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No. 65833-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

LEDCOR INDUSTRIES (USA) INC.,
a Washington corporation,

Appellant,

vs.

S.Q.I., INC., a Washington corporation; BORDAK BROTHERS, INC.,
an Oregon corporation; *et al.*,

Respondents.

BRIEF OF APPELLANT

Martens + Associates | P.S.

Richard L. Martens, WSBA # 4737
Scott A. Samuelson, WSBA # 23363
Steven A. Stolle, WSBA # 30807
Rose K. McGillis, WSBA # 34469
Kathleen A. Shea, WSBA # 42634
Attorneys for Petitioner
Ledcor Industries (USA) Inc.
705 Fifth Avenue South, Suite 150
Seattle, WA 98104-4436
Telephone: (206) 709.2999

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2011 MAY 27 PM 3:50

ORIGINAL

CORPORATE DISCLOSURE

Ledcor Industries (USA) Inc., is a Washington corporation, duly organized under the laws of the State of Washington, and is not publicly traded.

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I. INTRODUCTION

Appellant Ledcor Industries (USA) Inc. (“Ledcor”), plaintiff below, asks this Court to reverse multiple summary judgment orders dismissing its indemnity claims against its subcontractors on the ground they were untimely under the construction statute of repose, RCW 4.16.310.¹ This appeal follows a grant of discretionary review.

The primary issue on appeal is whether summary judgment was proper when the evidence regarding the date of substantial completion was in dispute. Substantial completion is inherently a factual inquiry.

Ledcor’s indemnity claims accrued on July 28, 2009, when it settled the underlying construction claims. Consequently, to be timely, Ledcor had to present evidence that substantial completion occurred within six years of settlement, i.e., on or after July 28, 2003. It did so.

As the non-moving party, Ledcor submitted evidence from the architect that the project was not substantially complete until sometime after September 2003. When Ledcor asked the architect in April 2003 to certify the project was substantially complete, the architect declined to do

¹ Under RCW 4.16.310, a construction claim must accrue within six years of substantial completion *or* within six years of termination of the subcontractor’s services, *whichever is later*. Substantial completion is defined as “the state of completion reached when an improvement upon real property may be used or occupied for its intended use.”

so because, in his opinion, there was too much work still to be done.²

Ledcor and Admiral Way agreed in an Addendum to the Prime Contract that substantial completion occurred in February 2004.

Ledcor's evidence created an issue of fact as to whether its indemnity claims were timely. The trial court initially agreed. However, on reconsideration, the trial court held substantial completion occurred as a matter of law when a Certificate of Occupancy for a portion of the project issued in March 2003.³ The architect's testimony and the trial court's ruling were in direct conflict. The trial court cannot resolve a disputed issue of fact against the non-moving party on summary judgment.

II. ASSIGNMENT OF ERROR

A. Assignment of Error.

1. The trial court erred as a matter of law in summarily dismissing Ledcor's indemnity claims against several of its subcontractors as untimely under the construction statute of repose, RCW 4.16.310.

² In the Prime Contract, the architect was designated by the owner (Admiral Way) and the contractor (Ledcor) to determine when substantial completion occurred. The terms and conditions in the Prime Contract were incorporated into each subcontract by a broad flow-down provision.

³ The Certificate of Occupancy issued by the City of Seattle is dated the 14th day of March, 2003. It states, in part: ". . . occupy per plan except retail (under separate permit) phase II of II." A copy of the Certificate is attached in the Appendix of this brief at A-1.

B. Issues Relating to Assignment of Error

1. Where a developer and general contractor agree by contract to designate the architect to determine the date on which a project is substantially complete, is the architect's opinion evidence of when substantial completion occurs under the construction statute of repose, RCW 4.16.310? (Assignment of Error No. 1)

2. Whether the trial court erred in ruling substantial completion occurs as a matter of law when a Certificate of Occupancy is issued by a municipality – covering only part of the project – given there is evidence that the architect, general contractor, and developer all agreed the project was not substantially complete on that date? (Assignment of Error No. 1)

3. Whether the trial court erred in summarily dismissing a general contractor's indemnity claims under the termination of services prong of the construction statute of repose, given there was evidence that its subcontractors performed work within six years of the date of accrual of those claims? (Assignment of Error No. 1)

III. STATEMENT OF THE CASE

A. Factual Background of the Underlying Admiral HOA Litigation and the Admiral Subcontractor Litigation.

The Project. This is a construction defect action arising out of the construction of the Admiral mixed-use project (“Project”) in West Seattle. *CP 183.* The Project contained 69 residential units, ground floor commercial space, underground parking, and a Bartell Drug Store. *Id.*

Admiral Way was the owner/developer. *CP 183.* Ledcor was the general contractor. *Id.* The subcontractors involved in this appeal are: (1) Bordak Brothers, Inc. (“Bordak”), the stucco siding subcontractor; (2) SQI, Inc., the roofing subcontractor; (3) Exterior Metals, Inc., a metal siding subcontractor; (4) Skyline Sheet Metal, Inc., a metal siding subcontractor; and (5) Scapes & Co., Inc., the roof deck and irrigation subcontractor.

Ledcor entered into a written agreement (the “Prime Contract”) with Admiral Way to build the Project and retained the subcontractors who possessed the necessary expertise to build it. *CP 429-480.*

Bordak’s subcontract. Bordak and Ledcor entered into a Standard Form Subcontract Agreement.⁴ *CP 24-74.*

⁴ Five subcontractors in this appeal (Bordak, SQI, Skyline Sheet Metal, Exterior Metals, and Scapes) were granted summary judgment dismissal of Ledcor’s indemnity claims on the ground they did not timely accrue under the construction statute of repose. All five subcontractors had the same form subcontracts with identical indemnification agreements. A sixth subcontractor, United Systems, Inc., was denied summary judgment against Ledcor because of a tolling agreement. Because Bordak brought the initial motion and received the initial order summarily dismissing Ledcor’s indemnity claims, this motion primarily discusses Bordak’s subcontract and work. If summary judgment was improper as to Bordak, as Ledcor contends, it was also improper as to the other subcontractors. To

In the Indemnification Addendum, Bordak specifically promised to defend, indemnify, and hold Ledcor harmless from any and all claims arising out of Bordak's work without any maximum limits of liability.⁵ *CP 74 - Appendix F.* Under this negotiated addendum (which is valid under Washington law), Bordak agreed to assume all risk of loss related to its work, regardless of whether the claims were covered by third party liability insurance policies. *Id.*

In 2002, Bordak retained a lower tier subcontractor, Pacific Coast Stucco ("PCS"), to perform the initial phase of stucco installation. *CP 491 at 25-26.* Bordak was on-site less than one day per week to oversee PCS's work. *CP 491-92 at 28:13 - 29:3.* Bordak and PCS performed 100 percent of the stucco work. *CP 500 at 61:17-21.* In July 2004, Bordak's subcontract services were formally terminated when it executed its Subcontract Closeout Documents, including its Final Release, Waiver of Lien & Claim, and Certification its work was complete. *CP 519-20.*

SQI's subcontract. SQI installed the initial built-up roofing

as to Bordak, as Ledcor contends, it was also improper as to the other subcontractors. To a lesser extent, the work of SQI is also discussed because it performed work more than one year after substantial completion. Ledcor's indemnity claims against SQI are also timely under the termination of services prong of the statute of repose.

⁵ Ledcor has similar written defense and indemnity agreements with all 10 subcontractors, including SQI, Skyline, Exterior, and Scapes. *CP 1163, 1646, 2033, 2139.*

system under a written subcontract dated April 20, 2001. *CP 1198*. In 2005, after the initial roofing system failed, SQI executed a second short form subcontract with a signed indemnity agreement to rebuild the roofing system. *CP 1161-63*. SQI performed this work in May 2005, including priming the existing roofing and torch applying an APP modified base sheet and white granulated cap membrane. *Id.*; *CP 1193*.

Substantial completion of the Project. Section 9.8 of the General Conditions of the Prime Contract designated the lead architect, Carl Pirscher, of CDA Architects, Inc. (“CDA”), to issue a Certificate of Substantial Completion when he believed the Project was substantially complete. *CP 429, 469*. The Prime Contract defined “substantial completion” as “[t]he stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended purpose.”⁶ *Id.*

Under Section 9.8, after the architect prepares a Certificate of

⁶ The statutory definition of the term “substantial completion of construction” is “the state of completion reached when an improvement upon real property may be used or occupied for its intended use.” *RCW 4.16.310*. The contract definition and the statutory definition are nearly identical - both inquiries focus on the date the project as a whole may be used or occupied for its intended purpose. The only difference is that the Prime Contract designates the architect as the person who decides when it occurs under the construction documents.

Substantial Completion, it is submitted to the Owner and Contractor for approval. *CP 469*. The date of substantial completion is an important condition that determines multiple contractual obligations, including the date on which warranties commence and final payment is due. *Id.*

Under the broad flow-down provision in its subcontract, Bordak agreed to be bound by the obligations, terms, and conditions in the Prime Contract to the same extent Ledcor was bound by them; one of the conditions was that the architect determines substantial completion. *CP 40 - Appendix A at ¶3.3: OBLIGATIONS AND RESPONSIBILITIES.*

Bordak acknowledged that a copy of the Prime Contract was made available for its review, so it knew – or should have known – of the General Conditions it agreed to comply with. *Id.* Flow-down provisions are valid and enforceable in Washington. *3A Industries, Inc. v. Turner Constr. Co.*, 71 Wn. App. 407, 417, 869 P.2d 65 (1993).

A Certificate of Occupancy for the residential portion of the Project was issued by the City of Seattle on March 14, 2003. *CP 1820*. A separate Certificate of Occupancy was to be issued at a later date for the retail portion of the Project. *Id.* Mr. Pirscher, an expert in construction practices, testified that the issuance of the Certificate of Occupancy did

not mean the Project as a whole was substantially complete. *CP 546 at ¶15.* According to Mr. Pirscher, certificates of occupancy are regularly issued by municipal agencies when significant work remains to be completed on a project. *Id.* In his opinion, this Project in particular had so many ongoing problems in April 2003 that hundreds of pages of punch lists and Field Directives were issued identifying fundamental work that had to be performed before the Project would be substantially complete.⁷ *CP 543-44 at ¶¶5, 6.* At that time, Mr. Pirscher believed it would take several months to complete this work. *Id.*

In April 2003, Ledcor asked CDA to certify that the Project was substantially complete. Seth Hale, who worked with Mr. Pirscher, declined to do so, writing Ledcor, in pertinent part:

CDA is in receipt of your fax stating the project is substantially complete. It is our understanding that [multiple units] are currently under repair due to water damage and [multiple units] are pending from previous

⁷ As Mr. Pirscher testified:

The Punch Lists were more extensive than any such lists I had ever prepared on a project of this kind. Indeed, while typically a punch list contains minor items, the Punch Lists I provided to Ledcor identified several **fundamental issues** with the Admiral's construction. In fact, to call my lists a "punch list" is actually a misnomer as they are more accurately described as **Field Directives** given the substantial amount of items needing work and repair by Ledcor. (*CP 544 at ¶ 7*) (*Emphasis supplied*).

water damage and possible mold intrusion. ***This in our opinion does not constitute substantial completion.***
CP 551. (Emphasis supplied).

In April 2003, CDA conducted a detailed inspection of the Project to determine its degree of completeness. *CP 553-64.* Following the inspection, Mr. Hale wrote Admiral Way, in pertinent part: “The project is not yet substantially complete.” *Id. (Emphasis in original).*

Although some items in the punch lists and Field Directives were minor, many were fundamental, including extensive water damage in unit interiors, defective deck membranes on exterior unit decks, damaged building paper that needed to be replaced, interior and common area repainting, defective stucco finish, defective hardiplank siding installation, and lack of caulking at metal siding and deck interfaces.⁸ *CP 1094-1159.*

As late as September 2003, Mr. Pirscher still could ***not*** issue a Certificate of Substantial Completion because there were so many exterior and interior items that remained to be completed. *CP 545-46 at ¶14.*

In the fall of 2003, to save money, Marc Gartin, the owner of Admiral Way, removed Mr. Pirscher from day to day monitoring of the Project even though there was still substantial work to be completed. *CP*

⁸ A three page list of fundamental work items that still had to be completed as of April 1, 2003, is attached in the Appendix at A-2 - A-4.

536-37 at §§ 20, 21. Because the Project was not substantially complete before he left, Mr. Pirscher did not issue a Certificate of Substantial Completion. *Id.* Under the Prime Contract, he was the only one who could. Leducor continued working throughout October 2003. *Id.* According to Mr. Gartin, the Project was still not substantially complete at the end of December 2003. *CP 537 at §§ 22-23.*

On February 10, 2004, Leducor and Admiral Way executed a Construction Agreement Addendum in which they agreed – for the first time – that “the Project is complete with the exception of the items listed in the Punch List” *CP 526-29.* Mr. Gartin testified: “Since the Agreement was executed in February of 2004, [Leducor and Admiral Way] agreed that substantial completion did not occur until that point.” *CP 538 at § 25.* According to Mr. Gartin, Admiral Way withheld final acceptance of the work and final payment until the Addendum was executed. *Id.*

Problems are discovered at the Project. In June 2007, Colin Murphy of Trinity/ERD, the Admiral HOA’s construction consultant, conducted an intrusive investigation of the Project’s building envelope and issued an investigation report. *CP 566-597.* Mr. Murphy, a licensed architect, concluded, among other things, that:

The observed stucco installations including the WRB, sealant joints, metal flashings and flexible flashings are deficient and allows water to infiltrate and cause elevated moisture readings and mold.

CP 578. Trinity/ERD recommended removal and replacement of 100 percent of Bordak's work because it was defective and caused damage to the Project. *CP 582.*

The Trinity/ERD report also identified multiple deficiencies in the roofing membrane installed by SQI, which resulted in water being trapped under the roofing membrane and entering the building envelope and called for removal and replacement of the roofing membrane. *CP 581-82.* In addition, Trinity/ERD identified multiple defects in the metal siding work performed by Exterior Metals and Skyline Sheet Metal and the decking and irrigation work performed by Scapes. *CP 566-597.*

The Admiral HOA litigation. In July 2007, the Admiral HOA sued Admiral Way for defective construction of the Project. *CP 599-606.* The Admiral HOA filed a List of Known Construction Defects with its Complaint, which identified, among other things, stucco, roofing, metal siding, and decking defects. *CP 608-13.* In September 2007, Admiral Way filed a third party complaint against Ledcor for defective construction performed by its subcontractors. *CP 615-30.*

On July 28, 2009, the Admiral HOA, Admiral Way, and Ledcor reached a three-way settlement in which Ledcor paid \$2.7 million and Admiral Way paid \$2 million to the Admiral HOA, for a total settlement of \$4.7 million. *CP 664-65*. Ledcor's indemnity claims against its subcontractors accrued on the date of settlement. *Id.*

The Admiral subcontractor litigation. In August 2008, Ledcor filed a separate action against its subcontractors, including Bordak, SQI, Exterior Metals, Skyline Sheet Metal, and Scapes, asserting claims for breach of contract, defense, insurance, and indemnity. *CP 1969-80*.

Through its indemnity claims, Ledcor sought reimbursement from the subcontractors who performed the defective work which resulted in Ledcor paying \$2.7 million to settle the claims made by Admiral Way and the Admiral HOA. In their respective Indemnification Addendums, the subcontractors broadly promised to reimburse Ledcor for all losses, liability, and damages incurred by Ledcor arising from their work.

B. Procedural History of Bordak's Motion and SQI's Joinder.

The procedural history is extensive. On August 14, 2009, Bordak filed its motion for summary judgment dismissal of Ledcor's claims for breach of contract and indemnity. *CP 168-180*. The motion was purely

procedural, seeking dismissal based on the statute of limitations and statute of repose. *Id.* SQI filed a three-page partial joinder with no exhibits on a discrete issue – SQI contended Ledcor’s indemnity claims did not accrue within six years of substantial completion. *CP 420-422.*

Ledcor filed an initial Response on August 31, 2009. *CP 181-98.* After Bordak re-noted its motion, Ledcor filed an updated Response and supporting materials on October 26, 2009. *CP 423-665; CP 666-685.*

At the November 6, 2009, hearing, the trial court requested additional briefing and continued the motion to January 29, 2010. Ledcor filed additional briefing. *CP 897-922.* Admiral Way filed a joinder in Ledcor’s opposition to Bordak’s motion. *CP 994-1003.*

Following oral argument on January 29, 2010, the trial court denied Bordak’s motion for summary judgment in its entirety and SQI’s joinder. *CP 1034-1038.*

On February 10, 2010, Bordak filed a motion for reconsideration of the indemnity ruling. *CP 1039-47.* Ledcor filed a response. *CP 1078-1204.* After the trial court requested additional briefing, Ledcor and Admiral Way filed briefing in May 2010. *CP 1231-54.*

On June 4, 2010, the trial court granted Bordak’s motion for

reconsideration dismissing Ledcor's indemnity claims (the "Bordak ruling"). *CP 1550-52*. Ledcor moved for reconsideration, or in the alternative, to certify the Bordak ruling for immediate appeal and stay the pending proceedings. *CP 1553-69*.

During a June 18, 2010, status conference, the trial court informed the parties that, because Ledcor's indemnity claims against all remaining subcontractors would be affected by the Bordak ruling, immediate review seemed appropriate. On June 22, 2010, the trial court denied Ledcor's motion for reconsideration, certified the Bordak ruling for immediate review, and stayed the action pending resolution of the appeal. *CP 2089-92*. It also granted SQI's motion for clarification that the Bordak ruling included its joinder. *CP 2093-95*.

During a July 16, 2010, status conference, the trial court vacated its June 22, 2010 order, modified the stay to allow other subcontractors to file their own summary judgment motions, and re-certified the Bordak ruling for immediate review under CR 54(b). *CP 2096-98*.

C. Based on the Bordak Ruling, Ledcor's Indemnity Claims Against Several Other Subcontractors Were Dismissed.

Exterior Metals, Skyline Sheet Metal, and Scapes filed similar motions seeking to dismiss Ledcor's indemnity claims under the Bordak

ruling. *CP 1570-88, CP 1950-68, CP 2099-2107*. Based on the Bordak ruling, the trial court dismissed Ledcor's indemnity claims against those three subcontractors *CP 3737-40, CP 3734-3736, CP 3922-28*.

D. Ledcor's Motion for Discretionary Review is Granted.

On August 12, 2010, Ledcor filed a Notice of Discretionary Review. *CP 2710-29*. At oral argument, Commissioner Verellen deferred ruling on Ledcor's Motion until after the other pending summary judgment motions based on the Bordak ruling had been ruled upon. After those rulings were made, the trial court entered a consolidated order certifying all of its indemnity rulings for immediate review. *CP 4038-46*.

Ledcor filed an Amended Motion for Discretionary Review, which included five subcontractors who had obtained orders dismissing Ledcor's indemnity claims as untimely: (1) Bordak; (2) SQI; (3) Exterior Metals; (4) Skyline Sheet Metal; and (5) Scapes. Admiral Way filed a joinder in Ledcor's Amended Motion.

On February 4, 2011, oral argument on Ledcor's Amended Motion for Discretionary Review was conducted before Commissioner James Verellen. On February 10, 2011, the Commissioner's Ruling Granting Discretionary Review was entered.

This appeal followed.

IV. ARGUMENT

A. The Standard of Review of Summary Judgment is *de novo*.

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). In ruling on a motion for summary judgment, the trial court must view the evidence and all reasonable inferences in favor of the nonmoving party – it may grant the motion only when there is no competent evidence that would support a finding for the nonmoving party. *Brown v. Courtesy Ford*, 108 Wn. App. 683, 687, 32 P.3d 307 (2001). On summary judgment, the trial court does not weigh evidence or assess credibility. *Barker v. Advanced Silicon Materials*, 131 Wn. App. 616, 624, 128 P.3d 633 (2006). The same is true when an appellate court reviews a summary judgment order. *Id.*

B. The Trial Court Erred in Summarily Dismissing Ledcor’s Indemnity Claims Given the Architect’s Opinion that the Project Was Not Substantially Complete as of July 28, 2003.

The primary issue is whether the architect’s determination on when the Project was substantially complete creates an issue of fact as to whether Ledcor’s indemnity claims are timely under the construction

statute of repose. In Section 9.8 of the General Conditions of the Prime Contract, Leducor and Admiral Way agreed the architect would determine when the Project was substantially complete. The architect determined the Project was not substantially complete as of July 28, 2003. By contract, the subcontractors agreed to abide by the architect's determination.

On summary judgment, the trial court held substantial completion occurred as a matter of law when the Certificate of Occupancy issued in March 2003, even though the architect had rejected that date outright and even though the certificate covered only a portion of the project.

The contract condition agreed to by Leducor and Admiral Way in which the architect would determine the date of substantial completion was valid and enforceable. It was negotiated by two sophisticated parties, it is reasonable, and it does not violate public policy.

In ruling on whether there was an issue of fact as to the date of substantial completion under the statute of repose, the trial court should have considered the architect's determination and therefore denied Bordak's motion for summary judgment dismissal of Leducor's indemnity claims.

1. **Washington endorses freedom of contract.**

The Washington Supreme Court has endorsed the principle of freedom of contract, under which parties are free to enter into, and courts will enforce, contracts that do not contravene public policy. *Keystone v. Xerox Corp.*, 152 Wn.2d 171, 176, 94 P.3d 945 (2004). This freedom of contract principle is particularly important in the construction industry. As the Washington Supreme Court stated:

[I]t is in [the construction] industry that we see most clearly the importance of the precise allocation of risk as secured by contract. The fees charged by architects, engineers, contractors, developers, vendors, and so on are founded on their expected liability exposure as bargained for and provided in the contract.

Berschauer/Phillips v. Seattle School Dist., 124 Wn.2d 816, 827, 881 P.2d 986 (1994).

Ledcor, Admiral Way, and the subcontractors contractually agreed that the architect would be the sole judge of when the Project was substantially complete. *CP 469 at § 9.8; CP 40 at ¶3.3*. That agreement was without limitation, which means the parties intended the architect's determination to apply for all purposes, including the statute of repose.

The architect designed the Project and was on site on a daily basis to monitor its progress. *CP 543-45*. He was the most qualified and knowledgeable person to determine when the Project was substantially

complete. The architect was certainly more qualified than the city inspector who performed a cursory inspection and issued a Certificate of Occupancy in March 2003. The architect vehemently disagreed with the notion that substantial completion of this Project occurred in April [sic] 2003 and opined that certificates of occupancy are commonly issued before a project is substantially complete. *Id.* As late as September 2003 (after the critical July 28, 2003 date), there was so much ongoing work to be completed that the architect was still unable to issue a Certificate of Substantial Completion. *CP 545-46 at ¶14.*

The substantial completion provision in the Prime Contract uses the same standard as the construction statute of repose, i.e., it is defined as the date on which the Project as a whole may be used or occupied for its intended purpose. All parties agreed to abide by the architect's determination that the Project as a whole was not ready to be used or occupied for its intended purpose in April 2003.⁹ As of that date, the

⁹ In fact, when Ledcor asked the architect to certify the Project as substantially complete in April 2003, the architect declined to do so because so much work remained to be completed. *CP 551.* Because Ledcor knew the architect was designated by contract to decide when the Project was substantially complete, it accepted that the Project was not substantially complete until the architect said so. Ledcor complied with its contractual obligations. The subcontractors should be required to the same. The architect's determination that the Project was not substantially complete as of April 2003 should apply equally to Ledcor and its subcontractors.

Project was not substantially complete for purposes of the Prime Contract or the construction statute of repose.

Ultimately, Leducor and Admiral Way contractually agreed in an Addendum to the Prime Contract that the Project was substantially complete in February 2004. *CP 526-29*. Under the flow-down provisions, the Addendum was incorporated into each subcontract. Because the Addendum provision is valid and enforceable, at a minimum, it raises an issue of fact as to whether Leducor's indemnity claims are timely.

2. Washington allows parties to toll or modify a limitation period by agreement if it is reasonable.

Washington allows parties to modify statute of limitation periods by agreement. *See, Southcenter View Condo. Owners' Assoc. v. Condo. Builders, Inc.* 47 Wn. App. 767, 736 P.2d 1075 (1986) (parties may agree to reasonable time in which to bring claims arising from their agreement); *Yakima Asphalt Paving Co. v. Washington Dep't of Transportation*, 45 Wn. App. 663, 726 P.2d 1021 (1986) ("A contract limitation period prevails over the general statute of limitations unless prohibited by statute or public policy, or unless the provision is unreasonable.")

Although statutes of limitation and statutes of repose are not identical, they are similar. Both limit the ability to bring a claim after a

specified period of time. However, a statute of repose differs from a statute of limitation in that a statute of limitation bars a plaintiff from bringing an already accrued claim after a specific period of time, whereas a statute of repose terminates a cause of action after a specified time, even if the injury has not yet occurred. *1000 Virginia Ltd. Part. v. Vertecs Corp.*, 158 Wn.2d 566, 574, 146 P.3d 423 (2006). Other jurisdictions enforce modifications to statutes of repose by agreement if they are reasonable – the same standard used for modifications to statute of limitation periods.

3. Other jurisdictions allow parties to toll or modify a statute of repose time period if it is reasonable.

Ledcor is not aware of any Washington case that addresses the issue of whether parties may toll or modify a statute of repose by agreement. However, other jurisdictions allow parties to toll or modify a statute of repose period by agreement so long as the tolling agreement or modification is reasonable. *See McRaith v. Seidman*, 909 N.E.2d 310 (Ill. App. 2009). In *McRaith*, the Illinois Court of Appeals held that both a statute of limitation and a statute of repose may be tolled by a private agreement, as long as the action is not tolled indefinitely. *Id. at 314.*

The central issue in *McRaith* was whether the tolling agreement entered into between an insurance company liquidator (the “Liquidator”)

and an auditor (the “Auditor”) was valid and operated to extend the applicable statute of limitation and professional accounting statute of repose.¹⁰ *Id.* at 317-19. After ongoing settlement negotiations ultimately proved unsuccessful, the Auditor moved to dismiss the Liquidator’s claims as untimely. The trial court denied the motion, finding that the tolling agreements were valid, enforceable, and extended both the statute of limitation and the statute of repose. The Auditor appealed.

On appeal, the Auditor argued that the private, indefinite tolling agreement with the Liquidator violated Illinois law and public policy. The Liquidator argued that the tolling agreement and extension were mutually negotiated between two sophisticated parties and that neither the law nor public policy should negate an agreement freely negotiated between two sophisticated parties. *Id.* at 320.

The Illinois Court of Appeals began its analysis by pointing out that the key consideration is whether there is a reasonable duration of tolling time that brings the repose period to an eventual end. *Id.* at 323. The Court recognized that a statute of repose is an affirmative defense subject to forfeiture. *Id.* at 327, citing *Willett v. Cessna Aircraft*, 851

¹⁰ The tolling agreement in *McRaith* was extended 11 times while settlement negotiations were ongoing over several years.

N.E.2d 626 (Ill. App. 2006). The Court also cited the *First Interstate Bank of Denver v. Central Bank & Trust*, 937 P.2d 855 (Colo. App. 1996) decision with approval. *Id.*

In *First Interstate*, the Colorado Court of Appeals held that parties could waive the statute of repose by agreement as long as the waiver was reasonable. 937 P.2d at 860-61. On appeal, the defendant had contended that even if the tolling agreement it had entered into was intended to waive the Securities Act statute of repose (Section 11-51-125(8)), a statute of repose could not be waived. The Colorado Court of Appeals disagreed, citing multiple cases where different statutes of repose had been equitably tolled or expressly waived by agreement in a variety of contexts and jurisdictions.¹¹ *Id.* The Colorado Court of Appeals noted that in general both procedural and substantive statutory rights may be waived so long as the waiver is voluntary. *Id.* The Court concluded that public policy arguments that may militate against equitable estoppel or equitable tolling of a statute of repose do not support a denial of a waiver by express agreement. *Id. at 863.* Accordingly, the Court enforced the waiver of the

¹¹ Other jurisdictions allow parties to modify or toll statutes of repose by agreement. *See, ESI Montgomery, Inc. v. Montenay Int'l Corp.*, 899 F.Supp. 1061,1066 (S.D.N.Y. 1995); *One N. McDowell Assoc. v. McDowell Dev. Co.*, 389 S.E.2d 834, 836 (N.C. App. 1990).

Securities Act statute of repose because it was by express agreement.

The Illinois Court of Appeals in *McRaith* found the Colorado Court of Appeals' decision to be persuasive because it enforced an express agreement by two sophisticated parties to toll the statute of repose.

McRaith, supra, 909 N.E.2d at 327. This Court should do the same here.

4. The contract provision designating the architect to determine the date of substantial completion is reasonable, as is the flow-down provision.

The agreement by Leducor and Admiral Way to have the architect determine the date of substantial completion was negotiated by two sophisticated parties. It is reasonable and enforceable, as is the flow-down provision in which each subcontractor agreed to abide by the conditions set forth in the Prime Contract. The touchstone for whether a statute of limitation or statute of repose may be modified by agreement is whether the modification is reasonable. These provisions easily pass the test.

The contract provision was negotiated and, by definition, it neither necessarily extends nor shortens the statute of limitations or the statute of repose. It merely designates the most knowledgeable person to determine when the Project is ready to be used or occupied for its intended purpose.

At a minimum, the architect's opinion on the date the Project is

substantially complete is evidence of the date of substantial completion under RCW 4.16.310. It is certainly more reliable than a Certificate of Occupancy issued by a city inspector following a cursory walk-through.

Here, the Certificate of Occupancy could not establish the date of substantial completion as a matter of law for three reasons. First, it is a partial Certificate of Occupancy, which only covers Phase I of the Project. *CP 1820*. Second, the architect opined that the Project was several months from being substantially complete when the Certificate of Occupancy was issued, as substantial work remained to be completed. *CP 545-46 at ¶14*. Third, in the Addendum, Leducor and Admiral Way agreed the Project was not substantially complete until February 2004. *CP 526-29*.

C. The Trial Court Erred in Resolving Disputed Fact Issues on Summary Judgment and Concluding Substantial Completion Occurred When the Certificate of Occupancy Issued.

The primary issue is whether the trial court erred by ruling as a matter of law that the issuance of the partial Certificate of Occupancy in March 2003 automatically controls the date of substantial completion under RCW 4.16.310, even when the evidence is in dispute. *CP 1820*. Leducor, the non moving party, submitted testimony by the architect that the Project was not substantially complete on the critical date, July 28,

2003. *CP 545*. If, as Ledcor contends, the Certificate of Occupancy does not automatically determine the date of substantial completion, the architect's testimony alone was sufficient to defeat summary judgment.

1. The date on which substantial completion of construction occurs under the construction statute of repose presents an issue of fact.

Under RCW 4.16.310, construction claims must accrue within six years of "substantial completion of construction" or "termination" of a subcontractor's services, whichever date is later.¹² *Parkridge Assoc. v. Ledcor Industries, Inc.*, 113 Wn. App. 592, 598, 54 P.3d 225 (2002). An indemnity claim accrues when the party seeking indemnity pays or is legally obligated to pay money to resolve a claim. *Central Wash. Refrig. v. Barbee*, 131 Wn.2d 509, 517, 946 P.2d 760 (1997). Here, accrual occurred on the date of settlement, July 28, 2009.

¹² **RCW 4.16.310 - Actions arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvement upon real property – Accrual and limitations of actions or claims.**

All claims or causes of action as set forth in RCW 4.16.310 shall accrue, and the applicable statute of limitations shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later. The phrase "substantial completion of construction" shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use. Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is later, shall be barred. . . .

“‘Substantial completion of construction occurs’ when the *entire improvement*, not merely a component part, may be used for its intended purpose.” *Smith v. Showalter*, 47 Wn. App. 245, 251, 734 P.2d 928 (1987) (*emphasis in original*). Here, the Certificate of Occupancy, on its face, excludes the retail portions of the mixed use project and does not cover the whole Project. *CP 1826*.

Even if it had, if a subtrade performs services after the date of substantial completion, then the statute of repose begins to run on the date the last services were performed. *Parkridge, supra*, 113 Wn. App. at 598. If the date of substantial completion occurs after the subtrade’s services are complete, then the statute of repose runs from the date of substantial completion. *Id.* Both inquiries fundamentally present issues of fact and depend on the particular facts of each case.

Where there is an issue of fact as to when a statutory time period begins to run, summary judgment should be denied. *McLeod v. Northwest Alloys*, 90 Wn. App. 30, 35, 969 P.2d 1066 (1998). Summary judgment should not be granted where there is an issue of fact as to when a construction project as a whole was substantially completed. *See North American Capacity Ins. Co. v. Claremont Liability Ins. Co.*, 177 Cal. App.

4th 272, 286-87, 99 Cal. Rptr. 3^d 225 (2009). As the California Court of Appeals stated in *North American*:

The point at which a job site has been put to its intended use is a question of fact to be determined under the conditions and circumstances of each case. (See *Hammond Lumber Co. v. Yeager* (1921) 185 Cal. 355, 358, 197 P. 111 [issue whether work is complete is an issue of fact, not law]; . . . *Nevada County Lumber Co. v. Janiss* (1938) 25 Cal. App.2d 579, 582-583, 78 P.2d 200 [completion of building is a question of fact . . .].)

It is logical that a residence might be partially inhabited prior to the date of completion, and not yet be put to its “intended use” because the owner does not have full use of the facilities. The owner testified that work continued well past May 2001 and went on for a year after that. The city inspector testified that even though a residence may receive a certificate of occupancy, it did not necessarily indicate the dwelling was habitable and typically interior painting and carpeting or other flooring materials have yet to be installed. (*Emphasis supplied*).

North American, 177 Cal. App. 4th at 286-287.

The *North American* case is instructive because it recognizes that: (1) substantial completion is a fact intensive inquiry; and (2) a project as a whole may not be substantially complete, even though a portion of the project may be inhabited. *Id.* The second principle is particularly pertinent to the Admiral Project, where a few units were sold before the Project as a whole was ready to be put to its intended purpose.

In determining whether the additional work to be completed delays the date of substantial completion, “the decision as to whether work at issue is substantial or trivial is fact sensitive.” *Ellsworth Paulsen Constr. v. 51-SPR, LLC*, 144 P.3d 261, 268-269 (Utah Ct. App. 2006), quoting *Interiors Contracting, Inc. v. Smith, Halander & Smith Assoc.*, 827 P.2d 963, 965 (Utah Ct. App. 1992). “[G]enerally it is for the trier of fact to determine whether the additional work was trivial or minor.” *Id.*, quoting *Carlisle v. Cox*, 506 P.2d 60, 63 (Utah Ct. App. 1973). Further, the question of when the owner accepted the work is fact dependent. *Ellsworth, supra*, 144 P.3d at 268-69. Mr. Gartin testified Admiral Way withheld acceptance of the Project until February 2004 because significant items of work were not complete until that time. *CP 538 at ¶ 25*.

2. **Ledcor’s evidence created an issue of fact as to whether its indemnity claims were timely under the substantial completion prong of the statute of repose.**

Under the substantial completion prong of the statute of repose, the trial court erred in dismissing Ledcor’s indemnity claims because, viewing the evidence in the nonmoving party’s favor, substantial completion did not occur until some point after July 28, 2003.

The architect, Carl Pirscher, opined the Project still was *not*

substantially complete in September 2003. *CP 543-46 at ¶¶ 6-15*. As a result, he could not issue a Certificate of Substantial Completion at that time. The architect for a large project like Admiral is well qualified by his skill, training, experience, and knowledge to offer an opinion regarding when a project is substantially complete. *ER 702*.

Mr. Pirscher's testimony is in direct conflict with the trial court's ruling that the Certificate of Occupancy automatically determines the date of substantial completion under RCW 4.16.310. He opined that a certificate of occupancy does **not** equate to substantial completion and explained why:

15. The issuance of the certificate of occupancy does not mean that a building is substantially complete. Indeed, certificates of occupancies are regularly issued when work remains to be completed on a project. *CP 546*.

The Certificate of Occupancy was not a legal determination that a project is substantially complete. It merely certifies that the non-retail portion of the Project "has been inspected and approved as complying with provisions of the Seattle Building Code." *CP 1820*. A periodic municipal building inspection does not implicitly or explicitly imply that the construction was properly completed. *Taylor v. Stevens County*, 111 Wn.2d 159, 167, 759 P.2d 447 (1988).

The Project, in particular, had so many ongoing problems in March of 2003 (when the Certificate of Occupancy was issued) that Mr. Pirscher issued more than one hundred pages of “Field Directives” in April 2003 identifying major items of work that needed to be completed before he could consider the Project substantially complete. *CP 543 at ¶6.*

Instead of deferring to an expert in construction, the trial court held substantial completion was triggered – as a matter of law – by the issuance of a certificate of occupancy. If the Legislature had intended the statute of repose to commence with the issuance of a certificate of occupancy, it would have said so. It did not. Instead, it used the term “substantial completion” and defined it in terms of when the project as a whole was ready to be put to its intended use. The inquiry is inherently fact driven.

Ledcor has a right to present Mr. Pirscher’s testimony to the trier of fact. If the trier of fact finds Mr. Pirscher’s testimony credible and persuasive – which, given his extensive knowledge and experience, it is – Ledcor’s indemnity claims against Bordak and the other subcontractors are timely. The trial court, however, prevented Ledcor from presenting its evidence to the jury by improperly weighing the evidence and resolving disputed fact issues against Ledcor, the nonmoving party. It is well settled

that a trial court cannot weigh evidence or assess credibility on summary judgment. *Barker, supra*, 131 Wn. App. at 624.

Under its flow-down provision, Bordak agreed to abide by the architect's determination. *CP 40 at ¶3.3*. It is bound by its agreement.

Flow-down provisions are standard in the construction industry and are recognized in Washington and most other jurisdictions. *See, e.g., 3A Industries, Inc. v. Turner Constr. Co.*, 71 Wn. App. 407, 417, 869 P.2d 65 (1993); *Industrial Indem. Co. v. Wick Constr. Co.*, 680 P.2d 1100, 1104 (Alaska 1984); *L&B Constr. Co. v. Ragan Enterprises, Inc.*, 482 S.E.2d 279, 281 (Ga. S.Ct. 1997); *Plum Creek Wastewater v. Aqua-Aerobic Sys., Inc.*, 597 F.Supp.2d 1228, 1233 (D. Colo. 2009); and *Martin County v. R.K. Stewart & Son, Inc.*, 306 S.E.2d 118 (N.C. Ct. App. 1983).

Washington public policy **strongly** favors enforcing contracts as written. This policy applies with special force to construction contracts:

There is a beneficial effect to society when contractual agreements are enforced and expectancy interests are not frustrated. **In cases involving construction disputes, the contracts entered into among the various parties shall govern their economic expectations.** The preservation of the contract represents the most efficient and fair manner in which to limit liability and govern economic expectations in the construction business.

Berschaueser/Phillips, supra, 124 Wn.2d at 828. (*Emphasis supplied*).

In addition, Leducor submitted the Construction Addendum Agreement, executed by Leducor and Admiral Way, as evidence the Project was not substantially complete until February 2004. *CP 526-29*. Marc Gartin testified that the Addendum is the only document that sets forth a date of substantial completion and that Admiral Way expressly withheld final acceptance of the Project until it was signed. *CP 538 at ¶25*.

By ignoring relevant contract provisions, assessing witness credibility, and weighing evidence, the trial court committed an error of law in dismissing Leducor's indemnity claims under the substantial completion prong of the statute of repose.

3. **The Lakeview Condominium case is materially distinguishable from the fact setting in Admiral.**

In its order granting Bordak's motion for reconsideration, the trial court stated it relied upon the analysis discussed in *1519-1521 Lakeview Blvd. Condominium Assoc. v. Apartment Sales Corp.*, 101 Wn. App. 923, 6 P.3d 74, *affirmed* 144 Wn.2d 570, 29 P.3d 1249 (2001). *CP 1550-52*.

In *Lakeview*, the Court of Appeals adopted the date the Certificate of Occupancy was issued as the date of substantial completion as a matter of law because there was no evidence to dispute it. The *Lakeview* case, however, does not support summary judgment dismissal of Leducor's

indemnity claims because the circumstances in *Lakeview* are materially different. Indeed, each case must be considered on its own facts.

The two projects were completely different in size and complexity. *Lakeview* involved a small **three-unit** townhome building. The Admiral Project, on the other hand, was a large, mixed-use project with **69 residential units**, multiple commercial businesses, multiple levels of underground parking, a large courtyard, and a large rooftop deck. In the Project, there were hundreds of workers on site on a given day, more sophisticated and extensive plumbing and HVAC systems, four different types of exterior siding (hardiplank, stucco, metal panels, and brick), large common areas in the courtyard and on the roof top, common area hallways, stairs, elevators, and a multi-story underground parking garage. Logically, the number of problems that arise in large, complex projects such as Admiral is significantly greater than in a three unit townhome.

Further, the facts relevant to the completion date of the *Lakeview* project were relatively simple and apparently not in dispute, whereas the facts surrounding the Admiral Project are complex and disputed. The **only** evidence presented in *Lakeview* was the Certificate of Occupancy (August 27, 1990) and the date the first unit sold (November 19, 1990). *Lakeview*,

supra, 101 Wn. App. at 928. In contrast, the architect, general contractor, and developer all agreed the Admiral Project was not substantially complete when the Certificate of Occupancy was issued – and the Certificate expressly excluded the retail portion of the mixed use Project.

There were no problems at *Lakeview* until 1997, when a heavy landslide caused the land under the complex to slide down a hillside rendering the units uninhabitable. The *Lakeview* lawsuit was filed in February 1997, more than six years after substantial completion. In the Admiral Project, the Prime Contract expressly provided that substantial completion did not occur until the architect issued a Certificate of Substantial Completion. *CP 469 at ¶9.8*. In *Lakeview*, there was no contract provision designating the architect as the person who determines when the project is substantially complete. Because there were so many ongoing problems to be corrected and ongoing work to be completed, the architect testified the Admiral Project was *not* substantially complete in April 2003. *CP 543-46 at ¶¶6-15*. He rejected outright the notion that the certificate of occupancy determines the date of substantial completion. *Id.* *After* the Certificate was issued, the architect compiled 80 pages of punch list and Field Directive items to be completed *before* substantial

completion could occur. *Id.* Moreover, the contractor and owner did not agree the Project was substantially complete until February 2004 – eight months after the Certificate of Occupancy was issued. *CP 526-29.*

The Court of Appeals in *Lakeview* expressly recognized that there was no evidence to dispute the Certificate of Occupancy, stating: “the record does not indicate that work yet unfinished rendered the project not substantially complete.” *Id.* at 932. Further, the termination of services prong of the statute of repose did not apply in *Lakeview* because all of the punch list work performed after the Certificate of Occupancy was issued was performed by the contractors who were not named as defendants.¹³ *Id.*

In contrast, the Admiral Project was difficult to construct and complete. The architect, who had worked on hundreds of projects dating back to the 1980's, opined there were more problems on this Project than on any other project he had ever worked on. *CP 544 at ¶7.*

¹³ The Court of Appeals also addressed the termination of services prong of the statute of repose. *1519 Lakeview*, 101 Wn. App. at 929-30. The owners argued the termination of services prong extended to the additional work performed by non-parties. The Court of Appeals made it clear that for contractors who performed work after substantial completion, the statute of repose runs from the “date the last service was provided.” *Id.* For other contractors who did not perform work after substantial completion, the statute runs from the date of substantial completion. *Id.* The Court of Appeals cited with approval testimony by the Senate Judiciary Committee that the “termination of services” calculation is determined by the “**date the individual subcontractor concluded work on the project.**” *Id.*(*Emphasis supplied*). Ledcor presented evidence Bordak and SQI performed work after the certificate of occupancy was issued.

In *Lakeview*, there was no evidence of ongoing damage or uncompleted work when the Certificate of Occupancy was issued. In contrast, there was evidence of water intrusion in multiple units and common areas at the Admiral Project *after* the Certificate of Occupancy issued, which had to be repaired before the Project could be put to its intended use. *CP 1094-1159*. The Project had 69 residential units with deck problems in nearly every unit, a large courtyard with a cracked and bubbled membrane, and a large roof with a pedestal/paver deck that was destroying the roof membrane and causing water to infiltrate the building envelope. *Id.* With such fundamental problems existing at the Project when the Certificate of Occupancy was issued, it could not be substantially complete. The facts surrounding substantial completion of the Project are completely different from and far more complex than the facts relevant to substantial completion in *Lakeview*. Because the two cases are not comparable, *Lakeview* does not control in this factual setting.

In *Lakeview*, the Court of Appeals did not hold substantial completion occurs as a matter of law when the Certificate of Occupancy is issued. Similarly, it did not hold that evidence substantial completion occurred *after* the Certificate of Occupancy was issued should be ignored.

To the extent the trial court considered *Lakeview* as holding that a Certificate of Occupancy is conclusive and un rebuttable evidence of substantial completion, Leducor believes it erred. See *Smith v. Showalter*, 47 Wn. App. 245, 734 P.2d 928 (1987); *McLeod v. NW Alloys*, 90 Wn. App. 30, 35, 969 P.2d 1066 (1998); *Miami Valley Contractors, Inc. v. Town of Sunman*, 960 F. Supp. 1366, 1378 (S.D. Indiana 1997); *North American Capacity, supra*, 177 Cal. App. 4th 272. The Legislature did not define substantial completion as the date on which a certificate of occupancy is issued. It could have, but it did not.

Summary judgment may have been correct in *Lakeview* under the record before that court. However, that does not make summary judgment correct under the facts of this case. The nature and quantum of evidence in *Lakeview* is completely different than in *Admiral*. This case must be decided on its own facts and, because there are material facts in dispute, summary judgment was improper.

D. Leducor's Indemnity Claims Against SQI Were Also Timely Under the Termination of Services Prong of the Statute of Repose.

Under the termination of services prong of the statute of repose, Leducor presented un rebutted evidence that SQI's services were not

terminated until more than 18 months after the critical date, July 28, 2003.¹⁴ In 2005, SQI installed a new roofing membrane at the Project under a second written subcontract with a separate indemnification addendum. *CP 1161-63*. It is difficult to understand how the trial court could disregard this evidence.

The trial court failed to follow this Court's instruction on how to construe the termination of services prong of the statute of repose:

If all services must have terminated before the six year period begins to run, there could be no services left to perform that would move a project from a state of "substantial completion" to full completion. **For contractors performing those final services, therefore, the statute runs from the date the last service was provided;** for others, it runs from the date of substantial completion.

Lakeview, supra, 101 Wn. App. at 930. (*Emphasis supplied*).

Division III of the Court of Appeals properly applied these principles in *Smith v. Showalter*, 47 Wn. App. 245, 734 P.2d 928 (1987), where a contractor worked on a home from 1975 until 1981 and sold it. In 1984, a fire destroyed the home and the buyer sued the contractor in July

¹⁴ Ledcor also submitted evidence that the services of other subtrades, including Bordak and Scapes, were not terminated until after the critical date, July 28, 2003. *CP 517-20, 2050-52*. SQI was the most glaring example of the trial court's failure to recognize that work was performed by subcontractors after the critical date.

of the following year. A fire expert concluded the fire began in an electrical outlet on the west wall of the utility room. The trial court held the statute of repose barred the suit because the six-year period began when the contractor wired and occupied the utility room in 1977. The Court of Appeals reversed, holding the statute of repose did not begin to run until the contractor's services were terminated in 1981, even though the fire resulted from work completed in 1977. Citing the legislative purpose to protect owners "where long-term construction was involved," the Court of Appeals held that because the contractor "continued to work on the home from 1975 until 1981," the "latter date would mark the beginning of the 6-year period of the statute of repose in RCW 4.16.310." *Id.* at 249-50.

Here, SQI continued to work on the Project more than 18 months after the critical date, July 28, 2003. Ledcor's indemnity claims against SQI were timely under the termination of services prong.

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 its reasonable

attorney's fees and expenses on appeal if it prevails under the indemnity agreement in Appendix F of the Bordak Subcontract and the prevailing party fee provision in section 7.4 of the Bordak Subcontract. For the same reason, Ledcor seeks to recover its fees from SQI and the other subcontractors who are parties to this appeal.

V. CONCLUSION

Ledcor presented substantial evidence – more than enough to create an issue of fact – that the statute of repose did not begin to run until after July 28, 2003. The trial court should not have ignored the architect's opinion on summary judgment. It is the function of the jury, not the trial court, to weigh evidence, and thus the weight to be given to the architect's opinions is exclusively within the province of the jury. In considering fact issues on summary judgment, the trial court must view all of the facts in favor of the nonmoving party. The trial court's function is to determine whether there were material issues of fact in dispute, which there were. Initially, the trial court was correct in denying summary judgment; it erred in granting reconsideration and then reversing itself.

This Court should reverse the trial court's rulings dismissing Ledcor's indemnity claims against multiple subcontractors because the

architect determined that substantial completion did not occur prior to September 2003. Under the Prime Contract, the architect was designated to determine when the Project was substantially complete and the subcontractors contractually agreed to abide by the architect's determination.

At a minimum, there are material issues of fact in dispute as to when substantial completion of the Project as a whole occurred and when each subcontractor completed its services. The Certificate which the trial court relied on was only a partial Certificate of Occupancy. On its face, it did not cover the entire project. It could not be conclusive evidence of when the Project as a whole was substantially complete.

Granting summary judgment under these circumstances was clearly improper.

RESPECTFULLY SUBMITTED this 27th day of May, 2011.

Martens + Associates | P.S.

By 
Richard L. Martens, WSBA # 4737
Scott A. Samuelson, WSBA # 23363
Attorneys for Petitioner
Ledcor Industries (USA) Inc.

APPENDIX

Certificate of Occupancy.....A-1

Work Items Identified by Architect in
April 2003 List of Field Directives.....A-2

City of Seattle

DEPARTMENT OF DESIGN, CONSTRUCTION AND LAND USE

CERTIFICATE OF OCCUPANCY

Permit No.: 731288

Address: 2331 42ND AV SW

Bldg Id: 2

Occupancy Established by this Certificate: R-1 APARTMENT/S-3 PARKING/M-RETAIL	Construction Type: I-FR & V-IHR SBC 311.2.2.1	No of Stories: 4
	Sprinkler Location: THROUGHOUT UBC STD 9-1	Basements: 2
	Max assembly occupant load: N/A	Number of Housing Units: 68

CONSTRUCT NEW 4-STORY MIXED USE BUILDING, 2-BASEMENT PARKING, STRUCTURAL AND ARCHITECTURAL, OCCUPY PER PLAN EXCEPT RETAIL (UNDER SEPARATE PERMIT) PHASE II OF II. COMPLETE ABOVE WORK OF PERMIT: 720486.

The work noted above has been inspected and approved as complying with provisions of the Seattle Building Code.

Issued this 14th day of March, 2003 for Director by Robert Berg
CHIEF BUILDING INSPECTOR

This certificate shall be posted in a conspicuous public area, shall not be removed, mutilated or obscured and shall be maintained in legible condition at all times. Any change of occupancy requires a new certificate.

Among the major remaining work items identified by the architect in his April 2003 list of Field Directives were:

- * water damage in units 421, 420, 418, 312;
- * evidence of chemical substance dripping from cracks in the concrete slab;
- * drains not installed in rooftop planters;
- * multiple deck membranes need to be re-coated;
- * multiple decks need to be re-sloped to eliminate ponding;
- * flashing repairs need to be made at deck wall interfaces;
- * remove and replace stucco and flashing in deck interfaces;
- * caulk and repaint interfaces between hardiplank and metal siding panels;
- * refinish deck membrane coating on exterior unit decks;
- * significant water infiltration at west of access gate below ramp beam directly onto access gate electrical equipment;
- * repair water damage in unit interiors;
- * replace PVC where burned from copper installation;
- * surface elevator not working properly and requires multiple repairs;
- * catch basins need repair to eliminate leakage;
- * improper seating of drains is causing leaking and needs repair;
- * significant leaking from below HC ramp;

- * repair leaking in garbage compactor room;
- * repair leaking at PVC cap east of meter room;
- * skim coat at ramp walls is delaminating and shows signs of seepage - needs to be repaired and area resurfaced;
- * repair flashing at sliding glass door interfaces;
- * repair caulking and repaint hard wood siding at exterior decks;
- * remove building paper that extends below bottom of flashing on exterior unit decks;
- * repair sill pockets at windows showing moisture accumulation on interior portion of window sill;
- * repair or replace metal siding on decks where there is a substantial gap showing;
- * repair flashing at exterior decks;
- * repair stucco finish problems on the building exterior;
- * remove stucco grout on top of flashing on exterior decks;
- * remove blue skin and tar paper that extends below flashing around deck edges;
- * install caulking on bellybands at hardiplank and metal siding interfaces;
- * surface canopy improperly installed and allows water to run behind;
- * areas with chipping paint need to be sanded, primed and painted;
- * recoat deck surface;

- * replace hardwood flooring in unit 307;
- * repair flashing at sliding glass doors;
- * repair damage to deck handrails;
- * have window manufacturer evaluate all operable hopper windows for water problems - if opened shortly after rain they dump water into the interior of the unit from the window head;
- * have window manufacturer evaluate all operable hopper windows for failure to close;
- * remove and replace sheetrock at sliding glass door interfaces;
- * repair significant cracks at west wall;
- * repair leaks at drive through;
- * install floor drain at northeast corner of building;
- * sand and re-paint rusted areas in trellises;
- * re-install soffit above exhaust vents; and
- * repaint walls and ceilings on common areas and on every unit on the fourth floor because the wall texture and painting were substandard.

CP 1094-1159.

No. 65833-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

LEDCOR INDUSTRIES (USA) INC.,
a Washington corporation,

Appellant,

vs.

S.Q.I., INC., a Washington corporation; BORDAK BROTHERS, INC.,
an Oregon corporation; *et al.*,

Respondents.

CERTIFICATE OF SERVICE

Martens + Associates | P.S.

Richard L. Martens, WSBA # 4737
Scott A. Samuelson, WSBA #23363
Steven A. Stolle, WSBA # 30807
Rose K. McGillis, WSBA # 34469
Attorneys for Petitioner
Ledcor Industries (USA) Inc.
705 Fifth Avenue South, Suite 150
Seattle, WA 98104-4436
Telephone: (206) 709.2999

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COURT OF APPEALS
STATE OF WASHINGTON
2011 MAY 27 PM 3:50

ORIGINAL

I hereby certify that on the 27th day of May, 2011, I caused to be served true and correct copies of Ledcor Industries (USA) Inc.'s Brief of Appellant (with attached Appendix materials) on counsel as follows:

<p>Counsel for SQI, Inc. R. Scott Fallon, Esq. Fallon & McKinley 1111 Third Avenue, Ste. 2400 Seattle, Washington 98101</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery (ABC Legal) <input type="checkbox"/> Telefax (206.682.3437) <input type="checkbox"/> Overnight Delivery <input checked="" type="checkbox"/> E-mail with Recipient's Approval</p>
<p>Counsel for Skyline Sheet Metal Steven G. Wraith, Esq. Lee Smart 701 Pike Street, Ste. 1800 Seattle, Washington 98101</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery (ABC Legal) <input type="checkbox"/> Telefax (206.624.5944) <input type="checkbox"/> Overnight Delivery <input checked="" type="checkbox"/> E-mail with Recipient's Approval</p>
<p>Counsel for Painters, Inc. Stephen Skinner, Esq. Johnson Andrews & Skinner, P.S. 200 West Thomas, Ste. 500 Seattle, Washington 98119</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery (ABC Legal) <input type="checkbox"/> Telefax (206.623.9050) <input type="checkbox"/> Overnight Delivery <input checked="" type="checkbox"/> E-mail with Recipient's Approval</p>
<p>Counsel for Scapes & Co. Brett M. Wieburg, Esq. Law Offices of Kelly J. Sweeney 1191 Second Avenue, Ste. 500 Seattle, Washington 98101</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery (ABC Legal) <input type="checkbox"/> Telefax (206.473.4031) <input type="checkbox"/> Overnight Delivery <input checked="" type="checkbox"/> E-mail with Recipient's Approval</p>
<p>Counsel for Pacific Coast Stucco Patrick N. Rothwell, Esq. Davis Rothwell Earle & Xochihua 5500 Columbia Center 701 Fifth Avenue Seattle, Washington 98104</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery (ABC Legal) <input type="checkbox"/> Telefax (206.340.0724) <input type="checkbox"/> Overnight Delivery <input checked="" type="checkbox"/> E-mail with Recipient's Approval</p>

Counsel for Exterior Metals

Gregory G. Jones, Esq.
Fallon & McKinley, PLLC
1111 Third Avenue, Suite 2400
Seattle, Washington 98101

- U.S. Mail
- Hand Delivery (ABC Legal)
- Telefax (206.628.3437)
- Overnight Delivery
- E-mail with Recipient's Approval

Counsel for Bordak Brothers, Inc.

Joanne T. Blackburn, Esq.
Gordon Thomas Honeywell Malanca
Peterson & Daheim, LLP
600 University, Ste. 2100
Seattle, Washington 98101

- U.S. Mail
- Hand Delivery (ABC Legal)
- Telefax (206.676.7575)
- Overnight Delivery
- E-mail with Recipient's Approval

Counsel for Roestel's Mechanical

Christopher Anderson Esq.
Law Office of Sharon J. Bitcon
200 West Mercer Street, Ste. 111
Seattle, Washington 98119

- U.S. Mail
- Hand Delivery (ABC Legal)
- Telefax (206.286.1941)
- Overnight Delivery
- E-mail with Recipient's Approval

Co-Counsel for Roestel's Mechanical

John P. Hayes, Esq.
Martin J. Pujolar, Esq.
Forsberg & Umlauf, P.S.
901 Fifth Avenue, Ste. 1400
Seattle, Washington 98164

- U.S. Mail
- Hand Delivery (ABC Legal)
- Telefax (206.689.8501)
- Overnight Delivery
- E-mail with Recipient's Approval

Counsel for United Systems, Inc.

Stephen M. Todd, Esq.
Todd & Wakefield
1501 Fourth Avenue, Ste. 1700
Seattle, Washington 98101

- U.S. Mail
- Hand Delivery (ABC Legal)
- Telefax (206.583.8980)
- Overnight Delivery
- E-mail with Recipient's Approval

Counsel for Starline Windows, Inc. Betsy A. Gillaspy, Esq. Salmi & Gillaspy, PLLC 821 Kirkland Avenue, Ste. 200 Seattle, Washington 98033	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery (ABC Legal) <input type="checkbox"/> Telefax (425.462.4995) <input type="checkbox"/> Overnight Delivery <input checked="" type="checkbox"/> E-mail with Recipient's Approval
Co-Counsel for Starline Windows William J. O'Brien, Esq. Law Offices of William J. O'Brien 999 Third Avenue, Ste. 805 Seattle, Washington 98104	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery (ABC Legal) <input type="checkbox"/> Telefax (206.515.4848) <input type="checkbox"/> Overnight Delivery <input checked="" type="checkbox"/> E-mail with Recipient's Approval
Counsel for Coatings Unlimited, Inc. Kara Masters, Esq. Skellenger Bender, P.S. 1301 Fifth Avenue, Ste. 3401 Seattle, Washington 98101	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery (ABC Legal) <input type="checkbox"/> Telefax (206.447.1973) <input type="checkbox"/> Overnight Delivery <input checked="" type="checkbox"/> E-mail with Recipient's Approval
Counsel for Admiral Way, LLC Stephan D. Wakefield, Esq. Hecker Wakefield & Feilberg, P.S. 321 First Avenue West, Seattle, Washington 98119	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery (ABC Legal) <input type="checkbox"/> Telefax (206.447.9075) <input type="checkbox"/> Overnight Delivery <input checked="" type="checkbox"/> E-mail with Recipient's Approval

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

DATED THIS 27th day of May, 2011, at Seattle, Washington.



Matthew Morgan
Paralegal for Martens + Associates | P.S.