

66375-5

66375-5

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

BRIEF OF APPELLANT

STEVEN J. JAGER, WSBA #10942
MARNIE H. SILVER, WSBA #34002
Attorneys for Appellant
JAGER LAW OFFICE PLLC
600 Stewart Street, Suite 1100
Seattle, WA 98101
(206) 441-9710

16

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR.....	1
III. STATEMENT OF THE CASE	2
A. Relevant Background	2
i. Miller's Roofing Work Performed In 1997	2
ii. The Metal Roofing Work Performed In 2005.....	4
iii. The Lower Torch Down Work Performed In January, 2006.....	5
iv. The Repair Work Performed In June, 2006.....	6
B. Relevant Procedural History.....	7
i. Plaintiffs Served Miller With The Summons And Complaint More Than Four Months After Filing The Summons And Complaint	7
ii. Plaintiffs' Amended Complaint.	8
iii. At First, The Trial Court Denied Miller's Motion for Summary Judgment.....	8
iv. The Court Subsequently Dismissed Breach Of Contract Claims Arising Out Of Original Construction Work In 1997 And 1998.	9
v. The Findings Of Fact And Conclusions Of Law Ultimately Entered By The Trial Court Are Inconsistent With The Trial Court's Earlier Dismissal Of Breach Of Contract Claims Arising Out Of Original Construction.....	10

IV. ARGUMENT	11
A. Standard Of Review.....	11
B. The Trial Court Erred In Finding Miller Liable As A Manufacturer.....	11
i. Washington Common Law Distinguishes Between Manufacturers And Those Who Construct Improvements Upon Real Estate.....	12
ii. Miller Was Not A Manufacturer Under The WPLA.....	14
iii. Miller, A Laborer, Did Not Impliedly Warrant Its Work Under The UCC.....	15
iv. The Evidence Presented At Trial Squarely Refutes The Proposition That Miller Was A Manufacturer Or That Miller Warranted The Roofs As Manufacturer.	16
v. The Court Awarded Damages Based On The Erroneous Conclusion That Miller Stepped Into The Role Of Manufacturer.	19
C. The Court Erred In Awarding Damages Arising Out Of Miller's Work In 2006, As Those Claims Were Time Barred.....	21
i. Plaintiffs Failed To Commence This Action Within The Applicable Statute Of Limitations.....	22
ii. Plaintiffs Cannot Rely On The "Discovery Rule" To Delay Accrual Of Their Causes of Action.	24
i. Plaintiffs Failed To Commence This Action Within The Applicable Statute Of Limitations.....	22

D.	Claims Asserted By Plaintiff McClincy Brothers Floor Covering, Inc. d/b/a McClincy Home Decorating Should Be Dismissed Because McClincy Brothers Floor Covering, Inc. d/b/a McClincy Home Decorating Has Failed To State A Claim On Which Relief Can Be Granted	26
i.	Miller's 1997/1998 Work Was Performed Pursuant To An Agreement With Tim McClincy, Not McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating	27
ii.	Similarly, Miller's 2005 and 2006 Work Was Performed Pursuant To An Oral Agreement With Tim McClincy.....	28
iii.	Plaintiff McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating Lacks Privity With Miller.....	29
V.	CONCLUSION.....	30

TABLE OF AUTHORITIES

Cases

<i>1000 Virginia Ltd. P'ship v. Vertecs Corp.</i> , 158 Wn.2d 566, 146 P.3d 426 (2006)	22, 24
<i>1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.</i> , 144 Wn.2d 570, 579, 29 P.3d 1249 (2001).....	12, 13
<i>Arango Constr. Co. v. Success Roofing</i> , 46 Wn. App. 314, 730 P.2d 720 (1986).....	15
<i>Architechtonics Construction Management, Inc. v. Khorram</i> , 111 Wn. App. 725, 45 P.3d 1142 (2002).....	24
<i>Blaske v. Smith & Entzeroth, Inc.</i> , 821 S.W. 2d 822 (Mo. 1991).....	12, 13
<i>Clayton v. Wilson</i> , 168 Wn.2d 57, 227 P.3d 278.....	11
<i>Condit v. Lewis Refrigeration Co.</i> , 101 Wn.2d 106, 676 P.2d 466 (1984)	12, 13
<i>Freezer Storage, Inc. v. Armstrong Cork Co.</i> , 476 Pa. 270, 382 A.2d 715 (1978)	12, 13
<i>Gerean v. Martin-Joven</i> , 108 Wn. App. 963,33 P.3d 427 (2001)	21
<i>Graham v. Concord Constr., Inc.</i> , 100 Wn. App. 851, 999 P.2d 1264 (2000)	14, 15
<i>Kinney v. Cook</i> , 150 Wn. App. 187, 193, 208 P.3d 1 (2009)	24
<i>Lien v. Barnett</i> , 58 Wn. App. 680, 794 P.2d 865 (1990).....	27
<i>Lobak Partitions, Inc. v. Atlas Constr. Co., Inc.</i> , 50 Wn. App. 493, 749 P.2d 716 (1988)	29
<i>Rottinghaus v. Howell</i> , 35 Wn. Ap. 99, 666 P.2d 899 (1983).....	25

<i>Taylor v. Puget Sound Power & Light Co.</i> , 64 Wn.2d 534, 392 P.2d 802 (1964)	22
<i>Unisys Corp. v. Senn</i> , 99 Wn. App. 391, 994 P.2d 244 (2000)	19
<i>Urban Development, Inc. v. Evergreen Building Products, LLC</i> , 114 Wn. App. 639, 652, 59 P.3d 112 (2002).....	22
<i>Vigil v. Spokane County</i> , 42 Wn. App. 796, 714 P.2d 692 (1986)	22
<i>Wright v. Safeco Ins. Co. of Am.</i> , 124 Wn. App. 263, 109 P.3d 1 (2004).....	25

Statutes

RCW 4.16.005	22
RCW 4.16.080	23
RCW 4.16.170	21, 24
RCW 4.16.310	13, 14
RCW 4.16.326	19
RCW 7.72.010	14
RCW 7.72.060	12
RCW 62A.2-102.....	15

Rules

RAP 2.2(a)(1)	11
RAP 2.2(a)(2).	11
RAP 2.5(a)(2)	26

Other Authorities

25 Wash. Prac., Contract Law & Practice, §16:17 (2009)
.....25

Appendices

Appendix A – Defendant’s Proposed Findings of Fact and Conclusions of
Law

I. INTRODUCTION

Appellant herein is Miller Roofing Enterprises, Inc. (“Miller”), the Defendant in the underlying action. By way of this appeal, Miller respectfully requests that the Court vacate the Findings of Fact and Conclusions of Law, entered November 22, 2010, and the Final Judgment, entered December 7, 2010. Miller further requests that the Court enter an Order dismissing all claims against Miller with prejudice.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that Miller was liable to Plaintiffs as the manufacturer of Plaintiffs’ torch down roof and in finding that Miller warranted the torch down roof against manufacturing defects for a period of 12 years and the metal roofs, together with the metal coping over the parapet walls, for 50 years.

2. The trial court erred in finding Miller liable for breach of oral contracts for repair work in 2006, as those claims were barred by the three year statute of limitations governing oral contracts.

3. The trial court erred in awarding damages to Plaintiff McClincy Brothers Floor Covering, Inc. d/b/a McClincy’s Home Decorating, as Miller’s agreement for construction work was with Plaintiff Tim McClincy. Plaintiff McClincy Brothers Floor Covering, Inc. d/b/a McClincy’s Home Decorating failed to state a claim upon which relief can

be granted.

III. STATEMENT OF THE CASE

A. Relevant Background.

i. **Miller's Roofing Work Performed In 1997.**

Respondent McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating, a water damage restoration specialist, leases a commercial building located at 4604 NE 4th Street, Renton, Washington. Clerk's Papers ("CP") 16, ¶3.1; Defendant's Ex. 34; October 13, 2010 Verbatim Report of Proceedings ("RP"), p. 83, lines 5-10. The commercial building is owned by Respondent Tim McClincy. CP 16, ¶3.1. The commercial building consists of three levels, the first of which is the main showroom from which McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating conducts its retail business and its administrative offices which are adjacent thereto. CP 427, ¶2.19. Below the main level is a fabrication facility at which McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating fabricates marble, granite and related composite materials for residential remodeling. *Id.* Located directly above the showroom are three residential apartment units. *Id.*

On or about June 16, 1997, Miller provided Tim McClincy with a proposal for the replacement of three roofs as a part of a substantial

remodel of the commercial building. CP 50; Plaintiffs' Ex. 1. The renovations included an addition to the existing commercial space, construction of the residential apartments, and reconstruction of the exterior shell of the building. CP 59, pp. 12-14. Those renovations were performed by others. CP 59, p. 15, lines 11-17; CP 60, p. 21, lines 21-24.

Miller's Proposal, which is addressed to "Tim McClincy," stated in relevant part as follows:

Roof guaranteed 5 years labor and 12 year
manufacture on Torch down and 50 year
manufacture warranty [sic] on metal.

CP 50; Plaintiffs' Ex. 1.

Miller thereafter installed torch down flat roofs over the showroom ("lower torch down roof") and the apartments ("upper torch down roof") and a metal steep slope roof over a small section of the building ("metal roof"). CP 26-27.

As part of its work on both torch down roofs, Miller (1) placed a fiberglass membrane over plywood sheathing installed by others, (2) fit and secured the torchdown component by melting it over the membrane, and (3) painted the torch down with a reflective coating after it had been allowed to dry. CP 275, pp. 22-24; October 18, 2010 RP, pp. 66-73. In other words, Miller joined typical roofing products that were already completed by other product manufacturers.

Miller's work began in 1997 and was completed in 1998. CP 27, line 5; CP 47, ¶3. After Miller performed its work, Mr. McClincy retained a separate trade to install siding which transitioned with Miller's roofing work. CP 47, ¶4; CP 60, p. 22, lines 3-5; October 13, 2010 RP, p. 88. There was no siding installed at the time that Miller performed its work. October 12, 2010 RP, p. 21, lines 17-19. This later work was or should have been integrated after Miller had completed its work by Mr. McClincy or his designated trade contractors.

ii. The Metal Roofing Work Performed In 2005.

In 2004, Mr. McClincy notified Miller that some areas of the metal roof were oxidizing or discoloring in locations where Miller had used touch up paint supplied by metal roofing manufacturer Champion Metal of Washington, Inc. ("Champion"). CP 47, ¶5. A warranty claim was made and Champion provided new metal roofing and coping metal which Miller installed in 2004/2005 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. Champion was a separate company and a component part manufacturer. Defendant's Ex. 24.

The work was completed to the satisfaction of Mr. McClincy.

October 12, 2010 RP, p. 32, lines 13-14.

iii. The Lower Torchdown Repair Work Performed In January, 2006.

In January, 2006, more than seven years after Miller's original work was completed, Mr. McClincy noted water leaking into the showroom that Mr. McClincy believed was coming from the lower roof installed by Miller in 1997 and 1998. CP 61. Miller returned to the property and found no leaks through the roofing itself. CP 48. Instead, Miller noted that the siding installed by another trade had not been installed with the proper overlap and that water was coming in at the transition between the stucco and the roof and roof scuppers. *Id.* Miller applied caulk to areas where it identified leaking due to improper transitioning between the stucco and roof and roof scuppers. CP 48; CP 52. Miller informed McClincy that the repairs would temporarily remediate the problem but that McClincy would need to address the issues with the stucco in order to prevent further intrusion. CP 48; CP 279, p. 38, lines 13-15. Miller also attempted to patch a small area for which Miller billed Tim McClincy \$489.60. CP 52. Miller was paid for this work. CP 423, ¶2.9. The invoice, which is the only evidence of what work was performed by Miller in 2006, clearly stated that water had been leaking not as a result of the roofing, but as a result of the stucco. CP 52.

iv. The Repair Work Performed In June, 2006.

Sometime after Miller's work in January, 2006, Mr. McClincy experienced another leak, this time along the eastern wall of the showroom primarily in the southeast corner below the scupper. CP 74, ¶3.6; CP 424, ¶2.10. Concerned about problems with the roof, Mr. McClincy retained American Leak Detection Services to investigate. 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. October 12, 2010 RP, p. 101-102.

Mr. Breshears prepared a report dated April 3, 2006 documenting his findings. CP 95-96. Mr. Breshears' report identified water leaking into the building at the two scuppers on the eastern wall. *Id.* The report identified specific locations along the exterior eastern wall of the showroom where Mr. Breshears found cracks and voids which were potentially causing water damage. *Id.* The report contained photographs documenting the cracks and recommended "sealing void areas identified at both front and middle scuppers. Interior leak areas should be monitored for additional leaks prior to drywall ceiling repair." *Id.*

Subsequently, Mr. McClincy provided the American Leak Detection Report to Miller. CP 279, p. 39, lines 5-7. Miller thereafter performed certain roof maintenance, including coating the metal roof,

repairing the torch down roof as needed, resealing scuppers as needed, re-caulking scuppers on outside walls to stucco and checking stucco walls and caulking as needed. CP 54. Miller did not replace scuppers, investigate additional areas of the roof or repair or replace any other aspect of the building. *Id.* Miller issued an \$870.40 invoice for its work on June 3, 2006. CP 54. Miller was paid for this work. CP 280, p. 41, lines 1-4; October 19, 2010 RP, p. 93. This is the only written documentation of the work Miller performed in June, 2006.

B. Relevant Procedural History.

i. Plaintiffs Served Miller With The Summons And Complaint More Than Four Months After Filing The Summons And Complaint.

Plaintiffs filed suit against Miller on February 5, 2009, asserting several causes of action arising out of allegedly defective torch down roofing work. CP 4-9. Plaintiffs failed to serve Miller with the Summons and Complaint until June 25, 2009 when Miller's counsel accepted service of the Summons and Complaint. CP 83. In accepting service of the Summons and Complaint, Miller's counsel expressly reserved all rights and affirmative defenses, including statute of limitations, statute of repose, and failure to timely commence the lawsuit. *Id.*

ii. Plaintiffs' Amended Complaint.

In January, 2010, McClincy retained expert Gerald Burke of Summit Construction and Roofing Company. CP 101. Over just a few hours, Mr. Burke performed a visual inspection of the building using passive moisture meters and no intrusive investigation beyond an invasive moisture meter stuck directly into materials tested. CP 209, ¶3; CP 214-247. In his January 18, 2010 report, Mr. Burke characterized the alleged defects in the roof installation and roof flashing as “numerous” and “very visible” and, as such, opined that destructive testing would not be necessary. CP 247. Based upon Mr. Burke’s report of January 18, 2010, McClincy amended its Complaint, adding new claims related to the metal roof, fastening of the parapet cap, and a variety of other alleged roofing defects. CP 15-24.

The Amended Complaint was filed on April 6, 2010. CP 15. Miller was served with the Amended Complaint on April 8, 2010. CP 188.

iii. At First, The Trial Court Denied Miller’s Motion For Summary Judgment.

On or about April 16, 2010, Miller moved for summary judgment dismissal of all claims against Miller. CP 25-46. Miller argued that all claims against Miller arising out of the original installation of the roofs in

1997-1998 were barred by the six year statute of repose governing construction claims, RCW 4.16.326(g). *Id.* Miller further argued that all claims arising out of Miller's 2005 warranty work and 2006 repairs were barred by the three year statute of limitations applicable to oral contracts.¹

Id.

After considering the pleadings and hearing oral argument on the motion, the Court denied the motion. CP 301-302. The May 21, 2010 Order Denying Defendant's Motion for Summary Judgment does not set forth the basis for the ruling. *Id.*

iv. The Court Subsequently Dismissed Breach Of Contract Claims Arising Out Of Original Construction Work In 1997 And 1998.

Trial in this matter was heard without a jury on October 12, 2010, October 13, 2010; October 14, 2010; October 18, 2010; and October 21, 2010. Midway through trial, Miller renewed its request that all claims arising out of original construction work in 1997 and 1998 be dismissed. October 14, 2010 RP, pp. 33-60. The Court ruled that breach of contract

¹ Miller also argued in its Motion for Summary Judgment that claims against Miller for negligent construction, negligent design, implied warranty, fraudulent concealment and violations of the WPLA should be dismissed. CP 37-45. Because the Court ultimately made no findings as to these claims, CP 430, Miller will not address them again here. To the extent that Plaintiffs argue that these claims should somehow be sustained, Miller incorporates by reference as if set forth fully herein the arguments contained in its Motion for Summary Judgment on these issues and reserves the right to address the issues further in Miller's Reply. CP 37-45.

claims arising out of Miller's work in 1997 and 1998 were time barred by RCW 4.16.326(g), the six-year statute of repose governing construction defect claims. CP 358-359. However, the Court indicated in its October 15, 2010 Order Granting Dismissal that it would reconsider McClincy's claim that Miller stepped into the role of manufacturer for the torch down roof upon a showing within the record presented to the Court in trial. CP 359.

v. The Findings Of Fact And Conclusions Of Law Ultimately Entered By The Trial Court Are Inconsistent With The Trial Court's Earlier Dismissal Of Breach Of Contract Claims Arising Out Of Original Construction.

After trial concluded, the parties submitted for the trial court's consideration proposed Findings of Fact and Conclusions of Law. CP 400-412; Defendant's Proposed Findings of Fact and Conclusions of Law, attached hereto as Appendix A with prior permission from Court. The trial court entered Plaintiffs' proposed Findings of Fact and Conclusions of Law with no modifications to Plaintiffs' proposed language. The Conclusions of Law entered by the Court state, in relevant part, as follows:

2. There was a valid and binding contract between the parties entered into on June 16, 1997. Miller Roofing manufactured the torch down roof and warranted the torch down roof, together with the metal coping over the parapet walls, for 50 years.

3. Miller Roofing breached the original contract with McClincy Brothers entered into June 16, 1997 and the subsequent oral agreements entered into in January and June, 2006.
4. As a direct, foreseeable and proximate result of Miller Roofing's breach of the written and oral agreements, Tim McClincy has suffered damages in the sum of \$13,740 and McClincy Brothers has suffered damages in the amount of \$1,373,708.58.

CP 430. Based on the Findings of Fact and Conclusions of Law, the trial court thereafter entered Final Judgment against Miller in the amount of \$1,388,193.59. CP 436-437.

IV. ARGUMENT

A. Standard Of Review.

RAP 2.2(a)(2) permits appeals of any written decision affecting a substantial right in a civil case which in effect determines the action and prevents a final judgment or discontinues the action. Appeals of final judgments are authorized by RAP 2.2(a)(1). The Court of Appeals reviews conclusions of law under a *de novo* standard. *Clayton v. Wilson*, 168 Wn.2d 57, 62, 227 P.3d 278 (2010).

B. The Trial Court Erred In Finding Miller Liable As A Manufacturer.

Miller 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, as there is no basis in Washington law for holding Miller liable as a manufacturer of the roofs at issue in this litigation.

i. Washington Common Law Distinguishes Between Manufacturers And Those Who Construct Improvements Upon Real Estate.

Rational distinctions exist between manufacturers and people who construct improvements upon real estate. *1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.*, 144 Wn.2d 570, 579, 29 P.3d 1249 (2001), citing *Condit v. Lewis Refrigeration Co.*, 101 Wn.2d 106, 110-11, 676 P.2d 466 (1984). Recognized rational distinctions between these 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*, 101 Wn.2d at 112; 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.

Here, Miller did not produce standardized goods from pretested designs and in large quantities. Rather, Miller constructed roofs specific to Mr. McClincy's building. Further, Miller did not construct the roofs in a controlled environment. Instead, Miller installed the roof at the construction site. Finally, Miller's work contributed to the structural aspects of Mr. McClincy's building and falls squarely within the scope of RCW 4.16.310, which applies to those persons

having constructed, altered or repaired any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property.

RCW 4.16.300. As such, the trial court erred in finding that Miller was the manufacturer of the torch down roof and that Miller warranted the roofs as a manufacturer.

ii. Miller Was Not A Manufacturer Under The WPLA.

Miller was not a “manufacturer” as it is defined under the Washington Product Liability Act. RCW 7.72.010(2) defines a manufacturer as

A product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer. The term also includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer.

The WPLA defines “product seller” as

... any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor, or retailer of the relevant product. The term also includes a party who is in the business of leasing or bailing such products ...

The term “product seller” does not include a provider of professional services who utilizes or sells products within the legally authorized scope of the professional practice of the provider. RCW 7.72.010(1)(b). Construction services are not products for purposes of the WPLA. *Graham v. Concord Constr., Inc.*, 100 Wn. App. 851, 856, 999

P.2d 1264 (2000). A product must be produced for introduction into trade or commerce for purposes of the WPLA. *Id.*

As part of its work on the torch down roof, Miller (1) placed a fiberglass membrane over plywood sheathing installed by others, (2) fit and secured the torchdown component by melting it over the membrane, and (3) painted the torch down with a reflective coating after it had been allowed to dry. CP 275, pp. 22-24; October 18, 2010 RP, pp. 66-73. Under the plain language of the WPLA, Miller did not “design, produce, make, fabricate, construct, or remanufacture” the component parts of the roof. Rather, Miller simply joined products that were already completed and manufactured. Further, Miller cannot be considered a “product seller” under the WPLA, as Miller utilized products within the course of providing professional services to Mr. McClincy, and the roofs that were constructed were not produced for introduction into trade or commerce.

iii. Miller, A Laborer, Did Not Impliedly Warrant Its Work Under the UCC.

Washington law is clear that contracts for construction work, labor and materials are not within the scope of the Uniform Commercial Code. *Arango Constr. Co. v. Success Roofing*, 46 Wn. App. 314, 317, 730 P.2d 720 (1986), citing RCW 62A.2-102 (contracts for work, labor and materials are governed by common law principles of contract). As such,

Miller cannot be held liable for breach of any warranty arising out of the UCC.

iv. The Evidence Presented At Trial Squarely Refutes The Proposition That Miller Was A Manufacturer Or That Miller Warranted The Roofs As Manufacturer.

The materials installed by Miller were warranted not by Miller, but the true manufacturers of the materials. Miller introduced as evidence at trial the 12 year roof membrane warranty issued by GS Roofing Products Company, Inc. (“GS”) and the 50 year warranty for metal roofing products issued by Champion Metal of Washington, Inc. (“Champion”). Defendant’s Ex. 23; Defendant’s Ex. 24. The GS warranty states in relevant part as follows:

GS hereby warrants to the above owner, subject to the following terms, conditions, limitations and exclusions that should there be any leaks in the FLINTLASTIC Roof Membrane and/or FLINTLASTIC Base Flashing materials caused solely by ordinary wear of the elements or manufacturing defect, and not caused completely or partially by any of the causes hereinafter excluded from coverage, GS or its designated roofing contractor will repair or replace, at its option, the FLINTLASTIC Roof Membrane and/or FLINTLASTIC Base Flashings as necessary to retain the Roof Membrane in a watertight condition, at GS’ expense ...

Defendant's Ex. 23. The Champion warranty states in relevant part that
Champion

...warrants its painted steel snap-loc roofing not to perforate for a period of 50 years, after shipment from its warehouse, when exposed to normal atmospheric conditions, on the conditions and subject to the limitations described herein...

Defendant's Ex. 24. Indeed, in 2004, when McClincy noticed that some areas of the metal roof were oxidizing or discoloring in locations where Miller had used manufacturer-supplied touch up paint, a warranty claim was made and Champion provided new metal roofing and coping metal which was installed by Miller Roofing in 2004/2005. CP 47-48. McClincy was not charged for replacement of the metal roof as it fell within the manufacturer's warranty. CP 48.

Not only does documentary evidence refute the proposition that Miller was the manufacturer of the roofs at issue in this lawsuit, the testimony of McClincy's own experts supports Miller's position that Miller did not act as a manufacturer. On October 12, 2010, Gerald Burke of Summit Construction and Roofing Company, a roofing expert retained on behalf of McClincy, testified that a distinction exists between a labor warranty and a manufacturer warranty:

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. So too, Richard Jackson of Joseph J. Jefferson & Sons, another expert retained by McClincy, agreed 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. There is thus no basis for the trial court's ruling that Miller stepped into the role of manufacturer.

v. The Court Awarded Damages Based On The Erroneous Conclusion That Miller Stepped Into The Role Of Manufacturer.

As set forth above, 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 RCW 4.16.326(g), the six-year statute of repose governing construction defect claims. CP 358-359. RCW 4.16.326(g) bars any and all claims, not just breach of contract claims. As such, the only claims remaining as of October 15, 2010 were those arising out of any discrete work performed by Miller after original construction, i.e. the limited repair work performed in 2005 and 2006. CP 374.

Nevertheless, the Court in its Findings of Fact and Conclusions of Law determined that Miller

... manufactured the torch down roof and warranted the torch down roof against manufacturing defects for a period of 12 years and the metal roofs, together with the metal coping over the parapet walls, for 50 years.

CP 430. The Court also determined that Miller

Breached the original contract with McClincy Brothers entered into June 16, 1997 and the subsequent oral agreements entered into in January and June, 2006.

Based on these alleged breaches, the Court found Miller liable to Mr. McClincy and McClincy Brothers in the amount of \$1,388,193.59, which consists of \$481,808 to replace the torch down roof together with portions of the west, south and east walls of the building; \$15,377.58 in water mitigation services; \$730,436 in business interruption losses; and \$13,740 to Tim McClincy in lost rent. CP 429.

Given that claims arising out of original construction were dismissed,² and given that Miller can bear no manufacturer liability, this award is plainly erroneous. The award entitles Plaintiffs to replace portions of the roof wholly unrelated to the limited work on the metal roof Miller performed in 2005, the \$489.60 worth of work Miller performed on the lower torch down roof in January 2006 or the \$870.40 worth of work Miller performed on the lower torch down roof in June 2006. For example, the McBride Construction Resources, Inc. repair estimate on which a portion of the Final Judgment is based calls for repairs to the entire roof as well as framing repairs, siding repairs and interior repairs. Plaintiff's Ex. 10. The award also entitles McClincy Brothers to business interruption losses resulting from repairs unrelated to Miller's work in 2005 and 2006.

² Notably, McClincy did not appeal this ruling.

Accordingly, the Court should vacate the Findings of Fact and Conclusions of Law as well as the Final Judgment entered by the trial court.

C. The Court Erred In Awarding Damages Arising Out Of Miller's Work in 2006, As Those Claims Were Time Barred.

All claims arising out of Miller's 2005 warranty work and 2006 repair work were time barred by the three year statute of limitations governing oral contracts. As such, the trial court erred when it awarded damages based on Miller's alleged breaches of its 2006 oral contracts. CP 430.

In order to avoid a statute of limitations defense, a plaintiff must commence a claim within the applicable period. *Unisys Corp. v. Senn*, 99 Wn. App. 391, 398, 994 P.2d 244 (2000). RCW 4.16.170 governs commencement for the purposes of tolling the statute of limitations. It provides that an action is deemed commenced when the complaint is filed or the summons is served, whichever occurs first. *Gerean v. Martin-Joven*, 108 Wn. App. 963, 968-969, 33 P.3d 427 (2001). Both steps must occur within ninety (90) days of each other, or the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations. RCW 4.16.170.

Statutes of limitations begin to run when a cause of action accrues. RCW 4.16.005. Generally, accrual of a breach of contract action occurs upon breach of the contract, regardless of when the breach is discovered. *Taylor v. Puget Sound Power & Light Co.*, 64 Wn.2d 534, 537-538, 392 P.2d 802 (1964). A plaintiff is deemed to have notice of his injuries once he has “facts sufficient to prompt a person of average prudence to inquire into the presence of an injury.” *Vigil v. Spokane County*, 42 Wn. App. 796, 800, 714 P.2d 692 (1986). There is no requirement that the plaintiff understand that he has a legal cause of action; rather, the three-year statute of limitations on tort-based actions accrues “when the plaintiff discovers the salient facts underlying the elements of the cause of action.” *1000 Virginia Ltd. P’ship v. Vertecs*, 158 Wn.2d 566, 576, 146 P.3d 423 (2006). Under the discovery rule, the statute of limitations begins to run “when a party knows, or in the exercise of due diligence, should know of a breach.” *Urban Development, Inc. v. Evergreen Building Products, LLC*, 114 Wn. App. 639, 652, 59 P.3d 112 (2002).³

i. Plaintiffs Failed To Commence This Action Within The Applicable Statute Of Limitations.

³ The Court in *Urban Development* also ruled that there is no claim of negligent construction in Washington and no claim of implied warranty arising under a construction contract. *Id.* at 646.

McClincy alleged the following causes of action arising out of Miller's 2005 work on the oxidized metal roof and 2006 repair work to the lower torch down roof: (1) breach of express and implied warranty; (2) negligent design and construction; and (3) fraudulent concealment. CP 15-23. These claims are subject to a three year statute of limitations. *See* RCW 4.16.080(3) (oral contracts); RCW 4.16.080(4) (fraud).⁴

Here, McClincy first noticed water intrusion into the showroom in early 2006. CP 17, line 2. Miller made repairs in January 2006. CP 17, lines 3-5. American Leak Detection prepared a report for McClincy on or about April 3, 2006, detailing voids in the roofing/scupper transition. CP 95-96. Miller returned on June 3, 2006 to perform general maintenance and repairs to the lower torch down roof. CP 17, lines 6-9. 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, 2007.

⁴ There is no dispute that Miller's agreements for work in 2005 and 2006 were oral. The Conclusions of Law entered by the trial court, which were drafted by McClincy, explicitly state that the agreements were oral. CP 430. McClincy did not submit evidence in support of its Opposition to Miller's Motion for Summary Judgment to suggest that the agreements were written and did not appeal the determination that the contracts were oral. CP 97-115. Further, the trial court made no findings as to claims of negligence, violations of the Washington Product Liability Act, or fraudulent concealment.

Although McClincy filed this action 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. Because that was not done so here, 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.

ii. McClincy Cannot Rely On The "Discovery Rule" To Delay Accrual Of Its Cause Of Action.

There is no general "discovery rule" with respect to breach of construction contracts under Washington law. The short-lived *Architectonics Construction Management, Inc. v. Khorram*, 111 Wn. App. 725, 45 P.3d 1142 (2002), did apply a general "discovery rule" to construction contracts. *Id.* at 737. However, the Supreme Court quickly abrogated the *Architectonics* decision in *1000 Virginia*. See *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 576-578, 146 P.3d 423 (2006).

The *1000 Virginia* Court "adopt[ed] the 'discovery rule' 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.

A “latent defect” is not simply a defect. A latent defect is “one which could not have been discovered by inspection...” *Rottinghaus v. Howell*, 35 Wn. App. 99, 108, 666 P.2d 899 (1983). To invoke the “discovery rule” in a construction contract, Plaintiffs would have to show that the alleged defects were impossible to discover by reasonable inspection. *See generally, Wright v. Safeco Ins. Co. of Am.*, 124 Wn. App. 263, 109 P.3d 1 (2004). *See also* 25 Wash. Prac., Contract Law & Practice, §16:17 (2009) (if plaintiff asserts “discovery rule” as basis for delaying commencement of limitation period, burden falls on plaintiff to establish that reasonable diligence would not have resulted in discovery of cause of action).

Here, Mr. McClincy, a water restoration specialist and sophisticated owner of a commercial building, could easily have discovered the alleged deficiencies in Miller’s 2005 and 2006 work at the time the work was performed. Not only did Mr. McClincy personally observe Miller’s work as it was performed, McClincy’s expert did not require destructive investigations in order to opine that deficiencies in the roof existed. CP 62, p. 36, lines 12-15; CP 63, p. 144, lines 13-16. As admitted by Mr. McClincy, who testified in his June 26, 2009 deposition that gutter and scupper issues were “observable to the naked eye,” all of the alleged defects were open, obvious, and identified with a simple visual

inspection. CP 63, p. 145, lines 2-13. McClincy's expert, Mr. Burke, went so far as to state in his January 18, 2010 report in relevant part as follows:

With destructive testing a more in depth explanation and documenting could take place. I don't believe that it is necessary at this time as there are numerous, very visible defects in the roof installation and roof flashing systems.

CP 247. As such, McClincy cannot argue that that the alleged defects were impossible to discover by reasonable inspection, and the discovery rule does not apply.

In summary, the trial court erred when it awarded damages based on Miller's alleged breaches of its oral agreements. The Court should vacate the Findings of Fact and Conclusions of Law and Final Judgment and dismiss all claims against Miller.

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

RAP 2.5(a)(2) provides that a party may raise a failure to establish facts upon which relief can be granted for the first time in the appellate court. In considering a motion to dismiss for failure to state a claim upon which relief can be granted, the plaintiff's factual allegations are presumed

to be true. *Lien v. Barnett*, 58 Wn. App. 680, 794 P.2d 865 (1990). Here, Plaintiffs' Amended Complaint does not allege that a contract existed between Miller and Defendant McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating. Rather, the Amended Complaint correctly states that Miller's contract for work was with Tim McClincy, the owner of the Project. The trial court thus erroneously awarded breach of contract damages to Defendant McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating. 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.

i. Miller's 1997/1998 Work Was Performed Pursuant To An Agreement With Tim McClincy, Not McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating.

Based on the plain language of Miller's Proposal, Miller's original agreement for work was between Miller and Tim McClincy only. CP 50; Plaintiff's Ex. 1. The Proposal is directed to Tim McClincy personally. *Id.* Plaintiffs acknowledge the distinction between Defendant McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating and

Defendant Tim McClincy in their Amended Complaint, in which Plaintiffs differentiate Tim McClincy from his business entity. CP 15-23.

For example, Plaintiffs clearly concede in the Amended Complaint that Miller's agreement for work in 1997/1998 was with Mr. McClincy only. In the Amended Complaint, Plaintiffs specifically identify Tim McClincy as "McClincy" and Plaintiff McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating as "McClincy Brothers." CP 15-16, ¶2.2. Plaintiffs then allege as follows:

On or about June 16, 1997, McClincy entered into a written agreement with Miller Roofing for the construction and replacement of three roofs as part of the remodeling and construction of the above-referenced commercial building ...

CP 16, ¶3.2. (Emphasis added).

ii. Similarly, Miller's 2005 and 2006 Work Was Performed Pursuant To An Oral Agreement With Tim McClincy.

As stated above, 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.

iii. Plaintiff McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating Lacks Privity With Miller.

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).

Here, Plaintiff McClincy Brothers Floor Covering, Inc. d/b/a McClincy’s Home Decorating lacks contractual privity with Miller. Accordingly, its 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. The Findings of Fact and Conclusions of Law and Final Judgment should therefore be vacated, and all claims asserted against Miller should be dismissed.

V. 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 5th day of May, 2011.

JAGER LAW OFFICE PLLC



Steven J. Jager, WSBA # 10942
Marnie H. Silver, WSBA # 34002
Attorneys for Appellant
Miller Roofing Enterprises, Inc.

APPENDIX A

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Hon. Julie Spector

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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

Plaintiffs,

vs.

MILLER ROOFING ENTERPRISES, INC.,

Defendant.

No. 09-2-06720-1 SEA

DEFENDANT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

[PROPOSED]

I. FINDINGS OF FACT

1. In 1996, plaintiff McClincy Brothers Floor Covering, Inc. (hereinafter "McClincy") acting as its own general contractor, undertook a substantial renovation of its commercial building.

2. The renovations included an addition to the existing commercial space, construction of residential apartments at the back of the building, and reconstruction of the exterior shell of the original building.

3. Throughout this extensive remodel and construction, McClincy operated its floor covering and remodeling business.

4. McClincy hired Miller Roofing Enterprises (hereinafter "Miller") to install roofing on the project.

DEFENDANT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW - 1
5288267

LEE · SMART

P.S., Inc. · Pacific Northwest Law Offices

1800 One Convention Place · 701 Pike Street · Seattle · WA · 98101-3929
Tel. 206.624.7990 · Toll Free 877.624.7990 · Fax 206.624.5944

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

5. There were three distinct areas of roofing. The showroom had an existing flat roof which Miller was hired to simply replace with similar products and materials that had been previously installed on this portion of the flat roof and which had functioned appropriately for the past 10 or 15 years.

6. Miller was not asked to change the venting or drainage. Miller was not hired to re-slope this lower roof. They were simply hired to install torch down roofing over this flat roof in similar fashion to what had been previously installed.

7. The second area of roofing was a sloped or pitched roof which had been previously covered with composition asphalt shingles. Miller was hired to replace this roofing with a metal roof.

8. The third area of roofing was over new construction where Miller was hired to install torch down roofing. After completion of the construction, the building inspector required additional vents be added to the third area of roofing which miller provided.

9. All of the roof vents installed by Miller were identical in size and design to venting that had been previously installed on the showroom and had functioned appropriately for 10 to 15 years.

10. To perform the original work in 1997, Miller provided a one page written proposal. The proposal stated that all of the roofing work would be performed by Miller at a cost of \$11,750.

11. The proposal also stated "roof guaranteed 5 years labor and 12 year manufacture on torch down and 50 year manufacture warranty on metal." There was no testimony indicating that the terms of this warranty were ever discussed between the parties at the time of the work.

1 12. The torch down roofing material was manufactured by GS Roofing Products
2 Company, Inc., which provided a 12 year manufacturer warranty on the roofing material itself.

3 13. The metal roofing was manufactured by Champion Metal which provided a 50
4 year limited warranty on the metal roofing material itself.

5 14. Miller also provided its 5 year guarantee for labor requiring it to make the roof
6 watertight for 5 years.

7 15. In 2004, it was noted that the paint on the metal roofing was discolored and
8 oxidizing. The parties made a warranty claim with the manufacturer Champion Metal and
9 much of the metal roof was replaced as well as about 1/3 of the metal parapet cap. No flashing
10 was replaced or added. The work was completed to the satisfaction of the owner and no
11 complaints were raised regarding the metal roof or parapet cap until 2010. There is no
12 evidence that either the metal roof or parapet cap ever leaked.

13 16. In January 2006, McClincy had water leaking into its showroom of its building.
14 McClincy called Miller out to address the leaking water. Miller patched an area between the
15 torch down roof and the stucco siding. They invoiced for the work in the amount of \$450 and
16 McClincy paid for the work. There was no discussion or suggestion between the parties that
17 this repair work for water leaks in 2006 was covered under any warranty issued by Miller for
18 the original work.

19 17. In April 2006, McClincy hired American Leak Detection Service to review the
20 roof and stucco installation because additional leaking had occurred. American Leak Detection
21 identified several cracks and voids near the drainage scupper installed at the southeast corner of
22 the building. The cracks and voids were present in both the stucco and roofing material where
23 they believed water could be entering into the wall assembly. American Leak Detection
24 recommended sealing and caulking these areas and instructed McClincy to leave the sheetrock
25

1 off of its ceiling in the area so McClincy could monitor the interior of the building to insure that
2 water did not continue to make its way into the wall assembly. The sheetrock had been
3 removed from the interior in order to allow for monitoring and no structural damage was found.

4 18. Miller was called out again to seal and caulk as directed by American Leak
5 Detection. In June 2006 Miller performed this work and billed McClincy \$870. McClincy
6 paid the bill. There was no indication that the parties believed these roof repairs should have
7 been covered by any warranty issued by Miller for its original work.

8 19. In December 2007, heavy rains and snowfall damaged the roofing system
9 causing serious deflection to the roof framing and possible damage to the roof membrane. In
10 November and December significant leaks of substantially greater amounts showed up in both
11 the southeast corner, as well as the east wall of the showroom. On or about November 2007
12 another roofing company was called out to patch the roof. A large black mastic patch was
13 installed which is not compatible with the original roof membrane and may have further
14 damaged the roof. The patching did not eliminate the water leaks.

15
16 20. Since November 2007 the various leaking areas of the showroom have been
17 examined by numerous experts. Most, if not all, of the experts have identified leaking around
18 the scupper areas where the roofing membrane transitions with the scuppers. All of the experts
19 have also identified leaking through the stucco siding at the same locations where the stucco
20 transitions to the metal scuppers.

21 21. The experts do not believe that the 3 sided scuppers are the proper design
22 because an overflow of the scupper could allow water into the wall assembly. There is no
23 evidence that the scuppers have ever overflowed or been overwhelmed. However, there is
24
25

1 substantial evidence that the roof and wall assemblies have leaked whenever it rains and have
2 done so since November 2007.

3 22. By late 2007 or early 2008, McClincy had other experts review the roof and had
4 given the opinion that to insure a watertight installation the entire lower roof should be
5 replaced.

6 23. Mr. McClincy was given a quote from Dowling Brothers Roofing to replace the
7 entire lower showroom roof for a price of \$16,923.50. McClincy did not perform the work
8 when recommended in 2008. McClincy has not repaired the roof and it has continued to leak
9 since 2007.

10 24. Plaintiffs' engineering expert is of the opinion that the December 2007 caused
11 damage to the roof membrane which in turn allowed a significant amount of water into the
12 building. It was his opinion that the snow and rain event caused an overload of the roof
13 framing which resulted in sudden damage to the roof membrane.

14 25. McClincy did not remove water soaked sheetrock or attempt to dry out the wall
15 assembly until April of 2009. The constant leaking since 2007 caused mold and rot to damage
16 the structural framing of the wall to the point that as of September 2010, significant framing
17 needs to be replaced in both the southeast and southwest corners of the building.

18 26 There is no evidence from which the court can find that the work performed by
19 Miller in 2005 and 2006 was done improperly or in breach of contract.

20 27. There is no evidence from which this court can determine that any of the work
21 performed by Miller in 2005 or 2006 caused any damage to the building.

22 28. There is substantial evidence that most if not all of the structural damage to the
23 building could have been avoided had McClincy replaced the lower roof in 2007 or early 2008.
24
25

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

CERTIFICATE OF SERVICE FOR BRIEF OF APPELLANT

STEVEN J. JAGER, WSBA #10942
MARNIE H. SILVER, WSBA #34002
Attorneys for Appellant
JAGER LAW OFFICE PLLC
600 Stewart Street, Suite 1100
Seattle, WA 98101
(206) 441-9710

ORIGINAL

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. BRIEF OF APPELLANT
2. CERTIFICATE OF SERVICE

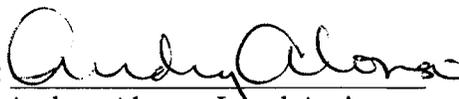
I caused to be served the above identified documents, on this day, May 6, 2011, via ABC legal messenger for personal delivery to the following:

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 May, 2011.

JAGER LAW OFFICE PLLC

By: 
Audrey Alonso, Legal Assistant