

No. 35137-4-II

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

DEBBIE WHITE,

Appellant/Defendants,

vs.

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

Respondent/Plaintiff

APPELLANT'S REPLY BRIEF

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPT. *W*

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ASSIGNMENTS OF ERROR

It was error for the Trial Court to take testimony from an AA Remodeling expert who prepared his opinion after discovery had closed, denying Debbie White the opportunity to learn the expert's opinion through deposition or interrogatory answer, even if that testimony was admitted for "rebuttal purposes."

It was error for the Trial Court to deny Debbie White's request for attorney's fees when Debbie White had prevailed on her claim against AA Remodeling's contractor's bond under RCW 18.27.

RESTATEMENT OF THE CASE

Debbie White owns a cabin at 2407 Summit Lake Shore RD NW, Olympia. She wanted to expand the cabin into a more livable home. (CP 98-106 at 98). She hired Turbo Mechanical d/b/a AA Remodeling to perform this work. (CP 98-106 at 99). AA Remodeling failed to perform its work expeditiously, properly or with minimal quality standards, leaving much work to be finished or fixed by others. (CP 98-106 at 99). After leaving the job, AA Remodeling submitted a substantial but disputed bill to Debbie White. (CP 98-106 at 100).

Both AA Remodeling and Debbie White prepared lawsuits, but AA Remodeling filed its lawsuit first. Debbie White answered AA Remodeling's Complaint and asserted a third-party claim against AA Remodeling's contractor's bond under RCW 18.27. (CPS 185-191; 203-287; 299-303).

After the witness disclosure deadlines imposed by the Trial Court's Case Schedule Order, AA Remodeling identified Leo Deatherage as an expert witness. (CPS 85-86; 87-97; 107-109) Leo Deatherage had not visited the house and had not prepared his testimony. To aid in the pretrial settlement process, and without waiving her objection to Leo Deatherage as a late-disclosed expert, Debbie White allowed Leo Deatherage to inspect her house. The inspection did not further settlement, but did result in Leo Deatherage forming opinions, contrary to those of Debbie White's experts, which were disclosed for the first time after close of discovery. Although AA Remodeling's counsel offered to allow Leo Deatherage's deposition to be taken on the eve of trial, Debbie White's counsel's schedule was filled up with trial preparation activities, and no time was available to complete discovery of an untimely disclosed expert opinion. (See attachments.)

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. (RP 10/14/06, p 6, ll. 1-25; p 14, l. 11 - p 15, l. 9; p 18, l. 2-10.) This is a clear example of trial by ambush.

The Court issued a split decision. AA Remodeling substantially prevailed on its contract claim. However, Debbie White prevailed on her claim under RCW 18.27, proving that AA Remodeling had performed defective work. In making these rulings, the Court singled out Leo Deatherage as a key witness. (RP 2/10/05; CP 380-390.)

AA Remodeling and Debbie White filed cross-motions for attorney's fees under RCW 18.27.040 (6). The Court denied AA Remodeling's motion because Debbie White, not AA Remodeling, had prevailed on the RCW 18.27 claim. 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.) Thus, the Court properly treated the RCW 18.27 claim as a distinct claim when denying AA Remodeling's motion, but failed to follow that logic when it denied Debbie White's motion.

SUMMARY OF THE ARGUMENT

The Trial Court committed two serious reversible errors. First, the Trial Court allowed AA Remodeling to present expert testimony prepared and disclosed after the close of discovery, on the eve of trial (during the trial preparation period). The seriousness of this error is underscored by the fact that the Trial Court was singularly impressed by the expert's testimony. The Trial Court should have excluded the testimony or should have continued the trial and reopened discovery. This Court should reverse the judgement and remand this matter for new trial with instructions either that discovery be reopened to give Debbie White a fair opportunity to discover and develop a response to the opinions of the expert or that the case should be retried without testimony from the expert.

Second, while the Trial Court ruled that Debbie White had proven her RCW 18.27 claim, the Trial Court refused to award her attorney's fees. RCW 18.27.040(6) entitles the prevailing party on a RCW 18.27 claim to attorney's fees. Both parties requested fees. AA Remodeling argued that because it prevailed over-all, when an unpled offset defense was applied, it was entitled to fees under RCW 18.27. Debbie White argued that she was entitled to fees because she prevailed on the RCW 18.27 claim.

As noted in AA Remodeling's Response Brief, this matter turns, to a large extent, on whether a claim under RCW 18.27 is a legally distinct claim, or whether it is merely part of a breach of contract claim against a registered contractor. In a recent case, the Washington State Supreme Court has decided this point – and has decided it in favor of Debbie White's position that a claim under RCW 18.27 is a distinct and separate claim from the breach of contract claim. The defendant on an RCW 18.27 claim (the contractor's bond) is different from the defendant on the breach of contract claim (the contractor). Further, the remedy is different (limited recovery of damages and attorney's fees against the bond up to the penal sum of the bond). Cosmopolitan Engineering Group, Inc. v. Onda Degremony, Inc., ___ Wash. 2d. ___, 149 P.3d 666 (filed December 28, 2006.) Given the separate nature of the RCW 18.27 claim from the breach of contract claim, the logic of fee awards set forth in Marassi v. Lau, 71 Wn.App. 912, 917, 859 P.2d 605 (1993) entitles Debbie White to fees. Debbie White prevailed on a claim that entitled her to a fee recovery. Debbie White's success or failure on claims that do not provide for attorney fee awards is immaterial. This was error under the Marassi analysis for the Trial Court to refuse to award Debbie White her fees.

ARGUMENT

Standard of Review

An appellate court reviews 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, Leo Deatherage did not inspect the building, or otherwise do the work necessary to form an opinion, until after the witness opinion disclosure deadline. Debbie White allowed this inspection under reservation of a right to object and to seek exclusion of Leo Deatherage's testimony. However, following this inspection, Leo Deatherage failed to provide any expert report summarizing or stating his opinion until after the close of discovery. This failure prevented Debbie White from assessing that testimony or preparing rebuttal testimony to address it.

AA Remodeling's offer to allow a deposition to be taken after disclosure is not sufficient. This offer was made in the two-week period prior to trial, which was set aside for trial preparation, not discovery.

The Trial Court's decision to allow the Defendant to use undisclosed opinions, which Debbie White had no opportunity to discover, at trial severely prejudiced Debbie White's ability to present her case and defense. Further, as those issues were the central issues of this case (whether there were construction defects and the value of AA Remodeling's construction work), limiting that testimony to "rebuttal" was a meaningless limitation. Finally, the actual significance of this error (admitting surprise testimony to the prejudice of a party), is starkly shown by the Trial Court's use of that testimony, expressly naming Leo Deatherage, in his Oral Decision and Findings.

Exclusion of properly prepared testimony is extreme. However, exclusion of expert testimony, which AA Remodeling could have easily developed and disclosed within the discovery period, but which AA Remodeling chose to delay until Debbie White ran out of time to respond, is a very different case. A Trial Court should exclude testimony as a sanction in cases of non-disclosure. Rice v. Janovich, 109 Wn.2d 48, 56, 742 P.2d 1230 (1987). Even an inadvertent error in disclosure of expert opinion justifies exclusion of testimony. Falk v. Keene Corp., 53 Wn.App. 238, 767 P.2d 576, *review granted*, 112 Wn.2d 1016 (1989).

The Trial Court ruled, and the Response Brief recites, “Exclusion of testimony is an extreme sanction.” However, in this regard there is a crucial distinction between fact witness testimony and expert testimony. Fact witness information may not be known to a party within the discovery period for many reasons beyond the party’s control. The fact witness may not be known, or may be hiding. The fact witness may be concealing information until the eve of trial out of a reluctance to testify. The fact witness may not remember something during discovery, but remember it later, on the eve of trial. Under all these circumstances, new and previously undisclosed witnesses may appear after the close of discovery, and it would be unduly harsh to exclude their testimony, which is based on events in the past which form the basis of the action.

Expert witness testimony is completely different. Experts are within the control of the party that hires them. Expert testimony is developed by the expert, usually based on activities the expert takes after the litigation has begun. Experts are hired to testify, so they do not suffer from the reluctance and memory issues that plague fact witnesses. A party has the power to tell the expert to investigate and form an opinion at any time. There is no excuse for delay.

In this case, AA Remodeling did not have its expert, Leo Deatherage, begin the task of developing his opinion (by doing an inspection and writing a report) until after the deadline for disclosure of that opinion. Further, those opinions were not developed or disclosed until after close of discovery, during trial preparation time in the three weeks before trial. This delay was needless and unjustified. It was also seriously prejudicial, as the outcome of the trial and the Trial Court's rulings show.

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, is, in large part, a consumer protection statute 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).

As seen in the Response Brief, the crux of the issue of entitlement to fees turns on whether a claim under RCW 18.27 is a distinct and separate claim from the breach of contract action against the contractor. If it is, then a successful bond claimant is entitled to attorney's fees under Marassi v. Lau, 71 Wn.App. 912, 917, 859 P.2d 605 (1993) even if she does not prevail on other, larger claims.

This issue was a matter of dispute when Appellant filed her Opening Brief. However, on December 28, 2006, the Washington State Supreme Court decided this issue – and decided it in favor of Debbie White's position that the claim against the bond is a distinct claim from the breach of contract action with regard to a determination of attorney's fee awards.

The first sentence of RCW 18.27.040(6) reads, "The prevailing party *in an action filed under this section against the contractor and 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." (emphasis added). This sentence refers to an action filed against the contractor *and* contractor's bond or deposit, but limits the application of the provision to actions "filed under this section." *Id.* The second sentence in RCW 18.27.040(6) reiterates the limitations of the surety's liability to the aggregate amount named in the bond.

Review of RCW 18.27.040 in its entirety demonstrates that actions "filed under this section" refer only to actions for recovery against the contractor's bond.

The various subsections of RCW 18.27.040 expressly refer or relate to suits against the bond. See, e.g., RCW 18.27.040(3) (“Any person, firm, or corporation having a claim against the contractor for any of the items referred to in this section may bring suit upon the bond…”). Subsection (6) occurs just after the legislature's discussion of suits against the bond, service and filing requirements for such actions, limitations on the surety's liability, and priority of payment from the bonds should judgments exceed the bond amount. See RCW 18.27.040(3)-(5). Nothing in these surrounding subsections suggests that the legislature intended to discuss actions against the contractors.

Cosmopolitan Engineering Group, Inc. V. Ondea Degremoney, Inc., ___

Wn.2d. ___, 149 P.3d 666 at 670 (file December, 28. 2006.)

The separate nature of the bond claim from the breach of contract claim is especially apparent in this case. Here, AA Remodeling filed a suit against Debbie White for alleged nonpayment. Debbie White counterclaimed against AA Remodeling for breach of contract. Debbie White also made a third-party claim (a separate claim against a new party, joined in the lawsuit by Debbie White) against AA Remodeling's bond under RCW 18.27. (CP 63-66 at 66.)

Under RCW 18.27.040, Debbie White is entitled to recover her attorneys' fees incurred pursuing her RCW 18.27 claim against AA Remodeling's bond. This recovery is mandatory. The Trial Court erred in

ruling that Debbie White was not entitled to an award of attorney fees and costs.

Marassi Analysis Applies Here and Supports Fees to Debbie White

AA Remodeling and Debbie White each prosecuted cross-claims for breach of contract. In addition, Debbie White plead and ultimately proved and prevailed on a bond claim against AA Remodeling's bond under RCW 18.27. As the Supreme Court ruled in Cosmopolitan Engineering Group, Inc. v. Onda Degremony, Inc., __ Wn.2d. ___, 149 P.3d 666 (file December, 28. 2006.), this bond claim was a separate and distinct claim from the breach of contract claims. The bond claim was also the only claim that included an entitlement to fee recovery.

“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). Debbie White is the prevailing party under RCW 18.27. Debbie White prevailed on her claims 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. *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).

Response to Cross-Appeal

The mere fact that a party prevails on claims which do not entitle it to attorney's fees does not create an entitlement to attorney's fees based on claims which the party did not prevail, even if the party would have been 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"). This is the unenviable position of AA Remodeling in this case. AA Remodeling won the central claims in the case, but lost the critical claim on the issue of attorney fee entitlement. Debbie White, not AA Remodeling, 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).

AA Remodeling argues in its Response that the RCW 18.27 claim is not properly a separate claim. Rather, AA Remodeling asserts, the RCW 18.27 claim is a part of the breach of contract claim. However, this argument has been expressly rejected, on this very issue (entitlement to

attorney's fees under RCW 18.27) by the Washington State Supreme Court.

Therefore, while the Trial Court erred in denying Debbie White's cross-motion for attorney's fees, the Trial Court correctly denied AA Remodeling's fee request. This matter should be remanded to the Trial Court for an award of fees to Debbie White on her claim under RCW 18.27.

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 serious legal errors below. This Court should reverse on both points.

First, the Trial Court allowed testimony from a surprise expert witness. The Trial Court further found that testimony particularly persuasive. The surprise expert did not develop his opinion until after the opinion disclosure deadline, and did not disclose that opinion until after the close of discovery, on the very eve of trial. There is no good reason for this delay – as the expert could have been instructed to develop and disclose this opinion well within the discovery period.

The only reason for this delay is to set up an ambushade from which to surprise Debbie White and her experts. This is an improper reason. The surprise testimony denied Debbie White a fair opportunity to prepare. 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 erred in refusing to award Debbie White attorney's fees even though she prevailed on her RCW 18.27 claim, which entitles her to an award of attorney's fees. RCW 18.27 entitles the

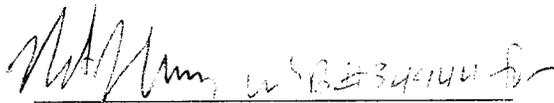
prevailing party on an RCW 18.27 claim to recover attorney's fees.

Although Debbie White failed to prevail on other claims, she prevailed on her RCW 18.27 claim.

Both parties requested fees under RCW 18.27. The Trial Court denied both fee requests. The Trial Court, recognizing that AA Remodeling had not prevailed on the RCW 18.27 claim, properly denied AA Remodeling's request. However, the Trial Court, disregarding Marassi v. Lau, 71 Wn.App. 912, 917, 859 P.2d 605 (1993), erred in denying Debbie White's motion for fees. 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 8th day of February, 2007

CUSHMAN LAW OFFICES, P.S.



Ben D. Cushman, WSBA #26358
Attorneys for Debbie White

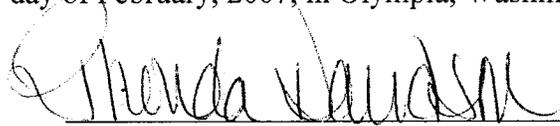
CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on **February 9, 2007**, 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 U.S. Mail, Postage Prepaid
 Division II Legal Messenger
 949 Market Street Overnight Mail
 Tacoma, WA 98402 Facsimile

copy: Tom Miller U.S. Mail, Postage Prepaid
 Attorney at Law Legal Messenger
 P. O. Box 12406 Overnight Mail
 Olympia, WA 98508 Facsimile

Signed this 9 day of February, 2007, in Olympia, Washington.



Legal Assistant

FILED
COURT OF APPEALS
DIVISION II
07 FEB -9 PM 1:49
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BY
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September 30, 2005

RECEIVED
OCT 03 2005
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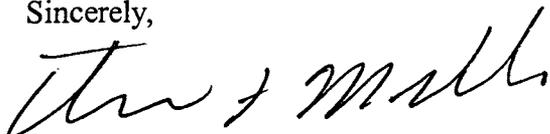
Re: AA Remodeling

Dear Ben,

Enclosed is the estimate to be used by Leo Deatherage in his testimony. While the time has passed for depositions I would not object if any were noted over the next few weeks.

You never did look at the file of AA Remodeling and are free to do so if you chose. There are no request for documents by yourself, but I will make them available if you chose.

Sincerely,



Thomas F. Miller

cc: Client

Tom Miller
Attorney at Law
1800 Cooper Point Rd SW, #8
Olympia, WA 98502

RECEIVED

OCT 03 2005

September 29, 2005

CUSHMAN LAW OFFICE, P.S.

AA Remodeling Matter

Dear Mr. Miller,

I have reviewed the scope of work with regards to the Debbie White residence. The following is my estimate of the fair value of the work done. I have used prices and figures from two years ago, as this was the time period of the work. Conversations with Mike Warren, previously of AA Remodeling, and review of the plans and photographs taken during construction have provided the information I used in preparing this estimate.

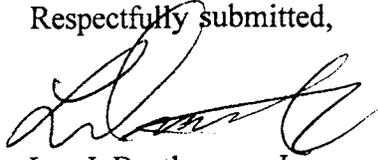
Plans & Permits	\$4200	
This includes AA time working with White and the architect/engineer developing the plans and obtaining the permits.		
Demolition	\$6600	
I estimate that the demo took three men eleven days at \$25 per man-hour.		
Debris removal	\$1200	
This is for dumpster fees or landfill fees for the disposal of the debris.		
Excavation & Foundation	\$6500	
This includes labor and materials		
Addition & Deck	\$9000	
The addition was framed in and then the deck was built. This does not include the roof.		
Set trusses, sheath roof, shingle roof	Materials	\$6760
	Labor	\$3000
Windows per AA Remodeling invoice		\$4867

The interior of the house was demolished, the exterior was dried in, and the job was ready for the interior walls to be built. This estimate does not include any electrical, plumbing, insulation, interior walls, exterior doors (except the patio doors), no painting, and no heat system. It is my understanding that White terminated AA Remodeling at this point.

This totals \$42,127. Add to this a reasonable profit and overhead figure of 20% and I arrived at a total of \$50,552.40, plus Washington State Sales Tax. I believe this to be a fair value of the work done by AA Remodeling.

Thank you. If you have further questions please call me.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Leo J. Deatherage, Jr.", written in a cursive style.

Leo J. Deatherage, Jr.
3445 26th Ave NE
Olympia, WA 98506

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* ALSO ADMITTED IN ALASKA, OREGON, IDAHO
& NORTH CAROLINA
#ALSO ADMITTED IN ALASKA, OREGON, GUAM
& MINNESOTA

August 30, 2005

Tom Miller
Attorney at Law
PO Box 12406
Olympia, WA 98508

RE: *Debbie White v. AA Remodeling*

Dear Mr. Miller:

Your threat to seek to exclude any statement of damages from the White trial is unsound and premature. There is a month remaining in discovery. We therefore still have time to provide you any information which you lack. Further, it is our position that our mediation statement properly summarized damages. The only gap in our mediation statement summary was that we did not have bid evidence to back up the cost to complete the project by finishing work downstairs as best as possible. After the mediation, we obtained and forwarded you that evidence. Therefore, you have in your hands all of the evidence of our damages, and have had, and still have, a full opportunity to fully examine all of that evidence during discovery. Given that you have all the evidence and have a unfettered opportunity to examine it, you will not be able to exclude any evidence from trial.

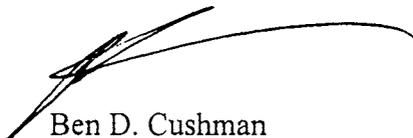
I also think you should reconsider your decision not to participate in a second mediation of this case. My recollection of the mediation was that your client's major sticking point was in our lack of full documentation on the cost to complete the work. We have now remedied that lack and received a cost to complete. In fact, as I predicted, the cost to complete the work was slightly more than my own estimate of the cost, which I included in the mediation statement. Therefore, there are no longer any gaps in our damages evidence.

Further, your own expert's inspection of the house should put to bed any lingering doubts you or your client have about liability. The addition your client built is unsound. It leans down and to the right. It also angles right. In other words, in every possible way that the addition could be out of plumb, it is out of plumb.

This case should be settled. If it is tried, I am confident that my client will recover an amount in excess of what she would be willing to settle for. Further, she would do this after your client incurs attorney's fees. In other words, your client would pay a substantial amount of money for the privilege of paying more after trial than he would pay if he settled the matter before trial. That strikes me as a waste of money.

I am confident that my client's position is sound, however, my client also does not want to go through the stress of trial or incur the attorney fee expense of the trial. She would willingly forego these expenses if your client were to offer a reasonable settlement amount. If you cannot get your client to offer such an amount without a mediation, I urge a second mediation in this case.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Ben D. Cushman". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

BDC/he

H:\Files\White, Debbie\AAA Remodel-Turbo Mechanical\Miller lrt. dtd. 08-30-05.wpd