

FILED
COURT OF APPEALS
DIVISION II

2015 APR 24 PM 2:15

STATE OF WASHINGTON

BY 
DEPUTY

Case No. 46898-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CHAMBERS CREEK LLC, a limited liability company registered to do
business in Washington

Appellant,

v.

CHARLES SCHMIDT and ANTHONY SCHMIDT,

Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Respondents' Brief appears to consist principally of evidentiary objections not addressed by the Trial Court and arguments about the credibility of witnesses neither of which are appropriately considered in an appeal from a summary judgment. For example, Respondents assert that summary judgment should be upheld because: "A reasonable juror can only conclude their [Appellant's witnesses] statements are false..." at the same time noting that issues of credibility are for the jury. Response at 11.

In the final analysis, this is exactly the kind of case which should not be resolved on summary judgment because of the direct conflicts in the evidence. In simplest essence, the parties agree that by contract, Coyote Excavating was required to deliver all metal salvaged from the Mill Site to Metro Metals. It is undisputed that metal salvaged from the site was sold to other buyers by the Respondents. Total sales by Respondents of metal from the Mill Site to Seattle Iron were \$145,282.80. Total sales by Respondents of metal from the Mill Site to R.S. Davis were \$223,932.60. (*CP 75-76; Brain 9/24/14 Dec. at ¶¶ 7-8*). That these sales were made is not in dispute.

From there, Respondents contend that the sales to these other companies were authorized. Appellant denies authorizing the sales. Which of these witnesses is to be believed is the province of the finder of fact at trial as Respondents themselves recognize.

The decision of the Trial Court is sustainable here if, and only if, there was a legal basis for the dismissal independent of the disputed facts. So, the principal focus here should be (1) whether a prior settlement

between different parties involving other claims bars this action and (2) whether the claims asserted by Appellant here are subject to dismissal under the compulsory counterclaim rule. Appellant will focus its analysis in this Reply on these issues.

II. APPLICABLE AUTHORITY AND DISCUSSION

The Respondents assert that the claims asserted in this action should be barred by a settlement reached in a prior action involving a different defendant and different claims. The initial lawsuit between Appellant and Coyote stated a single cause of action based on the contamination of the property as a result of Coyote's negligence:

Coyote's negligent breach of its duty not to cause damage to the Property of Chambers Creek has proximately caused damages to Chambers Creek in an amount estimated to exceed \$1,000,000.

(CP 70-73. 9/30/11 Amended Complaint, Appendix 3 at ¶ 4.2 attached hereto as Appendix 1). Coyote filed a counterclaim for conversion of certain construction equipment. Chambers asserted an affirmative defense of setoff on April 4, 2012. While Defendants assert that the setoff claim was based on the metal theft alleged here, that is not the case. The setoff was based on the clean-up costs relating to the asbestos contamination caused by Coyote. *(CP 75; Brain 9/24/14 Dec. at ¶ 5)*. No claim relating to metal theft was ever asserted in the prior *Chambers v. Coyote* litigation. *Id.*

Generally, to set off one claim against another, the claims must be between the same parties in the same capacity. *Johnson v. City of Aberdeen*, 147 Wash. 482, 266 P. 2d 707 (1928); see also *Reichlin v. First*

Nat. Bank, 184 Wash. 304, 314–15, 51 P.2d 380 (1935). Coyote’s claims for conversion of equipment could not be set off against Appellant’s claims against the individual Respondents. Asserting a setoff claim in the prior *Chambers v. Coyote* litigation against Respondents would have been a pointless act as the requisite mutuality would not exist.

The basis for Respondents’ assertion that the settlement in the prior action encompasses the claims here is a reference to *CP 16-20*; Coyote’s Answer in the *Chambers v. Coyote* litigation, and a portion of the summary judgment motion from which this appeal is taken; *CP 21-24* (see Response at 5). Neither of these documents even references the metal theft/conversion claims. The portion of the Motion cited in fact states that Charles Schmidt, one of the Respondents, “was not involved in the prior litigation.” *At CP 22*.

As stated in Respondents’ Brief, the Notice of Settlement in the Chambers/Coyote litigation states:

The parties have reached an agreement at mediation to a dismissal of the captioned action including all claims by plaintiff against defendant and all claims by defendant against plaintiff.

Response at 12. The Plaintiff was Chambers Creek, the Appellant here and the Defendant was Coyote Excavating. The Respondents were never parties to the prior *Chambers v. Coyote* litigation. In short, the settlement was expressly only between Coyote and Chambers Creek, not Chambers Creek and the Respondents, and involved only the claim of negligence asserted by Appellant and a counterclaim for conversion based on construction equipment retained by Appellant after Coyote left the job.

Respondent repeatedly asserts that the metal theft claims asserted by Appellant against the individual Respondents were settled in the prior *Chambers v. Coyote* litigation. It is undisputed however that no conversion claim based on metal theft was ever made in that action. Respondents' assertion that the conversion claims involving the individual Respondents were settled has absolutely no factual support whatsoever.

Respondents assert that the claim would be barred by the doctrine of judicial estoppel. Respondents correctly note that the doctrine is governed by a three part standard. The first part of the standard would require that Appellant's position here be clearly inconsistent with Appellant's position in the prior *Chambers v. Coyote* litigation. Here Appellant asserts that the Respondents, without permission or authorization, removed and sold metal from the Mill Site. However, that is exactly the position Respondents assert Appellant took in the prior *Chambers v. Coyote* litigation.

Respondents state that the second element is: "whether judicial acceptance of an inconsistent position would create the perception that either the first or second court was misled." (*CP 28: Motion at 8:4-6*). That is only half of the second element. What Respondents leave out is "***whether the party persuaded a court to accept its early position*** such that its acceptance of an inconsistent position in a later proceeding creates the perception that the party misled either the first or the second court." *Garrett v. Morgan*, 127 Wn. App. 375 at 379, 112 P.3d 531 (2005). No court has previously made any ruling or finding with respect to the metal theft based claims here. Judicial estoppel simply is not applicable.

Alternatively, Respondents rely on the "compulsory counterclaim

rule:”

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party

Initially, the rule is simply inapplicable here because neither of the Respondents was an “opposing party” in the *Chambers v. Coyote* litigation.

The rule goes on to state that the rule is applicable “if it arises out of the same transaction or occurrence that is the subject matter of the opposing party’s [Coyote’s] claim.” Interestingly, the pleading stating Coyote’s counterclaim is not in the record. The sole basis for the application of the rule is a statement in the Response on page 4 that “Defendant Anthony Schmidt is the owner of Coyote Excavation, which counterclaimed for conversion, negligence and for attorney fees.” *CP 16-20*. While this is an admission that the second Respondent here was also not an opposing party in the *Chambers v. Coyote* litigation, it provides no basis for applying the compulsory counterclaim rule here.

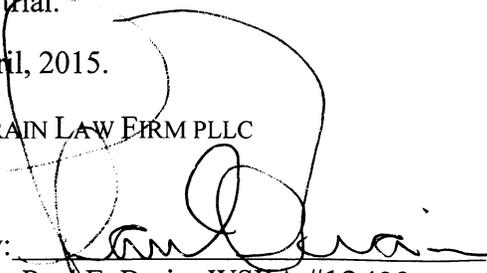
Reviewing the portion of the Motion Respondents also cite as the basis for the application of the compulsory counterclaim rule, Coyote’s claim in the prior litigation was based on Chambers retaining construction equipment belonging to Coyote. *CP 22*. There is no explanation by Respondents as to how Chambers’ alleged conversion of construction equipment belonging to Coyote arises from the same transaction or occurrence as the conversion of salvaged metal by the individual Respondents.

III. CONCLUSION

Neither the doctrine of judicial estoppel nor the compulsory counterclaim rule is applicable here. The issues in the case are entirely factual in character and every fact necessary to a resolution is in dispute. The ultimate disposition of the case turns on the credibility of various witnesses. This is exactly the kind of case which should not have been resolved on summary judgment. Appellant therefore respectfully submits that this Court should reverse the decision of the Trial Court and remand with instruction to set the matter for trial.

DATED this 23rd day of April, 2015.

BRAIN LAW FIRM PLLC

By: 

Paul E. Brain, WSBA #13438

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of April, 2015, served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

Counsel for Defendants:

James D. Case	_____	Hand Delivery
Case & Dusterhoff LLP	_____	U.S. Mail
9800 SW Beaverton Hillsdale Hwy, Suite 200	_____	(first-class, postage prepaid)
Beaverton, OR 97005	_____	Facsimile
	<u> X </u>	Email

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

DATED this 24th day of April, 2015, at Tacoma, Washington.



Kim Middleton

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BY _____
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Appendix 1

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

CHAMBERS CREEK LLC, a Washington
limited liability company,

Plaintiff,

v.

COYOTE EXCAVATING, INC., a
Washington corporation,

Defendant.

Case No. 11-2-10852-5

AMENDED COMPLAINT

COMES NOW Plaintiff, by and through its counsel, Paul E. Brain of the Brain Law Firm PLLC, and alleges and complains as follows:

I. PARTIES

1.1 Plaintiff Chambers Creek LLC. Chambers Creek LLC ("Chambers Creek") is a Washington limited liability company doing business in and, therefore, a resident of Pierce County, Washington. At all times material hereto, Chambers Creek owned the real property and improvements thereon.

1.2 Defendant Coyote Excavating, Inc. Coyote Excavating, Inc. ("Coyote") is a Washington corporation doing business in and, therefore, a resident of Pierce County, Washington.

II. JURISDICTION AND VENUE

2.1 Jurisdiction and Venue. This matter falls within the original jurisdiction of the Superior Court pursuant to RCW 2.08.010. Venue is properly in this Court pursuant to

1 RCW 4.12.025, in that Defendant has conducted business in and, therefore, resides within Pierce
2 County, Washington.

3 **III. FACTUAL ALLEGATIONS.**

4 3.1 Chambers Creek and Coyote entered into a contract (the "Contract"), under
5 which Coyote contracted to provide certain services in relation to the demolition of a former
6 paper mill site located in Steilacoom, Washington (the "Property").

7 3.2 During the course of the demolition related activities, Coyote knew or was
8 negligent in not knowing that certain of the construction materials present in certain structures
9 included fibrous asbestos as a component. Coyote demolished several structures known to
10 contain asbestos contaminating the large parts of the Property with asbestos in the process.

11 3.3 Irrespective of and independent of any duties or warranties arising under the
12 Contract between Coyote and Chambers Creek, Coyote was generally under a duty of care not to
13 undertake activities which would result in damage to the Property or injury to persons,
14 including, without limitation, the contamination of the Property with asbestos. The foreseeable
15 result of Coyote's activities in demolishing structures which Coyote either knew contained
16 asbestos, or was negligent in not knowing, was damage to the Property through contamination
17 by asbestos, and injury to persons resulting from exposure to asbestos. As a foreseeable
18 consequence of the contamination of the Property by asbestos as a result of Coyote's breach of
19 the duty of care, Chamber Creek's Property has been damaged. The costs of removing the
20 asbestos contamination are estimated to exceed \$1,000,000.

21 **IV. CLAIMS FOR RELIEF**

22 4.1 Chambers Creek re-alleges and incorporates by reference the prior allegations of
23 this Complaint.

24 4.2 Coyote's negligent breach of its duty not to cause damage to the Property of
25 Chambers Creek has proximately caused damages to Chambers Creek in an amount estimated to
26 exceed \$1,000,000.

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V. PRAYER FOR RELIEF

WHEREFORE, Chambers Creek prays for the following relief:

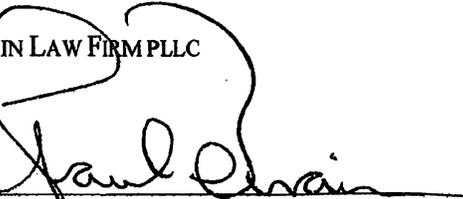
5.1 For an award of damages against Coyote in an amount to be proven at trial, but estimated to exceed \$1,000,000;

5.2 For an award of Chambers Creek's reasonable attorneys' fees and costs incurred herein; and

5.3 For such further relief as the Court deems just and necessary.

DATED this 30th day of September, 2011.

BRAIN LAW FIRM PLLC



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CERTIFICATE OF SERVICE

I hereby certify that I have this 30th day of September, 2011, served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

Counsel for Defendant:

James D. Case
Case & Dusterhoff LLP
9800 SW Beaverton Hillsdale Hwy, Suite 200
Beaverton, OR 97005

Hand Delivery
 U.S. Mail (first-class, postage prepaid)
 Facsimile
 Email

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

DATED this 30th day of September, 2011, at Tacoma, Washington.

