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No. 59823-6

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

WASHINGTON STATE MAJOR LEAGUE BASEBALL STADIUM
PUBLIC FACILITIES DISTRICT; and THE BASEBALL CLUB OF
SEATTLE, L.P.,

Appellants,

v.

HUBER, HUNT & NICHOLS-KIEWIT CONSTRUCTION, a
Washington joint venture; ET AL.,

Respondents/Cross-Appellants

v.

LONG PAINTING, INC., a Washington corporation; and HERRICK
STEEL, INC., a California corporation,

Cross-Respondents.

BRIEF OF CROSS-RESPONDENT LONG PAINTING, INC.

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I. INTRODUCTION

Respondent/Cross-Appellant Huber, Hunt & Nichols-Kiewit Construction Company Joint Venture ("HK") asserts a cross-appeal in the alternative that, "if the Court rules that the Mariners' (sic) claims are not time barred; (sic) than (sic) it follows that the third party claims should be reinstated as well." HK brief at 24. However, whether the Mariners' claims are time-barred is both irrelevant and immaterial to whether HK's third party claims against Long Painting are time-barred.

The sole issue on the Mariners' appeal is "[w]hether the statute of limitations applies to claims asserted by the PFD," because the PFD is allegedly a municipal corporation immune from the running of the statute of limitations. Mariners' brief at 2 (Issue Pertaining to Assignment of Error). That issue does not exist as to HK's claims against its subcontractors, including but not limited to Long Painting. Because there is no dispute that HK sued Long Painting over six years after the date of substantial completion on Safeco Field, HK's claims against Long Painting are time-barred by operation of RCW 4.16.040 and/or RCW

' Like HK, Long Painting will refer herein to Appellants Washington State Major League Baseball Stadium Public Facilities District ("PFD") and the Baseball Club of Seattle, L.P. ("the Club"), collectively as "the Mariners."

4.16.326(1)(g). Accordingly, the trial court's order on summary judgment dismissing HK's claims against Long Painting as time-barred should be affirmed, regardless of the outcome of the Mariners' appeal in the present case.

II. ASSIGNMENTS OF ERROR

Neither cross-appellant HK nor cross-respondent Long Painting assert any error by the trial court.

III. STATEMENT OF **THE** CASE

It is undisputed that Long Painting was a subcontractor retained by HK on the construction of Safeco Field. HK brief at 5. It is not alleged, and there is no evidence in the record, that Long Painting had any contractual relationship with the PFD or the Club. Long Painting was retained by HK to apply intumescent fire protection to structural steel at Safeco Field. CP 41-43 ¶ 6.

It is further undisputed that the date of substantial completion of Safeco Field is established as July 1, 1999. CP 174-176; *see also*, CP 148-149. The Mariners allegedly noticed blisters in the intumescent fire protection in February 2005. CP 6 ¶ 16; CP 226-27. They allegedly conducted an investigation and repairs to the alleged blistering shortly

thereafter. CP 6 ¶ 17. The Mariners subsequently filed suit against HK on August 14, 2006. CP 1-8. On October 13, 2006, HK filed an answer and third-party claims against Long Painting and Harrick Steel, Inc. CP 9-15.

Long Painting filed its answer and affirmative defenses to HK's claims on December 1, 2006. CP 16-20. In its Second Affirmative Defense, Long Painting alleged and asserted, "[t]hat third-party plaintiff's claims, if any, are barred by the applicable statute of limitations and/or the statute of repose." CP 18.

On February 23, 2007, HK moved for "Summary Judgment Re: Time-Barred Claims." CP 177-92. After briefing and oral argument from both HK and the Mariners, on March 23, 2007, the trial court granted HK's motion for summary judgment re: time-barred claims, also ordering that, "[a]ll third party claims by Hunt Kiewitt JV including claims against Herrick and Long Painting are dismissed with prejudice." CP 489-91. The Mariners filed a notice of appeal of the order on April 9, 2007. CP. 492-97. On April 19, 2007, HK filed a notice of cross-appeal seeking, "review by the Court of Appeals of that portion of the attached order dismissing Cross-Appellant's claims against Long Painting and Herrick Steel, but only in the event, and to the extent that the Court of Appeals reverses the trial court's dismissal of the Appellant's claims against Cross-Appellants." CP 499.

IV. ARGUMENT

In asserting its appeal only in the alternative, HK recognizes that if the Mariners' claims are time-barred, then HK's claims against Long Painting are likewise time-barred. *See* CP 489-91. While this is certainly true, HK fails to recognize that HK's third party claims are time-barred even if the Mariners' claims against HK are not.

The Mariners' asserted basis for appeal from the trial court's order dismissing their claims as time-barred is that the PFD is "a municipal corporation" exempt from the statute of limitations.' Mariners' brief at 2. The Mariners essentially admit that, if they are not exempt from the statute of limitations, their claims against HK are time-barred. Conversely, HK

² While it is irrelevant to HK's cross-appeal and Long Painting's response whether or not the statute of limitations applies to the PFD, Long Painting notes that the Mariners agreed in their opposition to summary judgment that Article 13.7 of the PFD/Hunt-Kiewit contract is valid. CP 424 n.21. That provision of the contract repeatedly states that "any applicable statute of limitations shall commence to run..." upon the date of a specific event. CP 165. So, if the PFD was ever exempt from the statute of limitations, it appears to have contractually waived the exemption. *See State v. Turner*, 114 Wn. App. 653, 660, 59 P.3d 711 (2002) ("The State may waive sovereign immunity by contract in an individual situation."), *citing Bond v. State*, 70 Wn.2d 746, 748, 425 P.2d 10 (1967). Otherwise, the Mariners are asking this Court to improperly render mutually negotiated terms of a valid contract entirely superfluous. *See, e.g., Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980) ("An interpretation of a writing that gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective."), *citing Newsom v. Miller*, 42 Wn.2d 727, 731, 258 P.2d 812 (1953).

cannot and does not assert that it is immune from the applicable statute of limitations vis-a-vis its subcontractors, which is six years from the termination of services or the date of substantial completion, whichever is later. *See* RCW 4.16.310, RCW 4.16.326(1)(g), and RCW 4.16.040.

It is undisputed that the date of substantial completion for Safeco Field is July 1, 1999. CP 174-76. It also is undisputed that HK did not file suit against Long Painting until October 13, 2006 - over seven years after the date of substantial completion. CP 9-15. This is over one year *after* expiration of the applicable six year statute of limitations. *See* RCW 4.16.326(1)(g). Thus, regardless of the result of the Mariners' appeal, this Court should affirm the trial court's dismissal of HK's claims against Long Painting. *See, e.g., Heath v. Uraga*, 106 Wn. App. 506, 515, 24 P.3d 413 (2001) ("An appellate court may affirm a trial court on any correct ground, even though that ground was not considered by the trial court."), *quoting Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

V. REQUEST FOR FEES AND COSTS FOR FRIVOLOUS APPEAL

Long Painting requests that this Court award its fees and costs against HK for filing a frivolous appeal under RAP 18.9(a). "An appeal is frivolous under RAP 18.9(a) if it raises no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal." *Andrus*

v. State Dept. of Transp., 128 Wn. App. 895, 900, 117 P.3d 1152 (2005),
citing State ex-rel Quick-Ruben v. Verharen, 136 Wn.2d 888, 905, 969
P.2d 64 (1998). HK's asserted cross-appeal of the order as to Long
Painting meets that criteria, as it fails to even assert any basis for reversing
the trial court's dismissal of its claims against Long Painting. The
Mariners' appeal rests on an alleged exemption to the statute of limitations
which is irrelevant to the running of the statute of limitations on HK's
claims against Long Painting. Therefore, Long Painting should be
awarded its fees and costs on the present appeal in accordance with RAP
18.9(a).

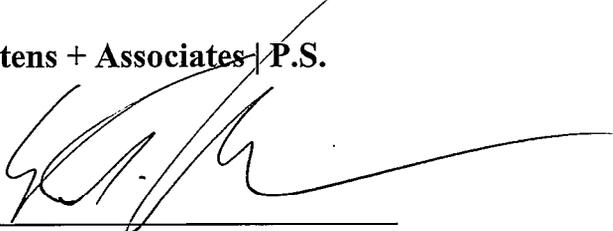
VI. CONCLUSION

In its opening brief, HK provides this Court with no basis
whatsoever for reversing the trial court's order dismissing HK's claims
against Long Painting. The very simple reason for this is that there is no
basis for a reversal as to Long Painting. In fact, the evidence of record
shows that Long Painting never should have been sued by HK to begin
with because the statute of limitations had expired over a year prior before
the commencement of the lawsuit by the Mariners. Therefore, the trial
court's order on summary judgment should be affirmed, at least as to its
order dismissing claims against Long Painting.

///

RESPECTFULLY SUBMITTED this 26th day of September 2007.

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By 

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Long Painting, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of September, 2007, I caused to be filed and served true and correct copies of Brief of Cross-Respondent Long Painting, Inc. upon the Court and counsel as follows:

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

DATED THIS 26th day of September, 2007 at Seattle, Washington.



-Leehwa Kim
 Paralegal for Martens + Associates P.S.

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