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No. 65833-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

LEDCOR INDUSTRIES (USA) INC.,
a Washington corporation,

Appellant,

vs.

S.Q.I., INC., a Washington corporation; BORDAK BROTHERS, INC.,
an Oregon corporation; *et al.*,

Respondents.

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS
STATE OF WASHINGTON
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I. INTRODUCTION

Appellant Ledcor replies to briefs submitted by Respondents Bordak Brothers, SQI, Exterior Metals, Skyline Sheet Metal, and Starline Windows. All Respondents agree Ledcor's indemnity claims accrued on July 28, 2009, and the critical date under the construction statute of repose is six years earlier, July 28, 2003. For Ledcor's indemnity claims to be timely, there must be evidence that substantial completion of the Project as a whole occurred on or after July 28, 2003, or that the subcontractors performed work on or after that date. There is evidence of both.

Respondents also agree that determining the date of substantial completion of construction involves a fact based inquiry. Respondents, however, take the position that the evidence is undisputed that substantial completion occurred when the Certificate of Occupancy issued. Ledcor disagrees. Ledcor submitted competent and admissible evidence from the architect, owner, and general contractor that substantial completion actually occurred after the critical date, July 28, 2003. It also submitted evidence that SQI and Scapes performed significant work after the critical date. Viewing the evidence in the light most favorable to the non-moving party, summary judgment was improper because the evidence was in

dispute.

II. LEGAL ARGUMENT

A. Ledcor's Reply to Respondent Bordak's Brief.

1. The trial court correctly held judicial estoppel did not apply and Bordak did not appeal its ruling.

Bordak first argues Ledcor is judicially estopped from arguing substantial completion occurred after the Certificate of Occupancy was issued because it cited that date in a summary judgment motion in the underlying Admiral HOA litigation. The trial court rejected Bordak's argument holding "Judicial estoppel is not applied because Ledcor did not persuade any court to adopt its earlier position on the date of substantial completion. *N.H. v. MAINE*, 532 U.S. 742, 750-51 (2001)." *CP 1037*. Bordak did not raise the judicial estoppel issue in its summary judgment moving papers and did not appeal the court's ruling. *CP 168-80; 686-90*.

The trial court's ruling was correct because: (1) there was no ruling in the HOA litigation on when substantial completion occurred (Admiral Way argued it occurred in February 2004); and (2) Ledcor did not benefit from its prior position because the HOA litigation settled for \$4.7 million (Ledcor paid \$2.7 million and Admiral Way paid \$2 million) while the motion was pending. *CP 664-65*. Absent success in a prior proceeding, a

party's later facially inconsistent position introduces no risk of inconsistent court rulings. *New Hampshire v. Maine*, 532 U.S. at 750. Indeed, if Ledcor believed this defense was dispositive, it would not have paid \$2.7 million while the motion was pending.

2. **Ledcor argues that contract conditions impact the substantial completion standard through the flow down provision, not that it had a tolling agreement.**

Bordak contends Ledcor is precluded from arguing Bordak contractually agreed to toll the statute of repose because it did not make that argument in the trial court. *Brief*, p. 18. Bordak misunderstands Ledcor's argument. In the trial court, Ledcor argued the flow down provision in each subcontract bound each subcontractor to the condition in the Prime Contract designating the architect to determine when the Project was substantially complete. In granting discretionary review, Commissioner Verellen identified the controlling question as whether contract conditions impact the substantial completion standard. If the issues are not the same, they are closely related.

a. **Ledcor did not argue it had a tolling agreement.**

Ledcor did not argue Ledcor and Bordak agreed to "toll" the statute of repose, as Bordak claims. *Brief*, p. 18. Rather, Ledcor argued that

parties may contractually agree to conditions that impact statutory time limitations so long as the conditions are reasonable.

Because Washington case law has not addressed this issue, Ledcor cited to Washington case law recognizing the broad freedom to contract and case law from other jurisdictions that allow parties to modify or toll statutes of repose by agreement so long as the agreement is reasonable. *McRaith v. Seidman*, 909 N.E.2d 310 (Ill. App. 2009); *First Interstate Bank of Denver v. Central Bank*, 937 P.2d 855 (Colo. App. 1996). Ledcor cited two out of state cases as persuasive authority that parties may agree to contract conditions that impact statutes of repose so long as those conditions are reasonable. These cases support Ledcor's argument that Bordak contractually agreed to be bound by the architect's decision on when the Project was substantially complete under the statute of repose.

b. Ledcor raised the flow down issue in the trial court and Commissioner Verellen identified it as the controlling question of law on review.

In the trial court, Ledcor argued that Bordak agreed to be bound by the contract condition that the architect determines when the Project is substantially complete because of the flow down provision in its subcontract. *CP 1241-1254*. Had he remained on the Project until it was

substantially complete, the architect would have issued a Certificate of Substantial Completion. However, to save money, the owner relieved him of day-to-day monitoring of the Project in October 2003. In the architect's opinion, the Project still was not substantially complete at that time. *CP 536-37*. His determination is binding on Bordak.

With the architect no longer on the Project, Ledcor and Admiral Way were left to monitor its progress on their own. In the Construction Agreement Addendum ("Addendum"), they agreed the Project was substantially complete in February 2004, a determination that is also binding on Bordak. *CP 526-29*.

In granting discretionary review, Commissioner Verellen restated the flow down issue when he identified the controlling question of law as: "the extent to which the 'substantial completion' standard is impacted by contract conditions or addendum that may be inconsistent with the statutory definition¹." *Commissioner's Ruling Granting Discretionary Review, p. 7*. Ledcor addressed the controlling question for two reasons: (1) Commissioner Verellen wanted it addressed; and (2) at a minimum, the

¹ In granting review, Commissioner Verellen also recognized the importance of having this issue reviewed because of its potential impact on settlement in a case involving millions of dollars in indemnity claims. *Id.* A complete copy of the ruling is attached.

question is “arguably related” to the flow down issue raised by Ledcor.

See State Farm v. Amirpanahi, 50 Wn. App. 869, 751 P.2d 329 (1988).

Both issues concern whether the Prime Contract condition designating the architect to determine substantial completion is enforceable and binding on the subcontractors, in which case it impacts the substantial completion standard in the statute of repose.

Instead of addressing the controlling question of law, Bordak asks the Court of Appeals to ignore it. *Brief*, p. 18. This is wrong because this question was the basis for a rare grant of discretionary review and Commissioner Verellen believed it was an important question for the Court of Appeals to resolve.

Commissioner Verellen further pointed out that Ledcor had submitted evidence to the trial court, including a declaration from the architect and the Addendum, both of which demonstrate that substantial completion did not occur until after the critical date of July 28, 2003. This suggests he believed that, if contract conditions impact the substantial completion standard, summary judgment was improper.

3. Contrary to Bordak’s claim, the evidence on when the Project was substantially complete is disputed.

Bordak next argues the trial court correctly ruled as a matter of law

that substantial completion occurred by April 2003 because the evidence was undisputed. Bordak argues the ruling was “based on a number of facts” and “[t]here was ample factual evidence” to support the trial court’s ruling. *Brief*, pp. 1, 5. The standard on summary judgment, however, is not whether there was ample evidence to support the trial court’s ruling, it is whether reasonable persons, viewing the evidence and all reasonable inferences in favor of the non-moving party (Ledcor), could reach but one conclusion. *LeMon v. Butler*, 112 Wn.2d 193, 199, 770 P.2d 1027 (1989). That standard was not met.

Ledcor and Admiral Way presented evidence that substantial completion occurred after the critical date of July 28, 2003, thereby creating a genuine issue of fact as to whether their indemnity claims timely accrued. This evidence included correspondence and testimony from the architect responsible for monitoring the day-to-day progress of construction, testimony from the project owner, and the February 2004 Addendum. *CP 526-29, 535-37, 543-47, 551, 553-64, 1094-1159*. Viewing this evidence in favor of the non-moving parties, reasonable minds could – and would – agree with Ledcor and Admiral Way.

Bordak argues that the marketing of certain units for sale in April

2003 is indisputable evidence the Project was ready to be occupied for its intended purpose. *Brief, p. 29*. Bordak ignores evidence that the entire Project was not complete when the first units were marketed for sale. The architect organized his April 2003 list of work items to be completed by unit number, so that when a buyer agreed to purchase a unit, Leducor gave priority to completing that unit so that it could be turned over to the buyer (*i.e.*, turn key) as soon as possible. *CP 546*. Under this process, only limited portions of the Project were ready for occupancy in April 2003.

Bordak also argues that Marc Gartin testified the Project was “for the most part” complete in April 2003. *Brief, p. 29*. This testimony is not dispositive. Although he may have believed the Project was nearly complete in April 2003, the architect disagreed. In addition, in his declaration, Mr. Gartin explained that he knew there was still significant work to be completed in April 2003, but he wanted to sell units as soon as possible for financial reasons. *CP 535-39*. To the extent his testimony is inconsistent, it goes to the weight of his testimony, not its admissibility. *State v. Israel*, 113 Wn. App. 243, 268, 54 P.3d 1218 (2002). The jury, not the trial court, resolves credibility issues. *Morse v. Antonellis*, 149 Wn.2d 572, 575, 70 P.3d 125 (2003).

Bordak contends Ledcor retained Morrison Hershfield (“MH”) to determine whether the Project was substantially complete and it concluded it was complete at the end of 2002. *Brief, p. 6.* Bordak misunderstands MH’s role. MH was retained in late 2002, while construction was ongoing, to look at building envelope issues and offer solutions. MH performed a visual inspection of the building envelope. It did not conduct an intrusive investigation and did not opine the Project was substantially complete. If MH had opened up Bordak’s work, it would have discovered the work was not complete due to debonding at the substrate, deficient flashing, moisture in the sheathing, and corroded fasteners. *See CP 578.*

Further, MH was not designated by contract to determine substantial completion – Carl Pirscher, AIA, was. Even assuming, for argument purposes, the MH report is evidence of substantial completion, at best it creates an issue of fact to dispute Mr. Pirscher’s testimony.

Bordak next points out that Mr. Pirscher never issued a Certificate of Substantial Completion. *Brief, p. 30.* That may be so, but it does not mean his opinions (or authority) should be ignored. Mr. Pirscher did not issue a Certificate because the owner removed him from day-to-day monitoring of the Project in October 2003. *CP 536-37.* Mr. Pirscher

testified that when he left the Project, it still was not substantially complete. *CP 545-46*. One of the realities of large construction projects is that when completion is delayed, money concerns arise and adjustments have to be made. Because they could no longer afford to pay the architect, Ledcor and Admiral Way agreed to decide when substantial completion occurred. In the Addendum, they agreed it occurred in February 2004. *CP 526-29*.

B. Ledcor's Reply to Respondent SQI's Brief.

1. The contract condition designating the architect to determine the date of substantial completion is reasonable, enforceable, and binding on SQI.

SQI argues that the contract condition designating the architect to determine the date of substantial completion is unreasonable because it imposes no time limits. *Brief, p. 21*. This argument fails because both Ledcor and Admiral Way have a strong interest in completing the Project at the earliest possible date. The final payment conditions require the Project to be substantially complete before Ledcor receives final payment. *CP 469*. It is in Ledcor's best interest to complete the Project as soon as possible so that it will be paid in full. Admiral Way also wants the Project to be substantially complete at the earliest possible date so that it can

market all of its units for sale and occupancy. In addition, the duty of good faith and fair dealing is implied in every contract, which requires the parties to a contract to cooperate with each other to ensure that each may obtain the full benefit of performance. *Carlile v. Harbour Homes*, 147 Wn. App. 193, 217, 194 P.3d 280 (2008). Ledcor and Admiral Way acted in good faith when they executed the Addendum under which substantial completion was neither extended indefinitely or unreasonably. *CP 526-29*.

2. SQI performed defective work after the critical date, making Ledcor's indemnity claims against SQI timely under the termination of services prong.

SQI admits it performed roofing work in 2005 pursuant to a written subcontract with an indemnity agreement. This date is well after the critical date of July 28, 2003. However, SQI argues that Ledcor submitted no evidence the claims made against Ledcor arose from work performed by SQI in 2005. *Brief, p. 28*. SQI not only should have been procedurally precluded from raising this issue, it performed defective work in 2005.

a. SQI is not entitled to relief under the termination of services prong because it did not seek such relief in its partial joinder.

SQI should not have been granted relief under the termination of services prong of the statute of repose because it never requested relief on

that ground in its Partial Joinder to Bordak's summary judgment motion.² CP 420-22. SQI's sole argument was substantial completion occurred as a matter of law when a partial Certificate of Occupancy issued and the statute of repose necessarily expired six years later. *Id.* Because SQI never requested relief under the termination of services prong in its Joinder, it was not entitled to relief. *See Davidson v. City of Kirkland*, 159 Wn. App. 616, 246 P.3d 822 (2011) ("It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment."). It is reversible error to grant relief not requested in the moving party's initial motion. *Id.*

b. SQI performed defective work in 2005 under a subcontract with an indemnity agreement.

Even though it should have been unnecessary, Leducor did present evidence the Admiral HOA claims arose, in part, from work performed by SQI under its 2005 subcontract.³ CP 581-82. In 2005, SQI reinstalled approximately 40 percent of the roofing membrane. *Id.* In 2007, the

² "SQI also joins in Bordak's motion to dismiss Leducor's indemnity claim because that claim did not accrue during the 6-year period following completion of construction pursuant to the Statute of Repose, RCW 4.16.310." *Id.*

³ SQI incorrectly argues that Leducor characterizes SQI's 2005 work as a "continuation" of its 2001 subcontract. *Brief*, P. 28. The 2005 subcontract was a separate subcontract with an indemnification agreement, not a "continuation" subcontract. CP 1161-63.

HOA's expert conducted an intrusive investigation of the roof and concluded 100 per cent of the roofing membrane had to be removed and replaced because it was defectively installed and caused damage to the Project. *Id.* This necessarily involves work performed by SQI in 2005.

SQI was not entitled to relief under the termination of services prong of the statute of repose for both procedural and substantive reasons.

C. Ledcor's Reply to Respondent Exterior Metals' Brief

Exterior Metals argues the trial court correctly determined that substantial completion occurred as a matter of law in April 2003 because: (1) a Certificate of Occupancy had been issued; and (2) a few of the 69 residential units had been sold. *Brief, p. 12.* The relevant inquiry, however, is when the Project *as a whole* was ready to be occupied, not when a portion of the Project was ready. The evidence showed the Project as a whole was not ready for occupancy in April 2003. According to the architect, the Project was not substantially complete in April 2003 and he identified more than 100 reasons why it was not and would not be ready for its intended use for several months. *CP 544, 553-64.* The partial Certificate refers only to the residential, not the commercial, portion of the mixed use project. That evidence alone creates an issue of fact.

D. Ledcor's Reply to Starline Windows' Brief.

Starline's brief addresses an order entered by the trial court summarily dismissing Ledcor's indemnity claims against Starline based on a Release given by the Admiral HOA following a settlement between Starline and the HOA. *Brief, p. 6.* Although Ledcor disagrees with the trial court's interpretation of the effect of the Release, it is not relevant to this appeal. Ledcor did not petition for review of the Starline summary judgment order and did not identify Starline as a party to this appeal. The trial court did not certify the Starline summary judgment order for review, and Commissioner Verellen did not identify Starline's issue as accepted for review. This is a single issue appeal of whether Ledcor's indemnity claims timely accrued under the construction statute of repose, and Starline's brief fails to address that issue.

E. Ledcor's Reply to Skyline Sheet Metal's Brief.

1. Like Bordak, Skyline argues the Court of Appeals should not consider the controlling question because Ledcor did not raise it in the trial court.

Like Bordak, Skyline argues that the Court of Appeals should not consider the issue of whether contract conditions impact the substantial completion standard in the statute of repose because Ledcor did not raise it

in the trial court. *Skyline's Brief*, p. 10. Skyline's argument should be rejected for the same reasons Bordak's argument should be rejected. *See, supra*, at p. 3. This issue is properly before the Court of Appeals because Ledcor raised it in the trial court and Commissioner Verellen identified it as the controlling question of law on appeal.

Like Bordak, Skyline fails to set forth any compelling reason why the contract conditions and addenda Ledcor contends impact the substantial completion standard are unreasonable, unenforceable, or not binding on the subcontractors.

2. **The trial court erred by resolving disputed fact issues on summary judgment and holding the Project was substantially complete by April 2003.**

Skyline next argues Ledcor believes that interpretation of a statute is an issue of fact. *Brief*, p. 13. That is not so. Ledcor is well aware that interpretation of the meaning of a statute is a question of law and it has never argued otherwise. However, the issue of whether the statute has been complied with in a given fact setting generally presents an issue of fact or, at best, a mixed issue of law and fact. For example, when there is an issue as to when a statutory time period begins to run, summary judgment should be denied. *McLeod v. Northwest Alloys*, 90 Wn. App.

30, 35, 969 P.2d 1066 (1998). Here, there was an issue of fact as to when the Project as a whole was substantially complete and summary judgment should have been denied.

Skyline cites *Glacier Springs Owner's Assoc. v. Glacier Springs Enterprises*, 41 Wn. App. 829, 706 P.2d 652 (1985), for the proposition that the determination of when substantial completion of construction occurs under RCW 4.16.310 is a pure issue of law. However, the *Glacier Springs* decision does not address whether the substantial completion inquiry is a factual or legal inquiry, let alone stand for the proposition that it is a purely legal inquiry. In *Glacier Springs*, the Court of Appeals adopted the latest date argued by either party (July 1973) as the date of substantial completion. 41 Wn. App. at 832. Applying that date, the Court of Appeals reversed the trial court's summary dismissal of the plaintiff's claims on the ground they were time barred under the statute of repose and remanded the case for trial. *Id.* at 830. That is the same relief Ledcor seeks in this appeal.

In granting discretionary review, Commissioner Verellen also recognized that there is limited case law in Washington analyzing how to apply the statutory definition of substantial completion to a particular fact setting. *Commissioner's Ruling*, p. 6. Other jurisdictions recognize that

summary judgment should not be granted when there is a dispute as to when a construction project as a whole was substantially complete. See *North American Capacity Ins. v. Claremont Liability Ins.*, 177 Cal. App. 4th 272, 286-87, 99 Cal Rptr. 3d 225 (2009).

The *Glacier Springs* case supports Leducor's position in one respect because it recognizes that substantial completion of construction occurs when the entire improvement, not merely a component part, may be used for its intended purpose. 41 Wn. App. at 833. The fact that a few units were sold in April 2003 does not mean the entire improvement (69 condominiums and multiple commercial spaces) was ready to be used for its intended purpose. As the architect testified, the entire improvement was not ready to be used for its intended purpose at that time. CP 544-47.

3. The California *North American Capacity Insurance* opinion is persuasive authority that supports Leducor.

Skyline claims the *North American* case is not relevant to this appeal because it did not involve interpretation of a statute of repose. *Brief*, p. 15. Leducor disagrees. No Washington case holds the determination of when substantial completion of construction occurs is a pure question of law. In *North American*, the California Court of Appeals recognizes the inquiry is inherently a factual one. This makes sense

because the evidence of when an entire improvement is substantially complete and ready to be put to its intended use is often in dispute.

Although the *North American* case is not binding on Washington courts, the reasoning of the California Court of Appeals is persuasive because it recognizes that the evidence of when a construction project is substantially complete and ready to be put to its intended use varies with the particular facts and circumstances of each project. 177 Cal. App. 4th 272, 99 Cal. Rptr 3d 229 (2010). The *North American* holding is relevant because summary judgment is improper when the evidence is disputed.

Skyline also argues the *Ellsworth* case Ledcor cited is irrelevant because it involved a Utah mechanic's lien statute, not a statute of repose. *Brief, p. 17; Ellsworth Paulsen Constr. v. 51-SPR, LLC*, 144 P.3d 261 (Utah Ct. App. 2006). The *Ellsworth* case is relevant and persuasive for sound reasons. In *Ellsworth*, the Utah Court of Appeals held the trial court erred in summarily dismissing the plaintiffs' claims as untimely under the mechanic's lien statute because there were genuine issues of fact. *Id.* at 268-70. In *Ellsworth*, both parties presented evidence on summary judgment that supported two conflicting project completion dates. *Id.* Viewing the evidence in favor of the non-moving party, the Utah Court held that because the evidence was in dispute, summary judgment was

improper. *Id.* The court in *Ellsworth* recognized that there were genuine issues of fact regarding the date of substantial completion. *Id.* That is exactly what the trial court should have recognized in this case.

4. The trial court's ruling on substantial completion is inconsistent with the terms of the Prime Contract.

Skyline contends the trial court's ruling on when substantial completion occurred under the statute is completely consistent with the contract condition regarding substantial completion.⁴ *Brief, p. 17.* It is not. The trial court's ruling is inconsistent with the contract condition because the contract designates the architect to determine whether the Project was substantially complete at a given time. If the trial court had enforced that condition, it would not have dismissed Ledcor's indemnity claims. When the trial court changed its mind on reconsideration and granted summary judgment to Bordak, its ruling became in direct conflict with the Prime Contract condition and the architect's opinions. Substituting its own opinion while excising those matters was error.

Skyline also argues that, regardless of the architect's opinion, it is undisputed that: (1) Admiral Way believed the Project was substantially

⁴ Both the statute and the Prime Contract provision use a similar definition of substantial completion, with both defining the term as the point at which an entire project is ready to be put to its intended use.

complete in March 2003; and (2) people were living in the building in April 2003. *Brief, p. 18.* Skyline fails to cite to the record to support either statement and there is evidence to dispute both statements. Mark Gartin, the owner of Admiral Way, testified that the Project was not substantially complete until February 2004 when the Addendum was signed. *CP 538 at ¶ 25.* Although there is evidence that a couple of units had been sold, there is no evidence units were occupied in April 2003. Further, occupancy of a portion of the Project does not mean the entire Project was substantially complete. *See Smith v. Showalter, 47 Wn. App. 245, 734 P.2d 928 (1987)* (substantial completion does not occur until the entire improvement is ready to be used for its intended purpose).

5. The *Lakeview* case is distinguishable on its facts.

Ledcor and Skyline disagree as to whether the facts in *Lakeview* are materially distinguishable from those in Admiral.⁵ Skyline contends the trial court correctly based its ruling on the *Lakeview* decision, arguing that substantial completion occurs as a matter of law on every project

⁵ *1519-1525 Lakeview Blvd. Condo. Assoc. v. Apartment Sales Corp.*, 101 Wn. App. 923, 6 P.3d 74, *aff'd* 144 Wn.2d 570, 29 P.3d 1249 (2001).

when the Certificate of Occupancy issues and the first unit is marketed for sale. *Brief, p. 19.* Ledcor disagrees.

In *Lakeview*, the Court of Appeals stated that, at the time the Certificate of Occupancy issued, “the record does not indicate that work yet unfinished rendered the project not substantially complete.” 101 Wn. App. at 932. In contrast, the record in *Admiral* clearly indicated that the Project was not substantially complete when the Certificate of Occupancy issued because of the large amount of unfinished work. Ledcor submitted a declaration from the architect, correspondence from the architect to Ledcor and *Admiral Way*, a declaration from the project owner, and the Addendum to show the Project was not substantially complete in April 2003. *CP 526-29, 535-37, 543-47, 551, 553-64, 1094-1159.*

Contrary to *Skyline*’s unsupported statement, the Court of Appeals in *Lakeview* did not look at a “variety of factors” in deciding when substantial completion occurred – it looked at only two factors, the Certificate of Occupancy and the marketing of units. Given that both events had occurred as of August 1990, the evidence in *Lakeview* was undisputed that substantial completion had occurred by that date. Those two controlling facts in *Lakeview* do not control in *Admiral* because there is other evidence the Project was not substantially complete in April 2003.

In addition, Skyline argues the nature and quantum of evidence in the record regarding substantial completion in *Lakeview* is the same as it is in Admiral, pointing out that units were being marketed in both projects. *Brief, p. 22.* The difference is that all three units at *Lakeview* were marketed for sale in August 1990, whereas only a select few of the 69 units at Admiral were marketed for sale in April 2003. The vast majority of units at Admiral were not ready for occupancy and the commercial and common areas were not complete at that time. In April 2003, the architect issued nearly 100 pages of Field Directives identifying work that had to be completed before substantial completion could occur. *CP 1094-1159.* In *Lakeview*, there was no 100 page list of Field Directives to be completed and no declaration from the architect opining the project was not substantially complete when the Certificate issued in August 1990.

6. A proper analysis of the substantial completion of construction standard in RCW 4.16.310 requires consideration of all relevant evidence.

Finally, Skyline argues that the application of the statute of repose is the same regardless of the size, scope, or complexity of the project. *Brief, p. 23.* This statement is misleading to say the least. To the extent Skyline is arguing the meaning of the statute of repose is the same regardless of the size, scope, or complexity of the project, Leducor agrees.

However, to the extent Skyline is arguing substantial completion occurs on every project when the Certificate of Occupancy issues, Ledcor strongly disagrees.

The term “substantial completion of construction” is not defined in the statute as the date the Certificate of Occupancy is issued. If the Legislature intended to define the term that way, it would have done so. Instead, it defined substantial completion of construction as occurring when the entire improvement may be used or occupied for its intended purpose. The substantial completion inquiry is inherently fact intensive because each project varies in size, scope, and complexity.

F. Scapes Does Not Dispute That It Performed Work Within Six Years of the Accrual of Ledcor’s Indemnity Claim.

In its Brief of Appellant, Ledcor presented evidence that Scapes performed construction services in 2004, well after the critical date of July 28, 2003. *Brief, p. 39, n. 14, citing CP 2050-52.* Ledcor further argued that its indemnity claims against Scapes were timely under the termination of services prong of the statute of repose. Because Scapes did not file a Brief, it fails to dispute Ledcor’s evidence or argument on this issue.

CONCLUSION

The issue of whether indemnity claims have timely accrued under

the construction statute of repose consistently arises in multi-tier construction defect cases. Indemnity agreements play a crucial role in promoting settlement and resolution of these cases short of trial. Commissioner Verellen recognized this in granting discretionary review.

As it stands now, Ledcor has lost its valuable indemnity claims because the trial court improperly weighed the evidence in favor of the moving party on summary judgment and ignored binding contract language under which the parties agreed the architect would determine substantial completion. It also ignored evidence that SQI and Scapes performed services after the critical date. This allowed the subcontractors to escape their contractual obligation to reimburse Ledcor for payments it made to repair defective work performed by its subcontractors.

Trial courts cannot resolve disputed fact issues on summary judgment because it infringes on the fundamental right of the trier of fact to decide issues of fact. The trial court's ruling should be reversed.

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RESPECTFULLY SUBMITTED this 21st day of September, 2011.

Martens + Associates | P.S.

By 

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Ledcor Industries (USA) Inc.

APPENDIX

Commissioner's Ruling Granting Discretionary Review

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

LEDCOR INDUSTRIES (USA))
INC., a Washington corporation,)
and ADMIRAL WAY, LLC, a)
Washington Limited Liability)
Company,)

Petitioner,)

v.)

S.Q.I., INC., a Washington)
corporation; BORDAK)
BROTHERS, INC., an Oregon)
corporation; UNITED SYSTEMS,)
INC., a Washington corporation;)
THE PAINTERS, INC., a)
Washington corporation;)
COATINGS UNLIMITED, a)
Washington corporation;)
EXTERIOR METALS, INC., a)
Washington corporation;)
SKYLINE SHEET METAL, INC.,)
an Oregon corporation;)
ROESTEL'S MECHANICAL,)
INC., a Washington corporation,)

Respondents.)

No. 65833-6-1

COMMISSIONER'S RULING
GRANTING DISCRETIONARY
REVIEW

Ledcor Industries (USA) Inc., the general contractor, and Admiral Way LLC, the developer, seek discretionary review of the trial court orders that the statute of repose bars their indemnity claims against several subcontractors. Specifically, the trial court based its rulings on the determination that substantial completion of the condominium project occurred no later than April 2003, when some of the units were sold and occupied, and any remaining defects in the project did not prevent the use of the condominiums for their intended purpose. Ledcor obtained a certification from the trial

court under CR 54(b) that there is no just cause for delay of entry of a final judgment dismissing the indemnity claims and a RAP 2.3(b)(4) certification that there is a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation. I accept the RAP 2.3(b)(4) certification.

FACTS

Ledcor was the general contractor for the Admiral Way condominium project. Admiral Way LLC was the developer. The general conditions of the prime contract provide that the architect determine "substantial completion." Several subcontractors worked on the project. The subcontract agreements included indemnity provisions. In March 2003, the City of Seattle issued a Certificate of Occupancy and Admiral Way LLC began marketing the units for sale. In April 2003, Admiral Way LLC sold some of those units. The sales were "turnkey" rather than advance sales of units not yet available for occupancy. In February 2004, Ledcor entered into a Construction Agreement Addendum with Admiral Way LLC agreeing that "the Project is complete with the exception of the items listed in the punch list..."

In July 2007, the homeowners association filed a lawsuit against Admiral Way LLC alleging construction defects. Admiral Way LLC filed a third party claim against Ledcor. On July 29, 2009, Admiral Way LLC and Ledcor settled with the homeowners.

In August 2009, Ledcor commenced a separate lawsuit against several subcontractors. Ledcor alleged several causes of action including claims of indemnity. Admiral Way LLC was allowed to intervene and asserted several causes of action including claims of indemnity.

Several of the subcontractors filed motions for summary judgment alleging that the indemnity claims are barred by the statute of repose. Over the course of several months, the trial court issued rulings dismissing the indemnity claims as barred by the statute of repose. The trial court's critical ruling was that, as a matter of law, the project was substantially complete no later than April of 2003, and that the 6-year statute of repose barred the indemnity claims that all accrued as of the July 29, 2009 settlement of the homeowner's lawsuit.

The trial court has issued its certification under CR 54(b) that there is no just cause for delay entry of a final judgment as to the indemnity claims. The trial court also issued its certification under RAP 2.3(b)(4) that there is a controlling question of law as to which there is a substantial ground for a difference of opinion and that immediate review may materially advance the ultimate termination of this action.

CRITERIA FOR DISCRETIONARY REVIEW

Discretionary review is available only if:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
- (4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b).

DECISION

As the CR 54(b) certification, two subcontractors argue that the indemnity causes of action are not claims separate from the remaining causes of action and therefore, CR 54(b) should not apply. Although the facts giving rise to the causes of action are closely related, it appears the causes of action could have been separately enforced and therefore Ledcor and Admiral Way LLC's indemnity claims are eligible for certification under CR 54(b).¹ For CR 54(b) "a showing of hardship or injustice is crucial...".² The trial court order offers some potential, but not clearly compelling, hardships. It is not necessary to conduct an in depth analysis of CR 54(b) or of the RAP 2.3(b)(1), or (2) standards because discretionary review is appropriate based on the RAP 2.3(b)(4) certification.

Washington case law does not provide any specific guidance regarding RAP 2.3(b)(4), but federal law provides some guidance because the rule is modeled on a federal law that provides for certification by the district court of interlocutory review in rare civil cases. 28 U.S.C.A. § 1292(b). There are distinctions between the two rules.³ Federal law interpreting § 1292(b) may help establish principles for reviewing

¹ See Nelbro Packing Co. v. Baypack Fisheries, L.L.C., 101 Wn. App. 517, 524, 6 P.3d 22 (2000) (applying Second Circuit test whether multiple claims are presented.)

² Pepper v. King Cnty., 61 Wn. App. 339, 353, 810 P.2d 527 (1991).

³ The federal rules of appellate procedure do not allow a party to seek review of an allegedly erroneous ruling as provided by RAP 2.3(b)(1) and (2). Neither does § 1292(b) permit interlocutory review based on the stipulation of the parties, as contemplated by RAP 2.3(b)(4). Section 1292(b) also does not provide for an automatic stay of trial court proceedings pending interlocutory review, as generally occurs in Washington when discretionary review is granted. Both rules provide that a trial court may certify a case for interlocutory review when (1) there is a question of law which (2) is controlling, (3) as to which there is a substantial ground for a difference of opinion, and (4) immediate review of which may materially advance the ultimate termination of the litigation.

certifications pursuant to RAP 2.3(b)(4), but it is not controlling. It is clear that certification in the federal courts is only granted in exceptional situations.⁴

“It has, of course, long been the policy of the courts to discourage piecemeal appeals because most often such appeals result in additional burdens on both the court and the litigants. Permission to allow interlocutory appeals should thus be granted sparingly and with discrimination.”

“In accordance with this policy, § 1292(b) ‘should and will be used only in exceptional cases where a decision on appeal may avoid protracted and expensive litigation, as in antitrust and similar protracted cases.’ . . . [T]he movant bears the heavy burden of demonstrating that the case is an exceptional one in which immediate appeal is warranted.”^{5]}

As one federal court notes, § 1292(b) “is not intended as a vehicle to provide early review of difficult rulings in hard cases. Nor is it appropriate for securing early resolution of disputes concerning whether the trial court properly applied the law to the facts.”⁶

All of the subcontractors urge that the trial court correctly dismissed the indemnity claims. Bordak Brothers does not oppose discretionary review. S.Q.I. urges caution in accepting the RAP 2.3(b)(4) certification. Exterior Metals, joined by Skyline

⁴ The federal circuit courts of appeal have unfettered discretion to decline to accept certifications. 28 U.S.C.A. § 1292(b). Only about 100 cases a year are certified under § 1292(b) in the entire federal system, and the circuit courts of appeal only accept half of these certifications. Koehler v. Bank of Bermuda, Ltd., 101 F.3d 863, 866 (2nd Cir. 1996) (citing CHARLES A. WRIGHT, LAW OF FEDERAL COURTS: REVIEW OF INTERLOCUTORY ORDERS § 102, at 758 (5th ed. 1994)). As this statistic suggests, over the years the federal case law appears to have moved in the direction of encouraging interlocutory review only in “exceptional” cases.

⁵ White v. Nix, 43 F.3d 374, 376 (8th Cir. 1994) (quoting Control Data Corp. v. Int’l Bus. Machs. Corp., 421 F.2d 323, 325 (8th Cir. 1970); S. Rep. No. 2434, 85th Cong., 2d Sess. (1958) (citations omitted); accord Flor v. BOT Fin. Corp., 79 F.3d 281 (2d Cir. 1996); Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21, 25 (2d Cir. 1990) (only exceptional circumstances justify departure from basic policy of postponing appellate review until after entry of final judgment); Orson, Inc. v. Miramax Film Corp., 867 F. Supp. 319, 321 (E.D.Pa. 1994)).

⁶ Abortion Rights Mobilization, Inc. v. Regan, 552 F. Supp. 364, 366 (S.D.N.Y. 1982) (citations omitted).

Sheet Metal argue that discretionary review should be denied.⁷ As to the (b)(4) certification the opponents to discretionary review argue that Ledcor and Admiral Way LLC present only a factual argument that the trial court misapplied the standards for summary judgment by improperly weighing the evidence. They also urge that Ledcor and Admiral Way LLC's other claims remain to be litigated against the subcontractors and judicial economy is served by avoiding a piecemeal appeal limited to the statute of repose and the indemnity claims. But, the trial court's consolidated order includes a detailed explanation of the reasons underlying the courts' certification for an immediate appeal.

First, there is a controlling question of law. RCW 4.16.310 bars claims made more than six years after the later of the date of substantial completion of the project or the termination of services. The statute includes a definition: "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." There is limited caselaw applying that definition. In Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp., 101 Wn. App. 923, 932, 6 P.3d 74 (2000), aff'd, 144 Wn.2d 570, 29 P.3d 1249 (2001), this court held that "substantial completion" occurred when the certificate of occupancy had issued, the units were being marketed and only "punch list" items remained with no indication that work yet unfinished rendered the project not fit for occupancy. Here, among other arguments, Ledcor and Admiral Way LLC resisted summary judgment by providing expert testimony regarding the architect's determination that the project was not substantially completed, as provided for in the

⁷ The other subcontractors impacted by these rulings have not offered a response to the request for discretionary review.

general conditions, and the addendum entered in February 2004 that the project was then substantially complete. The trial court concluded that as a matter of law, the project was substantially complete no later than April 2003. The controlling question of law is the extent to which the "substantial completion" standard is impacted by contract conditions or addendum that may be inconsistent with the statutory definition.

Second, the trial court reasons that an immediate appeal may materially advance the resolution of the litigation, because the indemnity claims are the broadest of the claims against the subcontractors and are fundamental to ability of Ledcor and Admiral Way LLC to fully recover their settlement payments to the homeowners. The trial court noted that the resolution of this question will greatly simplify the litigation and will "promote meaningful and productive settlement negotiations between the parties."

Finally, in recognition of the practical significance of resolving whether indemnity claims should remain in the litigation, the trial court has stayed the litigation of the remaining claims until this appeal can resolve the question whether Ledcor and Admiral Way LLC can pursue indemnity claims at trial. Consistent with the significance assigned by the trial court to the indemnity claim question, and its potential impact on settlement, I conclude that review is warranted under RAP 2.3(b)(4).

CONCLUSION

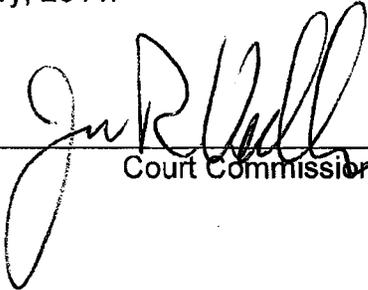
I accept the trial court's RAP 2.3(b)(4) certification as to the dismissal of Ledcor's and Admiral Way LLC's indemnity claims against subcontractors based upon the statute of repose.

No. 65833-6-1/8

Therefore, it is

ORDERED that the motion for discretionary review is granted.

Done this 10th day of February, 2011.



Court Commissioner

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No. 65833-6-I

COURT OF APPEALS,
DIVISION I OF THE STATE OF WASHINGTON

LEDCOR INDUSTRIES (USA) INC.,
a Washington Corporation

Appellant,

v.

S.Q.I., INC., a Washington corporation;
BORDAK BROTHERS, INC.,
an Oregon corporation; *et al.*,

Respondents.

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STATE OF WASHINGTON
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I hereby certify that on the date set forth below, I caused to be served true and correct copies of Ledcor Industries (USA) Inc.'s *Reply Brief of Appellant* on the court and counsel as follows:

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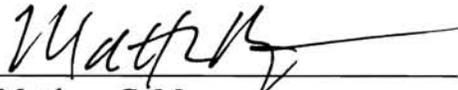
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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED in SEATTLE, WASHINGTON, this 21st day of September, 2011.


Matthew C. Morgan
Paralegal for Martens + Associates | P.S.