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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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No. 44971-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TIMOTHY INGRAM and ROSEMARY INGRAM, husband and wife,

Appellants,

vs.

AMERICAN CONTRACTOR INDEMNITY COMPANY,

Respondent.

APPEAL FROM THE SUPERIOR COURT
OF KITSAP COUNTY, WASHINGTON

THE HONORABLE STEVEN DIXON, JUDGE

BRIEF OF APPELLANT

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Rosemary Ingram

TABLE OF CONTENTS

I.	TABLE OF AUTHORITIES	3
II.	ASSIGNMENT OF ERROR	4
III.	ISSUES PRESENTED	4
IV.	STATEMENT OF THE CASE	5
V.	STANDARD OF REVIEW	6
VI.	ARGUMENT:	6
A.	THE TRIAL COURT ERRED WHEN IT SUMMARILY DISMISSED INGRAM'S CLAIMS AGAINST ACIC BY SUMMARY JUDGMENT WHEN THERE REMAINED MATERIAL ISSUES OF FACT	6
	1. Material Issues of Fact Exist As to the Substantial Completion Issue	7
	2. Material Issues of Fact Exist As to the Abandonment Issue	8
VII.	CONCLUSION	9

I. TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

Douchette v. Bethel School Dist. No. 403
117 Wn.2d 805, 809, 818 P.2d 1362, 1363 (1991) 6

WASHINGTON COURT OF APPEALS

Halligan v. Pupo
37 Wn. App. 84, 678 P.2d 1295 (1984). 6

Goodpaster v. Pfizer, Inc.
35 Wn. App. 199, 665 P.2d 414 (1982) 6

Spurrell v. Block
40 Wn. App. 854, 701 P.2d 529 (1985) 6

1519-1525 Lakeview Blvd. Condominium Ass'n v.

Apartment Sales Corp.

101 Wn. App. 923, 932, 6 P.3d 74, 79 (2000) 7

STATUTES

RCW 18.27.040(3) 5, 8, 9

RCW 4.16.310 7, 9

II. ASSIGNMENT OF ERROR

In granting the motion of respondent American Contractor Indemnity Company (“ACIC”) for summary judgment, the trial court erred in ignoring the material issues of fact with regard to (1) whether the construction project at issue had substantially completed, and (2) whether the contractor abandoned the construction project.

III. ISSUES PRESENTED

1. Did the trial court err in dismissing the claims against Respondent ACIC when appellants Timothy and Rosemary Ingram (collectively, “Ingram”) submitted evidence that the construction project had not been substantially completed because it had never been fit for occupancy?
2. Did the trial court err in dismissing Ingram’s claims against ACIC when Ingram presented evidence that the construction project had not been abandoned because the contractor had purported to finish the project?

IV. STATEMENT OF THE CASE

Ingram brought suit against On October 19, 2012 against, *inter alia*, defendants Calvin D. Rowan and his construction bond company, ACIC, alleging defective construction work on an enclosed deck and sun room in June of 2009. CP 6-7, 9. In March of 2013, ACIC brought a motion for dismissal, alleging Ingram's claims against ACIC exceeded the two year statute of limitations for actions against a contractor's bond as described in RCW 18.27.040(3). CP 24-27. The statute of limitations in RCW 18.27.040(3) is not triggered until the construction work was either (1) substantially completed, or (2) abandoned. CP 69 at 14-16; CP 70 at 12-15. In response, Ingram submitted an affidavit demonstrating that the project was not substantially completed because it could not be legally occupied due to significant violations of building codes, leading to adverse action by the county. CP 70 at 12-15. Ingram also submitted evidence that the project had not been abandoned because the contractor purported to finish the project and even issued a final invoice. CP 70-71. At a minimum, this evidence raised material issues of fact.

The presence of these material issues should have ended the matter and the trial court should have denied ACIC's motion for summary judgment. Nevertheless, on May 10, 2013, the trial court granted

summary judgment in favor of ACIC and dismissed Ingram's claims. CP 90-91. Then the trial court then granted a judgment against Ingram for attorney's fees and costs. CP 92-95.

V. STANDARD OF REVIEW

The record demonstrates the presence of material issues of fact that should have precluded summary judgment.

Summary judgment is only fitting when there is no genuine issue of material fact. Halligan v. Pupo, 37 Wn. App. 84, 678 P.2d 1295 (1984). It is appropriate when reasonable people could reach only one conclusion after consideration of all evidence and reasonable inferences from that evidence. Goodpaster v. Pfizer, Inc., 35 Wn. App. 199, 665 P.2d 414 (1982). A "material fact" is a fact upon which the outcome of the litigation depends, in whole or in part. Spurrell v. Block, 40 Wn. App. 854, 701 P.2d 529 (1985). A decision granting summary judgment requires de novo review, and this Court is supposed to view the facts most favorable to the nonmoving party. Douchette v. Bethel School Dist. No. 403, 117 Wn.2d 805, 809, 818 P.2d 1362, 1363 (1991).

VI. ARGUMENT

- A. THE TRIAL COURT ERRED WHEN IT DISMISSED INGRAM'S CLAIMS AGAINST ACIC BY SUMMARY

JUDGMENT WHEN THERE REMAINED MATERIAL ISSUES
OF FACT

1. The trial court erred in dismissing the claims against Respondent ACIC when there was evidence that the construction project had not been substantially completed.

Ingram's brief and affidavit raised material issues of fact as to whether the construction project had been "substantially completed". In the context of the statute of limitations at issue, that term is defined as "the state of completion reached when an improvement upon real property *may be used or occupied for its intended use*". RCW 4.16.310 (italics added). Substantial completion occurs when the project is fit for occupancy. See 1519-1525 Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corp., 101 Wn. App. 923, 932, 6 P.3d 74, 79 (2000). Here, Ingram provided evidence that the deck and sun room was not fit for occupancy. This evidence included a notice of building code violations issued by the Kitsap County Department of Community Development, and an inspection report revealing substantial building defects and code violations. CP 77. Since it would have been illegal to occupy the room due to the building code violations, the room was not fit for occupancy. Faced with this evidence, ACIC conceded in its reply brief submitted to the trial court that material facts existed as to whether the project had been substantially completed. CP 84 at 24-25. Nevertheless, at the hearing, the

trial court immediately ruled in favor of ACIC, stating that “[s]ubstantial completion was obviously completed” VRP 10 at 2-5.

2. The trial court erred in dismissing the claims against ACIC when Ingram submitted credible evidence that the construction project had not been abandoned

As indicated above, the statute of limitations in RCW 18.27.040(3) is triggered when a construction project is substantially completed, or when the contractor abandons the project. Even though the trial court determined that the statute of limitations had run its course because the construction project was substantially completed, it is important to note that Ingram also submitted evidence that the project had not been abandoned. Under these circumstances, the trial court should have found material issues of fact remained for both matters, and reserved determination until trial.

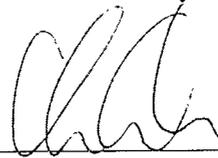
Although “abandonment” is not defined in the statutes, a common sense definition in the context of construction law is the contractor’s intentional walking away from a construction project before its completion, leaving an unfinished project for the homeowner to deal with. Ingram presented evidence, however, that the contractor purported to finish the project, had issued final invoices, and that Ingram paid them. CP 75 at 17-22. This evidence raised a material issue of fact as to whether

abandonment occurred. Based on this evidence, a fact finder could have concluded that the contractor did not abandon the project as that term was intended by legislature. Rather, Rowan terminated his services” under RCW 4.16.310 and did not “abandon” the project under RCW 18.27.040(3).

VII. CONCLUSION

The statute of limitations is only triggered by substantial completion or abandonment. ACIC concedes there are material issues of fact as to substantial completion, and Ingram submitted credible evidence there was no abandonment. Under these circumstances, Ingram respectfully requests that this Court reverse the trial court’s order granting defendant ACIC’s motion to dismiss.

RESPECTFULLY SUBMITTED this 18th day of November,
2013.



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DECLARATION OF SERVICE

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Kimberly Hammit declares and states as follows:

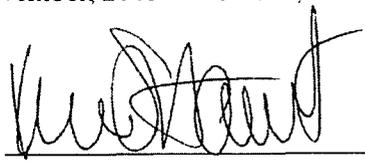
1. On the 18th day of November, 2013, I caused to be served or filed true and correct copies of the appellants' brief to the following recipients by emailing and mailing, via first class mail postage prepaid, the same to the following recipients:

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2. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED this 18th day of November, 2013 in Poulsbo, Washington.



Kimberly Hammit