

No. 42457-6-II
[Consolidated With No. 42607-2-II]

FILED
COURT OF APPEALS
DIVISION II
12 JAN 23 AM 9:56
STATE OF WASHINGTON
BY
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JERRY MULDER and SALLY MULDER

Plaintiffs/Respondents,

v.

CABINET DISTRIBUTORS, INC.

Defendant/Appellant.

PETITIONER'S OPENING BRIEF

Counsel for Defendant/Appellant

SCHEER & ZEHNDER LLP
John E. Zehnder, Jr., WSBA No. 29440
Brandon K. Batchelor, WSBA No. 42477
Attorneys for Defendant/Appellant

Scheer & Zehnder LLP
701 Pike Street, Suite 2200
Seattle, Washington 98101
Telephone: (206) 262-1200
Facsimile:(206) 223-4065

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. ASSIGNMENT OF ERROR AND ISSUES.....	3
III. STATEMENT OF THE CASE.....	4
A. General Background and Plaintiffs’ Claims.....	4
B. Jury Trial and Verdict.....	5
C. Plaintiffs’ Request for a New Trial is Granted.....	7
D. Trial Court Denies Request to Limit Re-Trial and Affirms New Trial on All Issues and Claims.....	8
IV. SUMMARY OF ARGUMENT.....	8
V. ARGUMENT.....	10
A. Standard of Review.....	10
B. Judgment Should have been Entered in Favor of CDI.....	11
1. Waiver and Interference.....	12
2. Appellate Court Must Reconcile Verdicts.....	13
3. Blue Chelan does not Control.....	14
4. Court Possesses the Authority to Enter Judgment on Special Verdict.....	17
C. Any Re-Trial Should be Limited in Scope.....	18
1. Separation of Claims and Issues.....	19
2. Separate and Distinct Claims – Fraud and CDI’s Counter Claim.....	20
3. Separate Issue – Breach of Contract for Mold.....	21

4.	Damages.....	22
VI.	ATTORNEY’S FEES.....	24
VII.	CONCLUSION.....	24

TABLE OF AUTHORITIES

Cases

<u>Andrasko v. Chamberlain Mfg. Corp.</u> 608 F.2d 944, C.A.Pa., 1979.....	15
<u>Auwater v. Kroll</u> 79 Wash. 179, 140 P.3 26 (1914).....	19
<u>Blue Chelan v. Dept. of L&I</u> 101 Wash.2d 512, 681 P.2d 233 (1984).....	9, 13, 14, 15, 16
<u>Boley v. Larson</u> 69 Wash.2d 621, 419 P.2d 579 (1966).....	10
<u>Cramer v. Bock</u> 21 Wash.2d 13, 16, 149 P.2d 525 (1944).....	9, 19, 20
<u>Great Western Land & Imp. Co. v. Sandygren</u> 141 Wash. 451, 252 P. 123 (1927).....	16
<u>Lian v. Stalick</u> 106 Wn.App. 811, 824 25 P.3d 467 (2001).....	10
<u>Lyster v. Metzger</u> 68 Wash. 2d 216, 412 P.2d 340 (1966).....	10
<u>McCurdy v. Union Pacific Railroad Company</u> 68 Wash.2d 457, 413 P.2d 617 (1966).....	19
<u>Myhres v. McDougall</u> 42 Wash.App. 276, 278, 711 P.2d 1037 (1985).....	13, 14, 17
<u>Nelson v. Fairfield</u> 40 Wash.2d 496, 244 P.2d 244 (1952).....	19

<u>Payne v. Ryan</u> 183, Wash. 590 (1935).....	13
<u>Sage v. Northern Pacific R. Co.</u> 62 Wash.2d 16, 380 P.2d 856 (1963).....	19, 20
<u>Schneider v. City of Seattle</u> 24 Wash.App. 251, 600 P.2d 666 (1979).....	11
<u>Sherman v. Lunsford</u> 44 Wash.App. 858, 723 P.2d 1176 (1986).....	12
<u>Tuthill v. Palermo</u> 14 Wash.App. 781, 545 P.2d 588 (1976).....	16
<u>Van Cleve v. Betts</u> 16 Wash.App. 748, 559 P.2d (1977).....	13, 17

Statutes

RCW 4.44.080.....	18
RCW 4.44.090.....	18
RCW 4.44.440.....	12, 17

Rules

CR 49(b).....	12, 17, 24
CR 59(a).....	19
RAP 18.1.....	24

INTRODUCTION

Appellant Cabinet Distributors, Inc. (hereinafter “CDI”) petitions this court to (1) overturn the trial court’s grant of a new trial and enter judgment in favor of CDI or, in the alternative, (2) limit re-trial on the matter to a determination of what damages (if any) plaintiffs are entitled to on their claim for breach of contract due to installation defect.

Jerry Mulder and Sally Mulder (hereinafter “plaintiffs”) are the respondents in this matter. Jury trial was conducted on their multiple claims against CDI in June of 2011. A verdict on all claims was rendered on June 10, 2011. With respect to plaintiffs’ claim of fraud against CDI, the jury found in favor of CDI. With respect to CDI’s counter claim against plaintiffs, the jury found in favor of CDI. With respect to plaintiffs’ claim of breach of contract due to mold contamination, the jury found in favor of CDI. With respect to plaintiffs’ claim of breach of contract due to installation defect, the jury found that plaintiffs had incurred \$7,600.00 in actual damages, but had both waived and interfered with CDI’s duties under the contract.

In response to plaintiffs’ request for substantial attorneys’ fees as the prevailing party, CDI requested that the trial court find that plaintiffs did not recover due to the findings of waiver and interference – the proper legal consequence of those findings. In opposition to this request, plaintiffs motioned for, and were granted, a new trial on all claims and

issues presented in the original trial. The trial court presumably found inconsistencies between the jury's finding that plaintiffs' incurred damages and their finding of waiver and interference. The basis of the court's grant of a new trial on the remaining claims and issues is unknown.

It was error for the court to grant a new trial based on apparent inconsistencies in the jury's verdict. The court should have entered judgment in favor of CDI, based on the clear direction of those findings. Moreover, it was error for the trial court to grant a universal new trial on all claims and issues, especially those not in controversy in post-trial motions. The jury's findings lead to only one answer – that CDI prevailed on all claims at trial. If the court disagrees regarding the single claim for breach of contract as to defective installation, however, there can be no question that the other claims and issues should not be re-tried. All other claims were, indisputably, resolved by the jury's verdict.

///

///

///

///

///

///

///

///

ASSIGNMENT OF ERROR AND ISSUES

A. Assignment of Error¹

1. Judgment should have been entered in CDI's favor

The trial court erred by refusing to enter judgment in CDI's favor based on the jury's findings plaintiffs had (1) waived CDI's obligations under the contract and (2) interfered with CDI's ability to perform its obligations under the contract.

2. Grant of New Trial on All Claims and Issues

The trial court also erred when it granted a new trial on all issues and claims – even those which are clearly distinct and separate from issues that were not addressed in post-trial motions. Even if the court's grant of a new trial on the claim in conflict in post-trial motions was correct, certainly a global re-trial on all claims and issues is not warranted and is improper.

¹ Though not contained herein, it is CDI's position that the manner in which plaintiffs requested a new trial and the manner in which that request was granted was inappropriate. Plaintiffs' request was contained within an opposition and not a motion. As a result, CDI was provided with no time or medium to appropriately respond. The very basic concept behind the limited civil rules regarding motions regarding motions requires that the court and adverse party receive ample notice of the specific relief sought. Pamelin Industries, Inc. v. Sheen-U.S.A., Inc., 95 Wash.2d 398, 622 P.2d 1270 (1981). Further, plaintiffs' request was not timely under CR 59(b), as it was made more than 10 days after the jury verdict was rendered. This time limit is supposed to be strictly enforced. Kaech v. Lewis County Public Utility Dist. No. 1, 106 Wash.App. 260, 23 P.3d 529 (2001). Finally, plaintiffs cannot be the aggrieved party as contemplated in CR 59(a). Plaintiffs should not be able to hold themselves out as both the winners and the losers in this matter, depending on what position is advantageous to them in a given situation. In the immediate wake of the trial, plaintiffs' attempted to recover substantial attorney fees as the prevailing party. For the foregoing reasons, plaintiffs' request for a new trial should have been denied on its face as a matter of procedure, and serves as an independent basis for this court to deny plaintiff a retrial here, and mandate that the trial court enter judgment in favor of the defense as stated herein.

B. Assignment of Issues

1. Whether the trial court erred in failing to enter judgment in favor of CDI in light of the jury's findings of waiver and interference by response to special interrogatories contained within the special verdict form.

2. Whether the trial court erred in ordering a new trial on all claims and issues, including those unrelated to, and not reviewed during, post-trial motions and controversy.

STATEMENT OF THE CASE

A. General Background and Plaintiffs' Claims

In 2004, CDI entered into written contracts with plaintiffs for the purchase and installation of cabinets, countertops and additional associated products for plaintiffs' Elma, Washington home. CP 1. On February 25, 2008, plaintiffs filed suit against CDI in relation to the work outlined in those contracts, alleging: breach of contract, violation of the Consumer Protection Act ("CPA"), fraud, and an action against the contractor's bond. Id. CDI brought a counter-claim alleging amounts due and owing under the contract. CP 5. Plaintiffs' breach of contract claim was based on two separate allegations. *First*, plaintiffs alleged that CDI breached the contract because of installation defects. CP 1. *Second*, plaintiffs alleged that CDI breached the contract by providing plaintiffs

with cabinets that contained mold. *Id.* Prior to trial, both the CPA claim and the action on the contractor's bond were dismissed.

B. Jury Trial and Verdict

Jury trial was conducted on the remaining claims between June 7, 2011 and June 10, 2011. At trial, the jury was asked to render a verdict on the following claims: (1) whether CDI committed fraud in connection with the installation of cabinets and countertops at plaintiffs' home; (2) whether CDI breached its contract with plaintiffs by failing to properly install cabinets and countertops; (3) whether CDI breached its contract by installing cabinets which contained mold; and (4) whether plaintiffs breached their contract with CDI by failing to pay for the products and services contracted for. CP 116 and RP 1-3 (June 10, 2011).

Additionally, the jury was asked to determine whether plaintiffs had (1) waived CDI's duties under the contractor and/or (2) interfered with CDI's performance of its duties under the contract. *Id.*

The jury determined that CDI did not commit fraud and did not breach its contract with plaintiffs due to mold. *Id.* Further, the jury found that CDI breached its contract with plaintiffs due to installation issues, but held that plaintiffs both waived CDI's duties under the contract and interfered with CDI's performance of those duties. *Id.* The jury held that plaintiffs breached their duties under the contract by not paying amounts due and owing to CDI. *Id.* The jury found plaintiffs actual damages to be \$7,600.00 for breach of contract and CDI's damages to be \$2,400.00 for

its counter-claim. Id. The special verdict form, as answered by the jury, read as follows:

Question 1: Did CDI commit fraud in connection with the installation of cabinets and countertops at Plaintiff's home?

Answer: No.

Question 2: Did CDI breach its contract with Plaintiffs by failing to properly install cabinets and countertops pursuant to the contract?

Answer: Yes.

Question 3: Did Jerry Mulder waive CDI's duties under the contract?

Answer: Yes.

Question 4: Did Jerry Mulder interfere with CDI's performance of its duties upon the contract?

Answer: Yes.

Question 5: Did CDI breach its contract with Plaintiffs by installing cabinets containing mold?

Answer: No.

.....

Question 7: What do you find to be Plaintiff's actual damages?

Answer: \$7,600.00.

Question 8: Did Plaintiffs breach their contract with CDI by failing to pay amounts due and owing?

Answer: Yes.

Question 9: What do you find to be Defendant's actual damages?

Answer: \$2,400.00

Id.

///

C. Plaintiffs' Request for New Trial is Granted

In the wake of the jury trial, plaintiffs motioned the court for the recovery of \$72,467.64 in attorney fees, alleging that they had substantially prevailed at trial. CP 117 and CP 119. CDI opposed this motion and requested judgment be entered in its favor, arguing that the jury's findings of waiver and interference were fatal to plaintiffs' recovery under a breach of contract theory.² CP 122. Plaintiffs opposed CDI's motion. In their opposition, plaintiffs requested that (1) CDI's motion be denied, (2) the trial court enter judgment in favor of plaintiffs, or (3) a new trial be granted. CP 130. The trial court granted the latter relief. Prior to plaintiffs' opposition, no request for a new trial had been made.

The trial court granted plaintiffs' request for a new trial by way of an oral decision. RP 34 (June 27, 2011). No written order was entered at the time of hearing on the motion. CDI then filed its motion for reconsideration of the court's grant of a new trial. CP 138. On July 25, 2011, the trial court entered a written order granting a new trial and denying CDI's motion for reconsideration. CP 149. CDI then filed its Notice of Appeal on the trial court's grant of a new trial. CP 155.

///

///

² CDI's motion in response to plaintiffs' request for substantial attorney fees is entitled a Motion to Amend under CR 59(h). It is not apparent that the motion should likely have been titled something else. The end result is the same, however, as CDI was requesting the court to determine that it prevailed on the installation defect claim and move forward with the proceedings.

D. Trial Court Denies Request to Limit Re-Trial and Affirms New Trial on All Issues and Claims

Neither the trial court's oral decision granting a new trial nor its written order on the same indicated any limit in the scope of the new trial. RP 22-34 (June 17, 2011). Presumably, the intent of the trial court was to conduct a re-trial of all issues and claims before it in the June 2011 trial. In order to clarify this question, CDI filed a motion for clarification of issues and claims at re-trial, asking the court to determine whether the grant of a new trial was to include all claims and issues presented at the June 2011 trial. CP 138. Oral argument was conducted on CDI's clarification motion and the court declined to limit the scope of re-trial on the matter. CP 177 and RP 2-8 (September 6, 2011). CDI then filed its second Notice of Appeal on the court's denial of clarification of issues and grant of a new trial on all issues and claims. CP 174.

SUMMARY OF ARGUMENT

This case presents questions regarding the trial court's discretion in granting a new trial and the application of that discretion. *First*, plaintiffs' request for a new trial asserted that a new trial is required due to the jury's allegedly inconsistent responses to special interrogatories. The jury found that plaintiffs had both waived and interfered with CDI's performance under the contracts. The jury then found that plaintiffs had incurred \$7,600.00 in actual damages on their claim of breach of contract claim due to installation defects. The courts – both trial and Appellate – must attempt to reconcile any perceived inconsistencies in jury responses to

special verdicts. Here, the jury's verdict answers can and should be reconciled. The legal effect of a finding of waiver and/or interference eliminates the possibility that plaintiffs can recover under a breach of contract theory, regardless of whether the jury had determined that plaintiffs had incurred actual damages. The jury's finding obviates the need for any further analysis.

It is undisputed that when reconciliation of the jury's verdict is not possible a new trial must be granted. Blue Chelan v. Dept. of L&I, 101 Wash.2d 512, 681 P.2d 233 (1984). In this matter, however, the jury's verdict can be reconciled and harmonized. The trial court erred in granting plaintiffs' request for new trial, when it should have recognized the singular directive contained within the jury's answers in the special verdict form and entered a judgment in favor of CDI on plaintiffs' breach of contract claim. The verdict form left only one option for a judgment to be entered – in favor of CDI. Instead, the trial court granted a universal “do over.”

Second, a new trial was granted on claims and issues that were not in controversy in post-trial motions. The trial court then refused to limit the scope of the re-trial to issues and claims which were actually reviewed in post-trial motions. There is no need to conduct re-trial on claims and issues that are not in error at trial or thereafter. Cramer v. Bock, 21 Wash.2d 13, 16, 149 P.2d 525 (1944). The court's basis for granting a new trial initially was due to inconsistencies in the verdict. CP 149. At no

point prior to the entry of the order granting a new trial, however, were (1) plaintiffs' fraud claim, (2) CDI's counter-claim, and (3) the jury's verdict regarding mold contamination objected to or discussed substantively. Thus, the record is absent as to why these jury decisions should be ignored and re-tried. The only possible inconsistency the court could base its decision upon is that which touches only the installation defect breach of contract claim. At no point did any error occur which could reasonably draw into question the jury's decision regarding the remaining claims and issues. The trial court erred in granting a re-trial on these claims and issues. CDI is entitled to the entry of a judgment in its favor on these claims and issues in the event of a re-trial and they should be excluded from the same.

ARGUMENT

A. Standard of Review

Generally, the standard of review for the trial court's grant of a new trial is abuse of discretion. A trial court abuses its discretion when its decision is manifestly unreasonable, is exercised on untenable grounds, or is based on untenable grounds. Lian v. Stalick, 106 Wn.App. 811, 824 25 P.3d 467 (2001). This standard is subject to the limitation that the trial court's order of a new trial was not predicated on rulings as to law. Lyster v. Metzger, 68 Wash. 2d 216, 412 P.2d 340 (1966). Granting or denying motion for new trial is largely within discretion of trial court except where pure questions of law are involved. Boley v. Larson, 69 Wash.2d 621, 419

P.2d 579 (1966). In the case of a pure question of law, the Appellate Court reviews for error only, not for abuse of discretion. Schneider v. City of Seattle, 24 Wash.App. 251, 600 P.2d 666 (1979). Unlike trial irregularities or evidentiary issues which cannot be made part of the record and which require the trial court to use its discretion, the standard of review here should be error of law.

B. Judgment Should have been Entered in Favor of CDI

The question presented here is whether the issues surrounding the jury's finding of waiver and interference require an entirely new trial. The analysis of this question pertains to only one cause of action and issue presented to the jury, as the remaining causes are free from issue. The jury found that CDI had breached its contract only under the theory that it had improperly installed countertops and cabinets at the plaintiffs' home. The jury then found that plaintiffs had both waived and interfered with CDI's ability to perform its duties under the contract. CP 116 and RP 1-3 (June 10, 2011). They then found plaintiffs had incurred \$7,600.00 in actual damages. *Id.* As can be seen in the verdict form, the only cause of action for which plaintiffs were found to have been damaged was breach of contract due to installation issues.

The case law presented to this point regarding this issue is factually divergent from the instant case. The question here is one of legal consequence of factual findings and the court's duty to enter judgment consistent with those finding. Not unlike a motion for Summary

Judgment, in which the court makes a specific finding which eliminates the possibility of recovery, plaintiffs are barred from recovery under a breach of contract theory in the wake of a finding of waiver and interference. The jury returned a verdict which clearly indicated their findings. Those findings, by operation of law, eliminate the ability for plaintiffs to recover under the cause of action at issue here. Simply because the jury found that plaintiffs had incurred actual damages, does not mean that those damages are recoverable. That is, of course, a question of law which is the province of the trial court and its authority to enter judgment from findings of fact provided by way of a special verdict form. RCW 4.44.440 and CR 49(b).

1. Waiver and Interference

There is no objection in the record to the evidence relied upon in the jury's decision regarding waiver and interference. Plaintiffs did not object to the special verdict form. The jury was asked specifically and separately whether the plaintiffs had waived and interfered with CDI's performance under the contract. They answered both affirmatively. CP 116 and RP 1-3 (June 10, 2011)

The legal consequences of waiver and interference are not in dispute here. An agreement to relinquish a known right under the terms of a contract excuses a party's obligation to perform according to the relevant contract terms. Sherman v. Lunsford, 44 Wash.App. 858, 723 P.2d 1176 (1986). When a party is prevented from the performance of her duties

under a contract, that party's non-performance is excused. Payne v. Ryan, 183, Wash. 590 (1935). Further, a party who prevents performance cannot then avail himself of the non-performance that he causes. Id. at 597.

The evidence presented at trial supports these findings and plaintiffs have not objected to them. Moreover, plaintiffs have not advanced an argument which counters CDI's position regarding the legal effect of waiver and interference. In short, it should not be at issue here that (1) plaintiffs both waived and interfered with CDI's performance under the contract and (2) the effect of waiver and interference is fatal to plaintiffs' recovery under a breach of contract theory. Because of this these findings, the court was left with only one proper decision, which it failed to make.

2. Appellate Court Must Reconcile Verdicts

In reviewing a verdict, the Appellate Court must try to reconcile the jury's answers to special interrogatories. Van Cleve v. Betts, 16 Wash.App. 748, 559 P.2d (1977); Myhres v. McDougall, 42 Wash.App. 276, 278, 711 P.2d 1037 (1985). The answers to special interrogatories should be read harmoniously if possible. Van Cleve, 16 Wash.App. at 757.

The answers to the special interrogatories presented to the jury here are not directly contradictory. The ultimate issue is possible to determine, so the trial court was not left without a choice, as in the Blue Chelan matter (discussed further below). Under the facts presented, it is

very conceivable that the jury could determine that plaintiffs had incurred actual damages, but that their own actions were sufficient to support a finding of waiver and interference. It is up to the court then to determine the effect of those answers. In the instant case, the special verdict form does not specifically address CDI's liability for damages incurred by plaintiffs. As a result, the determination of liability is within the province of the trial court, after being given the factual findings contained within the special verdict. As plaintiffs indicated previously, the jury's verdict can be reconciled as it was presented. CP 130. Further, the record is silent on any attempt the court made to base a decision and enter judgment on the findings of the jury. So, the correct action from the court would be to direct judgment in favor of CDI on this claim.

3. Blue Chelan does not Control

It is not in dispute here that neither the Appellate Court nor the trial court can substitute its judgment for that which is in the province of the jury. Myhres, 42 Wash.App. at 278; Blue Chelan, 101 Wash.2d at 515. Plaintiffs' previous position relied heavily upon the court's decision in Blue Chelan. CP 130. It appears that the trial court may have adopted this standard in reviewing this matter as well. RP 22-34 (September 6, 2011).

The instant case can be separated from Blue Chelan and its progeny. Most importantly, the answers to the jury verdict are not directly in conflict and direction from them can be determined. In Blue Chelan,

the answers to two special interrogatories which were at issue were directly inconsistent with one another and did not allow for any possible reconciliation. Blue Chelan, 101 Wash.2d at 514. In Blue Chelan, the jury's completed verdict form stated that the plaintiff worker was (1) not permanently disabled and (2) incapable of finding gainful employment. The Supreme Court held that these statements were inconsistent as the two special interrogatories asked, essentially, the same question but were answered in opposite fashions by the jury, requiring a new trial. Id., at 515. Here, the answers to the special verdict are not factually opposite such that a determination of liability cannot be made by the trial court. Unlike Blue Chelan, it is possible to harmonize the jury's responses and enter judgment without invading the province of the jury.

Not only is this matter factually different from the standard of inconsistency in Blue Chelan, the dissent in that matter may provide some specific insight into the current situation. The question in Blue Chelan hung on the apparent inconsistency in the jury's responses to special interrogatories in the verdict form. In response to Interrogatory No. 2, the jury determined that the plaintiff was not capable of obtaining gainful employment. Id., at 513.

In dissent, Justice Dore indicated that the jury's secondary response, which the majority found inconsistent with its primary response, had controlling legal effect on the proceedings and should have disposed of all issues in the case. Id., at 519. Justice Dore relied upon the statute

which defined total disability and indicated that a finding of disability was controlling and disposed of the entire case. Justice Dore identified the remaining answers to interrogatories as “surplusage.” Id.

Though not controlling – as the instant case is factually divergent from Blue Chelan – Justice Dore’s dissent should provide some insight as to the impact of the jury’s decision in this matter. The jury determined that waiver and interference occurred. Any determinations after that are immaterial, as the potential for recovery for breach of contract has already been eliminated.

The answers here, however, can be reconciled and are not factually conflicting, like in Blue Chelan. Instead, the application of the legal consequence of one finding allows for the interpretation and application of the other. There can be little argument that our legal system is not regularly occasioned by circumstances in which a party incurs actual damages, but is limited from recovery of those damages from another party. The consequence is the same here for plaintiffs in the wake of the jury’s finding of waiver and interference.

The Blue Chelan matter cites to several additional cases which plaintiffs’ echoed in their request for a new trial. CP 130. These include: Great Western Land & Imp. Co. v. Sandygren, 141 Wash. 451, 252 P. 123 (1927). Tuthill v. Palermo, 14 Wash.App. 781, 545 P.2d 588 (1976), and Andrasko v. Chamberlain Mfg. Corp., 608 F.2d 944, C.A.Pa., 1979. As with the Blue Chelan matter, new trials were granted in these

matters due to direct inconsistencies in the jury's findings that would not allow reconciliation or harmonizing of the answers. As outlined above, the instant case should not be included in this group of cases. This matter can be decided, and the jury's verdict can be reconciled, without invading the jury's province. The jury found both waiver and interference. Waiver and interference eliminate the possibility of recovery. The trial court should have entered judgment on behalf of CDI on this basis.

4. Court Possesses the Authority to Enter Judgment on Special Verdict

To this point, no dispute has been advanced by either party as to whether the jury verdict at issue falls within the category of a general or special verdict. In any event, it appears quite clear that the court has the authority to enter judgment based on the answers to special interrogatories provided by the jury here. CR 49(b). In fact, if trial court found that the jury's answers to special interrogatories were inconsistent with the "general" portion of the verdict (if any), it can still enter judgment consistent with the jury's findings of fact. RCW 4.44.440. The question is whether the court should reconcile and harmonize special verdict responses as opposed to ordering a new trial. The Van Cleve and Myhres matters answer this question clearly in the affirmative. In this circumstance, harmony and reconciliation is possible and should override the decision to grant a new trial.

The jury's findings of waiver and interference are not inconsistent with a finding of breach of contract and/or actual damages for the same.

In fact, a finding of waiver and/or interference specifically allows that even if there is a breach, and even if that breach resulted in damages, plaintiffs' waiver and interference bars plaintiffs from any recovery. In short, breach, actual damages, and waiver can and do coexist – and result in an extinguishment of plaintiffs' ability to recover.³

Moreover, plaintiffs cannot be heard to claim that the jury should have been given the opportunity to decide whether the waiver and interference should result in barring recovery on their breach of contract claim. The jury does not have the right to decide the legal effect of its finding of waiver and interference. Once waiver and interference are found, the court must enter judgment based on the legal consequence of those findings, pursuant to the authority outlined above. Questions of fact are decided by the jury and questions of law are decided by the court. RCW 4.44.080 and RCW 4.44.090. The impacts of plaintiffs' waiver and interference are questions of law.

C. Any Re-Trial Should be Limited in Scope

The trial court declined to limit the scope of its grant of a new trial. CP 177. Instead, the trial court intends to conduct re-trial on all claims and issues at bar in the first June 2011 trial. RP 9 (November 7, 2011). With the exception of the breach of contract claim concerning installation

³ Though it may have been better form to ask the jury first whether there was a breach of contract, then if plaintiffs had incurred actual damages, and *then* whether plaintiffs had waived and/or interfered, the order of the questions in the special verdict form does not impact the legal effect of the jury's finding of waiver and interference. Alternatively, the jury could have been instructed to not respond to the damages question if a finding of waiver or interference was made. This does not, however, change the legal impact of these findings and should not be the grounds for a new trial.

defect, none of the other claims or issues on which the jury rendered a verdict were discussed, reviewed, or objected to in post-trial motions, prior to the court's grant of a new trial. The trial court's order does not indicate in any manner the inconsistencies with respect to the jury's decisions regarding (1) fraud, (2) CDI's counter-claim, and (3) plaintiffs' breach of contract claim regarding mold. CP 148. In the same manner, the court's order denying CDI's motion to clarify issues at re-trial does not outline the reason these claims and issues must be re-tried. CP 177.

1. Separation of Claims and Issues

When several issues and claims are submitted to a jury by way of a special verdict, the issues and claims not complained of need not be retried. Nelson v. Fairfield, 40 Wash.2d 496, 244 P.2d 244 (1952). The court may deny new trial as to one cause of action and grant new trial as to others. Auwater v. Kroll, 79 Wash. 179, 140 P.3 26 (1914), Cramer, 21 Wash.2d 13. The civil rules specifically allow for the separation of claims and issues at re-trial. CR 59(a) states, in relevant part: "a verdict may be vacated and a new trial granted.....on some of the issues when such issues are clearly and fairly separable and distinct."

Issues at new trial may be limited when it clearly appears that original issues were distinct and separate from each other and that justice does not require re-trying the whole case. McCurdy v. Union Pacific Railroad Company, 68 Wash.2d 457, 413 P.2d 617 (1966), citing Nelson v. Fairfield, 40 Wash.2d 496, 501, 244 P.2d 244, 247 (1952); and Sage v.

Northern Pacific R. Co., 62 Wash.2d 16, 380 P.2d 856 (1963). No reason exists to completely set aside a verdict when issues determined by the jury are severable and no harm will result from retaining a verdict upon those issues not affected by preceding error. Cramer, 21 Wash.2d at 16. The controlling question in this analysis is whether error-free claims and issues are distinct and separable such that the trial of remaining issues can take place without injustice or complication. With the exception of plaintiffs' breach of contract claim for installation defect, no error was assigned (or even discussed) for any other claim or issue at trial or in post-trial motions. Plaintiffs made no objection at trial or in post-trial motions regarding any claims, let alone claims which were not even presented to the court for consideration after trial.

2. Separate and Distinct Claims – Fraud and CDI's Counter Claim

These claims are separate and distinct from the claim reviewed in post-trial motions. These claims are free from error. Trial can be conducted without inclusion or consideration of these claims without injustice or complication of the matter.

As outlined in plaintiffs' complaint and represented in the jury's decisions on special interrogatories, plaintiffs' fraud claim and CDI's counter-claim were decided in CDI's favor at trial. CP 1, CP 116 and RP 2-3 (June 10, 2011). The decisions on these claims are free from controversy and no objection has been made regarding the jury's verdicts on these claims in post-trial motions. No grounds exist to do away with

the jury's findings on these claims. Further, neither claim has any relationship whatsoever to plaintiffs' breach of contract claim. The jury's findings on these claims should not have been disturbed.

Based on the foregoing analysis, the court erred in granting a re-trial of these claims. By granting a new trial on these claims, the court has allowed plaintiff a "re-do" without outlining any basis for the same. In doing so, the court has overridden the jury's decision making authority, without cause to do so.

3. Separate Issue – Breach of Contract for Mold

This issue is separate and distinct from the issue reviewed in post-trial motions. This issue is free from error. Trial can be conducted without inclusion or consideration of this issue without injustice or complication of the matter.

As seen in plaintiffs' complaint and as presented at trial, plaintiffs' position regarding their breach of contract claim was two-fold. *First*, plaintiffs claimed that CDI improperly installed the cabinets and countertops in their home. *Second*, plaintiffs claimed that CDI sold them cabinets which contained mold. Obviously, the issue with cabinet installation is not free from controversy, as the jury's verdict regarding the same has led directly to the review of this matter. With respect to the issue of mold contamination, however, no post-trial objections or controversy were associated with the jury's verdict regarding this issue. The sufficiency of the jury's verdict regarding mold – that CDI did not breach its contract by

installing mold-infested cabinets – has not been called into question in post-trial motions. The issue is completely separate from plaintiffs’ claims regarding installation defects. In fact, plaintiff retained a specific and separate expert to testify regarding each issue, calling upon an industrial hygienist to opine regarding mold contamination in plaintiffs’ cabinets.

Based on the foregoing analysis, the court erred in granting a re-trial of this issue. By granting a new trial on this issue, the court has allowed plaintiff a “re-do” without outlining any basis for the same. In doing so, the court has overridden the jury’s decision making authority, without cause to do so.

4. Damages

The jury determined the actual damages incurred by plaintiffs were based on a repair value, as opposed to the replacement value claimed by plaintiffs at trial. In post-trial motions, plaintiff conceded this issue and indicated that the jury’s award was based on the testimony provided by CDI’s cost of repair expert and not plaintiffs’ damages expert. RP 24 (June 27, 2011). Again – the finding of repair value versus a finding of replacement value has not been objected to in post-trial motions, nor was it objected to at trial. By granting a new trial on the issue of damages, the court has provided the plaintiffs with any opportunity to improve their damages, when the controversy here is one of liability and not damages. As outlined above, these issues can and should be separated. The amount of actual damages incurred by plaintiffs has been clearly established by

the jury and no grounds exist for the re-trial of the same. No re-trial of plaintiffs' damages claims should be conducted. Instead, plaintiffs damages should be capped at \$7,600.00 – the amount they were awarded at trial. The only remaining issue should be one of liability – in the face of a determination of waiver and interference. This, of course, highlights the foregoing argument that no re-trial should be conducted at all, as the jury's decision is clear and can be reduced to a judgment.

In sum, plaintiffs should not be granted a “do over” on claims which were not in controversy in post-trial motions. Both the trial court and plaintiffs have indicated that it would be inappropriate for the province of the jury to be invaded. CP 130 and RP 22-34 (June 27, 2011). This is precisely what would take place if the jury's verdicts regarding all claims and issues were simply set aside. There has been no argument made that the inconsistencies alleged to exist with respect to the jury's findings of waiver and interference have any effect whatsoever on the claims above. As a result, and based on the authority above, under no circumstance should the aforementioned claims and issues be re-tried. It is error to grant a new trial as to all issues and claims. Especially when no error is assigned to those claims and no explanation is provided for the grounds for a new trial on those claims. Essentially, the trial court “threw up its hands” and rendered an incorrect order. The court erred by granting a new trial across the board and by failing to even consider clarification of claims and issues at re-trial.

ATTORNEY'S FEES

Pursuant to RAP 18.1, CDI requests herein its reasonable attorney's fees and expenses based on the subject contract between plaintiffs and CDI and plaintiffs' continued assertions of their right to recover the same. Specifically, CDI requests its reasonable attorneys fees incurred in recovery of amounts due and owing under the subject contract, as alleged in CDI's counter-claim. CP 5.

CONCLUSION

The jury's answers to the special verdict are reconcilable and are not in direct factual conflict with one another. The jury has spoken and found that plaintiffs had both waived and interfered with CDI's performance under the contract. That finding eliminates any possibility of recovery by plaintiffs. The trial court should have used the information provided to it by the jury and entered a judgment in favor of CDI on the claim in question. The Blue Chelan case and its progeny do not control this issue and the court should have used its authority under CR 49(b) to enter judgment. In doing so, the trial court would not invade the province of the jury, based on the legal consequences of a finding of waiver and/or interference.

The trial court should have properly limited the scope of the new trial. The separate and distinct claims and issues outlined above have no connection with the post-trial issues and controversies. As a result, no

grounds exist for the jury's verdict on those claims and issues to simply be set aside.

Based on the foregoing, CDI respectfully requests this court enter judgment in favor of CDI on plaintiffs' breach of contract claim due to the jury's finding of waiver and interference. In the alternative, if a new trial is to be conducted, CDI requests that the claims and issues at re-trial be limited in the manner outlined above.

DATED this 17th day of January, 2012.

SCHEER & ZEHNDER LLP

By 

John E. Zehnder, Jr., WSBA No. 29440
jzehnder@scheerlaw.com
Brandon K. Batchelor, WSBA No. 42477
bbatchelor@scheerlaw.com
Attorneys for Defendant Cabinet
Distributors, Inc.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

I am employed by the law firm of Scheer & Zehnder LLP.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served the document(s) to which this is attached, in the manner noted on the following person(s):

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
<u>CO/ Plaintiffs Jerry & Sally Mulder</u> Allen Miller Law Offices of Allen T. Miller, PLLC 1801 West Bay Drive NW, Suite 205 Olympia, WA 98502	<input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via E-Mail

DATED this 17th day of January, 2012, at Seattle, Washington.



Vanessa Acierto

12 JAN 23 AM 9:57
STATE OF WASHINGTON
BY SA
DEPUTY
CLERK OF SUPERIOR COURT
DIVISION II