

68903-7

68903-7

NO. 68903-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LAUREL STREET HOUSING, LLC,

Plaintiff/Respondent,

v.

SAFECO INSURANCE COMPANY OF AMERICA,
a member of Liberty Mutual, Surety Bond No. 6350742,

Defendant/Appellant.

Whatcom County Superior Court No. 11-2-00913-7,
the Honorable Ira Uhrig presiding

REPLY BRIEF OF APPELLANT

ORIGINAL

Thomas K. Windus, WSBA No. 7779
John J. White, Jr., WSBA No. 13682
Kevin B. Hansen, WSBA No. 28349
Livengood Fitzgerald & Alskog, PLLC
121 Third Avenue
P.O. Box 908
Kirkland, WA 98083-0908
Ph: 425-822-9281
Fax: 425-828-0908
Attorneys for Appellant

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 3

 A. Laurel Street’s lawsuit was untimely and should have
 been dismissed. 3

 1. An ongoing dispute between an owner and contractor
 after the work is done is not work on the construction
 project. 4

 2. Laurel Street confuses the existence of a “Contractor
 Default,” which occurred at the time of breach, with its
 duty to give the surety notice before pursuing the Bond. 7

 B. Laurel Street failed to satisfy the express conditions
 precedent to recovery against the Bond, so it seeks to
 read-out or re-write the Bond terms. 10

 C. There is no reason to believe a site visit by Safeco would
 have provided any information to Safeco that was not
 already contained in the documents that Laurel Street
 provided. The trial court’s finding of “bad faith” cannot
 stand. 14

 D. Laurel Street’s waiver of subrogation in the construction
 contract protects the general contractor’s surety. 16

 E. Laurel Street admits that it had full opportunity to litigate
 the damages caused by Ebenal’s work, but those are exactly
 the damages it now seeks to recover from Safeco. 17

 F. Laurel Street fails to respond to Safeco’s argument and
 thus concedes that it was not entitled to any attorneys’ fees. 18

III. CONCLUSION..... 19

TABLE OF AUTHORITIES

<i>Aetna Cas. & Surety Co. v. Superior Court</i> , 778 P.2d 1333 (Ariz. App. 1989).....	18
<i>Bosko v. Pitts & Still, Inc.</i> , 75 Wn.2d 856, 454 P.2d 229 (1969).....	17
<i>Charolais Breeding Ranches v. FPC Sec. Corp.</i> , 279 N.W.2d 493 (Wis. App. 1979).....	23
<i>Colorado Structures, Inc. v. Ins. Co. of the West</i> , 161 Wn.2d 577, 167 P.3d 1125 (2007).....	12
<i>Democratic Party v. Reed</i> , 388 F.3d 1281 (9 th Cir. 2004)	23
<i>Honeywell, Inc. v. Babcock</i> , 68 Wn.2d 239, 412 P.2d 511 (1966).....	10, 11
<i>Indus. Indemn. Co. v. Kallevig</i> , 114 Wn.2d 907, 792 P.2d 520 (1990).....	19
<i>Ingrassia Constr. Co. v. Vernon Twp. Bd. of Educ.</i> , 345 N.J. Super. 130, 784 A.2d 73 (N.J. Super. 2001)	16
<i>Mattingly v. Palmer Ridge Homes, LLC</i> , 157 Wn. App. 376, 238 P.3d 505 (2010).....	9, 10
<i>Nielson v. Spanaway Gen. Med. Clinic</i> , 135 Wn.2d 255, 956 P.2d 312 (1998).....	21, 22
<i>Olympic Steamship Co. v. Centennial Ins. Co.</i> , 117 Wn.2d 37, 811 P.2d 673 (1991).....	22
<i>Pub. Emp. Mut. Ins. Co. v. Sellen Constr. Co.</i> , 48 Wn. App. 792, 740 P.2d 913 (1987).....	12, 14, 15
<i>State v. Lundy</i> , 162 Wn. App. 865, 256 P.3d 466 (2011).....	23
<i>State v. Ward</i> , 125 Wn. App. 138, 144, 104 P.3d 61 (2005).....	23
<i>Strand Hunt Constr. v. Lake Wash. Sch. Dist.</i> , No. 56910-4-I, 2006 Wash. App. LEXIS 1931 (Sept. 5, 2006).....	19
<i>Touchet Valley Grain Growers v. Opp. & Siebold General Constr.</i> , 119 Wn.2d 334, 831 P.2d 724 (1992).....	20

Vukusich v. Comprehensive Accounting Corp.,
150 Ill. App. 3d 634, 501 N.E.2d 1332 (Ill. App. 1986)..... 23

I. INTRODUCTION

Safeco's opening brief detailed the trial court's reversible errors. The court misapplied the law in instances where there were no material facts in dispute, and it resolved disputed facts in Laurel Street's favor on summary judgment. The court allowed Laurel Street to proceed against Safeco despite Laurel Street's failure to timely file its lawsuit, Laurel Street's failure to comply with express conditions precedent, and full insurance coverage and payment for all of Laurel Street's damages. It determined that Safeco acted in bad faith without considering the circumstances of Safeco's denial of Laurel Street's claim. It awarded "damages" against Safeco despite Laurel Street's prior arbitration with the contractor that rejected a similar damage claim because a portion of the work was not defective. Throughout its brief, Laurel Street mischaracterizes evidence, represents facts without support in, or contrary to, the record, and mischaracterizes arguments and law.¹ On some critical points, including whether it is entitled to attorneys' fees at all, Laurel Street fails to make any response.

¹ Laurel Street's opening sentence sets the tone and standard for the rest of its brief. Without any citation to the record and contrary to the allegations in its complaint, it refers to the Project as a public works project. Resp't's Br. at 1. The contract was between private parties.

Laurel Street also ignores the indisputable proposition that the underlying matter here proceeded exactly how the contract between Ebenal and Laurel Street contemplated. Simply put, the underlying case involved a multi-party dispute over responsibility for alleged deficiencies in the material and/or workmanship provided under a construction contract. Two parties settled, though one, Kryton, provided litigation support to Laurel Street instead of paying money. The other two parties, Laurel Street and Ebenal, arbitrated as provided in the contract between them. When the arbitrator issued an award in favor of Laurel Street, Ebenal, through its liability insurance carrier, paid it in full. Because there is no basis to assert a double recovery here, Laurel Street's entire case necessarily relies on some theory that it is entitled to recover something more from Safeco than it was entitled to from Ebenal, mainly attorneys' fees. No such recovery is provided for under the terms of the underlying contract or the Bond. There is no basis to conclude that Safeco acted in bad faith as a matter of law, as the trial court did by granting summary judgment to Laurel Street.

This Court should grant judgment to Safeco because:

- This lawsuit was filed more than two years after Ebenal ceased work on the Project;
- This lawsuit was filed more than two years after a Contractor Default;

- Safeco’s obligations under the Bond did not arise because Laurel Street failed to attempt to arrange for a meeting with Safeco and Ebenal;
- Safeco’s obligations under the Bond did not arise because Laurel Street failed to formally terminate its contract with Ebenal; and/or
- Laurel Street’s damages from Ebenal’s breach were fully litigated and covered by Ebenal’s insurance policy, and Laurel Street waived the right to additional recovery.

Even if Safeco is not entitled to full summary judgment, it is entitled to partial summary judgment on its collateral estoppel claim regarding damages from Ebenal’s breach, which were fully resolved at arbitration, and on Laurel Street’s claim for damages relating to attorneys’ fees incurred in its arbitration with Ebenal. At the very least, the Court should reverse the summary judgment and remand for trial to resolve any factual disputes over when Ebenal ceased work on the Project, when Contractor Default occurred, and whether Safeco acted in bad faith.²

II. ARGUMENT

A. Laurel Street’s lawsuit was untimely and should have been dismissed.

Laurel Street promises what it cannot deliver: arguments from “[s]ettled Washington law” demonstrating *both* that Ebenal ceased working *and* that the “Contractor Default” occurred within the Bond

² A timeline of significant events is submitted in the Appendix to help the Court in sorting through the pertinent dates.

limitations period. Respt's Br. at 15. It filed this lawsuit more than four years after Ebenal achieved substantial completion on the Project, and more than two years after Ebenal refused to do any further warranty work.

1. An ongoing dispute between an owner and contractor after the work is done is not work on the construction project.

Laurel Street baldly asserts that "[t]he actual facts of this case and applicable Washington law dictate" that "a meeting and an offer to resolve a dispute constitutes 'work' on a construction project." Respt's Br. at 15-16. Neither fact nor law supports its assertion.

First, the facts. Laurel Street points to no evidence that Ebenal worked on the Project after July 2008. Instead, it points to talk about the Project, claiming Ebenal's July 28, 2008 letter meant that Ebenal "contemplated additional . . . work" on the project. Respt's Br. at 21. "Contemplating" is not "work" on a construction project. The limitations period in the Bond is triggered when Ebenal "ceased working," CP 229 (¶ 9), not when the work was "completed."³ Laurel Street asserts that after July 28, 2008, Ebenal "continued to work to correct" the alleged construction defects. Respt's Br. at 22. The only evidence that Laurel Street puts forward, however, is what it describes as "a proposal" and

³ Laurel Street mischaracterizes the July 28, 2008 letter regarding Ebenal's reservation of rights for additional payment. Respt's Br. at 21. Ebenal specifically referred to costs incurred "to date" – not future costs for further work to be performed. CP 161.

attendance at “several meetings” in response to Laurel Street’s demand in April 2009. *Id.*⁴ According to David Ebenal, Ebenal’s attempt to negotiate a resolution to the dispute in April 2009 was not work on the Project. CP 99 (¶ 6) (“Ebenal did not do any further work on the Project after [July 28, 2008].”); CP 100 (¶ 10) (“Since July of 2008, Ebenal did not do anything on the Project other than talking with Laurel Street, Kryton, and Zervas representatives.”). The trial court could have ruled in Laurel Street’s favor only by disregarding Mr. Ebenal’s declaration, which it may not do on summary judgment.

Laurel Street’s discussion of “applicable Washington law” is similarly misleading. As discussed in Safeco’s opening brief, neither case relied on by Laurel Street supports the proposition that a proposal and meetings to resolve a dispute constitutes “work” on a construction project.⁵

In *Mattingly v. Palmer Ridge Homes, LLC*, 157 Wn. App. 376, 238 P.3d 505 (2010), the court held that the contractual limitations period, which began to run upon “completion of the project,” was not triggered

⁴ The “proposal” was a letter from Ebenal dated April 22, 2009 in which Ebenal restated its “disagreement concerning who is responsible for the problem.” Given “its longstanding positive relationship with the Bellingham Housing Authority,” Ebenal stated that it was “prepared to work with the design team to install” a different system at the garage. CP 247.

⁵ Laurel Street fails to respond to Safeco’s discussion of *Mattingly* and *Honeywell* (*see* Appellant’s Br. at 25-28) in its response.

until “the date of completion for the punch list items.” *Id.* at 393. As noted in Safeco’s opening brief, the limitations period in *Mattingly* also began to run upon “cessation of work” on the project. *Id.* Within the one-year limitations period, a dispute arose over alleged defects. While attempting to resolve the dispute, the homeowners and contractor jointly inspected the home and the contractor “offered to remedy some of the defects.” *Id.* at 385. If this joint inspection and an offer to remedy defects constituted “work,” the lawsuit would have been timely. The court would not have remanded the case to determine when the punch list was completed. In other words, a contractor’s proposal and meeting with an owner to attempt to resolve a dispute is not “work” on a construction project. Although it is not clear how long before July 28 Ebenal last worked on the Project, there is no evidence of work after July 28, 2008.

The second case that Laurel Street relies on, *Honeywell, Inc. v. Babcock*, 68 Wn.2d 239, 412 P.2d 511 (1966), involved a payment bond that required any lawsuit on the bond to be commenced “within one year after the general contractor ceased work.” *Id.* at 242. The general contractor achieved substantial completion on July 29, 1963, its subcontractors finished punch list work on October 15, 1963, and the lawsuit on the bond was filed on August 18, 1964. Because the general contractor “was responsible to the owner for the satisfactory and full

completion of the subcontractors' work," its "work" necessarily included the punch list work done by its subcontractors within the limitations period. *Id.* at 243-44. *Honeywell* is easily distinguishable because it did not address a situation where there was a dispute over whether the project was completed and the contractor refused to do any further work. Unlike *Honeywell*, where "work" was clearly performed within the limitations period, none of Ebenal's subcontractors did any work after July 28, 2008 either.

2. Laurel Street confuses the existence of a "Contractor Default," which occurred at the time of breach, with its duty to give the surety notice before pursuing the Bond.

As noted in Safeco's opening brief, the Bond limitations period began to run upon *the earlier* of "Contractor Default" or when the "Contractor ceased working." CP 229 (§ 9). Laurel Street argues that the "Contractor Default" did not occur until it formally *declared* a Contractor Default under subparagraph 3.2 of the Bond. Respt's Br. at 23 ("On June 15, 2009, Laurel Street declared Ebenal in default, well within the two year period."). Laurel Street confuses "Contractor Default," or a material breach of the contract, with its duty to give notice before pursuing a claim against the Bond. Its argument directly contradicts both the express language of the Bond and Washington law.

The Bond defines “Contractor Default” as “[f]ailure of the Contractor, which has neither been remedied nor waived, to perform or otherwise comply with the terms of the Construction Contract.” CP 230 (¶ 12.3). Notably, the definition says nothing about an owner’s declaration of default, and the limitations period provision also says nothing about a declaration of default. CP 229 (¶ 9). In other words, the limitations period begins not when an owner declares a default, but rather when the contractor is in default. To adopt Laurel Street’s interpretation of the contract impermissibly adds words to the limitations period provision in the Bond. *Pub. Emp. Mut. Ins. Co. v. Sellen Constr. Co.*, 48 Wn. App. 792, 796, 740 P.2d 913 (1987) (“The court cannot ignore the language agreed upon by the parties, or revise or rewrite the contract under the guise of construing it.”). It would also render the limitations period meaningless because Laurel Street could dictate when the period commences based on its decision to declare a default, not when the default actually occurred.

Under Washington law, a contractor is in default when it “materially breaches the []contract, thereby permitting (but not requiring) the obligee to terminate or cancel the []contract.” *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 591, 167 P.3d 1125 (2007). A declaration of default by the owner does not determine the date of the

default, but merely constitutes the owner's election to treat the breach as material and announce its intent to terminate the contract. *Id.* The relevant question, then, is not when Laurel Street declared Ebenal to be in default, but rather when Ebenal materially breached the contract.

Laurel Street alleged material breaches by Ebenal – improper selection and installation of a waterproofing system, CP 167-71, 176, 267, and failure to satisfy warranty obligations, CP 119 – which would have given Laurel Street the right, but not the obligation, to terminate the contract. These material breaches, or “Contractor Default,” occurred upon substantial completion and at the end of the warranty period, respectively. If Ebenal's attempts to remedy the garage leaks extended the date of its material breach, “Contractor Default” occurred no later than July 28, 2008, when Ebenal notified Laurel Street that the leaks were not its responsibility and it would do no further work on the Project. CP 230 (§ 12.3) (Contractor Default defined as failure to perform which has not “been remedied”); CP 160-61.

Regardless of which date is chosen for the “Contractor Default,” each is more than two years before Laurel Street filed this lawsuit. The trial court erred by granting summary judgment to Laurel Street and denying Safeco's motion.

B. Laurel Street failed to satisfy the express conditions precedent to recovery against the Bond, so it seeks to read-out or re-write the Bond terms.

Laurel Street acknowledges that it was required to both request *and* attempt to arrange for a conference to comply with paragraph 3.1 of the Bond. Respt's Br. at 27. Laurel Street requested a conference, but asserts that it also "fulfilled its obligation to attempt to arrange a conference *by requesting a conference.*" *Id.* (emphasis added). This circuitous reading of the Bond renders the obligation to attempt to arrange a conference superfluous. "In construing a contract, the court should apply that construction that will give each part of the instrument some effect." *Sellen Constr. Co.*, 48 Wn. App. at 796. Laurel Street took no steps to attempt to arrange a conference with Ebenal and Safeco. Laurel Street's assertion that "Ebenal did not agree to meet within 15 days of Laurel Street's request," Respt's Br. at 27, is specious. Ebenal met with Laurel Street on April 17 and April 27, 2009. CP 23, 234 (¶ 9). The April 17 meeting was within 11 days of the April 6 notice and request for a meeting. Given the affirmative evidence that both of Laurel Street's attorneys stated that Safeco need not participate in a meeting, CP 82-83, and Mr. Coulson's vague assertion that he "did not withdraw Laurel Street's request for a

conference between Ebenal and Safeco,” CP 23,⁶ no reasonable person could conclude that Laurel Street satisfied its obligations under paragraph 3.1 of the Bond. Even were Mr. Coulson’s declaration sufficient to create a disputed material fact, the trial court clearly erred by resolving the dispute in Laurel Street’s favor.

Laurel Street argues that formal termination of its contract with Ebenal, as required in paragraph 3.2 of the Bond, was not necessary because Laurel Street informed Safeco of the termination and “many of the meetings . . . involved direct participation by the Project architect and her concurrence in Ebenal’s termination.” Respt’s Br. at 30-31. Laurel Street provides no citation to the record for the latter factual assertion – Safeco can locate no evidence of the architect’s “concurrence” with the termination, and Laurel Street provided no indication of the architect’s position in any of its communications to Safeco. CP 260-68. By asserting that its notice was sufficient, Laurel Street again improperly attempts to rewrite the terms of the Bond. *Sellen Constr.*, 48 Wn. App. at 796 (“The court cannot ignore the language agreed upon by the parties, or revise or rewrite the contract under the guise of construing it.”).

⁶ The Court should note that Mr. Coulson’s declaration says nothing about attempting to arrange for a meeting. He did not deny that Safeco properly responded to Laurel Street’s request for a meeting or that Laurel Street did not follow through with an attempt to arrange the meeting. CP 23.

Laurel Street's reliance on *Ingrassia Constr. Co. v. Vernon Twp. Bd. of Educ.*, 345 N.J. Super. 130, 784 A.2d 73 (N.J. Super. 2001) is misplaced. That case involved a contractor that was terminated from a project without a formal certificate from the architect. The contractor argued that the architect's certificate was a condition precedent to the owner terminating the contract and seeking damages. The contract provided, however, that the contractual rights and obligations "shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law." *Id.* at 141. Because the contract expressly preserved common law remedies, the court held that the architect's certificate was "not a condition precedent to the owner's exercise of its common-law right of termination." *Id.* Unlike *Ingrassia*, the Bond did not preserve common law remedies and Laurel Street failed to comply with its specific obligations under paragraph 3.2.

Laurel Street contends that its June 16, 2009 notice of default was "sufficient" to "formally terminate" the contract. Respt's Br. at 29. It was not. The bond required a "formal" termination, for which a specific procedure was described in the contract between Laurel Street and Ebenal. Safeco was prejudiced by the absence of the architect's certificate because the architect had a professional duty to both owner and contractor, and its professional determination would carry weight as to whether a default had

occurred. Ebenal denied any responsibility for the garage leaks – Laurel Street in essence demanded that Safeco take its side in the dispute, without having a third party involved. To the extent Laurel Street asserted that the architect had breached its obligations (as it did, leading Laurel Street to demand mediation with the architect, CP 67-68, 72-76), it could have brought in a new architect to make the determination.

Laurel Street further argues that Safeco waived the right to assert noncompliance with the architect certification requirement. Resp't's Br. at 32. Safeco did not waive this defense, as it specifically reserved all defenses in its rejection letter. CP 278.⁷ Unlike the insurer in *Bosko v. Pitts & Still, Inc.*, 75 Wn.2d 856, 454 P.2d 229 (1969), Safeco had no obligations under paragraph 4 of the bond unless Laurel Street satisfied all of the conditions of paragraph 3. CP 229 (§ 4) (“When the Owner has satisfied the conditions of Paragraph 3, the Surety shall . . .”). In any event, Laurel Street’s assertion of prejudice rings hollow in that it

⁷ Safeco stated:

Denial of your client’s claim for the above reasons is not intended as a waiver of any defenses we may have, and all rights and defenses of the surety should be considered specifically reserved. . . . This correspondence and all prior or subsequent communications and/or investigative efforts are made with the *express reservation of all rights and defenses which Safeco . . . or its principal has or may have at law, equity or under the terms and provisions of the bond and contract documents*. This reservation includes, without limitation, defenses that may be available under any applicable notice and suit limitation provisions.

CP 278 (emphasis added).

provided no documents or information to Safeco in response to Safeco's request until more than five months after its notice of default. CP 273.

C. There is no reason to believe a site visit by Safeco would have provided any information to Safeco that was not already contained in the documents that Laurel Street provided. The trial court's finding of "bad faith" cannot stand.

Laurel Street's response confirms that its bad faith claim is premised entirely on the fact that Safeco did not visit the construction site. Respt's Br. at 34-36. Laurel Street provides no authority for this premise and fails to explain what a site visit would have accomplished in investigating its claim that could not have been learned from the expert reports and other information it belatedly provided to Safeco.⁸ Ebenal had already visited the site and denied responsibility. Laurel Street blamed Ebenal, Zervas Group Architects, and Kryton International for the garage leaks, stating that each was "partly or wholly responsible." CP 67-70, 240-42, 249.

Laurel Street's assertion that Safeco "failed to do any investigation at all" is patently false. Respt's Br. at 37. Laurel Street did not *begin* to provide documents to Safeco until the November 20, 2009 letter to Safeco. CP 87. The documents included "[c]opies of the contracts"; the

⁸ See *Aetna Cas. & Surety Co. v. Superior Court*, 778 P.2d 1333 (Ariz. App. 1989) ("The plaintiff here has not advised this court, specifically or otherwise, concerning what additional pertinent facts would have been determined by any further investigation. Therefore she has failed to establish that the insurance company's pre-denial investigation could amount to bad faith.").

“[e]xecuted copy of the Performance Bond”; “[e]xpert reports”; “[n]otices and other relevant correspondence”; and “RFI’s⁹ [sic] and responses to RFI’s [sic] and specifications.” CP 274. Safeco reviewed all of this information as well as information provided by Ebenal’s attorney regarding insurance coverage, CP 89, as part of its investigation of Laurel Street’s claim. CP 87. Laurel Street’s dissatisfaction with the answer does not mean that no reasonable person could believe that, given “all the facts and circumstances of the case,” *Indus. Indemn. Co. v. Kallevig*, 114 Wn.2d 907, 920, 792 P.2d 520 (1990), Safeco’s investigation was reasonable.¹⁰ The trial court erred by resolving a factual dispute over the reasonableness of Safeco’s conduct in favor of Laurel Street.

⁹ “An RFI is a request for guidance submitted by the contractor to the owner regarding the construction plans.” *Strand Hunt Constr. v. Lake Wash. Sch. Dist.*, No. 56910-4-1, 2006 Wash. App. LEXIS 1931 at *5 n.1 (Sept. 5, 2006).

¹⁰ Without belaboring the point, the facts and circumstances surrounding Laurel Street’s claim included the following: (1) the claim was received more than two years after the date of substantial completion of the Project; (2) Laurel Street’s attorneys informed Safeco that it need not participate in a meeting because Laurel Street was working on a resolution with Ebenal and Ebenal’s insurance company, CP 82-83; (3) Ebenal’s attorney informed Safeco that Ebenal’s insurance would cover the claim asserted by Laurel Street, CP 89 (correctly, as it turned out, CP 80-81); (4) the chief operating officer of Laurel Street’s managing member, David Bergmann, specifically acknowledged to Ebenal that the dispute over the garage leaks was not a performance bond issue and that Safeco “should not be brought into the mix.” CP 100.

D. Laurel Street's waiver of subrogation in the construction contract protects the general contractor's surety.

Laurel Street fully recovered from Ebenal's insurance carrier for the damage to its building from the defective work,¹¹ CP 80-81, 300, directly contradicting its assertion that none of its damages were covered by insurance. Respt's Br. at 39, 41. Waivers of subrogation are enforceable absent a showing of fraud. *Touchet Valley Grain Growers v. Opp. & Siebold General Constr.*, 119 Wn.2d 334, 341, 831 P.2d 724 (1992). In *Touchet Valley*, an owner brought an action for construction defects, among other theories, seeking a recovery from the surety. The owner recovered from the general contractor's insurer, and from its own insurer.¹² The Court held that waiver of subrogation protected the surety from liability to the owner, to the same extent as its principal. *Id.* at 342. Laurel Street has already arbitrated the question of the principal's liability, and been fully paid for its damages.

¹¹ In its brief, Laurel Street quotes, without attribution, a portion of the subrogation provisions of the General Conditions contract. Respt's Br. at 38; *see* CP 118. It neither references nor discusses the broader waiver provision of the Supplementary General Conditions. CP 126.

¹² The owner structured the recovery from its insurer as a loan in an attempt to evade the subrogation waiver. 119 Wn.2d at 339.

E. Laurel Street admits that it had full opportunity to litigate the damages caused by Ebenal's work, but those are exactly the damages it now seeks to recover from Safeco.

Laurel Street has already litigated the question to what extent Ebenal's work was defective and the amount it is entitled to recover. The arbitrator rejected Ebenal's liability for 18.9% of the asserted total cost of repair and for design costs because Laurel Street's expert at arbitration "testified that two of these areas did not leak and were properly constructed." CP 299. Despite acknowledging in its response that the issue of damages from Ebenal's breach was fully litigated, Respt's Br. at 42, Laurel Street has again sought recovery of the *total* cost of repair and the *total* design costs against Safeco. Collateral estoppel precludes re-litigating whether the work under the contract was defective. The prior arbitration also established that the total cost of repair was \$648,074, not the higher figure asserted in this follow-on case against Safeco. *Compare* CP 299 *with* CP 307. The declaration testifying to Laurel Street's asserted damages clearly states that they arose from Ebenal's work and makes no reference to any action of Safeco that caused or added to the damages. CP 238, 307.

Laurel Street cites *Nielson v. Spanaway Gen. Med. Clinic*, 135 Wn.2d 255, 265, 956 P.2d 312 (1998) to urge that application of collateral estoppel would work an injustice. *Nielson* does not support the argument;

it contradicts Laurel Street's position. In *Nielson*, the plaintiff had already litigated damages in federal court against some of the defendants, but not before a jury. The plaintiff sought to litigate claims for additional damages against other defendants before a jury in state court. The state court granted summary judgment to the defendants because the prior proceeding had established the amount of damage. As in *Nielson*, Laurel Street is dissatisfied with the damages awarded in the earlier proceeding. Dissatisfaction with damages awarded is not an injustice. *Id.* at 265 n.3 (“A plaintiff's dissatisfaction with the amount of damages awarded after a full trial may be the basis of an appeal of the trial court's decision, but it is not an ‘injustice’ that prevents application of the doctrine of collateral estoppel on the issue of damages in a subsequent action.”).

F. Laurel Street fails to respond to Safeco's argument and thus concedes that it was not entitled to any attorneys' fees.

Laurel Street misrepresents Safeco's main arguments. Laurel Street is not entitled to an award of attorneys' fees, period.¹³ Neither the Bond nor *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991) warrant fees. The Bond allows recovery of legal costs, not attorneys' fees, and *Olympic Steamship* allows fees on a bad faith claim only in a coverage dispute. See Appellant's Br. at 37-38, 40-41, 45.

¹³ Laurel Street is not entitled to recover its attorneys' fees incurred in the arbitration with Ebenal or those incurred in this lawsuit. The trial court erred in awarding both.

Laurel Street makes no response to Safeco's fundamental arguments that Laurel Street is not entitled to fees and thus concedes the arguments. *State v. Lundy*, 162 Wn. App. 865, 873, 256 P.3d 466 (2011); *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005); *accord Vukusich v. Comprehensive Accounting Corp.*, 150 Ill. App. 3d 634, 644, 501 N.E.2d 1332 (Ill. App. 1986); *Charolais Breeding Ranches v. FPC Sec. Corp.*, 279 N.W.2d 493, 499 (Wis. App. 1979).

Instead, Laurel Street misstates *Democratic Party v. Reed*, 388 F.3d 1281 (9th Cir. 2004). In *Reed*, the Ninth Circuit faced a claim for fees by three political parties in a civil rights action. The court noted that the large disparity in time between prevailing and losing parties would ordinarily indicate excessive or duplicative effort. *Id.* at 1287-88. However, on the particular facts – that the three parties were normally adversarial – it explicitly determined that the appropriate measure was each prevailing parties' effort, not the aggregate time spent by all plaintiffs' attorneys.

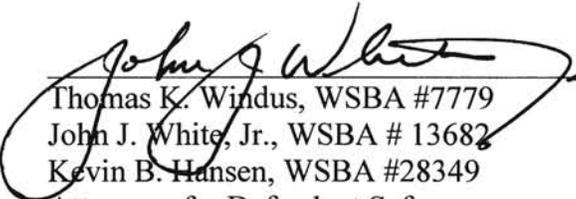
III. CONCLUSION

Safeco was entitled to summary judgment against Laurel Street on the limitations period issue, the conditions precedent issue, and the subrogation issue – each of which blocks Laurel Street's claim in its entirety. The trial court also should have granted Safeco partial summary judgment on the collateral estoppel issue and barred Laurel Street from re-

litigating the essential questions of what portion of Ebenal's work was defective and what damages it suffered as a result. At a minimum, the trial court should have denied Laurel Street's motion for summary judgment. It did none of these and its decision should be reversed.

DATED this 31st day of December, 2012

LIVENGOOD, FITZGERALD
& ALSKOG, PLLC



Thomas K. Windus, WSBA #7779
John J. White, Jr., WSBA # 13682
Kevin B. Hansen, WSBA #28349
Attorneys for Defendant Safeco
Insurance Company of America

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on December 31, 2012, I caused service of the foregoing to the following counsel of record:

<i>Attorneys for Plaintiff:</i> Edward R. Coulson Jacob D. Rosenblum Schweet Rieke & Linde, PLLC 575 S. Michigan Street Seattle, WA 98108 Tel: 206-275-1010 Fax: 206-381-0101	<input checked="" type="checkbox"/> via U.S. Mail <input type="checkbox"/> via Hand Delivery <input type="checkbox"/> via Facsimile – 206-381-0101 <input type="checkbox"/> via Overnight Mail
--	---

Dated: December 31, 2012



Kevin B. Hansen

Appendix

Timeline of Significant Events

- August 15, 2005 – contract between Laurel Street and Ebenal executed
- December 15, 2006 – substantial completion of Buildings B and C
- January 29, 2007 – substantial completion of Building A
- February 6, 2007 – apartments fully leased
- June 4, 2007 – final invoice for Project
- June 5, 2007 – final payment for Project except for subcontractors who had not yet submitted lien releases
- July 11, 2007 – Laurel Street certified to lender that Project was complete
- July 13, 2007 – Laurel Street notified Ebenal of garage leaks
- July 28, 2008 – Ebenal notifies Laurel Street that it will do no further work to remedy garage leaks
- April 6, 2009 – Laurel Street sends notice of possible “Contractor Default”
- April 6, 2009 – Laurel Street sends letter to architect of its breach of contract
- April 6, 2009 – Laurel Street sends letter to waterproofing manufacturer of warranty obligations
- April 14, 2009 – Safeco receives Laurel Street’s notice
- April 16, 2009 – Safeco’s attorney calls Laurel Street’s attorney regarding conference
- April 17, 2009 – Safeco responds to Laurel Street’s notice by letter
- April 17, 2009 – Laurel Street meets with Ebenal to discuss garage leaks
- April 21, 2009 – Safeco’s attorney calls Laurel Street’s other attorney regarding conference and is told that no action is required

- April 22, 2009 – Ebenal sends letter stating that it is willing to work with architect to install different waterproofing system
- April 27, 2009 – Laurel Street, Ebenal, and architects meet to discuss garage leaks
- June 15, 2009 – Laurel Street declares Ebenal in default
- June 15, 2009 – Laurel Street makes claim against architect and requests mediation
- June 18, 2009 – Safeco requests information and documentation of Laurel Street's claim
- September 8, 2009 – Safeco receives copy of September 4, 2009 letter stating that Ebenal's liability insurance coverage would cover any losses related to Laurel Street's claim
- November 20, 2009 – Laurel Street begins providing documents to Safeco
- December 29, 2009 – Safeco informed Laurel Street that it did not have a proper claim against the Bond
- July 14, 2010 – Laurel Street settled claims against architect
- January 7, 2011 – Laurel Street releases claims against manufacturer in exchange for cooperation in Laurel Street's claims against Ebenal
- April 6, 2011 – lawsuit filed against Safeco
- May 2011 – arbitration between Laurel Street and Ebenal
- June 6, 2011 – payment in full on arbitration award tendered to Laurel Village from Ebenal's liability insurance carrier