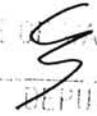


No. 42457-6-II

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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JERRY MULDER and SALLY MULDER,

Respondents,

v.

CABINET DISTRIBUTORS, INC.,

Appellant.

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BRIEF OF RESPONDENTS

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## I. INTRODUCTION

The Respondent's JERRY and SALLY MULDER (hereinafter Mulders) ask the Court of Appeals to affirm the Superior Court and (1) deny the Appellant Cabinet Distributors, Inc. (hereinafter "CDI") appeal to overturn the trial court's grant of a new trial and (2) deny the limiting of the issues on re-trial.

A jury trial was conducted on the Mulders' claims against CDI in June of 2011. A special verdict on all claims was rendered on June 10, 2011. With respect to the Mulders' claim of breach of contract due to installation defects, the jury found that the Mulders had suffered \$7,600.00 in actual damages. The jury also decided that the Mulders interfered with the CDI's duties under the contract.

After trial, the Mulders moved for and were granted, a new trial on all claims and issues presented in the original trial because of the inconsistencies in the jury verdict. This appeal followed.

## II. STATEMENT OF THE CASE

### A. General Background of the Mulders' Claim

The evidence at trial showed that on February 3, 2004, the Mulders' entered into contracts with CDI for the purchase and installation of new cabinets and countertops in their home in McCleary, Washington. The agreements required CDI to provide all labor, materials, and complete installation of cabinets and countertop surfaces in the kitchen, master bathroom, second bathroom, and closet doors and shelves in the Mulders' home.

(CP 1-5)

CDI commenced installation on or about August 31, 2004. The cabinets and countertops were improperly installed and contained mold. The cabinets did not fit the area designated for installation. The countertops were scratched and dimpled. (CP 1-5)

CDI failed to complete installation. The installation that was completed was of such poor quality and poor workmanship that the Mulders' were hampered in the use and enjoyment of their kitchen, bathrooms, and other areas of their home that were impacted by CDI's defective craftsmanship. (CP 1-5)

The Mulders' demanded that CDI replace the defective cabinets, doors, countertops, and other defects. CDI refused to cure or replace the defective cabinets, doors and countertops. CDI did not repair or replace any of the other defective work. (CP 1-5)

**B. Jury Trial and Verdict**

At the close of trial, a Special Verdict Form was provided to the jury that outlined the factual issues for the jury's consideration. The jury determined that CDI breached the contract and awarded the Mulders' "actual damages" in the amount of \$7,600.00. The jury also determined that the Mulders' breached the contract by failing to pay the full amount of the contract and awarded CDI "actual damages" in the amount of \$2,400.00. Thus, the Mulders' prevailed with a net damage award of \$5,200.00. (CP 25-26) The jury also decided that the Mulders had somehow interfered with CDI's performance. (CP 25-26)

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**C. Plaintiffs' Request for New Trial is Granted**

The trial court denied CDI's Motion to Amend Judgment and Opposition to Plaintiffs' Motion for a New Trial. The trial court granted the Mulders' request for a new trial. The court subsequently denied CDI's Motion for Reconsideration of Defendant's Motion to Amend Judgment. The court's decision granting a new trial and denying reconsideration was appealed by CDI. (CP 75-76)

**D. Trial Court Denies Request to Limit Re-Trial and Affirms New Trial on All Issues and Claims**

The trial court did not limit the scope of the new trial. (CP 73-74) The intent of the trial court was to conduct a re-trial of all issues and claims before it was in the June 2011 trial. CDI filed a Motion for Clarification of Issues and Claims at Re-Trial, asking the court to determine whether the grant of a new trial was to include all claims and issues presented at the June 2011 trial. Oral argument was conducted on CDI's clarification motion and the court declined to limit the scope of re-trial on the matter. (CP 121-122) CDI then filed its second Notice of Appeal on the Court's denial of Clarification of Issues and Grant of a New Trial on all Issues and Claims. (CP 117-120)

**III. ARGUMENT**

**A. Summary of Argument**

The trial court was correct in denying CDI's Motion to Amend the Verdict, and ordering a new trial in this matter. The court was correct in denying CDI's Motion to Reconsider. When considering the motions, the trial court had the discretion to grant a

new trial on some or all of the issues. The court had the discretion to grant a new trial in part only and deny a new trial on the rest of the issues. *Auwater v. Kroll*, 9 Wash 179, 140 P. 326 (1914); *Cramer v. Bock*, 21 Wn.2d 13, 149 P.2d 525 (1944). The court considered the motions and responses of the parties and exercised the court's discretion to grant a new trial, without limiting issues.

It was within the trial court's discretion to find that the jury's verdict in this matter was irreconcilably inconsistent. Therefore, the only remedy is a new trial. It would be error for the trial judge to amend the jury verdict. It is faulty logic for CDI to now attempt to use the irreconcilably inconsistent special verdict as a script to argue what issues should or should not go forward in a new trial. The verdict was irreconcilably inconsistent. As a matter of law, the verdict cannot be amended. The proper remedy is a new trial.

In *Blue Chelan, Inc v. Department of Labor & Industries*, 101 Wn.2d 512, 681 P.2d 233 (1984), the court specifically stated that a trial court's review of a special verdict differs from that of a general verdict. (See CR49(a), discussing Special Verdict). If the jury's answers to the special interrogatories (the questions which constitute the special verdict) conflict, the court attempts to harmonize the answers. However, if the court cannot reconcile the answers, "[n]either a trial court not an appellate court may substitute its judgment for that which is within the province of the jury....[T]he only proper recourse is to remand the cause for a new trial."(Citations omitted.) *Blue Chelan, Inc v. Department of Labor & Industries*, 101 Wn.2d 512, 681 P.2d 233 (1984).

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The Washington Supreme court has stated that when a court reviews a jury's verdict, "[the] court will not willingly assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it "*Phelps v. Wescott*, 68 Wn.2d 11, 410 P.2d 611 (1966)." The inferences to be drawn from the evidence are for the jury and not for [the] court. The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered. *Burke v. Pepsi-Cola Bottling Co.*, 64 Wn.2d 244, 391 P.2d 194 (1964) (emphasis omitted) (quoting *State v. O'Connell*, Wn.2d 797, 839, 523 P.2d 872 (1974)). The trial court properly applied the law in ordering a new trial.

This case does not present any questions regarding the trial court's discretion in granting a new trial and the application of that discretion. The Mulders' motion for a new trial asserted that a new trial is required due to the jury's inconsistent responses to the Special Verdict form. The jury found that the Mulders' had both waived and interfered with CDI's performance under the contracts. The jury also found the Mulders had incurred \$7,600.00 in actual damages on their claim of breach of contract due to installation defects. These findings are irreconcilable. It is undisputed that when reconciliation of the jury's verdict is not possible a new trial must be granted. The trial court did not err in granting the Mulders' request for new trial.

A new trial was granted on claims and issues that were in controversy. The trial court refused to limit the scope of the re-trial to issues and claims which were reviewed in

post-trial motions. The trial court determined the need to conduct a re-trial on all claims and issues in this matter. CDI is not entitled to the entry of a judgment in its favor on these claims and issues in the event of a re-trial.

**B. Standard of Review**

Generally, the standard of review for the trial court's grant of a new trial is abuse of discretion. A trial court abuses its discretion when its decision is manifestly unreasonable, is exercised on untenable grounds, or is based on untenable grounds. *Lian v. Stalick*, 106 Wn.App. 811, 824 25 P.3d 467 (2001). This standard is subject to the limitation that the trial court's order of a new trial was not predicted on rulings as to law. *Lyster v. Metzger*, 68 Wash. 2d 216, 412 P.2d 340 (1966). Granting or denying motion for new trial is largely within discretion of trial court except where pure questions of law are involved. *Boley v. Larson*, 69 Wash.2d 621, 419 P.2d 579 (1966). In the case of a pure question of law, the Appellate court reviews for error only, not for abuse of discretion. *Schneider v. City of Seattle*, 24 Wash.App. 251, 600 P.2d 666 (1979). Unlike trial irregularities or evidentiary issues which cannot be made part of the record and which require the trial court to use its discretion, there is no error of law in this case.

**C. The Superior Court Should be Affirmed**

The jury found that CDI had breached its contract because it improperly installed countertops and cabinets at the Mulders' home. The jury also found that the Mulders' had waived and interfered with CDI's ability to perform its duties under the contract. The jury found the Mulders' had incurred \$7,600.00 in actual damages.

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**1. Waiver and Interference**

There was no objection in the record to the evidence relied upon in the jury's decision regarding waiver to interference. CDI did not object to the special verdict form. The jury affirmed both specifically and separately that the Mulders were damaged and had waived and interfered with CDI's performance under the contract. These are irreconcilable findings by the jury.

**2. The Appellate Court May Not Reconcile the Verdict**

The answers to the special interrogatories presented to the jury here are clearly irreconcilable. The trial court was left with no choice, but to grant a new trial, as in the *Blue Chelan, Inc v. Department of Labor & Industries*, 101 Wn.2d 512, 681 P.2d 233 (1984). The trial court properly determined that the answers to the special verdict form were irreconcilable.

**3. Blue Chelan is Controlling Precedent**

Defendant CDI has misquoted the holding of *Blue Chelan, Inc v. Department of Labor & Industries*, 101 Wn.2d 512, 681 P.2d 233 (1984). The court in *Blue Chelan* specifically stated that a trial court's review of a special verdict differs from that of a general verdict (*Blue Chelan, Inc v. Department of Labor & Industries*, 101 Wn.2d 512, 681 P.2d 233 (1984)). If the jury's answers to the special interrogatories (the questions which constitute the special verdict) conflict, the court attempts to harmonize the answers. However, if the court cannot reconcile the answers, "[n]either a trial court nor an appellate court may substitute its judgment for that which is within the province of the jury. . . . [T]he only proper recourse is to remand the cause for a new trial." (Citations

omitted.) *Blue Chelan Inc. v. Department of Labor & Industries*, 101 Wn.2d 512, 515, 681 P.2d 233 (1984). See also *Great W. Land & Imp. Co. v. Sandygren*, 141 Wash. 451, 252 P. 123 (1927); *Tuthill v. Palermo*, 14 Wn. App. 781, review denied, 87 Wn.2d 1002 (1976); 2 L. Orland, Wash. Prac., *Trial Practice* § 293, at 317 (3d ed. 1972); see also *Andrasko v. Chamberlain Mfg. Corp.*, 608 F.2d 944 (3d Cir. 1979); *Guidry v. Kem Mfg. Co.*, 598 F.2d 402 (5th Cir. 1979) (construing Fed. R. Civ. P. 49), cert. denied, 445 U.S. 929 (1980).

When a trial court reviews a special verdict form that appears to be inconsistent, the trial court must reconcile the jury's answers when possible. *Alvarez v. Keyes*, 76 Wn.App. 741, 743, 887 P.2d 496 (1995). But if the verdict contains contradictory answers to interrogatories making the jury's resolution of the ultimate issue impossible to determine, a new trial is required. In making the court's analysis, the court may not substitute the court's judgment for the jury's. *Alvarez v. Keyes*, 76 Wn.App. 741, 743, 887 P.2d 496 (1995). (citing *Myhres v. McDougall*, 42 Wn.App. 276, 278, 711 P.2d 1037 (1985)).

The Washington Supreme Court has stated that when a court reviews a jury's verdict, “[the] court will not willingly assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it.” *Phelps v. Wescott*, 68 Wn.2d 11, 410 P.2d 611 (1966). The inferences to be drawn from the evidence are for the jury and not for [the] court. The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would

support the verdict rendered. *Burke v. Pepsi-Cola Bottling Co.*, 64 Wn.2d 244, 391 P.2d 194 (1964). *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994) (emphasis omitted) (quoting *State v. O'Connell*, 83 Wn.2d 797, 839, 523 P.2d 872 (1974).)

In this case, it was within the trial court's discretion to determine that a new trial was necessary because of the irreconcilable answers by the jury. The trial court was correct in denying CDI's Motion to Amend the Verdict, and ordering a new trial in this matter. The trial court issued a correct ruling in denying Defendant's Motion to Reconsider. When considering the prior motions, the trial court had the discretion to grant a new trial on some or all of the issues. The court had the discretion to grant a new trial in part only and deny a new trial on the rest of the issues. *Auwater v. Kroll* 79 Wash 179, 140 P. 326 (1914); *Cramer v. Bock*, 21 Wn.2d 13, 149 P.2d 525 (1944). The trial court considered the motions and responses of the parties and exercised the court's discretion to grant a new trial, without limiting the issues.

It was within the trial court's discretion to find that the jury's verdict in this matter was irreconcilably inconsistent. Therefore, the only remedy was a new trial. It would be error for the trial judge to amend the jury verdict. It is faulty logic for CDI to now attempt to use the irreconcilably inconsistent special verdict as a pathway to limit what issues should or should not go forward in a new trial.

**D. Any Re-trial Should Not be Limited in its Scope**

The trial court declined to limit the scope of its grant of a new trial. The trial court intends to conduct re-trial on all claims and issues of this case. It was within the trial

court's discretion to find that the jury's verdict in this matter was irreconcilably inconsistent. Therefore, the only remedy is a new trial. The trial court exercised its discretion and the new trial should not be limited in its scope.

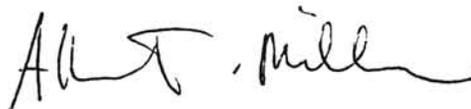
**E. Attorney's Fees**

Pursuant to RAP 18.1, the Respondents request attorney's fees and expenses, as the prevailing party under the contract at issue. RCW 4.84.330. CR54(d)(2). *Marassi v. Lau*, 71 Wn.App. 912, 859 P.2d 605 (1993), *Transpac Dev., Inc. v. Young Suk Oh*, 132 Wn.App. 212, 130 P.3d 892 (2006).

**V. CONCLUSION**

Based on the foregoing, the trial court's decision to grant of a new trial should be affirmed.

Dated this 19<sup>th</sup> day of March, 2012.

A handwritten signature in cursive script that reads "Allen T. Miller". The signature is written in black ink and is positioned above a horizontal line.

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Allen T. Miller / WSBA No. 12936  
Attorney for Plaintiffs/Respondents

COURT OF APPEALS  
DIVISION II

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No. 42457-6-II STATE OF WASHINGTON

BY [Signature]  
DEPUTY

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

CABINET DISTRIBUTORS, INC., a	)	
Washington Corporation	)	DECLARATION OF SERVICE
	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
JERRY MULDER and SALLY MULDER,	)	
and their marital community,	)	
	)	
Respondents.	)	

Vivian Miller declares:

I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

That on March 20, 2012, I caused the original and one copy of the Brief of Respondents and this Declaration of Service; to be served to David Ponzoha, Court Clerk for the Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402 via U.S. Mail, postage prepaid.