

No. 72317-1-I

COURT OF APPEALS,
DIVISION I OF THE STATE OF WASHINGTON

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

Appellant,

v.

STARLINE WINDOWS, INC.,
a Washington corporation,

Respondent.

BRIEF OF APPELLANT LEDCOR INDUSTRIES (USA) INC.

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I. INTRODUCTION

Appellant Ledcor Industries (USA) Inc. (“Ledcor”) asks this Court to reverse two partial summary judgment orders and a subsequent summary judgment order finding damages in the amount of \$19,101.20 as proposed by Ledcor’s subcontractor Starline Windows, Inc. (“Starline”).

This is a construction defect action arising out of the construction of The Admiral mixed-use project in West Seattle. Ledcor, the general contractor, brought suit against a number of subcontractors and materialmen, including Starline Windows, Inc. With regard to the latter, Ledcor alleged multiple contractual, statutory, and tort-based claims arising from Starline’s defective work and products provided at the Admiral Way project.

In deciding Starline’s two motions for partial summary judgment, the trial court dismissed Ledcor’s claims against Starline for breach of contract, breach of warranty, indemnity, and subrogation based on: (1) a confidential issue release, of which Ledcor had no knowledge, entered into between Starline and Admiral Condominium Owners Association (COA); and (2) the four-year statute of limitations in the Uniform Commercial Code (UCC). The trial court erred on both grounds when it ignored

evidence that Leducor had independent contractual or equitable reimbursement claims against Starline based on the products and services that Starline provided to Leducor via their mutually agreed upon written Construction Subcontract. Because Starline and Leducor first entered into an independent contract, Starline cannot unilaterally release Leducor's contractual rights by entering into a confidential issue release with the COA – of which Leducor was unaware. Increasing the harm, Starline and the COA formed the agreement eleven days before resolution of the Association's claims against Admiral Way LLC and Leducor, which included damages and consequential damages arising out of the windows, doors, and sliding glass doors Starline provided.

Second, the trial court erred when it applied the statute or limitations/repose from the Uniform Commercial Code ("U.C.C.") to the matter and ignored the evidence that Starline performed work and provided labor for the project years after delivery of the products.. Under Washington law, the U.C.C. does not govern construction contracts. Leducor provided ample and sufficient evidence that demonstrated Starline had provided both materials and labor under a mutually agreed upon Construction Subcontract. Accordingly, Leducor timely filed its claims un

the construction statute of repose and the statute of limitations governing written contracts.

Finally, the trial court erred when it entered summary judgment and partial judgment in the amount of \$19,101.20 against Starline based on its breach of the contractual duty to defend Ledcor. The partial summary judgment later became the final judgment against Starline after the trial court declined to award attorney's fees.

Damages can rarely be determined as a matter of law, particularly in a jury case. Ledcor timely filed a jury demand in this case and never waived its right to a jury. By entering judgment in favor of Ledcor, the trial court eschewed the Washington Constitution and invaded the province of the jury when it determined damages as a matter of law.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred as a matter of law in summarily dismissing Ledcor's claims for breach of contract, breach of warranty, breach of indemnity, contribution, and subrogation against Starline.

2. The trial court erred as a matter of law in summarily ruling on damages and entering partial judgment on Ledcor's claim against

Starline for breach of the contractual duty to defend.

B. Issues Relating to Assignments of Error

1. Whether the trial court erred in ruling that the Confidential Settlement Agreement entered into between Starline and The Admiral COA barred Ledcor's claims against Starline when Ledcor had independent contractual and equitable claims against Starline and no knowledge of the agreement when it paid the Admiral COA for some or all of the same damages? (Assignment of Error No. 1)

2. Whether the trial court erred in ruling that the UCC applies to Ledcor's claims for breach of contract and express warranty when the parties entered into a Construction Subcontract that provided for labor, materials, and work at the Project? (Assignment of Error No. 1)

3. Whether the trial court erred in entering damages as a matter of law on Ledcor's claim for breach of the duty to defend when damages are a question of fact exclusively within the jury's province? (Assignment of Error No. 2)

III. STATEMENT OF THE CASE

A. Factual Background of the Admiral Way Project

This is a construction defect action arises out of the construction of

The Admiral mixed-use project in West Seattle (“The Project”). CP 1-52. The Project contained residential units, ground-floor commercial space, and underground parking. CP 432.

Ledcor was the general contractor and Admiral Way LLC was the owner/developer. CP 342. Ledcor entered into a written agreement with Admiral Way to build the Project. CP 342-393. As is customary in the construction industry, Ledcor retained the trade subcontractors who possessed the necessary expertise to actually build the Project. CP 347.

B. Starline Entered into a Construction Subcontract with Ledcor to Provide Work and Materials for the Admiral Way Project

Pursuant to a written and signed Purchase Order/Subcontract (“Construction Subcontract”), Ledcor retained Starline Windows to supply all of the windows and exterior doors for the Project. CP 91-92, CP 321. Starline manufactured and supplied all of the vinyl windows, exterior doors, and sliding glass doors; it then performed service work, including installing windows and applying sealant at the job site. CP 321-322.

The agreed terms and conditions set forth in the Construction Subcontract included specific provisions addressing warranties, indemnification, and “flow down” incorporation of the provisions of the prime contract between Ledcor and Admiral Way LLC. CP 92. The

subcontract's warranty provision contained express warranties that the parties extended to cover latent defects to the fullest extent of the law.

Those express warranties ran directly to Ledcor:

4. WARRANTIES. All warranties of Vendor, whether created expressly by law or in fact, are incorporated herein by reference. Vendor shall provide all necessary maintenance of Vendor's Work, including protection of the work from damage by others, until final acceptance of the project. *Vendor expressly warrants:* (a) the goods comply with any and all specifications, drawings, samples or other descriptions furnished or adopted by Ledcor and incorporated herein or attached hereto; and (b) the goods are *merchantable, of good materials and workmanship and free from defects and fit for their intended purpose(s)*. During the warranty period established by the Contract Documents for the Project, or, if no period is specified, then for one (1) years after the date of final acceptance of the Project by Owner, Vendor shall make good at its sole cost and expense, all defects in the workmanship and/or materials furnished by Vendor (notwithstanding compliance of the goods with the Contract Documents when originally furnished) and *restore damage to other's work resulting therefrom*. Vendor shall execute in writing, any warranties, main maintenance agreements or other documents related to the work describer herein by the terms of the Contract Documents. *Vendor's responsibility for latent defects shall extend beyond the warranty period to the fullest extent applicable statutes permit. Id. (Emphasis Supplied).* CP 92.

Significantly, Starline also contractually promised to defend, indemnify, and hold Ledcor harmless from any and all claims arising out of Starline's work and/or the performance of its products. *Id.* And it

further agreed to protect both the owner and Leducor under Starline's liability insurance through Zurich.

The key provision in Starline's subcontract that incorporates the insurance obligations in the Main Contract is contained in paragraph 22, conveniently entitled "Flow Down." Undeniably, flow down provisions are valid in the state of Washington. *See Washington State Major League Baseball Stadium Pub. Fac. Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co.*, 176 Wn.2d 502, 296 P.3d 821 (2013). Under the Flow Down provision, Starline agreed to assume all of the obligations Leducor agreed to in the Prime Contract with Admiral Way LLC as follows:

22. FLOW DOWN. *Vendor binds itself to Leducor in the same manner and to the same extent that Leducor is bound and obligated to Owner under Leducor's contract with the Owner, including all addenda, modifications, and revisions thereto ("Main Contract"). All rights which the Owner may exercise against Leducor, may be exercised and enforced by Leducor against Vendor, including but not limited to any claim for liquidated damages. Vendor shall be required to do all things and be bound by all decisions, directives, interpretations and rulings of the Owner, Architect or others, including but not limited to decisions as to the scope of the Vendor's Work to the same extent Leducor is bound thereby.* Vendor acknowledges that it has had an opportunity to review any and all of the Main Contract documents and it is fully aware of all provisions contained in those documents that is applicable to or impact the Vendor's Work, including without limitation, schedules, drawings or specifications. *Id.* (*Emphasis*

supplied).

A related provision in the subcontract is Paragraph **18**. It provides:

INDEMNIFICATION. Vendor shall defend, indemnify and hold Leducor an Owner harmless against claims, damages, bodily injury or property damage arising out of Vendor's performance and to the extent caused by the negligent act(s) or omission(s) of Vendor, its employees agents and subcontractors.

The key incorporated provision in the Main Contract which flowed down to Starline is Exhibit G, entitled **INSURANCE AND INDEMNIFICATION**. CP 92. Under that provision, Leducor agreed to obtain primary and non-contributory insurance that covered, among other things, all claims, losses, liabilities, and damages arising out of the hazards and operations of the subcontractors and to provide additional insured coverage to protect Admiral Way and Leducor. *Id.* And Leducor did so.

It is undisputed that Starline had the identical obligation towards Leducor and admittedly failed to obtain the proper insurance based on Zurich's refusal to pay any defense or indemnity claims under Starline's liability policy. When the contractually mandated insurance is not provided, the subcontractor, in effect, becomes the insurance carrier. *See Frank Coluccio Const. Co., Inc. v. King County*, 136 Wn. App. 751, 150 P.3d 1147 (2007). Accordingly, the subcontractor is liable for all

contractually related damages, including defense costs, fees, and expenses incurred. *See, e.g., National Surety Corp. v. Immunex Corp.*, 176 Wn.2d 872, 297 P.3d 688 (2013).

Starline's multiple breaches of contract included other matters. In addition to installing the windows and sliding glass doors, Starline prepared shop drawings in its Langley, B.C. plant, where it also manufactured the vinyl windows and sliding glass doors. CP 322-323. Starline manufactured and supplied three different models for the Project: (1) Starline 7000 series vinyl nail-on window systems; (2) Starline 8000 series vinyl nail-on window systems; and (3) Starline 8500 series nail-on patio door systems. CP 323. Starline also provided installation instructions for its products and supplied sill flashings for the windows and doors. CP 324. Starline's shop drawings included a series of architectural details showing how each model of window and door was to be installed and flashed in the field. CP 325. Undeniably, the windows, swinging doors and sliding glass doors were to be installed in accordance with the installation instructions provided by Starline.

After its initial delivery of doors and windows in 2002, Starline made multiple site visits to the Project in 2003, 2004, 2005, and 2006 to

supply, repair, and install additional products. CP 330-331, CP 395-417.

Specifically, Starline performed the following work on the Project:

- * removed and replaced multiple window and door units on January 16, 2003;
- * delivered additional windows on December 11, 2003;
- * replaced scratched glass on multiple windows on August 19, 2004;
- * installed broken sealed unit on March 4, 2005;
- * replaced additional windows on March 25, 2005;
- * replaced two failed sealed units on June 15, 2005;
- * worked on leaking windows on February 6, 2006; and
- * installed window unit on October 2006.

CP 395-417.

C. **The Admiral Way COA Identified Defects in Starline's Work and Products and Leducor Tendered the Claims to Starline**

Following completion of construction, problems arose at the Project, including multiple issues with Starline's windows and doors. In June 2007, Trinity/ERD, the Admiral COA's construction consultant, conducted window testing at the Project to determine if the windows were defective and/or had been defectively installed. CP 419-429. All of the

windows and sliding glass doors tested in Unit 201 failed, with water entering the interior of the unit through crank mounts, windows latches, window frames, and sill trays. CP 425. As Trinity/ERD opined, these failures resulted from defective windows and doors. CP 444, CP 447.

On June 27, 2007, Trinity/ERD issued an Inspection Report identifying, among other problems, multiple instances of water penetration through the Starline window and sliding glass door units. CP, 436-437, CP 444. In July 2007, the Admiral COA sued Admiral Way, who in turn filed a third party claim against Leducor. CP 110-125. The Admiral COA subsequently filed an amended complaint to assert a direct claim against Starline for breach of a Limited Lifetime Warranty Certificate provided to the COA, which only covered repair or replacement of the defective product. CP 274-283, CP 509.

On November 16, 2007, Leducor sent a written tender to Starline seeking defense and indemnity for the claims asserted by The Admiral COA and Admiral Way.¹ CP 464-467. The tender letter included multiple

¹Leducor also tendered to Zurich, one of Starline's CGL carriers. Zurich had acknowledged Leducor was an additional insured on its Starline CGL policies, but denied that it had a duty to defend or indemnify Leducor, even though Zurich knew that The Admiral COA sought over \$3 million in damages that Leducor's experts assessed as related to problems with Starline's windows and doors. CP 496-506.

attachments, including the List of Known Construction Defects The Admiral COA filed which identified the following problems with Starline's windows and doors:

- a. Windows and doors are not capable of withstanding minimum differential pressures when tested under industry-standard criteria for water penetration;
- b. Large windows flex excessively when hand pressure is applied at the glazing;
- c. Exterior doors (swing and patio doors) were not set over sill pans as per industry standards;
- d. Two window units and one swing door failed testing for resistance to water penetration. . . .

CP 471-472.

After a second round of window testing in October of 2007, Trinity/ERD sent correspondence directly to Starline in January 2008, addressing the failure of the Starline windows and doors to perform to industry standards under window testing. Trinity/ERD's letter identified multiple issues it had discovered including: (1) water leakage through hardware; (2) water overwhelming the sill trays; (3) water entry through glazing pockets; (4) water entry through interstitial spaces between the window frame and rough opening; (5) inadequate structural support of large, nine panel windows; and (6) general failure of the tested window

units to withstand minimal testing pressures when tested per ASTM and AAMA standards. CP 492-494. Trinity/ERD recommended removal and replacement of *all* Starline windows, doors, and adjacent siding installed by others, noting this “represents a large percentage of the Scope of Repair and will be one of the largest components in the repair bid.” CP 493. In June 2008, the Admiral COA filed a First Amended List of Construction Defects, identifying additional defects in Starline’s windows and doors. CP 47.

All of this information was before the trial court on Starline’s motions for summary judgment.

D. Ledcor Sued Starline after Starline Settled Limited Warranty Claims Only with The Admiral COA in a Confidential Agreement

In its First Amended Complaint filed on September 23, 2009, Ledcor sued Starline, alleging claims for breach of contract, breach of the Washington Product Liability Act, breach of warranties, breach of the duty to defend, indemnity, equitable subrogation, equitable indemnity, and contribution. CP1-35. The contract claim included claims for defective products, breach of contract, and breach of insurance obligations. CP 27-30.

On July 17, 2009, the Admiral COA settled its direct limited warranty claims with Starline for \$165,000.00 and released its product liability claims against Starline. CP 180-182. The settlement agreement was confidential. It was not signed or agreed to by Ledcor. *Id.* Ledcor had no knowledge of the agreement. The warranty provided by Starline to the Admiral COA was strictly limited to replacement of windows and doors; it did not cover consequential damages resulting from defective windows and doors including repair and replacement of work of others that the leaking windows damaged, such as the adjacent siding and interior walls. CP 509. Because they were separate obligations, the release of The Admiral COA's warranty claims did not – and could not – release Ledcor's breach of contract, product liability, and consequential damages claims.

On July 28, 2009, eleven days after Starline entered into the confidential settlement agreement with The Admiral COA, Ledcor, Admiral Way LLC, and The Admiral COA resolved their dispute with Ledcor agreeing to pay \$2.7 million and Admiral Way LLC agreeing to pay \$2 million out of its own pocket to The Admiral COA. CP 184-191. In the settlement agreement, The Admiral COA released all claims against

Ledcor, including all claims for damages caused by the use and installation of defective products supplied by Ledcor. Of course, in actuality, Ledcor's subcontractors supplied and installed the products. The settlement included the damages caused by products supplied and installed by Starline (some of which were windows and sliding glass doors). CP 187-188. Ledcor paid \$150,000.00 out of its own pocket, and one of its own carriers, Chartis Insurance Company of Canada, paid the remaining amount. CP 517. Significantly, Zurich, which insured both Ledcor and Starline, paid nothing. *Id.* Furthermore, due to its confidential settlement with Starline, The Admiral COA more likely than not received a double recovery for the defective window products, swinging doors, and sliding glass doors at the Project. CP 180-182, CP 184-191.

E. Procedural Background of Motions Between Ledcor and Starline

In 2010, Starline filed a summary judgment against Ledcor requesting the Court dismiss Ledcor's claims based on the Confidential Settlement Agreement and the U.C.C. statute of limitations. CP 66-82. Starline also requested Ledcor's claim under the Washington Product Liability Act be dismissed even though Starline delivered the defective windows and doors to Ledcor. CP 77. Ledcor opposed the motion and

brought a cross motion for summary judgment on its claim for breach of the duty to defend. CP 284-311. On October 25, 2010, the Court denied Ledcor's cross motion, granted Starline's motion, and dismissed all claims except Ledcor's claims for breach of the contractual duty to defend and breach of contractual insurance obligation. CP 2180-2182. The Court failed to provide any reasoning or basis for its order. *Id.*

Years later, in 2014, Starline filed another motion for summary judgment requesting the Court rule as a matter of law that Starline breached its duty to defend under the contract and requested the Court set damages as a matter of law. CP 554-567. Starline also moved to dismiss Ledcor's claims for breach of insurance obligations. CP 745-753. The Court granted both of Starline's motions and ruled – as a matter of law – that Ledcor's damages for breach of the duty to defend was limited to \$19,101.20. CP 2183-2190. The Court entered partial judgment against Starline in the amount of \$19,101.20 in accordance with the summary judgment order, and later denied both parties' request for prevailing party attorney's fees making the partial summary judgment final. This appeal timely follows. CP 2176-2190.

IV. ARGUMENT

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

The standard of review of any summary judgment order is *de novo* – as 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. *Byrne v. Courtesy Ford, Inc.*, 108 Wn.App. 683, 687, 32 P.3d 307 (2001). It is black letter law that, on summary judgment, the trial court does not weigh evidence or assess credibility. *Barker v. Advanced Silicon Materials LLC*, 131 Wn. App. 616, 624, 128 P.3d 633 (2006). The same is true when an appellate court reviews a summary judgment order. *Id.* Consequently, the existence of any material issue of fact in dispute is sufficient to defeat a motion for summary judgment. Similarly, if the moving party is not entitled to the relief sought as a matter of law, the motion must be denied. *See* CR 56.

B. The Trial Court Erred in Ruling that Ledcor’s Breach of Contract, Breach of Warranty, Subrogation, and Indemnity Claims Against Starline Are Barred By the Confidential Settlement Agreement Entered Into Between Starline and The Admiral COA eleven days before the COA settled all of its claims against Admiral Way LLC and Ledcor

The trial court granted Starline’s motion for partial summary

judgment ruling – as a matter of law – that the Issue Release in the confidential settlement agreement between Starline and The Admiral COA completely barred Ledcor’s breach of contract, warranty, indemnity, and subrogation claims against Starline, including claims for consequential damages and defense costs. However, Ledcor – the party that entered into the Construction Subcontract with Starline – had independent contractual and equitable reimbursement claims against Starline entirely outside of the limited matters the Confidential Issue Release covered. Specifically, the release *only* applied to the warranty on the “windows.” The fact that Ledcor had independent contractual claims against Starline was reinforced and recognized by the trial court when it granted summary judgment in favor of Ledcor against Starline for Starline’s breach of its contractual duty to defend.

1. **The Issue Release did not bar Ledcor’s independent claims against Starline for consequential damages**

The Confidential Issue Release between Admiral COA and Starline provided:

ADMIRAL COA hereby agrees that this Settlement Agreement and Release of Claims hereby satisfies and releases all of ADMIRAL COA’S claims against all parties to the litigation arising from the defective design and/or defective manufacture of STARLINE’s window products at the Admiral Way Condominiums, including claims for

breach of express and implied warranties and claims under the Washington Product Liability Act. Specifically excluded from this Settlement Agreement and Release of Claims are any of ADMIRAL COA's claims against Admiral Way, LLC and/or Leducor Industries (USA), Inc. for those parties' improper specification, installation, alteration, modification or repair of STARLINE's window products at The Admiral Way Condominiums.

CP 180-182.

The Issue Release provides that (1) it is confidential and the terms shall not be revealed, disclosed, or discussed except by Court order; and (2) it is only for the benefit of the parties to the agreement. *Id.* It was fully executed on July 17, 2009. *Id.* The confidential Issue Release was entered into eleven calendar days before Leducor paid The Admiral COA for substantial damages related to the defective windows and doors at the Project. CP 184-191.

Unlike Leducor, The Admiral COA neither had contractual privity with nor claims for consequential damages against Starline. It was an end user. All the Admiral COA had was a limited manufacturer's warranty covering repair or replacement only. It was expressly limited to repair or replacement of the windows that violated the terms and conditions of the written warranty provided to the ultimate user. CP 509. It did not cover siding that had to be removed and replaced in taking out the defective

windows and reinstalling them. It did not cover damage to the interior walls or carpet. It did not cover *any* consequential damages at all – including the cost of removal and replacement – and it did not eliminate Starline’s contractual obligation to hold Leducor and Admiral Way LLC harmless from defects in its work and products.

By the time the settlement was reached, Leducor had already incurred nearly two years of defense costs and expenses in defending claims that arose out of the defective products Starline installed and supplied. Those products included *both* windows and sliding glass doors. Significantly, neither Leducor nor Admiral Way were parties to the settlement agreement between The Admiral COA and Starline, neither knew about it, and neither consented to the confidential terms of the release. Leducor had independent contractual and equitable rights against Starline for damages it had already incurred arising from Starline’s defective products and work that The Admiral COA did not own and could not release. By the time the settlement was reached, which included the “issue” release, Leducor had vested rights. Certainly, Starline knew that Leducor’s counsel were not working for free and they had spent years dealing with direct claims and consequential damages arising out of Starline’s defective products. Counsel incurred defense costs and

expenses on a daily basis. Had the trial court believed the confidential Issue Release extinguished all of Ledcor's claims, it would have dismissed all of Ledcor's claims against Starline. However, the trial court entered judgment against Starline on Ledcor's breach of the duty to defend and did not dismiss Ledcor's breach of insurance obligations until 2014 on an unknown and unarticulated basis. CP 2183-2185.

In an analogous situation, the Supreme Court of Washington has held that "a release between an insured and a tortfeasor does not extinguish the insurer's subrogation rights if: (1) the tortfeasor knows of the insurer's payment and right of subrogation; (2) the insurer does not consent to the settlement; and (3) the settlement does not exhaust the tortfeasor's assets." *Leader Nat. Ins. Co. v. Torres*, 113 Wn.2d 366, 373-74, 779 P.2d 722 (1989). "[R]eleases executed without consent from subrogors and with knowledge of outstanding subrogation claims should not be enforced in equity to destroy the rights of subrogors." *Id.* at 370.

Here, a release executed without the consent and knowledge of Ledcor and Admiral Way LLC is precisely what happened. The Admiral COA and Starline executed a release knowing that Ledcor had claims against Starline. Because the parties to the release did not obtain Ledcor's consent to the settlement, they cannot release Ledcor's independent claims

against Starline or Ledcor's insurance carriers' rights of subrogation for defense costs, fees, expenses and indemnity paid to The Admiral COA.

A party can only release claims that it owns at the time of the settlement. A release is a contract and "is to be construed according to the legal principles applicable to contracts." *Boyce v. West*, 71 Wn. App. 657, 662, 862 P.2d 592 (1993). The Condominium Owners Association *never* owned Ledcor's contractual rights against Starline and Starline cannot release another parties' claims against it. Furthermore, Ledcor had spent 23 months and hundreds of thousands of dollars defending claims that arose out of Starline's inadequate services and defective products which were believed to exceed three million dollars based on expert analysis. CP 506. Ledcor's claims had accrued and vested. They could not be divested by a sweetheart deal between Starline's insurance carrier and the Homeowners Association. See *Ballard Square Condo. Owners Ass'n v. Dynasty Const. Co.*, 158 Wn.2d 603, 617, 146 P.3d 914 (2006) ("An accrued cause of action is a vested right when it 'springs from a contract or from the principles of the common law.'") (citation in original omitted); *Corbit v. J. I. Case Co.*, 70 Wn.2d 522, 530, 424 P.2d 290 (1967) ("A contract is a promise or a set of promises for the breach of which the law gives a remedy.") (citation in original omitted).

Governments have extensive powers. Yet, fundamentally, neither the federal government nor the state can impair contractual obligations under their respective constitutions. *Mearns v. Scharbach*, 103 Wn. App. 498, 512, 12 P.3d 1048 (2000). It simply makes no sense to give that immense power to a stranger to the contract, particularly when that stranger is a private party with its own independent set of contractual obligations.

A party injured by a breach of contract, such as Ledcor, may recover all damages that accrue naturally from the breach including any incidental or consequential losses the breach caused. *Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 427 10 P.3d 417 (2000) citing *Eastlake Constr. Co., Inc. v. Hess*, 102 Wn.2d 30, 46, 686 P.2d 465 (1984). The purpose of expectation damages is to return the injured party to “as good a pecuniary position as [he or she] would have had if the ‘breaching party would have performed properly.’” *Eastlake*, 102 Wn.2d at 39. 686 P.2d 465 citing *Diedrick v. School Dist. 81*, 87 Wn.2d 598, 610, 555 P.2d 825 (1976). Where a subcontractor breaches its agreements with a general contractor by failing to properly perform work, the general contractor’s legal exposure to the owner is a consequential damage of the subcontractor’s breach if that exposure is a

reasonably foreseeable consequence of the breach. *Floor Exp., Inc. v. Daly*, 138 Wn. App. 750,755, 158 P.3d 619 (2007).

In this case, Starline's payment of \$165,000.00 to The Admiral COA was solely for the exchange for a release of The Admiral COA's claims under the terms of Starline Limited Warranty. CP 180-182. The confidential Issue Release did not and could not include Leducor's claims for breach of contract under the Construction Subcontract, including Leducor's valid claims for consequential damages against Starline. Leducor paid \$2.7 million and Admiral Way paid \$2.0 million to The Admiral COA for construction defects including products provided by Starline. CP 184-191. At the time it entered into its subcontract with Leducor, Starline could reasonably foresee that its breach would cause Leducor legal exposure with The Admiral Way COA and thereby entitle Leducor to recover its consequential damages against Starline. Accordingly, the trial court committed reversible error in dismissing those claims as a matter of law. CP 2180-2182.

2. **At best, the Issue Release, if it applies at all, only operates to bar Leducor's claims against Starline arising solely from its defective "windows"**

To the extent the Confidential Issue Release is construed to apply to non-party Leducor or the owner Admiral Way LLC (neither of whom had

any knowledge of it prior to paying \$4.7 million to the Admiral COA, the plain language of the document only releases claims “arising from the defective design and/or manufacture of STARLINE’s *window* products at the Admiral Way Condominiums.” CP 181. Under its Subcontract, Starline also manufactured and supplied exterior door products used at the Project, which were also defective and caused damage to the work of others. CP 91. By its plain language, the Release does not mention or include Starline’s defective swinging “*doors*” or “*sliding glass doors.*” In addition, while the generic term “window products” is not defined in the Settlement Agreement, it is commonly understood that a window is markedly different from a door.² Starline also provided shop drawings, instructions, architectural details, and specifications for how to install the windows and doors at the Project and provided labor at the Project. CP 322-CP 325, CP 330-331, CP 395-417. The Admiral COA knew that they had damages arising from both the windows installation and sliding glass doors. Starline likely knew that, too. Yet, neither party included sliding glass doors or specifications for installation in the confidential Issue

²The Merriam Webster Online Dictionary defines a “window” as “an opening especially in the wall of a building for admission of light and air that is usually closed by casements or sashes containing transparent material (as glass) and capable of being opened and shut.” The dictionary defines a “door” as “a usually swinging or sliding barrier by which an entry is closed and opened.”

Release.

Under the plain language of the Issue Release, The Admiral COA, at the most, released claims against Starline arising out of the defective *windows* it supplied to the Project. The Issue Release failed to cover any and all claims arising out of the sliding glass doors and specifications for installation of any of Starline's products. It follows that the trial court erred when it dismissed these independent claims.

C. The Trial Court Erred in Summarily Determining that the UCC Applied to Time Bar Ledcor's Claims Against Starline for Breach of Contract and Breach of Warranty

The trial court dismissed Ledcor's breach of contract and express warranty claims against Starline, in part, based on the Uniform Commercial Code ("U.C.C.") and its four year statute of limitations and repose. The trial court erred as the contract between Ledcor and Starline is a construction subcontract that is *not* subject to the UCC even if materials were a substantial portion of the Contract. A construction contract for labor and materials is not governed by Article 2 of the UCC. *Urban Development, Inc. v. Evergreen Bldg. Products, LLC*, 114 Wn. App. 639, 645, 59 P.3d 112 (2002) citing *Arango Construction Company v. Success Roofing, Inc.*, 46 Wn. App. 314, 320, 730 P.2d 720, 723-24 (1986).

The scope of Article 2 is described in RCW 62A.-102, which states

in pertinent part that “this Article applies to transactions in goods.” The comments to RCW 62A.2.102 indicate that construction contracts are not within the scope of coverage stated in the UCC. RCW 62A.2.102 at 95.

In interpreting the statute, Washington appellate courts have determined its meaning in accordance with the comments. In *Crystal Recreation v. Seattle Ass’n of Credit Men*, 34 Wn.2d 553, 209 P.2d 358 (1949), the Supreme Court held that the Uniform Sales Act – the precursor of RCW 62A.2 – did *not* apply to a contract for work, labor and materials. 34 Wn.2d at 558. *See also Whatcom Builders Supply Co. v. H.D. Fowler, Inc.*, 1 Wn. App. 665, 668, 463 P.2d 232 (1969) (Contract law not the Uniform Sales Act applies to a contract for work, labor, and materials.)

After its initial delivery of doors and windows in 2002, Starline made multiple site visits to the Project in 2003, 2004, 2005, and 2006 to supply, repair, and install additional products. 330-331, CP 395-417. Beginning in December 2003 until October 2006, Starline provided the following additional labor and work on the project: (1) Starline removed and replaced multiple window and door units on January 16, 2003; (2) delivered additional windows on December 11, 2003; (3) replaced scratched glass on multiple windows on August 19, 2004; (4) installed

broken sealed unit on March 4, 2005; (5) replaced additional windows on March 25, 2005; (6) replaced two failed sealed units on June 15, 2005; (7) worked on leaking windows on February 6, 2006; and (8) installed window unit on October 2006. CP 395-417.

It is undisputed that Starline provided services, labor and products on the project and that it entered into a construction contract with Leducor; therefore, Leducor's claims are not subject to the U.C.C. The trial court's dismissal of those claims pursuant to the U.C.C. statute of limitations is clear legal error.

D. The Trial Court Erred in summarily determining Leducor's Damages against Starline for its Claim of Breach of the Duty to Defend

Ultimately, the trial court entered summary judgment against Starline ruling that it breached its duty to defend Leducor for claims arising out of its defective products, work, and installation instructions. At Starline's request, the trial court also summarily ruled that the amount of damages awarded to Leducor for Starline's breach of its contractual duty to defend was a pure issue of law and entered partial judgment against Starline in the minuscule amount of \$19,101.20. CP 2187-2190.

The trial court erred when it invaded the exclusive province of the jury, determining and awarding damages to Leducor as a matter of law. The

Washington Supreme Court has long interpreted Washington's Constitution, Article 1, Section 21 to guarantee the right to trial by jury in a civil matter and has done so since the time of the constitution's adoption. *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 365, 617 P.2d 704 (1980). Our constitution declares, "The right of trial by jury shall remain inviolate." Const. Art. I, § 21. Accordingly, there is a right to a jury trial where the civil action is purely legal in nature. *Peters v. Dulien Steel Products*, 39 Wn.2d 889, 891, 239 P.2d 1055, 1056-57 (1952) (Disputed terms of contract and damages for alleged breach was sufficient to justify submission of the case to the jury). A request for monetary damages on a breach of contract claim is generally legal in nature. *Granite Rock Co. v. International Broth. of Teamsters, Freight, Constr., Gen. Drivers, Warehousemen & Helpers*, 649 F.3d 1067, 1069 -70 (9th Cir. 2011).

Damage determinations are a classic example of the type of questions which are traditionally decided by a jury. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645-66, 771 P.2d 711 (1989) *amended* 780 P.2d 260. In *Sofie*, the issue was whether the measure of damages is a question of fact within the jury's province. 112 Wn.2d at 715. Holding that damages are indeed within the jury's province, the Court analyzed its early decision in *Baker v. Prewitt*, 3 Wash. Terr. 595, 19 P. 149 (1888) where

the Supreme Court held:

Sections 204 and 289 of the [territorial] Code seem to require that in all actions for the assessment of damages the intervention of a jury must be had, save where a long account may authorize a referee, etc. This statute is mandatory, and we are satisfied that where the amount of damages is not fixed, agreed upon, or in some way liquidated, a jury must be called, unless expressly waived.

112 Wn.2d at 645 citing *Baker*, at 597-98, 19 P. 149. The Supreme Court went on to hold that if our constitution is to protect as inviolate the right to a jury trial at least to the extent as it existed in 1889, then the holding in *Baker* provides clear evidence that the jury's fact-finding function include the determination of damages. *Sofie*, 112 Wn.2d at 645-46. The law is unassailable and can only lead to the conclusion that our Constitution, in Article 1, section 21, protects the jury's role to determine damages. *Id.* at 646. *See also James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971) (“To the jury is consigned under the constitution the ultimate power to weigh the evidence and determine the facts – and the amount of damages in a particular case is an ultimate fact.”); and *Worthing v. Caldwell*, 65 Wn.2d 269, 273, 396 P.2d 797 (1964) (“Questions of damages should be decided by the jury.”)

Accordingly, Ledcor respectfully asks that this Court reverse the trial court’s judgment on damages because under Washington’s

Constitution damages are within the exclusive purview of the jury and Leducor was entitled to a jury trial.

E. The Contract Entitles Leducor to an Award of Attorney's Fees and Costs on Appeal

Section 19 of the parties' subcontract provides that the prevailing party in any action to enforce or to interpret the terms and provisions of the agreement "shall be entitled to its actual attorneys' fees and costs. . ." CP 92. Therefore, in accordance with RAP 18.1(b), Leducor requests an award of its attorney's fees and costs incurred on the present appeal or a direction to the trial court to determine those fees and costs after remand in accordance with RAP 18.1(j).

V. CONCLUSION

This Court should reverse the trial court's orders dismissing Leducor's claims for breach of contract, express warranty, indemnity, and subrogation because Leducor put forth sufficient evidence to demonstrate it had independent contractual or equitable reimbursement claims against Starline outside of the confidential Issue Release, based on Starline's defective products and services provided to the Project. Because Starline and Leducor entered into a separate and mutually agreed to Construction Subcontract, Starline cannot release Leducor's contractual rights by entering

into a Confidential Issue Release with the Admiral COA eleven days before the COA settled all claims against Admiral Way LLC and Leducor nor can it release Leducor's valid claims for foreseeable and consequential damages due to Starline's breach of contract.

Similarly, this Court should reverse the trial court's order dismissing Leducor's claims as untimely under the U.C.C. because Leducor put forth sufficient and undisputed evidence that Starline performed work and labor at the Project thereby excluding the applicability of the UCC to Leducor's claims.

The undisputed evidence that Starline provided work and labor on the Project Leducor presented was sufficient, at the very least, to create a material issue of fact on summary judgment and Starline never established that it was entitled to the relief sought as a matter of law.

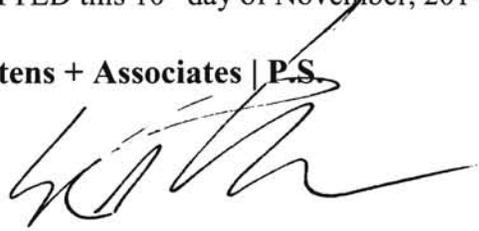
Finally, this Court should reverse the trial court's ruling that Leducor's damages on its breach of the contractual duty to defend can be decided on summary judgment and entered as partial judgment. Leducor had a constitutional right to have its claim for damages heard by a jury and Leducor never waived that right.

Granting summary judgment under these circumstances was clearly improper. This Court should reverse the trial court's rulings and remand

the matter for trial.

RESPECTFULLY SUBMITTED this 10th day of November, 2014.

Martens + Associates | P.S.

A handwritten signature in black ink, appearing to read 'R. Martens', written over a horizontal line.

By _____
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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November, 2014, I caused to be served true and correct copies of the foregoing on all parties as follows:

Counsel for Starline Windows, Inc.	<input type="checkbox"/> U.S. Mail
Kenneth Cusack, Esq.	<input type="checkbox"/> Hand Delivery (ABC Legal)
Forsberg & Umlauf, P.S.	<input type="checkbox"/> Telefax
901 Fifth Avenue, Ste. 1400	<input type="checkbox"/> Overnight Delivery
Seattle, Washington 98164	<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 10th day of November, 2014, at Seattle, WA.



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