

FILED: July 03, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

SHELTER PRODUCTS, INC.,
an Oregon corporation,
Plaintiff,

v.

STEELWOOD CONSTRUCTION, INC.,
a Washington corporation,
Defendant-Respondent,

and

CATAMOUNT CONSTRUCTORS, INC.,
a Colorado corporation,
Defendant-Appellant,

and

HD SALEM OR LANDLORD, LLC;
and SAFECO INSURANCE COMPANY OF AMERICA,
a Washington corporation,
Defendants.

STEELWOOD CONSTRUCTION, INC.,
Third-Party Plaintiff,

v.

HOME DEPOT, INC.,
Third-Party Defendant.

Marion County Circuit Court
10C20285

A148959

Pamela L. Abernethy, Senior Judge. (Limited Judgment)

Bernard L. Smith, Senior Judge. (Supplemental Limited Judgment)

Argued and submitted on September 18, 2012.

D. Brent Carpenter argued the cause for appellant. With him on the briefs were Joseph A. Yazbeck, Jr., and Yazbeck, Cloran & Bowser, PC.

Shawn A. Elpel, Washington, argued the cause for respondent. On the brief were Albert F. Schlotfeldt and Duggan Schlotfeldt & Welch PLLC.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Hadlock, Judge.

SERCOMBE, J.

Limited Judgment affirmed; appeal from "Supplemental Limited Judgment" dismissed.

1 SERCOMBE, J.

2 This case involves a dispute between a general contractor, Catamount
3 Constructors, Inc. (Catamount), and one of its subcontractors, Steelwood Construction,
4 Inc. (Steelwood).¹ Catamount contracted with Steelwood to perform work and provide
5 certain materials for the construction of the Salem Home Depot regional distribution
6 center (the project). However, after Steelwood provided the materials in question and
7 began work on the project, Catamount terminated its agreement with Steelwood "for
8 convenience." Steelwood filed a construction lien on the project and, as part of this
9 action, alleged claims for, among other things, breach of contract and construction lien
10 foreclosure.² Thereafter, Steelwood sought summary judgment against Catamount and,
11 after a hearing, the trial court granted the motion and entered a limited judgment against
12 Catamount.³ On appeal, Catamount raises five assignments of error, asserting that the

¹ Both Catamount and Steelwood were defendants in an action initiated by Shelter Products, Inc. (Shelter Products), one of Steelwood's suppliers for the project. Steelwood then filed cross-claims against Catamount. Shelter Products eventually obtained payment and dismissed its claims. It is Steelwood's claims against Catamount that are at issue on appeal.

² After the lien was recorded, Catamount filed a release of lien bond.

³ The trial court subsequently entered a "Supplemental Limited Judgment" awarding Steelwood attorney fees and costs. It also entered a "Second Supplemental Limited Judgment" awarding Steelwood additional fees and costs. We note, first, that Catamount did not file a notice of appeal from the "Second Supplemental Limited Judgment." Furthermore, this court has held that a supplemental judgment awarding attorney fees based on a limited judgment is not appealable. *See Interstate Roofing, Inc. v. Springville Corp.*, 217 Or App 412, 426-27, 177 P3d 1, *adh'd to as modified on recons*, 224 Or App 94, 197 P3d 27 (2008), *aff'd in part and rev'd in part on other grounds*, 340 Or 144, 218 P3d 113 (2009). Accordingly, this court does not have jurisdiction over Catamount's appeal from the "Supplemental Limited Judgment" and that portion of this appeal must

1 trial court erred in granting summary judgment in favor of Steelwood. For the reasons
2 explained below, we affirm the grant of summary judgment.

3 When reviewing a trial court's grant of summary judgment, we view the
4 facts and all reasonable inferences that may be drawn from them in the light most
5 favorable to the nonmoving party--in this case, Catamount. *Vaughn v. First Transit, Inc.*,
6 346 Or 128, 132, 206 P3d 181 (2009).

7 Catamount, as noted, was the general contractor on the project and hired
8 Steelwood as a subcontractor. Catamount and Steelwood entered into a purchase order, a
9 subcontract, and a joint check agreement. Pursuant to the purchase order, which was
10 signed "in conjunction with the Subcontract for a complete Steel erection and panelized
11 roof system," Steelwood was to provide materials for which Catamount was to pay a total
12 of \$300,000. Under the subcontract, Steelwood was to complete the installation of
13 structural steel and the roofing system for the project. The agreement, which the parties
14 signed on March 24, 2010, provided a schedule pursuant to which work was to begin by
15 May 2010 and be completed in July. The subcontract specified that time was of the
16 essence. Among other things, the subcontract provided that Catamount could terminate
17 the agreement for convenience:

18 "18. Termination for Convenience. The Contractor may, upon
19 seven (7) days written notice to the Subcontractor, without cause and
20 without prejudice to any other right or remedy, terminate this Subcontract,
21 in whole or in part, for its convenience. Upon receipt of any such notice,
22 Subcontractor shall, unless the notice directs otherwise, immediately

be dismissed.

1 discontinue the work on that date and to the extent specified in the notice,
2 place no further orders or subcontracts for materials, equipment, services,
3 or facilities, except as may be necessary for completion of such portion of
4 the work as is not discontinued; promptly make every reasonable effort to
5 procure cancellation upon terms satisfactory to Contractor of all orders and
6 subcontracts to the extent they relate to the performance of the discontinued
7 portion of the work and shall thereafter do only such work as may be
8 necessary to preserve and protect work already in progress and to protect
9 materials, plant and equipment on the site or in transit thereto. The
10 obligations of the Subcontractor shall continue as to portions of the work
11 already performed and as to bona fide obligations assumed by
12 Subcontractor prior to the date of termination. Subcontractor shall be
13 entitled to be paid the full cost of all work properly done by Subcontractor
14 to the date of termination not previously paid for, less sums already
15 received by Subcontractor on account of the portion of the work performed.
16 Should the Contractor's termination of the Subcontract under this paragraph
17 be deemed improper or wrongful, then such termination shall be deemed
18 automatically to have occurred pursuant to Contractor's rights under
19 paragraph 17."

20 (Boldface omitted.) The agreement also provided that Catamount could make payment to
21 Steelwood through joint checks made payable "to the joint order of [Steelwood and its]
22 sub subcontractors, suppliers or others * * *." The joint check agreement, executed by
23 representatives of Catamount, Steelwood, and Shelter Products (one of Steelwood's
24 suppliers on the project) on the same day as the subcontract,⁴ provided that Catamount
25 would "endeavor to make monthly payments jointly to [Shelter Products] and
26 [Steelwood] for all amounts owing to [Shelter Products] during the course of the Project
27 * * *."

28 All of the materials required under the purchase order were delivered to the
29 work site and, thereafter, Steelwood invoiced Catamount for those materials. Catamount

⁴ Catamount's representative signed the joint check agreement on March 23, 2010,
and representatives of the other two companies signed on March 24, 2010.

1 did not pay the invoice at that time. After Steelwood began work on the project, on
2 Wednesday, June 16, 2010, Catamount's project manager sent Steelwood a letter
3 outlining concerns about the progress of work on the project. In particular, he set out
4 several issues: (1) there would be additional costs if the work was not complete within
5 the agreed time period; (2) daily housekeeping at the work site was inadequate and
6 Catamount planned to begin cleaning up after Steelwood and billing Steelwood for that;
7 (3) certain work was deficient--certain braces and nailing were incomplete and some
8 nails, bolts, and plates were missing; and (4) "[p]roduction is not where committed to in
9 [the] contract." The project manager stated that "[o]n Monday morning we will evaluate
10 where you are and how to best assist you in meeting your contractual obligations."
11 However, on Saturday, June 19, 2010, Catamount terminated the contract for
12 convenience pursuant to paragraph 18 of the subcontract. Accordingly, on Monday, June
13 21, Steelwood vacated the work site.

14 After it terminated Steelwood for convenience, Catamount refused to pay
15 Steelwood's invoice for materials delivered under the purchase order. It also declined to
16 pay Steelwood for work performed under the subcontract prior to termination.

17 Thereafter, Steelwood recorded a construction lien for \$369,679.30. Several of
18 Steelwood's suppliers for the project--Shelter Products, White Cap Construction Supply,
19 and Ahern Rentals--also filed construction liens on the property, and Catamount posted
20 bonds on those liens.

21 Catamount, for its part, cleaned debris left by Steelwood on the project site

1 and entered into a subcontract with a new company, Panelized Structures, to complete the
2 work Steelwood was to have done. According to Catamount, it incurred \$75,440 in
3 conjunction with the clean up and to repair Steelwood's work:

4 "That amount is comprised of \$61,668 which Catamount paid to Panelized
5 Structures to repair and clean up Steelwood's defective work; \$276.00
6 Catamount incurred for clean-up of the Project site that it performed;
7 \$150.00 Catamount spent to hire a locksmith to enter a storage unit which
8 Steelwood had left locked; and \$13,350.00 which Catamount incurred in
9 additional labor and travel costs in coordinating and supervising the above-
10 described repairs and clean-up."⁵

⁵ In particular, to "repair Steelwood's defective work," Panelized Structures had to do work pursuant to a number of change orders:

"Change Order 1 totaled \$4,225.00 and required Panelized Structures to cut joists to the center of girders, install nailers on concrete walls, cover openings with plywood, replace missing studs in mechanical openings, replace 2x6s over girders, and install blocks. Change Order 2 totaled \$5,611.00 and required Panelized Structures to relocate mechanical openings, finish placing 2x6s over girders, frame five fill bays between doublers, and clean up material left behind by Steelwood. Change Order 3 totaled \$3,134.00 and required Panelized Structures to pull nails, remove and relocate incorrect mechanical openings, clean the rooftop, and set straps. Change Order 4 totaled \$3,876.00 and required Panelized Structures to correct Steelwood's over-nailing of plywood, install 6x6 nailers, and tear out and replace frame rooftop unit # 1. Change Order 5 totaled \$13,019.00 and required Panelized Structures to pick up nails left behind by Steelwood, install additional tie straps, add nails to tie straps in area installed by Steelwood and at the request of the inspector, install new subperlin as a corrective measure as required by the Project structural engineer, and repair roof nailing. Change Order 6 totaled \$2,215.00 and required Panelized Structures to perform additional bolting and welding on work performed by Steelwood, install 2x6s as directed by the Project structural engineer to repair Steelwood's work, and further clean rooftop area in which Steelwood had performed work. Change Order 7 totaled \$1,669.00 and required Panelized Structures to reinstall joist brackets that were incorrectly installed by Steelwood and bolt plates at girder that were missed by Steelwood. Change Order 9 totaled \$14,289[.00] and required Panelized Structures to reinstall additional joist brackets that were incorrectly installed by

1 However, after terminating the contract with Steelwood, Catamount did not provide
2 Steelwood with notice that its work was defective or needed repair, nor did it give
3 Steelwood an opportunity to enter the work site with respect to any defects in the work it
4 performed.

5 After filing its lien, Shelter Products filed an action against Steelwood and
6 Catamount to obtain payment for the materials it had provided on the project. Steelwood,
7 in turn, filed cross-claims against Catamount for payment of the materials and labor it
8 had supplied under the purchase order and subcontract. Catamount then asserted that it
9 was entitled to an offset and maintained that Steelwood was responsible for the amounts
10 Catamount incurred repairing the work Steelwood had done and for attorney fees and
11 other amounts incurred by Catamount relating to the liens. While the action was pending,
12 Catamount paid Shelter Products, White Cap Construction Supply, and Ahern Rentals the
13 amounts they were owed and discharged their liens.

14 Eventually, Steelwood sought summary judgment against Catamount on its

Steelwood and install a 6x6 nailer. Change Order 10 totaled \$6,400.00 and required Panelized Structures to purchase additional materials to replace materials that Steelwood had overnailed. Change Order 11 totaled \$2,319.00 and required Panelized Structures to relocate two columns placed by Steelwood. Change Order 13 totaled \$3,269.00 and required Panelized Structures to purchase additional nails to correct Steelwood's work. Change Order 14 totaled \$702.00 and required Panelized Structures to purchase special nails to attach additional subperlins which the Project engineer ordered to correct Steelwood's work. Change Order 15 totaled \$940.00 and required Panelized Structures to purchase special nails to attach additional subperlins which the Project structural engineer ordered to correct Steelwood's work."

1 claims for construction lien foreclosure and breach of contract, asserting that it was
2 entitled to recover the amount owed under the purchase order and, as a result of the
3 termination for convenience, the full cost of all work it had performed under the
4 subcontract. In particular, as costs, it asserted it was entitled to recover amounts it
5 expended on the project as well as profit and overhead. Catamount responded that
6 Steelwood was not entitled to summary judgment because "Catamount's costs incurred in
7 repairing Steelwood's defective work, in discharging Steelwood's suppliers' and
8 subcontractor's liens, and its costs relating to Steelwood's overstated lien total a greater
9 sum than it owes Steelwood under the subcontract between them." Steelwood replied, in
10 part, that, because Catamount had terminated Steelwood for convenience, it could not
11 avoid paying by asserting that the work Steelwood had done was defective. Furthermore,
12 according to Steelwood, it was "terminated from the site before finishing" work and was
13 not given notice after that termination that its work was defective.

14 At the end of the hearing on the summary judgment motion, the court ruled
15 from the bench and granted summary judgment in favor of Steelwood. It explained:

16 "Catamount argues that summary judgment should not be granted
17 because, 'Its costs incurred in repairing Steelwood's defective work, and
18 discharging Steelwood's supplies, and subcontractor liens, and its costs
19 relating to Steelwood's overstated lien total a great[er] sum than the amount
20 it owes Steelwood under the contract.'

21 "So Catamount is admitting that it does owe money under the
22 contract. It just says at the end of the day there are no damages. So that
23 gets us to address the two bases of damages that it claims are the offset.

24 "The first is the purchase order, which we've just been discussing.
25 And the court finds under these circumstances that it was an act or omission

1 of the contractor, not an act or omission of the subcontractor that started the
2 chain of events that resulted in these subs not being paid.

3 "When looking at both the contract and the joint check agreement,
4 which is an agreement in pari materia, or reading them both together,
5 Catamount was to endeavor to make monthly payments jointly to the
6 supplier and subcontractor, and all amounts owing to the supplier during
7 the course of the project. And this was not done.

8 "So when I read act or omission subparagraph 32 [of the
9 subcontract], in light of the joint check agreement * * * I conclude that
10 even looking at the facts in light most favorable to Catamount in this
11 regard."

12 Turning to the issue of whether "the 'repair of defective work' [defense] is somehow
13 viable," the court explained:

14 "Looking at the evidence in light most favorable to Catamount,
15 they're claiming \$75,444. And the Court agrees with [Steelwood's
16 argument] that when there is a termination for convenience, not a
17 termination for cause, there's been no opportunity to inspect and cure. In
18 fact, the exhibit that was provided by Catamount itself clearly demonstrates
19 that. The exhibit * * * suggest[s] that there be a Monday meeting. Never
20 was a Monday meeting because by Saturday the date of the termination of
21 convenience was executed.

22 "So to go back now without giving [Steelwood] an opportunity to
23 inspect, to cure, to do anything, and just say that the contract somehow
24 allows under termination of convenience for the contractor to then go in
25 and discover all of these things that it now charges against the
26 subcontractor, is not provided by the terms of the contract, is not provided
27 by any case law that I can find. And I don't think it's appropriate.

28 "So that \$75,444 does not offset the amount owed for Catamount's
29 breach, which as I said it essentially admitted in this matter."

30 In view of the payments to suppliers by Catamount during the litigation, the court
31 determined that it owed \$27,737.84 on the purchase order. With respect to Steelwood's
32 cost on the project, the court observed that approximately \$50,000 was actual cost owed.

1 However, Steelwood sought profit and overhead as well. The court initially determined
2 that there was not sufficient legal authority for the recovery of profit and overhead, which
3 Steelwood asserted amounted to \$27,231.90 (according to Steelwood, at the time of the
4 termination, it was owed \$60,785.50 for work performed and its profit and overhead
5 would have been 44.8 percent over and above that). Later in the hearing, Steelwood
6 asserted that, even if the court did not award profit, it should recover some amount for its
7 overhead. The court questioned how that would be calculated: "[I]f 45 cents on the
8 dollar is profit and overhead, are there documents that would tell me which portion of
9 that 45 cents is profit, and which portion is overhead?" Steelwood responded that,
10 because it did not anticipate the court's ruling, it had not broken the two amounts down in
11 its affidavits, but that, typically, "profit's 20 percent, but your overhead is like 25
12 percent." The court observed that Steelwood's \$61,633.30 lien did not include any
13 amount for profit and overhead and, ultimately, decided that it would simply allow the
14 full lien amount. Thus, in its order, the court concluded that Steelwood "is entitled to
15 collect its lien amount with respect to the purchase order in the amount of \$27,737.84 and
16 is entitled to collect, with respect to the subcontract, the amount of \$61,633.30, which
17 represents the full cost of all work[] performed by Steelwood until terminated by
18 convenience by Catamount." In view of those conclusions, the court entered a limited
19 judgment awarding Steelwood \$89,417.14 along with prejudgment interest, post-
20 judgment interest, and attorney fees and costs.

21 On appeal, we review the trial court's summary judgment ruling to

1 determine whether we agree that "the pleadings, depositions, affidavits, declarations and
2 admissions * * * show that there is no genuine issue as to any material fact and that the
3 moving party is entitled to prevail as a matter of law." ORCP 47 C; *O'Dee v. Tri-County*
4 *Metropolitan Trans. Dist.*, 212 Or App 456, 460, 157 P3d 1272 (2007). There is no
5 genuine issue of material fact if, "based on the record before the court viewed in a
6 manner most favorable to the adverse party, no objectively reasonable juror could return
7 a verdict for the adverse party on the matter that is the subject of the motion for summary
8 judgment." ORCP 47 C. In response to a summary judgment motion, "an adverse party
9 may not rest upon the mere allegations or denials of that party's pleading," but must, by
10 affidavits, declarations, or as otherwise provided by the summary judgment rule, "set
11 forth specific facts showing that there is a genuine issue as to any material fact for trial."
12 ORCP 47 D.

13 In its first assignment of error, Catamount contends that the trial court erred
14 in granting summary judgment because Steelwood failed to provide legally sufficient
15 evidence of its costs. In particular, Steelwood documented its costs in a profit and loss
16 statement along with an affidavit from the president of the company stating that the profit
17 and loss statement was "a true copy of all expenses incurred by Steelwood on the Home
18 Depot Project under the subcontract." Catamount argues that, because the contract was
19 terminated for convenience, the evidence provided by Steelwood was legally insufficient.
20 It asserts that "[t]estimony alone" is insufficient. Furthermore, in its view, in the absence
21 of documentation (such as "invoices, receipts, or payroll records") to substantiate the

1 profit and loss statement, Steelwood failed to demonstrate its costs with sufficient
2 certainty. Steelwood responds that Catamount failed to preserve this issue for appeal and
3 that, in any event, Steelwood "proved its actual costs with reasonable certainty" by
4 providing a "profit and loss statement that showed its actual costs incurred on the
5 project." We agree with Steelwood that Catamount failed to preserve the issue raised in
6 its first assignment of error.

7 Ordinarily, this court will not consider an issue on appeal unless it was first
8 presented to the trial court. ORAP 5.45(1). The preservation requirement is designed to
9 apprise the trial court of a party's position so that the court can consider it, to avoid
10 surprise and unfairness to the opposing party, and to foster full development of the
11 record. *Peeples v. Lampert*, 345 Or 209, 219-20, 191 P3d 637 (2008). The
12 "determination whether a particular issue was preserved for appeal is a 'practical one'; it
13 will depend on whether the policies behind the preservation requirement--judicial
14 efficiency, full development of the record, and procedural fairness to the parties and the
15 trial court--are met in an individual case." *Charles v. Palomo*, 347 Or 695, 700, 227 P3d
16 737 (2010) (quoting *State v. Parkins*, 346 Or 333, 340-41, 211 P3d 262 (2009)). We will
17 consider "an issue advanced by a party on [appeal] as long as that party raised the issue
18 below with enough particularity to assure that the trial court was able to 'identify its
19 alleged error' so as to 'consider and correct the error immediately, if correction is
20 warranted.'" *Id.* (quoting *State v. Wyatt*, 331 Or 335, 343, 15 P3d 22 (2000)).

21 In this case, in its motion for summary judgment, Steelwood asserted that

1 the "full cost" of the work it performed was \$60,785.50 plus profit and overhead and that,
2 in view of a payment Catamount made to a subcontractor of Steelwood, the amount still
3 owed was \$50,225.50 plus profit and overhead. It attached to its motion an affidavit from
4 Steve Eckman, the company president, stating that, at the time of the termination for
5 convenience, "Steelwood was owed not less than \$60,785.50 for work performed under
6 the Subcontract plus profit and overhead," and that Steelwood was still "owed at a
7 minimum, \$50,2[2]5.50" plus profit and overhead. Catamount, in its response to the
8 motion for summary judgment, asserted, among many other things, that "Steelwood
9 provides no substantiation, not even the slightest detail, of how it arrived at the amount it
10 is allegedly owed under the Subcontract. Is it the reasonable value of its labor? Even if it
11 is, the reasonable value of Steelwood's labor is irrelevant because the parties had entered
12 into the Subcontract." Thereafter, Steelwood filed a reply and attached to it a
13 supplemental affidavit from Eckman. Furthermore, Steelwood attached to Eckman's
14 affidavit Exhibit C, which Eckman stated was "a true copy of all expenses incurred by
15 Steelwood on the Home Depot Project under the subcontract." Exhibit C is a profit and
16 loss statement that includes a breakdown of Steelwood's expenses on the project for,
17 among other things, payroll, construction supplies, equipment rental, fuel, and postage
18 and delivery.

19 At the hearing, the court noted that Steelwood had submitted
20 "documentation here to say [that it] spent around \$50,000." It was Catamount's position,
21 however, that it was entitled to offset its expenses to repair the work done by Steelwood

1 against the amount Steelwood asserted was owed under the subcontract. The court,
2 during the hearing, specifically noted Exhibit C in an exchange with Catamount's
3 counsel:

4 "[CATAMOUNT'S COUNSEL]: I mean even accepting that
5 \$60,785.50 number--

6 "THE COURT: Yeah.

7 "[CATAMOUNT'S COUNSEL]: --it's still--at the end of the day,
8 they still owe us \$33,000.

9 "THE COURT: Okay. So you'll at least go with me as far as to say
10 probably now that we have Exhibit C, the \$50,000 that they say they
11 actually spent is a fair representation of what they actually spent.

12 "[CATAMOUNT'S COUNSEL]: Right."

13 As noted, before Exhibit C was submitted, Catamount asserted that Steelwood had failed
14 to substantiate its asserted costs. However, Catamount never argued that the later
15 submitted Exhibit C was insufficient to document those costs. And it certainly never
16 expressed the position, as it does here, that, because the contract was terminated for
17 convenience, to provide legally sufficient evidence of its costs, Steelwood could not rely
18 on testimony and was required to submit certain types of documentation--invoices,
19 receipts, payroll records, and the like--to substantiate the information contained in
20 Exhibit C. Indeed, as set forth above, at the summary judgment hearing, Catamount
21 appeared to agree with the trial court that, "probably now that we have Exhibit C, the
22 \$50,000 that they say they actually spent is a fair representation of what they actually
23 spent." In other words, in the proceedings below, Catamount failed to make any
24 argument that would have alerted the trial court and opposing counsel of its current

1 assertion that the evidence submitted by Steelwood to substantiate its costs on the project
2 is legally insufficient. Accordingly, we do not address the issue raised in Catamount's
3 first assignment of error.

4 In its second assignment of error, Catamount contends that the court erred
5 in awarding Steelwood overhead when Steelwood "had not met its burden of proving its
6 overhead." In particular, Catamount complains that "Steelwood claimed a lump sum for
7 both profit and overhead and did not segregate the amounts it claimed for profit and for
8 overhead." According to Catamount, because the subcontract was terminated for
9 convenience, Steelwood had the burden of proving overhead with "sufficient certainty"
10 but "failed to provide a reasonable basis on which the trial court could compute [its]
11 overhead" and "failed to present information sufficient to allow" the application of a
12 federal formula for determining overhead. Steelwood responds that, first, this issue was
13 not preserved before the trial court and, second, the "'overhead' costs awarded by the trial
14 court were fair and reasonable, and determined with reasonable certainty." Again, we
15 agree with Steelwood that Catamount failed to preserve before the trial court the
16 arguments that it advances on appeal.

17 As with its first assignment of error, in support of its position that it
18 preserved this argument, Catamount points to the assertion in its response to Steelwood's
19 summary judgment motion that Steelwood had provided "no substantiation, not even the
20 slightest detail, of how it arrived at the amount it is allegedly owed under the
21 Subcontract." However, in context, that assertion clearly was not aimed at Steelwood's

1 evidence relating to profit and overhead. Catamount's argument was as follows:

2 "The \$105,195.74 figure [Steelwood seeks] is comprised of the
3 amount owing under the Purchase Order, \$27,737.84, plus the *amount*
4 *allegedly currently owing under the Subcontract*, \$50,225.03, plus its profit
5 and overhead on the same, \$27,231.90. Steelwood provides no
6 substantiation, not even the slightest detail, of how it arrived at the amount
7 it is *allegedly owed under the Subcontract*. Is it the reasonable value of its
8 labor? Even if it is, the reasonable value of Steelwood's labor is irrelevant
9 because the parties had entered into the Subcontract."

10 (Emphases added.) Thus, Catamount broke down three amounts sought by Steelwood:

11 (1) the amount owing under the purchase order, (2) the amount "allegedly currently
12 owing under the Subcontract," and (3) the profit and overhead. It asserted that Steelwood
13 had failed to provide any substantiation of the second figure--the "amount it is allegedly
14 owed under the Subcontract"--and did not contest the sufficiency of the proof submitted
15 for the profit and overhead.

16 Indeed, Catamount's argument relating to profit and overhead in its
17 opposition to the summary judgment motion had nothing to do with the sufficiency of
18 Steelwood's proof. Instead, Catamount contended that Steelwood should only be able to
19 recover for the percentage of work it had completed, and not the amount it sought as
20 costs, profit, and overhead:

21 "Here, the Subcontract was for a lump sum amount of \$286,734.00.
22 As stated above, at the time of Steelwood's termination, it had--at best--
23 completed nine percent (9%) of its work under the Subcontract. Nine
24 percent of the total Subcontract amount of \$286,734.00 equals \$25,806.06.
25 Thus, the total amount of work that Steelwood had completed at the time of
26 its termination could not exceed \$25,806.06. As Steelwood admits in its
27 motion, Catamount paid \$10,560.47 of that total to Ahern, one of
28 Steelwood's equipment suppliers on the Subcontract, thereby reducing the

1 amount currently owed to Steelwood under the Subcontract to no more than
2 \$15,245.59.

3 "Because Steelwood is owed, at most, \$15,245.59, not \$50,225.03,
4 its claim of profit and overhead of \$27,231.90 is clearly erroneous. Further,
5 in alleging that it is entitled to profit and overhead on that amount,
6 Steelwood is actually seeking profit and overhead *on top* of profit and
7 overhead. That is, when Steelwood submitted its bid to Catamount to
8 perform its work on the Project in a lump sum amount of \$286,734.00 that
9 figure included Steelwood's costs, profit, and overhead. As a practical
10 matter, if Steelwood had fully performed its work under the Subcontract, it
11 would have received the total Subcontract amount of \$286,734.00 and no
12 additional sum for profit and overhead. As stated above, Steelwood
13 performed nine percent of the Subcontract, and therefore is entitled to nine
14 percent of that amount, at most. Because the total Subcontract includes
15 profit and overhead, nine percent of that amount includes profit and
16 overhead. To award Steelwood an additional \$27,231.90 in overhead
17 would be a windfall for Steelwood, to which it is not entitled."

18 (Citations omitted; emphasis in original.) The trial court rejected Catamount's assertion
19 that Steelwood was entitled to recover only nine percent of the total contract price and
20 concluded that Steelwood was entitled to recover its costs. With respect to profit, it was
21 the court's view that there was not sufficient legal authority for such an award. It stated:

22 "I'm not going to allow that to be paid in this instance. I just don't see
23 enough support for it. I have one little New York case. I don't have any
24 Oregon law. I don't have anything in the statute. I don't have anything in
25 the contract. I just don't have enough basis for it."

26 Later in the hearing, Steelwood brought up the issue of overhead:

27 "[STEELWOOD'S COUNSEL]: We just want to clarify as far as
28 the damages is the full cost, does that include the amounts for actual
29 overhead. Because that's part of his cost as well, as opposed to profit,
30 which is profit on top of that. Overhead is something that is actually is part
31 of your full cost. As so we just want to clarify if that's part of it, or not, and
32 actually we request that the actual overhead portion should be part of the
33 full cost of the damages.

34 "THE COURT: Well--

1 "[STEELWOOD'S PRESIDENT]: That's actual cost. That's actual
2 cost, not full cost.

3 "THE COURT: \$50,275 is actual cost.

4 "[STEELWOOD'S PRESIDENT]: Correct.

5 "THE COURT: And then you're stating that the other--the 45 cents
6 on the dollar included not just profit, but overhead.

7 "[STEELWOOD'S PRESIDENT]: But overhead. Correct.

8 "THE COURT: And we didn't segregate the two when we were
9 arguing about them. I only addressed the profit piece, and not the overhead
10 piece. Is that--

11 "[STEELWOOD'S COUNSEL]: Correct, Your Honor.

12 "THE COURT: Okay. So question before I decide about that. How
13 would we calculate--if 45 cents on the dollar is profit and overhead, are
14 there documents here that would tell me which portion of that 45 cents is
15 profit, and which portion is overhead? So that if you want a differential for
16 overhead on top of this \$50,000, what would it be? It wouldn't be 45 cents
17 on the dollar because some of that's profit.

18 "[STEELWOOD'S COUNSEL]: Well, typically--and I'm not sure if
19 it's stated in the affidavit, but I think profit's 20 percent, but your overhead
20 is like 25 percent.

21 "* * * * *

22 "[STEELWOOD'S PRESIDENT]: We didn't break it out. We
23 weren't anticipating."

24 As Catamount notes, "the trial court allowed an additional \$11,358.30 (*i.e.*, actual costs
25 of \$50,275 plus \$11,358.30 in overhead for a total of \$61,633.30) as overhead to
26 Steelwood."

27 At no point before the trial court did Catamount raise any of the issues it
28 seeks to argue in its second assignment of error--those are, that the court could not award

1 overhead in the absence of an evidentiary submission segregating amounts that
2 Steelwood "claimed for profit [from amounts] for overhead," and that a federal formula
3 should be used to compute Steelwood's overhead but that "Steelwood [had] failed to
4 present information sufficient to allow" an analysis under that formula. Indeed,
5 Catamount raised no issue at all regarding the proof of Steelwood's overhead and, when
6 the issue of overhead was specifically discussed at the hearing, Catamount said nothing.
7 Thus, as with the first assignment of error, before the trial court, Catamount failed to raise
8 the issues it seeks to argue on appeal such that the trial court could have considered and
9 corrected the alleged error immediately, if correction was warranted. *See Wyatt*, 331 Or
10 at 343. Accordingly, we do not consider further Catamount's second assignment of error.

11 Catamount next argues, in its third assignment of error, that the trial court
12 incorrectly concluded that Catamount was not entitled to offset any amount owed to
13 Steelwood with costs "incurred in repairing Steelwood's defective work." According to
14 Catamount, even though it terminated Steelwood for convenience, it continues to have a
15 "right in breach of contract against Steelwood for its breach of the Subcontract by
16 performing its work in a deficient manner." Steelwood responds that the "trial court
17 properly rejected Catamount's request for setoff for alleged defective work, when
18 Catamount terminated Steelwood for convenience, failing to give Steelwood notice and
19 opportunity to inspect, cure, or complete its work." In Steelwood's view, a party cannot
20 assert an offset after it has terminated for convenience. As explained below, we conclude
21 that the trial court correctly concluded in this case that Catamount was not entitled to an

1 offset.

2 As noted, the trial court observed that, "when there is a termination for
3 convenience, [as opposed to] a termination for cause, there[has] been no opportunity to
4 inspect and cure." It concluded that neither the case law nor the terms of the subcontract
5 would permit Catamount, after terminating Steelwood for convenience, to "go in and
6 discover all of these things that it now charges against the subcontractor" and, thereby,
7 receive an offset. We agree.

8 First, we agree with the trial court that, contrary to Catamount's assertions,
9 the text of the termination for convenience clause, in context, does not under the
10 circumstances of this case permit Catamount to both terminate Steelwood without cause
11 *and* subsequently proceed against Steelwood as if it had terminated the agreement for
12 cause. *See Yogman v. Parrott*, 325 Or 358, 361, 937 P2d 1019 (1997) (in interpreting a
13 contractual provision, the court examines the text of the provision in context). Again,
14 paragraph 18 of the subcontract provides that Catamount may, "without cause and
15 without prejudice to any other right or remedy, terminate this Subcontract, in whole or in
16 part, for its convenience." Upon receiving notice of termination for convenience, the
17 subcontractor

18 "shall * * * immediately discontinue the work * * *, place no further orders
19 or subcontracts for material, equipment, services or facilities * * *,
20 promptly make every reasonable effort to procure cancellation upon terms
21 satisfactory to Contractor of all orders and subcontracts to the extent they
22 relate to the performance of the discontinued portion of the work and shall
23 thereafter do only such work as may be necessary to preserve and protect
24 work already in progress and to protect materials, plant and equipment on
25 the site or in transit thereto. The obligations of the Subcontractor shall

1 continue as to portions of the work already performed and as to bona fide
2 obligations assumed by Subcontractor prior to the date of termination.
3 Subcontractor shall be entitled to be paid the full cost of all work properly
4 done by Subcontractor to the date of termination not previously paid for,
5 less sums already received by Subcontractor on account of the portion of
6 the work performed."

7 Catamount asserts that several clauses from that paragraph allow it to obtain an offset
8 from Steelwood regardless of the fact that it terminated the agreement for convenience.⁶

9 Initially, it states that the termination without cause is "without prejudice to any other
10 right or remedy." That clause, however, does not itself confer any right or remedy. And
11 it certainly does not, as Catamount asserts, permit Catamount to pursue two inconsistent
12 paths simultaneously: both terminating the agreement for convenience *and* seeking
13 damages against Steelwood as if it had terminated for cause and given Steelwood an
14 opportunity to cure. As discussed below, Catamount fails to identify any generally
15 applicable legal rule or provision of the contract that, in our view, would permit
16 Catamount to both terminate without cause, fail to provide an opportunity to cure, and, at
17 the same time, proceed against Steelwood as if it had terminated the agreement for cause
18 and given an opportunity to cure. Accordingly, in our view, the "without prejudice"
19 clause is not particularly helpful to Catamount's position.

20 Catamount also points out that paragraph 18 provides that Steelwood's
21 obligations "continue as to portions of the work already performed" at the time of the

⁶ We note that, although Catamount cites several portions of the contract that it asserts provide for the offset it seeks in this case, its arguments focus primarily on case law that it asserts supports its position.

1 termination for convenience and that it states that costs may be recovered for "all work
2 properly done by Subcontractor." In Catamount's view, those clauses permit it to obtain
3 an offset for work it deems deficient after terminating the agreement for convenience.
4 We disagree. As to the reference to work "properly" done by the subcontractor, read in
5 context, the term does not refer to the quality of work completed. Rather, the term
6 unambiguously refers to work done by the subcontractor prior to termination for
7 convenience, as opposed to work that should have been discontinued after the
8 subcontractor received notice of termination. It is preceded by discussion of the
9 requirement that, upon receiving notice of termination, the subcontractor must
10 "immediately discontinue the work," "place no further orders or subcontracts for
11 materials, equipment, services or facilities," "promptly make every reasonable effort to
12 procure cancellation" of orders and subcontracts, and "thereafter do only such work as
13 may be necessary to preserve and protect work already in progress and to protect
14 materials, plant and equipment on the site or in transit thereto." Thus, only as to work
15 done either prior to termination or under the terms of that provision will the subcontractor
16 be entitled to recover its costs--only that work is "properly done." Thus, that phrase in
17 paragraph 18 does not assist Catamount.

18 Likewise, the clause providing that Steelwood's obligations "continue as to
19 portions of the work already performed" does not permit Catamount to terminate for
20 convenience and also obtain an offset under the circumstances of this case. We first note
21 that the subcontract provides a warranty pursuant to which Steelwood warrants to the

1 owner its work and materials. Thus, paragraph 18 would not relieve Steelwood of that
2 obligation to provide a warranty--an existing obligation as to the work it already
3 performed.

4 In addition, we observe that, in contrast with paragraph 18, paragraph 17 of
5 the agreement (which relates to default) provides, among other things, that, if Steelwood
6 fails to maintain Catamount's schedule or "fail[s] to correct, replace and/or re-execute
7 faulty or defective work," Catamount "shall have the right to declare [Steelwood] in
8 breach of this Agreement and may, without prejudice to any other right or remedy
9 Contractor may have, terminate this agreement." If Catamount had terminated the
10 agreement under paragraph 17, the agreement specifically provides that "Subcontractor
11 shall not be entitled to any further payments until the Work covered by this Subcontract
12 has been completed." Furthermore, "[i]f the expense to correct, replace or complete
13 Subcontractor's work together with any liquidated damages attributable to delay in
14 Subcontractor's performance exceeds the unpaid balance of the Subcontract,
15 Subcontractor shall pay Contractor the difference." Thus, the remedy Catamount seeks
16 here was available pursuant to its right to terminate for cause under paragraph 17.
17 However, even that paragraph presupposes that, where Catamount terminates for cause
18 based on defective work, there will have been provided an opportunity for Steelwood to
19 "correct, replace and/or re-execute faulty or defective work." Catamount elected not to
20 terminate for cause, but instead terminated for convenience and, therefore, required
21 Steelwood to immediately stop work with no opportunity to inspect and cure.

1 Similarly, paragraph 10a(4), which permits Catamount to withhold payment
2 under the subcontract "pending satisfactory correction, repair, replacement, and/or
3 restoration of deficient work, materials, supplies, machinery, equipment or plant, or of
4 any work rejected as not conforming with" the subcontract, does not entitle Catamount to
5 the offset in question. Again, immediately after sending the letter to Steelwood
6 discussing its concerns with Steelwood's progress on the project, Catamount terminated
7 the agreement pursuant to paragraph 18 "without cause." As required, Steelwood
8 immediately discontinued work on the project and removed its equipment from the
9 project site. Thereafter, Catamount did not request that Steelwood correct, repair, or
10 replace any of the work that it had done on the project. Under those circumstances,
11 nothing in the contract permits Catamount to receive an offset against Steelwood's costs
12 for allegedly defective work done by Steelwood prior to the termination.

13 We further observe that, although, as the parties note, there are no previous
14 Oregon cases discussing termination for convenience, there is some persuasive authority
15 from other jurisdictions relating to the issue and that authority supports our view. In
16 particular, we are persuaded, at least in the absence of an opportunity to correct allegedly
17 defective work, that, where a party has terminated a contract for convenience, that party
18 may not then counterclaim for the cost of curing any alleged default. *See Paragon*
19 *Restoration Group, Inc. v. Cambridge Sq. Condominiums*, 839 NYS2d 658, 660, 42
20 AD3d 905, 906 (2007); *Tishman Contr. Corp. v. City of New York*, 643 NYS2d 589, 590,

1 228 AD2d 292, 293 (1996).⁷ Here, the amounts Catamount seeks to offset are costs
2 incurred in curing an alleged default by Steelwood. The facts on summary judgment are
3 that, after it was terminated for convenience, Steelwood did no further work on the
4 project as required under paragraph 18. After that time, Catamount did not notify
5 Steelwood of any alleged defects or provide it with any opportunity to correct any
6 defective work. Indeed, the defects in question were first asserted as part of this
7 litigation. Under the circumstances, the trial court correctly concluded on summary
8 judgment that, because it terminated the contract for convenience, Catamount was not
9 entitled to offset any amounts it owed Steelwood with amounts it incurred in correcting
10 Steelwood's allegedly defective work.

11 Finally, we turn to Catamount's fourth and fifth assignments of error.
12 Those assignments both involve the same issue--that is, whether the trial court erred
13 when it determined that Catamount was not entitled to offset amounts it owed Steelwood
14 by amounts it incurred in discharging liens from Steelwood's suppliers on the project that
15 were filed after Catamount terminated Steelwood for convenience. In order to discuss

⁷ Catamount asserts that, under federal authority, it has a right to an offset. As noted, we find the rule from the cases cited above persuasive. Furthermore, we observe that the Federal Circuit has declined to decide whether the government may deduct the cost of repairing or replacing defective work from a contractor's recovery following a termination by the government for convenience. *See Lisbon Contractors, Inc. v. United States*, 828 F2d 759, 769 (Fed Cir 1987). At least one administrative board with authority over federal government contracts has permitted an offset for defective work; however, in that case, it was noted that, "where no opportunity to correct deficiencies was afforded, no deduction for uncorrected work should be made." *Aydin Corp.*, EBCA No. 355-5-86, 89-3 BCA ¶ 22044, 1989 WL 74785.

1 Catamount's assertions, some background is necessary.

2 As discussed above, Catamount and Steelwood executed both a subcontract
3 and a purchase order relating to the project. Under the purchase order, Steelwood was to
4 supply materials for the project for which Catamount was to pay \$300,000. The
5 subcontract contained a number of clauses. As pertinent to the fourth and fifth
6 assignments of error, paragraph 32 of the subcontract provided that,

7 "[i]f any lower tier subcontractor, laborer or supplier of [Steelwood] files a
8 mechanic's lien or claim against [Catamount], its surety, or the Project,
9 *which lien arises out of any act or omission of [Steelwood] under this*
10 *Subcontract*, [Steelwood] shall satisfy or take steps to remove or discharge
11 such lien or claim at [Steelwood's] cost and expense, including all recording
12 fees, within five (5) days of the date of notice thereof. If such lien(s) is not
13 discharged within 30 days, [Catamount] shall, without any further notice to
14 [Steelwood], cause such lien to be discharged by any means [Catamount]
15 deems appropriate. All costs incurred by [Catamount] to discharge or
16 otherwise address said lien shall be borne by [Steelwood], including
17 without limitation bonding costs and [Catamount's] reasonable attorney's
18 fees."

19 (Emphasis added.) In light of that provision in the subcontract, in opposition to
20 Steelwood's summary judgment motion, Catamount asserted that it was entitled to offset
21 against any amounts owed Steelwood costs it incurred in discharging the liens placed by
22 the suppliers. It asserted that Steelwood was obligated to pay the suppliers and failed to
23 do so and, therefore, the liens "arose out of an act or omission of Steelwood." Steelwood
24 responded that it was undisputed that Catamount failed to pay the \$300,000 due under the
25 purchase order:

26 "Catamount doesn't dispute that it received the materials under the Purchase
27 Order. Nor does Catamount allege that * * * any of the materials were
28 defective or nonconforming. Nor does Catamount dispute that all the

1 materials were used on the project. Nor does Catamount dispute that it
2 didn't pay for the materials after being billed for them. In fact, Catamount
3 gives no defense or justification as to why it didn't pay for the materials."

4 According to Steelwood, "[b]y failing to pay for the materials" as required under the
5 purchase order, "Catamount triggered a chain of events which culminated in Steelwood
6 and its material suppliers filing liens against the project." In other words, it was
7 Steelwood's position that it was Catamount's act or omission that resulted in the liens and,
8 therefore, Steelwood was not responsible for any costs associated with those liens.

9 During the hearing, the court heard argument from the parties regarding
10 paragraph 32. Catamount took the position that, under paragraph 32 of the subcontract,
11 Steelwood was responsible for the costs to discharge all the liens. The court then
12 questioned Steelwood's attorney regarding the effect of the provision, asking how
13 Steelwood "g[o]t around paragraph 32." Steelwood's attorney argued that "[paragraph]
14 32 in the construction industry presupposes in that contract that Catamount is going to
15 pay Steelwood, and Steelwood is going to take that money and pay his material men."

16 The court clarified:

17 "THE COURT: So you're saying that the lien doesn't arise out of an
18 act or omission of the subcontractor because--

19 "[STEELWOOD'S COUNSEL]: No. Not at all. If you--

20 "THE COURT: --the act or omission was that of Catamount to start
21 the chain of events.

22 "[STEELWOOD'S COUNSEL]: Yeah. They refused to pay."

23 Catamount's attorney responded that there was "no implied pay-when-paid clause."

24 Rather, according to Catamount's counsel, paragraph 32 "says plainly that if an act or

1 omission * * * leads to a lien, then the contractor is entitled to its costs and fees in
2 dealing with the lien." The court, however, agreed with Steelwood and concluded that
3 "under these circumstances that it was an act or omission of the contractor, not an act or
4 omission of the subcontractor that started the chain of events that resulted in these subs
5 not being paid." The court looked at the purchase order and the subcontract, as well as
6 the joint check agreement, which, it observed, provided that "Catamount was to endeavor
7 to make monthly payments jointly to the supplier and subcontractor, and all amounts
8 owing to the supplier during the course of the project." Having read the agreements
9 together, the court concluded that Catamount was not entitled to offset the amounts it
10 paid to discharge the liens. In other words, the court relied on the agreements to conclude
11 that it was Catamount's act or omission that gave rise to the liens.

12 In its fourth assignment of error, Catamount challenges the court's
13 reasoning with respect to the joint check agreement, asserting that the joint check
14 agreement did not impose on it an obligation to "pay Shelter Products independent of its
15 obligation to pay Steelwood." In its fifth assignment of error, Catamount asserts that
16 summary judgment was inappropriate in this case because it was entitled to offset
17 amounts it owed Steelwood by costs it incurred in discharging suppliers' liens. As part of
18 that assignment of error, Catamount contends that paragraph 32 of the subcontract is
19 unambiguous, and that the trial court improperly considered extrinsic evidence of the
20 meaning of that provision. As explained below, we conclude that the trial court properly
21 interpreted paragraph 32 of the subcontract based on the text and context of that provision

1 and, in light of that interpretation, correctly concluded that Catamount was not entitled to
2 offset amounts it expended in discharging the suppliers' liens. In light of that conclusion,
3 we reject both the fourth and fifth assignments of error.

4 To interpret a contractual provision, the court begins by examining the text
5 of the provision in question "in the context of the document as a whole. If the provision
6 is clear, the analysis ends." *Yogman*, 325 Or at 361. "Words or terms of a contract are
7 ambiguous when they can, in context, be given more than one meaning." *Id.* at 363-64
8 (internal quotation marks omitted). If the provision in question is ambiguous, the trier of
9 fact will "ascertain the intent of the parties and construe the contract term consistent with
10 the intent of the parties." *Id.* at 363 (internal quotation marks omitted). To resolve that
11 question, the trial court may consider extrinsic evidence relating to intent. *Id.* "If the
12 meaning of a contractual provision remains ambiguous after the first two steps have been
13 followed, the court relies on appropriate maxims of construction." *Id.* at 364.

14 We begin by addressing Catamount's contention that, on summary
15 judgment, the trial court improperly considered extrinsic evidence in interpreting
16 paragraph 32 of the subcontract. It asserts that the trial court "create[d] an ambiguity" by
17 allowing and adopting extrinsic evidence that "'the construction industry presupposes in
18 that contract that Catamount is going to pay Steelwood.'" Additionally, it argues that "the
19 nature of the [extrinsic] evidence Steelwood submitted was not sufficient" because it was
20 an "argument that was entirely unsupported by anything in the record, but was merely an
21 oral assertion." The fundamental problem with Catamount's first assertion is illuminated

1 in that second argument. That is, the trial court did not consider (nor was it presented
2 with) any extrinsic evidence regarding the meaning of paragraph 32 of the subcontract.
3 Instead, the court heard legal argument from Steelwood's counsel regarding how
4 paragraph 32 should be interpreted. Catamount made no objection to the propriety of that
5 argument, but merely provided its own arguments regarding the import of paragraph 32.
6 Under those circumstances, Catamount's contention that the court improperly considered
7 extrinsic evidence regarding the meaning of paragraph 32 is without merit; we agree with
8 Steelwood that the court made its determination based on the text of the agreements and
9 the undisputed facts.

10 Turning to the proper interpretation of paragraph 32, based on the text of
11 provision, in context, we agree with the trial court's conclusion that Catamount was not
12 entitled to offset amounts it expended to discharge the suppliers' liens. As noted,
13 paragraph 32 of the subcontract provides that Steelwood is responsible to pay costs and
14 fees incurred as a result of suppliers' liens if those liens "arise[] out of any act or
15 omission" of Steelwood under the agreement. Conversely, then, if the lien in question
16 does not arise out of an act or omission of Steelwood, *i.e.*, if the lien arises out of an act
17 or omission of Catamount, then Steelwood is not responsible for the costs and fees
18 associated with discharging the lien under paragraph 32. The term "arising out of" means
19 "to originate from a specified source." *Webster's Third New Int'l Dictionary* 117
20 (unabridged ed 2002). Originate, in turn, means to "cause the beginning of" or "give rise
21 to." *Id.* at 1592.

1 In this case, Steelwood (by way of its suppliers) provided materials for the
2 project pursuant to the purchase order. After the materials were provided, Catamount
3 never asserted that there was any problem with them. Although, after accepting the
4 materials, Catamount had a legal obligation to pay, it failed to do so. Instead, after
5 terminating the contract for convenience, Catamount refused to make payment for any of
6 the labor or materials it had received pursuant to its agreements with Steelwood. It was
7 that refusal to pay any amount to Steelwood, including amounts clearly owing under the
8 purchase order, despite an obligation to do so, that led to the liens at issue.⁸ Thus, in
9 view of the unambiguous terms of the contract, together with the facts on summary
10 judgment, the liens in question clearly arose out of an act or omission of Catamount,
11 rather than an act or omission of Steelwood.⁹ The trial court did not err in so concluding.

⁸ We note that the amount due pursuant to the purchase order (along with the subcontract) at the time of the termination for convenience was far greater than any amount Catamount later asserted was due for offsets. Indeed, as the trial court observed, it "was pretty cheeky [for Catamount] to come in here and ask [Steelwood] to pay all the fees related to the litigation that had to be filed to force payment" from Catamount.

⁹ The joint check agreement, which the trial court discussed in its reasoning, supports that conclusion. As noted, the subcontract provides that Catamount may make payment to Steelwood through "checks made payable to the joint order" of Steelwood and Steelwood's suppliers. At the same time as it entered into the subcontract and purchase order, Catamount also entered into a joint check agreement with both Steelwood and Shelter Products, one of the suppliers on the project. Under that joint check agreement, Catamount agreed to "endeavor to make monthly payments jointly" to Steelwood and Shelter Products for any amounts owing to Shelter Products for materials and services provided on the project. We note that, although Catamount makes a number of arguments that are directed at the trial court's inclusion of the joint check agreement in its reasoning regarding the interpretation of paragraph 32, those arguments actually relate to the trial court's ultimate conclusion that it was an act or omission of Catamount that led to the liens in this case. Given that we agree with the trial court's interpretation of paragraph 32 and its conclusion that Catamount's act or omission gave rise to the liens,

1 In light of the foregoing, we conclude that the trial court properly granted
2 summary judgment in favor of Steelwood.

3 Limited Judgment affirmed; appeal from "Supplemental Limited Judgment"
4 dismissed.

we do not discuss the joint check agreement further.