

63173-0

63173-0

NO. 63173-0-1

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CROW ROOFING & SHEET METAL, INC.,

Appellant/Cross Respondent,

vs.

JULIUS THIRY and KATHERINE J. THIRY, husband and wife, and
the marital community composed thereof;

and

JULIUS THIRY and KATHERINE J. THIRY, Trustee of the THIRY
REVOCABLE LIVING TRUST

Respondents/Cross Appellants.

REPLY BRIEF OF APPELLANT

SANDRA BATES GAY, P.S.
Sandra Bates Gay, WSBA No. 4671
Attorney for Appellant **Crow Roofing &
Sheet Metal, Inc.**
Suite 1900 Bank of America Building
10500 N.E. Eighth Street
Bellevue, Washington 98004
(425) 637-3040

2009 DEC 28 AM 11:27
STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I



ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	REPLY TO RESTATEMENT OF ISSUES.....	3
	1. Scope of Liability.....	3
	2. Substantial Evidence: Costs of Repair.....	3
	3. Prejudgment Interest.....	4
	4. Attorneys' Fees.....	4
	5. Fees on Appeal.....	4
III.	REPLY TO RESTATEMENT OF THE CASE.....	4
	A. Crow's Statement Appropriately Cites Record.....	4
	B. Thirys' Statement Contains Irrelevant Facts.....	5
	1. Assertion that Crow Underbid.....	5
	2. Flanagan Testimony Re. Time.....	6
	3. Assertion of Property Damages.....	6
	4. Slanted Installation Remedied.....	6
	5. Crow Replaced Missing Tiles.....	7
	6. Color Agreed on By Parties.....	8
	7. Jobsite Clean-Up and Communication.....	8
	8. Inclusion of Subrogation Payment.....	9

IV.	ARGUMENT.....	9
A.	Damages Attributable to Warped Rafter Tail.....	9
	1. Crow Did Not Have Duty to Remedy.....	10
	2. Thirys Hired Engineer.....	10
B.	Crow Provided Decent Looking Roof.....	11
C.	Perimeter Flashing Meets Standards.....	12
D.	Oral Modification to Contract.....	12
E.	Evidence Not Sufficient to Support Damages.....	13
	1. Testimony Not Substantial Evidence.....	13
	2. Westlake Not Qualified Expert.....	15
	3. Evidence Relied On Was an Estimate.....	17
	4. Cost Analysis Substantial Evidence.....	18
	5. Estimate Improperly Increased.....	19
F.	Crow Entitled to Prejudgment Interest.....	20
	1. Prior Settlement Not Proper Set-Off.....	21
	2. Attorneys' Fees Should Not Set-Off.....	21
G.	Thirys Did Not Substantially Prevail.....	22
	1. Crow Prevailed on its Claim.....	22
	2. Thirys Did Not Prevail.....	23
	3. Interior Damage Not Issue at Trial.....	24
	4. Crow is Prevailing Party.....	25

V. CONCLUSION.....27

VI. APPENDIX.....Attached

TABLE OF AUTHORITIES

CASES	PAGE(S)
Buckner, Inc. v. Berkey Irrigation Supply, 89 Wn. App. 906, 919, 951 P.2d 338 (1998).....	22
Deep Water Brewing LLC v. Fairway Resources Limited, 152 Wn.App. 229, 215 P.3d 990 (2009).....	14, 16
Hoff v. Lester, 25 Wn.2d 86, 94, 168 P.2d 409 (1946).....	20
Mall Tool Co. v. Far West Equip. Co., 45 Wn.2d 158, 177, 273 P.2d 652 (1954).....	21,22
Marassi v. Lau, 71 Wn. App. 912, 916, 859 P.2d 605 (1993).....	26, 27
Moritzky v. Heberlein, 40 Wn. App. 181, 182, 697 P.2d. 1023 (1985).....	26
Park Avenue Condominium Owners Assn. v. Buchan Developments, LLC, 117 Wn.Ap. 3t69, 71 p. 3d 692 (2003).....	18
State v. Russell, 125 Wn .2d 24, 882 P.2d 747 (1994).....	16,17

Statutes

Regulations and Rules

Rule of Appellate Procedure (RAP) 10.3(a)(5).....	4, 5
Evidence Rule (ER) 703.....	13, 14

Other Authorities

CJS Evidence Section 814; 32 CJS Evidence Section 814.....	14
--	----

5B K. Tegland, WASH. PRAC.: Evidence § 703.6 (5th ed. 2007)....16

Chapter 19. Remedies and Damage Measures, 6 Bruner and
O'Connor on Construction Law Section 19:58.....20

Aw061\Crow\Thiry\Appeal\Reply Brief intro

REPLY BRIEF OF APPELLANT- vi

I. INTRODUCTION

Respondent Thirys' Brief does not support their argument that substantial evidence of defective workmanship was presented at trial, nor are the Thirys able to show that they properly presented admissible evidence of the measure of damages. The undisputed facts are clear:

At the commencement of this action, and at the time of trial, Defendants Julius and Katherine Thiry owed Plaintiff Crow Roofing approximately \$102,000 under its contract.

Prior to trial, the Thiry's homeowner insurer, Vigilant, had paid the Thirys the sum of \$54,648.51 for interior water damages allegedly caused when a Crow Roofing employee stepped through a water barrier applied during the construction. Crow Roofing's insurer paid Vigilant approximately \$45,000 on the subrogated claim and Crow Roofing contributed its deductible of \$10,000. On May 6, 2008, the Court entered an agreed Order granting Crow Roofing's Motion for Partial Summary Judgment and dismissing the Thirys' interior damage claims. The interior damage claim was not an issue at trial. At no point during trial, or in its Findings and Conclusions, did the Court rule that Crow Roofing's lien claim of \$102,416.83 should be offset by the amount of the interior damage

settlement. The issues on appeal relate solely to the proper amount of an award for correcting construction defects, if any, and the net amount due to Crow Roofing under its contract.

At trial, the Thirys' expert, Bryce Given, relied on a cost *estimate* of \$57,000 (as opposed to a detailed cost analysis) prepared by Robert Westlake to support the Thirys' claim for the cost of repairs to the roof. Robert Westlake did not appear at trial as a witness, nor had he been identified or qualified as an expert witness. Crow Roofing's expert Ray Wetherholt presented testimony based on a cost analysis for each alleged defective condition and concluded that the repairs to the roof would cost \$9,989. The cost analysis was prepared by Crow Roofing's President, Carolyn Vares, and roofing supervisor Charles Trichler, witnesses at trial who have had years of experience in the roofing industry.

At the conclusion of the trial, Crow Roofing was awarded its contract amount of \$102,416.83. The Thirys were awarded damages to repair the roof (wholly based on hearsay testimony admitted through Bryce Given) in the amount of \$62,073 (\$57,000 plus tax). Even assuming that the Court's offset of \$62,073 in favor of the Thirys was proper, Crow is still owed a net amount of

\$40,343.83 on its contract, plus pre-judgment interest of \$13,700 (as of November 2008, CP 843-850), under law consistently interpreted by precedent cases, for a net award of \$54,043.

This Court should reverse the trial court and award Crow Roofing its contract amount, plus pre-judgment interest, offset by \$9,989, plus Crow's attorney's fees and costs at trial and on appeal.

II. REPLY TO RESTATEMENT OF ISSUES

1. The trial court did not correctly determine the scope of Crow's liability for repairs to the roof where Crow did not have a duty to identify and remedy a warped rafter tail; where the roof was structurally sound; where the flashing around the roof's perimeter was sound; and where Mr. Thiry had agreed to the use of beveled cedar siding instead of copper flashing.

2. There is not substantial evidence that the roof repairs will cost \$57,000 plus tax where the evidence relied on by Bryce Given was inadmissible hearsay. Robert Westlake, on whose estimate Bryce Given completely relied as a measure of damages, was not identified or qualified as an expert; and the cost estimate provided by Westlake to Given was just that: an estimate, and could have been significantly less.

3. The trial court erred when it failed to award Crow Roofing prejudgment interest on the balance of its liquidated claim, having correctly made no offset for the interior damage settlement against Crow's claim, but incorrectly offsetting the court's award of the Thirys' attorney's fees against Crow's liquidated claim.

4. The trial court did not correctly award the Thirys their attorney's fees where the Thirys were only entitled to an offset of \$62,073 and Crow was entitled to its full contract price of \$102,416.83, together with pre-judgment interest on the offset balance. The insurance settlement for interior damage does not reduce Crow's lien claim.

5. The Court should award Crow Roofing its fees on appeal as allowed by appellate court rules and as requested in Crow's Notice of Appeal.

III. REPLY TO RESTATEMENT OF THE CASE

A. Crow Roofing's Statement of the Case and Argument appropriately cites to the Clerk's Papers, Report of Proceedings and Exhibits and should not be disregarded.

Contrary to the Thirys' assertion, Crow's statement of the case and argument appropriately cite to the record as required by RAP 10.3(a)(5) and present a "fair statement of the facts." Respondents have not supplemented the Record on Appeal. In

order to make the prose flow more smoothly, Appellant's opening Brief may reflect a few instances where two or three sentences set forth factual assertions, with the citation to the record at the end of the paragraph.

B. Much of the Thiry's Statement of the Case should be disregarded as it contains facts and assertions not relevant to the appeal or were not issues at the trial.

RAP 10.3(a)(5) also requires "A fair statement of the facts and procedure relevant to the issues presented for review, without argument...." The Thiry's Restatement of the Case is replete with facts and assertions that are not relevant to the issues presented for review on appeal, nor were they issues at trial or the subject of Findings entered by the court. Moreover, contrary to the mandate of RAP 10.3(a)(5) that the statement of the case be "without argument," the Thiry's present much of their argument in this portion of their brief.

1. The fact asserted by the Thiry's that Crow's bid was lower than that presented by another roofer is not relevant to any of the issues on appeal. BR 5. There is no evidence in the record cited by Respondents that Crow was even aware of the lower bid. In fact, the Thiry's acknowledge that Crow's President, Carolyn Vares, testified that Crow was not aware of Jorve's bid. BR 5; 9/18

RP 76 (see App. pp.1, VI.1). The fact that Crow's bid was lower than a competitor does not establish that Crow underbid the project or that the amount of the bid had any bearing on the claimed defective workmanship.

2. The testimony of John Flanagan cited by the Thirys, BR 5, that he wished they had longer for the project, 9/23 RP 97, is not relevant to the issues on appeal. Respondents did not inquire, in the course of cross-examining Mr. Flanagan, why he wished the contractor "had longer for the project." Mr. Flanagan testified at length about the measures taken to satisfy the Thirys regardless of the basis of their concern. 9/23 RP 62, 83-84 (see App. pp. 1-2, VI.2). The record shows that the installation took six months, in part, because of the manufacturer's delay in delivery of the slate. 9/23 RP 122-124 (see App. pp. 2-4, VI.3).

3. The assertion that Crow had damaged the Thirys' plants and car, or injured their dog, was not an issue at trial and is not relevant to any of the issues on appeal. Judge Fox specifically ruled that these issues were not before Court. 9/22 RP 122-124 (see App. pp. 2-4, VI.4).

4. The slate tiles that the Thirys claimed were installed at a slant were, in fact, removed and replaced. BR 7; 9/18 RP 106-

107. Judge Fox specifically ruled that the problem with the angled slates was remedied by Crow and was not an issue at trial 9/23 RP 34-35 (see App. pp. 4-5, VI.6). This is not a proper issue on appeal.

Moreover, the Thirys' assertion that these "tiles are still 'staggered' [9/18 RP 125]" BR 7, is misleading. This portion of the record cited is actually a discussion about the work on the hips and ridges, 9/18 RP 123-125 (see App. pp. 5-6, VI.7), not placement of slate tiles.

5. Bryce Given testified that he saw "three or five" missing tiles, 9/22 RP 25 (see App. pp. 8, VI.8), or at most "a half a dozen or so" tiles that had fallen off, 9/18 RP 132 (see App. pp. 7, VI.8). Ray Wetherholt testified that he calculated that the roof had somewhere between 28,000 to 32,000 slate tiles on it. 9/23 RP 155 (see App. pp. 7, VI.9); Finding of Fact 2.12. Respondents acknowledge that it is expected that tiles will "occasion[ally] fall off," BR 9. If there are 28,000 tiles and six fell off, this reflects an insignificant defect ratio of 3/14,000, or 0.02%. The Thirys do not cite to any part of the record that indicates that tiles are still falling off the roof. Crow Roofing did replace missing tiles in December 2007, 9/22 RP 133-134 (see App. pp. 7-8, VI.10). The record cited

by the Thirys does not indicate either that they requested Crow to replace additional tiles, or that Crow refused to do so.

6. The color of the slate was not an issue at trial. Whether or not the color was the shade of green that the Thirys expected, the Court found that the Thirys accepted the color, and this was no longer an issue before the trial court. 9/22 RP 117-119 (see App. pp. 8, VI.11). This is not a proper issue on appeal.

7. Jobsite clean-up and communication with Crow were not issues addressed at trial. As stated throughout the trial and this appeal, Judge Lum's Order of May 6, 2008 on the insurer's Motion for Summary Judgment – stipulated to by the Thirys - limited the issues at trial to "Crow Roofing & Sheet Metal's claim for payment and/or lien foreclosure and the Thiry's counterclaim for repair and/or replacement of the roof itself. No claims for damage outside of the roof itself remain for trial." CP 313-317.

Be that as it may, Thirys' reference in the record to John Flanagan's complaints regarding lack of roofers and equipment is misleading. BR 10. The cited reference is to Katherine Thiry's testimony, not Mr. Flanagan's, and is not substantiated by admissible evidence.

8. The Thirys' inclusion of the \$45,000 subrogation payment made by Crow's insurer to the Thirys' insurer in the net award to the Thirys is improper. The payment has nothing to do with who prevailed on the issues at trial. The issue of interior damage was settled and dismissed prior to going to trial. CP 130-132; CP 313-317; 9/22 RP 123 (see App. pp. 8-9, VI.12). It was a property damage claim, separate from the issue of what was owed on the contract and what damages the Thirys incurred as a result of alleged inferior workmanship. Respondents are attempting to characterize the subrogation payment as a setoff against what was owed on the contract. This is misleading and only confuses the issues. The payment of \$45,000 for property damage by Crow's insurance company did not alter the amount that the Thirys owed to Crow on the contract. After Crow and its insurer made the subrogation payment to Vigilant Insurance, the Thirys still owed Crow the remaining contract balance of \$102,416.83. The issue of interior damage was settled and dismissed prior to trial and is not a proper matter to bring before the appellate court.

IV. ARGUMENT

A. There is not substantial evidence to support damages attributable to the warped rafter tail.

1. Crow did not have a duty to remedy the warped rafter tail.

Bryce Given testified that the undulation of the roof was caused by a rafter tail that was out of plane with the other rafter tails. 9/22 RP 95-96 (see App. pp. 9, VI.13). As stated in Appellant's Brief, Crow did not have an obligation under the contract to fix the rafter tail. BA 15-19. The contract required Crow to "[t]horoughly inspect the decking for signs of deterioration or dry rot [and] ... replace decking as necessary on a time-and-material basis as an extra to the contract price" [emphasis added]. Ex. 7; 9/18 RP 164-165.

Bryce Given testified that Crow should have seen the warp because "all the roofing had to be removed and then new plywood put on." 9/22 RP 97. However, the testimony is clear that Crow Roofing employees were unable to detect the undulation during the removal and installation of the roof. BA 17.

While Crow had a duty under the contract to inspect the decking, it did not have a duty to inspect the underlying structure of the roof.

2. The Thirys had hired an engineer to inspect the roof prior to Crow installing the roof.

The duty to inspect the structure fell on the homeowner and the engineer retained independent of Crow's work. Prior to Crow's installation of the roof, as expressly required under the contract, the Thirys hired a structural engineer to inspect the roof and make sure that it was strong enough to hold a slate roof. Ex. 28, Deposition of Julius Thiry, p. 11-12. The Thirys also hired carpenters to reinforce the roof. Id. at 12-14. The engineer and carpenters had the opportunity and the duty to notice the warped rafter tail. Moreover, the Thirys present no evidence that either they were "caused damage" by the undulation, as presented in Finding of Fact 2.17. CP 749. In fact, when asked to describe the damages to their roof, neither Dr. Thiry nor Mrs. Thiry so much as mentioned the undulation. 9/23 RP 136-137, 146-147 (see App. pp. 9, VI.14).

B. Crow provided a decent looking roof.

Contrary to the Thirys' assertion, Crow does not deny that it had the "duty to provide a decent looking roof." Crow makes the argument that the contract does not contain an "aesthetics clause" that would permit the Thirys to reject the roof because they did not like how it looked after it was installed, which is what they attempted to do. From the beginning of the litigation, the Thirys wanted the roof replaced. 9/18 RP 184; 9/23 RP 10-11 (see App.

pp. 10, VI.15). They were still arguing for complete replacement of the roof at the conclusion of the trial.ⁱ

C. The perimeter flashing meets required standards.

As set forth in the Brief of Appellant (BA 21-23), Crow maintains that the perimeter flashing meets required standards. Even if repair of the perimeter flashing is properly included in the damages assessed against Crow, the Thirys did not present any evidence as to the portion of damages that was allocated to these repairs. The estimate relied on and testified to by their witness Bryce Given provides only a rough estimate of costs plus 25%. 9/22 RP 80-81 (see App. pp. 11, VI.16).

D. There is substantial evidence that Mr. Thiry wanted the beveled cedar transition as opposed to the exposed copper.

The Thirys argue that Mr. Thiry denied that he agreed to the beveled cedar transition as an alternative to the exposed copper flashing. BR 31; 9/18 RP 108; 9/23 RP 187. However, as stated in Appellant's Brief, BA 26-27, two witnesses, John Flanagan and Charles Trichler, testified that not only had Mr. Thiry agreed to the beveled cedar transition, he had rejected the exposed copper and accepted the hidden beveled cedar transition as an alternative. 9/23 RP 36-37, 77-78 (see App. pp. 12-13, VI.17). Expert Ray

Wetherholt testified that the installation of bevel siding was acceptable to provide a rounded transition base. 9/23 RP 142-143, 156, 157-159 (see App. pp. 13-14, VI.18).

Even if the beveled cedar transition is properly included in the damages assessed against Crow, the Thirys did not present any evidence as to the portion of damages that was allocated to this alleged breach of the contract. Again, the estimate relied on and testified to by their witness Bryce Given provides only a rough estimate of costs plus 25%. 9/22 RP 80-81.

E. The evidence is not sufficient to support the \$57,000 damages award.

1. Bryce Given's testimony regarding the cost of repairs was not "substantial" evidence of damages.

It is clear from the record that the Thirys' expert Bryce Given did not have the expertise to estimate the costs of repair for a slate roof, 9/18 RP 180 (see App. pp. 15, VI.19), and that he relied solely on the information provided by Robert Westlake of Alpha Pacific in concluding that the cost of repair to the roof would be "approximately \$50,000." 9/22 RP 82 (see App. pp. 16, VI.20). While ER 703 does allow testimony of an expert who bases his opinion on hearsay, there are crucial limitations to such testimony.

“An expert may legitimately use hearsay evidence to confirm an opinion which he or she reached by independent means, but it is not the intent of the rules dealing with opinion evidence that an expert opinion rest exclusively or primarily upon hearsay.... An expert witness may not serve as a mere conduit for the hearsay opinion of another expert who does not testify when the expert who does testify lacks the requisite qualifications to render the opinion in his or her own right.” CJS Evidence Section 814; 32 CJS Evidence Section 814.

In Deep Water Brewing LLC v. Fairway Resources Limited, 152 Wn.App. 229, 215 P.3d 990 (2009) the court allowed testimony of an expert witness based on what would otherwise be inadmissible hearsay stating that ER 703 “permits experts to base their opinions on facts or data that might not otherwise be admissible into evidence ‘[i]f of a type reasonably relied on by experts in the particular field in forming opinions or inferences upon the subject.’ ER 703.” *Id.*, at 275. The court went on to state, however, that the rule is “not designed to allow a witness to ‘summarize and reiterate all manner of inadmissible evidence.’” *Id.* In the Deep Water case, the court, in allowing the hearsay testimony, found that the expert witness, “did not merely adopt Mr. Walter’s report as his own. He followed standard procedures in independently verifying the data before relying on it.” *Id.*

In admitting the Aalpha Pacific report, Ex. 53, Judge Fox expressly stated that it was admitted not “for the truth of the matter asserted. It is only admitted for the fact that this witness [Bryce Given] testified that he examined this, and this is one of the things that he examined in order to reach his opinion.” 9/23 RP 175-176.

In fact, Mr. Given did not use the hearsay evidence of Robert Westlake to confirm or support his own opinion of the repair costs. The record is undisputed that Mr. Given did not use Mr. Westlake’s estimate as the basis for an independent analysis of the cost of repairs, and he repeated his testimony that he merely adopted Mr. Westlake’s repair costs as his own. 9/22 RP 81-83, 104 (see App. pp. 15-16, VI.20). Neither did Mr. Given independently verify the repair estimate before relying on it. He testified that he did not “cost-estimate this” but relied upon Mr. Westlake. 9/22 RP 82 (see App. pp. 16, VI.20). In addition, Mr Given made absolutely no inquiry as to Mr. Westlake’s credentials regarding slate roofing, but instead relied on what he was told by Mr. Westlake. 9/22 RP 77-78 (see App. pp. 16-17, VI.21).

2. Robert Westlake was not identified or qualified as an expert.

In their Brief, the Thiryys state that Bryce Given “testified to the exact amount based on input from another roofing expert...”

BR 2, referring again to Robert Westlake as “an expert in slate roofs...” BR 35. Although Bryce Given relied on “Mr. Westlake’s expertise in this industry and as a contractor and estimator” 9/22 RP 83, the record does not identify or establish that Mr. Westlake was, in fact, an expert, nor is there admissible evidence of Mr. Westlake’s experience with slate roofing. In the Joint Statement of Evidence/Amended filed with the Court, CP 701-710, Mr. Westlake was not identified as an expert witness.ⁱⁱ

The testimony of Mr. Given also indicates that he did not independently verify that Mr. Westlake was a licensed contractor or whether Mr. Westlake had worked on projects involving natural slate versus manufactured slate. 9/22 RP 78 (see App. pp. 17, VI.21). Although Mr. Given stated that he believed Mr. Westlake had “sufficient experience” 9/22 RP 83-84, the record does not support that his reliance on Mr. Westlake’s opinion was justified or reasonable.

In their brief, the Thirys cite Deep Water, *supra.*, at 1012-14 BR 35, for the proposition that an expert can rely on another expert’s appraisal. [Emphasis added]. They also cite 5B K. Tegland, WASH. PRAC.: Evidence § 703.6 (5th ed. 2007). The text in the section preceding the citation to State v. Russell, 125 Wn .2d

24, 882 P.2d 747 (1994) reads “Later cases, however, hold that an opinion based on the opinion of another expert [emphasis added] is admissible so long as the testifying expert ‘reasonably relied’ upon the opinion, as required by Rule 703.”

Mr. Westlake’s credentials either as an expert or a licensed contractor were not established in the record.

3. The evidence relied on by Bryce Given was not a detailed cost analysis but rather only an estimate of costs plus 25%.

Even assuming that Mr. Given properly relied on the Aalpha Pacific “cost plus” proposal, it is not substantial evidence of the actual costs of the repairs. The Aalpha Pacific estimate, Exhibit 53, was only that, an estimate. As Mr. Given testified, Robert Westlake did not provide “an itemization as to what each of the actions that needed to be taken would cost in order to arrive at his total.” 9/22 RP 80. Mr. Given also acknowledged that because it was just an estimate, the costs of repair could be less than \$50,000.00. 9/22 RP 82 (see App. pp. 16, VI.20). Crow Roofing, on the other hand, did supply a detailed cost analysis, identifying the specific repairs recommended by Mr. Given’s report and the cost of each repair. Ex. 26. The analysis was reviewed by expert Raymond Wetherholt, whose testimony and *curriculum vitae* (Ex. 19) clearly established

his experience and expertise in evaluating and preparing specifications for slate roof projects, 9/23 RP 131-133; and in preparing cost analyses for roofing projects, 9/23 RP 132, 165-166 (see App. pp. 17-18, VI.22).

4. The Cost Analysis properly relied on by Ray Wetherholt is substantial evidence of the cost of repairs.

By failing to present substantial admissible evidence of the cost of repairs, the Thirys failed to meet their burden of proof of the measure of damages. Park Avenue Condominium Owners Assn. v. Buchan Developments, LLC, 117 Wn.App. 3t69, 71 p. 3d 692 (2003). If, however, the trial court properly found that the Thirys were entitled to an off-set for the “reasonable costs of repair to remedy known defects” (CP 750), Crow presented the only admissible and substantial evidence of those costs. Expert Raymond Wetherholt testified that he had experience in preparing cost analyses, Ex. 26; 9/23 RP 165-166 (see App. pp. 17-18, VI.22), and that he had reviewed the cost analysis prepared by Carolyn Vares and Charles Trichler. 9/23 RP 167-168. The Thirys argue that Wetherholt’s testimony is subject to the same criticism that Crow lodges against Given. BR 37. However, unlike the estimate prepared by Robert Westlake which was admitted only for

the fact that expert Given relied on it, Judge Fox admitted Crow's Cost Analysis into evidence since he had heard the witness testify and indicated that the court would refer to it during its "evaluation of the evidence." 9/23 RP 180-181. Crow's Cost Analysis presented properly admissible evidence and was the only substantial evidence of the cost of repairs.

5. The Trial Court erred in considering Westlake's cost estimate of \$57,000, increased from his original estimate of \$50,000.00.

As the testimony indicates, 9/22 RP 79-82, Mr. Given also relied on a cost estimate dated March 2007, (Ex. 42, not admitted) in which Mr. Westlake estimated the costs of repair to be \$50,000. In June 2008, Mr. Westlake revised his estimate to \$57,000. 9/22 RP 83. Mr. Given testified that Mr. Westlake's earlier proposal of \$50,000 was a year and a half old and that he was told by Mr. Westlake that the cost of copper had gone up. 9/22 RP 82-83; 103-104.

Mr. Thiry later testified that in the two and one-half years since the roof was installed, he had not done any maintenance on the roof, 9/22 RP 151 (see App. pp. 18, VI.23), nor had he, at the time of trial, commenced with repairing any of the alleged defects

on the roof (or the interior damage) because he was told not to by his attorney, Mr. Singer. 9/22 RP 155 (see App. pp. 18-19, VI.23).

Under Washington law, the Thirys had a clear duty to mitigate their damages. “The general rule is that the [claimant] cannot be compensated for damages which he might have prevented by reasonable efforts and expenditures. 15 Am.Jur. 420, Damages, §§ 27, 28, 29, 40; 25 C.J.S., Damages, § 33, p. 499.” Hoff v. Lester, 25 Wn.2d 86, 94, 168 P.2d 409 (1946). The Thirys could not sit back and let additional damages accrue. Authors Bruner and O’Connor state that the “[c]ost of repair’ ordinarily is measured at the time of breach or within a reasonable period thereafter.” Chapter 19. Remedies and Damage Measures, 6 Bruner and O’Connor on Construction Law Section 19:58.

Assuming that Mr. Given’s reliance on Mr. Westlake’s estimate was proper, which it was not, the Court should have adopted the earlier estimate which was closer in time to the breach. Crow should not be penalized for passage of time that was attributable to the Thirys’ failure to move ahead with repairs that they argue were necessary.

F. Crow is entitled to prejudgment interest.

1. The prior amount paid in settlement of interior water damage is not a proper set-off.

As discussed previously, the settlement of the Thirys' interior damage is not relevant to the issues on appeal, and it is not relevant to the issue of whether Crow is entitled to prejudgment interest. The Court erroneously concluded that Crow is not entitled to pre-judgment interest because "there was an honest dispute as to what was owed." 2/20/09 RP 8. The Thirys argue that the balance of Crow's liquidated claim, \$40,343.83, should be further reduced by the prior settlement amount, but there is no basis or authority for using the property damage issue to create a "disputed claim." After the offset awarded by the trial court, the Thirys still owed Crow \$40,343.83. Crow is entitled to pre-judgment interest on the balance of its liquidated claim.

2. The award of attorney's fees & costs should not be set-off against Crow's liquidated claim.

The trial court erroneously set-off its award of attorney's fees in favor of the Thirys against the balance of Crow's liquidated claim. As stated by the Court in Mall Tool Co. v. Far West Equip. Co., 45 Wn.2d 158, 177, 273 P.2d 652 (1954) and acknowledged by the Thirys in their brief, BR 39, the rule of setting off an unliquidated claim against a liquidated claim applies when the offset is the result

of defective workmanship. However, the Mall Tool exception to the general rule of awarding pre-judgment interest on liquidating claims is a narrow one. Buckner, Inc. v. Berkey Irrigation Supply, 89 Wn. App. 906, 919, 951 P.2d 338 (1998). In the Buckner case, the trial court had deducted two setoffs from the liquidated amount awarded to Buckner: one set-off was clearly related to defective workmanship; the second set-off was not. The Court stated “[o]nly liquidated sums for defective product or performance may be deducted from a liquidated sum for purpose of calculating prejudgment interest” and reversed the trial court’s second set-off. Buckner at 919. The Thirys offer no authority that the award of attorney’s fees should be set off against the contract price in order to preclude an award of prejudgment interest on the net liquidated amount.

G. The Thirys did not substantially prevail at trial.

1. Crow prevailed on its claim.

Prior to trial, Judge Lum’s Order of May 6, 2008 made it clear that “Crow Roofing & Sheet Metal’s claim for payment and/or lien foreclosure” was still an issue at the trial. CP 313-317. At no point, either prior to trial or during trial, did the Thirys tender any portion of the “undisputed amount” to Crow. At the conclusion of

the trial, Judge Fox found that there was a valid and binding contract between the parties. Crow clearly prevailed on its breach of contract claim. Crow was entitled to its unpaid contract balance of \$102,416.83, less the set-off of \$62,073 (\$57,000 plus tax) awarded by the Court. CP 742-750. After Judge Fox applied the setoff, Crow was entitled to the balance of the contract amount and therefore received a net award in that amount.

2. The Thirys did not prevail on their claim for a new roof.

From the outset of this litigation, the Thirys sought replacement of the roof. 9/18 RP 184. As the Thirys acknowledge in their brief, BR 43, the trial court ruled that the Thirys could not pursue their claim for a roof replacement. CP 318; 9/18 RP 183-187 (see App. pp. 19-21, VI.24). This ruling confirmed that the Thirys did not, and could not prevail on their claim to replace the roof. Nevertheless, the Thirys continued to press for a complete replacement of the roof right up to the end of the trial, and even through the process of presenting proposed Findings and Conclusions (see endnote i; supra.) Indeed, even after trial, on page 2 of the Defendants Motion and Declaration of Alan M. Singer for Award of Attorney's Fees, attached as Exhibit A to Plaintiff's Objection and Response to Defendants' Request for Award of

Additional Costs, CP 884-907, the Thirys still pressed for consideration of a complete roof replacement:

Defendant pointed out that it was the position of the Thirys that an award of a new roof was supported by the evidence proven, it was never accepted by the court as an official position the Defense was allowed to take. If the Court is still willing to entertain a Motion for reconsideration on the matter, the Defendant would be willing to put their expert back on the stand to testify as to a new roof.

Contrary to the assertion in their Brief, BR 40, the Thirys were not awarded “the maximum damages they sought.” They continuously sought a complete roof replacement and lost on that claim.

3. The property damage settlement is not properly part of the determination of the prevailing party.

The claim and settlement for the interior water damage was not an issue at trial, is interposed only to increase damages for purposes of determining the prevailing party, and is not properly before this court as part of the calculation in making that determination. The claim for interior damage occurring during the project due to a leak resulting from diffusion through the water shield was not disputed by Crow, was not at issue at trial and, moreover, is not a proper set-off against Crow’s claim on its contract. The amount claimed, and an agreement by the Thirys’ insurer to pay any future damages, was resolved by a stipulated

Order (CP 130-132) and the Court's Order Granting Partial Summary Judgment (CP 313-317). This issue was also the subject of the Court's Order on a Motion in *Limine* to exclude references to those claims. CP 490-491. Judge Lum had reserved this issue, and at trial Judge Fox ruled that testimony regarding interior water damage would be excluded. 9/22 RP 121-124 (see App. pp. 2-4, VI.4). No Finding or Conclusion made such an award. The Thirys' multiple attempts to add this to the net award to increase their set-off is completely improper.

It should also be noted that the attorney's fees and costs incurred by Crow in prosecuting their claim for payment on the contract are not included in the fees and costs incurred as a result of settling the claims for interior damage. That portion of the Thirys' claim was handled by counsel Gregory Turner and as noted herein was resolved prior to trial. CP 130-132; CP 313-317.

4. Crow is the prevailing party.

The trial court erred in determining that the Thirys were the prevailing party. Crow initiated this lawsuit to recover the amount owed on the contract; they recovered (or should recover) that amount less the amount the court set off for repairs, resulting in a significant net award in its favor. Under Washington case law, as

set out in Crow's initial brief, BA 42-43 (Moritzky v. Heberlein, 40 Wn. App. 181, 182, 697 P.2d. 1023 (1985)), Crow has the net affirmative judgment.

The Thirys argue that Crow "does not really have a net affirmative judgment, taking the \$45,000 settlement into account." BR 45. As stated above, this was not an issue at trial and is not a proper setoff against Crow's claim on its contract. At the close of trial, Crow was still owed the balance of its liquidated claim, \$40,343.83. The Court should not take the settlement amount into account in determining the prevailing party.

The Thirys argue that the Moritzky decision should not be applied where to do so would be unjust, citing the case of Marassi v. Lau, 71 Wn. App. 912, 916, 859 P.2d 605 (1993). The Thirys further argue that under the affirmative judgment rule, the Thirys could never be the prevailing party where their counterclaim would not exceed Crow's lien claim. BR 47. But using a similar analysis, an unpaid party to a valid contract could never be a prevailing party either, where the contract is not disputed. Using the Thirys' analysis, Crow could not prevail even if the Thirys were awarded a set-off of \$100 or no set off at all, since the amount owed on the contract was "not disputed." This is not the law.

The Thirys argue that the Moritzky case is distinguishable because the Heberleins paid the full contract price and their counterclaim was actually more than the lien amount, thus making it possible in that case that both parties had the possibility of prevailing. BR 46-47. The Thirys argue that if the affirmative judgment rule is applied, the Thirys would have been better off to pay Crow the unpaid amount. BR 47. In fact, had they done so, and then recovered on their claims for damages, they would then rightly be considered the prevailing party. However, they refused to pay Crow any of the amount due on the contract, gambling that the Court would award them the full amount due for repair or replacement.

Finally, the Thirys argue that the Marassi court formulated a new rule: That each party be “awarded fees on the claims upon which they prevailed” with an offset for those fees. Appellant disagrees with this reciting of the Marassi opinion. However, if this rule were applied, at the very least, then Crow should be awarded its fees attributable to its claim for the contract balance.

V. CONCLUSION

There was not substantial evidence to support the Court’s findings of liability or damages. In particular, there was not

sufficient evidence to support the award of \$57,000 for repairs. In addition, Crow is entitled to prejudgment interest on the offset balance of its claim. Finally, the Thirys were not the prevailing party. This Court should reverse the trial court and award Crow its contract amount, plus pre-judgment interest, offset by \$9,989, together with Crow's attorney's fees and costs at trial and on appeal.

DATED: December 24, 2009

Respectfully submitted,



Sandra Bates Gay, WSBA No. 4671
Attorney for Appellant
Crow Roofing & Sheet Metal, Inc.

Aw061\Crow Roofing\Julius Thiry\Appeal\Reply Brief

ⁱ Respondents' trial counsel, Mr. Singer, sent a letter to Judge Fox at the conclusion of trial stating again that the Thirys were seeking complete roof replacement. Unknown to Appellant, the letter and attached Proposed Findings and Conclusions, which reflected the same request for roof replacement, were not filed as part of the record. Crow has filed a Motion to Allow Additional Evidence on Review which is to be heard before the panel.

ⁱⁱ Apparently, Mr. Singer did not sign the filed copy. However, Mr. Singer sent to Sandra Gay, Crow's attorney, an Endorsement of Witnesses for Trial dated June 13, 2008, which contains the exact language regarding Mr. Westlake as is in the Joint Statement. Mr. Singer did not file this pleading with the Court and it is included in Crow's Second Motion to Allow Additional Evidence before this Court.

VI. APPENDIX

1. ***Carolyn Vares was not aware of Jorve's bid***

9/18

Vares Testimony:

76

7 Q. All right. Are you aware of other bids that
8 are done on a job, or does that come by your nose
9 at all?

10 A. No.

11 Q. You don't know where you stand with regard
12 to other companies that bid on jobs.

13 A. Not always, no.

14 Q. Did you on this one?

15 A. No.

16 Q. You didn't?

17 A. No.

18 Q. So you didn't know that you were \$50,000
19 under the lowest bidder?

20 A. No.

2. ***John Flanagan's testimony re. issues raised by Thirys***

9/23

Flanagan Testimony:

62

12 Q. How often was Dr. Thiry at the home during
13 this project?

14 A. To be honest, I tried to meet with him every
15 morning prior to him dropping his daughter off at
16 school and before he went off to work. This is in
17 case he had anything he wanted to bring to my
18 attention so that way I could try to address it as
19 the day went on and meet his needs.

83

23 MS. GAY:

24 Q. The question was, was there any complaint
25 made by Dr. Thiry to your recollection that was

84

1 not dealt with or remedied?

2 A. I stated to you --

3 THE COURT: I'll permit that question to
4 be asked.

5 THE WITNESS: I stated to you at the
6 beginning of this, I met each day -- or tried to
7 meet each day with Dr. Thiry. If there was
8 anything further that he needed -- and he gave me
9 an agenda on what was happening that day at his
10 house, whether I had to help with the dogs, to
11 keep the dogs back, I made sure I did absolutely
12 what I had to do to help him out.

13 When it came to the roof, anything that
14 he eliminated or added, I made sure that the
15 customer was right, and I took care of it.

3. *Delay in delivery of slate*

9/23

Flanagan Testimony

63

4 Q. After the roof was torn off, then did you
5 immediately start reinstalling the slate roof?

6 A. Oh, no. No.

7 Q. And why was that?

8 A. There was a back order on the slate. It
9 came from the East Coast. It's a mineral, so it's
10 not your typical roof. It's normally done on old
11 universities. There's downtown roofs that have it
12 on down here. It's not your normal, typical roof
13 that you can go to the store and say, "Hey, I want
14 to purchase this and deliver it here." It's not
15 like that.

4. *Property damage not issues before Court*

9/22

122

2 Q. Mrs. Thiry, can you give the judge some idea
3 of the shrubbery and plants that you did --

4 THE COURT: That is precisely what I
5 mean. This is what I mean. This is not an issue

6 in the case, is it?

7 MR. SINGER: We are asking for damages
8 for --

9 THE COURT: You are?

10 MR. SINGER: Yes, we are asking for
11 damages, yes, as part of the claim.

12 THE COURT: Why didn't Mr. Thiry testify
13 about this since he is here?

14 MR. SINGER: Because she knows about it.
15 I'm sorry.

16 MS. GAY: Your Honor, if it please the
17 Court, the motion for summary judgment that was
18 stipulated to states that the only issue remaining
19 for trial is the issue regarding damage of
20 defective roof. All of the personal property
21 damage, all of the nonitems are covered by the
22 agreement between the carriers to take place in
23 the future.

24 MR. SINGER: No, it's not.

25 THE COURT: Is that correct?

123

1 MR. SINGER: No it's not, Your Honor.

2 THE COURT: Let me see the order. We'll
3 delay this witness's testimony. Give me a copy of
4 the order.

5 THE WITNESS: I'm sorry, but I can't
6 hear all of that.

7 MR. SINGER: That's okay. We're just
8 having a --

9 THE COURT: You will have to wait until
10 I'm shown a court order.

11 Pass it up directly to me. It's a court
12 order and not an exhibit.

13 The order provided as follows -- this is
14 signed by Judge Lum on May 6, 2008: "Hereby
15 ordered that Crow Roofing and Sheet Metal's motion
16 for partial summary judgment is hereby granted;
17 and that all counterclaims for property damage and
18 resultant damage are dismissed with prejudice as
19 to Crow Roofing, but preserved as set forth below
20 as to other parties.

21 "The only issues remaining for trial
22 will be Crow Roofing and Sheet Metal's claim for
23 payment and/or lien foreclosure and the Thirys'
24 counterclaim for repair and/or replacement of the
25 roof itself. No claims for damage outside of the

124

1 roof itself remain for trial."

2 As a result, I'm going to sustain the
3 objection, and let's get to the roof issues.

5. Correction of "slant"

9/18

Mr. Thiry Testimony:

106

19 Q. Okay. All right. And you had a
20 conversation with Charlie about this problem?

21 A. Yes.

22 Q. And what was the result of the conversation?

23 A. At first he tried to convince me that I
24 don't -- you know, I'm not seeing it right and
25 it's a different angle, and then when they

107

1 remeasure, I guess, the roof, they had to take it
2 off. They had to go up almost to the top and then
3 redo it.

6. Angle not an issue before Court

9/23

34

6 THE COURT: Well, my understanding is
7 that -- from the testimony yesterday what I didn't
8 understand to be in dispute was that the angle of
9 the installation of the slate when the job was
10 begun was brought to the attention of Crow, and
11 that after some initial discussions, that Crow
12 remedied it --

13 THE WITNESS: No --

14 THE COURT: -- started the job all over
15 again. Now that's what I was told yesterday. Is

16 this something new?

17 MS. GAY: No, Your Honor. It was fixed.

18 THE COURT: Well, then why are we
19 talking about it? Because not only are you going
20 to bring it out on direct, but Mr. Singer will go
21 into it, and I've already ruled that it's done.
22 Judge Lum's order seemed very clear to me, the one
23 you showed yesterday, so I don't want to go into
24 the color of the tile, that's not involved, or the
25 angle before the job was essentially started over

35

1 again. I don't see how that's helpful to the
2 Court at all.

3 MR. SINGER: If I may, Your Honor, the
4 only reason why it is relevant in our opinion is
5 because they have indicated that Mr. Thiry ran
6 this job with an iron hand, and they were
7 suggesting that he had frivolously asked them to
8 remove parts of the roof and reinstall them, and
9 he did not.

10 THE COURT: This again may be very
11 satisfying to the parties because they can express
12 their hostility towards each other, but I am not
13 interested in it one bit because it is not an
14 issue in this lawsuit.

7. *Misleading statement re "staggered" tiles*

9.18

Given Testimony:

123

23 Q. Mr. Given, moving on, did you get an
24 opportunity to inspect the house and look at the
25 tile work on the hips and ridges?

124

1 A. Yes.

2 Q. And -- actually, I don't know if we should
3 start with the pictures and go to the subject, or
4 start with the subject and go to the pictures.
5 But let's see. With regard to the hips and
6 ridges, could you describe to the judge what those

7 are?

8 A. Sure. The ridge of a house is typically the
9 top horizontal line --

10 Q. Uh-huh?

11 A. -- the very peak of the house, that's
12 referred to as the ridge. The hips are similar to
13 the ridge in that they are, you know, a proud,
14 except they are typically sloped down a roof, the
15 opposite of a valley. A valley is indented.
16 That's a valley as it slopes down a roof --

17 Q. Uh-huh.

18 A. -- a hip slopes down the roof, but it's
19 shaped like a ridge, and it juts out versus in,
20 like a valley.

21 Q. All right. You took some closeup pictures.

22 MR. SINGER: Your Honor has all the
23 admitted pictures, and so we probably want to find
24 them for final argument.

25

125

1 BY MR. SINGER:

2 Q. But with regard to your report, did you take
3 several pictures of the -- those -- is it the hip
4 that comes all the way down to the corner?

5 A. Yes, that would be a hip.

6 Q. How was that tile work done in terms of your
7 opinion in terms of --

8 A. The tile work itself was not in a nice, neat
9 row --

10 Q. Yeah.

11 A. -- it's somewhat staggered.

8. Missing tiles

9/22

Given Testimony:

25

19 Q. Do you recall how many missing tiles you
20 might have seen during your reviews of this
21 premises?

22 A. I believe three or five are the numbers that
23 stick in my head.

9/18

132

- 1 A. Well, this is a photo I took where a tile
2 had actually fallen out.
3 Q. Um-hmm. And how many of those did you see?
4 A. As best I recall, there were maybe half a
5 dozen or so.

9. Total number of tiles

9.23

Wetherholt Testimony:

155

- 5 Q. Have you calculated how many tiles are
6 probably present on this roof?
7 A. Yes.
8 Q. What is that calculation?
9 A. Well, if you figure that there's roughly an
10 average of four tiles per square foot, and there's
11 roughly seven to eight thousand square feet we've
12 talked about, that calculates to somewhere between
13 twenty--eight and thirty--two thousand tiles -- if
14 I did the math right and got the zeros in the
15 right place.

10. Replacement of fallen tiles

9/22

Mrs. Thiry Testimony:

133

- 9 Q. All right. Now, Mrs. Thiry, did Crow
10 Roofing not send personnel out to the home to
11 replace tiles and make other repairs after
12 mid-December?
13 A. Yes.
14 Q. That was on two or three occasions, was it
15 not?
16 A. I believe so.
17 Q. All right. Do you know when that took
18 place?
19 A. I think -- it was after December. I'm not

20 quite sure. There was a big gap there, and then
21 they came back. I think it was after the
22 holidays. There might have been one in December
23 and then after the holidays, and they came down at
24 different times.

25 Q. Okay. And they did perform some of the
134

1 repairs or modifications then; is that correct?

2 A. As far as I know, they didn't do them all,
3 but they did the ones that came off at the time.

11. *Slate color not an issue before Court*

9/23

118

19 THE COURT: Let me just interrupt for a
20 moment since there was an objection to this
21 question. Is this at issue in this case? And I
22 have heard this testimony, and I have heard people
23 give their opinions as to the color, but why is
24 this pertinent if there's no claim for it.

25 MR. SINGER: Background -- well, the
119

1 only reason -- it's only a claim in the fact that
2 we didn't get what we contracted for. That's all.

3 THE COURT: Well, there has been an
4 indication that it has been accepted by parties,
5 so let's stay away from this issue. We are just
6 wasting time on it.

12. *Dismissal of interior damage issue*

9/22

Judge Fox:

123

13 The order provided as follows -- this is
14 signed by Judge Lum on May 6, 2008: "Hereby
15 ordered that Crow Roofing and Sheet Metal's motion
16 for partial summary judgment is hereby granted;
17 and that all counterclaims for property damage and
18 resultant damage are dismissed with prejudice as

19 to Crow Roofing, but preserved as set forth below
20 as to other parties.

13. Cause of undulation

9/22

Given Testimony:

96

18 Q. What did you determine was the cause for the
19 undulation?

20 A. The rafter tail which was out of plane with
21 the other rafter tails.

14. Thirys' perception of damages

9/22

Mrs. Thiry Testimony:

136

11 Q. Were there issues that were not resolved?

12 A. There were so many issues that were not
13 resolved. We kept waiting for the walk-through.
14 That was the whole thing, and that's what just was
15 left, and that was represented to us is that that
16 would happen. The biggest unending issue was that
17 at that point we didn't know that our homeowners
18 was going to take care of our interior damages,
19 so, of course, we were waiting to hear what Crow
20 had to say on that, and we heard nothing.

21 Q. Okay. Was there other stuff too?

22 A. The slate was falling off. There was
23 trickled -- I think that's what the flashing is,
24 the copper wrappings around the chimneys and so
25 forth were bent. There were waves of nails that

137

1 came out. I was collecting these nails that were
2 coming off. After a while, I stopped collecting
3 them because I just thought we would have pieces
4 around the roof, around the home -- remnants of
5 them hitting the ground, and this continued.

Mr. Thiry Testimony:

146

15 Q. Mr. Thiry, in your own words, would you tell
16 the Court your problems with this roof?

17 A. Well, first the flashing is not done
18 correctly. Mr. Given was saying it's already
19 coming away from the brick wall, which some of the
20 pictures indicated. It's further going to be
21 deteriorating.

22 Also, the slates are not being preselected.
23 You see one thick slate, one thin slate. They are
24 not fitting together correctly. Only standing up.
25 There is a space between the slate under it and

147

1 the top slate so there's moisture could get under
2 it; moss could get under it.

3 Next the tiles are nailed to each other.
4 They are not spaced correctly. Some of them are
5 very, very close, very tight; others are too far
6 away from each other.

7 In other words, the whole way the job is
8 done is poorly done. I never see this type of a
9 job in Europe or on this coast, and I do not
10 believe Europe is better than the United States,
11 but this is not the correct job.

12 Q. Did you try to convey this to Crow?

13 A. I told that to John.

14 Q. Did you get any results?

15 A. No. They were very accommodating. "Yes, we
16 will fix it, we will fix it," but they never fixed
17 anything.

18 Q. Is that about it?

19 A. Yes.

15. *Roof replacement*

9/18

184

9 MR. SINGER: Yes, Your Honor. I think
10 if we look at our original complaint, we talked
11 about replacing the roof, and we've talked about

12 replacing the roof on many occasions, Your Honor.
13 Your Honor –

9/23

10

19 MR. SINGER: Well, that's what I'm
20 trying to tell the Court. A conversation didn't
21 count, and that conversation didn't count, and
22 what I indicated to the Court was we had never
23 changed our opinion regarding the remedy that we
24 were asking; and that is that we would rather have
25 a new roof than have the repairs because of the

11

1 impending problems that are causing this entire
2 roof to disintegrate.

3 Mr. Givens was prepared to testify as to
4 that, and Your Honor had -- apparently was under
5 the impression that this was new news to counsel.
6 This was not -- not only in the new news, the only
7 reason that I reiterated it is because we had an
8 informal conversation where I said, "Well, I don't
9 know about a new roof." But the fact is, as
10 things unraveled and as time passed, we found out
11 a new roof would be mandatory.

16. Westlake's estimate

9/22

Given Testimony:

80

17 Q. Is it your understanding that his proposal
18 of \$50,000 is a fixed cost?

19 A. No. In fact, it states in here "Provide all
20 necessary labor, materials, and equipment to
21 repair the recently installed slate roof to
22 industry standards at cost plus 25 percent."

23 Q. And then on the second page, it says, "Above
24 work to be completed at cost plus 25,000,
25 approximately 50,000 plus tax," correct?

81

1 A. Correct.

17. Agreement re transition flashing

9/23

Trichler Testimony:

36

18 Q. Mr. Trichler, did you have any discussions
19 with either Mr. or Mrs. Thiry about transition
20 flashing around the house?

21 A. Yes, when the job started.

22 Q. Okay. That was at the beginning of the job?

23 A. Yeah.

24 Q. What was that discussion?

25 A. We went over a couple of different ways of

37

1 how we were going to do that where the pitches
2 change. We discussed the metal. Mr. Thiry told
3 me that the existing roof never had metal, and he
4 asked me how much it would be metal. I said
5 around the whole house. He didn't want that. So
6 we came -- we tried putting short courses in at
7 that point to show him what it would look like.
8 He didn't like that, so we came up with what we
9 came up with out of the slate, by putting in the
10 siding.

11 Q. And using beveled siding?

12 A. Uh-huh.

13 Q. Okay. Did you insert or assemble more than
14 one example for him to see for the transition
15 flashing?

16 A. We actually started doing that. We did it
17 three times right there at the beginning of the
18 job, right above the garage right where you are
19 saying the high rafter is.

20 Q. And his decision was what?

21 A. That we were going with the beveled siding
22 just the way it's done now.

Flanagan Testimony:

77

22 A. It was all aesthetics. He didn't want the
23 copper going around. I told him, "Hey, once this
24 copper ages, it blends in with the green." There

25 was nothing I could go from there. I was out of
78

1 the water there. I was blown out of the water.
2 So until there was something that was diagnosed,
3 like the beveled siding to bring it up gradual to
4 where it all tied in together, that's the way I
5 installed it.

6 Q. So you installed it with beveled siding?

7 A. Yes.

8 Q. Okay. Did you do that because of
9 Dr. Thiry's choice?

10 A. Yes.

18. *Bevel Siding acceptable method*

9/23

Wetherholt Testimony:

142

23 Q. Mr. Given's report noted that there was no
24 metal flashing at the points of changes in slope.
25 Is it your -- what is your understanding regarding

143

1 the requirement to put metal flashing in those
2 locations?

3 A. I'm assuming you are talking about where the
4 steeper slope meets the slightly lower slope.

5 What was installed was bevel siding in order to
6 provide a rounded transition base. That's
7 perfectly acceptable.

8 Q. Is there any requirement that it be
9 flashing -- metal flashing?

10 A. No. There is a requirement for flashing
11 depending on how you read the code, but that
12 flashing does not have to be metal.

156

13 Q. Mr. Givens testified that under the IRC code
14 Chapter 9, when there's a change in the slope,
15 there must be metal transition flashing. Do you
16 agree with that statement?

17 A. That's not what it says.

18 Q. What does the code say?
19 A. It says there has to be flashing.
20 Q. All right.

157

8 THE COURT: Where did this concept of
9 nonmetal flashing -- where is it used?
10 THE WITNESS: The term "flashing" is
11 used sort of generically, and you can have metal
12 flashing, which is easy and common, and in the
13 construction defect world, you have metal flashing
14 that goes over the window is the common one.
15 There is also flashing that is the
16 peel--and--stick variety that is behind that
17 flashing or laps over that flashing.
18 In this case, you can do the flashing
19 literally with the roofing material as it goes up
20 the wall or it goes up the pitch change just as
21 this probably originally had with the shakes. So
22 the idea is it is kind of a process as much as it
23 is a product. Does that make sense?
24 THE COURT: I think so. So in other
25 words, what you are saying is that the normal --

158

1 let's say the typical residential roof, which is
2 probably some kind of composition material, that
3 the roofing material itself has flashing and
4 overlaps and allows for the water run down onto
5 the next level and the next and the next and the
6 next without penetrating the roofing surface.
7 THE WITNESS: Correct. Say this were a
8 composition shingle roof. The chances of you
9 having metal flashing in that transition would be
10 very, very slim.
11 THE COURT: Because you wouldn't need
12 it.
13 THE WITNESS: Because you wouldn't need
14 it because the product itself will conform to that
15 shape. In this case, they added the bevel siding
16 piece to give it the rounded shape. That's one
17 way to do it.

18 THE COURT: All right.
19 THE WITNESS: Basically if you have a
20 sharp pitch change, and metal is one way of
21 flashing, but you can do it with the roofing the
22 way they did it.
23 THE COURT: Another way to do it, I take
24 it, when you have a change in the transition of a
25 roof surface, if you are using flashing would be
159
1 to use -- you could put metal in there and bend
2 the metal to conform to the curve; for example, if
3 you had a roofing material unlike slate that would
4 adapt itself to a curve.
5 THE WITNESS: Yeah.
6 THE COURT: Okay.
7 THE WITNESS: You could do it with
8 metal; you could do it like I said with
9 composition. You could do it with some types of
10 roll roofing.
11 THE COURT: Thank you.

19. Given does not have expertise in estimating
9/18

Given Testimony:

180

16 Q. Did you consult -- well, first of all, did
17 you have the ability to determine on your own what
18 would be a reasonable cost? Do you have that
19 background?
20 A. I have a background as a project manager and
21 estimator, but not for slate roofing.

20. Given relied solely on Westlake's estimate
9/22

Given Testimony:

81

24 A. Approximately \$50,000. I relied on
25 Mr. Westlake seeing he has been a roofing

82

1 contractor for many years and has performed
2 roofing repairs and new roof installations.

3 Q. Is it your understanding that by
4 approximately 50,000, it could be less than
5 50,000?

6 A. Yes. Just as well could be more than
7 50,000, yes.

8 Q. So as you sit here today, do you know how
9 much it would cost to repair this roof if every
10 single one of those items were done?

11 A. I rely on Mr. Westlake and he's
12 approximately \$50,000. I think if we go back, I
13 stated that I did not cost-estimate this. I
14 believe I stated that earlier. I did not
15 cost-estimate these repairs, and I relied upon
16 Mr. Westlake as a roofing contractor, estimating
17 contractor, to provide his estimate for the
18 repairs. That's why I relied upon that.

83

18 Q. All right. So is it your testimony that you
19 believe from the things that you have observed, if
20 we were to repair this roof, regarding the things
21 that needed to be repaired, it's 57,000 plus tax?

22 A. 57 plus tax and, again, I'm relying upon
23 Mr. Westlake's expertise in this industry and as a
24 contractor and estimator.

104

11 Q. So your opinion regarding the potential cost
12 is not as reflected in 40, but it is as reflected
13 in a subsequent report from Mr. Westlake; is that
14 correct?

15 A. Relying on Mr. Westlake as a contractor and
16 estimator, I'm relying on his numbers.

21. Westlake credentials

9/22

Given Testimony:

77

19 Q. Okay. And did you do any investigation as
20 to Mr. Westlake's credentials before either
21 requesting or accepting his opinion as to the cost
22 of repair?

23 A. I contacted a contractor who has used
24 Mr. Westlake before on several projects. I spoke
25 to Mr. Westlake. He told me that he had not only

78

1 estimated slate roofing projects, but had worked
2 on slate roofing projects as well.

3 Q. Do you know if Mr. Westlake had ever done
4 work on slate projects involving natural slate
5 versus manufactured slate?

6 A. No.

7 Q. Did you ask or do you know if he is a
8 registered contractor?

9 A. What do you mean by "registered contractor"?

10 Q. Registered under the statutes of Washington
11 to perform the functions and services of a
12 construction contractor. Do you know the status
13 of his registration?

14 THE COURT: Do you mean "licensed,"
15 Counsel?

16 MS. GAY: Licensed, correct.

17 BY MS. GAY:

18 Q. Is he a licensed contractor?

19 A. I don't recall if I asked him that question.

20 Q. So as you sit here today, you don't know if
21 he is a licensed contractor; is that correct?

22 A. Correct.

22. *Wetherholt experience in preparing cost analyses*

9/23

Wetherholt Testimony:

165

21 Q. Mr. Wetherholt, in the course of your
22 consulting, do you ever perform cost analysis on
23 particular jobs?

24 A. Yes.

25 Q. Do you do that type of service where there

1 are issues regarding requested or necessary
2 repairs to roofs?

3 A. Yes.

4 Q. Could you explain generally how you would go
5 about preparing a cost analysis?

6 A. Basically, you look at -- each one is a
7 little different, but you look at what the task
8 is, assign hours that you think that it is going
9 to take to do the work, multiply the hours by the
10 cost of the worker or the billing rate or the
11 worker.

12 And then you add materials involved. Then
13 you may add overhead and profit to that, and that
14 gives you the total pretty much by task. Then you
15 can add the tasks up.

23. No maintenance on roof since installation

9/22

Mr. Thiry Testimony:

14 Q. Have you done any maintenance on your roof
15 since the roof was installed in December of 2005?

16 A. No.

17 Q. You have not had it blown off?

18 A. I did not call anybody to do anything on the
19 roof, no, if that's your question.

20 Q. Okay. So in two years and nine months, have
21 you had anything done to correct the defects that
22 you are now claiming on this roof?

23 A. On the roof?

24 Q. Yes.

25 A. No, I didn't do anything.

5 Q. Dr. Thiry, did you want to make repairs on
6 your roof?

7 A. I want to what?

8 Q. Did you want to make repairs on your roof?

9 A. Yes, I do.
10 Q. But you did not?
11 A. I did not.
12 Q. All right. Why didn't you?
13 A. Well, because I was told not to because I
14 was in the middle of a lawsuit. That's the reason
15 why I didn't fix the inside of the house, either,
16 for two years.

17 MR. SINGER: I don't have any further
18 questions for this witness at this time, Your
19 Honor.

20 RECROSS-EXAMINATION

21 BY MS. GAY:

22 Q. Who told you not to have your house fixed or
23 repaired?

24 A. My counsel.

24. Claim for roof replacement not issue before Court

9/18

183

10 MS. GAY: In the course of the discovery
11 in this case, it had been made perfectly clear to
12 the plaintiffs that the Thirys were not requesting
13 a full replacement to this roof. All of the
14 discovery that has been proffered and exchanged
15 has to do with repair and repair cost. I was
16 informed by an email last week that the Thirys are
17 now seeking a full replacement of the roof.

18 I will present it in my
19 cross-examination of Mr. Given, but when I took
20 his deposition, the Court will see that he
21 responded that he --

22 THE COURT: When was the deposition
23 taken?

24 MS. GAY: His deposition was taken
25 August the 21st.

184

1 He did not feel that the roof needed to
2 be replaced. Now we are getting into a whole area
3 of testimony which we have not had an opportunity

4 to explore. It is an absolute reversal of the
5 defendants' position, and we came into court today
6 to deal with cost analysis of doing specific
7 repairs to the roof, if the Court should find --

8 THE COURT: Can I have your response.

9 MR. SINGER: Yes, Your Honor. I think
10 if we look at our original complaint, we talked
11 about replacing the roof, and we've talked about
12 replacing the roof on many occasions, Your Honor.
13 Your Honor --

14 MS. GAY: Will you speak up so I can
15 hear, please.

16 THE COURT: That's not the question
17 here. The question is -- the duty is to
18 supplement responses to discovery under
19 Rule 26(e).

20 MR. SINGER: We supplemented as best --
21 well, what specific question are you asking, Your
22 Honor?

23 THE COURT: Well, my understanding is
24 that what counsel has said is that during the
25 deposition of Mr. Given that there was no opinion

185

1 given with regard to the necessity to replace the
2 roof, that that was not an opinion that he
3 expressed.

4 MR. SINGER: Right.

5 THE COURT: And under Rule 26(e), "A
6 party who has responded to a request for discovery
7 with a response that was complete when made is
8 under no duty to supplement its response to
9 include information thereafter acquired except as
10 follows." And (1)(B) is "The identity of each
11 person expected to be called as an expert witness
12 at trial, the subject matter of which he is
13 expected to testify, and the substance of his
14 testimony."

15 Now, if he has testified in deposition
16 that -- and didn't indicate that he had an opinion
17 regarding the necessity for the roof and that that
18 had to be seasonably supplemented, then I have a

19 concern about the lateness of the deposition:
20 One, it was only taken a month ago, but also with
21 regard to when the supplementation --

22 MR. SINGER: Correct.

23 THE COURT: -- came about, whether
24 that's seasonable or not.

25 MR. SINGER: The lateness of the
186

1 deposition was because -- Mr. Given was not going
2 to be deposed by plaintiff until Mr. Given found a
3 roof leak. So the lateness of the deposition had
4 to do with a new issue that presented itself.
5 Otherwise, I don't think he was going to be
6 deposed at all.

7 In terms of our notification to counsel
8 in terms of our saying now we need a replacement,
9 that was directly -- we emailed counsel when we
10 found out --

11 THE COURT: When did you tell them this?

12 MR. SINGER: Oh, when was it?

13 MS. GAY: It was last week.

14 MR. SINGER: As soon as I found out.

15 THE COURT: Okay.

16 MR. SINGER: Because this stuff has
17 been -- see, this is the Thiry -- this stuff's
18 been around -- as time has marched on, Your Honor,
19 this stuff has been unraveling itself day by day.
20 It's now -- it's starting to show itself.

21 THE COURT: I'm going to sustain the
22 objection. Changing the damage request to --

23 MR. SINGER: We didn't.

24 THE COURT: -- to basically doubling of
25 it by the supplementation of an opinion a week

187

1 before trial is not sufficient.

FILED
JUL 25 2009
STATE OF WASHINGTON
11:28

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NO. 63173-0-1

CROW ROOFING & SHEET METAL, INC.

Appellant,

vs.

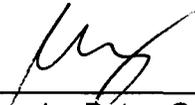
JULIUS THIRY and KATHERINE J. THIRY, et ux., et al.,

Respondents.

CERTIFICATE RE:

DECLARATION OF SERVICE: REPLY BRIEF OF APPELLANT;
APPELLANT'S MOTION TO FILE OVER-LENGTH REPLY BRIEF;
and APPELLANT'S SECOND MOTION TO ALLOW ADDITIONAL
EVIDENCE ON REVIEW.

SANDRA BATES GAY, of SANDRA BATES GAY, P.S. counsel for Appellant, certifies that Appellant's **DECLARATION OF SERVICE** in the form attached hereto was duly filed with the Clerk of Court of King County Superior Court, under Cause No. 06-2-29465-3SEA on the 24th day of December, 2009.



Sandra Bates Gay, WSBA NO. 4671
Sandra Bates Gay, P.S.
Attorney for Appellant
CROW ROOFING & SHEET METAL, INC.
10500 N.E. Eighth Street
Suite 1900
Bellevue, Washington 98004
(425) 637-3040

CERTIFICATE OF SERVICE

I, **ALICIA WILSON**, certify that on the 24th day of December, 2009, an original and a copy of the Reply Brief of Appellants; Appellant's Motion to File Over-Length Reply Brief; and Appellant's Second Motion to Allow Additional Evidence on Review was sent for filing with the Clerk of the Court of Appeals, Division 1, and a true and correct copy was served on the attorney of record for Respondents herein, via US Mail, First Class Postage Pre-paid, addressed to the following:

Charles K. Wiggins
Wiggins & Masters, PLLC
241 Madison Avenue North
Bainbridge Island, WA 98110

Court of Appeals
600 University St
One Union Square
Seattle, WA 98101-1176


ALICIA WILSON

Aw061\Crow Roofing\Thiry\Appeal\Cert Svc Reply