

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

ASHFORD PARK II OWNERS ASSOCIATION, a)
Washington non-profit corporation,)
Plaintiff,)

NO. 04-2-40938-1 SEA

v.)

WINDSOR CONSTRUCTION)
COMPANY'S MOTION FOR)
SUMMARY JUDGMENT)
DISMISSING CROSS-CLAIMS OF)
RYKLIF VENTURES BECAUSE OF)
THE APPLICATION OF RCW)
4.16.326(1)(g)

RYKLIF VENTURES, a Washington general)
partnership; THE CLIFDEN GROUP, INC., a)
Washington corporation; ADRIAN BLOCK, a)
Washington corporation; WINDSOR)
CONSTRUCTION, a Washington corporation and)
TYKON GROUP, a Canadian corporation,)
Defendants.

WINDSOR CONSTRUCTION, a Washington)
corporation;)
Third-Party Plaintiff

vs.)

A C T CONSTRUCTION, a Washington partnership)
consisting of ANDREW and "JANE DOE" SHEPHERD,)
CHRIS and "JANE DOE" CORMIER, ANTHONY and)
"JANE DOE" SOUCY; STANTON SPRAY, LLC, a)
Washington limited liability company; ALPINE)
WINDOW SYSTEMS/ALSIDE, INC. a Washington)
corporation; CHRISTOPHER T. JOHNSTON and)
"JANE DOE" JOHNSTON D/B/A C J

ORIGINAL

1 INC. a Washington corporation; GRIPENTROG)
 2 CONSTRUCTION, INC. a Washington corporation; JT'S)
 3 CONSTRUCTION, LLC, a Washington limited liability)
 4 company; LOBERG ROOFING COMPANY, INC., a)
 5 Washington corporation; MALONE CONSTRUCTION,)
 6 INC. a Washington corporation; MIDDLETON)
 7 PAINTING, INC. a Washington corporation; MOSS BAY)
 8 DEVELOPMENT, INC. a Washington corporation; P.J.)
 9 RAWLINGS & SONS CONSTRUCTION, LLC, a)
 10 Washington limited liability company; 4-B's)
 11 CONSTRUCTION, a Washington partnership consisting)
 of RICHARD and "JANE DOE" BUTLER, JO ANNE and)
 "JOHN DOE" BUTLER. KELLY L. and "JOHN DOE")
 BUTLER, ROBERT S. and "JANE DOE" BUTLER;)
 SHAMROCK LANDSCAPING, LLC, a Washington)
 limited liability company; SIDNEY M. ADAMS and)
 "JANE DOE" ADAMS D/B/A SIDNEY M. ADAMS)
 GENERAL CONTRACTOR; T&G CONSTRUCTION,)
 INC., a Washington corporation; VALLEY CONCRETE)
 CONSTRUCTION, INC., a Washington corporation;)
 VECTOR CONSTRUCTION, INC. a Washington)
 corporation;)
 Third-Party Defendants .)

12 **I. RELIEF REQUESTED**

13 Defendant Windsor Construction Company ("Windsor") moves for summary judgment
 14 dismissing the remaining cross claims of co-defendants Ryklif Ventures and Clifden Group, Inc.
 15 (hereafter collectively referred to as "Ryklif"). This court dismissed the indemnity claim in a prior
 16 motion for summary judgment, but denied the motion based on the Court of Appeals' prior decision
 17 in *1000 Virginia L.P. v. Vertecs Corp.* But the new Supreme Court opinion in that case has clarified
 18 the application of RCW 4.14.326(1)(g) to this case, and made clear that the statute provides the
 19 affirmative defense that bars consideration or application of the discovery rule to Ryklif's claims.
 20

21 **II. STATEMENT OF FACTS**

22 **A. WINDSOR AND RYKLIF NEGOTIATED MATERIALLY IDENTICAL**
 23 **CONTRACT TERMS FOR ASHFORD PARK PHASES I AND II.**

24 This lawsuit is based on a condominium project completed almost a decade ago. Ryklif
 25 Ventures is a joint venture of The Clifden Group, Inc. and Pacificview Properties, Inc. (Ryklif's

1 Answer, Exhibit 5 to the Declaration of Mark A. Clausen ("Clausen Declaration"). Ryklif Ventures is
2 a developer. It built the Ashford Park condominiums in Redmond. In 1995, Ryklif hired defendant
3 Windsor Construction Co. as construction manager for the building of Phase II of the Ashford Park
4 Condominiums. The parties signed Associated General Contractors ("AGC") Standard Form of
5 Agreement between Owner and Construction Manager, although they modified it in significant ways.
6 Exhibit 1 to the Declaration of Glenn Gronnerud re Phase II ("Gronnerud II"). It is a construction-
7 management, cost-plus contract.¹ Windsor performed no work on the project itself, except for pickup
8 work. (Declaration of Glenn Gronnerud re Phase I ("Gronnerud I") at ¶ 3). The project was
9 substantially complete by August 1996.
10

11 Plaintiff homeowners' association filed this action in December 2004. Defendant Ryklif
12 cross-claimed against Windsor in March 2005. On March 13, 2006, Judge Rogers dismissed Ryklif's
13 indemnity claim against Windsor, but denied the motion as to whether the statute of limitations
14 barred the Ryklif claim based on the 2005 Court of Appeals decision in *1000 Virginia L.P. v. Vertecs*
15 *Corp.*, 127 Wn. App. 899 (2005). Order at p. 2. The Supreme Court decided the appeal of *1000*
16 *Virginia L.P. v. Vertecs Corp.*, in November 2006. Based on the Court's decision, plaintiff HOA
17 moved last week for summary judgment, *inter alia*, determining the applicability of RCW
18 4.16.326(1)(g) to Ryklif's claims. This motion follows, and focuses solely on the application of
19 RCW 4.16.326(1)(g).
20

21 **III. ISSUES PRESENTED**

22 1. Does RCW 4.16.326(1)(g) create an affirmative defense that bars the application of the
23 discovery rule to breach of contract claims filed after July 27, 2003? **YES.**
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25 ¹ The form contracts contained provisions for a guaranteed maximum price but the parties deleted those references. Phase

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IV. EVIDENCE RELIED UPON

1. Gronnerud Declaration re Phase I (previously filed) dated February 3, 2006 (without exhibits)
2. Gronnerud Declaration re Phase II (previously filed) dated February 3, 2006
3. Clausen Declaration (previously filed) dated February 3, 2006 (with exhibit 5 only attached)
4. Judge Rogers Order of March 13, 2006 (attached).
5. Pleadings, Records and files herein

V. ARGUMENT

A. STANDARD OF REVIEW.

The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989); *West Coast, Inc. v. Snohomish Cty.*, 112 Wash.App. 200, 205, 48 P.3d 997 (Wn. App. 2002). Once met, the burden shifts to the party with the burden of proof at trial to produce evidence sufficient to establish the existence of every element essential to that party's case. *Young*, 112 Wash.2d at 225, 770 P.2d 182; *West Coast, Inc. v. Snohomish Cty.*, 112 Wash.App. at 205-06. If Ryklif fails to meet that burden as to each element of its claims, summary judgment is appropriate. *Young*, 112 Wash.2d at 225, 770 P.2d 182 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)); *West Coast, Inc. v. Snohomish Cty.*, 112 Wash.App. at 206. Windsor is entitled to Summary Judgment herein.

B. OUR SUPREME COURT'S OPINION IN 1000 VIRGINIA v. VERTECS MANDATES THE DISMISSAL OF RYKLIF'S CLAIM BECAUSE IT WAS FILED AFTER THE EFFECTIVE DATE OF RCW 4.16.326(1)(g).

This motion concerns the application of RCW 4.16.326(1)(g) to the facts of this case. The statute provides, in pertinent part, as follows:

I and II contracts, Addendum 1.

1 (1) Persons engaged in any activity defined in RCW 4.16.300 may be excused, in whole or in
2 part, from any obligation, damage, loss, or liability for those defined activities under the
3 principles of comparative fault for the following affirmative defenses:

4 ...

5 (g) In contract actions **the applicable contract statute of limitations expires,**
6 **regardless of discovery, six years after substantial completion of construction,** or
7 during the period within six years after the termination of the services, or during the
8 period within six years after the termination of the services enumerated in RCW
9 4.16.300, whichever is later. [Emphasis added].

10 RCW 4.16.326(1)(g). The statute became effective on July 27, 2003. The legislature, therefore,
11 statutorily created an affirmative defense that, as a matter of law, bars a claimant from maintaining a
12 claim against, among others, a licensed contractor more than six years after substantial completion.
13 Ryklif filed its action on or about March 24, 2005, almost nine years after completion. Declaration of
14 Clausen, Exhibit 5. Windsor substantially completed its work on the project by August 1996.
15 Gronnerud II, ¶11.

16 It is true that the Supreme Court recognized a discovery rule for latent construction defects in
17 *1000 Virginia Limited Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 146 P.3d 423 (2006). That
18 case, however, had not been decided when Judge Rogers considered the issue almost a year ago. He
19 denied defendants' motions for summary judgment almost a year ago based on RCW 4.16.326.(1)(g)
20 because of the Court of Appeals' decision, which found the statute to be a modification of the statute
21 of limitations and statute of repose.² The Supreme Court's analysis, however, has now clarified the
22 importance of the critical difference between the claims in *1000 Virginia* and the Ryklif claim against
23 Windsor: the plaintiff in *1000 Virginia* filed its action before the statutory effective date; Ryklif filed
24 its action after the effective date.
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1 The Supreme Court's analysis and the nature of RCW 4.16.326(1)(g) make this a critical
2 difference. The Supreme Court noted that RCW 4.16.326(1)(g) is neither a statute of limitations nor
3 a statute of repose. Nor is it an amendment to the statutes of limitations or repose. Instead, it is a
4 statute creating an affirmative defense. The Court stated as follows:

5 Although the parties and amici debate whether RCW 4.16.326(1)(g) is a statute of limitations
6 or a statute of repose, it appears to be neither. **It does not alter the period of repose set out
7 in RCW 4.16.300.** Instead, it states that the "applicable contract statute of limitations
8 expires, regardless of discovery," at the end of the same six year period set out in the statute
9 of repose. RCW 4.16.326(1)(g). **And, while the statute states an absolute end to the
10 limitations period as an affirmative defense, it does not itself establish any limitations
11 period.** Instead, RCW 4.16.326(1)(g) simply identifies a point at which the "applicable"
12 limitations period expires, without identifying what that limitations period is.

13 146 P.2d at 432. Emphasis added. *See also, e.g.*, 146 P.2d at 431-32 ("Here the legislature has
14 enacted an affirmative defense precluding application of a discovery rule for claims of breach of
15 written construction contracts.").

16 The Court repeated this analysis throughout its discussion of whether the statute should be
17 applied retroactively. *See* 146 P.2d at 433 ("RCW 4.16.326(1)(g) does not clarify any statute."); 158
18 Wn2d at 434 ("In short the new legislation is intended to undo judicial adoption of a discovery rule
19 for construction contracts."); 146 P.2d at 434 ("It is, as explained, a rule for determining when a
20 cause of action accrues and the statute of limitations begins to run.").

21 Because the RCW 4.16.326(1)(g) creates an affirmative defense, it does not automatically
22 apply. It must be pleaded. *1000 Virginia*, 146 P.3d at 432. But when it is pleaded, it governs the
23 plaintiff's claims and bars the application of the discovery rule.

24 ² The Supreme Court reversed the portion of the Court of Appeals opinion applying the discovery rule because the Court
25 of Appeals lacked authority to create such a policy. The Supreme Court then created its own discovery rule based on its
own analysis.

1 The Court in *1000 Virginia* spent a great deal of time analyzing whether the statute should be
2 applied retroactively. That analysis was necessary in that case because the plaintiff had filed its claim
3 approximately 10 months before the statute's effective date. 146 P.3d at 426. That analysis is
4 unnecessary here, because Ryklif filed its action almost two years after RCW 4.16.326(1)(g)'s
5 effective date.

6 The nature of the statute means it must be applied to all actions filed after July 27, 2003. As
7 the Court noted, the statute creates an affirmative defense. Anytime after the effective date of the
8 statute, a defendant can raise an affirmative defense. The use of the affirmative defense mechanism
9 mandates its application to all cases filed after the effective date. Nothing in the statute or in the
10 Court's opinion in *1000 Virginia* indicates that a court should limit the use of the affirmative defense
11 based on when the cause of action did or did not accrue. There is no limitation of the use of the
12 affirmative defense after the statutory effective date.

13 Any other interpretation would ignore both the language of RCW 4.16.326(1)(g) and the
14 Court's interpretation of it. Because it is not a statute of limitation or a statute of repose, the nature
15 and accrual date of the claim are not considered. The only issues are (1) whether the statute was
16 effective at the time of filing; and (2) did the defending party raise the affirmative defense. Windsor
17 filed an amended answer referencing the statute after the decision in *1000 Virginia*. The statute
18 governs Ryklif's claims and requires dismissal.

19 The dissent in *1000 Virginia* acknowledged this interpretation, and the majority stated nothing
20 to the contrary. The dissent states, in pertinent part, as follows:
21

22 Despite the majority's efforts to replace the breach rule with the discovery rule, the majority
23 acknowledges that its holding is subject to RCW 4.16.326(1)(g). **Thus, prospectively**
24 **contracting parties may plead RCW 4.16.326(1)(g) as an affirmative defense to preclude**
25 **application of the newly adopted (but short-lived) discovery rule.** Majority at [146 P.3d]
431. **Unfortunately, under the majority's decision, only those few contract actions filed**

1 **between the decision in *Architectonics* and the adoption of RCW 4.16.326(1)(g) will**
2 **apply the discovery rule** (and presumably only in Division One of the Court of Appeals).

3 Dissent in *1000 Virginia*, 146 P.3d at 441 (emphasis added). The key question is simply whether the
4 decision was filed before July 27, 2003. Ryklif fails that test.

5 Ryklif may argue that the Supreme Court did not expressly overrule the Court of Appeals'
6 conclusion that accrual is the key event for determining the application of RCW 4.16.326(1)(g). This
7 argument is fallacious. First, the Supreme Court reversed the Court of Appeals whole effort to apply
8 the discovery rule. It rejected the Court of Appeals' analysis that RCW 4.16.328(1)(g) was an
9 amendment to the statute of limitations. All conclusions flowing from the Court of Appeals
10 discussion is similarly discredited. Second, the Court of Appeals analysis is dicta, because it is
11 unnecessary for the resolution of the claims. Because the claims in question were filed before July
12 27, 2003, it makes no difference when the causes of action accrued. This court need not follow dicta,
13 as such language has no precedential value. See *State v. Pawlyk*, 115 Wn.2d 457, 487, 800 P.2d 338
14 (1990) ("statements 'not necessary to the decision of any issue in the . . . case' are dicta which do not
15 control future cases") (quoting *Gilmour v. Longmire*, 10 Wn.2d 511, 516, 117 P.2d 187 (1941)); *Pac.*
16 *N.W. Transp. v. Utils. & Transp.*, 91 Wn. App. 589, 959 P.2d 160 (1998); *Marriage of Roth*, 72 Wn.
17 App. 566, 570, 865 P.2d 43 (1994) (dictum is language not necessary to the decision) (citing
18 *Pedersen v. Klinkert*, 56 Wn.2d 313, 317, 320, 352 P.2d 1025 (1960)); *Plankel v. Plankel*, 68 Wn.
19 App. 89, 92, 841 P.2d 1309 (1992) (rationale not necessary to the decision is nonbinding dicta). This
20 is particularly true for an opinion that the Supreme Court stated was not properly decided.
21

22 The legislature and Supreme Court have simplified the consideration of this issue. In contract
23 actions filed after July 27, 2003, the affirmative defense of RCW 4.16.326(g) bars a claimant from
24 bringing a claim against a licensed contractor more than six years after substantial completion. This
25

1 action was filed in March 2005, almost nine years after substantial completion. Ryklif's claims are
2 time-barred.

3 CONCLUSION

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5 For the foregoing reasons, Windsor Construction Company requests that this court enforce the
6 Court's Order Granting Summary Judgment, the statute and the Contract between the parties, and
7 dismiss the claims of Ryklif Ventures with prejudice. A proposed Order accompanies this Motion.

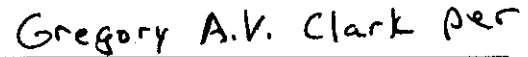
8 DATED this 19th day of January, 2007

9 DATED this 19th day of January, 2007

10 CLAUSEN LAW FIRM PLLC

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