

No. 72992-6-I

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

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

Respondent/Cross-Appellant,

vs.

STARLINE WINDOWS, INC., a Washington corporation,

Appellant/Cross-Respondent.

**BRIEF OF RESPONDENT/CROSS-APPELLANT
LEDCOR INDUSTRIES (USA) INC.**

Martens + Associates | P.S.

Richard L. Martens, WSBA # 4737
Matthew M. Kennedy, WSBA # 36452

**Attorneys for Respondent/Cross-Appellant
Ledcor Industries (USA) Inc.**
705 Fifth Avenue South, Suite 150
Seattle, WA 98104-4436
Telephone: (206) 709.2999

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

I. STATEMENT OF THE CASE.....1

II. ARGUMENT.....2

 A. Starline Cannot Show that the Trial Court Erred.....3

 1. Standard of Review.....3

 2. Ledcor is a prevailing party.....4

 3. Both or neither party prevails.....6

 4. Equitable basis for the trial court’s decision.....6

III. CONCLUSION.....8

CERTIFICATE OF SERVICE.....9

TABLE OF AUTHORITIES

Cases

Berchauer/Phillips v. Seattle School District No. ,
124 Wn.2d 816, 881 P.2d 986 (1994).....7

Eagle Point Condo. Owners Ass'n v. Coy,
102 Wn. App. 697, 9 P.3d 898 (2000).....4

Franklin County Sheriff's Office v. Sellers,
97 Wn.2d 317, 646 P. 2d 113 (1982).....4

Hall v. Feigenbaum,
178 Wn. App. 811, 319 P.3d 61 (2014),
review denied, 180 Wn.2d 1018 (2014).....3

Marassi v. Lau,
71 Wn. App. 912, 859 P.2d 605 (1993).....4

Mendez v. Palm Harbor Homes, Inc.,
111 Wn. App. 446, 45 P.3d 594 (2002).....6

Phillips Building Company v. An,
81 Wn. App. 696, 915 P.2d 1146 (1996).....6

Riss v. Angel,
131 Wn.2d at 633, 934 P.2d 669 (1997).....5

Wachovia SBA Lending v. Kraft,
165 Wn.2d 481, 200 P.3d 683 (2009).....5

Statutes

RCW 4.84.330.....5

Court Rules

RAP 18.1.....8

I. STATEMENT OF THE CASE

The underlying suit was filed against Leducor on August 29, 2008. Leducor filed several third-party claims and cross-claims against subcontractors to the development, including Starline. Leducor alleged many theories for recovery of damages, some sounding in tort and others in contract law. Starline denied all of them, including Leducor's claim that Starline owed Leducor a defense against the condominium association's claims. After nearly four years of rather significant litigation, on March 6, 2014,¹ Starline finally conceded that it owed Leducor a duty to defend against the condominium association's claims. At that point, trial was set for May 12, 2014 – barely two months away. Trial was continued and on May 14, 2014, Judge Richard Eadie entered judgment in favor of Leducor against Starline for defense costs and fees. The judgment was in an amount of \$19,101.20.² In the companion appeal, Leducor challenges the amount of the judgment against Starline as insufficient to cover the

¹As an indicator of the complexity of the underlying action, Starline's March 6, 2014 motion was docket entry 543.

²In the companion appeal, Leducor appeals the amount awarded. Starline confuses that appeal with its characterized "admission" by Leducor that it is *not* the prevailing party. That is incorrect. Leducor is the prevailing party on Starline's duty to defend. Leducor argues that \$19,101.20 was not the proper measure of Leducor's defense costs attributable to Starline.

defense costs in the underlying action. Washington Court of Appeals, Div. I Cause No. 72317-1-I.

The contract between Ledcor and Starline contained a provision for attorneys fees and costs to the prevailing party who brings an action to enforce the contract. On July 7, 2014, Judge Roger Rogoff found that both parties substantially prevailed and would therefore be responsible for their own costs and fees. Starline untimely appealed Judge Rogoff's order on January 9, 2015. Ledcor's motion to strike Starline's cross-appeal as untimely is presently pending before this Court. That motion to strike is a preliminary matter that, depending on the Court's ruling, may render the merits of Starline's so-called cross-appeal moot.³

II. ARGUMENT

Assuming, *arguendo*, this Court reaches the merits of Starline's appeal, Respondent/Cross-Appellant Ledcor Industries (USA) Inc. ("Ledcor") requests this Court affirm the trial court's determination that both parties substantially prevailed. This issue has already been partially briefed in the Reply of Appellant Ledcor in the companion appeal at pp. 18-19. That argument is incorporated herein by reference.

³Failure to grant Ledcor's motion to strike will eviscerate the time limitation requirements of the Rules of Appellate Procedure.

A. Starline Cannot Show that the Trial Court Erred.

Ledcor has already briefed its argument that the instant cross-appeal was untimely and should be stricken. Ledcor does not waive its argument or pending motion by answering the merits of Starline's cross-appeal under this Court's scheduling order.

1. Standard of Review

Washington Courts typically apply a two-part review to the award or denial of attorney fees: (1) the court reviews *de novo* whether a legal basis exists for awarding attorney fees by statute, under contract, or in equity and (2) the court reviews the reasonableness of an attorney fee award for abuse of discretion. *See Hall v. Feigenbaum*, 178 Wn. App. 811, 319 P.3d 61 (2014), *review denied* 180 Wn.2d 1018, 327 P.3d 54 (2014).

At issue in this appeal is not the legal basis for, or amount of the prevailing party attorney fees, but rather the trial court's determination that both parties substantially prevailed and therefore both parties should be independently responsible for their own costs and fees. The question of which party is the prevailing party for purposes of awarding fees is a mixed question of law and fact and is therefore reviewed under an error of

law standard. *See Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 706, 9 P.3d 898 (2000).

The error of law standard allows the reviewing court to essentially substitute its judgment for that of the lower court, though substantial weight should be accorded the lower court's view of the law. *See Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 646 P. 2d 113 (1982). In an appeal of a decision involving a mixed question of law and fact, the court should not try the facts *de novo* but rather, should determine the law independently of the lower court's decision and apply it to the facts as found by the lower court. *Id.*, *Franklin County*, at 329-30.

2. Ledcor is a prevailing party.

Starline does *not* argue that both parties substantially prevailed. In fact, Starline argues that *Marassi v. Lau*, 71 Wn. App. 912, 859 P.2d 605 (1993) as originally cited by it does *not* apply and that this Court should not engage in, or remand to the trial court for further proceedings regarding a proportional split of the attorney costs and fees. *Brief of Cross-Appellant at page 9*. Rather, Starline argues that the trial court simply erred in determining Ledcor is a prevailing party under any definition of the term.

Although Judge Rogoff cited RCW 4.84.330 for a definition of “prevailing party”, and for the conclusion that attorney fees are mandatory, RCW 4.84.330 does not actually apply to the present case because the attorney fee provision in Paragraph 19 is a bilateral fee provision.⁴ RCW 4.84.330 only applies to unilateral attorney fee provisions. *See Wachovia SBA Lending v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009). Nevertheless, the trial court was within its discretion in seeking statutory guidance on the meaning of the phrase “prevailing party”.

Regardless of the trial court’s reference to RCW 4.84.330, courts have routinely held that “[i]n general, a prevailing party is one who receives an affirmative judgment in his or her favor.” *See Riss v. Angel*, 131 Wn.2d at 633, 934 P.2d 669 (1997). Clearly Ledcor is a prevailing party in this instance as the affirmative judgment is in Ledcor’s favor.

This Court should deny Starline’s cross-appeal because Starline has failed to set forth any basis for a determination that the trial court erred in its application of the law to this case when it determined Ledcor was a prevailing party.

⁴ Paragraph 19 of their subcontract, states in relevant part that, “in the event that . . . litigation is instituted to . . . adjudicate any question(s) arising under this Agreement, the prevailing party shall be entitled to its actual attorneys’ fees and all costs incurred in connection therewith . . .” CP 727, lines 24-26.

3. Both or neither party prevails.

Judge Rogoff noted “[w]hen both parties prevail on a major issue, there may be no prevailing party for the purpose of awarding attorney fees.” *Citing Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 702, 915 P.2d 1146 (1996). Ledcor did prevail on a major issue: Starline’s duty to defend under the contract, which Starline does not now deny although it did for many years. Assuming for the sake of argument that Starline also prevailed on major issues, then Judge Rogoff was correct in determining that for the purposes of awarding attorney fees, neither party truly prevailed.

4. Equitable basis for the trial court’s decision

Judge Rogoff properly identified many equitable and public policy principles for his determination that both parties prevailed and, therefore, both parties should bear their own costs and fees. *See CP 728, lines 8-20*. When the trial court bases its judgment on both legal and equitable theories, the correctness of the equitable theory by itself is sufficient to justify affirmance. If the order was proper under either approach, this Court should affirm it. *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 460-61, 45 P.3d 594 (2002). Using this standard, Judge

Rogoff's order was absolutely correct and this Court should deny Starline's cross-appeal.

Judge Rogoff was properly worried about "Starline's position [that] would allow [it] to completely deny liability, force expenditure of incredible amounts of money and time, and then readjust its position at the last moment and claim that it 'prevailed.'" *CP 728, id.* Undoubtedly, such a position would encourage, rather than discourage litigation and utterly eliminate the benefits and security of a contract – particularly where large multinational insurance companies are driving the litigation⁵.

Just as with insurance contracts, the duty to defend is one of the main benefits of the contract at issue. Ledcor entered into the subject contract with Starline seeking protection from expenses arising from litigation. *Cf. Berchauser/Phillips v. Seattle School District No. ,* 124 Wn.2d 816, 826, 881 P.2d 986 (1994) (The allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract.) Ledcor prevailed and Starline owes a duty to defend. Now Starline wants this Court to compel Ledcor to pay for

⁵Starline's counsel was retained by Zurich Insurance Company which partially defended but did not pay any of the damages on behalf of Ledcor. CP 516-517, 496-506 in the companion appeal, Case No. 72317-1-I.

Starline's vexatious, time-consuming and expensive denial of Starline's contractual obligations.

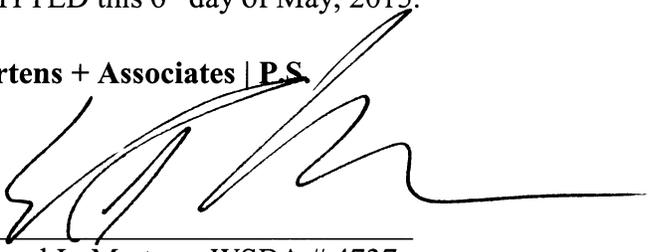
III. CONCLUSION

In the end, Starline argues, without basis, that it is the *only* prevailing party in this action. In so doing, Starline ignores the long line of cases defining the prevailing party as the party in whose favor judgment is rendered. In this case, judgment was undeniably rendered in favor of Ledcor. No judgment was entered in favor of Starline. Judge Rogoff correctly applied the facts in this case to the laws of Washington and determined that Ledcor was a prevailing party. Starline's cross-appeal should be denied.

Pursuant to RAP 18.1 and the contract with Starline, Ledcor should be awarded costs and fees on appeal.

RESPECTFULLY SUBMITTED this 6th day of May, 2015.

Martens + Associates | P.S.

By 

Richard L. Martens, WSBA # 4737

Matthew M. Kennedy, WSBA #36452

Attorneys for Appellant/Cross-Respondent

Ledcor Industries (USA) Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of May, 2015, 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)
Martin J. Pujolar, Esq.	<input type="checkbox"/> Telefax
Forsberg & Umlauf, P.S.	<input type="checkbox"/> Overnight Delivery
901 Fifth Avenue, Ste. 1400	<input checked="" type="checkbox"/> E-mail with Recipient's
Seattle, Washington 98164	Approval

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

SIGNED THIS 6th day of May, 2015, at Seattle, Washington.



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

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2015 MAY -6 PM 4:05