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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

CANTERBURY APARTMENT HOMES LLC,

Respondent,

v.

LOUISIANA PACIFIC CORPORATION,

Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

This appeal arises from Respondent Canterbury Apartment Homes LLC's action for breach of written warranty against Appellant Louisiana Pacific Corporation ("LP"), based on alleged defects in LP's Inner Seal® Siding. The state court action from which this appeal arises is not the first litigation between these parties and involving this siding. The first time these issues were litigated was a class action, in federal court, in which Canterbury was among the roughly 800,000 class members nationwide who sued LP for the alleged defects in Inner-Seal® Siding. Canterbury purchased the LP siding aware of the class action suit and, importantly for purposes of this appeal, the class members and LP settled the class action.

LP paid hundreds of millions of dollars in a settlement to avoid further litigation, subject to two narrow exceptions: (1) claims of class members who opted out of the settlement and (2) claims that post-date December 31, 2002, arising under the "express terms of the L-P 25-year Limited Warranty issued with the product." CP 264. Because Canterbury did not opt out of the class and because it brought its claims against LP after December 31, 2002, under the terms of the Settlement Agreement approved by the federal court, Canterbury's recovery should have been limited to "the express terms of the L-P 25-year Limited Warranty."

But the Superior Court instructed the jury in the trial below that “[t]he limited remedy stated in the warranty is not the sole and exclusive remedy available under the warranty.” CP 198. In doing so, the Superior Court directly contradicted the parties’ Settlement Agreement; ignored the federal court order that Canterbury’s remedy, “if any, is the 25-year warranty,” CP 254; and rewrote the terms of the Limited Warranty, which itself states that it contains the exclusive remedy available to Canterbury.

From this one fundamental error stemmed multiple others, each of them also the basis for a new trial. The Court erroneously instructed the jury that it may find the Limited Warranty to fail of its essential purpose, despite the federal court’s prior finding that the warranty remedy was adequate; no substantial evidence existed to show the warranty was inadequate (let alone a “failure”); and the issue was moot once the Court determined that the warranty remedy was not exclusive. Finally, there was no sufficient evidence to support the jury’s excessive damages award of \$755,314.17. Permitting the verdict to stand would allow a class member who sued after the settlement term expired to receive more in damages than a class member who made a claim under the settlement. That would be at odds with the parties’ Settlement Agreement, illogical, and fundamentally unfair to the other class members and LP.

This Court should reverse the denial of LP's renewed motion for judgment as a matter of law and motion for new trial and remand for a new trial.

II. ASSIGNMENT OF ERROR

The Superior Court erred in denying LP's renewed motion for judgment as a matter of law and motion for new trial.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Pursuant to the parties' class action Settlement Agreement, the Federal Court order, and the express terms of the Limited Warranty, is the remedy stated in the Limited Warranty exclusive?

2. Should the jury have been permitted to determine whether the Limited Warranty remedy had failed of its essential purpose where the Federal Court had already approved the warranty remedy, there was no evidence that the warranty remedy was inadequate, and the Superior Court had already ruled that the warranty remedy was not exclusive?

3. Can the jury's damages award be supported where the jury instructions excluded all consideration of the warranty remedy, Canterbury failed to put forward legally sufficient evidence of damages under the measure provided for in the Uniform Commercial Code, and the jury was erroneously instructed that it could award "repair and/or

replacement” costs in the sum of the full cost to replace 16-year-old siding of one kind with brand new siding of another?

IV. STATEMENT OF THE CASE

A. **Class Members Released All “Settled Claims” as Part of the Nationwide Inner-Seal[®] Siding Class Action Settlement.**

The filing of this case in 2011 was preceded, years earlier, by a nationwide class action filed on behalf of all owners of Inner-Seal[®] Siding in the U.S. District Court for the District of Oregon. *See* CP 256-62; *see also* CP 4 (Compl. ¶ 3.2). In the class action, the Federal Court issued a Final Judgment in 1996 that permanently enjoined class members from prosecuting released claims. CP 345-46 (Settlement Agreement § 14.1); CP 260 (Order, Final Judgment and Decree § 6). The “Settlement Class” was defined as including “all Persons who have owned, own, or subsequently acquire Property on which Exterior Inner-Seal[®] Siding has been installed prior to January 1, 1996,” and who did not “file a timely request for exclusion from the Settlement Class.” CP 329.

Under the Settlement Agreement, class members fully and unconditionally released LP from all “Settled Claims.” The Settlement Agreement broadly defined a “Settled Claim” as including any claim “known or unknown, asserted or unasserted, latent or patent,” that could have been asserted “or in the future might reasonably be asserted,” on any “legal theory, and regardless of the type or amount of relief or damages

claimed,” if relating in any way to defects in Inner-Seal[®] Siding. CP 328. The definition of “Settled Claims” was amended—at the Federal Court’s initiative—to exclude “claims made against L-P after the expiration of the term of the Settlement Agreement *under the express terms of the L-P 25-year Limited Warranty* issued with the product.” CP 264 (Amendment to Settlement Agreement § 1.3) (emphasis added). In other words, a class member could pursue a claim limited to the “express terms of the L-P 25-year Limited Warranty,” but all other claims—known or unknown—were settled and precluded by the amended Settlement Agreement. The Settlement Agreement further provided that it “shall supersede any previous agreements and understandings between the Parties with respect to the subject matter of this Agreement.” CP 351 § 20.2. The Settlement Agreement had a seven-year term under which class members could seek the compensation provided for under the Agreement, CP 330; that term expired on January 1, 2003, after which class members were limited to a claim under the express terms of the Limited Warranty issued with the product.

B. Canterbury Is a Class Member and Is Limited to Damages Under the 25-Year Limited Warranty.

Canterbury owns a multi-structure apartment building that was built between 1994 and 1995. RP (11/15/12) at 323:3-9. Inner-Seal[®]

Siding was installed on the structures in varying amounts and locations. *Id.* at 333:9-334:5; CP 250. All siding was installed before January 1, 1996. CP 250; CP 549. Canterbury was aware of the class action litigation when it purchased the siding at issue. RP (11/15/12) at 335:6-9; RP (11/19/12) at 394:5-9; CP 5-6 (Compl. ¶ 3.4).

Canterbury's Inner-Seal[®] Siding came wrapped with its 25-year Limited Warranty, which warrants against "manufacturing defects under normal conditions of use and exposure." Trial Ex. 9. The Limited Warranty expressly provides for a single, specific remedy as follows:

During the first 5 years, L-P's obligation under the above warranty shall be limited to twice the retail cost of the siding material when originally installed on the structure.

.....

During the 6th through 25th year, as determined in the above manner, warranty payments shall be reduced equally each year such that after 25 years from the date of installation no warranty shall be applicable.

Id.

After enjoying the use of Inner-Seal[®] Siding on its apartment building for 16 years, Canterbury decided that the siding was defective and, before LP had completed its claims process, tore it all off in 2011. RP (11/19/12) at 372:17-24; 374:8-11. On October 10, 2011, LP tendered its offer of payment under the warranty. *Id.* at 404:21-404:9.

On November 11, 2011, Canterbury filed suit in Pierce County Superior Court asserting three claims relating to allegedly defective Inner-Seal[®] Siding: breach of written warranty, breach of warranty created by advertising or similar communications to the public, and violation of the Washington Consumer Protection Act (two counts). CP 9-11. Canterbury sought damages “in the amount of approximately \$900,000, which is the estimated cost of replacing the siding, together with interest[] on such costs from the dates costs were incurred.” CP 9 (Compl. ¶ 4.3).

Because Canterbury’s Complaint alleged claims that clearly had been released in the class action settlement, LP—joined by Class Counsel—filed a motion in the Federal Court to enforce the Settlement Agreement. Canterbury, in response, argued that it believed it was not a class member and therefore was not bound by the Settlement Agreement. CP 541. The Federal Court largely granted LP’s joint motion, ruling that “[Canterbury] is a class member and [*Canterbury*]’s remedy, if any, is the 25-year warranty.” CP 254 (emphasis added). Accordingly, the Federal Court ordered Canterbury “to dismiss all claims asserted in [its] state court complaint except the written 25-year warranty claim.” CP 255. In so ruling, the Federal Court explained the origin of the exclusion of written warranty claims from the definition of “Settled Claim” in the class action settlement:

At the fairness hearing I conducted in April 1996, I raised concerns about certain aspects of the settlement, as did participants at the hearing. As a result, on April 26, 1996, counsel signed an Amendment to Settlement Agreement As relevant here, the amendment revised the definition of “Settled Claim” to exclude “claims made against L-P after the expiration of the term of the Settlement Agreement *under the express terms of the L-P 25-year Limited Warranty* issued with the product.”

CP 249 (emphasis added). In ruling that no claim but the Limited Warranty claim could proceed, the Federal Court pointed to the Notice of Approval of Settlement, which was sent to class members and explained that ““if you do not make a claim by January 1, 2003, but your siding fails after January 1, 2003, you can still make a claim under the warranty. . . . You should remember that most warranties issued for L-P Inner-Seal[®] Siding had a depreciation schedule so that by the year 2003 your recovery under the warranty will have depreciated.” CP 250 (emphasis in original); *see also* CP 420.

In response to the Federal Court Opinion and Order of July 26, 2012, Canterbury dismissed all of its claims other than the breach of express warranty claim. CP 21; CP 34. But Canterbury took the position that it was not limited to the remedy stated in the Limited Warranty, and that it was entitled to remedies available under Washington’s Uniform

Commercial Code (“UCC”), RCW 62A.2-714, and the full replacement cost of its siding. CP 617. LP, with the support of Class Counsel, again asked the Federal Court to enforce the Settlement Agreement. CP 608. But the Federal Court understood LP’s motion as asking the Federal Court “to interpret the warranty and determine Canterbury’s damages as a matter of law,” which the Federal Court declined to do. CP 427. The Federal Court reiterated, however, that Canterbury’s damages were subject to “the limitation to warranty damages.” *Id.*

C. The Superior Court Issued Multiple Rulings Rejecting LP’s Argument that the Limited Warranty Remedy Is Exclusive.

LP raised the issue of the exclusivity of the Limited Warranty remedy at least five times before, during, and after trial, each time to no avail. Before trial began, LP moved in limine to exclude, among other things, evidence of “replacement cost,” i.e., the amount of money that Canterbury paid to re-side the entire subject property in 2011 with brand new HardiePlank siding and to paint the new siding. CP 59-61. The basis for the motion was that full replacement cost was not relevant to any legally permissible damages theory. The Superior Court denied LP’s motion in limine to exclude such evidence, ruling that it would address the issue in jury instructions. CP 184; RP (11/13/12) at 62:11-16. In a preview of its ruling on the jury instructions, the Court stated that “this

limited warranty is not necessarily exclusive as the only option that is available to the plaintiff[.]" RP (11/13/12) at 62:19-21.

At the close of Canterbury's case, LP moved for judgment as a matter of law. CP 173-83. LP asserted that Canterbury did not present a sufficient legal basis for seeking \$900,000 in damages, given that the Limited Warranty was the exclusive remedy for Canterbury's claim under the plain language of the warranty and the class action settlement. *Id.* At oral argument on the motion, LP explained that the remedy in the Limited Warranty did not fail of its essential purpose because it provided twice the retail cost of the original siding less an aging deduction, and LP further explained that this was a question for the Court to decide. RP (11/19/12) at 424:13-425:17, 436:20-438:3. The Court denied LP's motion for judgment as a matter of law, and on the issue of whether the Limited Warranty was the exclusive remedy, the Court again ruled that it would address the issue in jury instructions. *Id.* at 440:20-441:7.

At the close of evidence, LP orally renewed its motion for judgment as a matter of law, and again argued that the remedy in the Limited Warranty did not fail of its essential purpose and that this was a question for the Court. RP (11/26/12) at 779:24-780:2. As LP explained, the remedy in the Limited Warranty was more than minimally adequate "when viewed through the lens of this class action settlement agreement

where this particular remedy was specifically approved as the only remedy available to class members who experienced damage to their siding [in] 2003 and after.” *Id.* at 782:17-21. The Court denied the motion. *Id.* at 807:3-4, 809:25-810:1.

The remedy issue was again addressed when the parties argued jury instructions. In ruling on the proposed jury instructions, the Court explained its view that: “Under this warranty, L-P holds all the cards. It determines [whether] it will honor the claim under the warranty. It determines, after the inspection and verification, if there is a failure under the warranty, according to the criteria and the protocols that it has developed.” *Id.* at 833:18-23. The Court in essence expressed its disapproval of the adequacy of the remedy approved by the Federal Court, concluding that, as to “whether there has been a minimum adequate remedy, given the fact of what has to be done, the Court finds that there is . . . sufficient evidence to show that the remedy has failed of its essential purpose.” *Id.* at 808:10-14. And, the Court ruled definitively that the Limited Warranty was “not the sole remedy available to the plaintiff.” *Id.* at 834:5-6. This ruling culminated in Jury Instruction No. 9, which provided: “The limited remedy stated in the warranty is not the sole and exclusive remedy available under the warranty.” CP 198.

Following on this ruling, the Court issued Jury Instruction Nos. 10 and 11 over LP's objections. RP (11/27/12) at 879:3-15. Jury Instruction No. 10 provided a measure of damages not found under the express terms of the Limited Warranty. Specifically, it instructed the jury:

With regard to the breach of warranty claim of Plaintiff, in your determination of damages, you are to use the following measure of damages in the amounts proved by Plaintiff:

The difference at the time and place of acceptance between the value of goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

The costs of repair and/or replacement may be evidence of the difference between the value of goods as accepted and their value as warranted.

CP 199. Jury Instruction No. 11 instructed the jury that it could consider whether "the remedy provided in the warranty fails of its essential purpose," and further provided the same measure of damages included in Instruction No. 10. CP 200.

After a three-week trial beginning November 13, 2012, the jury returned a verdict for Canterbury in the amount of \$755,314.17. CP 203.

D. LP's Renewed Motion for Judgment as a Matter of Law and Motion for New Trial Was Denied.

Pursuant to CR 50(b), LP timely filed a renewed motion for judgment as a matter of law and motion for new trial, asserting that the

Superior Court had erred in its rulings on LP's pre-verdict motions for judgment as a matter of law, in instructing the jury that the remedy stated in the Limited Warranty was not the sole and exclusive remedy available under the Limited Warranty, and in permitting judgment to be rendered for Canterbury on a basis that far exceeded the only remedy available under the Limited Warranty. CP 207. The Superior Court summarily denied the motion. CP 786.

V. ARGUMENT

A. Standard of Review

A trial court's denial of a motion for judgment as a matter of law is reviewed de novo. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 530-31, 70 P.3d 126 (2003). As the Washington Supreme Court has explained, "[a] motion for judgment as a matter of law must be granted 'when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.'" *Id.* at 531 (quoting *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997)).

Decisions on motions for a new trial are reviewed for abuse of discretion. *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997). But if the reason for the trial court's decision on a motion for new trial

involves a question of law, the standard of review is de novo. *Cox v. Gen. Motors Corp.*, 64 Wn. App. 823, 826, 827 P.2d 1052 (1992).

B. The Superior Court Erred in Instructing the Jury that the Remedy Stated in the Limited Warranty Was Not the Sole and Exclusive Remedy Available to Canterbury.

A trial court may order a new trial to remedy a prejudicial error of law that was objected to at trial. CR 59(a)(8). Error is prejudicial if, within reasonable probabilities, the outcome at trial would have been different had the error not occurred. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002); *Magana v. Hyundai Motor Am.*, 123 Wn. App. 306, 316-17, 94 P.3d 987 (2004).

A new trial is appropriate here because, as a matter of law, the jury should not have been permitted to even consider awarding damages beyond the remedy stated in the express terms of the Limited Warranty. As a party to both the class action Settlement Agreement and the Limited Warranty, Canterbury had already agreed to the Limited Warranty as its sole and exclusive remedy. The Superior Court's ruling to the contrary runs counter to the rules of contract interpretation under Washington law, the binding orders of the Federal Court, and public policy.

1. Washington Law Requires that the Limited Warranty Be Read in Conjunction with the Settlement Agreement.

The Limited Warranty is a contract; “[t]he touchstone of contract interpretation is the parties’ intent.” *Tanner Elec. Coop. v. Puget Sound*

Power & Light Co., 128 Wn.2d 656, 674, 911 P.2d 1301 (1996). Courts derive intent from “the actual language of the agreement” as well as “viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.” *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 84, 60 P.3d 1245 (2003) (quoting *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wn.2d 573, 580-81, 844 P.2d 428 (1993)); see also *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 271-72, 267 P.3d 998 (2011) (explaining principle that courts should view a contract “in its entirety and cannot interpret a phrase in isolation”); *Roats v. Blakely Island Maint. Comm’n, Inc.*, 169 Wn. App. 263, 274, 279 P.3d 943 (2012) (considering the parties’ subsequent conduct and “correlated” corporation documents because determining parties’ intent in a contract “requires analyzing the documents as a whole”). Where parties enter into two contracts on the same subject, “the contracts must be interpreted together, and the second agreement prevails if there are any inconsistencies.” *Durand v. HIMC Corp.*, 151 Wn. App. 818, 830, 214 P.3d 189 (2009).

As applied here, the Limited Warranty must be interpreted together with the Amended Settlement Agreement, which is a subsequent contract

between Canterbury and LP. *See Riley Pleas, Inc. v. State*, 88 Wn.2d 933, 937-38, 568 P.2d 780 (1977) (“A compromise or settlement agreement is a contract, and its construction is governed by the legal principles applicable to contracts.”). The Superior Court’s rulings interpreting the Limited Warranty, however, made no reference to the class action proceedings, the Settlement Agreement, or the Federal Court’s orders. *See* RP (11/26/12) at 831:13-834:8. The Court’s failure to grant LP’s renewed motion for judgment as a matter of law and order a new trial on this basis was in error.

Canterbury would have this Court believe (and apparently convinced the Court below) that the Settlement Agreement is irrelevant to the interpretation of the Limited Warranty. *See* CP 738 (“This Court’s task is to interpret the warranty, not the Settlement Agreement. Accordingly, all of LP’s arguments based on the Settlement Agreement are simply irrelevant.”). According to Canterbury, since the Federal Court has exclusive jurisdiction to interpret and enforce the Settlement Agreement, the Superior Court had no authority to consider the Settlement Agreement in interpreting the Limited Warranty.

But Canterbury’s suggestion that the Superior Court was required to ignore the Settlement Agreement defies the fundamental principles of full faith and credit and *res judicata*, which obligate state courts to honor

prior federal decisions. *See Americana Fabrics, Inc. v. L&L Textiles, Inc.*, 754 F.2d 1524, 1529 (9th Cir. 1985). Interpretation of the Limited Warranty cannot operate in a vacuum, to the exclusion of all subsequent acts and agreements between the parties. Rather, the Superior Court was required to acknowledge the parties' subsequent contract and interpret the Limited Warranty in light of the plain terms of the Settlement Agreement and the Federal Court orders enforcing it. Indeed, the terms of the Settlement Agreement and related Federal Court orders so plainly limit class members' remedies to the express warranty that the Settlement Agreement hardly requires interpretation. *See In re Marriage of Bocanegra*, 58 Wn. App. 271, 275, 792 P.2d 1263 (1990) ("If a decree is clear and unambiguous, there is nothing for the court to interpret.") (citing *Byrne v. Ackerlund*, 108 Wn.2d 445, 453, 739 P.2d 1138 (1987)). When the Limited Warranty is interpreted in light of the Settlement Agreement—an exercise which the Superior Court avoided altogether—it is clear that the parties intended for the remedy in the Limited Warranty to be exclusive.

2. The Settlement Agreement Is an Express Agreement that the Remedy in the Limited Warranty Is the Exclusive Remedy.

In the Amendment to Settlement Agreement, Canterbury as a class member expressly agreed that after December 31, 2002, the only claim

and remedy available for allegedly defective Inner-Seal[®] Siding is “under the express terms of the L-P 25-year Limited Warranty.” CP 264 § 1.3.

a. Canterbury’s Claim to a Remedy Other than That Stated in the Limited Warranty Was Released as Part of the Settlement Agreement.

In the Settlement Agreement, Canterbury as a class member broadly released LP from all claims relating to Inner-Seal[®] Siding that were asserted, could have been asserted, “or in the future might reasonably be asserted” against LP—including claims “in any way related to the promotion, design, manufacture, production, sale, distribution, or assembly of Exterior Inner-Seal[®] Siding,” except for claims made “under the express terms of the 25-year Limited Warranty.” CP 328-29; CP 264 § 1.3; CP 268 § 6. Canterbury’s claim that the remedy expressly stated in the Limited Warranty is *not* the sole and exclusive remedy (along with its claim that the remedy in the Limited Warranty failed of its essential purpose) is one that is clearly related to allegedly defective Inner-Seal[®] Siding and could have been asserted or, “in the future” (as of the time of the Settlement Agreement), might be asserted by class members. Indeed, the settlement class members specifically released “any claim for breach of any duty imposed by law” and “any claim based on . . . breach of express or implied warranty” other than a claim under the express terms of the Limited Warranty. CP 329.

Thus, Canterbury's challenges to the adequacy of the remedy in the Limited Warranty were released in a settlement that was approved by the Federal Court *over 16 years ago*. The words releasing all claims other than a claim "under the express terms of the L-P 25-year Limited Warranty" were an unmistakable expression of the parties' intent that the remedy expressly stated in the Limited Warranty be the sole and exclusive remedy.

Class members further agreed that the Settlement Agreement "shall be the sole and exclusive remedy" for all "Settled Claims" and that the Settlement Agreement "supersede[s] any previous agreements and understandings between the Parties." CP 345 § 13.1; CP 351 § 20.2. As explained above, where parties to a contract enter into a subsequent contract, the second agreement controls if there is any inconsistency between the two. Neither the Settlement Agreement nor its Amendment reference or permit any other remedies beyond the express terms of the Limited Warranty; there is no exception from the definition of "Settled Claim" for a claim under the UCC's damages and remedies provisions.

In fact, the Notice of Class Action Settlement provided to Canterbury before it agreed to the amended Settlement Agreement not only limits Canterbury to the Limited Warranty remedy, but also conveys that warranty damages will be subject to a depreciation schedule. The

Federal Court-approved Notice of Approval of Settlement specifically references the depreciation schedule in the Limited Warranty as limiting a class member's remedy at the end of the class claims period:

As a result of continuing negotiations, and after considering the views of Class Members, L-P has now agreed to reinstate the 25 year warranty after January 1, 2003. This means that if you do not make a claim by January 1, 2003, but your siding fails after January 1, 2003, you can still make a claim under the warranty. *All claims other than warranty claims . . . will be released if you stay in the Class. You should remember that most warranties issued for L-P Inner Seal Siding had a depreciation schedule so that by the year 2003 your recovery under the warranty will have depreciated.*

CP 420 (emphasis added). There would be no reason to reference the depreciation schedule if the remedy in the warranty were not the only remedy for class members after January 1, 2003.

The plain language of the Amended Settlement Agreement rings loud and clear: Canterbury's "sole and exclusive remedy," CP 345 § 13.1, is the one provided "under the express terms of the L-P 25-year Limited Warranty," CP 264 § 1.3. As a class member, Canterbury released all other claims and remedies.

b. Canterbury's Claim to a Remedy Other than That Stated in the Limited Warranty Is Barred by the Doctrine of Collateral Estoppel.

In approving the Settlement Agreement as amended, the Federal Court specifically ruled that “all members of the Class who do not file timely notices of exclusion release are barred and permanently enjoined from prosecuting ‘Settled Claims’ . . . against L-P.” CP 260 (Order, Final Judgment and Decree § 6). It further found the Amendment to the Settlement Agreement to be “fair, reasonable, and adequate and in the best interests of the Class.” CP 259 § 5. Moreover, the Federal Court has ruled, in this very case, that Canterbury was entitled only to the remedy provided by the Limited Warranty. These rulings are entitled to collateral estoppel effect in this case.

As the Washington Supreme Court has explained, the “‘doctrine of collateral estoppel is well-known to Washington law as a means of preventing the endless relitigation of issues already and actually litigated by the parties and decided by a competent tribunal.’” *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998) (quoting *Reninger v. Dep’t of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998)). “‘When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent

action between the parties, whether on the same or a different claim.” *Id.* (quoting Restatement (Second) of Judgments § 27 (1982)). The purpose of the collateral estoppel doctrine is “to promote the policy of ending disputes.” *Id.*

The elements of collateral estoppel are met when: (1) the issues are identical; (2) the prior adjudication ended in a final judgment on the merits; (3) the party against whom the doctrine is asserted was a party to the prior adjudication; and (4) application of the doctrine does not work an injustice. *Id.* at 262-63 (citing *Reninger*, 134 Wn.2d at 449). All of these elements are satisfied here.

There can be no dispute on factors two and three. Canterbury was a party to the Federal Court proceedings—both in this case and in the class action—and it is bound by the Federal Court’s final judgments. Nor should there be any dispute on factor four. Application of the doctrine would not work an injustice to Canterbury; on the contrary, as discussed further below, failure to apply the Settlement Agreement and Federal Court orders in this case would run counter to the public policy goals of settlement and any notion of fairness to LP or to the hundreds of thousands of other class members.

As to the first factor, the parties here have fully litigated before the Federal Court the issues of whether Canterbury is bound by the Settlement

Agreement and the nature of the remedy (though not the amount) to which Canterbury is entitled. In an effort to wriggle free of the binding effect of the Settlement Agreement, Canterbury argued to the Federal Court that it believed it was not a class member and should not be bound by the terms of the Settlement Agreement. CP 541. The Federal Court disagreed, stating in no uncertain terms that Canterbury “is a class member and *[Canterbury]’s remedy, if any, is the 25-year warranty.*” CP 254 (emphasis added). To arrive at that conclusion, the Federal Court reiterated the remedy provided by the Settlement Agreement: “As relevant here, the amendment revised the definition of ‘Settled Claim’ to exclude ‘claims made against L-P after the expiration of the term of the Settlement Agreement *under the express terms of the L-P 25-year Limited Warranty issued with the product.*’” CP 249 (emphasis added). Accordingly, the Federal Court ordered Canterbury “to dismiss all claims asserted in [its] state court complaint except the written 25-year warranty claim.” CP 255. Canterbury did not appeal the Federal Court’s Order.

Several months later, upon LP’s subsequent motion to enforce the Settlement Agreement, the Federal Court refused to make any determination “concerning the amount Canterbury may seek as damages *other than the limitation to warranty damages.*” CP 427 (emphasis added).

Federal Court's prior rulings. The jury instructions and resulting verdict conflict with those rulings, and accordingly the Superior Court should not have permitted that verdict to stand.

c. The Policy Supporting Settlement Prohibits Canterbury's Collateral Attack of the Settlement Agreement.

The Final Judgment "permanently enjoined" all class members who did not file a timely exclusion (or "opt out") from the settlement from prosecuting claims that had been released in the settlement. CP 260 § 6. It is well-established that a class member who does not opt out of the class is bound by the judgment in the class action, including any settlement. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874, 104 S. Ct. 2794, 81 L.Ed.2d 718 (1984) ("[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation.").

Courts, the class members, and defendants guard the interest in finality of such class settlements: "The binding effect of the judgment on all class members who do not exclude themselves is of major importance in the settlement context. A classwide judgment represents one of the major incentives that lead defendants to settle." 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 12:14 (4th ed. 2002). For these reasons, a class member who fails to opt out of the class or timely object

to the proposed settlement is prohibited from later collaterally attacking the settlement. *See Knuth v. Beneficial Wash., Inc.*, 107 Wn. App. 727, 31 P.3d 694 (2001) (affirming summary judgment dismissing claim released in prior class action settlement agreement); *see also Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1024 n.13 (9th Cir. 2012) (“Class members are not . . . entitled to unlimited attacks on the class settlement. Once a court has decided that the due process protections did occur for a particular class member or group of class members, the issue may not be relitigated.”) (quoting *In re Diet Drugs Prods. Liab. Litig.*, 431 F.3d 141, 146 (3d Cir. 2005)).

Canterbury’s strained interpretation—that a claim for a remedy beyond the “express terms of the L-P 25-year Limited Warranty” is available to Canterbury—is at odds with the entire purpose of the Settlement Agreement. Like nearly all class action settlements, its purpose was to provide a defined and finite pool of funds to class members in exchange for the certainty that the company settling the litigation would not face future litigation regarding the same claims. The Final Judgment estimated the class at 800,000 persons. CP 259 § 4. LP agreed to pay hundreds of millions of dollars to class members in exchange for the class members’ agreement to release their underlying claims, with the exception of any claim under “the express terms of the L-

P 25-year Limited Warranty,” which itself limited any such claim to “twice the retail cost of the original siding material,” subject to a depreciation schedule. The Federal Court approved that agreement and it is not subject to a collateral attack in this proceeding.

The illogic of the Superior Court’s jury instruction on Canterbury’s available remedy is that it allowed a class member whose siding did not fail for some 16 years to receive *more* in damages than a class member whose siding failed immediately and who made a claim under the seven-year claims period of the settlement. In fact, while payment for claims made under the settlement were governed by a location-specific replacement cost determined by an independent, court-approved supplier of construction cost information, CP 390; CP 328, Canterbury’s remedy was not so restricted. Where class members who made a claim prior to January 1, 2003, did not get to recover full replacement cost, CP 337-38 (claims subject to an aging deduction of eight percent per year in years five and later), it makes no sense to permit a jury to award a class member like Canterbury the full cost of brand new siding to replace all of its 16-year-old siding.

In 2005, nearly ten years after the Federal Court approved the class action Settlement Agreement, the Special Master in the case issued a final report on the state of the settlement. CP 385. The conclusion to that 30-

page report was entitled: "THE SETTLEMENT WORKED." CP 415.

The Special Master averred:

Because the terms of the Settlement, as agreed upon by the parties and approved by the Court, were fulfilled, this complex class action Settlement was a success.

....

I have been informed that this Settlement has resulted in the payment of more dollars to Claimants faster than almost every other product class action settlement, all at no cost or expense to Claimants. In fact, we have tried to make this Settlement a model for other complex product liability settlements, and I have been informed that this Settlement has already served as a blueprint for others.

CP 415-16. The Special Master further declared, "I have been and continue to be proud to have been affiliated with this Settlement." CP 416. The Special Master's approbation is ironic, to say the least, in light of the result below. Permitting a jury to award damages far in excess of what a class member could have recovered under the Settlement Agreement or what the Limited Warranty provides undermines the goals of the Settlement Agreement, undoing 16 years of success by effectively determining that the Settlement Agreement did not mean what it said when it limited Canterbury's remedy to the "express terms of the L-P 25-year Limited Warranty." If this Court were to affirm the judgment below,

it would threaten the certainty of not only this class action settlement, but the myriad class action settlements entered into by parties who thought they were putting an end to their litigation.

3. The Plain Language of the Limited Warranty Itself Demonstrates the Express Intent that the Stated Remedy Is Exclusive.

Though multiple contracts between the parties “must be interpreted together,” *Durand v. HIMC Corp*, 151 Wn. App. 818, 830, 214 P.3d 189 (2009), even looking at the plain language of the Limited Warranty by itself demonstrates the parties’ intent to limit the remedy for breach of warranty to that stated in the warranty. As an initial matter, the Limited Warranty has large block lettering in the upper portion of the document highlighting that it is a “LIMITED WARRANTY FOR INNER-SEAL[®] SIDINGS.” Trial Ex. 9. The one-page Limited Warranty sets out a single, specific, “limited” remedy:

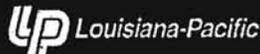
During the first 5 years, L-P’s obligation under the above warranty *shall be limited* to twice the retail cost of the siding material when originally installed on the structure....

During the 6th through 25th year, *as determined in the above manner*, warranty payments shall be reduced equally each year such that after 25 years from the date of installation no warranty shall be applicable.

Id. (emphasis added). The Limited Warranty further provides that, “Except for the express warranty and remedy set forth above, L-P

disclaims all other warranties, express or implied.” *Id.* For the ease of the Court’s reference, what follows is a copy of the Limited Warranty.

LIMITED WARRANTY FOR INNER-SEAL[®] SIDINGS



LIMITED 25-YEAR SIDING WARRANTY

Louisiana-Pacific Corporation (“L-P”) warrants the Inner-Seal[®] lap and panel sidings, when installed and finished according to the published installation and finishing instructions and when properly maintained, for a period of 25 years from the date of installation against manufacturing defects under normal conditions of use and exposure.

LIMITATIONS

L-P MUST BE GIVEN A 60-DAY OPPORTUNITY TO INSPECT THE SIDING BEFORE IT WILL HONOR ANY CLAIMS UNDER THE ABOVE WARRANTY. IF AFTER INSPECTION AND VERIFICATION OF THE PROBLEM, L-P DETERMINES THAT THERE IS A FAILURE COVERED BY THE ABOVE WARRANTY, L-P WILL REFUND TO THE OWNER AN AMOUNT OF MONEY EQUAL TO TWICE THE RETAIL COST OF THE ORIGINAL SIDING MATERIAL. THE COST OF LABOR AND MATERIALS OTHER THAN SIDING ARE NOT INCLUDED. WARRANTY PAYMENTS WILL BE BASED UPON THE AMOUNT OF AFFECTED SIDING MATERIAL.

DURING THE FIRST 5 YEARS, L-P’S OBLIGATION UNDER THE ABOVE WARRANTY SHALL BE LIMITED TO TWICE THE RETAIL COST OF THE SIDING MATERIAL WHEN ORIGINALLY INSTALLED ON THE STRUCTURE.

IF THE ORIGINAL SIDING COST CANNOT BE ESTABLISHED BY THE OWNER THE COST SHALL BE DETERMINED BY L-P IN ITS SOLE AND REASONABLE DISCRETION.

DURING THE 6TH THROUGH 25TH YEAR, AS DETERMINED IN THE ABOVE MANNER, WARRANTY PAYMENTS SHALL BE REDUCED EQUALLY EACH YEAR SUCH THAT AFTER 25 YEARS FROM THE DATE OF INSTALLATION NO WARRANTY SHALL BE APPLICABLE.

THE ABOVE WARRANTY SHALL APPLY ONLY IF THE INNER-SEAL SIDING IS SUBJECTED TO NORMAL SIDING USE AND EXPOSURE. THE SIDING MUST BE STORED, HANDLED, INSTALLED, FINISHED AND MAINTAINED IN ACCORDANCE WITH L-P’S PUBLISHED INSTRUCTIONS. FAILURE TO FOLLOW SUCH INSTRUCTIONS WILL VOID THIS WARRANTY.

IMPORTANT NOTICE:

FAILURE TO INSTALL, FINISH AND MAINTAIN IN ACCORDANCE WITH L-P’S PUBLISHED INSTRUCTIONS MAY CAUSE DAMAGE TO THE SIDING AND WILL VOID THIS WARRANTY.

CONDITIONS COVERED BY THIS WARRANTY

- DELAMINATION OF THE OVERLAY FROM THE SUBSTRATE.
- RESIN SPOTS.
- SPOTS ON OVERLAY RESULTING FROM A MANUFACTURING PROCESS WHICH CANNOT BE COVERED WITH PAINT.
- FOLDED OR “POPPED” WAFERS/STRANDS THAT BREAK THE OVERLAY SURFACE.

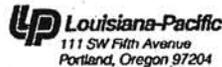
- CRACKING, PEELING, CHIPPING OR FLAKING OF THE OVERLAY SURFACE.
- EXCESSIVE OR MISSING SEALANT ON EDGES AND/OR GROOVES.
- DIMENSIONAL VARIANCE FROM SPECIFICATIONS, AT THE TIME OF SALE.
- PATTERN VARIANCES FROM SPECIFICATIONS.

CONDITIONS NOT COVERED BY THIS WARRANTY

- FAILURES DUE TO MOISTURE IN THE WALL CAVITY.
- FAILURES DUE TO INSUFFICIENT PAINT COVERAGE ON FACE AND EXPOSED EDGES.
- FAILURES DUE TO FAILURE OF THE PAINT SYSTEM.
- FAILURES RELATED TO MOLD, MILDEW AND/OR ALGAE ON PAINTED SIDING SURFACE.
- FAILURES DUE TO FACE NAILING ON LAP SIDING.
- FAILURES DUE TO INADEQUATE SPACING AND/OR SEALANT.
- FAILURES DUE TO UNCONTROLLED WATER RUNOFF OR INADEQUATE FLASHING.
- FAILURES DUE TO SIDING BEING IN DIRECT CONTACT WITH MASONRY AND/OR LESS THAN 6” FROM THE GROUND.
- FAILURES DUE TO SPRINKLERS SPRAYING ON THE SIDING.

DISCLAIMER: LOUISIANA-PACIFIC DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, REGARDING UTILITY GRADE INNER-SEAL SIDING, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. THE FOREGOING EXPRESS WARRANTIES ARE APPLICABLE ONLY TO OUR A-GRADE PRODUCT AND NOT OUR UTILITY GRADE WHICH IS SOLD “AS IS AND WITH ALL FAULTS”. EXCEPT FOR THE EXPRESS WARRANTY AND REMEDY SET FORTH ABOVE, L-P DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. NO OTHER WARRANTY WILL BE MADE BY OR ON BEHALF OF THE MANUFACTURER OR THE SELLER OR BY OPERATION OF LAW WITH RESPECT TO THE PRODUCT OR ITS INSTALLATION, STORAGE, HANDLING, MAINTENANCE, USE, REPLACEMENT OR REPAIR. NEITHER L-P NOR THE SELLER SHALL BE LIABLE BY VIRTUE OF ANY WARRANTY, OR OTHERWISE, FOR ANY SPECIAL, INCIDENTAL OR CONSEQUENTIAL LOSS OR DAMAGE RESULTING FROM THE USE OF THE PRODUCT. L-P MAKES NO WARRANTY WITH RESPECT TO INSTALLATION OF THE PRODUCT BY THE BUILDER OR THE BUILDER’S CONTRACTOR, OR ANY OTHER INSTALLER. SOME STATES DO NOT ALLOW THE EXCLUSION OR LIMITATION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, AND IN SUCH STATES THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO YOU. THIS WARRANTY GIVES YOU SPECIFIC LEGAL RIGHTS AND YOU MAY ALSO HAVE OTHER RIGHTS WHICH VARY FROM STATE TO STATE.

SEE REVERSE SIDE FOR WARRANTY CHECKLIST TO ENSURE SIDING PERFORMANCE AND VALIDITY OR WARRANTY.



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Canterbury's argument before the Superior Court was that the terms in the warranty "are flawed because they don't have the magic language that makes them exclusive." RP (11/26/12) at 800:13-15. According to Canterbury, that "magic language" is the phrase "sole and exclusive remedy." But Canterbury has pointed to no authority for this requirement, and there is none. RCW 62A.2-719(1) provides that a contract "may limit or alter the measure of damages," but "resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy." In other words, Washington's UCC requires that the contract (or in this case, contracts) contain an "express" agreement that a remedy is exclusive. The word "exclusive" (or "sole") need not be used.

Indeed, neither of the two Washington cases relied on below by Canterbury requires the supposedly "magic language" of "sole and exclusive." See *Am. Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 797 P.2d 477 (1990); *Nw. Perfection Tire Co. v. Perfection Tire Corp.*, 125 Wash. 84, 215 P. 360 (1923). Rather, these cases simply confirm that the contract must contain a clear expression of intent that the stated remedy be exclusive. See *Am. Nursery Prods.*, 115 Wn.2d at 227 (assessing whether the contract as a whole contains an "expression of an intent of exclusivity"); *Nw. Perfection Tire*, 125 Wash. at 92 (reviewing

contract to find “any plainly expressed intent to compel the [buyer] to resort exclusively to the remedy of replacement”). This is consistent with other courts’ interpretation of the UCC. *See, e.g., Council Bros., Inc. v. Ray Burner Co.*, 473 F.2d 400, 406 (5th Cir. 1973) (“[I]f the parties intend for a written warranty to prescribe an exclusive remedy, *this must be clearly expressed.*”); *Lennar Homes, Inc. v. Masonite Corp.*, 32 F. Supp. 2d 396, 403 (E.D. La. 1998) (“The U.C.C. requires only that the exclusivity be clearly expressed, *not that ‘magic words’ be employed.*”) (emphasis added). The Limited Warranty was not issued at Hogwarts; consistent with other jurisdictions, contract interpretation under Washington law looks to the plain meaning of the agreement, not to magical language or spells, to discern the parties’ intent.

Neither of the contracts at issue in the cases cited by Canterbury met the UCC standard requiring an express agreement on exclusivity. In *American Nursery Products*, the contract broadly conferred on the party declaring default “all rights provided under the Washington [UCC] and other applicable laws of the State” and provided that “[a]ll rights and remedies of either party may be exercised consecutively, successively and cumulatively.” 115 Wn.2d at 220, 226. In *Northwest Perfection Tire*, the warranty lacked an expression of intent of exclusivity where it simply “guarantee[d] all tires, tubes, and casings to be in good condition and to

make good all defects therein.” 125 Wash. at 92. The present case presents a warranty unlike the contracts analyzed in either of these two cases; the Limited Warranty contains both in its title (“Limited Warranty”) and in the text an unmistakable expression “disclaim[ing] all other warranties” “except for the express warranty and remedy” stated in the contract. Trial Ex. 9.

In any event, Canterbury concedes that the paragraph addressing LP’s obligation during the first five years “include[s] the limiting language,” CP 759 n.11, implicitly acknowledging that the Limited Warranty contains adequate wording to demonstrate the parties’ intent of exclusivity for that time period. *See also Norway v. Root*, 58 Wn.2d 96, 97, 361 P.2d 162 (1961) (finding exclusivity where warranty was “limited to replacement of . . . or credit for” defective parts); *Lennar Homes*, 32 F. Supp. 2d at 403 (“Stating that the buyer’s remedy is ‘limited to’ a certain measure of damages is merely the converse of saying that the remedy is exclusive.”). Canterbury contends, however, that there is no such limitation in years six through 25. But the Limited Warranty expressly incorporates the limited remedy available in years one through five and subjects it to a further limitation, a depreciation schedule: “During the 6th through 25th year, *as determined in the above manner* [i.e., the manner described for years one through five], warranty payments shall be reduced

equally each year such that after 25 years from the date of installation no warranty shall be applicable.” Trial Ex. 9 (emphasis added). When the paragraphs are interpreted together, the exclusive nature of the stated remedy applies to the full 25 years of the warranty. *See Am. Nursery Prods.*, 115 Wn.2d at 226 (reviewing “[t]he remedies in the contract, found in paragraphs 2.1, 5.2, and 9.3” to determine exclusivity).

Canterbury’s preferred interpretation would lead to an absurd result, where consumers who enjoy as much as 25 years of useful life of their siding could receive *more* in damages than consumers who experience defects in the first five years. *See Wash. Pub. Util. Dists.’ Util. Sys. v. Pub. Util. Dist. No. 1*, 112 Wn.2d 1, 11, 771 P.2d 701 (1989) (a contract should be given “a practical and reasonable interpretation that fulfills the object and purpose of the contract rather than a strained or forced construction that leads to an absurd conclusion, or that renders the contract nonsensical or ineffective”). Not only would such a result be unreasonable, *see Byrne v. Ackerlund*, 108 Wn.2d 445, 453-54, 739 P.2d 1138 (1987) (“Where one construction would make a contract unreasonable, and another, equally consistent with its language, would make it reasonable, the latter more rational construction must prevail.”), it is also expressly refuted by the warranty language, which specifies that consumers who experience defects after the first five years are subject to

an aging deduction and therefore are entitled to *less* money than those whose siding fails sooner. Trial Ex. 9.

The Limited Warranty in this case is clear. Standing alone, the Limited Warranty limits Canterbury's available remedy. But even if the Limited Warranty were ambiguous on the exclusivity of the stated remedy, the amended Settlement Agreement, a subsequent contract between the parties that controls to the extent there is any inconsistency, reinforces that the Limited Warranty remedy is exclusive; the Settlement Agreement contains a clear provision that settlement class members were barred from asserting any claim other than one provided in the "express terms" of the Limited Warranty itself.

C. The Superior Court Erred in Instructing the Jury to Determine Whether the Limited Warranty Failed of Its Essential Purpose.

The Superior Court compounded its error of determining, as a matter of law, that the remedy in the Limited Warranty was not the sole and exclusive remedy by asking the jury to determine whether the Limited Warranty failed of its essential purpose. This was erroneous for three independent reasons.

First and foremost, this instruction directly contradicts the Settlement Agreement and the Federal Court's prior decision regarding the adequacy of the Limited Warranty remedy. The Federal Court scrutinized

the original Settlement Agreement, heard from class members, and approved the Settlement Agreement, releasing all claims except for a claim “under the express terms of the L-P 25-year Limited Warranty issued with the product.” CP 264 § 1.3. It further barred class members who did not opt out of the class from prosecuting claims they had released. CP 345 § 14.1; CP 260 § 6. Claims for damages under the UCC, claims for violation of an implied warranty, claims that the remedies in the settlement were unfair and inadequate—all of these were claims that “could reasonably have been or in the future might reasonably be asserted” by class members and were therefore released. CP 328. In giving approval to the class action settlement in its 1996 Order, Final Judgment and Decree, the Federal Court specifically considered whether the Limited Warranty provided an adequate remedy to class members who did not have a present injury but might face and claim one as of 2003 or later. And the Federal Court ruled the settlement terms to be “fair, reasonable, and *adequate* and in the best interests of the Class.” CP 259 § 5 (emphasis added). As set forth above, these rulings are entitled to collateral estoppel effect in this case. The Superior Court’s jury instruction reopened an issue already decided by the Federal Court and permitted the jury to undo the Settlement Agreement by finding a court-

approved, “fair, reasonable, and adequate” remedy to fail of its essential purpose.

Second and relatedly, there was no substantial evidence to support Canterbury’s conclusory assertions that the warranty failed to “provide at least minimum adequate remedies.” *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 523, 210 P.3d 318 (2009). A remedy does not “fail of its essential purpose” simply because it did not cover all of the buyer’s damages from the breach of warranty. *See Hill v. BASF Wyandotte Corp.*, 696 F.2d 287, 292 (4th Cir. 1982) (“The argument seems to be that because [the plaintiff] *claims* damages in the amount by which his crop yield was allegedly reduced and cannot *obtain* such damages if the limitation on remedy is enforced, then the remedy ‘fails of its essential purpose.’ This would of course turn the provision on its head since it would always prevent imposition of any limitation that might prevent recovery of particular relief sought.”). The relevant question is whether “the remedy fails of *its* essential purpose, not the essential purpose of the [UCC], contract law, or equity.” 1 James T. White, Robert S. Summers, & Robert A. Hillman, *Uniform Commercial Code* § 13:20, at 1132 (6th ed. 2012). The provision of the UCC concerning failure of essential purpose is concerned with “the application of an agreement to novel circumstances not contemplated by the parties.” *Id.* (internal quotation marks and

citation omitted). Here, the remedy provided comports precisely with the circumstances contemplated by the Limited Warranty. The Limited Warranty specifically contemplated that manufacturing defects may not appear immediately but may instead surface “[d]uring the 6th through 25th year,” and it provides a single, specific remedy in those circumstances. Trial Ex. 9.

In fact, the “failure of essential purpose” exception to the general right of sellers to limit liability under the UCC “applies most obviously to those situations where the limitation of remedy involves repair or replacement that cannot return the goods to their warranted condition.” *Hill*, 696 F.2d at 292. A remedy allowing refund of the purchase price, on the other hand, rarely fails of its essential purpose:

Although an occasional decision holds that return of the purchase price is a remedy that fails of its essential purpose if the consequential damages far exceed that amount, these cases misread § 2-719(2) and confuse the concepts of unconscionability with failure of essential purpose. The better reasoned decisions hold that refund of the purchase price prevents a limited remedy from failing of its essential purpose. Similarly, refund of the purchase price as the *primary* remedy should not fail of its essential purpose if the seller is ready to refund as agreed.

Barkley Clark & Christopher Smith, *The Law of Product Warranties* § 8:29 (2010); *see also Marr Enters., Inc. v. Lewis Refrigeration Co.*, 556 F.2d 951 (9th Cir. 1977) (holding as a matter of law that refund of purchase price as minimum adequate backup remedy precludes failure of a remedial scheme's essential purpose); *Ritchie Enters. v. Honeywell Bull, Inc.*, 730 F. Supp. 1041, 1049 (D. Kan. 1990) ("The limited remedies set forth in the Basic Agreement have not failed of their essential purpose, and plaintiff's damages for breach of the express warranty of material and workmanship are limited to the actual damages not to exceed the purchase price of the Honeywell system."); *Garden State Food Distribs., Inc. v. Sperry Rand Corp.*, 512 F. Supp. 975, 978 (D.N.J. 1981). Here, the Limited Warranty allows Canterbury to recover *double* the purchase price, subject to a depreciation schedule. CP 337-38. This provides an even more robust remedy than a simple refund. Where Canterbury has enjoyed 16 years of useful life of its Inner-Seal[®] Siding, there was nothing inadequate about enforcing the limited remedy expressly stated in the warranty.

Third, once the Superior Court determined—albeit erroneously—that Canterbury's remedy was not limited to the express terms of the warranty, the question of whether the Limited Warranty failed of its essential purpose became moot. UCC damages are available "[w]here

circumstances cause an *exclusive or limited remedy* to fail of its essential purpose.” RCW 62A.2-719(2) (emphasis added). Once a contractual remedy is deemed to be *not* exclusive or limited, there is no need to determine whether it fails of its essential purpose.

Canterbury’s trial brief before the Superior Court acknowledged that the question regarding failure of essential purpose only comes into play if the remedy stated in the Limited Warranty is deemed Canterbury’s exclusive remedy. *See* CP 457 (“Even if the stated warranty remedies are deemed to be exclusive, they will not be enforced as the sole and exclusive remedies if it causes the warranty to fail of its essential purpose.”). In its opposition to LP’s post-trial motions, Canterbury conceded: “A failure of essential purpose may possibly be rendered moot in an appellate context following affirmation of a ruling [that] limited remedies are not exclusive, but it is wholly a different matter when the fact-finder has not yet reached a decision.” CP 761. Canterbury’s feeble attempt to gloss over the Superior Court’s error is unavailing. Here, the Superior Court determined, *as a matter of law*, that the remedy stated in the Limited Warranty was not Canterbury’s sole and exclusive remedy, and it instructed the jury as much. CP 198. In other words, the Court had already “reached a decision” regarding exclusivity, making its instruction to the jury on failure of essential purpose unnecessary and inappropriate.

Canterbury further contended below that its argument regarding failure of essential purpose was merely an alternative theory of recovery. CP 761. While it may be theoretically correct that the jury can be instructed that a party has alternative theories, the jury in this case was not instructed that whether the remedy failed of its essential purpose was an *alternative* basis for Canterbury's claim for replacement cost; the jury was instead instructed on failure of essential purpose without any other context. The failure to instruct the jury of Canterbury's alternative basis theory made the instructions as a whole misleading and inherently confusing. *See Keller v. City of Spokane*, 146 Wn.2d 237, 250-51, 44 P.3d 845 (2002) (affirming and remanding for new trial because court's refusal to give one jury instruction rendered the instructions as a whole misleading and inherently confusing); *see also id.* at 249-50 (stating rule that jury instructions are insufficient if they are misleading, fail to inform jury on the applicable law, or prevent a party from arguing its theories of the case). The Superior Court's failure to clearly instruct the jury on alternative damages theories was prejudicial, as it permitted the jury to award damages far in excess of any permitted under the Limited Warranty.

D. The Superior Court Also Erred in Rejecting LP's Argument that No Legally Sufficient Basis Supported the Jury's Damages Award.

A new trial is warranted where “there is no evidence or reasonable inference from the evidence to justify the verdict or the decision.” CR 59(a)(7); see *Kohfeld v. United Pac. Ins. Co.*, 85 Wn. App. 34, 41, 931 P.2d 911 (1997). Additionally, a new trial is appropriate upon an “[e]rror in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract.” CR 59(a)(6). It is this Court’s duty to “look to the record to determine whether there was sufficient evidence to support the verdict.” *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997). Moreover, “[i]f, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party.” CR 50(a)(1).

Regardless of whether the Superior Court’s rulings that the Limited Warranty remedy was not exclusive and that the jury should consider whether the remedy failed of its essential purpose were reversible errors, the Superior Court should have granted LP’s renewed motion for judgment as a matter of law or motion for new trial because there was insufficient evidence to support the jury’s damages award.

Jury Instruction No. 10 instructed the jury:

With regard to the breach of warranty claim of Plaintiff, in your determination of damages, *you are to use the following measure of damages in the amounts proved by Plaintiff:*

The difference at the time and place of acceptance between the value of goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

The costs of repair and/or replacement may be evidence of the difference between the value of goods as accepted and their value as warranted.

CP 199 (emphasis added).

As an initial matter, and as argued above, this instruction was in error because it includes a measure of damages beyond the exclusive remedy in the Limited Warranty. In fact, not only did the instruction *permit* the jury to award damages beyond the express terms of the Limited Warranty, it *required* such a damages award. Whereas Instruction No. 9 provided that the “limited remedy stated in the warranty is not the sole and exclusive remedy available under the warranty,” CP 198, Instruction No. 10 ensured that the limited remedy was not even an option available to the jury when making its damages determination. *See* RCW 62A.2-719(1)(b) (where a warranty remedy is not exclusive, “resort to a remedy as provided is *optional*”) (emphasis added). In this manner, the Superior

Court's erroneous instruction that the Limited Warranty did not provide the exclusive remedy was effectively transformed into a prohibition on any consideration of the Limited Warranty remedy whatsoever. Indeed, by essentially instructing the jury that it may *not* award damages according to the warranty remedy, the Court did just what it said it would not do. *See* CP 199 ("By instructing you on damages the Court does not mean to suggest the amount of any damages that should be awarded."). It would have been bad enough for the Court to instruct the jury that UCC damages were permissible; it was far worse for the Court to instruct the jury that UCC damages were mandatory. Jury Instruction No. 10 tied the jury's hands, forcing a damages award in excess of the one provided under the Limited Warranty, and was therefore in error.

Assuming that Canterbury's remedy was not limited to that stated in the Limited Warranty, and thus damages under the UCC were permissible, Canterbury offered no evidence of damages under the measure provided by the UCC: the difference between the value of the product as accepted and the value of the product as warranted. RCW 62A.2-714(2).¹ Nor, as a matter of law, is the full replacement cost of the nonconforming good a permissible UCC remedy, particularly where

¹ RCW 62A.2-714(3) also permits such a buyer to recover incidental and consequential damages "[i]n a proper case," but Canterbury did not seek such damages here.

the replacement cost exceeds by many multiples the highest recorded purchase price for the product.

It is the plaintiff's burden to establish the difference of value. *Fed. Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 439-40, 886 P.2d 172 (1994) (upholding trial court's refusal to award repair costs under RCW 62A.2-714 because the plaintiff "did not meet the appropriate level of proof"). The plaintiff in *Federal Signal* failed to present evidence "of the market value or even of the appraisal value of . . . the goods as accepted. Moreover, the testimony which was presented [which consisted of three plaintiff witnesses who used the product and testified that due to the problems, the product was 'worth basically nothing,'] was arguably subjective and exaggerated." *Id.* at 439. The Washington Supreme Court explained that, "[b]y refusing to award the purchase price, the trial court in effect held that [the plaintiff] failed to sustain its burden of proof that the difference in value was indeed the purchase price." *Id.*

Just like the plaintiff's lack of evidence in *Federal Signal*, Canterbury here introduced no evidence of either the value of the goods as warranted or the value of the goods as accepted. There was no evidence of how much Canterbury actually paid for its Inner-Seal[®] Siding; Canterbury's owner Mr. Dally could not remember and he no longer had any records of the transaction. RP (11/19/12) at 393:13-394:4. Nor was

there any evidence about the value of siding as accepted; no fact or expert witness testified about the value of exterior hardboard siding that had a lifespan of 16 years. Without evidence of either value, it was impossible for the jury to have applied the proper measure of damages under RCW 62A.2-714(2).

Nor is the full replacement cost of the siding 16 years after its original purchase—Canterbury’s evidence was that it cost \$834,476.59 (excluding painting) to replace the siding—recoverable under RCW 62A.2-714(2). Canterbury contended that, due to the lapped nature of the siding and the extent of the damage, there was no way to repair the siding except via a full replacement, though there was evidence at trial that it was possible to replace some boards or walls without re-siding the entire building. RP (11/15/12) at 212:23-213:4. But Canterbury can cite to no Washington authority where a buyer recovered replacement cost of a good that initially performed as warranted where the cost to replace it even twice exceeds the original cost of the good, let alone many multiples of the original cost. Indeed, such a windfall to Canterbury defies the purpose of the UCC remedy. *See Aubrey’s R.V. Ctr., Inc. v. Tandy Corp.*, 46 Wn. App. 595, 606, 731 P.2d 1124 (1987) (“The focus of RCW 62A.2-714’s basic measure of damages, *i.e.*, the difference between the value of goods as accepted and the value of goods as warranted, is based on the rationale

a buyer should only be given the benefit of his or her bargain and nothing more.”) (emphasis added).

Moreover, the Superior Court’s admission of evidence of the cost to re-side the property with brand new siding was irrelevant and unduly prejudicial. The jury verdict—in an amount in excess of \$755,000—was based on this evidence that finds no basis in the Limited Warranty or even the UCC. Before trial, LP filed a motion in limine asking to exclude such evidence as irrelevant (because it was outside the remedy contained in the Limited Warranty) and as unfairly prejudicial. CP 51. By offering evidence of how much Canterbury paid for new siding, Canterbury attempted (successfully) to achieve sympathy from the jury by demonstrating that it was “forced” to incur high costs. Where the only claim at issue was Canterbury’s claim for breach of warranty, there was no purpose in offering evidence of replacing the entire property’s 16-year-old siding except to gain emotional favor with the jury in light of the more limited amount of money that the Limited Warranty formula yields here. That is precisely the type of evidence that ER 403 prohibits.

Finally, the error regarding the damages award was compounded by the misleading and insufficient verdict form. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 539-40, 70 P.3d 126 (2003) (remanding because the general verdict form was insufficient to determine grounds of jury verdict

where there were multiple case theories, one of which was later invalidated). The general verdict form proposed by Canterbury and used at trial was unfairly prejudicial. The verdict form was a general one, where the jury was to simply insert the dollar amount that it found for Canterbury. CP 203. LP proposed a special verdict form that would have clarified and separated the issues for the jury. CP 172; RP (11/27/12) at 875:18-876:9. The special verdict form that LP proposed asked first, “How many square feet, if any, of plaintiff’s LP Inner-Seal[®] siding was affected by a condition covered by the Limited Warranty?” and second, “What amount of damages, if any, was caused by defendant’s breach of express warranty?” CP 172. By contrast, the general verdict form that Canterbury proposed (and that the Superior Court utilized) invited the jury to conclude, without further analysis, that it was appropriate to award Canterbury 100% of its cost to buy brand new siding, even if not all of the 16-year-old siding had been damaged. CP 149; CP 203. LP’s theory of damage was that not all of Canterbury’s siding had been damaged, and thus, not all of the damage claimed by Canterbury was caused by any breach of warranty, but the jury was not required to make a determination on those distinct issues. The general verdict form was prejudicial error.

The jury’s damages award not only vastly exceeded the remedy provided under the express terms of the Limited Warranty, it plainly

exceeded any permissible damages calculations under the UCC because there was no evidentiary basis for the award. On this basis alone, the Superior Court erred in denying LP's renewed motion for judgment as a matter of law and motion for new trial.

VI. CONCLUSION

LP respectfully asks this Court to reverse the Superior Court's denial of its renewed motion for judgment as a matter of law and motion for new trial and remand for a new trial.

DATED: July 1, 2013

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CERTIFICATE OF SERVICE

On July 1, 2013, I caused to be served upon the below named
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indicated, a true and correct copy of the foregoing document.

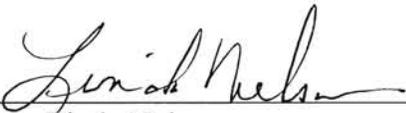
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**I certify under penalty of perjury under
the laws of the State of Washington that
the foregoing is true and correct.**

EXECUTED at Seattle, Washington, on July 1, 2013.

FILED
 COURT OF APPEALS
 DIVISION II
 2013 JUL -2 AM 11:40
 STATE OF WASHINGTON
 BY _____
 DEPUTY



 Linda Nelson