

No. 35137-4-II

IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

Debbie White, a single person

Appellant

vs.

AA Remodeling, a d/b/a/ of Turbo Mechanical Inc, a Washington
Corporation

Respondents, Cross Appellants

AA REMODELING'S REPSONSE BRIEF

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I. ASSIGNMENTS OF ERROR; ISSUES PRESENTED

- A. The cross appellant assigns error to the trial courts decision that as the prevailing party they are not entitled to an award of attorney fees under RCW 18.27.040(6).
1. Did the trial court err by not awarding attorney fees to AA Remodeling the general contractor and prevailing party because RCW 18.27.040(6) only provides for attorney fees when the initial filing of the summons and complaint is by someone other than the contractor?

II. STATEMENT OF THE CASE

This matter involves a home remodel project. AA Remodeling is a d/b/a of Turbo Mechanical Inc. and licensed as a general contractor under RCW 18.27. et seq. Debbie White owned a lake front cabin and desired to have it remodeled. In late September 2002, Mike Warren, representing AA Remodeling, met with Debbie White to determine what could be done to remodel Debbie White's lake front cabin and what it would cost to do the remodel.

On September 23, 2002, Mr. Warren prepared and presented a document, Exhibit 1, entitled "ESTIMATE". The "estimate" contained some very general statements of the work and also contained some very specific statements of work. The price was stated in the "estimate" as \$82,000 plus Washington State sales tax totaling \$88,560.

AA Remodeling contended that the "estimate" was never offered as a contract and was never accepted. Debbie White contended that the "estimate"

was the evidence of a design-build contract. The trial court held that the subsequent acts of the parties do not support the theory of a binding contract based upon the price and terms in the Estimate.

On October 1, 2002, Mr. Warren and Ms. White contracted for the first step in the remodel project which was identified as design, permit and beginning demolition. Payment was made by Ms. White this day and when the payment was brought into the office an invoice was prepared and signed by both Ms. White and Mr. Warren.

AA Remodeling then contracted for preparation of the engineering plans necessary for this project. The project included installation of a custom designed truss roof over an existing structure, so engineering was necessary. The engineering report was completed on December 16, 2002 so the drawings, as part of said report, were completed on or before December 16, 2002.

In early December 2002 AA Remodeling began the demolition work. The issuance of the building permit was delayed waiting for a decision on window locations and size by Debbie White. The building permit was also delayed because the project was located on the waterfront. The building permit approval was issued on March 24, 2003. After the building permit was issued AA Remodeling continued work on the project until early July, 2003.

On July 28, 2003 Mr. Warren delivered to Ms. White an invoice dated June 17, 2003 accounting for all charges and payments to date, exclusive of

the interest charge and payment. Ms. White declined to pay for the work done, so AA Remodeling left the job by mutual agreement on or about mid-June 2003. They did not return until late January 2004 when authorized in writing by Ms. White's attorney.

When AA Remodeling left in June of 2003 they had completed most of the shell and the windows were framed to the plans in existence. The roof was completed. The interior was in "open stud" condition. AA Remodeling had begun work on the deck without an agreed plan because the crew had dead time while waiting for the windows to be selected and plans re-engineered.

When AA Remodeling returned in January 2004 they finished the shell, completed siding and trim, and moved two or more windows. They performed some truss repairs, but the repair did not conform to the manufacturer's instructions. AA Remodeling left the job on January 6, 2004 and did not return.

Koepp & Sons then did work at the request of Ms. White in late July or early August. Caretek then was hired and invoices dated October 11, 2004 and December 14, 2004 are the best evidence of when they worked.

A pretrial motion by appellant was made to exclude the testimony of respondent's expert Leo Deatherage on basis he was late disclosed. After argument the trial court limited his testimony as a rebuttal witness to eliminate the need for the appellants to obtain a new expert. This decision is appealed by appellant for abuse of discretion.

The substantive issues at trial were the terms of the contract between the parties, value of the work completed and cost to repair. There were also issues of the value of the work completed on a quantum meruit basis. The trial court found that AA Remodeling was entitled for unpaid work less cost of repair in the amount of \$28, 824.00. The trial court also determined that AA Remodeling was the prevailing party. White sought a separate judgment for the cost of repair. The court denied the motion for a separate judgment and this decision is on appeal by White.

AA Remodeling made a motion for award of attorney fees as the prevailing party under RCW 18.27.040(6). White also made a cross motion for attorney fees arguing that with a separate judgment she would be the prevailing party under RCW 18.27.040(6). The trial court denied White was the prevailing party. The trial court also denied AA Remodeling's request for fees ruling that RCW 18.27.040(6) was not available to AA Remodeling because the lawsuit was initially filed by them and the lawsuit must be filed by someone other than the contractor to invoke the fees provision of the statute. This ruling is on appeal by AA Remodeling.

III. ARGUMENT

A. The Applicable Standard of Review Is Abuse of Discretion

Appellate review for denial of a motion to exclude testimony of

expert is abuse of discretion. *Estate of Foster* 55 Wn. App 545, (1989).

B. Trial Court did Not abuse Its Discretion to Allow Plaintiff's Expert Testimony on Rebuttal.

Appellants assign error to the decision of Judge Thomas McPhee in not excluding the testimony of Leo Deatherage for an alleged late expert disclosure when it only limited his testimony as a rebuttal witness.

(Oral Opinion 10/14/2005 Page 18 lines 2-10)

“Exclusion of testimony is an extreme sanction. Thus, it is an abuse of discretion to exclude testimony as a sanction for discovery violations absent a showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct. *Estate of Foster* 55 Wn. App 545 (1989). A "willful" violation means a violation without a reasonable excuse. *Foster* citing *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 280, 686 P.2d 1102 (1984), Aff'd, 104 Wn.2d 613, 616, 707 P.2d 685 (1985) (declining review on discovery issue). Further, even if a violation is willful, prejudice must be shown. It is only where willful noncompliance substantially prejudices the opponent's ability to prepare for trial that the exclusion of evidence is within the trial court's discretion. *Foster* at 548.

Here, the appellant was successful in obtaining an order denying the plaintiff's use of its expert in its case in chief. The court did however allow the plaintiff's expert as a rebuttal witness. (Hearing on Motion to Exclude Witness 10/14/2005 Page 18 lines 2-10).

The pertinent dates for disclosure of expert witnesses are as follows:

- 1) Friday July 29, 2005 -- Plaintiff's last date to disclose primary expert witnesses by case schedule order.

- 2) Monday August 1, 2005 -- Plaintiff faxes primary expert witness disclosure to defendant. **Leo Deatherage specifically disclosed.**
- 3) Friday August 12, 2005 -- Plaintiff's last date to disclose expert rebuttal witnesses by case schedule order
- 4) Monday August 15, 2005 -- Plaintiff files and serves expert rebuttal witness disclosure. **Leo Deatherage specifically disclosed.**

There is no surprise witness as claimed by appellant White. The disclosure of respondent's expert Deatherage occurred on August 1, 2005.

White's counsel acknowledged receipt of plaintiff's expert disclosure. (CP 107). The disclosure specified that Leo Deatherage would testify about value of work and quality of work performed. (CP 73-74). Shortly after the expert disclosure Ben Cushman accompanied Leo Deatherage for a site visit to the White home. Mr. Cushman even acknowledged discussing certain issues with Mr. Deatherage during the visit. (CP 108). Mr. Cushman knows Mr. Deatherage well as he is used as an expert by their law firm for similar testimony. (CP 112).

While an expert report is not required by the local court rules an estimate was prepared near the end of discovery since no deposition was scheduled by Mr. Cushman. (CP 112). This estimate was a two page estimate with five line items. I note that in the motion to exclude the

testimony of Mr. Deatherage, Mr. Cushman tells the court he has no objection to Mr. Deatherage testifying about the quality of the work, but does object to his testimony on value of the work. (CP 109, lines 3-4). As specified in the disclosure he was tasked to determine value of the work. (CP 74). I also note that Mr. Cushman chose not to take a deposition relying on his personal perception that Mr. Deatherage was only going to testify about quality issues. (CP 108 lines 16-22).

In an abundance of caution respondents caused Mr. Deatherage to prepare an estimate and submitted at the close of discovery, September 29, 2005, with a letter affording Mr. Cushman to take the deposition of Mr. Deatherage if he wanted. (CP 112). This is still two weeks before trial which was held on October 18-21, 2005. Mr. Cushman ignored the offer of a deposition.

The standard by which the court determines the outcome of a motion to exclude is whether the opponent was substantially prejudiced from preparing for trial. *Foster* at 548 citing *Hampson v. Ramer* 47 Wn. App. 806, 737 P.2d 298 (1987). The testimony of Mr. Deatherage was merely an estimate of the value of work performed by AA Remodeling. Appellant White had her own experts that had prepared there own

estimates. (CP 109 line 13-15). The testimony of Mr. Deatherage was allowed only as rebuttal to the expert testimony of Scott Carey. (CP 109) The court voiced a concern on the basis that Mr. Cushman may need a new expert and thus the decision to exclude testimony in the plaintiff's case in chief. (Hearing on Motion to Exclude Witness 10/14/2005 Page 18 lines 2-10)

White showed no substantial prejudice to the trial court other than conclusory statements that she could not prepare for the rebuttal testimony of Mr. Deatherage. There were weeks for a deposition before trial and White chose not to learn of Mr. Deatherage's testimony. White had already obtained an expert Scott Carey who could review the estimates of Mr. Deatherage and comment on them at trial. White also argues that the trial court should have continued the trial to afford opportunity to get a rebuttal expert and learn Mr. Deatherage's testimony. (Appellant brief pg 6) Mr. Scott Carey was the expert hired by White for trial. (CP 109). The tactical decision by White to not take the deposition of Mr. Deatherage as offered and hope for an exclusion of the expert witness by pre-trial motion was a risk she undertook. It worked. Mr. Deatherage was only allowed to testify in rebuttal.

In summary, appellant White showed no substantial prejudice to the trial court in preparing for trial. The trial court cured any perceived prejudice by limiting the proposed expert to rebuttal. Thus, there was no abuse of discretion by the trial court in limiting Mr. Deatherage to a rebuttal witness.

C. White is Not Entitled to Separate Judgment.

White advances the argument that because AA Remodeling did not assert a CR 8(c) affirmative defense of “offset” in answering the counterclaim that White can now unilaterally elect to have a separate judgment entered and recorded against AA Remodeling and the CBIC bond. In essence, White argues that the counterclaim is a separate contract action, thus severing the case and allowing each party to record a judgment against the other. The fallacy of this argument is that if White had filed the complaint first and AA Remodeling had counterclaimed then there would be no argument by White. **Under CR 8(c) the extensive list of affirmative defenses does not list “offset” as one that must be plead.** Using the legal analysis of White, *expressio unius exclusion alterius*, would preclude the requirement of an offset to be affirmatively plead.

AA Remodeling had no requirement to affirmatively plead an

“offset” under the facts or circumstances of the pleading of this matter. If it did, the court has discretion where justice requires treating the pleadings as if properly plead. White brought a motion in limine to have the parties realigned and have White treated as the plaintiff. (CP). Reading this motion and attached declaration of Ben Cushman one has no inkling that the trial would be of two independent contract actions. White struggles to position herself as if there were two independent contract actions that were consolidated for the convenience of the parties to avoid fees. This is neither what was anticipated before trial nor what was brought before the court at trial.

This was a contract action at trial. While both parties disagreed on the terms and scope of the contract, there was ultimately only one contract as determined by the court. The position advanced by AA Remodeling, convinced the court that its view of the contract terms and scope was most appropriate. Once the contract terms were determined, the issue was 1) what damages were incurred by AA Remodeling for White’s breaches and 2) what damages were incurred by White for AA Remodeling breaches. White in its opening brief keeps referring to “RCW 18.27 claims” as though it were a new subject area of law (i.e. contract, tort or real property). The various

underlying contract claims by White would be same even if she did not invoke RCW 18.27. RCW 18.27.040(6) is for a breach of contract by a party to a construction contract. See RCW 18.27.040(3).

White accepts the courts decision on the contract terms and extent of the scope of the contract at this stage, but wants each party's respective damages to be separately entered and recorded as judgments. There is no legal basis for being able to unilaterally elect a separate judgment for offsets under the facts of this case. AA Remodeling understands that separate judgments would possibly assist White in defeating the claim for fees and costs, but there is no legal support for such a remedy. White only provides lengthy argument, but no legal support for such a conclusion.

White did not convince the trial court that her counterclaim is an independent claim entitling her to a separate judgment. There is no legal support for the position of White.

IV. ARGUMENT WITH RESPECT TO CROSS APPEAL

A. The Applicable Standard of Review Is De Novo

Statutory construction is a question of law and is reviewed de novo. *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996).

B. Trial Court Erred in Deciding that RCW 18.27.040(6) Did Not Provide a Basis for Attorney Fees to the Contractor AA Remodeling as the Prevailing Party.

After trial AA Remodeling brought a motion to be awarded attorney fees under RCW 18.27.040(6). The trial court found that AA Remodeling was the prevailing party but ruled RCW 18.27.040 did not provide a basis to award AA Remodeling its attorney fees. The court explained that because the lawsuit was initiated by AA Remodeling as the contractor, they were not entitled to its fees. The court explained that while AA Remodeling was the prevailing party they did not file the action under RCW 18.27.040, thus no entitlement to attorney fees. In short, if White had filed the lawsuit and AA Remodeling had counterclaimed then fees would be awarded. The pertinent statutory language of RCW 18.27.040 is as follows

(6) The prevailing party in an action filed under this section against the contractor and contractor's bond or deposit, for breach of contract by a party to a construction contract, is entitled to costs, interest, and reasonable attorneys' fees. ... (Emphasis added)

RCW 18.27.040(6) is a means of protection for the consumer by providing a source of money (i.e. security) to pay for successful claims as

well as provide attorney fees for the prevailing party. While the statute provides the benefit of a security for payment, it also provides a risk/benefit for attorney fees. When White invoked her right to use the Contractors Registration Act RCW 18.27 et seq., she accepted the full benefit/risk of all its terms including attorney fees for the prevailing party.

The trial court took a strict reading of the statute and ruled that because the action (lawsuit) was not initially filed by White the homeowner the right to attorney fees was not available to AA Remodeling. This is a strained interpretation of the statute. This reading of the statute would mean that if White had prevailed then she would not be entitled to fees since the claim against the bond was done by a counterclaim. This is not the result the legislature intended. Practically, this reading would mean unless a homeowner is first to file they are without a remedy of attorney fees.

The primary goal of statutory construction is to carry out legislative intent. *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself. *Dep't of Transp. v. State Employees Ins. Bd.*, 97 Wn.2d 454, 458, 645 P.2d 1076 (1982). Words are not to be given their ordinary meaning when a contrary intent is manifest.

Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 479-80, 745 P.2d 1295 (1987). Here, the court has held that the meaning of the words "action filed under this section" excludes any counterclaim and only includes the initial lawsuit filing. It is well settled that statutes must not be construed in a manner that renders any portion thereof meaningless or superfluous.

Stone v. Chelan County Sheriffs Dep't, 110 Wn.2d 806, 810, 756 P.2d 736 (1988). If the trial courts ruling were correct then under RCW 18.27.040(3) a homeowner could not bring a counterclaim under RCW 18.27.040(3). This section of the statute refers to a summons and complaint. By a strict reading a complaint is not a counterclaim. The primary goal is to determine the legislative intent. The statute must be read to include not only the initial filing of a complaint, but also a counterclaim.

If the statute is invoked on a counterclaim, AA Remodeling is entitled to its fees and costs as the prevailing party.

V. REQUEST FOR ATTORNEY FEES ON APPEAL

Assuming the Court of Appeals affirms the principal judgment of the trial court, but reverses the decision and remands for an award of attorney fees, AA Remodeling should be awarded its fees on appeal.

VI. CONCLUSION

Appellant asks that the court affirm the decision of the trial court to allow testimony of Leo Deatherage on rebuttal, affirm the ruling that AA Remodeling is the prevailing party and reverse the decision to deny AA Remodeling its attorney fees and costs.

RESPECTFULLY Submitted This 09th Day of January 2007

A handwritten signature in black ink, appearing to read 'T. F. Miller', written over a horizontal line.

THOMAS F. MILLER, WSBA #20264
Attorney for AA Remodeling

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CERTIFICATE OF MAILING

I certify that on the 9th day of January, 2007, I placed in the mails of the United States a duly addressed, stamped envelope containing a copy of the AA Remodeling's Response Brief to the individuals and parties at the addresses listed below:

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DATED this 9th day of January 2007.

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