

No. 66375-5 "

**COURT OF APPEALS – DIVISION ONE  
IN AND FOR THE STATE OF WASHINGTON**

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MILLER ROOFING ENTERPRISES, INC.,

Appellant

v.

TIM McCLINCY, an individual, McCLINCY BROTHERS  
FLOOR COVERINGS, INC., a Washington corporation  
dba McCLINCY'S HOME DECORATING,

Respondents

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**RESPONDENTS' ANSWERING BRIEF**

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## **RESPONDENTS' ANSWERING BRIEF**

### **I. INTRODUCTION**

Respondents are Tim McClincy, an individual, and McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating ("McClincy"). Respondents submit this brief in response and opposition to Miller Roofing Enterprises, Inc. ("Miller") opening brief. McClincy requests that the findings of fact, conclusions of law and the judgment of the trial court be affirmed in their entirety and that this appeal be dismissed, with costs.

### **II. RESPONSE TO MILLER'S ASSIGNMENTS OF ERROR**

1. The trial court properly found Miller to be the manufacturer of the torch down roof, which he warranted against manufacturing defects for a period of 12 years and the metal roofs, together with the metal coping over the parapet walls for 50 years.

2. The trial court correctly found Miller liable for breach of oral contracts for repair work in 2006.

3. The trial court properly awarded damages to plaintiff McClincy Brothers Floor Covering, Inc.

### III. STATEMENT OF THE CASE

#### A. *Response to Appellant's Statement of Relevant Background.*

Miller has failed to identify certain portions of the record which are important to this appeal, consideration of which respondent believes will establish that the judgment of the trial court was based upon substantial evidence, and should be affirmed.

#### i. *The express warranties contained in Miller's proposal with respect to the torch down and metal roofs contained explicit temporal limitations the effect of which, as a matter of law, extend the statutes of limitation and repose.*

Miller's liability arises from his breach of the express warranties contained in the proposal agreement which he himself prepared and which makes no reference to any warranty from the manufacturer for any of the components of the torch down roof (including the fiberglass membrane), the metal roofs, or any of the metal components including coping which Miller installed over the parapets adjacent to the lower torch down roof.<sup>1</sup> The parties are thus limited to the terms of the agreement they reached.

The proposal contains the following:

*"Roof guaranteed 5 years labor and 12 year manufacture on Torch down and 50 year manufacture waranty (sic) on metal."*

See Pl's Ex. 1.

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<sup>1</sup> Miller could not even remember the identity of the manufacturer of the fiberglass base sheet, testifying that he did not recall what brand it was. See p. 20, *infra*.

On the basis of these express warranties, the court made the following finding:

*“2.16 Miller Roofing expressly warranted to McClincy Brothers that the torch down roof would not leak for 12 years and the metal roof would not leak for 50 years. McClincy Brothers has provided Miller Roofing and its representatives with notice of breach of these express warranties, but Miller Roofing has failed to provide any relief to McClincy Brothers for the damage caused to the premises due to water intrusion.”*

Clerk’s Papers (“CP”) 406, ¶ 2.16.

On the basis of that finding, the court made the following conclusions of law:

*“2. There was a valid binding contract between the parties entered into on June 16, 1997. Miller Roofing manufactured the torch down roof and warranted the torch down against manufacturing defects for a period of 12 years and the metal roofs, together with the metal coping over the parapet walls, for 50 years.*

*3. Miller breached the original contract with McClincy Brothers entered into June 16, 1997 and the subsequent oral agreements entered into in January and June, 2006.”*

CP 411, ¶ 2, 3.

Under the circumstances, Miller can find no sanctuary in the statutes of limitation and repose.

**ii. Miller's substandard workmanship would have invalidated any applicable warranties.**

Even if there were evidence to support an inference that the express warranties given by Miller were intended to apply only to those available from the manufacturers of the roof membrane and the metal roofs and their components, Miller's substandard workmanship would have invalidated those warranties, rendering Miller Roofing liable for all consequential damage. Each of the blank warranty forms identified as defendant's Exhibits 23 and 24 contain such disclaimers. GS Roofing Products Company Inc. provides a 12 year Flintastic Roof Membrane Product Warranty subject to the following exclusions:

***"EXCLUSIONS FROM COVERAGE.***

*GS shall not be liable for correction of conditions on, or any damage to, any building, interior or exterior, or property contained therein or thereon, or for damages or injuries of any kind whatsoever; and shall not be liable for damages to roof insulation, roof decks or other bases over which the GS products are applied; or for leaks, damages or injuries due to improper application, defective workmanship, or use for purposes other than which is recommended, or attributable to any of the following (or any combination thereof):*

*1. . . .*

*. . . .*

*4. Damage to, or failure of, the roof membrane and base finishings caused or contributed by:*

*a) Infiltration or condensation of moisture in, through or around the walls, copings, building structure or underlying or surrounding materials; or*

*b) . . .*

c) . . .

d) . . .

e) . . .

f) ***Lack of positive drainage, including, but not limited to, lack of adequate drainage to promptly and readily remove water from the roof membrane.***<sup>2</sup> Emphasis added.

Def. Ex. 23.

So much for any purported GS warranty.

Miller attempts to offer the Champion Metal 50 year limited warranty instead of his own. Again, his shoddy and substandard workmanship would have invalidated this warranty even if it were available to McClincy. Under the heading “*Conditions and Limitations,*” subsection (2) provides as follows:

“ . . .

E. *Exposure to damp insulation, damp lumber, or condensation.*

. . .

H. *Improper drainage—drainage must be provided so as not to hold any water.*

I. *Improper application—application must conform with C.M.W. recommended procedures.*

J. *Reaction between the fasteners and the sheet causing perforation. The type of fastener selection rests solely with the buyer.”*

Def. Ex. 24.

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<sup>2</sup> Gerald Burke’s unrefuted expert testimony established that the torch down roof was not constructed to drain properly, the metal coping over the parapets were not fastened securely, and the scuppers through the east wall were of improper design and installation. His opinion relative to the scuppers was confirmed by Miller’s own experts, Paustian and Wetherholt.

Miller admitted a total lack of familiarity with Uniform Building Code standards, and was unable to state that the roofs were constructed according to those standards. See Transcript of Proceedings (“RP”) 10/18/2010, p. 87:4-17.

Miller’s defective workmanship is discussed below.

***iii Miller’s work performed in 1997-1998.***

In describing Miller’s proposal for installation of the torch down flat roofs and the metal roofs, appellant comments that “. . . *Miller joined typical roofing products that were already completed by other product manufacturers.*” App. Brief, p. 3. However, in his testimony before the court Miller described in detail the process by which he built and manufactured the torch down roof, a process which complex, requiring a high degree of skill. Those specific portions of Miller’s testimony are set forth on pp. 19 through 22, *infra*.

In addition, after Miller completed his work, he prepared two statements, each of which is dated May 8, 1998. One is addressed to “*McClincy’s Home Decorating*” and is labeled “*extra work*” and states:

*“Wash stucco (sic) off upper and lower roofs so coating will stick to torch down roofing material. Add extra ply of torch down to gutter area and along walls were damaged check rest of roof and patch as needed with torch down.”*

Pl. Ex. 2.

The other statement is addressed to “*McClincy’s*” and is labeled “*Job Complete Final Bill.*” In it Miller confirmed that Miller Roofing installed a new metal cap on the walls, finished reflective coating on the torch down, painted metal where needed, performed extra work including extra roof vents and roofed around all flashings not yet in at time of roofing. Miller also represented that white cap sheet was added where the deck would be and on the lower roof, supplied overflow scuppers for balconies, as well as installing metal cap on balconies. Pl. Ex. 2. Miller obviously finished the torch down roof and installed the flashing *after* the siding was installed. It is therefore incorrect for Miller to state in his brief that “[T]here was no siding installed at the time Miller performed his work.” App. Brief, p. 4.

***iv. The metal roofing work performed in 2005.***

Tim McClincy testified that the problems developed after the roof was completed requiring that Miller return to re-spray painted areas which oxidized on the metal coping along the parapets as well as over the field surface of the roof. RP, 10/12/2010, p. 31:1-16. Miller re-sprayed those areas over paint that was used when the roof was originally installed. This paint was inadequate and should not have been used. RP, 10/12/2010, p. 31:21-24.

Sometime in 2003, the oxidation problem reappeared, ultimately requiring replacement of some of the metal coping, as well as the entire metal roof over the apartment. *Id.*, p. 32. McClincy testified that he expected Miller to honor his warranty as it was given on the original proposal and Miller did so.

McClincy made no claim on any warranty which may have existed with Champion, the metal manufacturer, and Miller honored its warranty by performing this metal replacement and repair *at no cost* to McClincy.

It is therefore inaccurate and incorrect for Miller to suggest *that “a warranty claim was made and Champion provided new metal roofing and coping metal . . .”* App. Br., p. 4 There is no evidence that McClincy ever made a warranty claim with Champion in connection with *any* of the metal roof components. While appellants purport to quote from an exhibit which was admitted over the objection of plaintiffs’ counsel for lack of foundation, it was not admitted for the purpose of establishing that McClincy was provided with a Champion warranty by Miller, which both McClincy and Miller testified never happened.<sup>3</sup> See McClincy’s

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<sup>3</sup> In admitting these two warranty exhibits, the transcript reads:

*Mr. Zobel:*            *Then 23 and 24 I would respectfully object to.*  
*Mr. Turner:*        *They’re already admitted.*  
*Mr. Zobel:*        *I don’t think they are.*  
*The Court:*        *I don’t think they’re in yet.*

testimony, RP., 10/12/2010, p. 28:3-22; and Miller's testimony RP

10/18/2010 p. 78:25 to 79:12. On the basis of this evidence, the court found:

*"2.8 Beginning in 2002 and later in early 2003, the metal roof and the metal coping over the parapets began to oxidize. Miller Roofing made repeated attempts to correct the oxidizing portions by repairing and retouching them until finally it became apparent that the roof would have to be replaced. Sometime in 2005, Miller Roofing removed and replaced the entire metal roof and one-third of the metal coping over the parapets."*  
CP 404, ¶ 2.8.

**v. *The lower torch down repair work performed in January 2006.***

Again, Miller has omitted important portions of the record which provide substantial evidence to support the judgment. . Tim McClincy testified that in January of 2006, water was staining toward the middle of the interior of the showroom section, in particular at the southeast corner area below the torch down, with the result that water was coming through the ceiling. RP 10/12/2010, p. 33:20-25; 34:1-15.

Miller represented in his invoice, number 16490 dated 1/23/2006

that:

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*Mr. Zubel: No, they're—I would have to make a strenuous objection because there's absolutely no foundation. They're just hearsay documents. They're not even filled out.*

*The Court: They're not the warranties in this case. They're just general warranties?*

*Mr. Turner: Correct.*

*The Court: Okay.*

RP. 10/21/2001, p. 69:21—p. 70:8.

*Repair roof where leaking in show room cause of leak stucco wall, stucco not down far enough over torch down, letting water in under torch down, we sealed torch down to stucco with roof cement and webbing also cut out torch down where water got under it and re-roofed with new torch down, new torch down should be coated with a reflective coating in spring.” Pl. Ex. 2*

It is therefore inaccurate and incorrect to suggest that this invoice “clearly stated that water had been leaking not as a result of roofing, but as a result of the stucco.” App. Br., p. 5. In any event, Miller represented that he corrected the problem and it was paid for doing so.

On the basis of this evidence, the court found:

*“2.9 In January 2006, the lower torch down roof began leaking into the showroom. On January 23, 2006, at the request of McClincy Brothers, Miller Roofing performed certain repairs to the lower torch down roof and the metal coping along the top of the parapets, as well as to the scuppers attached to the lower torch down roof, purportedly to correct water intrusion. McClincy Brothers paid Miller Roofing the sum of \$489.60 for this work.” CP, 404.*

**vi. The repair work performed in June, 2006.**

When the roof continued to leak after Miller purportedly performed its repairs in January of 2006, McClincy hired American Leak Detection Services (“ALDS”) to investigate the source of the water intrusion. On April 3, 2006, Doug Breshears of ALDS prepared a report summarizing his findings. See Pl’s Ex. 12. On the basis of that report, which was provided to and discussed with Miller, Miller purportedly

performed additional repair work in June of 2006. RP 10/12/2010, p. 40:18-25 - p. 41:1-11. He presented an invoice, number 16577, dated June 3, 2006 in the amount of \$870.40 in which he represented that he completed the following:

*“Maintenance lower torch down roof. Repair torch down as needed with new torch down. Reseal scuppers as needed also re-caulk scuppers on outside walls to stucco, check stucco walls and caulk as needed, coat roof with Karnack aluminum roof coating for protection. Replace nails with screws on one balcony couldn’t get in to others. Extra material and labor, Roof was supposed to be clean and ready for maintenance and was not we had to do cleaning.”* Pl. Ex. 2

Tim McClincy addressed the relationship of the scuppers to the EIFS, with respect to location, indicating that in order for Miller to construct the roof, it was necessary for him to select and install the scuppers. RP, 10/12/2010, p. 42:15-25 - p. 43:1-25.

On the basis of this evidence, the court found:

*“2.11 On June 3, 2006, Miller Roofing performed additional repairs to the lower torch down roof, the metal coping over the top of the roof parapets adjacent to the lower torch down roof as well as to the roof scuppers adjacent to the lower torch down roof again to correct water intrusion. McClincy Brothers paid Miller Roofing an additional \$870.40 for these repairs.*

*2.12 Miller Roofing represented that it repaired the roof where it was leaking into the showroom, sealed the torch down roof to the stucco with roof cement and webbing, cut out the torch down where water was penetrating underneath it and reroofed it with new torchdown.”*

CP, 405, and Appendix A.

**vii. *The uncontroverted expert testimony of Gerald Burke provided the basis for the court's findings and conclusions concerning Miller's substandard workmanship***

Gerald Burke testified as McClincy's expert witness with respect to the defects in the construction of the torch down and metal roofs, as well as the metal components installed over the parapets through which water was able to penetrate. Burke, who is the president of Summit Construction, wrote two lengthy reports, replete with photographs depicting his examination and testing, which were admitted into evidence as plaintiffs' Exhibits 4 and 20.

Miller called two expert witnesses. Each of them testified as to defects which existed with respect to the lower torch down roof through which the majority of water intrusion was experienced. Miller chose to call James Paustian, a structural engineer employed by Pacific Engineering, to testify that improperly installed scuppers caused water to leak into the building. Paustian's report was admitted into evidence as defendant's exhibit 33. Miller also called Ray Wetherholt, another structural engineer, who is employed by Wetherholt and Associates, who confirmed Paustian's testimony, which he helpfully supplemented by identifying three areas which placed the building in a state of virtual

collapse on account of deterioration from water intrusion which he helpfully opined found its inception in 2006 or 2007. Wetherholt prepared five reports which were admitted into evidence as defendant's exhibit 40, 49, 50, 51 and 52. In the face of this testimony, the court adopted Burke's findings and conclusions in relation to all defects existing with respect to all three roofs and their components, which were either not refuted or were supported by the testimony of Paustian and Wetherholt. See finding of the court, ¶ 2.17, CP 406-408 and attached Appendix A.<sup>4</sup>

*Miller's own experts thus contributed substantially to his defeat.*

**B. Relevant Procedural History.**

- i. Miller waived any right to object to service of process by having engaged in discovery between March 3, and June 25, 2009, when Miller's counsel accepted service of the summons and complaint on the occasion of the deposition of Tim McClincy.**

Miller contends that this action was not timely commenced on account of the fact that Miller's counsel did not accept service of the original complaint until more than 90 days after the action was commenced, the effect of which is to place McClincy's claims outside the three year statute of limitations for oral contracts. This argument fails given the nature and extent of the discovery undertaken by Miller both

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<sup>4</sup> For ease of reference, McClincy has included in Appendix A, the Findings of Fact, Conclusions of Law which were adopted by the court in this case.

before and after acceptance of service. See *Blankenship v. Kaldor*, 114 Wash.App. 312, 57 P.3d 295 (2002), holding that the defendant waived her affirmative defense of insufficiency of service of process by engaging in discovery not aimed at the issue of service and engaging in discovery without specifically inquiring about service, including taking the plaintiff's deposition. This is consistent with *Lyddert v. Grants County*, 141 Wash.2d 29, 39, 1 P.3d 1124 (2000), in which the Supreme Court stated that:

*" . . . A defendant cannot be allowed to lie in wait, masking by misnomer, its contention that service of process has been insufficient, and then obtain a dismissal on that ground only after the statute of limitations has run, thereby depriving the plaintiff of the opportunity to cure the service defects. "*

The court noted that it is imperative that initial discovery be directed to determining the sufficiency of process "*. . . before any significant expenditures of time and money had occurred and at a time when the plaintiff could have remedied the defect. "*

What is particularly egregious in this case is Miller's deliberate attempt to avoid service of process, requiring the plaintiff to incur substantial expenditure to the process server for four unsuccessful service attempts. Repeated requests by plaintiffs' counsel that defendant's counsel accept service as a condition of going forward with any further discovery, were not met until after the defendant contends that the statute of

limitations had run. When plaintiffs' counsel discovered that nonetheless the defendant intended to raise this defense at a scheduled mediation of this case, plaintiffs' counsel again requested that this defense be waived before the defendant could proceed with an examination of the premises by Miller's expert, and proceed with eight additional depositions. The defendant's counsel provided that waiver. See Pl. Ex. 44; or Dkt. # 38, Declaration of Eric Zobel, CP 136- 141 and Exhibit L attached thereto, CP 185-186..

Under the circumstances, the court was completely justified in refusing to dismiss McClincy's breach of contract claims on these grounds.

#### **IV. ARGUMENT**

##### **A. *McClincy properly commenced this action within the applicable statute of limitations.***

Miller contends that the trial court dismissed all breach of contract claims arising out of Miller's original work in 1997 and 1998 ruling that those claims were time-barred by RCW 4.16.326(g), the six year statute of repose governing construction defect claims. Miller's brief, p. 19. But as noted, this was a *provisional* order entered before the conclusion of the plaintiffs' case in chief. See discussion, pages 18 and 19, including transcript excerpts pages 19-22, *infra*.

For the court to have reached this result and dismiss these breach of contract claims, would have resulted in clear error. The court would have been required to disregard the plain language of the contract, by which Miller warranted the torch down for 12 years for defects in manufacturing, and the metal roofs and components for 50 years. Parties are free to extend the statute of limitations by explicitly providing that the warranty extends to future performance beyond the expiration of the applicable statute of limitations.

An express warranty given by a roof manufacturer which by its terms is for a period longer than the statute of limitations is enforceable. See *Church of the Nativity of Our Lord v. WatPro, Inc.*, 491 N.W.2d 1 (Minn. 1992), holding that notwithstanding the four year statute of limitations under Minn.Stat. § 336.2-725:

*“ . . . the Guarantees offered by Flag through WatPro extended the future performance of the goods, expressly warranting that the roofs would remain watertight for ten years. Where there is such an explicit warranty, the cause of action accrues and the statute of limitations begins to run ‘when the plaintiff discovers or should have discovered the defendant’s refusal or inability to maintain the goods as warranted in the contract.’ Citation omitted.”* At p. 6.

In *Church of our Nativity of Our Lord*, the breach occurred within ten years, and an action was brought within four years after its discovery. See also, *Western Recreational Vehicles, Inc. v. Swift Adhesives, Inc, et al.*

23 F3d 1547, (9th Circ. 1994), predicting that Washington would follow the majority view in recognizing the validity of future performance warranties which refer explicitly to temporal periods.

In *Hillcrest Country Club v. N.D. Judds Co., et al.*, 461 N.W. 2d 55 (Nebraska, 1990), a case involving the installation of a defective roof, a 20 year warranty was enforced as a “*special warranty*” rendering a four year statute of limitations inapplicable to the breach of express warranty and holding that the special warranty was in the nature of an indemnity. As that court observed:

*“More specifically, however, Judds’ action against Bear is, in reality, one for indemnity. Citation omitted. The rationale behind this is simple: A party seeking indemnification has no injury to complain of until he or she suffers a loss. If the period of limitations were to start running when the underlying warranty is breached, a party could be foreclosed from indemnity through no fault of his or her own.”* Emphasis added.  
461 N.W.2d at p. 64.

McClincy first noticed water intrusion into the showroom in early 2006. RP, 10/12/2010, p. 33:17-2534:1-24. McClincy requested that Miller make repairs to correct water intrusion which he did unsuccessfully in January, 2006. At his own expense, McClincy retained American Leak Detection to determine the source and cause of the water intrusion. On April 3, 2006, American Leak Detection submitted a written report (Pl. Ex. 12) detailing its findings which McClincy communicated to Miller.

Miller represented to McClincy that he corrected the water intrusion problem and represented that he had done so in writing on the invoices which he submitted to McClincy for payment. See Pl. Ex. 2.

McClincy testified that he is not a roofing expert. RP 10/12/2010, p. 37:1-2. There is no evidence that there was water intrusion into the showroom in late 2006 or early 2007. It was not until the winter of 2007-2008 when again substantial precipitation resulted in large amounts of water penetrating into the showroom area. RP, 10/12/2010, p. 56-57.

***B. The trial court correctly found Miller liable as a manufacturer.***

The trial court properly disregarded Miller's attempt to shift his express 12 year torch down roof warranty to GS Roofing Products Company ("GS") and the 50 year warranty for metal roofing products to Champion Metal of Washington, Inc. ("Champion").

Miller clearly intended to warrant the torch down roof for twelve years. This is precisely what the contract says, which Miller prepared. Pl. Ex. 1. There is no evidence that Miller intended that McClincy look elsewhere for warranty protection; were that the case, the parties clearly could have limited the warranty to the manufacturer of the roof membrane, which they clearly did not.

Miller claims that defendant's exhibits 23 and 24 exonerate him from any liability for the express warranties relating to the torch down roof and the metal roof. In fact, Miller quotes from a portion of the GS warranty on page 16 of its memorandum and from the Champion warranty on page 17. McClincy objected to the introduction of either of these exhibits for lack of foundation because Miller could not establish that the warranties given by him in his contract were conditioned upon those given from GS and Champion. See discussion pages 6 through 9, and FN 3, *supra*.

On October 15, 2010, at the conclusion of the plaintiffs' case in chief, the court *provisionally* granted defendant's motion for dismissal of claims of breach of contract. However, the court expressly allowed McClincy to establish that Miller stepped into the role of manufacturer for the torch down roof and permitted the plaintiff to develop a record to support this claim. CP, 359.

The trial resumed on October 18, 2010. McClincy had not rested its case but experts testified for Miller out of order in order that they might be accommodated. McClincy called Miller as an adverse party and on direct examination, Miller described in detail the process by which he built and manufactured the torch down roof:

Q. Tell us what a torch down roof is.

A. Torch down roof is a single ply of roof system with a base sheet and one ply of torch down, and a reflective coating on a smooth surface torch down.

Q. So a torch down roof has got three separate components?

A. Yes.

Q. And, again, those components are the base sheet, correct?

A. Yes.

Q. And what's the base sheet?

A. It's a fiberglass base sheet that's nailed down over the plywood roof deck.

Q. Who normally installs the plywood roof deck?

A. The builder.

Q. Do you remember when you worked – do you remember installing a torch down roof on this particular building?

A. Yes.

Q. Do you remember whether the builder put down the plywood?

A. Yes.

Q. So then the first step that you would have done would have been to do what?

A. Nail down the base sheet.

Q. What's that made out of?

A. Fiberglass and probably asphalt I guess.

Q. Was it supposed to be waterproof?

A. There are some that are waterproof.

Q. What about the one you installed?

A. **I don't recall what brand it was.**

Q. And then what goes on top of the base sheet?

A. The torch down.

Q. All right. And what is the torch down? What's it made of?

A. Polyester—*asphalt polyester reinforced mat.*

Q. How is it applied?

A. With torches.

Q. Well, is it in a liquid form, or is it in a solid form before it is torched?

A. It's in a solid form and we heat one side of the roll and bond it to the base sheet.

Q. So it comes on a roll, correct?

A. Yes.

Q. And what are the dimensions of the roll?

A. One roll is about three feet wide by probably 100 feet long.

Q. All right.

A. No, I'm sorry. Probably about 60 feet long.

Q. So it comes on a roll that's three feet wide, 60 feet long. Is it capable of being cut to size?

A. Yes.

Q. And how would you cut it?

A. With a razor knife.

Q. All right. So the process would be to cut the roll, the torch down which is in a solid—it's a solid, comes on a roll. You put it down over the mat?

A. The base sheet.

Q. The base sheet, I'm sorry. Then what do you do?

A. We roll it out, we heat one side of the roll with a torch and that bonds it to the base sheet.

Q. You heat the entire flat surface of the material?

A. Yes.

Q. The torch down?

A. Yes.

Q. It's not like you just do a seam –

A. No.

Q. --around the edges.

A. No.

Q. You melt the substance basically almost to a liquid, don't you?

A. Yes.

Q. and so that's designed to enable that liquid to basically bond to the fiberglass?

A. Correct.

Q. Correct?

A. Yes.

Q. Okay. Now, that –is there a certain amount of skill involved in doing that?

A. Yes.

Q. Well, what skill?

A. Well, if you get it too hot you can cause it to wrinkle or blister, or if you didn't get it hot enough you would have voids and it won't bond properly. So there is a technique.

Q. So this is not something that just anybody can do?

A. No.

*Q. And, in fact, people who you would hire at your roofing company to do this kind of work have to have a certain level of skill to do it, would that be a fair statement?*

*A. Yes.*

*Q. Okay. Do you remember how many people you hired to do the torch down on McClincy's roof?*

*A. I'm not sure. Probably like four guys. It would be a couple of laborers and a couple of installers.*

*Q. Now, these four workmen previously worked for you on torch down roofs?*

*A. Yes.*

*Q. You were satisfied they had the requisite level of skill?*

*A. Yes.*

*Q. Did you supervise them in the work that they were doing?*

*A. No.*

*Q. Who supervised them, if anyone?*

*A. The foreman on the job. One of the guys would be a lead guy. He would be the supervisor on the job.*

*(Emphasis added) RP, Oct. 18, 2010. P. 66:14 thru p. 70:25.*

...

*Q. Well, after he completed the torch down—in part of your normal practice when the torch down is complete did you have a normal practice of coming back and looking yourself to see if it was done right?*

*A. Yes.*

*Q. Did you do that in this case of McClincy?*

*A. I don't recall but I'm sure I did.*

*Q. All right. Getting back to the procedure. Now we've gotten to the point where we bonded the torch down, the riberglass. What's the next step?*

*A. Then we usually let the roof stand a while and weather a little bit before we come back and put the coating on so it bonds better. So it isn't shiny.*

*Q. What's the purpose of the coating?*

*A. To reflect the ultraviolet light, protect the torch down itself. It's not waterproof of any kind, it just protects it from breakdown from ultraviolet light, expanding, contracting, that kind of thing.*

*RP, Oct. 18, 2010, p. 71:19 thru p. 73:1.*

By his own testimony, Miller's construction company was solely responsible for manufacturing and building the roof. The contract proposal clearly granted McClincy a 12 year warranty for manufacturing defects, in the absence of any evidence that the parties intended some other entity as McClincy's exclusive recourse to obtain relief for manufacturing defects, Miller Roofing is solely responsible for *manufacturing defects, as well as its defective workmanship*, which caused the roof to deteriorate from water intrusion, damage the building, and allow water to leak into the interior showroom.

- i. Washington Common Law distinguishes between manufacturers and those who construct improvements upon real estate for purposes of application of RCW 4.16.310, the Builders' Limitations statute.***

Miller relies on authority from *1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.*, 144 Wn.2d 570, 29 P.3d 1249 (2001), in an effort to remove Miller from his role as manufacturer of the torch down roof. Reliance on this authority is misplaced. *1519-1525 Lakeview Blvd. Condo Ass'n* addressed a challenge to the constitutionality of RCW 4.16.310 on the grounds that it denies equal protection of the law to various classes who are excluded from asserting this statute as a defense.

Miller gave McClincy an express warranty that the roof would not fail for twelve years. Whether or not Miller enjoyed the "*status of a*

*manufacturer*” for purposes of determining the applicability of the builders’ limitation period is irrelevant because Miller expressly warranted the roof would not fail for twelve years. The court could not possibly have erred in finding that Miller was the manufacturer of the torch down roof in light of the fact that he expressly assumed that role. Miller expressly warranted the torch down roof as a whole, including the quality of his workmanship, and well as the installation of the scuppers and related metal coping and flashing.

***ii. Miller’s liability is not dependent upon the WPLA and whether or not he was a manufacturer under the terms of the Act is irrelevant and immaterial.***

The plaintiffs did not recover their judgment against Miller under the WPLA. The fact that construction services are not products for purposes of the WPLA is therefore irrelevant and immaterial for purposes of this appeal. In addition, a recovery under the WPLA is in *tort*, not contract. Accordingly, whether or not Miller was a “*manufacturer*” according to RCW 7.17.010(2) cannot be a basis to justify reversal of this judgment.

***iii. The judgment against Miller was for breach of express warranty arising out of contract, and not based upon any claim arising under the UCC.***

Miller correctly states that according to *Arango Constr. Co. v. Success Roofing*, 46 Wn.App. 314, 317, 730 P.2d 720 (1986), citing RCW

62A.2-102, that contracts for work, labor and materials are governed by common law principles of contract. The judgment entered against Miller was not dependent upon a finding of breach of implied warranty under the UCC, but rather a breach of contract including breach of express warranty for construction defects to the roofs. Miller's liability is based upon his multiple breaches of the contracts which resulted in the damages which formed the basis of this judgment.

***iv. Evidence of business practices of other roofing companies is irrelevant and immaterial and thus does not affect Miller's liability in this case.***

Whatever the business practices are of Gerald Burke of Summit Construction and Roofing Company, a roofing expert retained on behalf of McClincy or Richard Jackson of JJ Jefferson and Sons, another expert retained by McClincy, with respect to labor and materials warranties utilized by each of them in their respective trades is wholly irrelevant. The record in this case is clear is that neither of these manufacturer's warranties was even *discussed* between McClincy and Miller when they entered into their agreement. Miller could not even remember the brand name of the membrane he used to build the torch down roofs.

- v. ***The court properly awarded damages against Miller for breach of the express warranty set forth in the agreement.***

On the basis of Miller's proposal, the court found that the parties entered into a written contract on June 16, 1997 for the construction and replacement of three roofs as part of the remodeling and construction of the (above-referenced) commercial building. CP 404, ¶

2.5. The court also found that:

*“ . . . The contract provided for the replacement of four 2 x 2 skylights with new clear glass insulated skylights, the re-roofing of all low-pitched or flat roofs with one-ply 281 pound fiberglass base sheet and rubber torch down with an extra ply around all edges and outlets, including coating roof with a reflective coating, and replacement of all metal trim as needed. The agreement also provided for the re-roofing of all pitched roofs with Champion Snap-Lock metal roofing a 30 pound base sheet.”*  
CP, 404, ¶ 2.5.

The court also found that in January 2006, the lower torch down roof began leaking into the showroom and that on January 23, 2006, at McClincy's request Miller Roofing performed certain repairs to the lower torch down and the metal coping along the top of the parapets, as well as to the scuppers attached to the lower torch down roof for the the purpose of correcting water intrusion, for which Miller Roofing was paid the sum of \$489.60. CP, 404, ¶ 2.9. The court also found that when water continued to leak into the premises, McClincy Brothers hired American

Leak Detection (“ALD”) to determine its source. On April 3, 2006, ALD identified those locations where water was penetrating the lower torch down roof into the interior of the building as well as voids at the upper southeast scupper at the stucco transition which caused water to leak into the interior of the building. ALD also identified a patched seam in the roofing and recommended that it be re-sealed, and also identified voids at the upper sheet metal scupper and roofing transition. CP, 405, ¶ 2.10.

The court found that on June 3, 2006, Miller performed additional repairs to the lower torch down roof, the metal coping over the top of the roof parapets adjacent to the lower torch down roof as well as the roof scuppers adjacent to the lower torch down roof, again to correct water intrusion, for which Miller was paid an additional \$870.40. CP, 405, ¶ 2.11.

The court also specifically found:

*“2.12 Miller Roofing represented that it repaired the roof where it was leaking into the showroom, sealed the torch down roof to the stucco with roof cement and webbing, cut out the torch down where water was penetrating underneath it and reroofed it with new torchdown.”* CP, 405, ¶ 2.12.

The court also found that:

*“Miller Roofing improperly removed and replaced the entire metal roof and one-third of the metal coping over the parapets in 2005, [as well as improperly performing] additional repairs, replacement and construction to the*

*lower torch down roof, the metal coping over the top of the roof parapets adjacent to the lower torch down roof as well as to the roof scuppers through the parapets adjacent to the lower torch down roof, when work was concluded on June 3, 3006.” CP, 405, ¶ 2.13.*

The court also found that:

*“ . . . [D]uring November and December 2007, the building experienced substantial water intrusion into the interior of the showroom causing damage to the ceiling, walls and other areas, as well as damage and loss to products and materials on display.” CP, 406, ¶ 2.14.*

There is substantial evidence to support each of these findings.

The court therefore correctly concluded that Miller breached the contract with McClincy Brothers entered into on June 16, 1997 in the manner described above.

***C. The Court properly awarded damages arising out of Miller’s work in 2006 as those claims were not time-barred.<sup>5</sup>***

Miller contends that all claims arising out of 2005 warranty work and 2006 repair work were time-barred by the three year statute of limitations governing oral contracts. Miller’s brief, p. 21. This is incorrect. The court found that:

*“2.18 Plaintiffs could not reasonably have known of the precise nature and extent of the defective design and construction of the scuppers attached to the upper roof, and the lower torch down roof, the defects of the metal roof, the*

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<sup>5</sup> In light of the fact that Miller gave an express warranty of 12 years with respect to the torch down roofs and 50 years with respect to the metal roofs and metal components, McClincy could have waited until May 8, 2010 to commence this suit.

*metal coping along the top of the parapets of the torch down roof and the defects in the surface of the lower torch down roof until late December 2009 or early January, 2010 when presented with a report from a roofing expert specifically identifying those design deficiencies and defects in workmanship as a proximate cause of water intrusion.” .” CP , ¶ 2.14.*

This finding was supported by substantial evidence which consisted not only of McClincy’s testimony but also that of his expert, Gerald Burke whose findings are detailed in his written reports admitted into evidence as plaintiffs’ Exhibits 4 and 20.

Under the circumstances, the discovery rule applies in this case and begins to run “ . . . *when a party knows, or in the exercise of due diligence, should have known of the breach.*” *Urban Development, Inc. v. Evergreen Building Products, LLC*, 114 Wn.App. 639, 652, 59 P.3d 112 (2002).

- i. The Court properly found that McClincy did not discover the defects to the roof until November, 2007 and in detail, January, 2010.***

Miller contends that McClincy cannot rely on the “discovery rule” to delay accrual of this cause of action. In fact, the record is uncontroverted that McClincy could not discovery these latent defects until water intrusion was experienced into the showroom in November of 2007. Miller cites *1000 Virginia Limited Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 576-578, 146 P.3d 423 (2006), which clearly adopted the

discovery rule in action on construction contracts involving allegations of latent defects. Miller's brief, p. 24. In that case, the court specifically held that:

*“Statutes of limitations do not begin to run until a cause of action accrues. RCW 4.16.005. Usually a cause of action accrues when the party has a right to apply to a court for relief. Gazija v. Nicholas Jerns Co., 86 Wash.2d 215, 219, 543 P.2d 338 (1975); Lybecker v. United Pac. Ins. Co., 67 Wash.2d 11, 15, 406 P.2d 945 (1965). In many instances an action accrues immediately when the wrongful act occurs, but in some circumstances where the plaintiff is unaware of harm sustained a ‘literal application of the statute of limitations’ could ‘result in grave injustice.’ Gazija, 86 Wash.2d at 220, 543 P.2d 338. To avoid this injustice, courts have applied a discovery rule of accrual, under which the cause of action accrues when the plaintiff discovers, or in the reasonable exercise of diligence should discover, the elements of the cause of action. Green v. A.P.C., 136 Wash.2d 87, 95, 960 P.2d 912 (1998). This does not mean that the action accrues when the plaintiff learns that he or she has a legal cause of action; rather, the action accrues when the plaintiff discovers the salient facts underlying the elements of the cause of action. *Id.*”*  
*158 Wn.2d at pp. 575-576.*

To suggest that McClincy is somehow charged with the responsibility to undertake the kind of sophisticated inspection and analysis of the roof at a time when no problems were experienced from water intrusion is unreasonable in light of the record of this case. While McClincy owns a commercial building, to suggest that he is “*a water restoration specialist and sophisticated owner of a commercial building,*” and thus to conclude that he “*could easily have discovered the alleged*

*deficiencies in Miller's 2005 and 2006 work at the time the work was performed . . .*" is not supported by this record. Miller's brief, p. 25.

Miller represented that the repairs to the roof were completed and the problems corrected.

**D. *Claims asserted by the plaintiff McClincy Brothers Floor Covering, Inc. dba McClincy's Home Decorating were properly before the Court and judgment was properly entered in its favor.***

**i. *Miller's proposal dated June 16, 1997.***

Miller Roofing prepared an initial proposal to Tim McClincy on June 16, 1997 referencing under the heading "***Job Name/No.***" the words "***McClincy's Remodel***" followed by the address of the building. Pl. Ex. 1.

Miller contends that RAP 2.5(a)(2) provides that a party may raise a failure to establish facts upon which relief can be granted for the first time in the appellate court. Miller's brief, p. 26. While this is a correct statement of the law, it has no application to this case. Miller failed to specifically allege that McClincy Brothers Floor Covering, Inc. lacked the capacity to maintain this action which if it was to be timely raised would require that this be done as an affirmative defense in Miller's answer.<sup>6</sup>

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<sup>6</sup> See CR 9(a) and *Roth v. Drainage Improvement District No. 5 of Clark County*, 64 Wash.2d 586, 392 P.2d 1012 (1964). The law in Washington is clear that if a party's capacity to be sued is not raised by negative averment in the answer, it must be raised by supporting particulars by means of amending the answer and presenting supporting evidence prior to a ruling by the court on the challenge. *Reese Sales Co. v. Gier*, 16 Wash.App. 664, 557 P.2d 1326 (1977).

The court found that both plaintiffs entered into a written contract with Miller Roofing on June 16, 1997. CP, 404 ¶2.5.

The complaint further alleges in the first claim for relief, the existence of two contracts which were breached by Miller Roofing.

Paragraph 4.2 states:

*“4.2 Miller Roofing breached its contracts with McClincy Brothers by failing to design and construct the scuppers adjacent to the upper roof, the metal roof, the metal coping over the lower torch down roof parapets, the lower torch down roof, and the scuppers attached to the lower torch down roof, in a manner to prevent water intrusion to the interior of the premises.” CP, 19.*

Miller did not interpose any objection at the time of trial as to the failure of the complaint to properly allege the true contracting parties. McClincy confirmed in his testimony to be the owner of the building and McClincy Brothers to be the business entity to whom the building is leased. The evidence is uncontroverted that McClincy, the individual, suffered damages on account of Miller’s defective workmanship and the corporate entity (which McClincy testified is owned and controlled by him personally) suffered the business losses on account of Miller’s defective performance.

On that basis, the Court correctly found on the basis of McClincy’s testimony as well as plaintiffs’ Exhibit 1 (Proposal of Miller Roofing) and plaintiffs’ Exhibit 2 (invoices of Miller Roofing) as follows:

2.4 Plaintiff McClincy Brothers leases certain real property and improvements located at 4604 NE 4<sup>th</sup> Street, Renton, Washington, from Plaintiff Tim McClincy, its owner. McClincy Brothers conducts its business from this location at which it maintains its administrative offices as well as an extensive showroom in which it displays its products and materials. McClincy Brothers has done business from this location since 1988.

2.5 Plaintiffs entered into a written contract with defendant Miller Roofing dated June 16, 1997 for the construction and replacement of three roofs as part of the remodeling and construction of the above-referenced commercial building. The contract provided for the replacement of four 2 x 2 skylights with new clear glass insulated skylights, the re-roofing of all low-pitched or flat roofs with one-ply 281 pound fiberglass base sheet and rubber torch down with an extra ply around all edges and outlets, including coating roof with a reflective coating, and replacement with all metal trim as needed. The agreement also provided for the re-roofing of all pitched roofs with Champion Snap-Lock metal roofing a 30 pound felt base sheet. CP, 403-404, ¶¶ 2.4, 2.5

It was therefore appropriate for the court to conclude as a matter of law that damages for breach of contract by Miller Roofing were suffered by both plaintiffs for their respective recoveries as their interests appear.<sup>7</sup>

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<sup>7</sup> It would also appear that Miller is precluded by the doctrine of judicial estoppel from advancing this argument at this time in light of the fact that the defendant's findings of fact proposed to the court contain the following:

"1. In 1996, plaintiff McClincy Brothers Floor Covering, Inc. (hereinafter "McClincy") acting as its own general contractor, undertook a substantial renovation of its commercial building.

...  
4. McClincy hired Miller Roofing Enterprises (hereinafter "Miller") to install roofing on the project." See Appendix A, p.1, Brief of Appellant.

Based upon the uncontroverted evidence before the court, the court did properly conclude that Miller contracted with *both* plaintiffs and did so with knowledge of the fact both McClincy, the individual, and McClincy Brothers each retained property interest in the building (McClincy by virtue of his ownership and McClincy Brothers by virtue of its leasehold) both parties contracted with Miller for the purposes of this case.

***ii. Miller's remedial work performed in 2005 and 2006.***

On January 29, 98 and February 13, 1998, Miller Roofing Enterprises prepared two invoices identifying McClincy's, 4604 NE 4<sup>th</sup> Renton, Washington. Pl. Ex. 2. On May 8, 1998, Miller Roofing invoiced McClincy's Home Decorating, again referencing the job as "McClincy's Remodel," (Pl. Ex. 2) presumably intending that both would remain liable for the cost of the work to be performed. This is not surprising given the fact that Miller Roofing's right to record a mechanic's lien against the owner of the structure and it would matter little to Miller to distinguish between McClincy, the individual and McClincy Brothers the corporation. It would therefore appear that Miller intended to deal with Tim McClincy as president and sole owner of McClincy Brothers with the knowledge that McClincy owned the building and McClincy Brothers was the business entity which occupied it.

**iii. Privity existed between Miller and McClincy Brothers Floor Covering, Inc. dba McClincy's Home Decorating.**

Miller contends that there was a lack of privity for McClincy Brothers to maintain an action for breach of contract, again contending that “*McClincy's Home Decorating (failed) to state a claim upon which relief could be granted and the trial court erroneously awarded breach of contract damages to plaintiff McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating.*” Miller's Brief, p. 29. There is no question that Miller knew that he was entering into a contract for the construction of a roof on a commercial building from which McClincy Brothers Floor Covering, Inc. d/b/a McClincy's Home Decorating conducted its business and maintained its corporate offices. It was not important to Miller for the purposes of this contract to distinguish between McClincy the individual and McClincy's Home Decorating by any specific reference in the proposal agreement. The proposal itself was made to “*McClincy's Remodel*” and references the building address. The opposite side of the page underneath the heading, Miller Enterprises, references “*Tim McClincy,*” followed by the address of the building. On the face of the proposal, an argument can be made that Miller was looking to both plaintiffs for payment.

More significantly, however, before the work was completed in 1998, the two invoices dated January 29, 1998 and February 13, 1998, are made out to “*McClincy’s*,” the entity, not Tim McClincy, the individual. Pl. Ex. 2. The following invoices dated May 8, 1998 for \$3,200 bearing the reference “*Job Complete, Final Bill*” is made out to “*McClincy’s Attn: Mike*.” The last bill also dated May 8, 1998 in the amount of \$651.60 is made out by Miller to “*McClincy’s Home Decorating*.”

To now contend, at this late date, that there was no privity between Miller Roofing and McClincy’s Home Decorating is ridiculous.

Miller cites *Lobak Partitions, Inc. v. Atlas Construction Co. Inc.*, 50 Wash. App. 493, 749 P.2d 716 (1988), in support of this frivolous argument. This case is not even correctly cited; *Lobak* holds that even in the *absence* of privity, a third party may enforce a contract to which he is not in privity only if the contracting parties intended to secure to him personally the benefits of the provisions of the contract. It is uncontroverted that both McClincy, the individual, the owner of the building, and McClincy Brothers, the corporation which leased the building, were both intended by Miller to benefit from the contract, given the manner in which Miller prepared its invoices by which Miller obviously looked to the corporation for payment.

For these reasons privity of contract existed between Miller and both plaintiffs on the basis of their course of dealing between 1997 and 2006.

**V. CONCLUSION**

This is not a close case. This case is governed by a written contract which unambiguously grants express warranties by an experienced roofing contractor without any limitation restricting those warranties to particular materials' manufacturers. The court was careful to make detailed and exhaustive findings of fact based upon unrefuted expert testimony establishing the nature of Miller's shoddy workmanship and failure to comply with applicable building code standards. The nature of the damages which have foreseeably resulted from these breaches of contract are not challenged and for the purposes of this appeal, it must be concluded that Miller concedes that they have been suffered.

For all of these reasons, the judgment of the trial court should be affirmed in its entirety and McClincy should be awarded its costs.

DATED this 6<sup>th</sup> day of June, 2011.

ERIC ZUBEL, PC



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Eric Zubel, WSBA #33961  
Attorney for Respondents

## **APPENDIX A**

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

TIM MCLINCY, an individual,  
McCLINCY BROTHERS FLOOR  
COVERING, INC., a Washington corporation,  
dba McCLINCY=S HOME DECORATING

Plaintiffs,

vs.

Miller Roofing Enterprises, Inc.,

Defendant.

Case No.: 09-2-06720-1 SEA

~~PROPOSED~~

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

THIS MATTER was tried to the Court sitting without a jury, trial having commenced on  
October 12, 2010 and concluding on October 21, 2010, before the Honorable Julie Spector.

**1. EVIDENCE PRESENTED**

**1.1 Testimony of the following witnesses was presented:**

- 1.1.1 Timothy McClincy, testified in person.
- 1.1.2 Rick Miller testified in person.
- 1.1.3 Gerald Burke of Summit Construction testified in person.
- 1.1.4 Greg Coons, PE, of Swenson, Say and Faget, testified in person.
- 1.1.5 Douglas Breshears of American Leak Detection testified in person.
- 1.1.6 Richard Jackson of JJ Jefferson and Son, testified in person.

1 1.1.7 Danny Reeves, employee of McClincy Brothers testified in person.

2 1.1.8 Owen Dahl, of Moss Adams, testified in person.

3 1.1.9 Ray Wetherholt testified in person.

4 1.1.10 Mark Lawless of Lawless Construction testified in person.

5 1.1.11 Dennis Edwards of McBride Construction testified in person.

6 1.1.12 Jay Lukan testified in person.

7  
8 **1.2 The following Exhibits were admitted into evidence:**

9 Plf Exh 1 Proposal of Miller Roofing

10 Plf Exh 2 Invoices of Miller Roofing

11 Plf Exh 4 Report of Gerald Burke of Summit Construction

12 Plf Exh 5 Report of Gregory Coons

13 Plf Exh 6 Report of Owen Dahl

14 Plf Exh 7 NVL Laboratories Bulk Mold Analysis

15 Plf Ex 9 Log re: Mold Remediation

16 Plf Ex 10 McBride Estimate for Repairs, including all supporting bids

17 Plf Exh 11 Summit Construction Estimate for Repairs

18 Plf Exh 12 American Leak Detection Report

19 Plf Exh 13 MDE Report of Water Infiltration

20 Plf Exh 14 Photographs of interior and exterior of McClincy Building taken  
21 by Danny Reeves, Timothy McClincy and Randy Brooks

22 Plf Exh 15 Federal Income Tax Returns for 2004 – to date; Balance Sheets,  
23 Profit and Loss Statements for 2004 – to date.

24 Plf Exh 16 McClincy's itemization for water mitigation services for work  
25 through 6-25-09

26 Plf. Exh 18 CAD Drawings of McClincy Building

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- Plf. Exh 19 Report of American Leak Detection dated 6/28/10
- Plf Exh 20 Report of Gerald Burke dated July 14. 2010
- Def Exh 23 Manufacturer Warranty of GS Roofing Products Company, Inc.
- Def Exh 24 Manufacturer Warranty of Champion Metal
- Def Exh 25 Letter of 8/026/08 from McClincy's Home Decorating
- Def Exh 26 Letter of 9/12/08 from McClincy's Home Decorating
- Def Exh 27 Letter of 10/17/08 from McClincy's Home Decorating
- Def Exh 28 Letter of 8/23/04 to Miller Roofing
- Def. Ex. 29 Proposal and Contract of Summit Construction and Roofing Co.
- Def Exh 30 Proposal and Contract from Redhawk Construction
- Def Exh 33 Report of 1/4/08 from Pacific Engineering
- Def Exh 34 Photographs taken by Ray Wetherholt of McClincy's
- Def Exh 37 Cost of Repair by Mark Lawless
- Plf Exh 38 Time-Line for repairs to McClincy Building prepared by Tim McClincy
- Plf Exh. 39 Side Plan – Blueprints (9) of the Renton Building
- Plf. Exh. 40 Wetherholt and Associates Report -McClincy Brothers vs. Truck Insurance for Nicoll Black & Feig
- Plf. Exh. 41 Joseph J. Jefferson & Son, Inc. Bid Quotation
- Def. Exh 42 Downing Brothers Proposal
- Def. Ex. 43 Photographs (3) showing water damage wall after removing the sheet rock
- Plf. Ex. 44 Declaration of Eric Zubel in support of plaintiffs response to MTSMJG
- Def. Ex. 45 Mark Lawless' Cost Estimate

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- 1 Def. Ex. 46 Photograph  
2 Def. Ex. 47 Photograph  
3 Def. Ex. 48 Photograph  
4 Def. Ex. 49 July 12, 2010 - Wetherholt and Associates, Inc. Report  
5 Plf. Ex. 50 October 4, 2010 - Wetherholt and Associates, Inc. Report  
6 Plf. Ex. 51 July 19, 2010 - Wetherholt and Associates Inc. Report  
7 Plf. Ex. 52 August 13, 2010 - Wetherholt and Associates, Inc. Report  
8 Plf. Ex. 53 LCI Consultants Report of 10/7/2008  
9 Def. Ex. 54 Pacific Engineering Report of 12/19/07  
10 Plf. Ex. 55 Jay Lucan CV LCI CONSULTANTS

11  
12 **BASED UPON** the evidence presented at trial, the Court makes the following:

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14 **2. FINDINGS OF FACT**

15  
16 2.1 Plaintiff Timothy McClincy is a resident of King County, Washington and  
17 qualified to bring this action.

18 2.2 Plaintiff McClincy Brothers Floor Covering, Inc. ("McClincy Brothers") is a  
19 Washington corporation doing business in King County and is qualified to bring this action.

20 2.3 Defendant Miller Roofing Enterprises, Inc. ("Miller Roofing") is a Washington  
21 corporation doing business in King County.

22 2.4 Plaintiff McClincy Brothers leases certain real property and improvements  
23 located at 4604 NE 4<sup>th</sup> Street, Renton, Washington, from Plaintiff Tim McClincy, its owner.  
24 McClincy Brothers conducts its business from this location at which it maintains its  
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1 administrative offices as well as an extensive showroom in which it displays its products and  
2 materials. McClincy Brothers has done business from this location since 1988.

3           2.5 Plaintiffs entered into a written contract with defendant Miller Roofing dated June  
4 16, 1997 for the construction and replacement of three roofs as part of the remodeling and  
5 construction of the above-referenced commercial building. The contract provided for the  
6 replacement of four 2 x 2 skylights with new clear glass insulated skylights, the re-roofing of all  
7 low-pitched or flat roofs with one-ply 281 pound fiberglass base sheet and rubber torch down  
8 with an extra ply around all edges and outlets, including coating roof with a reflective coating,  
9 and replacement with all metal trim as needed. The agreement also provided for the re-roofing  
10 of all pitched roofs with Champion Snap-Lock metal roofing a 30 pound felt base sheet.

11  
12           2.6 Miller Roofing completed work on May 8, 1998.

13  
14           2.7 The written agreement provided that the roof was guaranteed five years labor and  
15 12 year manufacture on the torch down roof and 50 year warranty on the metal roofs.

16           2.8 Beginning in 2002 and later in early 2003, the metal roof and the metal coping  
17 over the parapets began to oxidize. Miller Roofing made repeated attempts to correct the  
18 oxidizing portions by repairing and retouching them until finally it became apparent that the  
19 roof would have to be replaced. Sometime in 2005, Miller Roofing removed and replaced the  
20 entire metal roof and one-third of the metal coping over the parapets.

21  
22           2.9 In January 2006, the lower torch down roof began leaking into the showroom.  
23 On January 23, 2006, at the request of McClincy Brothers, Miller Roofing performed certain  
24 repairs to the lower torch down roof and the metal coping along the top of the parapets, as well  
25 as to the scuppers attached to the lower torch down roof, purportedly to correct water intrusion.  
26 McClincy Brothers paid Miller Roofing the sum of \$489.60 for this work.

404

1           2.10 Water continued to leak into the premises. McClincy Brothers then hired  
2 American Leak Detection to determine the source and cause of the water intrusion. American  
3 Leak Detection completed a written report on April 3, 2006 specifically identifying those  
4 locations where water was penetrating the lower torch down roof into the interior of the  
5 building. American Leak Detection identified voids at the upper southeast scupper at the stucco  
6 transitions causing water to leak into the interior of the building. American Leak Detection also  
7 identified a patched seam in the roofing and recommended that it be resealed. American Leak  
8 Detection also identified voids at the upper sheet metal scupper and roofing transitions.  
9

10           2.11 On June 3, 2006, Miller Roofing performed additional repairs to the lower torch  
11 down roof, the metal coping over the top of the roof parapets adjacent to the lower torch down  
12 roof as well as to the roof scuppers adjacent to the lower torch down roof again to correct water  
13 intrusion. McClincy Brothers paid Miller Roofing an additional \$870.40 for these repairs.  
14

15           2.12 Miller Roofing represented that it repaired the roof where it was leaking into the  
16 showroom, sealed the torch down roof to the stucco with roof cement and webbing, cut out the  
17 torch down where water was penetrating underneath it and reroofed it with new torchdown.  
18

19           2.13 Miller Roofing improperly removed and replaced the entire metal roof and one-  
20 third of the metal coping over the parapets in 2005. Miller Roofing improperly performed  
21 additional repairs, replacement and construction to the lower torch down roof, the metal coping  
22 over the top of the roof parapets adjacent to the lower torch down roof as well as to the roof  
23 scuppers through the parapets adjacent to the lower torch down roof, when work was concluded  
24 on June 3, 2006.  
25  
26

1           2.14 During November and December 2007 the building experienced substantial  
2 water intrusion into the interior of the showroom causing damage to the ceiling, walls and other  
3 areas, as well as damage and loss to products and materials on display.

4           2.15 In January 2008, plaintiffs were informed that a cause of the water damage to the  
5 interior showroom was due to water penetrating the exterior finishes at the southeast corner roof  
6 scupper adjacent to the lower torch down roof which was defectively constructed by Miller  
7 Roofing in the course of construction of that roof.

8           2.16 Miller Roofing expressly warranted to McClincy Brothers that the torch down  
9 roof would not leak for 12 years and the metal roof would not leak for 50 years. McClincy  
10 Brothers has provided Miller Roofing and its representatives with notice of breach of these  
11 express warranties, but Miller Roofing has failed to provide any relief to McClincy Brothers for  
12 the damage caused to the premises due to water intrusion.

13           2.17 In late December 2009 or early January 2010, and July 14, 2010, McClincy  
14 Brothers learned that (1) the upper roof, (2) the metal roof and (3) the lower torch down roof  
15 were defectively constructed in the following manner:  
16

- 17
- 18           (1) The lack of starter metal on the metal roof allows rain to blow behind the  
19 gutter and is damaging the rafter tails.
  - 20           (2) The screws fastening the scuppers to the downspouts at the corners of the  
21 upper roof are too long and permit water to leak.
  - 22           (3) There is no diverter where the metal roof terminates and the gutter meets  
23 the stucco at the wall.
  - 24           (4) The flashing around the skylights of the metal roof is installed  
25 improperly on the sides and at the bottom.  
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- (5) There are no splash blocks in the down spouts at the lower flat roof level transition.
- (6) There is no diverter at the area where the gutter ties into the stucco below the metal roof.
- (7) Water is penetrating the metal coping along the top of the parapets due to improper assembly.
- (8) Water runs down the parapet walls directly behind the roofing on the lower torch down roof.
- (9) The lower torch down roof is pulling away from the scupper located at the southeast corner of the roof.
- (10) The scuppers are improperly installed through the parapet walls above the lower torch down roof.
- (11) Overflows were not installed to the scuppers to prevent overloading.
- (12) Counter-flashing from wall to roof was not installed.
- (13) Kant strip is missing at certain locations.
- (14) The lower torch down roofing at the walkable deck outside the south apartment on the second floor of the building is pulling away from the scupper causing water to leak through the light.
- (15) The torch down roof seams are open.
- (16) That the roofs were constructed in violation of and without regard to applicable sections of the Uniform Building Code and applicable building standards.

1 (17) The parapet walls have no secondary overflow drains to aid the defective  
2 "U" shaped scuppers with volume of precipitation. Water migrates into  
3 the scuppers during times of heavy rain/snow/wind and water overflows  
4 the top of the open scuppers within the parapet walls and flows  
5 downward inside the wall cavities causing damage.  
6

7 (18) Water has also penetrated the top of the parapet walls and has run from  
8 the top of the parapet walls to the foundation sill plate.

9 (19) The lack of adequate ventilation and leakage into the attic space requires  
10 removal and replacement of all of the plywood sheathing on the lower  
11 roof.  
12

13 2.18 Plaintiffs could not reasonably have known of the precise nature and extent of the  
14 defective design and construction of the scuppers attached to the upper roof, and the lower torch  
15 down roof, the defects of the metal roof, the metal coping along the top of the parapets of the  
16 torch down roof and the defects in the surface of the lower torch down roof until late December  
17 2009 or early January, 2010 when presented with a report from a roofing expert specifically  
18 identifying those design deficiencies and defects in workmanship as a proximate cause of water  
19 intrusion.  
20

21 2.19 The building consists of three levels, the first level consisting of the main  
22 showroom from which McClincy Brothers conducts its retail business and its administrative  
23 offices which are adjacent thereto. Below the main level is a fabrication facility at which  
24 McClincy Brothers fabricates marble, granite and related composite materials for residential  
25 remodeling. Located directly above the showroom adjacent to the torch down roof are three  
26 residential apartment units. Due to the configuration of the building in relation to the

1 surrounding area, the limited availability of parking, the need for staging and scaffolding to be  
2 placed adjacent to the structure as work progresses, and the necessity for parking of vehicles  
3 used by the various subcontractors in the course of their work, McClincy Brothers will be  
4 deprived of the use of parking for its retail customers and its employees. Tim McClincy's  
5 tenants, who reside in the three residential apartment units above the showroom will be deprived  
6 of parking. The anticipated noise and disruption from the remediation process over a protracted  
7 period will temporarily render the residential apartments uninhabitable, requiring that existing  
8 tenants vacate the premises.  
9

10 2.20 It was within the contemplation of the parties when they entered into the  
11 agreement for the construction of the roof that water intrusion into the building showroom on  
12 account of defective construction would probably cause water damage to the interior of the  
13 building requiring removal and replacement of beams, joists, plates, and other framing, the  
14 effect of which would substantially interfere with and probably cause temporary cessation of the  
15 plaintiffs' business operations and apartment rentals.  
16

17 2.21 The time necessary to complete the remediation to the building is between five  
18 and six months, during which time McClincy Brothers will be unable to conduct its business  
19 operations.  
20

21 2.22 In the opinion of Owen M. Dahl, CFA, LIFA, ASA, a principal of Moss Adams  
22 LLP, Certified Public Accountants and Business Consultants, an analysis of the revenues of  
23 McClincy Brothers between 2005 and 2009 indicated that revenues ranged from a high of \$3.1  
24 million dollars in 2007, to a low of \$2.0 million dollars in 2009. In addition, the company has  
25 recorded stable revenues since October of 2009 in excess of \$180,000 per month, and monthly  
26 revenues can be expected to be between \$169,383 and \$213,396, or an average of \$191,389.50.

1 According to Mr. Dahl, McClincy Brothers can reasonably be expected to suffer estimated  
2 impact from closure between a high of \$814,425 and a low of \$646,448, which together would  
3 average \$730,436.

4 2.23 As a direct, foreseeable and proximate cause of the acts and omissions of Miller  
5 Roofing, plaintiffs have suffered damages as follows:  
6

7 (1) The cost of repair and remediation, including replacement of the torch  
8 down roof together with portions of the west, south and east walls of the building \$481,808.

9 (2) The cost for water mitigation services undertaken by McClincy Brothers  
10 in the sum of \$15,377.58.

11 (3) Based upon the company's historical operating results between 2005 and  
12 2009, it is reasonable to assume that the closure of the company's Renton location for a period  
13 of five months in addition to one additional month at 50% of profitability and a following  
14 additional month at 80% of profitability, will cause McClincy Brothers to suffer business  
15 interruption losses during the period necessary to complete remediation and return to full  
16 profitability, in the sum of \$730,436.  
17

18 (4) The building tenants occupying the three apartments will have vacate the  
19 premises during the period necessary to complete remediation and it is reasonable to assume  
20 that Tim McClincy will suffer loss of rental income during the remediation process in the  
21 amount of \$13,740.  
22

23 2.24 The total damages suffered by Tim McClincy is the sum of \$13,740.

24 2.25 The total damages suffered by McClincy Brothers is the sum of \$1,373,708.58.

25 **AND THEREFORE**, having set forth the above Findings of Fact, the Court then makes  
26 the following:

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**CONCLUSIONS OF LAW**

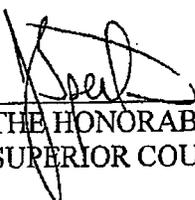
1. The above entitled Court has jurisdiction over the parties and the subject matter pursuant to RCW 2.08.010. Venue is proper pursuant to CR 82(a)(3).

2. There was a valid binding contract between the parties entered into on June 16, 1997. Miller Roofing manufactured the torch down roof and warranted the torch down roof against manufacturing defects for a period of 12 years and the metal roofs, together with the metal coping over the parapet walls, for 50 years.

3. Miller Roofing breached the original contract with McClincy Brothers entered into June 16, 1997 and the subsequent oral agreements entered into in January and June, 2006.

4. As a direct, foreseeable and proximate result of Miller Roofing's breach of the written and oral agreements, Tim McClincy has suffered damages in the sum of \$13,740 and McClincy Brothers has suffered damages in the amount of \$1,373,708.58.

DONE IN OPEN COURT this 22<sup>nd</sup> day of November, 2010.

  
\_\_\_\_\_  
THE HONORABLE JULIE SPECTOR  
SUPERIOR COURT JUDGE

Submitted by:

ERIC ZUBEL, PC

By: \_\_\_\_\_

Eric Zubel, WSBA # 33961  
*Attorney for Plaintiffs*

No. 66375-5

**COURT OF APPEALS – DIVISION ONE  
IN AND FOR THE STATE OF WASHINGTON**

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MILLER ROOFING ENTERPRISES, INC.,

Appellant

v.

TIM McCLINCY, an individual, McCLINCY BROTHERS  
FLOOR COVERINGS, INC., a Washington corporation  
dba McCLINCY'S HOME DECORATING,

Respondents

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**CERTIFICATE OF SERVICE FOR RESPONDENTS'  
ANSWERING BRIEF**

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ERIC ZUBEL, WSBA #33961  
Attorney for Respondents

ERIC ZUBEL, PC  
800 Fifth Avenue, Suite 4100  
Seattle, WA 98104  
206-447-1445

**CERTIFICATE OF SERVICE**

I, Cathy Hodges, 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. Respondents' Answering Brief
2. This Certificate of Service

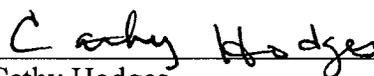
I caused to be served the above identified documents, on this day, June 6, 2011, via Legal Messenger, to the following:

Steven J. Jager  
Marnie H. Silver  
Jager Law Office PLLC  
600 Stewart Place, Suite 1100  
Seattle, WA 98101  
E-mail: [steven@jagerlaw.com](mailto:steven@jagerlaw.com)  
[marnie@jagerlaw.com](mailto:marnie@jagerlaw.com)

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

DATED this 6<sup>th</sup> day of June, 2011.

ERIC ZUBEL, PC

  
\_\_\_\_\_  
Cathy Hodges  
Legal Assistant