

NO. 35867-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

HARTFORD FIRE INSURANCE CO.,

Appellant/Cross-Respondent,

vs.

CSV LIMITED PARTNERSHIP,

Respondent/Cross-Appellant.

**RESPONDENT/CROSS-APPELLANT CSV LIMITED
PARTNERSHIP'S REPLY BRIEF ON CROSS-APPEAL**

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I. INTRODUCTION TO REPLY BRIEF ON CROSS-APPEAL

As this Court will recall, CSV settled with the condominium's homeowners association ("the HOA") for \$645,000.00 ("the HOA settlement"). In separate litigation, CSV received \$410,000.00 in settlement monies from certain contractors and the architect ("the contractor settlement"). In calculating CSV's damages with respect to the lightweight concrete remediation, the trial court allocated only a portion of the HOA settlement to that covered item of damage. (Conclusion 24, CP 964) The trial court also granted Hartford a partial offset from the contractor settlement against that portion of the HOA settlement allocated to the lightweight concrete damages. (Conclusion 26, CP 965) Because the offset was more than the allocated amount, CSV did not recover any amounts from Hartford for the lightweight concrete remediation. (Conclusion 33(c), CP 966)

CSV's cross-appeal concerns two alternative issues with respect to the trial court's calculation of CSV's lightweight concrete remediation damages: Either (1) the trial court erred in allocating only a portion of the amounts CSV paid in the HOA settlement to its covered claim against Hartford for lightweight concrete damages; or (2) the trial court erred in granting Hartford an equitable offset from amounts CSV received from its settlement with the

contractors against its recovery from Hartford of the covered portion of the HOA settlement. CSV asks this Court to either reverse the trial court's application of the allocation or reverse the trial court's calculation of an offset, and remand to the trial court for recalculation of the lightweight concrete remediation damages.

II. REPLY BRIEF

A. Exhibit 35 Does Not Establish a Basis for Allocating CSV's Lump Sum Settlement Payment to the Association Between Covered and Non-Covered Items.

As best CSV can tell, Hartford does not dispute that where no allocation between items of damage is made, no allocation may be imputed. *See Cramer v. Pemco Ins.*, 67 Wn. App. 563, 566, 842 P.2d 479 (1992). Furthermore, Hartford does not appear to dispute that if no allocation was made, the trial court erred in concluding that only a portion of the HOA settlement was attributable to the covered claim for lightweight concrete remediation. Hartford's sole position appears to be that the settlement was allocated because Exhibit 35 "sets forth the five discrete damage categories that were settled between the [Association] and CSV in 2001." *Hartford brief at 38.*

Hartford's reliance on Exhibit 35 is misplaced. As is evident on its

face, Exhibit 35 is a settlement demand to CSV from Steve Barber, the Managing Agent of the HOA. The five items identified by Mr. Barber were simply those which he felt needed immediate attention. (Ex. 35, page 1 (“The present Board feels that of these 14 items, the 5 items we discussed are some of the highest priority for immediate resolution.”) Furthermore, the parties’ settlement agreement did not reference any specific line item, but was merely a lump sum payment to the HOA. (Ex. 43, page 2, para. 1: “[CSV] shall pay the sum of \$645,000.00 to the [HOA]”) The settlement agreement does not contain any allocation of the lump sum amount for any line items.

Despite the lack of any such allocation, Hartford claims that Exhibit 35 supports the conclusion that “[t]he parties ultimately entered into a settlement agreement for these categories at the rounded up sum of \$645,000.” *Hartford opposition brief at 36-37*. This is contradicted by the record. William Macht, the president of the HOA at the time of trial, testified as follows:

Q Now, when we have \$645,000, was there ever any discussion or agreement as to exactly how that \$645,000 was allocated?

A No, there was not.

(RP 331:14-17)

Counsel for Hartford tried mightily to elicit testimony from Mr. Macht establishing that the five categories identified in Exhibit 35 were the items for which the HOA settled, but was unsuccessful:

Q Isn't it clear to you, sir, that the board had dropped nine out of the 14 claims, and all they were looking for from CSV was the money associated with the five categories that are in Exhibit No. 35?

A No, I don't think that there was any intention, in any legal sense, to drop any claim whatsoever. It was clearly not my understanding.

...

Q . . . You would agree that the paragraph here says, If you pay us for these five claims, we will drop and dismiss the other nine categories of claims?

A It wasn't for those particular five claims. It was an offer to sit down and negotiate, and to start with some sort of a balance to be able to do that.

Q But you'd agree the letter says something different than that?

A You may interpret the letter to be something different. That's now how we understood it.

...

Q In any event, the offer was accepted by CSV, was it not?

A It was not a, This is the letter, and therefore we accept your letter and here is the payment. There were long negotiations to arrive at a settlement.

Q What essentially happened is they rounded up your demand of \$644,697.84 and simply gave you \$645,000? That's what happened, right?

A I have no knowledge of how they arrived at \$645,000.

(RP 344:9-15; 345:16-346:2; 346:12-16)

Hartford's characterization of Exhibit 35 is also contradicted by the trial court's findings. In Conclusion 23, the trial court stated:

The settlement amount paid by CSV to the HOA was not identical to the amount described in Barber's letter to Daniels, and did not include the attorney's fees described in the letter. The terms of the settlement also were not identical, and **there is no indication that the basis for the settlement amount was *only* the categories listed in the April 2001 letter**, or that all of those categories were involved in the final calculation. The HOA was not required to spend the money on any particular item, or remedy any specific defect.

(Conclusion 23, CP 964) (emphasis added) Hartford has not assigned error to any of these findings and they are verities on appeal.

In short, Exhibit 35 is evidence of nothing other than the parties' settlement negotiations. The final settlement agreement clearly indicates that

the parties settled for a single, unallocated lump sum payment of \$645,000.00. The parol evidence rule prohibits using Exhibit 35 to impute an allocation to an unambiguous settlement agreement. *Buyken v. Ertner*, 33 Wn.2d 334, 342, 205 P.2d 628 (1949) (“all conversations and parol agreements between the parties prior to a written agreement are so merged therein that they cannot be given in evidence for the purpose of changing the contract or showing an intention or understanding different from that expressed in the written agreement”).

The trial court’s allocation of only a portion of the HOA settlement to the lightweight concrete remediation damages is not supported by its findings or the evidence in this case. Hartford’s own personal characterization of Exhibit 35 does not change this. The entire balance of the settlement (\$645,000.00 minus \$96,745.00, which CSV concedes is attributable to an uncovered claim) must be included when calculating Hartford’s obligations for this item of damage.

B. Hartford Has Failed to Establish that CSV Would Have Received a Double Recovery in the Absence of Any Offset for the Contractor Settlement.

Hartford appears to argue that the trial court was within its discretion to offset a portion of the monies CSV received from the contractors against

the amounts CSV was entitled to recover from Hartford because “CSV recovered what was allocable to its settlement with the contractors.” *Hartford brief at 47*. Hartford’s argument confuses the issue. Assuming the trial court correctly allocated CSV’s settlement with the Association between covered and non-covered damages, the fact of the allocation does not necessarily make the offset correct.

Hartford is entitled to an equitable offset only if CSV recovers damages from both the contractors and Hartford for the same defects. *See Eagle Point Condo. Owners Ass’n v. Coy*, 102 Wn. App. 697, 703, 9 P.3d 898 (2000). In its allocation analysis, the trial court concluded that \$276,255 of CSV’s settlement with the Association should be allocated to the lightweight concrete remediation. (Conclusion 24, CP 964) The trial court also concluded that CSV was entitled to recover \$218,241.45 of that amount from Hartford. (Conclusion 33(c), CP 966) The trial court further concluded that only \$235,106.47 of the contractor settlement was “related to the CSV-HOA settlement[.]” (Conclusion 26, CP 965) Thus, if the trial court’s allocation was correct, then Hartford is entitled to an offset only if it could prove that the amount of the contractor settlement related to the Association settlement was the same as the covered portion of the amounts CSV paid to

the Association; *i.e.*, only if CSV would receive a double recovery without the offset.

Hartford has not pointed to any such evidence. The trial court did not make any finding that the \$235,106.47 of the contractor settlement was exclusively for lightweight concrete remediation. Indeed, the settlement agreement for the contractor settlement simply broke down amounts between parties, not between items of damage. (Exhibit 44, page 1) Because Hartford has not demonstrated what part, if any, of the \$235,106.47 is attributable to lightweight concrete remediation, it has not made the necessary showing of double recovery and the offset was in error. *See Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co.*, 83 Wn. App. 432, 452, 922 P.2d 126 (1996).

Hartford is entitled to an equitable offset only if CSV recovers damages from both the contractors and Hartford for the same defects. *See Eagle Point*, 102 Wn. App. at 703. In the absence of any findings supporting such a contention, the trial court abused its discretion in calculating the offset. If this Court does not remand on the allocation issue, CSV asks this Court to remand this case for recalculation of its damages against Hartford for the

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lightweight concrete remediation without application of an offset.

Respectfully submitted this 7th day of November, 2007.

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and VALLEY INSURANCE COMPANY,

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**AFFIDAVIT OF MAILING
RESPONDENT/CROSS-APPELLANT CSV LIMITED
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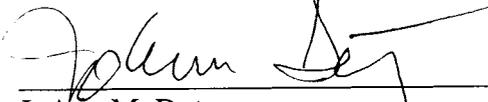
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a true and correct copy of this affidavit and Respondent/Cross-Appellant
CSV Limited Partnership's Reply Brief on Cross-Appeal.


KATHY KARDASH

Subscribed and sworn to before me this 7th day of November, 2007.




JoAnn M. Doty
Notary Public in and for the State of
Washington, residing at Gig Harbor.
My Commission Expires: 3-2-09