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No. 69606-8-I

**COURT OF APPEALS – DIVISION ONE
IN AND FOR THE STATE OF WASHINGTON**

MILLER ROOFING ENTERPRISES, INC.,

Appellant

v.

TIM McCLINCY, an individual, McCLINCY BROTHERS FLOOR
COVERINGS, INC., a Washington corporation dba McCLINCY'S
HOME DECORATING,

Respondent

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

I. REPLY.....1

A. The Trial Court Manifestly Abused Its Discretion
By Denying Miller's Motion For Leave To Amend
Answer And Affirmative Defenses 1

i. The Requested Amendment Is Proper Under
CR 15.....2

ii. No Prejudice Will Result From The Amendment
.....3

iii. To The Extent That Respondents Believe They Will
Be Prejudiced By The Limited Discovery That Will
Be Required, They May Move For A Protective
Order.....10

iv. Miller Has Not Waived Its Affirmative Defenses
.....11

v. The Collateral Estoppel Doctrine Does Not Bar
Miller From Asserting Its Affirmative Defenses
.....12

vi. Respondents Improperly Attempt To Distinguish
Caselaw Permitting Amendments To Pleadings
After Remand.....12

II. CONCLUSION 16

TABLE OF AUTHORITIES

Cases

<i>Bacon v. Gardner</i> , 38 Wn.2d 299, 229 P.2d 523 (1951).....	2
<i>Dep't of Revenue v. Puget Sound Power & Light Co.</i> , 103 Wn.2d 501, 694 P.2d 7 (1985)	11
<i>Herron v. Tribune Publishing Co.</i> , 108 Wn.2d 162, 165, 736 P.2d 249 (1987).....	15
<i>In re Campbell</i> , 19 Wn.2d 300, 142 P.2d 492 (1943).....	2
<i>Johnson v. Berg</i> , 151 Wash. 363, 275 P. 721 (1929).....	13
<i>Jones v. Western Mfg. Co.</i> , 32 Wash. 375, 73 P. 359 (1903).....	14, 15
<i>LeMond v. Dep't of Licensing</i> , 143 Wn. App. 797, 180 P.3d 829 (2008).....	12
<i>Michaels v. CH2M Hill, Inc.</i> , 171 Wn.2d 587, 257 P.3d 532 (2011).....	6
<i>Pederson v. Potter</i> , 104 Wn.App. 62, 11 P.3d 833 (2000).....	12
<i>Richardson v. Carbon Hill Coal Co.</i> , 18 Wash. 368, 51 P. 402 (1897).....	14
<i>Rosseau v. Rosche</i> , 158 Wash. 310, 290 P. 806 (1930).....	14
<i>Smith Sand & Gravel Co. v. Corbin</i> , 102 Wash. 306, 173 P. 16 (1918).....	15
<i>Stusser v. Gottstein</i> , 187 Wash. 660, 61 P.2d 149 (1936).....	14
<i>Wilson v. Horsley</i> , 137 Wn.2d 500, 974 P.2d 316 (1999).....	14, 15, 16

Statutes

RCW 4.16.326(g)9

Rules

CR 15(a).....2, 10

CR 26(c).....10

ER 702.....5

Appellant Miller Roofing Enterprises, Inc. (“Miller”) respectfully renews its request that the Court reverse the November 13, 2012 Order Denying Miller’s Motion for Leave to Amend Answer to Amended Complaint. Miller further requests that the Court permit Miller to add certain affirmative defenses which Miller intends to raise at the jury trial of this matter, which was remanded to the trial court after appeal from Division One of the Court of Appeals, Cause No. 66375-5-I.

I. REPLY

A. The Trial Court Manifestly Abused Its Discretion By Denying Miller’s Motion For Leave To Amend Answer And Affirmative Defenses.

The Court of Appeals in its May 7, 2012 unpublished opinion, Case No. 66375-5-I, reversed the trial court’s judgment to the extent of Respondents’ breach of written contract claim. CP 31. The Court of Appeals also reversed the trial court’s judgment on Respondents’ breach of oral contract claim, as the damages upon which the breach of the written contract claim are based were not segregated from the damages awarded for breach of the oral contracts. CP 32. The parties do not dispute that the only issues remaining before the trial court are (1) whether Respondents’ claim for breach of the two 2006 oral contracts are time barred, and (2) if not, whether Miller breached the oral contracts, and (3) if so, the damages attributable to the breach of oral contracts, if any.

Notably, the Court of Appeals directed the trial court to address the question of liability for Miller's alleged breaches of the 2006 oral agreement "in the first instance." CP 51. For the following reasons, the trial court's denial of Miller's Motion for Leave to Amend Answer and Affirmative Defenses constitutes a manifest abuse of discretion.

i. The Requested Amendment Is Proper Under CR 15.

CR 15(a) plainly states that leave to amend pleadings "shall be freely given when justice so requires." The mere fact that an amendment may introduce a new issue is not of itself sufficient grounds for denying it. *In re Campbell*, 19 Wn.2d 300, 307, 142 P.2d 492 (1943). An amendment is properly allowed where it enables the real matter in dispute to be determined and where the opposing party has ample time to meet the new issue. *Bacon v. Gardner*, 38 Wn.2d 299, 305, 229 P.2d 523 (1951). In *Bacon*, the Court of Appeals found that the trial court properly permitted an amendment to an amended complaint five months prior to trial. *Id.* Because there was five months' notice of a statute of limitations defense and no embarrassment, surprise or delay was involved, the opposing party could not justifiably say it was not prepared to meet the issue. *Id.* Here, no trial date has yet been set. Miller's Motion for Leave to Amend Answer to Amended Complaint was filed on July 19, 2012 and thus the proposed amendment was made with many months' notice. CP 2. Clearly

Respondents have ample time to “meet the issue.”

ii. No Prejudice Will Result From The Amendment.

Even if Miller were not seeking to amend its Answer to Respondents’ Amended Complaint to add certain affirmative defenses, some limited discovery would necessarily be required given the reconfigured issues to be decided by the trier of fact, including but not limited to the segregation of damages for Miller’s alleged breach of its 2006 oral contracts. This is an issue that the Court of Appeals has directed the trial court to address (“It is unclear whether and to what extent there are damages for breach of either 2006 oral contracts. This problem should also be addressed by the trial court on remand.” CP 51.

Nevertheless, Respondents argue, with no support, that “Each of the proposed affirmative defenses provide a springboard from which to engage in a considerable amount of discovery.” Respondents’ Answering Brief at p. 10. This is incorrect. To the contrary, to the extent the proposed affirmative defenses require any additional discovery at all, they will require only discrete discovery related to the two 2006 oral contracts for limited work (one contract was for \$489.60 worth of labor and materials, the other for \$870.40 of labor and materials). For example:

8. Untimely service of process.

Respondents do not dispute that this affirmative defense merely

formalizes arguments made in prior motion practice and at trial. In fact, the Court of Appeals expressly acknowledged that Miller previously raised the defense in in the underlying proceeding in its May 7, 2012 unpublished opinion, Cause No. 66375-5-I. CP 46. With regard to Miller's defense of untimely service of process, and Respondents' argument that Miller waived the same by engaging in certain discovery, the Court of Appeals expressly stated that "This is an issue that the trial court should consider on remand." *Id.* Respondents cannot in good faith take the position that Miller is not entitled to raise this defense at this time when the Court of Appeals has in fact directed the trial court to address this issue.

9. *Untimely notice of alleged defects.*

Respondents argue that they will be prejudiced because this affirmative defense will require expert testimony to acquaint the trier of fact with the nature and extent of the alleged roofing deficiencies and when those defects could reasonably be known to McClincy. Respondents' Answering Brief at p. 11. Again, however, the Court of Appeals has directed the trial court to consider the issue of when Respondents were put on notice of defects related to Miller's 2006 work. CP 49. Accordingly, this affirmative defense is proper at this time.

Additionally, Respondents fail to acknowledge that expert

testimony for both parties will be required irrespective of which affirmative defenses are allowed. This matter will now be tried by a jury, and given the complexity of the construction issues in this matter will necessarily require scientific, technical or other specialized knowledge pursuant to ER 702.

10. There is a lack of privity between McClincy Brothers Floor Covering, Inc. and Miller, and, therefore, McClincy Brothers Floor Covering, Inc. lacks standing to pursue claims against Miller.

This affirmative defense is appropriate now given the narrowed issues to be addressed by the trial court. Respondents do not dispute that invoices issued after Miller's work was performed in accordance with the two 2006 oral contracts (the only work now at issue) are directed to Tim McClincy only. CP 114; Trial Exhibit 2.¹ This is distinguishable from invoices issued in connection with Miller's 1997 work, no longer at issue, some of which are directed to "McClincys" or "McClincy's Home Decorating." *Id.* The 2006 invoices, which were admitted as trial exhibits, speak for themselves, and Miller has no need to conduct additional discovery on the issue.

¹ Miller has filed a Supplemental Designation of Clerk's Papers which includes Trial Exhibit 2, Defendants' Amended Trial Brief and the Order Granting Defendant's Motion for Dismissal of Claims of Breach of Contract. However, because these Clerk's Papers have not yet been returned with page numbers assigned, Miller refers to them by name rather than their "CP" designation.

11. *The damages sustained are unavoidable from the standpoint of this defendant.*

The January 23, 2006 invoice pertaining to Miller's 2006 work states "cause of leak stucco wall". Trial Exhibit 2. This wall was not installed by Miller. To the extent that Respondents' claimed damages arise from problems with the installation or maintenance of the stucco wall, Miller cannot be held liable for the same. This issue was raised by Miller in Miller's Amended Trial Brief and in testimony at trial, and thus this affirmative defense simply formalizes arguments previously made. Defendants' Amended Trial Brief at p. 2, lines 13-20.

Although this issue may require limited discovery to clarify expert opinions regarding the location(s) of and cause of Respondents' claimed damage, Respondents have set forth no evidence demonstrating that such discovery would be overly expensive or unduly burdensome.

12. *Intervening and superseding cause.*

Whether an intervening act breaks the chain of causation is a question for the trier of fact. *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 613, 257 P.3d 532 (2011). Notably, nearly two and a half years have passed since this case was originally tried. Among other things, Miller is entitled to discover whether conditions at the building have changed since the time of trial; whether repairs have been undertaken and, if so, the cost

thereof; and if no repairs have been undertaken, what steps, if any, have been undertaken to mitigate damages. It would be Miller, and not Respondents, who would be unfairly prejudiced if prevented from conducting discovery on these narrow issues.

13. Plaintiffs accepted the performance of Defendants.

Respondents do not dispute that they accepted and paid for the 2006 work performed by Miller. Defendant's Amended Trial Brief at p. 2, line 19. This issue requires no further discovery. No prejudice will result.

14. Plaintiffs misused the product.

Similar to the affirmative defense of intervening and superseding cause, this affirmative defense will require only limited discovery into how Respondents have utilized and/or maintained the roof since the time of the work and the original trial in this matter. Again, Miller, and not Respondents, would be unfairly prejudiced if prevented from conducting discovery on these discrete issues.

15. No warranty was provided or any applicable warranty expired.

The invoices pertaining to Miller's 2006 limited repair work contain no reference whatsoever to a warranty. Trial Exhibit 2. Nor does it appear that Respondents have alleged that Miller provided any other form of warranty that would apply to Miller's 2006 work. Defendant's

Amended Trial Brief at p. 2, lines 22-25. No further discovery on this issue is required, and thus no prejudice will result from the requested amendment.

16. Plaintiffs' claim is barred by the rules governing spoliation of evidence.

This affirmative defense will require extremely limited discovery into (1) whether Respondents have undertaken repairs to the lower torchdown roof repaired by Miller in 2006 and, if so, the extent to which the condition of the roof was documented. Again, it would be Miller, not Respondents, who would be prejudiced if barred from inquiring regarding this issue.

17. Plaintiffs' claim for repair costs will result in an unjust enrichment and substantial increase in the value of the property and its reasonable useful life.

Like several other affirmative defenses proposed by Miller, this affirmative defense simply formalizes arguments previously made by Miller. For example, Miller's Amended Trial Brief contains a lengthy discussion regarding Respondents' claimed damages, including the reasonable useful life of the roof. Defendants' Amended Trial Brief at p. 7.

Further, although it is presently unclear precisely what damages Respondents seek as a result of the alleged breach of 2006 oral contracts

(which, in and of itself demonstrates a compelling need for some limited discovery), Respondents no doubt seek damages far in excess of the \$1,360.00 worth of work performed by Miller more than seven years ago. The comprehensive repairs that Miller anticipates Respondents will call for will extend the useful life of the roof by a significant measure. To the extent appropriate, Miller should be permitted to present evidence to the jury that the requested repairs are disproportionate to the extremely limited scope of work performed by Miller in 2006.

Even if the jury finds that Miller breached its 2006 oral contracts and that Respondents were damaged as a result, Respondents have now benefited from seven years of useful life related to the 2006 repair work. Miller is entitled to an offset to the extent that Respondents have received this benefit.

18. *Plaintiffs' claim and suit are barred by RCW 4.16.326(1)(g).*

Miller raised a statute of repose defense at trial, including moving to dismiss all claims relating to original construction based upon the statute of repose. As such, this affirmative defense merely formalizes arguments previously raised. Defendant's Amended Trial Brief at p. 9, lines 6-25. The trial court in fact granted Miller's motion on October 15, 2010, citing RCW 4.16.326(1)(g) as a basis for its ruling. Order Granting

Defendant's Motion for Dismissal of Claims of Breach of Contract at p. 2, lines 5-6. CR 15 allows for amendment of affirmative defenses when an issue is tried with the consent of parties.

19. *The alleged breaches do not and will not adversely affect the performance of the building(s) and any adverse effect is merely technical and not significant to a reasonable person.*

It will be Respondents' burden to present evidence to the jury regarding the terms of Miller's 2006 oral agreements, whether and how Miller breached the agreements, and the damages allegedly resulting therefrom. To the extent that Respondents cannot prove that Miller's alleged breaches of contract have materially affected the performance of the lower torchdown roof, Miller should be allowed to present this defense.

iii. To The Extent That Respondents Believe They Will Be Prejudiced By The Limited Discovery That Will Be Required, They May Move For A Protective Order.

Although it is Miller's position that the limited discovery required by the parties in this reconfigured case will result in no prejudice to Respondents, the applicable civil rules provide built-in protection in the event Miller propounds discovery which Respondents believe is improper. CR 26(c) permits Respondents to move for a protective order to protect Respondents from annoyance, embarrassment, oppression, or undue

burden or expense. This, and not denial of Miller's Motion for Leave to Amend Amended Answer, would be the appropriate channel for a discovery objection by Respondents.

iv. Miller Has Not Waived Its Affirmative Defenses.

Respondents argue that Miller has waived the affirmative defenses it proposes to add because these defenses were not raised in the October, 2010 trial in this matter. This argument ignores the fact that, as discussed above, many of the affirmative defenses Miller seeks to add merely formalize arguments made in prior motion practice and at trial. CR 15 allows for amendment of affirmative defenses when an issue is tried with the consent of parties. For example, in *Dep't of Revenue v. Puget Sound Power & Light Co.*, 103 Wn.2d 501, 504-505, 694 P.2d 7 (1985), the defendant did not waive a statute of limitations as a defense by failure to plead it, since plaintiff was well aware that it was a central issue in the litigation. So too, Respondents here have long been aware of Miller's defenses.

Respondents' argument also ignores the fact that this case is now reconfigured after having been appealed, and that certain defenses which would not have been appropriate before are now appropriate given the limited issues for the trial court to address.

Finally, respondents mischaracterize Washington caselaw which

clearly permits amendments to pleadings after remand. This issue was addressed in the Brief of Appellant, pp. 12-15 and will be discussed in further detail below.

v. The Collateral Estoppel Doctrine Does Not Bar Miller From Asserting Its Affirmative Defenses.

Respondents argue that Miller's proposed affirmative defenses are barred by the doctrine of collateral estoppel. This is incorrect. The collateral estoppel doctrine is designed to preclude relitigation of issues in a subsequent claim or action. *LeMond v. Dep't of Licensing*, 143 Wn. App. 797, 804, 180 P.3d 829 (2008). This, however, is not a subsequent claim or cause of action; rather it is a remand from a previous trial court proceeding. Additionally, as Respondents point out, the collateral estoppel doctrine requires that the prior adjudication have ended with a final judgment on the merits. *Pederson v. Potter*, 103 Wn.App. 62, 67, 11 P.3d 833 (2000). Here, however, the Court of Appeals has vacated the final judgment previously entered by the trial court, so there is presently no final judgment in place. The collateral estoppel doctrine thus does not apply.

vi. Respondents Improperly Attempt to Distinguish Caselaw Permitting Amendments To Pleadings After Remand.

Respondents mischaracterize Washington caselaw which clearly

permits amendments to pleadings after remand. First, Respondents attempt to distinguish *Johnson v. Berg*, 151 Wash. 363, 275 P. 721 (1929) from the case at hand. However, despite differing procedural postures, there are sufficient similarities to *Johnson* such that its holding should apply here. As in the case at hand, the plaintiff in *Johnson* objected to a requested amendment seeking to add an affirmative defense after remand in part on the basis that all of the defenses were available to defendants when they filed their original answer and that to allow the amended answer to be filed would be unjust to plaintiff in that such filing would unduly delay the final determination of the cause. *Id.* at 367. The Supreme Court of Washington rejected that argument, reversing the trial court's denial of the request for an amendment. *Id.* at 372. In support of its decision, the Court stated unequivocally as follows:

The fact that an appeal to this court intervened, and that considerable time was necessarily consumed in such appeal, does not alter the situation, nor should defendants' rights be prejudiced thereby. Amendments to pleadings may be allowed after an appeal to this court and a remand for further proceedings, just as they may be allowed in the ordinary course of the preparation of a case for trial.

Id. at 370. Respondents provide no legitimate rationale as to why this broad holding should not apply here.

So too, Respondents improperly attempt to distinguish *Richardson v. Carbon Hill Coal Co.*, 18 Wash. 368, 51 P. 402 (1897). Again, despite differing procedural postures, *Richardson v. Carbon Hill Coal Co.* stands for the broad proposition that a trial court has power to grant amendments to pleadings after reversal and remand (“...the fact that the cause came to the appellate court and was reversed does not affect the power of the trial court to give leave to amend the pleading; for, after reversal and remission, the case stands exactly as it stood before the trial”). *Id.* at 372. The Court’s holding in *Richardson* has even been applied in several Washington Supreme Court cases since, including a case as recently as 1999. *See, e.g. Wilson v. Horsley*, 137 Wn.2d 500, 974 P.2d 316 (1999); *Rosseau v. Rosche*, 158 Wash. 310, 290 P. 806 (1930); *Stusser v. Gottstein*, 187 Wash. 660, 61 P.2d 149 (1936) (reversed on other grounds). Although Respondents argue that the *Rosseau* and *Stusser* cases are inapplicable, they were simply cited for purposes of illustrating that the holding in the *Carbon Hill Coal* case has long been accepted by Washington courts.

Plaintiffs also attempt to distinguish *Jones v. Western Mfg. Co.*, 32 Wash. 375, 73 P. 359 (1903) on the basis that the instant matter has already been tried. However, that is irrelevant, given that

the Court of Appeals has reversed the judgment obtained by Plaintiffs. So too, the fact that Miller seeks to add certain affirmative defenses as opposed to a counterclaim does not render *Smith Sand & Gravel Co. v. Corbin*, 102 Wash. 306, 173 P. 16 (1918) inapplicable. The holding in *Smith Sand & Gravel Co.* clearly extended to all amendments to pleadings, and was not limited solely to counterclaims:

Our statute (Rem. Code, § 273) permits a defendant to 'set forth ... as many defenses and counterclaims as he may have' whether legal or equitable; and Rem. Code, § 303, authorizes the court to allow amendments to pleadings, a matter that we have repeatedly held as within the discretion of the court, whose action will be set aside only upon a showing of abuse of discretion. That such amendments are permissible on a retrial upon remand from the Supreme Court is a well-recognized rule in this state.

Id. at 308-309.

Respondents' attempts to distinguish *Herron v. Tribune Publishing Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987) are also improper, as Miller is not attempting to develop additional facts which could have been raised earlier.

Finally, in *Wilson v. Horsley*, 137 Wn.2d 500, 974 P.2d 316 (1999) the Supreme Court noted that "following a reversal of the trial court judgment, a case 'stands exactly as it stood before trial.'" *Id.* at

511. While the Supreme Court in that case found that an amendment would be grossly unfair and prejudicial to the interests of the plaintiffs, this finding was based in part upon unfair surprise and the fact that the motion to amend was made “on the eve of trial,” i.e. less than two months before trial was to commence – neither of which apply here. *Id.* at 507.

II. CONCLUSION

For the reasons discussed above, and for the reasons set forth in the Brief of Appellant, this Court should reverse the November 13, 2012 Order Denying Miller’s Motion for Leave to Amend Answer to Amended Complaint and permit Miller to add certain affirmative defenses which may be raised at the jury trial of this matter.

DATED this 2nd day of April, 2013.

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CERTIFICATE OF SERVICE

I, Audrey M. Alonso, am over the age of 18 years and certify under penalty of perjury under the laws of the State of Washington, that I caused to be served on the persons listed below, in the manner shown, the following documents:

- 1. APPELLANT’S REPLY BRIEF
- 2. CERTIFICATE OF SERVICE

I caused to be served the above identified documents, on this day, April 3, 2013, via ABC legal messenger for personal delivery on April 3, 2013 to the following:

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

DATED this 3rd day of April, 2013.

JAGER LAW OFFICE PLLC

By: Audrey Alonso
 Audrey Alonso, Legal Assistant