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No. 69606-8

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

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MILLER ROOFING ENTERPRISES, INC.

Appellant

v.

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

Respondents

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**RESPONDENTS' ANSWERING BRIEF**

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ERIC ZUBEL, WSBA #33961  
Attorney for Respondents

ERIC ZUBEL, PC  
800 Fifth Avenue, Suite 4100  
Seattle, WA 98104  
206-447-1445  
eric@ericzubel.com

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## **RESPONDENTS' ANSWERING BRIEF**

### **I. INTRODUCTION**

Respondents are Tim McClincy an individual and McClincy Brothers Floor Covering, Inc. dba McClincy's Home Decorating (collectively "McClincy's"). McClincy's submits this brief in response to the opening brief of appellant Miller Roofing Enterprises, Inc. ("Miller"). McClincy's requests that the decision of the trial court denying Miller's motion for leave to amend to add certain affirmative defenses which Miller did not raise and litigate during the original trial of the underlying case be affirmed upon the failure to demonstrate, upon this record, that the trial court manifestly abused its discretion by denying the motion.

### **II. STATEMENT OF THE CASE**

#### ***A. Relevant Procedural History***

The underlying case, i.e., *Tim McClincy, an individual, McClincy Brothers Floor Covering, Inc., a Washington corporation dba McClincy's Home Decorating v. Miller Roofing Enterprises, Inc., Case No. 09-2-06720-1 SEA*, was tried to the court sitting without a jury between October 12 and October 21, 2010. A total of 13 witnesses testified at the trial of this case, all of whom, with the exception of Jay Lukan and Mark Lawless,

also had their depositions taken, including Timothy McClincy for the plaintiffs and Rick Miller for the defendant. Of those witnesses testifying, 3 expert witnesses testified for McClincy's (Gerald Burke, Greg Coons, and Owen Dahl) and 2 expert witnesses testified for Miller (Ray Wetherholt and James Paustian). Of the remaining witnesses, Douglas Breshears, Richard Jackson, Danny Reeves, Dennis Edwards and Jay Lukan, each testified for McClincy's concerning the scope and cost of remediation for McClincy's as did Mark Lawless for Miller. Clerk's Papers ("CP") 80.

On November 22, 2010, the trial court entered its findings of fact and conclusions of law. CP 14-26. In part they were:

*"2.23 As a direct, foreseeable and proximate cause of the acts and omissions of Miller Roofing, plaintiffs have suffered damages as follows:*

*(1) The cost of repair and remediation, including replacement of the torch down roof together with portions of the west, south and east walls of the building \$481,808.*

*(2) The cost for water mitigation services undertaken by McClincy Brothers in the sum of \$15,377.58.*

*(3) Based upon the company's historical operating results between 2005 and 2009, it is reasonable to assume that the closure of the company's Renton location for a period of five months in addition to one additional month at 50% of profitability and a following additional month at 80% of profitability, will cause McClincy Brothers to suffer business interruption losses*

*during the period necessary to complete remediation and return to full profitability, in the sum of \$730,436.*

*(4) The building tenants occupying the three apartments will have vacate the premises during the period necessary to complete remediation and it is reasonable to assume that Tim McClincy will suffer loss of rental income during the remediation process in the amount of \$13,740.*

*2.24 The total damages suffered by Tim McClincy is the sum of \$ 13,740.*

*2.25 The total damages suffered by McClincy Brothers is the sum of \$ 1,373,708.58 . . .”*  
CP 24

The trial court also found that the time necessary to complete the remediation of the building is between 5 and six months during which time McClincy Brothers would be unable to conduct its business operations. Finding 2.21, CP 23. The court then found

*“In the opinion of Owen M. Dahl, CFA, UFA, ASA, a principal of Moss Adams LLP, Certified Public Accountants and Business Consultants, an analysis of the revenues of McClincy Brothers between 2005 and 2009 indicated that revenues ranged from a high of \$3.1 million dollars in 2007, to a low of \$2.0 million dollars in 2009. In addition, the company has recorded stable revenues since October of 2009 in excess of \$180,000 per month, and monthly revenues can be expected to be between \$169,383 and \$213,396, or an average of \$191,389.50. According to Mr. Dahl, McClincy Brothers can reasonably be expected to suffer estimated impact from closure between a high of \$814,425 and a low of \$646,448, which together would average \$730,436.”*

CP 23-24

It was on this basis that the court concluded that the total damages suffered by McClincy Brothers was the sum of \$1,373,708.58. Concl. Law 4, CP 25.

Miller has set forth a relevant procedural history of the case in the court below. [App. Op. Brief, pp. 3-4] This recitation is essentially accurate insofar as it goes. However, it must be emphasized that the Court of Appeals did not address the sufficiency of the proof to support the damages which were awarded McClincy's by the trial court. CP 28-29.

Instead the Court of Appeals reversed the judgment on the basis that the damages on which the breach of the written contract claims are based were not segregated from the damages awarded for the breach of oral contracts. CP 57. The Court of Appeals specifically refrained from remanding the case for re-trial. Instead, the Court of Appeals did the following:

1. Reversed the judgment based on the alleged breach of the terms of June 1997 written agreement of the parties. CP 44.

2. Reversed the judgment as to the extent of the claims for breach of the 2006 oral agreements and directed on remand that these matters be addressed by the trial court "in the first instance." CP 51.

The Court of Appeals also reversed the judgment because it found that damages for the breach of contract claims were not segregated. CP 51.

3. After finding that “. . . [I]t is unclear whether and to what extent there are damages for breach of either 2006 oral contracts . . .,” the Court of Appeals directed the trial court to address this problem on remand. CP 51.

On remand, the trial court is therefore not required to address the issue of the damages, but only the manner in which those damages must be allocated, and ultimately whether the action was timely commenced.

***B. Miller’s motion for leave to amend its answer to amended complaint.***

Miller has set forth the affirmative defenses originally pled in Miller’s May 10, 2010 answer to amended complaint and those which Miller requested be added in its July 19, 2012 motion for leave to amend answer. The affirmative defenses originally pled appear on pages 4 and 5 of his opening brief and those that Miller requested be added appear on pages 5 and 6. The trial court directed counsel to appear for oral argument on Miller’s motion for leave to amend answer on October 30, 2012. The following dialogue took place between counsel for Miller and the Court:

[Mr. Jager] “I - - it is CR 15 standard, Your Honor. We are back for a new trial. There are new issues that will require different discovery in terms of how you segregate damages attributable to a total of \$1,200 of repairs. Those are the only issues remaining in the damages and contract portion of the case. There’s no prejudice to the parties.

With all due respect, if there's a concern about a discovery issue that's a discovery motion to be brought up, not at the time of the amendment, anymore than whether or not a legal claim is sufficient; you bring that up via dispositive motion. But the amendment standard is CR 15, prejudice, and not to grant the motion is an abuse of discretion where there's no prejudice to the adverse party.

They have time, they have opportunity to gather their arguments, marshal their pleadings, identify the witnesses. They are going to reconfigure their case as well. It's a reconfigured case on remand. That's just the naked truth of it. And they will reform and correct their tactical errors in their underlying case.

THE COURT: Well, I have to say I disagree with you. I think this is one of the most confusing appellate decisions I've ever gotten because it's not a re-do, it's not a re - - I mean, if they didn't like it, and they said there was not substantial evidence, they would have just said new trial, but they didn't. They were very careful, but also conflicted, on this issue of statute of limitations.

Based on what I have before me, I have to follow the remand. I have to go paragraph by paragraph on each issue that the appellate court has lined out for me, and I think you summarized them, correctly.

But I don't think you get to amend the pleadings because then - - I think, Mr. Zubel is correct. I think any lawyer who comes in after another lawyer has done their best, and nobody's saying that Mr. Turner was lacking in ability, he was vigorous in the defense of this case. The appellate court, frankly, didn't like this Court, my errors, of insubstantial evidence to support the findings that this Court made.

And they knocked out a few things, which I think narrows it. In fact, they did take the time to narrow the issues on remand. They didn't just say it's a do-over, they said specifically what I'm to consider. They didn't say open

up the record. They didn't say open up discovery again. They said, directly, you need to find enough evidence, one way or the other. And I may not find on remand that there's enough to support these oral contracts.

You know, clearly, this is a million plus, a \$1.3 million verdict, against your client, and they didn't like that. They obviously didn't think there was substantial evidence supporting the trial court's findings, but I'm going to just go paragraph by paragraph, based on what their remand directs this Court to do.

***But I think it would be absolutely prejudicial to allow the amendment at this late stage in the proceedings. It's like saying everything that Mr. Turner did doesn't count. We think there -- you know, they don't want to step into the shoes of Miller Roofing, they're just saying there may have been a waiver of the affirmative defense of statute of limitations, but we can't tell on this record.***

So by allowing you to raise all these affirmative defenses, I don't think that's what the Court of Appeals intended to do, so I'm going to deny the motion.”

(Emphasis Supplied)

Verbatim Report of Proceedings, 10/30/2012 (“TR”), p 15:16 –p. 18:6.

### III. ARGUMENT

#### A. Standard of Review

As Miller has correctly pointed out, “. . . [T]he standard of review of a trial court's denial of a motion to amend a pleading is manifest abuse of discretion. *Herron v. Tribune Publishing Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987), citing *DelGuzzi Constr. Co. v. Global NW Ltd., Inc.*, 105 Wn.2d 878,888,719 P.2d 120 (1986); *Caruso v. Local 690, Int'l Bhd of*

*Teamsters*, 100 Wn.2d 343, 670 P.2d 240 (1983).” Miller’s Brief, p. 9.

But, for the reasons discussed below, this record will not support a determination by this Court that the trial court’s denial of Miller’s motion for leave to amend was a manifest abuse of discretion.

***B. The trial court properly exercised its discretion in denying Miller’s motion for leave to amend answer and affirmative defenses.***

***1. A party does not have an absolute right to amend a pleading after the expiration of 20 days after it is served.***

CR 15 does not confer an absolute right upon a party to amend a pleading after the expiration of 20 days after it is served. Otherwise, a party would not be required to seek leave of court and demonstrate to the satisfaction of the court that an amendment should be allowed in the interests of justice. In *DelGuzzi Const. Co., Inc. v. Global NW Ltd., Inc.*, 105 Wn.2d 878, 719 P.2d 120 (1986), the Supreme Court reaffirmed the long-standing rule that if, in the opinion of the court, allowing the amendment would prejudice the non-moving party, it is within the discretion of the court to deny the motion. In relying upon *Caruso v. Local Union 690 of Int’l Brotherhood of Teamsters*, 100 Wn.2d 343, 670 P.2d 240 (1983), the *DelGuzzi* court stated:

*“A motion to amend pleadings is governed by CR 15(a) which states: ‘a party may amend his pleading only by leave of court or by written consent of the adverse party;*

*and leave shall be freely given when justice so requires.’ In Caruso v. Local Union 690 of Int’l Bhd. Of Teamsters, 100 Wash.2d 343, 670 P.2d 240 (1983), we discussed the objective of CR 15:*

*The purpose of pleadings is to ‘facilitate a proper decision on the merits’, Conley v. Gibson, 355 U.S. 41, 48, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957), and not to erect formal and burdensome impediments to the litigation process. Rule 15 of the Federal Rules of Civil Procedure, from which CR 15 was taken, ‘was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result.’ United States v. Hougham, 364 U.S. 310, 316, 5 L.Ed.2d 8, 81 S.Ct. 13 (1960). CR 15 was designed to facilitate the same ends.*

*Caruso at 349, 670 P.2d 240. As stated by this court, ‘[t]he touchstone for denial of an amendment is the prejudice such amendment would cause the non-moving party.’ (Citations omitted.) Caruso, at 350, 670 P.2d 240. The court in Caruso further stated: ‘A trial court’s action in passing on a motion for leave to amend will not be disturbed on appeal except for a manifest abuse of discretion or a failure to exercise discretion.’ (Citations omitted.) Caruso, at 351, 670 P.2d 240.”*

*105 Wn. 2d at p. 888.*

## **2. Miller’s proposed affirmative defenses.**

Miller’s proposed amended answer to the amended complaint lists the following new affirmative defenses:

8. *Untimely service of process.*
9. *Untimely notice of alleged defects.*

10. *There is a lack of privity between plaintiff McClincy Brothers Floor Covering, Inc. and this Defendant and, therefore Plaintiff McClincy Brothers Floor Covering, Inc. lacks standing to pursue claims against Defendant.*

11. *The damages sustained by Plaintiffs are unavoidable from the standpoint of this Defendant.*

12. *Intervening and superseding cause.*

13. *Plaintiffs accepted the performance of the Defendants.*

14. *Plaintiffs misused the product.*

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

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

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.*

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

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.*

CP 9.

**3. *McClincy's will suffer undue prejudice should Miller be permitted to assert these new affirmative defenses.***

Each of the proposed affirmative defenses provides a springboard from which to engage in a considerable amount of discovery. Because no

discovery has been undertaken subsequent to remand, it is impossible at this time to predict ultimately what this additional discovery will cost, both from the standpoint of attorney's fees as well as expert witness fees. Those affirmative defenses which can be expected to require new evidence, including expert testimony, are summarized below.

9. *Untimely notice of alleged defects.*

Miller can be expected to offer evidence that he was prejudiced because McClincy's did not advise him earlier of the numerous defects in the roofs. This may well require expert testimony to acquaint the trier of fact with the nature and extent of each of the defects which the court found in all three roofs and when those defects could have been reasonably known to McClincy's.

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

Evidence to support this affirmative defense could likely require the same new inquiry as indicated above.

12. *Intervening and superseding cause.*

Discovery will be necessary to determine the nature and extent of these causes and expert testimony could be required to explain them to the trier of fact.

14. *Plaintiffs misused the product.*

Miller may require a deposition from Tim McClincy concerning his use of the building, which itself may trigger the need for expert testimony to overcome this defense.

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

The same line of inquiry may be necessary with respect to this affirmative defense as with respect to number 14 above.

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.*

Expert testimony will be necessary both to support and rebut this defense from the standpoint of valuation of the building.

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.*

Expert testimony may be required with respect to this defense, as well as additional deposition testimony from the parties.

These new affirmative defenses do not simply propose new legal theories which are advanced and which can be tried on the record as it presently exists in the trial court.

Miller points to the fact that “respondents do not object to Miller’s jury demand, filed on June 26, 2012.” Miller’s brief, p. 15; CP 1.

Whether remand is tried to the court or to the jury is immaterial to the issue of prejudice, which results from the time and expense to undertake new discovery and to try these defenses.

On the other hand, should the case be tried on the pleadings as they presently stand, testimony and the documents which are relevant only to the issues on remand will be admissible before the jury, no differently than the presentation of evidence which would be made to the court in the absence of a jury.

In the final analysis, it is in the discretion of the trial court to determine what additional evidence it will allow in order to address the issues outlined by the Court of Appeals, and how the jury will be instructed in resolving those issues.

***C. Miller has cited no authority from Washington which permits a party to amend its pleadings after the appellate court remands the case with instructions to the trial court.***

Miller has argued that “longstanding Washington law” permits a party to amend its pleadings after remand from the appellate court. Miller brief, p. 12. The decision of the Court of Appeals by its very terms limited the issues to be tried upon remand. The Court of Appeals summarized its decision by holding as follows:

*“We hold that there is insufficient evidence to support the finding that Miller Roofing warranted the manufacture of either the torch down roof for 12 years or*

*the metal roofs for 50 years. Accordingly, we reverse the judgment to the extent of the written contract claim.*

*We also hold that, on this record, it is unclear whether the oral contract claims are barred by the statute of limitations. It is unclear whether Miller Roofing waived the affirmative defense of untimely service of process. And it is also unclear when plaintiffs had notice of the defects underlying their claim for breach of the two oral contracts. Thus, liability is unclear.*

*We also note that the damages on which the breach of written contract claim is based are not segregated from the damages awarded for the breach of the oral contracts claims. Accordingly, on this record, any judgment for damages on the oral contract claims cannot stand.”*

[CP 31-32]

The Court of Appeals did not remand this case for retrial on all issues, but instead remanded with instructions to retry only these discrete issues. It is for this reason that the posture of this case on retrial is starkly different from the circumstances in each of the cases cited by Miller, which are discussed in detail below.

***Johnson v. Berg, 151 Wash. 363, 275 P. 721 (1929)***

This case has to be read beyond the headnotes, all of which appear to support Miller’s claim that he should be permitted to file the amended answer in the form proposed. *Johnson* found its way to the Supreme Court a second time because of confusion by the trial court in how to address the affirmative defense of *res judicata* within the context of an

earlier lawsuit in a separate case in which the defendants successfully enjoined the county treasurer from collecting assessments levied against their real estate. The plaintiffs in the first action became the defendants in the second and the respondents in both appeals. On remand, the trial court denied the defendant Berg the opportunity to amend his answer to plead *res judicata* as an affirmative defense and again dismissed the case. In reversing a second time, with instructions, the Supreme Court took into consideration the affirmative defense pleaded by the appellants in their original answer, and found that the trial court abused its discretion by not allowing this defense to be pleaded. This case is no support for the wide-ranging relief which Miller is seeking, the effect of which would require the reopening of discovery and the trial of issues which were not addressed by the Court of Appeals in its opinion and which could have been raised at trial, but were not.

***Richardson v. Carbon Hill Coal Co., 18 Wash. 368, 51 P. 402 (1897)***

In *Richardson*, the superior court granted a judgment of nonsuit in favor of the defendant-respondent in a malpractice case against a physician. The Supreme Court reversed on appeal and remanded for a new trial, with leave to file new pleadings. On retrial, the plaintiff amended his complaint to which the defendant demurred. The demur was

sustained by the superior court. The second appeal followed. The basis of the demur was the expiration of the statute of limitations during the pendency of the appeal. In the second appeal, the Supreme Court reversed, finding that the amendment related back to the same transactions and rights which were set up in the prior complaint. It is difficult to understand how the holding in *Richardson* is of any value in determining whether Miller should be permitted to litigate these new affirmative defenses.

***Jones v. Western Mfg. Co., 32 Wash. 375, 73 P. 359 (1903)***

In *Jones*, a trial was permitted on the merits *after* remittitur. Although it is not clear from the opinion, an answer was apparently filed but no trial followed apparently on account of a successful demurrer. The respondent/defendants were permitted to amend their answer for the first time after remand and prior to trial on the merits. In this case, we have already had a trial and Miller lost on all issues except those identified for retrial by the Court of Appeals.

***Smith Sand & Gravel Co. v. Corbin, 102 Wash. 306, 173 P. 16 (1918)***

This case was appealed to the Supreme Court of Washington a total of three times. On appeal after a third trial, the Supreme Court found that the prior appeals did not involve any question upon the first cause of

action and defenses and thus was not controlled by the doctrine of the law of the case. This is because the amendment to the answer allowed by the trial court at the third trial was characterized as a defense notwithstanding that it was pled and tried as a counterclaim, and the counterclaim was thus permitted as an additional defense. Miller is not attempting to insert a counterclaim in this case and again it is difficult to understand what value *Smith Sand & Gravel* has to this case.

***Herron v. Tribune Publishing Co., 108 Wn.2d 162, 165, 736 P.2d 249 (1987)***

In *Herron*, the Washington Supreme Court held that it was not an abuse of discretion to deny a motion to amend to add an additional claim based on facts occurring *after* filing the original complaint.

However, the court in *Herron* emphasized that amendments to pleadings are appropriate to assert new legal theories upon the same set of operative facts. The court recognized that there is a general tendency to deny motions to amend based on new facts or occurrences, citing 61 Am.Jur.2d Pleadings § 322, 324 and 328. A plain reading of this case makes it clear that when the effect of allowing an amendment is to permit the development of additional facts which could have been raised earlier; it is not a manifest abuse of discretion for the trial court to deny the amendment. This is precisely what will occur in this case if these

amendments are permitted; Miller will be permitted to develop new facts to support these new affirmative defenses which it had a full opportunity to develop prior to trial, but apparently made a conscious effort not to do so.

***Netstad v. Beasley, 77 Wash.App. 459, 892 P.2d 110 (Div. 2, 1995)***

In *Netstad*, the Court of Appeals held that the trial court abused its discretion in granting leave to amend the complaint, but not allowing the amendment to relate back, overruling the trial court's holding that the amendment would not relate back to the plaintiff's delay in joining a new party because of inexcusable neglect. This case is of no value in resolving any of the issues presented in this appeal.

***Orwick v. Fox, 65 Wash.App. 71, 828 P.2d 12 (1992)***

In *Orwick*, the court's denial of leave to amend was affirmed where the denial of a motion for leave to amend is not an abuse of discretion if the proposed amendment is futile. This case is of no value to this appeal.

***Rousseau v. Roche, 158 Wash. 310, 290 P. 806 (1930)***

In *Rousseau*, the remitter based upon trial errors was "*for further proceedings*," and the Supreme Court construed that to mean a remand to the trial court for a new trial. This is clearly distinguishable from the

specific instructions on remand which the Court of Appeals directed to the trial court in this case.

***Stusser v. Gottstein, 187 Wash. 660, 61 P.2d 149 (1936)***

In *Stusser*, the defendant amended his answer after remand setting up an equitable defense and did so without the permission of the court. In the absence of prejudice and having been given a full hearing prior to trial upon the question of whether the cause could be tried to a court or a jury, the *Stusser* court found no prejudice. The court stated:

*“As to the manner of amending the pleadings, the trial court, after reversal of the judgment, **in the absence of a special direction**, stands in the same position as it did before the original trial, and amendments may be allowed after appeal just as they had been allowed in the ordinary course of the preparation of a case for trial.”* (Citations omitted). (Emphasis supplied.) 187 Wash. at p. 664.

Obviously this is not the case here; the Court of Appeals gave specific directions to the trial court on remand.

***Walker v. Sieg, 23 Wn.2d 552, 161 P.2d 542 (1945)***

In *Walker*, the Supreme Court affirmed the decision of the trial court in permitting an amendment to the answer to prove the statute of limitations, finding that there was no showing that the appellant was prejudiced by the court’s action or that the amended answer was filed for the purpose of delay or unduly delaying the trial of the case. 23 Wn.2d at

559. However, in affirming the decision of the trial court, the Supreme Court stated:

*“But the order to leave (to amend) shall be refused if it appears to the court (a) that the motion was made with intent to delay the action, or (b) that the motion was occasioned by lack of diligence on the part of the moving party and the granting of the motion will unduly delay the action or embarrass any other party, or (c) that, for any reason, the granting of the motion will be unjust.”*  
(Emphasis supplied) 23 Wash.2d at p. 558.

Nowhere in this record is there any evidence that Miller could not have interposed these additional 12 affirmative defenses in his original answer or by amendment prior to the trial.

***Wilson v. Horseley, 137 Wn.2d 500, 974 P.2d 316 (1999)***

In *Wilson*, the Supreme Court affirmed the denial of leave to amend after a completed arbitration, followed by a trial *de novo*. The trial court found that allowing the amendment would be grossly unfair and prejudicial to the interests of the plaintiffs, it being the case that all of the issues raised by Horseley had been known to him since the beginning of the litigation almost a year before, and further that upon the facts that the motion was made upon the eve of trial after the matter had been through arbitration. The court also found that Horseley was aware of the factual basis for his proposed amendments prior to the arbitration and to allow the amendment after arbitration would be contrary to the litigation reduction

purposes of the Mandatory Arbitration Rules. In affirming the denial of the motion to amend the answer and to assert a counterclaim, the Supreme Court reiterated that:

*“The trial court’s decision ‘will not be disturbed on review except upon a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’”* (Citation omitted) 137 Wash.2d at 505.

While the court in *Wilson* took account of policy considerations raised by the Mandatory Arbitration Rules, the deference given to the decision of the trial court is clear.

***Tagliani v. Colwell, 10 Wash.App. 227, 517 P.2d (1973)***

In *Tagliani*, the trial court granted summary judgment for the defendants and denied the plaintiff’s motion for leave to amend to allege that the defendants were liable for their own individual tortious conduct. On appeal, the Court of Appeals held that the trial court abused its discretion in refusing leave to amend holding that in the absence of a showing of undue prejudice, dilatory practice or undue delay, the motion to amend should have been granted. In contrast, McClincy’s will suffer undue prejudice, if Miller is granted a new trial and allowed to litigate these new affirmative defenses when the opportunity to do so existed in the original trial. Dilatory practice can be inferred from the state of this record unless this court is prepared to conclude that Miller made a

conscious decision to avoid pleading these new affirmative defenses as part of its trial strategy.

***Foman v. Davis, 371 U.S. 178, 9 L.Ed 222, 83 Sup. Ct. 227 (1962)***

*Foman* is cited every time a party wishes to amend a pleading.

*Foman* simply stated requires that an amendment be freely allowed under Rule 15(a) “when justice so requires.” But even *Foman* recognized that the grant or denial of an opportunity to amend is within the discretion of the district court and only when the court should fail to give a justifying reason for the denial is there an abuse of discretion. Judge Spector clearly stated the justification for the court’s denial of the motion for leave to amend, recognizing the undue prejudice which would be suffered by McClincy’s were Miller permitted a “do over.” See quote, pages 6-7, *supra*.

***D. Miller has waived the affirmative defenses it proposes to add to its answer.***

CR 8(c) provides that a party shall set forth in a pleading to a preceding pleading “*any matter constituting an avoidance or an affirmative defense.*” Affirmative defenses are waived unless they are (1) affirmative pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the express or implied consent of the parties. *Farmers Ins. Co. of Washington v. Miller, 87 Wash.2d 70, 549 P.2d 9 (1976), at p. 13*, holding

that the failure to plead estoppel and waiver deemed those defenses waived and precluded their consideration as triable issues in the case.

In *Harvey v. Obermait*, 163 Wash.App. 311, 261 P.3d 671 (Wash.App. Div 1, 2011), the court explained the doctrine of waiver as one which is “*designed to prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage.*” *King v. Snohomish Co.*, 146 Wash.2d 420-424, 47 P.3d 563 (2002).” A party may also be deemed to have waived an affirmative defense through dilatory conduct in failing to assert it. See *King v. Snohomish Co.*, *supra*. This rationale was earlier articulated in *Lybbert v. Grant Co.*, 141 Wash.2d 29, 39, 1 P.3d 1124 (2000), in which the court observed that, “*the doctrine of waiver is sensible and consistent with . . . our modern day procedural rules, which exist to foster and promote the just, speedy and inexpensive determination of every action.*” At p. 1129.

The facts of this case are even more egregious than those circumstances displayed in the case authority. This is not a case where Miller has waited until the eve of trial to seek to interpose 12 additional affirmative defenses. Instead, Miller has waited until after achieving some relief with respect to the intervening appeal to assert additional affirmative

defenses which could have been raised in a timely fashion prior to trial, but were not.

For all of these reasons, the doctrine of waiver precludes the assertion of these additional 12 affirmative defenses.

***E. The proposed affirmative defenses are barred by the doctrine of collateral estoppel.***

The 12 new affirmative defenses which Miller wishes to litigate upon remand of this case could have been asserted prior to trial. Miller is collaterally estopped from asserting them now.

In *Pederson v. Potter*, 103 Wash.App. 62, 11 P.3d 833 (2000), the court distinguished the doctrine of *res judicata* from that of collateral estoppel. The court defined *res judicata* as “claim preclusion” as opposed to collateral estoppel as “issue preclusion.” As the opinion states:

*“Collateral estoppel, or issue preclusion, prevents litigation of an issue after the party estopped after the party has already had a full and fair opportunity to present its case. Hansen v. City of Snohomish, 121 Wash.2d 552, 551, 852 P.2d 295 (1993). The requirements for application of the doctrine are: (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice. Id., at 562, 852 P.2d 295. Unlike res judicata, collateral estoppel requires the parties have a full and fair opportunity to present their case. Collateral estoppel also requires the same adjudication, res judicata only requires a prior judgment.” 11 P.3d at p.836.*

This is clearly a case where the doctrine of collateral estoppel should preclude Miller from litigating defenses which could have been raised at trial.

***F. The doctrine of stare decisis bars assertion of the affirmative defense of lack of privity.***

Miller wishes to allege lack of privity as a new affirmative defense.

Proposed affirmative defense number 10 alleges:

*“10. There is a lack of privity between plaintiff McClincy Brothers Floor Covering, Inc. and this Defendant and, therefore Plaintiff McClincy Brothers Floor Covering, Inc. lacks standing to pursue claims against Defendant.”*

CP 9

Miller attempted unsuccessfully in its appeal to raise the issue of privity and lack of standing on the part of McClincy Brothers to pursue these claims. In referring to Miller’s motion for summary judgment below, the Court of Appeals stated:

*“Here, in its motion for summary judgment below, Miller Roofing stated the following in its statement of facts:*

*This lawsuit arises from the installation of three roofs completed over twelve years ago. In 1996, Plaintiff McClincy Brothers Floor Covering, Inc. (hereinafter "McClincy"), acting as its own general contractor undertook a substantial renovation of its commercial building McClincy hired Miller to install torch down flat roofs over McClincy's showroom (lower torch down roof) and the apartments*

*(‘upper torch down roof’), and a metal steep slope roof over a small section of the building (‘metal roof’).*

*In a heading describing the subsequent oral contracts, Miller Roofing states, ‘[i]n 2006, **the parties entered into an oral agreement** whereby Miller made repairs to the lower torch down roof.’ Miller Roofing stated the same in its trial brief.*

*In view of these concessions that the agreements at issue were between Miller Roofing and McClincy Brothers, Miller Roofing cannot now argue that McClincy was the only party to these agreements. Therefore, we do not reach the substance of this argument.”*

[Emphasis in original] CP 52

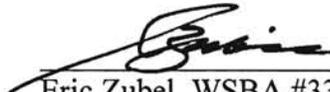
The doctrine of *stare decisis* precludes Miller from alleging this affirmative defense on remand. See *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L.Ed.2d 772 (1997); *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 961 P.2d 350 (1998), recognizing the established rule of law by which an appellate court is bound to follow established precedent.

#### IV. CONCLUSION

If Miller is permitted to amend his answer to assert these new affirmative defenses, McClincy’s suffers the ultimate prejudice by being required to try a case which the Court of Appeals did not require be tried. Miller will then have succeeded in achieving with the trial of additional defenses what he was unable to accomplish on appeal, i.e., remand for a new trial.

DATED this 4<sup>th</sup> day of March, 2013.

ERIC ZUBEL, PC

  
Eric Zubel, WSBA #33961  
Attorney for Respondents

No. 69606-8

**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,

Respondents

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**CERTIFICATE OF SERVICE FOR RESPONDENTS'  
ANSWERING BRIEF**

---

ERIC ZUBEL, WSBA #33961  
Attorney for Respondents

ERIC ZUBEL, PC  
800 Fifth Avenue, Suite 4100  
Seattle, WA 98104  
206-447-1445

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STATE OF WASHINGTON  
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**CERTIFICATE OF SERVICE**

I, Cathy Hodges, 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. Respondents' Answering Brief
2. This Certificate of Service

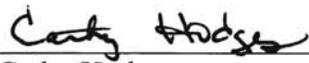
I caused to be served the above identified documents, on this day, March 4, 2013, via Legal Messenger, to the following:

Steven J. Jager  
Marnie H. Silver  
Jager Law Office PLLC  
600 Stewart Place, Suite 1100  
Seattle, WA 98101  
E-mail: [steven@jagerlaw.com](mailto:steven@jagerlaw.com)  
[marnie@jagerlaw.com](mailto:marnie@jagerlaw.com)

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

DATED this 4<sup>th</sup> day of March, 2013.

ERIC ZUBEL, PC

  
\_\_\_\_\_  
Cathy Hodges  
Legal Assistant

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Attorney for Respondents

ERIC ZUBEL, PC  
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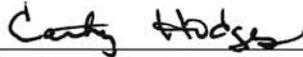
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Jager Law Office PLLC  
600 Stewart Place, Suite 1100  
Seattle, WA 98101  
E-mail: [steven@jagerlaw.com](mailto:steven@jagerlaw.com)  
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 4<sup>th</sup> day of March, 2013.

ERIC ZUBEL, PC

  
\_\_\_\_\_  
Cathy Hodges  
Legal Assistant