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No. 65139-1-I

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. and HERRICK STEEL, INC.,

Cross-Respondents.

[CORRECTED]
BRIEF OF CROSS-RESPONDENT LONG PAINTING, INC.

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DIVISION I

ORIGINAL

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I. INTRODUCTION

This is the second appeal in the rather tortured procedural history of this case. Unfortunately, largely due to the main parties' various misapplications of the Supreme Court's holding on the first appeal and wildly inconsistent positions taken by respondent/third party appellant Huber, Hunt & Nichols-Kiewit Construction Joint Venture, *et al.* ("HK"), the issues seem to have become more complex and more confused the second time around. However, the Supreme Court's actual holding on the prior appeal decided a single discrete issue, i.e., that the "action" brought by the owner of Safeco Field, the Washington State Major League Baseball Stadium Public Facilities District ("PFD") "*qualifies* under the 'for the benefit of the state' exemption to the six year contract statute of limitations in RCW 4.16.160." *See Washington State Major League Baseball Stadium Public Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 165 Wn.2d 679, 695, 202 P.3d 924 (2009) (Emphasis added). The Supreme Court did not hold that the Baseball Club of Seattle ("the Mariners") qualified for the exemption. Given the narrow holding on the prior appeal, it has little effect on Long Painting other than to engender ever more strained arguments by HK. On the present appeal, both the law

and the facts of record clearly establish that HK's third party claims against Long Painting were properly dismissed on summary judgment as time barred. This Court should affirm that ruling.

Similar to the first appeal, here HK asserts only a "conditional" cross-appeal against cross-respondent Long Painting Company ("Long Painting") that, "[i]f the trial court erred in dismissing the Mariners' cause of action against Hunt Kiewit, then the trial court likewise erred in dismissing Hunt Kiewit's third party claims against Long Painting." HK brief at 5. That does not follow and is not true. There is simply no basis on the complete record now before this Court to tie the fate of Long Painting to that of HK. They are different entities with different issues and different counsel.

For example, litigation strategies pursued by HK in this case are not binding on Long Painting. So if this Court were to hold HK estopped from asserting application of the statute of repose as a bar to the PFD's and Mariner's claims because HK took the position in the prior appeal that the statute of repose did *not* apply, that procedural bar against HK would not work an estoppel against Long Painting (or Herrick Steel) asserting the

statute of repose against HK.¹ Long Painting, in fact, did assert in the earlier appeal that HK's third party claims were barred by application of RCW 4.16.326(1)(g) because they did not accrue, if at all, until after the statute's effective date in 2003 and were not filed within the contract statute of limitations.² Otherwise, RCW 4.16.326(1)(g) would not apply, since it is not retroactive to causes of action that accrued prior to its effective date of July 27, 2003. *See 1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 146 P.3d 423 (2006); RCW 4.16.326 (2003 c 80 §1, eff. July 27, 2003). Thus, Long Painting does not stand in

¹ Long Painting will not belabor those issues, as briefing by the Mariners, both in their opening brief and reply, sufficiently apprises the Court of the multiple contrary positions taken by HK in this case. It should suffice to note that Long Painting is not bound by the litigation strategies and tactics of HK, which is an adverse party. So any estoppel against HK's assertion of inconsistent positions in this case is strictly limited to HK.

² RCW 4.16.326(1)(g) provides:(1) 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 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.

the procedural shoes of HK any more than it stands in HK's shoes on the merits – which is, to say, not at all.

Because there is no dispute that HK had no notice of any issue with Long Painting's work within six years of substantial completion and HK sued Long Painting over six years after the date of substantial completion, HK's claims against Long Painting are time-barred by operation of RCW 4.16.310 and/or RCW 4.16.040 and/or RCW 4.16.326(1)(g). None of HK's claims accrued within the statute of repose and, even assuming for the sake of argument that some did, those claims are barred by the statute of limitations. 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, although HK asserts a “conditional assignment of error” only if the Mariners prevail on their appeal.

III. STATEMENT OF THE CASE

A. The Construction of Safeco Field and Application of Apparently Incompatible Coatings.

This case was brought by the Mariners as the assignee of the PFD. CP 4, ¶2. The PFD contracted with HK acting as the general contractor to construct the stadium now known as Safeco Field, and with NBBJ architects, the designer of the stadium, acting as the owner's representative and administrator of the contract. *See* CP 38; CP 115-17, Art. 4. It is undisputed that Long Painting was a subcontractor retained by HK on the construction of Safeco Field. HK brief at 5; CP 520-21. It is not alleged, and there is no evidence in the record, that Long Painting had any contractual relationship with the PFD or the Mariners.

Long Painting was retained by HK to apply intumescent fire protection to structural steel at Safeco Field. CP 556-57. Intumescent fire protection is sprayed on to the structural steel members much like paint. CP 604-07. In the event of fire, the heat causes the intumescent coating to expand and insulate the structural steel against the heat of the fire. The expanded coating protects the steel for a rated period of time so that the structural integrity of the building is not compromised, at least for the rated period of time. The fire rating of the coating, i.e., 1 hour, 2 hour, etc., is generally measured by the thickness of the application. A thicker application results in a longer fire rating.

Long Painting's scope of work did not include either the choice of primer or its application. CP 556-57. The contract between the PFD and HK included a specification providing that HK could choose from several approved "zinc-rich" primers and several brands of intumescent fire protection to apply to the structural steel at Safeco Field. HK chose an approved primer by Wasser called MC-Zinc, which was applied by Herrick Steel and/or a subcontractor of Herrick, and an approved intumescent fire protection, Firefilm II, which was applied by Long Painting.

Application of the Wasser MC-Zinc generally was allowed by the original design documents. *See* CP 1606 at Sec. 2.2.B. However, on October 21, 1997, in a meeting on "paint issues," it was acknowledged that "[t]he compatibility of the intumescent paint to the Wasser MC Zinc is unknown." CP 1633. The project architect, Ralph Belton of NBBJ, "said that a CP [a Change Proposal] was to be issued expanding the scope of intumescent paint," and he was tasked with researching and responding to the compatibility issue. *See id.*

It remains unclear what Mr. Belton found out, if anything, but he stated in a declaration submitted by the Mariners in this case that he

changed the project specification on October 21, 1997 – the very same day as the above-referenced meeting – to require a Tnemec brand polyamide epoxy primer and drop the Wasser MC-Zinc entirely. CP 963 ¶¶5-7; CP 972-78. This was allegedly done through a “Change Proposal,” CP 126. *See id.* CP 126 was copied to the PFD and the Mariners. CP 972.

However, the reason given for CP 126 was simply to address the additional areas to receive intumescent fireproofing and, outside of the revised specification itself, primer is never mentioned. *See* CP 972-78.

On or about November 2, 1997, apparently unaware of CP 126 or perhaps because it was still only a “proposal,” Herrick submitted a Request for Information (“RFI”) to the PFD and HK questioning application of the MC-Zinc in areas to receive the intumescent fireproofing because the original design specifications stated “no paint” in those areas. CP 1621; *see* CP 1612-13; CP 1615-17; CP 1620. HK’s response to Herrick on or about November 3, 1997, was clear and unequivocal: “The polyamide epoxy primer is not with in (sic) Herricks (sic) scope of work. The areas of intumescent paint will be painted by Herrick with the approved Wasser primer per CP 126.” CP 1621.

This directive came from Jim Richards of HK even though just a

week before, on October 21, he attended and participated in the meeting on “paint issues” where it was acknowledged that “[t]he compatibility of the intumescent paint to the Wasser MC Zinc is unknown.” CP 1633. Further, the reference to CP 126 was inaccurate, as the direction from HK to Herrick was contrary to the new specification included in CP 126. In fact, the “polyamide epoxy primer” proposed by CP 126 is the same primer HK expressly told Herrick *not* to apply instead of the Wasser MC-Zinc. *See* CP 1621. This may be because CP 126 was only a “proposal” until the owner issued a “change order,” which, for reasons not apparent in the record, HK apparently did not request until June 1998 when it sought payment for the work already done. *See* CP 1080. Certainly, Mr. Richards acted as though the primer specification had not been changed, and Mr. Belton was aware that HK still intended to use the Wasser primer because he was copied on a letter to that effect from Mr. Richards to a representative of The Sherwin-Williams Company – a competing coating supplier – faxed on November 4, 1997, some two weeks after Mr. Belton issued CP 126. *See* CP 1635. In any event, the undisputed facts establish that Herrick did as HK directed, and applied the Wasser MC-Zinc primer in areas to receive the intumescent coating.

For the intumescent fire protection, HK chose a product called Firefilm II, manufactured by Fire Protection Systems (“FPS”). Firefilm was one of three product options provided in the specification documents. CP 967-68. Long Painting and HK entered into a subcontract for application of the intumescent coating on February 12, 1998. CP 521. Almost immediately thereafter – before beginning application of the Firefilm II – Long Painting noticed that the Wasser MC-Zinc was not on the FPS list of approved primers for Firefilm II and contacted FPS to find out if FPS would approve application over the MC-Zinc. CP 515; CP 590. FPS conducted laboratory tests which showed that adhesion of Firefilm II to the MC-Zinc primer was “only fair,” and expressed reluctance to recommend using that combination in the field. CP 593. In accordance with the subcontract, on March 30, 1998, Long Painting provided this information to HK by letter to Chris Willis, and the parties ultimately decided to conduct field testing of the combination in accordance with testing methods provided by FPS. *See* CP 540, §27 (Notice of Conflicting Conditions); CP 592-93; CP 595-99. The results of the field tests, attended by Chris Willis of HK, was an adhesion rating of “4A,” which means that there was “trace peeling or removal along incisions or at their

intersection.” CP 602; *compare* CP 597 §7.7. Nevertheless, no changes were made by HK to either the primer or the coating, and Long Painting was directed to proceed with the application. CP 516 ¶6.³

An additional problem during construction was the Firefilm II intumescent coating’s application in areas with exposure to rain and water. CP 516-17, CP 609-26. The coating itself is water-based and is recommended *only* for interior applications, which do not include covered areas that are still open to the outside, such as retractable-roofed stadiums. *See* CP 604. While this issue is somewhat ameliorated with application of the final top coat of paint, the intumescent coating was repeatedly damaged by water during construction, requiring its re-application by Long

³ It should be noted that, having given notice to HK of a conflicting condition affecting the Work under its subcontract, Long Painting did *not* accept the surface condition of the structural steel primed with the Wasser MC-Zinc when it applied the intumescent coating at HK’s direction; HK accepted it. *E.g.*, CP 540, §27; CP 106, §3.3.4. Under the *Spearin Doctrine*, Long Painting was entitled to rely on the conformity of its work with the plans and specifications existing at the time it did the work. That those specifications may have been inherently flawed was not Long Painting’s responsibility, particularly when it pointed out the problem to HK before doing the work. *See U.S. v. Spearin*, 248 U.S. 132, 39 S.Ct. 59 (1918); *Armstrong Const. Co. v. Thompson*, 64 Wn.2d 191, 196 (1964) (holding “the owner impliedly warrants to the builder that the plans and specifications furnished to the builder are workable and sufficient.”); *See also*, CP 1482-85 (discussion in Herrick MSJ). Long Painting pled this in its Ninth Affirmative Defense. CP 2192. Thus, this Court can affirm the trial court for this additional independent reason supported in the record.

Painting. *See* CP 609-13. Obviously, HK knew that exposure to water was a problem because it was paying Long Painting to do the re-work. *See id.* In addition, multiple representatives of both HK and the PFD were present at an April 29, 1998, meeting in which Kurt Shelley of Long Painting warned that there was already water damage to the fireproofing and that it would continue to be a problem if something was not done. CP 1640, item 45-3.

Finally, as HK was aware, the intumescent coating was very soft for several weeks until it was completely cured, and there were issues during construction with overlapping work – or simply careless subtrades – causing damage to the intumescent coating. *See* CP 615-26. Given all this, one might wonder why HK proceeded with the application as it did, with or without the approval of the PFD and Mariners. The answer, simply put, was money.

Time was of the essence in completing the stadium before the first home game of the Mariners 1999 season; consequently the parties set an aggressive construction schedule to reach substantial completion by March 1, 1999. CP 42, §§4.2 - 4.7. However, predictably in a large and complex project such as Safeco Field, the initial schedule slipped, and the

undisputed date of substantial completion of Safeco Field was established as July 1, 1999. CP 1472-73. HK's contract with the PFD contains fairly substantial liquidated damages for failure to reach substantial completion in time for the first home game in 1999. *See* CP 144-45, §§ 9.10.5.1-9.10.5.4. This, more than anything else, explains why HK did not elect to apply another coat of a different, compatible, primer – commonly referred to as a “tie coat” – before application of the Firefilm II. Re-priming all the structural steel members at the stadium obviously would have significantly delayed completion, and resulted in significant contractual penalties to HK. *See id.*

B. Prior Procedural History of the Case.

The Mariners allegedly first noticed blisters in the intumescent fire protection in February 2005. CP 6 ¶ 16; CP 217-18. They allegedly conducted an investigation and repairs to the alleged blistering shortly thereafter. CP 6 ¶ 17. Yet, the PFD and Mariners waited almost a year before notifying HK of an issue with the coating in January 2006, and HK notified Long Painting of the issue by letter dated February 20, 2006. CP 628. The Mariners, as assignee of the PFD, 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 – misnamed “Long Painting, Inc.”– and Herrick Steel, Inc. CP 9-15.

Long Painting filed its answer and affirmative defenses to HK’s claims on December 1, 2006. CP 2189-2193. 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 2191. In its answer to HK’s second amended answer and third party complaint, Long Painting pled RCW 4.16.326(1)(g) as an additional affirmative defense. CP 2198.

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 PFD and Mariners appealed.

On appeal, the Washington Supreme Court took direct review pursuant to RAP 4.4. While both the PFD and Mariners on the one hand and HK on the other seek to stretch the Court’s holding to fit their current

arguments, the only issue decided by the Washington Supreme Court on review was whether “the action by the PFD and the Mariners against HK regarding construction defects at Safeco Field *qualifies* under the ‘for the benefit of the state’ exception to the six year contract statute of limitations in RCW 4.16.160.” 165 Wn.2d at 694 (Emphasis added). Significant to the present appeal, the Court did not engage in any construction, interpretation, or other analysis of any of the contracts at issue in this case. *See generally, id.*

C. Procedural History After Remand

The procedural history on remand is somewhat convoluted. The Court has already received competing accounts of it from the PFD and Mariners from appellants’ point of view and from HK from the respondent/cross-appellant’s point of view. Long Painting declines to add a third version, except to clarify a couple of points.

First, in arguing the irregularity of the proceedings in the trial court’s action in granting the motions for summary judgment on February 12, 2010, the Mariners repeatedly state that no one was present for Long Painting. This is inaccurate, as Long Painting’s counsel, both Messrs. Martens and Stolle, were present in the courtroom, albeit not at counsel

table. Also, as the record of the hearing reflects, the trial court denied the prior motions for summary judgment brought by Herrick, Long Painting, and HK because Herrick had raised the statute of repose on its first motion only in its reply brief. CP 2222:3-7. The court was only waiting for a renewed motion from Herrick, properly raising the statute of repose, to grant all parties motions for summary judgment dismissal. CP 2221-25. That is exactly what the trial court did, dismissing all claims based on running of the statute of repose. *Id.*

IV. ARGUMENT

In asserting its appeal only in the alternative, HK recognizes that if the Mariners' assigned 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's third party claims are similarly time-barred even if the PFD's assigned claims to the Mariners are not. This result is compelled not only by application of the statute of repose to both the Mariners' claims and HK's third party claims, which the trial court identified as the basis of its ruling at the hearing on Herrick's renewed motion for summary judgment, but also by proper application of the statute of limitations and waiver arguments raised in Long Painting's motion for summary

judgment, along with the statute of repose.

A. The Trial Court Correctly Ruled that HK's Third Party Claims Against Long Painting are Barred by the Statute of Repose.

As the transcript of the summary judgment hearing makes clear, the trial court granted Herrick's, HK's, and Long Painting's separate motions for summary judgment dismissal of all claims asserted against each of them based upon application of the construction statute of repose, RCW 4.16.310. CP 2221:23–2222:11 (The Court: "I think we end up with the statute of repose flowing to everybody, to all – the primary and the sub."). Thus, while it is well-settled that this Court may affirm the trial court on any basis supported in the record, the appropriate place to begin review is with the basis identified by the trial court itself: application of the statute of repose barring all claims. *See id.*

1. The statute of repose applies to all parties.

It cannot be disputed that the construction of Safeco Field is a construction project subject to the six year construction statute of repose. *See* RCW 4.16.310. As provided in RCW 4.16.300:

RCW 4.16.300 through 4.16.320 shall apply to all claims or causes of action of any kind against any person, arising from such person having constructed, altered or

repaired any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property. **This section is specifically intended to benefit persons having performed work for which the persons must be registered or licensed under RCW 18.08.310, 18.27.020, 18.43.040, 18.96.020, or 19.28.041, and shall not apply to claims or causes of action against persons not required to be so registered or licensed.**

(Emphasis added). It is indisputable that Long Painting is an intended beneficiary of the referenced statutes, as a contractor registered as required under RCW 18.27.020, and, by definition, the construction of Safeco Field is an improvement upon real property subject to RCW 4.16.310.

RCW 4.16.310 provides in pertinent 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 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....The limitations prescribed in this section apply to all claims or causes of action as set forth in RCW 4.16.300 brought in the name or for the benefit of the state** which are made or commenced after June 11, 1986.

(Emphasis added). Thus, the absolute bar of the statute of repose applies to all parties regardless of whether their claims are “brought in the name or for the benefit of the state.” *Id.*

In this case, HK does not dispute, and affirmatively asserts, that the statute of repose expired on July 1, 2005, which is six years from the date of substantial completion on July 1, 1999. *See* HK brief pp. 2-3, 6. It is similarly not disputed by HK that the PFD and Mariners first notified HK of any issues regarding the primer and/or intumescent coating failure in January 2006 – some five months after the statute of repose expired. *See* HK brief p. 7, *citing* CP 865. Thus, HK had no notice from the PFD or Mariners of any issues implicating Long Painting’s work at the stadium until well after the date HK itself asserts that the statute of repose expired.

Also, as it candidly admits, HK has no independent claims against

Long Painting. Rather, it simply seeks to “pass down” any liability it may have for the claims of the PFD and Mariners to its subcontractors, including Long Painting. HK brief p. 41; *see also* CP 12-13. Consistent with this, HK asserts fairly typical general contractor pass-through claims, asserting that, to the extent the plaintiff’s allegations are proven true, then the subcontractor who did the work breached its contract with the general (HK) and is responsible for plaintiff’s damages. *See, e.g.*, CP 13 ¶¶39-44. However, inherent in the allegations of the third party complaint is that HK has no pass-through claims until there is a claim to pass through, that is, unless and until it receives at least notice, if not service of a complaint, alleging problems with Long Painting’s work. This, by itself, is sufficient to affirm the trial court’s dismissal of HK’s claims against Long Painting based on running of the statute of repose, RCW 4.16.310.

That the statute of repose bars all of HK’s claims is all the more apparent when each of its three pled contract claims are considered in turn. In its third party complaint, HK asserts three separate third party breach of contract claims against Long Painting: (1) breach of the duty to defend, (2) breach of the duty to indemnify, and (3) breach of the duty to perform the Work in accordance with the contract specifications. *See* CP 12-13.

First, with regard to HK's claim for breach of the duty to defend, the duty to defend could *not* accrue until there was something to defend. Under a private contractual, rather than insurance, duty to defend, "the facts at the time of tender *must demonstrate* that liability would eventually fall upon the indemnitor, thereby placing it under a duty to defend." *George Sollitt Corp. v. Howard Chapman Plumbing & Heating, Inc.*, 67 Wn. App. 468, 472, 836 P.2d 851 (1992) (emphasis added), *quoting Dixon v. Fiat-Roosevelt Motors, Inc.*, 8 Wn. App. 689, 693-94, 509 P.2d 86 (1973). Thus, unlike insurance, in which the insurer's duty to defend arises when the allegations of the complaint, if proved, are *potentially* within the policy's coverage, here the liability of Long Painting *must be demonstrated* before the obligation to defend accrues. *See id.* That simply has not happened in this case, and neither Long Painting's contractual duty to defend, nor HK's claim for breach of the duty to defend ever accrued at all, let alone within the statute of repose.

Second, no claim for indemnity could accrue *before* HK was legally obligated to pay money to the PFD and Mariners on their claims. *See, e.g., Parkridge Associates, Ltd. v. Ledcor Industries, Inc.*, 113 Wn. App. 592, 605, 54 P.3d 225 (2002) ("it is settled law that indemnity

actions accrue when the party seeking indemnity pays or is legally adjudged obligated to pay damages to a third party.”), *quoting Central Washington Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 517, 946 P.3d 760 (1997). Because HK’s claim for contractual indemnity did **not** accrue prior to the running of the construction statute of repose on July 1, 2005 – and, in fact, has never accrued – HK’s claim for contractual indemnity is barred by the statute of repose.

Third and finally, HK asserts a separate claim for breach of contract as follows:

The allegations of the Plaintiffs, if true, constitute a breach of the subcontract by Long [Painting], thereby entitling Hunt Kiewit to recover damages resulting from the breach in an amount to be proven at trial.

CP 13 ¶ 44. This claim did **not** accrue because HK did not have an essential element of the claim, i.e., damages proximately caused by the alleged breach.

When only money damages are at issue, “[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 Independent Forest Manufacturers v. Dept. of Labor and Industries*, 78

Wn. App. 707, 712-13, 899 P.2d 6 (1995), *citing Larson v. Union Invest. & Loan Co.*, 168 Wash. 5, 10 P.2d 557 (1932); *accord Sheldon v. American States Pref. Ins. Co.*, 123 Wn. App. 12, 17, 95 P.3d 391 (2004); *see also, Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 754, 162 P.3d 1153 (2007). Typically, but not always, a claim for breach of contract against a contractor will accrue at the latest when the contractor completes its work. *See, e.g., Harmony at Madrona Park Owners Ass'n v. Madison Harmony Development*, 143 Wn. App. 345, 353-54, 177 P.3d 755 (2008); *Jacob's Meadow*, 139 Wn. App. at 754 (“It is true that, as a general rule, every breach of contract gives rise to a cause of action, even when the aggrieved party has not suffered any actual damage.”), *citing Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 158, 43 P.3d 1223 (2002); *see also, 1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 146 P.3d 423 (2006) (“Usually, a cause of action accrues when the party has a right to apply to a court for relief.”), *citing Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 219, 543 P.2d 338 (1975). But as the court in *Jacob's Meadow* observed, “in suits for damages only, such as that here, a court may dismiss a breach of contract action if damages have not been suffered.” 143 Wn. App. at 754, *citing Ketchum v.*

Albertson Bulb Gardens, Inc., 142 Wash. 134, 252 P. 523 (1927) (“This court has held that, where the action is one for damages only, there being involved no property or personal rights having value in themselves, a failure to prove substantial damages is a failure to prove the substance of the issue, and warrants a judgment of dismissal.”).

As the court in *Jacob’s Meadow* recognized, determining when a cause of action for breach of contract accrues, particularly in a multi-tiered construction defect case, requires a more nuanced approach, which considers the type of relief available for the breach. In the present case, assuming that Long Painting breached its contract with HK by failing to perform its work in accordance with the contract specifications, a warranty claim to “make good” the work would accrue immediately upon breach because the remedy was immediately available. But here, the one year warranty was long expired, there was no warranty claim, and the only remedy available to HK for the claim asserted is money damages. A claim for money damages did not accrue, at the earliest, until HK was sued by the Mariners because that is the earliest that HK could possibly have incurred any actionable harm.

Assume, for example, several years after a project was completed

and all warranties expired, a general contractor came across photographs taken during construction of the project that showed the subcontractor responsible for window installation had installed some of the windows upside down in breach of the construction specifications and the subcontractor's contract with the general. In the meantime, the owner has never noticed the discrepancy. Here, the general has no independent basis for suit against the subcontractor absent a complaint by the owner against the general because the general has suffered no discernable harm from the breach. Now, as an ethical matter, the general might be obliged to notify the owner of the issue, but until the owner asserts a claim for defective work against the general contractor, the general lacks a viable claim against the subcontractor.

In the present case, HK simply seeks to pass through liability for the claims asserted by the PFD and Mariners to Long Painting. It cannot have incurred any damages on these claims prior to – at least – notice from the PFD of a problem with adhesion of the intumescent fireproofing in January 2006, some five months after the statute of repose expired. Accordingly, none of HK's breach of contract claims accrued within the

statute of repose and are now barred by application of RCW 4.16.310.⁴

The trial court order granting Long Painting's motion for summary judgment due to the running of the six year construction statute of repose can and should be affirmed on this basis alone.

B. Even Assuming HK's Breach of Contract Claim Accrued Within the Statute of Repose, It is Barred by the Statute of Limitations Applicable to Actions on a Written Contract, RCW 4.16.040.

As discussed above, the only one of its three breach of contract claims against Long Painting that HK can even arguably assert accrued prior to the running of the statute of repose is its claim for breach of contract for failure to perform its work in conformity with the contract specifications. *See* CP 13, ¶44. As also discussed above, this claim did *not* accrue until the PFD asserted a claim against HK some five months after the statute of repose expired because HK lacked an essential element of a claim – harm. Nevertheless, assuming *arguendo* that the claim did accrue prior to expiration of the statute of repose, it is barred by the six year statute of limitations, RCW 4.16.040 and/or – assuming accrual after

⁴ To the extent HK argues that its claims against Long Painting are subject to the discovery rule, they are barred by application of RCW 4.16.326(1)(g), which applies to all actions arising from construction accruing after its effective date of July 27, 2003.

July 27, 2003 – RCW 4.16.326(1)(g).

It is elementary that breach of a duty to perform work in accordance with contract specifications *occurs* when the work is actually performed. If the Court holds that HK's cause of action for breach of the duty to perform the work in accordance with the contract specifications fully *accrued* at that time for purposes of the statute of repose, then the claim accrued at the latest by the date of substantial completion on July 1, 1999. Thus, under this scenario, the six year statute of limitations applicable to HK's claims on the written contract expired on July 1, 2005. The Mariners did not file suit against HK until August 14, 2006, and HK did not file its answer and third party claims against Long Painting until October 13, 2006. *See* CP 1-9. Thus, even if HK's third party complaint were allowed to relate back to the date the Mariners filed the initial complaint in the action, it would still be over a year after the date the statute of limitations expired. *See id.*; *compare* RCW 4.16.040. Accordingly, as a matter of law the claim is barred by the statute of limitations, RCW 4.16.040, and/or RCW 4.16.326(1)(g).

- C. **The “flow down” provisions of Long Painting’s subcontract with HK do not incorporate an extra-contractual benefit to HK.**

Central to HK's cross-appeal is the argument that, if the PFD and Mariners succeed in obtaining reversal on appeal of the trial court's dismissal of their claims against HK, then the "flow down" provisions of its subcontract with Long Painting require reversal of the order granting Long Painting's motion for summary judgment. *See* HK brief pp. 41-46. This argument is fundamentally flawed and specious on several levels. Simply put, Long Painting is not joined at the hip with HK by the so-called "flow down" provisions relied upon by HK in Section 11 of the subcontract.

The provisions at issue cannot reasonably be interpreted to create the potentially perpetual obligation to HK that it advocates.

1. HK misinterprets the applicable flow down provisions.

The first provision relied upon by HK provides as follows:

(e) the Subcontractor warrants and guarantees the Work covered by this Subcontract and agrees to make good, at its own expense, any defect in materials or workmanship which may occur or develop *prior to the Contractor's release from responsibility to the Owner* therefore;

HK brief p. 42, *quoting* CP 525 and CP 1804 (Emphasis added by HK).

HK argues that this provision means that Long Painting is potentially

liable to HK for as long as HK is potentially liable to the owner or until HK obtains a “release from responsibility.” *See, e.g.*, HK brief pp. 43-44. This argument has no basis in the contracts at issue or in the law.

First, Section 11(e) of the subcontract is superceded by Section 14 of the Subcontract Supplementary Conditions. *See* CP 536. Section 14 is considerably longer, but provides in pertinent part:

Subcontractor agrees to make good on any warranty for the term of this Agreement plus one year thereafter, or for a period coextensive with any warranty from Contractor to Owner, whichever is longer...

CP 536. As the Supplementary Conditions provide: “To the extent that the Supplementary Conditions conflict with the Form of Subcontract, the Supplementary Conditions shall prevail.” CP 528. While HK argues that Section 11(e) is unlimited in time, Section 14 of the Supplemental Conditions is limited to one year. There being an apparent conflict, the one year limited warranty applies, just as HK provided the owner a one year warranty. *Compare* CP 528, *with* CP 152-53.

In Section 12.2.2 of the Prime Contract, HK provides the owner a one year warranty, promising to correct any non-conforming work at its own expense. *See id.* After that, HK is released from its responsibility to

the owner to correct the work. *See id.* As the Prime Contract makes clear, this one year “make good” warranty period “relates only to the specific obligation of the Contractor to correct the work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced.” CP 153 at Sec. 12.2.6. Thus, as the subcontract provision relates only to Long Painting’s agreement to “make good, at its own expense, any defects in materials and workmanship” so long as HK is obligated to do the same, that obligation assumed by Long Painting expired along with expiration of HK’s one year warranty.

The second “flow down” provision relied upon by HK is more general, providing as follows:

(f) the Subcontractor assumes toward the Contractor ***all obligations and responsibilities that the Contractor assumes toward the Owner and others, as set forth in the Prime Contract***, insofar as applicable, generally or specifically, to the Subcontractor’s Work.

HK brief p. 42, *quoting* CP 525, §11(f)(Emphasis added by HK). Relying on an Alaska supreme court case, HK argues that “[f]low down provisions such as those found in the Subcontracts are standard in the construction

industry.” HK brief p. 43, *citing Indus. Indem. Co. v. Wick Const. Co.*, 680 P.2d 1100, 1104 (Alaska 1984). While the presence of flow down provisions is a standard practice, their form and effect can vary widely.

In *Wick*, the primary case relied upon by HK, the flow down provision stated as follows:

So far as the SUBCONTRACT work is concerned, SUBCONTRACTOR shall assume toward the contractor all the obligations and responsibilities which the CONTRACTOR assumed toward the owner, and ***shall be entitled to the privileges and protections granted to the CONTRACTOR by the owner***, by the main contract...

Wick, 680 P.2d at 1103-04 (Emphasis added). It was this last, emphasized, language that the *Wick* court found significant to the issue before it, which was whether the subcontractor could obtain the benefit of a liquidated damages provision in the main contract to limit its liability. As the court held:

Clause (a) of the subcontract confers on Kenai (the subcontractor) all of the “privileges and protections” as against Wick that the prime contract confers on Wick as against ASHA (the owner). The liquidation of delay damages in the prime contract is clearly within the ambit of “privileges and protections” afforded Wick by ASHA.

Wick, 680 P.2d at 1104. Thus, the court in *Wick* required something more than merely an assumption of “obligations and responsibilities” in the subcontract such as in the Long Painting subcontract.

The holding in *Wick* is not unlike that in a Washington case also cited by HK, *3A Indust., Inc. v. Turner Const. Co.*, 71 Wn. App. 407, 869 P.2d 65 (1994). In *3A Industries*, the issue was whether an arbitration provision in the prime contract flowed down to the subcontractor through a subcontract provision, which provided in pertinent part:

With respect to the Work to be performed and furnished by the Subcontractor hereunder, the Subcontractor agrees to be bound to Turner by each and all of the terms and provisions of the General Contract and the other Contract Documents, ***and to assume toward Turner all of the duties, obligations and responsibilities that Turner by those Contract Documents assumes toward the owner, and the Subcontractor further agrees that Turner shall have the same rights and remedies as against the Subcontractor as the Owner under the terms and provisions of the General Contract and the other Contract Documents has against Turner with the same force and effect as though every such duty, obligation, responsibility, right or remedy were set forth herein in full.***

71 Wn. App. at 410 (Emphasis added). Division I of the Court of Appeals found the later highlighted incorporation of “rights and remedies”

dispositive of the issue of the flow down of the arbitration provision of the prime contract. “We hold that 3A’s explicit agreement to afford Turner the same remedies that the State would have against Turner effectively bound 3A to submit to arbitration should Turner demand that forum for dispute resolution.” *Id.* at 418-19.

In reaching its holding, the court in *3A Industries* distinguished cases relied upon by the subcontractor, stating, “in the cases relied upon by 3A, the terms of the subcontract required the subcontractor ‘to assume toward [the contractor] all the obligations and responsibilities that [the contractor], by [the prime contract] assumes toward the Owner.’” 71 Wn. App. at 418, *citing Fanderlik-Locke Co. v. United States for Use of Morgan*, 285 F.2d 939, 942 (10th Cir. 1960) (Subcontract provided that subcontractor was bound to contractor “by the terms of the Agreement, General Conditions, Drawings and Specifications, and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the owner.”), *cert. denied*, 365 U.S. 860, 81 S.Ct. 826, 5 L.Ed.2d 823 (1961); *United States for Use of B’s Co. v. Cleveland Elec. Co.*, 373 F.2d 585, 588 (4th Cir. 1967); *United States for Use of N.U., Inc. v. Gulf Ins. Co.*, 650 F.Supp. 557, 558 (S.D.Fla. 1986) (subcontract stated

that the contractor shall have “the same rights and privileges against the subcontractor as the owner in the general contract had against the contractor”); *H.W. Caldwell & Son, Inc. v. United States for Use and Benefit of John H. Moon & Sons, Inc.*, 407 F.2d 21, 23 (5th Cir. 1969). As the *3A Industries* court quoted the *Caldwell* case,

In the instant case there is no such [disputes] clause but only a general incorporation by reference of the terms of the principal contract. We hold that this refers only to the quality and manner of the subcontractor’s work, not the rights and remedies he may have against the prime contractor.

71 Wn App. at 418, *quoting H.W. Caldwell & Son*, 407 F.2d at 23. The “flow down” provision in *Caldwell* is strikingly similar to that in the present case, stating as follows:

The Subcontractor agrees: (a) to be bound to the Contractor by the terms of the General Contract between the Owner and Contractor, and the General and Special Provisions, Drawing and Specifications, and ***to assume toward the contractor all the obligations and responsibilities that he, by those documents, assumes toward the owner insofar as concerns the subject matter of the agreement.***

407 F.2d at 22-23; *compare* CP 525, §11(f). Side by side comparison of the *Caldwell* flow down provision with §11(f) of the Long Painting

subcontract reveals no discernable difference. *See ids.* Thus, there is no reason to interpret the Long Painting subcontract provision any differently than the Fifth Circuit interpreted essentially the same provision in *Caldwell* some forty years ago, i.e., that it only “refers to the quality and manner of the subcontractor’s work.” 407 F.2d at 23, *quoted in 3A Industries*, 71 Wn. App. at 418.

In the present case, HK argues that, if this Court reverses the order dismissing the PFD’s and the Mariners’ claims and they are allowed to pursue their rights and remedies against HK, then HK should similarly be able to assert its otherwise time-barred claims against Long Painting on the theory that, under the subcontract, “the parties clearly intended that Herrick’s and Long Painting’s liability be coextensive with Hunt Kiewit’s.” HK brief p. 43. The parties intended no such thing. There is simply nothing in the subcontract or in any case before this Court to support such an outlandish assertion, and the analysis in the *3A Industries* case inherently rejects it.

Similarly, Division III has rejected the assertion of broad duties allegedly imposed under a provision similar to the Long Painting subcontract. *See Mountain States Const. Co. v. Tyee Elec., Inc.*, 43 Wn.

App. 542, 545-46, 718 P.3d 823 (1986). In *Mountain States*, the subcontract at issue required the subcontractor to obtain insurance “with coverage equal to, or greater than, the minimum specified in the Main Contract.” 43 Wn. App. at 544. The general contractor sued the subcontractor alleging that the subcontractor had breached its contractual duty to obtain insurance because the subcontractor had not named the general as an additional insured on its insurance, as required of the general to the owner in the main contract. Although conceding the insurance provision in the subcontract was vague and ambiguous, the general pointed to the subcontract’s flow down provision.

Mountain States argues, however, the ambiguity is resolved by language in paragraph A which requires Tyee to assume “toward the Contractor” (Mountain States) all obligations Mountain States owed the City and engineer. It contends this includes the obligation to name Mountain States as an insured. Again, we disagree. If anything, this broad language introduces additional ambiguity. If paragraph A is read literally, the subcontractor is obligated to construct the entire waste water treatment facility and fulfill all terms of the prime contractor’s obligations. It is obvious that neither party intended to effectuate such a result.

Mountain States Const. Co. v. Tyee Elec., Inc., 43 Wn. App. 542, 545-46,

718 P.3d 823 (1986). Again, similar to the provision at issue in this case, the provision at issue in *Mountain States* provided that “the Subcontractor will assume toward the Contractor all obligations and responsibilities which the Contractor has assumed toward the Owner under the Main Contract.” *Id.* at 544.

Logically, and as the body of law interpreting these provisions has held, these general provisions regarding assumption of “obligations and responsibilities” refer to the performance of the subcontractor’s work under the subcontract unless there is some additional reference, such as to rights and remedies, putting the subcontractor on notice of some greater duty being imposed.

It is not controversial to recognize that construction contracts typically have flow down provisions intended to allocate risk, but to accept HK’s assertions concerning the contractual provisions at issue here would turn such construction contracts into a game of blindman’s bluff, in which the subcontractor could never be certain of what it had agreed to in its subcontract. This is not the current law in Washington and must be rejected. *See Berschauer/Phillips Construction Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 826, 881 P.2d 986 (1994) (“it is in this

[construction] industry that we see most clearly the importance of the precise allocation of risk as secured by contract.”)

Even if this Court were to accept the argument that all the Prime Contract provisions flow down to the subcontractors, a party’s immunity from the statute of limitations is not found in the contract, but is an extra-contractual circumstance, which does not “flow down” through the contract to the benefit of HK.

2. Acceptance of HK’s rationale for exempting its claims from operation of the statute of limitations would nullify settled Washington law.

According to HK, the “obligations and responsibilities” agreed to by Long Painting in its subcontract obligated Long Painting to be “liable to Hunt Kiewit to the same extent that Hunt Kiewit is liable to the PFD ... The parties clearly intended that Herrick’s and Long Painting’s liability be *coextensive* with Hunt Kiewit’s.” HK brief, p. 43 (Emphasis added). Once again, the parties intended no such thing. If HK’s position were to prevail, it would apply not only to those cases involving a plaintiff’s immunity from the statute of limitations, but to any and all actions timely filed by the plaintiff regardless of the plaintiff’s immunity, contrary to many years of settled Washington law. The courts of the State of Washington have never

held that the flow down provisions of the Prime Contract prevent the subcontractors from taking advantage of the statutes of repose and/or limitations to limit their liability on owners' claims that general contractors seek to pass through to their subcontractors. In fact, there is considerable binding authority to the contrary. *See Harmony at Madrona Park Owners Ass'n v. Madison Harmony Development*, 143 Wn. App. 345, 353-54, 177 P.3d 755 (2008) (holding some of general contractors' third party breach of contract claims against subcontractor barred by statute of limitations); *Serrano on California Condo. Homeowners Ass'n v. First Pacific Development, Ltd.*, 143 Wn. App. 521, 525, 178 P.3d 1059 (2008) (holding general contractor's fourth party claims against subcontractor barred by statute of limitations because brought more than three years after dissolution of subcontractor); *Parkridge Associates, Ltd. v. Ledcor Indus., Inc.*, 113 Wn. App. 592, 54 P.3d 225 (2002); *1515-1519 Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corp.*, 101 Wn. App. 923, 6 P.3d 74 (2000).⁵

⁵ Long Painting notes that, taking HK's argument to its logical legal conclusion also implicates the limitations period for actions against dissolved or cancelled business entities, which would be found to have waived or be estopped from asserting them based on the standard flow down provisions in their contracts. This, too, would violate the statutory scheme established by the legislature. *See, e.g., Chadwick Farms Owners*

Nor is the result advocated by HK supported by the out of state authority upon which it relies. In support of its argument that the flow down provisions of the subcontract require this Court to find that HK is exempt from the statute of limitations for its claims against Long Painting to the same extent that the PFD is exempt for claims against HK, HK cites two non-Washington cases. See HK brief, pp. 44-46, citing *Martin County v. R.K. Stewart & Son, Inc.*, 306 S.E.2d 118 (N.C.App. 1983), and *Peninsula Methodist Homes and Hospitals, Inc. v. Architects Studio, Inc.*, Cause No. C.A. 83C-AU-118, 1985 WL 634831 (Del.Super. 1985). Neither case is persuasive.

HK relies primarily upon the *R.K. Stewart* case, arguing that the “*Stewart* Court’s (sic) holding is persuasive, and closely mirrors the legal issues present here.” HK brief, p. 45. Yet, the facts show otherwise. Like the subcontract provisions at issue in *Wick* and *3A Industries*, the subcontract provision at issue in *Stewart* included more than just an assumption of “obligations and responsibilities.” CP 525. Rather, the subcontract in *R.K. Stewart* provided, not only that the subcontractor

Ass’n v. FHC, LLC, 166 Wn.2d 178, 186-202, 207 P.3d 1251 (2009) (rejecting equitable arguments that application of statute limiting action against cancelled LLC was “unfair,” and stating “it is not the province of this court to rewrite [the statute at issue]”).

“shall assume toward the Contractor all the obligations and responsibilities which the Contractor, by those Documents, assumes toward the owner,” but also that the subcontractor “shall have the *benefit of all rights, remedies and redress* against the Contractor which the Contractor, by those Documents, has against the Owner.” 306 S.E.2d at 119. Again, that additional language flowing down “all rights, remedies and redress” does not exist in the Long Painting subcontract, as to one degree or another it does in the subcontracts at issue in *Wick* and *3A Industries*. See, e.g., *3A Industries*, 71 Wn. App. at 410 (applying additional “rights and remedies” language); *Wick*, 680 P.2d at 1103-04 (applying additional “privileges and protections” language).

HK’s second non-Washington case contains little information for analysis.⁶ On its face, the case quotes language similar to the Long Painting subcontract at issue here. See *Peninsula Methodist*, 1985 WL 634831, *5. However, the case is governed by Delaware law, which is

⁶ It is unclear whether HK’s second non-Washington “authority” is actually properly cited to this Court, as it indicates that it is an unpublished opinion and the court rules should be checked prior to citation. *Peninsula Methodist Homes and Hospitals, Inc. v. Architects Studio, Inc.*, Cause No. C.A. 83C-AU-118, 1985 WL 634831 (Del.Super. 1985). Nevertheless, as the case has been put before the Court, out of an abundance of caution, Long Painting will address it and leave to the Court whether to consider it.

very different from the law of Washington, not least in the continued recognition of “seals” as exempting particular contract actions from certain otherwise applicable statutes of limitations. However, most pertinent here is the procedural posture of the *Peninsula Methodist* case compared to the case at bar.

In this case, HK is arguing for a contractual flow down of immunity from the statute of limitations predicated on the PFD’s immunity. That is not the issue in *Peninsula Methodist*. In that case, the plaintiff, Peninsula Methodist Homes and Hospitals (“PUMH”) brought a third party beneficiary action directly against the roofing subcontractor of its general contractor. *See id.* *5 (“PUMH’s rights against Sutton spring from the Sutton-Murry contract.”). Also, in Delaware, a contract under seal has a twenty year statute of limitations. *See id.* *2 (“under common law the breach of a contract under seal is actionable for twenty years”). So not only was there no sovereign immunity issue, there was no immunity issue at all, as there was still a twenty year “limitation period governing the Murry-PUMH contract.” *Id.* *5. Thus, *Peninsula Methodist* – a superior court decision – is simply inapplicable to the facts, circumstances, and law of this case.

In sum, HK's two non-Washington cases provide this Court with no sound reason to hold that HK is entitled to immunity from the running of the statute of limitations on its third party claims predicated on the flow down provisions of the Long Painting subcontract. As this Court is well aware, general contractors' third party claims are dismissed as untimely on a regular basis in Washington courts – whether due to the statute of repose or statutes of limitations – contractual flow down provisions similar to those in the Long Painting subcontract notwithstanding. There exists no sound basis in law or equity to abrogate the holdings of those cases and strip those statutory protections from subcontractors based solely upon whether the *plaintiff's* claims against the defendant general contractor are considered timely. It would, in fact, violate the public policy of the State of Washington as established in the statutory protections enacted by the Legislature. So even if the non-Washington authorities relied upon by HK were on point to the issue here, their holdings should be rejected.

D. Long Painting is Not “Equitably Estopped” from Invoking the Legislatively Enacted Protections of the Statutes of Repose and Limitations.

HK argues that Long Painting's “affirmative defenses relating to the statute of limitations and the statute of repose must be rejected

pursuant to the principles of equitable estoppel.” HK brief, p. 46. This nonsense is predicated on the same contractual flow down provisions analyzed, in Section C, *supra*, and should be rejected for the same reasons discussed there. *See* HK brief, pp. 47-48.

In addition, Long Painting *never* agreed to give up its limitations defenses. Waiver is “the voluntary and intentional relinquishment of a known right.” *Ives v. Ramsden*, 142 Wn. App. 369, 383, 174 P.3d 1231 (2008), *quoting Lake Wash. Sch. Dist. No. 414 v. Mobile Modules NW, Inc.*, 28 Wn. App. 58, 61, 621 P.2d 791 (1982). Waiver will not be found, “absent conduct inconsistent with any other intention but to forego that right.” *Id.*, *quoting Shoreline Sch. Dist. No. 412 v. Shoreline Ass’n of Edu. Office Employees*, 29 Wn. App. 956, 958, 631 P.2d 996 (1981). There is nothing in the contract documents evidencing that Long Painting intended to relinquish its right to benefit from either the construction statute of repose or the statute of limitations.

With regard to estoppel, Long Painting *never* took the position that neither the construction statute of repose or the statute of limitations would apply to claims against it, nor did HK rely upon any such imaginary representation. Given that HK filed two motions for summary judgment

asserting these very same defenses against plaintiffs, the assertion of reliance here is frivolous on its face.

Moreover, it is well-settled that “state law becomes as much a part of the contract as if the applicable statutes were actually written into it.” *Escrow Service Co. v. Cressler*, 59 Wn.2d 38, 43, 365 P.2d 760 (1961); *see Bremerton Central Lions Club, Inc. v. Manke Lumber Co.*, 25 Wn. App. 1, 6, 604 P.2d 1325 (1979). This necessarily includes the construction statute of repose and the statute of limitations. If HK wanted to write application of those statutes out of the contract – assuming that doing so would not be void as against public policy – it had to do so in clear and unequivocal terms. It undeniably did not, and cannot now claim a waiver or estoppel against Long Painting simply because HK finds itself in a position it apparently did not foresee with the PFD and Mariners.

E. HK Does Not Bring Its Third Party Claims “For the Benefit of the State.”

HK’s final argument is that, like the PFD, it also qualifies under the “for the benefit of the state” exception under RCW 4.16.160 because “Hunt Kiewit seeks the return of money that properly belongs to the State, from the entities that are ultimately responsible for the PFD’s damages.” HK brief, pp. 49-50. This is total nonsense. So now HK asserts that its

third party claims are for subrogation? Really?

While true that under a subrogation theory, HK would remain the real party in interest on its claims, the fact remains that the PFD has not asserted any right to subrogation against Long Painting. Rather, the PFD, through its assignee, the Mariners, has elected to seek its contract remedies directly against HK. Thus, the reality of the situation is that HK simply seeks contractual indemnity from Long Painting for any money it pays out to the PFD on its claims, just as HK pleads in its third party complaint. Seeking indemnification from a subcontractor does not convert HK's third party action into one "for the benefit of the state." Accordingly, this basis for HK asserting that it "is entitled to the exemption from the statute of limitations contained in RCW 4.16.160" must be rejected.

F. Article 13.7 of the Prime Contract Waives Any Immunity from Operation of the Statute of Limitations.

If the Court agrees with Long Painting that the flow down provisions of the subcontract did not incorporate all the provisions, terms, conditions, duties, rights, remedies, and immunities, etc., of the Prime Contract, the Court need not analyze Article 13.7 of the Prime Contract with regard to HK's cross-appeal. However, should the Court reach this issue on the cross-appeal, it should find that HK waived any claim of

immunity from the statute of limitations in Article 13.7.

The PFD's status that it "qualifies" under the "for the benefit of the state" exception to the applicable statute of limitations is not the end of the analysis, but the beginning. The Supreme Court went no further in the first appeal because neither the Mariners nor HK went beyond that issue. But on the present appeal, Long Painting did raise the issue of whether, notwithstanding that the PFD "qualifies" for the exemption, it nevertheless waived it under Article 13.7 of the Prime Contract. *See* CP 637 fn. 2, *and compare with* CP 156.

The state or any other governmental entity that qualifies under the "for the benefit of the state" exception to the statute of limitations can waive it by contract. *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). To assert otherwise would be to ask this Court to improperly render mutually negotiated terms of a valid contract – "the applicable statute of limitations shall commence to run" – 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).

The parties to the Prime Contract could have simply stated when causes of action would accrue and left it at that, but they did not. They also stated that, once accrued, “any applicable statute of limitations shall commence to run...” CP 156. They cannot delete that language now, and for the Court to ignore that language would be error. *E.g., Wagner*, 95 Wn.2d at 101. The issue of waiver was not addressed in the Supreme Court’s opinion issued on the prior appeal in this case, apparently because it had not been briefed to the trial court on summary judgment. Well, this time it has been briefed to the trial court and is properly before this Court on appeal. So if the Court reaches the issue of HK also “qualifying” for immunity from the statute of limitations, it should hold that HK waived any such immunity in Article 13.7 of the Prime Contract.⁷

⁷ Long Painting notes that HK has never asserted that the PFD waived immunity from the statute of limitations under Article 13.7. While that argument may have been waived by HK as to the PFD, it has not been waived by Long Painting as to HK’s third party claims. Again, contrary to the arguments of HK, Long Painting is not bound by the litigation strategy and tactics of HK and has not waived its defenses pursuant to any non-existent “co-extensive liability,” nor is it estopped from asserting them on an legal or equitable basis whatsoever.

Article 13.7 of the Prime Contract repeatedly and unequivocally states that “**any applicable statute of limitations shall commence to run...**” upon the date of a specific event. CP 156. As even the Mariners agree, the purpose of Article 13.7 is to “eliminate the discovery rule by providing that *the statute of limitations begins* on the date of a contractually specified occurrence.” Mariners’ brief, p. 33, fn. 8, *quoting* Commentary on AIA Document A201-1997 (Emphasis added). Thus, the entire purpose of Article 13.7 is to commence the statute of limitations running from a date certain, as established by a specific event.

The Mariners attempt to wiggle around this inconvenient truth by entirely ignoring the “statute of limitations shall commence to run” language in the contract and arguing that the Supreme Court held “that no statute of limitations applied to the PFD’s and Mariners’ claims.” Mariners’ Opening brief, p. 8. This is wrong because (1) the court must give effect to each provision in the contract and (2) the Supreme Court did not hold that no statute of limitations applied to the PFD’s and Mariner’s claims, but that the PFD “qualifies” under the “for the benefit of the state” *exception* to the applicable statute of limitations. 165 Wn.2d at 694. Thus, contractual waiver of any immunity for which the PFD, Mariners, or

HK might “qualify” is a live issue on remand and the present appeal.

Because the only reasonable interpretation of Article 13.7 of the Prime Contract is that it eliminated the discovery rule for the express purpose of commencing the statute of limitations applicable to any and all accrued causes of action, this Court should find that, if the flow down provisions of Long Painting’s subcontract incorporated this provision, HK waived any immunity from the statute of limitations therein.

CONCLUSION

This case arises from two fundamental errors by HK, first directing Herrick to apply the Wasser MC-Zinc primer in areas to receive the intumescent fire protection without confirming whether changes to the specifications in CP 126 applied, then overruling Long Painting’s concerns about applying the intumescent coating over the apparently incompatible Wasser MC-Zinc primer. Now HK argues that Long Painting has “co-extensive liability” for HK’s errors through flow down provisions in Long Painting’s subcontract. HK’s arguments on appeal are not supported by any basis in law or equity. The trial court order granting Long Painting’s motion for summary judgment should be affirmed whether on the statute of repose or the other independent bases supported by the record.

RESPECTFULLY SUBMITTED this 19th day of January 2011.

Martens + Associates | P.S.

A handwritten signature in black ink, appearing to be 'R. Martens', written over a horizontal line.

By _____
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Long Painting, Inc., whose true name is
Long Painting Company

CERTIFICATE OF SERVICE

I certify that on the day and date indicated below, I filed and served the foregoing on behalf of Cross-Respondent Long Painting, Inc., whose true name is Long Painting Company on the following counsel as indicated below.

<p>Counsel for Appellants John Parnass, Esq. Zachary Tomlinson, Esq. Davis Wright Tremaine LLP 1201 Third Avenue, Suite 2200 Seattle, Washington 98101</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Telefax <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> E-mail with Recipient's Approval</p>
<p>Counsel for Respondents/Cross-Appellants Huber, Hunt & Nichols-Kiewit Construction; Hunt Construction Group, Inc.; and Kiewit Construction Company David C. Groff, Esq. Michael Grace, Esq. Groff Murphy PLLC 300 E. Pine Street Seattle, Washington 98122</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Telefax <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> E-mail with Recipient's Approval</p>
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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 19th day of January, 2011 at Seattle, Washington.

A handwritten signature in black ink, appearing to read 'Leehwa', is written over a horizontal line.

Leehwa McFadden

Paralegal for Martens + Associates | P.S.