IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CLASEN FRUIT & COLD STORAGE, INC., a Washington corporation,	)	**No. 29102-2-III**
Respondent,	)	
v.	)	**Division Three**
FREDERICK & MICHAEL CONSTRUCTION CO., INC., a Washington corporation,	)	
Petitioner.	)	**UNPUBLISHED OPINION**

Sweeney, J. — Washington's version of the statute of repose for construction projects prohibits prosecution of a suit for faulty design and construction more than six years after the date of substantial completion or termination of services, whichever is later. The owner here sued the contractor for faulty design and workmanship more than six years after both the date of substantial completion and the last time the contractor provided any project specific services. We conclude that the contractor was entitled to summary dismissal of the suit and we reverse the trial court's denial of the contractor's

motion for summary judgment.

FACTS

In 1997, Clasen Fruit & Cold Storage, Inc., contracted with Frederick & Michael Construction Co., Inc., (F&M) to build a commercial fruit processing facility in Union Gap, Washington. F&M agreed in writing to construct, and did construct, several buildings, including those referred to as Building C, Building D, and Building E. The project was substantially completed in late 1997. Yakima County issued a certificate of occupancy in March 1999.

In 2001, wind damaged the roof of Building C. Clasen informed F&M and requested repairs. F&M directed Continuous Gutter Co., Inc., to make the necessary repairs. Continuous Gutter had been a subcontractor on the original project. And Continuous Gutter repaired the roof on Building C. The next year, 2002, F&M coordinated unrelated repairs for fire damage to Building C. Clasen paid for the repair work on both occasions.

In March 2003, wind damaged a section of a canopy connecting Building D with Building E. The canopy covers a walkway that extends between the buildings. Clasen again contacted F&M. F&M repaired the canopy and billed Clasen for that work. Clasen paid for the repairs.

In 2005, wind damaged the roof of Building D. Clasen hired Continuous Gutter to repair the damage. Continuous Gutter did

the work and billed Clasen directly for its services. In 2006, wind damaged the roof of Building C. In May 2006, the roof on Building C collapsed, necessitating a complete re-roofing project of the building. Clasen discovered that the cause of the collapse was the buildup of excessive moisture in the roof's vapor barriers, which eventually delaminated the plywood from underneath and weakened the holding ability of the steel roofing fasteners. Clasen put F&M on notice of its claim of construction defects by letter dated June 30, 2006, and demanded that F&M pay for repair and replacement costs.

In November 2008, Clasen sued F&M for damages for breach of contract and negligent design and construction of the roof. Clasen alleged that the roofs of two buildings failed during storm events, and that "these failures were due to excessive moisture being trapped between vapor barriers in these heated structures." Clerk's Papers (CP) at 4. F&M answered and affirmatively asserted that Washington's statute of repose (RCW 4.16.326(1)(g)) barred any suit.

F&M then moved for judgment on the pleadings pursuant to CR 12(c) and argued that Clasen's claim was barred by the applicable six-year statute of repose and/or limitation. The court denied the motion and directed the parties to complete discovery. Clasen's corporate representative, Dave Robins, stated in a declaration that the canopy repaired by F&M in 2003 was a different area from where the facility sustained wind-related roof damage. Mr. Robins also declared that he contacted Continuous Gutter directly in 2005 and 2006; he did not go

through F&M. Mr. Robins testified, in his deposition, that the 2003 canopy work was the last time F&M performed any services at the Clasen facility. CP at 149.

F&M again moved for summary dismissal this time pursuant to CR 56. F&M again argued that Clasen's claim was time barred by the statute of repose, which F&M had pleaded as an affirmative defense. The court concluded that issues of fact remained as to when F&M last performed services on the Clasen facility and the court refused to dismiss the suit. The court also denied F&M's motion for reconsideration.

F&M moved for discretionary review in this court and argued that the superior court's decision was obvious error that rendered further proceedings useless. Motion for Discretionary Review, *Clasen Fruit & Cold Storage, Inc. v. Frederick & Michael Constr. Co.*, No. 29102-2-III, at 9 (Wash. Ct. App. June 11, 2010). A commissioner of this court agreed and granted discretionary review. Clasen did not move to modify the commissioner's decision. So the matter is before us for review of a trial judge's interlocutory decision to deny a motion for summary judgment.

DISCUSSION

Discretionary Review

Discretionary review is an extraordinary procedure that should only be granted in exceptional cases. *Right-Price Recreation LLC v. Connells Prairie Cmty. Council*, 105 Wn. App. 813, 820, 21 P.3d 1157 (2001); RAP 2.3. Here, the claim is that the judge's decision is "obvious error" that rendered

further proceedings useless. RAP 2.3(a)(1); Motion for Discretionary Review, *Clasen Fruit & Cold Storage, Inc. v. Frederick & Michael Constr. Co.*, No. 29102-2-III, at 9 (Wash. Ct. App. June 11, 2010). Discretionary review anticipates that there is something more than simply that the trial judge got it wrong. Geoffrey Crooks, *Discretionary Review of Trial Court Decisions under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1546-47 (Oct. 1986). We conclude that this appeal does not meet the criteria for discretionary review.

The superior court's ruling did not render further proceedings useless. Indeed, further proceedings might well have proved useful. The trial judge could have revisited his rulings at any number of junctures in the proceeding or the lawyers and their clients, with or without the assistance of a mediator, could have settled the case. The trial process has to be allowed to play out before courts of review step in. *Right-Price Recreation*, 105 Wn. App. at 820. Here, that process was not allowed to play out.

That said, this case has now been pending in the court for almost a year. So we exercise our discretion and address the substantive issues raised. RAP 12.2.

Standard of Review

Summary judgment motions raise questions of law that we generally review de novo. *Parkridge Assocs. Ltd. v. Ledcor Indus., Inc.*, 113 Wn. App. 592, 597-98, 54 P.3d 225 (2002). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with any declarations, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Wm. Dickson Co. v. Pierce County*, 128 Wn. App. 488, 492, 116 P.3d 409 (2005). We view the evidence in the light most favorable to the nonmoving party. *Wm. Dickson Co.*, 128 Wn. App. at 492.

Statute of Repose

The six-year statute of repose imposed by RCW 4.16.310 begins to run from either substantial completion of construction or termination of specific services:

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

RCW 4.16.326(1)(g).

Those services for purposes of the "termination of services" prong include "alteration or repair of any improvement upon real property." RCW 4.16.300. A statute of repose imposes different and more categorical restrictions on a suit than a statute of limitations. *1000 Va. Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 582-84, 146 P.3d 423 (2006). We turn then to the two construction events that start the statute running.

Substantial Completion

"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." RCW 4.16.310. There is no argument here that these buildings were substantially completed and occupied no later than 1997. CP at 4.

Termination of Services

But the statute will also start to run from the date services are terminated. RCW 4.16.326(1)(g). Clasen relies on this second limitation, "termination of services enumerated in RCW 4.16.300" to argue that services continued into 2001, 2003, 2005 and 2006 with F&M's and Continuous Gutter's repair work to the roof and canopy. Clasen contends that the statute of repose was tolled because F&M was "always in control of when the statute of repose would begin to run." Resp't's Br. at 1. Clasen argues that F&M continued to provide services within the meaning of RCW 4.16.326 when it either directly, or through its former subcontractor, repaired wind-related roof and canopy damage. But, even if we accept that argument and include the repairs to roof damage in a limitation calculation, they would still not trigger the "termination of services" clause in this statute of repose for a number of reasons.

First, the earlier repairs were for wind damage; wind damage that on this record does not appear related to the defects that caused the ultimate failure of the roof in May 2006. Second, it is difficult to tie that repair work, no matter what the cause, to the earlier F&M contract for construction of

Clasen's buildings. Clasen does not claim that the later work was warranty work related to problems stemming from the original contract or punch-list-type follow-up work where a contractor cleans up problems and attends to owner complaints related to the original contract. *See Mattingly v. Palmer Ridge Homes*, LLC, 157 Wn. App. 376, 394, 238 P.3d 505 (2010). Indeed, Clasen paid both F&M for the 2003 work and later Continuous Gutter for the 2005 and 2006 wind-damage-related repairs. CP at 192-95. Finally, Clasen did not contact or complain to F&M at all about the 2005 and 2006 repairs. Rather it called, hired, and paid Continuous Gutter directly for that work. And the mere fact that Continuous Gutter worked as a subcontractor for F&M does not keep F&M on the hook, absent some showing that the work was warranty work or in some way in furtherance of the original contract. That showing has not been made here. And, of course, Clasen does not claim that any of Continuous Gutter's later repair work was defective and therefore the proper subject of this suit. The services then at issue for purposes of RCW 4.16.326(1)(g) are the original design and construction of these buildings, not the subsequent repair work.

It is that design and that construction that Clasen alleges caused the failure of these roofs. And the applicable statute is clear and categorical, "[T]he applicable contract statute of limitations expires, regardless of discovery, six years after substantial completion of construction." RCW 4.16.326(1)(g).

The court concluded that Continuous

Gutter's 2003 work raised a genuine issue of material fact as to when the faulty work should have been discovered and refused to dismiss the claim on F&M's motion for summary judgment. CP at 349-50. This was error. The work in 2003 was to a canopy between buildings D and E and did not involve the roofs on buildings C, D, and E. Clasen has not shown that Continuous Gutter's work was part of the original contract. It is repair work that was the product of separate agreements and was paid for as such.

Discovery Rule

Clasen argued in superior court that Washington's version of the so-called discovery rule tolled any limitation period—whether imposed by a statute of repose or a statute of limitations. But it does not urge application of the discovery rule here on appeal. Nonetheless, F&M addresses the contention in its appellate brief. We elect to discuss the question, again, because of the unusual procedural posture of this case.

There are two limitations on suit in play here, a statute of repose that has been interpreted as imposing a categorical prohibition to suit after a period of time, and a statute of limitations that is more nuanced and has been interpreted as accommodating Washington's version of the discovery rule. *1000 Va. Ltd. P'ship*, 158 Wn.2d at 579-87. The legislature eliminated the discovery rule by amendment to RCW 4.16.326 effective July 27, 2003. *Id.* The judicially created discovery rule is nonetheless apparently alive and well here but applies only to toll statute of limitations periods not the more

categorical statute of repose period. *Id.*

RCW 4.16.326(1)(g), then, bars any suit after six years from *substantial completion* or from the *termination of services*, regardless of when the construction defect(s) are discovered. But the discovery rule would toll the applicable statute of limitations (three years on an oral contract, RCW 4.16.080(3); six years on a written contract, RCW 4.16.040) based on when the defect was discovered. *1000 Va. Ltd. P'ship*, 158 Wn.2d at 579-87. Said another way, the discovery rule will not affect/extend the running of the statute of repose in Washington. *Id.* But it will extend the applicable statute of limitations, here six years. *Id.* RCW 4.16.326(1)(g) is "an affirmative defense precluding application of a discovery rule for claims of breach of written construction contracts." *Id.* at 582. So any claim must have both accrued and been filed within six years of substantial completion or termination of services, whichever is later.

Here, construction on the Clasen facility was substantially completed in 1997. Clasen became aware of the construction defects—the claim accrued—in May 2006 when it notified F&M of the defects. CP at 125-26. And again, all relevant services were completed at the latest by 2001. But Clasen did not sue until 2008, some seven years after termination of any roof related services.

Clasen only first complained that F&M's design and construction of the roofs on these buildings was defective in 2006. It really makes no claim that the subsequent repairs for wind damage were defective.

The complaint here is rather over the construction and design of these roofs and, arguably, the canopy. And, if that is the case, we can reach no other conclusion but that those services, the services on which this suit is based, terminated in 1997.

We then reverse the denial of F&M's motion for summary dismissal pursuant to CR 56 and remand with instructions to dismiss the suit.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Kulik, C.J.

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Brown, J.