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

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EASTLAKE LOFTS CONDOMINIUM ASSOCIATION, as assignee of  
Defendant/Third-Party Plaintiff Eastlake & Lynn, LLC,

Appellant,

v.

LORIG ASSOCIATES, LLC, a Washington Limited Liability Company,

Respondent.

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REPLY BRIEF OF APPELLANT EASTLAKE LOFTS  
CONDOMINIUM ASSOCIATION

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## I. INTRODUCTION

It is undisputed that (a) Lorig performed construction management and coordination services for E&L until June of 2010 pursuant to an oral agreement between the parties, (b) the Association delivered its notice of construction defect claims to E&L in February 2011 and (c) the Association filed its complaint seeking recovery on those claims against E&L in August 2011. Until E&L was put on notice in 2011 that the Association was asserting such claims, E&L had no basis for asserting its own resulting third party claims against Lorig. Furthermore, the record contains direct evidence showing that Lorig's performance of its management and coordination services was a contributing cause of the construction defects underlying the Association's complaint and E&L's third party complaint. The trial court erred by granting Lorig's motion for summary judgment in the face of this record.

## II. ARGUMENT

### A. E&L's Claims Against Lorig Accrued and the Statute of Limitations Began to Run in 2011

Lorig's contention that E&L's claims accrued and the statute of limitations began to run in 2008 is fully contradicted by both undisputed facts and longstanding rules of law that define the time of claim accrual for statute of limitations purposes. (See the Association's Opening Brief at

9-11.) The fundamental rule is that a claim does not accrue and the applicable statute of limitations does not begin to run until the claimant has a right to apply to a court for relief:

Statutes of limitation do not begin to run until a cause of action has “accrued”. RCW 4.16.010. In most circumstances, a cause of action accrues when its holder has the right to apply to a court for relief.

*Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 219, 543 P.2d 338 (1975).  
See also *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wn.2d 475, 485, 209 P.3d 863 (2009).

Faced with this fundamental rule Lorig attempts to support its position that E&L’s claims accrued in 2008 by citing case law stating that a cause of action accrues when the plaintiff discovers the salient facts underlying the elements of the cause of action. (See Lorig’s Brief at 9, citing *Green v. A.P.C.*, 136 Wn.2d 87, 95, 960 P.2d 912 (1998).) That citation, however, does not support Lorig’s position. Instead it supports the Association’s position that those claims did not accrue until 2011 when E&L first discovered that the Association was asserting construction defect claims against E&L – clearly a salient fact underlying E&L’s third party claims against Lorig.

E&L had no basis for asserting third party claims against Lorig before 2011, when the Association delivered its notice of construction

defect claims to E&L in February (CP 279-281) and filed its complaint against E&L seeking recovery on those claims in August (CP 1-11). Until those events occurred, E&L simply had no “beef” against Lorig and no grounds for applying to a court for relief. Until 2011, no claims had been asserted against E&L arising out of the defects that could have provided a basis for E&L to assert third party claims against Lorig. The fact that E&L became aware of certain construction defects in 2008 could not and did not provide a basis for E&L to assert any third party claims against Lorig because the only basis for such claims, the Association’s construction defect claims against E&L, had not been asserted at that point. E&L’s mere knowledge of the existence of construction defects in 2008 is thus irrelevant to the statute of limitations issues presented to the Court on this appeal.

**B. There are Questions of Fact Concerning the Nexus Between Lorig’s Acts and E&L’s Claims**

In contending that E&L failed to present admissible evidence establishing a nexus between Lorig’s acts and E&L’s claims Lorig completely ignores the direct evidence establishing questions of fact concerning that nexus presented in the Association’s Opening Brief (pp. 16-18). Among other things, that evidence shows that the same types of construction defects that were addressed in 2008 with coordination and

management assistance from Lorig were still in existence when the Association filed its complaint in August 2011 (CP 169-171, 294-297, ¶ 9, 1-11, ¶ 6A-Q) and that Lorig performed and billed for warranty work in 2009 and 2010 that was related to defects in condominium Unit 204, which defects were still at issue when the Association filed its complaint (CP 231, 233, 247-249, 252-253 1-11, ¶ 6A, 6H).

At a minimum, the nexus evidence described in the Association's Opening Brief establishes a genuine issue of material fact concerning the causal relationship between Lorig's acts and the construction defects that are the basis for E&L's third party claims against Lorig. The trial court erred in granting summary judgment given this record and the fundamental rule that "[i]ssues of negligence and causation are questions of fact" that are "not usually susceptible to summary judgment." *Miller v. Likins*, 109 Wn. App. 140, 144, 34 P.3d 835 (2001).

**C. The Contract Between E&L and Lorig Was a Continuous Services Contract**

Lorig erroneously contends that the Association's position that the E&L-Lorig contract was a continuous services contract is unsupported by admissible evidence and contrary to Washington law. In fact it is Lorig's position on this issue that is unsupported by admissible evidence and contrary to Washington law.

First, Lorig's contention that its contract with E&L was not a continuous services contract because unexecuted draft Development Services Agreements between Lorig and Val Thomas, Inc. contained duration and termination clauses (Lorig's Brief at 12) is fundamentally flawed and must be rejected. While Lorig now cites certain provisions in these unexecuted drafts to argue that the oral agreement between E&L and Lorig contained a termination date, Lorig offers no supporting legal authority for that argument and ignores the fact that E&L was not even identified as a party in either of the drafts and that the record contains no statements from representatives of either E&L or Lorig that their oral agreement included a termination date. Furthermore, Lorig cited those drafts for a completely different purpose in its motion for summary judgment by emphasizing the fact that they were never executed to support its argument that a three year rather than a six year statute of limitations applies. (CP 66-72). Lorig's current effort to rely on unexecuted draft agreements to establish a term in the E&L-Lorig agreement that never existed fails in the face of these undisputed facts. If anything, the unexecuted draft agreements tend to show that factual issues exist and summary judgment was inappropriate.

Second, the long-established rule in Washington is that a contract without specified time periods for payment or termination is a continuous

services contract on which the statute of limitations will not begin to run until the services are ended: “Where services are rendered under an agreement which does not fix any certain time for payment, nor when the services shall end, the contract of employment will be treated as continuous, and the statute of limitations will not begin to run until the services are ended.” *Richards v. Pacific Nat’l Bank*, 10 Wn. App. 542, 549, 519 P.2d 272 (1974), quoting *Ah How v. Furth*, 13 Wash. 550, 552, 43 P. 639 (1896). Lorig’s attempt to distinguish these cases by arguing that they involved “claims for amounts due”, as opposed to E&L’s claims based on defective performance, is made without any citation to supporting case law. That is because there is no such supporting case law – neither *Richards* nor *Ah How*, nor any other Washington case, limits the continuous services contract rule quoted above to cases in which a party is asserting claims for amounts due under the contract.

Third, Lorig cites the four year statute of limitations on warranty claims in the Washington Condominium Act as purported support for its argument that “the agreement to provide warranty coordination services ended when E&L’s warranties to the HOA and unit owners ended.” While the logic underlying this argument is unclear at best, even if the agreement ended when E&L’s warranties ended that would provide no support for any of the arguments presented in Lorig’s brief. Indeed, even assuming

that the four year statute of limitations set forth in RCW 64.34.445 could have begun to run as early as substantial completion of the project in July 2007 (CP 82, at ¶7), that would have resulted in E&L's warranty obligations expiring in July 2011, a year after the agreement was actually terminated when Lorig ceased performance in June 2010. Under Lorig's argument this would have meant that the statute of limitations on E&L's claims against Lorig would have begun to run in July 2011, rather than in June 2010 as the Association contends.

Finally, Lorig argues that application of the continuous services contract rule here "would obliterate the statute of repose" and "render the contract statute of limitations affirmative defense provided in RCW 4.16.326(1)(g) meaningless." (Lorig's Brief at 13.) Lorig offers no explanation, however, of how such results would occur but states instead that "Washington law concerning claims involving the construction or administration of construction contracts is well developed and sets forth when claims accrue and the statute of limitations begins to run." (Lorig's Brief at 12.) While that is an accurate statement it has little if any connection with the dire consequences that Lorig predicts. Lorig's failure to support its argument with an explanation of how continued application of the well-settled continuous services contract rule would cause such consequences requires complete rejection of the argument.

**D. E&L's Negligence Claim is for Negligent Construction Management**

Lorig has not cited any case stating that Washington does not recognize a claim for negligent construction management because no such case exists. Without the support of such a case, Lorig bases its challenge to E&L's claim for negligent construction management on an attempt to liken E&L's claim to a claim for breach of an implied warranty of workmanlike performance that Lorig contends "would be strikingly similar" to a claim for negligent construction, which is not recognized in Washington. (Lorig's Brief at 13-14.) The cases Lorig cites in support of that contention, however, both involved claims against contractors who had physically performed construction *work* and neither case says anything about whether or not a claim for negligent construction *management* is recognized in Washington. See *Warner v. Design and Build Homes*, 128 Wn. App. 34, 42, 114 P.3d 664 (2005) and *Urban Dev. Inc. v. Evergreen Bldg. Prods.*, 114 Wn. App. 639, 59 P.3d 112, *aff'd sub nom.*, 151 Wn.2d 534, 90 P.3d 1062 (2004). The fact that Washington does not recognize a claim for negligent construction is irrelevant here because E&L has not asserted a claim for negligent construction. Instead E&L has asserted a claim for negligent construction management based on the undisputed facts that Lorig did not physically perform the work at issue

(CP 298-302, ¶ D, line 18) but did perform a variety of construction management, supervision and coordination services (CP 294-297, ¶¶ 7-12).

Furthermore, the cases cited in the Association's Opening Brief in support of E&L's negligent construction management claim, *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 605, 257 P.3d 532 (2011) and *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 455-56, 243 P.3d 521 (2010), both recognized the existence of negligence claims against construction industry professionals who did not physically perform any construction work but did perform other professional services. Lorig's argument that those cases are distinguishable because (a) the services involved in them were engineering services and (b) Lorig did not provide engineering services ignores the fact that neither *Michaels* nor *Affiliated FM* restricted the stated rules to cases in which the professional services at issue were engineering services. Those rules are equally applicable in this case in light of the undisputed facts that Lorig provided construction management services (CP 294-297, ¶¶ 7-12) and described those services in its invoices to E&L as "Professional Services" (CP 231-254). Given this clear record and the absence of any legal authority that bars the assertion of a claim for negligent construction management, the trial court erred in dismissing such a claim asserted here by E&L.

Finally, Lorig cites *Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 826, 881 P.2d 986 (1994), as support for its argument that E&L cannot maintain a negligence claim because parties are to be held to their contracts to prevent tort and contract claims from overlapping. The precedential effect of *Berschauer/Phillips*, however, is now subject to substantial doubt as a result of the Washington Supreme Court's November 2013 ruling in *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, \_\_\_ Wn.2d \_\_\_, 312 P.3d 620 (2013). In *Donatelli*, the Court addressed the independent duty doctrine in the context of a negligence claim asserted by homeowners against an engineering firm and held that "[a]n injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract." *Id.* at 624, quoting *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 389, 241 P.3d 1256 (2010). Based on that rule the Court found that there were issues of fact concerning the scope of the engineering firm's duties and thus affirmed the trial court's denial of the firm's motion for summary judgment on the homeowners' negligence claim. *Id.* at 627. The same analysis should be applied here to reverse the trial court's granting of Lorig's summary judgment motion.

### III. CONCLUSION

For all of the reasons stated herein and in the Association's Opening Brief, the trial court's orders granting Lorig's Motion for Summary Judgment and denying E&L's Motion for Reconsideration and the Judgment on Third-Party Claims dismissing E&L's claims against Lorig should be reversed and the case should be remanded for trial.

DATED: February 3, 2014.

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies as follows:

1. I am over 18 years of age and a U.S. citizen. I am employed as a legal assistant by the law firm of Rafel Law Group PLLC.

2. I certify that on February 3, 2014, I caused true copies of the following documents to be served via the method(s) listed below on the following parties:

**DOCUMENTS**

1. Reply Brief of Appellant Eastlake Lofts Condominium Association; and

2. Certificate of Service.

Party	SERVICE VIA
David S. Cottnair Merrick, Hofstedt & Lindsey P.S. 3101 Western Ave., Ste. 200 Seattle, WA 98121  dcottnair@mhlseattle.com; jballard@mhlseattle.com  <i>Counsel for Respondent Lorig Associates, LLC</i>	<input type="checkbox"/> Email <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> Fax

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this certificate was executed on February 3, 2014, at Seattle, Washington.

  
\_\_\_\_\_  
Leah Katzer, Legal Assistant