

NOTICE  
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2012 IL App (4th) 111001-U

Filed 9/11/12

NO. 4-11-1001

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

GILLESPIE COMMUNITY UNIT SCHOOL DISTRICT	)	Appeal from
NO. 7, Macoupin County, Illinois,	)	Circuit Court of
Plaintiff-Appellant,	)	Macoupin County
v.	)	No. 09L22
WIGHT & COMPANY, an Illinois Corporation,	)	
Defendant-Appellee.	)	Honorable
	)	Patrick J. Londrigan,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.  
Justices McCullough and Cook concurred in the judgment.

**ORDER**

¶ 1 *Held:* Because there is no genuine issue of material fact as to whether a school district's actions against an architect are contractually time-barred, summary judgment in favor of the architect is affirmed.

¶ 2 Plaintiff, Gillespie Community School District No. 9, hired defendant, Wight & Company, an architectural firm, to design a new elementary school building and also, as a service preliminary to this design work, to investigate the proposed site of the building and to advise plaintiff on the potential for coal-mine subsidence. About six years and nine months after construction of the elementary school was completed, a coal mine beneath the school subsided, destroying the school. Plaintiff sued defendant on several legal theories, all of which boil down to the allegation that defendant provided plaintiff inadequate information on the risk of subsidence. Defendant moved for summary judgment, invoking a contractual provision that limited the time within which the

parties could sue one another. The trial court granted defendant's motion for summary judgment, and plaintiff appeals.

¶ 3 Looking at all the evidence in a light most favorable to plaintiff but interpreting the applicable statutes and unambiguous contractual provisions *de novo*, we find no genuine issue of material fact as to whether plaintiff's claims against Wight are contractually time-barred. See *Wisnasky-Bettorf v. Pierce*, 2012 IL 111253, ¶ 15; *Trans States Airlines v. Pratt & Whitney Canada, Inc.*, 177 Ill. 2d 21, 50 (1997); *Weisberger v. Weisberger*, 2011 IL App. (1st) 101557, ¶ 43; All of the counts against Wight are untimely under the contract between the School District and Wight, in view of the undisputed evidence. Therefore, we affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 A. The Pre-Referendum Service Agreement

¶ 6 In 1998, the School District resolved to build a new elementary school, anticipating that a grant from the state as well as a bond referendum would fund the project. On December 21, 1998, Wight tendered to the School District a written offer to provide "pre-referendum services" to the School District, services preliminary to the actual designing and construction of the new school building. The School District accepted the offer on January 13, 1999, thereby turning Wight's written offer into a contract. The parties call this contract the "Pre-Referendum Service Agreement."

¶ 7 One of Wight's promised performances in the Pre-Referendum Service Agreement was to perform a "site mine investigation." In return for \$4,000, Wight promised to do the following:

"The design team will investigate and examine the extent of mining in the Gillespie/Benld region. This investigation will result

in an analysis of the proposed building site for suitability of construction and implications on proposed structural systems. This information will be reviewed by the Capital Development Board for acceptability of the proposed site."

(Insomuch as the state would provide part of the funding for the construction, the Capital Development Board would have an interest in overseeing the expenditure of the state funds. See 20 ILCS 3105/9.03, 10.01 (West 1998)).

¶ 8 B. Burgert's Letter to Tucker

¶ 9 The School District owned land in Benld, and the old elementary school stood on this land. In its "site mine investigation," Wight hired Hanson Engineers, Inc., to assess the land for the danger of coal-mine subsidence. On February 16, 1999, a physical engineer at Hanson, Charles E. Burgert, wrote Mark Tucker of Wight a letter, which, in its "Re" line, read, "Undermining Assessment for Gillespie School District Proposed Elementary School." Under the heading "Recorded Subsidence Events," Burgert told Tucker that coal mines had been subsiding in the area of Benld and Gillespie for several decades. Burgert wrote:

"Quade (1934) performed an early mine subsidence investigation in the Benld/Gillespie area for the Federal Land Bank of St. Louis, and recorded numerous ground subsidence events over the Superior Coal Company Mines. The locations of these ground subsidence events are shown overlain on a mined out room and pillar base map for the Benld/Gillespie area in Figure 5. It is believed that this mined out room and pillar base map was prepared in the late

1950s.

Based on a review of available Illinois Office of Mines and Minerals information, four additional ground subsidence events have been recorded in the Benld/Gillespie area between 1982 and 1998, and are shown on Figure 5. Personnel at the Office of Mines and Minerals also indicated that there may have been a recent subsidence event adjacent to the railroad tracks between the towns of Benld and Sawyerville. The Illinois Mine Subsidence Insurance Fund has recorded five to six subsidence events in the Benld/Gillespie area since 1979 that have affected over 40 structures. The locations of these subsidence events and structures are confidential for insurance purposes, but it was indicated that the subsidence sags were up to a city block in diameter and that some of the structures underwent upwards to 10 in. of tilt."

¶ 10 Under the heading "Risk of Subsidence," Burgert wrote:

Based on the number of ground subsidence events shown on Figure 5, it can be intuitively concluded that there is a relatively high risk of subsidence in the Benld/Gillespie area. At first glance, there appears to be an area around the proposed school location shown on Figure 5 where subsidence events have not occurred. However, the following points should be considered:

- (1) Figure 5 does not include every ground

subsidence event that has occurred in the Benld/Gillespie area. There is a significant 40 to 50 year gap between the privately funded 1934 Quade study and the start of the recording of mine subsidence events by public agencies in the late 1970s and 1980s. Apparently, the recording of mine subsidence events during this intervening time period was not performed.

(2) The Superior Mines No. 1 to No. 4 converge near the city of Benld. Therefore, the Benld area may have been the last mined out area before the coal mines were abandoned in the 1950s. Subsidence events in the Benld area could possibly be delayed in comparison to earlier mined out areas.

The risk of future subsidence at the proposed school location should be evaluated along with other features of the site (such as the desirability of the location) with the knowledge that it will not be possible to completely avoid similar risks in the area closely surrounding the city of Benld, Illinois."

Thus, the immediate area of the proposed construction appeared, historically, to be stable, but one could not count on that apparent stability, considering that no exhaustive records of subsidence existed and the subsurface excavation in that area was more recent than in other areas (and therefore

the land had not had as much time to subside). Given the number of known subsidence events in Benld and Gillespie over the past several decades, "intuition" suggested that the risk of subsidence was high no matter where one built.

¶ 11 C. The Foundation Engineering Report

¶ 12 On March 23, 2000, about 13 months after Burgert wrote his letter to Tucker, Hanson prepared a "Foundation Engineering Report" for Wight, and Wight forwarded this report to the School District—but Wight never forwarded to the School District Burgert's letter of February 16, 1999, to Tucker. The Foundation Engineering Report noted that coal mines had subsided in Benld and the surrounding area, but, unlike Burgert's letter, it did not specify the number of known subsidence events, let alone point them out on a map.

¶ 13 Under the heading of "Geology," the report said in part:

"Our review of the available Illinois State Geological Survey maps of the mined-out coal areas in Illinois indicates that the site is undermined, and that there have been documented occurrences of ground surface subsidence due to collapse of abandoned coal mines within the town of Benld and the surrounding vicinity. Records indicate that the Superior Coal Company operated mines in the site vicinity from about 1900 to 1955. In the site area, the shaft depths were 324 to 350 ft, and the thickness of the coal seam mined (No. 6) was 8 ft."

¶ 14 Under the heading of "Risk of Coal Mine Subsidence," the report said there was an unavoidable risk of subsidence and that the degree of risk was unquantifiable:

"Due to the many unknown variables involved in predicting both the chance of subsidence and its possible magnitude, it is nearly impossible to quantify the risk involved in building on an undermined site. Surface investigations undertaken to predict the possibility of future subsurface are always very expensive and generally inconclusive. The owner should consider the fact that there is no economically feasible corrective action that can be taken to guarantee against future subsidence.

The risk of future subsidence must be valued along with the other features of the site with the knowledge that it will not be possible to completely avoid similar risks in the area closely surrounding Benld, Illinois."

The report, however, did not include figure 5 of Burgert's letter. Nor did the report state the actual number of known subsidences, as Burgert's letter had done. Nor did the report express the risk the way Burgert had expressed it in his letter, *i.e.*, "it can be intuitively concluded that there is a relatively high risk of subsidence in the Benld/Gillespie area."

¶ 15 D. The Final Agreement Between the School District and Wight

¶ 16 1. "Initial Information"

¶ 17 After the School District decided on the site for its new elementary school—*i.e.*, immediately adjacent to its existing elementary school, which was to be demolished—the School District entered into some rather elaborate written contracts with Wight and the contractor, Bercol Construction, Inc. One of the School District's contracts with Wight is entitled "Standard Form of

Agreement Between Owner and Architect With Standard Form of Architect's Services" (Standard Agreement).

¶ 18 The Standard Agreement begins by stating some "initial information," the "information and assumptions" upon which "[t]his Agreement is based." The "project parameters" are spelled out. The "project team" is identified. Then paragraph 1.1.4 states some "[o]ther important initial information":

".1 Pre-referendum, preliminary and other design services were initially performed under the Pre-Referendum Service Agreement \*\*\*.

\* \* \*

.4 Disputes arising out of the design services provided under the Pre-referendum Service Agreement \*\*\* shall be subject to the Dispute Resolution proceedings set forth in this Agreement."

¶ 19 *2. The "Agreement" Defined as a Conglomeration of Several Documents*

¶ 20 The Standard Agreement itself is only part of the contractual agreement between the School District (designated as the "Owner") and Wight (designated as the "Architect"). Paragraph 1.4.1 of the Standard Agreement says: "This Agreement comprises the documents listed below," and among the listed documents are the following:

- (1) the Standard Agreement itself;
- (2) the Pre-referendum Service Agreement;
- (3) yet another contract with Wight, entitled "Standard Form

of Architect's Services: Design and Contract Administration"  
(Design and Contract Administration);

(4) the Foundation Engineering Report; and

(5) "Exhibit E," which is the contract between the School District and Bercol, entitled "General Conditions of the Contract for Construction" (General Conditions).

¶ 21        3. *Wight's Preliminary Evaluation of the Site, Using the Reports of Consultants*

¶ 22        Article 2.3.2 of the Design and Contract Administration says: "The Architect shall provide a preliminary evaluation of the Owner's site for the Project based on the information provided by the Owner of site conditions, the reports of consultants retained by the Architect and the Owner's program, schedule and budget for the Cost of the Work." (Underlining omitted.)

¶ 23                        4. *The Meaning of Terms in the Standard Agreement*

¶ 24        Paragraph 1.3.7.2 of the Standard Agreement provides: "Terms in this Agreement shall have the same meaning as those in Exhibit E," *i.e.*, the General Conditions. (Underlining omitted.)

¶ 25                        5. *The "Accrual" Provision*

¶ 26        Paragraph 1.3.7.3 of the Standard Agreement redefines when a cause of action "accrues":

"Causes of action between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued and the applicable statutes of limitations shall commence to run not later than either the date of Substantial Completion for acts or failures

to act occurring prior to Substantial Completion or the date of issuance of the final Certificate for Payment for acts or failures to act occurring after Substantial Completion. In no event shall such statutes of limitations commence to run any later than the date when the Architect's services are substantially completed."

¶ 27 The term "Substantial Completion" is defined in the General Conditions (the School District's contract with Bercol). Paragraph 9.8.1 of the General Conditions provides: "Substantial completion is the stage in the progress of the Work when the Work or designated portion thereof, such as the Work of a Phase of the Project, is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use." (Underlining omitted.)

¶ 28 "Work" is capitalized, and, of course, capitalization usually signals that a term is specially defined. Paragraph 1.1.3 of the General Conditions defines "Work" as follows: "The term 'Work' means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment, expertise and services provided or to be provided by the Contractor [(Bercol)] to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project." (Underlining omitted.)

¶ 29 Paragraph 1.1.1 of the General Conditions in turn defines "Contract Documents" as follows:

"The Contract Documents consist of the Agreement Between Owner [(the School District)] and Contractor (hereinafter the Agreement), Conditions of the Contract (General, Supplementary and

other Conditions), Drawings, Specifications, Addenda issued prior to execution of the Contract, other documents listed in the Agreement and Modifications issued after execution of a Contract. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Architect. Unless specifically enumerated in the Agreement, the Contract Documents do not include other documents such as bidding requirements (advertisement or invitation to bid, Instructions to Bidders, sample forms, the Contractor's bid or portions of Addenda relating to bidding requirements)."

¶ 30 E. The School District's Occupation of the New School Building and the Eventual Destruction of the Building By Coal-Mine Subsidence

¶ 31 Bercol completed the construction of the school building in the fall of 2002. The School District began occupying and using the building in August 2002.

¶ 32 In March 2009, a coal mine subsided beneath the school building, causing extensive structural damage. Within a few weeks afterward, the Illinois State Board of Education condemned the building as a complete loss. Demolition was the only option.

¶ 33 F. The School District Sues Wight

¶ 34 On August 3, 2009, seven years after it began occupying and using the building as an elementary school but little more than four months after the mine subsidence, the School District filed suit against Wight. The School District asserted three theories against Wight.

¶ 35 Count II of the complaint accused Wight of professional negligence in that Wight had failed to use due care in its investigation of the site for the possibility of mine subsidence and Wight had withheld information from the School District concerning the likelihood of mine subsidence.

¶ 36 Count III alleged that Wight had breached an implied warranty "to employ proper investigative techniques on the issue of the likelihood of a coal mine subsidence to occur at the proposed site of the School District's new elementary school, including conducting a preliminary evaluation of the owner's site and requiring Wight to obtain proper consultants to investigate and conduct testing to determine the possibility of coal mine subsidence occurring at the site."

¶ 37 Count VI accused Wight of fraudulent misrepresentation by concealment of a material fact. The material fact was Burgert's letter to Tucker. The School District alleged: "The Foundation Engineering Report included some of the generalizations contained with the February 1999 Letter Report [(Burgert's letter)], but excluded the specific and material information supporting the conclusion that there is a relatively high risk of subsidence in the Benld/Gillespie area."

¶ 38 G. The Summary Judgment in Wight's Favor

¶ 39 On March 24, 2011, Wight moved for summary judgment. Wight argued that, in paragraph 1.3.7.3 of the Standard Agreement, the School District and Wight had agreed to replace the discovery rule (see 25 Ill. L. & Prac., *Limitations of Actions* § 73 (2001)) with their own special definition of "accrual" and that, under this special definition, the applicable statutes of limitations began running at the time of "Substantial Completion" as the parties' agreement defined that term. According to Wight, the statute of limitations applicable to counts II and III was the four-year statute of limitations in section 13-214(a) of the Code of Civil Procedure (735 ILCS 5/13-214(a) (West 2010)), and the statute of limitations applicable to count VI was the five-year statute of limitations

in section 13-205 (735 ILCS 5/13-205 (West 2010)). When the School District sued Wight, more than five years had passed since the "Substantial Completion," Wight argued, and hence the School District's claims against it were contractually barred.

¶ 40 The trial court agreed with Wight's argument and granted Wight's motion for summary judgment. The court thereafter denied the School District's motion for reconsideration.

¶ 41 This appeal followed.

¶ 42 II. ANALYSIS

¶ 43 A. The School District's Argument That the "Accrual" Provision Never Was Incorporated into the Pre-Referendum Service Agreement

¶ 44 The School District argues that the "accrual" provision in paragraph 1.3.7.3 of the Standard Agreement is "simply not part of the Pre-Referendum Service Agreement, upon which the School District bases its claim against Wight," because paragraph 1.1.4.4 of the Standard Agreement incorporates only the dispute-resolution procedures into the Pre-Referendum Service Agreement and the "accrual" provision in paragraph 1.3.7.3 is not part of the dispute-resolution procedures.

¶ 45 Actually, the concept of incorporation is a red herring, considering that the parties stipulate, in paragraph 1.4.1 of the Standard Agreement, that the Standard Agreement and the Pre-Referendum Service Agreement (among other documents) together constitute the "Agreement." To "incorporate" means "[t]o make the terms of another (esp[ecially] earlier) document part of a document by specific reference." Black's Law Dictionary 769 (7th ed. 1999). Thus, incorporation by reference requires at least two separate documents. It is true that, literally, the Standard Agreement and the Pre-Referendum Service Agreement are separate documents, but paragraph 1.4.1 of the Standard Agreement effectively makes them parts of the same document. Paragraph 1.4.1

fuses several documents into one contract, one "Agreement." "[W]here different instruments are executed as the evidence of one transaction or agreement, they are to be read and construed as constituting but a single instrument." *Wilson v. Roots*, 119 Ill. 379, 386 (1887); see also 11 Richard A. Lord, *Williston on Contracts* § 30:25 (4th ed. 1999) ("Where a writing refers to another document, that other document, or the portion to which reference is made, becomes constructively a part of the writing, and in that respect the two form a single instrument."). Because the Standard Agreement and the Pre-Referendum Service Agreement are parts of the same instrument, it makes no sense to speak of incorporating provisions from the Standard Agreement into the Pre-Referendum Service Agreement.

¶ 46 In short, in our *de novo* review of this issue (see *Virginia Surety Co., Inc. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007); *Cincinnati Insurance Co. v. Gateway Construction Co., Inc.*, 372 Ill. App. 3d 148, 151 (2007)), we do not find the Standard Agreement and the Pre-Referendum Service Agreement to be reasonably susceptible to an interpretation whereby the applicability of the "accrual" provision in paragraph 1.3.7.3 of the Standard Agreement to actions against Wight founded on the Pre-Referendum Service Agreement depends on the incorporation of paragraph 1.3.7.3 into the Pre-Referendum Service Agreement (see *William Blair & Co., L.L.C. v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 334 (2005)). Because the Standard Agreement and the Pre-Referendum Service Agreement are, in the eyes of the law, parts of one instrument (see *Wilson*, 119 Ill. at 386), there is no occasion for such incorporation. If a contract consists, for example, of parts A and B, the applicability of a provision in part A does not necessarily depend on its incorporation into part B.

¶ 47                    B. The School District's Invocation of the Rule of Construction  
                                 That a Specific Clause Prevails Over a General Clause

¶ 48                    The School District quotes a familiar rule of construction: "Courts and legal scholars have long recognized that, where both a general and a specific provision in a contract address the same subject, the more specific clause controls." *Grevas v. United States Fidelity & Guaranty Co.*, 152 Ill. 2d 407, 411 (1992). According to the School District, the "specific provision" is paragraph 1.1.4.4 of the Standard Agreement, which states, as "[o]ther important initial information," that "[d]isputes arising out of the design services provided under the Pre-referendum Service Agreement \*\*\* shall be subject to the Dispute Resolution proceedings set forth in this Agreement." The "general provision," according to the School District, is paragraph 1.4.1 of the Standard Agreement, which provides that "[t]his Agreement comprises the documents listed below," among which are the Standard Agreement and the Pre-Referendum Service Agreement.

¶ 49                    The School District argues: "[T]he 'specific provision' addressing which terms of the Standard Agreement are incorporated into the Pre-Referendum Service Agreement—Article 1.1.4(4), incorporating only the 'Dispute resolution proceedings' of the Standard Agreement into the Pre-Referendum Service Agreement—thus controls over the more general 'comprises' language contained in Article 1.4.1 of the Standard Agreement."

¶ 50                    We do not see the necessity, however, of choosing between paragraph 1.1.4.4 and paragraph 1.4.1; the two paragraphs are perfectly consistent with each other, and both paragraphs can be given effect. Typically, a specific provision of a contract overrides a general provision only if it is impossible to give effect to both provisions. *McDonald's Corp. v. Butler Co.*, 158 Ill. App. 3d 902, 909 (1987). For example, in the case that the School District cites, *Grevas*, it was necessary

to choose which of two sections of a contract applied to the plaintiff's situation; it was logically impossible to apply both sections of the contract, because they called for mutually inconsistent courses of action. *Grevas*, 152 Ill. 2d at 410. Because choosing one section over the other was unavoidable, the supreme court chose the section that was more specifically relevant to the plaintiff. *Id.* at 411.

¶ 51 In the present case, by contrast, choosing paragraph 1.1.4.4 over paragraph 1.4.1 not only is unnecessary but would conflict with paragraph 1.1.4's characterization of itself as mere "initial information" (as if additional, amplifying information will follow). Whenever it is possible to do so, we "must interpret a contract in a manner that gives effect to all of the contract's provisions"—and in this case, that means giving effect to both paragraph 1.1.4.4 and paragraph 1.4.1. *McHenry Savings Bank v. Autoworks of Wauconda, Inc.*, 399 Ill. App. 3d 104, 111 (2010). Those two paragraphs are not repugnant toward one another. "Where there is a repugnancy between general clauses and specific ones, the latter will govern; and even if there is no actual repugnancy if the words of the contract are taken literally, yet when taken from the whole instrument it appears that the purpose of the parties was solely directed towards the particular matter to which the special clause or words relate, the general words will be restrained." 4 Walter H. E. Jaeger, *Williston on Contracts* § 619, at 743-44 (3d ed. 1961). Again, the designation of paragraph 1.1.4.4 as "initial information" undercuts any rationale for "restraining" the subsequent paragraph 1.4.1. It does not appear, from the contract as a whole, that "the purpose of the parties was directed solely towards" the dispute-resolution procedures. *Id.* Hence, we give effect to paragraph 1.4.1's clear language that the unitary "Agreement" includes all of the Pre-Referendum Service Agreement as well as all of the Standard Agreement—including the "accrual" provision.

¶ 52 C. The School District's Argument That the "Accrual" Provision Does Not Apply to the School District's Action Against Wight

¶ 53 The School District argues that once one "cut[s] through the morass of the parties' contract documents (a morass which must be 'construed strictly against' Wight ([*Midwest Builder Distributing, Inc. v. Lord & Essex, Inc.*, 383 Ill. App. 3d 645, 665 (2007)])), it becomes clear that the limitations period triggering term of 'Substantial Completion' applies only to the agreement between the School District and its contractor, Bercol, and thus cannot act as a basis for Wight's statute of limitations argument—there is simply no other fair reading of the parties' agreement."

¶ 54 We do not follow the School District's logic. It is quite true that the term "Substantial Completion" describes the progress of the "Contractor's" work and that Bercol, instead of Wight, is the "Contractor." As far as we can see, however, nothing prevents Wight from crafting an offer pursuant to which any causes of action "accrue," and the statutory periods of limitations begin running when a third party (Bercol) reaches a certain point in the progress of its own work. The Agreement unambiguously says that when Bercol sufficiently completes its work that the School District can occupy or use the building for its intended use, the statutes of limitations for claims against Wight begin running.

¶ 55 It appears to be undisputed that in August 2002 the School District began occupying and using the building for the intended purpose of the building, as an elementary school. Therefore, the statutory periods of limitations for any claims against Wight began running in August 2002. "[P]arties to a contract may agree upon a shortened contractual limitations period to replace a statute of limitations, [provided that the shortened contractual limitations period] is reasonable.'" *Federal Insurance Co. v. Konstant Architecture Planning, Inc.*, 388 Ill. App. 3d 122, 126 (2009) (quoting

*Medrano v. Production Engineering Co.*, 332 Ill. App. 3d 562, 566 (2002)). We do not understand plaintiff to contend that paragraph 1.3.7.3 is unreasonable. In any event, in *Federal*, the First District upheld language in a standard form agreement of the American Institute of Architects (AIA) that was almost identical to the language of paragraph 1.3.7.3 in the AIA contract in the present case. See *Federal*, 388 Ill. App. 3d at 128 ("[W]e find that Article 9.3 of the AIA contract in this case controlled the accrual date of the applicable statute of limitations and precluded application of the discovery rule.").

¶ 56 Because the "Substantial Completion" of Bercol's work started the clock running, we need not consider the alternative triggering event, in the final sentence of paragraph 1.3.7.3 of the Standard Agreement: "In no event shall such statutes of limitations commence to run any later than the date when the Architect's services are substantially completed."

¶ 57 D. The School District's Argument That There Is a Genuine Issue as to Whether "Substantial Completion" Has Occurred, So as To Start the Running of the Statutes of Limitations

¶ 58 The School District contends that there is a genuine issue of material fact as to "whether Wight's required contract services were substantially completed (1) 'in accordance with' the parties' agreement, and (2) such that the School District could 'occupy or utilize the Work for its intended use.'" The School District reasons that, assuming the "accrual" provision in paragraph 1.3.7.3 of the Standard Agreement applies at all to the School District's claims against Wight, the "accrual" provision "triggers the running of the statute of limitations only upon 'Substantial Completion' of the 'construction and services required' by the parties' agreements both (1) 'in accordance with' the parties' agreements, and (2) so that the building could be utilized for its intended purpose." (Emphasis in original.) The School District takes the position that there was no

"Substantial Completion," because "Wight's required work was not done 'in accordance with' the parties' agreement": Wight "failed to complete its obligations relating to the construction site investigation and breached its duty to tender reports to the School District resulting from that investigation, all as required by the Pre-Referendum Service Agreement."

¶ 59           The problem with this reasoning is that "Substantial Completion"—the event which, under paragraph 1.3.7.3 of the Standard Agreement, starts the running of the statutes of limitations—has nothing to do with the Pre-Referendum Service Agreement. Under paragraph 1.3.7.2 of the Standard Agreement, "Substantial Completion" has the same meaning in the Standard Agreement that the term has in the General Conditions, the contract between the School District and Bercol. As we have said, paragraph 9.8.1 of the General Conditions defines "Substantial Completion" as "the stage in the progress of the Work when the Work or designated portion thereof, such as the Work of a Phase of the Project, is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use." (Underlining omitted.)

¶ 60           Paragraph 1.1.3 of the General Conditions in turn defines "Work" as follows: "The term 'Work' means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment, expertise and services provided or to be provided by the Contractor [(Bercol)] to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project." (Underlining omitted.)

¶ 61           So, leapfrogging from one specially defined term to another, one ultimately lands on the definition of "Contract Documents": essentially, when one disregards all the qualifications and refinements, the contract between the School District and Wight says that statutes of limitations

begin running at "Substantial Completion"; "Substantial Completion" means completion of the "Work"; and the "Work" means the tasks that the "Contract Documents" require to be done. It follows that "Substantial Completion" refers to the Pre-Referendum Service Agreement only if the Pre-Referendum Service Agreement is one of the "Contract Documents," so defined.

¶ 62 Again, paragraph 1.1.1 of the General Conditions defines "Contract Documents" as follows:

"The Contract Documents consist of the Agreement Between Owner [(the School District)] and Contractor (hereinafter the Agreement), Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of the Contract, other documents listed in the Agreement and Modifications issued after execution of a Contract. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Architect. Unless specifically enumerated in the Agreement, the Contract Documents do not include other documents such as bidding requirements (advertisement or invitation to bid, Instructions to Bidders, sample forms, the Contractor's bid or portions of Addenda relating to bidding requirements)."

¶ 63 The School District argues that Wight never "substantially completed" the Pre-Referendum Service Agreement and that consequently the statutes of limitations never began

running, but the School District does not explain how the Pre-Referendum Service Agreement conforms to the definition of "Contract Documents" in paragraph 1.1.1 of the General Conditions, quoted above. The term "Agreement," in paragraph 1.1.1 of the General Conditions, carries a different meaning than in paragraph 1.4.1 of the Standard Agreement, in which "[t]his Agreement" is said to consist of the Pre-Referendum Service Agreement, the Standard Agreement, the General Conditions, and several other documents. "Agreement," in paragraph 1.1.1, means only the agreement between the School District and Bercol. And paragraph 1.1.1 unambiguously says: "Unless specifically enumerated in the Agreement, the Contract Documents do not include other documents \*\*\*." We do not see where the Pre-Referendum Service Agreement is "specifically enumerated" in the definition of "Contract Documents" or anywhere else in the agreement between the School District and Bercol. The School District's and Wight's stipulation that *their* agreement would include the agreement between the School District and Bercol (*i.e.*, the General Conditions) does not logically make the agreement between the School District and Wight part of the agreement between the School District and Bercol. Therefore, in our *de novo* interpretation of the contract between the School District and Wight (see *Farm Credit Bank of St. Louis v. Whitlock*, 144 Ill. 2d 440, 447 (1991)), we conclude that Wight's alleged nonfulfillment of the Pre-Referendum Agreement did not prevent "Substantial Completion" and the consequent running of the statutes of limitations.

¶ 64 Even "[u]nder a 'strict' definition of 'Substantial Completion,' " the School District argues, "Substantial Completion" never occurred, "because at the time the Benld School was destroyed in March 2009, it obviously remained subject to likely subsidence as a result of Wight's failed construction site investigation and was, therefore, not 'sufficiently complete \*\*\* so that the [School District could] occupy or utilize [it] for its intended use." As we have explained, however,

in our discussion of the interlocking contractual definitions, "sufficient completion" refers to the tasks required by the "Contract Documents," and because the document that required the construction site investigation, *i.e.*, the Pre-Referendum Service Agreement, is not one of the "Contract Documents" as defined in paragraph 1.1.1 of the General Conditions, "sufficient completion" does not refer to the construction site investigation.

¶ 65 E. The Applicability of the Five-Year Period of Limitations in Section 13-205 to the Claim for Fraudulent Misrepresentation in Count VI

¶ 66 The School District does not appear to dispute that the four-year statute of limitations in section 13-214(a) of the Code of Civil Procedure (735 ILCS 5/13-214 (a) (West 2010)) applies to counts II and III of the complaint (although the School District disputes that the four-year period of limitation expired before the filing of the complaint). The School District disagrees, however, with Wight's position that the five-year statute of limitations in section 13-205 (735 ILCS 5/13-205 (West 2010)) applies to the action for fraudulent misrepresentation in count VI. Instead, the School District seems to take the position that no statute of limitations applies to that particular action.

¶ 67 Wight is correct that section 13-205 applies to count VI. The reason is that, according to section 13-214(e) (735 ILCS 5/13-214(e) (West 2010)), the periods of limitation in section 13-214 are inapplicable to claims of fraudulent misrepresentation—and if the periods of limitation in section 13-214 are inapplicable to such claims, then, by default, the five-year period of limitation in section 13-205 (735 ILCS 5/13-205 (West 2010)) for "all civil actions not otherwise provided for" is the applicable period of limitation. See *Rozny v. Marnul*, 43 Ill. 2d 54, 69 (1969) ("The all-inclusive phrase 'all civil actions not otherwise provided for', has been construed to cover actions for fraud and deceit [citations], and we now hold that it also encompasses actions for tortious misrepresentation;

thus the limitation period is 5 years.").

¶ 68 Sections 13-214(a) and (e) (735 ILCS 5/13-214(a), (e) (West 2010)) provide in part as follows:

"(a) Actions based upon tort, contract or otherwise against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property shall be commenced within 4 years from the time the person bringing an action, or his or her privity, knew or should reasonably have known of such act or omission. \*\*\*

\* \* \*

(e) The limitations of this Section shall not apply to causes of action arising out of fraudulent misrepresentations or to fraudulent concealment of causes of action."

¶ 69 It is true that an action against an architect for fraudulent misrepresentation is an "action[] based upon tort" and section 13-214(a) says that "[a]ctions based upon tort \*\*\* against any person \*\*\* in the design[] [or] planning \*\*\* of construction \*\*\* shall be commenced within 4 years from the time the person bringing an action, or his or her privity, knew or should reasonably have known of such act or omission." 735 ILCS 5/13-214(a) (West 2010). But subsection (e) makes an exception to subsection (a): the four-year limitation in subsection (a) "shall not apply to causes of action arising out of fraudulent misrepresentations." 735 ILCS 5/13-214(e) (West 2010). No other statute of limitations applies to an action against an architect for common-law fraud. Therefore, by

operation of section 13-214(e), an action against an architect for common-law fraud is a " 'civil action[] not otherwise provided for,' " to which section 13-205 applies. See *Rozny*, 43 Ill. 2d at 69.

¶ 70 To be sure, as the appellate court has remarked in a passage that the School District quotes, "section 13-205 \*\*\* has been held inapplicable to architects \*\*\* after passage of section 13-214." *Continental Insurance Co. v. Walsh Construction Co. of Illinois*, 171 Ill. App. 3d 135, 139 (1988). But the appellate court never said in *Continental* that section 13-205 was *categorically* inapplicable to architects, regardless of the action. After all, section 13-205 applies to several different actions: "actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for[.]" 735 ILCS 5/13-205 (West 2010). Just because, in cases of property damage, the appellate court has held section 13-205 to be inapplicable to architects (*Continental*, 171 Ill. App. 3d at 139), it does not follow that, in cases of fraud, section 13-205 would be inapplicable to architects. In fact, the appellate court in *Continental* hastened to add that, under section 13-214(e), "[i]njured parties whose claims arise out of fraudulent misrepresentations \*\*\* are not governed by" the period of limitation in section 13-214. *Id.* at 139. Excepting common-law fraud claims from the purview of section 13-214 exposes them to the operation of section 13-205, like any other fraud claim.

¶ 71 Because the meaning and effect of section 13-214(a) and (e) and section 13-205 are simple and straightforward, we need not discuss the cases from foreign jurisdictions that the School District cites.

III. CONCLUSION

¶ 72

¶ 73

For the foregoing reasons, we affirm the trial court's judgment.

¶ 74

Affirmed.