

No. 66902-8

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY,
commonly known as "SOUND TRANSIT,"
a Washington regional transit authority,

Appellant,

v.

STEVEN J. CECCHINELLI, a single individual, and CF SALES, INC., a
Washington corporation,

Respondents,

BRIEF OF APPELLANT

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I. INTRODUCTION

This is a statute of limitation accrual case. The central question is when the two-year statute of limitation in RCW 4.16.130 accrued for claims of damage to third-party property that was caused by a specific construction activity during the construction of a light rail system.

The standard accrual rules are well known. Negligence and strict liability claims for property damage normally accrue when the plaintiff suffers damage. When a plaintiff cannot discover the injury until a later point, the discovery rule delays accrual until the plaintiff knows or reasonably should know the basis for his cause of action. There is no reason to deviate from these rules in the present case.

Plaintiffs, Steven Cecchinelli and CF Sales, Inc. (collectively, "Plaintiffs") asserted a strict liability claim against Sound Transit, alleging that Sound Transit's installation of drilled shaft foundations on its light rail project damaged Plaintiffs' building. The drilled shaft installation began on March 12, 2004 and was completed by August 24, 2004. Plaintiffs sent complaints about the alleged damage to Sound Transit in May of 2004 and October of 2005, and followed up on them in December of 2005. Sound Transit's 1.3-mile-long section of at-grade and elevated light rail track was substantially complete as of May 24, 2006. Plaintiffs

did not file their lawsuit until January of 2009. Under the normal accrual rules, which should apply here, Plaintiffs' claims were barred by the two-year statute of limitation.

Instead of dismissing the claim, however, the trial court incorrectly deferred accrual for more than five years based on the Supreme Court's decision in a vertical construction case. Briefly, vertical construction is the construction of a building, where the entire construction project is adjacent to the third-party property. Horizontal construction, in contrast, involves the construction of projects like streets, highways, railroads, water/sewer systems, etc., that are typically many miles in length with the majority of the work not taking place adjacent to the third-party property. Specifically, the trial court ruled that Plaintiffs were entitled to wait until Sound Transit's contractor on the light rail project was 100% complete with everything related to its contract with Sound Transit -- a contract milestone that had still not occurred (1) more than five and a half years after Plaintiffs' original complaints about damage, (2) more than five years after the specific construction activities alleged to have caused the damage were completed, (3) nearly three years after the work was sufficiently complete to be used for its intended purpose, and (4) after the light rail system was actually open and carrying taxpayers.

For the reasons discussed below, this Court should reverse the trial court's decision and hold that Plaintiffs' claims accrued when the specific construction activity alleged to have caused the damage was finished (August 24, 2004) or, at the latest, when the adjacent light rail construction project was substantially complete (May 24, 2006). In either case, Plaintiffs' lawsuit was not filed within the applicable two-year statute of limitation, and Plaintiffs' claim should have been dismissed as untimely.

II. ASSIGNMENT OF ERROR AND ASSOCIATED ISSUES

Assignment of Error #1. The trial court erred in entering the Order of December 11, 2009, denying defendant Sound Transit's motion for partial summary judgment.

Issue #1. For property damage claims resulting from negligent or abnormally dangerous construction activities on horizontal construction projects (highways, railroads, etc.) where a small portion of the overall project is on adjacent property, does the claim accrue:

- (a) when the specific construction activities alleged to have caused the damage are completed, or
- (b) when the entire construction project is sufficiently complete so that it can be used for its intended purpose (i.e., at substantial completion), or
- (c) some other later date, such as when the project owner and contractor determine that the contractual relationship associated with the construction project is complete?

III. STATEMENT OF THE CASE

A. Statement of the Facts.

1. The Link Light Rail System.

Sound Transit is a regional transit authority, created pursuant to Chapter 81.112 RCW and Chapter 81.104 RCW to plan, develop, operate, and fund a regional high capacity transportation system. See RCW 81.112.010.

In 1996, voters in the Sound Transit district (generally the more populated areas of Pierce, King, and Snohomish counties) authorized the construction and operation of the first stage of this regional transportation system, which includes Sounder Commuter Rail between Tacoma and Everett, Regional Express bus service throughout the Sound Transit district, and construction of the first portion of a light rail system from SeaTac Airport to Northgate. CP 47-48 (Gildner Decl., ¶ 3). In 2008, voters in the Sound Transit district authorized the construction and operation of additional Sounder Commuter Rail service, additional Regional Express bus service, and additional light rail expanding that system north to Lynnwood, south to Redondo/Star Lake (north Federal Way), and east to the Overlake Transit Center (between Bellevue and Redmond). Id. These various stages authorized by voters are referred to as the Sound Transit light rail system (the “Link Light Rail System”). Id.

As of July 2009, the Link Light Rail System was in operation between downtown Seattle and Tukwila, just north of SeaTac Airport. CP 48 (Gildner Decl., ¶ 4). By December 31st of 2009, light rail was operating to SeaTac airport. Id.

2. The C-700 Project.

In October of 2003, Sound Transit entered into a contract (the “C-700 Contract”) with Kiewit Pacific Company (“Kiewit”) for the construction of the portion of light rail extending from Royal Brougham to Airport Way South, a 1.3 mile long section of at-grade and elevated trackway (the “C-700 Project”). CP 41 (Emam Decl., ¶ 5). As part of the C-700 Project, Kiewit in turn entered into a subcontract with Condon Johnson to install drilled shaft foundations to support the later installation of the elevated trackway. CP 41-42 (Emam Decl., ¶ 6). Condon Johnson began the drilled shaft foundations on or about March 12, 2004, and completed them by August 24, 2004. Id.

While the early work of foundation installation was complete in August 2004, the C-700 Project as a whole (including the elevated trackway, stations and other facilities) was substantially complete as of May 24, 2006. CP 55 (Lapetino Decl., ¶ 4), CP 160-163 (Notices of Substantial Completion). Section 1.01 of Sound Transit’s contract with Kiewit defined Substantial Completion in accordance with industry

custom (“utilized for the purpose for which it is intended”) and allowed Sound Transit to establish this date either as to Work as a whole or as to portions:

Substantial Completion: The time at which the Work or portion thereof has progressed to the point where it is sufficiently complete in accordance with the Contract Documents, so that the Work, or specified portion, can be utilized for the purpose for which it is intended.

CP 66.

Sound Transit issued three separate Notices of Substantial Completion for the C-700 Project (the “Notices”). CP 160-163. The first notice established March 31, 2006 as the Substantial Completion date for most of the Project (trackway and aerial structure). CP 160. The second notice added some additional elements to the list of substantially completed work (i.e., Royal Brougham Station, landscaping, bike path etc.) and provided a detailed breakdown of Substantial Completion dates for 10 separate “portions” of the Work, the latest of which was May 24, 2006 (Royal Brougham Station). The third and final notice listed certain drain and sewer work substantially completed in March and April, 2006, respectively, both before the last portion of the C-700 Project was substantially complete on May 24, 2006. Id.

3. Plaintiffs' Claims.

Plaintiff Steven Cecchinelli owns the building at issue in this action (located at 2752 Sixth Avenue South in Seattle) and leases it to Plaintiff CF Sales, Inc., a business in which he is the sole shareholder. CP 4 (Plaintiffs' Complaint, ¶ 2.4). The CF Resources Property is adjacent to a small portion of the 1.3-mile long C-700 Project. Id.

Plaintiffs allege that Sound Transit began "pile driving activities"¹ in "late April or early May of 2004" in close proximity to CF Sales' property, and that shortly thereafter, the floor of the building on the property "began to sink." Id. ¶ 2.5. The First Cause of Action in the Complaint (entitled "Damage to Real Property") is for damage to the real property owned by plaintiff Cecchinelli, specifically that the "pile driving" caused more than \$250,000 in settlement damage to the Property. CP 6.

The Second Cause of Action in the Complaint (entitled "Damage to Personal Property") was brought by the tenant CF Sales for alleged business interruption, specifically that damage to the Property in turn

¹ Throughout the trial court proceedings, Plaintiffs referred to Sound Transit's construction activities on the C-700 project as "pile driving." There were, in fact, no piles driven on the C-700 project. Instead, Sound Transit installed drilled shaft foundations, which are not piles. However, for purposes of the statute of limitation issue on this appeal only, the terms "drilled shaft installation" and "pile driving" are used collectively to mean the Sound Transit foundation construction activities that Plaintiffs allege caused damage to its property and are subject to strict liability.

caused disruption to the tenant's business operations in an unspecified amount. CP 7.

On May 19, 2004, at Plaintiffs' request, a Sound Transit community outreach officer (Roger Pence) walked through the facility to observe the alleged damage, which he determined to be pre-existing. CP 52 (Pence Decl., ¶ 4).

In October of 2005, Plaintiffs sent a "Sound Transit Incident Report" form to Mr. Pence (which Mr. Pence had provided to Plaintiffs at their request). CP 52 (Pence Decl., ¶ 5, 6). This report again alleged that Sound Transit's construction activities had caused settling of the warehouse floor. CP 229. Plaintiffs followed up this report with a December 19, 2005 email stating that it had not heard back from anyone at Sound Transit with respect to the earlier report. CP 52 (Pence Decl., ¶ 5, 6).

Despite not hearing back on either communication, Plaintiffs did not contact Mr. Pence or anyone else at Sound Transit for **more than two years** with respect to the alleged damage.² *Id.* ¶ 5,6. On or about April 16, 2008, Plaintiffs (through their attorney) sent Sound Transit a "claim

² Plaintiffs will likely argue, as they did to the trial court, that Sound Transit was estopped from asserting the statute of limitation defense. This argument is meritless, but Sound Transit will address the argument in reply if raised by Plaintiffs.

report form” again alleging that Sound Transit’s construction activities had caused settlement problems in the Plaintiffs’ building. CP 55 (Lapetino Decl., ¶ 5); CP 165-166 (Letter and claim report form). After review, by letter dated May 9, 2008, Sound Transit’s insurer denied this claim. Id. ¶ 7; CP 172 (denial letter).

On October 22, 2008, Plaintiffs sent an “RCW 4.96.020 Notice of Claim” to Sound Transit claiming that Sound Transit’s pile driving activities had damaged Plaintiff’s real and personal property and demanding compensation for the same. Id. ¶ 6; CP 168-170 (notice of claim). In that claim, Plaintiff asserted that “Sound Transit still has not completed the light rail project, so the statute of limitations on this claim has yet to commence.” CP 169. On January 8, 2009, Plaintiffs filed their lawsuit against Sound Transit. CP 1-8 (summons and complaint).

B. Proceedings Below.

On January 8, 2009, Plaintiffs filed suit in King County Superior Court and served Sound Transit with their complaint, seeking in excess of \$250,000 in damages based on two causes of action. CP 1-8. Plaintiffs’ first cause of action (and the only cause of action at issue in this appeal) was a strict liability claim for damage to its real property predicated solely on Sound Transit’s drilled shaft installation. CP 6 (First Cause of Action). Sound Transit answered the complaint on March 2, 2009. CP 9-21.

On November 6, 2009, Sound Transit filed a motion for partial summary judgment, supported by four declarations, seeking dismissal of Plaintiffs' first cause of action because the lawsuit was filed after the applicable two-year statute of limitation had expired. CP 22-37 (Motion); CP 40-46 (Emam Decl.); CP 47-50 (Gildner Decl.); CP 51-53 (Pence Decl.); and CP 54-172 (Lapetino Decl.). Sound Transit established, without contradiction, that the drilled shaft installation was completed by August 24, 2004 (CP 41-42 (Emam Decl., ¶ 6)) and that the last portion of the Project was substantially complete as of May 24, 2006. CP 160-163.

Plaintiffs opposed the motion on various grounds,³ supported by a declaration from their counsel. CP 173-191 (Response); CP 192-258 (Von Kallenbach Decl.). Sound Transit's reply was supported by a declaration from its counsel. CP 259-266 (reply); CP 267-280 (Tomlinson Decl.). The trial court heard oral argument December 4, 2009 (CP 281) and denied Sound Transit's motion by written order dated December 14, 2009. CP 282-283. On the order, the Court interlineated the following handwritten text:

The Court concludes that a two year statute of
limitation applies. The Court concludes that the

³ Plaintiffs claimed that a three-year statute (not a two-year statute) governed the limitations period, that Substantial Completion is not the correct trigger for the running of the applicable limitation period and that Sound Transit would in any event be barred under equitable tolling from enforcing the limitation period. CP 173-191.

cause of action accrued when the project was completed, not substantially completed. The Court relies upon the policy articulated in Oja and additionally notes that the term “substantial completion” existed in statute prior to Oja but was not used by the Court.

CP 283.

The case was presented to the trial court, without a jury, from January 10 to January 19, 2011. CP 296. Before the trial began, the Court and both parties agreed, off the record, that the two issues presented in Sound Transit’s motion for partial summary judgment (Sound Transit’s argument that the statute of limitation had run before Plaintiffs filed suit, and Plaintiffs’ argument that Sound Transit was estopped from asserting the statute of limitation defense) were both fully developed in the prior motion and were ready for appeal (if necessary) without additional testimony or evidence, and in fact, the Court did not allow additional testimony on the two topics. See, e.g., RP 28:8 - 29:24 (January 13, 2011 Pence Trial Transcript).⁴

In the trial court’s January 21, 2011 findings of fact, conclusions of law, and order (CP 296-303), the Court awarded \$154,800 in damage to

⁴ For example, at 28:2 - 7, the Court stated “Well, if we were litigating the Statute of Limitations issue, that would be pretty relevant. ... But both of you have previously indicated to me that we’re not litigating the Statute of Limitations issue.”

the Property, which was less than 15%⁵ of the amount Plaintiffs sought at trial (CP 303), and awarded the tenant CF Sales nothing on its claim for business interruption.⁶ Final judgment was entered on February 7, 2011, in the amount of \$155,497. CP 347-348. Sound Transit timely filed its notice of appeal on March 29, 2011. CP 372-374.

IV. ARGUMENT

A. Standard of Review.

For purely legal issues, this Court reviews a summary judgment de novo, engaging in the same inquiry as the trial court. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 501, 115 P.3d 262 (2005).

B. A Two-Year Limitation Applies to Plaintiff's Strict Liability Claim.

Plaintiffs' first cause of action alleged strict liability for third-party real property damage. Washington courts have unambiguously held that a strict liability claim for injury to real property is subject to the RCW 4.16.130 "two-year catchall period." See Mayer v. City of Seattle, 102 Wn. App. 66, 75, 10 P.3d 408 (2000) (holding that Mayer's claims for "nuisance, strict liability (abnormally dangerous activity), and negligent injury to real property" are all subject to the two-year limitation in RCW

⁵ No reference to the record is made for the amount plaintiff sought at trial, because plaintiff failed to file a trial brief before or during the trial.

⁶ The Court noted the floors and building "have been and are still useable for CF's business." CP 301.

4.16.130). Pursuant to Mayer and RCW 4.16.130, the statute of limitation on Plaintiffs' First Cause of Action (Damage to Real Property) ran no later than two years after the claim accrued.

C. The Trial Court Erroneously Excused Plaintiff from Filing Suit Within 2 Years of Discovery of the Damage.

Plaintiffs concededly discovered damage from the shaft construction activity by April or May 2004 and did not bring suit until more than four and a half years later. CP 1, ¶2.5. The normal rule in Washington is that negligence and strict liability claims for injury to property accrue as of the date the plaintiff suffers "some form of injury of damage." See Mayer v. City of Seattle, 102 Wn. App. 66, 75-76, 10 P.3d 408 (2000), citing Crisman v. Crisman, 85 Wn. App. 15, 20, 931 P.2d 163 (1997). Where a plaintiff cannot and does not discover the injury until a later point, however, the court may in certain situations apply the discovery rule. Id. at 76. Pursuant to the discovery rule, the statute of limitation will not run until plaintiff "should have discovered the basis for the cause of action." Id., citing Allen v. State, 118 Wn.2d 753, 758, 826 P.2d 200 (1992). As applied here, these normally applicable rules would dictate that Plaintiffs file suit by April or May 2006 (not January 2009). Accordingly, Plaintiffs' claim should have been dismissed as untimely.

Instead, however, the trial court deferred the accrual of Plaintiffs' claims, relying on language in Vern J. Oja & Assoc. v. Wash. Park Towers, Inc., 89 Wn.2d 72, 569 P.2d 1141 (1977). In Oja, the Court considered the construction of a condominium building (vertical construction) involving pile driving. With minimal analysis and discussion, the Oja Court articulated the following:

The damages flowed from the pile driving as a whole and the cause of action accrued when the building was completed. We have reexamined the statute of limitation cases which have been before this court, as urged by respondent, and find this view to be consistent with these cases. ... In those cases involving damage to real property arising out of construction or activity on adjacent property, the cause of action accrues at the time the construction is completed if substantial damage has occurred at that time. If the damage has not occurred when the construction is completed, the action accrues when the first substantial injury is sustained thereafter. In the instant case, substantial damage had occurred when the project was completed. The respondent was entitled to wait until the completion of the construction project before filing a cause of action so that it might determine the full extent of the damages. A different rule would force a plaintiff to seek damages in installments in order to comply with the statute of limitations.

Oja, 89 Wn.2d at 75-76 (internal citations omitted).

If a deferred accrual rule is to be gleaned from the above, it is: "In those cases involving damage to real property arising out of construction or activity on adjacent property, the cause of action accrues at the time the

construction is completed if substantial damage has occurred at that time. If the damage has not occurred when the construction is completed, the action accrues when the first substantial injury is sustained thereafter.” Id.

As applied to this appeal, the primary unanswered question is what the Court meant by completion -- whether accrual occurs when construction is substantially complete or when everything associated with the construction contract, however minor, is 100% complete. This is an issue of first impression because the decision in Oja would have been resolved the same regardless of the answer. For the numerous reasons discussed below, accrual must occur, at the latest, when the adjacent construction is substantially complete.

D. Plaintiffs’ Claim Accrued No Later Than When the Project Was Substantially Complete, May 24, 2006.

The trial court ruled that Plaintiffs were allowed to wait nearly five years after discovery of the alleged damage to bring suit on a claim that would ordinarily be subject to a 2-year statute. This ruling was based on the trial court’s view that Oja required the statute to be tolled until the “project was completed, not substantially completed.” CP 283. Presumably, the Court meant when the contract progressed to the point of Final Acceptance as defined in the C-700 contract (i.e., completion of all minor punch list work, final paper work, resolution of claims between

Sound Transit and its general contractor, and formal Board action to accept the work). CP 283. As of December 2009, however, the contract had still not reached Final Acceptance, despite the light rail opening for public operations months before. CP 183: 15-16. Thus, the trial court presumably ruled that Oja tolled Plaintiffs' claims more than 5 years, allowing the Plaintiffs more than seven years to bring a claim it had known about since 2004.

This Court should reverse the trial court's ruling and dismiss the First Cause of Action⁷ with prejudice because Plaintiffs' property damage claim accrued, at the latest, on May 24, 2006, when Sound Transit's C-700 project was substantially complete. This substantial completion accrual date (1) is the most objectively reasonable, (2) is consistent with the construction statute of repose, and (3) is consistent with the purpose articulated in Oja.

1. The relevant construction project is the C-700 project.

In contrast to their pre-suit notice of claim, Plaintiffs conceded in their summary judgment briefing that the relevant project is the C-700 project rather than the entire Link Light Rail System. CP 175:5 (“Relevant to this lawsuit is the C-700 Project, which involved the

⁷ As noted previously, the trial court awarded nothing to Plaintiff CF Sales on its separate personal property claim (business interruption) and thus there is no further trial court action necessary if Sound Transit's appeal is sustained.

construction of a section of at-grade and elevated trackway from Royal Brougham to Airport Way.”). (Internal citations omitted). If this was not the case, (i.e., if accrual depended upon the completion of the overall Link Light Rail System or even just the 14-mile long initial segment that opened in 2009), claims would not accrue until many years, possibly decades, after the alleged damage, and they could depend on completion of work literally tens of miles away from the property. Plainly, if the claims accrue at the completion of a particular project, that project should be the project that is at least partially adjacent to the property at issue. Here, that was the C-700 project. CP 41.

2. The trigger for commencement of claim accrual should not be a contractual milestone or dependent upon the terms or provisions of any specific contract.

One of the primary purposes of a statute of limitation is to limit the time within which a defendant is subject to potential liability for injuries to a plaintiff that knows of its injury. And Oja’s rationale for allowing the delayed accrual of known injuries resulting from construction activities is so that a plaintiff “might determine the full extent of the damages ... [and avoid requiring] a plaintiff to seek damages in installments.” Oja, 89 Wn.2d at 76. The trigger for claim accrual should necessarily be tied to achieving that specific objective – no more, no less.

There are two basic ways to measure construction progress. The first is in terms of attainment of contract milestones, which are provisions that define contract progress as between the two parties to the contract. The second is in terms of the progress of the construction itself, preferably as can be seen by an objective observer (such as the injured third party). For the accrual of *third-party* claims, the Court should reject the use of any *contract* milestones for several reasons.

First, on private construction projects (i.e., private owner and private contractor), a third-party has no legal right to documentation regarding the attainment of contractual milestones between two different private parties. Without a right to access such information, a plaintiff would not know when its claim accrues, defeating the purpose of the rule.

Second, contract terms and definitions vary from contract to contract. For example, Sound Transit used ‘substantial completion’ (the work is sufficiently complete that it can be used for its intended purpose, with only minor punch list work remaining), ‘acceptance’ (completion of construction work, including punch list work), and ‘final acceptance’ (completion of all contract obligations, including submission of all operations and maintenance manuals and warranty documentation). CP 63, 64, 66 (C-700 Contract Definitions). By contrast, like many construction contracts, one of the leading standard form construction

contracts from the American Institute of Architects (AIA) defines only two contract milestones: ‘substantial completion’ (work is sufficiently complete so that the owner can use the work for its intended purpose) and ‘final completion’ (all work and contract obligations have been completed in accordance with the contract). See Werner Sabo, Legal Guide to AIA Documents §§ 4.54, 4.56 (5th ed. 2008)(stating and explaining AIA A201 ¶ 9.8 [Substantial Completion] and A201 ¶ 9.10 [Final Completion and Final Payment]).⁸ A general rule, such as Oja’s deferred accrual, needs to be universally applicable and not subject to varying terms and definitions in different contracts.

Third, accrual of a *third-party* claim should not depend on when one or both parties to a construction contract take an action that results in a notice of a contractual milestone between the parties to the contract. Pursuant to the C-700 construction contract (which is consistent with RCW 4.16.310 and industry standard), the construction work was substantially complete when the work was sufficiently complete so that it could be used for its intended purpose. CP 66. If Sound Transit had never issued a notice of substantial completion on the C-700 project, the project would have at some point still been substantially complete by any definition. Similarly, a retroactive notice of substantial completion

⁸ A copy of the cited portion of the reference is included in the appendix.

reflects when the parties to the contract agree the work reached the required stage of completion. It has nothing to do with third parties that are not a party to the contract.

Finally, there is no logical basis to tie accrual of third-party claims to *contract* completion. Plaintiffs may argue that the Oja court meant *contract* completion as the trigger for claim accrual. Sound Transit's C-700 project is a perfect example of why that would lead to absurd results. Sound Transit's contract defined *contract* completion by the term 'Final Acceptance.' CP 64. As Plaintiffs noted in their summary judgment briefing, because there were disputed claims between Sound Transit and its contractor, Sound Transit had not issued a notice of Final Acceptance as of November 12, 2009. CP 183:15. As was widely reported in local media, however, the Link Light Rail System began carrying passengers between downtown Seattle and Tukwila in July of 2009 -- four months before then. CP 48 (Gildner Decl., ¶ 4).

It is axiomatic that an injured plaintiff should be able to easily determine when its claims accrue. To do so, accrual of third-party claims should not depend on the attainment of any *contractual* milestone.⁹ Contract milestones often have utterly nothing to do with the fact of (or

lack of) ongoing construction activity and thus do nothing to advance the policy articulated in Oja.

3. A third-party claim should accrue when the construction work adjacent to the property is substantially complete.

To the extent a deferred accrual rule derived from Oja governs this case,¹⁰ the appropriate trigger for accrual of third-party claims due to horizontal construction activities on adjacent property should be when the construction adjacent to the property can be used for its intended purpose - - i.e., when it is substantially complete. Accrual at substantial completion is consistent with the accrual date the Legislature established in the construction statute of repose. It is also the most objectively reasonable trigger because it is the point when the third party can assess the full extent of its alleged damage and when adjacent construction looks like it is ready to be used for its intended purpose because it actually can be seen.

In the construction statute of repose, the Legislature has already established that claims arising out of construction must accrue within six years after **substantial completion**, which the statute defines as “the state

⁹ Of course, *contractual* attainment of substantial completion will often coincide with the work objectively being substantially complete, but the trigger should be when the work is substantially complete, not when a *contractual* notice is issued.

¹⁰ As noted below, Sound Transit questions whether Oja, properly read, in fact requires a deferred accrual where (as here) the offending construction activity is terminated at an early stage in the overall progress of the work and where the project involves horizontal rather than vertical construction.

of completion reached when an improvement upon real property may be used or occupied for its intended use.” RCW 4.16.310. The statute provides, in relevant part:

All claims or causes of action ... shall accrue, and the applicable statute of limitation shall begin to run only during the period within *six years after substantial completion of construction* ... 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 ... shall be barred.

RCW 4.16.310 (emphasis added).

A claim for third party property damage is subject to this statute of repose, which as noted is based on the date of substantial completion. New Meadows Holding Co. by Raugust v. Wash. Water Power Co., 102 Wn.2d 495, 500, 687 P.2d 212 (1984) (“The focus is upon the cause of the damage, not its location. We conclude, therefore, the statute [of repose] applies equally to claims arising from adjacent property.”). Thus, known third-party property damage claims arising out of construction work must accrue no later than substantial completion because there is no logical or legal basis for using a trigger for claim accrual that differs from that enacted by the Legislature in the statute of repose.

Plaintiffs may argue that such a rule would require potential plaintiffs, who are not construction experts, to visually gauge construction completion. This argument is meritless for a number of reasons. First, there is no penalty for filing early – it would be inconceivable for a court to dismiss such a claim on the basis that it was too early. Second, gauging substantial completion does not require any particular expertise. By definition (RCW 4.16.310), a project is substantially complete when it may be used or occupied for its intended purpose -- in other words, it looks done.

Third, a substantial completion trigger is consistent with the purpose of allowing a plaintiff to learn the full extent of its damage before filing suit. The present facts bear this out. Plaintiffs' claim was premised entirely on vibrations due to installation of the drilled shaft foundations. The casings in question were 8 feet in diameter and 150 feet long, and they were installed by a vibratory or impact hammer (similar in appearance to a pile driver) attached to a large tower. After the drilled shaft work was completed in August of 2004, all remaining construction activities on the project were unrelated to Plaintiffs' claim. By the time the project was substantially complete in May 2006, the construction adjacent to the property looked like a completed elevated railroad, and Plaintiffs had already:

- May 2004 -- contacted Sound Transit to complain that the drilled shaft installation was damaging its building. CP 4 (Plaintiffs' Complaint, ¶ 2.5).
- October 2005 -- sent a Sound Transit incident report form to Sound Transit claiming the vibrations damaged its building. CP 52 (Pence Decl., ¶ 5,6).
- December 2005 -- sent an email following up on the earlier report. CP 52 (Pence Decl., ¶ 5,6).

In other words, CF Sales was fully aware of the cause and extent of its claim against Sound Transit but waited a total of two and a half additional years after Substantial Completion (and a total of more than 4 and a half years from discovery) to file suit.

Finally, local municipal codes support the use of substantial completion as the trigger for third-party claim accrual. Owners (public or private) can begin using projects when they are substantially complete. Owners can obtain a certificate of occupancy (CO) or a temporary certificate of occupancy (TCO) and start using a building or project when all fire/life/safety requirements and major building systems (mechanical, electrical, plumbing, etc.) have been installed and inspected. See, e.g., Seattle Building Code §§ 109.3 (CO) and 109.4 (TCO).¹¹ Minor punch list work does not need to be completed to obtain a CO or a TCO and begin using the project for its intended purpose. Id. Sound Transit's C-700 contract and the standard AIA construction documents also plainly

recognize the likelihood that at least temporary occupancy or use of the work will commence at substantial completion. CP 78 (§3.10 [Use of Completed or Partially Completed Work]; Werner Sabo, Legal Guide to AIA Documents § 4.55, (5th ed. 2008) (stating and explaining AIA A201 ¶ 9.9 [Partial Occupancy or Use]).

There is no objectively logical reason to allow Plaintiffs claim to accrue after the adjacent construction was substantially complete.

4. Accrual of a third-party claim should not depend on completion of punch-list work.

Plaintiffs may also argue that a third party claim should not accrue until all work on a construction project is 100% complete, including punch list work. This argument is meritless. First, it is impossible to determine by an independent third party. And like the statute of repose, the Oja rule envisions two scenarios: damage that results from work performed before substantial completion, and damage that occurs from work after substantial completion. Punch list work, to the extent that minor work can even damage adjacent property, is governed by the latter.

There is no objectively reasonable way for a third party to determine when punch list work is complete. One might argue that it is simply when workers stop working on the project. Punch list work,

¹¹ A copy of the codes is included in the appendix.

however, is by definition minor work. And there is no way for a third party to know whether, for example, a worker with a tool belt is doing punch list work, warranty work, or periodic maintenance work. Objectively, they look the same: a worker with a tool belt. There is no rational basis for setting claim accrual at the completion of minor punch list work that could just as easily be warranty or maintenance work, both of which occur after any definition of construction completion.

Accrual at substantial completion is also consistent with the construction statute of repose. The Legislature recognized that some construction claims (but not most) arise out of work performed after substantial completion. In such cases, the statute of repose runs from the termination of the construction services rather than substantial completion of the construction, but there must be a nexus between the claims asserted and the work or services performed after substantial completion. See Parkridge Assoc., Ktd. V. Ledcor Indus., Inc., 113 Wn.App. 592, 599 (2002).

Similarly, Oja envisions damages that might occur from work after substantial completion. Such claims involve scenario 2 of Oja: “If the damage has not occurred when the construction is completed, the action accrues when the first substantial injury is sustained thereafter.” Oja, 89 Wn.2d at 75-76. Here, however, because Plaintiffs’ claim involved

damage that resulted entirely from construction activities performed long before substantial completion and the full extent of the alleged damage was also apparent long before substantial completion, Plaintiffs' claim accrued, at the latest, when the adjacent construction was substantially complete: May 24, 2006.

Finally, tying claim accrual to completion of punch list work could lead to absurd results. Punch list items are frequently disputed between owners and contractors. The result is often a drawn-out punch list period or simply punch list items that are never completed by the contractor. See e.g., CP 254 (in which Sound Transit informs its contractor on the C-700 project that its failure to perform punch list work has led Sound Transit to have it performed by others). It is unreasonable for accrual of a third-party claim to depend on completion of disputed or delayed punch list items that may in fact never be completed.

For all of these reasons, accrual of third-party claims should not depend on completion of punch list work. Instead, if a deferred accrual rule applies at all, Plaintiffs' claim accrued, at the latest, when the C-700 project was substantially complete: May 24, 2006. Because Plaintiffs did not file suit until January 2009, their claims were untimely and the Court should reverse the trial court's denial of Sound Transit motion for partial summary judgment.

E. The Trial Court Should Have Applied the Standard Discovery Rule Applicable to Negligence and Strict Liability Claims.

The trial court should not have deferred accrual of Plaintiffs' claim beyond the time at which Plaintiffs discovered the alleged injury. The unique characteristics of horizontal construction projects (compared to vertical construction projects) combined with a more detailed analysis of the Oja opinion, require that the normal discovery rule should have applied to Plaintiffs' claim.

The Oja analysis, quoted above and repeated again here, does not withstand careful consideration:

The damages flowed from the pile driving as a whole and the cause of action accrued when the building was completed. We have reexamined the statute of limitation cases which have been before this court, as urged by respondent, and find this view to be consistent with these cases. See Gillam v. Centralia, 14 Wn.2d 523, 128 P.2d 661 (1942); Papac v. Montesano, 49 Wn.2d 484, 303 P.2d 654 (1956); Cheskov v. Port of Seattle, 55 Wn.2d 416, 348 P.2d 673 (1960); Gazija v. Nicholas Jerns Co., 86 Wn.2d 215, 543 P.2d 338 (1975); Haslund v. Seattle, 86 Wn.2d 607, 547 P.2d 1221 (1976). In those cases involving damage to real property arising out of construction or activity on adjacent property, the cause of action accrues at the time the construction is completed if substantial damage has occurred at that time. If the damage has not occurred when the construction is completed, the action accrues when the first substantial injury is sustained thereafter. In the instant case, substantial damage had occurred when the project was

completed. The respondent was entitled to wait until the completion of the construction project before filing a cause of action so that it might determine the full extent of the damages. A different rule would force a plaintiff to seek damages in installments in order to comply with the statute of limitations.

Oja, 89 Wn.2d at 75-76.

The facts in Oja are important. The two most important facts were the type of construction and the timing of the specific activity that caused the damage. Oja involved the construction of a condominium building (vertical construction) where all construction activities occurred on the adjacent property. Between August and September of 1966, the contractor installed piles. There was no construction activity between September 1966 and October 1967. The remaining piles were installed between November 1967 and April 1968, and the building was completed sometime in 1969. The plaintiffs in Oja filed their lawsuit on March 2, 1971. At trial, the jury attributed 70% of the damages to the first period of pile installation and 30% to the second period. Based on a three-year period of limitation applied in Oja, the defendants argued that the limitation expired on the damages based on the initial pile driving activity (because they were completed more than three years prior to the lawsuit) and that damages should be limited to the 30% portion that resulted from

the second period of pile driving (because they were completed within three years of the lawsuit being filed).

The quoted language above, which is all the Supreme Court devoted to the issue, raises numerous questions and ambiguities:

- After the Court determined that the damages flowed from the pile driving as a whole, meaning that the pile driving was a single, discrete activity, the remainder of its analysis was dicta, including the new deferred accrual rule.
- The new deferred accrual finds no support in the cases on which it was purportedly based.
- It is unclear how, if at all, the deferred accrual applies to horizontal construction projects (streets, highways, railroads, etc.) where projects are miles in length, with only a tiny portion adjacent to the property at issue.

These issues suggest that the Oja deferred accrual does not apply at all to horizontal construction and the present appeal.

1. The deferred accrual statements in Oja are *dictum* and unsupported by then-existing (or current) case law.

The jury in Oja apportioned 70% and 30% of the property damage respectively to the two periods of pile driving. The Supreme Court rejected the concept of apportionment, however, and stated that “The damages flowed from the pile driving as a whole.” Because the lawsuit was filed within three years from the completion of the specific construction activity giving rise to the damage (pile driving), and because the Court held that the damages flowed from the pile driving as a whole

(i.e., that they were a single activity), additional analysis was unnecessary to the disposition of the case. Specifically, it was unnecessary for the Court to allude to accrual at the time of project completion (which, in Oja, was 1969) because in fact the plaintiff filed suit within three years of the cessation of the offending pile driving activity specifically. A broader statement, i.e., one purporting to expand the normal accrual test one large step farther to coincide with overall cessation of all construction activity that has no potential for causing third party damage was not essential to the case.

Dictum is “Statements and comments in an opinion concerning some rule of law or legal proposition...not essential to determination of the case” and includes statements made without full consideration of the point. Black’s Law Dictionary 313 (6th ed. 1991). See also D’Amico v. Conguista, 24 Wn.2d 674, 683, 167 P.2d 157 (1946) (“...in some of our cases, we have made statements which would indicate our adherence to a rule that an employee was in the course of his employment when he was eating lunch. Those statements, however, were made in the course of our reasoning and did not, and could not, announce our adherence to such a rule because the question was not present in any of those cases.”). The deferred accrual analysis was similarly unnecessary and falls within this definition and should have no precedential value.

As applied here, the real rule announced in Oja (that pile driving is a single activity) would therefore at most do no more than extend the accrual date from April or May 2004 (when Plaintiffs admittedly discovered the alleged damage) to August 24, 2004 when the drilled shaft construction work terminated. The failure to file suit within 2 years of August 24, 2004 bars the claim.

Oja's dictum also found no support in the cases on which it was purportedly based and thus should not be read broadly.¹² In fact, none of the cited cases involved damage due to specific construction activities and they have no issues in common with the statute of limitation issue in Oja:

- Gillam v. Centralia, 14 Wn.2d 523, 128 P.2d 661 (1942) was a condemnation case involving deprivation of access, light, and air caused by a viaduct constructed on adjacent property. It had nothing to do with the manner in which the construction activities were performed. It was premised on the fact of the construction itself and the impact of the completed project on the adjacent property owner, not the manner in which the construction activities were performed. Under those circumstances, accrual at project completion was logical.
- Papac v. Montesano, 49 Wn.2d 484, 303 P.2d 654 (1956) involved the deterioration of underground wooden water pipes on adjacent property that occurred many years after the construction was complete. It had nothing to do with

¹² These analytical weaknesses, at a minimum, dictate that Oja not be read expansively to state a broadly applicable project completion rule that contradicts well-settled generally accepted principles of limitations law. In addition, they indicate the Supreme Court should clarify Oja when squarely presented with the issue.

the impact of the construction activities. Instead, it involved the long-term deterioration of the project itself.

- Cheskov v. Port of Seattle, 55 Wn.2d 416, 348 P.2d 673 (1960) is even more tenuous. It was also a condemnation case based on airplane noise from SeaTac airport. Again, it had nothing to do with the construction activities. Instead, it related to the existence of the project itself and the impact of the planes that flew in and out of it.
- Gazija v. Nicholas Jerns Co., 86 Wn.2d 215, 543 P.2d 338 (1975) had nothing to do with construction at all. It involved the unauthorized cancellation of an insurance policy related to loss of fishing equipment. Further, it hinged on and had a detailed discussion of the normal discovery rule -- not a deviation or extension of the discovery rule.
- Finally, Haslund v. Seattle, 86 Wn.2d 607, 547 P.2d 1221 (1976) did not involve a third-party property owner, did not involve damage related to construction activities on adjacent property, and it applied the discovery rule (not a more-lenient exception to it). In short, Haslund involved the city's negligent issuance of a building permit and the building owners damages associated with its subsequent revocation.

The first 3 cases involved the impact or existence of the *finished* construction project itself on an adjacent property owner and had nothing to do with the construction activities used to construct the project. The only logical conclusions based on the cited cases would be that (a) in a condemnation action based on damages due to the fact or effect of the existence of the adjacent construction project itself (as opposed to the construction activities used to construct the project), a property owner can wait until the project is complete to file suit so that it can know the full

impact of the finished project and (b) in other cases, the standard discovery rule should apply.

None of the cases support an extension to the already lenient standard discovery rule for known property damage that results from specific negligent or inherently dangerous construction activities. The Oja deferred accrual dictum was an unnecessary statement that, given its weak analytical underpinnings, should certainly not be extended one large step farther by creating a broad project completion accrual “rule” for all cases, especially those involving a different type of construction (streets, railroads, etc.). Rather, at most, Oja would relax the accrual to August 24, 2004 in the present appeal and thus would not save Plaintiffs’ untimely action.

2. Deferred accrual should not apply to third-party property damage claims on horizontal construction projects.

Because of the unique characteristics of horizontal construction projects, a deferred accrual rule should not apply. Instead, the traditional discovery rule provides adequate protection to the rights of third-party property owners.

Horizontal construction projects are very different from vertical construction projects. On vertical construction projects (buildings), all of the construction work occurs on the adjacent property and it is obvious to

a third-party when the building looks like it can be occupied or used. Horizontal construction projects, such as streets, highways, water/sewer transport systems, and railroads, however, often are many miles in length. For such projects, there is no logical reason to base the accrual of third-party property damage claims on the completion of construction work that may be miles away from the damaged property.

The appropriate rule for such claims is the standard discovery rule, which delays claim accrual until the plaintiff knows or should know the facts underlying its claim. Mayer, 102 Wn. App at 75-76. Applying the standard discovery rule fully protects third-parties. Id. This is particularly true if the specific offending construction activity (pile driving or activities like drilled shaft installation) is viewed as a whole, as Oja requires, which results in their accruing, even under the discovery rule, at the completion of the specific activity causing the damage.

For these reasons, the Court should apply the standard discovery rule to Plaintiff's property damage claims. Here, Plaintiffs admittedly discovered the alleged damage in April or May 2004. CP 4. Even if discovery were postponed to August 24, 2004 when the drilled shaft work ceased (CP 41-42 (Emam Decl., ¶ 6)), the present lawsuit was not filed within the applicable two-year statute of limitation.

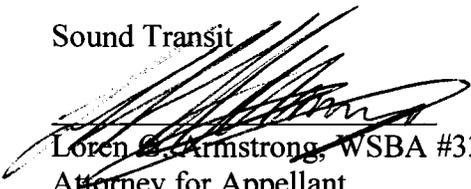
V. CONCLUSION

For these reasons, Sound Transit respectfully requests that this Court reverse the trial court's December 11, 2009 order denying Sound Transit's motion for partial summary judgment and remand for dismissal of the action.

DATED this 3rd day of August, 2011.

Respectfully submitted,

Sound Transit



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APPENDIX

1. 2006 Seattle Building Code Sections 109.3 and 109.4
2. Werner Sabo, Legal Guide to AIA Documents §§ 4.54, 4.55, and 4.56 (5th ed. 2008)
3. RP 28:8 - 29:24 (January 13, 2011 Pence Trial Transcript)

2006 SEATTLE BUILDING CODE

Chapter 1 Administration

...

109.3 Certificate issued. After satisfactory completion of inspections, if it is found that the building or structure requiring a Certificate of Occupancy complies with the provisions of this code, the Fire Code and other pertinent laws and ordinances of the City, the Building official shall issue a Certificate of Occupancy which shall contain the following information:

1. The building permit number;
2. The address of the building;
3. A description of that portion of the building for which the certificate is issued;
4. A statement that the described portion of the building complies with the requirements of this code for group and division of occupancy and the activity for which the proposed occupancy is classified; and
5. The name of the building official.

109.4 Temporary certificate. A Temporary Certificate of Occupancy may be issued by the building official for the use of a portion or portions of a building or structure prior to the completion of the entire building or structure if all devices and safeguards for fire protection and life safety, as required by this code, the Fire Code and other pertinent laws and ordinances of the City, are maintained in a safe and usable condition. See Section 106.13 for Certificates of Occupancy for temporary structures.

§ 4.54 Substantial Completion: ¶ 9.8

9.8 SUBSTANTIAL COMPLETION

9.8.1 Substantial Completion is the 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 use. (9.8.1; no change)

The date of substantial completion is an important one, on which the contractor is due its payment including any remaining retainage, less the value of punchlist items.²⁷⁹ At this point, the risk of loss passes to the owner, who must insure the building and take other responsibilities for it, as set forth in the architect's certificate of substantial completion (see ¶ 9.8.4).²⁸⁰ The contractor's warranties start to run from this date, and liquidated damages, if any, normally end on this date unless otherwise specified in the contract. Note that this date is different from the date, if any, on which a municipality issues a certificate of occupancy. The project may be substantially complete, but a certificate of occupancy may not be granted, and vice-versa.²⁸¹

²⁷⁹ Mayfield v. Swafford, 106 Ill. App. 3d 610, 435 N.E.2d 953 (1983). Failing to perform in a workmanlike manner constitutes a breach of the contract. If the owner receives substantial performance, it must pay the contractor the contract sum less the cost of correction of any deficiencies. See also J.R. Sinnott Carpentry, Inc. v. Phillips, 110 Ill. App. 3d 632, 443 N.E.2d 597 (1982); Watson Lumber v. Guennwig, 79 Ill. App. 2d 377, 226 N.E.2d 270 (1967); Cleveland Neighborhood Health Servs., Inc. v. St. Clair Builders, Inc., 64 Ohio App. 3d 639, 582 N.E.2d 640 (1989).

²⁸⁰ In Pete Wing Contracting, Inc. v. Port Conneaut Investors Ltd. P'ship, 1995 Ohio App. LEXIS 4341 (Sept. 29, 1995), the substantial completion provision was examined. The architect issued a certificate of substantial completion to the contractor, but the owner refused to accept it or release the retainage. The problem was that the original bid plans called for the ceiling height in the loft area to be seven feet, eight inches. When the construction plans were issued, the height was apparently given as 78 "instead of 7'8". The architect testified that it was understandable that the contractor interpreted the drawings in that manner, especially because the owner reduced the architect's scope of services during construction, leaving the contractor to deal directly with the owner instead of the architect. Thus, the ceiling height problem was not the contractor's fault, and the contractor had attained substantial completion of the project. In this case, it was apparent that the architect sided with the contractor, and the court was convinced that the owner brought about his own problems.

Without substantial completion, the contractor can only recover in quantum meruit. Stephenson v. Smith, 337 So. 2d 570 (La. Ct. App. 1976).

²⁸¹ Since ¶ 9.8.4 of A201 requires that the architect designate responsibility "for security, maintenance, heat, utilities, damage to the Work and insurance," what if the architect fails to issue the certificate, or fails to address these issues? What if the architect places all responsibility on the contractor when the contractor thought the owner would have such responsibility? The parties can proceed to the dispute resolution process found in Article 15, but this procedure opens the door to litigation. It would be better if this was addressed at the outset of the project.

²⁸² See, e.g., Miller v. Bourgojn, 613 A.2d 292 (Conn. App. 1992) ("although the issuance of a certificate of occupancy may be evidence of substantial completion, it is not dispositive of the question.")

It is the architect who determines the date of substantial completion.²⁸² On this date, the contractor is entitled to its fee, less the value of any uncompleted work.²⁸³

²⁸² *But see* Holy Family Catholic Congregation v. Stubenrauch Assoc., 136 Wis. 2d 515, 402 N.W.2d 382 (Ct. App. 1987). The case involved an action by a church against the architect and contractor for a leaky roof. The question turned on the date of substantial completion and whether the statute of limitations had run. The court held that it was up to the court, and not the architect, to determine the date of substantial completion. The architect's certificate may be persuasive, but it is not determinative.

In a Louisiana case, *Stephenson v. Smith*, 337 So. 2d 570 (La. Ct. App. 1976), the court held that because the contractor had left more than 10% of the work undone, he had not substantially complied with the contract.

In *American Prod. Co. v. Reynolds & Stone*, 1998 Tex. App. LEXIS 7387 (Nov. 30, 1998), the court certified Phase I of the project as substantially complete on October 1, 1984. On October 7, 1984, the roof on the addition collapsed, apparently due to the omission of certain specified bolts. Texas has a ten-year statute of repose (a statute of repose is similar to a statute of limitations in that it imposes an absolute time limit in which to bring an action). Because more than ten years had elapsed from the date of substantial completion, the court dismissed the action. The contractor argued that substantial completion must be measured from the date the entire project is substantially complete, not just one phase. Because the construction contract expressly provided for phased construction, it was proper to have separate dates of substantial completion. Even though the architect had inadvertently left the date on the Certificate of Substantial Completion as October 1, 1984, there was other evidence indicating the correct date, and the architect filed an affidavit attesting to the correct date. The architect was assigned exclusive authority to determine the substantial completion date by the contract, and the court would not disturb that determination.

The substantial completion provision can be modified. In *Brookridge Apartments, Ltd. v. Universal Constructors, Inc.*, 844 S.W.2d 637 (Tenn. Ct. App. 1992), the owner sued the architect and the contractor after two defective balconies at the apartment complex caused serious injuries four years after the initial construction. The issue was whether the trial court properly applied the four-year statute of limitations. The AIA contracts were modified by certain HUD amendments. The architect issued a certificate of substantial completion on June 11, 1986. However, the owner and the contractor had agreed that the date of substantial completion would be the date the HUD representative signed the final HUD Representative's Trip Report, which occurred on August 11, 1986. The suit filed August 20, 1990, was therefore timely filed.

In *B.M. Co. v. Avery*, 2001 WL 1658197 (Guam Terr. Dec. 2001), the court stated that the issuance of an occupancy permit is one factor indicating that a project is substantially completed.

²⁸³ In *Forrester v. Craddock*, 51 Wash. 2d 315, 317 P.2d 1077 (1957), the court stated the rule as follows:

Where the builder has substantially complied with his contract, the measure of damages to the owner would be what it would cost to complete the structure as contemplated by the contract. There is a substantial performance of a contract to construct a building where the variations from the specifications or contract are inadvertent and unimportant and may be remedied at relatively small expense and without material change of the building; but where it is necessary, in order to make the building comply with the contract, that the structure, in whole or in material part, must be changed, or there will be damage to part of the building, or the expense of such repair will be great, then it cannot be said that there has been a substantial performance of the contract.

8.2 When the Contractor corrects the Work or the Architect requires the Contractor to correct the Work, the Contractor shall be responsible for the cost of such correction. (9.8.2; no change)

8.3 Upon receipt of the Certificate of Substantial Completion, the Contractor shall determine whether the Work or the Architect's inspection of the Work is in accordance with the Contractor's list, which is not a part of the Contract Documents. (9.8.2; no change)

8.4 When the Work or design is not in accordance with the Architect will prepare a Certificate of Substantial Completion for the Contractor for security, maintenance, insurance, and shall fix the time when the list accompanying the Certificate of Substantial Completion shall commence on the date of substantial completion of the Work. (9.8.4; no change)

The contractor is due payment for the Work, upon substantial completion of the Work, upon receipt of the Certificate of Substantial Completion from the Contractor for substantial completion of the Work. (9.8.4; no change)

Accord J.M. Beeson Co. v. S. Swafford, 106 Ill. App. 3d 610, 411 Ill. App. 3d 632, 443 N.E.2d 226 N.E.2d 270 (1967); J&J Elec. (1974); E.B. Ludwig Steel v. C.

For an extensive discussion of the rule, see *Casino, Inc.*, 129 N.J. 479, 610 N.J. 2d 13 (1985); *Walter Lafaruge Real Estate, Inc. v. L & E, Inc.*, 539 P.2d 13 (1976); *Weill Constr. Co. v. Thibodeaux*.

In *Glacier Springs Property Owners Ass'n v. Glacier Springs Property Owners Ass'n*, 706 P.2d 652 (1985) (citing *Pat*), "substantial completion of construction of a component part, may be used for purposes of determining when substantial completion in that case occurred no later than the date of substantial completion of the Work. (9.8.4; no change)

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9.8.2 When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected prior to final payment. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents. **(9.8.2; no change)**

9.8.3 Upon receipt of the Contractor's list, the Architect will make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Architect's inspection discloses any item, whether or not included on the Contractor's list, which is not sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work or designated portion thereof for its intended use, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Architect. In such case, the Contractor shall then submit a request for another inspection by the Architect to determine Substantial Completion. **(9.8.2; no change)**

9.8.4 When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion which shall establish the date of Substantial Completion, shall establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion. **(9.8.4; no change)**

The contractor is due payment, less the amounts required to properly finish the work, upon substantial completion.²⁸⁴ Under the terms of A201, the architect's certificate of substantial completion is required before the contractor is entitled to payment for substantial completion. *Substantial completion* means that despite deficiencies, a construction is fit for its intended purpose.²⁸⁵ This is the time stated in the contract documents that effectively ends the project except for minor

Accord J.M. Beeson Co. v. Sartori, 553 So. 2d 180 (Fla. Dist. Ct. App. 1989); Mayfield v. Swafford, 106 Ill. App. 3d 610, 435 N.E.2d 953 (1983); J.R. Sinnott Carpentry, Inc. v. Phillips, 110 Ill. App. 3d 632, 443 N.E.2d 597 (1982); Watson Lumber v. Guennwig, 79 Ill. App. 2d 377, 226 N.E.2d 270 (1967); J&J Elec., Inc. v. Gilbert H. Moen Co., 9 Wash. App. 954, 516 P.2d 217 (1974); E.B. Ludwig Steel v. C.J. Waddell, 534 So. 2d 1364 (La. Ct. App. 1988).

For an extensive discussion of substantial completion, see Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 610 A.2d 364 (1992).

⁴ Walter Lafaruge Real Estate, Inc., v. Raines, 420 So. 2d 1309 (La. Ct. App., 1982); Jim Arnott, Inc., v. L & E, Inc., 539 P.2d 1333 (Colo. App. 1975).

⁵ Weill Constr. Co. v. Thibodeaux, 491 So. 2d 166 (La. Ct. App. 1986).

In Glacier Springs Property Owners Ass'n v. Glacier Springs Enters., Inc., 41 Wash. App. 829, 706 P.2d 652 (1985) (citing Patraha v. Armco Steel Co., 495 F. Supp. 1013 (M.D. Pa. 1980) ("substantial completion of construction occurs when the entire improvement, not merely a component part, may be used for its intended purpose.")), the court stated that substantial completion in that case occurred no later than the date the contractor billed for final payment. *Glacier Springs* apparently did not involve AIA documents.

completion items. Liquidated damages are usually computed as of the date of substantial completion.²⁸⁶ Note that it is the contractor who initiates the process, although the architect determines whether the contractor has substantially completed the work.

If substantial completion has been obtained, the architect is under a legal duty to issue a certificate of substantial completion.²⁸⁷

In *Moore's Builder & Contractor v. Hoffman*, 409 N.W.2d 191 (Iowa Ct. App. 1987), the court stated that "substantial performance allows only the omissions or deviations from the contract that are inadvertent and unintentional, not the result of bad faith."

One court held that an architect's determination of the date of substantial completion is not necessarily final. *Allen v. A&W Contractors, Inc.*, 433 So. 2d 839, 841 (La. Ct. App. 1983). The court found that an arbitrator had the power to fix a date of substantial completion different from the date the architect had determined. The fact that the contract provided that the architect establish the date of substantial completion is "not sacrosanct if the facts show substantial completion at a date earlier than that certified by the owner's architect."

In *Russo Farms, Inc. v. Vineland Bd. of Educ.*, 675 A.2d 1077 (N.J. 1996), the court followed the AIA definition as well as the following: "Substantial completion occurs when the architect certifies such to the owner and a certificate of occupancy is issued attesting to the building's fitness." Note that this definition is not accurate, because a certificate of occupancy does not trigger the date of substantial completion under the AIA documents. The court went on to hold that at the time of substantial completion, all that remains is the punch list, which is a final list of small items requiring completion, or finishing, corrective, or remedial work.

Russo was examined in *Daidone v. Buterick Bulkheading, Inc.*, 2006 WL 2346286 (Super. A.D. Aug. 15, 2006), wherein the owner filed suit against the foundation contractor and architect for the cost of repairing damage caused by settlement. The contractor completed its work and was paid in full by May 24, 1993. The architect completed its work on June 23, 1993. An occupancy certificate was granted on June 14, 1994. Plaintiff noticed the problem in 1999. In late 2001, plaintiff hired an expert and repairs were performed in July, 2002. Suit was not filed until June 2, 2004. The defendants moved to dismiss based on the ten-year statute of repose. The owner argued that the start of the statute of repose should commence on the date of issuance of occupancy certificate, not the date of completion of a particular party's work. The court rejected that argument.

²⁸⁶ *Page v. Travis-Williamson County Water Control and Imp. Dist. No. 1*, 367 S.W.2d 307 (Tenn. 1963) (owner had taken possession and was using the property. There is no delay for which liquidated damages may be awarded. Owner is entitled to actual damages after substantial completion.); *Hungerford Constr. Co., v. Florida Citrus Exposition, Inc.*, 410 F.2d 1229 (5th Cir. 1969); *Stone v. City of Arcola*, 536 N.E.2d 1329 (Ill. App. 4th Dist. 1989). In *Ledbetter Br. Inc., v. North Carolina Dep't of Transportation*, 314 S.E.2d 761 (N.C. App. 1984), the liquidated damages clause read: "It is mutually recognized that time is an essential element of the contract and that delay in completing the work will result in damages due to public inconvenience, obstruction to traffic, interference with business, and the increasing of engineering, inspection and administrative costs to the Commission. It is therefore agreed that in view of the difficulty making a precise determination of such damages, a sum of money in the amount stipulated in the contract will be charged against the Contractor for each calendar day that the work remains uncompleted after the expiration of the completion date, not as a penalty but as liquidated damages." The court held that this meant that liquidated damages terminated on final, substantial, completion.

²⁸⁷ *Haugen v. Raupach*, 260 P.2d 340 (Wash. 1953) ("If the architect is satisfied that there has been substantial performance of the contract it then becomes his duty to issue the certificate of completion, and if he does not do so, his conduct is regarded as arbitrary and capricious. If the architect

The comprehensive list is to conform to the contract documents. The contractor is still responsible for items that do not conform to the specifications. These items must be completed prior to the issuance of the certificate. If the work is not substantially complete, the contractor must request a reinspection. The certificate is issued only when the work is substantially complete, with the final punchlist attached to the certificate. Work that has been completed is not subject to reinspection. Even if the architect issues a certificate, the contractor is not relieved from liability if the work does not conform to the specifications. This occurs because the certificate does not guarantee the fact that the certificate holder has properly built, or even that the contractor has performed the work properly. An architect has been held liable for substantial completion based on inspecting an architect was not the owner of deviations (including the use of 125-amp breakers). Sometimes, for various reasons, a court may be asked to determine when the work is complete. Often there are incorrect factors in making this determination: (1) the degree of performance; (2) the degree to which the work is in need of correction; and (4) the

9.8.5 The Certificate of Substantial Completion

Contractor for their written Certificate. Upon such acceptance, the contractor shall make payment of retainage

is in collusion with his principal. Such opposition is not justified. The contractor is not to be obtaining the certificate as a condition of payment. ²⁸⁸ *May v. Ralph L. Dickerson Co.*, 2006 WL 2346286 (Super. A.D. Aug. 15, 2006). ²⁸⁹ *Blecick v. School Dist. No. 18*, 2006 WL 2346286 (Super. A.D. Aug. 15, 2006). The contractor does not issue a certificate of substantial completion if the contractor is excused from doing so (1953).

²⁹⁰ *South Union v. George Parker*, 2006 WL 2346286 (Super. A.D. Aug. 15, 2006). ²⁹¹ *Gibbens Pools, Inc., v. Corrin*, 2006 WL 2346286 (Super. A.D. Aug. 15, 2006).

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The comprehensive list is usually called the *punchlist*. If an item does not conform to the contract documents and does not appear on the punchlist, the contractor is still responsible for it. Even final payment does not constitute a waiver of items that do not conform to the contract documents (see ¶ 9.10.4). The punchlist must be completed prior to the time the contractor is entitled to final payment.

If the work is not substantially complete, the contractor must proceed with the work and request a reinspection by the architect. When the architect agrees that the work is substantially complete, it will issue the certificate of substantial completion, with the final punchlist and a description of the other items mentioned attached to the certificate. Warranties start to run as of this date for that portion of the work that has been completed.

Even if the architect issues a certificate of substantial completion, the contractor is not relieved from liability if the building is not constructed according to the plans and specifications. This occurred in a Mississippi case, in which the court held that the fact that the certificate had been issued did not mean that the building had been properly built, or even that the architect was acting as arbiter between the owner and contractor for the purpose of making such a determination.²⁸⁸

An architect has been held immune from suit for refusing to issue a certificate of substantial completion based on his capacity as arbiter.²⁸⁹ In one case, the "inspecting architect" was held liable to the owner for failing to notify the owner of deviations (including the use of smaller wires and the use of 100-amp instead of 125-amp breakers) from the electrical drawings by the contractor.²⁹⁰

Sometimes, for various reasons, there is no certificate of substantial completion and a court may be asked to determine whether the project is substantially complete. Often there are incomplete or defective items. Courts will look to several factors in making this determination, including (1) the extent of the defect or non-performance; (2) the degree to which the purpose of the contract is defeated; (3) the ease of correction; and (4) the use or benefit to the owner of the work performed.²⁹¹

9.8.5 *The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate. Upon such acceptance and consent of surety, if any, the Owner shall make payment of retainage applying to such Work or designated portion thereof.*

is in collusion with his principal, or yields to his opposition to the issuance of the certificate when such opposition is not justified, then in such cases the contractor has a legal excuse for not obtaining the certificate as a condition precedent to recovering on his contract.")

²⁸⁸ May v. Ralph L. Dickerson Constr. Corp., 560 So. 2d 729 (Miss. 1990).

²⁸⁹ Bleck v. School Dist. No. 18, 2 Ariz. App. 115, 406 P.2d 750 (1965) (contractor could recover from owner when a required certificate was unreasonably withheld). However, if the architect does not issue a certificate of substantial completion because the owner prevents it from doing so, the contractor is excused from obtaining the certificate. Haugen v. Raupach, 260 P.2d 340 (Wash. 1953).

²⁹⁰ South Union v. George Parker & Assocs., 29 Ohio App. 3d 197, 504 N.E.2d 1131 (1985).

²⁹¹ Gibbens Pools, Inc., v. Corrington, 446 So. 2d 420 (La. App. 4th Cir. 1984).

Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents. (9.8.5; no change)

If a surety is involved in the project, its consent should be obtained before paying the retainage (see AIA Document G707A, Consent of Surety to Reduction in or Partial Release of Retainage). If the work is incomplete or improper, the owner may deduct the value of that work from the retainage and pay it at the time of final payment if the work is then completed.

§ 4.55 Partial Occupancy or Use: ¶ 9.9

9.9 PARTIAL OCCUPANCY OR USE

9.9.1 The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer as required under Section 11.3.1.5 and authorized by public authorities having jurisdiction over the Project. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Architect as provided under Section 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, by decision of the Architect. (9.9.1; change reference; minor modifications)

When the owner wishes to occupy all or a portion of the project before final completion, the parties must agree and set forth the various provisions listed including responsibility for security, utilities, and so forth. Although this has been a practice in the industry for some time, it has been on an informal basis with little agreement as to allocation of risks between the owner and contractor. Further, unless the parties had specific written agreements related to partial occupancy, the contractor was frequently in a good position to argue that the owner had accepted the entire project by this partial occupancy. The ability to enforce the contract documents was thus compromised.

Among the important points to note are the following:

1. Permission must be obtained by appropriate governmental agencies and by the insurer.
2. Immediately before the partial occupancy, the owner, contractor, and architect must jointly inspect the area to be occupied. The condition of the area must be carefully documented, so that the contractor's obligation to complete the area

is clear as to each item substantially complete. "provisions" that the architect progresses. A201 requires completion and the second occupy one or more conduct more than that not covered under either protect should consider will be paid in addition.

3. The owner and contractor agree as to security, insurance. In most cases, the portions of the project could agree that the contractor items until substantially complete. The owner and contractor agree. The contractor usually substantially paid at the time. Agreement must be reached. The contractor is responsible, with the owner that does not conform must be an agreement. The owner substantial completion want it to start at the time. May have specific requirements. Again, the contract partial occupancy.

Paragraph 9.9.1 requires agreement concerning these items before start the partial occupancy. The owner may invoke the contract if occupancy is anticipated more fully.

Paragraph 9.9.1 specifies work that does not conform inspection that is conducted does not conform. Nonconformity by contractor, or else the contractor. If partial occupancy is anticipated, the contractor is entitled to inspect. The owner might want to inspect before occupancy.

is clear as to each item. Note that the area to be occupied need not be substantially complete. This "inspection" is more thorough than the "observations" that the architect is required to make periodically as the project progresses. A201 requires only two other inspections: one at substantial completion and the second at final completion. If the owner decides to partially occupy one or more areas of the project, the architect will then be required to conduct more than these two inspections. This additional cost to the architect is not covered under either contingent or optional additional services. The architect should consider adding this to the list of additional services for which she will be paid in addition to the basic services.

The owner and contractor must agree, in writing, to their relative responsibilities as to security, maintenance, heat, utilities, damage to the work, and insurance. In most cases, the owner would assume these responsibilities for the portions of the project that are partially occupied. However, the parties could agree that the contractor would continue to provide insurance and other items until substantial completion.

The owner and contractor must also agree as to payments, including retainage. The contractor usually requests release of the retainage and wants to be substantially paid at this stage.

Agreement must be reached relative to the correction period. (The contractor is responsible, within one year after substantial completion, to correct work that does not conform to the contract documents. See ¶ 12.2.2.) There also must be an agreement about any warranties required by the contract documents. The owner may want the correction period to commence upon substantial completion of the entire project, whereas the contractor may want it to start at the time of the partial occupancy. The specifications may have specific guarantee periods for particular items, such as elevators. Again, the contractor would want these periods to start immediately upon partial occupancy.

Paragraph 9.9.1 requires written agreement between the owner and contractor concerning these items. If they cannot agree, presumably the owner cannot start the partial occupancy. However, if the contractor is unreasonable, the owner may invoke the dispute resolution procedure in Article 15. If such partial occupancy is anticipated, the contract documents should address these items more fully.

Paragraph 9.9.1 specifically states that partial occupancy does not mean that work that does not conform to the contract documents has been accepted. The inspection that is conducted before the occupancy should stipulate all work that does not conform. Nonconforming work discovered later must be corrected by the contractor, or else the owner can obtain damages.

If partial occupancy delays the contractor or causes it additional cost, the contractor is entitled to a change order. If partial occupancy is anticipated, the owner might want to include a no-damage-for-delay clause related to the partial occupancy.

9.9.2 Immediately prior to such partial occupancy or use, the Owner, Contractor and Architect shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work. (9.9.2; no change)

This is to protect the contractor against claims by the owner that items were damaged before occupancy, when instead they could have been damaged by the owner's own forces.

9.9.3 Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents. (9.9.3; no change)

Even final payment does not constitute acceptance or waiver (see ¶ 9.10.4.2). That acceptance must be made in writing by the owner (see ¶ 12.3). One court has held that occupancy constituted acceptance of changes in the work by the contractor.²⁹² This provision should be read so that any occupancy by the owner does not waive any rights of the owner, and does not constitute an acceptance unless the owner knowingly accepts changes in the work.²⁹³ The contractor may want to have the owner execute a letter of acceptance, specifying particular work that deviates from the contract documents.

§ 4.56 Final Completion and Final Payment: ¶ 9.10

The contract is not finished until the date of final completion. A New Jersey case²⁹⁴ held that the risk of fire loss was upon the contractor until the project was fully completed, even though substantial completion had occurred.²⁹⁵

²⁹² Shimek v. Vogel, 105 N.W.2d 677 (N.D. 1960).

²⁹³ In Mt. Hawley Ins. Co. v. Structure Tone, Inc., 2004 WL 2792039 (N.J. Super. July 13, 2004), a fire caused extensive damage to a building that was about 70% complete. The loss also included furniture, workstations, and computer equipment. The appellate court reversed the trial court's grant of summary judgment that dismissed all claims for subrogation, based on the waiver of subrogation provision (¶ 11.4.7 of A201). Responding to the "Work" versus non-Work argument, the contractor argued that, pursuant to this provision, which requires agreement of the owner and contractor before the owner may partially occupy the premises, failure to secure such agreement meant that the contractor had full control of the premises, thereby triggering the waiver of subrogation provision as to everything at that location, including computer equipment and the like. The appellate court sent this matter back to the trial court as a factual issue to be determined at a later date.

²⁹⁴ Hartford Fire Inc. v. Riefolo Constr. Co., 161 N.J. Super. 99, 390 A.2d 1210 (1978).

²⁹⁵ See also Brown v. McBro Planning & Dev. Co., 660 F. Supp. 1333 (D. V.I. 1987) (owner's acceptance of the project did not shift liability when a hospital technician injured his knee in a fall on the hospital floor. The owner's acceptance of full responsibility and control of the hospital was not a superseding cause of the injury.).

9.10 FINAL COMPLETION

9.10.1 Upon receipt of the inspection and acceptance report, the Architect will promptly issue a certificate of completion acceptable under the Contract Documents. The Architect will promptly issue a certificate of completion to the best of the Architect's knowledge, based on the Architect's on-site verification of the work in accordance with terms and conditions of the Contract Documents and a balance found to be due and payable. The Architect's representation that the contractor's being entitled to final payment comes from "Contract Documents."

Note that the work must be completed and the contractor entitled to final payment.

⁹⁶ See Ryan v. Thurmond, 48 Cal. 4th 1000 (2000) (which is similar to AIA 1917). "Completion of the work performed." The court held that the work was not completed. The contractor introduced evidence that the work was not completed. The court held that the contractor was not entitled to final payment. See also *Redevelopment Corp.*, 925 P.2d 1000 (1996).

In *Martinson v. Brooks*, 100 Cal. App. 4th 1000 (2002), the court construed a similar provision in the contract as sufficient. The contractor introduced evidence that the work was not completed. The court held that this was a breach of the contract.

In *Laurel Race Course, Inc. v. Laurel Race Course, Inc.*, 100 Cal. App. 4th 1000 (2002), the contractor was not entitled to final payment until the engineer's "Final Certificate of Completion" was issued. The court held that the certificate of an architect or engineer is not a precedent to liability of the contractor. See also *Russell H. Lankton Co. v. T.A. Loving Co.*, 100 Cal. App. 4th 1000 (2002).

For an interesting case in which the contractor was not entitled to final payment, see *Professional Builders Association v. [redacted]*. After the owner lost in an arbitration on the grounds of the contractor's failure to complete the work, the court held that this was a breach of the contract and that the contractor was not entitled to final payment until the process of arbitration was completed.

In *In re Modular Structures, Inc.*, 100 Cal. App. 4th 1000 (2002), the contractor was not entitled to final payment until the process of arbitration was completed.

In *Johnson City Cent. Sec. v. [redacted]*, 100 Cal. App. 4th 1000 (1996), the dispute centered around the contractor's failure to complete the work. The bond had a requirement that the contractor complete the work.

10 FINAL COMPLETION AND FINAL PAYMENT

10.1 Upon receipt of the Contractor's written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make such inspection and, when the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's on-site visits and inspections, the Work has been completed in accordance with terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions listed in Section 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled. (9.10.1; written notice to come from "Contractor")

Note that the work must be fully completed in order for the contractor to be entitled to final payment.²⁹⁶ The contractor must initiate the architect's final

See Ryan v. Thurmond, 481 S.W.2d 199 (Tex. 1972), which interpreted the following language which is similar to AIA language): "Final payment shall be due Thirty days after (1) Substantial completion of the work provided the work be then (2) fully completed and the contract (3) fully performed." The court held that the contractor was not entitled to payment because the contract was not completed. The contractor had failed to plead substantial performance, and the owner produced evidence that the contract was not completed. *See also* RLI Ins. Co., v. MLK Ave. development Corp., 925 So. 2d 914 (Ala. 2005).

In *Martinson v. Brooks Equip. Leasing, Inc.*, 36 Wis. 207, 152 N.W.2d 849 (1967), the court construed a similar provision as requiring 100% completion. Substantial completion was not sufficient. The contractor had demanded full payment before completion of the project. The court held that this was a breach of contract.

In *Laurel Race Course, Inc. v. Regal Constr. Co.*, 274 Md. 142, 333 A.2d 319 (1975), the contractor was not entitled to recover the balance of the contract because it had not obtained the engineer's "Final Certificate." "Where payments under a contract are due only when the certificate of an architect or engineer is issued, production of the certificate becomes a condition precedent to liability of the owner for materials and labor in the absence of fraud or bad faith." *See also* Russell H. Lankton Constr. Co. v. LaHood, 143 Ill. App. 3d 806, 493 N.E.2d 714 (1986) (architect's final certification required after arbitration award contingent on certificate); *Bolton Corp., v. T.A. Loving Co.*, 380 S.E.2d 796 (N.C. App. 1989).

For an interesting case in which the architect had a 50% ownership in the general contracting firm, *see* *Professional Builders, Inc. v. Sedan Floral, Inc.*, 819 P.2d 1254 (Kan. Ct. App. 1991). After the owner lost in an arbitration with the contractor, the owner sought to overturn the arbitration on the grounds of fraud in issuing the equivalent of a final certificate for payment. The court held that this was actually the issue before the arbitrator. The type of fraud necessary to overturn an arbitration award deals with fraud in the arbitration, not that which is totally outside the process of arbitration. The arbitration was upheld.

In *In re Modular Structures, Inc.*, 27 F.3d 72 (3d Cir. 1994), the court held that the general contractor was not entitled to final payment until it had paid its subcontractors, based in part on this provision.

In *Johnson City Cent. Sch. Dist. v. Fidelity & Deposit Co.*, 641 N.Y.S.2d 426 (App. Div. 1996), the dispute centered around the timing of filing the suit against the surety. The performance bond had a requirement that suit must be initiated within two years of the date on which final

inspection. Even if a final certificate for payment is obtained, the contractor is not relieved of liability for work that does not conform to the contract documents (see ¶ 9.10.4.2).²⁹⁷

Note, also, that even if the owner waives the requirement that the architect issue a formal final certificate for payment, that does not mean that the owner has waived its right to have the contract fully performed.²⁹⁸ Some courts have held that issuance of the architect's final certificate was a required condition before the contractor was entitled to final payment.²⁹⁹ The architect should not omit the language "to the best of the Architect's knowledge" from the certificate, because otherwise the certificate might be taken to guarantee the work.

9.10.2 Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner, (3) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment and (5), if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be

payment under the contract fell due. The architect's final certificate for payment was issued December 21, 1992. Suit was filed on January 12, 1995. The court looked at this provision of Article 6 of A101 to determine whether the 30-day period meant that the two-year period began December 21, 1992, or 30 days later. There was some degree of uncertainty as to which construction was more plausible. Holding that there is a general rule of liberal construction in favor of insureds, the court held that the action was not time-barred. *See also* American Motorists Co., v. Gottfurcht, 2004 WL 909799 (Cal. App. 2d Dist. April 29, 2004); Decca Design Inc., v. American Auto. Ins. Co., 77 P.3d 1251 (Ariz. App. Div. 1 2003); Menorah Nursing Home Inc., v. Zukov, 153 A.D.2d 13, 548 N.Y.S.2d 702 (App. Div. 2d Dep't 1989).

²⁹⁷ *Environmental Safety & Control Corp. v. Board of Educ.*, 580 N.Y.S.2d 595 (App. Div. 1 1992). ("[r]eceipt of the architects' final certificate does not foreclose the defendant, however, from asserting claims against the contractor.")

²⁹⁸ *Ryan v. Thurmond*, 481 S.W.2d 199 (Tex. 1972).

²⁹⁹ *See, e.g., I. Perlis & Sons v. Peacock Constr. Co.*, 222 Ga. 723, 152 S.E.2d 390 (1966). In *Pickett v. Chamblee Constr. Co.*, 124 Ga. App. 769, 186 S.E.2d 123 (1971), failing to issue an architect's final certificate did not affect the contractor's right to final payment when there was compliance. The owner had taken possession of the building.

compelled to pay in discharging such lien, including all costs and reasonable attorneys fees. (9.10.2; no change)

The contractor should submit final waivers of lien for itself and all subcontractors and material suppliers that have been listed on the contractor's statements. Most title companies have such forms. The contractor can bond over any unperfected liens and close out the project. In some cases, the owner may need to hire an attorney to clear up liens by subcontractors. The costs of paying off the subcontractors and other costs such as attorneys fees are to be paid by the contractor to the owner. These items are best addressed by the owner's counsel. If a contractor fails to furnish satisfactory evidence of payment to subcontractors and suppliers, the owner is entitled to withhold final payment.³⁰⁰ The furnishing of the listed items is a condition precedent to the contractor's right to final payment from the owner.

Steffek v. Wichers, 211 Kan. 342, 507 P.2d 274 (1973), held that, by making changes and additions without resorting to or consulting with the architect and by disregarding the contract, the owner had waived the requirement of the architect's certificate for final payment.

In *American Continental Life Ins. Co. v. Ranier Constr. Co.*, 125 Ariz. 53, 607 P.2d 372 (1980), the court held that the owner did not waive the requirement of a final certificate for payment. The contractor argued that both the owner and contractor had deviated from the formal requirements of the contract in several respects: change orders were not signed, informal extensions of time were granted, and so on. The court, however, said:

the waiver of one right under a contract does not necessarily waive other rights under the contract. [Citation omitted.] Thus, even if American did waive other rights under the contract relating to change orders or extensions of time, that conduct does not manifest an intent to waive any right relating to payment for work.

In *Kilianek v. Kim*, 192 Ill. App. 3d 139, 548 N.E.2d 598 (1989), the appellate court overturned an arbitrator's award in favor of the contractor because the architect's final certificate had not been obtained. The court ruled that the arbitrator had exceeded his power because the owner's obligations had ended when the condition precedent (obtaining the certificate) had not been met. See *Formigli Corp. v. Fox*, 348 F. Supp. 629 (E.D. Pa. 1972), for a case in which consistent failure previously to obtain the architect's approval waived the requirement for final payment approval. Here, the owner had made 12 payments to the contractor without the architect's approval, thereby waiving the requirement.

In *Redevelopment Auth. v. Fidelity & Deposit Co.*, 665 F.2d 470 (3d Cir. 1981), the court found that the architect was the representative of the owner charged with administrative responsibility regarding final completion. The architect's execution of a final certificate for payment constituted final settlement of the contract for purposes of the surety's contractual limitations period.

In *Decca Design Build, Inc. v. American Auto. Ins. Co.*, 77 P.3d 1251 (Ariz. Ct. App. 2003), final completion had not been attained and the general contractor's action against a subcontractor's surety was not untimely. Accord *American Motorists Ins. Co. v. Gottfurcht*, 2004 Cal. App. Unpub. LEXIS 4258 (2d Dist. Apr. 29, 2004).

³⁰⁰ *Williard, Inc. v. Powertherm Corp.*, 497 Pa. 628, 444 A.2d 93 (1982). However, in *Henrico Doctors' Hosp. & Diagnostic Clinic, Inc. v. Doyle & Russell, Inc.*, 221 Va. 710, 273 S.E.2d 547 (1981), these documents were not required after the time for filing liens had passed.

See also *Hagerstown Elderly Assocs. v. Hagerstown Elderly Building Assocs.*, 368 Md. 351, 793 A.2d 579 (2002); *Beard Family P'ship v. Commercial Indem. Ins. Co.*, 116 S.W.3d 839 (Tex. App.-Austin, 2003); *Brown and Kerr, Inc. v. American Stores Prop., Inc.*, 715 N.E.2d 804 (Ill. App. 1st Dist. 1999); *In re Modular Structures, Inc.*, 27 F.3d 72 (3d Cir. 1994).

9.10.3 *If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, and the Architect so confirms, the Owner shall, upon application by the Contractor and certification by the Architect, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the Architect prior to certification of such payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of claims. (9.10.3; no change)*

If the final completion of the project is delayed through no fault of the contractor or because of the issuance of change orders, the contractor is entitled to payment for the work performed, and the owner cannot delay such payment. The final payment referred to is the actual last payment and not any prior payment. Thus if two payments are made after substantial completion, the first such payment does not operate as a waiver under ¶ 9.10.3. The owner might want to insert a statement requiring a certain retainage tied to the estimated cost of the punchlist items until final completion.

One issue is what happens if the architect does not “so confirm” the contractor’s right to receive the stated payment. Presumably, the contractor can avail itself of the claims procedure in Article 15.

9.10.4 *The making of final payment shall constitute a waiver of Claims by the Owner except those arising from:*

- .1** *liens, Claims, security interests or encumbrances arising out of the Contract and unsettled; (9.10.4.1; no change)*

This provision was held to bar a claim when the second change order issued reserved a claim by the owner for the contractor’s failure to complete the project on time. A subsequent change order failed to reserve this right, and the final payment authorization also did not reserve the claim.³⁰¹ It is important to note the reservation of any claims at the time of substantial and final completion.

- .2** *failure of the Work to comply with the requirements of the Contract Documents; or (9.10.4.2; no change)*

An owner demanded arbitration against the contractor, alleging faulty construction. The contractor sought to enjoin the arbitration, alleging that the final payment

In *R.W. Grainger & Sons v. Nobel Ins. Co.*, 2005 WL 3729018 (Mass. Super. Dec. 20, 2005), a sub-subcontractor filed an action for injunction, requiring a response by the general contractor who backcharged the subcontractor for its legal fees. The court held that this provision did not apply, since the action was not to secure the discharge of a lien.

³⁰¹ *John Price Assocs. v. Davis*, 588 P.2d 713 (Utah 1978); *Fitzgerald v. Corbett*, 793 P.2d 356 (Utah 1990).

stituted a waiver. An earlier version of this clause was held to negate the contractor's argument, and the case was sent to arbitration.³⁰² This clause has been held to refer to defects in materials and workmanship, not failure to comply with time deadlines.³⁰³

.3 terms of special warranties required by the Contract Documents. (9.10.4.3; no change)

When the owner makes final payment to the contractor, the owner waives all claims against the contractor or subcontractors except the listed exceptions.³⁰⁴

Woodward Heating v. American Arbitration, 259 Pa. Super. 460, 393 A.2d 917 (1978).

An Illinois case, *Village of Westfield v. Loitz Bros. Constr. Co.*, 165 Ill. App. 3d 338, 519 N.E.2d 37 (1988), involved an owner's claim that a contractor had accepted final payment from the owner and this acceptance operated as a release of all claims. Because the owner had stated that no final payment would be made until it received final waivers of lien from subcontractors and the final contractor's affidavit, and these documents were never given, there was no such release. See also *Burke County Pub. Sch. v. Juno Constr. Corp.* 50 N.C. App. 238, 273 S.E.2d 304(1981).

In *Automobile Ins. Co. v. United H.R.B. Gen. Contractors, Inc.*, 876 S.W.2d 791 (Mo. Ct. App. 1994), the court held that the waiver of subrogation (¶ 11.3.7) ended upon final payment to the contractor. A fire occurred after completion of the building, causing substantial damage. The owner's insurer sued the contractor, alleging faulty installation of the electrical system. The contractor defended based on the waiver of subrogation provision. The court construed an earlier version of the AIA contract. The exceptions contained in ¶ 4.3.5.2 (in an earlier version of this document) were at odds with the contractor's contention that the owner's insurer could not bring an action against the contractor after final payment. Because the owner expressly reserved the right to bring an action against the contractor after final payment for defective work, the owner's insurer could bring an action for subrogation after final payment. The waiver of subrogation was only effective so long as the contractor had an insurable interest in the property. The court found that the contractor's interest in the project terminated on final payment.

In *Warwick Township Water & Sewer Auth. v. Boucher & James, Inc.*, 2004 WL 557597 (Pa. Super. Mar. 23, 2004), the trial court refused to compel arbitration after the project was completed, based in part on the waiver provisions in the contract, similar to A201. The appellate court reversed and ordered arbitration, holding that claims relating to defects were not waived.

Centerre Trust Co. v. Continental Ins., 167 Ill. App. 3d 376, 521 N.E.2d 219 (1988).

In *John Price Assocs. v. Davis*, 588 P.2d 713 (Utah 1978), a contractor sued the owner on a promissory note. The owner defended and counterclaimed, saying that the project was late, resulting in damages to the owner. This provision of A201 waived claims by the owner related to delays, and the court held for the contractor.

Centerre Trust Co. v. Continental Ins., 167 Ill. App. 3d 376, 521 N.E.2d 219 (1988), involved an owner's action against the contractor for liquidated damages. The court held that the owner waived its right to liquidated damages arising from breach of the contract by making a final payment. *But see* *Illinois State Toll Highway Auth. v. Gust K. Newberg, Inc.*, 531 N.E.2d 982 (Ill. App. 2d Dist. 1988), distinguishing *Centerre*.

In *People ex rel. Skinner v. Graham*, 170 Ill. App. 3d 417, 524 N.E.2d 642 (1988), the court interpreted this section as meaning that liability of a surety was extinguished 12 months after final payment when the contract contained a specific limitation period and the contractor was not notified within that period of unfinished or defective work in need of correction.

It is therefore important that the final inspection of the architect be thorough so that other claims can be asserted. Courts have held that payment and acceptance of improvements constituted a waiver of all damages for defects that were known to the owner or that were observable by a reasonable inspection.³⁰⁵ Claims arising from unknown (latent) defects are not waived by final payment.³⁰⁶ Some states have adopted the *accepted work rule doctrine*, which states that an independent contractor will not be liable to third parties for injuries that occur after the contractor has completed the work and the work has been turned over to and accepted by the employer.³⁰⁷

In *David Co. v. Jim W. Miller Constr., Inc.*, 428 N.W.2d 590 (Minn. Ct. App. 1988), the court held that there was no waiver when there was a breach of contract by the contractor. This was the same as "failure of the work to comply with the requirements of the Contract Documents."

In *Wilson Area Sch. Dist. v. Skepton*, 860 A.2d 625 (Pa. 2004), the defendants were the contractors on a school project. Pursuant to their contract, these contractors paid some \$120,000 in permit fees to the borough in which the school was located, but under protest. The contractors then filed actions against the borough, and the trial court found that the permit fees were grossly disproportionate. The Pennsylvania Supreme Court ultimately ruled that the borough must refund the excess fees to the contractors. Thereafter the school district filed an action to recover the fees, asserting that it had a superior interest in the fees. The court found that the permit fees were not a separate line item in the bids, but were absorbed and buried in the total or composite contract price. Pursuant to this provision of A201, the school district had waived all claims against the contractors by making final payment and by not reserving a right to claim an interest in the refunded permit fees.

³⁰⁵ *Town of Tonawanda v. Stapell, Mumm & Beals Corp.*, 240 A.D. 472, 270 N.Y.S. 377 (1930); *Shaw v. Bridges-Gallagher, Inc.*, 174 Ill. App. 3d 680, 528 N.E.2d 1349 (1988); *State v. Wilson Constr. Co.*, 393 So. 2d 885 (La. Ct. App. 1981).

In *Eastover Corp. v. Martin Builders*, 543 So. 2d 1358 (La. Ct. App. 1989), the court held that the architect knew or should have known that certain pipe hangers were improperly spaced, causing damage when the pipes failed. Because the architect was an agent or representative of the owner, and because it was not a latent defect, it was waived.

³⁰⁶ *Intaglio Serv. Corp. v. J.L. Williams & Co.*, 95 Ill. App. 3d 708, 420 N.E.2d 634 (1981); *Centennial Trust Co. v. Continental Ins.*, 167 Ill. App.3d 376, 521 N.E.2d 219 (1988).

The contractor is also liable to third parties for latent defects, even when final acceptance of the project by the owner would normally end such liability. *Honey v. Barnes Hosp.*, 708 S.W.2d 686 (Mo. Ct. App. 1986). *Contra*, *Bruzga v. PMR Architects, P.C.*, 693 A.2d 401 (N.H. 1997) (declining to hold contractor liable for suicide); *R.W. Gast v. Shell Oil Co.*, 819 S.W.2d 367 (Mo. 1991) (cashier who was shot to death could not maintain action against general contractor who converted service bay into cashier's room).

³⁰⁷ *Harrington v. LaBelle's, Inc.*, 235 Mont. 80, 765 P.2d 732 (1988) (contractor who installed "speed bump" was not liable when bicyclist was injured several months after owner accepted work and made final payment).

In *R. W. Gast v. Shell Oil Co.*, 819 S.W.2d 367 (Mo. 1991), the parents of a gas station cashier who was shot to death during a robbery filed a wrongful death action against the contractor who converted a service bay into a cashier's room. The contractor apparently did not deviate from the plans and specifications. The court found that the contractor owed no duty to the owner's employees with respect to the design of the modifications. Also, the specifications were not so incomplete or improper that the contractor should have realized that the work would make the structure inherently unsafe. Therefore, there was no duty to third persons after acceptance by the owner.

the term *special warranty* project.³⁰⁸ In most cases, the absence of warranties. These v

In *Pierce v. ALSC Architects*, the court held that the architect was liable for a remodeling project for a supermarket. The architect was immediately below the observation walkway and provided the security walkway and provided the displays used in the store. The architect also provided a smaller walk-in freezer. A su... and the observation walkway. The architect provided an access door, using it in another location. That if the walkway was not properly illuminated, it would be required by code. The architect was the clerk at the supermarket, where the access door was to be used. The architect was unaware that the door was unlighted. The clerk fell through the ceiling.

The architect claimed that the architect was not liable, that, once the owner accepts the work, the architect is not liable to third parties. In rejecting this doctrine, the court held that

This defense, as previously stated, is not available for negligent acts or omissions of the architect or negligent party's services. The architect's defense is a fiction that by accepting the work, the architect is aware of the nature of any defect or damage. The opposite is usually true. Contractors are hired for their expertise and are not an average property owner. The architect is not a contractor for real property improvement. The architect is required to establish professional standards by recognizing and establishing standards that simply because the price is paid for those services, it is not the duty of an informed contractor and uninformed contractor.

The court also found that the architect's question was admittedly in error.

See also *Ogles v. E.A. Ogles & Co.*, 1997 West Communications Co.

The accepted work doctrine was applied in *Griggs v. Shamrock Bldg. Co.*, 545 (Wash. 2007), finding that the contractor who completed and accepted the work was not liable for injuries sustained by the owner's employee.

Hillcrest Country Club v. Hillcrest Country Club, 1997 (Wash. 2007), finding that a special warranty was a special warranty limited to one year under the contract. The owner's employee was injured by the contractor's work. The quotation was made a part of the contract, A201, which does not include

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The term *special warranty* in ¶ 9.10.4.3 refers to warranties that are specific to
project.³⁰⁸ In most cases, the specifications require particular warranties, such
roof warranties. These would fit the definition of special warranty.

In *Pierce v. ALSC Architects, P.S.*, 52 Mont. 93, 890 P.2d 1254 (1995), the architect designed
a remodeling project for a supermarket, which had a walk-in cooler located on the main floor
immediately below the observation and storage room. The roof of the cooler was even with the
security walkway and provided a floor for the storage room and a place for storage of seasonal
displays used in the store. During the remodeling, the cooler was removed and replaced with a
smaller walk-in freezer. A suspended ceiling was installed in the space between the new freezer
and the observation walkway. It was agreed that the walkway was to be sealed off by removing the
access door, using it in another location, and covering the opening with drywall. It was understood
that if the walkway was not to be sealed off, guardrails, lighting, and walkway improvements
would be required by code. During construction, the contractor had an extra door and used it
where the access door was to go. The access door was not replaced or sealed. Later the plaintiff, a
clerk at the supermarket, was asked by a customer to retrieve a poster from the area of the
walkway. Unaware that the roof of the cooler had been replaced, he stepped through the access
door. The area was unlighted and did not appear different than it had before the remodeling. The
clerk fell through the ceiling and injured himself.

The architect claimed that the accepted work doctrine barred recovery. That doctrine holds
that, once the owner accepts the work, the contractor or architect is free from liability to third
parties. In rejecting this doctrine, the supreme court of Montana stated:

This defense, as previously applied, has the undesirable effect of shifting responsibility for
negligent acts or omissions from the negligent party to an innocent person who paid for the
negligent party's services. Furthermore, the shifting of responsibility is based on the legal
fiction that by accepting a contractor's work, the owner of property fully appreciates the
nature of any defect or dangerous condition and assumes responsibility for it. In reality, the
opposite is usually true. Contractors, whether they be building contractors, or architects, are
hired for their expertise and knowledge. The reason they are paid for their services is that the
average property owner does not have sufficient knowledge or expertise to design or con-
struct real property improvements safely and soundly. The mere fact that expert testimony is
required to establish professional negligence makes it clear that nonexperts are incapable of
recognizing substandard performance on their own. How then can we logically conclude
that simply because the professional has completed his or her services and the contractee has
paid for those services, liability for the contractor's negligence should shift to the innocent
and uninformed contractee? We cannot.

The court also found that the architect was guilty of negligence per se because the area in
question was admittedly in violation of the building code.

See also *Ogles v. E.A. Mann & Co., Inc.*, 625 S.E.2d 425 (Ga. App. 2005); *Washington v.*
Qwest Communications Corp., 704 N.W.2d 542 (Neb. 2005).

The accepted work doctrine was rejected in *Davis v. Baugh Indus. Contractors Inc.*, 150 P.3d
545 (Wash. 2007), finding that this doctrine was outmoded, incorrect, and harmful. See, also,
Griggs v. Shamrock Bldg. Serv., Inc., 634 S.E.2d 635 (N.C. App. 2006) (there is an exception to
the completed and accepted rule, where a contractor remains liable where the work completed and
turned over to the owner was imminently dangerous to third persons).

Hillcrest Country Club v. N.D. Judds Co., 236 Neb. 233, 461 N.W.2d 55 (1990). In that case, the
special warranty was a specific 20-year roof warranty. The contractor argued that its liability was
limited to one year under ¶ 12.2.2 and because the warranty was contained in its quotation to the
owner rather than in the contract documents. The court rejected this contention on the basis that
the quotation was made a part of the contract. Compare that situation with the current version of
A201, which does not incorporate the bid documents (see ¶ 1.1.1). The *Hillcrest* warranty was

9.10.5 Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment. (9.10.4; no change)

If the contractor accepts final payment, it waives all claims except those specifically reserved in writing.³⁰⁹ One court held that a payment to a contractor is not the final payment which triggers the running of a statute of limitations if the payment was merely an interim payment that happened to be the last payment made.³¹⁰

§ 4.57 Article 10: Protection of Persons and Property

This article covers safety, both to people and things, on the job site, which is the contractor's responsibility. In addition to basic safety measures, the article includes procedures for encountering asbestos or PCB on the job site and for emergencies in general.

§ 4.58 Safety Precautions and Programs: ¶ 10.1

10.1 SAFETY PRECAUTIONS AND PROGRAMS

The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract. (10.1.1; no change)

for "future performance" (this relates to a statute of limitations defense—see U.C.C. § 2-725(2)). *Joswick v. Chesapeake Mobile Homes, Inc.*, 747 A.2d 214 (Md. App. 2000).

³⁰⁹ For a case that held that a claim had previously been made and the contractor did not waive the claim, see *Cape Fear Elec. Co. v. Star News Newspapers, Inc.*, 22 N.C. App. 519, 207 S.E.2d 323, cert. denied, 285 N.C. 757, 209 S.E.2d 280 (1974).

In *McKeney Constr. Co. v. Town of Rowlesburg*, 187 W. Va. 521, 420 S.E.2d 281, 283 (1992), the contract contained this provision:

The acceptance by the Contractor of the Final Payment shall be and shall operate as a release to the Owner of all claims and of all liability to the Contractor for all things done or furnished in connection with this work and for every act and neglect of the Owner and others relating to or arising out of this work, excepting the Contractor's claims for interest upon the Final Payment, if this payment is improperly delayed. No payment, however final or otherwise, shall operate to release the Contractor or his sureties from any obligation under this Contract or the performance bond.

This provision also operated as a release by the contractor of claims against the engineer. There was no evidence that the owner ever waived any provision of the contract. See also *Absher Constr. Co. v. Kent Sch. Dist.* No. 415, 77 Wash. App. 137, 890 P.2d 1071 (1995). In *Everman's Elec. Co., Inc. v. Evan Johnson*, 955 So. 2d 979 (Miss. App. 2007), the court rejected the argument by one prime contractor that this provision meant that another prime contractor had waived claims against it.

³¹⁰ *Credit Gen. Ins. Co. v. Atlas Asphalt, Inc.*, 304 Ark. 522, 803 S.W.2d 903 (1991). The court rejected the argument that final payment could be made without regard to the retainage.

It is the contractor's responsibility that the PROGRAM is in force at the time of the contract.

³¹¹ *Gero v. J.W.J. Realty*, 757 S.W.2d 294 (Tex. App.-Eastland 1994). For a case in which the court held that a payment to a contractor is not the final payment which triggers the running of a statute of limitations if the payment was merely an interim payment that happened to be the last payment made, see *631 F.2d 989* (D.C. 1980). An engineer owed the worker a duty to protect the worker from the hazards of the work.

This provision was examined in the situation of multiple prime contractors. The arbitration proceeding was held in Superior Court, 230, 331 A.2d 848 (Md. 1975).

In *Lewis v. N.J. Riebe Engineers & Architects, Inc.*, 1999 WL 165674 (Md. App. 1999), the court held that the engineer was found to have a duty to protect the worker from the hazards of the work.

Architects and engineers are responsible for the construction project. On the other hand, the engineer does not have a duty to oversee the construction project. Occupational Safety and Health Administration v. Milwaukee Metropolitan Sewerage Board, 1999 WL 165674 (Ma. App. 1999). In November 1988, the tunnel was found to contain methane. The tunnel was evacuated according to Healy's evacuation plan, but an explosion was detected. Apparently, the tunnel was not explosion-proof. The gas explosion occurred.

The engineer was cited for a violation of administrative law judge, but the citation was not upheld by a review panel. Ultimately, the original finding that the engineer could not hold that an engineer could not be held responsible for examining to determine the safety of the project. The court found that OSHA could not hold the engineer liable for not examining to determine the safety of the project.

With this intent in mind, the engineer was cited for not examining to determine the safety of the project. "alleviate hazards at the construction site" is the original finding that the engineer could not hold that an engineer could not be held responsible for examining to determine the safety of the project.

The engineer's contract with the contractor. The engineer was to examine the Contract Documents and act in accordance with the contract. The contract also stated that "the engineer shall use the means, methods, techniques, and procedures of the PROGRAM." These provisions were added in 1997, at ¶ 2.6.2.1.

1 Q. And what do you understand that document to be?

2 A. That's the incident report that C.F. Sales filled out.

3 Q. Okay. And do you recall what date they filled out the
4 incident report?

5 A. It is dated October 18th of 2005.

6 Q. And do you remember receiving that incident report?

7 A. Yes.

8 Q. And when you received the incident report, first of all,
9 was it on or around October 18th, 2005 that you received
10 it?

11 MR. VERWOLF: Your Honor, as interesting as this is,
12 I'm going to have to object to -- this is pretty
13 irrelevant, since it appears to be (inaudible) Statute of
14 Limitations issue, which we've already said is not
15 presently before the Court.

16 MR. VonKALLENBACH: I'm getting -- I'm getting --

17 THE COURT: What's the relevance?

18 MR. VonKALLENBACH: I'm getting to the very end,
19 your Honor. I have about two more questions, and the
20 relevance, I think, becomes, at least from my case, is
21 fairly obvious.

22 THE COURT: Well, tell me -- tell me now.

23 MR. VonKALLENBACH: He got the report. He didn't
24 turn it in to risk management, he stuck it on his
25 bookcase for three years, and then he found it after he

1 was prompted.

2 THE COURT: Well, if we were litigating the Statute
3 of Limitations issue, that would be pretty relevant.

4 MR. VonKALLENBACH: Well --

5 THE COURT: But both of you have previously
6 indicated to me that we're not litigating the Statute of
7 Limitations issue.

8 MR. VonKALLENBACH: Again, your Honor, one of the
9 arguments on our Statute of Limitations is an estoppel
10 argument that they're estopped from raising the Statute
11 of Limitations because they had the report for three
12 years and did nothing with it, after representing to C.F.
13 that they were going to turn it in to risk management and
14 process it, and I want to get that on the record that
15 they had the report.

16 THE COURT: Response?

17 MR. VERWOLF: I don't see what it's relevant to, the
18 Statute of Limitations question, we've already argued to
19 the prior judge, an incident report is not a statutory
20 claims report, and the obligation of filing that report
21 belongs to --

22 THE COURT: All right. Well, I think -- I tend to
23 think this is not relevant, but if you have two or three
24 questions --

25 MR. VonKALLENBACH: I do.

1 THE COURT: -- that you want to complete your
2 record, and then you won't do it again? It's probably
3 easier to just let you do it so --

4 MR. VonKALLENBACH: Thank you, your Honor.

5 THE COURT: -- let's do it in two or three
6 questions.

7 BY MR. VonKALLENBACH:

8 Q. I appreciate that. Mr. Pence, did you get that report?

9 A. Yes.

10 Q. What did you do with it?

11 A. Left it on my bookcase.

12 Q. How long did it sit there?

13 A. Too long.

14 Q. Well, how long is too long?

15 A. I would have to go back and research the date when that
16 -- when it was finally discovered, but you said three
17 years. I don't think it was quite that long, but it was
18 way too long.

19 Q. And when you discovered that report, what did you do with
20 it?

21 A. I promptly took it down to our risk management folks,
22 along with my effusive apologies and red face.

23 MR. VonKALLENBACH: Okay, I have no further
24 questions, your Honor.

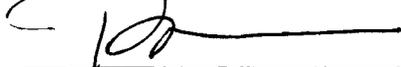
25 THE COURT: Okay, cross-examination.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that I caused a true and correct copy of BRIEF OF APPELLANT to be delivered by U.S. Mail, with a courtesy copy by email, to the following:

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Signed this 3rd day of August 2011 at Seattle, Washington.



Ruby Fowler, Legal Secretary
Central Puget Sound Regional Transit Authority