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DIVISION II

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

STATE OF WASHINGTON
BY Ca
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CHUN CHA CHI, an individual,

Appellant,

vs.

MAXCARE OF WASHINGTON, INC., a Washington Corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO APPELLANT CHI'S
OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

This breach of contract case arises out of disaster cleaning and restoration of Appellant Chi's personal property after her home caught fire in June 2005. Respondent MaxCARE—a third-party vendor of Chi's homeowner's insurance company—removed, cleaned, and stored her damaged personal property in June 2005, then returned it by November 2005.

Before MaxCARE performed the work, Chi signed MaxCARE's Service Authorization/Contract form. The relevant sentence in this document for purposes of this appeal is as follows:

“I hereby authorize MaxCARE of Washington, Inc. to proceed with the work at the above listed job location.”

Unhappy with MaxCARE's work, Chi filed suit against MaxCARE for breach of contract on June 1, 2009—four years after the property was returned. The trial court granted MaxCARE's motion for summary judgment dismissal on the basis that her claim was barred by the three-year statute of limitations for implied and/or oral contracts. Likewise, the trial court found that MaxCARE's Service Authorization/Contract form (the sentence cited above) was not a written contract or agreement. Accordingly, the six-year statute of limitations did

not apply. MaxCARE respectfully requests that the Court of Appeals affirm the trial court's ruling.

II. RESTATEMENT OF THE ISSUE ON APPEAL

Whether the trial court properly dismissed Appellant/Plaintiff Chun Cha Chi's breach of contract claim against Respondent/Defendant MaxCARE of Washington, Inc. ("MaxCARE") when her claim was filed after the expiration of the three-year statute of limitations governing implied or oral contracts?

III. RESTATEMENT OF THE CASE ON APPEAL

A. After Chi's home sustained fire damage, Respondent MaxCARE removed, cleaned, and stored her fire-damaged property in 2005.

On or about May 30, 2005, Appellant Chi's home (located in Federal Way, Washington) caught fire, causing substantial damage to the structure of her home and its contents. (CP 2) Allstate Insurance Company insured her home and its contents (CP 2), and used third-party vendors, such as Respondent MaxCARE to remove, clean, and/or store damaged property.

MaxCARE is in the disaster cleaning and restoration industry, which includes restoration of residential and commercial property caused by fire, water, and mold. (CP 18; CP 218) Allstate provided MaxCARE's

name to Chi, and likewise contacted MaxCARE with Chi's contact information. (CP 18) MaxCARE contacted Chi regarding the cleaning and storage of her fire-damaged property. (CP 18)

A few days after the fire, MaxCARE's representative, Robin Hamilton, met with Chi and discussed the work that MaxCARE would perform. (CP 213 at lines 22-23), then submitted a document entitled "Service Authorization/Contract" to Chi. (CP 18) The document is appended hereto as Appendix-1, and states in relevant part as follows:

"I hereby authorize MaxCARE of Washington, Inc. to proceed with work at the above listed job location."

Chi signed and dated it on June 1, 2005. The document does not contain any description of the work to be performed or terms and conditions that apply to the work. (CP 29) Likewise, Appellant Chi admits that "the Service Authorization signed by Ms. Chi contained no mention of any services to be performed, the price to be paid for such work, the terms of any agreement, or any warranties related to the work to be performed." (CP 187 at lines 20-26)

MaxCARE removed, cleaned, and stored Chi's fire-damaged personal property, and returned it to her by November 2005. (CP 4; CP 18) Additionally, a vendor called "FRSTeam" collected and removed Chi's clothing items that required dry cleaning. (CP 214) Chi's

homeowner's insurance company, Allstate, paid MaxCARE for the work it performed for Chi. (CP 217)

B. On June 1, 2009, Chi filed suit against MaxCARE for breach of implied contract.

On June 1, 2009—four years after the fire; four years after Chi signed the Service Authorization/Contract; and four years after MaxCARE cleaned and returned her personal property—she sued MaxCARE, *inter alia*, for breach of contract.¹ (CP 1-10) Her initial Complaint states in relevant part as follows: “[A]t no point in time did Ms. Chi enter into any type of written or oral contractual relationship with MaxCare.” (CP 3, ¶ 12) Rather, Chi characterized the “Service Authorization/Contract” as an implied contract. (CP 7) “While the work authorization does not constitute a ‘contract,’ an implied contract was created between Defendant MaxCare and Ms. Chi when MaxCare began work at Ms. Chi’s residence.” (CP 7-8, ¶ 35)

She alleged that MaxCARE breached its “contractual duties” and asserted that the terms of the contract “were, at a minimum, for the removal, cleaning, safe storage, and return of property to Ms. Chi.” (CP 8, ¶ 35) MaxCARE’s Answer to Chi’s Complaint admitted that there was no

¹ Chi also asserted that MaxCARE violated the Consumer Protection Act, but this claim was dismissed, without prejudice, pursuant to a Stipulation and Order of Dismissal entered on November 29, 2010. (CP 301-02)

written or oral contractual relationship between the parties, (CP 12, ¶ 12) and asserted the affirmative defense that Chi's lawsuit was barred by the applicable statute of limitations. (CP 15, ¶ 5).

C. Respondent MaxCARE moved for partial summary judgment based on the statute of limitations and Chi moved to amend her complaint for breach of a written contract.

On October 8, 2009, MaxCARE moved for partial summary judgment dismissal of Chi's breach of contract claim on the basis that it was time-barred by the three-year statute of limitations for implied or oral contracts. (CP 17-23) MaxCARE's motion included a copy of the signed Service Authorization/Contract, kept in the normal course of MaxCARE's business. (CP 25-29) MaxCARE argued that the document was neither a contract nor a written agreement. (CP 20). As Chi alleged in her Complaint—the parties had an implied contract. (CP 23-22)

When Chi received a copy of the Service Authorization/Contract with MaxCARE's motion, she moved to amend her Complaint to allege breach of a *written* contract. (CP 31; CP 50-53) In response to the motion for partial summary judgment, Chi argued that: (a) MaxCARE had asserted in a separate lawsuit involving different parties that the Service Authorization/Contract was a written contract; (b) she was moving to amend her Complaint against MaxCARE for breach of a written contract;

and therefore (c) MaxCARE's motion for summary judgment dismissal of her claim for breach of an implied contract was moot. (CP 31-32)

On November 6, 2009, the Honorable John A. McCarthy granted Chi's motion to amend her Complaint and reserved ruling on MaxCARE's motion for partial summary judgment. (CP 108-09)

On March 8, 2010, Chi filed her First Amended Complaint alleging that she had a contractual relationship with MaxCARE via the signed Service Authorization/Contract (CP 112, ¶ 9), even though she admits that the "document failed to detail what work was to be done, rate of compensation for such work, or the manner in which the work was to be done." (CP 112, ¶ 9) Chi alleges that the "terms of the contract, were, at a minimum, for the removal, cleaning, safe storage, and return of property to Ms. Chi." (CP 118, ¶ 42) Chi admits that MaxCARE returned her personal property to her in November 2005. (CP 114, ¶ 22)

Chi further admits that that "the Service Authorization signed by Ms. Chi contained no mention of any services to be performed, the price to be paid for such work, the terms of any agreement, or any warranties related to the work to be performed." (CP 187 at lines 20-26)

- i. **Chi relied on different facts in a separate lawsuit, *MaxCARE v. Hogue*, as “evidence” that she had a written contract with MaxCARE.**

In the case at bar, Chi premised her motion to amend her complaint as well as her summary judgment response on the facts underlying a separate lawsuit, *MaxCARE v. Hogue*, wherein MaxCARE sued Mr. and Mrs. Hogue in King County Superior Court for failure to pay MaxCARE for its work. (CP 30-33; CP 38-43; CP 50-53) Counsel for Plaintiff/Appellant Chi also represents Defendants Mr. and Mrs. Hogue in the separate lawsuit.

Chi’s motion to amend her complaint and her summary judgment response asserted that: (a) MaxCARE filed a claim for breach of a “written” contract in *MaxCARE v. Hogue*, based on an identical Service Authorization/Contract form that Chi signed in 2005; and (b) MaxCARE’s corporate representative testified in *MaxCARE v. Hogue* that she believed the Service Authorization/Contract was a “written” contract. (CP 30-33; CP 50-53) Based on these assertions, Chi argued that the Service Authorization/Contract that she signed was also a written contract falling within the six-year statute of limitations. (CP 30-33; CP 50-53)

In *MaxCARE v. Hogue*, Chi’s counsel represents Mr. and Mrs. Hogue, and they expressly denied that the identical Service

Authorization/Contract form used in that case was a valid contract. (CP 99, ¶ 4) Taking a contradictory position in *Chi v. MaxCARE*, Chi's counsel argues that the identical Service Authorization/Contract form is a valid contract.

ii. The facts in *MaxCARE v. Hogue* did not persuade the trial court in the present case.

In *MaxCARE v. Hogue*, MaxCARE did not contend its Service Authorization/Contract form was written contract. The Complaint in *MaxCARE v. Hogue* does not allege the existence of a written contract. (CP 38-41) MaxCARE alleges only that the Hogues "entered into a Contract with" MaxCARE to perform cleaning work on the property. (CP 39, ¶ 4) MaxCARE alleged that the Hogues' failure to pay was a breach of that contract. (CP 39)

Additionally, MaxCARE filed suit within the three-year statute of limitations for implied or oral contracts because the Hogues' alleged breach occurred between December 20, 2006, when the Hogues signed the Service Authorization/Contract, and December 3, 2008, when MaxCARE filed suit for nonpayment. (CP 38-41) Moreover, the Hogues' attorney is the same attorney in this appeal, and he denied in his Answer to MaxCARE's complaint that the identical Service Authorization/Contract (used in *Hogue* and *Chi*) was a valid contract. (CP 39, ¶ 4)

On August 9, 2009, Robin Hamilton, the corporate representative for MaxCARE, was deposed in *MaxCARE v. Hogue*. (CP 92) Throughout her deposition, Ms. Hamilton testified that the contract between the Hogues and MaxCARE was based upon the “Service Authorization/Contract” and conversations between MaxCARE and the Hogues, as well as additional electronic correspondence. She testified, in relevant part, as follows:

Q. What is MaxCARE’s basis for alleging a contract in this case?

A. For alleging a contract? It's due to the service authorization and the conversations that transpired and e-mails that transpired after the authorization.

(CP 94 at lines 12-16)

Q. And it’s your testimony here today that MaxCARE never received an agreement from the Hogues for the specific services to be performed by MaxCARE?....

A. There was agreements [sic] between the Hogues and MaxCARE as to services to be performed.

Q. And were those agreements oral or written?

A. Written on the service authorization and then verbal.

(CP 95 at lines 4-6 and 13-17)

Q. To an average layperson who doesn’t have the benefit of your knowledge, is “construction and contents” detailed enough to form a contract?

MR. HONGLADAROM: Objection; calls for speculation.

Q. You can answer, if you can.

MR. HONGLADAROM: Do you know? Please read back the question.

(The question was read.)

MR. HONGLADAROM: Same objection; calls for speculation, calls for a legal conclusion, vague. Go ahead and answer, if you can.

A. The service authorization was signed after extensive conversations as to what this would entail.

Q. Didn't MaxCARE provide a more specific description of the services to be performed?

A. Based on our discussions with the Hogues on-site, it appeared that everybody was in an understanding of what services were to transpire.

(CP 96 at lines 4-22) In the case at bar, Chi did not depose Ms. Hamilton.

D. The trial court granted MaxCARE's motion for partial summary judgment on Chi's breach of contract claim.

After Chi filed her Amended Complaint alleging breach of a *written* contract, MaxCARE's re-noted its motion for partial summary judgment dismissal of Chi's breach of contract claim. On March 19, 2010, Judge McCarthy granted MaxCARE's motion and dismissed Chi's claim with prejudice. (CP 136-38) On November 29, 2010, Chi and MaxCARE entered a stipulation and order for dismissal of Chi's sole

remaining claim, without prejudice. (CP 301-02) On December 28, 2010, Chi filed a Notice of Appeal of the March 19, 2010 Order granting MaxCARE's summary judgment on the breach of contract claim. Six months later, Appellant Chi filed her opening brief.

IV. LEGAL ARGUMENTS IN OPPOSITION TO APPELLANT'S OPENING BRIEF

A. The Standard of Review Is *De Novo*.

The appellate court reviews summary judgment decisions *de novo*, engaging in the same inquiry as the trial court, to determine if the moving party (here, Respondent MaxCARE) is entitled to summary judgment as a matter of law and if there is any genuine issue of material fact requiring a trial. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003); *Green v. A.P.C.*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998).

In reviewing the record *de novo*, all facts, and reasonable inferences there from, must be viewed in the light most favorable to Chi, the non-moving party. Even if the facts are undisputed, if reasonable minds could draw different conclusions, then summary judgment is improper. *Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wn.2d 282, 745 P.2d 1 (1997).

Here, Chi, the nonmoving party, failed to present competent and admissible evidence to establish that her breach of contract claim was filed

within the three-year statute of limitations. Likewise, she failed to establish as a matter of law that the signed Service Authorization/Contract was a contract or written agreement subject to the six-year statute of limitations. Accordingly, the trial court correctly ruled as a matter of law that Chi's breach of contract claim should be dismissed.

B. The Summary Judgment Standard Applies.

Summary judgment exists to avoid unnecessary trials or unnecessary litigation of issues. Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* CR 56(c). Once the moving party shows the nonmoving party lacks sufficient evidence to prove their case, the burden shifts to the nonmoving party "to establish the existence of an element essential to [their] case." *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989), affirmed in part, reversed in part by 130 Wn.2d 160, 922 P.2d 59 (1996). At this point, the nonmoving party may not rest upon mere allegations or denials, whether in general or derived from their pleadings. *See* CR 56(e); *Young*, 112 Wn.2d at 226-27.

The nonmoving party must provide specific facts showing there is a genuine issue for trial. *Id.*; *see Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995) (ordinarily in determining the legal question of

whether the statute of limitations applies to bar a suit, the underlying factual questions are questions of fact for the jury; but where the facts are susceptible of but one reasonable interpretation, they may be decided as a matter of law); *Gillespie v. Seattle-First Nat'l Bank*, 70 Wn. App. 150, 170, 855 P.2d 680 (1993). Here, the facts are susceptible to only one interpretation.

C. Summary of Respondent's argument.

The 6-year statute of limitations governs actions “upon a contract in writing, or liability express or implied arising out of a written agreement.” RCW 4.16.040(1); *Algona v. Pacific*, 35 Wn. App. 517, 520, 667 P.2d 1124 (1983).

“A written agreement for purposes of the 6-year statute of limitations must contain all the essential elements of the contract, and if resort to parol evidence is necessary to establish any material element, then the contract is partly oral and the 3-year statute of limitations applies.” *Moran v. Stowell*, 45 Wn. App. 70, 73-74, 724 P.2d 396 (1986).

The essential elements of a contract are “the subject matter of the contract, the parties, the promise, the terms and conditions, and (in some but not all jurisdictions) the price or consideration.” *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 31, 959 P.2d 1104 (1998). “It is therefore an

essential element of a contract in writing that it shall contain within itself a description of the thing sold, by which it can be known or identified [and, *inter alia*] of the price to be paid for it.” *Arbogast v. Johnson*, 80 Wash. 537, 540, 141 P. 1140 (1914).

Here, Chi has repeatedly contended there was no written contract. CP 3, ¶ 12; CP 7, ¶ 35; CP 112, ¶ 9; CP 187, ll. 20-26. She admits the services to be provided are not contained in the written agreement but were determined by oral agreement. Opening Brief of Appellant (“App. Br.”) 8-9; 15 (Chi and MaxCARE “discuss[ed] the ‘work’ Respondent MaxCARE was to perform”). There is no dispute that the “description of the thing sold” is not contained in the Service Authorization/Contract. Appendix-1 Chi confuses a “meeting of the minds” sufficient to form a contract with the requirements of a contract in writing sufficient to permit application of the six-year statute. App. Br. 15; RCW 4.16.040(1). A meeting of the minds is required for a contract, but it is not sufficient to prove a contract in writing, which in this case would require at a minimum a description of work to be performed. *DePhillips*, 136 Wn.2d at 31; *Arbogast*, 80 Wash. at 540.

Chi is also wrong that the parol evidence rule could be relied on to “fill the gap.” App. Br. 16. She seeks to use the parol evidence rule to

import an oral agreement regarding “the thing sold” into the Service Authorization/Contract to try and create a contract in writing. App. Br. at 16-17. This is improper. *See Moran*, 45 Wn. App. at 73-74 (“if resort to parol evidence is necessary to establish any material element, then the contract is partly oral and the 3-year statute of limitations applies”).

D. Summary judgment dismissal should be affirmed because there is no evidence of a written contract.

“[A]ccrual of a contract action occurs on breach.” *1000 Virginia Ltd. P'ship v. Vervecs*, 158 Wn.2d 566, 576, 146 P.3d 423 (2006). Chi initially alleged that (1) she had an implied contract with MaxCARE; (2) MaxCARE came into possession of Chi’s personal property in June 2005; and (3) MaxCARE released her personal property to her in November 2005. CP 2-4; 7. Accordingly, the alleged breach occurred between June and November 2005. Chi filed suit on June 1, 2009—at least one year after the three-year limitations period expired. RCW 4.16.080(3).

The “litigation of stale claims is unfair to the defending party and undesirable to society as a whole.” *Young v. Estate of Snell*, 134 Wn.2d 267, 279, 948 P.2d 1291 (1997) “[C]ompelling one to answer stale claims in the courts is in itself a substantial wrong.” *Ruth v. Dight*, 75 Wn.2d 660, 665, 453 P.2d 631 (1969).

Here, Chi alleged that by July 2005 she felt aggrieved by MaxCARE's performance. CP 4, ¶ 17. She further alleged MaxCARE lost or stole her personal property. CP 7 at ¶ 33. Yet she waited nearly four years, until June 2009 to commence suit when "[w]itnesses may no longer be available, memories have faded, and relevant evidence may no longer be obtainable." *See Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991).

When she did sue, Chi first took the position that she did not "enter into any type of written or oral contractual relationship with MaxCARE" (CP 3, ¶ 12) and that "while the work authorization does not constitute a 'contract,' an implied contract was created." (CP 7, ¶ 12) When confronted with a three-year statute of limitations applicable to implied contracts, Chi reversed her position and amended her Complaint to allege that the work authorization did constitute a written contract to qualify under the six-year statute of limitations for written contracts. RCW 4.16.040(1). However, the relevant "Service Authorization/Contract" does not, as a matter of law, constitute a written contract. Not all written documents create a contract or written agreement.

Unless all the essential elements of a contract are in the written document, an action premised on express or implied liability arising out of the writing are not subject to the six-year limitations period....The court has rejected the idea

that liability arising from a written instrument, alone, brings an action within the six-year limitations period. A contract in writing or written agreement is required.

DePhillips, 136 Wn.2d at 37 (holding that an “employer’s written promise, in and of itself, is insufficient to constitute a contract containing all the essential elements of a contract.”) “A written agreement for purposes of the 6-year statute of limitations must contain all the essential elements of the contract[.]” *Moran*, 45 Wn. App. at 74 (ruling that if resorting to parol evidence is necessary to establish any material element, then the contract is partly oral and the three-year statute of limitations applies). The essential elements of a contract are, at minimum, the services to be provided. *DePhillips*, 136 Wn.2d at 31.

As a preliminary matter, Chi has denied in this litigation that the Service Authorization/Contract that she signed contains the essential elements of a contract. After the trial court dismissed her breach of contract claim, MaxCARE moved for summary judgment dismissal of her Consumer Protection Claim (which was subsequently dismissed without prejudice pursuant to a Stipulation and Order). In response to the motion, Chi took the following position:

During the course of the June 1, 2005 meeting with Ms. Chi, Ms. Hamilton provided a one-page “Service Authorization/Contract” (“Service Authorization”) to Ms. Chi for signature. Though MaxCARE has asserted that Ms.

Hamilton spoke with Ms. Chi about the work that MaxCARE would perform during her one-hour meeting with Ms. Chi on June 1, 2005, **the Service Authorization signed by Ms. Chi contained no mention of any services to be performed, the price to be paid for such work, the terms of any agreement, or any warranties related to the work to be performed.** [Chi cites to and attaches the Service Authorization at issue in this appeal.]

(CP 187 at lines 20-26, and citing to the Service Authorization located at CP 235) Chi's interpretation of the Service Authorization flatly contradicts her interpretation in her Opening Brief. App. Br. at 14. There, she states that the essential terms are clear: "The subject matter is clearly stated: work to be performed by Respondent MaxCARE at the job location of 30025 1st Place S, Federal Way, Washington, Appellant Chi's fire-damaged home." *Id.* Chi also argues that the promise is clear: "The promise is clearly stated: Respondent MaxCARE would perform the work at the job location in exchange for a promise of payment by ... Chi." *Id.*

Chi's also asserts the service authorization's terms and conditions are clear: "The terms and conditions are clearly stated: That Appellant Chi would pay MaxCARE of Washington, Inc., rather than permitting Allstate Insurance to pay Respondent MaxCARE." *Id.* In short, Chi characterizes the service authorization according to the expediencies of her arguments, but not under any governing legal principle.

Likewise, her interpretation of the Service Authorization in her Opening Brief contradicts her Amended Complaint. She alleged in her Amended Complaint there was little or no framework governing MaxCARE's work: "MaxCARE failed to inform Ms. Chi [of] the full and actual scope of work intended to be done." (CP 113, ¶ 14) She also alleges that "MaxCARE, upon its own volition, removed personal property from Ms. Chi's home. MaxCARE's removal of the personal property was done without specific authorization by Ms. Chi." (CP 113, ¶ 16). In contrast, in her Opening Brief, she argues that all of the essential elements of a contract were clearly contained in the Service Authorization/Contract, and that the definition of the work to be performed was clearly understood, such that MaxCARE and Chi had a "meeting of the minds." App. Br. at 13-14.

Chi agrees that the scope of MaxCARE's work was determined via an oral agreement—Ms. Hamilton and Chi discussed the work that MaxCARE would perform. App. Br. at 9. If a contract is part oral and part written, then the three-year statutory limitation period applies, not the six-year limitation period. *Campbell v. King County*, 38 Wn. App. 474, 477-78, 685 P.2d 659 (1984) (of contract is partly oral then three-year statute of limitations applied). In fact, if resort to parol evidence is

necessary to establish any material element, the three-year statute of limitations applies. *Id.*; *Moran*, 45 Wn. App. at 74.

In *DePhillips*, the Supreme Court held that an employer's written promise in the employee handbook, in and of itself, was insufficient to constitute a contract containing all the essential elements of a contract. *DePhillips*, 136 Wn.2d at 31. The *DePhillips* Court found the employee handbook did not constitute a written contract because "it does not, for example, name or identify plaintiff, nor does it identify his job or job responsibilities or his work hours. Thus, at the least it does not sufficiently establish the parties to and the terms and conditions of a contract." *Id.*

Likewise, a law firm's retention letter to a client, confirming an oral agreement, was found not to express a promise by the client; therefore the letter did not satisfy the writing requirement for purposes of the six-year statute of limitations under RCW 4.16.040, rather the three year statute of limitations applied per RCW 4.16.080. *Bogle & Gates, PLLC, v. Zapel*, 121 Wn. App. 444, 451, 90 P.3d 703 (2004). Similarly, implied contract claims have a three-year statute of limitations. *Pinnell v. Copps*, 149 Wn. 578, 581, 271 P. 882 (1928); *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 838, 991 P.2d 1126 (2000).

The service authorization Ms. Chi signed is not a written contract. Appendix-1. The authorization is void of any terms, conditions or a description of the work to be performed, a required element. *DePhillips*, 136 Wn.2d at 31. The authorization is void of any promise, a required element. *Id.* The authorization is void of any price, also a required element. *Id.*; *see also Ingalls v. Angell*, 76 Wn. 692, 695, 137 P. 309 (1913); *Geyen v. Time Oil Co.*, 46 Wn.2d 457, 461, 282 P.2d 287 (1955) (discussing price as an element for a valid contract).

Chi agrees that the essential terms are missing. She states “the Service Authorization signed by Ms. Chi contained no mention of any services to be performed, the price to be paid for such work, the terms of any agreement, or any warranties related to the work to be performed.” (CP 187 at lines 20-26)

Chi originally alleged that “at no point in time did Ms. Chi enter into any type of written or oral contractual relationship with MaxCARE.” (CP 3, ¶ 12) *Without any change of facts*, Chi amended her Complaint and represented in her summary judgment response and in her Appellate Opening Brief that she did indeed have a valid written contract. However, her argument is untenable and unsupported by the words contained in the document titled “Service Authorization/Contract” and the law of contracts.

For example, Chi contends that the “terms and conditions” of the contract are “clear:” “Ms. Chi will pay MaxCARE of Washington, Inc., rather than permitting Allstate Insurance Company to pay MaxCARE.” App. Br. at 14. Not only is that interpretation incorrect,² those are not “terms and conditions” of a contract. They do not state what work MaxCARE is to do, how MaxCARE is to do the work, when MaxCARE is to perform the work, or when MaxCARE is to complete the work. As in *DePhillip*, where the Court found no written contract due to non-identification of the plaintiff’s job, his responsibilities, and his work hours, the “Service Authorization/Contract” is similarly deficient. *See DePhillips*, 136 Wn.2d at 31.

Chi’s bald assertion, unsupported by a declaration bearing her oath or signature, that she believed there was a “meeting of the minds” regarding the services that MaxCARE would perform does not transform the “Service Authorization/Contract” into a written contract, because those services were not listed on the authorization.

² The language to which Chi refers states, “I hereby authorize my insurance company to pay MaxCARE of Washington, Inc. directly for the repairs listed on the repair estimate.” This means exactly the opposite of what Chi stated; Chi authorizes Allstate (her insurance company) to pay MaxCARE directly.

As a matter of law, the “Service Authorization/Contract” is not a written contract. The legally required elements are absent. The six-year statute of limitations does not apply to Chi’s breach of contract claim. Rather, the three-year statute of limitation applies—which expired in November 2008, at the latest. As such, this Court should affirm the trial court’s dismissal of her breach of contract claim.

E. *MaxCARE v. Hogue*, filed in the King County Superior Court, is irrelevant to the case at bar because Hogue is premised on different facts and law.

Chi contends the Service Authorization/Contract she signed is a written contract based on the fiction that MaxCARE asserted in a different proceeding in the King County Superior Court (*MaxCARE v. Hogue*) that the “Service Authorization/Contract” was a written contract. However, in *Hogue* (wherein Plaintiff MaxCARE sued the Hogues for breach of contract for failing to pay), there is absolutely no reference to a written contract, nor did MaxCARE allege that the “Service Authorization/Contract” was a *written* contract. (CP 38-41) Further, whether the *Hogue* contract was written or oral or implied in law is irrelevant because MaxCARE timely filed suit against the Hogues within

the three-year statute of limitations.³

Chi also incorrectly asserts that MaxCARE's corporate representative testified in the *Hogue* matter that the Service Authorization/Contract was a written agreement. (App. Br. at 12) In fact (and as a matter of record), Robin Hamilton did *not* testify during her deposition that the "Service Authorization/Contract" was itself a written contract. Throughout her deposition, Ms. Hamilton testified that the contract between the Hogues and MaxCARE was based upon the "Service Authorization/Contract" and conversations between MaxCARE and the Hogues, as well as additional electronic correspondence.

She states in relevant part as follows:

Q. What is MaxCARE's basis for alleging a contract in this case?

A. For alleging a contract? It's due to the service authorization and the conversations that transpired and e-mails that transpired after the authorization.

(CP 94 at lines 12-16)

Q. And it's your testimony here today that MaxCARE never received an agreement from the Hogues for the specific services to be performed by MaxCARE?....

³ The elements of a contract implied in law are: (1) the defendant receives a benefit; (2) the received benefit is at the plaintiff's expense; and (3) the circumstances make it unjust for the defendant to retain the benefit without payment. *Young v. Young*, 164 Wn.2d 477, 484-85, 191 P.3d 1258 (2008).

A. There was agreements [sic] between the Hogues and MaxCARE as to services to be performed.

Q. And were those agreements oral or written?

A. Written on the service authorization and then verbal.

(CP 95 at lines 4-6 and 13-17)

Q. To an average layperson who doesn't have the benefit of your knowledge, is "construction and contents" detailed enough to form a contract?

MR. HONGLADAROM: Objection; calls for speculation.

Q. You can answer, if you can.

MR. HONGLADAROM: Do you know? Please read back the question.

(The question was read.)

MR. HONGLADAROM: Same objection; calls for speculation, calls for a legal conclusion, vague. Go ahead and answer, if you can.

A. The service authorization was signed after extensive conversations as to what this would entail.

Q. Didn't MaxCARE provide a more specific description of the services to be performed?

A. Based on our discussions with the Hogues on-site, it appeared that everybody was in an understanding of what services were to transpire.

(CP 96 at lines 4-22)

In sum, *MaxCARE v. Hogue* is irrelevant because it is a different case, timely filed, with no allegation of a written contract, and with undisputed testimony that the contract's specific provisions were left to oral agreement.

F. Chi's positions are inconsistent and contradictory.

Chi's arguments are baseless and inconsistent. First, she contends that MaxCARE has "affirmatively taken the position that the 'Service Authorization/Contract' is in fact a written contract for services," referencing the *Hogue* matter. App. Br. at 11. This is incorrect. Second, Chi contends that Robin Hamilton, MaxCARE's corporate representative in the *Hogue* matter, testified that the Service Authorization/Contract was a written contract. App. Br. at 11-12. This too is incorrect.

Since Chi's counsel represents both Chi and the Defendants Mr. and Mrs. Hogue, Chi's counsel should know (as discussed *supra*) that in the *Hogue* matter, MaxCARE neither alleged breach of a written contract nor did Robin Hamilton testify to such. Rather, MaxCARE simply alleged: "In or about December 2006, Defendants entered into a Contract with Plaintiff." (CP 39, ¶ 4) The Hagues, through the same counsel as in this appeal, replied, "Defendant David R. Hogue and Nene Hogue Deny

that a valid Contract was entered into with Plaintiffs regarding the work purported to be performed by Plaintiff.” (CP 99, ¶ 4)

Third, Chi initially alleged breach of an implied contract. CP 7. She now asserts a written contract existed. Yet, in the *Hogue* case which she relies on in this case, she denied the existence of any contract at all. CP 99, ¶ 4.

Fourth, Chi in her Opening Brief argues that all of the essential terms are contained in the Service Authorization/Contract, App. Br. at 14. Yet she argued in the trial court that “the Service Authorization signed by Ms. Chi contained no mention of any services to be performed, the price to be paid for such work, the terms of any agreement, or any warranties related to the work to be performed.” (CP 187 at lines 20-26).

In sum, her positions in the trial court and Court of Appeals are baseless and inconsistent. There is no dispute of any material fact. As Chi has contended many times, the Service Authorization/Contract is not a written contract for purposes of the six-year statute of limitations. As such, the trial court correctly dismissed Chi’s breach of contract claim on summary judgment.

G. MaxCARE is entitled to fees for a frivolous appeal.

Based on Chi’s’s opening brief, MaxCARE requests attorney fees on appeal pursuant to RAP 18.9(a). This rule permits an award of attorney

fees to party burdened by a frivolous appeal. *Id.* An appeal is frivolous when “there are no debatable issues upon which reasonable minds could differ and when the appeal is so totally devoid of merit that there was no reasonable possibility of reversal.” *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691-92, 732 P.2d 510 (1987).

To summarize, Chi sued MaxCare alleging an implied contract (CP 7, ¶ 35). When MaxCARE moved to dismiss the claim under the governing statute of limitations, Chi argued a written contract based on a different case brought by MaxCARE involving the same standard-form contract, in which MaxCARE did not allege a written contract, where its officer testified the terms of the contract were oral, and where Chi’s counsel denied the Service Authorization/Contract form constituted a valid contract. (CP 31; 39; 43; 94-96; 122).

Chi now brings this baseless and rejected argument to the Court of Appeals, months past the due date, and notwithstanding her repeated contentions that the Service Authorization/Contract at issue is not a written contract. *E.g.*, CP 187 at lines 20-26 (“the Service Authorization signed by Ms. Chi contained no mention of any services to be performed, the price to be paid for such work, the terms of any agreement, or any warranties related to the work to be performed”); CP 3, ¶ 12 (“at no point in time did Ms. Chi enter into any type of written or oral contractual relationship with MaxCare”); CP 7, ¶ 35 (the Service

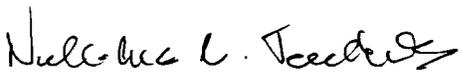
Authorization/Contract is an “implied contract”); CP 112, ¶ 9 (the Service Authorization/Contract “failed to detail what work was to be done, rate of compensation for such work, or the manner in which the work was to be done”). In short, in this case, RAP 18.9(a) authorizes an award of Respondent’s attorneys’ fees on appeal. Respondent requests these in addition to costs under RAP Title 14.

V. CONCLUSION

No genuine issue of material fact exists. There is no written contract, as a matter of law. Chi filed her suit after the applicable three-year statute of limitations expired, so the trial court’s dismissal of her breach of contract claim was correct and should be affirmed.

Respectfully submitted this 14th day of July, 2011

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APPENDIX



MaxCARE of Washington, Inc.
8801 Canyon Road East, Puyallup, Washington 98371
Main: 253.864.6445 Toll-free: 888.810.6445 Fax: 253.864.6448

SERVICE AUTHORIZATION/CONTRACT

Owner Name: PTC ALLSTATE -- TOM FORRESTER
Owner Address: CHI, CHUN CHA
30025 1ST PLACE S
Site Address: FEDERAL WAY, WA 98003
206-251-4279
Res. Phone: _____
Work/Mobile Phone: _____
Email Address: _____
Contact No. During Job: _____
Job Number: _____
Job Amount _____
Insurance Co./Adjuster: _____

I hereby authorize MaxCARE of Washington, Inc. to proceed with work at the above listed job location.

6-1-05
Date

Owner/Representative Signature

I hereby authorize my insurance company to pay MaxCARE of Washington, Inc. directly for the repairs listed on the repair estimate.

Date

Owner/Representative Signature

NOTICE TO CUSTOMER/DISCLOSURE STATEMENT

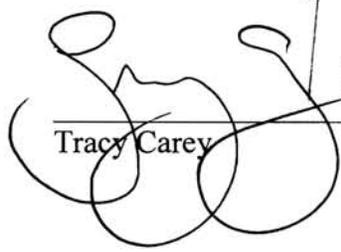
The laws of the State of Washington require that all licensed contractors furnish customers with projects in excess of \$1000 with the following Disclosure Statement and Notice to Customer. We certainly have no reason to anticipate the necessity of making a claim of lien and trust that you will not construe this notification as any reflection on you nor of this company. These notices must be provided automatically and, by doing so, MaxCARE of Washington, Inc. is merely complying with the laws of our state. If this information raises any questions in your mind, please feel free to call our office: MaxCARE of Washington, Inc. at 253.864.6445. We will be happy to answer any of your questions. MaxCARE of Washington, Inc. is registered with the State of Washington, Registration Number MAXCAWI962DB, as a specialty contractor, and has posted a bond or cash deposit of \$6000 in compliance with the State of Washington. The purpose of this bond is to satisfy claims against the contractor for negligent or improper work or breach of contract in the conduct of the contractor's business. The expiration date of this contractor's registration is March 02, 2006. This bond or cash deposit may not be sufficient to cover a claim which might arise from the work done under your contract. If any supplier of materials used in your construction project or any employee of the contractor or subcontractor is not paid by the contractor or subcontractor on your job, your property may be liened to force payment. If you wish additional protection, you may request the contractor provide you with original "lien release" documents from each supplier or subcontractor on your project. The contractor is required to provide you with further information about lien release documents if you request it. General information is also available from the Department of Labor and Industries.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 14th day of July 2011, I caused to be served a true and correct copy of the foregoing via legal messenger to the following:

Spencer Douglas Freeman
Freeman Law Firm, Inc.
1107 1/2 Tacoma Ave South
Tacoma, WA 98402-2005

Jon Grawn Hongladarom
Foster Pepper PLLC
1111 3rd Ave Ste 3400
Seattle, WA 98101-3299

FILED
COURT OF APPEALS
DIVISION II
11 JUL 14 PM 4:22
STATE OF WASHINGTON
BY  DEPUTY

Tracy Carey