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68903-7

No. 68903-7-I

COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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LAUREL STREET HOUSING, LLC,

Plaintiff/Respondent,

v.

SAFECO INSURANCE COMPANY OF AMERICA  
a member of Liberty Mutual, Surety Bond No. 6350742,

Defendant/Appellant.

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ON APPEAL FROM WHATCOM COUNTY SUPERIOR COURT  
(Honorable Ira Uhrig)

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**BRIEF OF RESPONDENT LAUREL STREET HOUSING, LLC**

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 ORIGINAL

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## I. INTRODUCTION

Washington's statutes require a bond to secure the performance of contractual obligations on public works such as the Laurel Street Village project (the "Project") in this case.<sup>1</sup> Safeco bonded two aspects of the performance of the general contractor, Ebenal General ("Ebenal"): 1) Ebenal would build the Project in a workmanlike manner, free of defects, and 2) Ebenal would warrant and repair any defective work. Safeco, after a 39-day investigation with no site visit, denied Laurel Street's bond claims for Ebenal's breach of both obligations. Subsequently, arbitration determined that Ebenal in fact breached both obligations. On these undisputed facts, the trial court determined Safeco breached its bond obligations and acted in bad faith, ultimately causing \$576,816.84 of damage to Laurel Street.<sup>2</sup> Safeco appeals those rulings, repeating arguments that, if accepted, would allow a contractor, by pretending to perform repair and warranty obligations and thereby inducing the owner to refrain from asserting a claim, to subsequently refuse further performance and assert no obligation to continue because the warranty period has expired, thereby exonerating itself, and its bonding company, because a bond claim was not made within two years of what it claims was

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<sup>1</sup> RCW 39.08.010.

<sup>2</sup> CP 409.

completion of its work. Accepting these arguments totally eviscerates Washington's public policy and contractual provisions requiring the protection of a performance bond. This Court should reject Safeco's arguments, just as the trial court did, affirm the trial court's ruling in all respects, and award Laurel Street its fees and costs incurred in Safeco's appeal.

## II. COUNTERSTATEMENT OF THE CASE

For over two decades, the Bellingham Housing Authority ("Housing Authority") has served the Whatcom County community by providing housing to low income families, the elderly, people with disabilities, and working families in need of affordable housing.<sup>3</sup> The Housing Authority delivers its housing by serving as the managing member of limited liability companies that own tax credit development projects.<sup>4</sup> In this case, the Housing Authority serves as manager of Laurel Street Housing, LLC, ("Laurel Street"), the owner of the Project. Working with its project architect, Zervas Group Architects ("Zervas"), Laurel Street developed the plans to build three apartment buildings containing 51 residential units.<sup>5</sup> Each building is three to four stories tall

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<sup>3</sup> CP 224.

<sup>4</sup> CP 224-25.

<sup>5</sup> CP 225.

and rests on a large, 12-inch thick, steel reinforced, cast-in-place concrete structural slab.<sup>6</sup> Between and around the buildings are walkways, courtyards, and decks, all of which are also built above the structural slab.<sup>7</sup> An underground parking garage and storage facilities are located below the slab.<sup>8</sup> The courtyards and decks consist of a topping slab, roughly six inches thick, cast in place above the structural slab.<sup>9</sup> The Project plans called for a waterproof membrane system between the topping slab and the structural slab to prevent water from entering the parking garage below.<sup>10</sup>

On August 15, 2005, Laurel Street and Ebenal contracted for the construction of the Project (the “Contract”).<sup>11</sup> The same day, a surety performance bond was executed between Ebenal and Safeco Insurance Company of America in the amount of \$5,940,000.00, the amount of the Contract (the “Bond”).<sup>12</sup> The Bond specifically binds Safeco to Laurel Street for the performance of the Contract.<sup>13</sup>

Construction began on August 18, 2005. During construction, Ebenal recommended that a system called Kryton T-1 crystalline

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<sup>6</sup> CP 225.

<sup>7</sup> CP 225.

<sup>8</sup> CP 225.

<sup>9</sup> CP 225.

<sup>10</sup> CP 225.

<sup>11</sup> CP 225.

<sup>12</sup> CP 225; CP 227-231.

<sup>13</sup> CP 227-231.

waterproofing, manufactured by a Canadian company named Kryton International, Inc., be used instead of the membrane system depicted in the original Project plans.<sup>14</sup> Zervas approved the use of Kryton, based on specific conditions memorialized in an e-mail to Ebenal's project manager.<sup>15</sup> Unfortunately, from the date the parking garage was completed during construction until the present repairs, the parking garage leaked and numerous other construction defects existed at Laurel Village.<sup>16</sup> The leaks that developed in the ceiling of the underground parking garage were caused by the defective installation of the waterproofing system above the garage.<sup>17</sup>

Until April 27, 2009, Ebenal constructed the Project, participated in numerous meetings and inspections, and made numerous attempts to make repairs to the leaks and construction defects, none of which were successful in stopping those leaks or correcting the defects.<sup>18</sup> After April 27, 2009, Ebenal refused to perform further work or repairs on the Project.<sup>19</sup>

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<sup>14</sup> CP 225.

<sup>15</sup> CP 225.

<sup>16</sup> CP 225.

<sup>17</sup> CP 225-226.

<sup>18</sup> CP 226.

<sup>19</sup> CP 226.

Paragraph 3 of the Bond describes when the Surety's obligations arises.<sup>20</sup> Paragraph 3.1 of the Bond states, if there is no "Owner Default", the Surety's obligation under the bond shall arise after:

3.1 The Owner has notified the Contractor and the Surety... that the Owner is considering declaring a Contractor Default and has requested and attempted to arrange a conference with the Contractor and the Surety to be held not later than fifteen days after receipt of such notice to discuss methods of performing the Construction Contract. If the Owner, the Contractor and the Surety agree, the Contractor shall be allowed a reasonable time to perform the Construction Contract, but such an agreement shall not waive the Owner's right, if any, subsequently to declare a Contractor Default.<sup>21</sup>

Pursuant to paragraph 3.1, in a letter dated April 6, 2009, Laurel Street notified Ebenal and Safeco that it was considering declaring a contractor default under the Bond.<sup>22</sup> Laurel Street also requested a conference with Ebenal and Safeco to discuss performance of the Agreement within fifteen days of receipt of the notice.<sup>23</sup> On April 16, 2009, Stacey Fitzpatrick, an attorney for Laurel Street, followed up on the letter by emailing Ebenal to request a meeting.<sup>24</sup> Safeco and Ebenal did not agree to a conference within 15 days of Laurel Street's request for the

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<sup>20</sup> CP 229.

<sup>21</sup> CP 229.

<sup>22</sup> CP 240-243.

<sup>23</sup> CP 241.

<sup>24</sup> CP 245.

conference, nor did Ebenal or Safeco agree to a subsequent request by Laurel Street for a conference.<sup>25</sup>

On April 22, 2009, Ebenal sent a letter to Laurel Street proposing to work with the design team to install a sheet metal gutter system at no charge to Laurel Street, provided that Laurel Street would release Ebenal from any liability associated with the Project once completed.<sup>26</sup> However, Ebenal did not respond to the request for a conference or Laurel Street's attempts to arrange the conference.<sup>27</sup>

On April 27, 2009, representatives from Laurel Street, Ebenal, Zervas (the Project architect) and Kryton met to discuss the continuing water leaks and property damage in the parking garage.<sup>28</sup> On April 28, 2009, Laurel Street sent a letter to Ebenal, Kryton and Zervas, to memorialize the meeting.<sup>29</sup> At the meeting Ebenal, Zervas and Kryton all requested an additional two weeks to come up with a detailed plan to address the problems, which Laurel Street agreed to, but would not allow another extension.<sup>30</sup>

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<sup>25</sup> CP 233.

<sup>26</sup> CP 247.

<sup>27</sup> CP 233.

<sup>28</sup> CP 234.

<sup>29</sup> CP 249.

<sup>30</sup> CP 234.

On June 15, 2009, in performance of paragraph 3.2 of the Bond, Laurel Street sent Safeco and Ebenal each individually a “Notice of Declaration of Contractor Default and Termination of Contract Performance Bond No. 65350742” informing them that Laurel Street was declaring Ebenal in default and terminating the Contract.<sup>31</sup> The letter to Safeco requested that it fulfill its obligations under the Bond.<sup>32</sup> In accordance with paragraph 3.3 of the Bond, Laurel Street also stated in the letter that it agreed to “pay the balance of the contract price to the surety in accordance with the terms of the construction contract or to a contractor selected to perform the construction contract in accordance with the terms of the contract” with Laurel Street.<sup>33</sup>

In response to Laurel Street’s default letter, Safeco sent a letter to Laurel Street’s attorneys on June 18, 2009, requesting dates and times that Laurel Street was available to discuss the situation and that they would “attempt to coordinate with Ebenal.”<sup>34</sup> Safeco never provided a date when Safeco and Ebenal would meet with Laurel Street, despite another request from Laurel Street.<sup>35</sup>

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<sup>31</sup>CP 251-58.

<sup>32</sup>CP 251.

<sup>33</sup>CP 251.

<sup>34</sup>CP 270-71.

<sup>35</sup>CP 273-275.

Laurel Street sent Safeco the requested Project documents on November 20, 2009.<sup>36</sup> Thirty nine days later, Safeco sent Laurel Street a letter dated December 29, 2009, stating that Laurel Street did not appear “to have a proper claim against the bond” and that “the remedies appear to lie with the subcontractor, the manufacturer, and/or their respective liability carriers, but not with Ebenal or the surety.”<sup>37</sup> On this basis, Safeco denied Laurel Street’s claim.<sup>38</sup>

Safeco’s “investigation” into Laurel Street’s claim did not involve any actual visit to the construction site, nor consultation with a single technical or construction expert to evaluate Laurel Street’s claim. In answering Laurel Street’s interrogatories, when asked what steps it took to investigate Laurel Street’s claim, Safeco answered:

Safeco acknowledged communications from Laurel Street Housing, LLC and/or its counsel concerning the claim or potential claim, requested information concerning the same from Laurel Street Housing, LLC and Ebenal General, Inc., reviewed and analyzed the information received and advised Laurel Street Housing, LLC of the results of its investigation and conclusions regarding the claim.<sup>39</sup>

In response to Safeco’s letter, because it had complied with paragraph 3 of the Bond, Laurel Street demanded on January 29, 2010,

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<sup>36</sup> CP 273-275.

<sup>37</sup> CP 277-79.

<sup>38</sup> CP 277-79.

<sup>39</sup> CP 219-20.

that Safeco perform its obligations under paragraph 6 of the Bond, and that if it failed to do so, Laurel Street would be entitled to enforce any remedy available to it against Safeco.<sup>40</sup>

Following Safeco's refusal to perform under the Bond, Laurel Street retained Building Envelope Technology and Research ("BETR"), a nationally recognized waterproofing consultant, to investigate the conditions at the Project.<sup>41</sup> In a February 18, 2010, report, BETR detailed the property damage and construction defects that existed at the Project, including defectively installed waterproofing it found between the topping slabs and the structural slab. Copies of BETR's report were furnished to Safeco.<sup>42</sup>

On February 26, 2010, and again on April 23, 2010, Laurel Street invited all parties to participate in mediation (as required by the contracts with Ebenal and Zervas), including Safeco. Safeco declined Laurel Street's invitation to participate in the mediation.<sup>43</sup> Mediation was conducted on July 14, 2010, in Seattle, before Christopher Soelling, an experienced construction defect mediator and arbitrator.<sup>44</sup> As a result of the mediation, Laurel Street settled its claims against the architect for

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<sup>40</sup> CP 280-82.

<sup>41</sup> CP 235.

<sup>42</sup> CP 235.

<sup>43</sup> CP 284-90; CP 292-93.

<sup>44</sup> CP 236.

damage “related in any way to waterproofing components” of the Project for \$150,000.00.<sup>45</sup> Laurel Street was unable to reach an agreement with Ebenal.<sup>46</sup>

Consequently, as required by the Contract, Laurel Street and Ebenal submitted Laurel Street’s claims to arbitration, agreeing to an arbitration hearing before Judge Charles S. Burdell, Jr. (ret.), commencing on May 2, 2011.<sup>47</sup> On March 16, 2011, Laurel Street informed Safeco of the scheduled arbitration hearing and demanded that Safeco participate in the arbitration, acknowledge its obligations, under the Bond and Washington surety law, and fund a repair.<sup>48</sup> Safeco chose not to participate in the arbitration.<sup>49</sup>

On May 17, 2011, after a four day arbitration hearing, Judge Burdell found that Laurel Street “established by a preponderance of the evidence that [the parking garage] leaks were caused by negligence of and/or breach of contract by Ebenal” and issued an award in favor of Laurel Street in the amount of \$603,343.00 for the costs of repair, design and monitoring services, and damage to automobiles.<sup>50</sup>

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<sup>45</sup> CP 236.

<sup>46</sup> CP 236.

<sup>47</sup> CP 236.

<sup>48</sup> CP 295-96.

<sup>49</sup> CP 236.

<sup>50</sup> CP 298-300.

The arbitration award did not cover or compensate Laurel Street for all its damages, so Laurel Street is entitled to recover additional damages against Safeco. Paragraph 6 of the Bond obligates the surety to perform on the construction contract when the owner has terminated the contractor's right to complete it. Specifically, paragraph 6 provides that the Surety is obligated for:

**6.1** The responsibilities of the Contractor for correction of defective work and completion of the Construction Contract;

**6.2** Additional legal, design professional and delay costs resulting from the Contractor's Default, and resulting from the actions or failure to act of the Surety under Paragraph 4; and

**6.3** Liquidated damages, or if no liquidated damages are specified in the Construction Contract, actual damages caused by delayed performance or non-performance of the Contractor.<sup>51</sup>

As a result of Safeco's default, Laurel Street incurred additional legal, design professional and delay costs, as well as other actual damages from Ebenal's default, all of which exceeded the amount of the arbitration award and the Zervas settlement and are recoverable under Paragraph 6 of the Bond. Laurel Street's damages also included the amounts Laurel Street had to pay for remediation of the construction defects, which would not have been necessary had Safeco performed under the Bond. On April

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<sup>51</sup>CP 229.

2, 2011, Laurel Street filed this lawsuit against Safeco for breach of the Bond and recovery of its additional damages.

On May 24, 2012, after Laurel Street moved for summary judgment and Safeco crossed moved for summary judgment, the trial court found that Safeco breached its contract by failing to perform under the Bond and acted in bad faith by failing to conduct a reasonable investigation into Laurel Street's claim.<sup>52</sup> It further found that Safeco was liable to Laurel Street for (1) all costs resulting from the default and failure to act, (2) all additional legal, design profession and delay costs resulting from Safeco's default and Safeco's failure to act, and (3) all its attorneys fees and expert costs for pursuing its claims against Safeco.<sup>53</sup>

In ordering summary judgment, the trial court further found that Laurel Street's damages under the Bond were (1) \$746,665.09 in remediation costs, (2) \$119,551.40 in design and professional costs, and (3) \$331,505.76 for legal fees and costs.<sup>54</sup> When adjusted for amounts already received through settlement and the arbitration award in Laurel Street's favor, the trial court found that Laurel Street's damages amounted to \$462,379.25.<sup>55</sup>

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<sup>52</sup>CP 11.

<sup>53</sup>CP 11.

<sup>54</sup>CP 11.

<sup>55</sup>CP 11.

On July 2, 2012, Laurel Street filed its Application for Award of Attorneys Fees and Costs. On July 20, 2012, the Court ordered that Laurel Street was entitled to all its attorneys fees and costs under *Olympic Steamship Company, Inc. v. Centennial Insurance Company*, 117 Wn.2d 37 (1991) and *Colorado Structures v. Insurance Company of the West*, 161 Wn.2d 577, (2007) and under the provisions of the Performance Bond.<sup>56</sup> The Court further found that such fees and costs “were necessary to the prosecution of Laurel Street’s claims and were charged at reasonable rates in comparison to rates charged in the Puget Sound legal community...”.<sup>57</sup> On this basis, the trial court awarded Laurel Street attorneys fees and costs against Safeco in the amount of \$114,436.99.<sup>58</sup> Thus, the total judgment to be affirmed amounts to \$576,816.84.<sup>59</sup>

### III. ARGUMENT

#### A. Standard of Review.

This Court reviews the Superior Court’s decision granting Laurel Street’s summary judgment motion and denying Safeco’s summary

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<sup>56</sup> CP 408.

<sup>57</sup> CP 408.

<sup>58</sup> CP 408.

<sup>59</sup> CP 409.

judgment de novo.<sup>60</sup> “The function of a summary judgment is to avoid a useless trial.”<sup>61</sup> “When reviewing an order for summary judgment, this court engages in the same inquiry as the trial court.”<sup>62</sup>

Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.<sup>63</sup> Further, “[S]ummary judgment is proper if reasonable minds could reach only one conclusion from the evidence presented.”<sup>64</sup> “The purpose of summary judgment, after all, is to avoid a ‘useless trial’.”<sup>65</sup> “If the moving party submits adequate affidavits, the burden shifts to the nonmoving party to set forth specific facts sufficiently rebutting the moving party’s contentions and disclosing the existence of a material issue of fact.”<sup>66</sup>

The facts in this case are clear. Even when this Court views the facts in the light most favorable to Safeco, there is no reasonable

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<sup>60</sup> *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 563, 178 P.3d 1054, *rev. denied* 165 Wn.2d 1004 (2008).

<sup>61</sup> *Deacy v. College Life Ins. Co. of America*, 25 Wn. App. 419, 422, 607 P.2d 1239(1980)(citing *Lamon v. McDonnell Douglas Corp.*, 91 Wn. 2d 345, 349, 588 P.2d 1346 (1979)).

<sup>62</sup> *Id.* (citing *Highline School District No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15 (1976)).

<sup>63</sup> *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007).

<sup>64</sup> *Westberry v. Interstate Distributor Co.*, 164 Wn. App. 196, 204, 263 P.3d 1251 (2011) (citing *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846, *cert. denied*, 552 U.S. 1040 (2007)).

<sup>65</sup> *Davis v. West One Automotive Group*, 140 Wn. App. 449, 456, 166 P.3d 807 (2007) (citing *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349, P.2d 1346 (1979)).

<sup>66</sup> *First Class Cartage, Ltd. V. Fife Service and Towing, Inc.*, 121 Wn. App. 257, 262, 89 P.3d 226 (2004) (citing *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)).

conclusion other than Safeco breached the Bond and did so in bad faith, causing damage to Laurel Street in the amount of \$576,816.84. As a result, there are no issues of material fact and the trial court Order of Summary Judgment must be affirmed.

**B. Laurel Street's Claim Fell Within the Suit Limitation's Clause.**

Safeco's contention that uncontroverted evidence exists that the "Contractor Default" and cessation of work occurred more than two years after Laurel Street filed its lawsuit is patently false. Pursuant to the language of the Bond and under clear Washington case law, there is no doubt that Laurel Street filed this lawsuit within the limitations period. Safeco argues Laurel Street failed to initiate its lawsuit on time based on two false assertions: (1) that Ebenal defaulted more than two years before Laurel Street filed this lawsuit and, (2) that Ebenal ceased working on the Project after July 28, 2008. Settled Washington law shows that these arguments are without merit.

Safeco's claim that Laurel Street's lawsuit is barred by the Bond's two year suit limitation hinges on what constitutes "work" on the Project. As Safeco argued to the trial court, and now argues in its appeal, without any authority: "There is simply no authority for Laurel Street's position that a meeting and an offer to resolve a dispute constitutes 'work' on a

construction project.”<sup>67</sup> The actual facts of this case and applicable Washington law dictate the opposite conclusion. Despite Safeco’s contention, the authority clearly supports that warranty work, even meetings, constitutes “work”.

Paragraph 9 of the Bond provides the limitations clause at issue.

It states in full:

Any proceeding, legal or equitable, under this Bond may be instituted in any court of competent jurisdiction in the location in which the work or part of the work is located and shall be instituted within two years after Contractor Default or within two years after the Contractor ceased working or within two years after the Surety refuses or fails to perform its obligation under this Bond, whichever occurs first.<sup>68</sup> (emphasis added)

Here, *Mattingly* is instructive. In *Mattingly*, the Court of Appeals held that a construction project was not complete until the items on the punch list were complete.<sup>69</sup> There, the contract limitation clause stated: “At the completion of this project, Contractor shall execute an instrument to Owner warranting the project for one year against defects in workmanship or materials utilized.”<sup>70</sup> On April 1, 2007, a certificate of substantial completion was signed.<sup>71</sup> The contract between the plaintiff and the

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<sup>67</sup>Brief of Appellant (“Appeal”) at 27.

<sup>68</sup> CP 229.

<sup>69</sup> *Mattingly v. Palmer Ridge Homes LLC*, 157 Wn. App. 376, 395, 238 P.3d 505 (2010).

<sup>70</sup> *Id.* at 383.

<sup>71</sup> *Id.* at 384.

contractor contained a limitations clause which limited the plaintiff's ability to sue the contractor for one year "beyond the completion of the project or cessation of the work."<sup>72</sup>

Although a certificate of substantial completion was signed, from May through October, the contractor and the homeowner worked together to arrange various repairs.<sup>73</sup> By September 24, 2007, although the contractor believed it had addressed all of the items on the punch list, it continued working on leaks and other punch list items.<sup>74</sup> Unsatisfied with the condition of their home, the plaintiffs hired a civil engineer to do an inspection who concluded the contractor did not complete the punch list.<sup>75</sup>

Upon their inspection, the plaintiffs notified the contractor of the remaining construction defects in February 2008.<sup>76</sup> The contractor offered to remedy some of the defects found but the plaintiffs rejected the offer because it did not correct all the issues and failed to include attorneys fees.<sup>77</sup> The plaintiffs sued on October 17, 2008.<sup>78</sup> The contractor moved

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<sup>72</sup> *Mattingly*, 157 Wn. App at 383.

<sup>73</sup> *Id.* at 385.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

for summary judgment claiming the lawsuit was time barred, which the trial court granted.<sup>79</sup>

On appeal, the plaintiffs argued that work did not cease until October 29, 2007, and that the contract required completion, not substantial completion, the date of which was a genuine issue of material fact precluding summary judgment.<sup>80</sup> The Court of Appeals found that under the contract, the date of completion was either “the date of completion for the punch list items or, if incomplete, the date that work on the punch list items ceased.”<sup>81</sup>

In its decision, the court emphasized how “completion” and “substantial completion” were not the same.<sup>82</sup> While “completion” infers something is “fully realized” or “carried to the ultimate”, “substantial completion” encompasses incompleteness.<sup>83</sup> The court further made reference to RCW 4.16.310, the statute of repose for construction claims, where a builder need only complete construction to allow occupancy or use of an improvement for its intended purpose.<sup>84</sup> The court articulated that had the contractor “intended the limitation period to run from the date

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<sup>79</sup> *Mattingly*, 157 Wn. App at 386-87.

<sup>80</sup> *Id.* at 393.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 394.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* (citing RCW 4.16.310).

of substantial completion, it should have made its intention apparent in the construction contract through use of that phrase.”<sup>85</sup> Thus, the court held that under the contract, the project was not complete until the items on the punch list were complete.

In addition to *Mattingly*, in *Honeywell*, the Supreme Court of Washington held that a general contractor’s work did not “cease” under a limitations clause in a payment bond requiring action within one year, until materials and work required by the construction contractor had been furnished and completed.

The limitations clause in the bond in *Honeywell* read:

No suit or action shall be commenced hereunder by any claimant.

(b) After the expiration of one (1) year following the date on which Principal (general contractor) ceased work on said Contract.<sup>86</sup>

The issue before the court was whether cessation of work was on the date the work was substantially completed or whether cessation of the work contemplated complete performance.<sup>87</sup>

As was the case in *Mattingly*, the court in *Honeywell* looked to the ordinary meaning of the words used in the limitations clause.<sup>88</sup> There, the

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<sup>85</sup> *Mattingly*, 157 Wn. App at 394.

<sup>86</sup> *Honeywell, Inc. v. Babcock*, 68 Wash.2d 239, 242, 412 P.2d 511 (1966).

<sup>87</sup> *Id.* at 243.

court held that the general contractor's work "did not cease until the materials and the work required by the contract had been furnished and completed."<sup>89</sup> In discussing what it meant to cease work, the court cited Webster's Third New International Dictionary which defined the word 'cease' as "to leave off: bring to an end: DISCONTINUE, TERMINATE."<sup>90</sup> Just as in *Mattingly*, the implication is that work has not ceased until the entire project is finished, including repair and warranty work.

**1. Ebenal ceased working after April 27, 2009.**

The logic of *Mattingly* and *Honeywell* apply to the suit limitations provision in the case at hand to determine when Ebenal ceased working. When construing contracts, the words used "must be given their usual and ordinary meaning."<sup>91</sup> As in *Mattingly*, the court must look at the plain language of the limitations provision in order to determine its meaning.

In *Mattingly*, as discussed above, even though there had been a certificate of substantial completion, the contractor continued to repair defects on the property and therefore the work was not complete under the language of the limitations provision. It naturally follows that the

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<sup>88</sup> *Honeywell, Inc.*, 68 Wash.2d at 243.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Mattingly*, 157 Wn. App. at 394.

contractor could not have “ceased working” while it continued to correct defects on the punch list.

The same logic applies to Ebenal’s work in this case. Here, three certificates of substantial completion had been executed, but Ebenal continued to do work to correct the leaks in the parking garage — or stopped working on the repairs, in breach of the contract and warranty — within two years of commencement of this lawsuit. The Court need look no further than David Ebenal’s own declaration to confirm these facts. David Ebenal’s July 28, 2008 letter to David Bergman proves that Ebenal did not believe it had completed its warranty work. In his letter, David Ebenal stated his belief that he had no information suggesting Ebenal’s work was defective, but that “[I]f the Bellingham Housing Authority has or receives additional information bearing upon this issue, please provide it to us so we can evaluate it.”<sup>92</sup> This statement provides a clear admission by Ebenal that it contemplated additional discussion and work was necessary to resolve the leaks in the parking garage. Ebenal further reserved its right and remedies to charge for labor and materials, which again demonstrates it did not believe its work was complete.<sup>93</sup>

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<sup>92</sup> CP 160-61.

<sup>93</sup> CP 161.

In fact, the construction defects were far from being resolved and Ebenal continued to work to correct them. On April 22, 2009, Ebenal's project manager sent Laurel Street a proposal to install a sheet metal gutter system to resolve the leaks.<sup>94</sup> Several meetings took place between Laurel Street and Ebenal in late April and on April 27, 2009, representatives from Laurel Street, Ebenal, Zervas and Kryton met to discuss continuing water leaks and property damage in the parking garage.<sup>95</sup> At the meeting, Ebenal explained the suggested installation of the sheet metal system in the garage and requested an additional two weeks to come up with a detailed plan, to which Laurel Street agreed.<sup>96</sup> Proposing a plan and meeting to correct a construction defect and preparing to perform those alternatives is just as much "work" under the Contract as putting the first shovel in the ground. Given the fact that Ebenal admits it was still doing this work on April 27, 2009 and beyond, there is no doubt that Laurel Street timely filed its lawsuit on April 6, 2011, within the two year period under the Bond's limitation clause.

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<sup>94</sup> CP 247.

<sup>95</sup> CP 234.

<sup>96</sup> CP 234.

## **2. Default occurred after April 27, 2009.**

Safeco's argument that default occurred more than two years before Laurel Street filed its lawsuit also holds no merit. Laurel Street filed its lawsuit on April 2, 2011. On June 15, 2009, Laurel Street declared Ebenal in default, well within the two year period. Furthermore, Ebenal only refused performance after April 27, 2009. Consequently, whether the date of default occurred when Ebenal refused performance or when Laurel Street declared default, Laurel Street clearly filed its lawsuit on time.

Safeco argues that breach of the contract must have occurred before January 2007.<sup>97</sup> In support of this contention, Safeco arbitrarily believes that default must have occurred on this date because the damage to the garage occurred before January 29, 2007. However, Safeco conveniently omits the important fact that Ebenal and Laurel Street had met on April 27, 2009, to discuss the leaks and property damage to the garage and that Ebenal requested additional time to come up with a plan to address the problems, which Laurel Street agreed to. Thus, the date of default did not occur until after April 27, 2009, after Ebenal refused to correct the defects at the Project. Essentially, Safeco would like the Court to believe that once any defect occurs on a construction project, instead of

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<sup>97</sup>Appeal at 22.

working with and allowing a contractor to remedy that defect, it must instead declare default.

Safeco haphazardly cites *Vertecs* for the proposition that Laurel Street must have brought its claim within two years of discovering the defects. No reasonable reading of *Vertecs* supports Safeco's argument. In *Vertecs*, the court held that the discovery rule applied in actions for breach of construction contracts where latent defects were alleged.<sup>98</sup> However, *Vertecs* only involves discussion on the date a "breach" occurs, not a default. As the Court in *Colorado Structures* stated:

Although the terms "breach" and "default" are sometimes used interchangeably, their meanings are distinct in construction suretyship law. Not every breach of a construction contract constitutes a default sufficient to require the surety to step in and remedy it. To constitute a legal default, there must be a (1) material breach or series of material breaches (2) of such magnitude that the obligee is justified in terminating the contract.<sup>99</sup>

The Court further stated:

[T]he law permits but does not require a nonbreaching promise/obligee to declare a default (i.e., to declare a material breach and announce its intention to terminate the

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<sup>98</sup> *1000 Virginia Ltd. P'Ship v. Vertecs*, 158 Wn.2d 566, 576, 146 P.3d (2006).

<sup>99</sup> *Colorado Structures, Inc. v. Insurance Co. of the West*, 161 Wn.2d 577, 591, 161 Wn.2d 577 (2007)(quoting *L & A Contracting Co v. Southern Concrete Services, Inc.*, 17 F.3d 106, 110 (1994).

contract). Instead, the law gives the promise/oblige the option to declare a default, terminate the contract, and sue for damages (if any) incurred to date; or, alternatively, to continue the contract in effect and sue for damages incurred when performance is finished.<sup>100</sup>

As the Court contemplated in *Colorado Structures*, Laurel Street chose to continue the contract and attempt to allow Ebenal to remedy the defective construction in accordance with its contract obligations. Default did not occur until Ebenal refused to correct the damage.

Safeco's argument regarding the suit limitations period further flies in the face of the Court's holding in *Colorado Structures*. If the Court were to accept Safeco's unsupported position, then any contractor could breach the contract, continue to try and fix defects under a warranty for the suit limitations period, and then walk away, completely exonerating the bond----and any claim against the surety thereafter. This is the exact situation the Court in *Colorado Structures* sought to prevent. As the *Colorado Structures* court stated "[T]he law gives the promise/oblige the option to declare a default, terminate the contract, and sue for damages (if any) incurred to date; or, alternatively, to continue the contract in effect and sue for damages incurred when performance is finished."<sup>101</sup>

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<sup>100</sup> *Colorado Structures, Inc.* 161 Wn.2d at 591 (emphasis added).

<sup>101</sup> *Id.* at 592.

Consequently, the premise of Safeco's argument, which relies on an unjustified default date, is unsustainable.

Furthermore, the language of the Bond supports Laurel Street's position. Paragraph 12.3 defines Contractor Default as:

Failure of the contractor, which has neither been remedied nor waived, to perform or otherwise to comply with the terms of the Construction Contract.<sup>102</sup>

As the language makes clear, the Bond defines contractor default as occurring upon the contractor's "failure to perform" or comply with the terms of the contract. As has been discussed, Ebenal continued to work on the Project and attempted to resolve any defects as late as April 27, 2009. Thus, failure to perform, as contemplated under the Bond, did not occur until after that date.

Safeco's argument regarding the date of contractor default ignores settled Washington law and the language of the Bond. Consequently, this Court must affirm the trial court as Laurel Street clearly brought its suit within the suit limitations period.

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<sup>102</sup> CP 230 (emphasis added).

C. **Laurel Street Complied with the Bond Requirements.**

1. **Laurel Street Attempted to Arrange a Conference.**

The facts showing that Laurel Street attempted to arrange a conference are indisputable. However, Safeco argues that simply because no conference occurred, Laurel Street failed the requirement under the Bond that it attempt to arrange a conference. There is no requirement under the Bond that a conference take place. Laurel Street need only have attempted to arrange one, which it did. Furthermore, despite Safeco's assertions to the contrary, Laurel Street never withdrew its request for a conference.

Paragraph 3.1 of the Bond states that the Surety's obligation arises after the Owner:

...has requested and attempted to arrange a conference with the Contractor and the Surety to be held not later than fifteen days after receipt of such notice to discuss methods of performing the Construction Contract.<sup>103</sup>

Laurel Street fulfilled its obligation to attempt to arrange a conference by requesting a conference with Ebenal and Safeco within fifteen days of receipt of the notice.<sup>104</sup> Although Safeco at first agreed to meet with Laurel Street, Ebenal did not agree to meet within 15 days of Laurel Street's request. Simply because a conference did not occur does not

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<sup>103</sup> CP 229.

<sup>104</sup> CP 233.

negate the fact that Laurel Street complied with the Bond by attempting to set up the conference.

Furthermore, Safeco's description of Laurel Street's attempt to arrange the conference is misleading and omits material facts, especially where Safeco asserts that Laurel Street "withdrew its request" for a conference."<sup>105</sup> In fact, Laurel Street never withdrew its request. Laurel Street's counsel, Edward Coulson, had informed Thomas Windus, counsel for Safeco, that Ebenal had met with Laurel Street and that he did not know the outcome in that meeting.<sup>106</sup> At no time did Laurel Street withdraw their request to meet.<sup>107</sup> Furthermore, Laurel Street again requested a meeting in its November 20, 2009 letter to Safeco.<sup>108</sup> Subsequently, Laurel Street invited Safeco to the mediation on February 26, 2010 and April 23, 2010.<sup>109</sup> Safeco's or Ebenal's refusal to meet and confer cannot be used to bar Laurel Street's rights under the Bond.

## **2. Laurel Street Gave Sufficient Notice of Termination and Default.**

Safeco argues that Laurel Street failed to formally terminate the contract with Ebenal and that Laurel Street must first have obtained

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<sup>105</sup> Appeal at 30.

<sup>106</sup> CP 23.

<sup>107</sup> *Id.*

<sup>108</sup> CP 273.

<sup>109</sup> CP 284; CP 292-93.

written certification from the architect. However, Safeco cites no controlling authority in Washington to support its position that an architect's certificate was necessary to trigger its obligations as a surety under a bond. Laurel Street's Notice of Declaration of Default was sufficient to comply with Paragraph 3 of the Bond because it put Safeco on notice and afforded it an opportunity to participate in the ensuing mitigation measures.

Laurel Street did not fail to formally terminate the contract with Ebenal or give notice to Safeco. Contrary to Safeco's assertions, this is not a situation where the surety's bond responsibilities were not triggered due to failure of the owner to terminate or give notice of default to the principal. Here, Laurel Street delivered a written notice of default and termination that clearly stated it was terminating the contractor and looking to Safeco to fulfill its bond obligations<sup>110</sup> and Safeco acknowledged receipt of the notice.<sup>111</sup>

Furthermore, Safeco has not shown that it has been prejudiced by Laurel Street's giving notice without an architect's certification. Safeco relies on *Stonington Water Street Assoc., LLC v. Hodess Bldg. Co., Inc.*, for the argument that its obligations in Paragraph 4 were not triggered

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<sup>110</sup> CP 251.

<sup>111</sup> CP 270.

because of unsatisfied conditions in Paragraph 3.<sup>112</sup> However, the facts of *Stonington* differ significantly from those at hand. Applying *Connecticut* state law, the court in *Stonington* found that where the owner waited two months and hired another contractor to complete work before giving the surety notice of termination and default, the surety was relieved of its obligations.<sup>113</sup> The court emphasized that the underlying reason for the notice requirement was to allow the surety to exercise its right under the performance bond to participate in the selection of a successor.<sup>114</sup> Although the court noted that the bond required certification by an architect, the court did not discuss the provision and instead based its holding on the fact that the insured in that case delayed giving notice to the surety for a prejudicial length of time, thus depriving it of its right to participate in selection of a successor.<sup>115</sup> Here, Safeco did in fact receive proper notice of termination and default, and had multiple opportunities to participate in the selection of a successor contractor, all of which it refused. This is particularly telling in this case, as many of the meetings (such as the one held on April 27, 2009) and the invitations (such as the mediation) involved direct participation by the Project architect and her

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<sup>112</sup> *Stonington Water Street Assoc., LLC v. Hodess Bldg. Co., Inc.*, 792 F.Supp.2d 253 (D. Conn. 2011) *aff'd* 472 Fed. Appx. 71 (2<sup>nd</sup> Cir. 2012).

<sup>113</sup> *Stonington Water Street Assoc., LLC v.* 792 F.Supp.2d at 264-265.

<sup>114</sup> *Stonington Water Street Assoc., LLC v.* 792 F.Supp.2d at 267.

<sup>115</sup> *Stonington Water Street Assoc., LLC v.* 792 F.Supp.2d at 267.

concurrence in Ebenal's termination. Thus, Safeco can show no prejudice to the lack of a formal architect's certificate.

The significance of a notice provision is in providing a surety with notice so that it can protect its interests, not so that it can obtain an architect's certificate. This position is supported by *Ingrassia Const. Co., Inc. v. Vernon Twp. Bd. of Educ.*, which held that an architect's certification "is not a condition precedent to the owner's exercise of its common-law right of termination."<sup>116</sup> Thus, even without an architect's certification, an owner maintains its right to terminate, "subject to the normal and traditional burden of proof of material breach from which it would be largely exempted by a proper certificate."<sup>117</sup> The court in *Ingrassia* further held that, "[A]n owner who terminates the contract because it believes that the contractor has materially breached the contract *cannot be deemed to have forfeited its right to prove the breach and the resultant damages simply because it has disadvantaged itself by not following the contractual termination procedures and has thereby lost the benefit of the conclusiveness of the certificate.*"<sup>118</sup> Similarly here, Laurel

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<sup>116</sup> *Ingrassia Const. Co., Inc. v. Vernon Twp. Bd. of Educ.*, 345 N.J. Super. 130, 141, 784 A.2d 73 (App. Div. 2001).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 141 (emphasis added).

Street has not forfeited its right to prove breach or damages by Ebenal simply because it did not procure a formal architect's certificate.

**3. Safeco Waived the Defense Of Noncompliance With Any Architect Certification Requirement by Failing to Raise it in Any of its Communications with Laurel Street or at Mediation.**

Safeco has waived or is estopped from asserting noncompliance with the architect certification requirement as a basis for denying coverage. Under *Bosko v. Pitts & Still, Inc.*, if an insurer denies liability under the policy for one reason, while having knowledge of other grounds for denying liability, it is estopped from later raising the other grounds in an attempt to escape liability, provided that the insured was prejudiced by the insurer's failure to initially raise the other grounds.<sup>119</sup> Furthermore, in Washington, an insurer's unconditional denial of liability to its insured on the insurance policy is either a waiver of the insured's duty to comply with policy conditions precedent or, if the denial is relied on by the insured to his prejudice, the insurer is estopped from raising noncompliance with policy conditions precedent as a defense.<sup>120</sup> These rules should apply to

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<sup>119</sup> *Bosko v. Pitts & Still, Inc.*, 75 Wn. 2d 856, 864, 454 P.2d 229 (1969).

<sup>120</sup> *Burr v. Lane*, 10 Wash. App. 661, 671, 517 P.2d 988, 995 (1974). See also, *Smith v. German Ins. Co.*, 107 Mich. 270, 65 N.W. 236, 239 (1895) (holding that denial of liability is treated as a waiver because good faith requires the insurer 'should apprise the (insured) fully of its position; and, failing to do this, it estops itself from asserting any defense other than that brought to the notice of plaintiff (insured)).

obligees, who as beneficiaries of the bond are in a similar position as an insured under a traditional contract.

Here, Safeco failed to make any mention of the architect's certificate in any of the numerous communications between it, Ebenal, or Laurel Street. Furthermore, in its response to Laurel Street, it denied liability on the Bond on the basis that Ebenal had performed and had not caused the construction defects, *not* on the basis that Laurel Street had failed to produce an architect's certificate. Finally, Laurel Street demanded several times that Safeco participate in the mediation involving all parties – the ideal forum for Safeco to express its dissatisfaction with not having received an architect's certificate. Safeco, however, refused without reason. If Safeco had raised such an objection, Laurel Street could have easily remedied the objection by obtaining the certificate. Having never raised the architect's certificate issue as a basis for denial of coverage, and thereby preventing Laurel Street from obtaining one, Laurel Street has been prejudiced and Safeco has waived the lack of certificate as a defense, and is estopped from raising it as an issue now.

**D. The Trial Court Correctly Found that Safeco Acted in Bad Faith.**

Safeco argues that Laurel Street must prove that its denial of coverage under the Bond must have been “unreasonable, frivolous or

unfounded.”<sup>121</sup> Ironically, this is the perfect description of Safeco’s denial of coverage. Safeco’s failure to even visit the construction site is so egregious, that no reasonable fact finder could find that its investigation was not in bad faith.

The “fiduciary duty of good faith is fairly broad and may be breached by conduct short of intentional bad faith or fraud.”<sup>122</sup> The duty of good faith requires an insurer to diligently investigate a claim.<sup>123</sup> An insured may maintain an action against an insurer for bad faith investigation of the insured’s claim regardless of whether the insurer was ultimately correct in denying coverage under the policy.<sup>124</sup>

“An insurer must make a good faith investigation of the facts before denying coverage and may not deny coverage based on a supposed

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<sup>121</sup> Appeal at 32 (citing *Am. States Ins. Co. v. Symes of Silverdale, Inc.*, 150 Wn.2d 462, 470, 78 P.3d 1266 (2003)).

<sup>122</sup>*Industrial Indemnity Company of the Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 916-17, 792 P.2d 520 (1990)(citing *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 73, 659 P.2d 509 (1983), *Whistman v. West Am.*, 38 Wn.App. 580, 584-85, 686 P.2d 1086 (1984), *Safeco Ins. Co. of Am. v. JMG Restaurants, Inc.*, 37 Wn.App. 1, 11, 680 P.2d 409 (1984)).

<sup>123</sup>*Truck Ins. Exchange of Famers Ins. Group v. Century Indm. Co.*, 76 Wn. App. 527, 533, 887 P.2d 455 (1995) citing *Weber v. Biddle*. 4 Wash. App. 519, 521-22, 483 P.2d 155 (1971).

<sup>124</sup>*Coventry Assoc. v. American States Ins. Co.*, 136 Wn.2d 269, 279, 961 P.2d 933 (1998).

defense which a reasonable investigation would have proved to be without merit.”<sup>125</sup> As the Washington Court of Appeals has stated:

An insurer must make a good faith investigation of the facts before denying coverage and may not deny coverage based on a supposed defense which a reasonable investigation would have proved to be without merit. The implied covenant of good faith and fair dealing in the policy requires the insurer to perform any necessary investigation in a timely fashion and to conduct a reasonable investigation before denying coverage. If the insurer fails in either regard, it will have breached the covenant and, therefore, the policy.<sup>126</sup>

As articulated by the Washington Supreme Court:

When an insurer fails to adequately investigate an insured’s claim, the insured must either perform its own investigation to determine if coverage should have been provided or take no action at all. In either situation, the insured does not receive the full benefit due under its insurance contract.<sup>127</sup>

That Safeco failed to conduct a reasonable investigation is incontrovertible based on Safeco’s own description of its investigation.<sup>128</sup>

Rather than conducting a real investigation into Laurel Street’s claim by visiting the construction site, Safeco chose to look at some documents and

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<sup>125</sup> *James E. Torina Fine Homes, Inc. v. Mutual of Enumclaw Ins. Co.*, 118 Wn.App 12, 15, 74 P.3d 648 (2003) (citing RCW 48.01.030; *Indus. Indem. Co. of the N.W., Inc. v. Kallevig*, 114 Wn.2d 907, 916-917, 792 P.2d 520 (1990)).

<sup>126</sup> *James E. Torina Fine Homes, Inc. v. Mutual of Enumclaw Ins. Co.*, 118 Wn.App 12, 15, 74 P.3d 648 (2003) (citing *Coventry Assocs v. Am. States Ins. Co.*, 136 Wn.2d 269, 281, 961 P.2d 933 (1998)).

<sup>127</sup> *Coventry Associates v. American States Insurance Company*, 136 Wn.2d 269, 282, 961 P.2d 933 (1998).

<sup>128</sup> CP 219-220. Safeco’s discovery responses acknowledge that the entirety of its investigation was that they “reviewed and analyzed information received”. CP 220.

photographs and simply chose the most favorable outcome: not having to pay. If this is any investigation at all, in no way was it a reasonable one. An insurer must “diligently investigate” a claim. Given Safeco’s own description of its investigation,<sup>129</sup> reasonable minds can only reach one conclusion from this evidence: there was no diligent investigation.<sup>130</sup> Safeco failed to assert any facts to show it conducted a reasonable investigation because it failed to do even the bare minimum by visiting the construction site. Consequently, there are no issues of material fact regarding the issue of bad faith and the trial court was correct in awarding summary judgment on bad faith.

Additionally, the fact that the arbitrator in Laurel Street’s arbitration with Ebenal found Ebenal to be at fault, reinforces the fact that Safeco failed to conduct a reasonably adequate investigation. Had Safeco properly investigated the claim and visited the construction site, it would have discovered that Ebenal was at fault for the construction defects at the Project and the failure to repair those defects. Instead, Safeco conducted an **inadequate** investigation, forcing Laurel Street to pursue arbitration and bring this lawsuit—which all could have been avoided, had Safeco conducted an **adequate** investigation.

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<sup>129</sup> CP 219-220.

<sup>130</sup> See *Westberry v. Interstate Distributor Co.*, 164 Wn. App. at 204.

Safeco justifies its actions as not being in bad faith based on three erroneous and untenable assumptions: (1) That the limitations period had expired, (2) that damage to the property was covered by Ebenal's insurance coverage, and (3) that Laurel Street failed to satisfy the condition precedents to coverage under the Bond. Under these false assumptions, Safeco argues it was justified in its failure to investigate and thus should not be found in bad faith. As has been set forth, these three assumptions are clearly false, thus Safeco most assuredly had an obligation to properly investigate Laurel Street's claim and perform under the Bond, which they failed to do.

The facts show that not only did Safeco fail to conduct a reasonable investigation, but they failed to do any investigation at all. Nina Durante, Safeco's Home Office Counsel, stated she received documents from Laurel Street that Safeco attorneys requested to evaluate Laurel Street's claims on November 20, 2009.<sup>131</sup> Confirming the investigation's shortcomings described in Safeco's answer to interrogatories, Ms. Durante then responded 39 days later, on December 29, 2009, after "reviewing" documents, by denying Laurel Street's claims.<sup>132</sup> Ms. Durante's declaration confirms exactly what Laurel Street

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<sup>131</sup> CP 87,

<sup>132</sup> CP 87.

alleged in its Complaint and Motion for Summary Judgment: that Safeco simply looked at documents and chose the path of least resistance without conducting an adequate investigation. This was the investigation in its entirety. Ms. Durante confirms Safeco did no investigation other than this. Safeco, upon adequate investigation, would have discovered Ebenal's subpar performance of the contract, identified the proper scope of repairs, and either would have had Ebenal do the repairs properly or hired a competent contractor to do so. Instead, Safeco left Laurel Street to fend for itself in investigating the problems, determining the scope of repairs, pursuing Ebenal for damages, and then having the defects—known and unknown—corrected. All this could have been avoided had Safeco performed under the Bond. The damages that have resulted are Safeco's responsibility.

**E. Waiver of Subrogation Provision Does Not Apply.**

Safeco asserts that provisions in Ebenal's Contract that neither Laurel Street nor Ebenal would be liable to each other for damage "to any building, structure or tangible personal property" caused by "fire or other causes of loss **to the extent covered by property insurance**" now bar Laurel Street's claims. This argument is based on four palpably false premises and should be rejected by the Court.

First, Safeco asserts its liability is limited to that of its principal, Ebenal.<sup>133</sup> Laurel Street however, is asserting claims directly against Safeco for its breach of the Bond (and bad faith). That Bond specifically envisions this situation and provides:

If... the Surety has denied liability, in whole or in part, without further notice the Owner [Laurel Street] shall be entitled to enforce any remedy available to the Owner.<sup>134</sup>

One such remedy available to Laurel Street is to bring this action for all damages caused by Safeco's failure to perform under the Bond. These damages are independent and different than any liability of Ebenal under the Contract. Laurel Street claimed damages it had suffered "that arise solely from Safeco's bad faith and breach of the Performance bond."<sup>135</sup> None of the damages awarded by the trial court duplicate amounts Laurel Street has recovered to date from Ebenal.

Second, the Contract provisions cited by Safeco demonstrate that none of the damages sought by Laurel Street in this case are covered by insurance. For example, the Supplementary General Conditions state the waiver of liability applies to: "any loss or damage to any building, structure, or tangible personal property...occurring in or about the

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<sup>133</sup> CP 38.

<sup>134</sup> CP 229.

<sup>135</sup> CP 320.

Work...”.<sup>136</sup> Laurel Street was awarded damages arising not to any building or tangible personal property, but only to the costs of repairing construction defects, repairing property damage, legal fees, consultant fees, and loss of use.<sup>137</sup>

Third, builder’s risk and property insurance only cover the types of damages listed in the Contract, so that the waiver of liability only applies to those damages. Safeco cites the Declaration of David Ebenal, which states that Mr. Bergmann “did not believe that garage leaks were a Bond issue”.<sup>138</sup> This information is irrelevant. Whatever Mr. Bergmann, Laurel Street’s managing member may have said, or for that matter, what Safeco may have taken from Laurel Street’s lawyer’s comments about Safeco’s responsibility under the Bond (which of course are denied<sup>139</sup>), those comments or impressions cannot change the terms of an insurance policy. Furthermore, if Safeco is arguing that Laurel Street somehow waived the right to proceed against the Bond, that argument falls flat on its face as well, as a long line of cases state that a waiver in a construction contract must be clear, compelling, and unequivocal.<sup>140</sup>

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<sup>136</sup> CP 122.

<sup>137</sup> CP 320.

<sup>138</sup> Appeal at 39; CP 100.

<sup>139</sup> CP 23.

<sup>140</sup> *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wash.2d 375, 392, 78 P.3d 375 (2003).

Finally, as Safeco well knows, damages from breach of contract are not covered by standard builder's risk or property insurance. Instead, they attempt to intimate that the arbitrator specifically tried to obtain coverage by inserting the words "negligence" in the award.<sup>141</sup> Regardless of the arbitrator's words, there is no cause of action for negligent construction in Washington.<sup>142</sup> As seen from the findings and conclusions cited by Safeco, the only damages sought by Laurel Street were from Ebenal's breaches of the Contract, not from any tort duties.

For all these reasons, the waiver of subrogation provisions in the Contract have no bearing on the issues before the Court and most certainly do not bar Laurel Street's claims. Consequently, the Court did not err in granting summary judgment.

**F. Laurel Street is Not Relitigating its Claim Against Ebenal.**

Safeco's estoppel claim is baseless because it conflates one breach of contract claim with another. There are two breach of contract claims that arose from the Project. The first breach of contract claim is against Ebenal for its defective work, which was litigated through arbitration. The second breach of contract claim, which is entirely separate from Laurel Street's claim against Ebenal, is against Safeco for breaching the Bond.

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<sup>141</sup> Appeal at 39-40 (citing CP 82-83).

<sup>142</sup> *Stuart v. Coldwell Banker*, 109 Wash.2d 406, 417-422, 745 P.2d 1284 (1997). (There is no cause of action for negligent construction on behalf of individual homeowners)

Even though Laurel Street invited Safeco to participate in the arbitration, Safeco chose not to. Safeco asserts that estoppel applies because the “issue of damages from Ebenal’s ‘negligence and/or breach of contract’ was fully litigated in the arbitration”.<sup>143</sup> Safeco is correct in this assertion—the issue of damages from Ebenal’s breach of contract was fully litigated. However, the issue of damages from Safeco’s breach of contract by failing to perform pursuant to the Bond was not litigated until the instant case.

The Bond specifically contemplates that Safeco will be liable for damages from its breach of the Bond as well as Ebenal’s breach of the Contract. The Bond provides that Safeco will be obligated for:

6.1 The responsibilities of the Contractor for correction of defective work and completion of the Construction Contract.

6.2 Additional legal, design professional and delay costs resulting from the Contractor’s default, and resulting from the actions or failure to act of the Surety.<sup>144</sup>

Under paragraphs 6.1 and 6.2 of the Bond, the only limit on Laurel Street’s recovery is that it must be “without duplication”<sup>145</sup>, i.e., with a reduction for amounts received from other parties for damages stemming

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<sup>143</sup> Appeal at 43.

<sup>144</sup> CP 229.

<sup>145</sup> CP 229.

from Ebenal's and Safeco's breaches. Here, none of the damages are duplicative. Laurel Street's damages against Safeco include (1) damages for correction of the defective work and completion of the Contract and (2) additional legal, design professional and delay costs resulting from contractor default and Safeco's failure to act. Laurel Street is not asking for recovery already received through settlement and arbitration. These damages include (1) remediation costs of \$764,665.40 (Bond, ¶ 6.1) (2) design and professional costs of \$119,551.40 (Bond, ¶ 6.2) and (3) legal fees and costs of \$331,505.76 (Bond, ¶ 6.2), all of which would have been avoided had Safeco performed under the Bond.<sup>146</sup> The total amount of Laurel Street's damages of \$462,379.25 (adjusted for amounts already received from settlement and arbitration, as the trial court did) are not duplicative because they represent Laurel Street's losses as a result of Safeco's failed performance under the Bond **and** account for amounts already received.

Finally, given that Safeco was not a party to the arbitration, a finding that Laurel Street is collaterally estopped would work an injustice because (1) Safeco was not a party to the earlier adjudication and (2)

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<sup>146</sup> CP 11.

Laurel Street was not afforded a full and fair opportunity to litigate its claim based on Safeco's failure to perform under the Bond.<sup>147</sup>

**G. Laurel Street is Entitled to Its Attorneys Fees.**

**1. Laurel Street and Safeco engaged in different tasks.**

Safeco's main argument to adjust Laurel Street's attorneys fees rests on the false premise that "Laurel Street's attorneys and Safeco's attorneys engaged in the same basic tasks in this litigation."<sup>148</sup> This assertion is patently false. Safeco relies on *Democratic Party of Wash. v. Reed*, 388 F.3d 1281 (9<sup>th</sup> Cir. 2004) for the principle that the time spent by the other side is an indicator of how much time is necessary. Safeco's reliance on *Reed* is misplaced because (1) Safeco and Laurel Street engaged in different tasks related to the litigation and (2) even if the parties' tasks were the same, *Reed* does not support Safeco's position.

Laurel Street's application provided ample distinction between the tasks required of it and Safeco. In this case, the disparity between Laurel Street's attorneys fees and Safeco's is completely justified. First, Safeco's assertion that the parties engaged in similar tasks is unsupported because Safeco failed to attach a copy of any detailed entry of its attorney time. Instead, Safeco merely attached a declaration baldly stating the time its

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<sup>147</sup> *Nielson v. Spanaway Gen. Med. Clinic*, 135 Wn.2d 255, 265-65, 956 P.2d 312 (1998).

<sup>148</sup> Appeal at 46.

attorneys spent on the summary judgment pleadings and other tasks. Under this pretext, Safeco offered the trial court no justification to compare the time spent by the parties even if it wanted to. Secondly, in preparing its case, responding to discovery, and drafting its summary judgment pleadings, Laurel Street's attorneys were required to organize three years' worth of construction documents and correspondence.<sup>149</sup> Before ever moving for summary judgment, Laurel Street's attorneys also spent significant time to judge the strength of its claim which included significant hours of research and conferences between attorneys and clients. As identified by its records, Laurel Street spent over 10 months pulling together facts and records, including ongoing assessments of discovery of additional construction defects in Ebenal's work, discussing the case with the project architect, reviewing voluminous arbitration exhibits, and preparing declarations necessary for summary judgment.<sup>150</sup> In stark contrast, Safeco brought its motion only after Laurel Street filed its motion, a period of 23 days.

Furthermore, Laurel Street also spent a significant and justifiable amount of time responding to discovery. Significant time was spent in carefully responding to Safeco's interrogatory regarding damages. In

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<sup>149</sup> CP 405.

<sup>150</sup> CP 405-406.

order to respond, Laurel Street's attorneys reviewed countless documents, invoices, and ledgers, as well as engaged in several conferences with the clients, which is reflected in the time sheets submitted in its application.<sup>151</sup> Importantly and obviously, Safeco did not have the burden of producing a damages summary.

Laurel Street also incurred extra attorneys fees because it was forced to respond to and oppose Ebenal's Motion to Intervene. Because Safeco did not oppose Ebenal's motion, it incurred no such fees. Furthermore, Laurel Street incurred additional attorneys fees when Safeco would not agree to a form of judgment, forcing Laurel Street to note and attend a presentation hearing.<sup>152</sup> Consequently, a disparity in the amount of time to respond to discovery is perfectly reasonable under the circumstances.

**2. *Reed* does not support Safeco's position.**

Safeco's reliance on *Reed* is misplaced. Although the Court in *Reed* stated that how much time the other side's lawyer spent is an indicator of how much time is necessary in a lawsuit, such a discrepancy is not dispositive and does not require the court to make an adjustment. In fact, the court in *Reed* actually ignored the discrepancies in hours spent

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<sup>151</sup> CP 357-381.

<sup>152</sup> CP 406.

and granted the prevailing parties all their attorneys fees. Although Safeco cites this case to prove that Laurel Street's fees are excessive, *Reed* actually reinforces the large amount of discretion given to the Court when assessing reasonable fees and that opposing parties will often work a different amount of hours in the same litigation.

In *Reed*, which involved multiple parties, there were large discrepancies in the amount of hours in excess and less than the losing party's time, ranging from 210 hours to 501. Despite these discrepancies, the Court awarded each successful party its requested fees.<sup>153</sup>

In the case at hand, Safeco has not given the Court any justifiable reason to adjust Laurel Street's reasonable attorneys fees. Although Safeco claims that there is a disparity in attorneys fees, nowhere does it offer evidence that Laurel Street's attorneys work was duplicative or unproductive or any other recognized basis to adjust the award.

**3. Laurel Street provided sufficient evidence for its reasonable fees.**

As the Washington Supreme Court stated in *Bowers*, documentation of hours worked "need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed, and the category of attorney who

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<sup>153</sup> *Democratic Party of Wash. v. Reed*, 388 F.3d 1281, 1277, 94 Cal. Daily Op. Serv. 10 (9<sup>th</sup> Cir. 2004).

performed the work (i.e., senior partner associate, etc.).”<sup>154</sup> In this case, Laurel Street supplied its billing records and supplied a more than adequate record for the trial court’s consideration that justified the reasonableness of its fees.<sup>155</sup>

Safeco also argues without support that the trial court failed to independently determine the reasonableness of Laurel Street’s fees. Instead, Safeco asserts, without any justification, that the trial court “did nothing more than rely on the amount claimed by Laurel Street’s attorneys”.<sup>156</sup> Laurel Street provided ample reasons for the reasonableness of its fees, and Safeco’s only argument was that its fees were lower than Laurel Street’s. Safeco offered no evidence as to how fees were unreasonable nor did they claim any fees were duplicative. Any adjustment would be based on sheer speculation. Rather than speculate, the trial court reviewed the records and determined Laurel Street’s fees were reasonable.<sup>157</sup> Although Safeco laments the amount of Laurel

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<sup>154</sup> *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 596 (1983).

<sup>155</sup> Safeco asserts in its brief that Laurel Street’s evidence of the reasonableness of its litigation costs “related to some other case involving a ‘Bank’ and ‘Defendant Khami’ and his ‘counterclaims’.” Appeal at 46. The mention of “Bank” and “Khami” result from an obvious but initially overlooked drafting error. The cost summary relating to this litigation, which totals \$827.24, is fully supported, with matching amounts referring to Laurel Street’s costs, as set forth in Exhibit 2 to the Declaration of Edward R. Coulson in Support of Plaintiff Laurel Street Housing, LLC’s Application for an Award of Attorneys Fees and Cost. CP 383-84.

<sup>156</sup> Appeal at 45.

<sup>157</sup> CP 407.

Street's fees, and although Laurel Street provided its billing records, Safeco gave the trial court no reason to adjust the fees.

Safeco also mistakenly asserts that because the trial court failed to "enter sufficient written findings and conclusions demonstrates its failure to independently decide a reasonable attorney fee award."<sup>158</sup> In fact, the Court specifically found that the hours spent by Laurel Street "were necessary to the prosecution of Laurel Street's claims and were charged at rates reasonable in comparison to rates charged in the Puget Sound legal community, also as set forth in Laurel Street's Application."<sup>159</sup>

The facts show that the disparity in hours spent by Laurel Street versus Safeco was completely justified. Furthermore, Safeco offers no credible argument that the trial court failed to make an independent determination of Laurel Street's fees. Their sole argument is that the amount of hours spent in this lawsuit are different. The fact remains clear that Laurel Street created an adequate record for the trial court's review and the trial court was not in error in finding that it was entitled to its reasonable attorneys fees and costs. Thus, the trial court's award of attorneys fees should be affirmed.

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<sup>158</sup> Appeal at 45.

<sup>159</sup> CP 408.

**H. Laurel Street Requests its Fees Under RAP 18.1.**

RAP 18.1 allows a prevailing party their attorneys fees and expenses associated with an appeal. Pursuant to RAP 18.1, Laurel Street requests its attorneys fees and expenses and will file an Affidavit of Fees and Expenses within 10 days after this Court's decision is filed, pursuant to RAP 18.1(d).

**V. CONCLUSION**

Even when all facts are viewed in favor of Safeco, there is no reasonable conclusion other than that Safeco breached the Bond and did so in bad faith. Furthermore, under settled Washington law, Laurel Street timely filed its lawsuit. Finally, Safeco failed to offer the Court any adequate basis to adjust the trial court's award of attorneys fees. Thus, there are no genuine issues of material fact and the trial court was correct in ordering summary judgment in favor of Laurel Street. Consequently, this court should reject Safeco's arguments, just as the trial court did, affirm the trial court's ruling in all respects, and award Laurel Street its fees and costs in this appeal.

DATED this 30<sup>th</sup> day of November, 2012

SCHWEET RIEKE & LINDE, PLLC



Edward R. Coulson, WSBA 14014  
Jacob D. Rosenblum, WSBA 42629  
Attorneys for Respondent, Laurel Street  
Housing, LLC

### DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following true and correct:

That on November 30, 2012, I caused the service of the above Brief of Respondent Laurel Street Housing, LLC on the following:

Office of the Clerk Court of Appeals, Division I 600 University St/One Union Square Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Thomas K. Windus John J. White Jr. Kevin B. Hansen  Livengood, Fitzgerald & Alskog, PLLC 121 Third Avenue PO Box 908 Kirkland, WA 98083-0908 Attorneys for Safeco Insurance Company of America	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

Signed at Seattle, Washington this 30<sup>th</sup> day of November, 2012.

  
Leah Bartoces  
Leah Bartoces  
Legal Assistant