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65833-6

NO. 65833-6-I

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

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.

BRIEF OF RESPONDENT SKYLINE SHEET METAL, INC.

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 AUG -11 PM 3:56

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ASSIGNMENT OF ERROR.....	2
III. STATEMENT OF THE CASE	3
A. Skyline’s work on the Admiral Way project.	4
B. Work performed to the sheet metal by others following Skyline’s departure.	5
C. Admiral Way received a certificate of occupancy from the City of Seattle and began marketing and selling units.	5
D. The underlying litigation and settlement of the claims by Ledcor and Admiral Way.	6
E. Proceedings in the superior court since Ledcor and Admiral Way’s settlement with the COA.....	6
1. Motion for Summary Judgment on Indemnity filed by Bordak and SQI.	7
2. Skyline’s Motion for Summary Judgment.....	8
F. Skyline incorporates herein facts set forth in other Respondents’ Briefs.....	8
IV. ARGUMENT.....	9
A. The standard of review is <i>de novo</i> , but this Court may affirm on any ground that the record supports.	9
B. The indemnity claims of Ledcor and Admiral Way accrued on or about July 28, 2009.	10
C. The superior court correctly decided that the date of substantial completion occurred before July 28, 2003 and therefore, the indemnity claims of Ledcor and Admiral Way were time-barred.	10
1. Ledcor and Admiral Way’s new arguments that the prime contract’s provisions concerning substantial completion toll or modify the statute of repose were never argued to the court below.	10

2.	The superior court correctly interpreted the statute of repose and its definition of “substantial completion” to determine that Ledcor and Admiral Way’s claims were time-barred	13
3.	Ledcor and Admiral Way’s reliance on out-of-state case law and specifically, <i>North American Capacity Insurance v. Claremont Liability Insurance</i> , is misplaced.	15
4.	The prime contract between Ledcor and Admiral Way does not conflict with the superior court’s determination of substantial completion.....	17
5.	<i>Lakeview</i> is applicable to this matter and the superior court did not err in applying its reasoning.....	19
6.	<i>Lakeview</i> ’s analysis of the statute of repose is also applicable in this matter because the statute makes no distinctions based on the scale or complexity of a construction project.	23
D.	The superior court correctly decided that the indemnity claims of Ledcor and Admiral Way against Skyline did not accrue within the statute of repose’s termination of service prong.....	24
1.	There is no evidence and no argument set forth that Skyline performed work after July 28, 2003.	25
2.	Ledcor’s retainage payment to Skyline in October 2004 is not a “service” as a matter of law.	26
E.	Skyline Requests an Award of Attorney’s fees Under RAP 18.1.	29
V.	CONCLUSION	29

TABLE OF AUTHORITIES
Table of Cases

	Page(s)
Washington Cases	
<i>American Best Food, Inc. v. Alea London, Ltd.</i> , 168 Wn.2d 398, 229 P.3d 693 (2010)	15
<i>Bohn v. Cody</i> , 119 Wash.2d 357, 832 P.2d 71 (1992).....	25
<i>Central Washington Refrigeration, Inc., v. Barbee</i> , 133 Wn. 2d. 509, 946 P.2d. 760 (1997)	10
<i>Condit v. Lewis Refrigeration Co.</i> , 101 Wash.2d 106, 676 P.2d 466 (1984)	13
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wash.2d 801, 828 P.2d 549 (1992)	19, 25, 26
<i>Glacier Springs Property Owner's Association v. Glacier Springs Enterprises, Inc.</i> , 41 Wash. App. 829, 706 P.26 652 (Div. I 1985)	13, 28
<i>In re Det. of Ambers</i> , 160 Wn.2d 543, 158 P.3d 1144 (2007).....	11
<i>1519-1525 Lakeview Blvd. Condominium Assoc. v. Apartment Sales Corp.</i> , 101 Wn. App.923, 6 P.3d 74, <i>aff'd</i> 144 Wn.2d 570, 29 P.3d 1249 (2001).....	19, 20, 21, 22, 23, 24, 26, 27
<i>LaMon v. Butler</i> , 112 Wn.2d 193, 770 P.2d 1027 (1989)	9
<i>Nast v. Michels</i> , 107 Wn.2d 300, 730 P.2d 54 (1986).....	9
<i>New Meadows Holding Co. v. Wash. Water Power Co.</i> , 102 Wn.2d 495, 687 P.2d 212 (1984)	11
<i>Parkridge v. Ledcor</i> , 113 Wn. App. 592, 54 P.3d. 225 (2002)	10, 27, 28
<i>Peoples Nat'l Bank v. Peterson</i> , 82 Wn.2d 822, 514 P.2d 159 (1973).....	11
<i>Smith v. Showalter</i> , 47 Wn. App. 24, 734 P.2d 928 (1987).....	26, 27
<i>Sourakli v. Kyriakos, Inc.</i> , 144 Wn. App. 501, 182 P.3d 985 (2008).....	11
<i>State v. Peterson</i> , 29 Wn. App. 655, 630 P.2d 480 (1981).....	9
<i>Wilson v. Steinbach</i> , 98 Wn. 2d 434, 656 P.2d 1030 (1982).....	9

Out of State Cases

Ellsworth Paulsen Constr. Co. v. 51-SPR, LLC, 144 P.3d 261(Utah Ct. App. 2006).....16, 17

North American Capacity Insurance Co v. Claremont Liability Ins. Co., 177 Cal. App. 4th, 272, 99 Cal. Rptr. 3d 225 (2009)15, 16

Statutes

RCW 4.16.30023, 24

RCW 4.16.3101, 3, 13, 14,16, 18, 23, 24, 26

Rules and Regulations

RAP 2.59

RAP 2.5A.....11

RAP 9.1211

RAP 10.1(g).....1

RAP 10.3(a)19

RAP 10.3(a)(6)25

RAP 18.1(a), (b)29

CR 56(c)9

Other Authority

Tegland, 2A *Wash. Prac.*, Rules Practice RAP 2.5 (6th ed. 2010)9

I. INTRODUCTION

Defendant/Respondent Skyline Sheet Metal, Inc. (“Skyline”) is one of several subcontractors that have been sued for indemnification by Appellant Ledcor Industries (USA) Inc. (“Ledcor”) and Admiral Way, LLC (“Admiral Way”). Pursuant to RAP 10.1(g), Skyline joins in the legal arguments made in the Respondents’ Briefs filed by Bordak Brothers, Inc. (“Bordak”), SQI, Inc. (“SQI”) and Exterior Metals, Inc. (“Exterior Metals”); the superior court’s decision regarding the date of substantial completion should be affirmed. Additionally, there are issues unique to Skyline under the “termination of services” prong of the construction statute of repose that further support the superior court’s decision.

On July 28, 2009, the indemnity actions of Ledcor and Admiral Way accrued. Under the construction statute of repose, RCW 4.16.310, in order for the indemnity claims to be timely against Skyline, Ledcor and Admiral Way had to demonstrate that either the settlement occurred within six years of “substantial completion” of the Admiral Way Condominium construction project (“the project”) or within six years of Skyline’s termination of services on the project. Thus, Ledcor and Admiral Way had to demonstrate that the project was not substantially complete until

after July 28, 2003 or that Skyline was still engaged in providing services on the project after July 28, 2003. Leducor failed in both respects.

There is no dispute that units at the project were being sold and occupied prior to July 28, 2003. Furthermore, there is no dispute that the City of Seattle issued a Certificate of Occupancy for the project prior to July 28, 2003. Based on these undisputed facts that the project was being used for its intended purpose in early 2003, the superior court properly determined that the project was substantially complete prior to July 28, 2003.

Furthermore, Leducor and Admiral Way presented no evidence of material facts to show that Skyline provided construction services on the project after July 28, 2003. Because Skyline did not perform any construction services after July 28, 2003 and “substantial completion” occurred well before July 28, 2003, the superior court properly ruled that the indemnity claims of Leducor and Admiral Way were untimely under the construction statute of repose as a matter of law.

II. ASSIGNMENT OF ERROR

Assignment of Error

Defendant/Respondent Skyline assigns no error to the superior court’s decision.

Issues Pertaining to Assignment of Error

Skyline disagrees with Ledcor and Admiral Way's statement of Issues Pertaining to Assignments of Error. Instead, the issues on appeal are more properly stated as follows:

Whether the superior court properly dismissed the indemnity claims of Ledcor and Admiral Way as a matter of law on summary judgment, where:

1. The Washington construction statute of repose, RCW 4.16.310, provides that "substantial completion" of construction **shall** mean the state of completion reached when an improvement upon the property may be used or occupied for its intended use;

2. The undisputed facts show that the Admiral Way Condominium was being put to its intended use prior to July 28, 2003 with the issuance of the Certificate of Occupancy by the City of Seattle, the marketing and selling of units, the individual third party owners' occupancy of the units and the use of the building as a dwelling;

3. The undisputed facts show that Skyline's construction services on the project terminated before July 28, 2003.

III. STATEMENT OF THE CASE

Ledcor, the general contractor on the project, originally filed the complaint in this matter naming Skyline as a defendant on August 29,

2008. CP 1671-82. An Amended Complaint was subsequently filed on September 23, 2009 erroneously asserting that Skyline provided stucco installation on the Admiral Way project. CP 1685; 1703-05. The causes of action as to Skyline in the Amended Complaint included a claim of indemnification. CP 1714-15.

The superior court permitted Admiral Way to intervene in this action. Admiral Way filed a Complaint in this matter on January 14, 2010. CP 1869-96. Admiral Way also asserted against Skyline a claim for breach of the contractual duty to indemnify. CP 1886-88; 1893.

A. Skyline's work on the Admiral Way project.

On April 12, 2001, Skyline entered into a contract with Ledcor to provide and install certain sheet metal work, including but not limited to exterior sheet metal cladding, parapet caps and metal soffit panels on the exterior of the project. CP 1590, 1596-1646.

Skyline worked on the project in 2002 and submitted its final invoice for payment on April 19, 2002. CP 1590; 1654. On May 22, 2002, Skyline's final payment application was approved and Skyline was issued a check at for 100% completion, minus retention. CP 1648-50. Mr. Jeff Peters, the estimator/project manager for Skyline on the project, submitted a declaration that Skyline did not perform any additional work

on the project after July 29, 2002. CP 1590. Ledcor paid Skyline the retention on March 4, 2004. CP 3255.

B. Work performed to the sheet metal by others following Skyline's departure.

After Skyline finished its work, Ledcor engaged another sheet metal subcontractor, Respondent Exterior Metals, Inc. ("Exterior Metals"), to remove and replace certain portions of Skyline's work, including cutting sections of sheet metal siding, removing and replacing certain sheet metal flashings, and reinstalling certain sheet metal panels. CP 1747, CP 1752-71. Exterior Metal's contract with Ledcor required it to complete its work by March 7, 2003. CP 1766.

C. Admiral Way received a certificate of occupancy from the City of Seattle and began marketing and selling units.

On March 14, 2003, the City of Seattle issued Admiral Way a certificate of occupancy for the project. CP 1820.

That same month, Admiral Way began marketing units at the project for sale. CP 1823. Mr. Marc Gartin, the principal of Admiral Way, believed that aside from a few "pick up items," construction of the project was complete at the time of marketing in March 2003. CP 1823-24. The sales of the units were "turn-key" sales, meaning that the buyers did not have to wait to move into and occupy the units. CP 1824. By

April 2003, units were being sold, transferred to buyers and the building was being occupied as a dwelling. CP 1823-24.

D. The underlying litigation and settlement of the claims by Leducor and Admiral Way.

On July 12, 2007, the Admiral Way Condominium Owner's Association ("COA") filed a complaint against Admiral Way alleging several claims, including construction defect, failure to disclose certain information to the COA and for violations of the Washington Consumer Protection Act. CP 1827-34. On September 7, 2007, Admiral Way answered the COA's complaint and asserted a third-party complaint against Leducor. CP 1836-51. Nine months later, on August 29, 2008, Leducor filed this separate action against Skyline and other subcontractors. CP 1671-82.

On July 28, 2009, Leducor and Admiral Way settled the underlying case with the COA. CP 1866-67.

E. Proceedings in the superior court since Leducor and Admiral Way's settlement with the COA

Skyline answered both Leducor's amended complaint and Admiral Way's complaint, asserting various affirmative defenses including statute of limitations and statute of repose. CP 1880-1912; 1914-25.

1. Motion for Summary Judgment on Indemnity filed by Bordak and SQI.

Bordak filed a Motion for Summary Judgment asserting that Ledcor's claims for indemnification were time-barred by the construction statute of repose. CP 168-180. When this motion was filed, Admiral Way had not yet intervened in the action. *See* CP1869-96. SQI filed a partial joinder to Bordak's motion also arguing that Ledcor's indemnity claim was time-barred under the statute of repose. CP 420-22.

The superior court requested additional briefing and continued the hearing on the motions to January 29, 2010. CP 898. By this time, Admiral Way had intervened in the action and had joined in Ledcor's opposition to Bordak and SQI's motions. CP 994-1003.

The superior court initially denied the motions. CP 1034-38. Bordak filed a Motion for Reconsideration, which SQI joined. CP 1039-47. On June 4, 2010, after considering additional briefing by the parties, the superior court granted the Motion for Reconsideration and dismissed Ledcor and Admiral Way's indemnity claims against Bordak and SQI. CP 1550-52. In its ruling, the superior court stated that "it specifically concurs with the analysis set forth at pp. 3-6 of SQI's Supplemental Brief." CP 1552. The court clearly agreed that because there was no dispute that Admiral Way marketed and sold units and buyers were

moving into and inhabiting the units, the building was in fact being used for its intended purpose in April 2003. CP 1552; CP 1292-95.

2. Skyline's Motion for Summary Judgment.

On June 18, 2010, Skyline filed its Motion for Summary Judgment. CP 1570-88. On June 22, 2010, the superior court issued a stay of proceedings to allow Ledcor to pursue discretionary review of the ruling on Bordak and SQI's motions. CP 2089-92.

However, on July 16, 2010, the superior court lifted the stay in order that all other subcontractors with similar statute of repose arguments could file their own motions. CP 2096-98. Skyline's Motion was re-noted to October 25, 2010. CP 2097.

On October 14, 2010, Ledcor filed its opposition to Skyline's motion and conceded that the superior court's June 4, 2010 ruling on the date of substantial completion was applicable to its claims against Skyline. CP 3214. Admiral Way conceded as well. CP 3334-35. The superior court granted Skyline's motion and dismissed Ledcor and Admiral Way's contractual indemnity claims. CP 3896-98; 3737-40.

F. Skyline incorporates herein facts set forth in other Respondents' Briefs

In order to serve judicial economy, Skyline hereby incorporates the statement of facts of the other Respondents so as to not burden the court with restating them again in this Brief.

IV. ARGUMENT

A. The standard of review is *de novo*, but this Court may affirm on any ground that the record supports.

This Court engages in the same inquiry as the trial court when reviewing a summary judgment order. *See Wilson v. Steinbach*, 98 Wn. 2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c). However, this Court ordinarily may not reverse a trial court on a theory not raised before that court. *See State v. Peterson*, 29 Wn. App. 655, 663, 630 P.2d 480 (1981).

This Court may affirm the trial court on any basis supported by the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989); Tegland, 2A *Wash. Prac.*, Rules Practice RAP 2.5 (6th ed. 2010) (“[a] trial court’s decision will be affirmed on appeal if it is sustainable on any theory within the pleadings and the proof.”) Further, this Court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

B. The indemnity claims of Ledcor and Admiral Way accrued on or about July 28, 2009.

It is settled law in Washington that an indemnity claim accrues when the party seeking indemnity “pays or is legally adjudged obligated to pay damages to a third party.” *Parkridge v. Ledcor*, 113 Wn. App. 592, 54 P.3d. 225 (2002), quoting *Central Washington Refrigeration, Inc., v. Barbee*, 133 Wn. 2d. 509, 946 P.2d. 760 (1997).

Here, there is no dispute that Ledcor’s indemnity claim accrued on July 28, 2009 when the parties entered into the CR 2A settlement agreement. CP 1866-67.

C. The superior court correctly decided that the date of substantial completion occurred before July 28, 2003 and therefore, the indemnity claims of Ledcor and Admiral Way were time-barred.

The superior court correctly determined that the Ledcor and Admiral Way’s claims were untimely because “substantial completion” occurred before July 28, 2003.

1. Ledcor and Admiral Way’s new arguments that the prime contract’s provisions concerning substantial completion toll or modify the statute of repose were never argued to the court below.

Ledcor and Admiral Way contend that the flow-down provisions in the prime contract between them acted to toll or modify the statute of repose. Ledcor App. Br. 20-25.

The general rule prevailing in Washington is that issues not raised in the trial court cannot be raised for the first time on appeal. *Peoples Nat'l Bank v. Peterson*, 82 Wn.2d 822, 829, 514 P.2d 159 (1973) (citations omitted); *In re Det. of Ambers*, 160 Wn.2d 543, 557 n.6, 158 P.3d 1144 (2007); *see also* RAP 2.5(a). On review of a summary judgment order, “the appellate court will consider only evidence and issues called to the attention of the trial court.” *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008) (citing RAP 9.12). This rule gives the trial court “an opportunity to rule correctly upon a matter before it can be presented on appeal.” *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984) (citation omitted).

Ledcor never argued in opposition to Skyline’s Motion for Summary Judgment that the construction statute of repose was modified or tolled by the terms of the prime contract; this issue was never raised before the superior court and cannot be raised now for the first time on appeal.

Moreover, Ledcor never raised this issue in opposition to the initial Motions for Summary Judgment filed by Bordak and SQI, nor in the briefing on the Motion for Reconsideration. Instead, in its various briefs, Ledcor argued that: (1) it needed a continuance of Bordak’s motion, and in the alternative, that the date of substantial completion is a fact based

inquiry precluding summary judgment (CP 181-198); (2) that no certificate of occupancy was issued by the architect and that the project could not be substantially complete under the contract before the date the owner and contractor agreed it to be substantially complete (CP 666-685); (3) foreign case law supported Leducor's contention that the issue of substantial completion was an issue of fact (CP 897-922); (4) reconsideration should not be granted as there were facts in dispute as to the date of substantial completion based on the architect's declaration (CP 1078-1204); and (5) all subcontractors agreed that the architect would determine the date of substantial completion and that his opinion was determinative, thereby creating an issue of fact (CP 1241-1254).

Nowhere in any of the briefing to the superior court does Leducor raise the issue that the subcontractors agreed through the flow down provisions that the prime contract worked as a modification or tolling mechanism of the construction statute of repose. Furthermore, Leducor did not cite or argue to the superior court the out-of-state cases, now cited in its appellate brief, which purport to permit such waivers of the statute of repose. Leducor App. Br., p. 21-24. To make this argument now in this Court for the first time is in violation of basic appellate principles. This new argument is procedurally improper, untimely, and should be ignored by this Court.

2. The superior court correctly interpreted the statute of repose and its definition of “substantial completion” to determine that Ledcor and Admiral Way’s claims were time-barred

Contrary to Ledcor’s assertions, interpretation of a statute is a matter of law. *See Condit v. Lewis Refrigeration Co.*, 101 Wash.2d 106, 676 P.2d 466 (1984); *Glacier Springs Property Owner’s Association v. Glacier Springs Enterprises, Inc.*, 41 Wash. App. 829, 832, 706 P.2d 652, 654 (Div. I 1985).

In *Glacier Springs*, this Court determined that the decision of when a project was “substantially complete” under the definition set forth in RCW 4.16.310 was a matter of law. *Id.* Although not directly on point, *Glacier Springs* is informative as it demonstrates that the trial court’s consideration of evidence and determination of the date of substantial completion was proper.

Glacier Springs involved a dispute over the date of substantial completion of a water distribution system for the purposes of the statute of limitations under RCW 4.16.310. *Id.* at 830-831, 653.

In 1971, the contractor contracted with the owner/developer to design and install a water system in 3 different divisions of the Glacier Springs Development. *Id.* at 830, 652. This design included the future location of a water tank. *Id.* Both parties argued and provided evidence as

to differing dates for substantial completion. *Id.* at 831, 652. The contractor argued that substantial completion occurred at the time he finished the installation of the alleged leaking pipes. *Id.* The association argued that it was the date that the water tank, indicated in the design, was installed by another subcontractor. *Id.* Deposition evidence and declarations from water experts were introduced. *Id.*

After considering this evidence, both the lower court and this Court determined as a matter of law the applicable date of substantial completion. *Id.* at 833, 654. The Court did so by determining when the water system could be used for its intended purpose as required by the statutory definition set forth in RCW 4.16.310. *Id.*

This is exactly what occurred, albeit in determining issues of the statute of repose, in this matter. The trial court considered the submissions by the subcontractors and Ledcor/Admiral Way and determined the date of substantial completion under the statutory definition of that phrase – *i.e.* “completion of construction shall mean the state of completion reached when an improvement upon the property may be used or occupied for its intended use”– found in RCW 4.16.310. Here, the evidence clearly shows that the project was being utilized for its intended purpose in March of 2003; the units were being marketed for “turn-key” sale (CP 1823-24), the Certificate of Occupancy was issued (CP 1820), Admiral Way was selling,

people were buying, and people were living in the units as of April 2003 (CP 1823-24). These facts are undisputed.

The superior court did not err in determining as a matter of law that the project was being used for its intended purpose, and was therefore substantially completed by April 2003.

3. Ledcor and Admiral Way's reliance on out-of-state case law and specifically, *North American Capacity Insurance v. Claremont Liability Insurance*, is misplaced.

Tacitly admitting that Washington law defeats its arguments, Ledcor cites to out-of-state cases, with heavy reliance on the case of *North American Capacity Insurance Co v. Claremont Liability Ins. Co.*, 177 Cal. App. 4th, 272, 99 Cal. Repr 3d 225 (2009) to assert substantial completion is an issue of fact. Ledcor App. Br., at 27-29. Out-of-state cases do not trump binding state law. *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 408, 229 P.3d 693 (2010). Furthermore, the out-of-state cases Ledcor relies on are distinguishable.

North American did not involve any issues of statutory law or the correct interpretation of "substantial completion." *Id.* at 276. Instead, the case involved two insurance carriers concerned with the allocation of time on the risk. *Id.* The issue in front of the court was to determine when the single family home involved in the loss was "completed" as defined in the

applicable insurance policy. *Id.* at 278. Although Ledcor contends that the *North American* case is instructive here in defining “substantial completion,” this contention is incorrect. The issue before the court in *North American* was not “substantial completion,” but rather the determination of “completion” of the home as was defined in the insurance policy, not any statute. Under the policy at issue in that case, a contractor’s work was “completed” under three different scenarios, including when the work had been put to its intended use. *Id.* at 286.

Here, under RCW 4.16.310, “substantial completion” is defined as “the state of completion reached when an improvement upon real property **may be used or occupied for its intended use.**” Thus, the definition of “completed” in the insurance policy in the *North American* case and the definition of “substantial completion” as set forth in the statute of repose are not the same.

Ledcor’s citation to the case of *Ellsworth Paulsen Constr. Co. v. 51-SPR, LLC*, 144 P.3d 261, 268-269 (Utah Ct. App. 2006) is as equally inapposite as *North American* as it a mechanic’s lien case that is governed by the Utah law related to mechanic’s liens, which in no way mirrors Washington’s statute of repose.

One of the considerations for the timeliness of filing a mechanic’s line in Utah is the requirement that the work “has been accepted by the

owner.” *Id.* at 268. In fact, this is *required* under Utah mechanic’s lien law. There is no such requirement in Washington’s statute of repose. Ledcor’s argument as to the lack of Admiral Way’s “acceptance of the work” and whether this is an “issue of fact” simply has no bearing on the interpretation of the statute of repose in this matter.

The second requirement of Utah mechanic’s lien law, is that the “**work under the contract** ‘has been substantially completed,’ leaving only minor or trivial work to be accomplished.” *Id.* (emphasis added). Again, this is simply not the related to the requirements under Washington’s statute of repose. In fact, the Utah mechanic lien inquiry is a completely different inquiry – Utah’s focus is on the work done under the **individual contract** versus the Washington statute of repose that provides for substantial completion of “construction” as defined by whether the improvement to real property can be put to its intended use. The *Ellsworth* case, which interprets Utah’s mechanic’s lien law, and *North American*, which interprets private insurance policies, have no bearing on this case and the statute of repose.

4. The prime contract between Ledcor and Admiral Way does not conflict with the superior court’s determination of substantial completion.

Both Ledcor and Admiral Way argue that under the terms of the prime contract between them, substantial completion could not occur until

the architect agreed that the construction was substantially complete. Ledcor App. Br., 16-20, 29-33; Admiral Way App. Br., 11. This is not accurate.

The prime contract sets forth in Section 9.8.1 under the heading “Substantial Completion” that “substantial completion is the stage in the progress of the Work when the Work . . . is sufficiently complete in accordance with the Contract Documents so that the Owner **can occupy or utilize the Work for its intended use.**” CP 469. This language mirrors the language that as set forth in RCW 4.16.310. Pursuant to Section 9.8.3 the architect may only dispute substantial completion when the Work “is not sufficiently complete” such that the Owner cannot occupy or utilize the work for its intended purpose. *Id.*

Here, regardless of what the architect’s opinions were/are/or may have been, the undisputed facts are that: (1) Admiral Way believed the project to be substantially complete in March 2003, (2) the Certificate of Occupancy was issued in March 2003, (3) because the project was substantially complete and the Certificate of Occupancy was issued, Admiral Way began marketing and selling units, and (4) people were living in the building in April 2003. Obviously, the project was being used for its intended purpose, and as such, was substantially complete as defined in both the prime contract and RCW 4.16.310.

Interestingly, to date, the architect has *never* issued a Certificate of Substantial Completion for the project. However, there is no argument by Ledcor that the building is not substantially complete due to this fact. To allow the architect's opinion to control in the face of the undisputed facts that the building was in fact being used for its intended purpose by March 2003, and was therefore substantially complete under both the prime contract and the statute of repose is unsupportable.

5. *Lakeview* is applicable to this matter and the superior court did not err in applying its reasoning.

Ledcor asserts, over several pages¹, that there are differences in the size, scope and complexity of this project versus the *Lakeview* construction project. Ledcor further asserts that the facts surrounding "substantial completion" are "completely different from and far more complex" than in *Lakeview*, such that the reasoning of *Lakeview* does not control. Ledcor App. Br., 33-38. The mere fact that the *Lakeview* case was decided on a different set of facts and the projects were not of comparable size or complexity does not mean it was error for the superior

¹ Over this several page argument, Ledcor regularly makes factual statements concerning alleged particular aspects of the Admiral Way project without any citation to the record, as well as statements referencing the *Lakeview* case, again, without citation.. Arguments that are unsupported by citation to the record or authority will not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(a)(6).

court to follow its analysis.

In *Lakeview*, the owner developer ASC hired an architect in 1988 to design three or four condominium homes on underdeveloped land in Seattle, Washington. *Lakeview*, 101 Wn. App. at 926-27. In June of 1990, ASC signed an exclusive listing agreement to sell the homes and by June 24, 1990, “open houses” were held so that potential buyers could view the homes. *Id.* On August 27, 1990, the City of Seattle issued a Certificate of Occupancy for the Lakeview properties. *Id.* The three condominium homes were under purchase and sale agreements on November 19, 1990, June 1, 1991 and January 21, 1992, respectively. *Id.* at 927-28. As a condition of the first sale, the purchaser required ASC to perform certain repairs. *Id.* The other two sales were also contingent upon ASC making certain more minor repairs. *Id.*

On January 3, 1997, after a period of severe storms, the land beneath the units began to slide, resulting in making the homes uninhabitable. *Id.* at 928. The homeowners sued, among several parties, ASC, the contractor, the architect, structural engineer, geotechnical engineer and construction manager. *Id.* The homeowners argued that their claims were not barred by the statute of repose because the claims accrued with six years of the sale of the homes. *Id.* The homeowners asserted that language contained in the legislative history suggested that

substantial completion could not occur until the tenants had moved in and ascertained whether there were any errors or omissions. *Id.* at 930. The superior court looked to **both** the Certificate of Occupancy and the undisputed fact that the units were being marketed for sale in August of 2000 and determined, as a matter of law that substantial completion had occurred. *Id.* at 932.

On appeal, the homeowners argued (much like Leducor and Admiral Way do here) that “the trial court erred in holding that the issuance of the certificate of occupancy by the City of Seattle established the date of substantial completion.” *Id.* See Also, Leducor App. Br., at 38. The Appellate Court disagreed with this argument, and pointed to the additional findings, other than the certificate of occupancy, made by the lower court. Specifically, the Court stated:

The court actually mentioned two events: ‘In this case, substantial completion, I believe did occur when the condos *were being marketed and a certificate of occupancy had been issued.*’ We agree that in this case, at the point both events had occurred in August 1990, the project was substantially completed. Only “punch list” items remained the record does not indicate that work yet unfinished rendered the project not substantially complete, i.e. not fit for occupancy.

Lakeview, 101 Wn. App. at 932.

Thus, in *Lakeview* the court looked a variety of factors, not just the certificate of occupancy, to determine that the project was substantially

complete. *Id.* In determining what date governed “substantial completion” the *Lakeview* court rejected any idea that the definition of substantial completion was ambiguous, and refused to apply any legislative intent to the consideration of the definition. *Id.*

Ledcor argues that the “nature and quantum of evidence in *Lakeview* is completely different than in *Admiral*.” This is simply not true as the evidence of substantial completion in this case mirrors almost exactly the evidence of substantial completion presented to the lower court in *Lakeview*: (1) the undisputed evidence shows that the project was being marketed for “turn-key” sale as of March 2003. CP 1823-24. The *Lakeview* court considered the marketing of the condominiums by ASC in rendering its decision as to substantial completion; (2) the Certificate of Occupancy, permitting the habitation of the project was issued by the City of Seattle in March 2003. The *Lakeview* court considered when the certificate of occupancy was issued by the City of Seattle; (3) the alleged “repairs” still to be made to the building were considered to be “pick up” items by Admiral Way’s principal, Marc Gartin. In *Lakeview*, “only ‘punch list’ items” remained; (4) No record submitted by Ledcor or Admiral Way indicates that the alleged work to still be performed prevented the Admiral Way Condominiums “not fit for occupancy.” In

Lakeview, the record did not indicate that work “yet unfinished” rendered the project not substantially complete, i.e. not for occupancy.”

Given the glaring similarities between the evidence establishing substantial completion in *Lakeview* and the evidence the superior court considered in this matter, the superior court did not err in considering the analysis as set forth in *Lakeview*.

6. *Lakeview’s* analysis of the statute of repose is also applicable in this matter because the statute makes no distinctions based on the scale or complexity of a construction project.

The statute of repose applies to all “claims or causes of action as set forth in RCW 4.16.300.” RCW 4.16.300 provides:

RCW 4.16.300 through 4.16.320 shall apply **to all claims or causes of action of any kind** against any person, arising from such person having constructed, altered or repaired any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property. (Emphasis added).

Thus, the application of the statute of repose is the same regardless of the size, scope, or complexity of the project. Nothing in the statute provides for varying interpretations of the plain language based on any of the distinctions raised by Ledcor. Similarly, the Court in *Lakeview* raised no such distinctions when it analyzed the definition of “substantial

completion.” Leducor’s contention that the definition of “substantial completion” and the interpretation of that statutory definition phrase by the *Lakeview* Court should not have relied on that analysis based on the “complexity” of the construction project is without merit.

D. The superior court correctly decided that the indemnity claims of Leducor and Admiral Way against Skyline did not accrue within the statute of repose’s termination of service prong.

RCW 4.16.310 states, in pertinent part, as follows:

All claims or causes of action as set forth in RCW 4.16.300 shall accrue, and the applicable statute of limitations shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the **termination of the services enumerated in RCW 4.16.300, whichever is later**. The phrase substantial completion of construction shall mean the state of completion reached when an improvement upon the property may be used or occupied for its intended use. **Any cause of action which has not accrued within six years after substantial completion of construction or within six years after termination of services, whichever is later, shall be barred. (Emphasis added).**

Pursuant to RCW 4.16.310, claims arising from construction must accrue within six years following the date of “substantial completion” or within six years of the “termination of services” of the particular subcontractor, whichever is later. Thus, if a subcontractor performs services after the date of substantial completion, then the statute begins to run as the date the termination of services. *See id.* However, if the

subcontractor does not perform services after the date of substantial completion, then the date of substantial completion governs. *Id.*

1. There is no evidence and no argument set forth that Skyline performed work after July 28, 2003.

Rule of Appellate Procedure 10.3(a)(6) requires the brief of the Petitioner to set forth in the argument section: “the argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.” The Court of Appeals should not consider an inadequately briefed argument. *Bohn v. Cody*, 119 Wash.2d 357, 368, 832 P.2d 71 (1992). Arguments that are unsupported by citation to the record or authority will not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(a)(6).

Ledcor asserts that the superior court’s decision should be reversed based on the termination of services prong of the statute of repose. Ledcor App. Br., 38-40. In support of its argument, Ledcor asserts that SQI performed services following the date of July 28, 2003, and thus, Ledcor’s indemnity claims are timely. *Id.* In a dropped footnote, Ledcor also asserts that two other respondent subcontractors, Bordak and Scapes, similarly performed services following that “critical date.” *Id.* at 39. However, Ledcor did not set forth any contention or citation to the record,

either in the body of its brief or the dropped footnote, that Skyline performed services after July 28, 2003. *Id.* There is no dispute that Skyline was off of the project and performed no further work after July 29, 2002.

Similarly, Admiral Way, which incorporated Leducor's Appellate Brief, cannot set forth any evidence that Skyline performed any services on the project after July 29, 2002. *See* Admiral Way App. Br, 1.

As both Leducor and Admiral Way make no argument and cite to no authority in the record to support any contention that Skyline performed services at the project beyond July 29, 2002, let alone the date of substantial completion on July 28, 2003, both have waived any argument that the superior court's decision on Skyline's motion for summary judgment should be reversed based on the termination of services prong of RCW 4.16.310.

2. Leducor's retainage payment to Skyline in October 2004 is not a "service" as a matter of law.

Leducor argues that the cases of *Lakeview*, 101 Wn. App. 923 (2000), 6 P.3d 74 (Div. I 2000) and *Smith v. Showalter*, 47 Wn. App. 24, 734 P.2d 928 (Div. III 1987) stand for the proposition that the termination of services prong of RCW 4.16.310 governs when a subcontractor provides construction services after the date of substantial completion.

Ledcor App. Br., 39-40. While it is acknowledged that not all construction services may be completed at the time of substantial completion, neither *Lakeview* nor *Smith* interpret what “services” must be provided to extend the statute of repose, and thus, are inapposite.

In interpreting what “services” may qualify to extend the time under the statute of repose, the court in *Parkridge v. Associates, LTD v. Ledcor Industries, Inc.*, 113 Wn.App. 592, 599, 54 P.2d 225, 599 (2002) held that the “services considered in this assessment [of the statute of repose] must be those that **gave rise** to the cause of action.” Thus, simply the “services” which are being asserted in consideration of when the statute of repose begins to run must be services that form the basis of the claims being made against the subcontractor. *Id.* No appellate Court has decided that the receipt of payment of retainage constitutes construction services.

In this case, Ledcor presented no facts that Skyline performed construction services on the project after July 29, 2002. Skyline billed at 100% complete on the project in April 2002. CP 1590; 1654. Pursuant to the terms of the contract between Ledcor and Skyline, all progress payments were subject to a 10% retainage. *See* CP 1606 ¶ 14.2.4. Skyline received its last progress payment, minus the retainage for its April 2002 invoice on May 2, 2002. CP 1648-50. The only interaction between

Ledcor and Skyline after July 28, 2003 involved the ministerial act of Skyline's submission of lien waivers and Ledcor's payment to Skyline of the retention owed on the project. CP 1651-53. These facts are undisputed.

Ledcor failed to cite to the superior court and fails to cite to this Court any case law that holds that the mere action of releasing retention to a subcontractor would constitute "services" under the termination of services prong of the statute of repose. Moreover, the payment of the retainage to Skyline did not form the basis of any of the construction defect claims for which Ledcor and Admiral Way seek indemnity. See CP 1703-05; 1714-15. Following the decision in *Parkridge, supra*, the payment of retention by Ledcor to Skyline and the documents that were transmitted so that Skyline could receive the payment of its retention cannot, as a matter of law, be considered "services" in assessing the statute of repose.²

The superior court correctly decided that, as a matter of law, Skyline did not perform services after the date of substantial completion,

² Although not related to the analysis of termination of services, the date of a contractor's final billing on the project, and not receipt of final payment, was determined to be the date of substantial completion because the record was unclear as to the actual date of completion. *Glacier Springs Property Owners Association*, 41 Wash. App. at 832, n. 3, 706 P.2d 652 the court referred to the date of final billing as the date of substantial completion only The court thus assumed the work was completed before final billing.

July 28, 2003. Because no services were provided after July 28, 2003, the indemnity claims of Leducor and Admiral Way were properly dismissed as untimely under the “termination of services prong” of the statute of repose and this Court should affirm.

E. Skyline Requests an Award of Attorney’s fees Under RAP 18.1.

Skyline requests an award of its reasonable attorney’s fees and expenses if it prevails on appeal under RAP 18.1(a) and (b), and under Section 7.4 of its subcontract with Leducor.

V. CONCLUSION

The superior court’s ruling that substantial completion occurred before July 28, 2003 was correct. The submission by Admiral Way’s architect concerning his “opinions” regarding substantial completion does not raise a material issue of fact. The undisputed facts evidenced that the building was being used for its intended purpose in April of 2003. By April of 2003, the City of Seattle had already issued the Certificate of Occupancy, units were being marketed and sold for immediate occupancy, and owners were, in fact, living in the building. Given the fact that the building was being used for its intended purpose, the superior court was correct in ruling as a matter of law that substantial completion had occurred under the construction statute of repose. Since substantial completion had been reached prior to July 28, 2003, and the indemnity

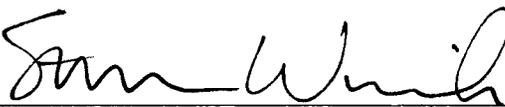
claims of Leducor and Admiral Way did not accrue until July 28, 2009, they were untimely under the six year substantial completion prong of the statute of repose.

Moreover, the undisputed facts show that Skyline did not perform any additional work on the project after July 29, 2002. Leducor and Admiral Way's cannot refute these facts. Therefore, Leducor and Admiral Way's contention that their indemnity claims are timely under the "termination of services" prong of the statute of repose are without merit. Neither Leducor nor Admiral Way put forth any arguments in their respective Briefs disputing these facts.

The superior court correctly determined that the Leducor and Admiral Way indemnity claims were untimely. The superior court's decision should be affirmed.

Respectfully submitted this 1st day of August, 2011.

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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on August 1, 2011, I caused service of the foregoing pleading on each and every attorney of record herein:

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