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No. 69606-8-I

**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

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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 reverse the November 13, 2012 Order Denying Miller’s Motion for Leave to Amend Answer to Amended Complaint. Miller further requests that the Court permit Miller to add certain affirmative defenses which Miller intends to raise at the jury trial of this matter, which was remanded to the trial court after appeal from Division One of the Court of Appeals, Cause No. 66375-5-I.

II. ASSIGNMENTS OF ERROR

1. The trial court manifestly abused its discretion in denying Miller’s Motion for Leave to Amend Answer to Amended Complaint, as CR 15(a) provides that leave to amend shall be freely given when justice so requires, and here, justice requires that Miller’s request for an amendment be granted.

2. The trial court manifestly abused its discretion in denying Miller’s Motion for Leave to Amend Answer to Amended Complaint, as longstanding Washington law permits amendments to pleadings after remand.

3. The trial court manifestly abused its discretion in denying Miller’s Motion for Leave to Amend Answer to Amended Complaint, as

no prejudice would result to Respondents from the amendment and, in fact, Miller would be unfairly prejudiced if not permitted to amend its Answer.

III. STATEMENT OF THE CASE

A. Relevant Procedural History.

This action arises out of a written contract, entered into in 1997, and two oral contracts, entered into in 2006, for roofing work on a commercial building owned by Respondent Tim McClincy. Clerk's Papers ("CP") 2. A bench trial took place before the Honorable Julie Spector on October 10, 2010; October 13, 2010; October 14, 2010; October 18, 2010; and October 21, 2010. CP 3. On November 22, 2010, after hearing testimony from twelve witnesses and admitting approximately 46 exhibits, Judge Spector entered Findings of Fact and Conclusions of Law as proposed by Respondents. CP 14-26. As set forth in the Findings of Fact and Conclusions of Law, the trial court found Miller liable as the manufacturer of the roof installed in 1997 pursuant to the written contract. CP 25. The trial court also found Miller liable for breach of the two oral contracts entered into in 2006. *Id.* On December 7, 2010, Judge Spector entered Final Judgment in favor of Respondents in the amount of \$1,388,193.59. CP 28-29. Miller subsequently appealed the decision.

On May 7, 2012, the Court of Appeals issued its unpublished decision. CP 54-76. The Court of Appeals held that there was insufficient evidence to support the finding that Miller warranted the manufacture of the torch down roof for 12 years or the metal roofs for 50 years. CP 56. Accordingly, the Court reversed the Final Judgment to the extent of the breach of written contract claim. *Id.*

The Court further held that any judgment for damages on the oral contract claims cannot stand, as the damages on which the breach of the written contract claim are based were not segregated from the damages awarded for the breach of the oral contracts. CP 57. Accordingly, the Court reversed the remaining judgment on the two breach of oral contract claims as well. *Id.*

Also, amongst other language, the Court of Appeals ordered the trial court to resolve on remand the question of whether the oral contracts for repair work are time barred based on insufficiency of service of process or the accrual date of the claims. *Id.*

The issues remaining before the trial court are thus (1) whether Respondents' claims for breach of the two 2006 oral contracts (one of which was for \$489.60 worth of labor and materials, the other which was for \$870.40 worth of labor and materials) are time barred, and (2) if not, whether Miller breached the oral contracts, and (3) if so, the damages

attributable to the breach of the oral contracts, if any.

Miller filed a Jury Demand on or about June 26, 2012, along with the proper filing fee. CP 1. At no point did Respondents object to the Jury Demand. There is no assigned trial date and no case management order in place.

B. Miller's Motion For Leave To Amend Answer To Amended Complaint.

On July 19, 2012, Miller filed its Motion for Leave to Amend Answer to Amended Complaint, seeking to amend its Answer to the Amended Complaint to add several additional affirmative defenses. CP 2-6. Miller included with its motion a proposed Amended Answer which includes the additional affirmative defenses Miller sought to add. CP 7-10.

The first seven affirmative defenses contained in Miller's proposed Amended Answer were asserted by Miller's prior counsel in Miller's May 10, 2010 Answer to Amended Complaint. CP 107-109. These affirmative defenses include the following:

- Plaintiffs have failed to state a claim upon which relief can be granted;
- Plaintiffs' claimed injuries and damages, if any, were caused in whole or in part by Plaintiffs' own negligence or fault;
- Plaintiffs' claimed injuries and damages, if any,

were caused in whole or in part by parties over whom defendants had no right of control;

- Plaintiffs have failed to mitigate their claimed damages;

- The statute of limitations bars Plaintiffs' claims;

- The statute of limitations bars Plaintiffs' claims;

- The economic loss rule bars Plaintiffs claims.

Id.

The affirmative defenses that Miller requested be added in its July 19, 2012 Motion for Leave to Amend Answer included the following:

- Untimely service of process;

- Untimely notice of alleged defects;

- There is a lack of privity between Plaintiff McClincy Brothers Floor Covering, Inc. and this Defendant and, therefore, Plaintiff McClincy Brothers Floor Covering, Inc. lacks standing to pursue claims against Defendant;

- The damages sustained by Plaintiffs are unavoidable from the standpoint of this Defendant;

- Intervening and superseding cause;

- Plaintiffs accepted the performance of Defendant;

- Plaintiffs misused the product;

- No warranty was provided or any applicable

warranty expired;

- Plaintiffs' claim is barred by the rules governing spoliation of evidence;

- Plaintiffs' claim for repair costs will result in an unjust enrichment and substantial increase in the value of the property and its reasonable useful life;

- Plaintiffs' claim and suit are barred by RCW 4.16.326(1)(g);

- The alleged breaches do not and will not adversely affect the performance of the building(s) and any adverse effect is merely technical and not significant to a reasonable person.

CP 7-10.

The trial court heard oral argument on Miller's Motion for Leave to Amend Answer to Amended Complaint on October 30, 2012. CP 140. At the conclusion of the hearing, the Court denied the motion on the basis that Respondents would be prejudiced by the amendment. *Id.*; Verbatim Report of Proceedings at p. 5, line 5; p. 17, lines 20-21. Miller then orally moved the trial court for a ruling be certified for immediate review under CR 54(b) as a final appealable judgment. CP 140; Verbatim Report of Proceedings at p. 18, lines 6-13. The trial court granted Miller request that the ruling be certified pursuant to CR 54(b). *Id.*

The parties thereafter submitted an agreed form of Order to the

Court, which was entered on November 14, 2012. CP 141-144. In addition to language denying Miller's Motion for Leave to Amend Answer to Amended Complaint, the Order states in relevant part as follows:

It is further ORDERED, ADJUDGED and DECREED that this Order is certified pursuant to CR 54(b) for immediate review and a final appealable judgment even though it does not dispose of all claims against all parties.

There is no just reason to delay immediate review of the Court's ruling on Defendant Miller Roofing Enterprises, Inc.'s Motion for Leave to Amend Answer to Amended Complaint, as the outcome of the appellate proceeding will have direct bearing on the evidence and testimony to be presented by the parties in this matter or otherwise dispose of the case, rendering further proceedings unnecessary.

No trial date has been set. A jury has been demanded.

CP 143.

IV. ARGUMENT

A. Standard Of Review.

RAP 2.2(a)(3) 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).

Here, the trial court has certified the Order Denying Miller's

Motion for Leave to Amend Answer to Amended Complaint pursuant to CR 54(b) for immediate review as a final appealable judgment even though it does not dispose of all claims against all parties. CP 149. This is because the outcome of the appellate proceeding will have direct bearing on the evidence and testimony to be presented by the parties in this matter or otherwise dispose of the case, rendering further proceedings unnecessary. *Id.* In fact, the trial court at the hearing on Miller's Motion for Leave to Amend expressly stated that, in the event the trial court granted Miller's Motion for Leave to Amend, the entire case would be disposed of:

MR. JAGER: How is there prejudice, Your Honor?

THE COURT: Because if you didn't plead statute of limitations and now you're allowed to re-plead it, they lose. It's that simple.

Verbatim Report of Proceedings at p. 5, lines 6-10.

However, even if the Court of Appeals does not agree with the trial court that Miller is entitled to an appeal as a matter of right pursuant to RAP 2.2, discretionary review is appropriate here pursuant to RAP 2.3. RAP 2.3(b)(2) provides that discretionary review may be accepted in circumstances where the superior court has committed probable error and the decision of the superior court substantially alters the status quo or

substantially limits the freedom of the party to act. RAP 2.3(b)(2). RAP 2.3(b)(4) further provides that discretionary review may be accepted when the superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling questions or law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation. As set forth in the instant brief, both tests are met here.

The standard of review of a trial court's denial of a motion to amend a pleading is manifest abuse of discretion. *Herron v. Tribune Publishing Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987), citing *Del Guzzi Constr. Co. v. Global NW Ltd., Inc.*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986); *Caruso v. Local 690, Int'l Bhd of Teamsters*, 100 Wn.2d 343, 670 P.2d 240 (1983). This standard will be discussed further below.

B. The Trial Court Manifestly Abused Its Discretion By Denying Miller's Motion For Leave To Amend Answer And Affirmative Defenses.

i. CR 15(a) Provides That Leave To Amend Shall Be Freely Given When Justice So Requires.

The trial court's denial of Miller's Motion for Leave to Amend violates CR 15(a), which states in relevant part as follows:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

(Emphasis added).

The purposes of CR 15 are to facilitate a proper decision of a case on its merits and to provide each party with adequate notice of the basis of the claims and defenses. *Orwick v. Fox*, 65 Wn. App. 71, 89, 828 P.2d 12, *rev. denied*, 120 Wn.2d 1040, 844 P.2d 435 (1992). A trial court has great latitude in permitting the amendment of pleadings and does not abuse its discretion in allowing a defendant to plead a statute of limitations defense where there is no resulting prejudice or any showing that it was made to hinder or delay trial of the cause. *Walker v. Sieg*, 23 Wn.2d 552, 559, 161 P.2d 542 (1945). *See also Tagliani v. Colwell*, 10 Wn. App. 227, 234, 517 P.2d 207 (1973), *citing Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed 222, 83 S. Ct. 227 (1962), reversing a trial court's denial of a motion for leave to amend under the parallel federal rule:

Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded (citation omitted). If the

underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Id.

Factors a court may consider in determining prejudice include whether the amendment to the complaint is likely to result in jury confusion, the introduction of remote issues, or a lengthy trial. *Herron*, 108 Wn.2d at 165-166. In the absence of prejudice to the nonmoving party, delay alone is not a sufficient reason to deny a motion for leave to amend. *Orwick*, 65 Wn. App. at 89. See also *Herron*, 108 Wn. 2d at 166 (“...the fact that the material in the amended pleading could have been included in the original pleading will not preclude amendment, absent prejudice to the non-moving party”). Even inexcusable neglect should not in itself bar amendment. *Nepstad v. Beasley*, 77 Wn. App. 459, 892 P.2d

110 (1995). In all cases, the touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party. *Del Guzzi*, 108 Wn.2d at 888.

Notably, appellate decisions permitting amendments have emphasized that, like here, the moving parties in those cases were merely seeking to assert a new legal theory based upon the same circumstances set forth in the original pleadings. *Herron*, 108 Wn.2d at 166, citing *Foman*, 371 U.S. at 182.

ii. Longstanding Washington Law Permits Amendments To Pleadings After Remand.

Johnson v. Berg, 151 Wash. 363, 275 P. 721 (1929) stands for the proposition that amendments to pleadings may be allowed after an appeal and remand for further proceedings, just as they may be allowed in the ordinary course of the preparation of a case for trial. This is because the trial court, after the reversal of a judgment and in the absence of special direction, stands in the same position as it did before the original trial. *Richardson v. Carbon Hill Coal Co.*, 18 Wash. 368, 372, 51 Pac. 402 (1897) (“...the fact that the cause came to the appellate court and was reversed does not affect the power of the trial court to give leave to amend the pleading; for, after reversal and remission, the case stands exactly as it stood before the trial”).

See also Jones v. Western Mfg. Co., 32 Wash. 375, 376, 73 P. 359 (1903) (amendments permitted when necessary for the furtherance of justice at any stage of the proceedings; and amendment may be had after a cause has been appealed and remanded for a new trial, as well as on the original trial of the cause). *See also Smith Sand & Gravel Co. v. Corbin*, 102 Wash. 306, 308-309, 173 P. 16 (1918) (that amendments to defenses, whether legal or equitable, are permissible on a retrial upon remand from the Supreme Court is a well-recognized rule in this state).

As in the case at hand, the plaintiff in *Johnson* objected to a requested amendment seeking to add an affirmative defense after remand in part on the basis that all of the defenses were available to defendants when they filed their original answer and that to allow the amended answer to be filed would be unjust to plaintiff in that such filing would unduly delay the final determination of the cause. *Id.* at 367. The Supreme Court of Washington rejected that argument, reversing the trial court's denial of the request for an amendment. *Id.* at 372. In support of its decision, the Court stated as follows:

The fact that an appeal to this court intervened, and that considerable time was necessarily consumed in such appeal, does not alter the situation, nor should defendants' rights be prejudiced thereby. Amendments to

pleadings may be allowed after an appeal to this court and a remand for further proceedings, just as they may be allowed in the ordinary course of the preparation of a case for trial.

In the *Carbon Hill Coal* case, an employee who was injured on the job filed an action against his employer for negligence and unskillful treatment from the employer's doctor. *Carbon Hill Coal*, 18 Wash. at 369. Following an unfavorable judgment, the employee appealed, and the court reversed. *Id.* After a second trial and a judgment for the employee, the employer appealed. *Id.* When the appellate court reversed without any order as to the trial court's future proceedings, the employee filed an amended complaint, alleging that the employer did not exercise care in selecting the doctor. *Id.* at 370. The employer filed a demurrer to the amended complaint. *Id.* The Supreme Court of Washington ultimately upheld the amendment of the complaint, stating as follows:

The case was reversed without any special order as to further proceedings, *but this does not negative the idea that the pleadings can be amended, or that any other proceedings may be taken in the lower court.* The usual course is, when a judgment is reversed, that the case is tried over, in the absence of any order of this court to the contrary.

Id. at 372 (emphasis added).

The Court's holding in *Carbon Hill Coal* has even been applied in several Washington Supreme Court cases since, including

a case as recently as 1999. *See, e.g. Wilson v. Horsley*, 137 Wn.2d 500, 974 P.2d 316 (1999); *Rosseau v. Rosche*, 158 Wash. 310, 290 P. 806 (1930); *Stusser v. Gottstein*, 187 Wash. 660, 61 P.2d 149 (1936) (reversed on other grounds).

Here, pursuant to the direction of the Court of Appeals, the issues that will be retried are (1) whether Plaintiffs' claims for breach of the two 2006 oral contracts are time barred, (2) if not, whether Miller breached the oral contracts, and (3) if so, the damages attributable to the breach of the oral contracts, if any. In accordance with well-established Washington law, Miller is entitled to amend its Answer to assert additional affirmative defenses as they apply to those remaining claims.

iii. No Prejudice Would Result From The Requested Amendment.

Importantly, Respondents did not object to Miller's Jury Demand, filed on June 26, 2012. CP 1. Given that this matter was originally heard as a bench trial, the case will necessarily have to be retried before the jury. This means that witnesses will need to be recalled and documentary evidence reintroduced as appropriate given the narrowed issues to be decided, irrespective of the trial court's ruling on Miller's Motion for Leave to Amend. This alone defeats Respondents' argument that Respondents would be prejudiced as a result of the amendment. In reality,

both sides will be required to reposition their cases and freshly present their sides to a new finder of fact. Because no trial date has been set, and there is no case management order in place which would be affected by limited discovery, (which Miller has no interest in duplicating) respondents have ample time to issue discovery, amend their complaint, or identify new witnesses in the event they determine it necessary. The Court of Appeals in its unpublished decision remanding this matter to the trial court did not limit any of these activities. CP 54-76.

Further, the sole basis for Respondents' argument that it would be prejudiced as a result of the proposed amendment was that "both sides will be forced to re-open discovery, at enormous cost." CP 85. This argument was made without any evidentiary support, and fails to acknowledge recoveries by Respondents. Respondents failed to submit a declaration or any testimony that suggested, let alone proved, that it would incur "enormous cost" as a result of the amendment. Nevertheless, in the event Respondents believe specific discovery that may be requested by Miller is unduly burdensome or expensive, Respondents may move for a protective order pursuant to CR 26(b)(1)(C). This would be the proper remedy for any potential prejudice, and not denial of Miller's requested amendment.

Notably, and contrary to Respondents' position, the evidence establishes that Miller, and not Respondents, would be severely prejudiced

if Miller were forced to try this matter without some limited discovery. More than two years have passed since this case was originally tried. Among other things, Miller is entitled to discover whether conditions at the building at issue in this matter have changed since the time of the 2010 trial; whether repairs have been undertaken and, if so, the cost thereof; documentation of those repair; and if no repairs have been undertaken, what steps, if any have been taken to mitigate damages. These issues go directly to the heart of Respondents' claim for damages.

Here, the amendment requested by Miller was not made to hinder or delay trial, but rather to provide Respondents and the trial court with notice of the defenses that Miller intends to present at the trial on remand. In fact, several of the affirmative defenses requested by Miller, such as untimely service of process; that claims are barred by RCW 4.16.326(1)(g), the statute of repose; and that Respondents' claim for repair costs will result in an unjust enrichment and substantial increase in the value of the property and its reasonable useful life merely formalize arguments previously made by Miller in pleadings and/or at trial.

This is evidenced by language from the Court of Appeals discussing Miller's longstanding argument regarding insufficiency of service of process and stating that "this is an issue that the trial court should consider on remand." CP 46. The Court of Appeals also discussed

Miller's underlying position regarding the discovery rule/accrual of Respondents' action for alleged breaches of the oral agreements, indicating that "these are matters that the trial court should address in the first instance. *Id.*; CP 51. These affirmative defenses are, therefore, properly added under CR 15(b), which provides that when issues not raised in 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. The trial court manifestly abused its discretion in rejecting Miller's request to add these affirmative defenses.

The remaining affirmative defenses are appropriate now in light of the changed procedural posture of the case. For example, Miller intends to move for partial summary judgment, seeking dismissal of claims asserted against Miller by McClincy Brothers Floor Covering, Inc., as the two invoices issued by Miller for its 2006 work (the only work now at issue) were directed to Respondent Tim McClincy only. CP 114. This is the basis for Miller's affirmative defense of lack of privity of contract. Similarly, the invoices make no reference to a warranty, rendering the affirmative defense that no warranty was provided or any applicable warranty expired appropriate. Also, Respondents observed or had the opportunity to observe Miller's 2006 work, paid for that work in full, and expressed no dissatisfaction with the work. An affirmative defense that

Respondents accepted the performance of the Defendant is appropriate. Moreover, to the extent Respondents repaired the building in the intervening time between trials, and to the extent the repairs were not properly documented, a spoliation affirmative defenses is warranted.

On the facts of this case, denial of Miller's proposed amendment was a manifest abuse of discretion, and the trial court's ruling on Miller's Motion for Leave to Amend Answer to Amended Complaint should be reversed.

V. CONCLUSION

For the above stated reasons, Miller respectfully requests that the Court reverse the November 13, 2012 Order Denying Miller's Motion for Leave to Amend Answer to Amended Complaint. Miller requests that the Court permit Miller to add several affirmative defenses that Miller may raise at the jury trial of this matter on remand.

DATED this 31st day of January, 2013.

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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. BRIEF OF APPELLANT
2. CERTIFICATE OF SERVICE

I caused to be served the above identified documents, on this day, January 31, 2013, via ABC legal messenger for personal delivery on January 31, 2013 to the following:

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

DATED this 31st day of January, 2012.

JAGER LAW OFFICE PLLC

By: 
Audrey Alonso, Legal Assistant