

64256-1

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NO. 64256-1-I
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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

vs.

AMERICA 1ST ROOFING & BUILDERS, INC., a Washington corporation,
ANTHONY'S HOMES, INC., a Washington corporation; BICKLEY
CONSTRUCTION, INC., a Washington corporation,

Respondents,

and

BUMSTEAD CONSTRUCTION, a sole proprietorship; SCOTT A. BUMSTEAD
and "JANE DOE" BUMSTEAD, individually and the marital community
comprised thereof; CEDAR KING LUMBER CO., INC., a Washington corporation
and successor in interest to TOWNSEND/WRAY, INC.; TOWNSEND/WRAY,
INC., a Washington dissolved corporation; CREERY CONTRACTING, a sole
proprietorship; MICHAEL L. CREERY and "JANE DOE" CREERY, individually
and the marital community comprised thereof; FRAME-IT-UP! CONST. LLC, a
Washington limited liability company; GRIZZ CONSTRUCTION a/k/a GRIZZ
CONSTRUCTION CO., a sole proprietorship; DONALD A VANDOVER and
"JANE DOE" VANDOVER, individually and the marital community comprised
thereof; GUNDERSON PLUMBING, a sole proprietorship; THOMAS M.
GUNDERSON and "JANE DOE" GUNDERSON, individually and the marital
community comprised thereof; J-S CONTRACTING, INC., a Washington
corporation; MICAHERD CONSTRUCTION, INC., a Washington dissolved
corporation; PRECISION GUTTER & SHEETMETAL, a sole proprietorship;
RICHARD E. PHELPS, JR. and "JANE DOE" PHELPS, JR., individually and the
marital community comprised thereof; SUPERIOR CEMENT FINISHING, INC., a
Washington corporation,

Defendants.

APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT
Honorable George F. B. Appel, Judge

BRIEF OF RESPONDENT BICKLEY CONSTRUCTION, INC.

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I. NATURE OF THE CASE

This suit was commenced too late. The respondent framer worked on several homes in the appellant's subdivision without a formal written agreement. The written documents and invoices do not amount to a contract entitled to the longer six-year limitations period set out in RCW 4.16.040.

The claimed defects in the construction work done by the respondents are not latent defects. The appellant developer is a sophisticated contractor. No evidence supports appellant's resort to the discovery rule to delay the running of the three-year statute of limitations. This suit is time-barred. The trial court's dismissal of the case should be affirmed.

II. ISSUES PRESENTED

A. Washington law provides that the discovery rule for breach of an oral construction contract applies when the claim is for latent defects. In order to invoke the discovery rule in a breach of an oral construction contract claim, one must allege latent defects, and present admissible evidence of material facts that the alleged defects are latent. Since Harbour Homes failed to do so here, does the discovery rule apply?

B. Washington law requires a proponent of a written contract to prove the existence of all essential elements of a written contract to

trigger the six-year statute of limitation period. If the parties must resort to parol evidence to prove the essential elements of a written contract, a three-year limitation period applies. Does the purported contract offered by Harbour Homes contain all of the essential terms of a written contract where, as in this case, the parties must go beyond the four corners of the contract to define essential terms?

C. A claimant must prove breach of duty and damages to establish a breach of contract. Where, as here, Harbour Homes provides no genuine issue of material fact as to breach or damages, must a claim for breach of contract be dismissed as a matter of law?

D. A duty to defend under an indemnity agreement is not interpreted as broadly as the duty to defend under an insurance contract. Does a tender without any facts to show that liability may eventually fall on the indemnitor trigger the duty to defend under a construction contract?

III. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

The Bluegrass Meadows neighborhood located in Mill Creek, Washington (“Bluegrass”) consists of 101 single-residential homes. CP 537. Harbour Homes, Inc., f/k/a Geonerco, Inc. (“Harbour Homes”), developed, constructed, and marketed the homes in Bluegrass. CP 690-91. In order to complete the many homes in the project, Harbour Homes hired

a number of subcontractors, including Bickley Construction, Inc. (“Bickley”). CP 678.

Construction on Bluegrass started in 2001. CP 586. Bickley commenced its work on Bluegrass some time before March 17, 2002. CP 608. On March 17, 2002, after construction of Bluegrass was well underway, Bickley and Harbour Homes entered into a standard form agreement authored by Harbour Homes and used with its subcontractors. CP 553-54, 583-84, 596-600. This form contract did not specifically apply to Bluegrass or any other projects. CP 553. The agreement also did not identify the lot numbers or the number of homes at Bluegrass on which Bickley would work. CP 596-600.

The form contract did not identify a scope of work or the project. CP 553-54. David Maxwell, the vice president of operations for Harbour Homes, was in charge of contract formation with the subcontractors. CP 542, 546-47, 585. He confirmed at deposition that the form contract with Bickley did not have a specific scope of work. CP 553-54.

In addition, Bill Schodorf, the production manager for Harbour Homes, was in charge of the execution of the form contracts. CP 583, 585-86. Like Mr. Maxwell, Mr. Schodorf confirmed that no contract provisions define scope of work under the form contract:

Q. Was there a scope of work attached to this subcontract agreement?

A. No.

Q. How was Bickley to determine what their scope of work was for this subcontract?

A. Code and industry standards.

Q. Was there any document generated by Harbour Homes that would define Bickley Construction's scope of work?

A. No.

CP 588.

In fact, Mr. Schodorf insisted at his deposition that a scope of work was not part of the form contract.

Q. And that would not have been within any of the framers' scope of work to install building paper?

MS. MCKOWN: Object to form.

A. What scope of work?

Q. (BY MR. NOEL) For the scope of work lets just take Bickley Construction. Would any of their scope of work have included the installing of building paper?

MS. MCKOWN: Object to form.

A. Once again you're going to the scope like there's a scope and there isn't a scope.

CP 592.

The work performed by Bickley was primarily labor, while Harbour Homes supplied the lumber and all necessary components for Bickley to complete its framing work. CP 548. In addition, Stimson Duratemp T1-11 siding was installed at Bluegrass. CP 551.

Harbour Homes chose the particular T1-11 product for Bluegrass. David Maxwell and other Harbour personnel supervising the project understood that the T1-11 product did not require the installation of weather resistive barrier behind this product. CP 538-39, 552. Indeed, Harbour Homes had no expectation in its agreements with its framing subcontractors, including Bickley, that they would install weather resistive barrier behind the T1-11 product. *Id.*, CP 592.

As the entity responsible for supplying all of the materials, Harbour Homes supplied all of the flashings Homes Harbour expected to be installed on the project. CP 594. Harbour Homes understood the window installation instructions did not require metal head flashing. CP 593, 538-39. Similarly, Harbour Homes did not expect penetration flashing was required at windows, vents, doors, hose bibs or lights. CP 539. Harbour Homes did not require its framing subcontractors to install any weather resistive barrier behind the T1-11 or metal head flashings and/or penetration flashings at Bluegrass. CP 592-93.

Bickley framed a total of 17 homes at Bluegrass. CP 630. Harbour Homes asserts claims related to four of the homes—lots 21, 25, 37 and 43 or 47.¹ CP 454. The certificates of occupancy were issued on a rolling basis for this project. CP 603-06.

The certificate of occupancy for lot 21 was issued on June 10, 2002. CP 604. The building department issued the certificate of occupancy for lots 25 and 47 on May 22, 2002, and October 11, 2002, respectively. CP 605-06.² The standard practice for Bickley was to bill for its work after it was completed. CP 608.

B. STATEMENT OF PROCEDURE.

This lawsuit is related to warranty claims for construction defects made against Harbour Homes by 37 homeowners—a number consisting of both original purchasers of the Bluegrass homes and subsequent purchasers. CP 250-52, 677-78, 684-99. This “underlying action” was

¹ In the motion for summary judgment, Bickley requested relief from the trial court as it relates to its work performed on lots 12, 21, 25, and 47. CP 630. In its brief opposing summary judgment, Harbour Homes did not include lot 12 and listed lots 21, 25, 37, 43 or 47. CP 454. It is unclear in the brief of Harbour Homes if it continues to assert claims as it relates to 43 or 47. In one section of its brief Harbour Homes claims that Bickley installed framing at lot 43. Brief of Appellant 5. The very next page of the brief the appellant asserts lot 47, with no mention of 43. Nevertheless, corespondent Anthony’s Homes (“Anthony’s”) concedes that it was responsible for lot 43 in its supplement to joinder in Bickley’s motion for summary judgment. CP 471-76.

² In its motion for summary judgment, Bickley’s request for relief to the trial court pertained to lots 12, 21, 25 and 47. CP 630. In its brief opposing summary judgment, Harbour Homes did not include lot 12 and listed only lots 21, 25, 37, 43 or 47. CP 454. Harbour Homes conceded lot 12 and replaced it with lot 37. CP 260-61, 284, 454.

filed on July 12, 2007, in Snohomish County Superior Court under Cause No. 07-2-05871-9. CP 710-23. The trial court dismissed the claims asserted by the subsequent purchasers, including Steven and Kristen Schwark, the owners of lot 37. CP 131, 250-252, 255.

The subsequent purchasers appealed the decision by the trial court. This Court held that the subsequent purchasers can assert CPA claims against the developer. *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 194 P.3d 280 (2008), *rev. granted in part*, 166 Wn.2d 1015 (2009). This Court, however, upheld the trial court's order dismissing all other claims asserted by the subsequent purchasers, including breach of contract.

The homeowners and Harbour Homes proceeded to arbitration in the underlying action. CP 533, 626-27. That apparently took place in December 2008 or early 2009 with the arbitrator apparently issuing some award in favor of the homeowners. CP 533, 543-45, 626-27. Harbour Homes has not disclosed this award to its subcontractors, with the stated intent not to disclose until it was made final. CP 543-45.

Harbour Homes filed a separate action against its subcontractors, and an amended complaint on November 15, 2007, asserting claims for breach of contract, indemnity and duty to defend. CP 674-99. Bickley moved for summary judgment or, in the alternative, partial summary judgment in June 2009. CP 532-606, 607-611, 612-624, 625-645.

After discovery, Bickley requested dismissal of all claims based on Harbour Homes's failure to file its action for breach of contract before the expiration of the three-year limitation period for oral contract claims and for the failure to bring the indemnity claim within the statute of repose.³ CP 625-45. In the alternative, Bickley requested relief from the trial court that it did not breach its duty under the contract as asserted by the homeowners to the developer for its failure to install weather resistive barrier and flashings at windows, doors and other areas requiring these components. *Id.* Bickley also requested alternative relief requesting dismissal of claims related to lots 12 and 25, even that if the court found a written contract existed, work on these lots was performed and completed prior to the execution of the March 2002 agreement. *Id.*, CP 256-58.

Another defendant, Anthony's, filed a joinder to the motion of Bickley asserting that Harbour Homes's claims against it should be barred by the three-year limitation period and statute of repose. CP 471-76.

Harbour Homes' opposition to summary judgment did not address lot 12, effectively conceding dismissal of claims related to that lot. CP 452-65. Harbour Homes, however, did include lot 37. *Id.* Claims related to Lot 37, as discussed above, involved claims of a subsequent purchaser.

³ RCW 4.16.080(3) and RCW 4.16.310, respectively.

CP 250-52, 255. Under this Court's decision in *Carlile*, 147 Wn. App. 193, the only remaining claim regarding that lot is based on Harbour Homes's alleged violations of the Consumer Protection Act. *See Carlile v. Harbour Homes*. Harbour Homes did not consider lot 37 as part of its claim against Bickley in the action against its subcontractors until it included that lot for the first time in its opposition to the motion of Bickley for summary judgment.⁴ CP 130-31, 139-248.

In its opposition, Harbour Homes submitted a declaration of a consulting expert, Colin Murphy, as evidence to support its breach of contract claim. CP 396-418. Bickley successfully moved to strike the declaration of Mr. Murphy.⁵ CP 80-88, 89-93, 115-17.

Without the declaration of Mr. Murphy, Harbour Homes had no expert testimony to support its claimed construction defects at the summary judgment hearing. *Id.*

Bickley's and Anthony's motions for summary judgment also alleged that Harbour Homes failed to timely file its breach of contract

⁴ In discovery, Bickley requested production of documents concerning investigations or inspections into its alleged damages. Harbour Homes responded with estimates prepared by Charter Construction, Inc. for repair of homes on lots that Harbour Homes deemed formed the basis of their damages claim against the subcontractors. Harbour did not produce an estimate for repair related to lot 37. CP 130-31, 139-248.

⁵ Harbour Homes does not assign error to the trial court's order striking the declaration of Colin Murphy.

claim before the expiration of the three-year limitation period.⁶ CP 110-14; CP 103-06.

Harbour Homes moved for reconsideration of the trial court's August 6, 2009 orders granting summary judgment. CP 94-102. Harbour Homes limited its briefing on reconsideration to whether the discovery rule applied, and whether the March 17, 2002, agreement contained sufficient information to impose a six-year statute of limitations. *Id.* Judge Appel issued a letter ruling on September 8, 2009 denying the motion for reconsideration. CP 45. The letter was signed by Judge Appel's Law Clerk and was not filed with the court in the form of an order. *Id.*

Harbour Homes then filed its notice of appeal on October 6, 2009. CP 26-44. The pendency of Harbour Homes's claim against Respondent America 1st Roofing & Builders, Inc (America 1st) made the notice of appeal as a matter of right premature. CP 763-861, 862-82.

America 1st then filed its motion for summary judgment on October 15, 2009 based on the same theory asserted by Bickley and Anthony's respective motions and the trial court's previous orders

⁶ Harbour Homes conceded that its indemnity claim was barred by RCW 4.16.310, the statute of repose for construction actions. CP 453, 464.

granting same. CP 862-82. Correcting its mistake in filing its notice of appeal prematurely, Harbour Homes then filed with this Court on November 5, 2009, its Notice of Improperly Designated Notice and re-designated its original Notice of Appeal into a Notice for Discretionary Review. Harbour Homes also filed its designation of Clerk's Papers with the trial court on November 5, 2009.

Harbour Homes and America 1st then entered into a stipulation and order granting summary judgment on November 10, 2009. CP 758-62. An Amended Notice of Appeal was then filed on November 24, 2009. CP 726-757. Harbour Homes' Brief of Appellant was served on the respondent Bickley and filed with the Court of Appeals on December 29, 2009, more than 45 days after the filing of the Clerk's Papers, and without a motion for extension of time.

IV. ARGUMENT

The trial court correctly dismissed all claims against the respondent Bickley Construction, Inc.

This case presents a breach of contract dispute concerning alleged defects in the construction of the Bluegrass subdivision of homes, built and marketed by the appellant Harbour Homes. Bickley installed siding on some of the homes in Bluegrass.

The only written agreement between Bickley and Harbour Homes lacked essential material terms sufficient to bring its enforcement under the six-year statute of limitations period. The trial court recognized that the agreement required the parties to rely upon parole evidence to identify these missing terms of the agreement. The court properly applied a three-year statute of limitation period.

In general, a claim for breach of an oral contract for construction services is barred three years from the time the claim accrues. The discovery rule can delay the accrual of the claim for breach of such a contract. To trigger the discovery rule, Washington law requires a claim for and evidence of latent defects.

Harbour Homes cannot invoke the discovery rule on the facts of this case. Harbour Homes failed to allege any latent defects in its amended complaint and Harbour Homes failed to provide the court with any admissible facts in its opposition to summary judgment to support its claim that Bickley's work was defective, let alone that the defects were latent.

Harbour Homes failed to adduce any admissible material facts at summary judgment to support its claim for breach of contract. The only evidence that Harbour Homes produced to support its claim for breach of contract was the declaration of an expert witness that was excluded by the

court. Harbour Homes has not appealed that decision to exclude. After the expert witness's opinions were stricken, there was no admissible evidence for the trial court to consider that any of the defendants breached their respective contracts, or that any of the defects alleged by Harbour Homes were latent.

Finally, Bickley's contractual duty to defend has not been triggered. The "duty to defend" under a contractual indemnity agreement is not the same as a "duty to defend" under an insurance policy. The duty to defend under an indemnity agreement arises only if the facts known at the time of tender can demonstrate that liability would eventually fall upon the indemnitor. Harbour Homes failed to meet that standard. In addition, like its claim for indemnity, which Harbour Homes has conceded, the six-year statute of repose bars the claim for duty to defend.

For all of these reasons, the court should affirm the decision of the trial court.

A. STANDARD OF REVIEW.

This is an appeal from an order granting a summary judgment.

Summary judgment orders are reviewed de novo by this court. *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wash.2d 55, 1 P.3d 1167 (2000). In doing so we observe the well-known principle that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the moving party is entitled to a judgment as a matter of law." CR 56(c).

Van Noy v. State Farm Mut. Auto. Ins. Co., 142 Wn.2d 784, 790, 16 P.3d 574 (2001).

The appellate court, however, may review only those matters that have been presented to the trial court for its consideration before entry of the summary judgment. *Lewis v. Bell*, 45 Wn. App. 192, 196-97, 724 P.2d 425 (1986); *see also Ashcraft v. Wallingford*, 17 Wn. App. 853, 860, 565 P.2d 1224 (1977), *rev. denied*, 91 Wn.2d 1016 (1979); RAP 9.12.

This Court should affirm an order granting summary judgment when there is no genuine issue of material fact and when the moving party is entitled to judgment as a matter of law. CR 56(c); *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d at 790. When reasonable minds can reach only one conclusion, questions of fact may be determined as a matter of law. *Ruff v. County of King*, 125 Wn.2d 697, 704, 887 P.2d 886 (1995).

B. THE DISCOVERY RULE DOES NOT APPLY BECAUSE HARBOUR HOMES FAILED TO ALLEGE LATENT DEFECTS OR TO PRESENT MATERIAL FACTS THAT THE ALLEGED DEFECTS WERE LATENT DEFECTS.

Harbour Homes has never provided any evidence that Bickley's work contained latent defects. It also never alleged in its complaint (*see* First Amended Complaint CP 674-82) or in answers to discovery that the

claimed defects were latent. This matter of latent defect was never raised until Harbour Homes filed oppositions to the subcontractors' motions for summary judgment.

Harbour Homes misreads Washington law on the discovery rule as applied to breach of construction contracts. The discovery rule does not apply to all claims for breach of construction contracts. The Supreme Court stated as much in *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 146 P.3d 423 (2006). In that case, the Supreme Court specifically held that the controlling precedent held that a claim arising out of a contract accrued on breach and not on discovery and that the Court of Appeals lacked authority to adopt the discovery rule in *Architectonics Construction Management, Inc. v. Khorram*, 111 Wn. App. 725, 45 P.3d 1142 (2002), *review denied*, 148 Wn.2d 1005 (2003). It held that in adopting the discovery rule in *Architectonics* and failing to follow controlling decisions of this Court, the Court of Appeals erred. The *1000 Virginia* court, however, did recognize the discovery rule would apply in limited circumstances:

[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.

158 Wn.2d at 578-79 (emphasis added). The decision in *1000 Virginia* does not create a general discovery rule with respect to breach of construction contracts under Washington law.

In *Harmony at Madrona Park Owners Assoc. v. Madison Harmony Dev., Inc.*, 143 Wn. App. 345, 177 P.3d 755, *rev. denied*, 164 Wn.2d 1032 (2008), this Court recognized that in order to invoke the discovery rule in a breach of construction contract claim, the party seeking to invoke the rule must have pled that there were latent defects. There, the general contractor never alleged that any of the claimed defects were latent. *Id.* at 356. The general contractor, therefore, could not invoke the discovery rule. *Id.* at 357.

Harbour Homes never alleged in its Complaint or during discovery that the homes contained latent defects. Moreover, Harbour Homes offered no such evidence in its opposition to summary judgment.

“To invoke the discovery rule, the plaintiff must show that he or she could not have discovered the relevant facts earlier.” *Giraud v. Quincy Farm & Chemical*, 102 Wn. App. 443, 449, 6 P.3d 104 (2000), *rev. denied*, 143 Wn.2d 1005 (2001). The evidence presented to the trial court made no specific reference to or itemization of what defects were in fact latent, or that the defects could not be discovered at the time of construction.

The best Harbour Homes could do in its opposition to summary judgment was to make unsupported and inadmissible conclusory statements that the defects were latent. Harbour Homes makes the same conclusory assertions in its brief here. *See, e.g.*, Brief of Appellant 16.

A “latent defect” is not simply any defect. A latent defect is “one which could not have been discovered by inspection.” *Rottinghaus v. Howell*, 35 Wn. App. 99, 108, 666 P.2d 899, *rev. denied*, 100 Wn.2d 1016 (1983). To invoke the “discovery rule” in a construction contract, plaintiff would have to show that the alleged defects were impossible to discover by reasonable inspection. *See generally Wright v. Safeco Ins. Co.*, 124 Wn. App. 263, 278, 109 P.3d 1 (2004).

Harbour Homes may not rely on the stricken declaration of Colin Murphy as proof that latent defects existed in the homes. Harbour Homes did not assign error to the trial court’s ruling striking Mr. Murphy’s declaration. *See, McKee v. American Home Products, Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989) (on appeal, the court “will not consider issues on appeal that are not raised by an assignment of error or are not supported by argument and citation of authority.”)

The admissibility of the expert’s opinions and declaration is therefore not an issue on appeal. Any reference to or reliance on the declaration of Mr. Murphy is improper.

In the absence of these expert opinions and declarations, Harbour Homes is left with nothing more than mere unsupported and inadmissible references to construction defects without any proof of latency. These mere references to defects by themselves are unsupported. They do not create a genuine issue of material fact on the presence of latent defects.

Even if the Court were to consider the alleged construction defects, the type of defects alleged should have been apparent to Harbour Homes at the time of construction or substantial completion. Harbour Homes conceded the fact that it did not contract with Bickley to install weather resistive barrier or flashings and did not expect that they were installed. Harbour Homes cannot claim that conditions that it knew about are latent. CP 538-39, 552, 592.

Harbour Homes asserts that Bickley failed to install the T1-11 siding with a sufficient gap around penetrations (doors and windows) to allow for expansion during heating cycles. *See* Brief of Appellant 24-25. It also asserts that the failure to provide a sufficient expansion gap caused the T1-11 panel siding to warp during heating cycles causing damage to the caulked joints around the penetration. *Id.* at 25. These are open and obvious conditions that were easily observable at the time of construction, and after. They cannot be deemed latent.

Harbour Homes is a developer of large projects similar in size to Bluegrass. It would strain credulity for Harbour Homes to make an argument about latency related to improper gaps and caulking.

Harbour Homes occupied the dual role of developer and general contractor, holding a general contractor's license. CP 589, 690. It had experienced employees on site managing the project. *Id.* at 589. Harbour Homes cannot ask this court to ignore these circumstances while pleading ignorance of defects when in fact they should have been open and obvious conditions.

Harbour Homes offered no admissible evidence in opposition to Bickley's motion for summary judgment regarding latent defects. Harbour Homes's expert was stricken by the trial court. A declaration was offered by Harbour Homes from Mr. Schodorf regarding what work was performed and to authenticate contracts and invoices, but his declaration was silent regarding allegations of latent defects. CP 299-395.

For Harbour Homes to allege the discovery rule, it must establish that the defects were latent. It did not plead that the defects were latent. It did not provide admissible evidence in opposition to the motions for summary judgment to establish latent defects.

The discovery rule does not apply and the accrual of claims for the homes at issue occurred at the time of substantial completion. The last of

the four homes was completed in October 2002. CP 606. The remaining issue is whether a six-year or three-year statute of limitation began to run on the date of substantial completion.

C. THE WRITINGS IN THE CASE DO NOT SATISFY THE REQUIREMENTS FOR A WRITTEN CONTRACT AND A SIX-YEAR LIMITATIONS PERIOD.

1. The Form Contract Agreement Lacks Essential Material Terms.

The trial court was correct in its analysis that courts have a compelling interest in avoiding stale claims. The court was well within its discretion to grant summary judgment. Indeed, this is consistent with the analysis of the State Supreme Court—to determine “whether to apply the discovery rule, the possibility of stale claims must be balanced against the unfairness of precluding justified causes of action.” *1000 Virginia*, 158 Wn.2d at 579, quoting *U.S. Oil & Refining Co. v. State Dept. of Ecology*, 96 Wn.2d 85, 93, 633 P.2d 1329 (1981). The court added that “compelling one to answer stale claims in the Courts is in itself a substantial wrong.” *Id.*, quoting *Ruth v. Dight*, 75 Wn.2d 660, 665, 453 P.2d 631 (1969).

Missing terms in written contracts create evidentiary problems. The onus is on the proponent of a written contract to define terms to its advantage. See *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 944, 640 P.2d 1051 (1982). The burden

of proving a contract is on the party asserting it, and the claimant must prove each essential fact, including the existence of mutual intention. *Cahn v. Foster & Marshall, Inc.*, 33 Wn. App. 838, 840, 658 P.2d 42, *rev. denied*, 99 Wn.2d 1012 (1983).

In order to take advantage of the six-year limitation period, a writing must contain all the essential elements of the contract. *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 30-31, 959 P.2d 1104 (1998). The essential elements of a contract are “the subject matter of the contract, the parties, the promise, the terms and conditions, and (in some but not all jurisdictions) the price or consideration.” *Id.* at 31 *quoted with approval in Bogle & Gates, P.L.L.C. v. Holly Mountain Resources*, 108 Wn. App. 557, 561, 32 P.3d 1002 (2001).

Harbour Homes must prove that the writings offered as the written contract clearly reflect on their face the requisite elements of a sufficiently definite, valid contract to allow Harbour Homes to avail itself of the longer six-year limitations period.

The trial court correctly found that the parties had to resort to parol evidence in order to define the missing essential terms under the contract. In particular, parol evidence was needed to define the project, the lot numbers, the scope of work, the terms and conditions, and the consideration or price. “[I]f resort to parol evidence is necessary to

establish any essential element, then the contract is partly oral and the 3-year statute of limitations [under RCW 4.16.080(3)] applies.” *Bogle & Gates*, 108 Wn.2d at 560.

The record is replete with the parties’ reference to parol evidence in order to define missing terms under the contract. For instance, Harbour Homes’s project manager, charged with the execution of the contract agreement, testified that the “[c]ode and industry standards” determine the scope of work under the contract. CP 588. In fact, Mr. Schodorf for Harbour Homes insisted that “there isn’t a scope” of work. CP 592. The contract does not identify the Bluegrass project. CP 553, 596-600. Harbour Homes mischaracterizes the evidence, asserting that the contract states “frame the homes at Bluegrass Meadows in accordance with the plans...” (Brief of Appellant 21) What the generic contract actually says is: “Subcontractor agrees to complete their portion of the work per the plans supplied . . .” CP 596-600. The Bluegrass project is not mentioned, framing is not mentioned, nor is any scope of work for that matter. Nowhere in that document does it state that “Bickley is to frame the houses at the Bluegrass project.” *Id.*

What is also detrimental to Harbour Homes’s position is that the contract is dated well into the construction of Bluegrass, it does not identify the number of homes or lots that Bickley was to frame, it does not

describe the plans and trade standards to be followed, and no clear expectation of what materials Bickley was expected to install. *Id.*

To illustrate this last point, counsel for Harbour Homes asserted in its opposition to summary judgment that Bickley installed the “belly bands.” CP 456. Bickley did not install the belly bands at Bluegrass. CP 257. For Harbour Homes to argue terms of the contract that are not found in the document it authored illustrates graphically the problem that the legislature wanted to avoid in imposing a shorter limitation period for oral contracts. Plaintiffs who would enforce contracts based on parol evidence must diligently pursue their claims while memories are fresh and evidence is readily available.

Harbour Homes asserts that the contract identifies Bickley’s trade as “framer.” This term, however, fails to define the work actually performed by Bickley. Bickley was asked to install T1-11 siding. The notion that this writing identifying Bickley as a framer by trade, with absolutely no other description or scope of work, without resorting to parol evidence, implicates Bickley for the allegations relating to the installation of the siding is farcical. One of Harbour Homes’s representatives testified, the scope was defined not by the written contract but by industry standard. CP 588. That suggestion coupled with the specification of “framer” must require the parties to go beyond the four

corners of the contract and rely on parol evidence to identify and prove missing terms of the agreement.

Harbour Homes, as the author of the contract, has the burden to prove all essential terms of the contract. It was in the best position to define these terms. It chose, however, to leave missing and incomplete terms in its contract and allow the parties to go beyond the four corners of the contract to define what the parties actually contracted to do at Bluegrass. The contract is partly oral and the three-year statute of limitations therefore applies. *Bogle & Gates*, 108 Wn. App. at 560; *DePhillips*, 136 Wn.2d at 31.

2. The Invoices and Bids Do Not Add the Requisite Definition to the Terms; the Argument Is Only Made for the First Time on Appeal, in Any Event.

For the first time on appeal, Harbour Homes claims that Bickley's invoices and bids constitute a written contract because they include all material terms of a written contract. Brief of Appellant 22-23. Harbour Homes did not make this argument against Bickley in the trial court. This Court will not review issues raised for the first time on appeal. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Even if this Court were to review this issue, it provides no reason to reverse the trial court's granting of the summary judgment motion.

There is no evidence that Bickley submitted a bid for the Bluegrass project. This evidence was not considered by the trial court because it was not submitted as part of the record. Harbour Homes cannot assert the existence of bids. Without this evidence, Harbour Homes has no proof on this issue, which it is asserting for the first time on appeal.

Similar to the analysis above regarding the form contract, Harbour Homes must prove that the invoices offered as a written contract define all of the essential elements of a writing. Harbour Homes cannot prove the existence of a writing without resorting to parol evidence. The three-year statute of limitations therefore applies to the invoices. *Bogle & Gates*, 108 Wn. App. at 560.

The invoices that Harbour Homes offers as a written contract do not clearly reflect on their face what the parties may have agreed to with respect to the subject matter of their contract. It is only with the benefit of outside parol evidence that one can even determine the terms of the parties' oral agreement. The invoices fail to establish the "promise" between Bickley and Harbour Homes. The invoices are simply bills for various tasks done over the course of the project and were only issued after the work was complete; not prior to performance of any work.

The invoices also fail to demonstrate the "terms and conditions," if any, to which the parties' may have orally agreed. The invoices make no

reference to, nor do they describe in any way, the full, agreed scope of Bickley's work over the course of the project. No terms and conditions define how the work is to be executed or make reference to building codes or trade standards that must be followed. The invoices are at best a "partly oral contract." *Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.*, 28 Wn. App. 539, 543, 625 P.2d 171 (1981) (court noted that agreement of the parties was oral, notwithstanding the presence of an invoice); *Cahn v. Foster & Marshall, Inc.*, 33 Wn. App. at 840-41 (receipt designated "invoice" does not satisfy standards of writing to bring contract within six-year statute).

In *Cahn*, the court found that the receipt was merely the confirmation of a stock transaction and it could not constitute a contract. *Id.* at 841. The court found that the receipt lacked essential terms upon which plaintiff allegedly relied and based his lawsuit. *Id.* Here, the invoices lack the promise and terms and conditions that Harbour Homes relies upon as a basis for its breach of construction contract claim. Any alleged "promise" and "terms and conditions" may only be implied through outside, parol evidence. The three-year statute of limitations therefore applies, barring Harbour Homes's breach of contract claim.

D. HARBOUR HOMES LACKS PROOF OF BREACH OF DUTY UNDER THE CONTRACT.

A breach of contract is the failure, without excuse, to fulfill the duties under the contract terms. *See* BLACK'S LAW DICTIONARY 188 (6th ed. 1990). "A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant." *Northwest Indep. Forests Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995).

Harbour Homes bears the burden of establishing the elements of every cause of action it asserts. *See Presnell v. Safeway Stores, Inc.*, 60 Wn.2d 671, 673, 374 P.2d 939 (1962). Harbour Homes conceded in its opposition that Bickley did not breach its contract based on the homeowners claims related to missing weather resistive barrier, penetration flashings, and metal head flashings. CP 463-64. Harbour Homes offered the declaration of Colin Murphy in support of its breach of contract claim. But this evidence was stricken from the record. CP 115-17. Harbour Homes cannot rely upon this expert's declaration on appeal. *McKee v. American Home Products, Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989).

Without this evidence Harbour Homes can only rely upon mere conclusory statements based on speculation and conjecture, which is fatal

to its claims against Bickley. The burden of proof is on the proponent “to present sufficient evidence from which damages can be determined on some rational basis and other than by pure speculation and conjecture.” *O’Brien v. Larson*, 11 Wn. App. 52, 54, 521 P.2d 228 (1974). Harbour Homes cannot prove an essential element—breach of duty.

Harbour Homes also cannot offer any evidence of damages caused by the alleged breach for the same reason it cannot prove breach of duty under the contract. A breach of contract may be dismissed where there is no evidence of damages caused by the breach. *Jacob’s Meadow Owners Assoc. v. Plateau 44 II, LLC*, 139 Wn. App. 743, 754, 162 P.3d 1153 (2007).

E. NO DUTY TO DEFEND HAS BEEN TRIGGERED UNDER THE ALLEGED CONTRACT.

Harbour Homes would like the Court to interpret the duty to defend provision under the construction contract as an agreement by Bickley to act as an insurer similar to the duty of an insurer under an insurance contract. “The insurer’s duty to defend the insured is one of the main benefits of the insurance contract.” *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 392, 823 P.2d 499 (1992). The indemnity clause provides that Bickley agreed to defend and indemnify Harbour Homes against any and all claims arising out of Bickley’s work. CP 384, 597. It specifies that

Bickley's duty to defend would not apply to liability for damage caused by the negligence of others including Harbour Homes. This was not an agreement to insure, but rather a logical allocation of the risk of loss arising from Bickley's work on the project.

The defense obligation under the construction contract is therefore triggered only if the claim asserted by Harbour Homes arose from, resulted from, or was connected with Bickley's work.

The duty to defend under an indemnity provision in a construction contract should not be interpreted with the context of insurance principles. *George Sollitt Corp. v. Howard Chapman Plumbing & Heating, Inc.*, 67 Wn. App. 468, 472, 836 P.2d 851 (1992). The duty to defend is determined by the facts known at the time of the tender of the duty to defend. *Id.*; *See also Parks v. Western Wash. Fair Ass'n.*, 15 Wn. App. 852, 855, 553 P.2d 459 (1976).

Washington courts have long held that the “facts at the time of the tender of defense must demonstrate that liability would eventually fall upon the indemnitor, thereby placing it under a duty to defend.” *Sollitt*, 67 Wn. App. at 472; *see also Dixon v. Fiat-Roosevelt Motors, Inc.*, 8 Wn. App. 689, 693-94, 509 P.2d 86 (1973).

Harbour Homes argues that its tender of defense accrued before the expiration of the statute of repose when it filed its amended complaint on

November 15, 2007. Harbour Homes re-alleged generally the homeowners' allegations. CP 562.

The amended complaint, however, fails to identify specific construction defects asserted by the homeowners that could implicate Bickley's scope of work, despite attaching the homeowner's complaint. The amended complaint did not specify how Bickley's work was allegedly defective. It did not explain or document the alleged causal connection between Bickley's work and the alleged defects by the homeowners. In fact, the amended complaint against Bickley stated at paragraph 24 that Harbour Homes denies the allegations of the homeowners' complaint. CP 560.

Harbour Homes categorically implicated Bickley's entire scope of work as a potential basis for liability. The mere potential for liability to fall upon Bickley does not trigger a duty to defend. Bickley vigorously opposed Harbour Homes's claims that its work was defective. Harbour Homes has to show facts to suggest that Bickley will be liable in order to trigger the duty to defend. This is a condition precedent that has not yet occurred.

Harbour Homes's claim under a duty to defend failed to accrue before the statute of repose expired. As discussed above, the mere potential for liability does not cause the duty to defend to accrue. The last

home at issue worked on by Bickley achieved substantial completion for purposes of the statute of repose on October 11, 2002. CP 606. To avoid its claims from being barred by the statute of repose, Harbour Homes's claim had to accrue by October 11, 2008. Harbour Homes did not pay and Harbour Homes was not found liable to any third-party on or before this date. Its claim against Bickley must be dismissed.

F. THERE IS NO BASIS FOR AN AWARD OF ATTORNEY FEES TO APPELLANT PURSUANT TO RAP 18.1.

The appellant's attorney fees request is not supported by law, as there is no contract, applicable statute, or recognized ground in equity serving as the basis for such an award. *Public Utility Dist. No. 1 v. Kottsick*, 86 Wn.2d 388, 389, 545 P.2d 1 (1976). Consequently there is no basis for an award of fees to appellant pursuant to RAP 18.1.

V. CONCLUSION

The trial court properly granted summary judgment. This Court should affirm.

DATED this 28th day of January, 2010.

REED McCLURE



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

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

Appellant,

vs.

AMERICA 1ST ROOFING &
BUILDERS, INC., a Washington
corporation; ANTHONY'S HOMES,
INC., a Washington corporation;
BICKLEY CONSTRUCTION, INC.,
a Washington corporation,

Respondents,

vs.

BUMSTEAD CONSTRUCTION, a
sole proprietorship; SCOTT A.
BUMSTEAD and "JANE DOE"
BUMSTEAD, individually and the
marital community comprised thereof;
CEDAR KING LUMBER CO., INC.,
a Washington corporation and
successor in interest to
TOWNSEND/WRAY, INC.;
TOWNSEND/WRAY, INC., a
Washington dissolved corporation;
CREERY CONTRACTING, a sole
proprietorship; MICHAEL L.
CREERY and "JANE DOE"
CREERY, individually and the
marital community comprised thereof;
FRAME-IT-UP! CONST. LLC, a
Washington limited liability company,
GRIZZ CONSTRUCTION a/k/a

No. 64256-1-I

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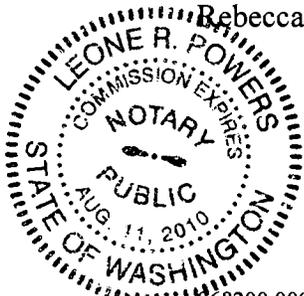
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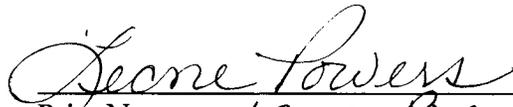


Rebecca C. Barrett

SIGNED AND SWORN to before me on January 28, 2010 by

Rebecca C. Barrett.





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Notary Public Residing at Sp. Co., WA
My appointment expires: 8/11/2010

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