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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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HARBOUR HOMES, INC. f/k/a GEONERCO, INC., a Washington  
corporation,

*Appellant,*

v.

AMERICA 1<sup>ST</sup> ROOFING & BUILDERS, INC., a Washington  
corporation,

*Respondent.*

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON

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BRIEF OF RESPONDENT AMERICA 1<sup>ST</sup>  
ROOFING & BUILDERS, INC.

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ORIGINAL

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### **III. ASSIGNMENTS OF ERROR**

Respondent America's 1<sup>st</sup> Roofing and Builders, Inc. ("America's 1<sup>st</sup>"), does not assign error to the Order Granting Summary Judgment Dismissal of Defendant America 1<sup>st</sup> Roofing and Builder's, Inc.

### **IV. STATEMENT OF ISSUES**

America's 1<sup>st</sup> disagrees with Appellant's Issues Pertaining to Assignments of Error and submits the following Statement of Issues which more appropriately reflect the questions before this court:

1. Is Harbour Homes' breach of contract claim against America 1<sup>st</sup> barred by the three-year statute of limitations on oral contracts, RCW 4.16.080(3)?
2. Does the discovery rule apply to extend the accrual date of Harbour Homes' breach of contract claim?
3. Is Harbour Homes' claim for "breach of duty to defend" time-barred because it did not accrue within the six-year statute of repose, RCW 4.16.310?

## V. STATEMENT OF THE CASE

### A. Factual Background

This case arises from construction of a number of homes in the Bluegrass Meadows (“Bluegrass”) neighborhood located in Mill Creek, Washington. Thirty-seven homeowners in that neighborhood filed claims for construction defects against the developer and general contractor, Harbour Homes, Inc., under *Carlile et al. v. Harbour Homes, Inc.*, Snohomish County Cause No. 07-2-05871-9. CP 565-579. Harbour Homes subsequently filed this lawsuit against several of its subcontractors on the project, including America 1<sup>st</sup>. CP 700-709. Harbour Homes’ causes of action include (1) breach of contract, and (2) breach of the duty to defend and indemnify. *Id.* Harbour Homes’ Complaint against the subcontractors was originally filed on August 24, 2007. CP 700-709.

America 1<sup>st</sup> was a roofing subcontractor on the project. CP Pending<sup>1</sup>. No written contract existed between America 1<sup>st</sup> and Harbour Homes for the Bluegrass project. *Id.* Rather, America 1<sup>st</sup>

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<sup>1</sup> Harbour Homes’ Supplemental Designation of Clerk’s Papers included America 1<sup>st</sup>’s Motion for Summary Judgment and the Supporting Declaration of Kimberly Reppart, but omitted the Declaration of America 1<sup>st</sup> proprietor John Herzog. America 1<sup>st</sup> has submitted a Supplemental Designation of Clerk’s Papers pursuant to RAP 9.6(a) correcting the omission. Citations will be supplemented.

simply invoiced Harbor Homes for its work as it completed each residence. CP Pending. David Maxwell, Harbour Homes' vice president of operations, confirmed at his deposition that he did not know of any written subcontract between Harbour Homes and America 1<sup>st</sup>:

Q. Do you know if there was ever a subcontract entered into with America 1<sup>st</sup> Roofing?

A. I don't.

...

Q. Would it be possible for you to find out if there is a subcontract with America 1<sup>st</sup> and produce it if there is one?

A. I would imagine we were asked to produce one. If you don't have one and we didn't produce one, we probably don't have one.

CP 797.

America 1<sup>st</sup> performed its work at the Bluegrass project in 2001 and 2002. CP Pending. The last Final Occupancy Approval for any home in the Bluegrass project included in this lawsuit was issued on October 11, 2002. CP 814, 839 and 859. The Final Occupancy Approval date for each residence at issue in the lawsuit is as follows:

<b>Lot</b>	<b>Final Occupancy Date</b>
05	Final Occupancy Approval: 8/07/01

06	Final Occupancy Approval: 8/27/01
12	Final Occupancy Approval: 1/25/02
16	Final Occupancy Approval: 3/25/02
18	Final Occupancy Approval: 3/21/02
19	Final Occupancy Approval: 3/07/02
20	Final Occupancy Approval: 2/07/02
21	Final Occupancy Approval: 6/10/02
22	Final Occupancy Approval: 7/15/02
25	Final Occupancy Approval: 5/22/02
27	Final Occupancy Approval: 5/30/02
28	Final Occupancy Approval: 6/11/02
29	Final Occupancy Approval: 7/08/02
34	Final Occupancy Approval: 5/30/02
43	Final Occupancy Approval: 10/03/02
47	Final Occupancy Approval: 10/11/02
48	Final Occupancy Approval: 8/14/02
51	Final Occupancy Approval: 8/05/02
61	Final Occupancy Approval: 2/25/02
62	Final Occupancy Approval: 4/10/02
65	Final Occupancy Approval: 2/19/02
66	Final Occupancy Approval: 4/17/02
67	Final Occupancy Approval: 1/25/02
68	Final Occupancy Approval: 1/11/02
72	Final Occupancy Approval: 11/21/01
76	Final Occupancy Approval: 12/03/01
78	Final Occupancy Approval: 12/11/01
79	Final Occupancy Approval: 12/18/01
87	Final Occupancy Approval: 10/24/01
88	Final Occupancy Approval: 10/29/01
91	Final Occupancy Approval: 8/24/01
94	Final Occupancy Approval: 6/28/01
97	Final Occupancy Approval: 8/14/01
37	Final Occupancy Approval: 10/08/02
41	Final Occupancy Approval: 11/01/02
85	Final Occupancy Approval: 10/23/01
99	Final Occupancy Approval: 6/22/01

CP 799-836, 838-840.<sup>2</sup> America 1<sup>st</sup> roofing work on each residence was completed no later than the date of Final Occupancy Approval. As America 1<sup>st</sup>'s contract with Harbour Homes was oral, the 3-year statute of limitations applies to bar Harbour Homes' breach of contract claims.<sup>3</sup>

Harbour Homes produced an "Indemnification Addendum," purportedly executed by America 1<sup>st</sup> on May 13, 1999, several years before the Bluegrass project. CP 840. The first paragraph states:

\_\_\_\_\_ (hereinafter Contractor) agrees to defend, indemnify and hold harmless Generco, Inc. dba: Harbour Homes (hereinafter Owner), its Representatives, Officials and Architect/Engineer harmless from any and all claims, demands, losses and liabilities to or by third persons **arising from, resulting from or connected with services performed or to be performed under this Contract** by Contractor, Contractor's agent or employees or support, to the fullest extent of the law.

*Id.* The Addendum does not refer to the Bluegrass project, nor is it attached to any contract.

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<sup>2</sup> Interestingly, Harbour Homes cited America 1<sup>st</sup>'s invoices for all but lot 99 in its opening brief on appeal to establish the dates when America 1<sup>st</sup> worked on each residence. America 1<sup>st</sup> is unsure as to which portion of the record Harbour Homes will cite to once the Clerk's Papers are supplemented, as Harbour Homes never filed any materials in response to America 1<sup>st</sup>'s Motion for Summary Judgment.

<sup>3</sup> America 1<sup>st</sup> also pleaded RCW 4.16.326(1)(g) as an Affirmative Defense. CP 846.

Harbour Homes' concedes that its claim for indemnity did not accrue within the six year statute of repose as required under *Parkridge v. Ledcor*, 113 Wn.App. 592, 93 P.3d 225 (2002). Opening Brief at p. 9-10. Harbour Homes argues that its "duty to defend" claim is somehow distinct from its claim for indemnity, and that the "duty to defend" claim accrued within the statutory period.

America 1<sup>st</sup> denies that its work was deficient and asserts that Harbour Homes' claims are all time-barred and were properly dismissed.

#### **B. Procedural History**

Appellant Harbour Homes originally filed suit against the subcontractor Respondents on August 24, 2007. CP 700-709. Harbor Homes amended its Complaint in November, 2007. CP 556-564. On August 6, 2009, the Honorable Judge George F.B. Appel of Snohomish County Superior Court heard argument on both Respondent Bickley's and Respondent Anthony's Motions for Summary Judgment. CP 625-645, 521-531. The motions were granted. CP 103-106. Harbour Homes moved for reconsideration on August 17, 2009. CP 94-102. Harbour Homes' Motion for Reconsideration was denied on September 8, 2009. CP 45.

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Harbour Homes filed a Notice of Discretionary Review on October 6, 2009. CP 26-44.

America's 1<sup>st</sup> filed its Motion for Summary Judgment on October 15, 2009, in which it sought dismissal on the same grounds as Defendants/Respondents Bickley and Anthony's, with a few notable factual differences. CP 862-882. Shortly after the motion was filed, Harbour Homes agreed to stipulate to America 1<sup>st</sup>'s dismissal on the basis of Judge Appel's prior ruling, as it had become the law of the case. CP 758-762. The Stipulation and Order Granting Summary Judgment Dismissal of Defendant America 1<sup>st</sup> Roofing and Builder's, Inc. was entered on November 12, 2009. *Id.* Harbour Homes filed an amended Notice of Appeal pursuant to RAP 5.1(a) on November 24, 2009, to include all of the Defendants in the appeal. CP 726-757.

Harbour Homes did not file any materials in Response to America 1<sup>st</sup>'s Motion for Summary Judgment prior to stipulating to America 1<sup>st</sup>'s dismissal.

## **VI. ARGUMENT**

### **A. STANDARD OF REVIEW**

Summary judgment decisions are reviewed de novo, with the facts and all reasonable inferences viewed in the light most

favorable to the nonmoving party. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn.App. 323, 329, 2 P.3d 1029 (2000). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, admissions, and affidavits show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A fact is material if the outcome of the litigation depends on it, in whole or in part. *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 803, 23 P.3d 477 (2001). The nonmoving party may not rely on speculation or argumentative assertions. *Pelton v. Tri State Memorial Hosp.*, 66 Wn.App. 350, 355, 831 P.2d 1147 (1992).

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. See *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," then the trial court should grant the motion.

*Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989), quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

**B. HARBOUR HOMES' BREACH OF CONTRACT CLAIM IS BARRED BY THE THREE YEAR STATUTE OF LIMITATIONS CONTAINED IN RCW 4.16.080(3)**

1. America 1<sup>st</sup>'s contract with Harbour Homes was an oral contract.

America 1<sup>st</sup> moved for summary judgment dismissal of Harbour Homes' breach of contract claim under the three year statute of limitations on oral contracts contained in RCW 4.16.080(3). CP 862-882. In support of its motion, America 1<sup>st</sup> presented the declaration testimony of John Herzog, the proprietor of America 1<sup>st</sup>, who established that no written contract existed between America 1st and Harbour Homes for the Bluegrass project. CP Pending. America 1<sup>st</sup> also cited the testimony of David Maxwell, Harbour Homes' vice president of operations, who confirmed at his deposition that he did not know of any written subcontract between Harbour Homes and America 1<sup>st</sup>. CP 797.

Harbour Homes presented no evidence to the trial court in response to America 1<sup>st</sup>'s Motion for Summary Judgment in support of the contention that its contract with America 1<sup>st</sup> was anything but oral. In its opening brief on appeal, Harbour Homes makes a half-hearted argument that America 1<sup>st</sup>'s *invoices* constitute "written contracts" for the purposes of the six-year statute of limitations.

First, this was not an argument presented to the trial court on America 1<sup>st</sup>'s Motion for Summary Judgment. Under the Rules of Appellate Procedure:

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court....

RAP 9.12. The purpose of RAP 9.12 "is to effectuate the rule that the appellate court engages in the same inquiry as the trial court." *Green v. Normandy Park*, 137 Wn.App. 665, 678, 151 P.3d 1038 (2007), citing *Wash. Fed'n of State Employees, Council 28 v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993). The burden was on Harbour Homes to come forward with evidence on summary judgment establishing a genuine issue of material fact that its contract with America 1<sup>st</sup> was written rather than oral. Harbour Homes did not meet this burden. The uncontroverted evidence before the trial court was that Harbour Homes' contract with America 1<sup>st</sup> was oral and Harbour Homes is bound to that evidence on appeal.

Second, ex parte writings, such as an invoice, are sufficient to establish a written contract only if the writings contain all of the elements of a contract: subject matter, parties, promise, terms and

conditions, and price or consideration. *Urban Dev., Inc. v. Evergreen Bldg. Prods., L.L.C.*, 114 Wn.App. 639, 650, 59 P.3d 112 (2002). If a material element of a written contract must be proved by extrinsic evidence, the contract is partly oral and the three-year statute of limitations applies. *Bogle & Gates, P.L.L.C. v. Holly Mountain Res.*, 108 Wn.App. 557, 560, 32 P.3d 1002 (2001).

In this case, it is fair to say that America 1<sup>st</sup>'s invoices include the *parties* and the *price*. It is not fair to say that the invoices include the *subject matter*, the *promise* or the *terms and conditions* of the agreement between Harbour Homes and America 1<sup>st</sup>. The invoices are merely bills for a task, illustrating that an oral contract existed between the parties. No information is provided as to duration, scope of work, standards, warranties, processes and procedures. No reference is made to any specifications or building codes by which America 1<sup>st</sup> was to perform its work. The invoices also do not contain any indication of a *promise*, not even a promise to pay. CP Pending.

America 1<sup>st</sup>'s invoices are merely evidence of work that was done. Any argument that genuine issues of material fact exist with respect to these issues is unpersuasive, as extrinsic evidence, or the testimony of the parties, is required to establish essential

contractual elements. The invoices do not constitute a “writing” for purposes of the 6 year statute of limitations contained in RCW 4.16.040(1), as a matter of law.

2. Harbour Homes’ breach of contract claim is barred by the three year statute of limitations.

Harbour Homes’ breach of contract claim is barred by the three year statute of limitations on oral contracts contained in RCW 4.16.080(3). That statute states:

The following actions shall be commenced within three years:

...

(3) Except as provided in RCW 4.16.040(2), an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;

...

RCW 4.16.080(3).

In analyzing whether a statute of limitations has run on an action arising out of construction or repair of an improvement on real property, both the relevant statute of limitations and the statute of repose set out in RCW 4.16.310 must be considered. *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 574, 146 P.3d 423 (2006). RCW 4.16.310 is a six-year statute of repose that applies to actions arising out of the construction of a building. It provides in relevant part:

All claims or causes of action as set forth in RCW 4.16.300 shall accrue, and the applicable statute of limitation shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later. The phrase "substantial completion of construction" shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use. Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is later, shall be barred...

RCW 4.16.310. Statutes of repose are "of a different nature than statutes of limitation." *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 211, 875 P.2d 1213 (1994). "A statute of limitation bars plaintiff from bringing an already accrued claim after a specific period of time. A statute of repose terminates a right of action after a specified time, even if the injury has not yet occurred." *Id.* at 211-12 (citations omitted).

As such, RCW 4.16.310 requires a 2-step analysis to compute the accrual of a cause of action arising out of the construction, alteration, or repair of any improvement to real property. "First, the cause of action must accrue within 6 years of substantial completion of the improvement; and second, a party then must file suit within the applicable statute of limitation,

depending on the type of action.” *Del Guzzi Constr. Co. v. Global Nw., Ltd.*, 105 Wn.2d 878, 883, 719 P.2d 120 (1986).

Washington Courts recently analyzed when a cause of action for breach of a construction contract **accrues** in *Harmony at Madrona Park Owners’ Association v. Madison Harmony Development, Inc.*, 143 Wn.App. 345, 177 P.3d 755 (2008). Considering an action upon *written* contract in that case, the court determined:

**When a breach of contract claim accrues prior to the beginning of the statute of repose, it may become time-barred before the statute of repose has run.** Here, Ledcor first pleaded breach of written contract claims against Serock in its November 30, 2004, amended complaint wherein Ledcor named Serock as a fourth party defendant. Serock stopped work on the project in May 1998. Thus, the statutory limitations period for breach of contract claims by Ledcor against Serock expired no later than May 2004, six months prior to Ledcor naming Serock as a defendant. Accordingly, we hold that because the six-year limitation period in this case expired prior to the expiration of the period set forth in the statute of repose, Ledcor’s breach of contract claims are time-barred.

*Harmony*, 143 Wn.App at 354 (emphasis added).

The same conclusion can be reached in this case. America 1<sup>st</sup>’s work on the Bluegrass project was completed **no later** than October 11, 2002, the date the last certificate of occupancy was

issued on a Bluegrass residence. CP 814, 839 and 859. This is the last date Harbour Homes' alleged breach of contract claim could have accrued. Because America 1<sup>st</sup>'s subcontract with Harbour Homes on the Bluegrass project was oral, any cause of action based on breach of that subcontract **expired** no later than October 11, 2005. Harbour Homes' did not file its lawsuit against America 1<sup>st</sup> until August 24, 2007. CP 700-709. RCW 4.16.080(3) acts to bar Harbour Homes' breach of contract claim.

**C. THE DISCOVERY RULE DOES NOT APPLY TO EXTEND HARBOUR HOMES' BREACH OF CONTRACT CLAIM**

Harbour Homes contends that the discovery rule applies to extend the accrual date of its breach of contract claim, an argument the trial court soundly rejected. CP 103-106, 110-114, CP 45. A claim accrues for the purposes of a statute of limitations when a party has the right to apply to a court for relief, which *may* be at the time the claim is discovered. *1000 Virginia*, 158 Wn.2d at 575-76. As did Defendants Bickley and Anthony, America 1<sup>st</sup> pleaded RCW 4.16.326(1)(g) as an affirmative defense to the discovery rule. CP 655. RCW 4.16.326(1)(g), provides that:

Persons engaged in any activity defined in RCW 4.16.300 may be excused, in whole or in part, from any obligation, damage, loss, or liability for those

defined activities under the principles of comparative fault for the following affirmative defenses:

...

(g) To the extent that a cause of action does not accrue within the statute of repose pursuant to RCW 4.16.310 **or that an actionable cause as set forth in RCW 4.16.300 is not filed within the applicable statute of limitations.** In contract actions the applicable contract statute of limitations expires, regardless of discovery, six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later;

RCW 4.16.326(1)(g).

The court in *Harmony, supra*, recognized that the Supreme Court unambiguously construed RCW 4.16.326(1)(g) to leave the statute of limitations *unchanged* as to when a breach of contract claim accrues: “[RCW 4.16.326(1)(g)] does not clarify any ambiguity in any statute of limitations pertaining to construction contracts; i.e., it does not purport to change RCW 4.16.040(1),” the 6-year statute of limitations on written contracts. *Harmony*, 143 Wn.App. at p. 356. Similarly, the affirmative defense does not change when a breach of contract claim accrues for the purposes of RCW 4.16.080(3), the 3-year statute of limitations on oral contracts. Harbour Homes’ alleged breach of contract claim accrued on October 11, 2002. It filed its suit against America 1<sup>st</sup> in

November, 2007, more than five years later. The claim is barred by the three-year statute of limitations.

Washington *limits* application of the discovery rule in the construction setting to cases involving *latent* defects only: “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. We are persuaded that the rule should apply to contract claims involving latent construction defects.” *1000 Virginia*, 158 Wn.2d at 578-79. Here, Harbour Homes **did not allege** “latent” construction defects in its Complaint against America 1<sup>st</sup>. CP 785-793. As such, the discovery rule does not apply. See *Harmony*, 143 Wn.App. at 356-57.

Moreover, Harbour Homes submitted no evidence to the trial court in response to America 1<sup>st</sup>'s Motion for Summary Judgment supporting its contention that the alleged defects in America 1<sup>st</sup>'s work were “latent.” As such, there is no record supporting such a claim before the Court of Appeals. RAP 9.12. In its appellate brief, Harbour Homes ignores this and presumptively argues that the alleged roofing defects were latent, without citation to evidence. Not only did Harbour Homes make no effort to show **what** the

alleged defects in America 1<sup>st</sup>'s work were, it also made no attempt to show **why** those defects were "latent" rather than plainly observable upon reasonable inspection. Harbour Homes cannot rely on the declaration of its expert, Colin Murphy, which it submitted in response to Bickley's and Anthony's Motions for Summary Judgment because Mr. Murphy's Declaration was stricken by the trial court and Harbor Homes did not assign error to this ruling. CP 115-117. At any event, Mr. Murphy's declaration contains no criticisms of America 1<sup>st</sup>'s work.

Reference to Washington' definition of "latent conditions" under the Recreational Use Statute, RCW 4.24.210, is instructive. Landowners who open their lands to the public for recreational use without a fee are generally immune from liability under RCW 4.24.210, however, the statute "does not limit a landowner's liability when injuries are sustained by reason of a known dangerous artificial **latent** condition for which warning signs have not been conspicuously posted." *Gaeta v. Seattle City Light*, 54 Wn.App. 603, 609, 774 P.2d 1255 (1989). Courts interpreting the statute have determined that a "latent condition" is one which is **not readily apparent**. *Gaeta*, 54 Wn.App. at 609-610, *citing* *Preston v. Pierce Cy.*, 48 Wn.App. 887, 892, 741 P.2d 71 (1987). Also:

if the condition is obvious, then it cannot be latent. What a particular user sees or does not see is immaterial. Consequently, the “dispositive question is whether the condition is readily apparent to the general class of recreational users, not whether one user might fail to discover it.”

*Swinehart v. City of Spokane*, 145 Wn.App. 836, 848, 187 P.3d 345 (2008) (internal citations omitted). See also *Ravenscroft v. Washington Water Power Co.* 136 Wn.2d 911, 924, 969 P.2d 75 (1998).

The same framework can be applied in this case to determine whether an alleged construction defect is “latent.” The discovery rule does not automatically apply merely because it would be convenient for Harbour Homes. Harbour Homes must present some evidence that the alleged defects were “not readily apparent” to the “general class of residential contractors.” Whether or not Harbour Homes *itself* became aware of the defects is insufficient. In this case, Harbour Homes failed to establish that any of the alleged defects in America 1<sup>st</sup>s work were “latent” (indeed, it failed to establish any defects at all), and its reliance on the discovery rule must be rejected.

In addition, Harbor Homes has failed to meet its burden to show that the discovery rule *should* be applied in this case. The

discovery rule tolls the date of accrual of a claim until the plaintiff “knows or, through the exercise of due diligence, should have known all the facts necessary to establish a legal claim.” *Crisman v. Crisman*, 85 Wn.App. 15, 20, 931 P.2d 163 (1997). The idea is that the discovery rule can apply when the nature of the claim makes it extremely difficult for the plaintiff to learn the factual elements of the cause of action. *Crisman*, 85 Wn.App. at 20-21. However, it is the *plaintiff* that bears the burden of proving that the necessary facts could not be discovered in time. *Douglass v. Stanger*, 101 Wn.App. 243, 256, 2 P.3d 998 (2000). Harbour Homes failed to carry its burden to show that it could not have known about the alleged defects in America 1<sup>st</sup>'s work earlier.

“Compelling one to answer stale claims in the Courts is in itself a substantial wrong.” *1000 Virginia*, citing *Ruth v. Dight*, 75 Wn.2d 660, 665, 453 P.2d 631 (1969). Harbour Homes’ claim for breach of its oral contract with America 1<sup>st</sup> is time-barred and must be dismissed as a matter of law.

**D. HARBOUR HOMES’ “DUTY TO DEFEND” CLAIM IS BARRED BECAUSE IT DID NOT ACCRUE WITHIN THE STATUTE OF REPOSE**

Harbour Homes asserts that although its *indemnity* claim did not accrue within the statute of repose period, its claim for a

*defense* under the purported indemnity agreement did timely accrue. This trial court rejected this argument and the Court of Appeals should do so again here.

Harbour Homes cannot cite any applicable legal authority demonstrating that America 1st is currently responsible for Harbour Homes' defense. It is well established that a duty to defend under an indemnity agreement is **not interpreted as broadly** as the duty to defend under an insurance contract. *George Sollitt Corp. v. Howard Chapman Plumbing & Heating, Inc.*, 67 Wn.App. 468, 475, 836 P.2d 851 (1992). Under an indemnity agreement, a duty to defend arises only if "[t]he facts known at the time of the tender of defense...demonstrate that liability would eventually fall upon the indemnitor..." *George Sollitt*, 67 Wn.App. at 472, citing *Knipschild v. C-J Recreation, Inc.*, 74 Wn.App. 212, 216, 872 P.2d 1102 (1994), and *Dixon v. Fiat-Roosevelt Motors, Inc.*, 8 Wn.App. 689, 694, 509 P.2d 86 (1973).

Unlike the duty to defend under an insurance agreement, the mere **potential** for liability to fall upon an indemnitor does not trigger a duty to defend under an indemnity agreement. In other words, mere allegations contained in the Complaint regarding America 1<sup>st</sup>'s work are insufficient. There must be **facts that**

**demonstrate** that liability would eventually fall upon America 1<sup>st</sup>. *George Sollitt*, 67 Wn.App. at 472. Service of a Complaint is not enough.

In this case, Harbour Homes' Complaint against the subcontractors fails to even *allege* specific construction defects against America 1<sup>st</sup> in its tender of defense:

Harbour Homes is entitled to a defense and indemnity from Defendants for any liability which Harbour Homes may have to the owners of the residences. To the extent that Defendants fail to defend, indemnify or hold harmless Harbour Homes, Defendants will cause damages to Harbour Homes in an amount to be proved at trial, including costs and defenses incurred in defending the claim, experts' fees, home office expenses, amounts paid in settlement, and any other damages flowing from Defendants' failure.

CP 680. The tender contains no facts or information regarding how America 1<sup>st</sup>'s work was even defective; much less establish that liability "would eventually fall upon" America 1<sup>st</sup>. In addition, the Complaint clearly states that Harbour Homes *denies* the allegations brought by the homeowners in the underlying *Carlile* suit. CP 678-79.

Moreover, the indemnity agreement Harbour Homes relies on with regard to its claims against America 1<sup>st</sup> states:

\_\_\_\_\_ (hereinafter Contractor)  
agrees to defend, indemnify and hold harmless Generco, Inc. dba: Harbour Homes (hereinafter Owner), its Representatives, Officials and Architect/Engineer harmless from any and all claims,

demands, losses and liabilities to or by third persons **arising from, resulting from or connected with services performed or to be performed under this Contract** by Contractor, Contractor's agent or employees or support, to the fullest extent of the law.

CP 840. The indemnity agreement was executed in 1999, is not attached to any construction contract, and makes no reference whatsoever to the Bluegrass project. Harbour Homes presented no evidence to the trial court on America 1<sup>st</sup>'s motion for summary judgment that establishing that the agreement even applied to claims arising out of the Bluegrass project. Ambiguous indemnity contracts are to be construed in favor of indemnitor and against indemnitee. *Calkins v. Lorain Division of Koehring Co.* 26 Wn.App. 206, 210, 613 P.2d 143 (1980). It is America 1<sup>st</sup>'s position that the indemnity agreement does not apply to Harbour Homes' claims in this case and that there is no duty to defend.

As previously pointed out, Harbour Homes presented no evidence to the trial court establishing that America 1<sup>st</sup> breached its contract or that its work was defective. As such, any potential duty to defend under the indemnity agreement has not yet accrued and is now barred by the statute of repose.

#### **E. REQUEST FOR FEES AND REASONABLE EXPENSES**

RAP 14.2 allows for costs and reasonable expenses to be awarded to the prevailing party on appeal. Pursuant to RAP 18.1(b), America 1st respectfully requests that the Court issue an order awarding the reasonable attorney's fees, costs and expenses allowed under RAP 14.3 should America 1<sup>st</sup> prevail on appeal.

## **VII. CONCLUSION**

This trial court properly dismissed Harbour Homes' breach of contract claims against the subcontractor defendants based on the expiration of the three year statute of limitations on oral contracts contained in RCW 4.16.080(3). Harbour Homes did not file any materials or evidence in response to America 1<sup>st</sup>'s Motion for Summary Judgment. As such, there are no genuine issues of material fact establishing that America 1<sup>st</sup>'s contract with Harbour Homes for the Bluegrass project was written and not oral. America 1<sup>st</sup>'s invoices do not contain all the elements of a written contract and are not available to bring Harbour Homes' claim within the six-year statute of limitation. Moreover, as Harbour Homes failed to plead or prove latency, the discovery rule does not apply.

Further, Harbour Homes' "duty to defend" claim did not accrue within the statute of repose period, and is based on an

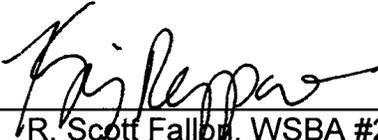
indemnity agreement which does not apply to this project. The duty to defend claim is barred as a matter of law.

The Order dismissing America 1st should be affirmed.

DATED this 28<sup>th</sup> day of January, 2010.

FALLON & McKINLEY, PLLC

Respectfully submitted:

By:   
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Kimberly Reppart, WSBA #30643  
Attorneys for Defendant America 1st  
Roofing

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

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HARBOUR HOMES, INC. f/k/a GEONERCO, INC., a Washington  
corporation,

*Appellant,*

v.

AMERICA 1<sup>ST</sup> ROOFING & BUILDERS, INC., a Washington  
corporation,

*Respondent.*

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AFFIDAVIT OF SERVICE

---

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STATE OF WASHINGTON                    )  
  )  
COUNTY OF KING                        )        ss

Tara Whitman, being first duly sworn on oath, deposes and states:

That on the 28<sup>TH</sup> day of January, 2010, she caused to be sent via legal messenger service, a copy of Brief of Respondent America 1<sup>st</sup> Roofing & Builders, Inc.; and this Affidavit of Service to the below listed party of record in the above-captioned matter, as follows:

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FURTHER YOUR AFFIANT SAYETH NOT.

Tara Whitman  
TARA WHITMAN

SUBSCRIBED and SWORN to before me this 28<sup>th</sup> day of  
January, 2010.

Elizabeth A. Bettridge  
SIGNATURE

Elizabeth A. Bettridge  
PRINT NAME

NOTARY PUBLIC in and for the State of Washington,  
residing at Des Moines  
My commission expires 9/22/12

