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CASE NO: 64037-2-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON
SEATTLE

MARGAUX MARINE GRAPHICS, INC,
D/B/A SEROCK CONSTRUCTION

Appellant/Cross-Respondent

v.

LEDCOR INDUSTRIES (USA), INC,

Respondent/Cross-Appellant

BRIEF OF APPELLANT

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FILED
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON
2009 NOV -5 PM 2:56

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I. INTRODUCTION.

The primary issue in this appeal is the trial court's denial of Serock's claim for an offset. This is the second time this case has been before this Court on appeal. In the first appeal, this Court reversed the trial court in part, and remanded to the trial court on two issues: (1) Ledcor's claim for breach of contract against Serock had expired for several of the buildings at issue; and (2) the trial court used the incorrect legal standard when awarding Ledcor defense costs against Serock. This Court's remand gave the trial court discretion to consider whether the barred breach of contract damages could be awarded under an indemnity theory. This Court also denied Serock's motion to reconsider or clarify that part of its appeal asserting an offset for settlements Ledcor had received from other subcontractors. This Court denied Serock's motion, but ruled that the trial court had discretion to address the issue of an offset on remand.

II. ASSIGNMENTS OF ERROR.

1. The trial court erred in granting Ledcor's motion for summary judgment on remand, by awarding repair costs as indemnity damages while denying Serock an offset for settlements that Ledcor received from another subcontractor for the same repairs.

2. The trial court erred when it added back the 25% deduction imposed at trial and upheld by this Court in Serock's first appeal.
3. The trial court erred in its calculation of, and in its awarding of, Ledcor's claim for an Additur.

Issues Pertaining to Assignments of Error

1. The cost to repair defects around the windows of the Phase I buildings of this project was \$255,000. Ledcor has collected, in settlements from its siding subcontractor, \$236,000 in damages for those repairs. The trial court's judgment on remand awarded Ledcor an additional \$184,875 for the same repair costs. Was it an abuse of the trial court's discretion to deny Serock an offset for settlements collected by Ledcor for the same repair damages Ledcor claimed against Serock? Assignment of Error 1.

2. Was it error for the trial court to allow Ledcor to recover \$420,875 in repair damages when its repair costs were \$255,000? Assignment of Error 1.

3. The trial court originally deducted 25% of Ledcor's claimed repair costs for metal work that was not within Serock's scope of work. This Court affirmed that decision on the first appeal. Was it an abuse of discretion for the trial court on remand to add the

25% deduction back into Ledcor's claim. Assignment of Error 2.

4. Was it an abuse of discretion for the trial court to award Ledcor an Additur of \$21,502.50 for attorney fees on remand when (1) it did not prevail on remand on the issue of defense costs, (2) the issue of an indemnity theory for damages barred by the breach of contract statute of limitations was not contested on remand, and (3) the issue of Serock's claim for an offset was only addressed by Ledcor in its reply brief in support of its motion for summary judgment. Assignment of Error 3.

III. STATEMENT OF THE CASE.

This is the second time this case has been before this Court. This Court's decision on Serock's first appeal was reported at *Harmony at Madrona Park Owners Assoc. v. Madison Harmony Development, Inc.*, 143 Wn.App. 345, 177 P.3d 755 (2008), *rev. den.*, 164 Wn.2d 1032, 196 P.3d 139 (2008). In the first appeal, this Court reversed the trial court in part, and remanded for further proceedings.

This Court reversed the trial court on two issues: (1) breach of contract damages were barred by the statute of limitations; and (2) the trial court's award of defense costs to Ledcor was arbitrary. *Harmony, supra*, at 357, 363. This Court also ruled that on remand,

the trial court could consider whether the barred breach of contract damages could be awarded under an indemnity theory. *Harmony* at 359. This Court denied that portion of Serock's appeal requesting a credit or offset on the basis that there was no evidence of other settlements to support the offset claim. *Harmony* at 359.

Serock moved this Court to reconsider or clarify its ruling regarding an offset. [CP Sub.No. 826, pp. 417-421]. This Court denied Serock's motion. [CP Sub.No. 826, p. 423]. However, in denying the motion, this Court ruled that nothing precluded the trial court from considering the issue and additional evidence on remand. [CP Sub.No. 826, p. 423].

After this Court decided Serock's first appeal, but before the trial court heard this case on remand, this Court published *Ledcor v. Mutual of Enumclaw*, 150 Wn.App. 1, 206 P.3d 1255 (2009). As recited in the *Ledcor* opinion, Ledcor hired Zanetti Custom Exteriors to install siding on Phase I of a 25-building condominium project in Bellevue, Washington. *Ledcor* at 6. Zanetti, through its insurer Mutual of Enumclaw, paid Ledcor \$236,000 to settle Ledcor's claims against Zanetti. *Ledcor* at 7.

The Harmony at Madrona Park condominium project is a 25-building condominium project in Bellevue, Washington. *Harmony*

at 350. Serock worked on 11 of the 13 buildings in Phase I of the project. *Harmony* at 351. Zanetti was a named fourth-party defendant in this case, and settled with Ledcor shortly before trial. *Ledcor* at 7, and *Harmony* at 351. Ledcor's trial experts' reports, which were admitted as trial exhibits, stated that the siding around the perimeters of the windows, the flashing between the windows and siding, and the weather resistive barrier behind the siding were all defectively installed and needed repair. [CP Sub.No. 826, pp. 426, 463]. Serock installed the vertical wood trim pieces between the windows in multiple window sets. *Harmony* at 351. The cost to repair all of the siding, flashing, weather resistive barrier, and wood trim defects at and around the Phase I buildings was \$255,000. *Harmony* at 358, [CP Sub.No. 826, p. 426, Sub.No. 825, p. 389].

On remand from this Court, Ledcor filed a motion for summary judgment on the two remanded issues, i.e. indemnity damages and defense costs. [CP Sub.No. 818, pp. 5-33]. Serock opposed Ledcor's motion. [CP Sub.No. 825, pp. 384-411]. Serock's basis for opposing Ledcor's motion regarding indemnity damages was that Serock should receive an offset or credit for settlements collected by Ledcor for the same repair costs as had been assessed against Serock. [CP Sub.No. 825, pp. 387-393]. Whereas at the first

trial Serock had no evidence of Ledcor's settlements with other subcontractors (for reasons discussed in the prior appeal), at remand there was evidence of a prior settlement before the trial court in the form of a published opinion from the Court of Appeals. *Ledcor, supra*. In its Reply, Ledcor did not dispute that Zanetti's settlement of \$236,000, as reported in *Ledcor v. Mutual of Enumclaw*, was for its work at Phase I of the Harmony at Madrona Park project. [CP Sub.No. 828, pp. 473-480].

The trial court's order on summary judgment denied Ledcor's request for defense costs, granted Ledcor's request for breach of contract damages to be awarded under an indemnity theory, did not grant Serock's request for an offset of \$236,000, and added 25% to the indemnity damages that the trial court had deducted at the first trial (which deduction had been affirmed by this Court on appeal). [CP Sub.No. 830, p. 482-485]. Ledcor then filed a motion for Additur and Presentation of Judgment. [CP Sub.No. 833, pp. 493-499]. Serock opposed the motion. [CP. Sub.No. 835, pp. 531-537]. The trial court granted Ledcor's motion for Additur and entered the Judgment presented by Ledcor. [CP Sub.No. 837, pp. 546-549, Sub.No. 838, pp. 550-552].

This appeal followed.

IV. ARGUMENT.

A. The Trial Court Erred by Denying an Offset to Serock for Zanetti's \$236,000 Settlement with Ledcor.

Pursuant to this Court's previous ruling on Serock's motion to reconsider or clarify its decision in *Harmony*, the trial court had discretion on remand to consider any evidence of offset. The trial court abused its discretion by denying Serock an offset of \$236,000. "An abuse of discretion occurs when a decision is manifestly unreasonable, exercised on untenable grounds, or based on untenable reasons." *Harmony* at 358. Whether or not to grant an offset is within the discretion of the trial court. *Eagle Point Condominium Owners Assoc. v. Coy*, 102 Wn.App. 697, 702, 9 P.3d 898 (2000). However, Serock's appeal is from a summary judgment order of the trial court on remand. Summary judgments are reviewed de novo. *Dombrosky v. Farmers Ins. Co.*, 84 Wn.App. 245, 253, 928 P.2d 1127 (1996).

"It is a basic principle of damages, both tort and contract, that there shall be no double recovery for the same injury." *Eagle Point, supra*, at 702. Here, it is undisputed that Ledcor's siding

subcontractor, Zanetti, paid Ledcor \$236,000 to settle Ledcor's claims against it for defectively installing vinyl siding at Phase I of the Harmony at Madrona project. It is undisputed that the evidence of that settlement was before the trial court. It is also undisputed that the costs claimed by Ledcor to repair all window related items, including siding issues, for Phase I of the project totaled \$255,000.

It is also undisputed that window related repair items included removing and replacing two courses of vinyl siding at the heads and sills of all windows, removing and replacing associated vinyl trim pieces, replacing building paper behind the siding, repairing or replacing flashing around the perimeters of the windows, and replacing portions of the gyp sheathing behind the building paper. [CP Sub.No. 826, pp. 426, 463]. All of that repair work was in addition to repairing the vertical wood trim that Serock installed between the windows. The repair costs assessed against Serock after remand for window related repairs total \$184,875. *Harmony* at 358, [CP Sub.No. 830, pp. 482-485]. If the trial court's order stands, Ledcor will be recovering damages in the amount of \$420,000 for \$255,000 worth of repair costs around the Phase I windows. That result is manifestly unreasonable because it constitutes a double recovery for the same injury. It was manifestly

unreasonable for the trial court to ignore the evidence of Zanetti's payment to Ledcor, when that fact was clearly established in a Court of Appeals published opinion.

Ledcor argued to the trial court on remand that Serock provided no evidence of Zanetti's scope of work, or that its settlement was for repair cost that had been assessed to Serock. [CP Sub.No. 828, pp. 473-480]. In short, Ledcor argued that it was Serock's burden to prove that Zanetti's settlement was not for repairs of other work.

The plaintiff in *Eagle Point* made the same argument, and was unsuccessful. There, the Court of Appeals upheld the trial court's grant of an offset. The plaintiff had argued that there should be no offset because the settlement covered different work than the work at issue with the remaining defendant. The Court of Appeals in affirming the offset, was critical of the plaintiff's failure to produce evidence to support that argument.

Here, as in *Eagle*, Ledcor did not present any evidence to the trial court that its settlement with Zanetti included other repairs. Nor did Ledcor present any evidence of what Zanetti's scope of work was or was not. Instead, Ledcor argued that Serock had the burden of proving what Zanetti's scope of work was, and what parts of

Zanetti's work were defective, and that Serock failed to meet that burden. Ledcor's argument has the burden exactly backwards, as explained in *Eagle*.

Ledcor's argument is also factually incorrect. This Court's published opinion in *Ledcor* recites the fact that Zanetti installed the vinyl siding on Phase I of this project. Ledcor's own trial exhibits, authored by its own experts, detail the repairs around the windows as consisting of removing and replacing two courses of siding at the sills and heads, along with associated trim pieces, building paper and flashing. All of those window repairs for Phase I, which included Zanetti's siding work as well as Serock's wood trim work, totaled \$255,000. All of those facts are clearly established by the evidence that was before the trial court as well as by the opinions of this Court. If Ledcor wanted to argue to the trial court that its \$236,000 settlement with Zanetti was for repair work other than Zanetti's defective work around the windows, it was Ledcor's burden to submit evidence to support that argument. Ledcor chose not to do so.

In a similar manner, Ledcor argued before the trial court that Serock had the burden of proving the terms of Ledcor's settlement agreement with Zanetti. Ledcor's argument is a curious one given

the fact that it has possession of the agreement and Serock does not, and that Ledcor never produced it to Serock or submitted it to the trial court. However, there is an even more basic flaw in Ledcor's argument to the trial court.

Serock had argued to the trial court that if Ledcor's settlement agreement with Zanetti did not allocate the settlement to various claims, then Serock was entitled to an offset for the entire settlement, rather than only a partial offset, citing *Litho Color, Inc. v. Pacific Employers Ins. Co.*, 98 Wn.App. 286, 295-96, 991 P.2d 638 (1999). [CP Sub.No. 825, p. 393]. In reply, Ledcor argued to the trial court that in the absence of any evidence of the terms of the settlement agreement, Serock is not entitled to any offset at all. [CP. Sub.No. 828, p. 427]. Again, Ledcor misunderstands the rule, and in fact has it completely backwards. Ledcor's settlement agreement with Zanetti, if it allocated the settlement to different claims, would afford Ledcor relief in terms of how much of an offset it would have to absorb. In the absence of proof that the settlement agreement allocates the settlement to other claims, whether because the terms do not make such an allocation or because the settlement agreement is not before the court as evidence to begin with, Ledcor is not entitled to any relief from a full offset. It is Ledcor's burden to

prove that its settlement agreement affords it partial or full relief from Serock's offset claim.

In the absence of evidence of Leducor's settlement agreement with Zanetti allocating the settlement to specific claims, Leducor is not entitled to any reduction in Serock's offset claim.

B. The Trial Court Erred When It Added 25% to Leducor's Damage Claim For Defective Metal Flashing.

At trial, the trial court deducted 25% from Leducor's damage claim. That deduction represented the cost of repairing defective metal flashing that was not within Serock's scope of work. The trial court's deduction was upheld by this Court in Serock's first appeal. *Harmony*, at 358-59. Thus, this issue was not remanded to the trial court.

On remand, Leducor argued that *Mutual of Enumclaw Ins. Co. v. T & G Construction, Inc.*, 165 Wn.2d 255, 199 P.3d 376 (2008) supported its argument that the 25% reduction should be reversed. [CP Sub.No. 818, p. 7]. Serock argued in opposition that *Mutual of Enumclaw* was clearly distinguishable. [CP Sub.No. 825, p. 393].

First, *Mutual of Enumclaw* addressed the issue of insurance coverage, specifically the definition and scope of covered property damage under Mutual of Enumclaw's policy language. Here, the

issue was the scope of Serock's contractual indemnity under the "arising under" language of its subcontract. The trial court determined, and this Court upheld, that the metal flashing for which the deduction was given was not within Serock's scope of work.

Second, Ledcor argued that in *Mutual of Enumclaw* the Supreme Court held that "the cost of removing and replacing the perfectly good work of others is simply part of consequential damages arising from defective workmanship." [CP Sub.No. 818, p.7]. Here, however, the metal flashing at issue in the deduction was not "perfectly good work" that was being removed in order to repair Serock's work. Rather, the flashing itself was defective and had to be repaired without regard to Serock's work. *Harmony* at 358-59.

The trial court committed an error of law when, on remand, it reversed the 25% deduction that this Court had affirmed on appeal. This Court reviews questions of law de novo.

C. The Trial Court Erred By Granting Ledcor's Motion For Additur.

Serock opposed Ledcor's motion for additur seeking \$21,502.50 in additional attorney fees. [CP Sub.No. 835, pp. 531-37]. Ledcor sought additur for expending 104 hours of paralegal and attorney time to bring its summary judgment motion on remand.

attorney time to bring its summary judgment motion on remand. Leducor raised two issues on remand. Leducor did not prevail on one issue, its claim for defense costs. On the other issue, whether an indemnity theory could support Leducor's claim for breach of contract damages barred by the statute of limitations, Serock offered no opposition. However, Serock did raise the issue of an offset in response, which Leducor addressed only in its reply. The amount of time expended for summary judgment on remand was excessive. The trial court has discretion when awarding reasonable attorney fees and this Court reviews such decisions for abuse of discretion.

V. CONCLUSION

Serock asks this Court to reverse the trial court's grant of summary judgment and entry of judgment. Serock further asks this Court to remand this matter to the trial court with instructions to grant Serock an offset of \$236,000, adjust the interest award accordingly, and enter judgment in accordance with this Court's decision. Further, Serock asks this Court to reverse and remand the trial court's granting of Leducor's motion for additur.

In the alternative, if this Court does not reverse the trial court's denial of an offset to Serock, Serock asks this Court to reverse and remand on the issue of the 25% reduction in damages

that this Court affirmed in the first appeal, and to reverse and remand the trial court's order granting Ledcor's motion for additur.

DATED this 5th day of November, 2009.

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