

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEBBIE

No. 35137-4-II

IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

DEBBIE WHITE

Appellant/Defendant

vs.

AA REMODELING, a d/b/a/ of Turbo Mechanical, Inc. a Washington
Corporation and CBIC Bond # SD6960.

Respondents, Cross Appellants

CROSS APPELLANTS REPLY BRIEF

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I. INTRODUCTION

AA Remodeling a d/b/a/ of Turbo Mechanical, Inc. and CBIC submits this reply brief in support of their cross appeal. CBIC also seeks to be joined as a Respondent/ Cross Appellant.

In their response brief AA Remodeling and CBIC raised issues that would support the trial courts decision to limit AA Remodeling and CBIC's expert testimony to rebuttal. They further raised issues as to why the trial court should have awarded attorney fees and costs to the cross appellants. White addressed those issues in its reply brief. AA Remodeling and CBIC submit a reply addressed to those issues.

II ANALYSIS

A. Pursuant to RAP 5.3. 9 (f) and (i) CBIC seeks joinder.

Pursuant to RAP 5.3.9 (f) and (i) CBIC seeks to be joined in this appeal as a respondent/ cross appellant and correct the record on appeal. The Opening Brief by Appellant White identified only AA Remodeling as the Respondent in its caption and argument. AA Remodeling followed and identified only themselves as Respondent/ Cross

Appellant. Both White and AA Remodeling have made extensive argument regarding the claims against the bond and is the substantive basis of appeal for both. Counsel for AA Remodeling also represents CBIC and no prejudice or delay will result from such joinder. AA Remodeling and White both intended CBIC to be a party to the appeal. Without CBIC as a Respondent / Cross Appellant, most of the appeal for both parties is moot. Essentially, we have a scrivener's error in not including the name of CBIC as a party to the appeal and cross appeal which was carried forward through the process.

B. The trial court properly allowed expert rebuttal testimony.

White argues that a late revealed expert opinion, even if inadvertent, should require the trial court to find a willful violation and exclude the testimony of the expert as a matter of law. This is not and should not be the law in Washington. It is an abuse of discretion for a trial court to exclude testimony as a sanction for discovery violations absent a showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct. See *Rice v. Janovich* 109 Wn. 2d 48, 742 P.2d 1230 (1987). A "willful" violation means a violation without a reasonable excuse. *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 686 P.2d 1102 (1984), *Aff'd*, 104 Wn. 2d 613, 707 P.2d

685 (1985) (declining review on discovery issue).

It is only where willful noncompliance substantially prejudices the opponent's ability to prepare for trial that the exclusion of evidence is within the trial court's discretion. See *Hampson v. Ramer*, 47 Wn. App. 805, 737 P.2d 298 (1987). The respondents did provide evidence of a reasonable excuse for the late discovery response. The court made no specific finding of a willful violation. The court did however consider the prejudice to the appellants for their trial preparation and fashioned a fair remedy. The court in its oral ruling on the motion to exclude fashioned a remedy as follows:

I am not terribly offended in the process of case administration by the disclosure of a witness that is just a few days late. What I am concerned about is the inability of the opposing party, here Mr. Cushman, to prepare to meet that evidence to find a conflicting expert. And that is why I am limiting Mr. Deatherage's testimony to that offered in rebuttal of Mr. Carey's testimony. Transcript of Proceedings October 14, 2005 Page 18

The exclusion of the testimony of Mr. Deatherage for AA Remodeling's case in chief eliminated any perceived prejudice to White in their trial preparation. The court obviously recognized the practical concern should White needed to retain a new expert to rebut the opinions of Mr. Deatherage. To avoid this potential problem the court limited Mr. Deatherage's testimony to rebut the testimony of Mr. Carey.

Exclusion of evidence requires “substantial prejudice” to the non offending party to prepare for trial. *Hampson* at 812. Appellants had the burden to establish that it was a substantially prejudiced in its trial preparation when the court allowed Mr. Deatherage to provide rebuttal testimony. Weeks before trial Mr. Carey’s testimony was known and Mr. Deatherage's testimony in rebuttal was known. Mr. Carey had sufficient time to review the estimates of Mr. Deatherage. There was sufficient time for White to prepare for the rebuttal testimony of Mr. Deatherage. The trial court did not abuse its discretion in fashioning a remedy to avoid any prejudice to present its case.

c. RCW 18.27. 040(6) entitle CBIC Its Attorney Fees.

White desperately tries to create a new liability theory for claims against the registration bond. White confuses the issues by implying that claims against the bond are not based on a breach of contract by the contractor. They use the term “bond claim” as if it were a liability theory separate from a claim for breach of contract. *Cosmopolitan Engineering Group Inc. Onda Degremoy, Inc.* 159 Wn.2d 292, 149 P.3d 666 (2006) made clear that the claim against the bond and contractor are separate

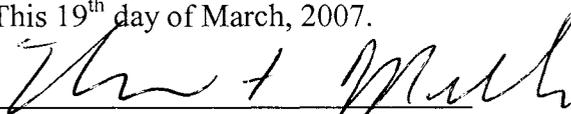
claims. One is made against the bonding company and the other against the contractor. What they also made clear is that the legal basis for liability against both is the same. *Cosmopolitan* stated, “[y]et an action against the bond must also necessarily claim that a contractor breached a contract or failed to pay.

Cosmopolitan held that RCW 18.27.040(6) was intended to authorize attorney fees for the prevailing party only in actions against the bond. *Id.* at 306. Here, White made a claim against the CBIC bond invoking RCW 18.27.040(6). The breach of contract claims against the contractor AA Remodeling was exactly the same as against the CBIC bond. White received no judgment against either AA Remodeling or the CBIC bond. CBIC should receive its attorney fees as the prevailing party.

III. CONCLUSION

This court should remand to the trial court for consideration a request for attorney fees by CBIC as the prevailing party. And this court should award AA Remodeling and CBIC the attorney fees and costs they incurred on this appeal.

RESPECTFULLY Submitted This 19th day of March, 2007.


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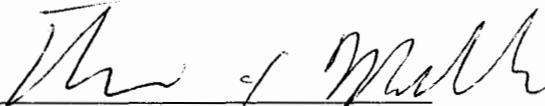
CERTIFICATE OF MAILING

I certify that on the 19th day of March, 2007, I placed in the mails of the United States a duly addressed, stamped envelope containing a copy of the Cross Appellants Reply Brief to Cross Appeal to the individuals and parties at the addresses listed below:

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DATED this 19th day of March, 2007.

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