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No. 64037-2-I

COURT OF APPEALS,
DIVISION I OF THE STATE OF WASHINGTON

MARGAUX'S MARINE GRAPHICS, INC.,
D/B/A SEROCK CONSTRUCTION

Appellant,

v.

LEDCOR INDUSTRIES (USA) INC.,

Respondent.

BRIEF OF RESPONDENT

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CORPORATE DISCLOSURE

Ledcor Industries (USA) Inc., is an employee-owned corporation.

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I. INTRODUCTION

This is the second appeal in this matter. Respondent Ledcor Industries (USA) Inc. (“Ledcor”) asks the Court of Appeals to affirm three discretionary rulings made by the trial court against Appellant Margaux’s Marine Graphics, Inc., d/b/a Serock Construction (“Serock”) following remand from Serock’s first appeal. Serock erroneously contends the trial court abused its discretion in: (1) once again rejecting its offset defense; (2) awarding indemnity damages of \$127,500.00 to reimburse Ledcor for the cost to repair Serock’s defective work on seven of the 13 buildings Serock worked on; and (3) awarding Ledcor prevailing party attorney’s fees of \$21,502.50 for obtaining judgment on remand under the subcontract. Because each of the trial court’s three rulings were well within its broad discretion and supported by substantial evidence, they should be affirmed.

First, the trial court did not abuse its discretion in denying Serock’s claim for offset. Serock’s claim that Ledcor received a double recovery is directly contrary to the trial court’s finding of fact that there is no evidence to support a double recovery, which was affirmed by this Court in Serock’s first appeal. In addition, Serock’s allegation is simply not true.

Ledcor paid \$1.25 million to settle the claims for defective construction by its subcontractors back on February 17, 2004 , *FF 26, CP 311*. Ledcor has not come close to getting its money back or the loss of the use of that money for six years. Serock's statement that Ledcor has already collected \$236,000.00 for the cost to repair Serock's defective work from another subcontractor is unsupported in the record and irresponsible on appeal.

Following a bench trial in 2005, the trial court entered detailed findings and conclusions that Serock *failed* to plead offset as an affirmative defense, *failed* to present any evidence on offset at trial and *failed* to prove any double recovery by Ledcor. The trial court denied Serock's post-trial motion for offset on independent grounds of waiver and lack of evidence. In the first appeal, this Court *affirmed* the trial court's denial of Serock's post-trial motion for offset under an abuse of discretion standard, and *denied* Serock's motion to reconsider its offset ruling.

Serock asks this Court to revisit a ruling it previously affirmed on two prior occasions as being within the trial court's broad discretion. There is simply no reason to revisit the issue. Serock does not get multiple bites of the same apple.

Second, the trial court did not abuse its discretion in awarding

indemnity damages of \$127,500.00 for the total cost to repair Serock's defective work on seven buildings.¹ The trial court's indemnity damage award is supported by its own finding that the total cost to repair all of Serock's work on the 13 buildings was \$255,000.00. Based on its finding, the trial court reduced the damage award for the seven buildings to \$127,500.00, which is approximately 50 percent of the \$255,000.00 total repair cost. The trial court's decision not to further reduce the award was within its broad discretion and its position as the trier of facts.

Third, the trial court did not abuse its discretion in awarding Ledcor \$21,502.50 in a motion for an *additur* for attorney's fees and costs. Although Serock argued Ledcor was entitled to a minimal judgment of only \$20,495.26, the trial court actually entered judgment in favor of Ledcor for almost 21 times that amount – \$430,153.96. The prevailing party fee provision in the subcontract allows the prevailing party to

¹Serock does *not* contend the trial court committed error in awarding damages for the cost to repair the seven buildings under the indemnity agreement. Rather, it contends the trial court abused its discretion in awarding \$127,500.00 in indemnity damages instead of \$95,625.00, which was the amount of the vacated contract damage award. *Serock's Brief*, p. 2. In its oral ruling following the bench trial, the trial court initially reduced the \$127,500.00 cost to repair for the seven buildings by 25 percent because the metal flashing that had to be removed during the repair process was not part of Serock's scope of work. On remand, the trial court did not apply the 25 percent reduction concluding the metal flashing was part of the consequential damages flowing from Serock's defective work because it had to be removed and replaced in order to repair Serock's defective work.

recover its actual fees. It is impossible to conclude Ledcor was not the prevailing party on remand.

The trial court is granted broad discretion in making rulings under an abuse of discretion standard because it is in the best position to make those rulings. Here, the trial court conducted the bench trial of this matter, observed and listened to the witness testimony and made credibility determinations, considered all of the evidence, entered findings of fact and conclusions of law based on its consideration of all the evidence and testimony presented at trial and made rulings on post-trial motions based on its findings and conclusions. The trial court properly found Ledcor's expert testimony on liability and damages to be credible, persuasive and un rebutted. Serock presented no expert testimony at trial. The findings and conclusions entered by the trial court were substantially affirmed on the first appeal and fully support the trial court's rulings on remand. The trial court's rulings were also consistent with this Court's published decision in the first appeal.

Because Serock fails to meet its heavy burden to show any abuse of discretion, the trial court's rulings should be affirmed in all respects.

II. LEDCOR'S COUNTERSTATEMENT OF ISSUES

1. Whether the trial court abused its discretion in denying Serock's motion for offset when Serock waived that defense by not pleading it, when Serock presented no evidence at trial to support an offset defense, when Serock failed to prove any double recovery by Ledcor and when the trial court's denial of Serock's post-trial motion for offset was previously affirmed by this Court of Appeals. (Assignment of Error No. 1).

2. Whether the trial court abused its discretion in awarding \$127,500.00 in indemnity damages for the total cost of repairing Serock's defective work on the seven buildings when its award is based on its findings of fact. (Assignment of Error No. 2).

3. Whether the trial court abused its discretion in granting Ledcor's motion for *additur* for prevailing party attorney fees when Ledcor prevailed in obtaining judgment of \$430,153.96 following remand from this Court and the subcontract has a prevailing party fee provision, which entitles the prevailing party to recover its actual fees and costs. (Assignment of Error No. 3).

III. LEDCOR'S COUNTERSTATEMENT OF THE CASE

A. After Being Sued for Construction Defects, Ledcor Sued Each of the Responsible Subcontractors Who Performed the Work,

Including Serock.

Ledcor was general contractor for the Harmony condominium project (“Project”) in Bellevue. *CP 308*. Ledcor retained the subcontractors who possessed the necessary expertise to build the project including subcontractor Serock. *Id.* Serock was retained to install wood trim, caulking and building paper around the windows on the 13 buildings in Phase I of the Project pursuant to a written and signed subcontract with Ledcor. *CP 325-371*.

Ledcor was sued by the owner/developer Madison Harmony Development, Inc., for defective construction performed by Ledcor’s subcontractors, including Serock. *CP 311*. Ledcor subsequently paid \$1.25 million dollars to resolve those claims. *Id.* The settlement was adjudged to be reasonable. *Id.*

Ledcor sued the subcontractors who performed the defective work. *CP 306-316*. Ledcor asserted claims against Serock for breach of contract, breach of duty to defend and indemnify and prevailing party attorney fees and costs. *Id.*

Ledcor’s indemnity claims were based on the express language of the Indemnification Addendum in Appendix E of the subcontract, which

provided, in pertinent part:

Serock Construction (“Subcontractor”) agrees to defend, indemnify and hold **Ledcor Industries, Inc.** (“Contractor”) and **Madison Development 5 Inc.**, (“Owner”) harmless from any and all claims, demands, losses and liabilities to or by third parties arising from, resulting from or connected with the work to be performed under this Subcontract or Subcontractor’s agents or employees to the fullest extent permitted by law

Subcontractor’s duty to defend, indemnify and hold Contractor and Owner harmless shall include, as to all claims, demands, losses and liability to which it applies, Contractor’s and/or Owner’s personnel-related costs, consultant fees, reasonable attorneys’ fees, court costs and all other claim-related expenses. *CP 364.*

Ledcor’s prevailing party fee claims were based on Paragraph 7.4 of the Serock Subcontract, as amended in Appendix A, which provides:

7.4 ATTORNEY’S FEES. Should either party employ an attorney to institute suit or demand arbitration to enforce any of the provisions hereof, to protect its interest in any manner arising under this Subcontract, or to recover on a surety bond furnished by a party to the Subcontract, *the prevailing party shall be entitled to its actual attorneys’ fees and all costs of such arbitration and/or litigation as determined in the mediation, arbitration and/or litigation, including without limitation, consultant and expert witness fees and expenses, in addition to costs otherwise taxable by statute or court rule. CP 329, 346 [Emphasis supplied].*

B. The Bench Trial Between Ledcor and Serock Results in Judgment in Favor of Ledcor.

A bench trial was conducted between Ledcor and Serock before the

Honorable Steven Gonzalez in November 2005. *CP 306-316*. Following the trial, the trial court made an oral ruling in favor of Leducor and entered Findings of Fact and Conclusions of Law based on its rulings. *Id.*

Findings of Fact that were affirmed on the first appeal and were binding on remand include the following:

8. In Appendix E of its subcontract, Serock freely and voluntarily agreed to fully indemnify Leducor for all losses and liabilities arising from, resulting from or connected with work performed or to be performed under the subcontract.

14. Leducor presented expert testimony from Richard Witte of McBride Construction, which testimony the Court finds to be credible, persuasive and unrebutted, stating opinions based on his work as the supervisor of the contractor for the repairs made at the Harmony project and his knowledge, skill, education and training, that the cost to repair and replace all of the defective work performed by Serock and damages caused by Serock was \$255,000.

20. The Court finds that overall Serock's work was defective, violated the standards of the industry, violated the standards set forth in the contract, breached the contract between the parties and caused damage to the work of others and to the project.

29. The Court finds that the contract between Leducor and Serock contains an indemnity agreement that was freely and voluntarily entered into between the parties as a means of allocating future risks and responsibilities for defective construction and damages caused thereby, and that the indemnity agreement covers the claims asserted against Leducor for the defective work of Serock on the project.

30. The Court finds that the claims asserted by Leducor against Serock all arose out of, were related to, or connected with Serock's scope of work under the contract. The Court further finds that Serock did not present any evidence on damages, did not plead an "offset" as an affirmative defense, did not establish any right to an offset, and did not demonstrate or establish any double recovery on the part of Leducor.

31. The Court finds that Serock breached its indemnification and hold-harmless obligations under the contract which proximately caused damage to Leducor and forced Leducor to defend Serock's defective construction in claims brought by the owner/developer, Madison.

32. The Court finds that Serock's indemnity obligations accrued when Leducor paid or agreed to pay Madison damages for defective construction, which included defective work by Serock. The date on which Leducor paid or agreed to pay Madison was February 17, 2004. That date was within six years of substantial completion of the project as a whole and within six years of substantial completion of each building. *CP 306-316*.

Conclusions of Law pertinent to this appeal include the following:

10. Leducor is entitled to recover [breach of contract] damages from Serock for defective work performed by Serock on buildings 1, 2, 4, 5, 6, 7, and 24, and the appropriate measure of damages is the cost to repair the defective work performed by Serock on [the seven] buildings.²

²This Conclusion was reversed by the Court of Appeals in the first appeal because the statute of limitations on Leducor's contract claims for the seven buildings had expired; the \$95,625 contract damage award for the seven buildings was vacated with an indication that the damage could be recoverable under an indemnity theory.

11. The total cost to repair all of Serock's work on all of the Phase 1 buildings was \$255,000.

12. The total cost to repair figure of \$255,000, however, is reduced by 50% due to the untimely contract claims for buildings 3, 10, 11, and 12 and the excluded contract claims for buildings 23 and 25, thereby reducing the contract damage award [for the seven buildings] to \$127,500.³

13. The adjusted contract damage award of \$127,500, however, is further reduced by 25% to remove the cost of repairing and replacing the metal flashing, which was not within Serock's scope of work under the contract, thereby reducing the breach of contract damage award to the amount of \$95,625.

15. All of Leducor's indemnity claims against Serock accrued within six years of substantial completion of the project as a whole and were timely brought. Serock breached the indemnity and hold-harmless agreement and caused damages to Leducor which was required to defend Serock's defective work in claims asserted by the owner/developer, Madison Harmony Development.

16. Leducor is entitled to total damages in the amount of \$95,625.00, plus attorney's fees, costs and expenses, and additional damages awarded in post-trial motions in the amounts of \$164,414.55 and \$18,209.30 against Serock and judgment should be entered in favor of Leducor and against Serock for the total sum of \$278,248.85 which the Court finds fair and reasonable. Serock is not entitled to any

³Prior to trial, the trial court reserved Leducor's indemnity claims for post-trial motions. Following the trial, Leducor moved for and recovered damages under an indemnity theory for the cost to repair buildings 3, 10, 11 and 12 – the four buildings the trial court found to be untimely under a breach of contract theory. The indemnity award for the four buildings was part of the \$164,414.55 award made in Conclusion 16; it was affirmed on appeal. *See CP 306-316.*

offset on that amount. *CP 306-316.*

In June 2006, the trial court entered judgment against Serock, including an *additur* for fees and costs, for \$290,512.85. *CP 41-50.*

C. Serock Files Its First Appeal.

Serock filed its first appeal in 2006 seeking review of multiple issues. Three issues raised in the first appeal are pertinent to this appeal: (1) whether the statute of limitations on Leducor's contract claims for the seven buildings had expired; (2) whether Serock was entitled to an offset; and (3) whether the indemnity damage award for the four buildings was excessive.

On February 25, 2008, this Court issued a published opinion in *Harmony at Madrona Park Owners Association v. Madison Harmony Development, Inc.*, 143 Wn. App. 345, 177 P.3d 755 (2008), *review denied*, 164 Wn.2d 1032 (2008). In its decision, this Court: (1) vacated the \$95,625.00 breach of contract damage award on the ground that the statute of limitations on Leducor's contract claims for the seven buildings (1, 2, 4, 5, 6, 7, and 24) had expired; (2) affirmed the trial court's denial of Serock's motion for offset; (3) affirmed the trial court's indemnity award on the four buildings (3, 10, 11, and 12).

This Court specifically suggested the trial court on remand could consider whether the cost of repair damages for the seven buildings, which were untimely under a breach of contract theory, were recoverable under an indemnity theory, stating:

We affirm the trial court's award of indemnity damages under the indemnification agreement between the parties for four buildings. We also note that, although Ledcor cannot recover under a breach of contract theory, nothing in the opinion precludes the trial court from considering whether Ledcor is entitled to indemnification for repairing the seven other buildings, for which the trial court erroneously awarded damages under a breach of contract theory. 143 Wn. App. at 359.

In rejecting Serock's appeal of the offset issue, this Court held:

Serock submits that the trial court erred when it refused to apply an offset to the damages awarded to Ledcor. The purpose of an offset under the circumstances of this case would be to prevent double recovery. Serock argues that the damages awarded to Ledcor include the work of other subtrades with whom Ledcor settled prior to trial. However, substantial evidence supports the trial court's finding that the damages awarded to Ledcor were caused by Serock's defective work, no evidence was presented showing that Ledcor previously recovered for repairing the same work. We affirm the trial court's denial of an offset.

In rejecting Serock's claim that the indemnity damage award was excessive, this Court held the cost to repair Serock's defective work was not excessive because substantial evidence supported the trial court's

finding that, in the course of repairing Serock's defective work, the work of other subtrades had to be destroyed and replaced. 143 Wn. App. at 358.

Serock filed a motion for reconsideration of this Court's decision affirming the trial court's denial of Serock's offset defense and affirming the indemnity award. *CP 417*. In its Order Denying Reconsideration, this Court stated that "nothing in its opinion precludes the trial court from considering additional evidence [on offset or indemnity] as it should see fit on remand." *CP 423*.

After a Petition for Review was filed and denied, the matter was remanded to the trial court for further proceedings consistent with this Court's published decision.

D. Following Remand, the Trial Court Enters Judgment in Favor of Ledcor.

Following remand, Ledcor filed a motion to set an expedited trial date in the event a trial was necessary. *CP 565-570*. In its partial opposition to Ledcor's motion, Serock requested "limited discovery be allowed into the issue of Ledcor's prior settlements with subcontractors who installed defective work around the windows." *CP 583-588*. In its reply Ledcor opposed Serock's request to re-open discovery on offset on the ground the trial court had already considered and rejected Serock's

offset defense, a ruling that had been affirmed on appeal. *CP 589-593.*

The trial court granted Ledcor's motion to set an expedited trial date and denied Serock's request to re-open discovery on offset. *CP 661-663.* Serock did not seek reconsideration of the trial court's order denying its request to re-open discovery and it did not appeal the order. The trial court's order is the law of the case.

Ledcor then filed a Motion for Summary Judgment for an Award of Indemnity, Attorney Fees and Post-Judgment Interest against Serock. *CP 5-21.* Ledcor's motion sought the following relief: (1) an order ruling that Ledcor was entitled to an indemnity damage award for the cost to repair the seven buildings; (2) an order awarding Ledcor pre-tender defense fees following the methodology outlined by the Court of Appeals; (3) an award of post-judgment interest on the indemnity award and the affirmed damage award of \$168,734.34; and (4) an order authorizing Ledcor to file an *additur* for an award of fees and costs incurred by Ledcor in prevailing on its motion and obtaining judgment on remand. *Id.* Ledcor's motion was supported by the Declaration of Scott Samuelson with attached exhibits, including the trial court's previously entered Findings of Fact and Conclusions of Law. *CP 37-371.*

Ledcor argued the damage award of \$95,625.00 for the seven buildings, which was untimely under a breach of contract theory, was timely and recoverable under an indemnity theory.⁴ *CP 5-21*. Ledcor argued it was entitled to full reimbursement of the cost to repair Serock's defective work on the seven buildings, which included the cost to repair the metal flashing installed by another subcontractor that had previously been discounted by the trial court in its breach of contract award.⁵ *Id.* Ledcor argued that an award of \$127,500.00 (without the additional discount to \$95,625.00) was consistent with the broad language in the indemnity agreement (in which Serock promised to indemnify Ledcor "from any and all claims, demands, losses and liabilities to or by third parties arising from, resulting from or connected with the work to be performed under this Subcontract. . ."). *CP 364*. Full reimbursement was also consistent with observations made by this Court in *Harmony* that it was not unreasonable for the trial court to award damages that included the cost to remove and replace the work of other subcontractors, which was

⁴The trial court previously awarded Ledcor indemnity damages for the four buildings, an award that was affirmed on appeal.

⁵When the trial court made its initial breach of contract award for the seven buildings, it reduced the award by 25 percent because Serock did not install the metal flashing that had to be removed and replaced in the course of repairing Serock's defective work. With the 25 percent reduction, the \$127,500.00 award was reduced to \$95,625.00. *CP 314*.

necessary to repair Serock's defective work. *Id.*

Moreover, the Washington Supreme Court in *Mutual of Enumclaw v. T&G Construction*, 165 Wn.2d 255, 270, 199 P.3d 376 (2008) recently held that the cost of removing and replacing the work of other subcontractors is simply part of consequential damages arising from defective workmanship.

Serock opposed Ledcor's motion for summary judgment, once again arguing it was entitled to an offset. *CP 384-411*. This time, Serock submitted a published decision, *Ledcor v. Mutual of Enumclaw*, 150 Wn. App. 1, 206 P.3d 1255 (2009), *review denied*, 167 Wn.2d 1007 (2009), with its opposition memorandum. Serock argued that because the *Mutual of Enumclaw* decision "referred" to a settlement between Ledcor and Zanetti in the Harmony litigation, Serock should be allowed a complete offset for the amount of that settlement – without submitting any evidence on what the Zanetti settlement covered. With the offset, Serock argued Ledcor was entitled to minimal judgment of only \$20,495.26. *CP 384-397*.

Ledcor pointed out the trial court had considered and rejected Serock's offset defense on multiple independent grounds and this Court

had reviewed the trial court's ruling on offset and found no error. *CP 473-480*. The Zanetti settlement did not change anything; there was still not one shred of evidence that Ledcor had received a double recovery or that the Zanetti settlement covered the same repair damages Ledcor was seeking against Serock. *Id.* There was simply no reason to revisit an issue that had been considered and rejected multiple times.

Following oral argument, the trial court entered an order granting Ledcor's motion for an award of indemnity and post judgment interest and denying Serock an offset.⁶ *CP 482-485*. The order made the following awards to Ledcor: (1) an award of \$127,500.00 as indemnity damages for the cost to repair Serock's defective work on the seven buildings, bringing Ledcor's award, including damages affirmed on appeal to \$296,238.24; (2) post-judgment interest of \$108,712.27 (on the \$296,238.24 award); and (3) permission to file an *additur* for attorney fees and costs incurred on remand under the prevailing party fee provision in the subcontract. *Id.*

Ledcor filed a motion for an *additur*, which was granted, awarding Ledcor \$21,502.50 in fees and costs and an additional \$3,700.95 in post-

⁶The trial court denied Ledcor's request for pre-tender defense fees. Because Ledcor believes that all of the trial court's rulings on remand fall within its broad discretion, Ledcor is not appealing that ruling.

judgment interest. *CP 493-499; 550-552.*

On July 28, 2009, Judgment on Remand was entered in the amount of \$430,153.96. *CP 546-549.* This appeal followed.

E. Serock Files Its Second Appeal.

On August 21, 2009, Serock filed its second appeal. *CP 553-556.* Once again, Serock appealed multiple discretionary rulings made by the trial court: (1) its ruling Serock was not entitled to an offset; (2) its indemnity damage award of \$127,500.00 for the cost to repair Serock's defective work on the seven buildings; and (3) its award of prevailing party attorney's fees and costs on remand. *CP 553-556.* All three rulings were made within the trial court's sound discretion.

IV. ARGUMENT

A. The Parties Agree the Standard of Review for All Three Issues Raised by Serock is Abuse of Discretion.

In its opening brief, Serock states that the standard of review for the three rulings it is appealing is abuse of discretion. Ledcor agrees.

The standard of review of the trial court's ruling on whether to grant an offset is abuse of discretion. *Eagle Point Condo. Owners Assoc. v. Coy*, 102 Wn. App. 697, 701, 9 P.3d 898 (2000).

The standard of review for the trial court's indemnity damage

award is whether the trial court, as the trier of fact, abused its discretion by basing its award on unsupported facts. *Mayer v. Sto Industries*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006); see also *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 850, 792 P.2d 142 (1990)(trier of fact has discretion to award damages which are within the range of relevant evidence and appellate court will not disturb a damage award unless it is outside the range of substantial evidence in the record); *Bingham v. Lechner*, 111 Wn. App. 118, 45 P.3d 562 (2002), *review denied*, 149 Wn.2d 1018 (2003)(trial court's damage award will be affirmed if it is supported by the findings of fact).

The amount of the trial court's prevailing party fee award will be overturned only when there is a manifest abuse of discretion. *Faraj v. Chulisie*, 125 Wn. App. 536, 548, 105 P.3d 36 (2004).

The discretionary standard correctly recognizes that broad deference is owed to the trial court, which is in a better position to decide the discretionary issues in question. *Wash. State Physicians Ins. Exchange v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). An appellate court will find an abuse of discretion *only* when there is a clear showing the trial court's exercise of discretion was manifestly unreasonable or

exercised on untenable grounds or for untenable reasons. *T.S. v. Boy Scouts of America*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006).

“A discretionary decision rests on ‘untenable grounds’ or is based on ‘untenable reasons’ if the trial court relies on unsupported facts or applies the wrong legal standard; the court’s decision is ‘manifestly unreasonable’ if ‘the court, despite applying the correct legal standard to the supported facts, adopts a view ‘that no reasonable person would take.’” *Mayer v. Sto Industries*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006), quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). This is true regardless of the fact that the Court of Appeals might have decided the issues differently had it been sitting as the trier of fact.

B. The Trial Court Did Not Abuse Its Discretion When It Once Again Denied Serock’s Request for an Offset.

The trial court did not abuse its discretion in once again denying Serock an offset. Serock merely re-hashes the same arguments that have been rejected on multiple occasions by the trial court and this Court.

Following the bench trial, Serock filed a post-trial motion seeking an offset from Ledcor’s settlements with other subcontractors. *CP 306-316*. The trial court denied Serock’s post-trial motion on multiple independent grounds: (1) Serock waived its affirmative defense by not

pleading it; (2) Serock did not present evidence of offset at trial; and (3) Serock failed to submit evidence Ledcor obtained a double recovery. *Id.*

Serock could have elicited testimony from Ledcor's witnesses at trial as to the amounts of Ledcor's settlements. It chose not to. Serock could have presented expert testimony at trial as to the cost to repair Serock's work and cost to repair the work of other trades. It chose not to. There is no evidence that the two courses of siding removed between the windows to repair Serock's defective work were defectively installed by Zanetti. There is no evidence what defective work Zanetti performed or what the cost to repair Zanetti's defective work was. As the trial court correctly recognized, Serock failed to present *any* evidence to support offset.

When Serock first appealed the trial court's denial of an offset, this Court affirmed the trial court's ruling. *Harmony, supra*, 143 Wn. App. at 359. Serock made the same argument then that it makes here – that the damages awarded to Ledcor include the work of other trades. This Court rejected those arguments, holding:

Serock argues that the damages awarded to Ledcor include the work of other subtrades with whom Ledcor settled prior to trial. However, substantial evidence supports the trial court's finding that the damages awarded to Ledcor were

caused by Serock's defective work, and no evidence was presented showing that Ledcor previously recovered for repairing the same work. We affirm the trial court's denial of offset.

Harmony, 143 Wn. App. at 359. This Court did not remand this case for further proceedings on offset.

This Court also denied Serock's motion to reconsider its offset ruling. In its Order denying Serock's motion for reconsideration, this Court stated the trial court "**could**" – **not "should" or "must"** – consider additional evidence if it saw fit to do so. *CP 423*. This Court's statement implicitly recognizes that the trial court would not abuse its discretion if it saw fit not to consider additional evidence of offset. Therefore, the trial court's decision not to consider additional evidence cannot constitute an abuse of discretion because it is consistent with this Court's directive.

Serock completely failed to meet its burden to prove it was entitled to an offset. Offset is an equitable affirmative defense and the party asserting the defense bears the burden of proving it. *Puget Sound Energy v. Alba General Ins.*, 109 Wn. App. 683, 695-696, 10 P.3d 445 (2000); *affirmed*, 149 Wn.2d 135 (2003)(insurer asserting equitable defense of offset bears the burden of proving plaintiff has already been made whole

by prior settlements).⁷

In addition, Serock knew *before* Ledcor filed its motion for summary judgment the trial court was not going to consider additional evidence of offset because it had already denied Serock's request to re-open discovery following remand. *CP 661-663*. Because Serock did not appeal that ruling, it is the law of the case.

Serock's argument that the *Eagle Point* case supports applying an offset in this setting has already been rejected by the trial court and this Court because the circumstances in that case are distinguishable. In *Eagle Point*, both parties submitted evidence and expert testimony at trial on whether a settlement with another party covered the same damages sought in that case and whether an offset was necessary to avoid a double recovery. 102 Wn. App. at 701-703. After considering all of the evidence, the trial court in *Eagle Point* ruled an equitable offset of \$55,000 was appropriate under the circumstances. *Id.* On appeal, this Court held

⁷On page nine of its Brief, Serock mistakenly argues it is Ledcor's burden to prove the Zanetti settlement did not include money to repair all of Serock's defective work based on the *Eagle Point* case. The *Eagle Point* case is distinguishable because in that case both parties submitted evidence and expert testimony on offset at trial. Here, Serock submitted no evidence or expert testimony on offset at trial even though it knew before trial began that Ledcor had settled with Zanetti. The Zanetti settlement is not even in evidence. Serock does not get another chance four years after discovery and the trial have been completed to start the entire process over.

the trial court was within its discretion to award an offset. This Court did not hold the trial court would have abused its discretion if it had denied an offset. It properly recognized the trial court has broad discretion in this area because it is in the best position to judge whether an offset is appropriate based on the evidence admitted at trial.

The circumstances here are far different. Serock argues the \$236,000.00 settlement between Ledcor and Zanetti, which is mentioned in passing in *Ledcor v. Mutual of Enumclaw, supra*, covers exactly the same repairs as the repairs for Serock's defective work.⁸ *Serock's Brief*, p. 2. Serock's statement is incorrect and irresponsible. There is not one shred of evidence to support it: no testimony; no documents; and no exhibits. Serock offered no evidence of what Zanetti's scope of work was, no evidence of what defective work it performed, no evidence of what the necessary repairs to Zanetti's work were, and no evidence of what the cost to repair Zanetti's defective work was. Serock chose not to present any expert testimony at trial regarding the cost to repair Zanetti's defective

⁸On page 5 of its Brief, Serock states: "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." In support of its statement, Serock cites page 358 of the *Harmony* decision. Page 358 of the *Harmony* decision states that \$255,000 is the total cost to repair the defects in Serock's work. It says nothing about the total cost to repair all of the siding defects at and around Phase I of the project. Serock's statement is, at a minimum, greatly exaggerated.

work and whether that repair was identical to the cost to repair Serock's defective work. The record is devoid of any evidence Ledcor recovered for the same damages twice because it has not. Without such evidence, an offset would be based on pure speculation and result in a windfall to Serock. Although equity may be used to prevent a windfall, it will not be used to provide a windfall. *See Bank of America v. Prestance Corp.*, 160 Wn.2d 560, 567, 160 P.3d 17 (2007).

The trial court's denial of an offset defense it previously rejected should be affirmed because it was within the trial court's broad discretion.

C. The Trial Court Did Not Abuse Its Discretion in Awarding Indemnity Damages of \$127,500.00 for the Cost to Repair Serock's Defective Work on the Seven Buildings.

The trial court did not abuse its discretion in awarding indemnity damages of \$127,500.00 for the cost to repair the seven buildings. The trial court's award is supported by its own findings of fact, which in turn are supported by credible, persuasive and un rebutted expert testimony. *CP 306-316*. There is a strong presumption the determination of damages by the fact-finder [here, the trial court] is valid. *Delahunty v. Cahoon*, 66 Wn. App. 829, 832 P.2d 1378 (1992).

Serock challenges only the amount of the award, not the decision

to award indemnity damages.⁹ Serock contends the trial court abused its discretion in awarding \$127,500.00 in indemnity damages because the award is 25 percent more than the vacated \$95,625.00 contract award. But damages are uniquely within the purview of the trier of fact. *Mason, supra*, 114 Wn.2d at 850.

The trial court's indemnity damage award is amply supported by its own findings of fact. *CP 306-316*. Based on credible, persuasive and un rebutted expert testimony, the trial court found the total cost to repair Serock's defective work was \$255,000.00. *CP 310 - Finding 14*. Based on its finding, the trial court concluded the total cost to repair Serock's defective work on the seven buildings was 50 percent of the total cost to repair Serock's defective work, which was \$127,500.00. *CP 314 - Conclusion 12*. In making its contract damage award for the seven buildings, the trial court made an additional reduction of 25 percent to eliminate the cost of removing and replacing the metal flashing between the windows because metal flashing was not part of Serock's scope of work. *CP 310 - Finding 13; CP 314 - Conclusion 13*. This reduced the

⁹Serock states that it offered "no opposition" to whether Ledcor could recover cost of repair damages for the seven building under an indemnity theory after this Court vacated the breach of contract award as untimely. *Serock's Brief, p. 14*.

contract damage award to \$95,625.00.

On appeal, this Court did not disturb Finding 14 that the total cost of repair was \$255,000.00. In vacating the contract damage award, this Court necessarily vacated Conclusions 12 and 13 on the amount of contract damages for the seven buildings.

Finding 14 conclusively established that the cost to repair Serock's work on the 13 buildings *was* \$255,000.00. On remand Ledcor sought an indemnity damage award for seven of those 13 buildings because its contract damage award had been vacated on appeal. Based on the established facts of the case, the trial court properly concluded damages for the cost to repair the seven buildings under the indemnity agreement was 50 percent of the total cost to repair the 13 buildings, which is \$127,500.00. Essentially, the trial court entered a new Conclusion 12 as its award of indemnity damages for the seven buildings. The trial court decided not to further reduce the damages by 25 percent because it agreed with Ledcor that the metal flashing had to be removed and replaced in order to repair Serock's defective work and thus was part of the consequential damages flowing from Serock's defective work. The trial court's indemnity damage award was supported by its findings and was

within its discretion. It was also supported by binding authority from this Court and the Washington State Supreme Court. *See Harmony, supra*, 143 Wn. App. at 358; *T&G, supra*, 165 Wn.2d at 270.

A trial court's determination of damages is given substantial deference on review. Evidence of damage is sufficient if it affords a reasonable basis for estimating the loss and does not subject the trier of fact to mere speculation or conjecture. *Eagle Point, supra*, 102 Wn. App. at 704. In *Eagle Point*, the trial court made its own rough estimates of damages rather than accepting the estimates provided by the parties. *Id.* This Court affirmed the trial court's damage estimate, holding the evidence provided a reasonable basis for the court's damage estimate. *Id.*

Here, the trial court's damage award is supported by credible, persuasive and unrebutted expert testimony. *CP 310 - Finding 14*. The trial court was in the best position to decide the proper amount of damages. It was the fact-finder at trial. It heard and considered all of the evidence presented and made determinations as to the credibility of witnesses. Its damage award should not be surprising given Serock presented no evidence of damages and no expert testimony at trial.

The trial court's indemnity award is also consistent with the broad

scope of the indemnity obligation owed by Serock. Indemnity is a distinct and separate equitable cause of action which requires full reimbursement and transfers liability from the one who has been compelled to pay to another who rightfully should bear the loss. *Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 588, 5 P.3d 730 (2000). The indemnity agreement in Serock's subcontract is extremely broad – it requires Serock to indemnify Ledcor “from any and all claims, demands, losses and liabilities to or by third parties arising from, resulting from or connected with the work to be performed under this Subcontract.” CP 364. The trial court fully reimbursed Ledcor for the cost to repair the seven buildings.

In addition, the trial court's indemnity award is consistent with this Court's statements in *Harmony* that the trial court could award damages for the cost to remove and replace the work of other trades. Its ruling is also consistent with the holding by the Washington Supreme Court in *Mutual of Enumclaw v. T&G, supra*, that recoverable damages include the cost to remove and replace the work of other trades. 165 Wn.2d at 270.

Serock's sole argument that the metal flashing was defectively installed by another subtrade is not supported by the findings of fact. *Serock's Brief*, p. 13. The trial court did not enter any finding that the

metal flashing itself was defectively installed. *See CP 304-314*. Serock is bound by the established findings of fact.

In addition, Serock's statement on page 13 of its Brief that this Court stated on pages 358-359 of the *Harmony* decision that: "the flashing itself was defective and had to be repaired without regard to Serock's work" is not true. There is no finding of fact that the metal flashing was defective and this Court never stated it was defective.

Because Serock fails to meet its heavy burden to show the trial court abused its discretion in making its indemnity award, it should be affirmed.

D. The Trial Court Did Not Abuse Its Discretion When It Awarded Leducor Prevailing Party Attorney Fees for Obtaining Judgment on Remand.

The trial court did not abuse its discretion in awarding Leducor its fees under the prevailing party fee provision in the subcontract. Leducor prevailed on its summary judgment motion and was awarded \$127,500.00 in indemnity damages and \$108,712.27 in post judgment interest; in addition, Serock's request for an offset of \$236,000.00 was denied. *CP 482-485*. The order granting summary judgment expressly authorized Leducor to file a motion for an *additur* for attorney fees and costs under the

prevailing party fee provision in the subcontract. *Id.*

Ledcor is entitled to a fee award because it was the prevailing party. An attorney fee award is appropriate when there is a prevailing party fee provision in the parties' contract. *Marine Enterprises, Inc. v. Security Pacific Trading Corp.*, 50 Wn. App. 768, 750 P.2d 1290 (1988).

As the Washington Supreme Court has held:

When the question is one of money damages, the decision about which party prevails or substantially prevails is easy. The party that receives judgment is the prevailing party.

Blair v. Washington State University, 108 Wn.2d 558, 571, 740 P.2d 1379 (1987).¹⁰ Undeniably, final judgment was entered in Ledcor's favor.

Not only did Ledcor prevail, it prevailed by a considerable margin. Serock argued Ledcor was only entitled to judgment of \$20,495.26. *CP 384-397*. On July 28, 2009, the trial court entered final judgment in favor of Ledcor and against Serock in the amount of \$430,153.96 – almost 21 times Serock's figure. *CP 546-549*.

Ledcor's motion for an *additur* was properly supported by a declaration from its attorney, Scott Samuelson, with attached billing

¹⁰Although Serock's subcontract has a bilateral contract fee provision, RCW 4.84.330, which applies when there is a unilateral contract fee provision, similarly defines the "prevailing party" as "the party in whose favor final judgment is entered."

invoices documenting fees and costs incurred in prevailing on remand. *CP 493-499, 500-530*. A prevailing party fee award may be supported by and based upon an attorney declaration. *Bank of America v. Hubert*, 153 Wn.2d 102, 123, 101 P.3d 409 (2004). The trial court ruled Ledcor's hourly rate for attorneys and paralegals was reasonable. *CP 482-485*. Serock did not present any evidence Ledcor's fees were unreasonable.

Serock argues the trial court abused its discretion in awarding Ledcor all of its fees from the summary judgment motion because Ledcor did not prevail on every issue. *Serock's Brief, p. 14*. Serock presents no legal authority to support its argument, which is directly contrary to the language of the subcontract, which provides the prevailing party shall recover all of its **actual** fees and costs. *CP 329, 346*.

Ledcor clearly was the prevailing party and the trial court's fee award was well within its broad discretion. *See Ethridge v. Hwang*, 105 Wn. App. 447, 460, 20 P.3d 958 (2001). Ultimately, the fee award must be reasonable given the results obtained. *Id.* at 461. Ledcor obtained a judgment in excess of \$430,000 on remand. It is difficult to comprehend how a discretionary fee award of \$21,000 could be unreasonable.

Again, Serock has failed to meet its heavy burden to show a

manifest abuse of discretion by the trial court and its prevailing party fee award should be affirmed.

E. Ledcor Requests an Award of Fees on Appeal Under RAP 18.1.

RAP 18.1(a) and (b) provide that a party who has a right to recover reasonable attorney's fees or expenses on review must request an award of fees in its opening Brief. Ledcor requests an award of reasonable attorney's fees and expenses on appeal if it prevails under the indemnity agreement in Appendix E of the Subcontract and the prevailing party fee provision in section 7.4 of the Subcontract.¹¹

V. CONCLUSION

The trial court did not abuse its discretion in making any of its rulings. Serock did virtually nothing to defend the claims asserted by Ledcor and its predicament is entirely of its own making. In its answer, Serock failed to plead waiver, laches, or offset. During discovery, Serock took no depositions, conducted no investigation, and disclosed no fact or expert witnesses. At trial, Serock presented one witness (Ed Serock) and no expert testimony. It elicited no testimony and no evidence of other settlements from Ledcor's witnesses at trial. It is not surprising Serock

¹¹Because Serock did not request its fees on appeal in its opening brief under RAP 18.1, it waived any claims for fees on appeal it may have had.

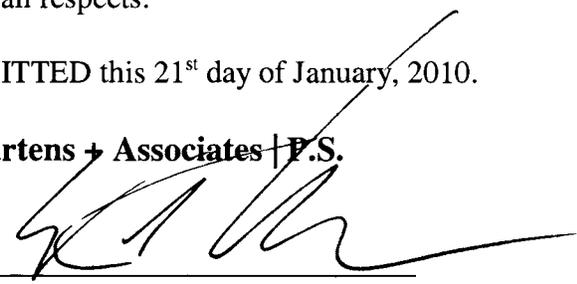
lost at trial and lost on post-trial motions. Serock did not prevail on remand because its arguments were not supported by the evidence, whereas Leducor's arguments were supported by the findings of fact.

Further, Serock repeatedly makes statements in its Brief regarding purported facts that are not in the record and simply do not exist, in a desperate attempt to convince this Court that it should get another chance to present the case it now wishes it had presented at trial. Well, it did not happen and it is much too late now.

Frankly, it is time to put this litigation to rest. Serock has had a full and fair opportunity to defend Leducor's claims and its arguments were rejected by the trial court because they were not supported by any evidence. Because Serock merely re-hashes the same arguments that have already been soundly rejected, Serock's appeal should be dismissed and the learned trial court affirmed in all respects.

RESPECTFULLY SUBMITTED this 21st day of January, 2010.

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By 

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January, 2010, I caused to be served true and correct copies of the foregoing Brief of Respondent on the court and counsel as follows:

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

DATED THIS 21st day of January, 2010.



Matthew C. Morgan
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