

64037-2

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CASE NO: 64037-2-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON
SEATTLE

MARGAUX MARINE GRAPHICS, INC,
D/B/A SEROCK CONSTRUCTION

Appellant/Cross-Respondent

v.

LEDCOR INDUSTRIES (USA), INC,

Respondent/Cross-Appellant

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

A. The Trial Court Abused Its Discretion When It Ignored Evidence That Ledcor Received Settlement Money From A Co-defendant For The Same Repairs That It Assessed Against Serock.

When this Court denied Serock's claim for an offset in the first appeal, it did so because Serock presented no evidence to the trial court of the amounts Ledcor received from other subcontractors for the same repairs that the court assessed against Serock. *Harmony at Madrona Park Owners Assoc. v. Madison Harmony Development, Inc.*, 143 Wn.App. 345, 359, 177 P.3d 755 (2008). On remand, Serock was able to present such evidence, despite the trial court denying Serock's motion to allow additional discovery.¹ That evidence came in the form of a published opinion from this Court. *Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.*, 150 Wn.App. 1, 5-7, 206 P.3d 1255 (2009).

In its responsive brief, Ledcor recounts at some length the procedural history of Serock's claim for set-off. That history, including Serock's attempts to raise the issue both pre-trial and post-trial, were before this Court in Serock's first appeal. With full knowledge of that

¹ Ledcor argues in its responsive brief that "Serock knew" the trial court was not going to consider additional evidence relating to the offset issue on remand because it denied Serock's motion to re-open discovery. Serock "knew" no such thing. The trial court did not say it would refuse to consider additional evidence. The trial court simply denied Serock's motion for additional discovery.

history, this Court did not preclude Serock from raising the issue and presenting evidence of offset on remand, nor did this Court prohibit the trial court from considering the issue of offset and evidence relating to that issue on remand. [CP Sub. No. 826, p.423].

The issue Serock now raises before this Court is not to rehash the prior history of the offset issue. Rather, the issue Serock asks this Court to hear is whether the trial court, on remand, abused its discretion when it ignored material evidence Serock offered showing that Ledcor had already been paid for the damages awarded against Serock.

Ledcor next makes a two-pronged argument: (1) that there is no evidence of what Zanetti's scope of work was or was not, or that its settlement with Zanetti was for repair costs assessed against Serock [Brief of Respondent at p.21];² and, (2) that it is Serock's burden to make such a showing.

² Ledcor incorrectly asserts that this Court found, in the first appeal, that the window-related siding was within Serock's scope of work, and therefore the reason it upheld the trial court's award of repair costs for this item against Serock. What this Court actually said was that even though the siding work was the work of other subcontractors, Serock was responsible for its repair costs because there was sufficient evidence for the trial court to conclude that Serock's defective work caused repairs to be performed that damaged the work of other trades. *Harmony*, at 358. Serock is not attempting to relitigate that ruling. Rather, given that Serock has been found liable for the siding repairs under this Court's prior ruling, the issue is whether Ledcor has already been paid for part or all of those repairs. Ledcor also incorrectly states that Serock was assessed costs to repair siding defects between the windows. Siding around the windows was repaired. There was no siding between the windows at issues. Instead, Serock installed thin pieces of vertical wood trim between the jambs of adjoining windows. That was the portion of Serock's work that Ledcor's experts called out to be repaired. *Harmony*, at 351.

The first prong of Leducor's argument is factually incorrect. First, of course, is this Court's decision in *Leducor v. MOE*, recounting that Zanetti installed the vinyl siding at Phase I of the project. Leducor did not dispute that statement on remand below [CP Sub. No. 828, pp. 473-480], nor does it dispute that statement before this Court. Second, Leducor implies that Zanetti's scope of work might have included work other than installing vinyl siding. However, Leducor points to nothing in the record before this Court supporting its assertion. There is nothing in the record before this Court showing that Zanetti's work included anything more than installing vinyl siding. Third, Leducor's suggestion that Zanetti's settlement was for repairs other than repairs around the windows is unsupported by any citation to the record.³

The trial court had before it, as this Court does, the scope of repairs prepared by Leducor's own expert. [CP Sub. No. 826, pp. 424-432]. That report contains a summary of repairs by line item. The complete list of repairs includes sections for window related repairs (including siding), roof repairs, railing repairs, site repairs, and belly band repairs. Leducor did not present any evidence to the trial court on remand, nor does it point

³ Leducor attempts to downplay this Court's opinion in *Leducor v. Mutual of Enumclaw* by characterizing this Court as "mentioning in passing" the \$236,000 settlement between Leducor and Zanetti. Serock does not take so lightly an appellate court's recitation of the background facts, taken from the record before it, and relied upon by the appellate court in reaching its decision.

to any evidence in the record before this Court, that any portion of Zanetti's settlement was for any repairs listed in its own expert's report, other than the window-related siding repairs.

The second prong of Ledcor's argument, i.e. that it is Serock's burden to prove that Zanetti's settlement covered the same damages as were assessed against Serock, represents a misunderstanding of the applicable law. Ledcor argues that *Puget Sound Energy, Inc. v. Alba General Ins. Co.*, 149 Wn.2d 135, 68 P.3d 1061 (2003) is dispositive and that *Eagle Point Condominium Owners Assoc. v. Coy*, 102 Wn.App. 697, 9 P.3d 898 (2000) is distinguishable. Actually, the reverse is true. *Alba* is distinguishable and *Eagle Point* is directly applicable.

Alba, and its whole line of cases, is discussed at length in *Puget Sound Energy, Inc. v. Certain Underwriters at Lloyds, London*, 134 Wn.App. 228, 138 P.3d 1068 (2006). That whole line of cases concerns offsets in insurance coverage cases involving environmental cleanups. In those cases, the triggered policies were jointly and severally liable for all of the damages, and the underlying settlements included releases for potential future damages and an "unquantifiable basket of risks" that were not part of the litigation claims. *Puget Sound Energy v. Certain Underwriters*, at 242-43, citing *Alba*.

Here, the context is entirely different. Insurance coverage is not at issue. Nor is Serock jointly and severally liable with Zanetti and the other subcontractors for all of Ledcor's repair costs. And, most importantly, Ledcor was not faced with an "unquantifiable basket of risks" when it settled with Zanetti. On the contrary, Ledcor's damages were fixed by its prior settlement with the developer for \$1.25 million. *Ledcor v. MOE*, at 7. Thus, none of the factors in the *Puget Sound* line of cases are present here, factors that caused the court in *Puget Sound v. Certain Underwriters*, at p.247, to conclude that it was virtually impossible for the non-settling insurer to prove its entitlement to an offset.

Eagle Point, on the other hand, is directly on point. Ledcor's attempts to distinguish *Eagle Point* fail. Ledcor argues that *Eagle Point* is distinguishable because the offset issue was litigated at trial, rather than post-trial, and that Serock's failure to litigate offsets at trial is fatal. Ledcor's description of *Eagle Point* is not supported by the language of the opinion. In *Eagle Point* (a construction defect case) a bench trial resulted in a judgment in favor of the plaintiff Association. The remaining defendant, Coy, then asked the court for an offset against the judgment, in the amount of his co-defendant's (Brixx's) prior settlement with the Association. The trial court then took post-trial briefing and eventually awarded Coy an offset. *Eagle Point*, at pp.700-701. The trial court based

its offset, in part, on the Association's failure to allocate any of the Brixx settlement to any particular claim. In affirming the trial court, the Court of Appeals agreed that the Association did not present any evidence in a way that would have enabled the trial court to separate claims that were not part of the settlement from those that were. *Eagle Point*, at pp. 702-03. The Court of Appeals held that the trial court "was within its discretion to conclude that an offset was necessary as a matter of equity to ensure that the plaintiff did not recover damages from both Coy and Brixx for the same damages." *Eagle Point*, at p. 703. The *Eagle Point* rationale is consistent with the opinion in *Litho Color, Inc. v. Pacific Employers Ins. Co.*, 98 Wn.App. 286, 991 P.2d 638 (1999), cited by Serock in its opening brief, and is consistent with the general principle that a plaintiff cannot recover for the same injury more than once. *Eagle Point*, at p. 702.

Here, Ledcor is in the same position as the Association in *Eagle Point* was. It settled with one defendant and pursued the same claims against the non-settling defendant as it had against the settling defendant. It failed to offer any evidence to the trial court segregating claims or allocating settlement funds. It was Ledcor's burden to produce such evidence. Indeed, Ledcor was the only party in possession of the information to meet that burden.

Ledcor attempts to argue that it is entitled to be made whole for its entire \$1.25 million settlement with the developer, before offsets are allowed to Serock. Ledcor's argument is erroneous because its unspoken premise is that all subcontractors are jointly and severally liable for all of Ledcor's damages. Therefore, there can be no offset for anyone until Ledcor collects the entire amount it paid to the developer. That premise is false.

Ledcor's subcontractor's are not jointly and severally liable for all of Ledcor's damages. The equitable principle that results in offsets is that Ledcor should not be paid for the same injury twice. Here, the same injury that Serock and Zanetti are being asked to pay for is the repair cost for the siding around the windows. Ledcor's argument would require that it be fully reimbursed for roof repairs, railing repairs, and site repairs (items not within either Serock's or Zanetti's scopes of work), before Serock would be entitled to an offset for Zanetti's settlement covering the same repairs. In effect, Ledcor's position would require Zanetti and Serock to underwrite any shortfalls in recoveries Ledcor received from other subcontractors, even though their scopes of work are different and even though they are not jointly and severally liable with those other subcontractors to Ledcor. Ledcor cites no authority for its argument.

Serock asks this Court to hold that Serock is entitled to an offset of \$236,000 on remand.

B. The Trial Court Erred When It Added 25% To Ledcor's Damage Claim For Defective Metal Flashing.

In its responsive brief, Ledcor points out that the trial court, in effect, entered a new Conclusion 12 to its original decision. [Brief of Respondent, at p. 27]. Ledcor argues that the trial court's action was acceptable because the basis of the award on remand was an indemnity theory rather than a breach of contract theory (which this Court had reversed in the first appeal). There are three significant defects in Ledcor's argument.

First, part of Ledcor's response to Serock's first appeal was to cross-appeal the trial court's 25% deduction for the metal flashing repair. This Court affirmed the trial court on that issue in the first appeal. *Harmony*, at 358-59. Thus, this issue was not remanded to the trial court, and the trial court had no legal basis to revisit the issue. The trial court, in effect, reversed this Court's decision affirming the 25% deduction.

Second, this Court, after affirming the 25% deduction, approved the trial court's calculation of \$95,625 as the proper measure of damages for the seven buildings at issue. This Court then reversed the trial court on Serock's statute of limitations defense to Ledcor's breach of contract theory. However, this Court then held that on remand, the trial court could

consider awarding the same damages on an indemnity theory. *Harmony*, at p. 359. This Court never remanded the issue of the 25% deduction or the issue that \$95,625 was the correct measure of damages for the seven buildings to the trial court.

Third, at the original trial, the trial court awarded damages to Ledcor for the other four buildings that Serock worked on, under an indemnity theory. *Harmony*, at 358-59. This Court upheld that award. In arriving at its award for the four buildings, the trial court had also deducted 25% for the metal flashing repairs. Now, as a result of the trial court's ruling on remand, the awards are inconsistent. The indemnity damages for four of the buildings were calculated with the 25% deduction, while the indemnity damages for the other seven buildings now have the 25% deduction added back in. This result makes no logical sense and cannot be justified on the basis of Ledcor's argument that on remand the change in legal theory from breach of contract to indemnity supports the trial court's decision. The damages for all buildings are now awarded under an indemnity theory, but one group of buildings has the 25% deduction and the other group does not.

Serock asks that the trial court's decision be reversed and the 25% deduction for the seven buildings be reinstated.

DATED this 22nd day of February, 2010.

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The undersigned declares as follows:

I am over the age of 18, not a party to this action, and competent to be a witness herein.

On the 22nd day of February, 2010, I caused to be delivered in the manner indicated below, a true and correct copy of the following documents:

1. Reply Brief of Appellant ; and
2. Certificate of Service.

to the following counsel of record:

PARTY/COUNSEL

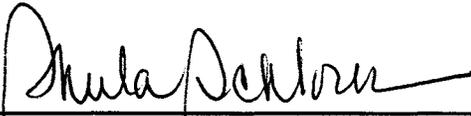
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of February, 2010.



Sheela Schlorer