

NO. 62766-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RK PICTURE PERFECT PAINTING, INC., a Washington
Corporation,

Respondents,

vs.

JOHNSON DESIGN HOMES CORP., a Washington corporation;
and JOHNSON CHEN and JANE DOE CHEN, a marital
community,

Appellant.

APPELLANT'S REPLY BRIEF

MARSTON ELISON, PLLC

Jami K. Elison WSBA # 31007
16880 N.E. 79th Street
Redmond, WA 98052-0902
Telephone: (425) 861.5700
Facsimile: (425) 861.6969

Attorneys for Appellant

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TABLE OF CONTENTS

REPLY 1
PROOF OF SERVICE.....4

REPLY

Rules of law exist in part to prevent trial judges from making arbitrary decisions or from making decisions based on bias. Here, the trial court failed to apply the controlling law of *Eastlake Construction*. Instead, the trial court denied Appellant damages either by arbitrarily concluding that the “market value of the residence was not adversely affected”, for which there was no evidence whatsoever, or else by favoring the subcontractor with inapposite, inaccurate speculation about whether Respondent “would [] have been able to clean up the misting residue, given an opportunity to do so by Defendant.” CP at 44 (Finding of Fact #17).

Our trial judges are bound to apply rules of law to existing facts without regard to which litigating party is perceived to have more money. Here, the fact of misting residue discoloring Appellant’s tiles is undisputed. That fact that the misting residue resulted directly from Respondent’s spraying operations,¹ which occurred with knowledge that areas were exposed, is also undisputed. Under applicable law, the trial

¹ Respondent’s argument that Appellant caused the “mess” (Respondent’s Brief, p.5) is facetious and not supported by the trial court’s rulings which pertained instead to repairability and market value. Subcontractor Respondent was a licensed, registered specialty tradesman that now argues on appeal he is not responsible for overspray damage when as a professional he sprays stain while knowing that areas are exposed. On these simple and self-evident facts, there can be no genuine argument about the cause of the misting residue. It was not Appellant’s fault that Respondent knowingly sprayed stain onto tile files.

court was obligated to determine the cost to repair these damages. The trial court was not authorized to say that the damage is not “significant”, which personal assumption the court improperly based on the existence of an offer to buy the house and speculation about whether the discoloration could be cleaned up.

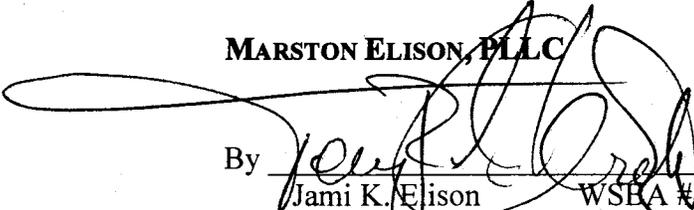
The trial court was impressed with the fact that marketing of the home “resulted in a substantial offer to buy which was not accepted.” CP at 44 (Finding of Fact #18). But it was a reversible *non sequitur* for the court to arbitrarily assert that the “market value of the residence was not adversely affected.” Regardless of whether the trial court considered the offer “substantial,” the offer may indeed have been less than would have been extended to Appellant if the tiles were not dirtied by overspray. There was no evidence, and no substantial evidence in the record, to support the trial court’s assumption about market value of the house with or without the tile discoloration. And as the trial court was advised by counsel, under *Eastlake Construction* that was the wrong analysis. The cost to repair was the required, but omitted, legal analysis.

Furthermore, it was internally inconsistent to deny damages even while it was inherent in the trial court’s ruling that repair and associated repair costs are necessary. The trial court speculated that Respondent may “have been able to clean up the misting residue, given an opportunity to do

so by Defendant.” CP at 44. Regardless of whether such a right is created by contracts or under UCC law, there is no common law “right to cure” or self-correct defects in small construction projects. But the trial court appears to have improperly assumed such a right for the benefit of Subcontractor Respondent. Nothing in Respondent’s briefing or existing Washington law justifies that preferential assumption made by the trial court. Respondent had no right, and Appellant had no obligation, to make sure that Respondent cleaned up its defects. Moreover, substantial evidence in the record confirms that Respondent in fact made multiple failed attempts to clean up the misted residue. Appellant is entitled to damages to repair the misted residue. Because the trial court avoided its obligation in this regard, reversal is necessary and Appellant should be awarded the documented and unrebutted cost of \$36,504. Consequently, the attorney fee awards must also be reversed and denied.

DATED this 27th day of July, 2009.

MARSTON ELISON, PLLC

By 

Jami K. Elison

WSBA #31007

Attorneys for Appellant Johnson Design Homes

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I certify under penalty of perjury that on the 27th day of July 2009,

I served a copy of Appellant's Reply Brief via US Mail on the following:

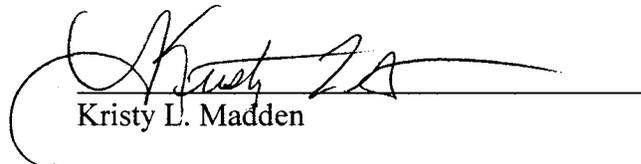
Attorneys for Respondent, RK Picture Perfect Painting

Edward A. Ritter II
Daniel C. Wershow
Wershow & Ritter, Inc., P.S.
710 Second Ave., Ste. 700
Seattle, WA 98104
Phone 206.223.0868
Fax # 206.223.0884

Attorneys for Respondent, RK Picture Perfect Painting

James P. McGowan
Hollenbeck, Lancaster & Andrews
15500 SE 30th Place, Ste. 201
Bellevue, WA 98007-6347
Phone: 425-644-4440
Fax: 425-747-8338

Dated at Redmond, Washington this 27th day of July, 2009.



Kristy L. Madden

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