

FILED

DEC 29 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 302440
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

SCHREINER FARMS, INC.,
a Washington Corporation

Appellant,

v.

AMERICAN TOWER, INC., a Delaware Corporation; NEXTEL WEST
CORPORATION, INC. d/b/a NEXTEL COMMUNICATIONS, a
Delaware Corporation; TOWER ASSET SUB INC., a Delaware
Corporation; SPECTRASITE COMMUNICATIONS, INC., a Delaware
Corporation; and WESTERN OREGON WIRELESS
COMMUNICATIONS, INC., a Oregon Corporation; and
WASHINGTON OREGON WIRELESS, a Washington Corporation.

Respondents.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Assignment of Error No. 1

Assignment of Error No. 1: The Superior Court erred in granting Respondents' Motion for Summary Judgment and dismissing Schreiner Farms' declaratory judgment claims with prejudice upon determining that they are barred by a six year statute of limitations.

1. **First Issue Pertaining to Assignment of Error No. 1:**

Whether the statute of limitations for Schreiner Farms' declaratory judgment claims purportedly sounding in breach of contract is triggered at the point of failure to cure, not the point of first default, when the underlying contract provides that Schreiner Farms may terminate the contract only after providing notice of default and failure to cure within sixty days.

2. **Second Issue Pertaining to Assignment of**

Error No. 1: Whether the Superior Court erred in concluding that the discovery rule does not apply to Schreiner Farms' declaratory judgment claims upon determining that the Washington Supreme Court's

holding in *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566 (2006), applies only to breach of contract claims involving latent construction defects.

3. **Third Issue Pertaining to Assignment of**

Error No. 1: Whether under principles of equity, the discovery rule applicable to actions sounding in fraud applies to Schreiner Farms' declaratory judgment claims involving fraudulent concealment of alleged defaults of a contract.

4. **Fourth Issue Pertaining to Assignment of**

Error No. 1: Whether Respondents' acts constitute a continuing breach of the contract, thereby extending the statute of limitations.

5. **Fifth Issue Pertaining to Assignment of**

Error No. 1: Whether Respondents are equitably estopped from asserting the statute of limitations defense.

II. STATEMENT OF THE CASE

A. Summary

This case is about an absurd and inequitable result attained through the guise of precedent. In a nutshell, Appellant Schreiner Farms and

Respondent Nextel entered a Communications Site Lease Agreement (“Ground Lease”) providing that Nextel could use a portion of Schreiner Farms’ secluded rural property in the Columbia Gorge to erect and use a cellular service transmission pole for Nextel’s business and its business only. (CP 328-337.) In violation of the Ground Lease, Nextel secretly assigned rights to use the power pole to a series of companies (Respondents Tower Sub, American Tower, and Spectrasite) that are in the business of subleasing space on power poles to other cellular service companies, in this case Respondent Washington Oregon Wireless. (CP 339, CP 343-355, CP 423-431.) The Ground Lease expressly prohibits this. When Schreiner Farms found out Nextel had assigned its rights (which was more than six years after the first assignment) (CP 292, CP 421), Schreiner Farms promptly provided written notice of the default and demanded that it be cured. (CP 388-390.) The Ground Lease provides that Schreiner Farms may not terminate the agreement without first providing notice and a sixty day opportunity to cure. (CP 330.) However, upon receiving notice of the default, Respondents disputed the clear language of the Ground Lease and refused to resolve the matter. (CP 392-393, CP 396.) Months later, Schreiner Farms brought this declaratory relief action pursuant to RCW 7.24.020 seeking a judgment declaring that Nextel and the other Respondents are in default of the Ground Lease so that Schreiner

Farms may rightly terminate the agreement and seek appropriate damages for breach of contract. (CP 4-7.)

The novel issue this case presents is when does the statute of limitations run for a declaratory relief action purportedly sounding in breach of contract, given: (1) the contract provides that termination of the contract could occur only after the defaulting party's failure to cure upon being given written notice of a default (CP 330), (2) the declaratory relief action was brought within months after the defaulting party failed to cure upon being given notice of the default (CP 4-7), (3) the non-defaulting party did not know about the defaulting actions until more than six years after the first point of default (CP 282, CP 421), (4) the underlying contract is not a construction contract (CP 328-337), (5) the actions giving rise to the default were fraudulently and intentionally concealed (CP 339, CP 357-368, CP 423-426, CP 428-431), and (6) the actions giving rise to the default continue to this day (CP 392-393, CP 396). The result handed down by the Superior Court is that Schreiner Farms' declaratory relief claims are time barred by the six year statute of limitations for breach of contract, which it held began to run at the first point of default. (CP 729-738.) The Superior Court's decision in this regard is premised solely upon the Washington Supreme Court's ruling in *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566 (2006), which the Superior Court

understood as limiting the applicability of the discovery rule for breach of contract claims to latent breaches of construction contracts. Under the Superior Court's perspective, the discovery rule cannot apply to any other breach of contract claim in any other context, regardless of whether it involves a latent breach or default. This case provides a model for the absurdity and inequities of interpreting and applying precedent in such a narrow way. The absurd result here is that the statute of limitations presumably ran before Schreiner Farms knew or could have known about the defaults (at the very least, there remains a genuine issue of material fact on this issue). (CP 862-863.) It is of note that, the Superior Court denied Respondents' motion for summary judgment with regard to the substantive issues, thereby confirming that this case would otherwise go to trial. (CP 863.) Even more, Schreiner Farms is left with absolutely no recourse to terminate the Ground Lease even though it is absolutely clear that Respondents intentionally concealed the defaults (again, at the very least, there remains a genuine issue of material fact on this issue). (CP 862-863.) Even the Superior Court recognized the absurd result, and therefore called upon the higher courts to justly expand the application of *1000 Virginia*.

This Court need not even address whether the discovery rule as set forth in *1000 Virginia* applies, as the statute of limitations was triggered

when Respondents failed to cure the alleged defaults pursuant to the termination provision of the Ground Lease. Nevertheless, if this Court were to determine that the statute of limitations was triggered at the first point of default, this Court should step up and apply the discovery rule given the set of facts herein is strikingly analogous to those in *1000 Virginia*. In addition, this Court could also reach a more just result by concluding one or more of the following: (1) the discovery rule applicable to fraudulent concealment claims applies to declaratory judgment claims involving the fraudulent concealment of the alleged defaults of a contract; (2) the statute of limitations should be extended given Respondents default is continuing; and/or (3) Respondents are equitably estopped from asserting the statute of limitations defense. In any case, the Superior Court's dismissal of this case based on the statute of limitations should be reversed.

B. Substantive Facts

1. Parties

SCHREINER FARMS, INC. (hereinafter "Schreiner Farms") is the owner of certain remote rural land located above and to the north of the Columbia River in Klicitat County, Washington (hereinafter "Premises").

Respondent NEXTEL COMMUNICATIONS, INC. (hereinafter “Nextel”) is a telecommunications company which operates a wireless communication service for its client utilizing numerous communications towers and antenna arrays;

Respondent TOWER ASSET SUB, INC. (hereinafter “Tower Asset”) at all times relevant herein was an affiliate of Nextel and doing business as SPECTRASITE COMMUNICATION, INC.;

Respondent SPECTRASITE COMMUNICATIONS, INC. (hereinafter “Spectrasite”), at all times relevant herein was the Manager and Agent for Tower Asset.

Respondent AMERICAN TOWER is a legal entity which merged with Spectrasite on or about August 8, 2005 thereby securing all rights and obligations of Spectrasite;

Respondent WASHINGTON OREGON WIRELESS, LLC is a business entity which operates a wireless communication service for its clients.

2. Negotiations between Schreiner Farms and Nextel and the execution of the Communications Site Lease Agreement

Schreiner Farms owns an extensive piece of undeveloped and pristine land located above the north bank of the Columbia River. It is

remote, beautiful, and part of the federally designated Columbia River Gorge Conservation Area. (CP 290; CP 341.)¹

Over a period of several years representatives of Nextel (Cord Communications) solicited Schreiner Farms to allow them to locate a cellular service tower on a small and remote portion of their property. (CP 292-326.) The location apparently provided unique access for cell phone communication in the river gorge below.

On August 28, 1999 Schreiner Farms (Lessor) and Respondent Nextel (Lessee) executed a Communications Site Lease Agreement (“Ground Lease”). (CP 328-337.)

a. Terms providing use by only one wireless company at a time, assignment only upon transferring all rights and obligations regarding a single communications facility, and no additional structures permitted

During the negotiations, Nextel provided a form contract that it typically uses when leasing property to install and maintain its cell phone communication equipment. (CP 309-313.) Prior to the execution of the Ground Lease, Schreiner Farms raised various issues with Nextel’s form contract as written, and the parties mutually agreed to several changes based upon specified justifications as memorialized in memorandums

¹ These photographs depict the remoteness of the land. The tower antennas at the top are Nextel’s (as authorized by the Ground Lease) and the antenna below that belongs to Washington Oregon Wireless (not authorized by the Ground Lease). (CP 341.)

prepared by Nextel entitled “Lease Modifications Requested with Justifications.” (CP 292-296; CP 298-303; CP 305-307; *see also* CP 309-313.)

First, Schreiner Farms insisted that the property be used by only *one* wireless communication company at a time. (CP 298-302; 309-313.) Changes were thereby made to Nextel’s form contract to guarantee that only one company would be utilizing the site, no equipment of any kind other than that expressly authorized by the Ground Lease or subsequently specifically authorized by Schreiner Farms would be placed on the property. (CP 321.) Moreover, Schreiner Farms was “adamant about limiting subleasing or licensing without consent” (CP 302). Changes were made in which the Ground Lease that allowed Nextel to assign the Ground Lease but *only* by transferring *all of its rights and obligations* to a new entity and only to an entity that would be using the property for “provision of *a* radio communications facility” (CP 323.) Documents evidencing the negotiations, requested changes, and reasons for the requested changes to the Nextel form contract unequivocally establish the parties’ mutual understanding and intent in this regard. (CP 292-326.)

Specifically, as reflected in the final Ground Lease, the paragraph setting forth the permissible use of the property was changed to reflect an “*a*” as emphasized above, added at the insistence of Schreiner Farms along

with limiting the use to operations specific to Lessee's communications system only:

2. Use. The Premises may be used by Lessee for any activity in connection with the provision of a radio communications facility from which Lessee can provide radio communications services specific to Lessee's operations.
(CP 328) (emphasis added.)

In addition, the following other changes were made as indicated:

6. Facilities; Utilities; Access. No additional structures beyond those proposed and depicted in Exhibit B can be considered part of this Agreement unless previously approved by Lessor in writing, which approval shall not be unreasonably withheld, but may cause Rent to change. In connection therewith, Lessee has the right to do all work necessary to prepare, maintain and later the Premises for Lessee's business operations and to install transmission lines connecting the antennas to the transmitter and receivers. Title to the Lessee Facilities shall be held by Lessee. All of Lessee Facilities shall remain Lessee's personal property and are not fixtures.
(CP 328 (emphasis added).)

Moreover, Paragraph 14 of the Nextel form contract was amended at the request of Schreiner Farms to prevent assignments or subletting of a portion of the property as noted in the right margin of the 7/10/98 draft and subsequent versions of Paragraph 14 including the final. (CP 312.) Accordingly, paragraph 14 of the Ground Lease allows full and complete assignments of the Ground Lease *only* if Nextel assigns **all** of its rights and obligations to the assignee who thereafter assumes all rights and obligation, including the above requirement that the assignee use the

Ground Lease solely to operate *a* wireless communications system specific to its operation:

14. Lessee may assign this Agreement to an entity upon written notification to Lessor by Lessee, subject to the assignee assuming *all* of Lessee's obligations herein. Upon assignment, Lessee which shall be relieved of all-future performance, liabilities, and obligations under this Agreement. Lessee shall not have the right to sublet or license the Premises or any portion thereof without Lessor's consent.

(CP 330.) The Ground Lease thereby expressly limits the use of the Premises by Lessee to operation of Lessee's radio communications services specific to Lessee's business. It also expressly identifies the location of and number of towers, antenna arrays and ground buildings permitted on the Premises.

b. Schreiner Farms' right to terminate the Ground Lease requires notice of default and failure to cure within 60 days.

The Ground Lease provides that while Nextel could terminate the agreement for, *inter alia*, "any reason or for no reason" upon thirty (30) days notice, Schreiner Farms could terminate the Agreement only upon giving notice of a default to Nextel and after Nextel's failure to cure within 60 days:

10. Termination. This Agreement may be terminated without further liability on thirty (30) days prior written notice as follows: (1) by either party upon a default of any covenant or term hereof by the other party, which default is not cured within sixty (60) days

of receipt of written notice of default, provided that the grace period for any monetary default is ten (10) days from receipt of notice.

(CP 330.)

3. Respondents' concealed defaults of the Ground Lease

Almost immediately after the Ground Lease was executed in August of 1999, Nextel, along with its co-Respondents herein, executed a series of assignments which on their face appear to be proper and authorized under the Ground Lease. (CP 423-431.) Nextel appeared to have assigned its rights to Respondent Tower Asset, which, through Nextel's affiliate Respondent Spectrasite, assigned the ground lease to Respondent American Tower. (*Id.*)

Each of the "assignments" was in violation of the Ground Lease in that Nextel did not actually assign "all" of "its rights and obligations" but only licensed or subleased, without the knowledge and consent of Schreiner Farms, the Power Pole. In addition, the assignees were merely in the business of maintaining and subleasing power poles to other wireless communications systems such as Washington Oregon Wireless for money. (CP 343-355). In discovery Respondents have admitted that only Nextel and Washington Oregon Wireless are operating wireless communication services from the property. (CP 371.) Thus, other than Nextel and Washington Oregon Wireless, none of the Respondents are in the business

of operating wireless communication services as required by the Ground Lease.

What was secretly going on was that Nextel, behind the back of Schreiner Farms, was creating entities to operate the power pole as a profit center, entering into contracts with entities like Respondent Washington Oregon Wireless to allow that wireless communications company to erect facilities on the property to operate another separate wireless communication network from the tower. (CP 339; CP 357-368; CP 423-426; CP 428-431.) For example, Respondent Spectrasite, not a party to the Ground Lease, contracted with Washington Oregon Wireless for the latter to erect antenna arrays and other equipment on the property of the Ground Lease without the knowledge and consent of Schreiner Farms. (CP 343-355.) Recall that the lease provided for no new equipment or facilities without the written consent of Schreiner Farms and an adjustment to the rent. (CP 328.) Schreiner Farms supposed "consent" was deceitfully obtained by Respondent Spectrasite via an intentionally misleading and fraudulent request for consent which merely stated that a company named Western Oregon Wireless was taking over the lease and would be complying with the terms of the Ground Lease. (CP 339.) This letter does not in any way indicate that a second wireless communications

company would be operating from the facility or that any new equipment would be erected.

4. Schreiner Farms' knowledge of the default, issuance of notice to Respondents and Respondents' failure to cure

Schreiner Farms did not learn of the assignments going on behind its back and resulting defaults of the Ground Lease until 2006 when another wireless communication company, Verizon Wireless, who was negotiating with Schreiner Farms for a different antenna cite nearby, mentioned that while near the site they had observed that another wireless communications company was using the Ground Lease power pole in addition to Nextel and beyond that requested by Nextel or its assigns. (CP 282; CP 421.) None of the alleged assignments or the purported license to Washington Oregon Wireless (the license agreement names an entity known as Western Oregon Wireless, presumably by mistake), indicate that Nextel would still be using the property per the Ground Lease or that any request was being made to erect new facilities on the leasehold. (CP 339; CP 423-426; CP 428-431.)

Upon further investigation, Schreiner Farms subsequently discovered that a second equipment array had been installed upon the tower and that defaults had arisen relating to the provisions of the Ground Lease. (CP 388.)

On April 25, 2007, counsel for Schreiner Farms sent a letter to American Tower notifying it that its actions were in default of the provisions of the Ground Lease. (CP 388-390.) On June 14, 2008, American Tower responded by letter stating its position that there are no defaults under the Ground Lease and that it did not intend to cure or otherwise resolve the matter. (CP 392-393.) On July 3, 2007, counsel for Schreiner Farms responded and reaffirmed its position explaining that “Schreiner Farms is prepared to take action to have a court declare that the Lease has been breached and proceed to terminate the Lease unless American Tower and Schreiner Farms are able to agree to an amendment of the Lease that fairly compensates Schreiner Farms for the use of the leased premises as a co-location facility.” (CP 394-395.) On August 20, 2007, American Tower again insisted that there are no current defaults under the Lease and expressly indicated that it would not cure or otherwise resolve the matter. (CP 396.)

C. Procedural Facts

On October 5, 2007, just months after the aforementioned notice of default and American Tower’s explicit refusal to resolve the matter, Schreiner Farms filed a complaint for declaratory relief. (CP 4-7.) The

complaint, as amended, seeks judgment declaring that “a default exists under the provisions of the lease” on the grounds that:

- (1) Nextel was not authorized to assign the lease to Tower Asset because American Tower, SpectraSite and Tower Asset do not provide radio communication services;
- (2) American Tower, SpectraSite and Tower Asset were not authorized to sublease the premises to Washington Oregon Wireless because American Tower, SpectraSite and Tower Asset did not obtain Schreiner Farms’ voluntary and knowing consent”;
- (3) Washington Oregon Wireless is not authorized to use the Premises based upon a sublease that was executed without Schreiner Farms’ voluntary and knowing consent; and
- (4) American Tower, SpectraSite, Tower Asset and Washington Oregon Wireless were not authorized to use the Premises without obtaining and complying with all Government and agency required permits, restrictions and conditions and that they failed to obtain such permits and/or comply with such restrictions and conditions.²

(CP 93-94.)

On April 18, 2011, Respondents jointly filed a motion for summary judgment. (CP 107-109.)

On June 19, 2011, the Superior Court issued an order granting in part and denying in part Respondents’ joint motion for summary judgment. (CP

² In 2009 Schreiner Farms received correspondence from the Columbia River Gorge Commission to Respondent Spectrasite indicating that Nextel had violated its original permit by erecting a second set of arrays on the power pole (and painting it the wrong color) and installing additional ground structures without permission and permits. (CP 357-368.) Schreiner Farms sought leave to amend the complaint, which was granted, for which Schreiner Farms added this additional basis for declaring that Respondents are in default of the Ground Lease. (CP 95-96.) The Superior Court granted Respondents motion for summary judgment with respect to this single alleged default, upon concluding that “the permit omission was cured.” (CP 670 (June 7, 2011 Record of Proceedings, p.8, line 9-15); CP 863.) This issue is not a subject of this appeal.

860-864.) Notably, summary judgment was denied with respect to: (1) the statute of limitations (“[t]here are material questions of fact as to the application of the discovery rule in this case and whether it tolled the statute of limitations as a result of fraudulent concealment”) and (2) the substantive issues (“[t]here are questions of fact concerning Plaintiff’s claims of breach of the lease ...”). (CP 863.) The sole basis upon which it was granted was Schreiner Farms’ declaratory relief claim regarding default as a result of violations of permit requirements.

On June 30, 2011, Respondents filed a joint motion for reconsideration. (CP 549-551.)

On July 19, 2011, the Superior Court granted Respondents’ joint motion for reconsideration, thereby granting Respondents’ motion for summary judgment with respect to the statute of limitations issue (previously denied) and dismissed the complaint in its entirety with prejudice. (CP 727-738.)

On July 29, 2011, Schreiner Farms filed a motion for reconsideration of the Superior Court’s decision granting Respondents’ motion for summary judgment. (739-749.)

On August 16, 2011, the Superior Court denied Schreiner Farms’ motion for reconsideration. (CP 846-847.)

On September 2, 2011, Schreiner Farms filed a timely notice of appeal. (CP 848-856.)

On September 14, 2011, Respondents' filed a notice of cross-appeal. (CP 857-864.)

III. ARGUMENT

A. Standard of Review

This Court reviews summary judgment orders *de novo*, and thus engages in the same inquiry as the Superior Court. *Wilson Court Ltd. Partnership v. Tony Maroni's Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590 (1998). An order on summary judgment will be affirmed only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 698. This Court must consider the facts in the light most favorable to Schreiner Farms as the nonmoving party, and the motion should be granted only if reasonable persons could reach only one conclusion. *Id.*

B. The Superior Court erred in granting Respondents' motion for summary judgment and dismissing Schreiner Farms' declaratory judgment claims with prejudice upon determining that Schreiner Farms' claims are barred by a six year statute of limitations

In general, Washington courts have held that "declaratory judgment actions must be brought within a 'reasonable time.'" *Brutsche v.*

City of Kent, 78 Wn.App. 370, 376, 898 P.2d 319 (1995) (quoting *Federal Way*, 62 Wn.App. at 536). ““What constitutes a reasonable time is determined by *analogy* to the time allowed for appeal of a *similar decision* as prescribed by statute, rule of court, or other provision.””

Brutsche, 78 Wn.App. at 376-77, 898 P.2d 319 (quoting *Federal Way*, 62 Wn.App. at 536-37, 815 P.2d 790) (emphasis added). For the following reasons, the Superior Court erred in dismissing this action upon determining that Schreiner Farms’ declaratory relief claims are barred by a strict application of the six year statute of limitations for breach of contract on the basis that: (1) Schreiner Farms’ declaratory relief claims are based on an alleged breach of contract which occurred when Nextel first secretly assigned rights to use the power pole and (2) the discovery rule set forth in *1000 Virginia* does not apply because this case does not involve a construction contract.

1. The statute of limitations for Schreiner Farms’ declaratory relief claims is triggered at the point of failure to cure and not the point of first default.

This Court need not even determine whether the discovery rule as set forth in *1000 Virginia* applies in the context of this declaratory relief action purportedly sounding in breach of contract. Indeed, the Supreme Court in *1000 Virginia* explained that the discovery rule, whether applied in a tort or breach contract context, is the exception to the rule that “this

court has consistently held that the accrual of a contract action occurs on breach.” *Id.* This begs the question here: When does the underlying breach occur?

a. A cause of action accrues when a party has the right to seek relief in the courts

As support of the general rule that “the accrual of a contract action occurs on breach,” the Supreme Court in *1000 Virginia* cited to, among other cases, *Schwindt v. Commonwealth Ins. Co.*, 140 Wn.2d 348, 997 P.2d 353 (2000). In *Schwindt*, the Supreme Court held that based on the terms of a claim-based insurance contract at issue, the insured did not have a breach of contract claim against the insurance company until and unless the insurance company rejected a demand for coverage. 140 Wn.2d. at 358. In doing so, the Supreme Court reversed the court of appeals’ determination that the breach occurred when the damage giving rise to the insurance claim occurred. Based on the terms of the actual contract at issue, the actionable breach occurred when notice of the alleged refusal to abide by the agreement was given.

The holding in *Schwindt* follows the general rule, as consistently stated by the Washington Supreme Court, that “[a] cause of action accrues when a party has the right to seek relief in the courts.” *Colwell v. Eising*, 118 Wn.2d 861, 868, 827 P.2d 1005 (1992) (en banc) (citations omitted).

In *Colwell*, the court held that plaintiffs had a right to seek redress when the defendant told them he would not pay any share of the management fee under their partnership agreement as “[d]efendant’s total repudiation was the event which caused accrual.” *Id.* at 1010; *see also Fowler v. A&A Co.*, 262 A.2d 344 (D.C. 1970) (holding that “trial court did not err in ruling that the statute began to run from the date O’Roark breached the contract by failing to correct the defect on demand ... ” (emphasis added); *Ehrenhaft v. Malcolm Price, Inc.*, 483 A.2d 1192, 1203 n. 17 (D.C. 1984) (recognizing that *Fowler* held “that the statute of limitations begins to run from the date that a contractor breaches the contract by failing to correct a defect upon demand”). A cause of action accrues upon failure to correct a default on demand because: “[u]pon total repudiation of the contract one no longer has the election of continuing the contract but must timely enforce his rights through available legal remedies.” *Fowler*, 262 A.2d at 348 n.6.

Notably, the court in *1000 Virginia* acknowledged this very rule: “Usually, a cause of action accrues when the party has the right to apply to a court for relief.” 158 Wn.2d at 575 (citing *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 219, 543 P.2d 338 (1975); *Lybecker v. United Pac. Ins. Co.*, 67 Wn.2d 11, 15, 406 P.2d 945 (1965).) Indeed, in *Schwindt*, the insurance claimant had no right to apply to the court for relief under the

agreement until and unless the insurance company refused to cover its claim. The point the Supreme Court in *1000 Virginia* was making with respect to the discovery rule is that sometimes (*i.e.* the exception to the rule) a breach of contract claim could accrue *after* the party has a right to apply to a court for relief. Otherwise, “the literal application of the statute of limitations’ could ‘result in grave injustice.’” *Id.* (citing *Gazija*, 86 Wn.2d at 220, 543 P.2d 338.) Here, Schreiner Farms has sought declaratory relief well within six years from the point its underlying breach of contract claim accrued, if not *before* it has in fact accrued, and therefore whether the discovery rule applies is not relevant to the statute of limitations analysis.

b. Schreiner Farms’ right to seek relief for its underlying breach of contract claim arises when there is complete repudiation, or total breach, of the Ground Lease

The express terms of the Ground Lease provide that Schreiner Farms did not have a right to seek relief for total breach of the contract (*i.e.* one that provides grounds for termination of the lease) until and unless Nextel fails to cure within 60 days after receiving written notice of default. Washington law, as exemplified in *Schwindt* and *Colwell*, clearly establishes that complete repudiation, or *total breach*, is what triggers the statute of limitations for Schreiner Farms’ underlying breach of contract

claim (and ostensibly its declaratory relief claims), and not the actions giving rise to an alleged default.

The Restatement (Second) of Contracts, as paraphrased in *Bailie Communications v. Trend Business Systems* 53 Wn.App. 77, 765 P.2d 339 (1988), explains why this is so:

‘A material failure by one party gives the other party the right to withhold further performance as a means of securing his expectation of an exchange of performances.’ Restatement (Second) of Contracts sec.241, comment e (1981) (hereinafter Restatement 2d). **A material breach suspends the injured party’s duties until the breaching party cures the default.** Restatement 2d sec.sec. 237, 241. The breaching party has a reasonable time to cure, after which the injured party may either **sue for total breach** or rescind and obtain restitution. Restatement 2d sec.sec.242, 243, 373.

Bailie Communications, 53 Wn.App. at 81. *Bailey* and the Restatement (Second) of Contracts make clear that: (1) a total breach occurs only after the notice and failure to cure occurs and (2) a party can thereafter “sue for total breach.” *See also Cary Oil Co., Inc. v. MG Refining and Marketing, Inc.*, 90 F.Supp.2d 401, 408 -409 (S.D.N.Y., 2000) (explaining that “if the breach is not material or if the party aggrieved by a material breach elects not to terminate, the breach is deemed partial, and the contract remains in force ... [and] only those claims arising out of the partial breach accrue at that time (citing 2 FARNSWORTH §§ 8.15, 8.16; RESTATEMENT (SECOND) OF CONTRACTS § 236, cmt. b).

Washington law, including *1000 Virginia*, makes clear that the actionable total breach of the Ground Lease occurred – at the very earliest, and if it has yet to occur – when Respondents expressly refused to cure within sixty days after Schreiner Farms’ counsel sent the April 25, 2007 letter to American Tower notifying it that its actions, and those of the other Respondents, were in default of the Ground Lease. American Tower responded within 60 days unequivocally stating it had no intention of resolving the matter. This arguably represents Respondents’ total repudiation of the Ground Lease, and marks the point from which Schreiner Farms’ underlying breach of contract claims accrued. Schreiner Farms brought this declaratory relief action within a matter of months following this correspondence, and therefore there is absolutely no question that Schreiner Farms’ present declaratory judgment claims were brought well within the statute of limitations.

To be sure, Schreiner Farms maintains that it has brought its declaratory relief action *before* its right to seek relief for total breach of the Ground Lease. Ultimately, the determination of whether Respondents’ actions constitute a default under the Ground Lease is a “condition precedent” of Schreiner Farms’ ability to terminate the agreement and sue for total breach of contract. *See Tacoma Northpark, LLC v. NW, LLC*, 123 Wn.App. 73, 79, 96 P.3d 454 (2004) (“[c]onditions precedent are those

facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available” (internal quotations and citation omitted)). Indeed, Schreiner Farms’ prospective assertion of its contractual rights is proper under Washington’s Uniform Declaratory Judgment Act (“WUDJA”), which provides that “[a] contract may be construed either *before* or after there has been a breach thereof.” RCW 7.24.030. The WUDJA “is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be *liberally construed and administered.*” RCW 7.24.120 (emphasis added). Upon obtaining a declaratory judgment that Respondents’ actions are in violation of the Ground Lease, Schreiner Farms will provide Nextel notice of said default for which Nextel will have sixty days to cure.³ If Nextel does not do so, then Schreiner Farms’ will terminate the agreement, upon which point its breach of contract claim will accrue. Until then, the Ground Lease continues to be in force and effect (and Respondents continue to be in default thereof).

Accordingly, the 6-year statute of limitations for actions on contracts does

³ American Tower’s denial that its actions are in default of the Ground Lease and refusal to resolve the matter do not necessarily speak for Nextel, and moreover, are what gave rise to the present dispute as to whether in fact Respondents’ actions are in default. That is all that Schreiner Farms’ is requesting the judiciary to resolve in this litigation.

not apply to Schreiner Farms prospective assertion of its right to terminate the Ground Lease. *See Panorama Residential Protective Assn'n v. Panorama Corp.*, 28 Wn.App. 923, 627 P.2d 121 (holding that 6-year statute of limitations for actions on contracts did not apply to action seeking declaratory judgment that landlords' imposition of rent surcharge violated lease agreement as it "deal[s] with the commencement of a cause of action which has already accrued" and "do[es] not apply to the prospective assertion of a right such as involved herein"). Indeed, just as Respondents have purportedly cured the default regarding the permits, which resulted in the dismissal of that claim (CP 670, p.8, line 9-15; CP 863), they still have the opportunity to cure the remaining alleged defaults.

In summary, pursuant to the plain language of the Ground Lease, Schreiner Farms did not and does not have a "right to seek relief in the courts" for its underlying breach of contract claim until and unless Nextel refuses to cure a default upon being given notice thereof. Schreiner Farms brought this present action seeking declaratory judgment that Nextel is in fact in default of the Ground Lease so that Schreiner Farms can then assert its right to terminate the Ground Lease and file a subsequent action for breach of contract to recover damages for Respondents' total breach. In fact, Schreiner Farms' present declaratory relief action has been brought *before* the accrual of its underlying breach of contract claim, as expressly

permitted under WUDJA, and thus its present declaratory relief action is in no way time barred. Such a holding prevents the absurd and inequitable result that the statute of limitations could in fact run before Schreiner Farms even has a right to seek relief. It is therefore the most straightforward and just result.

2. The discovery rule as set forth in the Washington Supreme Court's holding in *1000 Virginia* applies here; it was never intended to apply only to breach of contract claims involving latent construction defects.

The discovery rule, as applied in the context of a breach of contract claim in *1000 Virginia*, is the exception to the foregoing rule for when a breach of contract claim accrues. The rule itself should resolve the matter on appeal before this Court. Nonetheless, the Superior Court's decision to dismiss Schreiner Farms' claims as barred by the statute of limitations is based on a misreading of the Supreme Court's instructions for when to apply the discovery rule and a complete disregard for the underlying legal and equitable principles expressed in *1000 Virginia*. The Supreme Court was not creating a narrow exception for applying the discovery rule only in cases involving claims of latent construction defects. A complete reading of *1000 Virginia* clearly demonstrates that it was the fact that the alleged breach could not be discovered, and the fundamental inequity of

applying a strict six year statute of limitations in the context of latent breach of a contract.

Under the discovery rule, a cause of action accrues and the statute of limitations begins to run when a party discovers, or in the exercise of reasonable diligence should have discovered, the facts giving rise to the claim. *1000 Virginia*, 158 Wn.2d at 428 (citing *Green v. A.P.C.*, 135 Wn.2d 87, 95, 960 P.2d 912 (1998)). The burden then falls on the plaintiff to establish that through reasonable diligence it would not have learned of those facts. *Id.* In *1000 Virginia*, the Supreme Court unequivocally expressed that the fundamental principle in determining whether to apply the discovery rule is based on equity and the “the goal of common law to provide a remedy for every genuine wrong”:

In determining whether to apply the discovery rule, the possibility of stale claims must be balanced against the unfairness of precluding justified causes of action. *U.S. Oil*, 96 Wash.2d at 93, 633 P.2d 1329; *Gunnier v. Yakima Heart Ctr., Inc.*, P.S., 134 Wash.2d 854, 860, 953 P.2d 1162 (1998). A court must consider the goal of the common law ‘to provide a remedy for every genuine wrong’ while recognizing, at the same time, that ‘compelling one to answer stale claims in the courts is in itself a substantial wrong.’ *Ruth*, 75 Wash.2d at 665, 453 P.2d 631.

1000 Virginia, 158 Wn.2d at 579 (emphasis added). Upon applying these principles, the Supreme Court determined, based on the set of facts presented (which just happened to involve a construction

defect), that the discovery rule should apply to contract claims involving a latent breach or default:

[A]pplication of the discovery rule in construction contract cases involving latent defects that the plaintiff would be unable to detect at the time of breach is a logical and desirable expansion of the discovery rule. We are persuaded that the rule should apply to contract claims involving latent construction defects.

Id. at 578.

The Supreme Court declared the following *principles* behind its decision, including;

- It is unfair to permit a defendant to escape responsibility simply because the cause of action is based on contract rather than a tort theory;
- It is more equitable to place the burden of loss on the party best able to prevent it;
- The modern trend is toward applying a discovery rule in contract cases;
- A court **must** consider the goal of the common law ‘to provide a remedy for every genuine wrong...’; and
- In determining whether to apply the discovery rule, the possibility of stale claims must be balanced against the unfairness of precluding justified causes of action.

Id.

Indeed, it is fundamental *legal principles* on which precedent is based: “respect for precedent ‘promotes evenhanded, predictable, and *consistent development of legal principles*, fosters reliance on judicial

decisions, and contributes to the actual and perceived integrity of the judicial process.” *City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597 (1991)) (emphasis added). Taken in total and placed in context, it is clear that the Washington Supreme Court’s analysis and holding in *1000 Virginia* was intended to provide fundamental legal principles to guide the lower courts on how to make the equitable decisions as to when it is appropriate to apply the discovery rule in the context of breach of contract cases. The Supreme Court was thereby instructing the lower courts that the discovery rule should be applied in cases where the plaintiff would be unable to detect the breach at the time of default or breach; and moreover, would otherwise be precluded from bringing its justified cause of action. Indeed it is the word “latent” that is the principled basis for the holding (*i.e.* the inherent inequities of a concealed wrongdoing); and the words “defect” and “construction” carry absolutely no significance. It is also of note that declaratory relief actions, such as this present action, are fundamentally actions in equity, which ultimately involve the weighing of factors based on equitable principles.

The Superior Court’s ruling here discounted and disregarded the aforementioned fundamental legal principles underlying the Supreme

Court's holding in *1000 Virginia*.⁴ It is indisputable that Schreiner Farms' declaratory relief claims involve a latent default of the Ground Lease (factually and legally no different than a latent defect). In addition, there is absolutely no factual or legal basis for concluding that any of the claims of Schreiner Farms are "stale." They are as fresh as new fallen snow, bread straight from the oven and apples picked straight from the tree. Moreover, no prejudice to Respondents has been shown, claimed or could be claimed in the context of a declaratory relief action asking the court if the Respondents are, at this point in time, in default under the lease because of actions they are taking now and are ongoing. Most notably, the result leads to incontrovertible prejudice to Schreiner Farms who is now left

⁴ The Superior Court's hesitancy in applying the discovery rule to this case stems from its fear of purportedly extending precedent without authority from the Supreme Court in light of the Supreme Court's commentary in *1000 Virginia* which basically slapped the wrists of the Court of Appeals in *Architectonics Construction Management, Inc., v. Khorram*, 111 Wn.App. 725, 45 P.3d 1142 (2002), rev. denied, 148 Wn.2d 1005, 60 P.3d 1212 (2003) for applying the discovery rule in a breach of contract case prior to any direct authority to do so from the Supreme Court:

Because controlling precedent held that a claim arising out of a contract accrued on breach and not on discovery, the Court of Appeals lacked authority to adopt the discovery rule in *Architectonics*.... When the Court of Appeals fails to follow directly controlling authority by this court, it errs.... Thus, in adopting the discovery rule in *Architectonics* and failing to follow controlling decisions of this court, the Court of Appeals erred.

Id. at 578. The very next sentence, the Supreme Court praised and adopted the logic of the Courts of Appeals in both *Architectonics* and *1000 Virginia* below for applying the discovery rule to their respective cases: "Nonetheless, application of the discovery rule in construction contract cases involving latent defects that the plaintiff would be unable to detect at the time of breach is a logical and desirable expansion of the discovery rule...." *Id.* at 578-579. The Supreme Court went on to set forth the broad instructions to the lower courts for determining when to apply the discovery rule in the context of breach of contract claims as set forth herein, thereby providing direct authority to do so. Any fear of expanding precedent is unwarranted inasmuch as this Court abides by the authoritative principles expressly set forth by the Supreme Court in *1000 Virginia*.

with no recourse to terminate the Ground Lease despite the goal of the common law “to provide a remedy for every genuine wrong....” *1000 Virginia*, 158 Wn.2d at 579

Moreover, one court of appeal’s dictum paraphrase of the Supreme Court’s holding in *1000 Virginia* as “adopt[ing] the discovery rule in the limited context of ‘actions on construction contracts involving allegations of latent construction defects’” (*Kinney v. Cook*, 150 Wn.App. 187, 208 P.3d 1 (2009) (quoting *1000 Virginia*, 158 Wn.2d at 578) is neither controlling nor persuasive. First of all, applying *1000 Virginia* to a case involving a latent breach of a *non*-construction contract does not constitute an expansion of precedent as neither “construction” nor “defect” is the pertinent adjective underlying the fundamental legal principles on which that decision was based. Moreover, the decision of the court of appeals in *Kinney* not to apply the discovery rule in its fact specific situation was not a determinative factor of that case. Ultimately, the court in *Kinney* held that the alleged breach occurred at a time when the underlying agreement was not in effect (*id.* at 193), which thereby rendered the discovery rule and any analysis or application of *1000 Virginia* irrelevant. *Kinney*, 150 Wn.App. at 194. *Kinney* provides absolutely no authority to support the Superior Court’s draconian ruling here.

To be sure, no fine line was created by the Supreme Court in *1000 Virginia*, but, rather, a series of legal principles and factors to consider was given to make the decision on a case by case basis. Where, as in this case, the facts fit the reasoning and analysis provided in *1000 Virginia*, that case is authority to so apply the law to reach a fair and equitable balance and protection of interests. Fairness considerations weigh in favor of applying the discovery rule where the circumstances rendered Schreiner Farms unable to detect the actions giving rise to the default. To hold otherwise undermines the expressed holding of *1000 Virginia*, the underlying legal principles on which it is based, and the expressed instruction to the lower courts. Therefore, Schreiner Farms respectfully requests that this Court reverse the Superior Court's decision to grant Respondents' motion for summary judgment.

At the very least, there exists a question of fact as to what Schreiner Farms knew or should have known about the alleged default prior to October 5, 2001 (six years before filing of complaint); which is a matter properly left for the trier of fact. *Crisman v. Crisman*, 85 Wn.App. 15, 23, 931 P.2d 163 (1999) (“[t]he determination of when the plaintiff discovered through the exercise of due diligence should have discovered the factual basis for a cause of action is a factual question for the jury”). Nevertheless, the undisputed facts establish that the property in question is

secluded and remote and no one on behalf of Schreiner Farms inspected, nor had any reason to inspect, the premises before 2002. (CP 281-283.) Even if they had, Schreiner Farms maintains that Respondents' actions giving rise to the defaults were impossible to discover save by an expert in wireless communication tower construction. None of the documents, assignments, or licenses Schreiner Farms saw provides any indication of a default. The assignments and license, albeit frauds, gave no indication of what Respondents were really doing on the property. In any case, the Superior Court's decision to grant summary judgment in favor of Respondents must be reversed.

3. Under principles of equity, the discovery rule applicable to tort actions applies to declaratory judgment claims involving a fraudulent concealed default of a contract

Washington courts have held that “declaratory judgment actions must be brought within a “reasonable time” which is “determined by *analogy* to the time allowed for appeal of a similar decision as prescribed by statute, rule of court, or other provision.” *Brutsche*, 78 Wn.App. at 376-77, 898 P.2d 319 (quoting *Federal Way*, 62 Wn.App. at 536-37, 815 P.2d 790) (emphasis added). When there is more than one analogous period, “the longer of two ... periods should be applied.” *Brutsche*, 78 Wn.App. at 377, 898 P.2d 319. The Washington courts have applied the above “reasonable time” analysis to cases involving declaratory actions sounding

in contract, and have held that the six year statute of limitations applies. The facts of this case, however, present as much or more of an analogy to the tort of fraudulent concealment than to breach of contract, and thus, the statute applying the discovery rule to such claims (RCW 4.16.080 (4)) should apply inasmuch as it is the “longer of two.” This is particularly true, where, as here, it would be inequitable and unreasonable to conclude that a “reasonable time” could be *before* Schreiner Farms knew or could have reasonably known about the underlying defaults of the Ground Lease given they were intentionally and fraudulently concealed.

To establish fraudulent concealment, a plaintiff may affirmatively plead and prove the elements of fraud, or “may simply show that the defendant breached an affirmative duty to disclose a material fact.” *Crisman v. Crisman*, 85 Wn.App. 15, 22, 931 P.2d 163 (1999) (citing *Stiley v. Block*, 130 Wn.2d 486, 515-16, 925 P.2d 194 (1996) (Talmadge, J., concurring). “Either method of proof will activate the statutory discovery rule for fraud, RCW 4,16,080(4).” *Id.* (citing *Viewcrest Co-op. Assn’n, Inc. v. Deer*, 70 Wn.2d 290, 295, 422 P.2d 832 (1967).

Here, Schreiner Farms did not plead the nine elements of a traditional fraud action, however, the evidence presented is sufficient to prove – or at least present a genuine issue of material fact – that Respondent Nextel owed and breached an affirmative duty to disclose

material facts which precluded Schreiner Farms from discovering the facts giving rise to its declaratory relief claims. This includes the material facts that Nextel was secretly assigning *some* of its rights to use the power pole to a series of companies and had secretly installed the second equipment array to meet the demands of the secret assignees. The Ground Lease required that Nextel give notice prior to both assigning its rights and installing additional equipment, thereby giving Nextel an affirmative duty to disclose such material facts. *See Crisman*, 85 Wn.App. at 22 (holding that plaintiff presented sufficient evidence to prove defendant owed and breached an affirmative duty of candor thereby activating the discovery rule for her underlying conversion claim). This case is even clearer, as Nextel did not just remain silent, it affirmatively and deceitfully requested Schreiner Farms' supposed "consent" by misleading Schreiner Farms into thinking that a company named Western Oregon Wireless was taking over the lease and would be complying with the terms of the Ground Lease. This affirmative assurance, upon which Schreiner Farms reasonably relied, provided Schreiner Farms no reason to engage in any due diligence or inquire further as to whether any wrongdoing may have been going on behind its back.

It is of note that in its initial ruling denying Respondents' motion for summary judgment, the Superior Court expressly recognized that

“[t]he discovery rule can apply when a defendant has fraudulently concealed a material fact from a plaintiff, depriving the plaintiff of the knowledge of the accrual of the cause of action. Of course, that’s exactly, that’s precisely what the plaintiff is arguing in this case.” (CP 668, p. 6 lines 7-13; citing *Burns v. McClinton*, 135 Wn.App. 285, 143 P.3d 630 (2006)). The Superior Court also correctly determined that this fact is to be left for the fact-finder. (CP 669, p. 6, lines 20-22); *see also Crisman*, 85 Wn.App. at 23 (“[t]he determination of when the plaintiff discovered through the exercise of due diligence should have discovered the factual basis for a cause of action is a factual question for the jury”); *see also Burns*, 135 Wn.App. at 636. The Superior Court’s initial order denying Respondents’ motion for summary judgment, which was notably proposed and submitted by Respondents, states that the issue presented with respect to the statute of limitations “includes the issue of whether fraudulent concealment of the fact of the breach invokes the discovery rule.” (CP 862.) It further concluded that “[t]he Court finds that there are material questions of fact as to the application of the discovery rule in this case and whether it tolled the statute of limitations as a result of fraudulent concealment.” (CP 863.) The Superior Court’s subsequent reversal on Respondents’ motion for reconsideration now precludes any ruling on the factual issue as to whether Respondents fraudulently concealed the alleged

defects so as to justify the application of the discovery rule in this case. This alone justifies this Court's reversal of the Superior Court's subsequent entry of summary judgment in Respondents' favor which resulted in the dismissal of all of Schreiner Farms' claims with prejudice.

Where, as here, the facts support a claim that the breaching party fraudulently concealed the breach, factors supporting the application of the discovery rule to circumstances involving fraudulent concealment compel the conclusion that Respondents should be held to that standard. Again, this case is a declaratory relief action, and thus "it is the longer of the two analogous statutes that apply." *Brutsche*, 78 Wn.App. at 377, 898 P.2d 319. Schreiner Farms need not have specifically pled a fraudulent concealment claim to reach this equitable result. *See Crisman*, 85 Wn.App. at 22. The Superior Court correctly concluded that a material issue of fact does exist as to whether Respondents fraudulently or intentionally sought to conceal their default which needs to be decided by the ultimate trier of fact.

It is also of note that applying the discovery rule to declaratory relief claims where fraud is present in concealing alleged defaults of a contract is not inconsistent with *1000 Virginia*. Quite the contrary, it is consistent with the general rule affirmed in *1000 Virginia* applying a discovery rule in tort cases, the statute applying the discovery rule to

fraudulent concealment claims (RCW 4.16.080 (4)), and the Supreme Court's call to avoid manifest injustice in deciding when to apply the discovery rule.

4. Respondents' acts constitute a continuing breach of the contract, thereby extending the statute of limitations.

In Washington, "[t]he general rule is that a covenant to make repairs is not breached until the expiration of the term." *James S. Black Co., Inc. v. F.W. Woolworth Co.*, 14 Wn.App. 602, 609 (1976) (internal citations omitted). This is based on the premise that the breach of covenant for failure to repair is continuing. The facts in *Black* involved a leaky roof, which began fifty years prior to the plaintiff bringing suit, and had since continued causing considerable damage to upper floors of a building. The court held that even though the lessor could have filed suit immediately, because the conduct (failure to repair) continued, the lessor was not required to bring action within six years of the first point of default but instead could file suit for breach of contract up until six years after the lease expired. *Id.* at 604.

Similarly here, the actions of Respondents are in the form of a continuing breach, as Respondents' failure to cure the alleged defaults continues to this day. Unlike a traditional breach of contract action in which a breach occurs (failure to pay or perform or installing a faulty pipe

at a specific point of time), here the breach is ongoing. Respondents continue the unauthorized use of Schreiner Farms' property (as defined in the Ground Lease) by, among other things: (1) operating two wireless communication systems on the property without Schreiner Farms' consent; and (2) maintaining equipment on the property without Schreiner Farms' consent. Schreiner Farms is seeking a declaratory judgment that Respondents are in default under the Ground Lease today, not eleven years ago or seven years ago. Once the court declares Respondents to be in default, they will be provided notice of default and have sixty days to cure the default. If they do not, Schreiner Farms will assert its right to terminate the Ground Lease and seek damages.

Indeed, it is not when the Respondents' default starts, but when it ends that begins the period within which an action must be filed (6 years). Holding otherwise would serve an absurd and unjust result, as it would encourage parties to a contract to conceal their default in hopes of winning by default. Accordingly, if this Court were to conclude that the six-year statute of limitations for breach of contract applies, Schreiner Farms respectfully requests this Court to conclude that Respondents' acts constitute a continuing breach thereby extending the accrual of statute of limitations to the present.

5. Respondents should be equitably estopped from asserting the statute of limitations

“The equitable doctrine of estoppels in pais is applicable in a proper case ... where the defendant conceals facts or otherwise induces the plaintiff not to bring suit within the period of the applicable statute of limitations.” *Central Heat, Inc. v. Daily Olympian*, 74 Wn. 2d 126, 134 (1968). Equitable estoppel is based on the view that “ ‘a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.’ ” *Lybbert v. Grant County*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000) (quoting *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993)). Equitable estoppel requires three elements: (1) an act inconsistent with a claim afterwards asserted, (2) action by another in reasonable reliance upon that act, and (3) injury to the relying party. *Lybbert*, 141 Wn. 2d at 35.

Here, there is sufficient evidence in the record that Respondents induced Schreiner Farms not to inspect the property or otherwise inquire whether there had been a default by secretly assigning rights to use the power pole to a series of companies. Indeed, Schreiner Farms “consent” was superficially obtained by Respondent Spectrasite via an intentionally misleading and fraudulent request for consent which merely stated that a company named Western Oregon Wireless was taking over the lease and

would be complying with the terms of the Ground Lease. (CP 339.) This letter did not indicate that a second wireless communication company would be operating from the facility or that any new equipment would be erected. Schreiner Farms relied on this letter and did not at this time send a notice of default. Given the assurances in the letter, Schreiner Farms' reliance upon such representations was reasonable. Inasmuch as this Court concludes that Schreiner Farms' underlying breach of contract claim accrued at the point of first default, as a direct result of this fraudulent concealment of the default, Schreiner Farms would suffer irreparable injury. Indeed, Schreiner Farms would be barred from seeking *any* relief for Respondents' actions giving rise to their default of the Ground Lease. *See, e.g. Rouse v. Glascam Builders, Inc.*, 101 Wn.2d 127 (1984) (holding that equitable estoppel applied as "[t]here exists substantial evidence in the record to support the trial court's finding that Glascam ... induced Rouse from June 1977 to April 1981 to refrain from bringing legal actions against Glascam as a result of the repeated assurances that the necessary repairs would be made.... Rouse's reliance upon such representations were reasonable")

Accordingly, if this Court were to conclude that the 6-year statute of limitations for breach of contract applies and that Schreiner Farms' declaratory relief claims accrued at the point of first default, Schreiner

Farms respectfully requests this Court to hold that equitable estoppel applies so as to preclude any conclusion that the statute of limitations bars Schreiner Farms' claims.

IV. CONCLUSION

For the foregoing reasons, Schreiner Farms respectfully requests this Court to reverse the Superior Courts grant of summary judgment and to hold that Schreiner Farms' declaratory relief claims are not barred by the statute of limitations; and, accordingly, to remand this matter to the Superior Court for further proceedings.

DATE: 12/29/11

Respectfully submitted

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