the date an individual contractor concluded work on the project. *Smith v. Showalter*, 47 Wn.App. 245, 249-50, 734 P.2d 928 (1987).

Ledcor and Admiral Way LLC argue that SQI “continued to work on the Project” more than 18 months after the critical date, July 28, 2003, but that is not the case. SQI completed installation of the Malarky built-up roofing system (which only covered a portion of the project) no later than March 29, 2002, when it submitted its last invoice for original installation work. *CP 4128*. SQI signed its last “Conditional Release, Waiver of Lien & Claims and Certification” on August 20, 2002. *CP 4130-4141*. These facts were not disputed by Ledcor on summary judgment.

Before the trial court, and again on appeal, Ledcor tries to characterize the repair work performed by SQI in 2005 as some sort of “continuation” of its original 2001 contract, extending the statute of repose period with regard to Ledcor’s indemnity claim. The undisputed evidence establishes that SQI was called back out in

2004-2005 to assess and correct roof damage caused by other trades, such as the defective rooftop paver system installed by co-defendant Scapes & Co., which had voided the Malarky roof warranty. *CP 1161-1200*. SQI entered into (and was paid for) a completely separate and distinct 2005 contract with Ledcor to do this work.

Q And this is a subcontract bid by SQI dated April 29, 2005, that was prepared by Steve Gardner and it was for reroof work to bring the existing roofing back into the warranty compliance per Marlarkey?

A Correct.

Q Have you seen this actual document?

A Yes.

Q And can you explain to me what work had to be done to bring the roofing back into warranty by Malarkey?

A Well, the area where the pedestals and pavers were at, the contractor who installed it didn't install it per -- you know, properly and it did damage to the roof system in that area and it had to be reroofed.

CP 3655-3656. Ledcor did not argue on summary judgment that SQI's 2005 repair work was to correct defects in SQI's original roof installation. Nor did Ledcor argue that its indemnity claim arose out of some sort of defect or problem with SQI's 2005 repair work. *CP 666-685; 1078-1204, 1298-1308; and 3193-3216*.

Ledcor's and Admiral Way LLC's indemnity claims must be based on alleged defects in the 2005 repair work and not on alleged defects with the original installation work, or they are untimely.

[t]he 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 Associates, Ltd v. Ledcor Indus., Inc., 113 Wn.App. 592, 599, 54 P.3d 225 (2002). Neither Ledcor nor Admiral Way LLC made any effort on summary judgment tie their claims against SQI to alleged defects in SQI's 2005 repair work. Their indemnity claims are untimely and it must be dismissed.

E. SQI REQUESTS AN AWARD OF ATTORNEY'S FEES UNDER RAP 18.1

SQI requests an award of its reasonable attorney's fees and expenses if it prevails on appeal under RAP 18.1(a) and (b), and under Section 7.4 of its subcontract with Ledcor.

VI. CONCLUSION

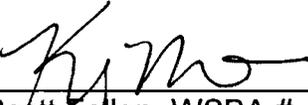
"RCW 4.16.300 and .310 were adopted to protect architects, contractors, engineers, surveyors and others from extended potential tort and contract liability." *Meneely v. S.R. Smith, Inc.*, supra. The trial court properly determined on summary judgment that the Admiral Way condominiums were in fact being "used or

occupied for their intended use” as of April, 2003. Ledcor’s and Admiral Way LLC’s indemnity claims accrued more than 6 years later. The indemnity claims are untimely and were properly dismissed on summary judgment. Neither Ledcor nor Admiral Way LLC can extend the statute of repose period under the termination of services prong because their claims do not arise out of SQI’s 2005 repair work, which was performed under a second and separate contract.

This court should uphold the trial court’s dismissal of Ledcor’s and Admiral Way LLC’s indemnity claims on summary judgment.

RESPECTFULLY SUBMITTED this 29th day of July, 2011.

FALLON & MCKINLEY

By: 

R. Scott Fallon, WSBA #
Kimberly Reppart, WSBA #30643
Attorneys for Respondent SQI, Inc.

APPENDIX

Bryant v. Don Galloway Homes, Inc.
556 S.E.2d 597, 601 (N.C. 2001).....A-1

McRaith v. BDO Seidman, LLP
909 N.E.2d 310 (Ill.App.Ct.2009).....A-7

Monson v. Paramount Homes, Inc.
515 S.E.2d 445, 450 (N.C. App. 1999).....A-31

11. Limitation of Actions ◀43

Repair may qualify as a "last act" under the statute of repose of the North Carolina real property improvement statute if required by the parties under an improvement contract. G.S. § 1-50(a)(5)a.

Appeal by plaintiffs from order entered on 26 April 2000 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 August 2001.

Sellers, Hinshaw, Ayers Dortch & Lyons, P.A., by Robert C. Dortch, Jr., Charlotte, for plaintiff-appellant.

Dean & Gibson, L.L.P., by Christopher J. Culp, Charlotte, for defendant-appellee Don Galloway Homes, Inc.

Frost, Brown & Todd LLC, by Kathy Kendrick, Lexington, KY, for defendant-appellee Don Galloway Homes, Inc.

BRYANT, Judge.

On 25 November 1991, defendant completed construction of a residence in Huntersville, North Carolina, and received a certificate of occupancy from the Charlotte/Mecklenburg County Building Standards Department. Defendant used the residence as a model home for a year. In September 1992, Plaintiffs entered into a contract to purchase the residence, and closed on the sale on 4 December 1992.

In February 1994, plaintiffs submitted to defendant a one-year walk-through form in which they indicated that the "[h]ardwood floors in [the] foyer, right inside the door, appear to be buckling." In July 1994, water intruded into the same area where the floors had buckled. In August 1994, Defendants attempted to repair the problem. In July 1996, plaintiffs again discovered water damage, this time in the wall adjacent to the front door in the foyer. Plaintiffs learned that the wallboard was wet, the framing members were wet and mildewed and there was significant damage to structural members. On 10 February 1998, plaintiffs performed a moisture intrusion test, which revealed excessive moisture

greater than nineteen percent. Plaintiffs estimate that repairs would cost between \$11,291.00 and \$97,342.69.

On 25 November 1998, plaintiffs filed a complaint against defendant alleging damages due to defective construction. Plaintiffs alleged seven causes of action related to the exterior installation and finish system [EIFS] on the house: (1) breach of express warranty; (2) breach of implied warranty of habitability and workmanlike construction; (3) breach of implied warranty of merchantability; (4) breach of implied warranty of fitness for a particular purpose; (5) negligence; (6) negligent failure to warn; and (7) unfair and deceptive trade practices. Specifically, plaintiffs alleged that water penetrated behind the EIFS on the house because of defects caused by defendant during the construction of the house.

On 18 February 2000, defendant moved for summary judgment on the grounds that Plaintiffs' claims were outside the statutes of repose and limitation. The trial court granted Defendant's motion for summary judgment on 26 April 2000 and dismissed Plaintiffs' complaint with prejudice. Plaintiffs filed notice of appeal on 25 May 2000.

Plaintiffs assign as error the trial court's holding that a genuine issue of material fact did not exist as to: (1) when the house was substantially complete, or when Defendant's last acts or omissions occurred for purposes of the statute of repose; and (2) whether the statute of limitations barred Plaintiffs' claims. We disagree, and hold that the trial court did not err in granting Defendant's motion for summary judgment.

Upon motion, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (1999). An issue is material if "the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of*

judgment for builder. Homeowners appealed. The Court of Appeals, Bryant, J., held that: (1) to constitute a "last act or omission," for purposes of setting repose period under the North Carolina real property improvement statute, that act or omission must give rise to the cause of action, and (2) builder's attempted repairs did not reset starting date of statute of repose, but rather, repose period began to run when builder completed construction of house and received certificate of compliance.

Affirmed.

Greene, J., filed concurring opinion.

1. Limitation of Actions ⇔182(2)

Statute of repose is a condition precedent that must be specifically pled. Rules Civ.Proc., Rule 8(c), G.S. § 1A-1.

2. Limitation of Actions ⇔1

Statute of repose is a substantive limitation that establishes a time frame in which an action must be brought to be recognized.

3. Limitation of Actions ⇔43

Repose period begins to run when an event occurs, regardless of whether or not there has been an injury.

4. Limitation of Actions ⇔199(1)

Issue of whether the statute of repose has expired is a question of law.

5. Limitation of Actions ⇔1

"Statute of repose" prevents a plaintiff from bringing an action a certain number of years after the defendant's act or omission, regardless of whether the plaintiff has suffered an injury.

See publication Words and Phrases for other judicial constructions and definitions.

6. Limitation of Actions ⇔43

Although the statute of repose in the North Carolina real property improvement statute does not define "last act or omission," for purposes of provision that no claim for a defective or unsafe condition of an improvement shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the

cause of action or the substantial completion of the improvement, to constitute a "last act or omission," that act or omission must give rise to the cause of action. G.S. § 1-50(a)(5)a.

See publication Words and Phrases for other judicial constructions and definitions.

7. Limitation of Actions ⇔18

Purpose of the statute of repose in the North Carolina real property improvement statute is to protect from liability those persons who make improvements to real property. G.S. § 1-50(a)(5).

8. Appeal and Error ⇔840(1)

Appellate court would not address argument that statute of repose in the North Carolina real property improvement statute did not expire before complaint was filed because repose period began to run on or after date of purchase, where homeowners offered no evidence that they were prevented from using house as residence, homeowners lived in house for six years before bringing complaint, and homeowners pointed to no specific language in support of argument that rebuttable presumption arises. G.S. § 1-50(a)(5)a.

9. Limitation of Actions ⇔43

Builder's attempted repairs on front door and foyer were not "last act or omission" that would reset starting date of statute of repose in North Carolina real property improvement statute for installation of exterior installation and finish system (EIFS) of house, but rather, repose period began to run when builder completed construction of house and received certificate of compliance, and thus action brought more than six years after completion and receipt of certificate was untimely. G.S. § 1-50(a)(5).

10. Limitation of Actions ⇔43

To allow the statute of repose in the North Carolina real property improvement statute to toll or start running anew each time a repair is made would subject a defendant to potential open-ended liability for an indefinite period of time, defeating the very purpose of such statutes of repose. G.S. § 1-50(a)(5)a.

mining fairness concerning a breach of contract . . . is whether the contract expressly provides that the law of the forum state would apply to actions arising out of the contract.” (alterations in original) (citing *Cherry Bekaert & Holland v. Brown*, 99 N.C.App. 626, 635, 394 S.E.2d 651, 657 (1990)).

Corbin’s reliance on *Inspirational Network* is misguided. In that case, Inspirational Network, Inc., [INSP], a cable network, provided advertising and television programs. Merchant Square Network, Inc. [MSN] entered into a contract with INSP to air “infomercials.” When MSN defaulted on payments to INSP in North Carolina, it executed a promissory note providing that, inter alia, the note was “to be governed and construed in accordance with the laws of the State of North Carolina.” *Inspirational Network*, 131 N.C.App. at 233, 506 S.E.2d at 757. After making several payments on the note, MSN defaulted. INSP sued MSN’s president and chief executive officer, as well as its chief financial officer [the defendants]. The defendants moved to dismiss for lack of in personam jurisdiction. The trial court denied the motion, and the defendants appealed. In affirming the trial court’s decision, this Court found jurisdiction under this State’s long arm statute and minimum contacts to satisfy due process requirements. The minimum contacts requirement was satisfied because the CFO made numerous phone calls to North Carolina, MSN’s programs were aired in North Carolina and MSN voluntarily entered into a contractual arrangement with INSP, a North Carolina corporation.

The *Inspirational Network* Court noted that the provision that the promissory note would be “governed and construed in accordance with the laws of the State of North Carolina” was a factor in determining the fairness of the breach of contract. *Id.* at 241–42, 506 S.E.2d at 761–62. Thus, reading *Inspirational Network* and *R.N. Rouse* together, it becomes clear that: 1) the clause in the contract in *Inspirational Network* was a choice of law clause; and 2) a choice of law clause is a *factor* in determining the issue of minimum contacts and due process, but not

determinative of the issue of in personam jurisdiction.

Like the promissory note in *Inspirational Network*, the Note in the case sub judice contains a choice of law provision but no choice of, or consent to jurisdiction provision. However, unlike *Inspirational Network*, the only contact Alexander’s had with North Carolina was the mailing to this State of approximately four payments on the Note. Therefore, we must rely solely on these payments to determine whether due process requirements have been met. We find that they have not. Other than the payments, we find nothing else to indicate that Alexander’s purposely availed itself of the benefits and protections of the laws of North Carolina. This contact is too tenuous to avoid offending “traditional notions of fair play and substantial justice.” Accordingly, we reverse.

Reversed.

Judges GREENE and CAMPBELL concur.



**Kenneth G. BRYANT, and Wife Pamela
W. Bryant, Plaintiffs–Appellants,**

v.

**DON GALLOWAY HOMES, INC.,
Defendant–Appellee.**

No. COA00–1076.

Court of Appeals of North Carolina.

Dec. 18, 2001.

Homeowners brought action alleging various causes of action, including breaches of express and implied warranties, negligent failure to warn, and unfair and deceptive trade practices, against builder seeking damages for allegedly defective flooring in foyer. The Superior Court, Mecklenburg County, Robert P. Johnston, J., entered summary

Winston-Salem, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). An issue is genuine if it is supported by substantial evidence. *Id.*

Plaintiffs' first argument is that the trial court erred in dismissing the complaint as barred by the statute of repose. Plaintiffs argue that the statute actually began to run: (1) sometime after the closing on 4 December 1992, when the house could be used for its intended purpose; or (2) in August 1994, when defendant attempted repairs. We disagree.

[1-4] A statute of repose is a condition precedent that must be specifically pled. *Tipton & Young Constr. Co. v. Blue Ridge Structure Co.*, 116 N.C.App. 115, 118, 446 S.E.2d 603, 605, (1994), *aff'd*, 340 N.C. 257, 456 S.E.2d 308 (1995); see N.C.G.S. § 1A-1, Rule 8(c) (1999). It is a substantive limitation that establishes a time frame in which an action must be brought to be recognized. *Id.* The repose period begins to run when an event occurs, regardless of whether or not there has been an injury. *Id.* at 117, 446 S.E.2d at 604. The issue of whether the statute of repose has expired is a question of law. *Colony Hill Condo. I Ass'n v. Colony Co.*, 70 N.C.App. 390, 392, 320 S.E.2d 273, 275 (1984) (citing *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871-72 (1983)). Summary judgment is proper if the pleadings or proof show without contradiction that the statute of repose has expired. *Id.* The moving party has the burden of producing evidence sufficient to show that summary judgment is justified. See *Sidney v. Allen*, 114 N.C.App. 138, 143, 441 S.E.2d 561, 564 (1994), *aff'd*, 341 N.C. 190, 459 S.E.2d 237 (1995). The burden then shifts to the non-moving party to "set forth specific facts showing that there is a genuine issue for trial." *Id.* (quoting *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992)).

[5-7] A statute of repose prevents a plaintiff from bringing an action a certain number of years after the defendant's act or omission, regardless of whether the plaintiff has suffered an injury. *Monson v. Paramount Homes, Inc.*, 133 N.C.App. 235, 240, 515 S.E.2d 445, 449 (1999). In the case at bar, the applicable statute of repose is the

North Carolina real property improvement statute, which states in pertinent part:

No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

N.C.G.S. § 1-50(a)(5)(a) (1999). The statute defines "substantial completion" as

that degree of completion of a project, improvement or specified area or portion thereof (in accordance with the contract, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended.

N.C.G.S. § 1-50(a)(5)(c) (1999). Although the statute does not define "last act or omission," this Court has stated that "[i]n order to constitute a last act or omission, that act or omission must give rise to the cause of action." *Nolan v. Paramount Homes, Inc.*, 135 N.C.App. 73, 79, 518 S.E.2d 789, 793 (1999), *review denied*, 351 N.C. 359, 542 S.E.2d 214 (2000). The purpose of section 1-50(a)(5) is to protect from liability those persons who make improvements to real property. *Id.*

[8] Plaintiffs first argue that the statute of repose did not expire before the complaint was filed because the repose period began to run on or after 4 December 1992, the date of purchase. Plaintiffs base this argument on *Nolan v. Paramount Homes, Inc.*, 135 N.C.App. 73, 518 S.E.2d 789 (1999). In *Nolan*, defendant Paramount Homes, Inc. [Paramount], constructed a house in Durham, North Carolina. The Durham City-County Inspections Department issued a Certificate of Compliance on 6 June 1991, stating that the house was in substantial compliance with building and zoning ordinances. Paramount sold the house to the plaintiff, Barbara B. Nolan, on 9 December 1991. In March or April 1992, Paramount completed work pursuant to a punch list.

Nolan filed suit on 23 October 1997 for breach of implied warranty of habitability

and workmanlike construction. Paramount moved for summary judgment, raising the statute of repose as a defense. Nolan argued that the statute of repose did not start to run until the house was substantially completed, i.e., when Paramount finished work on the punch list. The trial court disagreed, and granted Paramount's motion. *Id.*

On appeal, this Court stated that the house was substantially completed when it could be used for its intended purpose. *Id.* The house could be used for its intended purpose—a residence—upon issuance of the certificate of compliance. *Id.* Furthermore, Paramount's last act or omission occurred when it defectively built the walls, not when it completed work on the punch list. *Id.* at 79, 518 S.E.2d at 793. Nolan had the burden of establishing a direct connection between the alleged harm and Paramount's last act or omission and failed to carry that burden. *Id.* at 77, 518 S.E.2d at 792.

In this case, plaintiffs argue that *Nolan* creates a rebuttable presumption that a house is substantially complete upon issuance of the certificate of compliance because it is at that time that the house can be used for its intended purpose. We find two problems with this argument. First, plaintiffs have offered no evidence that they were prevented from using the house as a residence. In fact, the record indicates otherwise. Plaintiffs lived in the house for six years before bringing this complaint. Second, plaintiffs point to no specific language in *Nolan* in support of their argument that a rebuttable presumption arises. We therefore decline to address this argument which is not adequately supported by the record. See N.C. R.App. P. 28(a), (b)(5).

[9] Plaintiffs next argue that the statute of repose began to run upon the last act or omission of defendant, i.e., Defendant's attempted repairs on the front door and foyer. We disagree. In *Monson v. Paramount Homes, Inc.*, 133 N.C.App. 235, 515 S.E.2d 445 (1999), the defendant general contractor, Paramount Homes, Inc. [Paramount], sold a house to the original owner in August 1990. The original owner then sold the house to

Monson in 1993. Monson brought suit against Paramount alleging, inter alia, that Paramount used defective materials and improperly installed the windows and doors. Paramount subsequently learned that Carolina Builders Corporation [CBC] had repaired and replaced the windows and doors. Paramount filed a third party complaint for indemnification against CBC on 29 October 1997. CBC moved for dismissal for failure to state a legal claim. The trial court dismissed Paramount's claim as outside the statute of repose. Paramount appealed.

[10,11] On appeal, Paramount argued that CBC's last act or omission occurred when it completed repairs in 1994; therefore, the claim was within the six-year repose period because it was filed in 1997. The issue on appeal was whether a repair qualified as a last act or omission under North Carolina General Statute section 1-50(a)(5). The *Monson* court held that CBC's last act or omission occurred upon substantial completion when CBC supplied Paramount with the materials for the original construction of the house, not when CBC made repairs in 1994. *Id.* at 242, 515 S.E.2d at 450. "To allow the statute of repose to toll or start running anew each time a repair is made would subject a defendant to potential open-ended liability for an indefinite period of time, defeating the very purpose of statutes of repose such as N.C. Gen.Stat. § 1-50(5)." ¹ *Id.* at 240, 515 S.E.2d at 449 (referring to what is now North Carolina General Statute section 1-50(a)(5), which was amended by Act of June 19, 1995, ch. 291, s. 1, 1995 N.C. Sess. Laws 587 (adding, among other things, subsection (a))).

Applying the holding of *Monson* to this case, to allow the statute of repose to run from the date of Defendant's last repairs to the foyer in August 1994 would be tantamount to resetting the starting date of the statute of repose for the installation of the EIFS. The repose period began to run in November 1991 when defendant completed construction of the house and received a certificate of compliance. Therefore, the

1. We note that a repair may qualify as a last act under section 1-50(a) if required by the parties

under an improvement contract. *Monson*, 133 N.C.App. at 241, 515 S.E.2d at 450.

statute of repose had expired when plaintiffs brought this claim on 25 November 1998.

We therefore hold that the trial court did not err in dismissing the complaint based on the expiration of the statute of repose. Because the expiration of the statute of repose is sufficient to bar Plaintiffs' claim, we will not review the second assignment of error regarding the statute of limitations. Affirmed.

Judge CAMPBELL concurs.

Judge GREENE concurs in the result with a separate opinion.

GREENE, Judge, concurring in the result.

I agree that summary judgment for Defendant was proper because the statute of repose had run before Plaintiffs filed their complaint. I write separately to note my disagreement with two aspects of the majority's analysis.

Substantial Completion

The majority reads *Nolan v. Paramount Homes, Inc.*, 135 N.C.App. 73, 518 S.E.2d 789 (1999), *disc. review denied*, 351 N.C. 359, 542 S.E.2d 214 (2000), to establish a conclusive presumption that the issuance of a certificate of occupancy evidences the date of substantial completion. I disagree. The issuance of the certificate of occupancy raises only a rebuttable presumption of substantial completion, entitling a party to present evidence showing the residence was not yet usable for the purpose for which it was intended. *See id.* at 76-77, 518 S.E.2d at 791-92 (items on punch list could prevent or materially interfere with the plaintiff's use of the house as a residence, even though certificate of occupancy had already been issued).

In this case, Plaintiffs presented no evidence challenging the rebuttable presumption of substantial completion on the date of the certificate of occupancy. Because no genuine issue of fact was raised, summary judgment as to this aspect of the statute of repose was properly granted for Defendant. *See* N.C.G.S. § 1A-1, Rule 56(c) (1999).

Last Act

The majority appears to read *Monson v. Paramount Homes, Inc.*, 133 N.C.App. 235,

515 S.E.2d 445 (1999), as holding that repairs can never "toll or start the running [of the statute of repose] anew." I disagree. A failed attempt to repair an alleged existing "defective or unsafe condition of an improvement to real property" starts the running of the statute of repose anew, as the attempted repair is the "last act . . . giving rise to the cause of action." N.C.G.S. § 1-50(a)(5)a (1999); *see New Bern Assoc. v. The Celotex Corp.*, 87 N.C.App. 65, 70-71, 359 S.E.2d 481, 484-85 (in reversing summary judgment the court necessarily found repair of defective roof material for "last act" analysis under section 1-50(a)(5)a), *disc. review denied*, 321 N.C. 297, 362 S.E.2d 782 (1987). Also, a repair made after the date of substantial completion pursuant to a continuing obligation under the original improvement contract represents the "last act" within the meaning of section 1-50(a)(5)a. *Monson*, 133 N.C.App. at 241, 515 S.E.2d at 450.

In this case, the evidence shows the repairs attempted by Defendant in August 1994 were not to the stucco, the alleged defective condition created by Defendant, but instead to the floors in the house. Because no genuine issue of fact was raised, summary judgment as to this aspect of the statute of repose was properly granted for Defendant. *See* N.C.G.S. § 1A-1, Rule 56(c).



STATE of North Carolina

v.

Angel SANCHEZ, Jr.

No. COA00-1075.

Court of Appeals of North Carolina.

Dec. 18, 2001.

Defendant was convicted in the Superior Court, Forsyth County, James Webb, J., of trafficking in cocaine by possession and

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McRaith v. BDO Seidman, LLP
 Distinguished by Commerce Bank v. FG MK, LLC, N.D.Ill., July 2, 2010
 Appellate Court of Illinois, First District, Third Division. May 27, 2009. 391 Ill.App.3d 565 330 Ill.Dec. 597

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909 N.E.2d 310
 Appellate Court of Illinois,
 First District, Third Division.

Michael T. McRAITH, Director of the State of Illinois Division of Insurance, solely in his capacity as statutory and court-affirmed Liquidator of Coronet Insurance Company, Crown Casualty Company and National Assurance Indemnity Company, Plaintiff-Appellee,

v.

BDO SEIDMAN, LLP, f/k/a BDO Seidman, Defendant-Appellant.
 Michael T. McRaith, Director of the State of Illinois Division of Insurance, solely in his capacity as statutory and court-affirmed Liquidator of Coronet Insurance Company, Crown Casualty Company and National Assurance Indemnity Company, Plaintiff-Appellant,

v.

BDO Seidman, LLP, f/k/a BDO Seidman, Defendant-Appellee (BDO Seidman, LLP, Third-party Plaintiff, v. Clyde W. Engle; Glenn J. Kennedy; Richard A. Leonard; Paul H. Albritton, Jr.; Lee N. Mortenson; Everett A. Sisson; Robert Spiller; Peter Henry Bergman; David John Blears; Howard Friedman; John Charles Russell; Michael Joseph Tucker; RDIS Corporation; Telco Capital Corporation; Wisconsin Real Estate Investment Trust; Hickory Furniture Company; Sunstates Corporation; Indiana Financial Investors Inc.; Normandy Insurance Agency, Inc.; Sew Simple Systems, Inc.; Sunstates Equities, Inc.; Sunstates Financial Services, Inc.; Alba-Waldensian Holdings Company; RMHC (Delaware), Inc.; Wellco Holdings Company; Sunstates Realty Group, Inc.; and Michael T. McRaith, in his capacity as Director of the State of Illinois Division of Insurance, Third-party Defendants).

Nos. 1-06-1430, 1-07-0959. May 27, 2009.

Synopsis

Background: Liquidator of insurance companies sued public accounting firm for negligence and breach of contract in auditing the companies. The Circuit Court, Cook County, Barbara J. Disko and Bill Taylor, JJ., denied motion to dismiss suit as time barred, but dismissed liquidator's claims. Firm sought interlocutory review, and liquidator appealed. The Appellate Court denied firm's motion for leave to appeal. Firm then filed petition for leave to appeal. The Supreme Court, 222 Ill.2d 576, 306 Ill.Dec. 188, 857 N.E.2d 281, denied petition, but directed the Appellate Court to decide case on merits. Appeals were consolidated.

Holdings: On rehearing, the Appellate Court, Quinn, J., held that:

- 1 professional negligence statutes of repose may be tolled, as long as the action is not tolled indefinitely;
- 2 one year period to file new suit after dismissal is not jurisdictional and may be tolled;
- 3 as a matter of first impression, tolling agreement between liquidator and firm was valid; and

RELATED TOPICS

Duties and Liabilities to Third Persons

Public Accountant of Accounting Firm

Limitation of Actions

Computation of Period of Limitation

Meaning of Accidental Failure of Suit

Principal and Agent

Notice to Agent

Agent Actual Notice or Knowledge of Certain Facts

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4 as a matter of first impression, guilty knowledge and conduct of insurance companies' sole shareholder could not be imputed to liquidator.

Reversed and remanded.

West Headnotes (27)

Change View

- 1 **Appeal and Error**  Cases Triable in Appellate Court
Validity of tolling agreement between insurance company liquidator and auditor was reviewable de novo as appeal involved contract interpretation and interpretation of statute of repose for professional negligence actions against public accountants, and statute setting deadline for commencing a new action following dismissal. S.H.A. 735 ILCS 5/13-214.2(b), 5/13-217.

2 Cases that cite this headnote
- 2 **Statutes**  Intention of Legislature
The primary objective of the reviewing court when construing the meaning of a statute is to ascertain and give effect to the intent of the legislature.
- 3 **Statutes**  Existence of ambiguity
The intent of the legislature is best gleaned from the words of the statute itself, and where the statutory language is clear and unambiguous, it must be given effect.
- 4 **Contracts**  Construing whole contract together
Contracts  Language of Instrument
The primary goal of contract interpretation is to give effect to the parties' intent by interpreting the contract as a whole and applying the plain and ordinary meaning to unambiguous terms.

2 Cases that cite this headnote
- 5 **Contracts**  Existence of ambiguity
Contractual language is not rendered ambiguous simply because the parties disagree.
- 6 **Contracts**  Operation and effect
A contract modified by the parties creates a new single contract consisting of so many of the terms of the prior contract as the parties have not agreed to change, in addition to the new terms on which they have agreed.
- 7 **Limitation of Actions**  Negligence in performance of professional services
Professional negligence statutes of repose, such as statute applicable to negligence actions against public accountants, may be tolled, whether by statute or specific circumstance, as long as the action is not tolled indefinitely; the key consideration depends on whether there is a reasonable duration of tolling time that brings the repose period to an eventual end. S.H.A. 735 ILCS 5/13-214.2(b).

1 Cases that cite this headnote
- 8 **Limitation of Actions**  Negligence in performance of professional services
"In no event" language of statute of repose permitting professional negligence suit against public accountant "in no event more than five years after the date of alleged negligence" is not mandatory and, thus, does not require 100%

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enforcement; several statutory exceptions exist. S.H.A. 735 ILCS 5/13-214.2 (b, c), 5/13-214.3(e), 5/13-215.

1 Cases that cite this headnote

- 9 **Limitation of Actions**  Agreements waiving limitation
Limitation of Actions  New Action After Dismissal or Nonsuit or Failure of Former Action
 Statute permitting plaintiff to commence new action within one year of reversal or dismissal or the remaining period of limitation is not jurisdictional, does not require refiling within one year, but can be waived and is subject to tolling by parties. S.H.A. 735 ILCS 5/13-217.

- 10 **Limitation of Actions**  Operation as to rights or remedies in general
 Statutes of limitation that apply to common law claims are procedural, not jurisdictional, and affect only the remedy available, not the substantive rights of the parties.

- 11 **Limitation of Actions**  Agreements as to period of limitation
 Private tolling agreements between insurance company liquidator and accounting firm were valid and effectively tolled statute of repose and one-year period for refiling voluntarily dismissed lawsuit; the final tolling agreement contemplated an eventual ending that was reasonable based on the facts specific to the case. S.H.A. 735 ILCS 5/13-214.2, 5/13-217.

1 Cases that cite this headnote

- 12 **Estoppel**  Rights subject to waiver
 Individuals generally may waive substantive rules of law, statutory rights, and even constitutional rights enacted for their benefit, so long as the waiver is knowing, voluntary, and intentional.

- 13 **Limitation of Actions**  Nature of statutory limitation
Limitation of Actions  Waiver or estoppel by failure to plead
 A statute creating a right unknown at common law with an inherent element in the right so created is not considered a statute of limitations; instead, a statute of limitations is an affirmative defense, which may be forfeited if not timely raised by the defendant.

1 Cases that cite this headnote

- 14 **Limitation of Actions**  Nature of statutory limitation
 Statutes of repose are affirmative defenses subject to forfeiture.

2 Cases that cite this headnote

- 15 **Accountants**  Duties and liabilities to third persons
 The guilty knowledge and conduct of insurance companies' sole owner could not be imputed to the companies or their liquidator, and, thus, imputation and sole shareholder doctrines did not apply to bar liquidator's professional negligence suit against accounting firm, where the sole owner clearly engaged in fraudulent conduct in order to line his own pockets at the insurance companies' expense, it would be illogical to impute his guilty knowledge or disloyal, predatory conduct to the insurance companies or the liquidator, he did not have unbreakable communication with the companies, and they did not benefit from his misconduct.

2 Cases that cite this headnote

- 16 **Appeal and Error**  Striking out or dismissal

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When reviewing a motion to dismiss, appellate court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff.

17 Appeal and Error  Extent of Review Dependent on Nature of Decision Appealed from

When reviewing a motion to dismiss, appellate court may consider all facts presented in the pleadings, affidavits, and depositions found in the record.

18 Principal and Agent  Agent's acts in general
Principal and Agent  Imputation to Principal in General
Principal and Agent  Adverse interest of agent

Generally, knowledge and conduct of agents are imputed to their principals; an exception to this rule exists where the agent's interests are adverse to the principal.

19 Principal and Agent  Individual Interest of Agent
Principal and Agent  Fraud

When an agent, by his self-serving conduct, so abandons his principal's interests as to act adversely to those interests, or worse, to act in fraud of his principal, it can fairly be said that, pro tanto, the agency really ceases.

20 Principal and Agent  Knowledge of Facts
Principal and Agent  Failure to repudiate agent's acts or delay in repudiating

Once the agency ceases, the principal is not bound by the acts or declarations of the agent unless it can be proved that he had at the time actual notice of them, or having received notice of them, failed to disavow what was assumed to be said and done in his behalf.

21 Fraud  Interest of or benefit to defendant

A party who knowingly receives and retains a benefit from a transaction that is tainted from fraud cannot later claim that benefit and disavow knowledge of the fraud; conversely, a party who receives no benefit from the transaction cannot be charged with knowledge of the fraud.

22 Corporations and Business Organizations  Fraud
Corporations and Business Organizations  Knowledge or notice of principal's own fraud

When a corporate officer or agent engages in fraudulent conduct for the distinctly private purpose of lining his own pockets at his corporation's expense, it is unlawful, as well as illogical, to impute the agent's guilty knowledge or disloyal, predatory conduct to his corporate principal.

23 Corporations and Business Organizations  Imputed liability in general

The "sole owner doctrine" for imputing owner's misconduct to corporate principal applies under two circumstances: (1) the agent must have unbreakable communication with his principal, and (2) because the sole owner is the only shareholder of the corporate entity, he personally benefits from his own wrongdoing whereas the corporation itself does not.

24 Action  Illegal or immoral transactions

In pari delicto defense is intended for situations in which the victim is a participant in the misconduct giving rise to his claim.

- 25 Action** ⚙️ Illegal or immoral transactions
In *pari delicto* defense exists only because wrongdoers must not be permitted to profit from their wrongdoing.
- 26 Action** ⚙️ Illegal or immoral transactions
In *pari delicto* defense loses its sting once the person who is in *pari delicto* is removed.
- 27 Accountants** ⚙️ Duties and liabilities to third persons
Insurance companies' liquidator could not be in *pari delicto* with their sole shareholder, and, thus, in *pari delicto* defense could not apply to liquidator's professional malpractice suit against auditor; by statutory definition, liquidator was not the wrongdoer, but served to protect the insurance industry and the public interest by ensuring that victims of the misconduct could recover monies entitled to them. S.H.A. 215 ILCS 5/193.

Attorneys and Law Firms

****314** Tabet, DiVito & Rothstein, LLC (Gary L. Prior, of counsel), McDermott, Will & Emery, LLP (William P. Schuman, of counsel), and Schuyler, Roche & Crisham, P.C., all of Chicago (Jean M. Prendergast, of counsel), for Appellant.

Robinson, Curley & Clayton, P.C., Chicago (Alan F. Curley and Robert L. Margolis, of counsel), for Appellee.

Opinion

*****601 MODIFIED UPON REHEARING**

Justice QUINN delivered the opinion of the court:

***566** This consolidated appeal arises from: (1) the interlocutory appeal of a certified question pursuant to ***567** Supreme Court Rule 308 (155 Ill.2d R. 308) regarding whether a private tolling agreement may indefinitely extend the statutory limitation period for refiling a claim under section 13-217 of the Code of Civil Procedure (Code) (735 ILCS 5/13-217 (West 2006)) and the five-year statute of repose for accountants pursuant to section 13-214.2(b) of the Code (735 ILCS 5/13-214.2(b) (West 2006)) (No. 1-06-1430); and (2) the decision of the circuit court of Cook County to dismiss counts I, II and III of a lawsuit commenced by plaintiff, Director of the State of Illinois Division of Insurance Michael T. McRaith, acting in his capacity as statutory and court-affirmed liquidator (the Liquidator) on behalf of the insolvent third-party insurance company claimants (No. 1-07-0959). The lawsuit alleged, *inter alia*, that defendant, BDO Seidman, LLP, formerly known as BDO Seidman (BDO), committed negligence and breach of contract in its public accounting and auditing services provided to the third-party insurance companies. In its order dismissing the Liquidator's lawsuit, the circuit court held that the "sole owner" doctrine barred the claims of the third-party insurance companies against BDO.

Pursuant to the supreme court's November 29, 2006, supervisory order, we decide whether the parties' private tolling agreement extended the statute of limitations for refiling a claim under section 13-217 and the five-year statute of repose for accountants pursuant to section 13-214.2(b). In addition, we determine whether the circuit court properly dismissed counts I, II and III of the Liquidator's lawsuit under Code section 2-619 (735 ILCS 5/2-619 (West 2006)).

For the following reasons, in appeal number 1-06-1430, we cannot answer the certified question as phrased, but we do hold that the parties' private tolling agreement effectively extended both sections 13-214.2(b) and 13-217 and, therefore, the Liquidator's claims against BDO are not time-barred. Further, in appeal number 1-07-0959, we reverse the circuit court's decision to dismiss counts I, II and III of the Liquidator's September 22, 2005 complaint against BDO and remand for further

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proceedings. We also find, as a matter of first impression, that the imputation doctrine does not apply to the director of the State of Illinois Division of Insurance (IDI) when acting as an insolvent insurance company liquidator under the statutory authority provided by the Illinois Insurance Code (215 ILCS 5/1 et seq. (West 2006)) and Civil Administrative Code of Illinois (20 ILCS 5/5-1 et seq. (West 2006)).

I. BACKGROUND

A. Facts Relevant to Both Appeals

Plaintiff is the director of the IDI and has appeared in this action in his statutory ***602 **315 and court-affirmed capacity as liquidator of the third- *568 party insurance companies, Coronet Insurance Company (Coronet), Crown Casualty Company (Crown) and National Assurance Indemnity Company (National Assurance) (collectively, the Insurance Companies). Defendant is a national certified public accounting firm with offices in Chicago.

The Insurance Companies are Illinois-domiciled companies that principally sold automobile insurance to individuals. Crown and National Assurance were wholly owned subsidiaries of Coronet. During their years of operation, the Insurance Companies were regulated by the IDI. Each of the Insurance Companies was declared insolvent and ordered into liquidation by the circuit court beginning with Coronet on December 24, 1996, National Assurance on January 3, 1997, and Crown on January 31, 1997.

The parties do not dispute that, at all relevant times, the insurance companies were owned by corporate entities owned and controlled by third-party defendant, Clyde W. Engle. The parties also do not dispute that, at all relevant times, Engle dominated and controlled the insurance companies. In addition to being the ultimate owner of the Insurance Companies and third-party defendant corporations, Engle was chairman of the board of directors and chief executive officer for each of the insurance companies and third-party defendants RDIS Corporation, Telco Capital Corporation, Hickory Furniture Company, Indiana Financial Investors, Inc., Wisconsin Real Estate Investment Trust, Sunstates Corporation and Normandy Insurance Agency, Inc. In addition, Engle served as a director or trustee of the other third-party defendant corporations.

BDO audited the insurance companies pursuant to the Civil Administrative Code and issued audit reports on their financial statements for the years 1992, 1993 and 1994. BDO began work on the 1995 audits, but did not complete them or issue any statutory statement opinions for that year.

During the time period when BDO provided auditing services to the insurance companies, Illinois law required an annual audit of licensed insurers by a certified public accountant or an independent accounting firm. Specifically, Title 50, section 925, of the Administrative Code provided that "[a]n annual audited financial reports must be filed by all insurers¹ with the Director [of the Illinois Department of Insurance] on or before June 1, for the year ended December 31 immediately preceding." 50 Ill. Adm.Code § 925.40 (1991). "[A]n *569 independent certified public accountant or accounting firm who has a license to practice issued by the state in which he resides or has his principle place of business" was required to perform the annual audit. 50 Ill. Adm.Code § 925.30, 925.60 (a) (1991). "The insurer shall obtain a letter from such accountant, and file a copy with the Director, stating that the accountant is aware of the provisions of the Illinois Insurance Code * * * relat[ing] to accounting and financial matters and affirming that he will express his opinion on the financial statements in terms of their conformity to the statutory accounting practices prescribed or otherwise permitted by the Department [of Insurance] * * *." 50 Ill. Adm.Code § 925.60(b) (1991). The Administrative Code stated that "[t]he purpose of this Part is to improve ***603 **316 the Illinois Insurance Department's surveillance of the financial condition of insurers by requiring an annual examination by independent certified public accountants of the financial statements reporting the financial condition and the results of operations of insurers." 50 Ill. Adm.Code § 925.20 (1991). The contents for the annual audited financial report included, *inter alia*: (1) the accountant's report; (2) a balance sheet reporting admitted assets, liabilities, capital and surplus; (3) a statement of operations or statement of revenues and expenses; (4) a statement of changes in financial position or cash flows; and (5) a statement of changes in capital and surplus. 50 Ill. Adm.Code § 925. 50(b)

(1991). The Administrative Code provided that the accountant's examination of the insurer's financial statements "shall be conducted in accordance with generally accepted auditing standards." 50 Ill. Adm.Code § 925.90 (1991). The director was not precluded from ordering, conducting or performing examinations of insurers under his jurisdiction, including the financial condition and operations of such insurers. 50 Ill. Adm.Code § 925.20 (1991).

In addition, the Administrative Code provided requirements for notification of an adverse financial condition. "The insurer required to furnish the annual audited financial report shall require the independent certified public accountant to immediately notify in writing an officer or director of the insurer of any determination by that independent certified public accountant that the insurer has materially misstated its financial condition as reported to the Director as of the December 21 immediately preceding, or of any determination that the insurer does not meet the minimum capital and surplus requirement of the Illinois Insurance Code * * *." 50 Ill. Adm.Code § 925.100(a) (1991). Further, "[i]f the accountant, subsequent to the date of the audited financial report filed pursuant to this Part, becomes aware of facts which might have affected his report, the Department notes the *570 obligation of the accountant to take such action as prescribed by Volume 1, Section AU561 of the Professional Standards of the American Institute of Certified Public Accountants." 50 Ill. Adm.Code § 925.100(c) (1991).

B. Facts Relevant to Appeal No. 1-06-1430

On July 25, 1997, the Liquidator's predecessor filed his initial complaint against BDO in the circuit court alleging, *inter alia*, professional malpractice as the Insurance Companies' statutory auditor (1997 BDO action).²

To pursue settlement negotiations and avoid the costs of litigation, the parties subsequently agreed to a dismissal of the 1997 BDO action without prejudice in exchange for the execution of a tolling agreement that would freeze the rights of the parties at that time. On February 27, 1998, the parties executed a tolling agreement (first tolling agreement) that provided the following in paragraph 1:

"BDO hereby agrees that the period (hereinafter referred to as the 'Tolling Period') commencing on July 26, 1997, and ending on June 30, 1998 shall be excluded from the calculation of any limitations or other time-related periods for purposes of any statute of limitations, doctrine of laches, or any other time- ***604 **317 related defenses applicable to claims (a) asserted in the Action, or (b) arising out of the professional services provided by BDO to Coronet, [National Assurance] and/or Crown and their subsidiaries (collectively 'Claims')."

The first tolling agreement also stated:

"Within seven (7) days of the execution of this Agreement, [the Liquidator's predecessor] will voluntarily dismiss without prejudice the Action. In the event [the Liquidator's predecessor] causes an action to be filed based on any Claims, BDO agrees that (a) it will not seek to invoke the provisions of section 13-217 of the Illinois Code of Civil Procedure, 735 ILCS 5/13-217 ('Section 13-217'), in that action, (b) that it will not assert that the voluntary dismissal of [the Action] as described herein constitutes a dismissal as contemplated by Section 13-217, and (c) that it will not include the Tolling Period in the calculation of the period of time for purposes of asserting any time-related defenses."

Section 13 -217 permits a plaintiff to refile a voluntarily dismissed lawsuit "within one year or within the remaining period of limitation, whichever is greater." 735 ILCS 5/13-217 (West 2006). Although the *571 first tolling agreement did not specifically mention section 13-214.2(b), the five-year accountant's statute of repose (735 ILCS 5/13-214.2 (b) (West 2006)), the parties expressly agreed to toll the period of time for asserting "any time-related defenses." Pursuant to the first tolling agreement, the 1997 BDO action was dismissed without prejudice on March 5, 1998.

Thereafter, over the next several years, BDO and the Liquidator agreed to twelve extensions of the first tolling agreement, the last of which was executed on June 26,

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2000 (final tolling agreement). The first tolling agreement and the subsequent eleven supplemental agreements each contained a specific time duration. The twelfth and final tolling agreement, however, provides:

"The period of time referred to in paragraph 1 of the original Tolling Agreement shall be extended to the period commencing on July 26, 1997, and ending on the date on which the Liquidator files in any federal or state court or other forum a complaint, amended complaint or other pleading or petition naming BDO as a party (the 'Termination Date'), so that this entire time period shall be excluded from the calculation of any limitations or other time-related period referred to in paragraph 1 of the original Tolling Agreement. No prior notice need be given by Liquidator to BDO of any filing referred to herein."

The final tolling agreement also states that "[n]othing in this or any other Tolling Agreement shall prevent BDO from raising any defenses (other than time-related defenses referred to in paragraph 1 of the original Tolling Agreement)," and that the terms of the first tolling agreement "shall remain in effect through and including the Termination Date, as defined above." In short, the Liquidator and BDO agreed "to renew, supplement and further extend the [first] Tolling Agreement and all Extensions and Supplemental Extensions thereto." Significantly, at the time BDO and the Liquidator executed the final tolling agreement, the Liquidator had a pending federal action against Engle (Engle federal action).

The Engle federal action was brought against Engle and a number of codefendants to recover property and damages due the insurance companies and to compensate them for losses caused by the alleged misconduct of their directors, attorneys and others. The Liquidator alleged that, over a period of 11 years beginning ***605 ***318 in 1985, "Engle, assisted by the other defendants, devised and implemented a series of complex financial transactions by which more than seventy million dollars was illegally transferred out of the insurance companies." The Liquidator claimed that "[t]he purpose of the illegal transactions was to remove cash and other assets from the insurance companies that *572 should have been used to pay policyholder claims, and to use the cash and assets so removed to support personal and business interests of Engle and the other defendants." The Liquidator asserted that, by the end of 1996, the insurance companies had been drained of all their assets and were no longer able to pay the claims of their policyholders. Engle then surrendered the insurance companies to the Liquidator for liquidation of their assets.

In the spring 2000, the parties allegedly met to try to settle the dispute, but failed to reach an agreement. BDO suggested during the settlement discussions that the Liquidator await the outcome of the then-pending federal case against Engle before refiling the 1997 BDO action. The Liquidator allegedly agreed to wait until the resolution of the federal case before further addressing his claims against BDO. The Engle federal action settled at some point prior to August 11, 2005.³ Thereafter, the Liquidator contacted BDO and the parties agreed to meet for further settlement negotiations on August 11, 2005. According to the Liquidator, the parties had reached an impasse, which led to the filing of a complaint against BDO on September 22, 2005 (2005 BDO action).

On October 31, 2005, BDO moved to dismiss the Liquidator's 2005 BDO action pursuant to Code section 2-615 (735 ILCS 5/2-615 (West 2006)), alleging that the case was barred by sections 13-217 and 13-214.2(b). BDO contended that the parties' tolling agreements did not extend the statute of repose because none of the agreements specifically referred to the statute of repose. BDO also asserted that neither the five-year statute of repose for accountants nor the refiling rule can be waived or tolled by the agreement of the parties. In addition, BDO argued that the Liquidator's claims were barred because the final tolling agreement violated public policy against stale claims and in favor of ending a litigation at some absolute, final and definite date.

On January 30, 2006, the circuit court ruled on BDO's motion to dismiss the 2005 BDO action. The court found that "the agreements' language (particularly the last agreement) clearly and unambiguously provides that [BDO] agrees to allow [the Liquidator] to refile

his action without worry regarding the respective statutes of limitation and the statute of repose." The court denied BDO's motion because the final tolling agreement "clearly provided such a tolling" of the statutes of limitation and repose.

Next, on March 2, 2006, BDO moved to certify two questions for interlocutory appeal pursuant to Rule 308. Ultimately, the circuit court certified one of those questions to this court, namely:

***573** "May parties, through a tolling agreement, extend indefinitely the one-year refiling rule provided by section 13-217 of the Code of Civil Procedure (735 ILCS 5/13-217) and the accountant's five-year statute of repose provided by section 13-214.2(b) of the Code (735 ILCS 5/13-214.2(b))?"

On June 22, 2006, this court denied BDO's motion for leave to appeal pursuant to Rule 308. BDO then filed a petition for leave to appeal in the supreme court. On ****606 **319** November 29, 2006, the supreme court denied BDO's petition, but issued a supervisory order to this court ordering that BDO's Rule 308 leave to appeal be decided on the merits. On February 6, 2007, this court vacated its order of June 22, 2006, and allowed BDO's Rule 308 petition. On June 5, 2008 this case was assigned to this panel. Oral arguments were held on June 25, 2008.

C. Facts Relevant to Appeal No. 1-07-0959

BDO filed a second, combined motion to dismiss pursuant to Code section 2-619.1 (735 ILCS 5/2-619.1 (West 2006)). BDO asserted under section 2-615 of the Code (735 ILCS 5/2-615 (West 2006)) that the Liquidator's claims asserted on behalf of the Insurance Companies' creditors and insureds fail as a matter of law because the creditors and insurers lack standing to sue BDO under the Illinois Public Accounting Act (225 ILCS 450/0.01 *et seq.* (West 2006)). BDO also asserted that the Liquidator failed to state claims for negligence, breach of contract and violations of the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.* (West 2006)). BDO's section 2-619 claims stated:

"The Liquidator's claims asserted on behalf of the insurance companies themselves are barred by the Liquidator's sworn allegations in the prior federal lawsuit of fraud and other intentionally tortious conduct by the owners, officers and directors of the insurance companies. The insurance companies, as intentional tortfeasors, cannot recover under the law from the auditor that they admit they deceived."

Further, BDO claimed that, because the Liquidator brought counts I, II and III of the 2005 BDO action pursuant to section 191 of the Insurance Code (215 ILCS 5/191 (West 2006)), the Liquidator was then vested with all the rights of action of the insurance companies. In other words, BDO argued that the alleged fraudulent and willful misconduct of Engle and the other officers and directors was imputed to the insurance companies and, in turn, was imputed to the Liquidator, which consequently, barred the Liquidator's claims against BDO because intentional tortfeasors cannot sue alleged co-wrongdoers. BDO also asserted that audit clients, such as the insurance companies in this case, cannot recover from a deceived auditor where the fraud ***574** was pervasive and committed not only by the company's top management, but by the owners of the audit client who are alleged to have themselves orchestrated the fraud and interfered with the auditing process to the extent that the fraud was concealed from the auditor. BDO sought the dismissal of counts I, II and III from the Liquidator's 2005 BDO action.

In response to BDO's motion, the Liquidator argued Illinois law precludes imputation in accountant malpractice cases where the individuals were not acting for the benefit of the company. The Liquidator asserted that Engle and the other defendants were acting adversely to the Insurance Companies by stealing from them. The Liquidator contended that the defendants in the Engle federal action would not benefit from the 2005 BDO action.

BDO replied that the "sole owner" doctrine applies in this case. BDO argued that whether an adverse interest existed was irrelevant because the fraudulent or improper conduct was committed by the company's owner. BDO contends that, in this case,

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Engle was both an adverse agent and the sole representative of the principal insurance companies when he committed fraudulent misconduct and, therefore, the insurance companies are charged with Engle and the other defendants' knowledge.

****320 ***607** The Liquidator was granted leave to file a surreply and argued that the sole owner exception does not apply in looting cases or cases brought by insurance company receivers, and that there was an insufficient factual record on which to conclude Engle was the sole owner. The Liquidator asserted that the insurance companies were not complicit in the commission of fraudulent acts in a scheme to defraud third parties; rather, the insurance companies were the intended victims of the scheme.

The circuit court denied BDO's motion on the issue of standing. The court also denied BDO's motion on the issue of imputation, finding applicable the holding in *Holland v. Arthur Andersen & Co.*, 127 Ill.App.3d 854, 82 Ill.Dec. 885, 469 N.E.2d 419 (1984). The *Holland* court found that the adverse-interest rule precluded imputation of fraudulent conduct to the company. The circuit court in this case found, "it is apparent that Engle's actions were not done on behalf of the corporation."

Thereafter, the circuit court judge who denied BDO's section 2-619.1 motion to dismiss retired from the bench. The case was reassigned to a different circuit court judge, who reviewed BDO's December 22, 2006, motion to certify question for interlocutory appeal. The court entered an order converting BDO's Rule 308 motion to a motion to reconsider the denial of BDO's section 2-619.1 motion to dismiss.

***575** After reviewing additional briefs from each party, the circuit court conducted a hearing on BDO's motion. Following argument by both parties, the court granted BDO's motion to reconsider and dismissed counts I, II and III of the 2005 BDO action in their entirety, with prejudice. The court stated its reasoning as follows:

"While I did not find any cases also in Illinois regarding the Sole Owner Doctrine * * * [a]nd now that the Commissioner of Insurance or Director of Insurance is now standing in the shoes of Mr. Engle or the company since it's a sole owner, the Motion To Reconsider is going to be granted. The Motion To Dismiss is going to be granted, also, based on the Sole Owner Doctrine."

On April 6, 2007, the Liquidator timely appealed.

II. ANALYSIS

In appeal number 1-06-1430, BDO argues that the final tolling agreement in this case cannot indefinitely extend the limitation period for the refiling rule under Code section 13-217 or the accountant's five-year statute of repose pursuant to section 13-214.2(b) of the Code. BDO contends that a private, indefinite tolling agreement is violative of Illinois law and public policy. BDO asserts that Illinois courts strictly construe statutes of limitation and repose and that public policy strongly favors imposing a reasonable closure on a plaintiff's claims for the benefit of everyone involved in the administration of justice.

The Liquidator responds that BDO is a sophisticated national accounting firm with experienced attorneys that were fully aware of the consequences surrounding the agreement to toll and expressly forfeit all time-related defenses, including sections 13-214.2(b) and 13-217, in exchange for the Liquidator's dismissal of the timely 1997 BDO action. The Liquidator asserts that, due to the inherently uncertain length of the Engle federal action, the parties needed flexible language to end the inefficient practice of executing short extensions every few months as had been done for the first 11 tolling agreements. The Liquidator contends that, as a result, the parties agreed to the final tolling agreement which BDO now challenges. The Liquidator maintains that, if BDO truly *****608 **321** had been concerned about any potential abuse of the tolling of the statutes of limitation and repose, it could have refused to sign any of the extensions. The Liquidator asserts that BDO engaged in the negotiation process and, after having obtained the benefits of that process, namely, the dismissal of the 1997 BDO action, the Liquidator's continued forbearance of suit against BDO, and the possibility of avoiding litigation altogether, BDO now seeks to void the parties' final tolling agreement because

it no longer suits BDO's purpose. The Liquidator argues that no law or public policy should *576 prevent sophisticated parties with equal bargaining power from contracting as the Liquidator and BDO have done here with the cost-saving goal of avoiding litigation, only to later negate the agreement after one party has reaped its benefits.

In appeal number 1-07-0959, the Liquidator argues that the circuit court erred by dismissing under Code section 2-619 counts I, II and III of the 2005 BDO action. The Liquidator asserts it is a violation of well-settled law to (1) impute the conduct of a thief, in this case, Engle, to his victims, here, the insurance companies; (2) then impute that conduct to the Liquidator, whose duty as imposed by the Illinois Insurance Code is to liquidate immediately the property, business and affairs of the company to preserve the rights and interests of policyholders and other creditors; and (3) apply the *in pari delicto* defense against the Liquidator. The Liquidator maintains the equitable imputation doctrine does not apply where, as here, (1) the wrongdoers acted adversely to the insurance companies by stealing from them; (2) the plaintiff is an insurance company liquidator who has committed no wrongdoing and is suing for the ultimate benefit of innocent policyholders and creditors; (3) the wrongdoers have been removed and will not benefit from any recoveries in this lawsuit; and (4) imputation will not protect any innocent parties, but instead will serve only to spare negligent auditors from the liability they would otherwise face.

BDO responds that, because the Liquidator brought the claims at issue "solely on behalf" of the Insurance Companies, the Liquidator then stands in the shoes of those companies and is subject to all defenses that could be asserted against them by BDO. BDO asserts that the Liquidator judicially admitted that Engle was the ultimate owner and controlling person of the Insurance Companies and that the alleged fraud that BDO failed to detect was committed at the direction of Engle. BDO argues that for this reason, the sole-owner doctrine bars the claims of a plaintiff standing in the shoes of the company. BDO maintains that there is no meaningful distinction between the insurance industry and any other industry when applying the sole owner doctrine. BDO contends that the equities are in its favor because it is accused of mere negligence, while the Liquidator is standing in the shoes of an intentional tortfeasor and, therefore, unable to sue BDO under well-established law.

A. Appeal No. 1-06-1430

In this appeal, BDO argues that parties may not indefinitely toll the statutory time limitations at issue here for several reasons. BDO first asserts that indefinite tolling of the accountant's statute of repose *577 and the refiling rule is contrary to the plain language of these statutes. Next, BDO contends that indefinite tolling is contrary to Illinois law, which strictly construes time limitations and maintains a firm distinction between statutes of limitations and statutes of repose. Third, BDO argues that, while there is no Illinois authority on this issue, other jurisdictions overwhelmingly have held that statutes of ***609 **322 repose and refiling statutes cannot be tolled indefinitely. Finally, BDO maintains that tolling by private agreement for an indefinite or unreasonable time subverts the legislative purpose and public policy behind statutes of limitation and repose.

The Liquidator responds that courts applying Illinois law and the laws of other states enforce agreements by parties to toll repose periods without regard to duration. The Liquidator asserts that statutes of repose are forfeitable affirmative defenses. The Liquidator points out a number of Illinois equitable estoppel cases, including *DeLuna v. Burciaga*, 223 Ill.2d 49, 306 Ill.Dec. 136, 857 N.E.2d 229 (2006), where the supreme court enforced indefinite tolling of the statutes of limitation and repose without concern for statutory time limits for the underlying professional negligence claim. The Liquidator also contends that public policy strongly supports the final tolling agreement at issue here. In addition, the Liquidator argues that, having accepted the benefits of the tolling agreements, BDO cannot now assert that they are unenforceable.

1. Standard of Review

1 2 3 The certified question to be determined in this case involves the interpretation of Code sections 13-214.2(b) and 13-217. Because this issue involves both statutory and contract interpretation and there is no question of fact, we review this issue *de novo*. *Murray v. Chicago Youth Center*, 224 Ill.2d 213, 228, 309 Ill.Dec. 310,

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864 N.E.2d 176 (2007); *Mermelstein v. Menora*, 372 Ill.App.3d 407, 411, 309 Ill.Dec. 876, 865 N.E.2d 239 (2007). The primary objective of the reviewing court when construing the meaning of a statute is to ascertain and give effect to the intent of the legislature. *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill.2d 390, 415, 300 Ill.Dec. 329, 844 N.E.2d 1 (2006). The intent of the legislature "is best gleaned from the words of the statute itself, and where the statutory language is clear and unambiguous, it must be given effect." *Orlak v. Loyola University Health System*, 228 Ill.2d 1, 8, 319 Ill.Dec. 319, 885 N.E.2d 999 (2007).

4 5 6 Similarly, "[t]he primary goal of contract interpretation is to give effect to the parties' intent by interpreting the contract as a whole and applying the plain and ordinary meaning to unambiguous terms." *Joyce v. DLA Piper Rudnick Gray Cary LLP*, 382 Ill.App.3d 632, 636-37, 321 Ill.Dec. 138, 888 N.E.2d 657 (2008). Contractual language is not rendered ambiguous simply *578 because the parties disagree. *Joyce*, 382 Ill.App.3d at 637, 321 Ill.Dec. 138, 888 N.E.2d 657. Significantly, "a contract modified by the parties creates a 'new single contract consisting of so many of the terms of the prior contract as the parties have not agreed to change, in addition to the new terms on which they have agreed.'" *Joyce*, 382 Ill.App.3d at 637, 321 Ill.Dec. 138, 888 N.E.2d 657, quoting *Schwinder v. Austin Bank of Chicago*, 348 Ill.App.3d 461, 469, 284 Ill.Dec. 58, 809 N.E.2d 180 (2004).

2. Tolling of Section 13-214.2(b)

7 Section 13-214.2(b), the statute of repose for professional negligence actions against public accountants, provides:

"In no event shall such action be brought more than 5 years after the date on which occurred the act or omission alleged in such action to have been the cause of injury to the person bringing such action against a public accountant." 735 ILCS 5/13-214.2(b) (West 2006).

BDO focuses particularly on the portion of the statute providing, "[i]n no event," arguing that indefinite tolling of section ***610 **323 13-214.2(b) would render that phrase meaningless. BDO cites cases holding that the phrase "in no event" is mandatory, particularly when coupled with the word "shall," as here. BDO relies upon *Kurr v. Town of Cicero*, 235 Ill.App.3d 528, 176 Ill.Dec. 535, 601 N.E.2d 1233 (1992), *Lincoln Manor, Inc. v. Department of Public Health*, 358 Ill.App.3d 1116, 295 Ill.Dec. 506, 832 N.E.2d 956 (2005), *Short v. Belleville Shoe Manufacturing Co.*, 908 F.2d 1385 (7th Cir.1990), and *Wilson v. Hill*, 782 P.2d 874 (Colo.App.1989) in support of its argument. A review of these cases shows, however, that only *Short* involves a statute of repose. There, the Seventh Circuit Court of Appeals held that the plaintiffs' action for securities fraud was untimely under the applicable statute of repose. *Short*, 908 F.2d at 1392-93.

8 The pertinent Illinois statutes and authority, however, do not support an interpretation of the "in no event" language as mandatory. Although the language, "[i]n no event," is plain and unambiguous, the statutes of repose for professional negligence in Illinois, including section 13-214.2(b), provide exceptions to this language. Within section 13-214.2(b) is an exception that reads, "in the event that an income tax assessment is made or criminal prosecution is brought against a person, that person may bring an action against the public accountant who prepared the tax return within two years from the date of the assessment or conclusion of the prosecution." 735 ILCS 5/13-214.2(b) (West 2006). Section 13-214.2(c) tolls the statute of repose in accounting malpractice cases until the plaintiff reaches the age of majority. 735 ILCS 5/13-214.2(c) (West 2006); see also 735 ILCS 5/13-212(c), 13-214.3(e) (West 2006). Section 13-215 of the Code of Civil Procedure provides tolling in professional negligence cases where "a person liable to an action fraudulently conceals the *579 cause of such action from the knowledge of the person entitled thereto." 735 ILCS 5/13-215 (West 2006); see also *DeLuna*, 223 Ill.2d at 78-79, 306 Ill.Dec. 136, 857 N.E.2d 229; *Witherell v. Weimer*, 85 Ill.2d 146, 159, 52 Ill.Dec. 6, 421 N.E.2d 869 (1981).

Accordingly, our legislature intended to grant certain exceptions to the statutes of repose as evidenced by the enactment of these statutes. Thus, the "[i]n no event" language that BDO refers to in section 13-214.2(b) does not require 100% enforcement

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of the statutes of repose in professional negligence cases. See *DeLuna*, 223 Ill.2d at 72, 306 Ill.Dec. 136, 857 N.E.2d 229.

Furthermore, Illinois courts also have allowed the tolling of statutes of repose in professional negligence actions in other circumstances specific to the case. For example, the statute of repose for medical malpractice (735 ILCS 5/13-212 (West 2006)) may be tolled by a plaintiff based on a continuing negligent course of treatment for a specific condition. See *Cunningham v. Huffman*, 154 Ill.2d 398, 404-06, 182 Ill.Dec. 18, 609 N.E.2d 321 (1993); but cf. *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill.2d 325, 347, 264 Ill.Dec. 283, 770 N.E.2d 177 (2002) (noting that the *Cunningham* decision did not adopt a continuing violation rule of general applicability in all tort cases).

The key consideration for tolling of the statutes of repose depends on whether there is a reasonable duration of tolling time that brings the repose period to an eventual end. In *Anderson v. Wagner*, 79 Ill.2d 295, 311, 37 Ill.Dec. 558, 402 N.E.2d 560 (1979), the supreme court addressed the legislature's response to judicial expansion of the discovery rule, which had undermined the medical malpractice statute of limitations by creating a tolling provision of potentially unlimited duration. The ***611 **324 court held that the then four-year medical malpractice statute of repose provided due process to a potential plaintiff:

"Any statute of limitations will eventually operate to bar a remedy and the time within which a claim should be asserted is a matter of public policy, the determination of which lies almost exclusively in the legislative domain, and the decision of the General Assembly in that regard will not be interfered with by the courts in the absence of palpable error in the exercise of the legislative judgment." *Anderson*, 79 Ill.2d at 311, 37 Ill.Dec. 558, 402 N.E.2d 560, quoting *Owen v. Wilson*, 260 Ark. 21, 24 -25, 537 S.W.2d 543, 545 (1976).

The supreme court in *Best v. Taylor Machine Works*, 179 Ill.2d 367, 401, 228 Ill.Dec. 636, 689 N.E.2d 1057 (1997), stated:

"Under the discovery rule, a cause of action accrued when a person learned of his injury or reasonably should have learned of it. Because the discovery rule came to be applied extensively in medical malpractice cases, statutes of limitation in existence no longer provided repose for malpractice defendants. The discovery rule was perceived to be partly responsible for the medical malpractice crisis *580 because it created a 'long tail' of liability for medical malpractice defendants. Thus, the statute of limitations provision at issue in *Anderson* was enacted to place an outside limit on the applicability of the discovery rule to physicians and hospitals."

In sum, the foregoing demonstrates that professional negligence statutes of repose, such as section 13-214.2(b), may be tolled, whether by statute or specific circumstance, as long as the action is not tolled indefinitely.

3. Tolling of Section 13-217

9 Section 13-217 provides that a party "may commence a new action within one year or within the remaining period of limitation, whichever is greater." 735 ILCS 5/13-217(West 2006). BDO maintains that section 13-217 strictly requires the refile of a claim within one year of dismissal. BDO also argues that the refile rule is jurisdictional and cannot be waived, citing *Wilson v. Evanston Hospital*, 276 Ill.App.3d 885, 213 Ill.Dec. 469, 659 N.E.2d 99 (1995), and *Johnson v. United National Industries, Inc.*, 126 Ill.App.3d 181, 81 Ill.Dec. 375, 466 N.E.2d 1177 (1984). We disagree.

"Section 13-217 provides plaintiffs with the absolute right to refile their complaint within one year or the remaining period of limitations, whichever is greater." *Timbertake v. Illini Hospital*, 175 Ill.2d 159, 163, 221 Ill.Dec. 831, 676 N.E.2d 634 (1997). Section 13-217 should not be used as a mechanism for "harassing renewal of litigation." *Wilson*, 276 Ill.App.3d at 888, 213 Ill.Dec. 469, 659 N.E.2d 99.

Here, BDO's reliance upon *Wilson* and *Johnson* for the proposition that section 13-217 is jurisdictional is misplaced. Statutes of limitation that apply to common law claims are considered procedural, not jurisdictional, and affect only the remedy available, not the substantive rights of the parties. *Lease Partners Corp. v. R & J Pharmacies, Inc.*, 329 Ill.App.3d 69, 75, 263 Ill.Dec. 294, 768 N.E.2d 54 (2002). In addition, jurisdictional prerequisites for maintaining suit are expressly provided in Illinois statutes. See, e.g., *Whitaker v. Human Rights Comm'n*, 184 Ill.App.3d 356, 359, 132 Ill.Dec. 621, 540 N.E.2d 361 (1989) (noting that under section 7A-102(A)(1) of the Illinois Human Rights Act (775 ILCS 7A-102(a)(1) (West 2006)), the 180-day period to file a claim, is a prerequisite for maintaining suit). The court in *Wilson* merely analogized ***612 **325 section 13-217 to Supreme Court Rule 303 (134 Ill.2d R. 303) for the purpose of determining at what point the statutory time begins to run. The *Wilson* court made no finding that section 13-217 is jurisdictional. Likewise, *Johnson* does not apply here because it does not involve tolling or waiver of the statute. Accordingly, BDO's argument on this issue is rejected.

In addition, BDO relies upon *Hinkle v. Henderson*, 85 F.3d 298 (7th Cir.1996) to argue that the absolute outer limit for refiling under section 13-217 is one year after the expiration of either the statute of limitations or statute of repose. Essentially, the *Hinkle* court *581 determined whether section 13-217 applied both to statutes of limitation and repose. There, the plaintiff waited until the very last day of the eight-year repose period to file suit, then took no action in the circuit court for eight months, failing even to attempt service on the defendant, received a voluntary dismissal, and finally waited just short of one year to refile the case in district court. The defendant was served more than nine years after the alleged acts of negligence. The *Hinkle* court held that section 13-217 applies to the statute of repose. In its reasoning, the court stated:

"While 'saving' a cause of action for one year does not effect the indefiniteness of potential liability, it does change the certainty and predictability afforded defendants; however, this is true *only where the defendant is unaware that the first action was filed*. Where the defendant knows that plaintiff has brought an action, usually from receiving service, he must be presumed to understand that a procedural defect in the action may cause a delay of up to one year pursuant to the savings statute." (Emphasis in original.) *Hinkle*, 85 F.3d at 303.

The holding in *Hinkle* does not limit the period of refiling to one-year as argued by BDO. Instead, *Hinkle* stands for the proposition that a refiled lawsuit that is timely under section 13-217 will not be barred by the statute of repose even though the refiling occurred beyond the repose period. 85 F.3d at 302-03. Moreover, unlike *Hinkle*, BDO was aware of the first action that was filed and entered into an express agreement with the Liquidator, which did not affect the certainty or predictability of refiling under section 13-217.

Our supreme court has held that section 13-217 is remedial in nature and, as a result, should be liberally construed. *Bryson v. News America Publications, Inc.*, 174 Ill.2d 77, 106, 220 Ill.Dec. 195, 672 N.E.2d 1207 (1996). In *Bryson*, as here, the original claim was timely filed within the statutory limitations period. Section 13-217 was enacted "to facilitate the disposition of litigation upon the merits and to protect plaintiffs from losing a cause of action because of a technical default unrelated to the merits." *Bryson*, 174 Ill.2d at 106-07, 220 Ill.Dec. 195, 672 N.E.2d 1207. The court held, where the initial action was timely filed, the plaintiff should not be penalized simply for exercising his absolute right to refile under section 13-217. *Bryson*, 174 Ill.2d at 107, 220 Ill.Dec. 195, 672 N.E.2d 1207.

In this case, a liberal construction of section 13-217 shows no intent by the legislature to prevent parties from tolling the statute. This interpretation is consistent with *Bryson* and, as will be shown, preserves the substantive rights of the parties based on the unique circumstances in this case. As we have determined the tolling of sections 13-214.2(b) and 13-217 is consistent with the intent of the *582 legislature and pertinent Illinois authority, we now turn to the issue of whether the final tolling agreement was valid.

4. Validity of the Final Tolling Agreement

This court recently determined whether an amended, private tolling agreement, ***613 **326 effectively tolled the statute of limitations for a legal malpractice action. See *Joyce*, 382 Ill.App.3d at 637-38, 321 Ill.Dec. 138, 888 N.E.2d 657. In *Joyce*, the plaintiff, on behalf of similarly situated stockholders, sued the defendant law firm due to an alleged drafting error in a merger agreement. The plaintiff offered to withhold the defendant's name from their forthcoming suit against a codefendant if the defendant agreed to enter into a tolling agreement with respect to the statute of limitations. The parties agreed:

"1. The running of any statute of limitations applicable to any of the Potential Claims, whether arising under state or federal law, including any defense based upon the doctrine of laches or any similar defense based upon the lapse of time (collectively, the "Statute of Limitations Defenses") is hereby tolled until such time as a lawsuit asserting any one or more of the Potential Claims against [defendant] is filed so long as such lawsuit is filed on behalf of one or more of the Potential Claimants, on or before December 31, 2002, and the Shareholder Representative delivers written notice to the undersigned representative of [defendant] of the filing of such lawsuit within three (3) business days after it is filed;

2. Without limiting the generality of any of the foregoing, [defendant] hereby waive[s] and agree[s] not to assert or attempt to avail [itself] of any Statute of Limitations Defenses based in whole or in part upon the passage of time occurring after the date of this Agreement in response to any lawsuit asserting any of the Potential Claims, provided such lawsuit is filed on behalf of one or more of the Potential Claimants, on or before December 31, 2002, and the Shareholder Representative delivers written notice to the undersigned representative of [defendant] of the filing of such lawsuit within three (3) business days after it is filed;

3. Except to the extent provided herein, this Agreement is without prejudice to the respective rights, claims and defenses of the parties hereto; and notwithstanding anything to the contrary contained herein, it is specifically understood and agreed that any Statute of Limitations Defense or Defenses which [defendant] may have as of the date of this Agreement is preserved, and shall not be affected in any manner whatsoever by this Agreement, and may be asserted by [defendant] in response to or against any one or more of the Potential Claim[s]; " *Joyce*, 382 Ill.App.3d at 633-34, 321 Ill.Dec. 138, 888 N.E.2d 657.

The parties' tolling agreement was amended four times, altering only the date on which the plaintiff was required to file suit against *583 the defendant. As such, only the first two paragraphs of the tolling agreement were affected. In addition, the final amendment provided that " '[i]n all other respects, the Tolling Agreement, the First Amendment, the Second Amendment, the Third Amendment and the Fourth Amendment shall remain in full force and effect.' " *Joyce*, 382 Ill.App.3d at 635, 321 Ill.Dec. 138, 888 N.E.2d 657.

The plaintiff filed the underlying legal malpractice claim nearly one year after the expiration of the tolling agreement. The defendant moved to dismiss the plaintiff's claim as untimely, but the circuit court denied the motion, finding that the plaintiff's claim was timely based upon the tolling agreement. The court also denied the defendant's motion to reconsider.

On appeal, the defendant argued that, because the plaintiff had failed to satisfy the condition precedent in the tolling agreement, namely, that the plaintiff was required to file the lawsuit by the stipulated ***614 **327 date, the statutes of limitation and repose were not tolled, which barred the filing of the complaint. The plaintiff responded that each amendment renewed the starting date for the statute of limitations. This court disagreed.

In *Joyce*, this court found that the clear, unequivocal language from the first two paragraphs of the tolling agreement demonstrated that the defendant agreed to waive its potential timeliness defenses, but only if the plaintiff complied with the condition precedent to file the complaint by the agreed date. The court held that, because the plaintiff failed to comply with the condition precedent, the defendant's potential time-related defenses were not waived. *Joyce*, 382 Ill.App.3d at 637, 321 Ill.Dec. 138, 888

N.E.2d 657. In addition, the court noted that its decision was further supported by paragraph three of the tolling agreement, which expressly preserved the defendant's timeliness defenses if the plaintiff failed to file his complaint by the agreed date. *Joyce*, 382 Ill.App.3d at 637-38, 321 Ill.Dec. 138, 888 N.E.2d 657. Finally, the court stated, "to accept plaintiff's argument would require this court to allow plaintiff the benefits of the first four amendments without fulfilling the requirement of filing suit by the specified dates imposed by any of the amendments." *Joyce*, 382 Ill.App.3d at 638, 321 Ill.Dec. 138, 888 N.E.2d 657.

For the purposes of the instant case, the *Joyce* court made no finding regarding whether a private tolling agreement requires a definitive duration of time in order to be enforceable. The holding in *Joyce* was limited to the issue of whether the tolling agreement barred the plaintiff from filing a complaint against the defendant.

12 13 14 "Individuals generally may waive substantive rules of law, statutory rights, and even constitutional rights enacted for their benefit [citation], so long as the waiver is knowing, voluntary, and intentional." *584 in *re estate OF ferguson*, 313 Ill.App.3d 931, 937, 246 Ill.Dec. 740, 730 N.E.2d 1205 (2000). A statute creating a right unknown at common law with an inherent element in the right so created is not considered a statute of limitations. *Van Milligen v. Department of Employment Security*, 373 Ill.App.3d 532, 542, 311 Ill.Dec. 422, 868 N.E.2d 1083 (2007). Instead, a statute of limitations is an affirmative defense, which may be forfeited if not timely raised by the defendant. *Fox v. Heimann*, 375 Ill.App.3d 35, 45, 313 Ill.Dec. 366, 872 N.E.2d 126 (2007); *Lease Partners*, 329 Ill.App.3d at 76, 263 Ill.Dec. 294, 768 N.E.2d 54. Similarly, statutes of repose are affirmative defenses subject to forfeiture. *Willett v. Cessna Aircraft Co.*, 366 Ill.App.3d 360, 371, 303 Ill.Dec. 439, 851 N.E.2d 626 (2006); *Boldini v. Owens Corning*, 318 Ill.App.3d 1167, 1170, 253 Ill.Dec. 88, 744 N.E.2d 370 (2001).

In this case, BDO knowingly and voluntarily entered into each of the 12 tolling agreements with the Liquidator fully aware of the consequences of expressly forfeiting all time-related defenses. The record does not support BDO's assertions that the tolling agreements were one-sided in favor of the Liquidator. Both parties to the tolling agreements sought a benefit. The Liquidator contracted to avoid potential costly litigation, while BDO's 1997 action was dismissed with the possibility of avoiding litigation altogether depending on the outcome of the Engle federal action. The Liquidator sought damages from Engle and the other defendants for the purpose of making the policyholders and creditors whole. If the Engle federal action did not serve to make those parties whole, the Liquidator would seek the remainder from BDO for its alleged wrongful conduct.

328 *615 There is no Illinois authority with similar factual circumstances; however, the decision in *First Interstate Bank of Denver v. Central Bank & Trust Co. of Denver*, 937 P.2d 855 (Colo.App.1996), provides insight on this issue. There, the plaintiff initially sued the defendant under federal securities law, but did not join any state law claims. The federal district court granted the defendant's motion for summary judgment. While the appeal to the Tenth Circuit Court of Appeals was pending, the parties agreed in writing to toll any statute of limitations, doctrine of *laches* or other time bar on the plaintiff's state claims until a final adjudication on the federal claims. After a final determination by the United States Supreme Court, the plaintiff brought an action against the defendant for violations of Colorado securities law. On appeal, the plaintiff argued that the circuit court erred by finding the tolling agreement did not waive the time limit imposed by the Colorado Securities Act's statute of repose.

First, the Colorado Court of Appeals held that a stipulated, express forfeiture can negate a statute of repose. *First Interstate Bank*, 937 P.2d at 860. The court noted "although the introductory phrase 'in no event' may be read in particular contexts to establish a jurisdictional *585 condition [citation], it does not necessarily do so" for the pertinent statute of repose. *First Interstate Bank*, 937 P.2d at 861. The court next considered public policy and legislative intent for the terms of the statute, stating that "[t]he policy arguments advanced [by the defendant] simply are inapplicable when, as here, parties expressly agree not to assert the statute's time limitations." *First Interstate Bank*, 937 P.2d at 863. Pertinent for this case, the court found:

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"Specifically, here, there is no contention that the tolling agreement prompted plaintiff to delay investigation or wait for more favorable securities prices in order to bring suit, or that additional problems of proof developed. [Citations.] Indeed, when the tolling agreement was signed in July 1990, the claims were clearly defined and a similar action based on the same transaction had already been filed in federal district court and dismissed on summary judgment. Furthermore, the agreement, which made clear plaintiff's intention to assert additional claims in state court, was for the benefit of both parties, implemented to preclude unnecessary litigation while the federal issues were on appeal." *First Interstate Bank*, 937 P.2d at 863.

The circuit court's decision to dismiss the plaintiff's claims was reversed.

In this case, because the Liquidator's predecessor had filed his initial action against BDO in 1997, the claims asserted against BDO were clearly defined. As in *First Interstate Bank*, the Liquidator had filed another action based on the same transaction in federal court. None of the tolling agreements in this case made reference to the pending Engle federal action, but the record supports that the parties entered into the final tolling agreement and worded it as such based on the pending action in federal court. Otherwise, the "Termination Date" as provided in the final tolling agreement would have included a specific expiration date similar to the previous 11 tolling agreements, rather than "ending on the date on which the Liquidator files in any federal or state court or other forum a complaint, amended complaint or other pleading or petition naming BDO as a party."

The clear, unequivocal language of each of the tolling agreements demonstrates that BDO agreed to forfeit its potential timeliness defenses without exception or condition precedent, in contrast to *Joyce*. ***616 **329 This conclusion is further supported because each of the tolling agreements repeated BDO's agreement to forfeit all time-related defenses and provided that the parties agreed "to renew, supplement and further extend the [first] Tolling Agreement and all Extensions and Supplemental Extensions thereto."

*586 Moreover, we find that the final tolling agreement contemplates an eventual ending that is reasonable based on the facts specific to this case. We read a reasonableness requirement into the final tolling agreement. The record supports that the parties bargained and agreed to the final tolling agreement based on the fact that the Engle federal action would come to an end. We do not hold here that private tolling agreements may forfeit time-related defenses indefinitely.

Based on the foregoing, our answer to the certified question cannot be answered in the affirmative or the negative. We hold that the private tolling agreements in this case were valid and effectively tolled all time-related defenses, including sections 13-214.2(b) and 13-217 of the Code of Civil Procedure. Therefore, we find that the Liquidator's claims against BDO are not time-barred.

B. Appeal No. 1-07-0959

15 In this appeal, the Liquidator argues the circuit court erred by granting BDO's motion to dismiss counts I, II and III of the 2005 BDO action. According to the Liquidator, the fundamental principles of the imputation doctrine preclude the imputation of Engle's misconduct to the Liquidator. The Liquidator asserts that courts uniformly reject imputation defenses when asserted against liquidators of insolvent insurance policies, as supported by public policy. The Liquidator also contends that the sole-owner exception to the adverse-interest rule does not apply in this case. In addition, the Liquidator argues that, even if Engle's conduct could be imputed to the Insurance Companies, the equitable *in pari delicto* defense does not apply here.

BDO responds that the Liquidator's claims are barred by the doctrines of imputation and *in pari delicto* under the sole-owner doctrine. BDO asserts that the sole-owner doctrine applies when the fraudulent owner diverts insurance company funds. BDO maintains that there is no basis to apply different rules for *in pari delicto* or imputation in the case of insolvent insurance companies. BDO also argues that the Liquidator's claims are brought solely on behalf of the Insurance Companies, not their creditors and

policyholders. Additionally, BDO asserts that the equities are in its favor and that the Liquidator is judicially estopped from contradicting its sole owner allegations.

1. Standard of Review

16 17 A section 2-619 motion to dismiss (735 ILCS 5/2-619 (West 2006)) raises defects or defenses to the complaint and questions whether the defendant is entitled to judgment as a matter of law. *Gonnella Baking Co. v. Clara's Pasta Di Casa, Ltd.*, 337 Ill.App.3d 385, 388, 272 Ill.Dec. 224, 786 N.E.2d 1058 (2003). "When reviewing a motion to dismiss, this court must accept all well-pleaded facts as true [citation] and view them in the light *587 most favorable to the plaintiff." *Gonnella Baking Co.*, 337 Ill.App.3d at 388, 272 Ill.Dec. 224, 786 N.E.2d 1058. We may consider all facts presented in the pleadings, affidavits, and depositions found in the record. *Gonnella Baking Co.*, 337 Ill.App.3d at 388, 272 Ill.Dec. 224, 786 N.E.2d 1058. Since the resolution of this case hinges on a matter of law, our review is *de novo*. *Gonnella Baking Co.*, 337 Ill.App.3d at 388, 272 Ill.Dec. 224, 786 N.E.2d 1058.

***617 **330 2. Public Policy for the Insurance Industry

The United States Supreme Court previously has noted the importance of the insurance industry to the public interest that remains quite relevant in today's economy:

"We have shown that the business of insurance has very [defined] characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby, and charged with great responsibility. How necessary their solvency is, is manifest. On the other hand to the insured, insurance is an asset, a basis of credit. It is practically a necessity to business activity and enterprise. It is, therefore, essentially different from ordinary commercial transactions, and, as we have seen, according to the sense of the world from the earliest times-certainly the sense of the modern world-is of the greatest public concern." *German Alliance Insurance Co. v. Lewis*, 233 U.S. 389, 414-15, 34 S.Ct. 612, 620, 58 L.Ed. 1011, 1023 (1914).

Concomitant with federal regulation of the insurance industry, insurance companies also are subject to state control in the exercise of its police powers through the Insurance Code. *Lincoln Towers Insurance Agency, Inc. v. Boozell*, 291 Ill.App.3d 965, 969, 225 Ill.Dec. 909, 684 N.E.2d 900 (1997). "Illinois has adopted a strong policy of regulating, controlling, and supervising the business of insurance because it affects the public interest." *Coronet Insurance Co. v. Washburn*, 201 Ill.App.3d 633, 637-38, 146 Ill.Dec. 973, 558 N.E.2d 1307 (1990). Illinois recognizes that the core aim of insurance regulation is "geared toward protecting policyholders from unscrupulous or inexperienced management." *Hoylake Investments Ltd. v. Washburn*, 723 F.Supp. 42, 46 (N.D.Ill.1989).

For the purpose of protecting policyholders and creditors, the Illinois Legislature enacted the Insurance Code, which provides that the director is vested by operation of law with the title to all property, *588 contracts and rights of action of the company as the date of the order directing liquidation. See 215 ILCS 5/191 (West 2006). The duties of the Liquidator, as director of insurance, also are conferred by statutory provisions. Upon an order of insolvency, the Liquidator immediately proceeds to liquidate the property, business and affairs of the insurance company. See 215 ILCS 5/193 (West 2006). The Liquidator may deal with the property, business or affairs of the insurance company in his name as director, or if the court so orders, in the name of the company. See 215 ILCS 5/193(1) (West 2006). In addition, the Liquidator "may bring any action, claim, suit, or proceeding against any director or officer of the company or against any other person with respect to that person's dealings with the company including, but not limited to, prosecuting any action, claim, suit, or proceeding on behalf of the creditors, members, policyholders, or shareholders of the company." 215 ILCS 5/193(3) (West 2006).

The Civil Administrative Code of Illinois also vests powers and duties that are discharged and executed by the director of insurance. The director is charged with the rights, powers and duties pertaining to the ***618 **331 enforcement and execution of all the insurance laws of the State of Illinois. See 215 ILCS 5/401 (West 2006).

As another part of the goal of protection through the regulation process, the Insurance Companies here were required to submit annual audited financial reports with the director of insurance. 50 Ill. Adm.Code § 925.40 (1991). The annual audit must be performed by an independent certified public accountant or accounting firm. 50 Ill. Adm.Code § 925.60(a) (1991). Furthermore, accountants are required to notify the officer or director of the Insurance Companies immediately upon any determination of an adverse financial condition. 50 Ill. Adm.Code § 925.100 (1991). Here, the Liquidator sought to recover from BDO for its alleged failure to meet the required professional standards in its performance of the annual audit examinations.

3. The Doctrine of Imputation as Applied to Insolvent Insurers

In this case, BDO argues that the Insurance Companies acted through its officers, agents and employees. As such, according to BDO, both the conduct of those persons when acting within the scope of their duties and the knowledge or intention with which they perform the duties are imputed to the insurance companies. BDO asserts that the fraudulent misreporting of the insurance companies' assets to the Liquidator was perpetrated by Engle and other supporting corporate officers, which must be imputed to the insurance companies as a result. BDO maintains that due to the imputation of conduct, the insurance companies cannot equitably recover from BDO.

18 *589 Illinois courts have yet to address the issue of imputation of conduct in the context presented in the instant case, namely, during the liquidation of insolvent insurers. Generally, the knowledge and conduct of agents are imputed to their principals. *Metropolitan Condominium Ass'n v. Crescent Heights*, 368 Ill.App.3d 995, 998, 307 Ill.Dec. 271, 859 N.E.2d 271 (2006). An exception to this rule exists where the agent's interests are adverse to the principal. *Lease Resolution Corp. v. Lamey*, 308 Ill.App.3d 80, 86, 241 Ill.Dec. 304, 719 N.E.2d 165 (1999).

A case on point for this issue, *Reider v. Arthur Andersen, LLP*, 47 Conn.Supp. 202, 209-10, 784 A.2d 464, 470 (2001), explains the logic of the adverse interest exception:

"The general rule is based on the presumption that an agent will be loyal to his principal, and thus will faithfully report to the principal whatever he learns 'while acting for his principal and in reference to a matter in the course of his agency * * *'. [Citation.] The principal is thus charged with his agent's knowledge because it is presumed that the principal will actually receive and have the benefit of the agent's knowledge contemporaneously with the agent's actions. The 'adverse interest exception' suspends the operation of the general rule when 'the circumstances are such as to raise a clear presumption that the agent will not perform [his] duty,' and thus that the principal will not in fact receive and have the benefit of the agent's knowledge." *Reider*, 47 Conn.Supp. at 209-10, 784 A.2d at 470, quoting *Resnik v. Morganstern*, 100 Conn. 38, 43, 122 A. 910, 911 (1923).

In *Reider*, the liquidator claimed that the agents' conduct was designed exclusively to loot from the principal insurance company for their own personal financial gain. Monies due the principal for the policies it sold instead were directed to a corporate affiliate that the agents also controlled. From there, the agents were able ***619 **332 to withdraw the money for their own private purposes, which were of no benefit to the principal. The court considered the principal to be the victim of the agents' alleged fraud. The court stated that the principal was propped up artificially without sufficient assets so it could continue to attract new business and obtain new credit, the proceeds of which were collected by the agents. The court held that the principal could not be charged with fraud in connection with the acts of the agents since the interests of the agents were always adverse to the principal. *Reider*, 47 Conn.Supp. at 211-12, 784 A.2d at 470-71.

The *Reider* court noted three exceptions to rebut the general rule presuming that knowledge of the agent is imputed to the principal. The first exception is where the scope of the duty of the agent to report to the principal is strictly limited. *590 *Reider*, 47

Conn.Supp. at 210, 784 A.2d at 470. The second and third exceptions involve the adverse-interest rule and fraudulent conduct committed by the agent.

19 20 21 Nevertheless, "[w]hen an agent, by his self-serving conduct, so abandons his principal's interests as to act adversely to those interests, or worse, to act in fraud of his principal, it can fairly be said 'that pro tanto, the agency really cease[s].'" *Reider*, 47 Conn.Supp. at 210, 784 A.2d at 470, quoting *Resnik*, 100 Conn. at 43, 122 A. at 910. Once the agency ceases, "the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or having received notice of them, failed to disavow what was assumed to be said and done in his behalf.'" *Reider*, 47 Conn.Supp. at 210-11, 784 A.2d at 470, quoting *Resnik*, 100 Conn. at 43-44, 122 A. at 910. Consequently, a party who knowingly receives and retains a benefit from a transaction that is tainted from fraud cannot later claim that benefit and disavow knowledge of the fraud. Conversely, a party who receives no benefit from the transaction cannot be charged with knowledge of the fraud. *Reider*, 47 Conn.Supp. at 210, 784 A.2d at 470.

22 Pertinent to this case, "when a corporate officer or agent engages in fraudulent conduct for the distinctly private purpose of lining his own pockets at his corporation's expense, it is unlawful, as well as illogical, to impute the agent's guilty knowledge or disloyal, predatory conduct to his corporate principal." *Reider*, 47 Conn.Supp. at 211, 784 A.2d at 470. The *Reider* court stated that, unless the agent's conduct in pursuit of the scheme somehow benefits the corporation, the corporation cannot be held responsible for the agent's fraud.

The defendant in *Reider* also argued that the adverse interest exception did not apply because the principal was benefitted by the agents' conduct, resulting in the extension of its corporate existence and continued earned income from new customers. The *Reider* court rejected this argument because the principal was looted.

The Seventh Circuit Court of Appeals in *Schacht v. Brown*, 711 F.2d 1343, 1348 (7th Cir.1983) (applying Illinois law), as quoted by *Reider*, 47 Conn.Supp. at 212, 784 A.2d at 471, further stated on this issue:

"Defendants argue nonetheless that since the alleged fraudulent scheme had the effect of continuing [the insurer's] active corporate existence past the point of insolvency to the detriment of outside creditors and policyholders, [the insurer] was pro tanto benefitted. But the fact that [the insurer's] existence may have been artificially prolonged pales in comparison with the real damage allegedly inflicted by the diminution of its assets and income. Under such circumstances, the prolonged artificial solvency of [the ***620 **333 insurer] *591 benefitted only [the insurer's] managers and the other alleged conspirators, not the corporation.'"

The issue of the sole-owner doctrine also was raised in *Reider*. The defendant there, arguing similarly to BDO here, asserted that the adverse-interest exception does not apply where the agent who loots a corporation is its sole owner and shareholder.

23 The sole-owner doctrine applies under two circumstances. First, the agent must have unbreakable communication with his principal. Because the looting agent and his principal are one and the same, the principal clearly has knowledge of its agent's actions at all times. *Reider*, 47 Conn.Supp. at 213, 784 A.2d at 472; see also *Spindler v. Krieger*, 16 Ill.App.2d 131, 146-47, 147 N.E.2d 457 (1958). Second, because the sole owner is the only shareholder of the corporate entity, he personally benefits from his own wrongdoing whereas the corporation itself does not. The owner himself, as the sole person whose economic interests are directly affected by the corporation's financial success or failure, is not affected. The *Reider* court explained that "the looted corporation is not so much the owner's victim as it is his tool to defraud third parties." *Reider*, 47 Conn.Supp. at 213, 784 A.2d at 472. Under those circumstances, courts have held that "it is only fair to impute the self-dealing conduct of the looter to the looted corporation." *Reider*, 784 A.2d at 472, citing e.g., *In re Mediators, Inc.*, 105 F.3d 822 (2d Cir.1997); *Federal Deposit Insurance Corp. v. Ernst & Young*, 967 F.2d 166 (5th Cir.1992).

Significantly for the purposes of this case, *Reider* does not involve a typical corporation, rather, the principal is an insurance company. The liquidator there, similar to the Liquidator here, argued that the sole-owner exception cannot apply to insurance companies because of their unique legal responsibilities to policyholders, creditors and the general public. The *Reider* court noted the separate set of rules and strict regulations that govern insurance companies. As in Illinois, Connecticut recognizes the need to afford insurance companies special protections to ensure the public's need for reliable insurance coverage. Annual audits of insurance companies are required and the Insurance Commissioner is given sweeping statutory powers to take action to minimize the consequences from rehabilitation or liquidation. The actions of insurance companies are heavily regulated to preserve solvency in the public interest.

Considering the role of insurance companies and the special protections they require, the *Reider* court held there could not be complete unity of interest between a sole shareholder who loots his own insurance company and the company itself. "Therefore, when a sole owner seeks to loot his own insurance company, every person with *592 a legally protected interest in the insurer's continuing solvency is not a knowing and willing participant in the owner's fraud." (Emphasis omitted.) *Reider*, 47 Conn.Supp. at 218, 784 A.2d at 474.

The *Reider* court concluded that the fraud of the agents was a fraud upon the principal insurance company, not a fraud by it. "Because the [Insurance] commissioner had the right and duty to take it over and manage [the principal's] affairs on behalf of the public if its insolvency was threatened, the company itself had an enforceable claim against any person or entity who unlawfully contributed materially to its insolvency by violating a legal duty to advise it, either directly or through the commissioner, as to true financial status." 47 Conn.Supp. at 219, *Reider*, 784 A.2d at 475.

****334 ***621** We find the holding and reasoning in *Reider* applicable here. Illinois law supports our decision. In *Holland v. Arthur Andersen & Co.*, 127 Ill.App.3d 854, 866, 82 Ill.Dec. 885, 469 N.E.2d 419 (1984), the defendant accounting firm argued that the imputation doctrine was applicable to the trustee in bankruptcy. Although misconduct on the part of the defendant may also have been done in a knowing fashion by the principal, there were no allegations in the complaint which established that the purported misconduct on the part of the principal's top management was committed on behalf of the principal. The principal's complaint alleged that the purported misrepresentation served to artificially prolong the principal's business-life past the point of insolvency and that various corporate executive personnel would have needed to take steps to at least minimize the damage already sustained had they known of the misrepresentations. Thus, the *Holland* case involved fraud clearly committed by the companies' top management and, as a result, the companies were not able to benefit. The *Holland* court held that the misconduct of the agent could not be imputed to the principal. 127 Ill.App.3d at 866, 82 Ill.Dec. 885, 469 N.E.2d 419.

Other jurisdictions have held similarly to *Reider* and *Holland*. See *Cordial v. Ernst & Young*, 199 W.Va. 119, 483 S.E.2d 248 (1996) (rejecting the defendant accounting firm's argument that the rights of a receiver in bankruptcy rise no higher than those of the corporations which they represent and instead finding that the receiver acts to vindicate the rights of the public, including policyholders and creditors); *Bonhiver v. Graff*, 311 Minn. 111, 248 N.W.2d 291 (1976) (imputation doctrine could not be asserted against the receiver because the receiver represents the rights of creditors and is not bound by the fraudulent acts of a former officer of the corporation); *Arthur Andersen LLP v. Superior Court of Los Angeles County*, 67 Cal.App.4th 1481, 79 Cal.Rptr.2d 879 (1998) (holding that the liquidator acts in his capacity on behalf of the public interest and, therefore, is not subject to the *593 imputation defense that an "ordinary receiver" may face); *In re Integrity Insurance Co.*, 240 N.J.Super. 480, 573 A.2d 928 (1990) (holding that the liquidator was not barred by the defendant accounting firm's imputation defense because of the "unique situation" imposed by New Jersey's insurance code); and *LeBlanc v. Bernard*, 554 So.2d 1378 (La.App.1989) (finding that the circuit court erred as a matter of law by placing the rehabilitator of an insolvent insurance company "in the exact shoes" of the insurance company).

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In its petition for rehearing, BDO argues that this court should have addressed several cases which they raised in motions to cite additional authority. While we did consider these cases in reaching our initial opinion, we choose to address them now. BDO argues that the holding in *Holland v. Arthur Andersen & Co.*, 127 Ill.App.3d 854, 82 Ill.Dec. 885, 469 N.E.2d 419 (1984) (*Holland I*), was modified by the subsequent holding in *Holland v. Arthur Andersen & Co.*, 212 Ill.App.3d 645, 156 Ill.Dec. 797, 571 N.E.2d 777 (1991) (*Holland II*). *Holland II* affirmed summary judgment for Andersen against American Reserve Corporation (ARC). In doing so, the court pointed out that Holland, ARC's trustee in bankruptcy, failed to provide "support for a theory of damages as to ARC," as opposed to damages suffered by ARC's creditors. *Holland II*, 212 Ill.App.3d at 652, 156 Ill.Dec. 797, 571 N.E.2d 777. The Liquidator in the instant case has presented a theory of recovery for damages to the companies as well as to creditors. We note that the *Holland II* court also rejected the trustee's reliance on cases in which bankruptcy trustees were held to have ***622 **335 standing to prosecute creditor's claims. "By the plaintiff's own admission, these cases involved either the fraudulent conveyance of an entity's assets wherein the trustee is empowered by statute to assert the creditors' claims or situations in which the trustee on behalf of the creditors pierced the corporate veil to retrieve assets to be rightfully distributed amongst the creditors in general. These are not the circumstances of this case." *Holland II*, 212 Ill.App.3d at 653, 156 Ill.Dec. 797, 571 N.E.2d 777. The instant case involves exactly the circumstances mentioned by plaintiff in *Holland II*.

BDO's petition for rehearing also cites the holding in *Republic Life Insurance Co. v. Swigert*, 135 Ill. 150, 25 N.E. 680 (1890), in support of its imputation argument. We believe that *Swigert* strongly supports our holding that the imputation doctrine cannot apply to the liquidator. In *Swigert*, the state auditor filed a petition against Republic Life Insurance Company under the dissolution statute then in effect. The auditor sought to compel the corporation's stockholders to pay for subscriptions to stock which had been surrendered to the corporation. In holding for the stockholders, the supreme court pointed out that "there were no debts due the company from the stockholders here in question." *Swigert*, 135 Ill. at 175, 25 N.E. 680.

*594 The court described the receiver's powers as follows:

"A receiver, *virtute officii*, and without regard to any expansion of his powers by statute or by an authorized decree of court, is only a custodian of property. He is ordinarily, in respect to his title and in respect to the litigations in which he may engage, merely the representative of the owners of the property submitted to his control. But, so far as his powers are derived from a statute or from a lawful decree of court, and the powers do not involve rights which, at the time of his appointment, were vested in such owners, he is not merely their representative, but is the instrument of the law and the agent of the court which appointed him. Such right and authority as the law and the court rightfully give him he possesses, and, in respect to such right he is not circumscribed and limited by the right which was vested in and available to the owners.

Nor is it provided in the statute, nor legitimately deducible therefrom, as is the case in respect to the statutes in force in some jurisdictions, that the receiver may represent creditors, and bring suits to set aside acts of the persons or corporations whose property is in charge of the receivers, which were in fraud of such creditors. The legislature has made no provision of this kind, and in its absence it does not devolve upon the courts, by judicial legislation, to assume a jurisdiction that they have not heretofore possessed." *Swigert*, 135 Ill. at 176-78, 25 N.E. 680.

While the pertinent statutes in 1877 did not provide for receivers of insolvent insurance companies to have the ability to file suit to recover monies due the companies with the purpose of then paying the creditors of those companies, this oversight has been remedied by section 191 and 193 of the Insurance Code (215 ILCS 5/191, 193 (West 2006)). Clearly, the Liquidator possesses the powers granted him under sections 191 and 193 and, in respect to pursuing these rights, "he is not circumscribed and limited by

the right which was vested in and available to the owners." *Swigert*, 135 Ill. at 177, 25 N.E. 680.

Finally, BDO also relies upon *People v. Bank of Peoria*, 295 Ill.App. 543, 15 N.E.2d 333 (1938). The *Barrett* court held that the director of insurance was not permitted ***623 **336 to act as a representative of creditors under the pertinent insurance statutes as passed in 1925 and as amended in 1928. Again, sections 191 and 193 now provide for such powers.

Here, the imputation doctrine also cannot apply to the Liquidator where Engle clearly engaged in fraudulent conduct for the distinctly private purpose of lining his own pockets at the insurance companies' expense. We agree with *Reider* and *Holland* that it would be unlawful, *595 as well as illogical, to impute Engle's guilty knowledge or disloyal, predatory conduct to his corporate principals, the insurance companies or to the Liquidator, who is statutorily charged with preserving the rights of the policyholders and creditors. *Swigert*, 135 Ill. at 178, 25 N.E. 680; *Reider*, 47 Conn.Supp. at 210, 784 A.2d at 470; *Holland*, 127 Ill.App.3d at 866, 82 Ill.Dec. 885, 469 N.E.2d 419.

As a result of our finding that Engle's conduct cannot be imputed to the insurance companies and, in turn, the Liquidator, we likewise find that the sole-owner doctrine does not apply. The record does not show that Engle had unbreakable communication with the insurance companies. In fact, the record does not make clear the level of communication or operational organization of the insurance companies. In addition, the record does not demonstrate that the insurance companies benefitted from Engle's wrongdoing.

24 25 26 In addition, although we need not reach BDO's argument that the doctrine of *in pari delicto* applies, we address it here briefly. "*In pari delicto*" means "[e]qually at fault." *King v. First Capital Financial Services Corp.*, 215 Ill.2d 1, 34, 293 Ill.Dec. 657, 828 N.E.2d 1155 (2005), quoting Black's Law Dictionary 806 (8th ed.2004). *In pari delicto* is intended for situations in which the victim is a participant in the misconduct giving rise to his claim. *In re Edgewater Medical Center*, 332 B.R. 166, 176 (Bankr.N.D.Ill.2005) (applying Illinois law). "The *in pari delicto* defense exists only because wrongdoers must not be permitted to profit from their wrongdoing." *In re Edgewater Medical Center*, 332 B.R. at 178. Furthermore, the *in pari delicto* defense "loses its sting" once the person who is in *in pari delicto* is removed. *In re Edgewater Medical Center*, 332 B.R. at 177. In *Albers v. Continental Illinois Bank & Trust Co.*, 296 Ill.App. 596, 599, 17 N.E.2d 67 (1938), the court held that the doctrine of *in pari delicto* could not be asserted against a bank receiver, who, similar to the Liquidator, is an administrative officer of the state with rights, powers and duties conferred by statute.

27 In the instant case, the *in pari delicto* doctrine cannot apply because the Liquidator, by statutory definition, is not the wrongdoer; rather, he serves to protect the insurance industry and the public interest by ensuring the victims of the misconduct can recover monies entitled to them. To equate the Liquidator with Engle under *in pari delicto* is illogical and unavailing. Furthermore, Engle was removed from any potential recovery upon the Liquidator's filing of the Engle federal action. BDO's assertion of the *in pari delicto* defense is rejected.

Accordingly, we find as a matter of first impression that the imputation defense is inapplicable against the Liquidator. This decision is supported by Illinois law and public policy that vests the Liquidator with the statutory authority to liquidate the property, business *596 and affairs of the insolvent insurance company in order to protect policyholders and creditors from the type of misconduct which occurred here. See 215 ILCS 5/193 (West 2006); *Coronet Insurance*, 201 Ill.App.3d at 637-38, 146 Ill.Dec. 973, 558 N.E.2d 1307. In addition, based on our finding that BDO's imputation defense does not apply and, consequently, ***624 **337 the underlying doctrines of sole owner and *in pari delicto* likewise are inapplicable, we find that the circuit court erred by dismissing counts I, II and III of the Liquidator's September 22, 2005, complaint against BDO.

III. CONCLUSION

Accordingly, the Rule 308 certified question is not answered, but addressed by separate holding and the decision of the circuit court of Cook County to dismiss counts I, II and III of the Liquidator's complaint is reversed and remanded for further proceedings.

Certified question not answered; reversed and remanded.

CUNNINGHAM and COLEMAN, JJ., concur.⁴

Parallel Citations

391 Ill.App.3d 565, 909 N.E.2d 310

Footnotes

- 1 The Administrative Code defines an insurer as "a domestic insurance company as defined in Section 2(f) of the Illinois Insurance Code (Ill.Rev.Stat.1985, ch. 73, par. 614(f))." 50 Ill. Adm.Code § 925.30 (1991).
- 2 In our original opinion in this case, we asserted "The claims as set forth in the 1997 BDO action were timely under the pertinent statutes of limitation and repose." We agree with BDO's position in their petition for rehearing that the timeliness of the Liquidator's claims is still at issue on remand.
- 3 The record does not include the exact date of settlement of the Engle federal action.
- 4 Due to the fact that Justice Alan Greiman, who sat for oral argument, is no longer with this Court, Justice Sharon Johnson Coleman shall now become the third panel member. Justice Coleman has reviewed the briefs and oral argument tape in this case.

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North Carolina State Bar ("Rule 1.2"). Under RPC 223, "the client's failure to contact the lawyer within a reasonable period of time after the lawyer's last contact with the client must be considered a constructive discharge of the lawyer." Ethics op. RPC 223, *N.C. State Bar Lawyers' Handbook 1999*, at 198, 199 (Jan. 12, 1996). Once reasonable attempts to locate the client prove to be unsuccessful, RPC 223 requires that the lawyer withdraw from the representation of a client who has disappeared. Rule 1.2(a) requires a lawyer to "abide by a client's decisions" and to "consult with the client as to the means by which they are to be pursued." R. Prof. Conduct N.C. St. B. 1.2(a), 1999 Ann. R. N.C. 503.

Although, as the law firm argues, RPC 223 is based on facts distinguishable from those in this case, RPC 223, Rule 1.2(a), and *Amethyst Corp.* correctly emphasize the principle that a lawyer cannot properly represent a client with whom he has no contact. Here, as in *Amethyst Corp.*, no attorney-client relationship exists between defendant and the attorneys seeking to represent him. The law firm has had no contact with defendant and has not been authorized by him to undertake his representation in this or any other matter. Therefore, we conclude that the trial court erred in failing to remove the firm from the representation of Shoemate. Accordingly, we affirm the Court of Appeals' holding that the law firm lacks the authority to act on Shoemate's behalf.

Having held that a law firm or attorney may not represent a client without the client's permission to do so, we note that Rule 24 of the North Carolina Rules of Civil Procedure provides a means by which an interested party, under certain circumstances, may intervene in a pending lawsuit. Under Rule 24(a)(2), anyone may be allowed to intervene in a pending lawsuit

[w]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and he [or she] is so situated that the disposition of the action may as a practical matter impair or impede his [or her] ability to protect that interest, unless the applicant's interest is

adequately represented by the existing parties.

N.C.G.S. § 1A-1, Rule 24(a)(2) (1990). Thus, intervention is an appropriate mechanism by which an interested party may attempt to protect its interests in pending litigation.

AFFIRMED.



Donald M. MONSON, Plaintiff,

v.

PARAMOUNT HOMES, INC., Defendant
and Third-Party Plaintiff,

v.

Simplex Products Division of K2Inc. and
Carolina Builders Corporation,
Third-Party Defendants.

No. COA98-463.

Court of Appeals of North Carolina.

May 18, 1999.

Subsequent owners of home brought action against general contractor for defective construction. Contractor brought third-party action against subcontractor alleging breach of contract, breach of express and implied warranties, and negligence. The Superior Court, Durham County, Ronald L. Stephens, J., dismissed contractor's third-party complaint. Contractor appealed. The Court of Appeals, Hunter, J., held that contractor's claims were time-barred under statute of repose.

Affirmed.

Greene, J., dissented in separate opinion.

1. Limitation of Actions ⇨18

Statute of repose applies to defective improvements to real property by a materialman, meaning one who furnishes or supplies

materials used in building construction, renovation or repair. G.S. § 1-50(5)(c).

2. Limitation of Actions ⇨46(6), 47(1), 49(7), 55(5)

Third-party claims of contractor against subcontractor, for breach of contract, breach of express and implied warranties, and negligence, were time-barred under statute of repose, as they were not filed within six years after last act and date of substantial completion; subcontractor substantially completed its duties under its contract with contractor by supplying materials for original construction of house, at that time statute of repose began to run, and repairs to home made by subcontractor four years later did not reset running of statute. G.S. § 1-50(5).

3. Limitation of Actions ⇨104.5

While equitable doctrines may toll statutes of limitation, they do not toll substantive rights created by statutes of repose.

4. Limitation of Actions ⇨165

A statute of repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue, and functions to give a defendant a vested right not to be sued if the plaintiff fails to file within the prescribed period.

5. Limitation of Actions ⇨165

A statute of repose bars an action a specified number of years after a defendant has completed an act, even if the plaintiff has not yet suffered injury.

6. Limitation of Actions ⇨43

The later of the last act or omission or date of substantial completion is the date at which time the party, contractor, builder, etc., has completed performance of the improvement contract, for purposes of the statute of repose, and accordingly, the last omission may occur when the party fails to perform or does not complete performance. G.S. § 1-50(5).

7. Limitation of Actions ⇨43

A duty to complete performance may occur after the date of substantial completion, however, a "repair" does not qualify as

a "last act" under statute of repose unless it is required under the improvement contract by agreement of the parties. G.S. § 1-50(5).

Appeal by defendant and third-party plaintiff Paramount Homes, Inc., from judgment entered 15 January 1998 by Judge Ronald L. Stephens in Durham County Superior Court. Heard in the Court of Appeals 5 January 1999.

Brown, Todd & Heyburn, P.L.L.C., by Julie M. Goodman, Lexington, and Smith Helms Mulliss & Moore, L.L.P., by Gary R. Govert, Raleigh, for defendant and third-party plaintiff-appellant.

Hunton & Williams by Steven B. Epstein, Raleigh, for third-party defendant-appellee Carolina Builders Corporation.

HUNTER, Judge.

In August 1990, general contractor defendant Paramount Homes, Inc. ("Paramount") completed the house at issue in this case. Paramount sold the home to the original owner, who subsequently sold the house to plaintiff in 1993. On 29 August 1996, plaintiff filed suit against Paramount for defective construction of the house. Plaintiff alleged use of defective materials and improper installation of windows, doors, and exterior insulation and finish systems ("EIFS") cladding, also known as synthetic stucco. Paramount, in turn, sought indemnity and contribution from Simplex Products Division of K2inc. ("Simplex"), the manufacturer of the EIFS installed at plaintiff's house, by third-party complaint filed 20 December 1996. During discovery, Paramount learned that Carolina Builders Corporation ("CBC") had made repairs and replacements to the windows and doors at the house at plaintiff's request in 1994. CBC had manufactured and sold the materials to Paramount during original construction of the house. Paramount filed a motion on 16 October 1997 to add CBC as a second third-party defendant, which was granted on 23 October 1997. Paramount filed its amended third-party complaint on 29 October 1997 alleging causes of action against CBC for

breach of contract, breach of express and implied warranties, and negligence. CBC moved to dismiss, pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. CBC's motion was granted on the grounds that Paramount's claims were filed after the applicable statute of repose had expired. On 28 April 1998, plaintiff filed a voluntary dismissal with prejudice of his lawsuit. On 29 May 1998, Paramount filed a voluntary dismissal with prejudice of its third-party claims against Simplex. Paramount appeals the dismissal of CBC as a third-party defendant.

[1] The parties acknowledge that the applicable statute of repose in the present case is the real property improvement statute which states:

No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the *later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.*

N.C. Gen.Stat. § 1-50(5)(a) (1996) (emphasis added). While the statute does not clarify the meaning of "last act or omission" any further, "substantial completion" means

that degree of completion of a project, improvement or specified area or portion thereof (in accordance with the contract, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended. The date of substantial completion may be established by written agreement.

N.C. Gen.Stat. § 1-50(5)(c) (1996). N.C. Gen.Stat. § 1-50(5) applies to defective improvements to real property by a materialman, meaning one who furnishes or supplies materials used in building construction, renovation or repair. *Forsyth Memorial Hospital v. Armstrong World Industries*, 336 N.C. 438, 444 S.E.2d 423 (1994). Thus, N.C. Gen. Stat. § 1-50(5) applies to CBC in the present case.

[2] Paramount contends the court erred in granting CBC summary judgment because its "last act or omission" giving rise to the relevant claims was the repairs completed by CBC in 1994; therefore, the claim is valid since it was filed in 1997, well within the six year statute of repose. Paramount supports its position by citing *New Bern Assoc. v. The Celotex Corp.*, 87 N.C.App. 65, 359 S.E.2d 481, *disc. review denied*, 321 N.C. 297, 362 S.E.2d 782 (1987).

In *New Bern*, plaintiff New Bern Associates brought suit against the Celotex Corporation ("Celotex") alleging breach of warranties in connection with roofing materials manufactured by Celotex and installed on plaintiff's building. Construction of the building, including the installation of Celotex's roofing materials, had been substantially completed on or prior to 18 March 1975. On 28 April 1986, Celotex asserted third-party claims for indemnity and contribution against T.A. Loving Company ("Loving"), the general contractor responsible for constructing the building and installing the roofing materials. In regards to when the statute of repose began to run, the Court held that the 1963 version of the statute applicable in *New Bern* is the same as the 1981 version, stating: "We think it means nothing different from the language of the 1981 version in which the statute runs 'from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.'" *Id.* at 70-71, 359 S.E.2d at 485. Therefore, the Court found that the claim against Loving would be valid, under the statute of repose, only if the substantial completion date or last act or omission of Loving occurred on or after 28 April 1980.

The evidence in *New Bern* indicated that the completion date was 18 March 1975; however, one of Loving's employees was involved in continuous efforts to repair the property from the 18 March 1975 completion date until after 28 April 1980. This Court found that the dispute over whether the individual was actually Loving's agent after 28 April 1980 was a genuine issue of material fact as to whether Loving's "last act or omission alleged to give rise to plaintiff's injury

occurred within six years of the date Celotex filed its third-party complaint," and remanded the case in order for this determination to be made. *Id.* at 71, 359 S.E.2d at 485. The Court did not hold that the individual's acts, if he were Loving's agent after 28 April 1980, would qualify as Loving's "last act or omission" under the statute of repose. Therefore, *New Bern* is persuasive, but not controlling in the case *sub judice*. The dispositive issue in the present case is whether a repair qualifies as the "last act or omission" under N.C. Gen.Stat. § 1-50(5).

While the Court in *New Bern* referred to the repairs in question as continuous efforts after the completion date, it gave no indication whether these repairs were pursuant to the original improvement contract, a warranty, or new and separate contracts. In the present case, Paramount alleges in its third-party complaint that CBC, pursuant to contract, supplied Paramount with windows, doors, and associated materials for use in construction of the house in 1990. Paramount further alleges that, pursuant to the plaintiff's dissatisfaction with the materials:

CBC returned to the House [sic] in approximately the spring or summer of 1994 to inspect, repair, and replace the windows about which the plaintiff had complained. Upon information and belief, CBC performed this repair and replacement work pursuant to a warranty and did not charge the plaintiff for replacement parts provided.

While alleging in its third-party complaint that the repairs were completed pursuant to a warranty given in 1990, Paramount also attempts, in its brief, to classify the 1994 repairs as duties under the original 1990 improvement contract. The allegations of the third-party complaint must be treated as true, as the court is ruling on a motion to dismiss for failure to state a claim upon which relief can be granted. *Hickman v. McKoin*, 337 N.C. 460, 462, 446 S.E.2d 80, 82 (1994). Paramount never alleges in its third-party complaint, or in its brief, that CBC failed to complete performance and finish the improvement in 1990. The record reveals, and both parties concede, that the plaintiff's house was completed in 1990. Thus, CBC

had completed its duties under its contract with Paramount in 1990 and the statute of repose began to run.

Paramount has not contended that the 1994 repair should be classified as a new and separate improvement, thus starting the running of a second statute of repose. Therefore, this issue is not addressed. Paramount, however, does contend that the statute of repose did not begin running or was "reset" in 1994 because CBC "must have believed that it had a duty to do those [1994] repairs, and any such duty could only have been created pursuant to its contract with Paramount and the warranties provided in connection with that contract." While Paramount opines as to why CBC made the repairs, it presents no evidence that CBC had a continuing duty to complete any repairs under the original 1990 improvement contract. Also, there is no evidence in the record indicating that CBC had a continuing duty to repair under any implied or express warranty.

Assuming *arguendo* that a continuing duty of repair existed pursuant to a warranty, no evidence indicates that CBC had a continuing duty to repair under the improvement contract with Paramount. A warranty is unique in that it anticipates future performance; therefore, this Court has held that a statute of limitations is tolled during the time the seller endeavors to make repairs to enable the product to comply with a warranty. *Haywood Street Redevelopment Corp. v. Peterson Co.*, 120 N.C.App. 832, 463 S.E.2d 564 (1995). In that case, the defendant gave a written express warranty on a waterproofing surface on plaintiff's parking lot on 15 June 1988 and agreed to correct deficiencies in the work until 15 March 1993. The Court stated that the warranty "is in the nature of a prospective warranty, in that it guarantees the future performance of the waterproofing for a stated period of time." *Id.* at 836, 463 S.E.2d at 566 (citations omitted). Therefore, on each day the waterproofing was not free of defects, there was a new breach of the warranty. With the occurrence of each breach, a new cause of action accrued. *Id.* at 837, 463 S.E.2d at 567. The case was reversed and remanded because the statute of

limitations was tolled during the repair period, and because the breach of warranty claim was filed within three years pursuant to N.C. Gen.Stat. § 1-52(1) (1983)—the statute of limitations applicable to breach of warranty and contract claims.

Haywood is distinguishable from the present case. Paramount, while alleging breach of implied and express warranties, does not rely on the statute of limitations found in N.C. Gen.Stat. § 1-52(1), which applies to breach of warranty. However, the holding in *Haywood* does indicate that once the improvement to which the warranty applied was completed, the applicable statute of limitations began running. A subsequent repair, pursuant to a warranty, tolled the running of the statute of limitations, but it did not “reset” the running of the statute of limitations. Likewise, Paramount presents no precedent for the proposition that the statute of repose, once it begins running upon completion of the improvement, can be “reset” or “tolled” during a repair. The holding of *New Bern* never determined affirmatively that the statute of repose began running at a certain date, thus the issues of “tolling” or “resetting” were never addressed.

In another similar case, *Cascade Gardens v. McKellar & Assoc.*, 194 Cal.App.3d 1252, 240 Cal.Rptr. 113 (1987), the defendant developed the Cascade Gardens Condominiums from 1972 to 1973 and filed its notice of completion on 13 July 1973. Soon after the homeowners moved into the condominiums, they notified defendant developer of roof leaks, as well as other defects. Defendant contracted with a roofing company to reroof the condominiums, which took from December 1973 to March 1974. The Court did not find that the repair reset the applicable statute of limitations which began at the date of completion, however, the statute was tolled during the four month period of repairs. *Cascade*, 240 Cal.Rptr. at 116-17.

[3-5] While equitable doctrines may toll statutes of limitation, they do not toll substantive rights created by statutes of repose. *Stallings v. Gunter*, 99 N.C.App. 710, 716, 394 S.E.2d 212, 216 (citing Restatement (Second) of Torts § 899, Comment (g) (1979)), *disc. review denied*, 327 N.C. 638,

399 S.E.2d 125 (1990). The statute of repose codified as N.C. Gen.Stat. § 1-50(5) is “designed to limit the potential liability of architects, contractors, and perhaps others in the construction industry for improvements made to real property.” *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 427-28, 302 S.E.2d 868, 873 (1983). To allow the statute of repose to toll or start running anew each time a repair is made would subject a defendant to potential open-ended liability for an indefinite period of time, defeating the very purpose of statutes of repose such as N.C. Gen.Stat. § 1-50(5). See, e.g., *Tetterton v. Long Manufacturing Co.*, 314 N.C. 44, 56, 332 S.E.2d 67, 74 (1985). A statute of repose “serves as an unyielding and absolute barrier that prevents a plaintiff’s right of action even before his cause of action may accrue,” *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985), and functions to give a defendant a vested right not to be sued if the plaintiff fails to file within the prescribed period. *Colony Hill Condominium I Assoc. v. Colony Co.*, 70 N.C.App. 390, 320 S.E.2d 273 (1984). In short, a statute of repose bars an action a specified number of years after a defendant has completed an act, even if the plaintiff has not yet suffered injury. Our Supreme Court has stated:

Statutes of limitation are generally seen as running from the time of injury, or discovery of the injury in cases where that is difficult to detect. They serve to limit the time within which an action may be commenced after the cause of action has accrued. Statutes of repose, on the other hand, create time limitations which are not measured from the date of injury. These time limitations often run from defendant’s last act giving rise to the claim or from substantial completion of some service rendered by defendant.

Trustees of Rowan Tech. v. Hammond Assoc., 313 N.C. 230, 234 n. 3, 328 S.E.2d 274, 276-77 n. 3 (1985); see *Boudreau v. Baughman*, 322 N.C. 331, 368 S.E.2d 849 (1988) (statute of repose sets a fixed time limit beyond which plaintiff’s claim will not be recognized); *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 440, 302 S.E.2d 868, 880

("unless the injury occurs within the six-year period, there is no cognizable claim").

[6, 7] According to N.C. Gen.Stat. § 1-50(5), the statute of repose begins running at the later of the last act or omission or date of substantial completion. Other courts have held that since all liability has its genesis in the contractual relationship of the parties, an owner's claim arising out of defective construction accrues on completion of performance "no matter how a claim is characterized in the complaint—negligence, malpractice, breach of contract." *City School Dist. of Newburgh v. Stubbins & Assocs.*, 85 N.Y.2d 535, 626 N.Y.S.2d 741, 742-43, 650 N.E.2d 399, 400-01 (1995). We agree with this reasoning. The logical interpretation of our statute includes classifying the later of the last act or omission or date of substantial completion as the date at which time the party (contractor, builder, etc.) has completed performance of the improvement contract. Accordingly, the last omission may occur when the party fails to perform or does not complete performance. A duty to complete performance may occur after the date of substantial completion, however, a "repair" does not qualify as a "last act" under N.C. Gen.Stat. § 1-50(5) unless it is required under the improvement contract by agreement of the parties.

Our holding coincides with the public policy encouraging repairs and subsequent remedial measures, codified in Rule 407 of the North Carolina Rule of Evidence. Rule 407 provides, in part: "When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event." N.C.R. Evid. 407. The commentary to this rule makes its purpose clear:

The . . . more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs . . . and the language of the present rule is broad enough to encompass [such application].

Id. (Commentary). The rationale behind this policy is that a party might avoid repairing work it had earlier performed, or a product it had earlier manufactured and sold, if it believed that such repairs might later be construed as an admission that the original work was improper or defective. See 2 *Weinstein's Federal Evidence* § 407.03[1] (1999). To allow subsequent repairs to restart the statute of repose would defeat the policy underpinning both Rule 407 and N.C. Gen. Stat. § 1-50(5).

Based on the foregoing, we hold that the last act or omission by CBC in completing the improvement at issue—in this case supplying materials for original construction of plaintiff's house—occurred on or prior to August 1990, the date of substantial completion. At that point, performance was completed by CBC and in accordance with N.C. Gen.Stat. § 1-50(5), the statute of repose began to run. The repairs in 1994 did not reset the running of the statute of repose. Therefore, the claims of Paramount against CBC are time-barred under N.C. Gen.Stat. § 1-50(5), as they were not filed until after August 1996, more than six years after the last act and date of substantial completion. The trial court did not err when it granted CBC's motion to dismiss.

Affirmed.

Judge JOHN concurs.

Judge GREENE dissents.

GREENE, Judge, dissenting.

I would hold that the trial court erred in dismissing Paramount's complaint; therefore I respectfully dissent from the majority opinion.

When deciding a motion to dismiss, the trial court must determine "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. . . ." *Harris v. NCNB*, 85 N.C.App. 669, 670, 355 S.E.2d 838, 840 (1987). A complaint should not be dismissed "unless it affirmatively appears that the plaintiff is entitled to no relief under any state of facts which could be presented in

support of the claim.” *Forsyth Memorial Hospital v. Armstrong World Industries*, 336 N.C. 438, 444, 444 S.E.2d 423, 427 (1994) (quoting *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985)); see also *Arroyo v. Scottie’s Professional Window Cleaning*, 120 N.C.App. 154, 158, 461 S.E.2d 13, 16 (1995) (noting that complaints must be liberally construed on a motion to dismiss), *disc. review improvidently allowed*, 343 N.C. 118, 468 S.E.2d 58 (1996). Accordingly, unlike the majority, I do not find it dispositive that Paramount has “present[ed] no evidence that CBC had a continuing duty to complete any repairs under the original 1990 improvement contract” or that “there is no evidence in the record indicating that CBC had a continuing duty to repair under any implied or express warranty.” Slip op. at 6–7. Paramount’s allegations, liberally construed and taken as true, suffice at this stage of the proceedings.

The applicable six-year statute of repose begins to run at the later of (1) “the specific last act or omission of the defendant giving rise to the cause of action” or (2) “substantial completion” of the improvement. N.C.G.S. § 1–50(a)(5) (Supp.1998). The “last act” giving rise to the cause of action is determined by “the nature of the services [the defendant] agreed to perform.” *Hargett v. Holland*, 337 N.C. 651, 656, 447 S.E.2d 784, 788 (construing similar language in section 1–15(c)), *reh’g denied*, 338 N.C. 672, 453 S.E.2d 177 (1994).

In this case, Paramount alleges CBC “made numerous express and implied warranties to Paramount, concerning the windows and associated materials used in construction of the [Monson house].” Accordingly, the nature of the services CBC agreed to perform allegedly included future duties during the warranty period. See *Haywood Street Redevelopment Corp. v. Peterson Co.*, 120 N.C.App. 832, 836, 463 S.E.2d 564, 566–67 (1995) (discussing prospective warranties), *disc. review denied*, 342 N.C. 655, 467 S.E.2d 712 (1996). In 1994, CBC allegedly repaired and/or replaced windows in the Monson house pursuant to the warranty, i.e., pursuant to its duties to Paramount. It follows that

CBC’s “last act” under the contract occurred in 1994.

In any event, Paramount’s complaint further alleges “the CBC windows installed in the [Monson house] continued to leak and allow moisture intrusion behind the EIFS cladding on the [Monson house] even after CBC’s repair and replacement.” It therefore follows that the statute of repose began to “run anew” from the date of CBC’s repairs, because the replacement windows were defective and were a proximate cause of damage to the Monson house. See 63B Am. Jur.2d *Products Liability* § 1629 (1997) (noting that the “time period in a statute of repose may run anew with respect to a replacement part for a product, if the replacement part itself is defective . . . and is the proximate cause of the plaintiff’s injuries”).

In addition, I believe *New Bern Assoc. v. The Celotex Corp.*, 87 N.C.App. 65, 359 S.E.2d 481, *disc. review denied*, 321 N.C. 297, 362 S.E.2d 782 (1987), controls the outcome of this case. The majority attempts to distinguish *New Bern* by stating that we did not hold that repairs may constitute the “last act” giving rise to a cause of action in that case. I disagree. In *New Bern*, we reversed and remanded the trial court’s grant of summary judgment. Summary judgment, as this Court noted therein, is appropriate “if there is no genuine issue of material fact and any party is entitled to judgment as a matter of law.” *New Bern*, 87 N.C.App. at 68, 359 S.E.2d at 483 (emphasis added). The evidence in *New Bern* was equivocal as to whether the individual who had conducted repairs within six years of the filing of the plaintiff’s action acted as the defendant’s agent; accordingly, there existed a genuine issue of fact as to whether the defendant had made repairs within the preceding six years. If the repairs at issue could not have constituted the “last act” giving rise to the cause of action, this genuine issue of fact would not have been material, and therefore would not have supported our reversal of the trial court’s decision. Contrary to the majority’s conclusion, therefore, this Court has determined that repairs may constitute the “last act” of the defendant giving rise to the cause of action. Accordingly, we are bound, at this

stage of the proceedings, to hold that the applicable statute of repose began to run in 1994, the date of the alleged "last act" giving rise to the cause of action. See *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding one panel of the Court of Appeals is bound by the decisions of other panels unless they have been overturned by a higher court).

Finally, I disagree with the majority's conclusion that treating a repair as the "last act" would defeat our public policy encouraging repairs. To the contrary, treating a repair as the "last act" would, in fact, encourage repairs as an alternative to litigation. In other words, refusing to treat a repair as the "last act" would encourage the homeowner to bring suit immediately upon noticing a defect (*i.e.*, before the statute of repose has run), rather than working with the contractor (or subcontractor) for a nonlitigious solution.



Johnny Richard GIBSON,
Petitioner/Appellant,

v.

Janice FAULKNER, Commissioner North
Carolina Division of Motor Vehicles,
Respondent/Appellee.

No. COA98-712.

Court of Appeals of North Carolina.

April 6, 1999.

Motorist who was found not guilty of driving while impaired (DWI) brought action challenging Division of Motor Vehicles' (DMV) suspension of his driving privilege for 12 months based on his willful refusal to submit to chemical analysis. The Superior Court, Haywood County, Jesse B. Caldwell, III, J., denied relief. Motorist appealed. The Court of Appeals, Horton, J., held that: (1) information provided to state trooper by off-

duty deputy sheriff provided reasonable grounds for trooper to stop motorist; (2) record supported finding that motorist was advised of his rights under implied consent statute; and (3) motorist's acquittal on DWI charge did not collaterally estop DMV from revoking his driving privilege.

Affirmed.

1. Automobiles \S 349(6)

Information provided to state trooper by off-duty deputy sheriff provided reasonable grounds for trooper to stop motorist for implied consent offense, even if deputy's information would be inadmissible in court as hearsay.

2. Courts \S 90(2)

Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.

3. Automobiles \S 144.2(10.5)

Record in action challenging administrative driver's license suspension supported trial court's finding that motorist was advised of his rights under implied consent statute, even if district attorney referred to wrong subsection of that statute when he questioned trooper as to whether motorist had been so advised; trooper testified that he presented motorist with written rights form that motorist refused to sign, such form set out statutory rights in detail, and fact that motorist made telephone calls immediately after being advised of his right to do so indicated that he was fully advised of his rights. G.S. \S 20-16.2(a).

4. Appeal and Error \S 1010.1(4)

Where the trial judge sits as the trier of fact, the court's findings of fact are conclusive on appeal if supported by competent evidence, even though there may be evidence to the contrary.

5. Automobiles \S 422.1

Whether breath test administered to motorist was conducted according to applicable rules and regulations was irrelevant in ensuing civil administrative proceedings for

2011 AUG -1 PM 1:39

No. 65833-6-1

(King County Superior Court No. 08-2-29583-4 SEA)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

LEDCOR INDUSTRIES (USA), INC.,
a Washington Corporation,

Petitioner,

vs.

S.Q.I., INC., a Washington corporation; BORDAK BROTHERS,
INC., an Oregon corporation, *et al.*

Respondents.

CERTIFICATE OF SERVICE

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ORIGINAL

CERTIFICATE OF SERVICE

Elizabeth Bettridge, being first duly sworn on oath, deposes and states:

That on the 1st day of August, 2011, she caused to be sent a copy of Brief of Respondent SQL, Inc.; and this Certificate of Service to the below listed party of record in the above-captioned matter, as follows:

| | |
|------------------------------|---|
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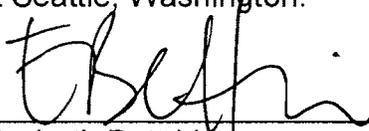
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DATED this 1st day of August, 2011 at Seattle, Washington.



Elizabeth Bettridge