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STATE OF WASHINGTON
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No. 37512-9-III

101073-7

SUPREME COURT
OF THE STATE OF WASHINGTON

WALL STREET APARTMENTS, LLC and ALAA ELKHARWILY, M.D.

Appellants,

v.

ALL STAR PROPERTY MANAGEMENTMENT, LLC, ALL STAR CONSTRUCTION, LLC, GIEVE PARKER, individually and on behalf of her marital community,

Respondents,

JOHN DOES AND JANE DOES I through X,

Defendants.

PETITION FOR REVIEW OF APPELLANTS

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I. IDENTITY OF PETITIONER

Wall Street Apartments, LLC and Alaa Elkharwily, MD, ask this court to accept review of the Court of Appeals decisions terminating review designated in Part B of this petition.

II. COURT OF APPEALS DECISION

Appellants seek review of the decision of the Court of Appeals, filed April 19, 2022, and the Order denying motion for reconsideration and amending opinion filed June 7, 2022. A copy of the decision is in the Appendix at pages A-1 through A-20. A copy of the order denying motion for reconsideration and amending opinion is in the Appendix at pages A-21 through A-22.

III. ISSUES PRESENTED FOR REVIEW

A. Whether the Supreme Court may order remand to the Court of Appeals and direct withdrawal of its Opinion filed April 19, 2022, and amended June 7, 2022, or whether the Supreme Court in the interests of public policy and judicial economy should direct withdrawal of the Opinion and proceed with the review of this action.

B. Following a bench trial, whether the doctrine of judicial admission preempts the standard of substantial evidence on review, thus placing the appellant court in the same

position as the trial court so as to apply a de novo standard of review.

C. Whether the oral testimony of a party to the action deposed under CR 30(b), as a corporate co-owner absolutely binds the corporation to judicial admission that ultimately decides the issue or if it is treated like any other testimony that could be contradicted through other corporate witness.

D. Whether a plaintiff on a Consumer Protection Act claim of failure to give pre-lien notice must prove the negative in response to a summary judgment motion.

E. Whether an award of attorney fees to a party is unjustified as a matter of public policy when that party committed wrongful acts which prompted the request for trial de novo even if said party prevails.

IV. STATEMENT OF THE CASE

In the summer of 2012, the parties entered into a management agreement under which Defendants All Star Property Management would manage 6 units of the 36 units in the Wall Street's building. Ex. P1. The agreement required Defendants to use "due diligence in the management of the premises…" Id. at ¶ 1, 7, 9.

Central to this case is the removal of the fire alarm system in the evening of 27th of September, 2012. After a bench trial, the trial court held that there was no evidence that Defendants, after Gieve Parker, co-owner of All Star, sent a text

message "I quit" on September 27, 2012, at 10:25 am, "assumed responsibility for the fire alarm or expected or knew it was taken down." CP 1097-1115 at ¶28.

The court found that on September 26, 2012 that it was not clear if there was any plan to start demolition of the lobby wall that day so as to make the Lobby more open. Most of the wall, Trina and door was taken down on September 26, 2012.The remaining part of the wall, and the fire alarm box and panel on which they were hung, were not taken down, disconnected nor removed until the evening of September, 27. On September 27, at 10:25 am Parker sent a text a message "I quit" over a dispute over the phone with Plaintiffs. CP. 1382-1407. A lot of tenants left the building after the taking down of the wall and fire system. Parker, All Star corporates' owner, testified under oath at the L and I Board that she had no personal knowledge nor involvement in the removal of the fire alarm system. The corporate officer testified she filed a lien on the property for a little over $ 1,500. She conceded she had "all the keys" to the building including "the boiler room" which had the fire system control unit. RP 426-427. She conceded her claims she made against Elkharwily two weeks after the removal of the fire alarm system for harassment was dismissed with prejudice. RP 230: 21:23.

Plaintiffs filed a suit for multiple claims and damages under breach of contract, covenant of good faith, consumer protection act among other claims. Defendants counterclaimed for little over $ 1,300. On summary judgment, the breach of contract and covenant of good faith survived. The other claims including the claim under the Consumer Protection Act for failure to provide the prerequisite pre lien notices required by RCW 18.27.114 were dismissed for "lack of supporting proof". The parties went to arbitration which awarded Plaintiffs a little over $ 7,000 in damages. During arbitration, Parker for the first time testified about an email she alleged was sent to her from Mr. Kimbrel whom she claimed he worked for Fire West Company. The email expressly shows he was called to disconnect the fire boxes and he was on the phone with Parker on the day he disconnected fire system. Parker maintained that her call to Mr. Kimbrel was before she quit. Plaintiffs moved for trial de novo, deposed Parker and requested her to produce the alleged email. During deposition, Parker, a corporate officer, testified that a lot of her testimony at the L and I was "wrong". RP 421:1. At trial, Parker's oral testimony detailed her corporate's knowledge and the take upon the removal of the fire alarm system after the "quit" message. Parker asserted she was still the

"property manager," even after she had sent the text she quit. RP 407:1-3. She testified that the phone call she previously testified made to Kimbrel before she quit was in fact made only after she had quit and after most of the wall, the trim, and door went down but before the rest of the wall with the fire system came down, RP 418:2-4, 417:5-7. She testified she kept telling Dr. Elkharwily to call the number on the fire box after she herself admittedly removed the fire box and panel. RP 419:12-17.

> Q. Okay. So if we look at the -- when you were telling Dr.. Elkharwily -- when you were telling Elkharwily that the fire panel was not your problem, "You should call the box, the number on the box," and so forth. you had moved them out by then?
>
> A. Yes.

Following a bench trial, the court returned a decision in favor of Defendants for a little over $1,300 and awarded attorney fees including post arbitration fees because Plaintiff failed to improve his position at trial. In post-trial motions, Defendants did not dispute nor deny in a required response the purported Kimbrel email was fake and fabricated by Defendants.[1] CP 1139-1183. p 42:1-3.

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[1] The email is Appendix Ex 3 to Plaintiffs' motion to reconsider, attached here as Appendix, A-27.

On July 24, 2020, the trial court issued its order and amended findings in response to Plaintiff's post-trial motions for reconsideration, etc. CP 1382-1407. The trial court held that the amendments to its findings did not change the disposition of the case. The trial court's order on reconsideration and amended findings were promptly furnished to the court of appeal upon its direction. Order filed October 20, 2021. In its Opinion filed April 19, 2022, the Court of Appeals erroneously found that the trial court's post-trial orders and amended findings were not part of the record, and did not consider the amended findings in review of this case. Opinion, at 8 n 2 (App. A-8). Upon Plaintiffs' motion for reconsideration, etc. filed May 9, 2022, the court of appeals amended its opinion by order filed June 7, 2022, acknowledging the error over the missing records of the amended findings and the post-trial order. (App. A-21-22.) The court did not make any other change to the Opinion. There are still multiple motions to modify rulings by the clerk of the court of appeals.

The facts pertinent to the issues on appeal will be reviewed with each issue

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review on whether it may remand the case to the Court of Appeals and direct withdrawal of its Opinion filed April 19, 2022, and amended June 7, 2022, or whether the Supreme Court in the interest of the public policy and judicial economy direct withdraw the Opinion and proceed with its own review of this action.

(i) The Opinion' is in conflict with the Supreme Court precedents as well as the constitutional role of the court of appeals.

It has been long held by the Supreme Court that, "It is the function and duty of the Appellate court to review the claimed errors of the trial court, whether of law or of fact. *Malnati v. Ramstead*, 50 Wn.2d 105, 309 P.2d 754 (1957), quoting with approval from *Knatvold v. Rydman*, 28 Wn.2d 178, 182 P.2d 9 (1947).

In reviewing the Court of Appeals Opinion, the Supreme Court is generally limited to questions presented to and determined by that court and to claims of error directed to that court's resolution of such issues. *Peoples Nat'l Bank v. Peterson*, 82 Wn.2d 822, 830, 514 P.2d 159 (1973); *Wood v.*

Postelthwaite, 82 Wn.2d 387, 510 P.2d 1109 (1973). The Supreme Court then noted in *State v. Williams*, 149 Wn. 2d 143 (Wash. 2003) " If an appellate court declines to review a trial court decision, and thus fails to reach the merits of the decision, it cannot be said to have affirmed that decision." The remedy is therefore to remand to the Court of Appeals to determine the unresolved issues. *State v. Cunningham*, 93 Wn. 2d 823 (Wash. 1980).

In the instant case, the court of appeal erred by rendering and issue its Opinion,

1) when it failed to include the records of the established facts of the case as part of its review after promptly furnishing them upon its direction.[2]; and when it

2) failed to review the assigned errors in light of the established facts after having acknowledged its error and having included the missing records as part of its review; and when it

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[2] Court order filed October, 20, 2021. Declaration of Counsel Brian Dykman filed May 9, 2022.

3) failed to review the assigned error of denying Plaintiffs' post-trial motions. [3] The question was directed by the court to be part of its review but was left unresolved; and

4) when it relied in rendering its Opinion on false and fabricated records that were not supposed to be part of the trial court or its records, were not ever served upon Plaintiffs, nor were they authenticated. CP 1327-1329. Said disingenuous fabricated unreliable evidence infested the records of the court of appeals, and continue, in lieu of the genuine true records of the trial court. [4], [5], [6].

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[3] Assignment of error number 2 ; Opening Brief 38-43; Respondents' Brief 24-32; Appellants' Reply 21-35.
[4] The court of appeals denied Plaintiffs' motion to correct the records and to purge the false records before it amended its order to include the other missed records of the established facts to be part of the review. Because the Supreme Court does not review rulings made by the clerk, Plaintiffs filed motion to modify on June 7, 2022. No decision has been rendered yet.
[5] See motion to reconsider filed in this court Appendix Ex 3.
[6] The true and genuine record included the email Mrs. Parker alleged was sent to her by Mr. Kimbrel. The email is critical to the court of appeal review of the trial court actions and decisions. The purported email was part of the records of the trial court and it explains the trial court s evolving position and findings in post-trial motions and its judgement of attorney fees. See Plaintiff s motion to reconsider filed May 9 at

It is well established by the Supreme Court that when the trial court amends its findings, and the revised findings are not disputed, it is unnecessary to determine whether there is substantial evidence to support the findings. They are the established facts of the case. *West Coast Airlines Inc. v. Miner's Aircraft Engine Serv., Inc.*, 66 Wn.2d 513, 403 P.2d 833 (1965); *Weiss v. Weiss*, 75 Wn.2d 596, 452 P.2d 748 (1969). When such established facts become missing from the record, the appellate review becomes impossible. *Beach v. Board of Adjustment*, 73 Wn.2d 343, 438 P.2d 617 (1968). When a full and complete record of established facts had been promptly furnished upon the direction of the appellant court for review but became missing from the records considered by the review panel, the appellate court may not speculate upon the existence of said facts that do not appear in the record it considered.

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paragraphs 10 at page 16-17. and last paragraph at page 7 and 8. The reliance of the court on the false and fabricated evidence, which was not served nor authenticated nor was it supposed to be part of the records of the trial court, was discovered by Plaintiff on the day he filed his motion to reconsider the 19th of April Opinion, May 9, 2022. See footnote 19 of said motion and the unopposed Declarations of Mr. Brian Dykman, Mr. Rick Wylie and Alaa Elkharwily, MD attached as Appendix Ex D, E, and F to the motion filed May 25, 2022.

Falcone v. Perry, 68 Wn.2d 909, 915, 416 P.2d 690 (1966). *Beach*, supra. Merely acknowledging the error of the missing records and amending the Opinion[7] to acknowledge said error without review, analysis or comment defeats the purpose of review by the appellate court. State v. Williams, 149 Wn. 2d 143 (Wash. 2003).What is more, the court of appeal failed to make any review analysis to the error of law of the assumption of duty under the public policy, statute, contract and common law, which had been assigned and argued in detail by Plaintiffs.[8]

Without review of the established facts or the assigned error of law the trial court becomes Supreme.

It has been long held that it is the function and duty of the Appellate court to review the claimed errors of the trial court, whether of law or of fact. *Malnati v. Ramstead*, 50 Wn.2d 105, 309 P.2d 754 (1957), quoting with approval from *Knatvold v. Rydman*, 28 Wn.2d 178, 182 P.2d 9 (1947). See WA Const. Art. 4, Sec. 4 and 30.

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[7] Order filed June 7, 2022 denying motion to reconsider and order amending Opinion filed April 19, 2022.
[8] Appellants' Opening Brief at 5-13 Opinion at 10-11.

Additionally, the court of appeal reliance on the fabricated and unauthenticated evidence that was not supposed to be part of the trial or the court of appeal records places grave challenge to the constitutionality of the Court of Appeals' Opinion. "Fundamental fairness is absent from any proceeding "in which evidence is allowed which lacks reliability." *State v. Bartholomew*, 101 Wn.2d 631, 640, 683 P.2d 1079 (1984). *State v. Rupe*, 108 Wn. 2d 734 (Wash. 1987).

This challenge continues and will continue to extend to the Supreme Court review as long as the fabricated evidence is still infesting the records and not purged nor replaced with the correct records. In their constitutional role, courts ultimately have the obligation of ensuring those before them receive due process of law. See, e.g., *State v. Oppelt*, 172 Wash.2d 285, 288, 257 P.3d 653 (2011); *City of Redmond v. Moore*, 151 Wash.2d 664, 677, 91 P.3d 875 (2004). And like the due process protection, the Washington doctrine of appearance of fairness is challenged as well: It is axiomatic that, whenever the law requires a hearing of any sort as a condition precedent to the power to proceed, it means a fair hearing, <u>a hearing not only</u>

fair in substance, but fair in appearance as well. *In re Smith v. Skagit Cy.*, 75 Wn.2d 715, 739, 453 P.2d 832 (1969).

(ii) The public interest will be served.

In addition to the challenges compromising the fair and due process, the review of the instant case by the Supreme Court will serve the public interest because of the opportunity presented to resolve the other issues raised in this petition which have not been clearly determined in Washington, such as how to treat the testimony by a corporate deponent, the applicability of public policy on post-arbitration attorney fees even when the party does not improve his position. Also see the clarifications needed to lower courts regarding standards of review in summary judgement under the consumer protection act and the standard of review following bench trial.

B. This Court Should Accept Review to Clarify Whether the Doctrine of Judicial Admission May Be Considered to Establish the Standard of Review Following a Bench Trial.

(i), (ii) The Court of Appeals Decision Conflicts with This Court's Precedents and Division Two precedents.

The court of appeal held that "[T]his court must defer to the finder of fact in resolving conflicting evidence and credibility determinations."; "Wall Street's arguments on appeal

fail to acknowledge the applicable standard of review."

Opinion at 10. *State v. N.B.*, 7 Wn. App. 2d 831, 837, 436 P.3d 358 (2019) that the court of appeal relied on does not address the applicable standard under the doctrine of judicial admission. In this instant case there is oral testimony by the same corporate officer, Parker who previously denied any knowledge or involvement , admittedly detailing the corporate knowledge and involvement in the removal of the fire alarm system after the quit message.

Review of a bench trial is a two-step process. First, the court reviews findings of fact to determine whether they are supported by substantial evidence and, if so, whether the findings support the conclusions of law. *Hegwine v. Longview Fibre Co., 132 Wn. App. 546, 555, 132 P.3d 789 (2006).* The court reviews conclusions of law de novo. *Id. at 556.*

Absent judicial admission by a party, on a question of fact, before the trier of the fact is warranted in finding the fact established, there must be substantial evidence in its support. This . . . mean[s] that a disputed question of fact, by whatever character of evidence it is sought to be proven, must have in its

support that character of evidence which would convince an unprejudiced thinking mind of the truth of the fact, before it can be said to be established. *Thomson v. Virginia Mason Hosp.*, 152 Wash. 297, 300-01, 277 P. 691 (1929) (emphasis added);" *in re Davis v. Microsoft Corp., 149 Wn. 2d 521 (Wash. 2003).*

Judicially admitted fact however conclusively establishes the evidence and withdraws the fact from the issue. As Justice Madsen has noted, "judicial admissions ..... by a party have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.' "*Key Design, Inc. v. Moser*, 138 Wn.2d 875, 893, 983 P.2d 653, 993 P.2d 900 (1999) (Madsen, J, concurring in part and dissenting in part) Such admissions are " 'proof possessing the highest possible probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them.'" *Mukilteo Ret. Apartments, L.L.C. v. Mukilteo Investors L.P.*, 176 Wash. App. 244 (Wash. Ct. App. 2013).

The distinction is therefore very important because not

only does judicially admitted fact preempt the deference to the trial court as a fact finder, it also frees the appellate court from being bound to the trial court's findings of facts. And it therefore places the appellate court in as good a position as the trial court to judge the evidence by eliminating the need for fact finding. When an appellate court is in as good a position as the trial court to judge the evidence, [the] review is de novo. *In Re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986).

The distinction therefore resolves confusion Amongst Lower Courts About the Exception to Authority to Exercise Discretion of credibility determination over two inconsistent or conflicting testimonies by the same party-opponent, one is false and the other is true.

What is more, a decision by the Supreme Court will resolve confusion in the lower courts about the limits on their authority to exercise discretion over inconsistent testimony by the same party, where one testimony must be false and the other true – the admission prevails.

(iii) The Public Interest Will Be Served.

Not only is there a conflict of authority, but the issue has

substantial public importance. The standard of substantial evidence is frequently invoked.

Resolving the confusion amongst the lower courts about the exception to credibility determination by clarifying the applicability of the doctrine of juridical admission will "promote both efficiency and economy in resolving disputes..... litigants need not expend effort in investigations concerning it nor incur expense in presenting evidence to prove it. Judicial administration is also aided. Admissions reduce the time required to try a case. .... Finally, admissions encourage litigants to evaluate realistically the hazards of trial, and thus tend to promote settlements." *Lakes v. von der Mehden*, 117 Wash.App. 212, 218, 70 P.3d 154 (2003) (quoting 8A CHARLES ALAN WRIGHT ET AL, FEDERAL PRACTICE AND PROCEDURE § 2252, at 522 (2d ed. 1994)); *Peralta v. State*, 187 Wash. 2d 888 (Wash. 2017).

C. This case is an ideal vehicle for resolving the issue that has not been clearly decided in Washington whether a corporation is absolutely bound to the testimony in a CR 30(b)(6) deposition as a judicial admission that ultimately decides an issue or if it is treated like any other testimony that may be contradicted through other corporate witnesses. Casper v. Esteb Enters., 119 Wn. App. 759, 768, 82 P.3d 1223 (2004).

(i), (ii) The Court of Appeals Decision Conflicts with This Court's precedents; and Division Two Precedents.

The court of appeals held there is no assumption of responsibility by the Defendant All Star after crediting the corporate owner Parker's denial of any knowledge or personal involvement in the removal of the fire alarm system. Opinion 10. At the same time, the court discredited the testimony of the same corporate officer in deposition admitting "a lot of her testimony" which was made at L and I Board of appeals is "wrong". The court further discredited the oral testimony of the same officer at trial detailing the corporation's knowledge and personal involvement. [9] In addition to her details about calling Mr Kimbrel after she had quit to disconnect the fire boxes, Parker admitted that she herself removed them afterwards. RP 419:12-17.

What is more, the court of appeals, in its review, excluded the corporate officer's admissions from treating them

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[9] The court of appeal did not review the post trial motion for reconsideration in which the corporation did not deny said admissions nor did it request to review nor amend.

as evidence all together ***"No evidence*** *of Ms. Parker's direct involvement in the dismantlement of the fire alarm system* ***was ever presented****."* Opinion at 11.

Relevant admissions of a party-opponent are not among those matters with which the trial court has such broad discretion. *For* more than a century "this state has recognized and applied the rule that relevant unprivileged admissions of a party-opponent are admissible against him. *Hart v. Pratt*, 19 Wn. 560, 568, 53 P. 711 (1898). Such evidence is not confined to the purpose of impeachment, but it is also entitled to be admitted as substantive evidence. E. Cleary, McCormick's Handbook of the Law of Evidence § 262, at 629 (2d ed. 1972), quoted in *Goodell v. Itt-Federal Support*, 89 Wn. 2d 488 (Wash. 1978). The Supreme Court also held that courts do not have discretion to limit relevant evidence simply because it wants to do so. *In re Detention of Duncan, 167 Wn. 2d 398 (Wash. 2009); [the court "has no discretion outside the rules of evidence to refuse [relevant and competent evidence]."in re State v. Cheatam, 150 Wn. 2d 626 (Wash. 2003), Justice*

CHAMBERS, J. (concurring in majority; and agreeing with the dissent's concluding statement of the law.).

Furthermore, in Washington, two Court of Appeals cases have adopted the judicial admissions doctrine in "clearly" establishing responsibilities arising from agreements effectuated in open court. In *Powers v. Hastings*, 20 Wn. App. 837, 582 P.2d 897 (1978), aff'd, 93 Wn.2d 709, 612 P.2d 371 (1980), the Court of Appeals held that the testimony of a lessor in open court regarding the details of an oral lease with an option to purchase constituted sufficient "writings" or "memorandum." *Id.* at 846. *Key Design*, however, relies instead on the Court of Appeals decision in *Sea-Van Invs. Assocs. v. Hamilton*, 71 Wn. App. 537, 861 P.2d 485 (1993), rev'd, 125 Wn.2d 120, 881 P.2d 1035 (1994), a case squarely on point since it involved an earnest money agreement.

In *Powers*, the Washington Supreme Court held that the lessee through his oral testimony had "clearly" established the existence of an oral lease-purchase agreement. It further held that the testimony of defendant in open court as to the details

was sufficient "memoranda" or "writings" to satisfy a requirement by the statute of fraud. The court of appeals further articulated that courts in Washington hold the view that court testimony is "equivalent to signed depositions."

In this case, the corporation, through its officer's testimony in deposition, admitted that "a lot" of her testimony at L and I denying any knowledge or involvement that was made at the L and I is "wrong"; and at trial the corporation through its same officer detailed both the knowledge and involvement, thus "clearly" established the assumption of duty of removal of the fire alarm system. The court of appeal erred by not treating the corporate officer's admissions, in deposition and at trial, as evidence and it erred by not binding the corporate and withdrawing the issues from dispute (conclusive evidence).

(iii) The Interest of the Public Will be served.

To avoid repetition please see above under the application of the doctrine of judicial admission.

D. Review will clarify, and provide direction to the lower courts, that failure to provide the prerequisite notice required by RCW 18.27.114 before filing a lien is

considered a violation per se of the consumer protection act, RCW 18.27.350; and when consumers are not required to provide evidence to support such a claim.

(i), (ii) The court of appeal decision is in conflict with the Supreme Court precedents and Division two precedents.

The court of appeal erred by holding that Plaintiffs claim under the CPA lacked supporting evidence. The trial court denied Plaintiffs' CPA claim because it found the claim "lacking supporting evidence" to prove that Defendants did not provide the prerequisite pre- lien notices .CR1003-1009, pp 4, paragraph 3. [10]

The court of appeal prematurely shifted the burden of the proof to Plaintiff before Defendants met their initial proof. It is well established by the Supreme Court: *The burden of proof cannot shift on summary judgement to Plaintiffs without Defendants' burden first being met. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).* Plaintiffs claimed that Defendants did not provide the notices required by law in violation of RCW 18.27.114(6); RCW 18.27.350 this violated the Consumer Protection Act. Defendants did not claim

[10] Order, 8/10/2018.

nor did they offer any proof they provided said notices. Further, Defendants failed to indicate any place in the record that said pre lien notices were provided; and what is more, Defendants cannot.

The court of appeal decision also conflicts with common sense. It is over burdensome and almost impossible to prove a negative. The Supreme Court has pointed out in in *Glazer v. Adams,* 64 Wn.2d 144, 148, 391 P.2d 195 (1964)) that it is more difficult to illustrate and prove the negative than the affirmative.

(iii) Accepting review will serve the public interest.

The result if the court of appeal's holding is affirmed so consumers are required to provide supporting evidence to prove that Contractors did **not** provide pre-lien notices, no claim under the CPA would ever survive summary judgment. The holding is against the public policy of this state and the purpose of RCW 18.27.350, which is to protect consumers. A decision of the Supreme Court clarifying the burden of proof where the issue is the absence of pre-lien notice would serve consumers' best interests.

E. This case is an ideal vehicle to determine whether a party seeking post arbitration attorney fees for failure of opposing party to improve its position on trial de novo should be awarded attorney fees contrary to the public policy of this state when the de novo trial was promoted due to the party seeking fees own wrong.

(i) Accepting review will serve the public interest.

The court of appeal's awarding attorney fees under SCCAR 7.3, is in conflict with the public policy expressed in Washington statute and appellant case law. RAP 13.4(b) (i), (ii) and (iv). RCW §11.84.900 explicitly states it is *the policy of this state that no person shall be allowed to profit by his or her own wrong, wherever committed.* See, *Moore v. Wash. State Health Care Auth.*, 181 Wash. 2d 299, 314, 332 P.3d 461, 468 (2014) ("[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Wenzler & Ward Plumbing & Heating Co. v. Sellen*, 53 Wn.2d 96, 99,330 P.2d 1068 (1958). The policy was applied where a defendant caused a witness to be unavailable he cannot benefit through a Sixth

Amendment confrontation objection or a hearsay objection. *State v. De Jesus Hernandez*, 192 Wash. App. 673, 689-90, 368 P.3d 500,509 (2016).

SCCAR 7.3 allows fees only for attorney work and costs following the post-arbitration request for trial de novo if the requesting part does not improve his position. However, the full amount of requested post arbitration fees need not be awarded. And, fees should not be awarded for duplicative or unsuccessful work. Only reasonable fees may be awarded. *Berryman v. Metcalf*, 312 P.3d 745, 2013 (Wash. App. 2013). This rule should be extended to specifically include exception to a wrongdoer whose own wrong causes the request for the trial de novo.

The '"Richard Kimbrel" story is an example. During arbitration Defendants for the first time testified there is an email by Mr. Kimbrel that Parker alleged he sent to her so as to support her position of lack of involvement. The testimony prompted the request for de novo trial. The alleged email show

that Kimbrel was called to remove the fire alarm panel. [11]

Another example is Defendants' false photographic evidence presented to support the alleged bad shape of the units. RP 429. Parker admitted that her photographs alleged of Unit 19, were not from Wall Street:

> Q. All right. And so none of the pictures that you showed us the other day of messy looking apartments, that none of those were 19?
>
> A. Correct. RP 428:15-18.

CONCLUSION

For the foregoing reasons, Appellants request this Court grant this Petition for Review and vacate the Court of Appeals' decision.

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[11] The email is attached as Ex B, P4 to petition to recall opinion and correct records filed May 25, 2022; and also attached herein as Appendix A- 27. This court may take judicial notice. The true genuine email is part of the trial court records but was substituted by the disingenuous and false Record of CP 1327-1329 which lacked the email. The false record CP 1327-1329 has disingenuous signatures and was not filed by Plaintiffs. Ex E, D and F of Appendix attached to petition filed May 25, 2022.

Certificate of Compliance

I certify that this document contains 4790 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED: July 7, 2022

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CERTIFICATE OF SERVICE

I, Brian K. Dykman, certify that:

1. I am over 18 years of age, and competent to testify if called upon.

2. On July 7, 2022, I filed and served a true and correct copy of the foregoing document on the Appellant and Respondents via electronic service to all parties as per records.

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

July 7, 2022.

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APPENDIX

Opinion of Court of Appeals – April 19, 2022..................1

Order Denying Motion for Reconsideration and Amending Opinion – June 7, 2022...21

Appendix Ex. 3 to Motion for Reconsideration.................23

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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

WALL STREET APARTMENTS, LLC, a Washington limited liability company, and ALAA ELKHARWILY, M.D., Appellants, v. ALL STAR PROPERTY MANAGEMENT, LLC, a Washington limited liability company; GIEVE PARKER, individually and on behalf of her marital community, Respondents, JOHN DOES and JANE DOES I through X, Defendants.	)	No. 37512-9-III UNPUBLISHED OPINION

PENNELL, J. — Wall Street Apartments, LLC and Dr. Alaa Elkharwily (collectively Wall Street) appeal an adverse judgment in favor of All Star Property Management, LLC and Gieve Parker (collectively All Star). We affirm and award All Star attorney fees on appeal.

FACTS

Dr. Alaa Elkharwily was the CEO of Wall Street Apartments. Through Wall Street, Dr. Elkharwily owned an apartment building at 225 South Wall Street (the Wall Street building) in Spokane. On September 2, 2012, Wall Street entered into an agreement with All Star to manage units in the Wall Street building. All Star was owned by Ronald and Gieve Parker.

The management agreement tasked All Star with duties:

> 1. To use due diligence in the management of the premises . . . and agrees to furnish services for the renting, leasing, operating, and managing of the above mentioned premises.
> 2. To render monthly statement of receipts, expenses, and charges and to remit the same to the Owner together with receipts less disbursement. In the event the disbursements are in excess of the rents collected by All Star Property Management, the Owner hereby agrees to pay such excess promptly upon demand . . . .
> 3. To deposit all receipts collected for the Owner (less any sums properly deducted or as otherwise provided for herein) in a pooled Trust account . . . .
> 4. To advertise the availability for rental of the above-referenced premises . . . to sign, renew and/or cancel or terminate leases for the

> premises or any part thereof; to collect rents due or to become due and give receipts therefore; to terminate tenancies and to sign documents in the Owner's name.
>
> . . . .
>
> 6. To make or cause to be made and to supervise repairs, expenses, and charges and to remit to Owner receipts less disbursement. In the event the disbursements shall exceed of [sic] the amount of rents collected by All Star Property Management, the Owner hereby agrees to pay such excess promptly upon demand . . . .
>
> 7. To make or cause to be made and to supervise any alterations, and to do maintenance on the above-referenced premises; to purchase supplies and pay all bills thereof. All Star Property Management agrees to secure the prior approval of the Owner on all expenditures in excess of $1.00 for any one item . . . .
>
> . . . .
>
> 9. To hire, discharge, and supervise all labor and employees required for the operation and maintenance of the premises. . . .

Ex. P1, at 1-2. In consideration for All Star's work, Wall Street agreed to pay six percent of the monthly rental rate, $100.00 for each new signed lease, all rental income in excess of $533.00, and $0.55 per mile to pick up and deliver materials to any job site.

In meetings with the Parkers around the time the management agreement was signed, Dr. Elkharwily expressed his intent to renovate the interior of the Wall Street building. All Star did not agree to perform the remodeling.

On September 12 and 13, 2012, All Star secured tenants for apartment 19 of the Wall Street building. Ms. Parker collected $685.00 from the new tenants and placed the funds in trust accounts. Ms. Parker also collected $300.00 in rent from apartment 18 on

September 22. A receipt dated September 22 noted the apartment as "# 5 Was 18." Ex. D133. In the month of September, All Star incurred $1,517.39 in expenses for travel and materials at the direction of Wall Street.

On September 26, demolition began on an interior wall in the lobby of the Wall Street building. At 4:00 p.m. that day Ms. Parker sent a text message to Dr. Elkharwily containing a photo of Christopher Godwin, a handyman for Dr. Elkharwily who lived at the Wall Street building, demolishing the lobby wall. On the wall were two components of the building's fire alarm system—a fire panel, and a fire box (i.e., the electric box supplying the fire alarm system with power).

At 10:25 a.m. on September 27, Ms. Parker sent Dr. Elkharwily a text message informing him she quit after the two had a heated dispute over garbage bags. Dr. Elkharwily accepted the resignation. After she quit, Mr. Godwin helped Ms. Parker load her truck with various supplies from the Wall Street building, which had been purchased by All Star. Ms. Parker returned some of these supplies to the stores where they were purchased. Ms. Parker made multiple trips to the Wall Street building to collect items from the building's hall and the office after she quit. Mr. Godwin ultimately departed the Wall Street building with Ms. Parker after the last trip.

Around 7:00 p.m. on September 27, Dr. Elkharwily became aware that the lobby wall had been demolished and the fire alarm system disconnected. The fire department had called Dr. Elkharwily and informed him the Wall Street building was without a working fire alarm system, and would be condemned unless he established a fire watch program. Dr. Elkharwily proceeded to hire individuals to perform a constant fire watch until the fire alarm system could be replaced several days later.

Over the ensuing days, Dr. Elkharwily accused Ms. Parker of dismantling the lobby wall and removing the fire alarm system. Ms. Parker denied the accusations, directed him to call the phone number on the fire box, and demanded payment for All Star's unpaid $1,517.39 in expenses.

On October 12, Ms. Parker sent Dr. Elkharwily two envelopes via certified mail. One envelope contained all the apartment and office keys. The other contained invoices for All Star's outstanding expenses, account statements, leases, and a check for funds in tenant trust accounts.

In 2015, Wall Street sued All Star. The complaint contained nine causes of action, including breach of contract, breach of implied covenant of good faith and fair dealing, and violation of Washington's Consumer Protection Act (CPA), chapter 19.86 RCW.

All Star answered the complaint and also asserted a counterclaim for $1,517.39 in outstanding expenses.

Most of Wall Street's claims were dismissed on summary judgment based on a lack of evidence. The trial court later characterized Wall Street's surviving claims as follows:

> 1. Whether [All Star] breached its management duties concerning due diligence, collecting and turning over rent, demolishing a lobby wall [without permission], and incurring unauthorized purchases over $1.
> 2. Whether [All Star] breached its implied covenant of good faith and fair dealing concerning production of monthly statements, the demolition of the lobby wall . . . and the removal of the fire alarm [system].

Clerk's Papers (CP) at 1098.

The remaining claims initially went to mandatory arbitration in January 2019. An arbitrator found in favor of Wall Street, issuing an award of $7,949.00 against All Star. Wall Street exercised its right to request a trial de novo under former[1] Superior Court Mandatory Arbitration Rule (MAR) 7.1 (2011) and Spokane County Local Superior Court Mandatory Arbitration Rule (LMAR) 7.1(a). All Star later offered to settle with Wall

[1] The Superior Court Mandatory Arbitration Rules (MAR) were renamed the Superior Court Civil Arbitration Rules (SCCAR) effective December 3, 2019.

Street for $2,796.30, a figure All Star arrived at by subtracting a $5,152.70 judgment it had against Wall Street in another case from the $7,949.00 arbitration award.

Wall Street rejected All Star's settlement offer and proceeded with a de novo bench trial. At trial, the parties presented conflicting testimony over what happened during their short business relationship. Dr. Elkharwily testified that Ms. Parker engaged in a course of intentionally wrongful conduct. He claimed Ms. Parker was solely responsible for tearing down the lobby wall and did so out of frustration; she made unauthorized purchases of supplies; and after her departure, business records, supplies, and tools were missing. Ms. Parker denied Dr. Elkharwily's allegations. According to Ms. Parker, Dr. Elkharwily was responsible for directing the destruction of the lobby wall. She also denied removing any business records or making unauthorized purchases.

The trial court ruled in favor of All Star, finding Wall Street had submitted insufficient facts and the conflicting testimony favored All Star. The court concluded Wall Street breached its duty to pay All Star for expenses, and awarded All Star $1,321.57 in damages.

Wall Street subsequently moved for reconsideration, a new trial, amended findings, and relief from judgment. The parties represent[2] that the court granted Wall Street's motion in part, and entered amended findings of fact and conclusions of law. The trial court's amended findings did not change the case's ultimate disposition.

All Star moved for an award of attorney fees and costs. First, All Star requested $29,920.00 in postarbitration attorney fees and $997.73 in costs under RCW 7.06.060 and former MAR 7.3.[3] Second, All Star requested $28,526.80 in prearbitration attorney fees and $633.60 in costs under RCW 4.84.185 and CR 11. In response, Wall Street contended All Star's postarbitration fee request was duplicative of work performed prior to arbitration.

The trial court granted All Star's requests. It found Wall Street failed to improve its position on trial de novo, entitling All Star to fees and costs under RCW 7.06.060 and former MAR 7.3. The court also found Wall Street should have known it was unlikely to prevail at trial due to a lack of supporting evidence, entitling All Star to fees and costs under RCW 4.84.185. Finally, it found:

---

[2] Neither the trial court's order granting the appellants' motion in part nor the amended findings of fact and conclusions of law are included in the record on review.

[3] *See* footnote 1, *supra.*

> Elkharwily pursued litigation against Defendants in bad faith and for an improper purpose. This includes relying on incoherent, inadmissible, and nonexistent evidence at summary judgment, at which time all but one of Plaintiffs' claims were dismissed, as well as producing indecipherable testimony and exhibits at trial.

Order Granting Defs.' Mot. for Att'y's Fees and Costs at 3. This entitled All Star to attorney fees and costs under CR 11. The court found the amounts presented and detailed by All Star to be reasonable and necessary to defend against Wall Street's claims, and awarded it the amounts requested.

Wall Street now appeals the order granting partial summary judgment, the judgment in favor of All Star, and the order granting All Star's attorney fees and costs.

ANALYSIS

This appeal raises four issues: (1) whether substantial evidence supports the trial court's findings in favor of All Star on the two substantive claims submitted at trial, (2) whether the trial court properly granted summary judgment on Wall Street's CPA claim, (3) whether the trial court properly awarded attorney fees, and (4) whether All Star should be awarded attorney fees on appeal.

Substantial evidence

We review the factual findings of a trial court in a bench trial for substantial evidence. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). "'Substantial

evidence' is evidence sufficient to persuade a fair-minded person of the truth of the matter asserted." *In re Marriage of Chandola*, 180 Wn.2d 632, 642, 327 P.3d 644 (2014). "[T]his court must defer to the finder of fact in resolving conflicting evidence and credibility determinations." *State v. N.B.*, 7 Wn. App. 2d 831, 837, 436 P.3d 358 (2019).

Wall Street's arguments on appeal fail to acknowledge the applicable standard of review. Rather than recounting the evidence in a manner consistent with the trial court's findings, Wall Street construes the evidence in its favor and then disingenuously claims the evidence is admitted or uncontested. Wall Street's failure to recognize the standard of review renders its briefing largely unhelpful and undercuts its claim for relief on review.

The alarm system

All Star presented substantial evidence showing Ms. Parker was not aware of the dismantlement of the fire alarm system, and did not assume responsibility for its removal. The Parkers both testified they did not expect the lobby wall to be demolished in September 2012. Ms. Parker testified she quit on the morning of September 27. She testified that the last time she saw the lobby wall in the Wall Street building, the fire alarm system was still connected. Both Ms. Parker and Mr. Godwin testified she had no involvement in the removal of the fire alarm system. All parties agree Ms. Parker left the building for the final time before 7:00 p.m. on September 27, when the first evidence the

fire alarm system had been dismantled arose. No evidence of Ms. Parker's direct involvement in the dismantlement of the fire alarm system was ever presented. The trial court had ample evidence to support the conclusion that Ms. Parker did not know of, or personally become involved in, the removal of the fire alarm system.

Return of property and documents

The trial court's finding that Ms. Parker returned all keys, documents, and a refund check to Dr. Elkharwily was supported by substantial evidence. Ms. Parker testified she sent Dr. Elkharwily two envelopes containing her keys,[4] account statements, leases, and a check. She denied removing any business records from the Wall Street building's office, and Mr. Godwin provided similar testimony.

Ms. Parker's return to the Wall Street building

The trial court's finding that Ms. Parker did not return to the Wall Street building after she quit on September 27 was, in context, supported by substantial evidence. Wall Street is correct that after she quit, Ms. Parker made multiple trips to and from the Wall Street building to collect and return unused supplies to the store. However, the court's

[4] Contrary to Wall Street's repeated assertions, Ms. Parker did not admit to retaining the only set of keys that would have allowed access to the fire alarm system. She testified her keys were all duplicates.

finding should not be read in isolation. The finding pertained to Wall Street's claims that Ms. Parker returned to the Wall Street building at some point on September 27 to move a tenant and collect $2,200 in rent. Wall Street presented no evidence at trial to support its claim that Ms. Parker returned to the Wall Street building on September 27 to do these things. On the contrary, the receipt and invoice referred to by Wall Street clearly state the rent was collected on September 22. The only evidence of Ms. Parker's activities at the Wall Street building after she quit was testimony from Ms. Parker and Mr. Godwin that Ms. Parker collected supplies from the hall and office of the building. Substantial evidence supports the court's finding.

Provision of receipts

The parties' management agreement required All Star "[t]o render monthly statement of receipts, expenses, and charges and to remit the same to the Owner together with receipts less disbursement." Ex. P1, at 1. This language did not specifically require All Star to provide return receipts to Wall Street for items purchased on Wall Street's behalf but returned to the store. The meaning of "receipts" becomes clear when read in the context of the management agreement as a whole. For example, the agreement assigned All Star the duty "to collect rents due or to become due and give receipts therefore" and then "[t]o deposit all receipts collected for the Owner (less any sums

properly deducted or as otherwise provided for herein) in a pooled Trust account."

Ex. P1, at 1.

Substantial evidence supports the trial court's determination that Ms. Parker provided receipts as the term is set forth above. Neither the trial court nor this court is required to accept Dr. Elkharwily's personal opinion regarding the definition of receipts.

Calculation of damages

The trial court's damage calculation falls within the range of the trial evidence. All Star presented an invoice detailing $1,517.39 in expenses they had incurred for purchases pre-authorized purchase for supplies and related mileage. The court dedicated substantial time at trial to the issue of these unpaid expenses, and its final damage award of $1,321.57 was within the range of evidence presented and between the amounts argued for by both parties. As the finder of fact, the court was entitled to disregard Wall Street's evidence and arguments as to the proper calculation of damages. While the court's exact reasoning for arriving at this precise figure is unclear, mathematical exactness is unnecessary. *See Mason v. Mortg. Am., Inc.*, 114 Wn.2d 842, 850, 792 P.2d 142 (1990). The court's award of damages does not exist outside the range of evidence, shock the conscience, or result from passion or prejudice. The calculation of damages was not an abuse of discretion and will not be disturbed on appeal.

Summary judgment

We review a summary judgment order de novo, "performing the same inquiry as the trial court." *Colo. Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wn. App. 654, 661, 246 P.3d 835 (2011). "When ruling on a summary judgment motion, the court is to view all facts and reasonable inferences therefrom most favorably toward the nonmoving party." *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). "A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.*

The summary judgment process involves burden shifting between the parties. A defendant moving for summary judgment initially bears the burden of showing the absence of a material issue of fact for trial. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If this is met, the burden shifts to the plaintiff as the party with the ultimate burden of proof at trial. *Id.* The plaintiff must proffer the existence of admissible evidence sufficient to sustain each element of its case. *Id.* If the plaintiff fails to meet this burden, the defendant is entitled to judgment as a matter of law. *Id.*

The trial court properly dismissed Wall Street's CPA claim on summary judgment. After All Star moved for summary judgment on the CPA claim, Wall Street argued, for

the first time, that its claim rested on the assertion that Ms. Parker filed a lien without providing the necessary prefiling notice. But Wall Street failed to back up this assertion with any proof. Given Wall Street's failure to support its legal claim with admissible evidence, the trial court properly granted summary judgment.

Trial court's award of attorney fees

Wall Street makes four challenges to the trial court's award of attorney fees. First, that the award of prearbitration fees was unwarranted under CR 11 and RCW 4.84.185. Second, that postarbitration fees were improper because Wall Street had reasonable grounds for requesting a trial de novo. Third, that the amount of fees awarded to All Star for trial work was excessive because the preparation was duplicative. And fourth, that public policy did not favor an award of fees due to All Star's wrongdoing at trial. We address each claim in turn.

Prearbitration attorney fees

RCW 4.84.185 authorizes the trial court to award attorney fees if it finds an action was "frivolous and advanced without reasonable cause . . . unless otherwise specifically provided by statute." CR 11 similarly authorizes sanctions for filing a claim for an improper purpose, or one that is not grounded in fact or law. A lawsuit brought for purposes of harassment constitutes an improper purpose for which sanctions may be

imposed. *In re Recall of Lindquist*, 172 Wn.2d 120, 136, 258 P.3d 9 (2011). A trial court's award of sanctions under either provision is reviewed for abuse of discretion. *Kilduff v. San Juan County*, 194 Wn.2d 859, 874, 453 P.3d 719 (2019).

The trial court here adequately exercised its discretion in imposing attorney fees as a sanction. The trial court pointed to the lack of evidence supporting Wall Street's claims and the incoherence of many of its positions as the basis for sanctions. The record supports this determination. Of Wall Street's nine original claims, seven were dismissed at summary judgment for a complete lack of evidence. Wall Street presented very little coherent evidence in support of its remaining two claims at trial. Wall Street's case largely rested on Dr. Elkharwily's self-serving testimony and speculation. When read in conjunction with the angry and accusative e-mails directed at Ms. Parker by Dr. Elkharwily, the trial court could properly infer Wall Street's suit was not filed in good faith, but with an intent to harass. The court did not abuse its discretion by imposing attorney fees as a sanction under CR 11 and RCW 4.84.185.

Postarbitration attorney fees

Under RCW 7.06.060(1), "[t]he superior court shall assess costs and reasonable attorneys' fees against a party who appeals the [arbitration] award and fails to improve his or her position on the trial de novo." Costs and reasonable attorney fees means all

reasonably necessary expenses incurred after the request for a trial de novo is made. RCW 7.06.060(2). Likewise, former MAR 7.3 requires a court to impose "costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo."

"The purpose of the fee-shifting provision in [former MAR] 7.3 is 'to encourage settlement and discourage meritless appeals.'" *Bearden v. McGill*, 190 Wn.2d 444, 448, 415 P.3d 100 (2018) (quoting *Niccum v. Enquist*, 175 Wn.2d 441, 451, 286 P.3d 966 (2012)). Former MAR 7.3 "deters frivolous appeals by penalizing pyrrhic victors: a party who congests a trial court's docket by requesting a trial de novo in order to lose money shall succeed in that endeavor, and parties who wish to appeal close calls do so at their own peril." *Id.*

When determining whether an appellant achieved a better result in the trial de novo, the trial court should compare (1) damages and statutory costs awarded by the arbitrator, with (2) damages and statutory costs awarded by the trial court. *Id.* at 451. "If a party offers to settle prior to trial, that settlement offer replaces the arbitration award when determining whether the party who requested trial de novo improved his or her position." *Nelson v. Erickson*, 186 Wn.2d 385, 388, 377 P.3d 196 (2016).

Here, the trial court appropriately awarded All Star its postarbitration attorney fees under RCW 7.06.060 and former MAR 7.3. At arbitration, Wall Street won a judgment of $7,949.00. All Star later offered Wall Street $2,796.30 to settle the matter. At the trial de novo, the court ruled against Wall Street on all of their claims, and awarded the defendants $1,321.57 on their counterclaim. Needless to say, Wall Street did not improve its position after trial. Accordingly, the court did not err by awarding All Star its postarbitration attorney fees.

Reasonableness of fees

Wall Street argues the trial court's fee award was unreasonable in light of the duplicative nature of All Star's work preparing for arbitration and the trial de novo. Our review is for abuse of discretion. *Berryman v. Metcalf*, 177 Wn. App. 644, 656-57, 312 P.3d 745 (2013).

The trial court did not abuse its discretion. The court made minimally sufficient findings, supporting its award in the face of Wall Street's claim of duplicative work. The trial court found the work by All Star's counsel to be reasonable and necessary. This adequately addressed Wall Street's arguments. Indeed, anyone who has had to retry a case knows that preparation can be extensive. The trial court's fee award was not an abuse of discretion.

Public policy

Finally, Wall Street attempts to argue the award of attorney fees was contrary to public policy because All Star engaged in wrongdoing at trial. Wall Street's argument appears to assume that it has prevailed against All Star. It has not. The record does not support Wall Street's public policy claim.

APPELLATE ATTORNEY FEES

Both parties request attorney fees on appeal. We award fees to All Star.[5] RAP 18.1(a) allows a party to recover attorney fees or expenses incurred on appeal, so long as applicable law permits such a recovery. Under former MAR 7.3, a party who requested trial de novo after mandatory arbitration and fails to improve their position on appeal to the Court of Appeals must pay the other party's reasonable attorney fees. Given our agreement with the trial court's rulings, Wall Street has, on appeal, again failed to improve its position. As a result, All Star is entitled to an award of reasonable attorney fees.

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[5] Wall Street's fee request lacks factual or legal support.

CONCLUSION

The orders on appeal are affirmed. All Star is awarded reasonable attorney fees, subject to compliance with RAP 18.1(d).

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Fearing, J.

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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

WALL STREET APARTMENTS, LLC, a Washington limited liability company; and ALAA ELKHARWILY, M.D. Appellants. v. ALL STAR PROPERTY MANAGEMENT, LLC, a Washington limited liability company; GIEVE PARKER, individually and on behalf of her marital community, Respondents, JOHN DOES and JANE DOES I through X, Defendants.	)	No. 37512-9-III ORDER: (1) DENYING MOTION FOR RECONSIDERATION, AND (2) AMENDING OPINION

THE COURT has considered appellants Wall Street Apartments, LLC and Alaa Elkharwily, M.D.,'s motion for reconsideration of our April 19, 2022, opinion; and the record and file herein.

IT IS ORDERED that the appellants' motion for reconsideration is denied.

No. 37512-9-III
Wall St. Apartments, LLC v. All Star Prop. Mgmt., LLC

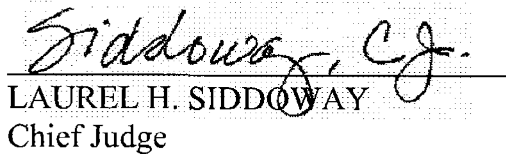
IT IS FURTHER ORDERED that the court's April 19, 2022, opinion is amended as follows:

The second sentence in the first paragraph on page eight, including footnote two, is stricken from the opinion and replaced with the following:

> The trial court denied Wall Street's motions for reconsideration, a new trial, and relief from judgment, but granted in part the motion for amended findings of fact and conclusions of law. *See* CP 1382-1407.

PANEL: Judges Pennell, Fearing and Lawrence-Berrey

FOR THE COURT:



LAUREL H. SIDDOWAY
Chief Judge

APPENDIX EXHIBIT 3

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FILED
MAR 23 2020
Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

WALL STREET APARTMENTS, LLC,
A Washington limited liability company, and
ALAA ELKHARWILY, M.D.,

Plaintiffs,

No. 15-204021-3

Declaration of Alaa Elkharwily MD

vs.

ALL STAR PROPERTY MANAGEMENT, LLC,
A Washington limited liability company;
GIEVE PARKER, individually, and
on behalf of her marital community;
and JOHN DOES and JANE DOES I thru X,

Defendants.

Alaa Elkharwily, for his declaration herein, states as follows:

1. I am one of the Plaintiffs herein in this action.

2. During the trial, Gieve Parker testified that she called a representative of "General Fire" to ask about what to do with the fire alarm system at Wall Street during remodeling. She also testified that she told me whatever he told her.
3. Gieve Parker, during trial, testified that a Richard Kimbrel, who worked for General Fire, was the person she spoke with.
4. Previously in this case she testified that she spoke with someone whose company was on a sticker on the fire alarm system – "Fire West" or similar name.
5. The only name on any sticker on the fire alarm system at Wall Street was Allied.
6. In July 2019, Defendants produced an alleged email, a copy of which is attached hereto as Exhibit 1. It was allegedly sent by a "John Johnson" to Gieve Parker and allegedly signed by "Richard Kimbrel," again allegedly on behalf of "Fire West Systems" claiming they made a survey and removed the panel while on the phone with Mrs. Parker.
7. In any event, the first time "General Fire" was mentioned by Parker was during trial.
8. During trial I could not reach anyone General Fire to confirm or deny that the newly mentioned General Fire had been called by Gieve Parker regarding removal of the fire box and whether a John Johnson or Richard Kimbrel ever worked for General Fire and if Johnson or Kimbrel or any one at General Fire ever worked, unhooked, rehooked or removed the Wall Street fire boxes and or if that company had ever performed a consult or any other task regarding the Wall Street Apartments building.
9. Finally, on February 27, 2020, a man named Jason from General Fire, left a message for me and I called him back. He told me he had been with that company for 23 years and after checking company records, did not believe that the company had ever had any one by the name of Richard Kimbrel nor had General Fire worked at Wall Street Apartments at any time, whether for a survey or removal or even consultation, back in 2012 nor at any other time. This conversation had led to the CEO Darrell Siria and Jason Knauft providing a declaration which has been filed herein.

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

Dated this March 13, 2020.

Alaa Elkharwily, MD

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john johnson
wall street apartments
October 26, 2012 at 10:48 AM

To Whom it may concern:

My name is Richard Kimbrell. I am an alarm service Tech for Fire systems west inc. I was called out to the wall street apartments to survey to remove the fire alarm panel from the wall. There was only 2 people on site when this was convey'd to me to pull panel off the wall so the demo. could be done. no one representing allstar propertys was on site nor in contact when I was told to remove panel. However, I was told to remove it by one of the reps. from the wall street apartment complex. I don't remember the persons name. I know he had to call some one to get the ok. I was on the phone with allstar prop. when the ok was given by the rep of the apartments. allstar propertys had not given the ok to do the work at any time. jean had not nor was not in the position to give the go a head to do such work. If you have any questions feel free to call me 509.599.9341

Thank you
Richard K.

Ex. 1

BRIAN K. DYKMAN, ATTORNEY AT LAW

July 07, 2022 - 2:42 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	37512-9
Appellate Court Case Title:	Wall Street Apartments, LLC, et al v. All Star Property Management, LLC, et al
Superior Court Case Number:	15-2-04021-3

The following documents have been uploaded:

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