

No. 66375-5

**COURT OF APPEALS – DIVISION ONE
IN AND FOR THE STATE OF WASHINGTON**

MILLER ROOFING ENTERPRISES, INC.,

Appellant

v.

TIM McCLINCY, an individual, McCLINCY BROTHERS FLOOR
COVERINGS, INC., a Washington corporation dba McCLINCY'S
HOME DECORATING,

Respondent

APPELLANT'S REPLY BRIEF

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Appellant Miller Roofing Enterprises, Inc. (“Miller”) respectfully renews its request that the Court vacate the Findings of Fact and Conclusions of Law, dated November 22, 2010, and the Final Judgment, entered by the trial court on December 7, 2010. The Court should further enter an Order dismissing all claims against Miller with prejudice and award Miller its costs.

A. The Trial Court Erroneously Held Miller Liable As A Manufacturer.

i. Miller Was Not A Manufacturer Under Any Statutory Or Common Law Definition.

In their Answering Brief, Respondents Tim McClincy and McClincy Brother’s Floor Covering, Inc. d/b/a McClincy’s Home Decorating (“McClincy”) argue that *1519-1525 Lakeview Blvd. Condo. Ass’n v. Apartment Sales Corp.*, 144 Wn.2d 570, 29 P.3d 1249 (2001) does not apply to the instant matter. Tellingly, McClincy fails to include any substantive analysis to support this position. While it is true that the Court in *1519-1525 Lakeview Blvd. Condo. Ass’n* addressed the constitutionality of RCW 4.16.310, the builder’s limitation statute, the Court’s discussion in its opinion regarding the distinction between manufacturers and contractors is instructive.

As set forth in the Brief of Appellant, the Court in *1519-1525 Lakeview Blvd. Condo. Ass’n* cited existing caselaw for the proposition

that “rational distinctions exist between manufacturers and people who construct improvements upon real estate.” *Id.* at 578-579. Recognized distinctions between the two classes include the following:

(1) Manufacturers have liability under products liability law, an independent area of law separate from basic negligence or breach of contract, and this area of law has its own statutes of limitation, which are keyed to the useful life of the product. *1519-1525 Lakeview Blvd*, 144 Wn.2d at 579, *citing Condit v. Lewis*, 101 Wn.2d 106, 676 P.2d 466 (1984); RCW 7.72.060.

(2) Manufacturers produce standardized goods from pretested designs and in large quantities whereas contractors make a unique product designed to deal with the distinct needs of a particular piece of real estate. *1519-1525 Lakeview Blvd*, 144 Wn.2d at 579, *citing Blaske v. Smith & Entzeroth, Inc.*, 821 S.W. 2d 822, 830 (Mo. 1991); *Freezer Storage, Inc. v. Armstrong Cork Co.*, 476 Pa. 270, 277, 382 A.2d 715 (1978).

(3) Manufacturers produce their goods in a controlled environment whereas contractors build improvements upon real estate in an ever-changing environment. *1519-1525 Lakeview Blvd*, 144 Wn.2d at 579, *citing Blaske*, 821 S.W.2d at 830; *Freezer Storage*, 476 Pa. at 277.

(4) Manufacturers do not contribute to the structural aspects of real estate improvements; nor do they engage in any of the construction activities enumerated in RCW 4.16.310. *1519-1525 Lakeview Blvd*, 144 Wn.2d at 579, *citing Condit*, 101 Wn.2d at 110-11.

McClincy sets forth no rationale as to why this analysis would not

apply to the instant matter. Indeed, nothing in *1519-1525 Lakeview Blvd.* suggests that the Court intended its detailed discussion regarding the differences between manufacturers and contractors to apply in constitutional cases only.

McClincy spends a great deal of time discussing the particular means and methods utilized by Miller in constructing the torch down roof at the Project in an attempt to support its argument that Miller manufactured the torch down roof. Respondents' Answering Brief at pp. 20-22. However, the method by which Miller installed the roof does not render Miller a manufacturer under Washington law. It is unrefuted that the roof installed by Miller was not a standardized good generated from pretested designs and in large quantities. Rather, the roof installed by Miller was a unique product designed to deal with the distinct needs of the building owned by Tim McClincy. So too, the roof installed by Miller was not produced in a controlled environment such as a factory. To the contrary, Miller installed the components, which were manufactured by others, on site. McClincy's position that Miller served as a manufacturer is also belied by the fact that that the Court held Miller liable under a breach of contract theory, and not under the Washington Products Liability Act. CP 430. Were Miller properly characterized as a manufacturer, the Court should have found Miller liable under products

liability law and not under contract law.

McClincy also ignores the public policy impact implicit in its argument that Miller properly bears the liability of a manufacturer. In McClincy's view, all construction professionals assembling component parts, be they roofers, framers, siders or other installers, should bear the liability of a manufacturer. This argument blurs the distinction between products liability law and breach of contract law and significantly changes the nature and length of a construction professional's legal exposure.

Perhaps most importantly, however, Mr. McClincy himself admitted that Miller was not the manufacturer of the metal roof. At trial, Mr. McClincy testified as follows:

- Q. And you know the manufacturer of the roof?
A. I believe it's Champion.

October 12, 2010 RP, p. 33, lines 3-4. McClincy should be judicially estopped from now arguing that Miller manufactured the roofs when Mr. McClincy acknowledged at trial that an entity unrelated to Miller was the true manufacturer of the metal roof.

Finally, Miller agrees with McClincy that Miller's liability is not dependent on the WPLA or the UCC. Miller cited the definition of "manufacturer" under those statutory schemes simply to illustrate that under no common law or statutory definition can Miller be considered a

manufacturer of the roofing products at issue in this matter.

ii. Evidence Was Presented That McClincy Was To Look Elsewhere For Manufacturer Warranty Protection.

McClincy argues that Miller should bear the liability of a manufacturer because “there is no evidence that Miller intended that McClincy look elsewhere for warranty protection...” Respondents’ Answering Brief at p. 18. This is incorrect. In connection with repairs to the metal roof made by Miller in 2004 and 2005, a warranty claim was made and metal roofing manufacturer Champion Metal of Washington, Inc. (“Champion”) provided new roofing and coping metal which Miller installed in the same fashion and manner as the previous roofing. CP 47-48, ¶5. Neither Mr. McClincy nor McClincy Brothers Floor Covering, Inc. d/b/a McClincy’s Home Decorating were charged for the replacement of the metal roof, as it fell within Champion’s warranty. CP 48, ¶5. These facts are set forth in a Declaration signed under penalty of perjury by Mr. Miller as well as in Mr. Miller’s trial testimony, and are not controverted anywhere in the record. CP 47-48; October 18, 2010 RP, p. 78, lines 14-15. McClincy’s suggestion that there was no independent manufacturer’s warranty is belied by facts presented to the trial court. This is the case regardless of who made the warranty claim on behalf of McClincy.

McClincy also argues that, even if the Champion or GS Roofing Products Company, Inc. (“GS”) warranties applied, Miller’s “shoddy and substandard workmanship” would have invalidated the warranties. Respondents’ Answering Brief at p. 5. This is nothing but speculation. McClincy presented no evidence whatsoever to the trial court that GS or Champion in fact disclaimed any applicable warranties resulting from defective work on the part of Miller or from factors outside the scope of Miller’s work. To the contrary, as set forth, *supra*, Champion honored a warranty claim in connection with repairs to the metal roof made by Miller in 2004 and 2005.

Further, irrespective of whether the 12 year GS membrane warranty and the 50 year Champion warranty for metal roofing products applied in this particular case, the documents competently evidence the distinction between a manufacturer warranty and a labor warranty. Defendant’s Exhibit 23; Defendant’s Exhibit 24. McClincy’s own witnesses testified on this topic and agreed that a manufacturer warranty differs from a labor warranty. On October 12, 2010, Gerald Burke of Summit Construction and Roofing Company, a roofing expert retained on behalf of McClincy, testified as follows:

Q. Now, in addition to your labor warranty there’s also a manufacturer’s warranty?

A. Usually.

Q. That's from the manufacturer of the roofing material?

A. Yes.

October 12, 2010 RP, p. 193-94, lines 21-1. Richard Jackson of Joseph J. Jefferson & Sons, a cost estimating witness called by McClincy, also testified that a labor warranty is separate from a manufacturer's warranty:

Q. For your work, what kind of – I didn't see in your bid quote. Does it say anything about what kind of warranties you provide?

A. It does not say. I have a one-year warranty.

Q. Is that a labor warranty?

A. That's for my labor warranty, yeah.

Q. So it covers your workmanship for one year?

A. Correct.

Q. And does the manufacturer of the product also provide a warranty?

A. A manufacturer will supply some warranty for materials. Retrofit projects tend to be three-year material warranty.

Q. So if that material itself fails, the manufacturer will provide some coverage for it for three years?

A. They'll put something in their fine print.

October 13, 2010 RP, p. 39-40, lines 18-9. Contrary to McClincy's assertion, this testimony is directly relevant to the question of whether Miller should bear the liability of a manufacturer. Because Miller did not manufacture the roofs at issue in this matter, and because McClincy's own

witnesses conceded that a labor warranty is separate and distinct from a manufacturer's warranty, there was no basis for the trial court's ruling that Miller stepped into the role of manufacturer.

B. The Trial Court Erroneously Awarded Damages Arising Out Of Breach Of Miller's 1997 Contract For Roofing Work.

As set forth in the Brief of Appellant, on October 15, 2010 the trial court dismissed all breach of contract claims arising out of Miller's original work in 1997 and 1998, ruling that those claims were time barred by the six-year statute of repose governing construction defect claims. CP 358-359. Nevertheless, in the Conclusions of Law entered by the Court on November 22, 2010, the Court stated that

Miller Roofing breached the original contract with McClincy Brothers entered into June 16, 1997...

CP 454, ¶3. The Court thereafter awarded damages to McClincy "as a direct, foreseeable and proximate result of Miller Roofing's breach of the written and oral agreements..." *Id.*, ¶4. This directly conflicts with the law of the case, in which the Court stated as follows:

The court finds that the time limit on a claim for construction defect is governed by a statute of repose. In construction defect claims, RCW 4.16.310 is a statute of repose that terminates an action for construction defects that accrue six years from the time of substantial completion of construction or termination of services,

whichever is later. RCW 4.16.326(g) requires that construction defect claims be filed within six years of substantial completion of construction or termination of service regardless of when the claims were discovered.¹

CP 359. Miller's work arising out of its 1997 contract for work was completed in 1998. CP 27, line 5; CP 47, ¶3. Under RCW 4.16.326(g), the applicable contract statute of limitations expires, regardless of discovery, six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later. As such, all claims against Miller arising out of Miller's original work were barred in 2004, or six years after its work under the 1997 contract was completed. That the Court ultimately imposed any liability on Miller for breach of its 1997 contract was clear error.

C. The Trial Court Erroneously Held Miller Liable For Breach Of Oral Contracts For Work In 2005 And 2006, As Those Claims Were Barred By The Three Year Statute Of Limitations.

i. McClincy Was On Notice Of Roof Deficiencies In 2005 And 2006.

The only claims against Miller remaining as of October 15, 2010 were those arising out of any discrete work performed by Miller after

¹ McClincy did not appeal any portion of this ruling, including the applicability of RCW 4.16.326(g).

original construction, i.e. the limited repair work performed under oral agreements in 2005 and 2006. CP 374. Those claims are time barred.

First, McClincy argues that the Court properly found that McClincy did not discover the defects to the roof until November, 2007. This argument is refuted by evidence presented to the court at trial by Mr. McClincy himself. Mr. McClincy testified that he first noticed water intrusion along the east wall of the showroom in January, 2006. October 12, 2010 RP, p. 33, lines 17-21. According to Mr. McClincy, water was coming through the ceiling. *Id.*, p. 34, lines 16-17. Mr. McClincy estimated that 100 linear feet of interior space was affected. *Id.*, p. 34, lines 21-24. Miller performed \$489.60 in repair work in January, 2006. CP 17, lines 3-5; Plaintiffs' Exhibit 2. When leaks persisted, Mr. McClincy hired American Leak Detection Services to investigate further.² CP 424, ¶2.10. Doug Breshears of American Leak Detection Services performed inspections and water testing to determine potential causes of the water leaking into the building, and issued a report on April 3, 2006

² Mr. McClincy's expertise in water restoration no doubt aided him in his decision to hire an entity to investigate the roof further. Mr. McClincy is clearly unlike the "unsuspecting homeowners" contemplated in the *1000 Virginia* matter. *1000 Virginia*, 158 Wn.2d at 579. Rather, he is more similarly situated to the "sophisticated real estate developer whose agents were on the construction site daily with ample opportunity to inspect and review construction" discussed by this Division in the unpublished *Harbour Homes, Inc. v. America 1st Roofing & Builders, Inc.* case, Wash. Ct. App., Oct. 25, 2010.

documenting alleged problems with the roof, including voids at upper scupper/stucco transitions among other issues. October 12, 2010 RP, p. 101-102; Plaintiffs' Exhibit 12. Miller returned on June 3, 2006 to perform general maintenance and repairs to the lower torch down roof. CP 17, lines 6-9. The work was limited, as evidenced by the fact that Miller charged only \$870.40 for the work. Plaintiffs' Exhibit 2.

Given the evidence presented at trial by McClincy and its experts, McClincy cannot argue now in good faith that it did not have notice of the problems with the roof until November 2007. McClincy was aware of alleged roof deficiencies at the time Miller performed its limited repair work in 2005 and 2006. In light of these facts, the Court's finding, that

Plaintiffs could not reasonably have known of the precise nature and extent of the defective design and construction of the scuppers attached to the upper roof, and the lower torch down roof, the defects of the metal roof, the metal coping along the top of the parapets of the torch down roof and the defects in the surface of the lower torch down roof until late December 2009 or early January, 2010 when presented with a report from a roofing expert specifically identifying those design deficiencies and defects in workmanship as a proximate cause of water intrusion...

was clearly erroneous. CP 406, ¶2.14.

ii. The Discovery Rule Is Inapplicable In The Instant Matter.

Washington courts have consistently held that accrual of a contract action accrues upon breach. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 576, 146 P.3d 423 (2006). The exception to this rule is applied in the limited context of “actions on construction contracts involving allegations of latent construction defects.” *Kinney v. Cook*, 150 Wn. App. 187, 193, 208 P.3d 1 (2009), *quoting 1000 Virginia*, 158 Wn.2d at 590. The discovery rule applies only in cases of defects that the plaintiff “would be unable to detect at the time of breach.” *Id.* at 579. Importantly, the discovery rule requires that

when a plaintiff is placed on notice by some appreciable harm occasioned by another’s wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm. The plaintiff is charged with what a reasonable inquiry would have discovered.

Id. at 581. A plaintiff cannot ignore notice of possible defects. *Id.* If a plaintiff in a construction contract case inspects as construction proceeds, voluntarily or as a matter of contractual obligation, or is placed on inquiry notice of harm during construction, these facts will bear on whether the plaintiff should have discovered the cause of action. *Id.*

Where a plaintiff invokes the discovery rule to counter a statute of limitations defense, the plaintiff bears the burden to show that facts constituting the cause of action were not discovered or could not have been discovered by due diligence earlier. *G.W. Constr. Corp. v. Prof'l Serv. Indus., Inc.*, 70 Wn. App. 360, 367, 853 P.2d 484 (1993); accord *Giraud v. Quincy Farm & Chem.*, 102 Wn. App. 443, 449, 6 P.3d 104 (2000) (emphasis added).

Here, McClincy was aware of alleged defects in the roof in 2005 and 2006. Even if McClincy was unaware of the extent of the problems with the roof, it was placed on inquiry notice of harm in 2005 and 2006. At that point, McClincy was obligated to investigate further. Mr. McClincy, particularly given his occupation as a water restoration specialist, cannot avail himself of the discovery rule in these particular circumstances.

iii. Claims Against Miller For Work In 2005 And 2006 Are Time Barred.

Because the discovery rule does not apply, any action based on the 2005 repairs to the metal roof would have been barred in 2008. Any action based on the January, 2006 repair work would have been barred by January, 2009, and any action based on the June 3, 2006 repair/maintenance would have been barred by June 3, 2009.

Although McClincy filed this action on February 5, 2009, it did not serve Miller until Miller's attorney accepted service on June 25, 2009. CP 83. Pursuant to RCW 4.16.170, service must occur within 90 days of the filing of the complaint. That was not done so here. As such, the action was not timely commenced under RCW 4.16.170, and all claims arising out of Miller's work in 2005 and 2006 should have been dismissed.

Miller does not challenge sufficiency of process as McClincy discusses in its Answering Brief at length. The issue here is that McClincy failed to properly commence this action in a timely manner. Although counsel for Miller ultimately accepted service, it never waived the position that service was untimely. In fact, counsel for Miller expressly preserved this position in its Acceptance of Service. CP 177.

The Acceptance of Service states as follows:

The undersigned hereby accepts original service of process of the summons and complaint in the above-captioned case for the defendant, MILLER ROOFING ENTERPRISES, INC., a Washington Corporation. Reserving all rights and affirmative defenses including statute of limitations, statute of repose and failure to timely commence this lawsuit.

Id. (Emphasis in original).

The cases cited by McClincy in an effort to prove that Miller waived its defense of untimely service are limited to their facts and do not

support McClincy's argument. In *Blankenship v. Kaldor*, 114 Wn. App. 312, 57 P.3d 295 (2002) and *Lyddert v. Grants County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000), the court addressed the issue of insufficiency of service (which is not disputed here) as opposed to untimely service (which is disputed). Their holdings are thus inapplicable to the instant matter. Although the Court in those cases found that the defendants waived insufficiency of service as a defense by engaging in extensive discovery in the absence of having asserted any such defense, McClincy has presented no evidence that Miller's conduct rises to the level of a waiver of its timeliness defense. To the contrary, unlike in *Blankenship*, McClincy, Miller's counsel executed the Acceptance of Service, with express language preserving timeliness of service as a defense, prior to taking depositions. CP 139, ¶10; CP 177.

So too, despite McClincy's suggestion, there is not one iota of evidence that Miller deliberately attempted to avoid service of process. The fact that McClincy's process server unsuccessfully attempted service four times, with nothing more, does not prove that Miller somehow tried to evade service. The fact is, McClincy could have timely served Miller in any number of ways, including, for example, through the Washington Secretary of State. For reasons that remain unclear, McClincy simply chose not to do so.

D. Plaintiff McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating Failed To State A Claim Upon Which Relief Can Be Granted.

The fact that Miller erroneously identified "McClincy Brothers Floor Covering, Inc." as the party with whom Miller contracted in its proposed Findings of Fact and Conclusions of Law (which were not entered by the Court) does not change the nature of the relationship between the parties. Judgment was not properly entered in favor of McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating, as the evidence presented at trial does not support the contention that McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating contracted with Miller. Specifically, the trial court erred in awarding Defendant McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating \$730,436 in business interruption losses resulting from Miller's alleged breach of contract as well as other damages.

Miller's original agreement for work in 1997 was between Miller and Tim McClincy only. CP 50; Plaintiff's Ex. 1. Regardless to whom invoices issued after the work were directed, it is undisputed that the June 16, 1997 Proposal is directed to Tim McClincy personally. *Id.* Mr. McClincy was not invoiced for repair work in 2005, as that work was performed under a warranty issued by Champion, the manufacturer of the

metal roof. However, with respect to Miller's January 2006 and June 2006 repair work, Miller's invoices are directed to Mr. McClincy personally at a Maple Valley address which is not the location of the Project. CP 52; CP 54. These are the only written documents memorializing Miller's subsequent work at the Project.

To maintain an action for breach of contract a party must have privity. *See Lobak Partitions, Inc. v. Atlas Constr. Co. Inc.*, 50 Wn.App 493, 497, 749 P.2d 716 (1988). A stranger to a contract may not sue. *Id.* Privity is defined as "the relationship between parties to a contract, allowing them to sue each other but preventing a third-party from doing so." Black's Law Dictionary 1217 (7th Ed. 1999). A third party may enforce a contract to which he is not in privity only if the contracting parties intended to secure him personally the benefits of the provisions of the contract. *Lobak*, 50 Wn. App. at 497.

Here, Plaintiff McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating lacks contractual privity with Miller. McClincy presented no evidence at trial that Miller intended that McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating was to benefit from the contract. Accordingly, McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating's breach of contract claim fails on its face. Under CR 12(b)(6), Plaintiff

McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating failed to state a claim upon which relief could be granted, and the trial court erroneously awarded breach of contract damages to Plaintiff McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating.

E. Conclusion.

For the above stated reasons, Miller respectfully requests that the Court vacate the Findings of Fact and Conclusions of Law, dated November 22, 2010, and the Final Judgment, entered December 7, 2010. The Court should further enter an Order dismissing all claims against Miller with prejudice.

DATED this 6th day of July, 2011.

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Respondent

CERTIFICATE OF SERVICE FOR APPELLANT'S REPLY BRIEF

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CERTIFICATE OF SERVICE

I, Audrey M. Alonso, am over the age of 18 years and certify under penalty of perjury under the laws of the State of Washington, that I caused to be served on the persons listed below, in the manner shown, the following documents:

1. APPELLANT'S REPLY BRIEF
2. CERTIFICATE OF SERVICE

I caused to be served the above identified documents, on this day, July 6, 2011, via ABC legal messenger for personal delivery to the following:

Counsel for McClincy
Eric Zobel, WSBA # 33961
Eric Zobel, PC
800 5th Ave., Suite 4100
Seattle, WA 98104

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 6th day of July, 2011.

JAGER LAW OFFICE PLLC

By: 
Audrey Alonso, Legal Assistant