

FILED  
COURT OF APPEALS  
DIVISION II

APPELLANT'S OPENING BRIEF

No. 35137-4-II

DATE FILED: 11/13/2013

**COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON**

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DEBBIE WHITE,

Appellant/Defendants,

vs.

AA REMODELING, a d/b/a of TURBO MECHANICAL, INC., a  
Washington corporation,

Respondent/Plaintiff

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APPELLANT'S OPENING BRIEF

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## ASSIGNMENTS OF ERROR

It was error for the Trial Court to take testimony from a AA Remodeling's expert retained after discovery had closed when Debbie White had not been given a proper opportunity to discover and prepare a rebuttal to the testimony.

It was error for the Trial Court to deny Debbie White's request for attorney's fees when Debbie White had prevailed on a claim entitling her to an award of attorneys fees.

## STATEMENT OF THE ISSUES

Was it proper for the Court to take testimony from an expert witness hired by AA Remodeling after discovery had closed, preventing Debbie White from discovering and preparing a rebuttal to the opinions to be offered?

Is Debbie White entitled to an award of attorney's fees when she prevailed on a counterclaim under RCW 18.27, which provides for a mandatory attorney fee award to a successful claimant, and AA Remodeling, who prevailed on other claims for which there is no fee entitlement, failed to raise the defense of offset?

## STATEMENT OF THE CASE

Debbie White owns a home at 2407 Summit Lake Shore RD NW, Olympia. Her home was in need of remodeling and upgrading, so Debbie took out a home equity loan and began soliciting bids for the work that she wanted done to her home. (CP 98-106 at 98).

Turbo Mechanical d/b/a AA Remodeling, submitted a proposal and drawings that best suited the wishes of Debbie with a price that fell within her budget. This proposal included dry rot repair and a complete remodel of the upper floor, finishing of the basement, and the construction of an addition and deck. Debbie White believed that she had accepted this offer, but the Trial Court ruled that she had not. The Trial Court limited the scope of work to the work described in documents prepared by AA Remodeling while AA Remodeling was performing its work. (CP 98-106 at 99).

From the start of AA Remodeling's performance, problems arose with the pace, quality and sequence of construction. AA Remodeling failed to perform its work properly or with minimal quality standards. Substantial extra work was necessary to repair AA Remodeling's work. (CP 98-106 at 99).

After leaving the job, AA Remodeling submitted a substantial bill to Debbie White based on its accounting of the time and material cost of the project. Debbie White disputed that the contract was a time and materials contract, believing that it was a fixed priced contract with a price substantially less than that being charged by AA Remodeling. Further, Debbie White was receiving bids for the repair work necessary to finish the project, and those bids exceeded the amount claimed as due by AA Remodeling by a large margin. (CP 98-106 at 100).

Unable to resolve this impasse, both AA Remodeling and Debbie White prepared lawsuits. AA Remodeling filed its lawsuit first and proceeded with this litigation as Plaintiff. Debbie White answered AA Remodeling's Complaint and asserted a counterclaim against AA Remodeling (and a third-party claim against AA Remodeling's contractor's bonds) under RCW 18.27. (CPS 185-191; 203-287; 299-303).

On the eve of trial, after close of discovery and after the witness disclosure deadlines imposed by the Trial Court's Case Schedule Order, AA Remodeling identified Leo Deatherage as an expert witness who would testify about building quality and general standards and terms in the

construction industry. Debbie White objected to this late disclosure and sought to have the expert excluded from trial. (CPS 85-86; 87-97; 107-109) The Court denied this request, ordered that the trial continue as scheduled, and took testimony from Leo Deatherage even though he had been disclosed late and even though Debbie White had been disabled from preparing to meet his testimony (or even learning what that testimony would be). (RP 10/14/06, p 6, ll. 1-25; p 14, l. 11 - p 15, l. 9; p 18, l. 2-10.)

The Court, following trial, ruled that AA Remodeling had substantially prevailed on its contract claim and was entitled to recover damages from Debbie White for nonpayment. However, the Court also ruled that Debbie White had prevailed on her claim under RCW 18.27, proving that AA Remodeling had performed defective work. In making these rulings, the Court specifically referred to the testimony of Leo Deatherage as critical testimony and indicated that the Court looked more favorably on Leo Deatherage's testimony than it looked on any other evidence in the case. (RP 2/10/05; CP 380-390.)

However, the amount the Court awarded to Debbie White was less than the amount awarded to AA Remodeling. The Court discounted the

award to AA Remodeling by offsetting the amount awarded to Debbie White from the amount otherwise due to Debbie White. The Court made this offset even though AA Remodeling had not pled offset as an affirmative defense and even though Debbie White specifically requested that the award to her be reduced to a separate judgment, rather than treated as an offset. (RP 2/10/05; CP 380-390.)

Following these rulings, AA Remodeling and Debbie White filed cross-motions for attorney's fees under RCW 18.27.040 (6), which was the only basis on which either party could recover attorney's fees. The Court denied AA Remodeling's motion because Debbie White, not AA Remodeling, had prevailed on the RCW 18.27 claim. However, the Court denied Debbie White's motion because AA Remodeling had prevailed in the case overall by receiving the larger award. (CP 160-162; 163-173; 185-191; 203-287; 288-291; 299-303.)

#### SUMMARY OF THE ARGUMENT

The Trial Court committed two reversible errors that need to be addressed and resolved by this Court. First, the Trial Court allowed AA Remodeling to present testimony from a surprise expert witness. AA Remodeling had not identified the expert or his opinions until after the

discovery period in the case had closed. Debbie White tried to exclude this surprise expert, but the Trial Court denied her motion and heard the witness. The Trial Court was singularly impressed by the surprise expert's testimony, identifying that testimony as the most persuasive in the case when making rulings following trial.

This testimony amounted to an improper trial by ambush. Debbie White was denied a fair opportunity to prepare her claim and defense and to rebut AA Remodeling's claim and defense. The Trial Court should have excluded the surprise expert. If the Trial Court did not exclude the witness, the Trial Court should have, at a minimum, continued the trial and reopened discovery to allow Debbie White to discover the opinions being offered and to develop a response to those opinions (potentially hiring a rebuttal expert). The Trial Court did none of these things, and then decided the case based on the surprise testimony. These decisions were improper, and this Court should reverse the judgement and remand this matter for new trial. Further, this Court should order either that discovery should be reopened prior to the new trial to give Debbie White a fair opportunity to discover and develop a response to the opinions of the

surprise expert, or the case should be retried without presentation of the surprise expert.

Second, the Trial Court's decision was not a complete win for either side. The Trial Court ruled that AA Remodeling, rather than Debbie White, had proven its breach of contract claim. The Trial Court also ruled that Debbie White had proven her claim under RCW 18.27. However, the Trial Court offset those recoveries, giving AA Remodeling a net recovery. In doing so, the Trial Court disregarded the fact that AA Remodeling had not pled offset as a defense and that Debbie White was requesting a separate judgment, rather than an offset.

Further, RCW 18.27 entitles the prevailing party on an RCW 18.27 claim to recover attorney's fees. Both parties requested fees under this statutory provision. The Trial Court denied both fee requests. The Trial Court properly ruled that AA Remodeling was not entitled to fees because AA Remodeling had not prevailed on the RCW 18.27 claim, or on any claim entitling it to attorney's fees. However, the Trial Court, disregarding the logic of fee awards set forth in Marassi v. Lau, 71 Wn.App. 912, 917, 859 P.2d 605 (1993), ruled that Debbie White was not entitled to fees even though she had prevailed on a claim that entitled her

to a fee recovery because she had not also prevailed overall. This was error under the Marassi analysis, and this Court should award fees to Debbie White on this appeal and remand this case to the Trial Court for an award of fees to Debbie White as part of her recovery.

## ARGUMENT

### *Standard of Review*

An appellate court reviews issues of fact under the substantial evidence standard and issues of law *de novo*. Washam v. Democratic Central Comm., 69 Wn. App. 453 at 459, 849 P. 2d 1229 (1993). All issues raised in this appeal are pure issues of law.

### *Identification and Discovery of Expert; Trial by Ambush*

AA Remodeling failed to identify Leo Deatherage, or any expert witness, within the time set for witness identification in the Case Schedule Order. More importantly, AA Remodeling failed to provide any expert report summarizing or stating Leo Deatherage's opinion until after the close of discovery. This failure prevented Debbie White from assessing that testimony or preparing rebuttal testimony to address it.

Despite these defects in their mustering of evidence for their case, the Trial Court allowed AA Remodeling to proceed to trial with the

testimony of its undisclosed expert, Leo Deatherage. This amounted to an improper trial by ambush. Debbie White was placed at a severed, unfair and ultimately insurmountable disadvantage.

Further, the importance of this testimony to the outcome of the case is underscored by the fact that the Trial Court referred to Leo Deatherage by name in his Oral Decision and Findings. Leo Deatherage proved to be the linchpin witness in this case. This critical testimony should never have been admitted.

The proper and appropriate remedy in this case was to exclude the testimony of Leo Deatherage. A trial court may exclude testimony as a sanction for discovery violations in cases of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct. Rice v. Janovich, 109 Wash.2d 48, 56, 742 P.2d 1230 (1987). A "willful" violation means a violation without a reasonable excuse. In re Estate of Foster, 55 Wash.App. 545, 548, 779 P.2d 272 (1989). Thus, even an inadvertent error in failing to disclose an expert witness has been deemed willful, justifying exclusion of testimony. Falk v. Keene Corp., 53 Wn.App. 238, 767 P.2d 576, *review granted*, 112 Wn.2d 1016 (1989).

There was no reasonable excuse for AA Remodeling's noncompliance with the Case Schedule Order in this case. That constitutes a willful violation and the testimony of Mr. Deatherage should have been excluded. If the testimony was not excluded, the trial should have been continued and discovery reopened to allow Debbie White to learn the substance of Leo Deatherage's opinions and testimony and to prepare a rebuttal to that testimony, possibly bringing on its own rebuttal expert.

Much of Debbie White's litigation strategy and choice of experts was based on AA Remodeling's apparent lack of an outside expert. Debbie White's litigation strategy was therefore surprised and upset by this last-minute change. Debbie White was denied a reasonable pretrial opportunity to inquire into the testimony AA Remodeling offered through Leo Deatherage. Therefore, that testimony should have been excluded, or the trial should have been continued and discovery reopened.

This Court should reverse the Trial Court's decision to proceed without giving Debbie White a fair opportunity to discover and respond to the opinions of Leo Deatherage. This case should be remanded to the

Trial Court, either for retrial without testimony from Leo Deatherage or for retrial following additional discovery.

*Fee Entitlement Under RCW 18.27*

RCW 18.27, the contractor's licensing and bonding statute, exists to protect homeowners like Debbie White from damages caused by contractors like AA Remodeling. RCW 18.27.010. The statute is particularly applicable when a contractor performs defective work, as AA Remodeling did in this case. The statute provides for limited fee shifting under the statute. RCW 18.27.040 (6).

RCW 18.27.040 requires a contractor to post a bond upon registration as a contractor. An Owner, especially a residential homeowner remodeling her home, may seek to recover against the bond. RCW 18.27.040(3) and (4).

RCW 18.27.040(6) states:

The prevailing party in an action filed under this section against the contractor and the contractor's bond or deposit, for breach of contract by a party to a construction contract, is entitled to costs, interest, and reasonable attorneys' fees. The surety on the bond is not liable in an aggregate amount in excess of the amount named in the bond nor for any monetary penalty assessed pursuant to this chapter for an infraction.

Under *expressio unius est exclusio alterius*, a canon of statutory construction, when a statute specifically designates the things on which it operates, there is an inference that all other things are excluded. In re Personal Restraint of Acron, 122 Wn.App. 886, 890, 95 P.3d 1272 (2004). The legislative inclusion of certain items in a category implies that the other items are intended to be excluded. Bour v. Johnson, 122 Wash.2d 829, 836, 864 P.2d 380 (1993).

The first sentence of RCW 18.27.040(6) is a general sentence entitling the prevailing party in any breach of contract action filed under RCW 18.27.040 to recover attorneys' fees, costs and interest. AA Remodeling is the prevailing party in such a breach of contract action. The second sentence of subsection (6) applies only to the surety on the bond and limits the amount for which the surety can be liable. Under the principle of *expressio unius est exclusio alterius*, the Court must assume the Legislature intended that only the surety's liability is limited under this statute. Therefore, the liability of the general contractor to pay attorney's fees under this statute is not limited to the amount of the bond.

Under this statute, Debbie White is entitled to recover all her attorneys' fees incurred pursuing her RCW 18.27 claim against AA

Remodeling. This recovery is mandatory and is not limited to the amount of the bond. The Trial Court erred in ruling that Debbie White was not entitled to an award of reasonable attorney fees and costs under RCW 18.27.

*Marassi Analysis Applies Here and Supports Fees to Debbie White*

AA Remodeling brought this action as Plaintiff seeking recovery for monies it claimed it was due under a written contract it prepared and presented to Debbie White, but which did not include an attorney's fee provision. Without question the Trial Court ruled that AA Remodeling prevailed on its breach of contract action. However, that breach of contract action is entirely independent of any action under RCW 18.27. Because the contract does not have an attorney's fee provision, AA Remodeling was and is not entitled to attorney's fees spent prosecuting its claim for breach of contract.

Debbie White, however, brought and prevailed on a claim pursuant to RCW 18.27. In answering that counterclaim and crossclaim, AA Remodeling and its bonds did not raise any affirmative defenses, including the total or partial defense of offset. Thus, AA Remodeling's claim for breach of contract is independent of an RCW 18.27 claim and does not

become linked to that claim as a defense to it. By failing to raise its own claim as a defense to Debbie White's claim, and by choosing to defend against Debbie White's claim only by way of strict and absolute denial of the claim, AA Remodeling exposed itself to an award of fees under RCW 18.27 under the current circumstances.

It is potentially critical that AA Remodeling failed to plead offset as an affirmative defense (and failed to plead any affirmative defenses) to Debbie White's RCW 18.27 counterclaim. AA Remodeling, rather than asserting any affirmative defenses, chose to oppose Debbie White's counterclaim with what was formerly known as a general demurrer – a total denial of the entire claim and the facts on which the claim rests. Affirmative defenses that are not properly pled are deemed waived. Harting v. Barton, 101 Wash. App. 945, 6 P.3d 91 (2000) (involving defenses of failure to provide notice of default and failure to pursue mandatory arbitration). To prevail on this demurrer defense, AA Remodeling had to prevail absolutely and without any allowance of a recovery to Debbie White. Debbie White was allowed a recovery. Therefore, Debbie White is the prevailing party under RCW 18.27

Debbie White proved at trial that AA Remodeling performed defective work and received an award from the Court for that defective work. “A party need not recover its entire claim in order to be considered the prevailing party.” Silverdale Hotel Assocs. v. Lomas & Nettleton Co., 36 Wn.App. 762, 774, 677 P.2d 773 (1984); *see generally* Piepkorn v. Adams, 102 Wn.App. 673, 687 10 P.3d 428 (2000). Without raising the defense of offset, AA Remodeling is not entitled to reduce Debbie White’s award by the amount of any award it received. Rather, Debbie White is entitled to choose to have her award entered as a separate judgment, and she has exercised that option.

The mere fact that a party prevails on claims which do not entitle it to attorney’s fees in their own right does not create an entitlement to attorney’s fees based on claims which the party did not prevail on but which would have entitled the party to attorney’s fees had the party prevailed. Matter of Eaton, 48 Wn.App. 806, 814, 740 P.2d 907 (1987) (“Attorney fee awards are not favored in this state, and will not be granted absent contract, statute, or recognized ground in equity”). It is the unenviable position in which AA Remodeling finds itself. AA Remodeling could have prevailed on its principal claim for breach of

contract, but is not entitled to attorney's fees under that claim. AA Remodeling did not prevail, and in fact lost, on Debbie White's counterclaim and crossclaim under RCW 18.27. Debbie White is entitled to an award of attorney's fees for the RCW 18.27 claim. *See Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 743 733 P.2d 208 (1987).

Conversely, Debbie White is the prevailing party under RCW 18.27. The prevailing party is the party in whose favor an affirmative judgment is entered. *See Tacoma News, Inc. v. Tacoma-Pierce County Health Dept.*, 55 Wn.App. 515, 525, 778 P.2d 1066 (1989). Debbie White prevailed on her claims under RCW 18.27, receiving a positive award and defeating AA Remodeling's defense and attempt to "zero" her on the claim. As such, Debbie White is entitled to fees and costs under RCW 18.27.

As the prevailing party under RCW 18.27, Debbie White is entitled to recover the attorney's fees she incurred pursuing that claim even though she did not prevail on other claims in this case, specifically the underlying breach of contract claim in general for which there is no attorney's fee right. *See Marassi v. Lau*, 71 Wn.App. 912, 917, 859 P.2d 605 (1993); *see*

*also* Mike's Painting, Inc. v. Carter Welsh, Inc., 95 Wn.App. 64, 68-69, 975 P.2d 532 (1999). The party that prevails on a claim entitling it to attorney's fees does not lose that entitlement merely by failing to prevail on claims that do not provide for attorney's fees, especially when the adverse party has failed to plead the affirmative defense of offset.

Because AA remodeling did not seek an affirmative defense of offset, it is not entitled to require that Debbie White's claim be treated as a mere credit against its claim. Rather, each of the claims should be entered separately and, most importantly, should be separately considered when determining an award for attorney's fees. This is the analysis required by Marassi v. Lau, 71 Wn.App. 912, 917, 859 P.2d 605 (1993), which states that attorney fee entitlements are determined on a claim-by-claim, not a case-by-case, basis, and the Court can only award fees incurred prosecuting or defending claims which provide for such an award.

Therefore, the Trial Court erred in denying Debbie White's cross-motion for attorney's fees. This matter should be remanded to the Trial Court for an award of fees to Debbie White on her claim under RCW 18.27, and the Trial Court should be directed to award Debbie White her

reasonable fees as determined under the lodestar method used in Washington State.

#### *Attorney's Fees*

RAP 18.1 provides that when a party prevails on issues that, under law or contract, entitle the prevailing party to recover attorney's fees, the prevailing party can recover fees on appeal if that party included a prayer for fees in its brief. State v. Farmers Union Grain Co., 80 Wn. App. 287, at 296, 908 P.2d 386 (1996).

This action is an action under the contractor's licensing statute, so Debbie White is entitled to recover its attorney's fees under RCW 18.27.040(6). Such fees should be awarded in this case. The amount is to be stated in an affidavit of the prevailing party within ten days of the decision awarding fees.

#### CONCLUSION

The Trial Court committed two errors below. This Court should reverse on both points.

First, the Trial Court allowed testimony from a surprise expert witness, and found that testimony particularly persuasive. The surprise expert was first identified on the very eve of trial, well after the discovery

period in the case had closed. The Trial Court denied Debbie White's motion to exclude the expert and heard the witness. The Trial Court later identified that expert testimony as the most persuasive in the case.

This was trial by ambush. Debbie White was denied a fair opportunity to prepare her claim and defense. The witness should not have been heard. If the witnesses was to be heard, the Trial Court should have, at a minimum, continued the trial and reopened discovery. The decision to take critical testimony from a surprise expert was improper. This Court should reverse and remand this matter for a new trial that either follows fair discovery or that excludes the surprise expert.

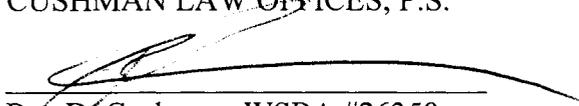
Second, the Trial Court's decision was a split decision. AA Remodeling, rather than Debbie White, won on the dueling breach of contract claims. The Trial Court ruled that Debbie White had proven her claim under RCW 18.27. However, the Trial Court failed to recognize that AA Remodeling had not pled any affirmative defense and that Debbie White wanted a separate judgment, rather than an offset. The Court offset the recoveries, giving AA Remodeling a net award.

RCW 18.27 entitles the prevailing party on an RCW 18.27 claim to recover attorney's fees. Both parties requested fees under RCW 18.27.

The Trial Court denied both fee requests. The Trial Court's denial of fees to AA Remodeling was proper, recognizing that AA Remodeling had not prevailed on the RCW 18.27 claim. However, the Trial Court disregarded Marassi v. Lau, 71 Wn.App. 912, 917, 859 P.2d 605 (1993) in ruling that Debbie White was not entitled to fees even though she had prevailed on her RCW 18.27 claim. The Court improperly ruled that, to be entitled to an attorney fee award, a party must prevail both on a claim that allows a fee award and on the overall case. This was error under the Marassi analysis. This Court should award fees to Debbie White on this appeal. This Court should then remand this case to the Trial Court for an award of fees to Debbie White.

Respectfully Submitted this 15<sup>th</sup> day of November, 2006.

CUSHMAN LAW OFFICES, P.S.



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Attorneys for Debbie White

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**CERTIFICATE OF SERVICE**

BY [Signature]

I certify, under penalty of perjury under the laws of the State of Washington, that on **November 15, 2006**, I caused to be served a true copy of the foregoing by the method indicated below, and addressed to each of the following:

original:	Court of Appeals	<input type="checkbox"/>	U.S. Mail, Postage Prepaid
	Division II	<input checked="" type="checkbox"/>	Legal Messenger
	949 Market Street	<input type="checkbox"/>	Overnight Mail
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copy:	Tom Miller	<input checked="" type="checkbox"/>	U.S. Mail, Postage Prepaid
	Attorney at Law	<input type="checkbox"/>	Legal Messenger
	P. O. Box 12406	<input type="checkbox"/>	Overnight Mail
	Olympia, WA 98508	<input checked="" type="checkbox"/>	Facsimile

Signed this 15 day of November, 2006, in Olympia, Washington.

[Signature]  
Legal Assistant