70335-8

70335-8

ORIGINAL

NO. 70335-8-1

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

STOCK & ASSOCIATES, INC., a Washington corporation,

Appellant,

vs.

STUART MCLEOD, an individual and MCLEOD DEVELOPMENT COMPANY, a Washington company

Respondents.

APPELLANT'S REPLY BRIEF

THE COLLINS LAW GROUP PLLC
Jami K. Elison WSBA #31007
Sheri Lyons Collins WSBA #21969
2806 NE Sunset Blvd., Suite A
Renton, WA 98056
Telephone: (425) 271-2575
Facsimile: (425) 271-0788

Attorneys for Appellant

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STATEMENT OF FACTS PERTINENT TO REPLY

Respondents, Stuart McLeod and McLeod Development Company ("McLeod") attempt to distract attention from the merits of Appellant's Stock & Associates, Inc.'s ("Stock & Associates") appeal by arguing that Stock & Associates waived its rights. An examination of the relevant procedural history shows that there was no waiver; rather, a standing objection arises by virtue of a motion in limine and the trial court failed to afford an opportunity to review and make exceptions to jury instructions as required by CR 51(f).

Regarding the merits of the appeal, McLeod ignores the admissions by McLeod that the parties actually failed to reach an agreement but proceeded to complete work to protect and benefit McLeod without finalizing an agreement. Given these facts, Stock and Associates requested that the jury be instructed about breach of contract and *quantum meruit*. The jury was not correctly instructed on the law and the jury was unfairly prejudiced by inclusion of an improper argument regarding a settlement payoff. McLeod's opposition fails to refute these key grounds for reversal and new trial. Instead, McLeod's opposition wades into factual arguments that could be made to a properly instructed jury and

misleads this Court as to repeated objections made by Stock & Associates during trial.

A. Relevant Procedural History

1. Quantum Meruit Jury Instruction Was Proposed and Court Failed to Afford Opportunity Required by CR 51(f) to Make Exceptions

Prior to trial, Stock & Associates filed proposed jury instructions.[1] The proposed jury instructions included Instruction 27, on Quantum Meruit[2]. This instruction was rejected by the court and did not go to the jury, leaving the jury instructed only on breach of contract claims and remedies.[3] Stock & Associates did not advise the trial court that it had no exceptions. In fact, counsel was not given an opportunity to make exceptions. On November 5, 2012, prior to Stock & Associates' rebuttal case and prior to receipt by the parties of the Court's final set of jury instructions, the Court asked if the parties had any exceptions. Stock & Associates' counsel stated:

> I'm not *prepared* to make any exceptions *at this point*. I don't believe I will make any exceptions at any point, Your Honor, *but if I* --

whereupon the judge interrupted and stated that he would give the parties a chance to examine the instructions and that the court would take

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[1] See CP 64-119, Plaintiff's proposed jury instructions.
[2] CP 103.
[3] See CP 362-86, jury instructions submitted to the jury.

exceptions later.[4] Specifically the judge stated:

> Tell you what we'll do. Let's go ahead with the testimony. Hopefully that will give you a chance to look through the exhibits – the instructions. And then we can take exceptions later on if there are any."[5]

Stock and Associates' did not state that there were no exceptions, and indicated that he was not prepared to make exceptions to instructions he had not had an opportunity to review. On the other hand, the judge indicated that he would revisit the issue of exceptions after testimony and an opportunity to examine the jury instructions.

In the end, the trial court gave counsel no opportunity to either review the jury instructions or make exceptions. After the dialogue quoted *supra*, Stock & Associates presented rebuttal witnesses during which time counsel was fully occupied in eliciting testimony and in listening to and analyzing cross-examination of rebuttal witnesses by McLeod's counsel. After Bruce Stock and Shelly Stock testified on rebuttal, Stock & Associates' counsel did *not* state that he had no exceptions. He stated:

> No further witnesses, your honor.[6]

Counsel was clearly stating that he had no further rebuttal witnesses, not that he had no exceptions.

The record is clear that counsel never had the opportunity to

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[4] RP, Jury Instructions at p.3 ll. 7-22 (emphasis added)
[5] *Id.* at p.3 ll.19-22.
[6] RP, Jury Instructions, p.4 l.7.

review the numbered copies of the court's proposed jury instructions, nor did the trial court revisit the issue of exceptions. The record shows that after confirming with McLeod's counsel that cross-examination of witnesses on rebuttal was concluded, the court skipped the taking of exceptions and instead went right into instructing the jury.

> All right, ladies and gentlemen, *we're just going to move right into jury instructions*, which will take about 30 minutes for me to read to you and then we'll proceed with closing arguments.[7]

The trial court never provided an opportunity to review the jury instructions and never provided an opportunity to make exceptions.

2. Stock & Associates Repeatedly Objected to McLeod's Voluntary Payment to PSM Through Motion in Limine and Motion for Directed Verdict

Contrary to McLeod's contentions, Stock & Associates formally objected to McLeod's settlement with PSM being put to the jury. Before trial, Stock & Associates attempted to keep this irrelevant and unfairly prejudicial matter from being presented to the jury by filing its Motion in Limine 5: "Evidence and Argument Regarding Defendant's End-Run Settlement With Plaintiff's Sub-consultant PSM Should Be Excluded."[8]

Stock & Associates urged the trial court to exclude all evidence and argument on this matter as irrelevant under ER 401 and unfairly

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[7] RP, Jury Instructions, p.4 ll.8-13 (emphasis added).
[8] See CP 10-24, Motions in Limine, and CP 16-17, Motion in Limine 5.

prejudicial under ER 402 and ER 403.[9] McLeod had made a voluntary payment that had no bearing on contractual obligations between McLeod and Stock & Associates. It would be unfair for McLeod to use the voluntary payment to falsely suggest to the jury that Stock & Associates was failing to meet contract obligations. The court denied the motion in limine and McLeod was allowed to present the settlement as a counterclaim against Stock & Associates.[10]

McLeod finished presenting its witnesses on November 1, 2012. On November 2, 2012, Stock & Associates filed a motion for directed verdict under CR 50(a) requesting dismissal of McLeod's so-called counterclaim for reimbursement of sums it voluntarily paid to PSM.[11] The motion was denied and the jury was allowed to consider an alleged breach of contract by Stock & Associates as an element of damages for McLeod. The trial court later corrected this error, but only after the jury had been tainted by an erroneous argument.

B. Summary of Pertinent Facts

In its opening brief, Stock & Associates showed that there is evidence upon which a jury could have found that there was no agreement between the parties as to the Additional Service Requests ("ASR").

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[9] *Id.*
[10] CP 308, Clerk's Minute Entry; CP 324-26, Order, particularly at CP 326.
[11] CP 327—35.

- Stock & Associates provided McLeod at separate times, a proposed draft contract, the B-151 form, an Exhibit A, and an Attachment B which was the project's scope, which had changed from the scope on which Exhibit A was based.[12]
- Exhibit A had the $1.41 million that McLeod contends is the final fixed fee cost, but that was not Stock & Associates' final number nor was it intended to be biding.[13]
- At that time there were ongoing changes to the project scope that would have changed the final fee proposal numbers.[14]
- Stock & Associates had provided a proposed draft contract B-151 form before November 29, 2007;[15]
- Alekson did not respond for McLeod until January 13, 2008, with significant changes to the B151, including the striking out of Stock & Associates' ability to ask for additional services for an appeal to city council and other fair allocation of risk provisions.[16]
- Stock & Associates was instructed to stop working on the contract and focus on the February 2008 deadline.[17]
- The contract was not finalized and Stuart McLeod said that he felt the parties did not need a contract and that he would take care of Stock & Associates.[18]
- Stuart McLeod blamed both Alekson and Stock & Associates for not reaching agreement on a contract.[19]

If the jury found no breach of contract, perhaps due to failures in contract formation, it should have been instructed about quantum meruit.

AUTHORITY

Where there was no finalized agreement for additional work that

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[12] RP, Smedley at p. 22 l. 22 – p. 27 l. 4.
[13] RP, Smedley at p. 81 l. 8 – p. 85 l. 5; Ex. 46.
[14] RP, Smedley at p. 7 l. 6 – p. 72 l. 5; p. 81 l. 8 – p. 85 l.5.
[15] RP, Smedley at p. 90 l. 6- p. 91 l. 10.
[16] RP Smedley at p. 85 ll. 7-23; p. 94 l. 15 – p. 96 l. 5; RP, Stock at p. 16 l.3-24, p. 60 l. 1 – p.63 l. 8.
[17] RP, Smedley at p. 99 .l.- - p.101 l.12.
[18] RP Smedley at p. 99 l. 9 – p. 101 l. 22.
[19] RP, McLeod I at p. 30 ll. 8-24.

Stock & Associates performed on McLeod's request and for McLeod's behalf, the trial court should have instructed the jury on quantum meruit as an alternative to breach of contract claims. Stock & Associates requested that jury instruction. The trial court failed to comply with CR 51(f) and that failure to afford an opportunity to review and make exceptions creates a procedural irregularity and defect and not a voluntary waiver. In the end, the jury was not accurately instructed regarding Washington law.

The record demonstrates that, over formal objection by Stock & Associates, McLeod sought to include, and successfully included, evidence of its voluntary payment to PSM. This highly and unfairly prejudicial evidence was erroneously allowed to go to the jury while the jury was making credibility and other determinations. Although this error corrected in part when the trial court overturned the jury's verdict for McLeod based on that evidence, it was too late to undo the tainting of Stock & Associates which would affect other jury determinations.

A. The Trial Court Failed to Comply with CR 51(f) And Prevented Any Exceptions from Being Taken.

In this matter where Stock & Associates and McLeod failed to agree upon a contract, recovery in quantum meruit was an integral part of Stock & Associates ability to recover damages. The trial court rejected Stock & Associates' proposed jury instruction on quantum meruit. At

trial, the court did not give Stock & Associates an opportunity to put its objection on the record.

Civil Rule 51(f) requires that:

> Before instructing the jury, the court shall supply counsel with copies of its proposed instructions which shall be numbered. *Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction.*

(emphasis added). That did not happen.

The judge asked for exceptions *before* supplying counsel with a copy of its proposed jury instructions. This is contrary to the clear requirement of CR 51(f) which mandates that a numbered copy of the instructions *shall* be given to counsel *prior* to exceptions. Not having had the opportunity review the instructions, Stock & Associates' counsel did not state that he had no exceptions, as McLeod argue, but that he was "not prepared to make exceptions" to a copy of jury instructions that had not yet been provided. The judge indicated that he would revisit the exceptions issue later but never did and instead decided to skip the process staying instead, "we're just going to move right into jury instructions."

Counsel is entitled under the civil rules to examine a copy of the proposed numbered instructions prior to making exceptions. Immediately

after the copies of the court's proposed jury instructions were distributed, Stock & Associates was fully occupied with putting on its rebuttal case, and called two witnesses who were examined and cross-examined. Counsel did not have the opportunity to review the jury instructions that had just been handed out by the court since he was engaged in questioning witnesses and focusing on the cross-examinations.

After rebuttal, counsel stated that he had "No further witnesses," and the judge confirmed that McLeod had completed its cross examination. Rather than return to the issues of exceptions, the court skipped that process and immediately commenced giving jury instructions. Contrary to Civil Rule 51(f), the trial court failed to "afford an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction." CR 51(f).

If counsel had the opportunity to review the jury instructions, and if the court inquired as to exceptions, counsel would have been able to make an exception as to the non-inclusion of its proposed jury instruction on quantum meruit. Quantum meruit was an essential to a fair trial for Stock & Associates because facts were elicited during trial about failures to reach a meeting of the minds regarding contract formation, leaving only quantum meruit as a possible remedy if the jury found failures in

contract claims. McLeod has theorized grounds for not giving the instruction, but each theory fails as being contrary to law. If makes no difference whether quantum meruit was plead as the alternative to a breach of contract claim because, as cited in Appellant's brief, it is inherent in every contract claim and provides an alternative form of relief when there are failures of proof with regard to contract claims.[20]

Had the requested instruction been given, the jury's verdict could have easily gone the other way. If instructed about quantum meruit, the jury would have a mechanism for awarding damages to Stock &

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[20] Moreover, it is contrary to Washington law to rely upon pleadings because Washington law clearly establishes that in order to conform to evidence as presented at trial, pleadings may be amended at any stage, including at the conclusion of trial or even after judgment. Because Stock & Associates submitted a proposed jury instruction on quantum meruit before trial, there could be no basis for arguing lack of notice.

> The civil rules of our state provide a specific mechanism for circumstances where issues outside the pleadings arise at trial. CR 15(b) provides that '[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.' 'At the discretion of the trial court, the pleadings may be amended to conform to the evidence at any stage in the action, including at the conclusion of a trial, and even after judgment.' *Green v. Hooper,* 149 Wash.App. 627, 636, 205 P.3d 134 (2009). 'However, amendment under CR 15(b) cannot be allowed if actual notice of the unpleaded issue is not given, if there is no adequate opportunity to cure surprise that might result from the change in the pleadings, or if the issues have not in fact been litigated with the consent of the parties.' *Green,* 149 Wash.App. at 636, 205 P.3d 134 (quoting *Harding v. Will,* 81 Wash.2d 132, 137, 500 P.2d 91 (1972)). In determining whether the parties impliedly consented to the trial of an issue, 'an appellate court will consider the record as a whole, including whether the issue was mentioned before the trial and in opening arguments, the evidence on the issue admitted at the trial, and the legal and factual support for the trial court's conclusions regarding the issue.' *Dewey v. Tacoma Sch. Dist. No. 10,* 95 Wash.App. 18, 26, 974 P.2d 847 (1999)

Mukilteo Retirement Apartments, L.L.C. v. Mukilteo Investors L.P., 176 Wn. App. 244, 255-57, 310 P.3d 814 (2013).

Associates even if the jury did not find breach of contract. The trial court's failure to follow the procedure mandated by court rules failed to afford the opportunity to record a formal exception to the omission of the proposed quantum meruit instruction, which cannot result in a "voluntary waiver" under Washington waiver law.[21] The failure to give the instruction resulted in the jury being inaccurately instructed about Washington law. Stock & Associates were deprived of a trial on a legally entitled remedy that they asked the court to instruct the jury on. The failure to give that instruction was reversible error. A new trial is necessary for trial on quantum meruit.

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[21] Because the right to a jury trial is protected, a wavier may not be "presumed." "The State carries a heavy burden of demonstrating a voluntary, knowing, and intelligent waiver of any constitutional right." *Matter of James*, 96 Wn.2d 847, 851, 640 P.2d 18 (1982), citing *State v. Coyle*, 95 Wash.2d 1, 621 P.2d 1256 (1980); *State v. Sweet*, 90 Wash.2d 282, 581 P.2d 579 (1978). "Such waivers will not be presumed." *Matter of James* at 851, citing *Coyle*, supra; *Sweet*, supra. The failure to make an exception as a waiver can only constitute a voluntary relinquishment of a known right when the opportunity is afforded to make those exceptions.

> A waiver is the intentional and voluntary relinquishment of a known right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive. To constitute implied waiver, there must exist unequivocal acts or conduct evidencing an intent to waive; waiver will not be inferred from doubtful or ambiguous factors. The intention to relinquish the right or advantage must be proved, and the burden is on the party claiming waiver.

224 Westlake, LLC v. Engstrom Properties, LLC, 169 Wn. App. 700, 714, 281 P.3d 693 (2012), quoting *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998). The failure to make an exception here is equivocal and not voluntary because there was not even an opportunity afforded to make exceptions as required by CR 51(f).

B. There Was Substantial Evidence at Trial That the Parties Did Not Reach an Agreement

As recited *supra* p.6, the parties did not reach agreement as to all of the work eventually performed on the project and did not reach an agreement on a form of contract to govern their relationship. Stock & Associates proposed a contract with a fixed fee that covered an early scope of work. It was expected by both parties that the fee would be revised. Stock & Associates' proposed contract allowed for payment for additional services. McLeod's revisions struck out the provisions and severely limited the ability of Stock & Associates to be compensated for additional services. The parties did not agree on the revisions and McLeod persuaded Stock & Associates to proceed without a signed agreement on the understanding that the firm would be compensated for its work.

Stock & Associates' authorities are on point. McLeod is correct in that *if* the parties had agreed that Stock & Associates was bound by Alekson's revisions to Stock & Associates' proposed contract – which they did not – there could be no recovery in quantum meruit. Evidence produced at trial shows that Stuart McLeod allowed work to proceed when he knew there was no contract and when he understood that Stock & Associates expected to be compensated fairly for its work – and not be limited by the restrictions proposed by Alekson. Stuart McLeod promised

to take care of Stock & Associates.

Contrary to McLeod's advocated version of the facts, evidence adduced at trial shows that the parties agreed only that a certain, limited scope of services was covered by the fixed fee proposal. Stock & Associates billed the fixed items separately, as requested by McLeod. The fact that it did so does not show that it agreed to Alekson's revision of the proposed contract. The instant situation is indeed one where Stock & Associates billed as ASRs "substantial changes which are not covered by the contract and are not within the contemplation of the parties" in which case quantum meruit is mandated.[22] McLeod could have argued to the jury, as he has argued to this Court of Appeals, the reasons why he believed the jury should have relied on the unsigned rejected contract; however, for there to have been a fair trial under controlling law, Stock & Associates should have been allowed to argue to the jury that recovery is allowed under quantum meruit when the parties fail to reach an agreement.

C. As Compensation for the ASRs Was Not Subject to An Agreement, Stock & Associates is Entitled to Recover in Quantum Meruit

The appropriate standard of review in this situation is whether Stock & Associates was permitted to argue its theory of the case and

[22] *Hensel Phelps Constr. Co. v. King County*, 57 Wn. App. 170, 177, 787 P.2d 58 (1990).

whether the instructions as a whole informed the jury of the law.[23]

McLeod's contention that Stock & Associates is not entitled to recover in quantum meruit for work done on the ASRs depends on the finder of fact making certain determinations that were hotly disputed at trial, namely: whether the parties agreed on the gutted version of the B-151 form sent by Mr. Alekson to Stock & Associates; what was the scope of work included in the $1.41 million fixed amount; and whether the work actually performed by Stock & Associates was within the agreed upon scope. However, when the jury is not instructed accurately about quantum meruit as an available remedy, there is no need for the jury to make those factual determinations once the jury finds failures in contract formation. If the jury found there was not a contract to be breached, the jury should have turned its attention to valuing the work provided for McLeod's benefit. McLeod spends a significant portion of its brief essentially retrying the case for this Court – rehashing facts favorable to its position while ignoring facts that show the parties failed to agree regarding payment for ASRs and reached agreement only on a scope of work significantly less comprehensive than what was necessarily performed. Wading through the extensive facts in the case is not a productive exercise, however, because the real, issue is not which facts support

[23] *See Anfinson v. Fedex Ground Package Sys., Inc.*, 159 Wn. App. 35, 35, 244 P.3d 32 (2010); *Cramer v. Department of Highways*, 72 Wn. App. 516, 520, 870 P.2d 999 (1994).

McLeod's interpretation of the parties' agreement and its terms.[24]

The operative question is whether the trial court erred in declining to give Stock & Associates' proposed jury instruction on quantum meruit because not having that instruction deprived Stock & Associates of the ability to argue its theory of the case. Without the quantum meruit instruction, the jury instructions failed to provide a mechanism by which Stock & Associates could be compensated for work if the jury found a contract was not finally formed. In failing to provide that mechanism, the trial court failed to properly inform the jury on applicable law.[25] Hearing only Instruction 6 regarding Stock & Associates' breach of contract claim without any instruction as to recovery in quantum meruit, the jury likely believed that the only way that Stock & Associates could recover for the ASRs is if Stock & Associates and McLeod expressly agreed that those services covered by the ASRs would be billed and paid as such.[26] This is not Washington law because Washington law recognizes when parties fail to complete a contract they may still be entitled to compensation.[27]

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[24] For example, while McLeod briefs the merits of entitlement to compensation for ASR 1 acceleration, McLeod ignores the portions of the record upon which the jury could have found entitlement to compensation. *See* RP, Smedley at p.40 l.24- p.43 l.11. Those factual determinations are not for McLeod to make nor are they for this Court of Appeals to make. They are for a properly instructed jury to make.

[25] *See Anfinson*, 159 Wn. App. at 35; *Cramer*, 72 Wn. App. at 520.

[26] See CP 371, regarding Stock & Associates' Breach of Contract Claim.

[27] *See Hensel Phelps Constr. Co. v. King County, 57 Wn. App. 170, 177, 787 P.2d 58 (1990).*

D. The Court Should Disregard McLeod's Untimely Appendix A Because It Was Not Part of the Record.

McLeod requested and this Court granted a 32-day extension of time for it to file its brief in this appeal, up to and including February 3, 2014. Although McLeod complied with that deadline in filing its brief, it filed one day late a document called "Appendix 1 to Brief of Respondents." This contained a chronology of events that McLeod regards as significant to its position regarding the parties' agreement. It omits key events that would tend to support Stock & Associates' position in this matter. The document is not a part of the record on appeal. It was not an exhibit below and should not be included as an exhibit now. This Court should simply disregard it.

E. Allowing Testimony and Evidence Regarding McLeod's Improper Counterclaim Was Prejudicial Error

1. Stock & Associates Timely Objected to McLeod's Claim Regarding the PSM Settlement

McLeod has misrepresented to this Court that Stock & Associates sat idly by without objection while McLeod presented its counterclaim for recovery of sums it paid in its voluntary settlement with PSM. The record clearly and unambiguously demonstrates the contrary.

Stock & Associates filed a Motion in Limine to exclude any evidence and argument regarding said voluntary payment. The motion in

limine was sufficient to raise and preserve Stock & Associates' objection. In fact, under Washington law a "standing objection" results from pursuing a motion in limine: "because the purpose of a motion in limine is to resolve legal issues outside the presence of the jury, a trial court's ruling denying a motion in limine is final and the moving party has a standing objection."[28]

Ignoring what actually happened at trial, McLeod relies on the *Boyd v. Kulcyzk* case where there were no motions and no objections.[29] In contrast, Stock & Associates filed a motion in limine and again objected to the PSM claim being presented to the jury in a motion for directed verdict. Washington law recognizes a standing objection and completely refutes McLeod's argument that Stock & Associates should have objected during testimony even after the trial court had denied the motion in limine. McLeod's citation to *Boyd v. Kulcyzk* is misplaced or misleading.

Had the trial court granted the directed verdict motion, the jury would not have heard argument regarding the PMS claim, nor jury instructions, nor would the claim have appeared on the special verdict

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[28] *Millican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 313 P.3d 1215, 1219 (2013) (citing *State v. McDaniel*, 155 Wn. App. 829, 853 n.18, 230 P.3d 245 (2010) (holding that the trial court had abused its discretion in denying appellant's motion in limine to exclude respondent's evidence and argument regarding its duty when respondent's position had no basis in law).

[29] In *Boyd*, the appellate court "ha[d] no decision of the trial court to review." *Boyd v. Kulcyzk*, 115 Wn. App. 411, 416-17, 63 P.3d 156 (2003). Here, Stock & Associates objected but prior to trial in a Motion in Limine and after McLeod presented its case in a motion for directed verdict.

form. In short, when considering whether McLeod was a bad actor in refusing to pay its obligations, the jury would not also have been considering whether Stock & Associates was an equally bad actor because it also refused to pay its obligations. The trial court erroneously denied this motion. Stock & Associates objected to the claim being heard by the jury at every stage. It waived no rights.

After trial, Stock & Associates filed a Motion to Amend Judgment Under CR 59 in which it showed the trial court that McLeod's so-called counterclaim had no legal basis.[30] The trial court admitted that it had "erred in allowing the counterclaim to be submitted to the jury."[31]

McLeod cites no cases to support its position that a party has waived its rights to object to presentation of evidence and issues to a jury after filing both a motion in limine and a motion for directed verdict on that very issue. McLeod's argument borders on frivolous, particularly since under Washington law, the motion in limine on its own was sufficient to preserve Stock & Associates' objection.[32]

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[30] See CP 516-528, Plaintiff Stock & Associates, Inc.'s Motion to Amend Judgment Under CR 59.
[31] CP 596-600, Order Granting Plaintiff's Motion to Amend Judgment at CP 598.
[32] *Millican*, 177 Wn. App. 881, 313 P.3d at 1219.

2. The Presentation of Argument and Evidence to the Jury of McLeod's Voluntary Payment to PSM Was Prejudicial Error

Stock & Associates argued to the jury that the Stock & Associates did not agree limit itself to a $1.41 million fee for all work including ASRs. When contract negotiations reached an impasse on that issue Stuart McLeod told Stock & Associates that a signed contract was not necessary and that he would take care of Stock & Associates. Stock & Associates further showed that McLeod accepted all of Stock & Associates' work but nonetheless refused to pay for all the work performed, paying only for the limited work initially anticipated before design changes were completed and before contract negotiations reached an impasse. Stock & Associates presented evidence that McLeod was a bad actor because it did not pay its obligations to Stock & Associates.

To allow the jury to hear evidence and argument regarding McLeod's voluntary payment to PSM, and that the payment was made because Stock & Associates itself did not honor its obligations and was also a bad actor, was highly prejudicial. The trial court errred, both in denying Stock & Associates' Motion in Limine to exclude evidence and argument of the PSM settlement and in denying Stock & Associates' motion for directed verdict on the same issue, as the court eventualy

acknowledged in its order granting Stock & Associates' post-trial motion for reconsideration.

Whether Stock & Associates honored its own obligations directly affected its credibility and the credibility of its position. In erroneously allowing the issue of the PSM settlement to go to the jury, the trial court permitted McLeod to undermine Stock & Associates' credibility and to make Stock & Associates look like a bad actor. Despite the trial court's reversal of the jury's award for McLeod on its counterclaim, the jury's verdict remains tainted by the fact that it heard the improper evidence and argument going to credibility concerns which likely affected the jury's determinations regarding contract claims. The trial court's error was compounded by its error in not allowing Stock & Associate's requested instruction on quantum meruit. Not only did the trial court's erroneous rulings allow McLeod to paint Stock & Associates as a bad actor, but also the jury lacked instructions on how to calculate damages for non-payment of ASRs had it been inclined to award such damages.

As the trial court belatedly ruled, there was no reason that the jury should have heard any evidence or argument related to McLeod's so-called counterclaim for amounts McLeod incurred in settling its non-existent obligations to PSM. There was no basis in the record for

concluding that McLeod had any obligations whatsoever directly to PSM and it prejudiced the jury's credibility considerations.[33]

The improperly admitted evidence was completely irrelevant to the issues to be tried, and highly prejudicial. *Feldmiller v. Olson*, an automobile accident case cited by McLeod for the proposition that the erroneous admission of the evidence of the PSM settlement was not prejudicial, is inapplicable. In *Feldmiller* two witnesses testified as to the same facts, and one witness's testimony was based upon hearsay. The court first determined that the trial court did *not* err in not striking the challenged testimony, then in dicta stated that even if the trial court had erred in not striking the testimony it would not have been prejudicial because of the other witness's testimony.[34] In contrast, the situation before this Court concerns evidence and argument that the trial court admitted should not have been presented to the jury, and, furthermore, there would have been no other evidence on this issue because the evidence and argument was completely irrelevant to the issues at trial and highly prejudicial as well.

Stock & Associates fully preserved its rights to object to McLeod's introduction of evidence and argument regarding the PSM settlement. The trial court abused its discretion in first denying Stock &

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[33] CP 596-600, Order Granting Plaintiff's Motion to Amend Judgment.
[34] *Feldmiller v. Olson*, 75 Wn.2d 322, 324-25, 450 P.2d 816 (1969).

Associates' motion in limine and in the second instance denying its motion for directed verdict, both of which were designed to keep such evidence and argument out of the cognizance of the jury.

CONCLUSION

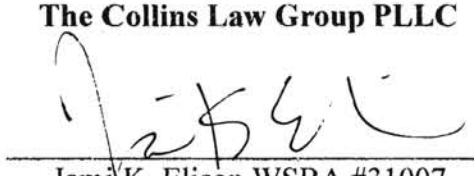
This lawsuit arose because McLeod abused trust and attempted to take advantage of the contract negotiations that McLeod himself admitted to have failed. Since then, McLeod's legal strategy has been to avoid controlling law and get away with something. Toward that end, McLeod has argued that Stock & Associates lost its right to an appeal when the trial court failed to follow its own procedures by not providing a copy of an Order the trial court promises to provide. In its brief, McLeod continues that approach by arguing that Stock & Associates lost its right to appeal when the trial court failed to comply with CR 51(f) and afforded no opportunity to take exceptions to jury instructions. McLeod's argument about not objecting the PSM settlement evidence deliberately ignores that Stock & Associates had pursued both a motion in limine and directed verdict on that exact issue. McLeod's opposition fails at each turn.

In the end, to prevent McLeod's attempt to get away with its injustice, a jury must make a determination on quantum meruit recovery as requested by Stock & Associates and mandated by Washington law. For that to happen, this Court should reverse and remand for a new trial solely

on Stock & Associates' quantum meruit entitlement and omitting McLeod's dismissed counterclaim that unduly goes to credibility issues.

DATED this 5th day of March 2014.

The Collins Law Group PLLC



Jami K. Elison, WSBA #31007
Email: jami@tclg-law.com
Sheri Lyons Collins, WSBA #21969
Email: sheri@tclg-law.com
2806 NE Sunset Blvd., Suite A
Renton, WA 98056
Tel: (425) 271-2575
Fax: (425) 271-0788

Attorneys for Appellant Stock & Associates, Inc.

PROOF OF SERVICE

I certify under penalty of perjury that on the 5th day of March, 2014, I served a copy Appellant's Reply Brief via email per agreement of the parties on the following:

Christopher I. Brain, Esq.
1700 Seventh Ave., Suite 2200
Seattle, WA 98101
cbrain@tousley.com
Attorneys for Respondent

Dated at Renton Washington this 5th day of March, 2014.

Jami K. Elison