

No. 72317-1-I

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

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

Appellant,

vs.

STARLINE WINDOWS, INC., a Washington corporation,

Respondent.

**REPLY BRIEF OF APPELLANT
LEDCOR INDUSTRIES (USA) INC.**

Martens + Associates | P.S.

Richard L. Martens, WSBA # 4737
Matthew M. Kennedy, WSBA # 36452

**Attorneys for Appellant
Ledcor Industries (USA) Inc.**
705 Fifth Avenue South, Suite 150
Seattle, WA 98104-4436
Telephone: (206) 709.2999

COURT FILED
JUL 11 2013
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I. ARGUMENT

Appellant Ledcor Industries (USA) Inc. (“Ledcor”), requests this Court reverse two summary judgment orders.

A. **The Trial Court Erred in Ruling that Ledcor’s Breach of Contract, Breach of Warranty, Subrogation, and Indemnity Claims Against Starline Are Barred by the Confidential Settlement Agreement Entered Into Between Starline and the Admiral COA Eleven Days before the COA Settled all of Its Claims Against Admiral Way LLC and Ledcor**

The trial court granted Starline’s motion for partial summary judgment ruling – as a matter of law – that the Issue Release in the confidential settlement agreement between Starline and the Admiral COA completely barred Ledcor’s breach of contract, warranty, indemnity, and subrogation claims against Starline, including claims for consequential damages and defense costs. CP 2180-2182.

1. **Ledcor could not and did not know the terms or conditions of Starline’s settlement with the Admiral COA prior to the mediation.**

On July 2, 2009, Starline and the Admiral COA filed a Notice of Settlement and sent a copy to Ledcor’s previous counsel of record. The reference to Ledcor’s “knowledge” of the confidential settlement is totally based on a billing entry by then-counsel for Ledcor spending all of .1 hours reviewing the Notice of Settlement on July 2, 2009. Seizing upon

that single .1 hour time entry, Starline argues that Ledcor knew the entirety of the terms and conditions of its confidential settlement with the Admiral COA. That cannot be true. In fact, such terms probably did not exist as of July 2, 2009, because it was not until more than two weeks later, on July 17, 2009, that Starline and the Association executed the settlement agreement and release of claims presently at issue. CP 180-182 and CP 184-191.

Starline confuses the difference between a Notice of Settlement (typically a one or two page document) and a confidential settlement agreement executed more than two weeks later. And it incorrectly attributes to Ledcor knowledge of the latter because of the knowledge of the former. That, of course, does not follow.

But Starline is right about one thing, “Ledcor was not a party to the agreement,”¹ so unless Starline or the Admiral COA violated the terms of the confidentiality clause in their own agreement (for which there is no evidence at all), how could Ledcor possibly have known the contents thereof in time for the mediation July 28, 2009? In fact, Starline and the Admiral COA held fast to their confidentiality agreement leaving Ledcor

¹ Brief of Respondent at page 32.

without any knowledge of the terms and conditions of the settlement.

2. **Ledcor asked to be informed of any settlement reached between Starline and the Admiral COA, and was not so informed.**

Interestingly, Starline blames Ledcor for urging Starline and the Admiral COA to seek their own resolution. In support of its argument Starline points to a letter written by then-counsel for Ledcor on November 16, 2007. On that date, Ledcor tendered the defense of the window claims being brought by the Admiral COA and the Developer to Starline. Starline fails to quote the entire paragraph at issue in its brief at page 30. Specifically, Starline left out the beginning of the paragraph and the last sentence. In its entirety, the paragraph reads as follows:

“To the extent that Starline believes it has no responsibility to the claims made by the HOA and/or Developer, we encourage Starline to immediately contact their respective attorneys and to negotiate an issue release that absolves Starline and our clients from any liability in any way related to the Starline products. Absent such a release, we will be left with no choice but to presume that the HOA’s and Developer’s claims do relate to defects in the manufacture of Starline products.”
(Emphasis in original.) CP 163

Based upon the plain language of the above paragraph, Ledcor not only wanted to be informed of the settlement, Ledcor also wanted

confirmation from Starline that they would defend, or deny the claims of the Admiral COA. Starline did neither and remained silent until they confidentially settled with the Admiral COA 18 months after receiving the above letter.

Starline can point to no document evidencing any effort on their part to *ever* inform Leducor of the terms and conditions of the settlement prior to the mediation on July 28, 2009. Pursuant to the plain language of the above paragraph, Leducor was left to presume the veracity of the Admiral COA and Developer's claims as it entered mediation in 2009 because Starline never informed Leducor of their settlement efforts. After waiting more than 18 months from the date of the letter, Starline and the Admiral COA settled within mere days of the global mediation; failed to inform Leducor of the same and now seek to blame Leducor for Starline's actions. Neither the facts in the record nor equity supports Starline's position or the trial court's ruling.

3. Starline could not and did not release all claims for damages arising out of Starline's defective windows.

Starline does not deny that Leducor has claims for damages outside of the scope of express warranties.²

² See Brief of Respondent at page 35.

a. **The amount of the settlement between Starline and the Admiral COA was insufficient to cover the damages caused by Starline’s defective products.**

Starline points out that the Admiral COA originally demanded \$5.3 million for the costs of repair to the Project and settled with Ledcor and Admiral Way, LLC for \$4.7 million.³ (See Brief of Respondent at p. 38). According to Starline, the original estimate for repair/replacement of Starline’s products was around \$385,000⁴ from which Starline settled with the Admiral COA for only \$165,000. *Id.* Starline argues that because both settlement amounts are less than their initial demands, then Starline must have settled all of the claims stemming from its products with the Admiral COA. This is an illogical conclusion, and actually underscores the validity of Ledcor’s argument on appeal – that the Starline release with the Admiral COA was *not* for the full amount of damages caused by Starline’s products.

Ledcor’s argument, that Starline and the Admiral COA only resolved the express warranty claims is supported by the very facts set out

³ The original demand was \$8.9 million, of which only \$5.3 million was for the cost of repairs.

⁴ \$320,000 for the windows and “approximately half” of \$129,000 for the doors.

by Starline above. If replacing the windows and doors alone would cost around \$385,000, how can a sum less than half that amount also include consequential damages and damage caused to the work of others on the project? It cannot, and it does not.

Even if Starline's illogical argument about the relative amounts of offers and demands held some water, it is not remotely sufficient to rise to the level of summary judgment. Under black letter law, summary judgment is only proper where the evidence points reasonable minds to only one conclusion. Starline's baseless assertions and assumptions about the relative values of offers and demands does not so point. The trial court committed reversible error in concluding otherwise.

b. Starline makes a similarly rhetorical argument that the settlement between the Admiral COA and Leducor did not include damages for Starline's defective products.

Starline argues that because the Leducor settlement agreement with the Admiral COA does not specifically attribute each and every dollar of the \$4.7 million spent in settlement to each and every subcontractor's defective work involved in the project, it somehow must not include payment for damages caused by Starline's defective products. Convoluting though it may sound, such is Starline's argument. Simply put, neither

Starline nor any other subcontractors were named in Leducor's settlement with the Admiral COA because they were not parties to that settlement. As discussed above, you must be a party to a contract to be bound by it. Once again, the conclusion is not the purest of logic.

Starline then proceeds to discuss the weight and sufficiency of the Admiral COA's expert's opinion about the nature and extent of the damage caused by either Starline's defective windows and/or the installation of the same. The very fact that Starline can engage in this type of argument concerning the sufficiency of the weight of the evidence reveals the error of the trial court's ruling on summary judgment. If reasonable minds can reach more than one conclusion when viewed in the light most favorable to Leducor, then summary judgment is inappropriate under CR 56.

- c. **The Admiral COA could only resolve express warranty claims with Starline, leaving everything else to Leducor.**

Undeniably, Leducor has claims against Starline – in addition to those brought by the Admiral COA – that Starline could *not* have settled. Those additional claims specifically include the consequential damages to

property of others caused by Starline's defective windows.⁵

All the Admiral COA had was a limited manufacturer's warranty covering repair or replacement only. It was expressly limited to repair or replacement of the windows that violated the terms and conditions of the written warranty provided to the ultimate user. CP 509. Nothing more, and nothing less.

The Admiral COA only resolved claims for breach of express warranty against Starline because those were the only claims the Admiral COA could resolve with Starline. Parties to an express warranty cannot resolve claims of strangers to the warranty in a settlement.

Starline quotes another letter from Leducor dated October 13, 2008, this time from Leducor's then-counsel to the attorney for the Admiral COA. Starline suggests this letter was a blanket invitation from Leducor to the Admiral COA to sue Starline directly for any and all claims imaginable, when in fact, even the portion cited by Starline in the brief refers to Leducor's "position that such claims can only be made by the HOA . . ." CP 134, 157. Without the rest of the letter, one might wonder what "such claims" are. But even a cursory reading of the remainder of that letter

⁵ See *Fortune View Condo. Ass'n v. Fortune Star Development Co.*, 151 Wn.2d 534, 90 P.3rd 1062 (2004).

reveals exactly the claims Ledcor was encouraging the Admiral COA to bring – express warranty claims – both against Starline, and against the manufacturer of the roofing material Malarkey, because Ledcor’s position was that it could not bring direct claims for breach of express warranty against product manufacturers because Ledcor was never the owner or end user of the property.

Starline notes that in its complaint for damages, the Admiral COA alleges breach of express warranties, contractual warranties, implied statutory and common law warranties and violations of the WPLA. CP 273-283.⁶ Starline urges this Court to assume that its settlement with the Admiral COA must have included all claims originally plead by the Admiral COA, as if the simple act of filing a lawsuit makes all claims alleged therein true.⁷ Interestingly, on June 30, 2009, Starline filed a motion for summary judgment against the Admiral COA in which Starline argued that the Admiral COA lacked legally cognizable claims for all of the above.⁸

⁶ *See also* Brief of Respondent at page 30.

⁷ *See* Brief of Respondent at page 30.

⁸ King County Superior Court cause No. 07-2-22890-0 SEA. Docket No. 263.

Starline's present position, namely that it resolved with the Admiral COA many more claims than the express warranty claim, is diametrically opposed to its position taken in June 2009 when it argued that the Admiral COA had no other such claims to begin with. Obviously, the Admiral COA had only those express warranties available to it. Those were the only claims resolved with regard to Starline's products.

The Admiral COA was an end-user of Starline's products and therefore only had limited manufacturer's warranty claims against Starline. The claims possessed by the Admiral COA were limited by the manufacturer's warranty to repair or replacement of windows. Significantly, it did not allow for the recovery of consequential damages. CP 509.

If the UCC applies, as the trial court held, then it is undeniable that Ledcor had valid claims for express warranties under its contract with Starline, valid claims for implied warranties and valid claims for implied indemnity. In 2004, the Washington Supreme Court re-affirmed the availability of implied indemnity claims originally discussed in *Central Washington Refrigeration, Inc. v. Barbee*.⁹ As the Court in *Barbee*

⁹ 133 Wn.2d 509, 946 P.2d 760 (1997) cited in *Fortune v. Fortune, supra*.

explained, “[w]hile indemnity sounds in contract and tort it is a separate equitable cause of action.” A cause of action for implied indemnity “arises when one party incurs a liability the other party should discharge by virtue of the nature of the relationship between the two parties.”¹⁰ The implied indemnity action in *Barbee* was based on the existence of implied warranties under the UCC.¹¹ “[A] contractual relationship under the U.C.C., with its implied warranties, provides sufficient basis for an implied indemnity claim”. The Court in *Fortune* extended the claims for implied indemnity in *Barbee* to cases involving express warranties based upon the product manufacturer’s advertising.¹² No such extension is necessary in the present case as Ledcor had contractual privity with Starline. In *Barbee*, a contract was not required to support an implied indemnity claim, but was required to establish implied warranties under the UCC.¹³

¹⁰ *Id.*

¹¹ *Id.* at 516

¹² *Fortune v. Fortune, supra.*

¹³ “[I]ndemnity is an equitable action and ‘is not based on contract or tort, although either may secondarily be involved, but on one party paying more than its fair share’” (quoting *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 512 N.W.2d 872, 874 (1994))

Ledcor – the party that entered into the Construction Subcontract with Starline – had independent contractual and equitable reimbursement and indemnity claims against Starline entirely outside of the limited matters of the settlement agreement for replacement of the defective windows and doors. The trial court was wrong to conclude otherwise. This matter should be remanded to determine the value of damages caused by Starline’s faulty products.

B. Even if the UCC Does Apply to Ledcor’s Claims for Breach of Contract and Express Warranty, the Court Erred in Dismissing the Claims.

Ledcor also has an express warranty claim against Starline, not stemming from Starline’s product warranty (which is what the Admiral COA settled), but rather from the subcontract with Ledcor, which contains an express warranty claim enforceable as a matter of contract law.

1. Even if the UCC does apply [which it does not], goods and services were provided by Starline within four years of the date the underlying lawsuit was filed.

The trial court erred when it dismissed Ledcor’s breach of contract and express warranty claims against Starline, in part, based on the Uniform Commercial Code (“UCC”) and its four-year statute of limitations and repose. Assuming for the sake of argument that the UCC does apply to the

present subcontract,¹⁴ it was inappropriate of the trial court to categorically dismiss Leducor's claims based upon the assumption that the completion date of the Project¹⁵ was the date of accrual of Leducor's breach of contract claims against Starline. It is undisputed that Starline provided goods and services to the Project less than four years prior to the date the lawsuit was filed. As noted in Leducor's opening brief, and admitted in Starline's Response, both goods and services were being supplied by Starline as late as October 2006. Therefore, it was reversible error for the trial court to dismiss all claims based upon its determination that some of the claims were barred by the UCC statute of limitations. Starline concedes as much in its Response at page 43 when it notes that goods and services provided after August 31, 2005 would *not* be barred by the UCC four-year statute of limitations.

2. **The trial court incorrectly determined the accrual date under the UCC.**

Again, even assuming the UCC applies to the present contract, the

¹⁴ The contract between Leducor and Starline is titled "Subcontract" and will be referred to as such in this Reply Brief. Construction contracts are generally *not* governed by the UCC. See *Urban Dev.*, 114 Wn. App. 645, 59 P.3d 112 (citing *Arango Contr. Co. v. Success Roofing, Inc.*, 46 Wn. App. 314, 317-20, 730 P.2d 720 (1986) (citing *Christiansen Bros., Inc. v. State*, 90 Wn.2d 872, 877, 586 P.2d 840 (1978))).

¹⁵ The date of completion of the Project is somewhat in dispute and no specific date is conceded by Leducor in this Reply.

trial court erred when it used the date of occupancy as the date of accrual to begin running the four-year statute of limitations. Washington has applied the discovery rule to a great many types of cases over the years, one of which is cases involving the UCC.

“A cause of action accrues when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.”¹⁶

In the present case, Starline windows carried a limited lifetime warranty – which would have extended the date of accrual pursuant to the UCC during the products’ lifetime. But perhaps more importantly, windows are products that must await the passage of time in order to ascertain whether or not they are made to the specifications of the contract. Initial damages due to leaky windows are not inherently detectable. Indeed, many of them are hidden for years inside walls. In the present case, failing windows were discovered up through 2007. CP 419-429. Applying the statutory discovery rule leads to an accrual date far later than

¹⁶ RCW 62A.2-725(2)

applied by the trial court. At an absolute minimum, it was a material issue of fact in dispute under CR 56 and the large body of law interpreting it including.¹⁷ In fact, in *Daughtry, supra*, the court determined that at the very least the trial court was required to enter findings of fact as to the accrual date for the purposes of the UCC.

The trial court erred in applying the four-year statute of limitations under the UCC; but even if the UCC applies, the trial court erred by arbitrarily setting the date of accrual of the cause of action at the completion of the Project, and/or ignoring the goods and services provided by Starline after August 31, 2005.

C. **The Trial Court Erred as a Matter of Law in Summarily Ruling on Damages on Leducor's Claim Against Starline for Breach of the Contractual Duty to Defend.**

Tying this argument back to an earlier argument, when Leducor wrote to Starline in November of 2007, Leducor specifically asked Starline whether or not Starline would assume the defense of Leducor for damage caused by Starline's defective products. More than 18 months later, Starline confidentially settled with the Admiral COA without once accepting the defense or paying any of the costs or fees associated

¹⁷ *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 592 P.2d 631 (1979)

therewith. The trial court determined that Starline owed Leducor a duty to defend, and that Starline breached that duty. The court then took a step too far when it summarily decided the value of damages incurred by Leducor because of Starline's dilatory and, indeed, non-existent defense.

The value of the defense owed by Starline can be calculated in many ways, one of which was suggested by Leducor in response to interrogatories promulgated by Starline – the so-called “MOE method”.¹⁸ The MOE method attempts to create a proportionate share of the costs and fees based upon the relative settlement values of the settling parties. The MOE method assumes that the settlement values of the various parties were the correct values. As argued above, the \$165,000 number urged as a numerator by Starline was only for a small portion of the damages caused by Starline's defective products, and therefore only a small portion of the legal costs and fees incurred by Leducor in its defense of those claims.

Leducor put forth an expert opinion testifying that as much as \$3 million in damages had occurred as a result of Starline's defective products. While Starline can certainly argue the weight of the expert's

¹⁸ See *Leducor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.*, 150 Wn. App. 1, 206 P.3d 1255 (2009). For the sake of clarity, Leducor will refer to this method as the “MOE method” rather than the “Leducor method.”

testimony and opinions to a jury, the very fact that Starline can make such arguments should preclude the imposition of summary judgment in this matter. Juries are instructed that they are the sole judges of the credibility of witnesses and the sole judges of the value or weight of evidence.¹⁹ Judges on the other hand must weight the evidence in the light most favorable to the non-moving party in a motion for summary judgment.²⁰

The trial court erred when it decided that \$165,000 was an adequate sum for the damages caused by Starline and compounded that error by employing the same sum to determine Starline's proportionate share of the defense costs.

By the time the global settlement was reached, Ledcor had already incurred nearly two years of defense costs and expenses in defending claims that arose out of Starline's defective products. Even assuming for the sake of argument that Ledcor did urge Starline to settle all of the claims from the Admiral COA as Starline argues, the fact that Starline delayed for more than 18 months between the time the November 16, 2007 letter was written and settlement reached on July 17, 2009 caused Ledcor

¹⁹ WPI 1.02

²⁰ CR 56

to incur significant costs and fees defending against the Admiral COA's claims – which are not adequately reflected in the amount imposed by the trial court.

D. Starline Cannot Show that the Trial Court Erred When It Refused to Award Starline Prevailing Party Fees.

Ledcor has already briefed its argument that Starline's cross-appeal requesting this Court reverse the trial court's decision to deny Starline prevailing fees and costs was untimely and should be stricken. Ledcor does not waive its argument or pending motion by answering the merits of Starline's cross-appeal under this Court's scheduling order.

Washington Courts apply a two-part review to the award or denial of attorney fees: (1) the court reviews *de novo* whether a legal basis exists for awarding attorney fees by statute, under contract, or in equity and (2) the court reviews the reasonableness of an attorney fee award for abuse of discretion.²¹ A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds.²²

In the present case, the first prong is easy and is not the basis for Starline's appeal. The parties contracted an attorney fee provision into

²¹ See *Hall v. Feigenbaum*, 178 Wn. App. 811, 319 P.3d 61 (2014)

²² See *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007)

Paragraph 19 of their subcontract. Therefore, the only remaining issues is whether or not the trial court abused its discretion by awarding neither party costs and fees. Starline has pointed to absolutely nothing to indicate that Judge Rogoff abused his discretion when he decided that neither party substantially prevailed. Indeed, the trial court's order and opinion dated July 7, 2014, cited to *Phillips Building Company v. An*, 81 Wn. App. 696, 702, 915 P.2d 1146 (1996) for the proposition that there may be no prevailing party to a lawsuit. Starline has failed to explain how the trial court's decision is manifestly unreasonable or based upon untenable grounds. As the trial court pointed out, Starline did not prevail on every issue and indeed ended up with a judgment against it for the defense costs and fees owed under its duty to defend Ledcor which it denied for nearly seven years from the date of tender. Starline's victory, if any, is pyrrhic at best. Under the rulings made at the trial level by Judge Eadie, the trial court did not abuse its discretion in finding that neither party substantially prevailed.

II. CONCLUSION

This Court should reverse the trial court's order dismissing Ledcor's claims for breach of contract, express warranty, indemnity, and

subrogation because Ledcor put forth sufficient evidence to demonstrate it had independent contractual or equitable reimbursement claims against Starline outside of the confidential settlement with the Admiral COA, based on Starline's defective products and services provided to the Project. The Admiral COA could not release any claims other than those that were legally cognizable – to wit, their claims under the express warranty from Starline. The Admiral COA could not, and did not release Ledcor's claims for consequential damages against Starline.

Similarly, this Court should reverse the trial court's order dismissing Ledcor's claims as untimely under the UCC because Ledcor put forth sufficient and undisputed evidence that Starline performed work and labor at the Project thereby excluding the applicability of the UCC to Ledcor's claims. Even if the UCC did apply, the trial court erred in its application of the accrual date. Even if the accrual date set by the trial court was correct for the initial claims of Ledcor, the trial court erred when it dismissed claims for products and services provided within four years of the date the Summons and Complaint were filed in the present matter.

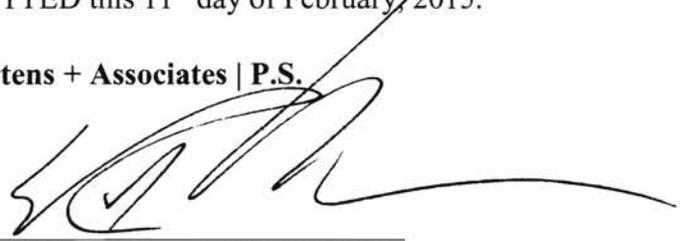
Finally, this Court should reverse the trial court's ruling that Ledcor's damages on its breach of the contractual duty to defend can be

decided on summary judgment and entered as partial judgment, particularly when the amount derived by the court was based upon faulty assumptions. Ledcor had a constitutional right to have its claim for damages heard by a jury and Ledcor never waived that right.

Granting summary judgment under these circumstances was clearly improper. This Court should reverse the trial court's rulings and remand the matter for trial.

RESPECTFULLY SUBMITTED this 11th day of February, 2015.

Martens + Associates | P.S.

By 

Richard L. Martens, WSBA # 4737
Matthew M. Kennedy, WSBA #36452
Attorneys for Appellant
Ledcor Industries (USA) Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of February, 2015, I caused to be served true and correct copies of the foregoing Reply Brief of Appellant Ledcor Industries (USA) Inc. on all parties as follows:

Counsel for Starline Windows, Inc.	<input type="checkbox"/> U.S. Mail
Kenneth Cusack, Esq.	<input type="checkbox"/> Hand Delivery (ABC Legal)
Martin J. Pujolar, Esq.	<input type="checkbox"/> Telefax
Forsberg & Umlauf, P.S.	<input type="checkbox"/> Overnight Delivery
901 Fifth Avenue, Ste. 1400	<input checked="" type="checkbox"/> E-mail with Recipient's
Seattle, Washington 98164	Approval

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

DATED THIS 11th day of February, 2015, at Seattle, Washington.



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

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