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DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JERRY MULDER and SALLY MULDER

Plaintiffs/Respondents,

v.

CABINET DISTRIBUTORS, INC.

Defendant/Appellant.

APPELLANT'S REPLY BRIEF

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I. REPLY

Petitioner Cabinet Distributors, Inc. (hereinafter “CDI”) provides the following reply to the Brief of Respondents, Jerry and Sally Mulder (hereinafter “plaintiffs”). As highlighted herein, plaintiffs have largely failed to address, let alone rebut, CDI’s position that the trial court erred by granting a new trial in this matter. Moreover, plaintiffs failed to address/rebut that the court also erred by refusing to the limit the scope of that new trial – i.e. granting a new trial on all claims and issues previously tried including those which were **never** at issue in post-trial motions.

A. Supplemental Statement of the Case

Plaintiffs’ brief misconstrues the record and presents this Court with an inaccurate version of the events leading to this appeal. As such, CDI clarifies the record as follows:

1. Plaintiffs’ Waiver and Interference

It is undisputed here that the jury found that plaintiffs had both waived and interfered with CDI’s duties under the contract. Plaintiffs’ indication that the jury “somehow” found interference is misleading.¹ At no point did the plaintiffs or the trial court call into question the sufficiency of evidence showing plaintiffs’ waiver and interference or the reliance upon the same by the jury. To do so now is an inappropriate, and makeweight, attempt by the plaintiffs to undermine the jury’s findings and the key impacts of those findings on the present matter. Plaintiffs’ attempt

¹ *Brief of Respondents* at Page 2.

to do so is even inconsistent with plaintiffs' position on appeal regarding the sanctity of the province of the jury.

2. No Breach Based on Mold

Plaintiffs assert in their statement of the case that the cabinets installed in their home by CDI "contained mold."² The jury in this matter, however, determined that CDI did not breach its contract with plaintiffs by installing cabinets that later developed mold. CP 116. This serves as an example of the overreaching inherent in plaintiffs' position – when the jury's decisions favor plaintiffs, the sanctity of those decisions should not be disturbed, but when the decisions favor CDI, they should be disregarded entirely.³

3. No Evidence of Plaintiffs' Demand for Replacement

At trial, plaintiffs presented absolutely no evidence that they demanded CDI repair or replace cabinets at their property, and there is no such evidence in the record here. This statement is irrelevant to the issues before this Court and, regardless, is a misrepresentation of facts presented and/or established at trial.

4. Plaintiffs Did Not Make a "Motion" for New Trial

Plaintiffs represent that the trial court denied CDI's "Opposition to Plaintiffs' Motion for a New Trial."⁴ That is false. That is, Plaintiffs did

² Id.

³ Plaintiffs' brief repeatedly argues the sanctity of the jury's verdict in support of the trial court's decision to grant a new trial, but at the same time repeatedly disregard the jury's findings where it undercuts their position. Plaintiffs' brief is replete with this hypocrisy. Here, the jury found that the cabinets were not installed with mold, which plaintiffs ignore.

⁴ *Brief of Respondents*, Page 3.

not file a Motion for a New Trial. Plaintiffs' request for a new trial came in opposition to *CDI's* Motion to Amend Judgment. CDI included a brief discussion of this issue in its opening appellate brief. In short, plaintiffs did not make a motion to the trial court for a new trial. Instead, their request was contained within an Opposition that allowed CDI no opportunity respond to or oppose the request.⁵

B. The Court's Decision to Grant a New Trial Was Error

As set forth next, plaintiffs' opposition fails to argue, let alone establish, that: (1) a finding of waiver and/or interference is actually irreconcilably inconsistent with the jury's finding of damages; and/or, (2) a finding of waiver and/or interference does not dispose of plaintiffs' ability to recover under a breach of contract theory.

1. Blue Chelan's Facts Are Drastically Different Than the Facts Here

Because it was anticipated plaintiffs would erroneously rely on Blue Chelan, CDI's opening brief has already largely dealt with this issue and so only a few additional comments are needed here.⁶ First, the legal standards set forth in Blue Chelan are not in dispute here, and they support CDI's position. That is, a remand for a new trial is appropriate only where a jury's finding are irreconcilably inconsistent. Blue Chelan v. Dept. of Labor and Industries, 101 Wash.2d 512, 515, 681 P.2d 233 (1984). It is

⁵ Grays Harbor County Superior Court Rules do not allow for reply briefs on such motions.

⁶ *CDI's Opening Brief* at Page 13.

precisely the point here that there is no inconsistency whatsoever in the jury's verdict.

In Blue Chelan the jury's verdict was irreconcilably inconsistent because the verdict form stated that the plaintiff was not permanently disabled but then, in irreconcilable conflict with that finding, found that the plaintiff was in fact permanently disabled (i.e. plaintiff was incapable of finding gainful employment due to his disabling condition). Id., at 514. Both of those finding cannot be true.

Here, a finding of breach of contract and damages is consistent with a finding that the plaintiff waived the breach, and also interfered with CDI's performance. That is, those subsequent findings excuse the breach, and bar plaintiffs from recovering the damages they incurred due to the breach they waived and in any event caused (via interference).

2. The Trial Court Erred When it Failed to Harmonize the Jury's Findings, and Render a Defense Verdict

After trial, CDI requested that the trial court do what it is charged to do, answer a question of law. RCW 4.44.080 and RCW 4.44.090. In that vein, even though there is no inconsistency in the jury's verdict (as explained above), to the degree the trial court believes there is inconsistency, the trial court must seek to harmonize the answers to a special verdict. Blue Chelan, at 514. The trial court failed to attempt to do so, which conflicts with the standards set forth in Blue Chelan.

Without explanation, plaintiffs have simply asserted that the verdict findings are “clearly” inconsistent.⁷ However, that is not correct. It is well settled a new trial is warranted only when “special verdicts are **patently** inconsistent and cannot be reconciled.” Alvarez v. Keyes, 76 Wash.App. 741, 743, 997 P.2d 496 (1995). Federal case law cited by plaintiffs identifies the basis for new trial as when the interrogatory answers are “**hopelessly** irreconcilable.” Andrasko v. Chamberlain, 608 F.2d 944, 947 (1979). The preceding section makes it clear the jury’s finding were either consistent or, at a minimum, could be harmonized – which should have resulted in a defense verdict.

It should be noted that the facts in Alvarez provide plaintiffs with no support.. In Alvarez the jury found that the **plaintiff** in a car accident case was solely responsible for causing the subject accident. However, on the defendant’s counter-claim for personal injury damages, the jury found that the defendant was 55% liable for defendant’s own damages. Alvarez, at 742-743. Obviously, if the plaintiff was 100% responsible for the accident, the plaintiff must be 100% responsible for the defendant/counter-claimant’s damages. A 55% finding is an irreconcilable conflict – i.e. an impossibility. That is not the case here.

3. No “Substitution of Judgment” At Issue

It is undisputed that the trial court may not substitute its judgment for that of the jury, and CDI has never sought that this be done. CDI has only requested that the court take the jury’s findings and making a finding

⁷ *Brief of Respondents* at Page 5.

of law. That is, due to the waiver of the breach of contract, and the interference with CDI's performance of the contract, the plaintiff may not recover damages for a breach waived and otherwise caused (via interference) by the plaintiff. In short, a defense verdict.

4. Waiver and Interference are Fatal to Plaintiffs' Breach of Contract Claim – No Recoverable Damages

It is a glaring omission that plaintiffs have failed to address the impact of the jury's findings of waiver and interference on the breach of contract claim. At no point in post-trial briefs, oral arguments, or appellate submissions have plaintiffs (or the trial court) discussed the issue. It is avoided by plaintiffs precisely because those two findings of waiver and interference bar recovery, and mandate a defense verdict. This is unrebutted.

As outlined in CDI's opening brief, 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. In short, though plaintiffs may have suffered damages due to a breach of contract, where they have waived the breach, and/or have interfered with performance of the contract, they may not recover those damages. Defense verdict.

5. This Court Must Attempt to Reconcile Verdicts

Plaintiffs brief indicates that “The Appellate Court **May Not** Reconcile the Verdict.”⁸ Regardless of whether plaintiffs are arguing this Court has no power to do so, and/or should not do so here, they are wrong. Not only is it within the power of this Court to reconcile the verdict, the case authority mandates that this Court attempt to reconcile the jury’s answers to the special interrogatories. Alvarez, at 743 *citing* Myhres v. McDougall, 42 Wash.App. 276, 278, 711 P.2d 1037 (1985). Where the jury findings mandate a defense verdict, as they do here, a court ruling for the defense here should be issued.

C. Scope of Re-Trial – At a Minimum Certain Claims have been Resolved by the Jury’s Findings

This Court has the authority – as the reviewing court – to make the determination that certain claims and issues are free from error and the jury’s decisions regarding those claims and issues should not be disturbed. As outlined in CDI’s opening brief, the only jury finding at issue in post-trial motions was the jury’s findings of waiver, interference and damages as to the breach of contract claim. The following three claims/issues were not discussed substantively in post-trial motions prior to the granting of a new trial: (1) plaintiffs’ fraud claim, (2) CDI’s counter-claim, and (3) plaintiffs’ breach of contract claim based on allegations of mold.⁹

⁸ *Respondent’s Brief* at Page 7 (emphasis added).

⁹ Interestingly, plaintiffs make **no mention** of the claims on which they lost – fraud and CDI’s counter-claim – in their brief. Apparently plaintiffs maintain that the jury’s verdict on these claims should be disregarded without even including a single mention of them in their brief.

The foregoing three claims/issues were not discussed because – irrespective of the erroneous arguments as to consistency of the jury verdict on the issues of waiver, interference and damages as to plaintiffs’ breach of contract claim – there is no question that these issues have been decided by the jury and have no place in a re-trial. Re-trial of plaintiffs’ fraud claim, the mold breach of contract claim, or CDI’s counter-claim and award to CDI of damages, would be improper.

Moreover, even if a new trial were warranted on the issue of the **impact** of the finding of plaintiffs’ waiver and interference, the jury’s finding that there was a waiver, and the finding that there was interference, and the finding on the amount of damages, may not – and should not – be disturbed. The jury has spoken and found waiver and interference. Further, the amount of damages due to breach of contract is settled, thus, the only question would be whether – with a finding a waiver and interference – plaintiffs may collect some, or any, portion of those damages. Of course, this highlights the absurdity of a new trial. Given that the jury has decided those issues, as a matter of law plaintiffs should not be entitled to any recover and so no re-trial whatsoever is necessary.

1. Cramer v. Bock

The case of Cramer v. Bock, 21 Wash.2d 13, 149 P.2d 525 (1944) provides controlling authority on the issue of scope of any re-trial. In Cramer, the verdict was in error and a new trial was granted. The Cramer

court reviewed the question of whether a re-trial of the cross-complaint should be conducted. The Cramer court held that:

“[i]t is now well established....that when an error exists **as to only one or more issues and the judgment is in other respects free from error**, a reviewing court may, when **remanding the cause for a new trial**....limit the new trial to the **issues affected by the error** wherever these issues are entirely distinct and separable from the matters involved in other issues and the trial can be had without danger of complication with other matters.”

Cramer, at 16-17 (emphasis added). The standard for “distinct and separable claims” are those which a re-trial of the separable claim at issue can be conducted without injustice and danger of complication of the remaining matters. Id., at 17.

Here, the three claims and issues outlined above – including the amount of damages found on the breach – are separate and distinct from the issue of the impact of the finding of waiver and interference on plaintiffs’ right to recover the damages found. Additionally, they remain free from error.

The plaintiffs’ fraud claim is separate and distinct because it is based on an entirely distinct elemental structure **and** evidentiary burden. CDI’s counter claim is for amounts due and owing by plaintiffs and has no connection with their breach of contract claim. Though brought under the same cause of action, plaintiffs’ claim regarding mold has absolutely no connection to their claim for construction/installation defect. In fact, plaintiffs hired separate expert witnesses to testify regarding the installation defect and alleged mold.

Not only could re-trial be conducted fairly without these claims, it would be less complicated and would simplify the jury's review. When claims are distinct and separate, they **need not** be retried. Nelson v. Fairfield, 40 Wash.2d 496, 244 P.2d 244 (1952).

Importantly, the claims and issues outlined above were not a part of post-trial motions. They are free from error, as a matter of law, having not been previously raised. They are distinct and separate from the claims at issue above. As a result, the trial court should have limited the scope of re-trial to exclude these claims. Plaintiffs present no argument to the contrary and do not assign error to the jury's findings on these claims. This Court has the authority – as the reviewing court – to make an appropriate determination as to whether the claims and issues at bar are “free from error” and enter judgment accordingly.

D. What A Re-Trial Should Look Like

There should be no re-trial, but if one is ordered by this Court, the parameters of that re-trial merely highlights why no re-trial is appropriate. That is, the only question for a re-trial is this:

Where CDI has breached its contract resulting in \$7,600.00 of damages, but plaintiff has as a matter of law waived that breach of contract, and also interfered with the performance of that contract, what amount, if any, of that \$7,600.00 is plaintiff entitled to?

As noted herein, and in CDI's first brief, this is the only possible question remaining. The amount of damages has been decided, and no one has ever challenged the amount of damages – thereby waiving any challenge – and may not do so here at this late date.

Moreover, in that vein, plaintiffs have failed from the outset – in the trial court and here – to assign or argue that there is any error with anything done in this case other than the assertion that the jury's finding of \$7,600.00 of damages is not consistent with the jury's finding of waiver and interference. Again, however, there is no inconsistency. Where there is waiver and interference as to the breach of contract, as a matter of law the plaintiffs are not entitled to receive an award of any damages resulting from the breach.

If this matter does proceed to a re-trial, and damages are awarded to plaintiffs, that award must be reduced by the \$2,400.00 award the jury has already made to CDI, which may result in a net award in favor of CDI.

II. ATTORNEY FEES

CDI is the prevailing party in this case, and is entitled to its attorney fees. As outlined in its briefs, CDI has 100% prevailed on all claims. However, even if in the end plaintiffs were to prevail on their breach of contract theory and collect \$5,200.00 (i.e. \$7,600.00 minus the award to CDI of \$2,400.00), there can be no question that CDI under this circumstance has substantially prevailed and is entitled to its attorney fees.

The cases cited by plaintiffs require that a party **substantially prevail** to have a right of recovery of reasonable attorney fees where a party does not wholly prevail, and outline the “proportionality approach” to the award of attorney fees, which awards each party attorney fees on claims for which that party prevailed. Transpac Development v. Oh, 132 Wash.App. 212, 130 P.3d 892 (2006); Marassi v. P.H. Lau, 71 Wash.App. 912, 859 P.2d 605 (1993). As explained next, these cases support an award to CDI, regardless.

Plaintiffs brought five claims against CDI: (1) fraud; (2) recovery of contractor’s bond; (3) CPA; (4) breach of contract for construction/installation defect; (5) breach of contract due to mold. CP 1. CDI brought one counter-claim for amounts due and owing. CP 5. Of the six claims, plaintiffs were successful (allegedly) on **one**.¹⁰ Their best result here, if they prevail on appeal and there is a re-trial, would be an award of \$5,200.00 – just over 5% of what they asked the jury for at trial.

Based on the foregoing, CDI alone is entitled to attorney fees. In that regard, CDI is entitled to 100% of its attorney fees as prevailing party, or CDI is entitled to 95% of its attorney fees because plaintiffs prevailed on only one claim to the tune of 5% what plaintiffs demanded, or – breaking it out by number of claims – CDI should receive five-sixths of its attorney fees, having prevailed on five out of the six claims.

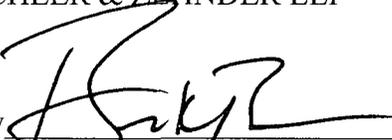
¹⁰ Two of plaintiffs’ claims were dismissed prior to trial.

III. CONCLUSION

For all the foregoing reasons, and those contained in CDI's opening brief, CDI respectfully requests this Court enter a judgment in favor of CDI on all claims and issues. In the alternative, CDI requests this matter be remanded for re-trial in the limited capacity outlined above in section D.

DATED this 20th day of April, 2012.

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CERTIFICATE OF SERVICE

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

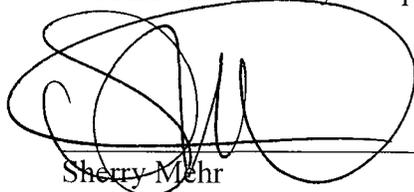
I am employed by the law firm of Scheer & Zehnder LLP.

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
CO/ Plaintiffs Jerry & Sally Mulder 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 23rd day of April, 2012, at Seattle, Washington.



Sherry Mehr