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68227-0

No. 68227-0

DIVISION I, COURT OF APPEALS OF THE STATE OF
WASHINGTON

SHEPLER CONSTRUCTION

Plaintiff-Respondents

v.

GARY LEONARD AND SUSAN KIRALY-LEONARD, and the marital
community thereof

Defendant-Appellant

and

PHH MORTGAGE SERVICES CORPORATION,

Defendant

ON APPEAL FROM SAN JUAN COUNTY SUPERIOR COURT
(Hon. Vickie I. Churchill)

BRIEF OF APPELLANTS

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2012 SEP 21 PM 2:14
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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	3
A. Assignments of Error	3
B. Issues Pertaining to the Assignments of Error	4
III. STATEMENT OF THE CASE.....	5
A. Shepler’s Pleadings Did Not Elect the Statutory Remedy of the Specific Enforcement of the Arbitration Clause	6
B. Twenty Months Into the Case, the Trial Court Granted Summary Judgment Dismissal of the Leonards’ Counterclaims on the Ground There Was No Evidence Supporting Them.....	7
C. This Court Reversed the Dismissal of the Counterclaims and Remanded the Case for Trial	8
D. The Trial Court Dismissed the Counterclaims On the New Ground of the Failure to Comply With the Arbitration Clause and Then Refused to Compel Arbitration.....	9
E. The Second Appeal Affirmed the Denial of the Motion to Compel Arbitration But Did Not Reach the Dismissal Order. The Decision, However, Ruled: “the Parties had Waived Arbitration by Litigating, Not the Underlying Claims.”.....	10
F. The Trial Court Refused to Consider the Underlying Construction Defects as Affirmative Defenses In the Second Trial	11
IV. SUMMARY OF ARGUMENT	12
V. ARGUMENT	13
A. Standard of Review	13
B. Arbitration Was a Waivable Defense	14
1. Shepler Abandoned Arbitration as a Defense, By Failing to Plead Arbitration as	

	An Affirmative Defense and to Compel Arbitration Before the First Trial.....	17
2.	Shepler’s Prosecution of a Damage Remedy Estopped Its Tardy Assertion of a Dismissal Remedy	20
3.	The Arbitration Clause Was Not An Exclusive Remedy	23
C.	The Trial Court Applied An Erroneous Rule of the Law, When It Ruled the Failure to Abide by a Contractual Dispute Provision Was a Complete Bar to the Counterclaims	26
D.	The Refusal to Consider Construction Defect Evidence As Part of the Leonards’ Affirmative Defenses Was Reversible Error	29
1.	The Summary Judgment Dismissal Did Not Bar the Affirmative Defenses	29
2.	The Trial Court Erred When It Failed to Follow the Appellate Ruling that the Underlying Claims Were Not Waived.....	32
E.	The Law of the Case Is Arbitration Was Not An Exclusive Remedy and Litigation Did Not Waive Underlying Claims.....	34
F.	The Trial Court Made Additional Prejudicial Errors.....	35
G.	This Court Should Remand the Case for a Jury Trial and Transfer the Case to a New Judge.....	41
H.	This Court Should Grant the Leonard Fees Pursuant to the Prevailing Party Provision in the Contract.....	42
VI.	CONCLUSION.....	42

TABLE OF AUTHORITIES

CASES	Page(s)
<u>Absher Constr. Co. v. Kent Sch. Dist. No. 415</u> , 77 Wn. App. 137, 890 P.2d 1071 (1995).....	26, 27, 35
<u>Bd. of Regents v. Wilson</u> , 27 Ill. App.3d 26, 326 N.E.2d 216 (1975).....	24
<u>Brundridge v. Fluor Fed. Servs., Inc.</u> , 164 Wn.2d 432, 191 P.3d 879 (2008).....	13, 14
<u>Buckeye Check Cashing, Inc. v. Cardegna</u> , 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006).....	15
<u>Chassereau v. Global-Sun Pools, Inc.</u> , 363 S. C. 628, 611 S.E.2d 305 (S.C. Ct. App. 2005), <u>aff'd</u> , 373 S.C. 168, 644 S.E.2d 718 (S.C. 2007)	23
<u>Cogswell v. Cogswell</u> , 70 Wash. 178, 126 P. 431 (1912).....	24
<u>Detweiler v. J.C. Penney Cas. Ins. Co.</u> , 110 Wn.2d 99, 751 P.2d 282 (1988).....	24
<u>Graoch Assocs. # 5 LLP v. Titan Constr. Corp.</u> , 126 Wn. App. 856, 109 P.3d 830 (2005).....	24, 25
<u>Harting v. Barton</u> , 101 Wn. App. 954, 6 P.3d 91 (2000), <u>review denied</u> , 142 Wn.2d 1019, 16 P.3d 1266 (2001).....	16, 17, 26
<u>In re Marriage of Lesley</u> , 112 Wn.2d 612, 772 P.2d 1013 (1989).....	19
<u>Johnson Assoc. Corp. v. HL Operating Co.</u> , 2012 U.S. App. LEXIS 10339 (6th Cir. May 23, 2012).....	17
<u>Johnson v. Schultz</u> , 137 Wash. 584, 243 P. 644 (1926).....	21

<u>Keller v. City of Spokane,</u> 104 Wn. App. 545, 17 P.3d 661 (2001).....	13, 28
<u>Kramarevcky v. Dep’t of Social and Health Serv.,</u> 122 Wn.2d 738, 863 P.2d 535 (1993).....	21
<u>Lake Washington Sch. Dist. No. 414 v. Mobile Modules NW, Inc.,</u> 28 Wn. App. 59, 621 P.2d 791 (1980).....	18
<u>Mike M. Johnson, Inc. v. Cnty. of Spokane,</u> 150 Wn.2d 375, 78 P.3d 161 (2003).....	27
<u>Minter v. Pierce Transit,</u> 68 Wn. App. 528, 843 P.2d 1128 (1993).....	22
<u>Minton v. Mitchell,</u> 89 Cal. App. 361, 265 P. 271 (1928).....	24
<u>Oak Harbor Educ. Ass’n v. Oak Harbor School Dist.,</u> 162 Wn. App. 254, 259 P.3d 274 (2011).....	13, 14
<u>Olsen v. Pesarik,</u> 118 Wn. App. 688, 77 P.3d 385 (2003).....	34
<u>Pederson v. Klinkert,</u> 56 Wn.2d 313, 320, 352 P.2d 1025 (1960).....	23, 24
<u>Pegasus Constr. Corp. v. Turner Constr. Co.,</u> 84 Wn. App. 744, 929 P.2d 1200 (1997).....	25, 26
<u>Rainier Nat’l Bank v. Lewis,</u> 30 Wn. App. 419, 635 P.2d 153 (1981).....	17
<u>Realm, Inc. v. City of Olympia,</u> -- P.3d --, 2012 WL 1604848 (Wn. App. May 8, 2012).....	27
<u>Reeploeg v. Jensen,</u> 5 Wn. App. 695, 490 P.2d 445 (1971).....	23
<u>Sanders v. State,</u> 169 Wn.2d 827, 240 P.3d 120 (2010).....	13
<u>Saviano v. Westport Amusements, Inc.,</u> 144 Wn. App. 72, 180 P.3d 874 (2008).....	13

<u>Sea-First Nat'l Bank, N.A. v. Siebol,</u> 64 Wn. App. 401, 824 P.2d 1252 (1992).....	34
<u>Shepler Constr., Inc. v. Leonard,</u> 153 Wn. App. 1035 (Table), 2009 WL 5153672(Wn. App. Dec. 21, 2009), <u>review denied</u> , 169 Wn.2d 1003, 234 P.3d 1172 (2010).....	passim
<u>Somsak v. Critton Techn./Heath Tech., Inc.,</u> 113 Wn. App. 84, 52 P.3d 43 (2002).....	18
<u>State v. Schwab,</u> 163 Wn.2d 664, 185 P.3d 1151 (2008).....	33
<u>State v. Sledge,</u> 133 Wn.2d 828, 947 P.2d 1199 (1998).....	40
<u>State v. Strauss,</u> 119 Wn.2d 401, 832 P.2d 78 (1992).....	35
<u>Susan Kiraly-Leonard v. Shepler Constr. Inc.,</u> 132 Wn. App. 1054, 2006 WL 1217216, *1 (Jun. 6, 2006), <u>review denied</u> , 160 Wn.2d 1014, 161 P.3d 1014 (2007).....	6, 7, 20, 38
<u>Thomas v. French,</u> 99 Wn.2d 95, 659 P.2d 1097 (1983).....	28
<u>Thorgaard Plumbing & Heating Co. v. Cnty. of King,</u> 71 Wn.2d 126, 426 P.2d 828 (1967).....	15
<u>Union Trust Co. of Indianapolis v. Curtis,</u> 186 Ind. 516, 116 N.E. 916 (1917).....	33
<u>United States v. Sears, Roebuck & Co.,</u> 785 F.2d 777 (9th Cir. 1985).....	41
<u>Verbeek Properties, LLC v. GreenCo Env't, Inc.,</u> 159 Wn. App. 82, 246 P.3d 205 (2010).....	16, 19, 26

STATUTES AND COURT RULES

RCW 7.04.060	15
RCW 62A.2-313(c).....	39

RCW 62A.2-719(1)(a)	23
RCW 62A.315-.316	39
RAP 2.5(c)(2).....	34
RAP 12.2.....	32, 34
CR 8(c).....	17
CR 12(i).....	39
CR 54(b).....	28

OTHER AUTHORITIES

4 Am. Jur. 2d <u>Alternative Dispute Resolution</u> § 86 (2007)	15
6 C.J.S. <u>Arbitration</u> § 61 (2004).....	15
5 Charles Alan Wright et al., <u>Fed. Practice & Procedure</u> § 1278 (2004).....	17
II E. Allan Farnsworth, <u>Farnsworth on Contract</u> § 8.7(a) (3d. ed. 2004)	33
3 Karl B. Tegland <u>Wash. Practice: Rules Practice</u> (7th ed. 2011).....	34

I. INTRODUCTION

Appellants Gary Leonard and Susan Kiraly Leonard (collectively the Leonards) are appealing from the second summary judgment dismissal of their counterclaims for construction defects. Those counterclaims are against respondent Shepler Construction, Inc.

The overarching issue in this appeal is: did the parties impliedly waive an arbitration clause in an alternative dispute resolution provision by litigating their claims for over five years? The answer is clearly, yes. This Court has already determined “both parties waived arbitration” through engaging in “substantial litigation including a prior appeal of the counterclaims.”¹ Both parties waived the offensive use of the arbitration clause as a sword and the defensive use of the clause as a shield.

This Court held that the five years of litigation waived the arbitration clause and affirmed the trial court’s denial of the Leonards’ motion to compel arbitration.² The same legal principles require this Court to hold once more that the five years of litigation waived the arbitration clause and once more reverse the trial court’s dismissal of the counterclaims.

¹ Appendix B to this brief (Shepler Constr., Inc. v. Leonard, noted at 153 Wn. App. 1035 (Table), 2009 WL 5153672 ¶ 15 (Wn. App. Dec. 21, 2009), review denied, 169 Wn.2d 1003, 234 P.3d 1172 (2010).

² Id.

With the case now almost spanning a decade, one appellate judge has already expressed the frustration that the case is approaching the modern day equivalent of the suit in the *Bleak House* saga.³ But that frustration should rest with Shepler—not the Leonards. There are three strikes against Shepler. First, Shepler convinced the trial court to grant summary judgment dismissal of the same counterclaims in 2004, despite the existence of genuine issues of facts. This Court in a per curiam decision reversed the dismissal. Second, Shepler convinced the trial court on remand to grant dismissal a second time, ruling arbitration was not an alternative dispute procedure but was instead an exclusive, unwaivable remedy. That ruling is contrary to very well-established law. Third, after this Court affirmed the denial of the motion to compel arbitration, Shepler convinced the trial court on remand to ignore this Court’s statement that the arbitration clause did not provide an exclusive remedy.

These repeated errors of law have resulted in a second one-sided trial depriving the Leonards from having their day in court on the counterclaims and affirmative defenses for the construction defects.

The Leonards request this Court reverse the summary judgment dismissal of the counterclaims, award them appellate fees, remand the case for a jury trial, and transfer the case to another judge.

³ *Id.* ¶ 18 (Agid, J., dissenting).

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

No. 1. The trial court erred when it entered the order granting summary judgment dismissal of the construction defect counterclaims. CP 357-55.

No. 2. The trial court erred when it ruled on the first day of trial that affirmative defenses based on construction defects were barred by the summary judgment dismissal of the construction defect counterclaims.

No. 3. The trial court erred when it failed to follow the court of appeals ruling that the arbitration clause was not an exclusive remedy and that parties had not waived claims by litigating them.

No. 4. The trial court erred when it repeatedly excluded trial testimony about construction defects offered in support of affirmative defenses.

No. 5. The trial court erred when it provided an explanation of the dismissal order that was factually and legally incorrect in the post-trial decision and findings and conclusions. Findings of Fact and Conclusions of Law at 1:14-3, CP 172-74. Id. at 4:6-7 (Finding No. 2), CP 175. Id. at 10:1-5 (Finding No. 27), CP 181.

B. Issues Pertaining to the Assignments of Error.

The parties had litigated the construction defect counterclaims in the trial and appellate court for over five years. Did the trial court err when it enforced the clause as barring the counterclaims for construction defects over five years into the case? Did the parties waive the arbitration clause?

Is Shepler estopped from asserting the arbitration clause as defense to the counterclaims?

Even if the arbitration clause were not waived, does the clause bar the Leonards from asserting affirmative defenses that arising from the construction defects?

The decisions that Shepler cited to the trial court construe public works contracts with clauses expressly and absolutely waiving claims when a party fails to comply with the dispute resolution procedure that is a condition precedent to suit.⁴ In the absence of these clauses, did the trial court misconstrue the consumer contract when it ruled that the Leonards

⁴ Appendix J (Order Granting Summ. J. as to Defs. Leonards' Breach of Dispute Resolution at 2:8-3:1 (referring to case law cited by parties and earlier oral decision of Mar. 14, 2008) (Dkt. 284), CP 357-59; App. K (Pl.'s Mot. for Recons. of Summ. J. Order or to Compel Arbitration and for Limited Stay (Apr. 11, 2008) (Dkt. 291), CP 360-76; RP (Mar. 14, 2008) at 13:17-22 (citing Pegasus Constr. Corp. v. Turner Constr. Co., 84 Wn. App. 744, 929 P.2d 1200 (1997))).

“had to initiate the dispute resolution process”⁵ and that the failure to do so resulted in the forfeiture of their contractual rights?

Did the trial court correctly construe the mandate?

The trial court has twice dismissed the counterclaims, has expressed view determined to be erroneous and has substantial difficulty putting aside those views. Is reassignment of the case advisable to preserve the appearance of justice? Is there any waste or duplication where the Leonards are entitled to a jury trial on all substantive claims?

III. STATEMENT OF THE CASE

In 2000, the Leonards were looking for a contractor to construct a house for them in Friday Harbor. They selected Shepler. They signed the construction contract form that had been drafted by Shepler’s lawyer.⁶

Before filing this suit, Shepler sent letters about initiating the arbitration clause/A.D.R.⁷ The Leonards admit that they did not respond to these requests; instead, their lawyer sent a letter about the incomplete work.⁸

⁵ RP (Mar. 26, 2008) at 25:4-8.

⁶ Shepler Constr., Inc. Building Agreement, Appendix C. CP 127-32. Attached to Complaint, CP 270-82.

⁷ Appendix B (2009 WL 5153672 ¶ 3).

⁸ Id.

A. Shepler’s Pleadings Did Not Elect the Statutory Remedy of the Specific Enforcement of the Arbitration Clause.

Shepler filed a complaint for lien foreclosure and breach of contract against the Leonards.⁹ The complaint does not use the word “arbitration.”¹⁰ Although the complaint does allege that the Leonards refused to abide by the A.D.R. provision, their answer denied that allegation.¹¹ As affirmative defenses, the Leonards asserted “plaintiff’s own breach of the ... contract,” “plaintiff’s own non-performance of a condition precedent and the failure of consideration,” “setoff,” and “the failure to state a claim upon which relief may be granted.”¹²

The Leonards counterclaimed Shepler “failed to perform work in a workmanlike manner and failed to complete its work in a timely manner” and “failed to follow the plans and specifications” and other claims.¹³ Answering the counterclaims, Shepler did not assert any affirmative defenses.¹⁴

⁹ Appendix C (compl.), CP 270-82.

¹⁰ Id.

¹¹ Appendix C (compl.); Appendix D (Answer, Affirmative Defenses and Counterclaim at 2). CP 283-89. Id. (denying Complaint ¶¶ 3 and 7).

¹² Appendix D at 4:1-7.

¹³ Appendix D at 4:15-6:16.

¹⁴ Appendix E (Answer to Counterclaim), CP 290-91.

B. Twenty Months Into the Case, the Trial Court Granted Summary Judgment Dismissal of the Leonards' Counterclaims on the Ground There Was No Evidence Supporting Them.

Shepler moved for the summary judgment dismissal of the construction defect counterclaims.¹⁵ In response, the Leonards submitted expert testimony that the exterior walls, heating system, and other work were defective or incomplete, and in response Shepler submitted declarations, including one by the contractor who installed the heating system.¹⁶ Despite this evidence, the court granted summary judgment dismissing the counterclaims.¹⁷ The December 2004 trial was on the enforcement of the lien only.¹⁸ At trial, although the court ruled the Leonards had violated the arbitration clause, it denied Shepler's claim for damages based on the alleged violation of the clause. The trial court granted a judgment in favor of Shepler for the contract balance plus extras.¹⁹ The Leonards appealed that judgment.²⁰

¹⁵ Appendix A (Susan Kiraly-Leonard v. Shepler Constr. Inc., noted at 132 Wn. App. 1054, 2006 WL 1217216, *1 (Jun. 6, 2006)), review denied, 160 Wn.2d 1014, 161 P.3d 1014 (2007).

¹⁶ Id.

¹⁷ CP 77 ("On April 19, 2004, this court granted Shepler's motion for summary judgment dismissing Leonards' counterclaims ...").

¹⁸ Appendix B (Shepler Constr., 2009 WL 5153672 ¶ 5).

¹⁹ Appendix F (Findings of Fact and Conclusions of Law at 2:1-4)(Dkt. 151), CP 294-99.

²⁰ Appendix A (Leonard, 2006 WL 1217216, *1).

C. **This Court Reversed the Dismissal of the Counterclaims and Remanded the Case for Trial.**

In the unpublished per curium decision, this Court reversed the summary judgment dismissal.²¹ This Court ruled:

Evidence that Shepler Construction, Inc., performed unprofessional work and used incorrect methods in building a house for Gary Leonard and Susan Kiraly-Leonard created an issue of material fact about whether Shepler met its contractual obligation to perform in a workmanlike manner. We reverse the trial court's order of summary judgment dismissing the Leonard's counterclaim for Shepler's breach of contract and remand for trial.²²

Dissatisfied with the decision, Shepler sought reconsideration.²³ The motion was unsuccessful. Dissatisfied with the disposition of the reconsideration motion, Shepler petitioned the Supreme Court to review the decision. The issues presented for review included:

1. May a party to a contract that provides for mandatory and binding arbitration ignore the contract and assert a claim for construction defect directly in superior court?²⁴

Thirteen months after this Court's first decision, the Supreme Court denied review.²⁵

²¹ Appendix A (Leonard, 2006 WL 1217216).

²² Id. at *1.

²³ Appendix G (Mot. for Recons. (May 26, 2006), Order Denying Mot. to Recons (May 25, 2006); Pet. For Review (Aug. 26, 2006), attached to Reply in Supp. of Defs.' Mot. to Strike Pl.'s Proposed Findings of Fact and Conclusions of Law and for Terms) (Dkt. 358), CP 446-543.

²⁴ Appendix G (Pet. for Review at 1); id. at (Issues Presented for Review) at 2.

²⁵ Shepler Constr. v. Leonard, 160 Wn.2d 1014 (Table), 161 P.3d 1027 (June 6, 2007).

D. The Trial Court Dismissed the Counterclaims On the New Ground of the Failure to Comply With the Arbitration Clause and Then Refused to Compel Arbitration.

On remand, the Leonards made a jury demand.²⁶ They made the jury demand based in part on the counterclaim for breach of contract.²⁷ Relying on the arbitration clause, Shepler moved for summary judgment dismissal of the counterclaims and to strike the jury demand.²⁸ Initially, the trial court denied the motion but later granted reconsideration, concluding the construction defect counterclaims should have been submitted to arbitration and dismissing the counterclaims for the failure to comply with the arbitration clause.²⁹ The court struck the Leonards' own reconsideration motion as untimely³⁰ and struck their jury demand.³¹

The Leonards moved to compel arbitration and stay the trial pending arbitration.³² After the trial court denied their motion, the Leonards appealed from the order denying the motion to compel arbitration and related orders.³³

²⁶ Dkt. 222, Supplemental Designation.

²⁷ Resp. to Pl.'s Mot. to Strike Jury Demand at 3:5-15 (Dkt. 245), Supplemental Designation.

²⁸ Compare Appendix H (Pl.'s Mot. for Summ. J. as to Breach of Dispute Resolution Provision) (Dkt. 238), CP 304-07, with Appendix G (Pl.'s Recons. Mot. (Dkt. 260)), CP 327-29. See Pl.'s Mot. to Strike Jury Demand (Dkt. 240), Supplemental Designation.

²⁹ Appendix J (Order Granting Summ. J. as Dispute Resolution Provision (Dkt. 284)), CP 69-71.

³⁰ Appendix B (Shepler Constr., Inc. v. Leonard, 2009 WL 5153672, ¶ 8).

³¹ Order Granting Mot. to Strike Jury Demand (Dkt. 297), Supplemental Designation.

³² Id. ¶¶ 8-9.

³³ Id. ¶ 9.

E. The Second Appeal Affirmed the Denial of the Motion to Compel Arbitration But Did Not Reach the Dismissal Order. The Decision, However, Ruled: “the Parties had Waived Arbitration by Litigating, Not the Underlying Claims.”³⁴

This Court affirmed the denial of the motion to compel arbitration.³⁵ This Court concluded arbitration had been waived:

The facts before this court establish that both parties waived arbitration. Neither party initiated a notice of arbitration as provided by chapter 7.04A RCW. Neither party asserted a right to arbitration in their answers to the pleadings of the other party. Moreover, both parties conducted discovery and engaged in substantial litigation including a prior appeal of the counterclaims. Seven years passed, and substantial case development occurred prior to the Leonards' assertion of the right to arbitrate. We hold that the trial court did not err in denying the motion to compel arbitration.³⁶

This Court granted the Leonards' reconsideration motion and withdrew a ruling that the summary judgment dismissal was a final determination extinguishing the counterclaims.³⁷ Declining to reach the merits of the dismissal of the construction defect counterclaims,³⁸ the appellate decision construed the legal effect of the arbitration clause. The decision's modified footnote one states: “The arbitration clause did not provide that it was the exclusive remedy for breach. As noted above, the

³⁴ Id. ¶ 15 n.1 (Dec. 21, 2009).

³⁵ Id.

³⁶ Id. ¶ 14.

³⁷ Compare Appendix B (2009 WL 5153672, ¶ 15 n.1 (Aug. 24, 2009)) with Appendix B (2009 WL 5153672, ¶ 15 n.1 (Dec. 21, 2009) (same case name; modifying footnote one)).

³⁸ Appendix B (2009 WL 5153672, ¶ 16 (Dec. 21, 2009)).

parties waived the arbitration clause by litigating, not the underlying claims.”³⁹

F. The Trial Court Refused to Consider the Underlying Construction Defects as Affirmative Defenses In the Second Trial.

The case was tried a second time on August 8-10, 2011.⁴⁰ At the start of the trial, the Leonards requested the evidence of the construction defects be admitted at least for the purpose of a defense against any award for compensation to the contractor or more broadly for the purpose of the underlying claims.⁴¹ But the trial court refused to consider the construction defect evidence,⁴² reaffirming the ruling several times, striking trial testimony and sustaining objections. See, e.g., RP (Aug. 8, 2011) at 179:21-180:20 (striking testimony that the heating unit would never heat the house).⁴³ As a result, there was a second trial that failed once again to consider the construction defect evidence.

³⁹ Id. at *3, ¶ 15 n.1.

⁴⁰ RP (Aug. 8-10, 2011).

⁴¹ RP (Aug. 8, 2011) at 6:11-15, 16:24-17:17, 26:24-24:7; Def.’s Trial Br. at 3:1-18, CP 21; Defs.’ Br. of Recoupment (Dkt. 478), Supplemental Designation.

⁴² RP (Aug. 8, 2011) at 26:12-27:5.

⁴³ RP (Aug. 9, 2011) at 205:6-21 (start of the second day of trial, confirming the Leonards could not ask witness Kevin Taylor questions about construction defects); RP at 220:20-222:6 (sustaining objections to Gary Leonard testimony about grouting and workmanship as violating the summary judgment order); RP at 235:18-21 (sustaining objections to his testimony about incorrectly installed cabinet); RP 245:10-18, 246:19-249:6 (same as to testimony about door and frame and drywall defects).

Three months after trial, the trial judge sent a letter decision summarizing the procedural background and the findings and conclusions.⁴⁴ The trial court entered judgment in favor of the contractor for \$324,552.⁴⁵ \$95,457 of that judgment is for the contract and quantum merit recovery—with no credit for the construction defects.⁴⁶ The two thirds of the judgment is interest and fees including the contractor’s appellate fees in the first appeal that the contractor lost.⁴⁷

The construction defects claims include the installation of a heating system that fails to heat the entire house, the failure to install weather barrier over the OSB sheathing for the first floor of the house, the failure to install expansion/construction joints in the concrete for the garage floor, the failure to flash doors and windows, etc.⁴⁸

IV. SUMMARY OF ARGUMENT

Shepler waived the arbitration clause as a defense to the counterclaims for construction defects. Shepler failed to invoke the arbitration clause as an affirmative defense at the start of the case. Later, when Shepler moved for summary judgment on the merits of the counterclaims and sought damages for the breach of the clause, Shepler

⁴⁴ Appendix N (Letter (Nov. 16, 2011), CP 77-92.

⁴⁵ Judgment and Decree at 1-3, CP 93-95; Amended Judgment (increasing fees to \$146,758), CP 268.

⁴⁶ CP 198-99 (\$81,000 in prejudgment interest).

⁴⁷ CP 99 (summarizing 2005 fees), CP 99-100 (summarizing fees in appeal in 2006-07).

⁴⁸ Trial Br. at 3:10-18, CP 21; CP 33-40, 42-47.

completely abandoned any prospect of using the clause as a defense. The trial court made repeated prejudicial errors by dismissing the counterclaims and excluding the evidence of the construction defects.

This Court's prior ruling that the arbitration clause was waived squarely conflicts with the trial court's repeated rulings that the clause had not been waived. Compare ("the parties waived the arbitration clause ... not the underlying claims")⁴⁹ with ("the Leonards are barred from bringing any claim before this court that should have been submitted to binding arbitration").⁵⁰ The appellate ruling is well supported by the law.

V. ARGUMENT

A. Standard of Review.

A summary judgment order is subject to de novo review.⁵¹ Summary judgment is appropriate only where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.⁵² The determination of waiver is a mixed question of law and fact,

⁴⁹ Appendix B (2009 WL 5153672, ¶ 15 n.1 (Dec. 21, 2009)).

⁵⁰ Appendix J (Order Granting Summ. J. As to Defs. Leonards' Breach of Dispute Resolution Provision), CP 69-71.

⁵¹ Oak Harbor Educ. Ass'n v. Oak Harbor School Dist., 162 Wn. App. 254, 262, 259 P.3d 274 (2011) (citing Mount Adams Sch. Dist. v. Cook, 150 Wn.2d 716, 722, 81 P.3d 111 (2003)).

⁵² Oak Harbor Educ. Ass'n., 162 Wn. App. at 262.

with de novo review of the legal question of whether the facts amount to a waiver.⁵³

“An erroneous statement of the applicable law is a reversible error if it prejudices a party.”⁵⁴ This Court reviews findings and conclusions to determine “whether substantial evidence supports the findings and, if so, whether they support the trial court’s conclusions of law and judgment.”⁵⁵

B. Arbitration Was a Waivable Defense.

The summary judgment dismissal of the counterclaims for the failure to abide by the arbitration clause was an error of law. This Court reviews de novo review whether uncontested facts amount to waiver of the arbitration clause, which is a question of law.⁵⁶ The genuine dispute as to the operative facts requires those facts must be construed in favor of the Leonards who were responding to a motion for summary judgment dismissal.⁵⁷ The dismissal order rests on the misapplication of the

⁵³ Sanders v. State, 169 Wn.2d 827, 849, 240 P.3d 120 (2010) (mixed question of law and fact); Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 440-41, 191 P.3d 879 (2008) (whether the facts proved amount waiver is a question of law); id. at 441 (if the parties do not dispute the facts, the question is one of law for the court).

⁵⁴ Keller v. City of Spokane, 104 Wn. App. 545, 551, 17 P.3d 661 (2001).

⁵⁵ Saviano v. Westport Amusements, Inc., 144 Wn. App. 72, 78, 180 P.3d 874 (2008) (omitting internal citations).

⁵⁶ Brundridge, 164 Wn.2d at 441 (if the parties do not dispute the facts, the question of waiver is one of law for the court).

⁵⁷ Oak Harbor Educ. Ass'n., 162 Wn. App. at 262. There are material issues of fact regarding Shepler’s invocation of the clause (failing to disclose an arbitrator and failing to initiate the arbitration or move to compel arbitration).

doctrines of implied waiver and estoppel,⁵⁸ which were raised in response to the summary judgment motion. The order also rests on a fundamental misunderstanding of the nature of arbitration as a remedy, which was briefed when the Leonards subsequently moved to compel arbitration.⁵⁹

The Federal Arbitration Act and state acts overturn the common law rule that an arbitration agreement could not be specifically enforced; the acts provide an exclusive statutory remedy—an order compelling arbitration.⁶⁰ “[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.”⁶¹ The general rule is an unperformed arbitration agreement will not bar suit on the same subject matter, unless arbitration is a condition precedent to suit.⁶² The general rule applied in this case, where arbitration was not a

⁵⁸ Appendix I (Resp. to Pl.’s Mot. for Summ. J. at 3:13-6:19) (Dkt. 245), Supplemental Designation.

⁵⁹ Appendix M (Defs.’ Mot. to Compel Arbitration and Motion for Stay Until Arbitration is Completed at 5:4-15:26) (Dkt. 309), Supplemental Designation; Appendix L (Defs.’ Reply in Supp. of Application/Pet. To Compel Arbitration and for Stay at 1:15-8:2) (Dkt. 321), Supplemental Designation.

⁶⁰ Appendix M (Defs.’ Pet. To Compel Arbitration and for Stay at 9:6-18 & n.17 (citing Red Cross Line v Atlanta Fruit Co., 264 U.S. 109, 118, 44 S. Ct. 274, 68 L. Ed. 582 (1924)), Supplemental Designation; see 6 C.J.S. Arbitration § 61 at 130 (2004).

⁶¹ Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-46, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006).

⁶² 4 Am. Jur. 2d Alternative Dispute Resolution § 86 at 141(2007) (“Notwithstanding the general rule that an unperformed arbitration agreement will not bar suit on the same subject matter, if a party’s right to bring suit is validly conditioned on an award of arbitrators ... the courts will not take jurisdiction of his or her suit until he or she complies with conditions precedent or is legally excused therefrom.”). See Appendix M (Defs’ Pet. To Compel Arbitration and Mot. for Stay at 5:13-18 & n.8 (citing McNeff v. Capistran, 102 Wash. 498, 503-04, 208 P. 41 (1922) (where there was no absolute condition precedent to arbitration and parties waived the arbitration privilege)), (continued . . .)

condition precedent to suit. Further, neither party served personally or sent by registered mail RCW 7.04.060's notice of intention to arbitrate whose effect is to bar a party from failing to comply with the arbitration agreement.⁶³ Instead, they litigated the arbitrable claims in superior court and the appellate courts.

Over five years into the case, the trial court ruled: "The Leonards are barred from bringing any claim before this court that should have been submitted to binding arbitration under the contract's dispute resolution provision."⁶⁴ When it made this ruling, the trial court simultaneously made two errors of law: (1) it failed to rule the clause had been waived, and (2) it failed to rule Shepler was estopped from using the clause as a defense.⁶⁵

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Supplemental Designation; Thorgaard Plumbing & Heating Co. v. Cnty. of King, 71 Wn.2d 126, 131 n.4, 426 P.2d 828 (1967), where arbitration was a condition precedent to judicial relief).

⁶³ Appendix M (Defs.' Pet. To Compel Arbitration at 5:8-17 & n.7 (quoting Martin v. Hydraulic Fishing Supply, Inc., 66 Wn. App. 370, 375 n.6, 832 P.2d 118 (1992) (RCW 7.04.060 notice included a "warning that unless the served party files a motion to stay arbitration within 20 days of service, that party is barred from contesting the existence or validity of the arbitration agreement or the failure to comply with it.")), Supplemental Designation. RCW 7.04.060 was superseded when Washington adopted the Uniform Arbitration Act.

⁶⁴ Appendix J (Order Granting Pl.'s Mot. for Summ. J. at 2:17-18, CP 70; RP at 13:17-14:2 (3/14/2008) (citing Pegasus Constr. v. Turner Constr., 84 Wn. App. 744, 929 P.2d 1200 (1997)). See also App. N (Letter decision at 1-3), CP 77-79.

⁶⁵ RP (Mar. 14, 2008) 10:4-13:16; Appendix I (Resp. to Pl.'s Mot. for Summ. J. at 5-6 (implied waiver); id. at 3-4 (equitable estoppel)), Supplemental Designation. Appendix N (Letter decision), CP 77-79.

1. Shepler Abandoned Arbitration as a Defense, By Failing to Plead Arbitration as An Affirmative Defense and to Compel Arbitration Before the First Trial.

“Waiver of an arbitration clause may be accomplished expressly or by implication. ... The right to arbitrate is waived by “conduct inconsistent with any other intention but to forego a known right.”⁶⁶ The Leonards raised implied waiver below: “Shepler had the opportunity to bring motions to stay the litigation and move the case to arbitration pursuant to the contract. Shepler’s failure to act constitutes an implied waiver.”⁶⁷

When answering the counterclaims, Shepler failed to raise any affirmative defenses. The omitted affirmative defenses included that the counterclaims were completely barred or totally foreclosed by the failure to submit them to arbitration or through waiver of the claims.⁶⁸ CR 8(c) (entitled, Affirmative Defenses); *id.* (identifying waiver as an affirmative defense).⁶⁹ Shepler’s answer that failed to use the term “arbitration” and

⁶⁶ *Verbeek Properties, LLC v. GreenCo Env’t, Inc.*, 159 Wn. App. 82, 87, 246 P.3d 205 (2010) (citations omitted); *Harting v. Barton*, 101 Wn. App. 954, 962, 6 P.3d 91 (2000) (stating similar rule for dispute resolution clause), *review denied*, 142 Wn.2d 1019, 16 P.3d 1266 (2001). *Id.* (ruling party waived mediation provision by failing to demand mediation; filing counterclaim and moving for summary judgment waived right to mediation).

⁶⁷ Appendix I (Resp. to Pl.’s Mot. for Summ. J. at 5-6 (implied waiver)), Supplemental Designation.

⁶⁸ Appendix E (Answer to Counterclaim), CP 290-91.

⁶⁹ *Harting v. Barton*, 101 Wn. App. at 962 (mediation clause as an avoidance or affirmative defense under CR 8(c)); 5 Charles Alan Wright et al., *Fed. Practice & Procedure* § 1278 at 654 (2004) (failure to plead “the controversy is properly the subject (continued . . .)

“did not hint that judicial remedies are totally foreclosed” was insufficient to invoke arbitration.⁷⁰ “[A] defendant’s failure to raise arbitration as an affirmative defense shows his intent to litigate rather than arbitrate.”⁷¹ That is exactly what happened here.

While the requirement to plead affirmative defenses “is not to be construed absolutely, it will not be abrogated where it affects the substantial rights of the parties.”⁷² The requirement to plead arbitration as an affirmative defense should not be abrogated in this case, where Shepler litigated the counterclaims for years and where the Leonards’ right to relief on the merits of the construction defects has been abrogated.

Shepler completely abandoned any arbitration defense when it moved the court to dismiss the counterclaims on the merits two years into the case.⁷³ When Shepler later moved to enforce the arbitration clause to bar the counterclaims five years into the case,⁷⁴ the Leonards responded that Shepler had “slept” on its right “to stay the litigation and move the

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of arbitration” as an affirmative defense).

⁷⁰ Appendix M (Defs.’ Pet. To Compel Arbitration and Mot. for Stay at 6:21-7:2 & n.10 (citing Ives v. Ramsden, 142 Wn. App. 369, 383, 174 P.3d 1231 (2008)), Supplemental Designation.

⁷¹ Johnson Assoc. Corp. v. HL Operating Co., 2012 U.S. App. LEXIS 10339, *11-*12 (6th Cir. May 23, 2012)(affirming judgment that arbitration had been waived).

⁷² Rainier Nat’l Bank v. Lewis, 30 Wn. App. 419, 422, 635 P.2d 153 (1981).

⁷³ Lake Washington Sch. Dist. No. 414 v. Mobile Modules NW, Inc., 28 Wn. App. 59, 60, 63, 621 P.2d 791 (1980).

⁷⁴ Appendix H (Pl.’s Mot for Summ. J. as to Breach of Dispute Resolution Provision) (Dkt. 238), CP 304-07.

case to arbitration pursuant to contract” for five “years, and now seeks to use its own failure to assert that right as a means to obtain summary judgment against the Leonards. The five-year delay before raising the defense is entirely unreasonable. This is precisely the type of unjust result that the doctrine of laches is designed to prevent.”⁷⁵

“Laches is an implied waiver arising from knowledge of existing conditions and acquiescence in them.”⁷⁶ Shepler had (1) knowledge and reasonable opportunity to discover the arbitration clause as a defense, (2) Shepler’s five-year delay in asserting the defense was an unreasonable delay, and (3) the Leonards have suffered damage resulting from the unreasonable delay. Therefore, the Leonards established the three elements of laches.⁷⁷ The trial court erred in when it did not rule laches barred the defensive use of the arbitration clause to foreclose a judicial remedy for the construction defects.

In short, through litigating the counterclaim for five years in court, Shepler had waived the arbitration clause as a defense. The trial court erred when it failed to correctly apply the doctrine of implied waiver and

⁷⁵ Appendix I (Resp. to Pl.’s Mot. for Summ. J. at 5:19-6:2, Supplemental Designation.

⁷⁶ Appendix I (*id.* at 5:2-4), Supplemental Designation. *Id.* (*Somsak v. Critton Techn./Heath Tech., Inc.*, 113 Wn. App. 84, , 93, 52 P.3d 43 (2002)).

⁷⁷ Appendix I (Resp. to Pl.’s Mot. for Summ. J. at 5:19-6:2), Supplemental Designation. *Id.* (*In re Marriage of Lesley*, 112 Wn.2d 612, 619, 772 P.2d 1013 (1989)).

laches. A second error was committed in failing to correctly apply the law of estoppel.

2. Shepler's Prosecution of a Damage Remedy Estopped Its Tardy Assertion of a Dismissal Remedy.

Shepler did much more than omit an affirmative defense. Before raising the arbitration clause as a complete shield to the previously-litigated counterclaims, Shepler prosecuted its claims to judgment.⁷⁸ Shepler's prior statements and conduct estop it from asserting the arbitration clause as a shield after asserting it as a sword. Shepler had elected a speculative damage claim as the remedy for the violation of the arbitration clause. Shepler in the first appeal claimed the trial court had erred when it denied damages for the Leonards' refusal to comply with the arbitration clause.⁷⁹ The appellate decision remanding the case acknowledged Shepler was still pursuing a damage remedy for the violation of the arbitration clause:

Because we remand for trial, it is not necessary to address the Shepler's counterclaim for damages resulting from the Leonard's failure to abide by the contract's dispute resolution provisions. In light of the additional evidence that will be provided upon remand, the trial court's assessment of breach and damages by the parties

⁷⁸ Cf. Verbeek Properties, LLC v. GreenCo. Env'tl, Inc., 159 Wn. App. 82, 89-90, 246 P.3d 205 (2010) (stating omitting a demand for arbitration from initial pleadings is not an affirmative election to forgo arbitration; ruling moving to compel arbitration less than two months after filing complaint did not waive arbitration).

⁷⁹ "The question of damages caused by this breach should be subject to a second trial because the trial court failed to award damages for this breach." Appendix K (Mot. for Recons. at 6 n.270)(Dkt. 291), CP 360-76; Appendix C (Compl. at 5:13-15), CP 270-82.

may change. Any opinion this court could offer now would only be advisory.⁸⁰

Shepler moved for reconsideration of this appellate decision and petitioned for review and in the process raised the new defense that the Leonards had “waived” any claim of construction defect when they failed to comply with the arbitration clause.⁸¹ But Shepler had already impliedly waived that defense and was estopped from asserting it. So it is no wonder the Supreme Court denied review.

Laches and estoppel are related defenses. “The doctrine of laches as a defense is grounded on the principle of equitable estoppel, which will not permit the late assertion of a right where other persons by reason of the delay will be injured by its assertion.”⁸² The elements of equitable estoppel are: (1) a party's admission, statement or act inconsistent with its later claim, (2) action by another party in reliance on the first party's act, statement or admission, and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission.⁸³

⁸⁰ Appendix A (2006 WL 1217216 n.4 (May 6, 2006)).

⁸¹ Appendix G (Mot. for Recons. at 4:12-5:24)(Dkt. 291), CP 360-76; *id.* at 4:12-13 (“Appellants Waived Any Claim ...”); *id.* at 5:12-13 (“Leonards’ refusal ... waived their right”); *id.* at 4:23-24 (“The Leonards waived any ... claim ...”).

⁸² *Johnson v. Schultz*, 137 Wash. 584, 587, 243 P. 644 (1926) (citation omitted). See CP 119:13-14 (citing *Schultz*).

⁸³ Appendix I (Resp. to Pl.’s Mot. for Summ. J. at 3-4 (equitable estoppel) (Dkt. 245), Supplemental Designation. See *Kramarevsky v. Dep’t of Social and Health Serv.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993) (ruling DSHS was equitably estopped from
(continued . . .)

Shepler's actions established those elements. First, Shepler admitted the counterclaims were part of the lawsuit. Shepler never personally served a notice of intention to arbitrate, nor did it move to compel arbitration. Instead of using the arbitration clause as a defense to the counterclaims, Shepler wielded it as a sword seeking damages based on the clause. Second, the Leonards detrimentally relied on Shepler's pleadings, and third, they were damaged. They would have pursued the construction defect claims through the arbitration procedure if Shepler had claimed the arbitration clause prevented the litigation of the counterclaims.

Having litigated the counterclaims for years, Shepler was equitably estopped from taking the inconsistent position that arbitration clause was a defense barring the counterclaims from being litigated in court.⁸⁴

Below the Leonards argued that they "relied on Shepler's act of filing a lawsuit" and "[i]t was Shepler ... and not the Leonards who made the choice to have the dispute decided in court, rather than as the contract dictated," and if the summary judgment dismissal were granted, the Leonards "will once again be prevented from arguing their case at trial, resulting in devastating injury."⁸⁵ Nonetheless, the trial court dismissed

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recovering public assistance benefits it overpaid to recipients).

⁸⁴ Appendix I (Resp. to Pl.'s Mot. for Summ. J. at 3:13-4:11) (Dkt. 245), Supplemental Designation.

⁸⁵ Appendix I (Resp. to Pl.'s Mot. for Summ. J. at 4:1-11) (Dkt. 245), Supplemental (continued . . .)

the counterclaims and erred, by failing to hold Shepler was estopped from asserting arbitration as a complete defense to the counterclaims.

Even if the trial court did not err in applying the doctrines of waiver, estoppel, laches, and election of remedies,⁸⁶ the trial court misconstrued the arbitration clause.

3. The Arbitration Clause Was Not An Exclusive Remedy.

This Court has already ruled the arbitration clause does not provide that it is an exclusive remedy. The clause is similar to the one construed in Pederson v. Klinkert, where the supreme court rejected claims that arbitration was “the only remedy,” because, “it is clearly not the law” when the clause was “purely optional” and merely required “[a]ll questions ... shall be submitted to arbitration at the choice of either party.”⁸⁷

Here, the trial court, at Shepler’s urging, adopted a construction of the arbitration clause that “clearly is not the law.”⁸⁸ By implicitly construing the clause to be an exclusive, unwaivable remedy, the trial court violated a fundamental canon of construction: “If language

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Designation.

⁸⁶ Minter v. Pierce Transit, 68 Wn. App. 528, 530, 537, 843 P.2d 1128 (1993) (construing a labor arbitration procedure containing an election of remedies provision that litigation waived the right to arbitrate and arbitration waived the right to litigate).

⁸⁷ 56 Wn.2d 313, 320, 352 P.2d 1025 (1960); Appendix M (Defs.’ Pet. to Compel Arbitration and Mot. for Stay at 6:1-23) (Dkt. 309), Supplemental Designation..

⁸⁸ 56 Wn.2d at 320.

providing for a forfeiture is capable of two constructions—that against forfeiture should be followed.”⁸⁹ The clause does not use the words “exclusive,” “sole,” or “only.” By analogy under the Uniform Commercial Code, the arbitration clause is an “optional” remedy (not an “exclusive or limited remedy”) because there is no exclusivity language.⁹⁰ The policies supporting an optional, waivable alternative dispute resolution procedure weigh even more strongly here, where a consumer retained a registered general contractor whose counsel drafted the contract with the unexpressed intention of creating an unwaivable and exclusive remedy.⁹¹

The effect of waiving arbitration is to litigate the underlying claim in court—not the dismissal of the claim,⁹² unless there are additional

⁸⁹ Reeploeg v. Jensen, 5 Wn. App. 695, 698, 490 P.2d 445 (1971).

⁹⁰ RCW 62A.2-719(1)(a) (agreement may limit or alter damages allowable to price or repair and “resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy”). See, e.g., Chassereau v. Global-Sun Pools, Inc., 363 S. C. 628, 634 n.15, 611 S.E.2d 305, 308 n.15 (S.C. Ct. App. 2005) (construing arbitration clause stating it was an exclusive remedy), aff’d, 373 S.C. 168, 644 S.E.2d 718 (S.C. 2007)). The provision was conspicuous and clear and taxed the eyes. 363 S.C. at 632, 611 S.E.2d at 307.

⁹¹ RP (Dec. 15, 2004) at 118: 14-17 (J. Shepler Trial Test.).

⁹² See, e.g., Detweiler v. J.C. Penney Cas. Ins. Co., 110 Wn.2d 99, 110-14, 751 P.2d 282 (1988) (affirming waiver of UIM arbitration and remanded to superior court trial on liability and damages); Pedersen, 56 Wn.2d at 320-21 (1960) (“the parties to a contract having an arbitration clause may waive it; and a party does so by failing to invoke it in the trial court when an action is commenced against him on the contract”); Cogswell v. Cogswell, 70 Wash. 178, 183, 126 P. 431 (1912) (contract having been partially performed and the failure to arbitrate “not giving ground for a rescission, it follows that the appellants have mistaken their remedy. They should have applied to the court for enforcement of the contract by fixing the price.”); accord, Minton v. Mitchell, 89 Cal. App. 361, 265 P. 271, 274 (1928) (“an arbitration clause of a contract will not be
(continued . . .)

contractual provisions that are absent in this case. “It is a basic principle of law that parties by an express agreement may contract for an exclusive remedy that limits their rights, duties and obligations. The contract, however, must *clearly indicate* that the intent of the parties was to make the stipulated remedy exclusive.”⁹³

But Shepler did not clearly indicate an intention to create an exclusive remedy. Instead, Shepler made an unlimited express warranty that the work will be “substantially completed in a workmanlike manner according to standard practices of the area and in compliance with . . . codes.”⁹⁴ There is no disclaimer of any implied warranties, and there is no limitation of remedies provision. The arbitration clause does not rise to the level of an exclusive remedy that could not be waived.⁹⁵ Yet, the trial court construed the arbitration clause to operate as a stealth defense creating a complete or absolute bar to claims.

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construed as ousting the courts of jurisdiction, . . . unless the clause is made a condition precedent by express words or necessary implication, it will be construed as merely collateral to the liability clause, and is no bar to an action without an award”).

⁹³ Bd. of Regents v. Wilson, 27 Ill. App.3d 26, 326 N.E.2d 216, 220 (1975) (adding emphasis) quoted in Graoch Assocs. # 5 LLP v. Titan Constr. Corp., 126 Wn. App. 856, 865, 109 P.3d 830 (2005).

⁹⁴ Appendix C (attachment to complaint, Shepler Constr., Inc. Building Agreement at 1), CP 270-82.

⁹⁵ Graoch Assocs. # 5 LLP v. Titan Constr. Corp., 126 Wn. App. 856, 866, 109 P.3d 830 (2005) (ruling trial court erred in ruling one-year limited warranty was an exclusive warranty).

C. **The Trial Court Applied An Erroneous Rule of the Law, When It Ruled the Failure to Abide by a Contractual Dispute Provision Was a Complete Bar to the Counterclaims.**

The trial court made another reversible error when it adopted Shepler's confabulation of a general rule of law from limited dicta. The trial court stated: "A party that fails to abide by a contractual dispute provision is completely barred from bringing suit for recovery of alleged losses that should have been resolved through the dispute resolution procedure. Pegasus Constr. Corp. v. Turner Constr. Co., 84 Wn. App. 744, 929 P.2d 1200 (1997)."⁹⁶ This statement was a verbatim quote from Shepler's motion.⁹⁷ But the statement is nowhere to be found in the Pegasus decision.⁹⁸ In Pegasus, this Court affirmed a trial court's refusal to vacate an arbitration award. The decision merely stated the arbitrator had concluded the Pegasus had not complied with the dispute resolution provisions; it ruled: "Pegasus' failure to comply with the dispute resolution procedure was dispositive."⁹⁹ The limited ruling is certainly not a general rule of law. The correct statement of law is: "Waiver of an arbitration clause may be accomplished expressly or by implication. ... The right to arbitrate is waived by 'conduct inconsistent with any other

⁹⁶ RP (Mar. 14, 2008) at 13:17-18.

⁹⁷ Summ. J. Mot. at 3:15-19, CP 304-07.

⁹⁸ Compare Pegasus Constr. Corp., 84 Wn. App. at 749-50 with RP (Mar. 14, 2008) at 13:17-18 (order).

⁹⁹ 84 Wn. App. at 749.

intention but to forego a known right.”¹⁰⁰ The trial court’s standard that a party breaching an arbitration clause was “completely barred from bringing suit” is incontestably and completely an incorrect statement of law, ignoring the very well-established principle that arbitration clauses are waivable.

The trial court’s reliance on the Pegasus decision was also unreasonable because the case involved a public works contract, a wholly distinguishable setting from this consumer contract. Shepler relied upon another decision construing a public works contract, the Absher decision¹⁰¹ that Shepler claimed was controlling precedent.¹⁰² There, this Court construed a contract that contained an “absolute waiver” clause and another clause that made dispute resolution a condition precedent filing a lawsuit,¹⁰³ as part of the policy of protecting the public fisc. But Shepler’s contract does not have that extraordinary clause.

¹⁰⁰ Verbeek Properties, LLC, 159 Wn. App. at 87; Harting, 101 Wn. App. at 962, 6 P.3d 91 (2000) (stating similar rule for dispute resolution clause).

¹⁰¹ Absher Constr. Co. v. Kent Sch. Dist. No. 415, 77 Wn. App. 137, 143, 890 P.2d 1071 (1995).

¹⁰² Appendix K (Pl.’s Mot. for Recons. at 3:7-8 (“This case is controlled by Absher”))(Dkt. 260), CP 327-29.

¹⁰³ Similarly, this Court’s decision in Absher, 77 Wn. App. at 143 is not controlling for three reasons. First, in Absher, “[t]he dispute resolution procedures in the contract are clearly mandatory,” required compliance “before a lawsuit could be commenced” and “could not be waived except by an explicit written waiver.” Id. at 139-140, 146. Second, the decision did not involve the waiver of an arbitration clause through litigation. Third, the contract contained a provision that absolutely waived some claims. Id. at 140, 146.

More recently the supreme court, in Mike M. Johnson, Inc.,¹⁰⁴ construed another public works contract that had a “completely waives” clause (“by failing to follow the procedures of this section ..., the Contractor completely waives any claims for protested work”) and a condition precedent to judicial relief clause requiring (“[f]ull compliance ... is a contractual condition precedent to the ... right to seek judicial relief.”). But Shepler’s contract does not contain those extraordinary clauses.¹⁰⁵

A trial court’s error is reversible if it is prejudicial and prejudicial if “it affects, or presumptively affects, the outcome ...”¹⁰⁶ Here, the erroneous rule of law that the arbitration clause was a complete bar to suit was prejudicial, when it was the conclusion of the trial court’s oral decision.¹⁰⁷

¹⁰⁴ Mike M. Johnson, Inc. v. Cnty. of Spokane, 150 Wn.2d 375, 380, 78 P.3d 161 (2003); Realm, Inc. v. City of Olympia, -- P.3d --, 2012 WL 1604848 (Wn. App. May 8, 2012) (affirming dismissal of contractor’s claims for failure to comply with contract’s pre-suit notice); id. ¶ 12 (construing public works contract providing “these sections must be complied with in full, as a condition precedent to the Contractor’s right to seek claim resolution through any nonbinding alternative dispute resolution process, binding arbitration, or litigation”).

¹⁰⁵ Appendix C (attachment to complaint, Shepler Construction, Inc., Building Agreement), CP 270-82.

¹⁰⁶ Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983); Keller v. City of Spokane, 104 Wn. App. 545, 551, 17 P.3d 661 (2001) (“An erroneous statement of the applicable law is reversible error if it prejudices a party.”).

¹⁰⁷ “Since it is undisputed the Leonards never invoked the dispute resolution process, the Court grants Shepler’s Motion for Summary Judgment and dismisses the Leonards’ Counterclaims for Defective Workmanship.” RP (Mar. 14, 2008) at 13:23-14:2.

In addition to prejudicially applying an erroneous standard of law, the trial court compounded its prior errors when it rendered a portion of the appellate decision to be dicta, preventing the Leonards from establishing most of their affirmative defenses at the second trial.

D. The Refusal to Consider Construction Defect Evidence As Part of the Leonards' Affirmative Defenses Was Reversible Error.

The summary judgment order ruled: “All causes of action or counterclaims relating to Shepler[]’s performance ... are therefore dismissed.”¹⁰⁸ “Because there was no CR 54(b) certification, the order ‘[was] subject to revision at any time before entry of judgment adjudicating all the claims and rights and liabilities of the parties.’”¹⁰⁹ At the start of the trial, the Leonards asked for clarification or revision of the order.

1. The Summary Judgment Dismissal Did Not Bar the Affirmative Defenses.

The Leonards asked the trial court to permit them to offer the evidence of the construction defects. The report and declarations summarizing the evidence were attached to their trial brief.¹¹⁰ The Leonards argued this Court’s ruling meant their construction defect

¹⁰⁸ Appendix J (Order Granting Summ. J. As to Defs. Leonards’ Breach of Dispute Resolution Provision at 2:18-3:1), CP 70.

¹⁰⁹ Appendix L (Reply in Supp. of Revised Mot. for Recons. of Summ. J. Order or to Compel Arbitration and for Limited Stay at 2), CP 407-15. *Id.* (quoting CR 54(b)).

¹¹⁰ Ex. A –D, Def.’s Trial Br., CP 33-51.

defenses were not waived by the failure to comply with the arbitration clause.¹¹¹ The defenses would be restricted to merely eliminating an award of additional compensation to the contractor.¹¹²

The dismissal order did not mention the affirmative defenses.¹¹³ Shepler had the burden proving its lien claim. “[T]he underlying basis for a lien claim is proof that the work was executed in a proper and workmanlike manner.”¹¹⁴ Even if Shepler made a prima facie showing of lienable work, the Leonards had affirmative defenses for which they had the burden of proof. After the dismissal order was granted, the Leonards stated they would pursue “the defense of improper workmanship and the defense of incomplete work and a counterclaim for damages caused by defective performance.”¹¹⁵

They did just that at the start of the trial, when they asserted the dismissal order “merely preclude[d] a net affirmative recovery against

¹¹¹ Def.’s Trial Br. at 3:1-18, CP 21.

¹¹² Def.’s Trial Br. at 3:1-18, CP 21; Defs.’ Br. of Recoupment, Supplemental Designation.

¹¹³ Appendix J (Order Granting Summ. J. As to Defs. Leonards’ Breach of Dispute Resolution Provision at 2:18-3:1), CP 70-71.

¹¹⁴ Appendix M (Defs.’ Pet. To Compel Arbitration and Mot. for Stay at 14), at CP xx. Id. (citing Lundberg v. Corp. of Catholic Archbishop of Seattle, 55 Wn.2d 77, 83-84, 346 P.2d 164 (1959) and other decisions permitting offset for construction defects).

¹¹⁵ Appendix M (Defs.’ Pet. To Compel Arbitration and Mot. for Stay at 14) (Dkt. 309) Supplemental Designation.

Shepler” and raised the “affirmative defense of recoupment or setoff based on the construction defect claim.”¹¹⁶ The Leonards argued:

Let’s start with what the Court of Appeals said. Footnote one of the ... decision says, quote ...

“The arbitration clause did not provide that it was the exclusive remedy. As noted above, the parties waived the arbitration clause by litigating, not the underlying claims.” That’s what the Court of Appeals said. That’s in the mandate back to you.

The Court of Appeals is saying the arbitration clause is not exclusive, the parties waived the arbitration clause by litigating, but not the underlying claim.

So our position is simply we follow what the Court of Appeals says. The underlying claims were not waived. At minimum, there is a claim for recoupment or setoff.¹¹⁷

In response, Shepler advocated a second, one-sided trial excluding the evidence. Shepler contended the statements in this Court’s footnote one were “dicta,” “the Leonards don’t get to come to this court and make arguments that they should have made in arbitration,” and “the remedy was to bar those claims,” otherwise “dispute resolution provisions would become meaningless.”¹¹⁸

While the trial court acknowledged that it had “a difficult time considering that the footnote is a mandate,”¹¹⁹ it ultimately ruled it would not consider construction defects in the second trial.¹²⁰ The trial court

¹¹⁶ RP (Aug. 8, 2011) at 6:11-5.

¹¹⁷ RP (Aug. 8, 2011) at 16:24-17:17. See Appendix B (2009 WL 5153672, ¶ 15 n.1).

¹¹⁸ RP (Aug. 8, 2011) at 25:9-13; 25:20-23; 26:1-2; 26:3-6.

¹¹⁹ RP (Aug. 8, 2011) at 26:16-23.

¹²⁰ RP (Aug. 8, 2011) at 26:24-27:4.

offered no explanation why the construction defects could not support the affirmative defenses. During the trial, the court admitted some evidence on incomplete work, but it barred the admission of any evidence in support of the defense of improper workmanship or the counterclaim for defective performance.¹²¹

2. The Trial Court Erred When It Failed to Follow the Appellate Ruling that the Underlying Claims Were Not Waived.

The trial court erroneously construed the mandate. The mandate provides: “This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of that decision.”¹²² The trial court failed to act “in accordance with” the appellate decision when it construed footnote one to be superfluous. The issue of the evidence properly supporting the affirmative defenses required the trial court to construe the arbitration clause again more in the light of the appellate court’s construction of that clause. But the trial court ignored this Court’s construction of the arbitration clause.

¹²¹ See, e.g., RP (Aug. 8, 2011) at 179:21-180:20 (striking testimony that the heating unit would never heat the house). *Id.* at 205:6-21 (start of the second day of trial, confirming the Leonards could not ask witness Kevin Taylor questions about construction defects); RP at 220:20-222:6 (sustaining objections to Gary Leonard testimony about grouting and workmanship as violating the summary judgment order); RP at 235:18-21 (sustaining objections to his testimony about incorrectly installed cabinet); RP 245:10-21 (same as to testimony about door and frame and drywall defects).

¹²² Mandate, CP 9.

RAP 12.2 provides: “the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings ...” Footnote one is a binding construction of the arbitration clause:

The arbitration clause did not provide that it was the exclusive remedy for breach. As noted above, the parties waived the arbitration clause by litigating, not the underlying claims.¹²³

If the underlying claims were not waived, then the affirmative defenses arising from those same circumstances were not waived.¹²⁴ The appellate ruling in footnote one is dispositive on two issues: (1) arbitration was not an “exclusive remedy” and (2) the parties’ “underlying claims” were not waived by litigation. But the trial court construed footnote one as having no effect at all. As another state supreme court concluded: “It is not for the [trial court] to answer that this court’s opinion is any part dictum and of no bearing on its mandate.”¹²⁵

The trial court erred when it apparently determined the affirmative counterclaims and affirmative defenses are the same. But there is a legal difference between the two. Affirmative counterclaims cannot be asserted after the limitations period has run, but affirmative defenses can be asserted. “Recoupment or offset is one of the defenses that is not barred

¹²³ Appendix B (Shepler Constr., 2009 WL 5153672 ¶ 15).

¹²⁴ Appendix D (Answer at 4:1-21).

¹²⁵ Union Trust Co. of Indianapolis v. Curtis, 186 Ind. 516, 525, 116 N.E. 916 (1917).

by the statutes of limitations ‘so long as the main action itself is timely.’”¹²⁶ The affirmative defense of recoupment “goes to the justice of the plaintiff’s claim, and although no affirmative judgment can be had, recoupment is available as a defense even when barred as an affirmative cause of action.”¹²⁷ The same rule applies to a recoupment defense when the underlying counterclaim is entirely barred by the failure to comply with an arbitration clause.

In short, the trial court erred when it determined the counterclaims and the affirmative defenses to be the same, excluded the construction defect evidence supporting the affirmative defenses, and failed to follow the appellate decision.

E. The Law of the Case Is Arbitration Was Not An Exclusive Remedy and Litigation Did Not Waive Underlying Claims.

The record and the law support the prior appellate ruling: “the parties waived the arbitration clause by litigating, not the underlying claims.”¹²⁸ Shepler’s contract did not include an “anti-waiver” clause restricting the application of waiver.¹²⁹ Even if there had been such a

¹²⁶ *Olsen v. Pesarik*, 118 Wn. App. 688, 692, 77 P.3d 385 (2003).

¹²⁷ *Sea-First Nat’l Bank, N.A. v. Siebol*, 64 Wn. App. 401, 824 P.2d 1252 (1992) (quoting 20 Am.Jur.2d *Counterclaim, Recoupment, and Setoff* §§ 10 and 11, at 235-36 (1965)).

¹²⁸ Appendix B (2009 WL 5153672, ¶ 15 n.1).

¹²⁹ II E. Allan Farnsworth, *Farnsworth on Contract* § 8.7(a) at 469 (3d. ed. 2004).

clause, the arbitration remedy was waived through the substantial litigation.

The appellate decision in footnote one is the law of the case in this second appeal. RAP 2.5(c)(2).¹³⁰ The exceptions to the law of the case doctrine do not apply. Those exceptions are newly discovered evidence,¹³¹ an intervening change in the law, or a clearly erroneous appellate decision working an injustice to one party, with no corresponding injustice resulting to the other party if the erroneous ruling were set aside.¹³² Therefore, this Court's prior decision construing the arbitration clause is binding in this second appeal.

The prejudice to the Leonards is not restricted to the dismissal order and rulings at trial.

F. The Trial Court Made Additional Prejudicial Errors.

Three months after the trial, the trial court issued a letter decision.¹³³ The decision was incorporated into the findings and conclusions.¹³⁴ The decision includes an explanation of the summary judgment dismissal that had been made over three years earlier.¹³⁵ The decision states: "The Leonards'

¹³⁰ *State v. Strauss*, 119 Wn.2d 401, 412, 832 P.2d 78 (1992).

¹³¹ 3 Karl B. Tegland *Wash. Practice: Rules Practice* RAP 12.2 at 152 (7th ed. 2011).

¹³² *State v. Schwab*, 163 Wn.2d 664, 672-73, 676, 185 P.3d 1151 (2008) (RAP 2.5(c)(2) codifies two common law exceptions to the doctrine).

¹³³ Appendix N (letter (Nov. 6, 2011), CP 77-79).

¹³⁴ Findings and Conclusions at 1-3 (procedural background section), CP 172-73.

¹³⁵ Appendix N (letter at 2), CP 78; *id.* at 2 & n.1 (referring to summary judgment order (continued . . .))

refusal to comply with the dispute resolution provision ... waived any claim of construction defect,” citing to the Absher decision.¹³⁶ But unlike Absher, Shepler’s contract has no clause preventing waiver of the arbitration clause.

In addition to relying upon the wholly distinguishable Absher decision, the trial court’s decision incorrectly states that “the Leonards never brought a motion for reconsideration” of the summary judgment order.¹³⁷ The decision also ignored their pre-trial request for the admission of construction defect evidence to support their affirmative defenses.¹³⁸ But the misstatements go well beyond an inaccurate procedural history.

Explaining the dismissal order granted over three years earlier, the decision states: “it makes no sense to believe the contractor would be an ‘aggrieved party’ under this dispute resolution process or in some instances even know that the homeowner was aggrieved by certain work.”¹³⁹ But the contractor is an aggrieved party when it wants to avoid litigation in court about workmanship issues or when it wants to close out a project. Shepler

(. . . continued)

entered on March 31, 2008 and second trial on August 8-10, 2011).

¹³⁶ Id. at 3 & n.5, CP 79. See supra at 27.

¹³⁷ Compare Appendix N (letter at 2), CP 78, with Appendix K (Mot. for Recons. of Summ. J. Order or to Compel Arbitration and for Limited Stay), CP 360-76.

¹³⁸ Compare Appendix N (letter at 3) (stating the counterclaims for construction defect claims were not allowed at trial), CP 79, with RP (Aug. 8, 2011) at 5:19-9:8, 16:23-18:16 (arguing summary judgment order does not bar affirmative defenses for breach of contract, acts of subcontractors, and the appellate decision’s footnote one ruling the underlying claims were not waived).

¹³⁹ Appendix N (letter at 2), CP 78.

never sent a demand nominating an arbitrator and never moved to compel arbitration. (The irony is the Leonards did just that in 2008.)

The decision uses the heating system as an example of why the Leonards—not Shepler—were an aggrieved party under the dispute resolution process:

For instance, the Leonards were not pleased with the heating system, even though they chose it. Shepler never knew the heating system was in dispute for eight years because the Leonards never invoked the dispute resolution process. In any event, the Leonards have a remedy with the manufacturer if they believe the heating system is inadequate because the Leonards hold the warranty, not Shepler.¹⁴⁰

Each of these three sentences misstates the record.

The first quoted sentence (“the Leonards were not pleased with the heating system, even though they chose it”) squarely conflicts with Jay Shepler’s trial testimony that he showed the Leonards a system he installed for his dad’s house, the Leonards requested a similar system, and Shepler had a subcontractor perform the calculations and install the system.¹⁴¹ The record

¹⁴⁰ Appendix N (letter at 2), CP 78; Findings of Fact and Conclusion of Law at 2:12-18, CP 173.

¹⁴¹ RP (Aug. 8, 2011) at 123:10-19 (Shepler showed the Leonards the system built for Sheper’s father, so they picked it, and Shepler had its contractor calculate and install); *id.* at 128:12-18 (father’s house was smaller, so there would be different calculations); *id.* at 129:1-23 (the installer was Shepler’s subcontractor who gives a warranty upon completion); *id.* at 131 (believes the installer warrants the calculations and capacity; installer told of the Leonards contentions); *id.* at 132:13-22 (admitted there had been no arbitration and claimed he had not known of the complaints about the heating system for eight years); *id.* at 133:3-11 (confirming Shepler’s heating contractor had filed declaration stating the assertions of the Leonards’ contractor were incorrect, the issues were brought before the court on summary judgment and both sides filed declarations).

is Shepler recommended the system—not that the Leonards sourced the system and are displeased with their own choice.

The decision’s second quoted sentence (“Shepler never knew the heating system was in dispute for eight years because the Leonards never invoked the dispute resolution process”) blatantly and entirely misstates the record. The sentence has two clauses. Each squarely conflicts with record. The first clause (Shepler never knew the heating system was in dispute for eight years) conflicts with the pleadings, the appellate decisions, and trial testimony confirming Shepler knew of problems with the heating system starting in 2003. Shepler received a declaration from the Leonards’ heating expert in 2003 and Shepler’s subcontractor submitted a responsive declaration. The same trial judge erroneously concluded in 2004 that those declarations (and other ones) did not raise genuine issues of fact for trial and dismissed the counterclaims. This Court reversed and remanded the case for trial in 2007.¹⁴² The declarations by the Leonards’ heating expert were even attached to their trial brief in August 2011.¹⁴³

The trial court’s statement (“Shepler never knew the heating system was in dispute for eight years) is likely based on Jay Shepler’s incorrect and immediately retracted testimony on the first day of trial. Shepler’s own

¹⁴² Appendix A (Leonard, 2006 WL 1217216, *1 (May 8, 2006) (“the Leonards submitted declarations of ... heating contractor, Dick Wil[l]son. ... In reply, Shepler provided the declarations of Michael Drake who installed the heating system, ...”).

¹⁴³ Ex. B to Trial Br., CP 42-44.

counsel elicited the correct testimony—both sides had filed declarations about the heating system claim in the summary judgment hearing.¹⁴⁴ In short, the appellate decisions, the pleadings, and the trial testimony contradict the trial court’s finding and explanation for the erroneous dismissal.

Likewise, the second clause in the second sentence (“the Leonards never invoked the dispute resolution process”) conflicts with trial testimony and the pleadings. The trial testimony was Shepler did not know the Leonards had nominated an arbitrator, although the nomination was also in the pleadings to compel arbitration.¹⁴⁵

The decision’s third quoted sentence (“In any event, the Leonards have a remedy with the manufacturer if they believe the heating system is inadequate because the Leonards hold the warranty, not Shepler”) also squarely conflicts with the record and misstates the law. There was no testimony about a manufacturer’s warranty. Shepler’s subcontractor made the calculations—not a manufacturer—and Shepler admitted its subcontractor warranted those calculations.

¹⁴⁴ RP (Aug. 8, 2011) at 133:1-11; Decl. of Dick Willison, Dogwood Indus. LLC (Dec. 30 2003), CP 42-45.

¹⁴⁵ RP (Aug. 8, 2011) at 2:2-19) (Jay Shepler trial testimony) with Appendix M (Defs. Mot. to Compel Arbitration and Mot. for Stay of this Action Until Arbitration is Complete at 10:13-11:10 (responding to Shepler’s argument about nomination of Russell as part of tri-partite process where each party nominated a contractor and the contractors chose a third contractor to act as arbitrator)(Dkt. 309) Supplemental Designation.

Shepler made an independent warranty. Its contract includes an express warranty for completing work “in a workmanlike manner according to standard practices and in compliance with all applicable state and local building, electrical, and mechanical codes.”¹⁴⁶ Further, Shepler made a separate express warranty by using the system he had installed at his father’s house as a model for the Leonards. Shepler also made additional implied warranties that were not disclaimed.¹⁴⁷ There is nothing in the record indicating that the Leonards’ remedy was to file a separate suit against the subcontractor, especially since Shepler failed to plead the affirmative defense that a non-party was at fault under CR 12(i).¹⁴⁸

On the first day of trial, after Jay Shepler testified, the Leonards expert was allowed only to testify about a disputed change order.¹⁴⁹ When the expert testified that he ran his own calculations and concluded the heating unit would never heat the house, the court struck the testimony.¹⁵⁰ The record establishes that at each instance, the trial court has made very clear she does not want to hear the construction defect counterclaims.

¹⁴⁶ CP 127.

¹⁴⁷ RCW 62A.2-313(c); RCW 62A.315-.316.

¹⁴⁸ Appendix E (Answer to Counterclaim at 2), CP 290-91.

¹⁴⁹ *Id.* at 180-184.

¹⁵⁰ RP (Aug. 8, 2011) at 179:70-9 (inspected heating unit in 2003); *id.* at 179:21-180:20 (striking testimony of conclusion that unit would not heat the house).

G. This Court Should Remand the Case for a Jury Trial and Transfer the Case to a New Judge.

The Leonards made a jury demand based on their counterclaim for damages, but the trial court struck the demand after dismissing the counterclaims. Therefore, this Court should direct a jury trial as part of the reversal of the summary judgment order. This Court should also grant a new trial on all issues. The lien claim is not separate and distinct from the counterclaims and affirmative defenses. The trial court's distinctions at trial between incomplete work (for which there could be evidence) and defective work (for which the evidence as excluded) were prejudicial.¹⁵¹ In light of the new evidence of the construction defects that will be provided on remand, the overall trial and evidence will be different. Therefore, a new trial is the appropriate remedy.

The trial court has "already expressed views on disposition." State v. Sledge, 133 Wn.2d 828, 846 n.9, 947 P.2d 1199 (1998) and transfer of the case to another judge on remand would be appropriate. Id. (granting remand before another judge).¹⁵² The trial court has already expressed erroneous

¹⁵¹ RP (Aug. 8, 2011) at 220:20-222:6, 235:18-21, 245:10-245:21-249:3, see supra at 31.

¹⁵² The federal courts apply a three-part test: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) ... would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. United States v. Sears, Roebuck & Co., 785 F.2d 777, 780 (9th Cir. 1985).

views regarding the heating unit in its post-trial explanation of the summary judgment dismissal of the construction defect counterclaims. The reassignment is advisable to preserve the appearance of justice, and will not entail waste and duplication out of proportion to any in preserving the appearance of fairness. The case has been pending for nearly a decade.

H. This Court Should Grant the Leonard Fees Pursuant to the Prevailing Party Provision in the Contract.

The contract has a prevailing party fee provision.¹⁵³ This Court should grant the Leonards appellate fees and costs. The trial court's award of fees and costs should be vacated pending a new trial.

VI. CONCLUSION

By litigating the counterclaims in court for over five years, Shepler waived any defense that the counterclaims should have been prosecuted in an arbitration. The trial court's decision enforcing the arbitration clause and dismissing counterclaims was prejudicial error. The trial court erroneously construed the arbitration clause to impose an exclusive, limited remedy.

Although the trial court was provided several opportunities to correct or mitigate the erroneous ruling, it declined to do so. Accordingly, given the unique circumstances of this case, this Court should reverse the

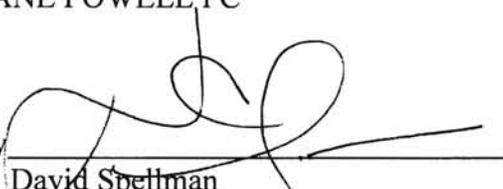
¹⁵³ CP 131.

dismissal order, remand the case for a jury trial, and direct the transfer of the case to another judge.

RESPECTFULLY SUBMITTED this 21 day of June, 2012.

LANE POWELL PC

By



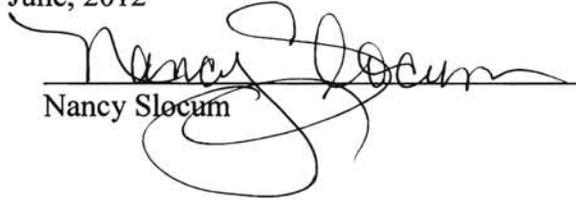
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CERTIFICATE OF SERVICE

I, Nancy Slocum, hereby certify that on June 21, 2012, I served a copy of the document to which this Certificate is attached on the following parties via Courier:

K. Garl Long
Law Of K. Garl Long
1215 S/ Second Street, Suite A
Mount Vernon, WA 98273

Dated this 21st day of June, 2012


Nancy Slocum

No. 68227-0

DIVISION I, COURT OF APPEALS OF THE STATE OF
WASHINGTON

SHEPLER CONSTRUCTION

Plaintiff-Respondents

v.

GARY LEONARD AND SUSAN KIRALY-LEONARD, and the marital
community thereof

Defendant-Appellant

and

PHH MORTGAGE SERVICES CORPORATION,

Defendant

ON APPEAL FROM SAN JUAN COUNTY SUPERIOR COURT
(Hon. Vickie I. Churchill)

APPENDIX FOR BRIEF OF APPELLANT

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Attorneys for Appellants

- A. Gary Leonard and Susan Kiraly-Leonard v. Shepler Constr. Inc., noted at 132 Wn. App. 1054 [table], No. 55651-7-1, 2006 WL 1217216 (Wn. App. May 8, 2006), review denied, 160 Wn.2d 1014, 161 P.3d 1014 (2007).
- B. Shepler Constr., Inc. v. Leonard, noted at 153 Wn. App. 1035 [table], 2009 WL 5153672 ¶ 15 (Wn. App. Dec. 21, 2009), review denied, 169 Wn.2d 1003, 234 P.3d 1172 (2010).
- C. Compl. for Foreclosure of Lien and Breach of Contract, Extracts. CP 270-82 (attaching Shepler Constr. Building Agreement).
- D. Answer, Affirmative Defenses, and Counterclaim. CP 282-89.
- E. Answer to Counterclaim. CP 290-91.
- F. Findings of Fact and Conclusions of Law. CP 294-99.
- G. Mot. for Recons. (May 26, 2006), Order Denying Mot. to Recons (May 25, 2006), and Pet. For Review (Aug. 26, 2006), attached to Reply in Supp. of Defs.' Mot. to Strike Pl.'s Proposed Findings of Fact and Conclusions of Law and for Terms (Aug. 1, 2008). CP 446-543.
- H. Pl.'s Mot. for Summ. J. as to Breach of Dispute Resolution Provision (Jan. 4, 2008). CP 304-07.
- I. Response to Pl.'s Mot. for Summ. J. (Dkt. 245). Supplemental Designation.

APPENDIX A

Westlaw

Page 1

Not Reported in P.3d, 132 Wash.App. 1054, 2006 WL 1217216 (Wash.App. Div. 1)
 (Cite as: 2006 WL 1217216 (Wash.App. Div. 1))

H
 NOTE: UNPUBLISHED OPINION, SEE RCWA
 2.06.040

Court of Appeals of Washington,
 Division I.
 Gary LEONARD and Susan Kiraly-Leonard, Ap-
 pellants,
 v.
SHEPLER CONSTRUCTION, INC., Respondent.

No. 55651-7-I.
 May 8, 2006.

Appeal from Superior Court of San Juan County;
 Hon. Vickie I. Churchill, J.
 Philip James Buri, Buri Funston PLLC, Mark
 Aaron Kaiman, Lustick Law Firm, Bellingham,
 WA, for Appellants.

K. Garl Long, Attorney At Law, Mount Vernon,
 WA, for Respondent.

SCHINDLER, A.C.J., and DWYER and COLE-
 MAN, JJ.

UNPUBLISHED OPINION
 PER CURIAM.

*1 Evidence that **Shepler** Construction, Inc., performed unprofessional work and used incorrect methods in building a house for Gary Leonard and Susan Kiraly-Leonard created an issue of material fact about whether **Shepler** met its contractual obligation to perform in a workmanlike manner. We reverse the trial court's order of summary judgment dismissing the Leonard's counterclaim for **Shepler's** breach of contract and remand for trial.

FACTS

The Leonards contracted with **Shepler** to build a custom home. The fixed price contract contained a dispute resolution mechanism and a provision for

Shepler to remedy nonconforming work before final payment. After construction began, disputes between the Leonards and **Shepler's** employees led to difficulties between the parties. Progress payments eventually stopped, work ceased, and the Leonards notified **Shepler** through their lawyer that its employees were not allowed on the site.

Shepler filed a mechanic's lien. When attempts to invoke the contract's dispute resolution provisions went unanswered, **Shepler** filed suit to enforce the lien and obtain damages for breach of contract. The Leonards filed counterclaims including a construction defect claim alleging **Shepler** breached the contract by failing to complete the work in a workmanlike manner. Meanwhile, the Leonards hired another contractor, Sliger Construction, to finish construction of the home.

Shepler moved for summary judgment on the lien and the Leonards' construction defect counterclaim. In support of the motion, **Shepler** relied on the deposition of Ken Sliger of Sliger Construction. According to Sliger, **Shepler's** work was not shoddy and the only real problem was it was incomplete. In opposition, the Leonards submitted the declarations of the finish carpenter, Gerald Green, the siding installer, Kevin Taylor, and heating contractor Dick Wilson. These declarations contained several criticisms of **Shepler's** work, including specific points regarding interior walls, vinyl siding, house wrap under the siding, the chimney chase and the heating system. In reply, **Shepler** provided the declarations of Michael Drake, who installed the heating system, Jay **Shepler**, **Shepler's** president and additional excerpts from the Sliger deposition, listing the areas **Shepler** and its subcontractors would have addressed had they completed the work. The court granted **Shepler's** motion for summary judgment.

After summary judgment was granted, the Leonards obtained new counsel and filed a declaration by construction consultant Richard Russell in sup-

Not Reported in P.3d, 132 Wash.App. 1054, 2006 WL 1217216 (Wash.App. Div. 1)
(Cite as: 2006 WL 1217216 (Wash.App. Div. 1))

port of a motion to reconsider. In Russell's opinion the construction was defective for several reasons in addition to those described in Leonards' response to the original motion. The trial court denied the motion, concluding the Leonards had not shown good cause for reconsideration under CR 59.

Though the parties had previously stipulated discovery was complete and the matter ready for trial, the Leonards sought to add Russell as a trial witness. The court denied the motion.

*2 Jay and Jeff **Shepler** and Susan Leonard testified at trial. The court ruled the lien was valid and the Leonards breached the contract. The court concluded, however, that some of **Shepler's** change orders claims were not supported, and rejected **Shepler's** request for additional damages because the Leonards did not comply with the contract's dispute resolution provision. The court entered judgment in favor of **Shepler** and awarded **Shepler** attorney fees under the contract.

The Leonards appeal, challenging the trial court's summary judgment order, denial of their motion for reconsideration, and the order prohibiting Russell from testifying at trial. **Shepler** cross-appeals, assigning error to the trial court's decision not to award additional damages.

ANALYSIS

The Leonards' primary argument is the trial court erred in granting summary judgment dismissing their counterclaim. Summary judgment is appropriate if the pleadings, affidavits, depositions, answers to interrogatories, and admissions on file demonstrate the absence of genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c). The court must consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wash.2d 654, 662, 63 P.3d 125 (2003). Review of summary judgment is de novo. *Denaxas*, 148 Wash.2d at 662, 63 P.3d 125.

At issue is whether **Shepler's** work was defective within the meaning of the contract, which required the work to be "substantially completed in a workmanlike manner according to standard practices of the area and in compliance with all applicable state and local building, electrical, and mechanical codes." ^{FN1} The Leonards contend the declarations submitted in opposition to summary judgment create genuine issues of material fact precluding summary judgment on their counterclaim. ^{FN2} We agree.

FN1. Repeating an argument it made in the trial court, **Shepler** cites *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wash.2d 506, 522, 799 P.2d 250 (1990) for the proposition that a homebuyer is not entitled to a perfect house. *Atherton* is not helpful because it involved the parameters of the implied warranty of habitability, not an express contractual provision for workmanlike construction of the type in this case.

FN2. While the Leonards have attached to their brief a copy of Russell's declaration submitted to the trial court in support of the motion to reconsider summary judgment, that declaration is not relevant to our review of the order granting summary judgment and we do not consider it.

Shepler correctly points out that none of the Leonards' three responsive declarations expressly describes its work as insufficient under the precise terms of the contract. But viewed in the light most favorable to the Leonards, the declarations nonetheless support the reasonable inference that **Shepler** failed to meet the agreed to standard in the contract.

For example, Green stated that among the reasons he found **Shepler's** work "very unprofessional" was that some of the walls were visibly out of plumb, one to the extent it "did not even come close to a right angle", which resulted in a situation where interior doors could not be properly installed.

Not Reported in P.3d, 132 Wash.App. 1054, 2006 WL 1217216 (Wash.App. Div. 1)
(Cite as: 2006 WL 1217216 (Wash.App. Div. 1))

Similarly, according to Taylor, house wrap was not used where it should have been, which created a substantial risk of dry rot in the material under the siding. Drawing all reasonable inferences in favor of the Leonards, the declarations support the conclusion that **Shepler's** work failed to meet the contractual standard of being "workmanlike according to standard practices of the area."

*3 **Shepler** also contends the responsive declarations failed to rebut Sliger's opinion that the work was merely incomplete.^{FN3} This is arguably true of some of the listed complaints. But the evidence supports the reasonable inference that **Shepler** would have done no further work to correct the problem of out-of-plumb walls because those walls were finished and Jay **Shepler** regarded the issue as simply a question of adjusting finish molding. Likewise there is a reasonable inference that **Shepler** would not have installed additional house wrap. Jay **Shepler** believed it unnecessary to use on the lower story because of the foam and concrete construction used on the lower story.

FN3. In a statement of supplemental authority, **Shepler** has suggested an alternative basis for affirming the trial court under RCW 64.50.020 as a result of the holding in *Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge L.P.*, 125 Wash.App. 71, 104 P.3d 22 (2005). That case, however, has now been reversed by the Supreme Court in a decision adverse to **Shepler's** position. See *Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd. P'ship*, 2006 Wash.App. Lexis 271, 2006 WL 929511 (Wash. Apr. 6, 2006)

Viewing the record in the light most favorable to the Leonards, there is a material issue of fact as to whether **Shepler** breached its contractual obligation to perform in a workmanlike manner. We therefore vacate the judgment, including the attorney fees award, and remand the case for trial.^{FN4}

FN4. Because we remand for trial, it is not

necessary to address the **Shepler's** counterclaim for damages resulting from the Leonard's failure to abide by the contract's dispute resolution provisions. In light of the additional evidence that will be provided upon remand, the trial court's assessment of breach and damages by the parties may change. Any opinion this court could offer now would only be advisory.

Both parties have requested reasonable attorney fees under the contract. The determination of who is the prevailing party under the contract, however, depends on the ultimate outcome of the trial. *Stuart v. Am. States Ins. Co.*, 134 Wash.2d 814, 824, 953 P.2d 462 (1998) (attorney fees abide remand outcome); *Schumacher Painting Co. v. First Union Mgmt., Inc.*, 69 Wash.App. 693, 702, 850 P.2d 1361 (1993) (prevailing party is determined by the outcome at the conclusion of the entire case). The award of fees and expenses shall be determined by the trial court at the conclusion of the trial.

Reversed and remanded for trial.

Wash.App. Div. 1, 2006.
Leonard v. Shepler Const., Inc.
Not Reported in P.3d, 132 Wash.App. 1054, 2006
WL 1217216 (Wash.App. Div. 1)

END OF DOCUMENT

APPENDIX B

Westlaw

Page 1

Not Reported in P.3d, 153 Wash.App. 1035, 2009 WL 5153672 (Wash.App. Div. 1)
(Cite as: 2009 WL 5153672 (Wash.App. Div. 1))

H
NOTE: UNPUBLISHED OPINION, SEE RCWA
2.06.040

Court of Appeals of Washington,
Division 1.
SHEPLER CONSTRUCTION, INC., Respondent,
v.
Gary LEONARD and Susan Kiraly–Leonard, and
the marital community thereof, Appellants,
PHH Mortgage Services Corporation, a New Jersey
corporation, Defendant.

No. 61900–4–I.
Aug. 24, 2009.
Dec. 21, 2009.

West KeySummaryAlternative Dispute Resolu-
tion 25T  182(2)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement,
and Contest
25Tk177 Right to Enforcement and De-
fenses in General
25Tk182 Waiver or Estoppel
25Tk182(2) k. Suing or participat-
ing in suit. Most Cited Cases

Both parties in a lawsuit had waived a contrac-
tual right to arbitration by their conduct during the
progress of a law suit. Neither party initiated notice
of arbitration, nor asserted a right to arbitration in
their answers to pleadings. Moreover, both parties
conducted discovery and engaged in substantial lit-
igation over the previous seven years.

Appeal from San Juan Superior Court; Honorable
Vickie I. Churchill, J.
David Christopher Spellman, Andrew J. Gabel,
Lane Powell, PC, Seattle, WA, for Appellants.

K. Garl Long, Attorney at Law, Mount Vernon,

WA, for Respondent.

UNPUBLISHED OPINION
APPELWICK, J.

*1 ¶ 1 Where neither party timely invokes a
construction contract's arbitration provision and
where both parties pursue litigation to address their
contract dispute claims for six years, we hold that
the arbitration provision was waived by each party.
The trial court did not err in denying the motion to
compel arbitration. We affirm.

FACTS

¶ 2 Gary Leonard and Susan Kiraly–Leonard
contracted with **Shepler Construction, Inc.**, to build
a custom home. *Leonard v. Shepler Construction,
Inc.*, noted at 132 Wash.App. 1054, 2006 WL
1217216, at *1, *review denied*, 160 Wash.2d 1014,
161 P.3d 1027 (2007). The fixed price contract con-
tained a dispute resolution mechanism and a provi-
sion for **Shepler** to remedy nonconforming work
before final payment. *Id.* After construction began,
disputes between the Leonards and **Shepler's** em-
ployees led to difficulties between the parties. *Id.*
Progress payments eventually stopped, work
ceased, and the Leonards notified **Shepler**, through
their lawyer, that its employees were not allowed
on the site. *Id.*

¶ 3 In December 2001, **Shepler** sent a letter re-
garding the dispute, requesting a progress payment
in the amount of \$35,927. The letter stated that
“[s]hould any part of the completed work remain
unsatisfactory, we should both refer to the Dispute
Resolution portion of the Building Agreement and
initiate that process.” Another letter sent March 14,
2002, stated:

The contract makes it clear that the Leonard's had
the responsibility to bring such issues to the con-
tractor's attention in a timely manner. It does not
appear that they did so. In any event these issues
are to be addressed under the dispute resolution

Not Reported in P.3d, 153 Wash.App. 1035, 2009 WL 5153672 (Wash.App. Div. 1)
(Cite as: 2009 WL 5153672 (Wash.App. Div. 1))

provisions of the underlying contract. Your letter reads as if your client is refusing to abide by this aspect of the contract. Please confirm whether or not that is the case.

The Leonards did not respond to the demands for dispute resolution of their claims. Instead, they sent a letter about the incomplete work.

¶ 4 **Shepler** filed a mechanic's lien against the Leonards' property. *Id.* **Shepler** subsequently filed suit to enforce the lien and obtain damages for breach of contract. *Id.* The Leonards filed counterclaims, including a construction defect claim alleging that **Shepler** breached the contract by failing to complete the work in a workmanlike manner. The Leonards also alleged that **Shepler** billed for work not performed, failed to obtain approval for additional work, and abandoned the worksite at crucial times during the project. The Leonards claimed that these actions resulted in substantial damages, including required repairs of **Shepler's** deficient work. Meanwhile, the Leonards hired another contractor, Sliger Construction, to finish construction of the home. *Id.*

¶ 5 **Shepler** moved for summary judgment on the lien and the Leonards' construction defect counterclaim. *Id.* The court granted **Shepler's** motion for summary judgment on the counterclaim only. *Id.* Subsequently, the court held a trial on the enforcement of the mechanic's lien. *Id.* The court entered judgment in favor of **Shepler** and awarded **Shepler** attorney fees under the contract. *Id.* at 2, 161 P.3d 1027.

*2 ¶ 6 The Leonards appealed the dismissal of their counterclaims on summary judgment. *Id.* This court reversed the grant of summary judgment and remanded, holding that genuine issues of material fact existed on the counterclaims. *Id.* at 3, 161 P.3d 1027.

¶ 7 In 2008, **Shepler** again filed for summary judgment on the counterclaims, arguing that the Leonards had breached the contract by failing to seek

arbitration of the counterclaims. The trial court denied the motion. **Shepler** filed a motion for reconsideration. The trial court granted summary judgment on March 31, 2008. The Leonards did not directly appeal the grant of summary judgment.

¶ 8 On April 11, 2008, the Leonards filed a motion for reconsideration of the summary judgment order or to compel arbitration and for a limited stay. The court denied the motion, finding it was "not timely under the rules and should not have been filed." The court awarded attorney fees in the amount of \$500 to **Shepler**. But, the court determined that "defendant's right to bring a timely motion to compel arbitration at a later date is preserved." Again, the Leonards did not appeal this order.

¶ 9 On May 21, 2008 the Leonards filed a motion to compel arbitration and a motion for a stay pending the completion of arbitration. The court denied the motion. On June 20, 2008, the Leonards appealed the order denying their motion to compel arbitration and stay the proceedings and all related rulings.

DISCUSSION

I. Mootness

¶ 10 As a preliminary issue, **Shepler** claims that the appeal is moot, because it is now offering to arbitrate, therefore, no controversy exists and this court need not consider the claimed error. A case is moot if a court can no longer provide effective relief. *Orwick v. City of Seattle*, 103 Wash.2d 249, 253, 692 P.2d 793 (1984). The issue of mootness is directed at the jurisdiction of the court. *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wash.2d 339, 350, 662 P.2d 845 (1983). We decline to hold that the case is moot.

II. Motion to Compel Arbitration

¶ 11 We review whether the trial judge properly denied the motion to compel arbitration *de novo*. *Scott v. Cingular Wireless*, 160 Wash.2d 843, 851, 161 P.3d 1000 (2007). **Shepler**, as the party opposing arbitration, bears the burden of showing the arbitration clause is inapplicable or unenforce-

Not Reported in P.3d, 153 Wash.App. 1035, 2009 WL 5153672 (Wash.App. Div. 1)
(Cite as: 2009 WL 5153672 (Wash.App. Div. 1))

able. *Id.*

¶ 12 The Leonards sought an order to compel arbitration nearly six years after the start of this litigation. **Shepler** argues that the Leonards waived arbitration and are therefore estopped from invoking it.

¶ 13 In fact, Washington courts have long held that the contractual right to arbitration may be waived through a party's conduct if the right is not timely invoked. *See, e.g., Ives v. Ramsden*, 142 Wash.App. 369, 382–83, 174 P.3d 1231 (2008) (securities broker impliedly waived arbitration by not raising it in his answer to plaintiff's complaint); *Harting v. Barton*, 101 Wash.App. 954, 962, 6 P.3d 91 (2000) (failure to pursue mediation waived the issue); *B & D Leasing Co. v. Ager*, 50 Wash.App. 299, 303, 748 P.2d 652 (1988) (“parties to an arbitration contract may expressly or impliedly waive that provision ... by failing to invoke the provision when an action is commenced.”). The right to arbitrate is waived by conduct inconsistent with any other intent and “a party to a lawsuit who claims the right to arbitration must take some action to enforce that right within a reasonable time.” *Lake Wash. Sch. Dist. No. 414 v. Mobile Modules Nw., Inc.*, 28 Wash.App. 59, 62, 64, 621 P.2d 791 (1980); *see also Shoreline Sch. Dist. No. 412 v. Shoreline Ass'n of Educ. Office Employees*, 29 Wn.App. 956, 958, 631 P.2d 996, 639 P.2d 765 (1981). Most recently, in *Otis Housing Ass'n v. Ha*, the Washington Supreme Court explained that “[s]imply put, we hold that a party waives a right to arbitrate if it elects to litigate instead of arbitrate.” 165 Wash.2d 582, 588, 201 P.3d 309 (2009).

*3 ¶ 14 The facts before this court establish that both parties waived arbitration. Neither party initiated a notice of arbitration as provided by chapter 7.04A RCW. Neither party asserted a right to arbitration in their answers to the pleadings of the other party. Moreover, both parties conducted discovery and engaged in substantial litigation including a prior appeal of the counterclaims. Seven years passed, and substantial case development oc-

curred prior to the Leonards' assertion of the right to arbitrate. We hold that the trial court did not err in denying the motion to compel arbitration.

III. Summary Judgment

¶ 15 The Leonards contend that the trial court erred when it granted summary judgment, finding their counterclaims were waived for failing to comply with the arbitration clause of the contract.^{FN1}

FN1. The arbitration clause did not provide that it was the exclusive remedy for breach. As noted above, the parties waived the arbitration clause by litigating, not the underlying claims. The Leonards did not directly appeal the March summary judgment order, but argue that we should consider it pursuant to RAP 2.4(b). **Shepler** has not objected.

¶ 16 As a threshold matter, we must decide if the arguments regarding the summary judgment order are properly before this court. RAP 2.2(a)(1) allows a party to appeal a final judgment of any proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs. Here, the order was not final. But, the Leonard's request review of summary judgment pursuant to RAP 2.4(b), which states:

The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.

We decline. Since we have concluded the arbitration clause was waived, the order does not prejudicially affect the decision designated in the notice. Appeal of the June order denying the motion to compel arbitration does not place the March summary judgment order before us.

¶ 17 We affirm.

Not Reported in P.3d, 153 Wash.App. 1035, 2009 WL 5153672 (Wash.App. Div. 1)
(Cite as: 2009 WL 5153672 (Wash.App. Div. 1))

I CONCUR: LAU, J.

AGID, J. (dissenting).

¶ 18 I am not persuaded by the motion for reconsideration or the new majority opinion that our original opinion in this matter was flawed. In fact, it correctly resolved a case that the new opinion threatens to turn into *Jarndice v. Jarndice of Bleak House*^{FNI} fame. I would deny the motion and adhere to our original reasoning.

FNI. Charles Dickens, *Bleak House* (1853).

ORDER GRANTING MOTION

The appellant, Gary Leonard and Susan Kiraly Leonard, having filed their motion for reconsideration of the opinion filed on August 24, 2009; respondent, **Shepler** Construction, Inc., having filed a response to the appellant's motion for reconsideration; and the court having determined that said motion should be granted; now, therefore, it is hereby ORDERED that

1. the motion for reconsideration is granted;
2. the opinion filed on August 24, 2009, is withdrawn, and
3. a substitute opinion shall be published and printed in the Washington Appellate Reports.

Wash.App. Div. 1,2009.
Shepler Const., Inc. v. Leonard
Not Reported in P.3d, 153 Wash.App. 1035, 2009
WL 5153672 (Wash.App. Div. 1)

END OF DOCUMENT

APPENDIX C

COUNTY CLERKS OFFICE
FILED

OCT 04 2002

MARY JEAN CAHILL
SAN JUAN COUNTY, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF SAN JUAN

SHEPLER CONSTRUCTION, INC., a
Washington corporation,

Plaintiff,

vs.

GARY LEONARD AND SUSAN
KIRALY-LEONARD AND THE
MARITAL COMMUNITY THEREOF;
PHH MORTGAGE SERVICES
CORPORATION, a New Jersey
corporation,

Defendants.

NO. 02 2 05162 7

COMPLAINT FOR
FORECLOSURE OF LIEN AND
BREACH OF CONTRACT

COMES NOW Shepler Construction, Inc., by and through attorney, K. GARL LONG, and
for causes of action against defendants, allege as follows:

I. Parties

1. The Plaintiff, SHEPLER CONSTRUCTION, Inc. ("Shepler") is a Washington corporation. Shepler is a licensed contractor in the State of Washington pursuant to *RCW Ch. 18.27*, has paid all fees due the State of Washington, and has otherwise satisfied all conditions precedent to the maintenance of this lawsuit. Shepler has a superior construction lien recorded against the property that is the subject of this suit that dates from February 7, 2002.
2. Defendants, Gary Leonard and Susan Kiraly-Leonard (Leonards) are residents of San Juan

COMPLAINT - 1

ORIGINAL

LAW OFFICE OF
K. GARL LONG
ATTORNEY AT LAW
1215 S. SECOND STREET, SUITE A
MOUNT VERNON, WASHINGTON 98273
(360) 336-3322 Fax (360) 336-3122

- 1 7. The Leonards have absolutely refused to abide by the dispute resolution provisions of the
2 contract despite numerous demands by Shepler. It is believed that Leonards have so
3 modified the status of the construction as to render the dispute resolution provision
4 nugatory.
5
6 8. Shepler Construction repeatedly tried to get information from PHH as to the status of the
7 construction financing. PHH has refused to give any information. It is believed that
8 PHH distributed additional sums to Leonards despite its knowledge of the Claim of Lien
9 filed by Shepler.
10
11 9. Shepler Construction has not been fully paid for work performed under the contract. Labor
12 was performed and material furnished for which progress payments are past due. In
13 addition labor performed and materials furnished to complete the requested change orders
14 has not been paid. Invoices for this work have been ignored.
15
16 10. In accordance with the contract between the parties and the laws of the State of
17 Washington the Plaintiff is entitled to reimbursement for its costs and attorney's fees
18 incurred in bringing this action.

19 **IV. Causes of Action**

20 **Foreclosure of Lien**

- 21 1. The Plaintiff incorporates by reference the allegations in each paragraph above as if
22 fully set forth herein.
23
24 2. Shepler is entitled to an order foreclosing its Construction Lien, establishing its
25 priority in the property and directing sale of property.
26
27 3. Th foreclosure of lien is required and is to be in accord with RCW 60.04. et seq.
28

1 **Priority of Lien**

- 2 1. The Plaintiff incorporates by reference the allegations in each paragraph above as if
3 fully set forth herein.
4
5 2. Shepler is entitled to an order of lien priority against PHH for any moneys distributed
6 to the Leonards after PHH knew of the Leonards' failure to pay and/or Shepler's
7 construction lien.

8 **Breach of Contract**

- 9 1. The Plaintiff incorporates by reference the allegations in each paragraph above as if
10 fully set forth herein.
11
12 2. The Leonards have breached the contract by failing to make the required progress
13 payments, by interfering with the Plaintiff's performance, by forcing the Plaintiff
14 from the job site, by refusing to abide by the dispute resolution provisions of the
15 contract, by contracting with other parties and by occupying the property without
16 making the final payment called for under the contract.

17
18 WHEREFORE, Plaintiff prays for judgment against the Defendants for:

- 19
20 1. That judgment to be entered in favor of the Plaintiff in accordance with the filed lien in
21 the principal amount of \$60,667.64 against the Leonards plus prejudgment interest
22 thereon;
23
24 2. Establishment that the Plaintiff's lien is superior to any distribution made by PHH
25 directly to the Leonards;
26
27 3. An award of reasonable attorney fees and costs as allowed by law as a part of the
28 foreclosure action;

**SHEPLER CONSTRUCTION, INC.
BUILDING AGREEMENT**

This contract is entered into this 14th Of June, 2000, by and between Gary Leonard and Susan Kiraly (Leonard) of Friday Harbor Washington, hereafter called the "Owners" and SHEPLER CONSTRUCTION, INC., hereinafter called the "Contractor."

The Contractor and the Owner, in consideration of the mutual covenants and agreements hereinafter set forth, agree as follows:

1. The Contractor shall furnish all the materials and perform all of the necessary labor for the construction of, or remodel of a residential/commercial building for the owners on their property, the common address of which is 459 Fairway Drive, Friday Harbor, Washington and which property is legally described as follows (if no legal description is inserted here, see attached property marked "Exhibit A"):

2. The labor and materials, including but in particular those in the attached specifications marked as "Exhibit B," shall be used in the construction of the building except as substitutions of materials is provided for herein. The building shall be constructed in accordance with the plans attached as "Exhibit C." Each of the aforementioned exhibits are incorporated by this reference as if set forth in full. If the plans must be changed or altered to achieve government approval the required changes will be billed as change orders.

The work to be performed under this contract shall be commenced and shall be substantially completed in a workmanlike manner according to standard practices of the area and in compliance with all applicable state and local building, electrical, and mechanical codes.

CONTRACT PRICE

The owner shall pay the contractor for the performance of the contract subject to any additions or deductions made pursuant to change orders, the sum of two hundred eighty thousand four hundred forty four and 37/100 Dollars (\$280,444.37) including Washington State Sales Tax.

DEPOSIT

Owner does herewith deposit with contractor the sum of five thousand Dollars (\$5,000.00) to secure contractor's services and perform initial grading and foundation work.

8

SITE PREPARATION

Contractor agrees to prepare the site for construction providing grading and backhoe service as necessary, based on contractor's physical inspection of the building site. Any additional costs for labor or materials associated with unforeseen geological, hydrological or structural work are not included in the contract price. Charges for heavy equipment, engineering, blasting, water drainage or diversion or soil erosion protection shall be an additional charge. Contractor agrees not to incur such additional expense at owners' cost in excess of \$2,500 without the owners' written consent.

DEVIATION FROM PLANS

It is understood and agreed between owner and contractor that contractor may be required to implement minor changes in the location of a wall, stairway, door, window, or fixture as a result of designer errors or omissions in plans. Such changes shall not be an additional cost to owners unless contractor secures a written change order as required below. Owner agrees to advise contractor of any portion of the plans whether interior or exterior which cannot be deviated from due to specific owner requirements such as furniture, appliances or owner supplied fixtures. Contractor agrees to advise owner if major deviations are required before implementing such changes in the plans.

SUBSTITUTION OF MATERIALS AND EQUIPMENT

Contractor has prepared his bid and this agreement with the intent of furnishing materials and equipment as specified. In the event original materials cannot be furnished as specified, substitute materials or equipment capable of equal performance may be used. If such substitution is necessary, contractor shall specify in writing the material and equipment to be substituted and the reason or reasons for his inability to furnish the specified items. Where substitutions are made, the construction contract is to be adjusted accordingly by a contract amendment with the difference in cost, if any, between the items furnished and the items specified being included in the contract amendment.

CHANGE ORDERS

Alterations or deviations from the plans as incorporated herein involving extra cost of material or labor will only be executed upon written orders for same, and will become an extra charge over and above the agreed price set forth in this contract. All agreements by the parties for changes must be made in writing. If the time for completion of the contract must be extended in order to accommodate the change order, the new time for completion of the project shall be stated in the change order. It is the responsibility of the owner to timely approve or reject all change orders submitted to him by the contractor to avoid work delay.

INSPECTIONS AND DISCOVERY OF NON-CONFORMING WORK

Owner shall have the right at reasonable times to inspect the progress of the work being performed hereunder so long as such inspections do not interfere with contractor's work. Owner shall exercise all reasonable diligence in discovering and reporting to contractor, as the work progresses, all materials and labor which are not satisfactory to owner, to avoid trouble and cost to contractor in making good any defective parts or workmanship; otherwise, any objection thereto shall be deemed to have been waived if the same was reasonably discoverable upon physical inspection of the premises by the owner.

INSURANCE

Unless otherwise provided, owner will purchase and maintain property insurance upon the project to the full insurable value thereof and will provide proof to the contractor. This insurance shall include the interests of owner, contractor and subcontractors on work and shall insure against the perils of fire, extended coverage, vandalism and malicious mischief. Any insured loss under the policy of insurance required by this paragraph is to be adjusted with owner and made payable to owner as trustee for the insureds as their interests may appear, subject to the requirements of any applicable mortgage clause.

PERMITS

Permits are the responsibility of the Owner. Connection fees to public utilities are not included in the contract price unless specifically noted herein.

Owner requests that Contractor obtain permits and will pay the contractor separately for doing so.

COMPENSATION FOR CHANGE ORDERS

For all extra work of every description that may be ordered, not covered by the specifications or plans, contractor shall receive actual cost of material furnished and labor performed, plus fifteen percent (15%) for profit, use of tools, equipment, and general supervision, and any other overhead and fixed charges.

PROGRESS PAYMENTS

On or before the 5th day of each month, the owner shall make payments on account of the contract as provided herein, said payments to be equal, in full, to the

percentage of work completed by the contractor to that date since the last payment date, and to be made when information stated in the following paragraphs is presented by the contractor. Before the 5th day of each month, the contractor shall present to PHH Mortgage / USAA Fed Savings Bank, owner's lender or to owners, whichever is applicable, a statement showing the percentage of work done by the contractor to that date. Upon issuance of a progress payment by owner's lender in the name of owner and contractor, owner agrees not to withhold his signature on the check for said progress payment.

FINAL PAYMENT

The contractor shall give written notice to the owners and to owner's lender, PHH Mortgage / USAA Federal Savings Bank, that work is completed. The owners and said lender shall have the right and opportunity to make a final inspection of work and said materials within ten (10) days after receipt of notice of completion of the work. Upon acceptance thereof by the owners and said lender, payment of the remaining balance due the contractor shall be made. Such acceptance shall not be unreasonably withheld and if the owners or said lender refuse to accept, the owners shall within ten (10) days of receipt of the notice of completion from the contractor, notify the contractor in writing of such refusal, and shall specify the reasons therefor. The contractor shall within ten (10) work days of receipt of owners objection or "punch list" take appropriate steps to remedy any non-conforming work set forth as a reason for refusal. Upon completion of the owners "punch list" by contractor, contractor shall again give notice that the work is completed to the lender and the owner and within five (5) days thereof, owner and lender shall supply a supplemental "punch list" or pay the remaining contract balance due contractor.

INTEREST ON LATE PAYMENTS

In the event owner and/or lender unreasonably withholds progress payments or final payment to contractor, then the unpaid balance shall bear interest at the rate of twelve percent (12%) per annum from the date due and shall further be subject to a one-time late charge of five percent (5%) of the installment payment owed.

OCCUPANCY

The entire amount of the contract is to be paid prior to occupancy by the owners. The terms "occupancy" is defined for purposes of this agreement as the act of placing personal possessions or belongings in the residence or on the premises and the act of physically taking possession of the building. Until such time as contractor notifies owner of completion and the contract balance is paid, owner's access to the premises shall be subject to the complete control of the contractor in order to protect contractor's property and equipment which may be on the premises.

All personal property of owners placed on premises prior to giving of contractor's consent to occupy shall be at owner's risk.

DISPUTE RESOLUTION

If a dispute arises between owner and contractor as to performance of contractor's obligations under this agreement, such disputes shall be resolved as follows:

Each party shall employ a contractor of his or her choice to evaluate the work completed. The contractors then will select a third contractor to act as an impartial arbiter. This contractor shall, likewise, inspect the construction to determine if the work has been performed in accordance with this agreement, applicable building codes and in a good and workmanlike manner as provided hereinabove. If two of the three contractors determine that the work is not in conformity with the provisions of this agreement, then they shall state in writing the work in need of repair or replacement and contractor shall undertake to perform same as soon as reasonably practical. Contractor shall be responsible for owner's fees and costs associated with this arbitration as well as the impartial contractor's fees and costs. If no remedial work is recommended by the contractors, then the owner shall pay for the costs of the arbitration. The owner shall forthwith pay the amounts due to the contractor as established by the majority of the arbiters.

ATTORNEYS' FEES

In the event either of the parties hereto incur attorney's fees, expert witness fees or court costs in respect to enforcement of any term of this agreement, then the prevailing party shall be paid their fees and costs by the non-prevailing party.

ENTIRE AGREEMENT

This written agreement and the plans and specifications attached hereto as exhibits are intended by the parties to be a complete final expression of their agreement with respect to the terms contained herein. The contractor has made no promises or warranties other than those as may be contained herein or attached hereto. Any addition to, or alteration of, this agreement must be made in writing, signed by the parties hereto.

NOTICE TO CUSTOMER

This contractor is registered with the State of Washington, Registration No. SHEPLC10191A, as a general contractor and has posted with the State a bond or cash deposit of \$6,000 for the purpose of satisfying claims against the contractor for negligent or improper work or breach of contract in the conduct of the contractor's business. The expiration date of this contractor's registration is November 30, 2000. This bond or cash deposit may not be sufficient to cover a claim which might arise from the work done under your contract. If any supplier of materials used in your construction project or any employee of the contractor or sub-contractor is not paid by the contractor or

sub-contractor on your job, your property may be liened to force payment. If you wish additional protection, you may request the contractor to provide you with original "lien release" documents from each supplier or sub-contractor on your project. The contractor is required to provide you with further information about lien release documents if you request it. General information is also available from the Department of Labor & Industries. This disclosure given pursuant to RCW 18.27.114.

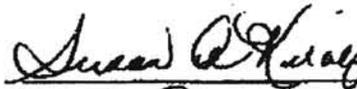
IN WITNESS WHEREOF, the parties hereto have executed this agreement the day and year first above written.

SHEPLER CONSTRUCTION, INC.

OWNERS

By: Jay Shepler
Its: President


6-14-00




APPENDIX D

COUNTY CLERKS OFFICE
FILED
DEC 18 2002
MARY IFAN CAHILL
SAN JUAN VA HUNTON

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF SAN JUAN

SHEPLER CONSTRUCTION INC a
Washington corporation

Plaintiff

v

GARY LFONARD AND SUSAN
KIRALY LEONARD AND THE
MARITAL COMMUNITY THEREOF
PHH MORTGAGE SERVICES
CORPORATION a New Jersey
corporation

Defendants

NO 02 2 05162 7

ANSWER AFFIRMATIVE DEFENSES
AND COUNTER CLAIM

Defendants Gary Leonard and Susan Kiraly Leonard and PHH Mortgage Services
Corporation by counsel for their Answer to the Complaint and their Affirmative Defenses to
Plaintiff Shepler Construction Inc state the following

ANSWER AND AFFIRMATIVE
DEFENSES AND COUNTER
CLAIM- 1

CARNEY
BADLEY
SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
700 FIFTH AVENUE #5800
SEATTLE WA 98104 5017
FAX (206) 467 8215
TEL (206) 622 8020

Handwritten initials

Handwritten mark

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I PARTIES

1 Admitted

2 Admitted

3 Admitted

II JURISDICTION AND VENUE

1 Admitted

2 Admitted

3 Admitted

III GENERAL ALLEGATIONS

1 Admitted

2 Denied

3 Defendants are without sufficient knowledge to admit or deny the allegations
of this paragraph therefore they are denied

4 Defendants are without sufficient knowledge to admit or deny the allegations
of this paragraph therefore they are denied

5 Defendants are without sufficient knowledge to admit or deny the allegations
of this paragraph therefore they are denied

6 Defendants are without sufficient knowledge to admit or deny the allegations
of this paragraph therefore they are denied

7 Denied

ANSWER AND AFFIRMATIVE
DEFENSES AND COUNTER
CLAIM- 2

**CARNEY
BADLEY
SPELLMAN**

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
700 FIFTH AVENUE #5800
SEATTLE WA 98104 5017
FAX (206) 467 8215
TEL (206) 6 2 8020

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VI AFFIRMATIVE DEFENSES

1 Plaintiff has failed to state any claim upon which relief can be granted

2
3 2 Plaintiff's claim for retainage is improper and should be dismissed because
4 plaintiff failed to timely follow all requirements set forth in RCW 60 28 et seq

5 3 Plaintiff's damages if any are a result of plaintiff's own breach of the
6 subcontract plaintiff's own non performance of a condition precedent and the failure of
7 consideration

8 4 Plaintiff's damages if any, are a result of the actions or omissions of third
9 parties outside the control of defendants

10 5 Plaintiff's damages if any are a result of plaintiff's own failure to mitigate
11 damages

12 6 Plaintiff's damages if any are barred or reduced by payment setoff

13 7 Plaintiff has failed to join necessary parties

14
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16
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21

VII COUNTER CLAIM

1 Counter Claimants Gary Leonard and Susan Kiraly Leonard reallege their
2 admissions or denials and incorporate them by reference as though fully set forth here

3 Pursuant to the contract between the parties Shepler Construction was
4 required without limitation to perform its work in a workmanlike manner in a timely
5 manner with skilled laborers and subcontractors and with appropriate supervision Shepler
6 Construction failed to use skilled labor or properly supervise its laborers and subcontractors

ANSWER AND AFFIRMATIVE
DEFENSES AND COUNTER
CLAIM- 4

**CARNEY
BADLEY
SPELLMAN**

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
700 FIFTH AVENUE #5800
SEATTLE WA 98104 5017
FAX (206) 467 8215
TEL (206) 622 8020

1 3 Shepler Construction failed to perform work in a workmanlike manner and
2 failed to complete its work in a timely manner

3 4 Shepler Construction failed to have adequate knowledge of the plans and
4 specifications and failed to accurately follow the plans and specifications

5 5 Shepler Construction billed for work not performed

6 6 Shepler Construction billed for work performed but not part of its scope of
7 work

8 7 Shepler Construction neglected and abandoned its work at crucial times in the
9 project

10 8 Shepler Construction billed for work performed or completed or repaired by
11 others

12 9 Shepler Construction failed to properly prepare or execute its work pursuant to
13 the plans and specifications

14 10 Shepler Construction failed to obtain written approval by the counter
15 claimants before performing changed or allegedly extra work

16 11 All of the actions or omissions by Shepler Construction in paragraphs two
17 through eight above without limitation constituted material breaches of the contract between
18 counter claimants and Shepler Construction

19
20
21
**ANSWER AND AFFIRMATIVE
DEFENSES AND COUNTER
CLAIM- 5**

**CARNEY
BADLEY
SPELLMAN**

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
700 15TH AVENUE #5800
SEATTLE WA 98104 5017
FAX (206) 467 8215
TTL (206) 672 8020

APPENDIX E

The undersigned states under penalty of perjury of the laws of the State of Washington that on this day I faxed and deposited in the mails of the United States a properly stamped and addressed envelope directed to C Craig Holley the attorney for the Defendants a copy of the document to which this declaration is attached.

Mary Jean
Name Date

COUNTY CLERKS OFFICE
FILED

JAN 22 2003

MARY JEAN CAHAIL
SAN JUAN COUNTY WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF SAN JUAN

SHEPLER CONSTRUCTION, INC a
Washington corporation,

NO 02-2-05162-7

Plaintiff

ANSWER TO COUNTERCLAIM

vs

GARY LEONARD and SUSAN KIRALY-LEONARD and the marital community thereof **PHH MORTGAGE SERVICES CORPORATION**, a New Jersey corporation,

Defendants

COMES NOW, the Plaintiff, Shepler Construction Inc , by and through their attorney, K GARL LONG, and in reply to Defendant's Counterclaim, admit, deny, and allege as follows

VII COUNTERCLAIM

1 Defendants admissions are accepted, to the extent any allegations are incorporated in the answer they are denied

2 Admit and deny Plaintiff admits that it timely performed under the contract in a workmanlike manner used skilled laborers and subcontractors and provided appropriate supervision The remaining allegations are denied

3 Admit that the Defendants' actions caused the work to terminate before the project was finished The remaining allegations are denied

4 Denied

ANSWER TO COUNTERCLAIM 1

ORIGINAL

LAW OFFICE OF
K GARL LONG
ATTORNEY AT LAW
1215 S SECOND STREET SUITE A
MOUNT VERNON WASHINGTON 98271
Telephone (360) 336 3322
Fax (360) 336-3122

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5 Denied

6 Admit that Shepler Construction was directed to perform and did perform work
7 under the direction of the Leonards that varied from the plans The remaining allegations
8 are denied

9 Denied

10 Admit that Shepler Construction billed for work performed by subcontractors
11 The remaining allegations are denied

12 Denied

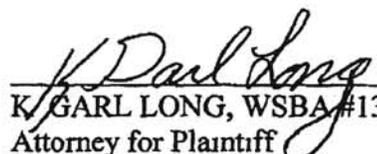
13 Admit that the Leonards have refused to sign change orders for work they directed
14 and requested The remaining allegations are denied

15 Denied

16 Denied

17 Denied

DATED this 15 day of January, 2003


K GARL LONG, WSBA #13569
Attorney for Plaintiff

APPENDIX F

COUNTY CLERKS OFFICE
FILED

JAN 10 2005

MARY JEAN CAHILL
SAN JUAN COUNTY WASHINGTON

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF SAN JUAN

SHEPLER CONSTRUCTION, INC.,

No. 02-2-05162-7

Plaintiff,

vs

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

GARY LEONARD and SUSAN KIRALY-
LEONARD, and the marital community thereof,
and PHH MORTGAGE SERVICES
CORPORATION, a New Jersey corporation,

~~PROPOSED~~ JK

Defendants

THIS MATTER having come regularly before the court for bench trial, and the parties having appeared through their counsel, examined witnesses, introduced evidence and presented argument, and the court having considered the evidence and arguments of counsel, and being familiar with the records and files herein, the court enters the following Findings of Fact and Conclusions of Law

FINDINGS OF FACT

1 In June of 2000, the parties entered into a contract for the construction of a residence in San Juan County. This action was filed to collect amounts due under the contract, to foreclose a lien for the amount owed, and to establish the priority of the lien over defendant PHH

ORIGINAL

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5 ..

1 2 Summary judgment was previously granted against the Leonards on their construction
2 defect allegation. The summary judgment decision was not appealed.

3 3 Summary judgment has previously been granted to Shepler Construction as to the
4 priority of its lien over PHH. The summary judgment decision was not appealed.

5 4 The flat amount of the contract was \$280,444.37. The contract between the parties
6 stated that that amount presumed the drawings provided by the Leonards were correct. In fact, the
7 drawings were incorrect or lacking in several respects. Some of the construction was beyond that
8 which was set forth in the plans.

9 5 Although the contract provided for written change orders, the Leonards either requested
10 or were aware that extra work was being done on their home and accepted that work. The Leonards
11 assured Shepler Construction that cost of the extra work "would be taken care of" and Shepler
12 Construction performed the work on that basis.

13 6 ^{MK} ~~The~~ ^{Some of the} extra work set forth in the written change orders later prepared by Shepler
14 Construction, was performed and was of the value stated. The Leonards have not produced any
15 evidence to the contrary.

16 7 The amount unpaid under the original contract is \$67,451.60. The vast majority of this
17 amount represents profit and overhead on work that was performed ^{* Add} After barring Shepler
18 Construction from the work site, the Leonards obtained a \$46,089.22 draw on the PHH construction
19 loan. At that point the Leonards' new contractor had performed only \$4,039.22 worth of work. A
20 substantial amount of this draw therefor represented payment for construction work done by Shepler
21 Construction.

22 8 The lien was not contested, it was properly and timely served and filed, and all required

23 ^{Hand} * After the Leonards failed to pay Shepler Construction, Shepler
24 Construction withdrew from the job site but continued to offer
25 to return to work upon
26 payment. The Leonards
27 barred Shepler Construction
28 from the job site on
March 8, 2002.

11

1 notices were given

2 9 Jay Shepler borrowed money personally to pay subcontractors and suppliers for work
3 done on the Leonards' residence He testified that the loan was in the amount of \$100,000 00 Shepler
4 Construction's hard costs, which include some amounts applicable to change orders, exceeded
5 \$253,247 98 Draw payments to Shepler Construction totaled \$217,992 22 The difference between
6 these amounts and what was due under the original contract exceeds \$100,000 00
7

8 10 Mr Shepler had hard costs of \$253,247 98—he was only paid \$217,992 87, therefore,
9 \$35,255 11 of the money to provide materials to the Leonards' job site came out of his own pocket

10 11 Although Mrs Leonard complains that Jay Shepler was not at the project site more,
11 nothing in the contract required him to be at the site

12 12 Jay Shepler was credible when he discussed the extra work required on the project He
13 documented the work with change orders after the fact Several of the change orders, although
14 documenting changes or extra work, did not request additional payment Those requesting payment
15 were
16

17 Foundation Height Excavation for the foundation exposed the need for unanticipated work.
18 This included dealing with a "sink hole" and increasing the height of the foundation The Leonards
19 paid an invoice for this work when it was presented The \$2,549 80 charge was reasonable and was
20 properly paid.
21

22 Vaulted Ceilings The height of ceiling vaults was increased and extra storage space was added
23 This greatly increased the finish surface as well as the difficulty of finishing the ceiling. The Leonards
24 wanted this change because they "liked the look" of the open ceiling and wanted the additional storage
25 space The additional work this created was obvious to the parties The \$16,052 93 charge is
26
27

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1 reasonable and should have been paid

2 Stairs to the Apartment The drawing provided by the Leonards was not adequate as to the
3 apartment stairs Shepler Construction was forced to design a set of stairs that would work As built,
4 the stairs were accepted by the county, however, the court finds that the \$911 57 requested for this
5 change should not be awarded
6

7 Deck on Apartment Although initially built oversized, this deck was later shortened at the
8 request of Mrs Leonard Her request returned the deck to the size shown on the plans The court finds
9 that the \$150 00 requested for this change should not be awarded

10 Round to Square Corner This corner was shown round on the plans and constructed round
11 Mrs Leonard had earlier said she wanted it square, but the message did not get to the framer Although
12 Mrs Leonard then accepted the corner round, the sheetrockers arrived without the materials to cover
13 the round corner and so it was made square The court finds that the \$569 73 requested for this change
14 should not be awarded
15

16 Furnace Exhaust The exhaust was moved from one roof to another at the request of Mrs
17 Leonard for aesthetic reasons The \$990 84 charge is reasonable and should have been paid
18

19 Laundry The Leonards' choice of a nonstandard machine, apparently from Europe, required the
20 modification The \$123 86 charge is reasonable and should have been paid

21 Chimney Chase The chimney chase was enlarged from what is shown on the plans The court
22 finds that the \$798 86 requested for this change should not be awarded

23 Deck Stairs The extra excavation required for the foundation caused a change in the length of
24 the deck stairs The \$222 94 charge is reasonable and should have been paid

25 Stone work The stone is not shown on the plans Additional stone had to be added because of
26
27

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1 the extra excavation required for the foundation The Leonards decided how high the stone should run
2 The \$7,833 83 charge is reasonable and should have been paid

3 Two tones of paint The plans do not identify a two-tone paint scheme Mrs Leonard's
4 testimony that two tones was not a change because she was given a paint chip card that showed a
5 house with a two-tone paint job was not credible The \$3,158 30 charge is reasonable and should have
6 been paid

7
8 Roofing upgrade The plans call for a 25-year roofing material The Leonards chose a 50-year
9 material that cost more and was much more difficult to install The \$4,266 80 charge is reasonable and
10 should have been paid

11
12 13 The Leonards failed to engage in dispute resolution as called for by the contract Shepler
13 Construction sent letters, including a letter of December 11, 2001, attempting to get them to honor the
14 contractual provision The Leonards' silence was not an appropriate answer, it constituted a rejection
15 of dispute resolution and was a breach of the contract

16 14 The contract calls for a 5% late payment penalty and 12% interest on past due amounts
17 Shepler Construction is entitled to these amounts

18 CONCLUSIONS OF LAW

19
20 1 Shepler Construction is entitled to the benefit of its bargain on the contract and should
21 be awarded the remaining balance of \$67,451 60

22 2 Shepler Construction deserves to be paid \$32,649 50 for the extra work completed under
23 the doctrine of Quantum Meruit and to prevent the unjust enrichment of the Leonards

24 3 Shepler Construction is entitled to late fees, interest, costs and attorney's fees pursuant to
25 the contract

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APPENDIX G

THE HONORABLE VICKIE L. CHURCHILL
Hearing Date: Julie 30, 2008, 8:30 a.m.
COUNTY CLERKS OFFICE
With Oral Argument
FILED

AUG 01 2008

JOAN P. WHITE
SAN JUAN COUNTY, WASHINGTON

SUPERIOR COURT OF WASHINGTON FOR SAN JUAN COUNTY

SHEPLER CONSTRUCTION,

Plaintiff,

v.

GARY LEONARD and SUSAN KIRALY-
LEONARD, and the marital community
thereof, and PHH MORTGAGE SERVICES
CORPORATION, a New Jersey Corporation,

Defendant.

NO. 02-2-05162-7

REPLY IN SUPPORT DEFENDANTS'
MOTION TO STRIKE PLAINTIFF'S
PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND FOR
TERMS

Introduction

The court should decline to enter the proposed findings and conclusions for at least three procedural reasons. First, Shepler has failed to file a motion that would trigger RAP 7.2 (e), Postjudgment motions and Actions to modify. Second, Shepler has failed to state a basis for CR 59 or 60 motion. Therefore, RAP 7.2 (a) governs and "the trial court has no authority to act"

In addition to the procedural violations, the terms should be awarded because the proposed findings and conclusions impermissibly smuggle facts and legal theories not raised in the pleadings or during the June 18, 2008 hearing.

REPLY IN SUPP. OF MOTION TO STRIKE
PROPOSED FINDINGS AND CONCLUSIONS AND
FOR TERMS - 1

120430.0001/1566235.1

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1420 FIFTH AVENUE, SUITE 4100
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The undersigned states under penalty of perjury of the laws of the State of Washington, that on this day I deposited in the mails of the United States a properly stamped and addressed envelope directed Mark Kaiman and Philip Bari the attorneys for Appellants containing a copy of the document to which this declaration is attached.

Justin E. Fisher 5-25-06
Name Date

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

GARY LEONARD and SUSAN KIRALY-
LEONARD,

Appellants,

vs.

SHEPLER CONSTRUCTION, INC.,

Respondents.

COURT OF APPEALS NO. 55651-7-1

MOTION FOR RECONSIDERATION

1. MOVING PARTY

Respondent Shepler Construction, Inc. brings this motion for reconsideration of the per curium opinion filed May 8, 2006.

2. RELIEF SOUGHT

Because the Leonards failed to introduce competent evidence on each element of a construction defect claim, the opinion should be modified to affirm the trial court's summary judgment determination.

If the decision is not modified to affirm the summary judgment determination then remand should be limited to trial of the Leonards' claim of offset based on construction defect, and Shepler's claim of damages for the Leonards' breach of the dispute resolution provision of the contract. The

parties should not be compelled to relitigate issues that are not related to the construction defect claim.

3. THE LEONARDS FAILED TO INTRODUCE COMPETENT EVIDENCE AT SUMMARY JUDGMENT ON ALL ELEMENTS OF A CONSTRUCTION DEFECT CLAIM

The Leonards claimed that they were due an offset against the amount owed under a construction contract because of construction defects. *Brief of Appellant, page 17.* The summary judgment motion challenged the Leonards' mere allegation of a claim to an offset based on construction defects. The Leonards could not rely on mere allegations in the complaint; they were required to support the claim with specific facts. RAP 56(e).

Contract Standard: The court's opinion concedes that the Leonards failed to introduce any evidence that the construction departed from standard practices or did not comply with building codes. *Opinion at 4.* The contract provided that the work "shall be substantially completed in a workmanlike manner according to standard practices of the area and in compliance with all applicable state and local building, electrical, and mechanical codes." (Emphasis Added) CP, Ex 57,1.b. The measures of performance were 1) standard practices, and 2) applicable codes. "Workmanlike" was not a measure of performance; it was the manner in which the standards of performance were to be met.

Failure to use the standards set forth in the contract converts it into a guarantee that the house will be completed according to some owner defined standard of perfection. Indeed the opinion falls into this trap when it interprets the use of the word "workmanlike" as a guarantee of subjective perfection despite the clear standard practices and code limits in the same sentence of the contract.

Opinion at 4, FN 1.

At summary judgment, the Leonards failed to produce any evidence of a violation of industry practices or of a violation of code provisions. Nonetheless, the subjective opinion of a finish carpenter that walls were not sufficiently plumb, or a siding installer's disagreement with the fact the building code did not require an additional vapor barrier over the 6" thick concrete wall, was found in the opinion to be sufficient to create an issue of material fact as to a construction defect. But even if this is so, there was no evidence of damage. There was no proof, of any kind, that the Leonards suffered any loss.

Damage Element not Proven: Damages are a critical element of any claim. Without proof of damages there is no justiciable controversy. The law does not concern itself with trifles. Ketchum v. Albertson Bulb Gardens, 142 Wash. 134, 252 P. 523 (1927). Although there was reference in one of the declarations as to how something was fixed, there was no evidence that the Leonards had to pay a single extra dollar based on the claimed defects. In fact, their replacement contractor, Mr. Sliger, testified that the house was properly built, it only needed to be finished. CP 94-95. If the alleged defect could be fixed then, had it not been forced off the job, Shepler Construction would have been obligated to fix it at no expense to the Leonards, it was a flat fee contract.

The Leonards failed to introduce any evidence as to the cost of repairing the alleged defects at the summary judgment hearing.¹ There was no evidence at the hearing that they suffered a loss of any kind due to allegedly out-of-plumb walls or missing vapor barrier. The reasonable inference is that these "defects" were either fixed at no cost to them, or that they did not require fixing.

¹ They also failed to introduce cost of completion evidence at trial. There was no bar to the introduction of such evidence.

358

1 A party that has not been damaged cannot obtain damages. A plaintiff has the burden of
2 establishing that he suffered loss; damages may be awarded only for losses that are actually suffered
3 and that are proved with reasonable certainty. Esca v. KPMG Peat Marwick, 86 Wash. App. 628,
4 939 P.2d 1228 (1997). The Leonards, even if they introduced enough evidence to create a material
5 issue of fact as to a construction defect, failed to introduce any evidence that they were damaged by
6 the alleged defect. Not one of the their declarations claims that there was any cost to or loss by the
7 Leonards. In order to defeat summary judgment, the non-moving party must submit declarations that
8 support all elements of the party's claim. B.A. Van de Grift, Inc. v. Skagit County, 59 Wash. App.
9 545, 800 P.2d 375 (1990). Here there was no evidence establishing damages. Without proof of
10 damages caused by a construction defect, there was no justiciable defect claim.
11

12
13 **4. THE APPELLANTS WAIVED ANY CLAIM OF CONSTRUCTION**
14 **DEFECT BY REFUSING TO ENGAGE IN DISPUTE RESOLUTION**

15 The Leonards did not assign error to the trial court's finding that they breached the contract
16 by failing to abide by the mandatory and binding dispute resolution provision. A party that fails to
17 abide by a contractual dispute resolution provision is barred from bringing suit for recovery of
18 alleged losses that should have been resolved through the dispute resolution procedure. Pegasus
19 Constr. v. Turner Constr, 84 Wash. App. 744, 929 P.2d 1200 (1997). The contract provided:
20

21 **DISPUTE RESOLUTION**

22 If a dispute arises between owner and contractor as to performance of contractor's obligations
23 under this agreement, such disputes **shall be resolved** as follows:

24 Each party **shall** employ a contractor of his or her choice to evaluate the work completed. The
25 contractors then will select a third contractor to act as an impartial arbiter. This contractor
26 shall, likewise, inspect the construction to determine if the work has been performed in
27 accordance with this agreement, applicable building codes and in a good and workmanlike
28 manner as provided hereinabove. **If two of the three contractors determine that the work**

1 is not in conformity with the provisions of this agreement, then they shall state in
2 writing the work in need of repair or replacement and contractor shall undertake to
3 perform same as soon as reasonably practical. Contractor shall be responsible for owner's
4 fees and costs associated with this arbitration as well as the impartial contractor's fees and
5 costs. If no remedial work is recommended by the contractors, then the owner shall pay for
6 the costs of the arbitration. The owner shall forthwith pay the amounts due to the contractor
7 as established by the majority of the arbiters.

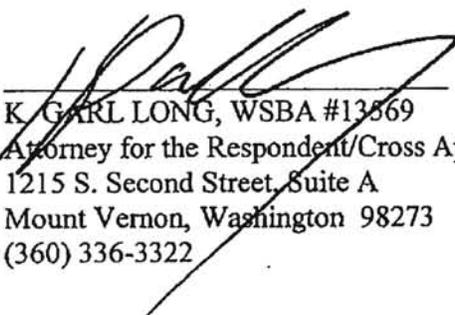
8 Ex. 57, 1.b.

9 Washington has a strong public policy favoring alternate dispute resolution. Where an
10 agreement provides for a method of resolving disputes between the parties, that method must be
11 pursued before a party can resort to the courts for relief. This contract provided a procedure to
12 resolve claims concerning the construction work. The dispute resolution procedures in the contract
13 are clearly mandatory. Leonards' refusal to comply with the dispute resolution procedure set forth in
14 the contract waived their right to claim a construction defect. Absher Constr. v. Kent School Dist, 77
15 Wash. App. 137, 890 P.2d 1071 (1995).

16 At the time the summary judgment hearing was held, the trial of the breach of contract case
17 had not yet occurred. On appeal, the court has before it both the summary judgment record and the
18 undisputed finding of the trial court that the Leonards breached the contract by refusing to abide by
19 its dispute resolution provision. The appellate court can affirm the trial court's summary judgment
20 determination on the basis of the record before it. There is no reason to return the case to the
21 superior court for a renewed summary judgment motion based on the record that is already before the
22 appellate court. The Leonards waived any construction defect claim by their obstinate refusal to
23 follow the binding dispute resolution procedure set forth in the contract. CP 325.

1 the Leonards an opportunity to establish their claim of offset based on construction defect. Shepler
2 Construction should be allowed to establish damages caused by the Leonards refusal to abide by the
3 mandatory dispute resolution clause of the contract. There is no reason to disturb the findings of the
4 trial court that are unrelated to the Leonards' claim of offset.
5

6
7 DATED this 25 day of May, 2006.
8
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11 
12 K. GARL LONG, WSBA #13869
13 Attorney for the Respondent/Cross Appellant
14 1215 S. Second Street, Suite A
15 Mount Vernon, Washington 98273
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

GARY LEONARD AND SUSAN
KIRALY-LEONARD,

Appellants,

v.

SHEPLER CONSTRUCTION, INC.,

Respondent

No. 55651-7-1

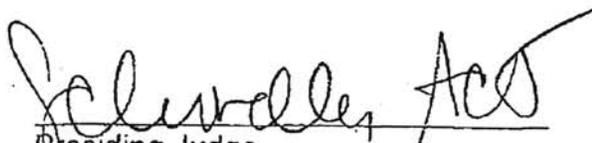
ORDER DENYING MOTION TO
RECONSIDER

Respondents, Shepler Construction, Inc. filed a motion to reconsider the opinion filed May 8, 2006 and the appellants filed an opposition to the motion to reconsider. A majority of the panel has determined this motion should be denied. Now, therefore, it is hereby

ORDERED that appellants' motion for reconsideration is denied.

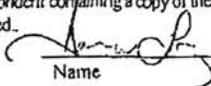
DATED this 25th day of July 2006.

FOR THE PANEL:


Presiding Judge

FILED IN COURT
JUL 25 2006
CLERK OF COURT

The undersigned states under penalty of the laws of the State of Washington, that on this day I deposited in the mails of the United States a properly stamped and addressed envelope directed to Philip Buri, the attorney for the respondent containing a copy of the document to which this declaration is attached.


Name
8/2/06
Date

RECEIVED BY
AUG 2 2006
Buri Funston, PLLC

Appellate Court No. 55651-7-1

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

GARY LEONARD AND SUSAN KIRALY-LEONARD,

Respondent

v.

SHEPLER CONSTRUCTION, INC.,

Petitioner

PETITION FOR REVIEW

K. GARL LONG, WSBA #13569
Attorney for Petitioner
1215 South Second Street
Mount Vernon, WA 98273

346

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. IDENTITY OF THE PETITIONER.....	1
II. DECISION TO BE REVIEWED	1
III. ISSUES PRESENTED FOR REVIEW.....	1
IV. STATEMENT OF THE CASE.....	2
V. WHY REVIEW SHOULD BE ACCEPTED.....	5
VI. PUBLIC POLICY BARS A PARTY THAT REFUSES TO ABIDE BY A CONTRACTUAL DISPUTE RESOLUTION PROVISION FROM PURSUING A CLAIM SUBJECT TO THE PROVISION IN COURT.....	6
VII. AN ALLEGATION OF CONSTRUCTION DEFECT MUST ALLEGE MORE THAN MERE DEFECTS IN WORKMANSHIP	8
THE SUMMARY JUDGMENT RECORD	10
THE LEONARDS PRESENTED NO EVIDENCE OF DAMAGES.....	14
VIII. IF THE CASE WERE REMANDED FOR TRIAL OF A CONSTRUCTION DEFECT CLAIM, RETRIAL OF OTHER ISSUES WOULD NOT BE NECESSARY.....	16
IX. CONCLUSION.....	19

TABLE OF AUTHORITIES

CASES

Absher Constr. v. Kent School Dist, 77 Wash. App. 137, 890 P.2d 1071 (1995). ----- 8

B.A. Van de Grift, Inc. v. Skagit County, 59 Wn. App. 545, 800 P.2d 375 (1990). ----- 16

Burton v. Ascol, 105 Wn.2d 344, 715 P.2d 110 (1986).----- 17

Eastlake Construction v. Hess, 102 Wn.2d 30, 686 P.2d 465(1984).----- 15

Ketchum v. Albertson Bulb Gardens, Inc., 142 Wash. 134, 139, 252 P. 523, 525 (1927).
----- 15

Pegasus Constr. v. Turner Constr, 84 Wash. App. 744, 929 P.2d 1200 (1997). ----- 6

STATUTES

RCW 4.16.326. ----- 10

RULES

CR 1 19

CR 56(e)..... 16

OTHER AUTHORITIES

Black's Law Dictionary 5th Edition..... 14

348

I. IDENTITY OF THE PETITIONER

Petitioner Shepler Construction, Inc. was the plaintiff at trial and the respondent before the Court of Appeals.

II. DECISION TO BE REVIEWED

Shepler petitions for discretionary review of the Court of Appeals' decision setting aside the trial court's summary judgment motion and subsequent judgment at trial, and the denial of reconsideration of that decision. Copies of the decision and denial of reconsideration are appended to this petition.

III. ISSUES PRESENTED FOR REVIEW

1. May a party to a contract that provides for mandatory and binding arbitration ignore the contract and assert a claim for construction defect directly in superior court?
2. Is a builder required to construct a house so perfect that aesthetic concerns and "mere defects in workmanship," are construction defects, or is the test reasonableness, and not perfection, in determining whether construction is defective?
3. When summary judgment is granted on a single issue and the party then allows the case to be tried on the other issues, must an appellate court reversing the summary judgment decision also reverse the trial court decisions on other issues?

IV. STATEMENT OF THE CASE

Shepler Construction (Shepler) was a small family-owned business engaged in residential construction. VP 28-29. Susan Kiraly-Leonard and Gary Leonard (the Leonards) are married. Ms. Kiraly-Leonard is a dentist in private practice. VP 176. Mr. Leonard is an airline pilot. VP 192.

On June 14, 2000, Shepler Construction (Shepler) and the Leonards entered into a contract for construction of a residence on Orcas Island. CP Ex 57, 1b.6. The contract committed Shepler to build the residence in return for payment of \$280,444.37. The contract amount included materials and labor. The final contract amount was subject to adjustment for change orders and allowances. The contract called for the Leonards to make progress payments. CP Ex 57, 1b.

When the house was 90% complete the Leonards simply refused to make a progress payment. CP 322, 7, (hand-written addition), VP 64. Shepler made several attempts to get the project on a financially sound basis but the Leonards steadfastly refused to make the payment. CP 322, 7, (hand-written addition); VP 56-57.

The Leonards also refused to abide by the dispute resolution provision of the contract. CP 325, 13. When Shepler sought arbitration under the contract the Leonards barred the company from the property.

CP 322, 7, (hand-written addition), VP 56-57, Ex 57, 1b.5. The Leonards then hired another contractor, Mr. Sliger, to complete the project. VP 240, Ex 59.

Shepler timely filed a mechanic's lien in an attempt to obtain payment. CP 322, 8, Ex 58. When the Leonards continued to refuse to participate in contractual dispute resolution Shepler filed suit to enforce its lien, and to obtain damages for breach of contract. CP 1-13.

The Leonards' answer alleged a counterclaim for breach of contract. Although no construction defect counterclaim was expressly set forth, language in the breach of contract claim included an allegation that work was not completed in a workmanlike manner as called for in the contract. CP 19-21. In answering the counterclaim, Shepler asserted that its work was accomplished in a workmanlike manner and denied the breach of contract allegations.

Shepler deposed Mr. Sliger, the general contractor the Leonards hired to complete the house. Sliger testified that although the house was not complete, Shepler Construction's work was performed in a workmanlike manner and that he saw no "shoddy" construction. CP 94-95. Based on the testimony from Mr. Sliger, Shepler Construction moved for dismissal of any construction defect counterclaim. CP 87.

In response to the motion the Leonards filed declarations

describing work that was not finished when Shepler was forced off the project, and criticizing some of its work. The contract between the parties provided that the work would be accomplished according to standard building practices and in compliance with building codes. None of the criticisms in the Leonard's declarations referenced standard building practices or codes. In addition the Leonards failed to produce any evidence that they were damaged.

The trial court determined that the Leonards had not produced facts to support a construction defect claim. The request to dismiss any "construction defect" claim was granted and reconsideration was denied. CP 153, RP. (8-2-2004), 23-26. Their general breach of contract counterclaim was subsequently tried before the same judge.

At trial Jay Shepler and Jeff Shepler testified as to the contract, the construction, change orders, the Leonards' refusal abide by the mandatory dispute resolution provision of the contract, and the need to borrow money to cover losses caused by the Leonards' breach.

Shepler used change orders to document charges in addition to the flat fee contract. Each of these change orders was examined in minute detail at trial. RP 40-50, 98-139.

The Leonards failed to call Sliger (the contractor that finished the house) or any other contractor or subcontractor at trial. Mrs. Leonard

testified as to any work she disapproved of. She was allowed to testify as to her understanding of building codes and assert a violation. RP 216-217.

The trial court found that the Leonards refused to abide by the dispute resolution provision of the contract and that the Leonards denied Shepler Construction the opportunity to complete the work. CP 325, 7, 13. It awarded damages to Shepler for breach of contract including payment for some of the change orders, established the amount of the mechanics lien, and allowed the foreclosure to proceed. Shepler was awarded attorney's fees as the prevailing party. CP 325-326.

The Court of Appeals found that the subjective opinions critical of Shepler's work contained in the Leonards' declarations were sufficient to support a "construction defect" claim separate from the other breach of contract claims and reversed the summary judgment. It then reversed the trial court judgment on all other issues.

V. WHY REVIEW SHOULD BE ACCEPTED

The decision of the Court of Appeals is contrary to Washington's strong public policy of supporting dispute resolution provisions in contracts, and contrary to decisions supporting that policy.

The Court of Appeals use of a subjective standard akin to negligence to determine whether a "construction defect" cause of action

has been supported imposes an unrealistic construction standard and is contrary to decisions stating that a builder is not required to build a "perfect house" to avoid a construction defect claim.

VI. PUBLIC POLICY BARS A PARTY THAT REFUSES TO ABIDE BY A CONTRACTUAL DISPUTE RESOLUTION PROVISION FROM PURSUING A CLAIM SUBJECT TO THE PROVISION IN COURT

The dispute resolution provision of the contract provided for a speedy, inexpensive and informal arbitration to decide any issues relating to the performance of the contractor's obligations under the contract. Ex 57 1b.5. The Leonards understood the dispute resolution provision. RP 185-186. Nothing prevented them from following the dispute provision, they simply refused. RP 275, CP 325, 13.

A party that fails to abide by a contractual dispute resolution provision is barred from bringing suit for recovery of alleged losses that should have been resolved through the dispute resolution procedure. Pegasus Constr. v. Turner Constr., 84 Wash. App. 744, 929 P.2d 1200 (1997).

Their refusal to honor the contractual commitment was devastating to Shepler Construction. RP 58. Shepler borrowed \$100,000 to pay off subcontractors on the project. VP 59. His business was never able to

make up the losses; he had to leave home building. VP 59. The contract provided:

DISPUTE RESOLUTION

If a dispute arises between owner and contractor as to performance of contractor's obligations under this agreement, such disputes shall be resolved as follows:

Each party shall employ a contractor of his or her choice to evaluate the work completed. The contractors then will select a third contractor to act as an impartial arbiter. This contractor shall, likewise, inspect the construction to determine if the work has been performed in accordance with this agreement, applicable building codes and in a good and workmanlike manner as provided hereinabove. If two of the three contractors determine that the work is not in conformity with the provisions of this agreement, then they shall state in writing the work in need of repair or replacement and contractor shall undertake to perform same as soon as reasonably practical. Contractor shall be responsible for owner's fees and costs associated with this arbitration as well as the impartial contractor's fees and costs. If no remedial work is recommended by the contractors, then the owner shall pay for the costs of the arbitration. The owner shall forthwith pay the amounts due to the contractor as established by the majority of the arbiters.

Ex. 57, 1.b.

Washington has a strong public policy favoring alternate dispute resolution. Where an agreement provides for a method of resolving disputes between the parties, that method must be pursued before a party can resort to the courts for relief. This contract provided a procedure to resolve claims concerning the construction work. The dispute resolution procedures in the contract are clearly mandatory. The Leonards' refusal to comply with the dispute resolution procedure set forth in the contract

waived their right to claim a construction defect. Absher Constr. v. Kent School Dist, 77 Wash. App. 137, 890 P.2d 1071 (1995).

VII. AN ALLEGATION OF CONSTRUCTION DEFECT MUST ALLEGE MORE THAN MERE DEFECTS IN WORKMANSHIP

In addition to providing for dispute resolution through arbitration the contract provided a construction standard. The Court of Appeals' decision imposes a subjective standard that in essence requires construction of a perfect house in the eye of the consumer in order to defeat a claim of "construction defect".

The contract between the parties provided that construction was to be substantially completed in a "workmanlike manner according to standard practices of the area and in compliance with all applicable state and local building, electrical, and mechanical codes." Ex 57, 1b, 1.

The opinion below concedes that "none of the Leonards' three responsive declarations expressly describes (Shepler's) work as insufficient under the precise terms of the contract." But it then finds that despite the lack of any express testimony that the construction standard was not met, it could reach "a reasonable inference that Shepler failed to meet the agreed standard in the contract." *Opinion at 4*. It then cites subjective opinions in two declarations as being sufficient to establish a

factual issue as to a "construction defect". The Court of Appeals has confused a breach of contract claim (not meeting the standard in the contract) with a construction defect claim (building something that is dangerous or unsound).

The Leonards' counterclaim alleged failure to perform timely; failure to use skilled laborers and subcontractors; failure to properly supervise; failure to have adequate knowledge of the plans and specifications; failure to follow the plans and specifications, billing for work not performed; billing for work performed but not part of "its scope of work"; neglecting and abandoning the work, billing for work performed by others; and failure to obtain written change orders before performing changed work. CP 19-21.

The partial summary judgment motion tested whether the Leonards were asserting a defective construction claim somewhere in the breach of contract counterclaim, and whether there were material facts to support all elements of such a claim. This was an important issue since a construction defect allegation was likely to involve expert testimony, and could result in substantial damages.

In addition, if the Leonards had set forth facts to support a construction defect claim, Shepler would have had the opportunity to assert such comparative fault defenses as those codified in RCW 4.16.326.

But the Leonards failed to produce material evidence of a construction defect, and failed to produce any evidence of damages caused by such a defect. Partial summary judgment was properly granted.

The Summary Judgment Record

Shepler deposed Mr. Sliger (the contractor that finished the house) in an attempt to learn the basis for the Leonards' claims. Relevant pages from Mr. Sliger's deposition testimony were attached to the motion for summary judgment. CP 94-97. When asked about the Leonards' assertions in the counterclaim that the construction was not workmanlike and that extensive reworking or repair was needed, Mr. Sliger testified as follows:

Q Did you see Shepler Construction work that wasn't done in a workmanlike manner?

A No. I would say not complete, but not shoddy.

Q Were you required to do extensive reworking and repair of Shepler Construction's work?

A No.

Sliger Deposition at 27-28.

When asked by the Leonards' attorney if he had spoke to anyone that was critical in any way of Shepler Construction's work he testified as follows:

Q Anyone else that you spoke to on the project other than the Leonards who was critical in any way of the work performed?

A No.

Sliger Deposition at 34.

Based on Mr. Sliger's testimony, summary judgment was sought against the Leonards solely as to the possible claim of defective construction.

In response to the motion, the Leonards obtained declarations from three subcontractors that worked on the project after Shepler was barred. None of the declarations referenced applicable state or local building, electrical or mechanical codes. Incomplete work was described, but not work that was defective.

The Court of Appeals relied on two of these declarations as providing sufficient facts to support a construction defect claim. The first deals with a subjective opinion concerning how plumb a wall should be, and the other concerns a vapor barrier.

The interior trim was not finished when Shepler Construction was forced off the job by nonpayment. A declaration from a Mr. Green was

critical of Shepler's work and described some walls as out of plumb, but did not relate his observation to any industry standard or construction code provision.

Without some reference to code provisions or industry standards, opinions as to acceptable plumb are meaningless. The uncontested testimony before the court at summary judgment was that wood framed portions of buildings, in this case interior walls, floors and roof, shift with changes in the environment. That walls are seldom perfectly plumb, and that adjusting finish materials is a common part of finish work. It was further uncontested testimony that the walls were within construction norms. CP 139, 14.

The Leonards produced no evidence at summary judgment or at trial of any increased finishing cost or loss of value caused by walls that were not within acceptable plumb.

A Mr. Taylor's declaration stated that a vapor barrier was missing that should be present "unless the wall is made of a water impervious substance." CP 121, 7. Taylor apparently did not realize the walls with no separate barrier were made of a water impervious substance, concrete encased in foam. The court had before it undisputed testimony that no vapor barrier was needed over such walls and that the county approved the lack of a vapor barrier. CP 139, 11-12. Far from constituting a

construction defect, the testimony of both Mr. Taylor and Shepler was consistent; no vapor barrier was needed over the foam filled concrete walls.

But even if a debate existed as to whether house wrap should have been placed between the vinyl siding and the concrete/foam wall its lack would not create a construction defect. Far from creating a structural issue it would not even create a cosmetic one. The Leonards produced no evidence at summary judgment or at trial as to any increased finishing cost or loss of value caused by the lack of a vapor or water barrier over the concrete/foam walls.

Although there does not appear to be a settled definition of "construction defect" a defect is not the same as an imperfection. Black's law dictionary defines "defective" as something lacking in some particular which is essential for the completeness, legal sufficiency or security of the object spoken of. It defines a "defective condition" as one that is unreasonably dangerous to the user. *Black's Law Dictionary 5th Edition*. Cases discussing the implied warranty of habitability are developing a definition of construction defect in the warranty context. These cases state that mere imperfections, or imperfect workmanship, do not constitute defects.

A builder is not required to construct a perfect house. Aesthetic

concerns are not construction defects, nor are "mere defects in workmanship," in determining whether a house is defective the test is reasonableness and not perfection." Atherton Condo Ass'n v. Blume Dev. Co. 115 Wn.2d 506, 799 P.2d 250 (1990).

The Court of Appeals attempts to distinguish Atherton because it deals with the definition of construction defect in the context of the implied warranty of habitability. But it was in this context that the summary judgment was filed. It tested whether the Lenards, in addition to the contract counterclaim, were alleging a defect that could be cognizable under the implied warranty theory. The trial court properly determined that there were no facts to support such a construction defect claim and heard the Leonards' counterclaim on a breach of contract theory.

The Leonards Presented No Evidence Of Damages

The Leonards failed to address the element of damages in the summary judgment submittal. Damages were an element of their claim. Ketchum v. Albertson Bulb Gardens, Inc., 142 Wash. 134, 139, 252 P. 523, 525 (1927). Damages for construction defects cannot be awarded without sufficient evidence to apply a measure of damages. Eastlake Construction v. Hedd, 102 Wn.2d 30, 686 P.2d 463 (1984). Shepler, on the

other hand, submitted unchallenged evidence from Mr. Sliger, the contractor that completed construction, that repair or reworking of what Shepler had built was not required. In light of Sliger's testimony, the Leonards were unable to provide the required evidence of damage. Even if other elements of a construction defect were support, the damages element was not.

In order to prevent summary judgment, the non-moving party must submit declarations that support all elements of the party's claim. B.A. Van de Grift, Inc. v. Skagit County, 59 Wn. App. 545, 800 P.2d 375 (1990). The Leonard presented no declarations as to damages.

The Leonards were required to demonstrate, with competent evidence, that there was a genuine issue for trial as to a construction defect separate from their breach of contract claim. CR 56(e). The parties were in agreement that the project was not complete when the Leonards replaced Shepler Construction with Sliger Construction. Matters related to completion, such as adjusting the siding, stabilizing the chimney, fitting the trim and completing and tuning the heating system, were matters for trial. Even accepting all of the defense declarations there was no material evidence of a construction defect. The case was properly tried on a breach of contract theory.

VIII. IF THE CASE WERE REMANDED FOR TRIAL OF
A CONSTRUCTION DEFECT CLAIM, RETRIAL OF
OTHER ISSUES WOULD NOT BE NECESSARY

The partial summary judgment was limited to an allegation of construction defect. All other matters went to trial and were fully litigated. The value of what Shepler built, and the manner in which it was built, were breach of contract issues for trial, and were decided by the trial court. CP 324.

The Leonards did not assign error to any ruling at trial. Their appellate issues were limited to the summary judgment decision and the exclusion of their second expert as a discovery sanction. Even if the reversal of the summary judgment decision is maintained there is no reason to require relitigation of unrelated issues decided at the first trial. If the Leonards can prove on remand that they suffered loss because of a construction defect then the amount of their loss can simply be offset against Shepler Construction's present judgment. Burton v. Ascol, 105 Wn.2d 344, 715 P.2d 110 (1986). Issues that should not be relitigated include:

Dispute Resolution Breach: The trial court found that the Leonards breached the construction contract by refusing to abide by the mandatory Dispute Resolution provision of the contract. CP 325. The dispute resolution provision was intended to prevent just this sort of prolonged

litigation. The Leonards' breach of the binding dispute resolution provision has led to years of litigation and tens of thousands of dollars in legal fees. The trial court's finding of breach is not affected in any way by their claim of construction defect. There is no reason to mandate relitigation of the issue. To do so would simply further punish Shepler for the Leonards' breach.

Contract Amount: The trial court determined that Shepler Construction was entitled to the remaining contract balance. It found that the Leonards collected a draw for work Shepler completed but kept the money rather than paying it to Shepler as required by the contract. CP 323, 325. There is no reason to relitigate what is due under the contract. Any construction defect loss of the Leonards can be offset against it.

Extra Work: The court found that the Leonards were obligated to pay for extra work because they had either requested or were aware of the work and assured Shepler Construction that the cost of the extra work "would be taken care of." CP 322. The value of the extra work was fully litigated and the court entered findings. CP 323-325. This extra work, such as the installation of a vaulted ceiling, had nothing to do with the alleged defect claim (crooked wall and house wrap) which the opinion states were adequately supported at summary judgment. There is no reason to force relitigation of these issues.

Validity of Lien: The trial court determined that the lien was properly and timely served and filed, and all required notices were given. CP 322-323. There is no reason to relitigate the validity of the lien. Although the amount of the lien would be adjusted if the Leonards were found to be entitled to an offset based on a claim of construction defect, the defect claim does not affect the validity of the lien. The validity of the lien should not have to be litigated again.

The findings as to Leonards' breach of contract, liability for the extra work, and the validity of the lien need not be disturbed in order for the Leonards to present their claim of offset based on construction defect. To the extent they are able to prove damages caused by a construction defect, an offset against the present judgment can be applied. Requiring a retrial of all of the issues is expensive, unnecessary, and further punishes Shepler Construction for the Leonards' failure to abide by the mandatory and binding dispute resolution provision.

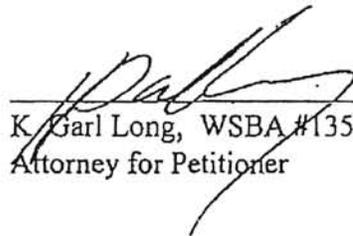
Washington's policy interest in the efficient and inexpensive resolution of civil cases is encased in our civil rules. CR 1. The same judge presided over the summary judgment hearing and the trial. No evidence was excluded at trial. The Leonards did not offer any evidence of increased finished carpentry cost or of a need to install house wrap over the concrete/foam walls. Nothing barred such evidence. The breach of

contract issues, including such allegations as failing to comply with construction plans and possible code violations were fully litigated. These issues should not be relitigated.

IX. CONCLUSION

Consistent with established case law and public policy the Lenards' refusal to comply with the dispute resolution provision of the contract should bar any claim of construction defect. Even if such a claim were allowed the Lenards failed to support it in response to the summary judgment motion. If the summary judgment is reversed the parties should not be required to relitigate the issues already decided at trial.

Respectfully submitted this 29th day of August, 2006.


K. Garl Long, WSBA #13569
Attorney for Petitioner

APPENDIX H

COUNTY CLERKS OFFICE
FILED
JAN 04 2008
JOAN P. WHITE
SAN JUAN COUNTY, WASHINGTON

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF SAN JUAN

SHEPLER CONSTRUCTION,

Plaintiff,

v.

**GARY LEONARD and SUSAN KIRALY-
LEONARD, and the marital community thereof,
and PHH MORTGAGE SERVICES
CORPORATION, a New Jersey corporation,**

Defendants.

No. 02-2-05162-7

**PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AS TO BREACH OF
DISPUTE RESOLUTION PROVISION**

COMES NOW Shepler Construction, the plaintiff herein, and moves for summary judgment on the issue of defendant Leonards' breach of contract by failure to follow the contractually mandated dispute resolution process. This motion is based on the records and files herein, the attached exhibits, and this memorandum.

FAILURE TO ABIDE BY DISPUTE RESOLUTION PROVISION

The dispute resolution provision of the contract provided for a speedy, inexpensive and informal arbitration to decide any issues relating to the performance of the contractor's obligations under the contract. The contract states:

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS
TO BREACH OF DISPUTE RESOLUTION PROVISION - 1

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DISPUTE RESOLUTION

If a dispute arises between owner and contractor as to performance of contractor's obligations under this agreement, such disputes shall be resolved as follows:

Each party shall employ a contractor of his or her choice to evaluate the work completed. The contractors then will select a third contractor to act as an impartial arbiter. This contractor shall, likewise, inspect the construction to determine if the work has been performed in accordance with this agreement, applicable building codes and in a good and workmanlike manner as provided hereinabove. If two of the three contractors determine that the work is not in conformity with the provisions of this agreement, then they shall state in writing the work in need of repair or replacement and contractor shall undertake to perform same as soon as reasonably practical. Contractor shall be responsible for owner's fees and costs associated with this arbitration as well as the impartial contractor's fees and costs. If no remedial work is recommended by the contractors, then the owner shall pay for the costs of the arbitration. The owner shall forthwith pay the amounts due to the contractor as established by the majority of the arbiters.

According to their own testimony the Leonards understood the dispute resolution provision. *Attached, RP 185-186.* The Leonards further testified that nothing prevented them from following the dispute provision, they simply refused to do so. *Attached RP 275-277.*

Their refusal to honor the contractual commitment has been devastating to Shepler Construction. Shepler borrowed \$100,000 to pay off subcontractors and protect his reputation. His business was never able to make up the losses; he had to leave home building. *Attached RP 58-59.* The years of litigation are the direct result of the Leonards' breach of the dispute resolution provision of the contract.

REMEDY TO BE IMPOSED FOR BREACH

Washington has a strong public policy favoring alternate dispute resolution. Where an agreement provides for a method of resolving disputes between the parties, that method must be pursued before a party can resort to the courts for relief. This contract provided a procedure to

112

1 resolve claims concerning the construction work. The dispute resolution procedures in the
2 contract are clearly mandatory. The Leonards' refusal to comply with the dispute resolution
3 procedure set forth in the contract waived any claim of construction defect. Absher Constr. v.
4 Kent School Dist, 77 Wash. App. 137, 890 P.2d 1071 (1995).

5
6 In Absher a party sought payment for additional work, and claimed it was entitled to
7 payment as an "off-contract" remedy based on fraud. The court refused to address the merits of
8 the claim, and held that the failure to follow the dispute resolution provision barred the party
9 from seeking payment through the courts. "Where an agreement provides for a method of
10 resolving disputes between the parties, that method must be pursued before either party can resort
11 to the courts for relief." Absher, 146, citing cases. In the same paragraph the court went on to
12 hold that where the dispute resolution procedures in a contract are mandatory, a party that fails to
13 follow those procedures waives its claims.

14
15 A party that fails to abide by a contractual dispute resolution provision is completely
16 barred from bringing suit for recovery of alleged losses that should have been resolved through
17 the dispute resolution procedure. Pegasus Constr. v. Turner Constr, 84 Wash. App. 744, 929
18 P.2d 1200 (1997).

19
20 In Pegasus v. Turner, a party (Pegasus) that had failed to abide by the dispute resolution
21 provision of a construction contract sought to obtain payment by presenting the merits of its
22 claim in arbitration. The arbitrator refused to hear evidence as to the merits of the claim and
23 refused to award damages. On review the court stated "Pegasus' failure to comply with the
24 dispute resolution procedure was dispositive. Evidence regarding the merits of the claim was
25 therefore not "pertinent and material to the controversy." Pegasus at 749-50.

26
27 PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS
28 TO BREACH OF DISPUTE RESOLUTION PROVISION - 3

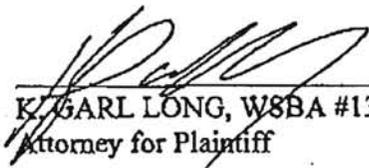
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1 Here the Leonards have refused to comply with the dispute resolution provisions of the
 2 contract. Their refusal is dispositive. They are prevented from seeking damages for claims that
 3 should have been submitted to dispute resolution.
 4

5 **CONCLUSION**

6
 7 Summary judgment should be granted as to Shepler Construction as to breach of contract
 8 for the Leonards' refusal to abide by the dispute resolution provision. The Leonards should be
 9 barred from bringing any claim that was subject to the provision. They have caused this
 10 prolonged litigation by their stubborn refusal to follow the contract; they cannot be heard to
 11 demand damages.
 12

13
 14 DATED this 4th day of January, 2008.

15
 16 
 17 K. GARL LONG, W8BA #13569
 18 Attorney for Plaintiff
 19

20 The undersigned states under penalty of perjury of the laws
 21 of the State of Washington, that on this day I fixed to, and
 22 deposited in the mails of the United States a properly
 23 striped and addressed envelope directed to Mark Kaiman
 24 the attorney for Defendants containing a copy of the
 25 document to which this declaration is attached.

26
 27 
 28 Name Date

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APPENDIX I

COUNTY CLERKS OFFICE
FILED

JAN 23 2008

JOAN P. WHITE
SAN JUAN COUNTY, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SAN JUAN

SHEPLER CONSTRUCTION INC.

Case No. 02-2-05162-7

Plaintiff,

**RESPONSE TO PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

vs.

GARY LEONARD and SUSAN KIRALY-
LEONARD and the marital community thereof;
PHH MORTGAGE SERVICES
CORPORATION, a New Jersey Corporation

Defendant.

FACTS

Gary and Susan Leonard entered into a contract with Shepler Construction on June 14, 2000 for the construction of a residence at 459 Fairway Dr. on San Juan Island. The contract contained a paragraph entitled "Dispute Resolution" which states:

If a dispute arises between owner and contractor as to performance of contractor's obligations under this agreement, such dispute shall be resolved as follows:

Each party shall employ a contractor of his or her choice to evaluate the work completed. The contractors then will select a third contractor to act as an impartial arbiter. This contractor shall likewise inspect the construction to determine if the work has been performed in accordance with this agreement, applicable building codes, and in a good and workmanlike manner as provided hereinabove. If two of the three contractors determine that the

ORIGINAL 

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2 work is not in conformity with the provisions of this agreement,
3 then they shall state in writing the work in need of repair or
4 replacement and contractor shall undertake to perform same as
5 soon as reasonably practical. Contractor shall be responsible for
6 owner's fees and costs associated with this arbitration as well as
7 the impartial contractor's fees and costs. If no remedial work is
8 recommended by the contractors, then the owner shall pay for the
9 costs of the arbitration. The owner shall forthwith pay the amounts
10 due to the contractors as established by the majority of the
11 arbiters.

12 Construction commenced on January 8, 2001. The Leonards eventually became
13 dissatisfied with the quality of Shepler's work. Jay Shepler abandoned the project on or
14 about August, 2001; Jeff Shepler abandoned the project in approximately October,
15 2001. Shepler Construction filed a claim of lien on February 7, 2002, and filed its lawsuit
16 on October 4, 2002. Shepler made no attempt to enforce the dispute resolution
17 provision of the contract.

18 LEGAL ARGUMENT

19 The purpose of summary judgment is to avoid a useless trial where there is no
20 genuine issue of material fact. *Olympic Fish Products Inc. v. Lloyd*, 93 Wash.2d 576,
21 602, 611 P.2d 739 (1980). Summary judgment is appropriate if the pleadings, affidavits,
22 depositions, and admissions on file demonstrate the absence of any genuine issues of
23 material fact, and that the moving party is entitled to summary judgment as a matter of
24 law. CR 56(c); *Clements v. Travelers Indem. Co.* 121 Wash.2d 243, 249, 850 P.2d 1298
25 (1993). A fact is a material fact if it is one upon which the outcome of the litigation
depends, in whole or in part. *Atherton Condominium Apartment Owners Assoc. Board
of Directors v. Blume Development Co.*, 115 Wash.2d 506, 516, 799 P.2d 250 (1990).

The court must consider the facts in the light most favorable to the non-moving
party, and the motion should be granted only if reasonable persons could reach but one



1 conclusion. The non-moving party may not rely on speculation, argumentative
2 assertions that unresolved factual issues remain, or consideration of its affidavits at face
3 value. *Pain Diagnostics & Rehabilitation Assoc. PS v. Brockman*, 97 Wash.App. 691,
4 697, 988 P.2d 972 (1999), review granted 140 Wash.2d 1013, 5 P.3d 8 (2000).

5 If the non-moving party fails to make a showing sufficient to establish the
6 existence of an element essential to that party's case, and on which that party will bear
7 the burden of proof at trial, then the court should grant the motion for summary
8 judgment. *Young v. Key Pharmaceuticals Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182
9 (1989); *Celotex Corp. v. Catrett*, 477 US 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265
10 (1986).
11

12
13 **The relief Shepler is seeking is barred by the doctrine of equitable estoppel.**

14 The elements of equitable estoppel are: 1) a party's admission, statement or act
15 inconsistent with its later claim; 2) action by another in reliance on the first party's act,
16 admission or statement; 3) injury to the relying party if the first is permitted to repudiate
17 its prior act, admission, or statement. *Kramarevcky v. DSHS*, 122 Wn.2d 738, 743, 863
18 P.2d 535 (1993).

19 At trial in 2004, Jay Shepler testified that he sent the Leonards a letter
20 acknowledging that there were problems with the construction that they were willing to
21 remedy, and that if the parties could not resolve the matter between themselves, they
22 should involve an arbitrator. When the Leonards did not respond, Shepler filed suit.

23 According to his own testimony, Jay Shepler never followed through with seeking
24 alternative dispute resolution. He never contacted the Leonards with a clear and
25 unequivocal demand to enforce the contract. He never engaged the services of another



1 contractor to evaluate his work. Even after filing the lawsuit, Shepler never brought a
2 motion to compel arbitration pursuant to the terms of the contract. These facts are
3 indisputable. Equitable estoppel bars Shepler from obtaining summary judgment when
4 its prior act (filing suit, failing to demand ADR) is inconsistent with its later claim that it
5 wanted arbitration. The Leonards were served with a summons and complaint in 2002
6 and responded. They relied on Shepler's act of filing a lawsuit. It was Shepler
7 Construction and not the Leonards who made the choice to have the dispute decided in
8 court, rather than as the contract dictated. If Shepler is granted summary judgment, the
9 result will be that the Leonards will once again be prevented from arguing their case at
10 trial, resulting in devastating injury.
11

12 Viewed in the light most favorable to the Leonards, there is a question of material
13 fact as to whether or not the plaintiff is estopped by its own prior acts from seeking
14 summary judgment.

15 Shepler relies on *Pegasus Construction v. Turner Construction*, 84 Wn.App 744,
16 929 P.2d 1200 (1997) to support its contention that the Leonards are barred from
17 bringing suit to recover their losses. In *Pegasus*, litigation was stayed pending
18 arbitration. After reviewing written declarations and hearing oral argument, the arbitrator
19 ruled that neither party had complied with the terms of the prime contract, and that
20 therefore neither party was entitled to damages. *Pegasus* at 747. The trial court
21 dismissed the case, and the Court of Appeals affirmed. *Pegasus* does not support
22 Shepler's argument that only they are entitled to present a case to the jury. If anything,
23 *Pegasus* stands for the proposition that neither of the parties is entitled to recovery, and
24 the case should be dismissed.
25



1 **The relief Shepler is seeking is barred by the doctrine of laches.**

2 Laches is an implied waiver arising from knowledge of existing conditions and
3 acquiescence in them. *Somsak v. Criton Technologies/Heath Tecna, Inc.*, 113
4 Wash.App 84, 52 P.3d 43 (2002). Laches is a doctrine of equity, intended to preclude
5 the late assertion of a right where other persons, by reason of the delay, will be injured.
6 *Young v. Jones*, 72 Wash. 277, 130 P. 90 (1913). Elements of laches are common
7 knowledge or reasonable opportunity by the plaintiff to discover a cause of action
8 against the defendant, an unreasonable delay in commencing that cause of action, and
9 damage to the defendant as a result of the unreasonable delay. *In re Marriage of Leslie*,
10 112 Wash.2d 612, 772 P.2d 1013 (1989). The purpose of laches is to prevent injustice
11 and hardship. *Brost v. L.A.N.D. Inc.*, 37 Wash.App 372, 375, 680 P.2d 453 (1984);
12 *Crodle v. Dodge*, 99 Wash. 121, 168 P. 986 (1917); *Johnson v. Schultz*, 137 Wash.
13 584, 243 P. 644 (1926).

14
15 In the case at bar, it was Shepler Construction who drafted the contract that the
16 parties executed in 2000. They obviously knew about the dispute resolution provisions,
17 and had approximately a year to request enforcement of those provisions between the
18 time that Jeff Shepler ultimately abandoned the site until the filing of this lawsuit. Even
19 after filing suit, Shepler had the opportunity to bring motions to stay the litigation and
20 move the case to arbitration pursuant to the contract. Shepler's failure to act constitutes
21 an implied waiver.

22
23 When this dispute began, Shepler had the right to demand alternative dispute
24 resolution. The plaintiff has slept on that right for approximately seven years, and now
25 seeks to use its own failure to assert that right as a means to obtain summary judgment



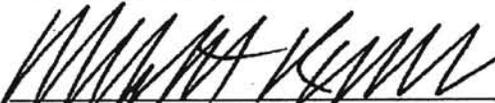
1 against the Leonards. The long delay before raising the issue is unreasonable. This is
2 precisely the type of unjust result that the doctrine of laches is designed to prevent.

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5 **CONCLUSION**

6 At the original trial, the defendants were denied the opportunity to present their
7 case, resulting in a judgment in favor of Shepler. That judgment was vacated by the
8 Court of Appeals, but the plaintiff once again seeks to prevent the Leonards from
9 introducing evidence and arguing their case. The premise of their argument is that this
10 matter has resulted in protracted litigation because of the Leonards. That premise
11 simply does not stand up to scrutiny. Shepler Construction is the plaintiff. Shepler
12 Construction filed the lawsuit, and never demanded arbitration at any time. The plaintiff
13 comes before the court with unclean hands, and should not be rewarded for it. To ask
14 the court to penalize the Leonards for conduct that Shepler engaged in is not a proper
15 basis for summary judgment. The Leonards are entitled to trial in order to balance the
16 equities. In the alternative, the court should follow the holding of *Pegasus* and dismiss
17 the entire case. The defendant respectfully requests that the court deny the plaintiff's
18 motion for summary judgment against the Leonards alone.

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23 Dated: January 18, 2008

THE LUSTICK LAW FIRM

24 

25 Mark Kaiman WSBA No. 31049
Attorney for Defendant



APPENDIX J

The Honorable Vickie I. Churchill

COUNTY CLERKS OFFICE
FILED

MAR 31 2008

JOAN P. WHITE
SAN JUAN COUNTY, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN THE COUNTY OF SAN JUAN

SHEPLER CONSTRUCTION, INC., a
Washington corporation,

Plaintiff,

vs.

GARY LEONARD and SUSAN KIRALY-
LEONARD and the marital community
thereof; PHH MORTGAGE SERVICES
CORPORATION, a New Jersey
corporation,

Defendants.

NO. 02-2-05162-7

**ORDER GRANTING SUMMARY
JUDGMENT AS TO DEFENDANT
LEONARDS' BREACH OF DISPUTE
RESOLUTION PROVISION**

THIS MATTER having come regularly before the court on *Plaintiff's Motion for Summary Judgment*, and Shepler Construction having appeared through attorney K. Garl Long and the defendants having appeared through attorney Mark Kaiman, and the court having listened to the arguments of counsel and having considered:

1. *Plaintiff's Motion For Summary Judgment As To Breach Of Dispute Resolution Provision;*
2. *Plaintiff's Declaration Of Counsel As To Attachments* and the attachments thereto;
3. *Defendants' Response to Plaintiff's Motion for Summary Judgment*

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176

4. Defendant's *Declaration of Susan Kiraly-Leonard*;
5. Plaintiff's *Reply In Support Of Motion For Summary Judgment As To Breach Of Dispute Resolution Provision* and attachments thereto;
6. Plaintiff's *Motion For Reconsideration*
7. Defendant's *Memorandum in Opposition to Motion for Reconsideration*
8. Plaintiff's *Reply In Support of Plaintiff's Motion For Reconsideration*
9. The records, file, declarations and exhibits herein.

AND THE COURT having fully set forth findings of fact, authorities, and conclusions of law in its oral decision of March 14, 2008, which is incorporated herein by reference, the court GRANTS summary judgment to the plaintiff as the Leonards' breach of the dispute resolution provision, and having reviewed the case law cited by the parties, finds that the appropriate remedy for breach of a mandatory dispute resolution provision is the barring of any claim that was subject to the provision.

IT IS THEREFORE ORDERED that:

The Leonards are barred from bringing any claim before this court that should have been determined by submittal to binding arbitration under the contracts dispute resolution provision. All causes of action or counterclaims relating to Shepler Construction's performance under the parties agreement, and specifically those asserting that Shepler Construction's work was not performed in accordance with the contract between the parties, applicable building codes, and in a good and

//

workmanlike manner, are therefore dismissed.

DATED this 26 day of March 2008.

Vickie I. Churchill

Honorable Vickie I. Churchill

Presented by:

LAW OFFICE OF K. GARL LONG

presented telephonically

K. Garl Long, WSBA No. 13569
Attorney for Plaintiff

Approved ^{as form:} ~~for entry:~~

THE LUSTICK LAW FIRM

approved telephonically

Mark Kaiman, WSBA No. 31049
Attorney for Defendants

APPENDIX K

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THE HONORABLE VICKIE L. CHURCHILL

COUNTY CLERKS OFFICE
FILED

APR 11 2008

JOAN P. WHITE
SAN JUAN COUNTY, WASHINGTON

SUPERIOR COURT OF WASHINGTON FOR SAN JUAN COUNTY

SHEPLER CONSTRUCTION,

Plaintiff,

v.

GARY LEONARD and SUSAN KIRALY-
LEONARD, and the marital community
thereof, and PHH MORTGAGE SERVICES
CORPORATION, a New Jersey corporation,

Defendants.

No. 02-2-05162-7

MOTION FOR RECONSIDERATION OF
SUMMARY JUDGMENT ORDER OR TO
COMPEL ARBITRATION AND FOR
LIMITED STAY

TABLE OF CONTENTS

I. Overview/Relief Requested. *Either Shepler should be compelled to arbitrate the
Leonards' contractual claims or the summary judgment order dismissing the Leonards'
contractual claims should be vacated.*

II. Statement of Facts.

A. Industry-accepted construction contracts contain claim procedures that govern
contractor claims for extra work and broad arbitration clauses the cover claims asserted by
either the contractor or property owner.

B. The public works contracts construed in *Absher*¹ and its progeny have claim
procedures that "expressly," or even "absolutely," waive contractor claims for extras, where
the contractor fails to follow the contractual procedure.

C. Shepler's contract has a peculiar arbitration/dispute resolution clause that the Court
has construed to cover only owner claims for backcharges. In contrast to the public works

¹ *Absher Construction Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 890 P.2d 1071
(1995).

RECONSIDERATION MOTION OR MOTION TO
COMPEL ARBITRATION- 1

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*Sent on 4/10/08 via fax
for filing in San Juan CSC*

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1 contracts. Shepler's clause does not "expressly" waive claims, where the owner fails to follow
2 the clause. The clause also has no deadlines.

3 D. When Shepler filed this suit for lien foreclosure and breach of contract, the Leonards
4 asserted counterclaims for incomplete work and construction defects. But Shepler's pleadings
5 failed to raise the arbitration/dispute resolution clause as a claim or affirmative defense.

6 E. In 2004, Shepler did not rely upon the arbitration/dispute resolution clause as the
7 ground for summary judgment that dismissed the Leonards' contractual claims.

8 F. In 2006, Division One reversed and remanded for trial the Leonards' contractual
9 claim. Division One did not address the Shepler's counterclaim for damages resulting from
10 the Leonard's alleged failure to comply with the arbitration/dispute resolution clause.

11 G. In 2008, Shepler has argued that Absher controls and the Leonards failed to comply
12 with arbitration/dispute clause and thus waived their contractual claims. The Court has
13 granted summary judgment on this basis.

14 H. The Leonards seek to compel arbitration due to Shepler's neglect or to vacate the
15 summary judgment order.

16 III. Issues Presented.

17 IV. Argument.

18 A. The Leonards have a statutory right to compel arbitration due to Shepler's "neglect."

19 B. Shepler cannot prove prejudice. Shepler's arbitration/dispute resolution clause has no
20 contractual limitations period. Shepler failed to expedite the process by sending a prenotice
21 under the Construction Defect Statute, RCW Chapter 64.50, whose remedy would merely be a
22 *dismissal without prejudice* rather than *the dismissal with prejudice* that Shepler now
23 demands. Shepler's litigation costs are self-inflicted wounds resulting from its inactions and
24 the limited scope of the arbitration/dispute resolution clause.

25 C. An arbitration and limited stay will reduce the issues for trial and potential issues for
26 appeal. This will benefit the parties and the public interest, including judicial economy. The
lien foreclosure suit requires the determination of the allowances/backcharges for incomplete
and defective work.

D. Absher and its progeny do not control this case.

1. Civil Rule 8(c) and 9(c) and the doctrines of waiver and estoppel prevent Shepler from
raising the arbitration/dispute resolution clause as an affirmative defense or condition
precedent, when Shepler failed to raise them in its original pleadings.

2. Even if the Court were to permit Shepler to amend its pleadings, the defenses fail as a
matter of law. Unlike the contractual procedures in Absher and its progeny, Shepler's
contractual procedure does not expressly waive the Leonards' contractual claims.

3. The clause is unconscionable.

RECONSIDERATION MOTION OR MOTION TO
COMPEL ARBITRATION- 2

182

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I. Overview and Relief Requested.

Defendants Gary Leonard and Susan Kiraly-Leonard (collectively "the Leonards") demand arbitration of their contractual claims and request the Court grant an order compelling arbitration due to the "neglect" of Shepler. This action should be stayed pending an arbitration that should be completed no later than May 31, 2008. Alternatively, the Leonards request the reconsideration of the March 31, 2008 summary judgment order that dismissed their counterclaim for breach of contract.

In conjunction with this motion, the Leonards invoke the arbitration/dispute resolution. They designate the previously disclosed expert witness, Richard Russell, as their contractor representative in the arbitration. Federal law and state law grant them Leonards a statutory right to compel arbitration "claiming neglect or refusal of another to proceed with arbitration." The Leonards also have the statutory right to request this action be stayed pending arbitration.

Compelling arbitration will not cause any prejudice to Shepler for two reasons.

First, Shepler failed to timely demand arbitration in the complaint and later in the answer to Leonards' counterclaim as either an affirmative defense or condition precedent. Shepler therefore waived the claim under Civil Rule 8(c) and 9(c). Moreover, the six year limitations period for contract claims governs the arbitration/dispute resolution clause. Shepler cannot complain about the fact its own peculiar contract does not contain a shorter limitations period.

Second, compelling arbitration will protect the private interests and the public interest. The parties will receive the benefit of their bargain, because qualified experts will determine "if work has been performed in accordance with the agreement, applicable building codes, and in a good and workmanlike manner" after they make onsite inspection. The public interest will be served, because the issues for trial will be reduced and the prospect of an appeal will be reduced. At trial the contract price must be adjusted by allowance for defects,

RECONSIDERATION MOTION OR MOTION TO
COMPEL ARBITRATION- 3

183

1 omissions and incomplete work. The experts/arbitrators are in the best position to make the
2 determination of this adjustment. The Court will avoid the public cost of visiting the site and
3 some additional time and effort.

4 Finally, the summary judgment was wrongly decided. Absher and its progeny do not
5 control this case. Those decisions construe standard form public works contracts that
6 "expressly" and even "absolutely" waive claims, where the contractor fails to follow the
7 contractual procedure. In contrast, Shepler's arbitration/dispute resolution clause has no
8 provision where the owner expressly waives claims that are not submitted to arbitration. The
9 clause has no deadlines. The narrow and unilateral clause results in claims splitting and is
10 unconscionable, because it is not a mutual provision as required by Ninth Circuit precedent.
11 But the Leonards will to waive their claim about the deficiencies of the clause if the Court
12 enforces it and grants a limited stay that will further the interest of judicial economy.

13 II. Statement of Facts.

14 A. **Industry-accepted construction contracts contain claim procedures that govern
15 contractor claims for extra work and broad arbitration clauses the cover claims asserted
16 by either the contractor or property owner.**

17 AIA Document A201 has a mutual arbitration clause that incorporates by reference the
18 Construction Rules of the American Arbitration Association. That provision will be filed in a
19 supplemental declaration by Andrew Gabel.

20 B. **The public works contracts construed in Absher and its progeny have claim
21 procedures that "expressly," or even "absolutely" waive contractor claims for extras,
22 where the contractor fails to follow the contractual procedure.**

23 In Absher, the Kent School District's contract contained a specific deadlines for claim
24 notifications and mandatory mediation before suit could be commenced:

25 The Absher contract contained alternative dispute resolution
26 procedures. During contract negotiation, Absher acknowledged that these
provisions were mandatory. Absher was required to give the District prompt

RECONSIDERATION MOTION OR MOTION TO
COMPEL ARBITRATION- 4

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184

1 and detailed written notice of any claims 14 days after events giving rise to
2 claims, enter into structured dispute resolution procedures, and mediate any
3 remaining disputes before any lawsuit could be commenced. This
4 requirement could not be waived except by an explicit written waiver
5 signed by the owner. Failure to provide complete written notification was an
6 absolute waiver of any claims arising from or caused by delay. Acceptance of
7 final payment would also constitute a waiver of all unidentified claims.
8 (Emphasis added.)

9 Absher failed to comply with the claim notification procedure and mandatory
10 mediation provision before it filed suit. By operation of those contractual requirements, there
11 were express contractual waivers of those claims. But Shepler's contract does not contain
12 similar conditions precedent to filing suit or waivers of claims. Furthermore, the Absher
13 contract also contained a contractual deadline for filing suit:

14 Supplemental Conditions required Absher to bring suit within 120 days after
15 the date of Substantial Completion (August/September 1992). SC 4.4.2.6. This
16 requirement cannot be waived except through an explicit written waiver signed
17 by the District. Prompt notice of litigation is needed for many reasons, not the
18 least of which is the 60-day statutory lien period after Final Acceptance and the
19 need to accept formally a project with no unknown claims. Absher did not
20 bring suit until 230 days after Substantial Completion. Absher again waived
21 any right it had to payment

22 **C. Shepler's contract has a peculiar arbitration/dispute resolution clause that the**
23 **Court has construed to cover only owner claims for backcharges. In contrast to the**
24 **public works contracts, the clause does not "expressly" waive claims, where the owner**
25 **fails to follow the clause. The clause also has no deadlines.**

26 In June 2000, the Leonards signed a form contract, "Shepler Construction, Inc.
Building Agreement," which was drafted by Shepler. The "Dispute Resolution" clause states:

If a dispute arises between owner and contractor as to performance of
contractor's obligations under this agreement, such dispute shall be resolved as
follows:

Each party shall employ a contractor of his or her choice to evaluate the work
completed. The contractors then will select a third contractor to act as an
impartial arbiter. This contractor shall likewise inspect the construction to
determine if the work has been performed in accordance with this agreement,
applicable building codes, and in a good and workmanlike manner as provided
hereinabove. If two of the three contractors determine that the work is not in
conformity with the provisions of this agreement, then they shall state in
writing the work in need of repair or replacement and contractor shall
undertake to perform same as soon as reasonably practical. Contractor shall be
responsible for owner's fees and costs associated with this arbitration as well

RECONSIDERATION MOTION OR MOTION TO
COMPEL ARBITRATION- 5

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185

1 breach and damages by the parties may change. Any opinion this court could
2 offer now would only be advisory.

3 Furthermore, on appeal, Shepler argued that the Leonards were required to give them
4 an opportunity to cure under the construction defect statute. But Division One rejected the
5 argument.

6 **G. In 2008, Shepler has argued that Absher controls and the Leonards failed to
7 comply with arbitration/dispute clause and thus waived their contractual claims. The
8 Court has granted summary judgment on this basis.**

9 In January 2008, Shepler filed a summary judgment motion and reconsideration
10 motion that argued the arbitration/dispute resolution clause "must be pursued before a party
11 can resort to the courts for relief. . . . The Leonards' refusal to comply with the dispute
12 resolution procedure set forth in the contract waived any claim of construction defect. Absher
13 Constr. v. Kent Sch. Dist., 77 Wash. 137, 890 P.2d 1071."³

14 **H. The Leonards seek to compel arbitration due to Shepler's neglect or to vacate the
15 summary judgment order.**

16 **III. Issues Presented.**

17 The Leonard have a contractual right to have the building "constructed in accordance
18 with the plans," "in compliance with all applicable state and local building, electrical, and
19 mechanical codes" and "substantially completed in a workmanlike manner according to
20 standard practice of the area." (Shepler Construction, Inc., Building Agreement at 1 of 6.)
21 Unlike the public works contract in the Absher case, Shepler's clause does expressly waive

22 ³ Plf.'s Motion for Summ. J. at 2:24-3:5, Dkt. #s 238-239, Jan. 4, 2008; Reply Brief, Jan. 24,
23 2008, Dkt. # 248. Shepler filed a motion for reconsideration that "[t]his case is controlled by
24 Absher." Plf.'s Motion for Reconsideration at 2:24-3:8 ["This case is controlled by Absher,
25 the court should have granted the motion for summary judgment"], Dkt. #s 259-260, Feb. 7,
26 2008. The Leonards opposed the motion. Resp. to Plf.'s Motion for Summ. J., Jan. 23, 2008,
Dkt. #245. The Court denied the summary judgment motion but later granted the
reconsideration motion. Order Denying Summ. J., Dkt. # 252, Feb. 5, 2008; Order Granting
Reconsideration, Dkt. # 284.

RECONSIDERATION MOTION OR MOTION TO
COMPEL ARBITRATION- 8

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188

1 claims when the contractual procedure is not complied with. Furthermore, the clause does not
2 require the compliance with the dispute resolution clause as a condition precedent to filing a
3 lawsuit. In the absence of these contractual limitations, does Shepler have any remedy that
4 that causes the forfeiture of the Leonards' contractual right to enforce the contract?

5 The statutory remedy for breach of an arbitration agreement is a motion to compel
6 arbitration. During the five years this case has been pending, Shepler failed to plead the
7 clause or compel arbitration. What is the legal effect of Shepler's inactions? Did Shepler's
8 inactions waive the right to arbitration, so that the Court will decide the Leonards' contractual
9 claims at trial? If not Shepler did not waive arbitration, may the Leonards compel arbitration?
10 Will the Shepler be prejudiced by arbitration? What are the parties' interests and the public
11 interest?

12 IV. Argument.

13 A. **The Leonards have a statutory right to compel arbitration due to Shepler's**
14 **"neglect."**

15 The Federal Arbitration Act governs the enforcement of the arbitration clause. The
16 Leonards have a statutory right to compel arbitration due to the neglect of S. 9 U.S.C. § 4 ("A
17 party aggrieved by the alleged failure, neglect, or refusal of another party to arbitrate under a
18 written agreement for arbitration may petition any . . . court . . .").⁴

19 B. **Shepler cannot prove prejudice. Shepler's contract has no contractual**
20 **limitations period. Shepler failed to expedite the process by sending a prenotice under**
21 **the Construction Defect Statute, RCW Chapter 64.50, whose remedy would merely be a**
22 ***dismissal without prejudice* rather than the *dismissal with prejudice* remedy that Shepler**

23 ⁴ Even if state law were to apply the result is the same. RCW 7.04.040(1) ("A party to a
24 written agreement for arbitration claiming neglect or refusal of another to proceed with
25 arbitration thereunder may make an application to the court for an order directing the parties
26 to proceed with the arbitration in accordance with their agreement"). The Uniform
Arbitration Act that is known as the revised Washington Arbitration Act ("RWAA") became
effective January 1, 2006. RCW 7.04A.900. RWAA "does not affect an action or proceeding
commenced or right accrued before January 1, 2006. RCW 7.04A.903. Therefore, because
this action was commenced or right accrued before January 1, 2006, the claims fall under the
former Washington Arbitration Act, RCW Ch. 7.04.

RECONSIDERATION MOTION OR MOTION TO
COMPEL ARBITRATION- 9

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189

1 **C. An arbitration and limited stay will reduce the issues for trial and potential issues**
 2 **for appeal. This will benefit the parties and the public interest, including judicial**
 3 **economy. The lien foreclosure suit requires the determination of the**
 4 **allowances/backcharges for incomplete and defective work.**

5 The summary judgment order does not insulate the Court from deciding issues about
 6 the nature and completeness of Shepler's work. In the lien foreclosure claim, the contractor
 7 must prove that her performance was executed in a proper and workmanlike manner and the
 8 property owner may raise the defense of improper defense and a counterclaim for damages
 9 caused by defective performance.¹¹ If the contractor was wrongfully terminated, the
 10 contractor may recover the work actually completed less savings resulting from the
 11 termination of the work.¹²

12 The Court and the parties will be better off with a contractor/arbitrator's a professional
 13 opinion concerning this work and whether Shepler is fit to perform it.

14 **D. Absher and its progeny do not control this case.**

15 **1. Civil Rule 8(c) and 9(c) and the doctrines of waiver and estoppel prevent Shepler**
 16 **from raising the arbitration/dispute resolution clause as an affirmative defense or**
 17 **condition precedent, when Shepler failed to raise them in its original pleadings.**

18 The failure to timely assert an affirmative defense under CR 8(c) results in the waiver
 19 of the defense. See Davidson v. Henson, 135 Wn.2d 112, 123, 954 P.2d 1327 (1998). A
 20 party to a contractual arbitration agreement waives her right to have the dispute arbitrated by
 21 not seeking to enforce her rights in a timely manner. See, e.g., Detweiler v. J.C. Penney Ins.,
 22 110 Wn.2d 99, 110-14, 751 P.2d 282 (1988) (affirming waiver of UIM arbitration and

23 ¹² Patrick v. Bonthius, 13 Wn.2d 217, 218-19, 124 P.2d 553 (1942) (after trial, "the trial court
 24 concluded some minor corrections should be made to the building and gave the contractor
 25 sixty days to complete them"); Alpine Indus. v. Gohl, 30 Wn. App. 750, 757-61, 637 P.2d
 26 998, 645 P.2d 737 (1981) (jury verdict on construction defects was reduced on appeal but jury
 verdict on extra construction work in a foreclosure action was advisory only and remanding
 on that issue); Swensen v. Lowe, 5 Wn. App. 186, 188-89, 486 P.2d 1120 (1971) (lien claim
 after deducting offsetting allowances and stating "he may recover the contract price less the
 reasonable cost of making good the deficiencies in performance").

RECONSIDERATION MOTION OR MOTION TO
 COMPEL ARBITRATION- 12

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192

1 remanded to superior court trial on liability and damages). The effect of the waiver is a trial -
2 not dismissal of the court action. See id. (remanding for trial on merits). In Harting v.
3 Barton, 101 Wn. App. 954, 962, 6 P.3d 91 (2000), Division Three ruled that a mediation
4 clause was "an avoidance or affirmative defenses" under CR 8(c) that was waived by failing
5 to plead. The court further ruled: "A notice of claim or mediation clause in a contract does
6 not deprive the court of subject matter jurisdiction. They merely condition a lawsuit and, as
7 such, may be waived." Id. at 961.

8 Similar to Rule 8(c) is Rule 9(c). Rule 9(c)'s requirement is a defendant "shall" plead
9 "[a] denial of performance or occurrence . . . specifically and with particularity." The failure
10 to specifically plead the denial of performance results in the waiver of the condition. See,
11 e.g., Brooks v. Monroe Sys. for Bus., Inc., 873 F.2d 202 (8th Cir. 1989). Rule 9(c) barred a
12 similar belatedly raised defense/condition, where a county that failed to plead a non-claims
13 statute in an answer and was estopped from raising the defense after the applicable statutory
14 limitations period has run. Dyson v. King County, 61 Wn. App. 243, 245, 809 P.2d 769,
15 review denied, 117 Wn.2d 1020 (1991). The same result governs Shepler's
16 arbitration/dispute resolution claim, regardless of whether it is an affirmative defense or the
17 denial of a condition precedent.

18
19 **2. Even if the Court were permit Shepler to amend its pleadings, the defenses fail as**
20 **a matter of law. Unlike the contractual procedures in Absher and its progeny, Shepler's**
21 **contractual procedure does not expressly waive the Leonards' contractual claims.**

22 Absher involved a public works contract. The trial court granted summary judgment
23 dismissing a contractor claim that had not been submitted within 14 days after the events
24 giving rise to the claim. 77 Wn. App. at 142-44. The trial court rejected contractor's
25 arguments that the claim notification provisions and alternative dispute resolution process
26 violated the no-damage for delay statute or were waived, because the district failed to initiate
the procedure, the procedure was futile, and the process was not Absher's sole remedy. 77

RECONSIDERATION MOTION OR MOTION TO
COMPEL ARBITRATION- 13

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193

1 Wn. App. at 145-46. Finally, the trial court ruled that the contractor's claim was precluded by
2 a contractual claim limitation that required suit to be brought within 120 days of final
3 acceptance. 77 Wn. App. at 147-48. Division One of the Court of Appeals affirmed each of
4 these decisions: the contractor's waiver of claims by failing to compliance with the
5 contractual notice provisions, by failing to follow the dispute resolution procedures, by
6 signing a nonclaim affidavit, and by failing to file suit within the contractual claim limitation
7 period preclusion of claims. 77 Wn. App. at 139.

8 The Washington Supreme Court has relied upon the Absher decision in construing
9 other public contracts with mandatory notice, protest and formal claims provisions that are
10 must be complied with to avoid contractual waiver of claims and as conditions precedent to
11 filing a lawsuit.¹³ But Shepler's contract does not contain similar requirements. Absher
12 simply does not control

13
14 **3. The arbitration/dispute resolution clause is unconscionable.**

15 "... Washington courts have long held that mutuality of obligation means both parties
16 are bound to perform the contract's terms -- not that both parties have identical
17 requirements."¹⁴ The Ninth Circuit has ruled that non-mutual arbitration clauses in
18

19 ¹³ American Safety Cas. Ins. Co. v. City of Olympia, 162 Wn.2d 762, 764-65, 174 P.3d 54
20 (2007) (construing WSDOT 2000 Standard Specifications for Road, Bridge and Municipal
21 Contracts requiring "the contractor was to required to follow the contractual procedures if it
22 wished to file a protest, formal claim, or lawsuit" and contract provided "[b]y failing to flow
23 the procedures constitutes a waiver of the claims," "completely waives any claims for
24 protested work" and failure to file timely suit "shall be a complete bar to any such claims or
25 causes of action" and relying on Mike M. Johnson and Absher to affirm the dismissal of
26 claims); Mike M. Johnson, Inc. v. County of Spokane, 150 Wn.2d 375, 378-82, 386-89, 78
P.3d 161 (2003) (construing WSDOT 1996 Standard Specifications for Road, Bridge and
Municipal Contracts with "mandatory notice, protest, and formal claims procedures, including
written protests within 15 calendar days with specific cost information, relying upon Absher
and ruling there were no "unequivocal actions of conduct evidencing an intent to waive)

¹⁴ Zuver v. Airtouch Comm'n Inc., 153 Wn.2d 293, 317, 103 P.3d 753 (2004); Adler v. Fred
Lind Manor, 153 Wn.2d 331, 347, 103 P.3d 773 (2005)(arbitration provision statute of
limitations provision was substantively unconscionable and the substantively unconscionable
(continued...))

RECONSIDERATION MOTION OR MOTION TO
COMPEL ARBITRATION- 14

APPENDIX L

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THE HONORABLE VICKIE L. CHURCHILL
THURSDAY, APRIL 24, 2008 @ 1:30 PM

COUNTY CLERKS OFFICE
FILED

APR 22 2008

JOAN P. WHITE
SAN JUAN COUNTY, WASHINGTON

SUPERIOR COURT OF WASHINGTON FOR SAN JUAN COUNTY

SHEPLER CONSTRUCTION,

Plaintiff,

v.

GARY LEONARD and SUSAN KIRALY-
LEONARD, and the marital community
thereof, and PHH MORTGAGE SERVICES
CORPORATION, a New Jersey corporation,

Defendants.

No. 02-2-05162-7

REPLY IN SUPPORT OF REVISED
MOTION FOR RECONSIDERATION OF
SUMMARY JUDGMENT ORDER OR TO
COMPEL ARBITRATION AND FOR
LIMITED STAY

INTRODUCTION

Gary Leonard and Susan Kiraly-Leonard ("Leonards") respectfully request the Court revise the recent summary judgment order, or in the alternative, compel arbitration and stay the current proceedings. The Leonards timely filed their motion. The CR 59 time requirements do not apply in this situation or should be extended. Moreover, the summary judgment erroneously dismissed Leonards' contractual counterclaim based upon the false assumption that the dispute resolution clause created an exclusive remedy. The clause does not contain the required disclaimer language that would need to be conspicuous under consumer protection laws. As construed by the court, the clause fails under governing law. Plaintiff Shepler Construction ("Shepler")'s briefs were based upon a fundamental error of law that misled the court and will increase the costs for the parties and the public. Accordingly, the Court should revise or reconsider its previous order dismissing the Leonards' counterclaim. Arbitration of the claim makes sense.

REPLY IN SUPP. OF RECONSIDERATION OR
ARBITRATION- 1

*Sent on 4/22/08 via fax
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REPLY

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2 The motion to revise the prior non-final order that granted reconsideration and granted
3 partial summary judgment was timely. Furthermore, the court may enlarge an applicable
4 deadline. The motion for reconsideration/revision and to compel arbitration is not a motion
5 for a new trial or a motion concerning a final order. Perhaps, it is more properly labeled a
6 motion for revision and to compel arbitration. The March 28, 2008 summary judgment order
7 was filed and docketed on March 31, 2008. (Dkt. #s 284, 285.) The order failed to include
8 CR 54(b) language that would have made it a final order that is appealable and not subject to
9 revision. CR 54(b) states:

9 **(b) Judgment Upon Multiple Claims or Involving Multiple Parties.**
10 In the absence of such findings, determination and direction, any order or
11 other form of decision, however designated, which adjudicates fewer than all
12 the claims or the rights and liabilities of fewer than all the parties shall not
13 terminate the action as to any of the claims or parties, and the order or other
14 form of decision is subject to revision at any time before the entry of judgment
15 adjudicating all the claims and the rights and liabilities of all the parties.

16 Because there was no CR 54(b) certification, the order "is subject to revision at any time
17 before the entry of judgment adjudicating all the claims and the rights and liabilities of all the
18 parties."¹

19 The careful reading of the Civil Rules reflects that CR 59 is in a section called
20 "Judgment (Rule 54—63)." Here, there was no judgment or final order. There was merely a
21 non-final, interlocutory order granting summary judgment on one claim. III Washington Civil
22 Procedure Deskbook Chapter 59, Rule 59, New Trial, Reconsideration, and Amendments of
23 Judgments § 59.5(2)(g) at 59-9, 59-10 (Washington State Bar Association 2006) states:

24 CR 59 expressly encompasses motions for reconsideration in its caption, but
25 does not indicate, whether all, or only some, types of motion for
26

¹ Shepler cites to Schaefer v. Gorge River Gorge Comm'n, 121 Wn.2d 366, 367, 849 P.2d 1225 (1993) for the proposition that a reconsideration motion must be filed and served within 10 days. But in Schaefer, trial court entered "its final order" and the moving party failed to timely file and serve a motion for reconsideration and failed to timely file a notice of appeal.

REPLY IN SUPP. OF RECONSIDERATION OR
ARBITRATION- 2

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APPENDIX M

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THE HONORABLE VICKIE L. CHURCHILL

COUNTY CLERKS OFFICE
FILED

MAY 21 2008

JOAN P. WHITE
SAN JUAN COUNTY, WASHINGTON

SUPERIOR COURT OF WASHINGTON FOR SAN JUAN COUNTY

SHEPLER CONSTRUCTION,

Plaintiff,

v.

GARY LEONARD and SUSAN KIRALY-
LEONARD, and the marital community
thereof, and PHH MORTGAGE SERVICES
CORPORATION, a New Jersey Corporation,

Defendant.

NO. 02-2-05162-7

DEFENDANTS' MOTION TO COMPEL
ARBITRATION AND MOTION FOR
STAY OF THIS ACTION UNTIL
ARBITRATION IS COMPLETED

I. Overview and Relief Requested

Defendants Gary Leonard and Susan Kiraly-Leonard (collectively "the Leonards") request an order that compels plaintiff Shepler Construction to arbitrate all intertwined claims and that stays this action, pending the completion of the arbitration.

For over five years, the Leonards have pursued in this lawsuit a counterclaim against plaintiff Shepler Construction for the failure to perform and complete work in accordance with the contract. The Leonards and their prior counsel legitimately relied upon on the well-established precedent that arbitrable claims can be properly asserted in a lawsuit, and, as a result, there was no reason to initiate an arbitration to pursue those claims.

But the court's recent summary judgment order dramatically altered the status quo. The court's adoption of Shepler Construction's recently coined theory that the counterclaim should be dismissed for the failure to comply with the Dispute Resolution provision gives the

DEFENDANTS' PETITION TO COMPEL
ARBITRATION AND MOTION FOR STAY - 1

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1 But even if Shepler Construction had complied with the formal requirements for an
2 unequivocal arbitration demand that was personally served, the parties' arbitration provision
3 quite clearly is an optional remedy that either party may choose to invoke or, as happened
4 here, waive. Shepler Construction's contract does not contain any special language that
5 would make arbitration an exclusive remedy or a condition precedent to either party's
6 common law and statutory rights to pursue claims in a court of law. The Washington
7 Supreme Court has consistently rejected the argument that arbitration is an exclusive remedy,
8 or "the only remedy," because, as the court has stated, that "is clearly not the law".⁹

9 The appellants also urge that since their contract with respondent contained an
10 arbitration clause, the superior court had no jurisdiction and resort to arbitration
11 was the only remedy available to the parties. The trial court ignored this
12 contention of the appellants in disposing the case, because it is clearly not the
13 law.

12 The arbitration clause is purely optional, reading,

13 "All questions in dispute under this agreement shall be submitted to
14 arbitration at the choice of either party."

15 It may well be that the appellants raised the issue they would have required that
16 their controversies with the respondent, as in *State ex rel. Fancher v. Everett*
(1927), 144 Wash. 592, 258 Pac. 486, where arbitration was demanded under a
17 similar provision.

18 There can, however, be no doubt that the superior court had jurisdiction and of
19 the parties and the subject matter of the litigation, and it invoked the right and
20 duty to proceed when that jurisdiction was invoked.

21 It is clear that parties to a contract having an arbitration clause may waive it;
22 and a party does so by failing to invoke it in the trial when an action is
23 commenced against him in the contract. . . . ; *McNeff v. Capistran*, ...
(Underlines added.)

24 Shepler's complaint (and until recently its subsequent pleadings) did not use the term
25 "arbitration" nor did the pleadings assert that arbitration had completely foreclosed the
26 Leonards' judicial remedies. A pleading that fails to use the term "arbitration" and "does not

⁹ *Pederson v. Klinkert*, 56 Wn.2d 313, 320, 352 P.2d 1025 (1960).

DEFENDANTS' PETITION TO COMPEL
ARBITRATION AND MOTION FOR STAY - 6

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1 hint that judicial remedies are totally foreclosed" is insufficient to invoke arbitration, as
2 Division Two of the Court of Appeals ruled just four months ago.¹⁰

3 For the same reasons, and consistent with the well-established precedent that
4 arbitration is not an exclusive remedy, the Leonards had no reason to initiate an optional and
5 redundant arbitration proceeding after Shepler Construction had already filed this suit. But
6 once this court granted the recent order that dismissed their counterclaims for the failure to
7 comply with the Dispute Resolution provision, the optional nature of that provision changed;
8 arbitration under the Dispute Resolution provision was no longer an redundant option – it
9 became vital and, indeed, mandatory. Given that this is now the law of the case, the Leonards
10 seek arbitration at this time.

11 **B. There is no contractual deadline for initiating arbitration, and the Leonards have**
12 **satisfied the contractual condition precedent to commence arbitration.**

13 The burden rests on Shepler Construction to prove the arbitration agreement is not
14 enforceable:

15 Arbitration agreements are "valid, enforceable, and irrevocable except upon a
16 ground that exists at law or in equity for the revocation of contract." RCW
17 7.04A.060(1). Strong public policy favors arbitration. ... "The party opposing
18 arbitration bears the burden of showing that the agreement is not
19 enforceable."¹¹

20 The contractual language is construed in favor of arbitration, even when it comes to allegation
21 of delay, waiver or similar defenses:

22 In general, although the intentions of the parties as expressed in the
23 agreement control, 'those intentions are generously construed as to issues of
24 arbitrability.' ... In other words, "any doubts concerning the scope of
25 arbitrable issues should be resolved in favor of arbitration, whether the problem
26 at hand is the construction of the contract language itself or an allegation of
27 waiver, delay, or a like defense to arbitrability."... Therefore, a contractual
28 dispute is arbitrable unless it can be said "with positive assurance' that the

29 ¹⁰ Ives v. Ramsden, 142 Wn. App. 369, 383, 174 P.2d 1231 (2008).

30 ¹¹ Rodriguez v. Windermere Real Estate/Wall Street, Inc., 142 Wn. App. 833, 836, 175 P.3d
31 604 (2008).

32 DEFENDANTS' PETITION TO COMPEL
33 ARBITRATION AND MOTION FOR STAY - 7

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231

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"Under such circumstances, having kept alive its own right to arbitrate, [Shepler Construction] could not prevent [the Leonards] from exercising the remedy of arbitration." Tas-T-Nut Co. v. Continental Nut Co., 125 Cal. App. 2d 351, 270 P.2d 43 (1954). "[T]he general rule is that where the remedy at law is clearly inadequate, . . ., or for any other reason, no action at law will lie on the contract in question, . . ., equity will intervene."²⁰ The law and equity abhor forfeiture.²¹ The Leonards have contractual claims that have been dismissed and forfeited for the failure to submit those claims to arbitration, they have a statutory right to specific enforcement of the agreement to arbitrate, Shepler Construction has recently elected arbitration as a remedy, and equity must intervene. Without the enforcement of the statutory right to compel arbitration, the Leonards will have no remedy at law to pursue their other contractual claims and enforce the contract.

D. Shepler Construction has failed to show cause that Richard Russell should be disqualified from acting an arbitrator in a tri-partite panel. Therefore, Shepler has failed to prove a "substantial issue" that prevents arbitration.

Shepler Construction argues: "That arbitration is not seriously sought can be seen by the attempt to name Leonards' litigation expert as an arbitrator."²² Richard Russell, the Leonards' construction expert, has substantial experience both as a contractor and a certified AAA arbitrator. His nomination is consistent with the Dispute Resolution provision's requirements that "[e]ach party shall employ a contractor of his or her choice to evaluate the work completed. The contractors will then select a third contractor to act as an impartial arbitrator." Washington courts routinely enforce similar tri-partite processes where a party nominates an expert who is chosen precisely for his or her involvement and expertise:

²⁰ Lamken v. Miller, 181 Wash. 544, 551, 44 P.2d 190 (1935) ("the general rule is that where the remedy at law is clearly inadequate, . . ., or for any other reason, no action at law will lie on the contract in question, . . ., equity will intervene.").

²¹ Port of Walla Walla v. Sun-Glo Producers, Inc., 8 Wn. App. 51, 60-61, 504 P.2d 324 (1972).

²² Pif.'s Resp. to Untimely Motion to Reconsider of to Compel Arbitration at 6:17-19.

DEFENDANTS' PETITION TO COMPEL
ARBITRATION AND MOTION FOR STAY - 10

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234

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1 The arbitration process . . . is a tripartite process where each party designates
 2 one arbitrator, and these two party arbitrators then agree on a third arbitrator
 3 who is presumably neutral. Any two arbitrators must agree before an award is
 4 made. It is widely acknowledged that the party arbitrators serving on a
 5 tripartite panel may not be completely neutral. The benefit to the parties is that
 6 their nominees are frequently experts in the area, and they are chosen as
 7 arbitrators precisely because of their involvement and expertise. *Schreifels*, 45
 Wn. App. at 449 n. 3, 725 P.2d 1022; . We are not persuaded by the . . .
 argument that . . . claimants are entitled to three impartial arbitrators on a . . .
 tripartite panel or that the tripartite process is somehow unfair. What the [party]
 view[s] as impermissible partiality is instead the strength of the tripartite
 process.²³

8 Shepler Construction has failed to prove Mr. Russell "to be corrupt, dishonest, or financially
 9 indebted to" the Leonards. Thus, there is no basis to disqualify him or "to prompt this or any
 10 court to intervene in the arbitration process."²⁴

11 **E. The arbitrator -- not the court -- decides all procedural questions such as time
 12 limits and laches. Accordingly, the timing does not constitute "a substantial issue
 for the court to decide.**

13 Shepler claims that the statute of limitations bars an arbitration. But a petition or
 14 application to compel arbitration is not a "cause of action" that triggers a statute of limitations
 15 but is instead a "judicial remedy."²⁵ This judicial remedy is specially mandated by the
 16 arbitration statutes that abrogated the common law policy that disfavored arbitration²⁶ and
 17 create a special proceeding. See RCW Title 7, Special Proceedings and Actions.

18 Even if the arbitration were construed to be cause of action (and it is not) instead of a
 19 judicial remedy, the petition/application to compel arbitration is timely, because the filing of
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 21

22 ²³ *Perez v. Mid-Century Ins. Co.*, 85 Wn. App. 760, 766, 934 P.2d 731 (1997).

23 ²⁴ *Id.* at 768.

24 ²⁵ *Thorsgaard Plumbing*, 71 Wn.2d at 131 n. 4.

25 ²⁶ *Puget Sound Bridge & Dredging Co. v. Lake Washington Shipyards*, 1 Wn.2d 401, 405, 96
 P.2d 257 (1939) (arbitration statute abrogated common law arbitration); *Godfrey v. Hartford
 Cas. Ins. Co.*, 142 Wn.2d 885, 898, 16 P.3d 617 (2001).

26 DEFENDANTS' PETITION TO COMPEL
 ARBITRATION AND MOTION FOR STAY - 11

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1 In summary, there are two statutory sanctioned results: (1) an order that compels
2 arbitration or (2) a jury trial on whether there has been a failure to comply with the arbitration
3 clause.

4 As an alternative, if arbitration is not compelled, the Shepler Construction might
5 consider stipulating to the submission of all issues to a jury (except the lien foreclosure which
6 is purely an equitable claim). Shepler Construction has two claims. It has a claim for "breach
7 of contract in an amount to be proven at trial." Complaint at 6:8-9. To prevail on this claim,
8 it must prove that it performed satisfactorily the contractual obligations. See Lundberg v.
9 Corp. of the Catholic Archbishop of Seattle, 55 Wn.2d 77, 346 P.2d 164 (1959) (affirming
10 judgment for property owner in a lien foreclosure suit that "contractor did not perform the
11 contract in accordance with the terms and failed to complete it."). That is an issue for jury and
12 the issue overlaps the elements for the Leonards' cause of action for breach of contract and for
13 setoff. Shepler Construction also has a lien claim. But the underlying basis for the lien claim
14 is proof that the work was executed in a proper and workmanlike manner and has a specific
15 value and the Leonards may raise the defense of improper workmanship and the defense of
16 incomplete work and a counterclaim for damages caused by defective performance. Id.³² In
17 summary, Shepler Construction's two claims raise issues for the jury. Therefore, one practical
18 solution is to submit all issues to the jury – any substantial issues about the enforcement of the
19 agreement to arbitrate any issue about the contract, and value of the work.

20 G. Both statutes require a stay of this action while the arbitration is pending.
21

22 ³² Patrick v. Bonthius, 13 Wn.2d 217, 218-19, 124 P.2d 553 (1942) (after trial, "the trial court
23 concluded some minor corrections should be made to the building and gave the contractor
24 sixty days to complete them"); Alpine Indus., Inc. v. Gohl, 30 Wn. App. 750, 757-61, 637
25 P.2d 998, 645 P.2d 737 (1981) (jury verdict on construction defects was reduced on appeal but
26 jury verdict on extra construction work in a foreclosure action was advisory only and
remanding on that issue); Swensen v. Lowe, 5 Wn. App. 186, 188-89, 486 P.2d 1120 (1971)
(lien claim after deducting offsetting allowances and stating "he may recover the contract
price less the reasonable cost of making good the deficiencies in performance").

DEFENDANTS' PETITION TO COMPEL
ARBITRATION AND MOTION FOR STAY - 14

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238