

No. 72317-1-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LEDCOR INDUSTRIES (USA) INC.,

Appellant,

vs.

STARLINE WINDOWS, INC.,

Respondent.

On Appeal from the Superior Court of King County
The Honorable Roger Rogoff, Judge
No. 08-2-29583-4

BRIEF OF RESPONDENT STARLINE WINDOWS, INC.

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I. INTRODUCTION

At Ledcor's urging, Starline settled claims against its window products directly with the Admiral Condominium Owners Association ("Association"). Starline's settlement with the Association released all claims the Association asserted against Starline, or could have asserted, and also released all claims against all other parties (including Ledcor and the project developer, Admiral Way, LLC ("LLC")) arising from the design or manufacture of Starline's window products, in exchange for Starline paying the Association \$165,000.

Ledcor received notice of Starline's settlement nearly four weeks before Ledcor itself settled with the Association and the LLC. Ledcor's settlement with the Association and the LLC did not apportion any part of its settlement to the Association's claims against Starline's window products.

After Ledcor and the LLC settled with the Association, the LLC dismissed its claims against Starline. Ledcor, on the other hand, added Starline as a defendant in this lawsuit against its other subcontractors, which had been on-going.

All of this litigation arose out of the construction of the Admiral Way project, which was completed in March 2003. Starline supplied window products, including sliding glass doors, to Ledcor, the general

contractor for the project pursuant to a written Purchase Order/ Subcontract. Leducor hired a different subcontractor to perform that work.

The Association sued the developer, the LLC, in 2007. The LLC, in turn, joined Leducor as a third-party defendant. Leducor did not join Starline or any of its other suppliers or subcontractors as fourth-party defendants. Instead, Leducor tendered defense and indemnity of the LLC's claims separately to its subcontractors and to Starline. Leducor then sued its other subcontractors in a separate lawsuit but did not then sue Starline.

In its tender letter to Starline, Leducor urged Starline to contact the attorneys for the Association and the LLC and negotiate an issue release in favor of Starline and Leducor from any liability related to Starline's products. Leducor then advised the Association that it would not pursue claims against Starline and that any claims against Starline arising out of Starline's window products must be made by the Association.

As a result of Leducor's position the Association amended its complaint to add Starline as a defendant and to allege claims against Starline for breach of express and implied warranties, and claims under the Washington Product Liability Act ("WPLA"). Starline filed a motion for summary judgment to dismiss all of the Association's claims. While Starline's motion was pending, and before the Association's response was due, Starline settled the Association's claims as described above,

obtaining an issue release in favor of itself, Ledcor, the LLC, and all other parties.

After Starline's settlement with the Association and after Ledcor's settlement with the Association, Ledcor filed an amended complaint in this litigation adding Starline as a defendant. Ledcor's amended complaint sought reimbursement for claims against Starline's window products that the Association had already settled and released Starline, Ledcor, and the LLC from. In addition to these "pass through" claims (passed through from the Association), Ledcor asserted independent claims for its defense costs, and for Starline's alleged failure to name Ledcor as an Additional Insured on Starline's insurance policies.

In 2010 Starline moved for summary judgment to dismiss Ledcor's "pass through" claims. Starline's motion did not seek summary dismissal of Ledcor's defense cost claim or its Additional Insured claim. Ledcor opposed Starline's motion and cross-moved for summary judgment on its defense cost claim and Additional Insured claim. The trial court granted Starline's motion, denied Ledcor's cross-motion, and denied Ledcor's motion to reconsider.

The other subcontractor defendants moved for summary judgment dismissal of Ledcor's indemnity claims, based upon the statute of repose, one of the grounds that Starline had raised in its motion. The trial court

granted the defendants' motions dismissing Ledcor's indemnity claims based on the statute of repose. Ledcor sought review in this Court of all the orders dismissing its indemnity claims, which was granted. This Court affirmed the trial court's summary judgment dismissal. Ledcor's indemnity claims are therefore no longer at issue.

After this Court's decision, litigation in the trial court resumed. In response to discovery requests directed to its defense cost claim, Ledcor elected determine the amount of its defense costs attributable to Starline, using the proportionate share method rather than attempting to segregate its Starline-related defense costs from its voluminous attorney billing statements. Starline filed a motion for summary judgment to determine the Ledcor's defense costs under the proportionate share method, and to dismiss Ledcor's Additional Insured Claim. The court granted Starline's motions.

Starline and Ledcor then cross-moved for prevailing party attorney fees, pursuant to Starline's Purchase Order/Subcontract with Ledcor. The court denied both motions and filed its order on July 8, 2014. However, the court did not distribute its order to Starline or notify Starline that it had decided the motions.

II. ASSIGNMENT OF ERROR

Starline assigns error to the trial court's denial of Starline's motion for prevailing party attorney fees, pursuant to Starline's Purchase Order/Subcontract with Leducor.

III. STATEMENT OF THE ISSUES

1. Whether the trial court erred in ruling that Starline was not the substantially prevailing party, when Starline prevailed on all of its summary judgment motions, including its motion for properly calculating the amount of Leducor's awardable defense costs.

2. Whether Leducor's claim for indemnity is at issue in this appeal in light of this Court's July 2, 2012 decision, in an unpublished opinion affirming the trial court's dismissal of Leducor's indemnity claims against Starline and other subcontractor defendants, based upon the statute of repose. *Bordak Brothers, Inc. v. Pacific Coast Stucco Ltd. et al.*, 169 Wn. App. 1008 (2012).

3. Whether Leducor has abandoned its claim for breach of contract based upon Starline's alleged failure to name Leducor as an Additional Insured, by failing to assign error to that decision or to brief the issue.

4. Whether Starline's Purchase Order/Subcontract with Leducor is governed by the UCC under the "predominant factor" analysis.

5. Whether the trial court may be affirmed on other correct grounds, to which Ledcor has not assigned error.

IV. STATEMENT OF THE CASE

A. Starline Entered Into a Purchase Order/Subcontract with Ledcor to Supply Windows and Sliding Glass Doors to the Admiral Way Project.

Starline agreed to provide 216 vinyl clad window products (including 36 sliding glass doors) to Ledcor for the Admiral Way project. CP 90-92. Starline's agreement with Ledcor did not require Starline to install any of its window products at the Admiral Way project, and Starline did not, in fact, install its products. CP 91-92, 324, 660-661. The contract price for the window products Starline supplied was approximately \$65,000. CP 91. Starline delivered the products required by its agreement, to the site, between October 2001 and August 2002. CP 93-104.

Starline's Purchase Order/Subcontract with Ledcor does not require Starline to purchase liability insurance or to name Ledcor as an Additional Insured on any insurance policy. CP 91-92. Neither the "Flow Down" provision in Starline's agreement nor the "Indemnification" provisions even mention insurance, let alone require Starline to provide insurance for Ledcor's benefit. CP 91-92. In any event, Ledcor concedes that it was named as an Additional Insured under Starline's insurance

policy issued by Zurich. *Brief of Appellant*, p. 11, footnote 1. Ledcor complains only that it has a coverage dispute with Zurich, not that Starline failed to name Ledcor as an Additional Insured. *Brief of Appellant*, p.11.

The Certificate of Occupancy for the Admiral Way project was issued on March 14, 2003. CP 108. After Starline completed delivering its window products to Ledcor in October, 2002, it performed some service work on its windows and replaced some damaged products, both before and after the date of the Certificate of Occupancy. CP 395-417. When Starline performed service work on its windows or replaced damaged products, it did not remove and replace the entire window assembly that had been installed at the project. Instead, it would remove and replace the sealed glass units (double-pane glass panels). CP 328-334. If the service work or glass replacement was provided because of a problem with the Starline window, Starline would provide the service or replacement at no charge to Ledcor. CP 330-331. If, however, Starline provided service or product replacement because its product was damaged after delivery, Starline would charge Ledcor. CP 330-331.

Ledcor points to eight specific instances of Starline performing additional work at the Admiral Way project. *Brief of Appellant*, p. 10.

1. *Removed and replaced multiple window and door units on January 16, 2003.* There is a work order request in the record for

January 3, 2003, completed on January 16, 2003 to replace one stress-cracked sealed unit in a 9-light window assembly in Unit 200. CP 405. This service work was performed prior to the Certificate of Occupancy being issued. CP 108. There is another service request dated September 26, 2002, completed on January 16, 2003. CP 412. This service request notes the sealed unit replacement in Unit 200 mentioned above, and also notes that the architect has tagged several doors as unacceptable. The work order further notes that Total Glass will need to adjust the doors and fix a problem with the bowed sills. The service request shows that all of the work indicated was completed on January 16, 2003, before the Certificate of Occupancy was issued. CP 108.

2. *Delivered additional windows on December 11, 2003.* This work order actually shows that additional sealed units, rather than additional windows, were delivered to the site. CP 328-329, 396.

3. *Replaced scratched glass on multiple windows on August 19, 2004.* The work order shows that five sealed units were replaced because the glass was scratched. Starline charged for these replacements, indicating Starline was not responsible for the damage. CP 414.

4. *Installed broken sealed unit on March 4, 2005.* There is no service request or material order dated March 4, 2005. CP 395-417.

5. *Replaced additional windows on March 25, 2005.* The service request shows one sealed unit was replaced in Unit 405. CP 416.

6. *Replaced two failed units on June 15, 2005.* The work order shows the work was requested on May 26, 2005 and was for Unit 301. There is no charge indicated. CP 417.

7. *Working on leaking windows on February 6, 2006.* The service request shows that extra weep holes were drilled in two window sills in Unit 416, and that the request for Unit 218 was not a Starline window issue. CP 415.

8. *Installed window unit in October 2006.* There is no service request for October 2006 in the record. There is a service request for October 6 in an unspecified year, to replace two sealed units in Unit 222. There was a charge for the replacement. CP 403.

There is nothing in the record showing a nexus between the HOA's complaints concerning Starline's windows and the service work Starline performed on isolated, specific windows after the Certificate of Occupancy was issued.

B. The Association Sues for Construction Defects.

The Association sued the developer of the Admiral Way project, the LLC. CP 160-164. The LLC then filed a third-party complaint against Ledcor, its general contractor. CP 162, 109-125. Ledcor's attorneys

tendered the claims relating to Starline's windows to Starline on November 16, 2007. CP 160-164.

Ledcor's tender letter noted the filing of the complaint and third-party complaint along with the List of Known Construction Defects filed by the Association. CP 160-164. Ledcor's letter specifically referred to: (1) an alleged express warranty given by Starline; (2) Washington Product Liability Act provisions; and (3) UCC provisions. CP 162-163. On these bases, Ledcor's attorneys requested that Starline defend Ledcor and hold it harmless from any claims "related to the manufacture of the Starline windows and sliding glass doors at the Project." CP 163. Ledcor's attorneys then urged Starline to:

*** immediately contact their respective attorneys [the Association's and the LLC's] and to negotiate an issue release that absolves Starline and our clients from any liability in any way related to the Starline products.

(Emphasis in original.) CP 163.

Ledcor filed its Answer to the LLC's third-party complaint, but did not file a fourth-party complaint against Starline or any of its other suppliers or subcontractors. CP 67-70, 126-140. Several months later Ledcor filed a separate lawsuit against its subcontractors (this litigation). CP 130. At that time, Ledcor did not sue Starline in the subcontractor suit either. CP 68-70. Instead, Ledcor did two things. First, it promised the

Association that it would consolidate the two suits if the Association would agree to a trial continuance and a new Case Management Order. CP 67-70, 126-140. The Association eventually agreed but Leducor never followed through on its promise. CP 67-70, 132-133. Secondly, on the day that the trial court entered a new Case Management Order, Leducor informed the Association that Leducor would not be pursuing claims against Starline, stating:

Also, please let us know if (and when) you anticipate amending your Complaint to add claims against Starline. Please note that it is our position that such claims can only be made by the HOA and that any damages that could (or should) be recovered by the HOA from Starline are not recoverable from our client. Accordingly, we are not pursuing any claims against Starline.

(Emphasis in original). CP 134, 157.

The Association amended its Complaint to add Starline as a defendant. CP 69, 273-283. The Amended Complaint asserted claims against Starline for breach of an express warranty, violations of the WPLA, and violations of the UCC. CP 273-283. Starline filed a motion for summary judgment to dismiss all the Association's claims. CP 69-70, 165-178.

C. Starline Settles with the Association.

While Starline's summary judgment motion was pending, Starline settled with the Association. CP 67-70, 179-182. The settlement

agreement provided that Starline would pay the Association \$165,000 in exchange for a complete release. CP 180-181. In particular, the Association agreed to release Starline:

***from any and all claims asserted or which could have been asserted by ADMIRAL COA in connection with the litigation.

CP 180. The settlement agreement further provided:

8. **Issue Release.** ADMIRAL COA hereby agrees that this Settlement Agreement and Release of Claims satisfies and releases all of ADMIRAL COA's claims against all parties to the litigation arising from the alleged defective design and/or manufacture of STARLINE's window products at the Admiral Way Condominiums, including the claims for breach of express and implied warranties and claims under the Washington Product Liability Act. Specifically excluded from this Settlement Agreement and Release of Claims are any of ADMIRAL COA's claims against Admiral Way, LLC and/or Ledcor Industries (USA) Inc. for those parties' improper specification, installation, alteration, modification or repair of STARLINE's window products at the Admiral Way Condominiums.

CP 181.

Ledcor's attorneys became aware of Starline's settlement with the Association no later than July 2, 2009 when they reviewed the Association's Notice of Settlement filed with the court and served on the parties, and billed Ledcor's insurers for that review. CP 732.

D. Ledcor and the LLC Settle with the Association.

On July 28, 2009, nearly four weeks after Ledcor became aware of Starline's settlement with the Association, Ledcor and the LLC settled

with the Association. CP 183-191. Ledcor settle for \$2,700,000. CP 185. There is nothing in the Association's settlement with Ledcor and the LLC allocating any portion of that settlement to the Association's claims for design and/or manufacturing defects against Starline's windows, or to the Association's claims for breach of express or implied warranties or WPLA claims. CP 183-191.

In opposition to Starline's subsequent summary judgment motion, Ledcor submitted the Declaration of Thomas Lofaro of Ledcor. CP 514-518. In his Declaration, Mr. Lofaro asserts that he "understood" that the Association's settlement with, and release of, Ledcor included claims against the "products supplied by Starline" and all damages resulting therefrom. CP 517. But neither Mr. Lofaro nor Ledcor offered any evidence showing what Mr. Lofaro's "understanding was based upon. CP 514-518. Ledcor offered no evidence that the mutual intent of itself and the Association was to include the Association's claims against Starline's windows in their settlement and release. In fact, the Association could not have entered into such an agreement because it had already settled and released all of its claims against Starline's windows when it settled with Starline. CP 179-182.

In his Declaration, Mr. Lofaro does not deny that he was aware of Starline's settlement before Ledcor settled with the Association. CP 514-

518. Nor does Mr. Lofaro claim that the Association or Starline misrepresented the terms of the Starline settlement to him or to Ledcor, or otherwise defrauded Ledcor either before or during the settlement negotiations between Ledcor and the Association. CP 514-518. In short, Mr. Lofaro's Declaration merely asserts a belated, self-serving understanding of Ledcor's settlement agreement, with no factual basis to support his "understanding." CP 514-518.

Only after Starline settled with the Association and after Ledcor and the LLC settled with the Association, did Ledcor amend its complaint in this litigation to add Starline as a defendant. CP 1-35. Ledcor alleged that Starline manufactured and supplied windows and doors for the Admiral Way project, and asserted claims under the WPLA and the UCC, as well as claims for indemnity, equitable subrogation, and equitable indemnity and/or contribution. CP 23-35. Ledcor asserted that to the extent Starline's products caused damage to the project, any liability Ledcor had to the owners or developer of the project were recoverable damages from Starline. CP 23-35. Finally, Ledcor alleged claims for breach of contract, breach of a duty to defend, breach of a duty to obtain insurance and name Ledcor as an Additional Insured, breach of a duty to indemnify and hold Ledcor harmless, and breach of warranty. CP 23-35.

E. The Trial Court Grants Starline's Motion for Partial Summary Judgment Against Ledcor.

Starline moved for summary judgment on Ledcor's pass-through claims for breach of contract, breach of warranty, indemnity, contribution, and subrogation in 2010. CP 66-85. Starline's motion did not address Ledcor's independent claims for defense costs and failure to name Ledcor as an Additional Insured. CP 66-85.

Starline base its summary judgment motion on the Association's release of all parties from all claims related to Starline's allegedly defective window products. CP 72-74. Starline's additional bases for its motion were: the statute of limitations barred Ledcor's claims for breach of contract and breach of warranty; that the statute of repose barred its indemnity claims; Starline did not provide an express warranty to Ledcor; and Ledcor had no legally cognizable causes of action for under the WPLA, or for equitable indemnity, equitable subrogation, or contribution. CP 74-82. Finally, Starline argued that Ledcor was estopped from pursuing the "pass-through" claims from the Association against Starline. CP 74.

On October 25, 2010 the trial court granted Starline's motion for partial summary judgment, dismissing all of Ledcor's claims against Starline, except Ledcor's claims for defense costs and for not naming

Ledcor as an Additional Insured, and dismissed Ledcor's cross-motion for summary judgment. CP 2180-2182. Ledcor moved for reconsideration. CP 2191. Starline opposed Ledcor's motion to reconsider CP 2207-2216 and the trial court denied Ledcor's motion to reconsider. CP 2227-2229.

F. Ledcor Appeals the Trial Court's Dismissal of Its Indemnity Claims Based on the Statute of Repose.

The other subcontractor defendants in this case filed motions for summary judgment to dismiss Ledcor's indemnity claims as barred by the statute of repose. CP 2235. The trial court eventually granted those motions. CP 2235. By unpublished decision dated July 2, 2012 this Court affirmed the trial court's dismissal of Ledcor's indemnity claims because of the statute of repose. *Bordak Brothers, Inc. v. Pacific Coast Stucco, LLC et al.*, 169 Wn. App. 1008 (2012). In its decision this Court noted that Ledcor did not "argue that the trial court erred in dismissing the indemnity claims against Starline. Therefore, any argument that summary judgment was not proper for Starline is waived." *Bordak Brothers, supra*.

G. After Remand, the Trial Court Resolved Ledcor's Two Remaining Claims Against Starline on Summary Judgment.

After remand, Starline moved for summary judgment regarding Ledcor's two remaining claims against it: (1) Ledcor's claim for defense costs; and (2) Ledcor's claim that Starline breached its contract by failing to name Ledcor as an Additional Insured on Starline's insurance policies.

CP 554-565, 745-751. The trial court granted both of Starline's motions. CP 2183-2185, 2187-2190. In particular, the court ruled that Leducor's recoverable defense costs using the proportionate share methodology were limited to \$19,101.20 rather than the approximately \$190,000 Leducor claimed. CP 2187-2190.

H. The Trial Court Finds That Neither Party is a Prevailing Party.

Starline and Leducor cross-moved for an award of prevailing party attorney fees and costs. CP 2234-2319. On July 7, 2014 the trial court denied both motions for prevailing party attorney fees, finding that neither party substantially prevailed. CP 2388-2390. The court's order was filed with the Clerk of Court, but not distributed. CP 2388.

V. ARGUMENT

A. Standard of Review.

The standard of review of a summary judgment order is de novo. The appellate court performs the same inquiry as the trial court. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 78 P.3d 1274 (2003). Appellate courts view facts in the record in the light most favorable to the non-moving party. *Barker v. Advanced Silicon Materials LLC*, 131 Wn. App. 616, 128 P.3d 633 (2006). Summary judgment should be granted where reasonable minds can reach only one conclusion based on the admissible facts in evidence. *Barker, supra*, at 623 citing *Smith, supra*. An appellate court

may sustain a trial court on any correct ground, even though that ground was not considered by the trial court. *Nast v. Michels, supra*.

Appellate courts do not review assigned errors that are not supported by argument or citation to legal authority. RAP 10.3(a)(6); *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991). A party's passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290, *review denied* 136 Wn.2d 1015 (1998).

B. Starline Based Its Summary Judgment Motions on Multiple Correct Grounds, to Which Ledcor Has Not Assigned Error.

Ledcor assigns three errors to the trial court's summary judgment orders: (1) granting summary judgment to Starline based upon the Association's settlement with Starline and release of all of its window product claims against all parties; (2) granting summary judgment to Starline based upon the UCC statute of limitations; and (3) the court's application of the proportionate share methodology to Ledcor's defense cost claim. However, Starline also based its summary judgment motions on several other correct grounds, upon which the trial court can be affirmed and which Ledcor does not contest in this appeal. *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986).

1. **The statute of repose bars Leducor's indemnity claims.**

Starline's summary judgment was based, in part, on the statute of repose. The trial court granted Starline's motion, along with motions from several other subcontractors, dismissing Leducor's indemnity claims. This Court affirmed the trial court's orders on summary judgment, specifically noting that Leducor waived its argument that the trial court erred when it dismissed Leducor's indemnity claims against Starline. *Bordak Brothers, Inc. v. Pacific Coast Stucco, LLC et al.*, 169 Wn. App. 1008 (2012). Leducor does not attempt to raise that issue again here. The trial court's dismissal of Leducor's indemnity claims may therefore be affirmed on this separate, correct ground, in addition to the grounds Leducor contests in this appeal. *Nast v. Michels, supra*.

2. **Leducor's claims under the Washington Product Liability Act were properly dismissed because the Act does not apply to Leducor's claims.**

Leducor pled claims under the WPLA [RCW 7.72, *et seq.*]. CP 23-35. Starline showed that the Act did not apply to Leducor's claims because its claims were economic loss claims, specifically excluded by the Act and deferred to the UCC pursuant to a risk of harm analysis. CP 66-85. Leducor has not assigned error to the dismissal of its product liability claims.

3. **Ledcor's express warranty claims were properly dismissed on multiple correct grounds.**

Ledcor's initial position, with the Association, was that any Starline warranties ran to the Association rather than to Ledcor. However, after the Association settled with Starline, and after the Association subsequently settled with Ledcor and the LLC, Ledcor changed its position and sued Starline for breach of express warranties. The express warranty Ledcor now relies upon is Paragraph 4 of the Terms and Conditions of the Purchase Order/Subcontract. CP 90-92.

The warranty has multiple parts. First, it provides that Starline's products conform to the drawings and specifications provided by Ledcor. Starline's summary judgment motion showed that Ledcor never made a claim that Starline's products failed to conform to the drawings and specifications. CP 539-540. Ledcor has not assigned error to the trial court's summary judgment dismissal based upon this ground. Second, the warranty provides that the goods are merchantable, of good material and workmanship, and free from defects. This clause of the warranty simply incorporates the implied indemnities of the UCC, barred here by the UCC four-year statute of limitations. Third, the warranty provides that the warranty period is for one year. Ledcor has not claimed that Starline breached the one-year warranty period and has not assigned error to the

trial court's dismissal based upon this ground. CP 540. Finally, the warranty provides that Starline is responsible for latent defects beyond the one year warranty period "to the fullest extent applicable statutes permit." Starline argued that the applicable statute is the UCC with its four-year statute of limitations for warranty claims, and that the four-year statute barred Leducor's claims. Leducor has assigned error to the trial court's order to the extent it applies the UCC to Leducor's Purchase Order/Subcontract with Starline. Starline addresses Leducor's argument on this issue in Section D below.

4. **Leducor is estopped from asserting claims against Starline and Leducor has not assigned error to dismissal of its claims on grounds of estoppel.**

In support of its summary judgment motion in 2010, Starline argued that Leducor was estopped from changing its position regarding the scope of the Association's claims, and its position encouraging Starline to settle with the Association. CP 74. Leducor has not assigned error to dismissal of its claims on grounds of estoppel.

The doctrine of equitable estoppel rests on the principle that a person "shall not be permitted to deny what he has once solemnly acknowledged.

Nickel v. Southview Homeowners Assoc., 167 Wn. App. 42, 53-54, 271 P.3d 973 (2012), quoting *Arnold v. Melani*, 75 Wn.2d 143, 147, 449 P.2d 800 (1968).

[W]here a person, by his acts or representations, causes another to change his position or to refrain from performing a necessary act to such person's detriment or prejudice, the person who performs such acts or makes such representations is precluded from asserting the conduct or forbearance of the other party to his own advantage.

Nickel, at p. 54, citing *In re Marriage of Barber*, 106 Wn. App. 390, 396, 23 P.3d 1106 (2001) (quoting *Hartman v. Smith*, 100 Wn.2d 766, 769, 674 P.2d 176 (1984)). Thus, equitable estoppel requires three things:

- (1) an admission, statement, or act inconsistent with the claim afterwards asserted;
- (2) action by the other party on the faith of such admission, statement, or act; and
- (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

Nickel, at p. 54 citing *Thomas v. Harlan*, 27 Wn.2d 512, 518, 178 P.2d 965 (1947).

Here, Leducor's representations to the Association and Starline are inconsistent with Leducor's current claim. Leducor told the Association that Leducor would not be pursuing any claims against Starline because any window claims belonged to the Association rather than to Leducor. Leducor encouraged the Association to directly sue Starline, which it did. Leducor also strongly encouraged Starline to defend against the Association's window claims, and to settle directly with the Association. Leducor further requested that any Starline settlement with the Association include an

issue release that protected Leducor and LLC. Starline acted on Leducor's representations and requests, and accomplished the very thing Leducor requested. It wasn't until after the Association sued Starline, and then settled with Starline, and after Leducor settled with the Association with full knowledge of the Association's earlier settlement with Starline, that Leducor filed its claims against Starline. Clearly Starline would be injured if Leducor is now allowed to contradict its earlier statements and acts.

Judicial estoppel is a separate estoppel doctrine applicable to Leducor's claims.

“Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Arkison*, 160 Wash.2d at 538, 160 P.3d 13 (quoting *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)). There are two primary purposes behind the doctrine: preservation of respect for judicial proceedings and avoidance of inconsistency, duplicity, and waste of time. *Id.* “[A] trial court's determination of whether to apply the judicial estoppel doctrine” is guided by three core factors: (1) whether the party's later position is ‘clearly inconsistent’ with its earlier position, (2) whether acceptance of the later inconsistent position ‘would create the perception that either the first or the second court was misled,’ and (3) whether the assertion of the inconsistent position would create an unfair advantage for the asserting party or an unfair detriment to the opposing party. *Id.* at 538–39, 160 P.3d 13 (internal quotation marks omitted) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750–51, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)).

Anfinson v. FedEx Ground Package System, Inc., 174 Wn.2d 851, 861, 281 P.3d 289 (2012), *Anfinson v. FedEx Ground Package Sys., Inc.*, at 861-62.

Here, Leducor's earlier positions induced the Association to amend its complaint to add claims against Starline, and caused the Court in the Association litigation to move the trial date and enter a revised Case Management Order. To allow Leducor to now take an inconsistent position regarding its claims against Starline, and regarding Starline's settlement with the Association creates the perception that either the first trial court or the second trial court was misled, and would result in an unfair detriment to Starline.

5. Leducor has not assigned error to the trial court's dismissal of its breach of contract claim based upon Starline's alleged failure to name Leducor as an Additional Insured on Starline's insurance policies.

Even though Leducor devotes a portion of its Statement of the Case addressing its claim that the Purchase Order/Subcontract with Starline required Starline to procure insurance and name Leducor as an Additional Insured, it fails to assign error to the trial court's dismissal of this claim or to address this issue in its Argument. *Brief of Appellant* at pp. 3-4, 7-9, and 16-31. Leducor concedes in its *Brief of Appellant*, that Starline did procure insurance from Zurich and that Leducor was an Additional Insured

under Starline's Zurich policy. *Brief of Appellant*, p. 11, footnote 1. Leducor's complaint is not that Starline failed to name Leducor as an Additional Insured, but that Leducor has a coverage dispute with Zurich because Zurich apparently denied Leducor's claim. Leducor cites no authority for the proposition, and makes no argument, that a coverage dispute with Starline's insurer constitutes a breach of contract by Starline.

Additionally, Starline argued in its summary judgment motion that it did not have a contractual duty to procure insurance and to name Leducor as an Additional Insured in the first place. Leducor alleges, in its Statement of the Case, that the Flow Down clause of the Purchase Order/Subcontract required Starline to name Leducor as an Additional Insured. *Brief of Appellant*, p. 7. Leducor relies upon a single case for authority, *Washington State Major League Baseball Stadium Pub. Fac. Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co.*, 176 Wn.2d 502, 296 P.3d 821 (2013).

However, there is no requirement in the Flow Down clause, the Indemnity clause, or any other part of Starline's Purchase Order/Subcontract that Starline provide insurance and name Leducor as an Additional Insured. In fact, insurance is not even mentioned. CP 90-92.

Leducor's reliance on *Major League Baseball* is misplaced. The meaning of the "flow down" provision is a question of contract interpretation, and thus a question of law for the Court. *Major League*

Baseball at 517. The issue in *Major League Baseball* was not whether the flow down provisions there required the subcontractors to purchase insurance or to name the general contractor as an additional insured. Instead, the issue was whether the flow down provisions allowed the general contractor to assert third party claims against its subcontractors to the extent the general contractor was liable for defective work or materials of its subcontractors. *Major League Baseball, supra*.

The Court there held that the general contractor could pass those claims through to its subcontractors. The Court pointed out that the flow down provisions there incorporated, by reference, the prime contract documents into the subcontracts “‘so far as they apply’ to the subcontractor’s ‘Work hereinafter described.’” *Major League Baseball*, at 517-518. Thus, the Court recognized that the flow down provision was limited to incorporating the provisions of the prime contract into the subcontracts “if, but only if they pertain to the subcontractor’s work.” *Major League Baseball*, at 519.

The Court then distinguished the facts before it from the facts in *Mountain States Construction Co. v. Tye Electric, Inc.*, 43 Wn. App. 542, 718 P.2d 823 (1986). *Major League Baseball*, at 521-522. The “flow down” language in *Mountain States* bound the subcontractor to “‘all obligations’ ” the general contractor assumed toward the owner. *Major*

League Baseball, at 521. The Court in *Major League Baseball* then observed:

The question whether this required the subcontractor to obtain certain liability insurance as required by the prime contract had to be answered “no” because a literal interpretation of the plain language used would mean that the subcontractor would be responsible for all of the work under the prime contract, despite the fact that the subcontractor performed only a limited part of the work on the project.

* * *

Mountain States shows that flow-down provisions that purport to require a subcontractor to assume “all of” the obligations that the general contractor assumes to the owner, when the subcontractor is responsible for only a part of the project, cannot be enforced as written.

Major League Baseball, at 521-522.

The language in Leducor’s “flow down” provision is the same as the language in Mountain States in that it purports to bind Starline to Leducor for “all of” the obligations that Leducor assumed to the Owner. Under *Mountain States* and *Major League Baseball*, Leducor’s “flow down” provision cannot be enforced to require Starline to purchase insurance or to name Leducor as an Additional Insured.

C. **Starline’s Settlement with the Association Bars All Claims Leducor Sought to Pass Through from the Association to Starline.**

Leducor argues that the Association’s settlement with Starline for allegedly defective window products does not bar Leducor’s subsequent

claims for the same allegedly defective windows. Ledcor's argument depends on several factual misstatements, which find no support in the appellate record. Ledcor erroneously states that: (1) the Association could only assert, and did only assert, a narrow claim against Starline for breach of an express warranty; (2) the Association's release of Starline was likewise limited to express warranty claims; (3) the Association's release was limited to windows only, and did not include sliding glass doors; (4) Ledcor had "independent" claims for consequential damages that the Association did not release; (5) Ledcor was not aware of Starline's settlement with the Association and the Association's broad release, before Ledcor settled with the Association; (6) Ledcor's settlement with the Association included payment for the Association's claims against Starline's window products; (7) damages attributable to Starline's windows were approximately \$3 million; (8) the \$165,000 settlement Starline paid to the Association was insufficient to fully compensate the Association for its claims related to Starline's window products; and (9) Ledcor is in the position of a subrogee. Not only are Ledcor's statements contrary to the record on appeal, some of Ledcor's statements are contrary to earlier positions Ledcor took in the Association's lawsuit. Because the actual facts in the record support the trial court's grant of summary

judgment, the trial court did not err in granting Starline's motion for summary judgment.

1. **The Association asserted several claims against Starline and its release was broad and total (mis-statements 1 and 2 above).**

Ledcor prompted the Association to sue Starline directly when its attorney wrote to the Association's attorneys:

Also, please let us know if (and when) you anticipate amending your Complaint to add claims against Starline. Please note that it is our position that such claims can only be made by the HOA and that any damages that could (or should) be recovered by the HOA from Starline are not recoverable from our client. Accordingly, we are not pursuing any claims against Starline.

(Emphasis in original). CP 134, 157.

Additionally, Ledcor told the Association that the Association met the definition of "claimant" under the WPLA, CP 157-158, and that the Association's claims against Starline included claims for resulting damage. CP 157-159. The position Ledcor took to persuade the Association to sue Starline directly, is contrary to the position it now takes on appeal.

The Association responded to Ledcor's urging by amending its complaint to assert claims directly against Starline. CP 69, 273-283. The Association alleged Starline's windows were defective and caused resulting damage to other building components at the project. CP 273-

283. The Association asserted claims for breach of express warranties, breach of contractual warranties, breach of implied statutory and common law warranties, and violations of the WPLA. CP 273-283. In short, the Association's claims against Starline were not limited narrow express warranty claims for repair or replacement of windows only, as Ledcor argues on appeal.

Starline's settlement with the Association was consistent with Ledcor's earlier request to Starline. After the LLC joined Ledcor in the Association's lawsuit, but before the Association joined Starline, Ledcor tendered the window claims to Starline, urging Starline to:

*** immediately contact their respective attorneys [the Association's and the LLC's] and to negotiate an issue release that absolves Starline and our clients from any liability in any way related to the Starline products.

(Emphasis in original). CP 163.

Starline's settlement with the Association achieved exactly what Ledcor requested. The Association's settlement released all of the claims it asserted, or which could have been asserted, against Starline in the litigation. The Association's release further provided an "issue release" releasing all of the Association's claims against all parties to the litigation arising from the alleged defective design or manufacture of Starline's "window products" including claims for breach of express and implied

warranties and claims under the WPLA. Contrary to Leducor's argument, the Association's release of Starline was not limited to express warranty claims and it was not limited to the "parties to the agreement." The release expressly released the Association's claims against all parties to the litigation, including Leducor and the LLC.

Leducor's argument that the Association had no claims against Starline for consequential damages (*Brief of Appellant*, p. 19) and therefore could not release them is mistaken and contrary to the position Leducor had taken earlier. By consequential damages, Leducor means damage to other components of the building like the siding, interior walls, and carpeting. *Brief of Appellant*, pp. 19-20. The Association asserted claims against Starline for violation of the WPLA and breaches of implied statutory warranties (UCC), and released Starline, Leducor, and the LLC from all of those claims. Claims under the WPLA include consequential damages, i.e. damage to property other than the product at issue. RCW 7.72.030. Claims for breach of the UCC implied warranties include claims for consequential damages. RCW 62A.2-714 and 715.

2. **The Association's release of claims against Starline's window products included Starline's sliding glass doors (mis-statement 3 above).**

The settlement agreement between the Association and Starline released all of the Association's claims against Starline's "window

products.” Ledcor impermissibly reads the word “products” out of the release and argues, without pointing to any evidence, that Starline and the Association really meant “windows” when they said “window products” in their settlement agreement.

“The touchstone of contract interpretation is the parties’ intent.” *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 83, 60 P.3d 1245 (2003), citing *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996). Washington courts apply the “context” rule when called upon to interpret a contract:

In Washington, the intent of the parties to a particular agreement may be discovered not only from the actual language of the agreement, but also from “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., *infra* at 84, citing *Scott Galvanizing, Inc. v. N.W. EnviroServices, Inc.*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993), quoting *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990).

Ledcor was not a party to the agreement, yet it attempts to impose a mutual intent on Starline and the Association that they did not express or intend. Ledcor’s argument is unsupported by citation to legal authority.

The mutual intent of Starline and the Association is evident from

the specific language at issue and from the context of the entire agreement. In the preamble to the agreement the parties agreed that the Association was settling its claims against Starline arising out of the litigation. There was no caveat exempting Starline's sliding glass doors from the agreement. In Paragraph I.1 of the agreement, the Association agreed to release Starline from "any and all claims asserted or which could have been asserted" by the Association in the litigation. In that context, the Association agreed to an Issue Release, stating that the agreement satisfies and releases all of its claims "against all parties to the litigation arising from the alleged defective design and/or defective manufacture of STARLINE's window products...." CP 67-70, 179-182. The parties used the term "window products" rather than "windows" as Ledcor would prefer.

The remainder of Paragraph I.8 (the Issue Release paragraph) also provides helpful context. The release distinguishes between Starline's window products and the installation of those products. The Association is releasing claims arising from Starline's allegedly defective window products, but not claims arising from the defective installation of those products.

Specifically excluded from this Settlement Agreement and Release of Claims are any of ADMIRAL COA's claims against Admiral Way, LLC and/or Ledcor Industries (USA)

Inc. for those parties' improper specification, installation, alteration, modification or repair of STARLINE's window products at the Admiral Way Condominiums.

CP 179-182.

Ledcor points to no evidence that Starline and the Association meant to exclude Starline's sliding glass doors from the release. Ledcor points to no evidence that the parties intended the Merriam Webster definition of "windows" to define "window products" as used in their agreement. To the contrary, it is clear from reading the entire agreement that the intent of the parties was to resolve all claims the Association asserted or could have asserted against Starline for alleged defects in its products, and to conclude the Association's litigation against Starline. Ledcor points to no evidence that the Association reserved its claims against Starline for the sliding glass doors or that it continued to pursue those claims. Finally, Ledcor points to no evidence that its own settlement agreement with the Association included payment for claims arising from defects in the sliding glass doors. Indeed, as pointed out above, the Association could not have included such a provision in its settlement with Ledcor.

3. **Ledcor's "independent" claims were not dismissed by the trial court's summary judgment rulings in 2010; they were separately resolved by summary judgment in 2014 (mis-statement 4 above).**

It is unclear what Ledcor means by the term "independent" claims. Presumably Ledcor is referring to claims it made against Starline that are independent of claims it seeks to pass through from the Association and the LLC to Starline. Those "independent" claims would be Ledcor's claims for defense costs and insurance procurement. However, those claims were not resolved on the basis of Starline's settlement agreement with the Association, which was one of the bases for the trial court's dismissal of Ledcor's "pass through" claims in 2010. Instead, Ledcor's "independent" claims were resolved on summary judgment in 2014 on separate grounds. CP 2183-2190.

In its First Amended Complaint Ledcor alleged that any damage caused by alleged defects in Starline's window products, for which Ledcor was held liable, was the responsibility of Starline, and that Starline was therefore responsible for any damages recovered against Ledcor because of Starline's allegedly defective window products. CP 1-52. These are "pass through" claims. These are the claims that were dismissed on summary judgment in 2010. One of Starline's bases for dismissal of these claims was the Starline/Association settlement and release agreement.

Because the Association settled and released all of its claims arising from alleged defects in Starline's windows before the Association settled its remaining claims with the LLC and Leducor, the Association could not assert any window product claims against the LLC and Leducor. Therefore, there were no claims that Leducor could "pass through" to Starline.

4. **Leducor was well aware of Starline's settlement with the Association before Leducor settled with the Association (mis-statement 5 above).**

Leducor asserts that it had no knowledge of the settlement agreement between Starline and the Association, but it points to no evidence to support its assertion. *Brief of Appellant*, p. 14. Mr. Lofaro, in his Declaration, never testifies that he or Leducor were unaware of Starline's settlement when Leducor settled with the Association. CP 514-518. In fact, Leducor was well aware of Starline's settlement with the Association. Leducor's defense attorneys reviewed the Notice of Settlement filed by the Association on July 2, 2009, nearly one month before Leducor settled, and billed Leducor's insurer for that review. CP 732.

5. **Leducor's settlement with the Association did not include payment for the Association's claims against Starline's window products (mis-statements 6, 7, and 8 above).**

The express terms of Leducor's settlement agreement fails to allocate any portion of Leducor's settlement to the Association's claims

against Starline's allegedly defective window products. In fact, Leducor's settlement agreement fails to even mention those claims. Leducor fails to point to any evidence in the record showing that the mutual intent of itself and the Association was to include the Starline window product claims in their settlement and release. Again, as pointed out above, the Association could not have been a party to such a provision because it had already released its Starline window claims as to all parties in the litigation, including Leducor. Leducor's argument is unsupported by the record or by legal argument.

Leducor attempts to buttress its argument by making two additional, unsupported arguments: (1) that the Association's damages attributable to Starline's window products were approximately \$3,000,000; and (2) that Starline's settlement of \$165,000 was insufficient to fully compensate the Association for its claims against Starline.

As Starline pointed out to the trial court in its summary judgment pleadings, Leducor submitted no evidence to support its argument that damages flowing from Starline's allegedly defective window products were \$3,000,000. CP 536-553, 2207-2216. On the contrary, the Association's expert conceded that there were significant problems with the installation of Starline's products, including inadequate attachment to the framing, inadequate flashing, and upside-down installation (weep

holes at the top), that required repair. CP 536-553. The installation issues were not Starline's responsibility. In addition, the Association's expert conceded that even if there was nothing wrong with the window products or their installation, the siding on the project would have to be removed and replaced because of its own defects. CP 536-553. The cost to remove and replace the siding constitutes a significant portion of the \$3,000,000 Leducor relies upon. CP 536-553.

Leducor's argument that Starline's settlement of \$165,000 is insufficient is likewise unsupported. The first point to make, of course, is that the Association accepted that amount in exchange for a full and complete release of its claims against all parties for Starline's products. That alone should negate Leducor's argument. But additionally, Starline pointed out to the trial court that the Association's original demand was \$8.9 million, based upon an estimated cost of repair of \$5.3 million. CP 2207-2216. Of the \$5.3 million original repair estimate, \$320,000 was to repair/replace windows and \$129,000 was to repair and replace doors (of which approximately half were sliding glass doors supplied by Starline). CP 2207-2216. The Association eventually settled with Leducor and the LLC for a total of \$4.7 million, in addition to \$165,000 from Starline, or approximately 55% of its original demand. Given those facts, Starline's settlement with the Association was reasonable.

In short, Ledcor offered no factual support for its arguments in the trial court below and the trial court did not err by rejecting Ledcor's arguments.

6. Ledcor was not a subrogee (mis-statement 9 above).

Ledcor argues that its position is analogous to a subrogee's and that its "subrogation" rights could not be impaired by Starline's settlement with the Association. Ledcor's argument is unsupported by the record or the law. "The right to subrogation exists when a party, not a volunteer, pays another's obligation for which the obligee has no primary liability in order to protect such subrogee's own rights and interests. The right to subrogation is based on equity and will be protected only when justice so requires." *Millers Cas. Ins. Co. v. Biggs*, 100 Wn.2d 9, 13-14, 665 P.2d 887 (1983). Ledcor could not be a subrogee because its payment to the Association was for its own primary liability as the general contractor. Ledcor's settlement payment was not a payment of Starline's obligation because: (1) Starline had already extinguished its obligation to the Association and Ledcor's obligation to the Association for Starline's window products; and (2) nothing in Ledcor's settlement agreement with the Association provides that any part of Starline's obligation to the Association is being satisfied by Ledcor's payment. Further, Ledcor

knew that the Association had settled with Starline before Ledcor settled. Ledcor therefore had no basis to assume that any part of its settlement related to the Association's claims against Starline.

D. The Uniform Commercial Code and Its Four-Year Statute of Limitations Apply to the Ledcor/Starline Purchase Order/Subcontract.

Ledcor argues that the UCC does not apply to its agreement with Starline because its agreement is a construction contract rather than a contract for the sale of goods. Ledcor's argument ignores the fact that it pled a UCC claim against Starline in its amended complaint. CP 1-52. Ledcor's argument is not supported by the record and it misstates Washington law.

Ledcor argues that Starline agreed to supply labor as well as window products to Ledcor, and therefore the UCC does not apply. However, Ledcor fails to discuss the seminal Washington case addressing this issue, *Tacoma Athletic Club, Inc. v. Indoor Comfort Systems, Inc.*, 79 Wn. App. 250, 902 P.2d 175 (1995). In *Tacoma Athletic Club*, the Court of Appeals adopted the predominant factor test when analyzing whether or not a contract is governed by the UCC. Under that test, a court analyzes contracts that provide for the sale of good and services to determine if the UCC applies. If the sale of goods dominates the contract, the UCC

applies. If the sale of services dominates the contract, the UCC does not apply. *Tacoma Athletic Club*, at 256-257.

Applying that test to the contract before it, the Court in *Tacoma Athletic Club* held that substantial evidence supported the trial court's finding that the contract for the sale of a dehumidifier system, although it included labor (including installation labor), was predominantly a contract for the sale of goods. *Tacoma Athletic Club*, at 258-259. The Court also distinguished *Arango Construction Co. v. Success Roofing, Inc.*, 46 Wn. App. 314, 730 P.2d 720 (1986), a case Leducor relies upon in its brief. *Brief of Appellant*, at p. 26. The Court pointed out that *Arango* was not helpful in determining whether a contract was a construction contract or a contract for the sale of goods because it did not apply any analytical test to classify contracts. Instead, the court in *Arango* appeared to interpret a contract that seemed clearly to be a construction contract. *Tacoma Athletic Club*, at 256.

Leducor also relies upon *Urban Development, Inc. v. Evergreen Bldg. Products, LLC*, 114 Wn. App. 639, 645, 59 P.3d 112 (2002). Leducor's reliance is again misplaced. In *Urban Development* the subcontracts at issue were for the installation of deck waterproofing, installation of handrails and fences, and installation of a roofing membrane and of parapet wall flashing. *Urban Development*, at 643. The

Court in *Urban Development* described the subcontracts as installation contracts, *i.e.* clearly construction contracts rather than contracts for the sale of goods. Therefore, it was unnecessary to conduct a predominant factor analysis. Instead, the Court cited *Arango* for the well-settled rule that construction contracts are not governed by the UCC. *Urban Development*, at 645.

Here, Starline's agreement with Ledcor provided that Starline would supply window products to Ledcor for the Admiral Way project. The agreement did not provide that Starline would install the window products or provide any other labor. In fact, Starline did not install its window products at the Admiral Way project. After Starline completed delivering its products to Ledcor, Starline replaced some window components that were damaged after delivery, replaced some window components that failed, and performed some service work. However, the labor Starline provided for these tasks was incidental to its contract, and minimal in scope. Substantial evidence supports the conclusion that Starline's agreement with Ledcor was predominantly for the sale of goods. The UCC therefore applies.

It is unclear from Ledcor's brief if it is also arguing that the UCC statute of limitations, even if applicable, would not bar Ledcor's claims against Starline for post-delivery product repair and/or replacement. If

Ledcor is making that argument, it is not well-founded. Ledcor filed its First Amended Complaint against Starline on August 31, 2009. Any product replacement or incidental service work provided by Starline before August 31, 2005 would still be barred by the UCC four-year statute of limitations. All of the products supplied and/or service work performed by Starline, cited by Ledcor, occurred before August 31, 2005 except for one instance. On February 6, 2006 Starline installed extra weep holes in two window sills in Unit 416. Ledcor points to no evidence in the record that those two windows thereafter failed or were included in the Association's claims. All of Ledcor's claims against Starline that are based upon alleged defects in Starline's window products are barred by the UCC statute of limitations.

E. The Trial Court's Determination of Ledcor's Defense Costs Claim Meets the Summary Judgment Standard.

Summary judgment is appropriate if there is no genuine issue as to any material fact and Starline is entitled to judgment as a matter of law. CR 56(c). Summary judgment is proper if reasonable minds could reach only one conclusion from the evidence presented. *Westberry v. Interstate Distributor Co.*, 164 Wn. App. 196, 263 P.3d 1251 (2011), *review denied*, 174 Wn.2d 1013, 281 P.3d 686 (2012). Ledcor has not assigned error to the trial court's application of the summary judgment standard.

Additionally, Ledcor has not argued in its appeal brief that there are genuine issues as to any material fact.

Instead, Ledcor raises a constitutional argument. Ledcor argues that because jury trials for legal claims are guaranteed by Washington's constitution, the trial court erred by entering summary judgment. Implicit in Ledcor's argument is the proposition that it is never permissible to grant summary judgment on issues or claims where there is a right to a jury trial. However, Ledcor is unable to cite any authority for that proposition because it is not the law of Washington. For example, cause-in-fact issues in negligence cases generally raise a jury question. However, summary judgment may be entered against a plaintiff unless the plaintiff offers sufficient admissible evidence to raise an issue of material fact to warrant sending the case to the jury. *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 151 P.3d 201 (2006).

The cases Ledcor does cite do not support its proposition. In *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989), the Washington Supreme Court held that a statute limiting a plaintiff's non-economic damages violated the Washington constitution's guarantee of a jury trial. In *Peters v. Dulien Steel Products*, 39 Wn.2d 889, 239 P.2d 1055 (1952), the Washington Supreme Court upheld the trial court's denial of a motion to strike plaintiff's jury demand. The court disagreed

with the defendant's argument that the relief sought was equitable rather than legal. Neither case stands for the proposition that granting summary judgment because there are no contested material facts violates a party's constitutional right to a jury trial. In fact, both cases recognize the power of the court to grant remitter, in the appropriate circumstances, without violating the constitutional right to a jury trial.

Here, Ledcor elected to use the proportionate share methodology adopted in *Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.*, 150 Wn. App. 1, 15, 206 P.3d 1255 (2009), to calculate its defense cost claim. Starline did not object. The proportionate share method is an alternative to Ledcor segregating its Starline-related defense costs from its voluminous defense cost invoices, which it would otherwise be required to do. *Harmony at Madrona Park Owners Assoc. v. Madison Harmony Development, Inc.*, 143 Wn. App. 345, 364, 177 P.3d 755 (2008).

Under the proportionate share method, a ratio is created with the numerator being Starline's settlement with the plaintiff and the denominator being the total of Starline's and Ledcor's settlements with the plaintiff. *Ledcor v. Mutual of Enumclaw, supra*. That ratio is then applied to Ledcor's defense costs to arrive at Starline's proportionate share of those costs. *Ibid*. The material facts for the proportionate share method are therefore: (1) the amount of Starline's settlement with the

Association; (2) the amount of Leducor's settlement with the Association; and (3) the amount of Leducor's defense costs. None of these facts are in dispute and Leducor does not argue on appeal that they are.

Leducor made two arguments in the trial court that it does not raise on appeal. First, Leducor argued that the numerator of the proportionate share ratio should not be Starline's settlement with the Association. Instead, Leducor argued that the numerator should be a share of repair costs unilaterally assigned to Starline by Leducor's trial expert. That amount was approximately \$704,000. Not only was Leducor's argument contrary to the explicit holding of *Leducor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.*, that number was also disavowed by Leducor's own expert. CP 554-567. The trial court properly rejected Leducor's argument as an erroneous statement of applicable law. Second, Leducor argued that the proportionate share ratio should be applied to all of its defense costs, instead of only those defense costs it incurred until the Association sued Starline directly and Starline took over the defense of the claims against its window products. The trial court properly rejected Leducor's legal argument that Starline had a contractual duty to reimburse Leducor for its defense costs after Starline took over the defense of the Association's window claims. The trial court's grant of summary judgment to Starline regarding the measure of Leducor's defense cost claim was not error.

F. The Trial Court Erred In Finding That Starline Was Not the Prevailing Party.

A prevailing party is one who receives an affirmative judgment in his or her favor. If neither party wholly prevails, then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends on the extent of the relief afforded the parties. *Riss v. Angel*, 131 Wn.2d 612, 633-34, 934 P.2d 669 (2009), citing *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 795 P.2d 1143 (1990), *Marassi v. Lau*, 71 Wn. App. 912, 859 P.2d 605 (1993), and *Rowe v. Floyd*, 29 Wn. App. 532, 629 P.2d 925 (1981). A party need not prevail on all issues to be considered a prevailing party. *Kysar v. Lambert*, 76 Wn. App. 470, 493, 887 P.2d 431 (1995). If neither party wholly prevails, the determination of who is the prevailing party depends on the extent of the relief afforded. *Transpac Dev., Inc. v. Oh*, 132 Wn. App. 212, 217-19, 130 P.3d 892 (2006); *Marine Enter., Inc. v. Sec. Pac. Trading Corp.*, 50 Wn. App. 768, 772, 750 P.2d 1290 (1988).

Here, Starline has prevailed on all issues, including the issue of the amount of Ledcor's defense fees for which judgment has been entered for Ledcor. Starline prevailed in 2010 on its summary judgment motions dismissing all but two of Ledcor's multiple claims. In 2014 Starline

prevailed on those two remaining claims, including Leducor's defense cost claim.

Starline's summary judgment motion showed that Leducor misapplied the proportionate share method, and that proper application of that method resulted in an allocable share to Starline of \$19,101.20, rather than the approximately \$190,000 Leducor claimed. The trial court entered judgment in the amount Starline calculated on June 4, 2014.

Because Starline prevailed on every issue, it is clearly the prevailing party under Washington law. The trial court erred when it concluded that Starline and Leducor were both prevailing parties and that each should bear its own costs and attorney fees.

G. Starline Should Be Awarded Its Costs and Fees On Appeal.

The Purchase Order/Subcontract between Leducor and Starline provides that the prevailing party in any action to enforce the terms of the contract is entitled to its attorney fees and costs. CP 90-92. Pursuant to RAP 18.1(b) Starline requests an award of its attorney fees and costs incurred on this appeal or a direction to the trial court to determine those fees and costs after remand in accordance with RAP 18.1(j).

VI. CONCLUSION

The trial court's grant of summary judgments in favor of Starline may be affirmed on grounds argued to the trial court and to which Leducor

has not assigned error. On that basis alone, this Court should affirm the trial court. In addition, the three assignments of error Ledcor does assert are unsupported by the record or by legal authority. This Court should affirm the trial court on the basis that Ledcor's assigned errors are not supported. This Court should reverse the trial court's order finding that neither party was a prevailing party, should find that Starline is the prevailing party, and should remand this case to the trial court for a determination of Starline's reasonable attorney fees.

RESPECTIVELY SUBMITTED this 9th day of January, 2015.

FORSBERG & UMLAUF, P.S.

By: 

John P. Hayes, WSBA #21009
Kenneth J. Cusack, WSBA #17650
Attorneys for Respondent
Starline Windows, Inc.

CERTIFICATE OF SERVICE

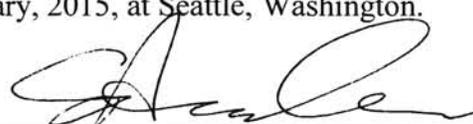
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing BRIEF OF RESPONDENT STARLINE WINDOWS, INC. on the following individuals in the manner indicated:

Richard L. Martens
Matt Kennedy
Jane Matthews
Martens + Associates, P.S.
705 Fifth Avenue South, Suite 150
Seattle, WA 98104

(X) Via Email (with Recipient's Approval)

SIGNED this 9th day of January, 2015, at Seattle, Washington.



Sherelyn L. Anderson

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SHERELYN L. ANDERSON