68522-8

68522-8

THE COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON
NO. 68522-8-1

MADERA WEST CONDOMINIUM OWNERS ASSOCIATION, et al.,

Respondents,

v.

MARX/OKUBO, LTD., a Washington corporation,

Appellant

BRIEF OF APPELLANT MARX/OKUBO, LTD.

Kenneth G. Yalowitz, WSBA 12017
Amber L. Hardwick, WSBA 41828
Natalya P. Markovich, WSBA 43099
Attorneys for Appellant
Marx/Okubo, Ltd.

GREEN & YALOWITZ, PLLC
1420 Fifth Avenue, Ste. 2010
Seattle, WA 98101-4087
206-622-1400
206-583-2707 (fax)
kgy@gyseattle.com

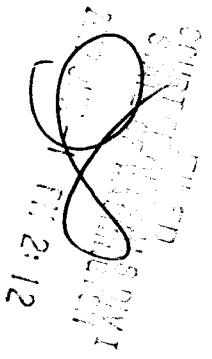

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules and Regulations

I. ASSIGNMENTS OF ERROR AND STATEMENT OF ISSUES

A. Assignment of Errors

1. The trial court erred in entering its order dated March 12, 2012, denying Marx/Okubo's motion for entry of an award of prevailing party attorney's fees pursuant to RCW §4.84.330.

2. The trial court erred in entering its order dated March 12, 2012, denying Marx/Okubo's motion for an award of sanctions under Civil Rule 11.

3. The trial court erred in entering its order dated March 12, 2012, denying Marx/Okubo's motion for an award of sanctions under Civil Rule 26(g).

B. Issues Pertaining to Assignments of Error

1. Plaintiffs sought to enforce obligations assumed by Marx/Okubo under a contract plaintiffs were not signatory to. The contract contained a prevailing party attorney's fees provision. The trial court dismissed all of plaintiffs' claims against Marx/Okubo. Under the circumstances presented, is Marx/Okubo entitled to a prevailing party attorney's fee award pursuant to RCW §4.84.330, the doctrine of equitable estoppel and the provisions of the contract plaintiffs sought to enforce? (Assignment of Error No. 1)

2. **Should CR 11 sanctions be imposed on plaintiffs who knowingly assert claims which their prior testimony established to be unprovable? (Assignment of Error No. 2)**

3. **Should CR 26(g) sanctions be imposed on plaintiffs who provide false responses to written discovery requests? (Assignment of Error No. 3)**

II. INTRODUCTION

This litigation arises out of the conversion of the Forest Village Apartments into the Madera West Condominiums. The owners association and 56 individual plaintiffs sought damages from the project developer and its real estate agent alleging they failed to disclose known construction deficiencies and misrepresented the amount of funds deposited in a reserve account. Plaintiffs also claimed Marx/Okubo made negligent misrepresentations in a Property Condition Assessment and Reserve Study prepared for a predecessor owner.

The trial court dismissed all claims against Marx/Okubo. Marx/Okubo sought an award of prevailing party attorney's fees pursuant to the terms of the agreement plaintiffs claimed Marx/Okubo negligently performed. Marx/Okubo also sought terms against certain plaintiffs for violating Civil Rule 11 and Civil Rule 26(g). The trial court denied Marx/Okubo's requests for fees and terms, but certified

its dismissal of the claims against Marx/Okubo as final pursuant to Civil Rule 54(b).

Marx/Okubo is entitled to an award of prevailing party attorney's fees. Although plaintiffs were not in privity with Marx/Okubo, their claims arose out of Marx/Okubo's alleged inadequacy of performance under a contract containing a prevailing party attorney's fees provision. It is undisputed the only duties Marx/Okubo owed with respect to the project arose out of the written agreement. Because the duties undertaken by Marx/Okubo upon which plaintiffs' claims were premised arose solely out of Marx/Okubo's contract, plaintiffs' lawsuit was "an action on a contract" within the scope of RCW §4.84.330, and Marx/Okubo is entitled to recover its attorney's fees pursuant to the prevailing party attorney's fees provision contained in the agreement. Alternatively, because plaintiffs sought to take advantage of warranties made by Marx/Okubo in its contract, plaintiffs should be equitably estopped from denying that the contractual attorney's fees provisions apply to them.

CR 11 sanctions should have been imposed on those plaintiffs who knowingly asserted meritless claims. Prior to filing their Third Amended Complaint asserting negligent misrepresentation claims against Marx/Okubo, a number of plaintiffs testified they did not rely upon Marx/Okubo's Property Condition Assessment and/or Reserve

Study. Reliance on a false statement of existing fact is an essential element of a negligent misrepresentation claim. These plaintiffs knew prior to filing their Third Amended Complaint they could not establish at least one of the essential elements of their negligent misrepresentation claims. Sanctions under CR 11 should have been imposed because these plaintiffs asserted negligent misrepresentation claims after their testimony established the claims were meritless.

CR 26(g) sanctions should have been imposed on plaintiffs who provided false responses to discovery requests. A number of plaintiffs testified in responses to written discovery requests they had relied upon Marx/Okubo's Property Condition Assessment and Reserve Study, then recanted their testimony in depositions. The plaintiffs providing false testimony should bear the costs of the depositions required to investigate their false statements and obtain truthful answers to discovery from those plaintiffs.

III. STATEMENT OF THE CASE

A. Marx/Okubo's Property Condition Assessment Was Prepared for Use by Real Estate Development Professionals in Negotiating a Purchase.

In January of 2005, Marx/Okubo submitted to A.F. Evans Development, Inc. a proposal to perform a pre-purchase Property Condition Assessment with respect to the Forest Village Apartments.

The primary purpose of the assessment was to provide Evans Development with information to assist it in negotiating the purchase of the apartment complex. (CP 116-17, CP 119-31) Evans Development accepted Marx/Okubo's proposal by authorizing Marx/Okubo to proceed, and the documents became the contract between the parties. (CP 117, CP 132-5)

B. Marx/Okubo's Contract Limited the Scope of Its Services and Its Potential Liability and Contained a Prevailing Party Attorney's Fees Provision.

Marx/Okubo's scope of work was defined in its proposal as follows:

> Marx/Okubo's analysis will consist of one non-invasive site observation which will include accessible areas of the site, building exterior walls, roofs, common areas and 20% of the apartment units and representative attics and crawlspaces, if access is made available.

(CP 119. Emphasis added.)

Marx/Okubo's proposal incorporated Marx/Okubo's Standard Terms and Conditions. (CP 126) The Standard Terms and Conditions strictly limited use of Marx/Okubo's reports by third parties and prohibited Evans Development from distributing the reports to others. The Terms and Conditions provided as follows:

> These documents . . . may not be reproduced in advertising, brochures, or sales materials, or used by the Client for any purpose other than for which they were prepared, nor may they be used for any purpose by third parties, without the written permission of Marx/Okubo.

(CP 129) Marx/Okubo gave no permission to expand uses of the reports. (CP 118, CP 225-6)

Marx/Okubo's standard Terms and Conditions contained the following prevailing party attorney's fees provision:

> The substantially prevailing party in any arbitration, or other final binding dispute proceeding upon which the parties may agree, shall be entitled to recover from the other party all costs and expenses incurred by that party in participating in the arbitration, including reasonable attorneys' fees.

(CP 131)

C. Marx/Okubo's Property Condition Assessment Explained Its Limited Scope and the Limitations on Its Use.

In April of 2005 Marx/Okubo issued its Property Condition Assessment to Evans Development. The report noted that only Marx/Okubo's client was entitled to use the report:

> The sole purpose of this report is to observe the major aspects of the property and evaluate their condition. The use of this report is limited to the client to whom it is addressed. This report is intended to provide the basis for a statement by A.F. Evans Development, Inc., the "declarant," as described in RCW 64.34.415.

(CP 140)

D. The Trial Court Dismissed All Claims Against Marx/ Okubo, But Denied Marx/Okubo's Requests for Prevailing Party Attorney's Fees, CR 11 Sanctions and CR 26(g) Sanctions.

Marx/Okubo moved for summary judgment. It sought dismissal of plaintiffs' claims on three grounds: (a) plaintiffs were not within the limited class entitled to bring a negligent misrepresentation claim; (b) plaintiffs failed to establish that Marx/Okubo made a false statement of existing fact, an essential element of a negligent misrepresentation claim; and, (c) plaintiffs failed to establish Marx/Okubo owed an independent tort duty to them. (CP____)[1]

In opposition to Marx/Okubo's motion, plaintiffs cited to standard of care provisions included in Marx/Okubo's contract with Evans Development to support their claims. Plaintiffs argued as follows:

> The only relevant part of the standard terms here, is Okubo's warranty that "[it would] perform its services for [Evans] within the accepted practices and procedures and [would] exercise that degree of care and skill ordinarily exercised under similar circumstances by members of its profession." (Id.) In other words, Okubo warranted that it would not be negligent in carrying out the work in its proposal. . . . Its proposal was to provide Evans a fair assessment of the property so that Evans could, through Madera West, LLC,

[1] Marx/Okubo's Motion for Summary Judgment was included in the Clerk's Papers by supplemental Designation of Clerk's Papers filed on June 1, 2012. Clerk's Papers page numbers have not yet been assigned to the document. The cited reference is to pages 1-2 of the document.

> provide at least a reasonable disclosure on the condition of the property to unit owners.

(CP ___)[2] The trial court rejected plaintiffs' effort to enforce Marx/Okubo's performance warranty and granted Marx/Okubo's motion. (CP 447-9; *see also* CP 450-2)

Marx/Okubo filed a motion seeking an award of prevailing party attorney's fees and sanctions pursuant to Civil Rule 11 and Civil Rule 26(g). (CP 453-75) Marx/Okubo also sought certification of the judgment of dismissal as final pursuant to Civil Rule 54(b). The trial court denied Marx/Okubo's request for fees and sanctions but granted its motion for CR 54(b) certification. (CP 874-9, CP 881-3)

IV. ARGUMENT

A. Plaintiffs' Claims Against Marx/Okubo Were Premised Upon Duties Arising Out of a Contract Containing a Prevailing Party Attorney's Fees Provision. Marx/Okubo Prevailed on the Claims and Is Entitled to an Award of Prevailing Party Attorney's Fees Pursuant to RCW §4.84.330 and the Doctrine of Equitable Estoppel.

Neither Madera West nor any of the individual plaintiffs had a relationship with Marx/Okubo; nevertheless, they sought to obtain benefits and enforced obligations arising out of a contract

[2] Plaintiffs' Opposition to Marx/Okubo's Plaintiffs' [sic] Motion [for] Summary Judgment was included in the Clerk's Papers by supplemental Designation of Clerk's Papers filed on June 1, 2012. Clerk's Papers page numbers have not yet been assigned to the document. The cited reference is to page 5 of the document.

Marx/Okubo entered with a third party, Evans Development. Had Evans Development pursued claims similar to those asserted by plaintiffs and lost, Evans Development would be liable to Marx/Okubo under the prevailing party attorney's fees provision contained in the contract. Under RCW 4.84.330 and the doctrine of equitable estoppel plaintiffs are liable for attorney's fees incurred by Marx/Okubo in defeating plaintiffs' claims.

Appellate courts review de novo trial court determinations of whether or not grounds exist for an award of attorney's fees. Ethridge v. Hwang, 105 Wn. App. 447, 460, 20 P.3d 958 (2001) ("Whether a party is entitled to attorney's fees is an issue of law which is reviewed de novo."). Therefore, this Court's review of the trial court decision is de novo.

1. Marx/Okubo is entitled to attorney's fees under RCW §4.84.330.

Plaintiffs' tort claims against Marx/Okubo were premised upon the alleged inadequacy of services Marx/Okubo performed under a contract with Evans Development. The only duties Marx/Okubo had with respect to the Madera West project arose out of its agreement with Evans Development, which contained a prevailing party attorney's fees provision. Because the duties undertaken by Marx/Okubo upon which plaintiffs' claims were premised arose solely out of

Marx/Okubo's contract with Evans Development, plaintiffs' lawsuit was "an action on a contract" within the scope of RCW §4.84.330, and Marx/Okubo is entitled to recover its attorney's fees under the prevailing party attorney's fees provision contained within the agreement.

RCW 4.84.330 provides, in pertinent part, as follows:

> In any action on a contract . . . where such contract . . . specifically provides that attorney's fees and costs . . . shall be awarded to one of the parties, the prevailing party . . . shall be entitled to reasonable attorney's fees . . . .

RCW §4.84.330.

Attorney's fees are awardable under the statute on non-contract claims if the contract was central to the existence of the non-contract claims. Deep Water Brewing LLC v. Fairway Resources Ltd., 152 Wn. App. 229, 278, 215 P.3d 990 (2009) ("The court may award attorney fees for claims other than breach of contract when the contract is central to the existence of the claims, i.e., when the dispute actually arose from the agreements."); Brown v. Johnson, 109 Wn. App. 56, 58, 34 P.3d 1233 (2001) ("If an action in tort is based on a contract containing an attorney fee provision, the prevailing party is entitled to attorney fees." Footnotes omitted.); Edmonds v. John L. Scott Real Estate, Inc., 87 Wn. App. 834, 855-6, 942 P.2d 1072 (1997) ("The negligence claims were based upon [defendants'] . . . breach of duty

to act with due diligence in negotiating the purchase of the property on terms acceptable to . . . Edmonds. This duty was created under, and defined by, the buyer/broker agreement. . . . Therefore . . . the contractual relationship created by the agreement are central to these claims, rendering the claims 'on a contract.'"); Western Stud Welding, Inc. v. Omak Industries, Inc., 43 Wn. App. 293, 299, 716 P.2d 959 (1986) ("The lawsuit included causes of action for tortious interference with a contractual relationship and for breach of fiduciary duty, both of which have no relationship to the stock purchase and sale agreement." "The lawsuit arose out of the stock sale agreement. The broad interpretation of the 'on the contract' language of RCW 4.84.330 dictates the result that Quall is entitled to attorney's fees accrued in defending this lawsuit."). See also Eastwood v. Horse Harbor Foundation, Inc., 170 Wn.2d 380, 401-2, 241 P.3d 1256 (2010) (attorney's fees awarded pursuant to RCW 4.84.330 on tort claims arising out of lease).

The duties plaintiffs asserted Marx/Okubo breached were created by Marx/Okubo's contract with Evans Development. Without the contract there could be no tort claims against Marx/Okubo. It is beyond dispute that plaintiffs' claims arose out of Marx/Okubo's contract with Evans Development. Therefore, plaintiffs' claims were "on the contract." Based upon the cited authority, RCW 4.84.330

provides a recognized ground for an award of attorney's fees to Marx/Okubo, and the trial court erred when it denied Marx/Okubo's motion for an award of fees.

2. Marx/Okubo is entitled to attorney's fees under the doctrine of equitable estoppel.

The doctrine of equitable estoppel prevents a party from taking a position inconsistent with one previously asserted in litigation. Plaintiffs relied upon warranty provisions included in Marx/Okubo's contract with Evans Development to support their claims against Marx/Okubo. Equity requires plaintiffs be estopped from arguing the prevailing party attorney's fee provision in the contract containing the warranties is inapplicable to plaintiffs' claims.

Plaintiffs relied upon standard of care warranties contained in Marx/Okubo's contract with Evans Development to support their claims against Marx/Okubo (CP ___.[3] ". . . Okubo warranted that it would not be negligent in carrying out the work in its proposal."). Equity requires that plaintiffs be estopped from attempting to avoid the prevailing party attorney's fee burden the contract imposes.

The recent supreme court decision in Townsend v. Quadrant Corp., 173 Wn.2d 451, 268 P.3d 917 (2012), is controlling. The case

[3] Opposition to Marx/Okubo's Plaintiffs' [sic] Motion [for] Summary Judgment was included in the Clerk's Papers by supplemental Designation of Clerk's Papers filed on June 1, 2012. Clerk's Papers page numbers have not yet been assigned to the document. The cited reference is to page 5 of the document.

involved a contractual arbitration clause rather than a contractual attorney's fees provision; however, the facts are otherwise analogous to those presented here. In Townsend, as in this case, nonparty plaintiffs sought to enforce warranties arising out of a contract. The Townsend court applied the doctrine of equitable estoppel to enforce an arbitration clause in the purchase and sale agreement against the nonparties to the agreement who sought the benefit of warranties contained in the agreement. The court reasoned as follows:

> As a general rule, nonsignatories are not bound by arbitration clauses. . . . However, courts have recognized limited exceptions to this rule, including the principle of equitable estoppel. . . . Equitable estoppel "'precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes.'" In this regard, equitable estoppel may require a nonsignatory to arbitrate a claim if the person, despite never having signed the agreement, "'knowingly exploits the contract in which the agreement is contained.'"

Id. at 460-1. Our supreme court found that, because the nonparties were "attempting to enforce the terms of the PSA and . . . they base their claim for breach of warranty on the warranties contained therein," they were "knowingly exploiting the terms of the contract" and therefore bound by the arbitration provisions of the agreement. Id.

No reason exists to distinguish an arbitration provision from an attorney's fee provision for purposes of applying the doctrine of equitable estoppel. Plaintiffs' claims against Marx/Okubo arose out of services performed by Marx/Okubo under its contract with Evans Development. Plaintiffs sought to avail themselves of warranties and duties Marx/Okubo owed to Evans Development under the agreement. Plaintiffs sought to "knowingly exploit" the standard of care warranty contained in Marx/Okubo's services agreement by premising their claims on the warranty provision contained in the agreement. Without the services agreement, plaintiffs would have no basis for pursuing claims against Marx/Okubo. Plaintiffs' claims against Marx/Okubo were premised upon duties and warranties created by the Evans Development–Marx/Okubo agreement; plaintiffs should be equitably estopped from denying application of the contractual attorney's fee provision contained in that agreement. Under the doctrine of equitable estoppel, Marx/Okubo is entitled to an award of attorney's fees pursuant to the attorney's fees provision contained in its contract with Evans Development.

3. Conclusion.

The duties undertaken by Marx/Okubo upon which plaintiffs' claims were premised arose solely out of Marx/Okubo's contract with Evans Development. The contract was central to the existence of plaintiffs' non-contract claims. Furthermore, plaintiffs explicitly

sought to enforce standard of care warranties contained in Marx/ Okubo's agreement with Evans Development. On the facts presented, plaintiffs' lawsuit was "an action on a contract" under RCW §4.84.330, and Marx/Okubo is entitled to recover its fees under the prevailing party attorney's fees provision contained in the contract. Alternatively, equity requires that plaintiffs be estopped from denying applicability of the attorney's fees provision contained in the contract that was the source of the warranties they sought to enforce.

Marx/Okubo advised plaintiffs' counsel before plaintiffs filed their Third Amended Complaint that it intended to seek an award of fees under RCW §4.84.330. (CP 483-4) ("Because the duties underlying plaintiffs' claims arose out of Marx/Okubo's contract with A.F. Evans, Marx/Okubo will be entitled to an award of attorney fees under RCW §4.84.330 if plaintiffs' claims fail.") Therefore, plaintiffs were fully aware of the risk of an attorney's fee award if they pursued their claims against Marx/Okubo. Plaintiffs proceeded and failed. They should be required to pay Marx/Okubo's attorney's fees.

B. A Number of Plaintiffs Knowingly Asserted Factually Unsupported Claims Against Marx/Okubo. Those Plaintiffs Should Have Been Sanctioned Pursuant to Civil Rule 11.

Plaintiffs' negligent misrepresentation claims against Marx/ Okubo were premised upon alleged false or insufficient information

contained in Marx/Okubo's Property Condition Assessment and Reserve Study. (CP 102) Reliance on a false statement of existing fact is an essential element of a negligent misrepresentation claim. Prior to the filing of Plaintiffs' Third Amended Complaint, which asserted negligent misrepresentation claims against Marx/Okubo, 15 plaintiffs testified in interrogatory responses or by deposition that they either did not review, or reviewed but did not rely upon, Marx/Okubo's Property Condition Assessment and Reserve Study; four plaintiffs testified they did not rely on one or the other document. These plaintiffs knew, prior to the filing of Plaintiffs' Third Amended Complaint, they could not establish at least one of the essential elements of their negligent misrepresentation claims. Nonetheless, plaintiffs re-asserted negligent misrepresentation claims against Marx/Okubo in their Third Amended Complaint.

CR 11 sanctions are appropriate where three conditions are met: a claim was not well-grounded in fact, the claim was not warranted by existing law, and the party or attorney signing the pleading failed to conduct a reasonable inquiry into the factual or legal basis of the action. Housing Authority of City of Everett v. Kirby, 154 Wn. App. 842, 859-60, 226 P.3d 222 (2010), abrogated on other grounds; Housing Authority of City of Seattle v. Bin, 163 Wn. App. 367, 260 P.3d 900 (2011). Each condition to imposition of CR 11

sanctions is satisfied here. Under the facts presented, sanctions should have been imposed.

The appropriateness of a trial court's decision regarding the imposition of sanctions is reviewed for an abuse of discretion. Kirby, supra, 154 Wn. App. at 849. A trial court abuses its discretion when its order is manifestly unreasonable, based upon untenable grounds or based upon an erroneous view of the law. Washington State Physicians Ins. Exchange & Ass'n v. Fisons, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

In March and June of 2011 Marx/Okubo propounded written discovery requests to 36 individual plaintiffs.[4] Marx/Okubo asked each plaintiff the following questions[5]:

> Interrogatory No. 9. Did you read the Okubo Report referred to in your Amended Complaint prior to the date identified in your response to Interrogatory No. 8 [the date ownership was acquired]?
>
> . . . .
>
> Interrogatory No. 13. Did you read the Reserve Study referred to in your Amended Complaint prior to the date identified in your response to Interrogatory No. 8 [the date ownership was acquired]?
>
> . . . .

[4] Fourteen plaintiffs were joined in the original complaint naming Marx/Okubo as a defendant. (CP 166-180) Twenty-two additional plaintiffs were joined in October of 2011. (CP 237-253)

[5] The interrogatory numbers changed in the discovery requests served on the newly joined plaintiffs, but the questions remained the same.

> Interrogatory No. 16. Do you contend you relied upon information supplied by Marx/Okubo that was false?
>
> Interrogatory No. 17. If your answer to Interrogatory No. 16 is anything other than an unqualified "no," please provide the following information:
>
> (a) identify all false information you contend Marx/Okubo supplied;
>
> . . . .

(CP 177-8. Emphasis added.)

Ten plaintiffs (Carter, Crettol, Rockey, Winkler, Dannenberg, Gresette, Peterson, Octave, Harrison and Trujillo) testified in discovery responses signed prior to the filing of Plaintiffs' Third Amended Complaint they did not read either Marx/Okubo's Property Condition Assessment or Reserve Study prior to their purchase of a unit at the Madera West Condominiums. (CP 283-7, CP 492-3, CP 566-70) Three plaintiffs (Berry, Jones and Perry) testified in discovery responses they did not read the Reserve Study prior to their purchase, and one plaintiff (Fidler) testified he did not read the Property Condition Assessment prior to his purchase. (CP 568-71) Five plaintiffs (Fuller, Donaldson, Fidler, Perry and Fassler) testified in discovery responses they reviewed Marx/Okubo's Property Condition Assessment and/or Reserve Study prior to purchase and that they relied on false information provided by Marx/Okubo, then acknowledged in deposition testimony prior to the filing of the Third Amended Complaint they did not review or rely on the documents, or any other false

information supplied by Marx/Okubo, prior to purchasing their units. (CP 566-7, CP 569-71)

In June of 2011 the trial court dismissed without prejudice plaintiffs' claims against Marx/Okubo contained in their Second Amended Complaint for failure to comply with RCW Ch. 64.50 (which requires a pre-litigation notice). Before plaintiffs filed their Third Amended Complaint reasserting negligent misrepresentation claims against Marx/Okubo, Marx/Okubo's counsel suggested to plaintiffs' counsel they consider CR 11 before refiling claims identical to those dismissed:

> You mentioned in an e-mail yesterday the claims plaintiffs will be asserting in their new amended complaint are the same claims that were asserted in the prior amended complaint. The deposition testimony and discovery responses of a number of plaintiffs established that their negligent misrepresentation claims were meritless. You might consider the impact Civil Rule 11 may have on the refiling of those claims.

(CP 485-6) See also CP 485 ("The testimony of a number of plaintiffs made clear they cannot establish factually at least some of the essential elements of their negligent misrepresentation claims.").

Madera West and numerous individual plaintiffs re-asserted identical negligent misrepresentation claims against Marx/Okubo in their Third Amended Complaint, including claims by 15 plaintiffs who previously testified they had not reviewed either Marx/Okubo's Condition Assessment or the Reserve Study prior to purchase, and

claims by four plaintiffs who testified they had not reviewed at least one of the documents before purchase. (CP 102-3)

CR 11 provides in pertinent part as follows:

> The signature of a party or of an attorney constitutes a certificate by the party or attorney . . . that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact . . . .

CR 11(a). "CR 11 requires attorneys to 'stop, think and investigate more carefully before serving and filing papers.'" Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 219, 829 P.2d 1099 (1992).

Sanctions are appropriate where a plaintiff continues to pursue a claim after discovery responses have revealed the facts do not support essential elements of the claim. See, MacDonald v. Korum Ford, 80 Wn. App. 877, 888, 912 P.2d 1052 ("[T]he trial court did not abuse its discretion in concluding that after MacDonald's deposition, Cain lacked a factual basis for pursuing a hostile environment claim."). See also Manteufel v. Safeco, 117 Wn. App. 168, 177, 68 P.3d 1093 (2003) ("Moreover, even after Manteufel failed to perform a reasonable investigation, he ignored . . . Wathen's warning that his arguments had no factual or legal basis . . . . The frivolousness of Manteufel's suit would have been clear to Manteufel had he simply read the cases Wathen provided.").

Plaintiffs Carter (CP 574-5), Crettol (CP 587-8), Rockey (CP 600-1), Winkler (CP 605-6), Dannenberg (CP 634-5), Berry (CP 638-9), Jones (CP 649), Gresette (CP 663-4), Peterson (CP 667-8), Octave (CP 671-2), Harrison (CP 686-7), Trujillo (CP 690-1), Fidler (CP 708) and Perry (CP 720) admitted in responses to discovery requests they did not review or rely upon the Marx/Okubo Property Condition Assessment and/or Reserve Study prior to purchasing their units. Plaintiffs Fuller (CP 583), Berven (CP 614-5), Miller (CP 625-30), Berry (CP 642-3), Jones (CP 656-60), Donaldson (CP 682-3), White (CP 698-704), Fidler (CP 713-16), Perry (CP 724-9) and Fassler (CP 736-43) admitted in deposition they did not review or rely upon the Property Condition Assessment and/or Reserve Study in purchasing their units. After plaintiffs' claims were dismissed without prejudice, plaintiffs were advised through counsel that the refiling of negligent misrepresentation claims by plaintiffs who had not relied upon the Property Condition Assessment and/or Reserve Study might violate CR 11. Plaintiffs ignored the warning and refiled the meritless claims. Based upon the authority cited, CR 11 sanctions were warranted.

The trial court denied Marx/Okubo's motion for sanctions without explanation. A likely reason for the denial was the court's misapplication of the law to the facts presented. Misapplication of the

law is an abuse of discretion. Fison, supra, 122 Wn.2d at 345-6. Under the circumstances, the trial court abused its discretion and its order denying Marx/Okubo's motions should be reversed.

C. A Number of Plaintiffs Provided False Responses to Discovery Requests. The Trial Court Should Have Sanctioned Those Plaintiffs Under CR 26(g).

A number of plaintiffs testified in response to written discovery requests that they had reviewed and/or relied upon Marx/Okubo's Property Condition Assessment and Reserve Study in purchasing their units, then recanted that testimony in response to deposition questions. The trial court erred by not sanctioning these plaintiffs for providing false testimony in response to discovery requests.

Trial court orders applying the sanction provisions of Civil Rule 26(g) are reviewed for an abuse of discretion. Fison, supra, 122 Wn.2d at 338. A trial court's application of an erroneous legal standard in ruling on a motion for sanctions for discovery abuse is an abuse of discretion. (Id. 345-6.)

Plaintiff Fuller testified in response to written discovery requests that he "relied upon information supplied by Marx/Okubo that was false." (CP 578-80) His deposition testimony directly contradicted his interrogatory responses:

Q. Can you recall any specific portion of this reserve study that you reviewed prior to purchasing your unit?

A. Nothing specific.

. . . .

Q. Did you take any action as a result of anything you read in the reserve study?

A. Not that I remember.

. . . .

Q. Did you rely upon any representation in either the Okubo report or reserve study prior to the purchase of your unit?

A. Not that I remember.

(CP 583-4)

Diana Crettol testified in interrogatory responses that she "relied upon information supplied by Marx/Okubo that was false." (CP 589) In deposition testimony Ms. Crettol admitted that her interrogatory response was inaccurate:

Q. . . . You stated earlier that you had never read either the condition – property condition assessment or the reserve study by Marx/Okubo; however, you state here that you did rely on information supplied by them that was false. Can you tell me what information you're referring to?

A. I might have misunderstood the question.

Q. Okay. So as you sit here today, is there any information from Marx/Okubo that you believe was false prior to purchasing your unit?

A. I didn't have any information to rely on.

(CP 594-5)

Jayne Miller testified in discovery responses that "she relied upon information supplied by Marx/Okubo that was false." (CP 621) Under deposition questioning she could not identify any information to support her response to the discovery request:

> Q. Did you take any actions based upon any information that you read in the Marx/Okubo reserve study?
>
> A. When you say when, do you mean before I purchased?
>
> Q. Yes.
>
> A. No.
>
> Q. So prior to the purchase of your unit, you did not take any action based on anything –
>
> A. No.
>
> Q. – in the reserve study? . . . .
>
> . . . .
>
> Q. When you – prior to the purchase of your unit, what information did you rely upon in the property condition assessment report that led you to purchase your unit?
>
> A. What led me to purchase my unit was what was told to me by the sales agent.
>
> . . . .
>
> Q. Did Mr. Nelson [the sales agent] ever talk to you about Marx/Okubo?
>
> A. No.
>
> . . . .

Q. So if we can focus in on just Marx/Okubo, because that is the person I represent today. Apart from what the sales agent told you, what specifically did you rely upon in this property condition assessment report that convinced you one way or another to purchase your unit?

A. I don't know.

Q. Was there anything?

A. I don't know.

(CP 627-31)

Jonathan Jones testified in response to interrogatories that he read and "relied fairly heavily on" Marx/Okubo's Property Condition Assessment in purchasing his condominium. (CP 648, CP 650) He further testified in his responses that he relied upon false information supplied by Marx/Okubo. (Id.) Mr. Jones acknowledged in deposition testimony his discovery answers were incorrect:

Q. And you can just tell me what – as you sit here today what you recall, so feel free to just give me your honest recollection. I'm going to show you the Okubo report and that is located in Exhibit-32 at tab H. So earlier you told me that you had not read any documents other than the punch list and the purchase and sale agreement; is that right?

A. Mm-hm, yes.

Q. And the Okubo report which is here in front of you at tab H –

A. Mm-hm, yes.

Q. – is not the punch list, correct?

A. That is correct.

Q. And this is not the purchase and sale agreement, correct?

A. Correct.

Q. So since you only read those two documents, would it be accurate to say that you did not read the property condition assessment before you bought your unit?

A. That is correct.

Q. So the answer you gave here, Yes, is that a misunderstanding?

A. Yes, I believe I misread the question.

. . . .

Q. So that should actually read that you did not read the Okubo report before purchase, correct?

A. That is correct.

Q. And because you did not read the Marx/Okubo report which is here in Exhibit-32 at tab H before purchase, you could not have relied on it; isn't that right?

MR. CASEY: Object to form.

A. That would appear to be correct.

(CP 652-60)

Michelle Donaldson's discovery responses included apparent instructions from counsel on how to respond to the questions. For example, Ms. Donaldson was instructed as follows:

> Obviously you will not remember the date in which you reviewed the report, but please confirm you skimmed and relied upon it before purchasing your unit

and answer subparts as best you can. Confirm it was read during purchase in your answers.

(CP 676, CP 678) Consistent with the instructions Ms. Donaldson testified in her interrogatory responses the Marx/Okubo Condition Assessment was "skimmed by me before purchasing my unit (E201)." (CP 679) She further testified in the discovery responses: "I used this information to make a decision to purchase my unit." (CP 679)

In deposition testimony Ms. Donaldson was unable to identify anything in the Property Condition Assessment she relied upon:

Q. But right now we're talking about the report itself which is different from the reserve study. Is there anything in the report that you specifically identify -

A. I don't.

Q. – as something you relied on?

A. I don't.

Q. So there's nothing in the report that you relied on?

A. Not that I recall.

Q. Was there anything in the report that was misleading that you can recall?

A. Not that I recall.

(CP 682-3)

Rosie White testified in responses to written discovery requests that she read both the Marx/Okubo Property Condition Assessment and Reserve Study before she acquired an ownership interest in her

unit. (CP 694-5) She testified by deposition her interrogatory response was false:

> Q. But you said that you didn't read it prior to purchasing your unit?
>
> A. No, definitely didn't go through all this.
>
> Q. You seem pretty sure that you didn't read it?
>
> A. Yeah, I am because just looking at it gave me a headache.
>
> . . . .
>
> Q. In your response to when we asked you when you read it and where you were, you stated that you were in the Madera West sales office with your real estate agent that would have been during purchase. Was that a misstatement?
>
> A. Yeah, that's a misstatement. I tell you, that's a misstatement.
>
> Q. Okay.
>
> . . . .
>
> Q. So the next answer you gave in subsection D on Page 15 says, I relied upon the Okubo report before purchasing my unit. Do you see that, Page 15, Section (sic) D at the top?
>
> . . . .
>
> A. That is – that's a misstatement too.
>
> Q. Okay.
>
> A. Because I'm just – because I want to be as honest as possible and –
>
> Q. Okay. What would be the correct answer?

A. I read it at home.

Q. After purchasing your unit?

A. Yes.

Q. So you could not have relied on the report before purchasing your unit because you didn't read it at that time?

A. That's correct. That is correct.

Q. So in all of the instances here where you say you relied on the report prior to the purchase of your unit, would you now retract those statements?

A. I – I would.

. . . .

Q. So the same question as I had with the property condition assessment. In your answer on Page 16, you stated that you relied upon the reserve study report before purchasing my unit. Do you see that?

A. Yes.

Q. But, in fact, since you didn't read it before purchasing your unit, you could not have relied on it?

A. Correct.

. . . .

Q. And neither of these documents were documents you could have relied on before purchase, correct?

A. Correct.

(CP 699-704)

Ryan Fidler testified in interrogatory responses that he read Marx/Okubo's Reserve study before he acquired an ownership

interest in his condominium unit. (CP 709) He recanted his testimony under deposition questioning:

> Q. And you just testified that you had never seen the Marx/Okubo report or anything with the Marx/ Okubo logo on it prior to purchasing your unit. Is that a fair statement?
>
> A. That is correct.
>
> . . . .
>
> Q. This is the Marx/Okubo reserve study. Do you recall seeing this Exhibit-I prior to the purchase of your unit?
>
> A. I have not.
>
> Q. So would you agree with me that if you never saw the Marx/Okubo report, Exhibit-H, and the Marx/ Okubo reserve study, Exhibit-I, if you didn't see those two prior to the purchase of your unit, you could not have relied on anything contained in these reports prior to purchasing your unit?
>
> A. Correct.

(CP 713-16)

Scott Perry testified in responses to written discovery requests that he had reviewed Marx/Okubo's Condition Assessment prior to acquiring an ownership interest in a home in the project. (CP 719) In subsequent deposition testimony Mr. Perry recanted his prior testimony and explained he answered interrogatories falsely out of aggravation with his situation:

> Q. (By Ms. Kasyanyuk) These are what are called interrogatories and requests for production, just a

fancy way of lawyers asking questions. Can I have you flip to the very last page?

A. (Complies.)

Q. For verification purposes, can you verify that that is your signature?

A. Yes.

Q. And do you agree that you gave responses to these questions on or about April 30, 2011?

A. Yes.

. . . .

Q. And some of these questions asked about two documents that I also wanted to speak to you about today. The first document is the – what we're referring to as the Okubo report. Have you ever read the Okubo report?

A. No.

Q. Have you ever read a document entitled, Property Condition Assessment?

A. Not that I recall.

. . . .

Q. Do you see interrogatory number nine at the top of the document?

A. Yes.

Q. And we asked you that question back in April as to whether you read the report, and your answer at that time was yes. Do you see that?

A. Yes.

Q. And today you told me that you hadn't, so could you clarify that for me?

A. I can't recall.

. . . .

Q. And take a look at the first page there, and I'll give you a moment to just kind of flip through the pages. I'll represent to you this is the property condition assessment.

A. I can't recall reading that. I'm sorry I misrepresented that.

. . . .

Q. (By Ms. Kasyanyuk) Did you rely on something in this report – on any representation in this report prior to buying your unit?

A. I can't recall that.

. . . .

Q. Do you contend that you relied upon information supplied by Marx/Okubo that was false?

A. I can't remember reading all this stuff to be honest with you.

Q. So you –

A. I probably went through this too quickly. Just aggravated that I'm in this situation that I'm in right now with people not following through doing what they're supposed to do. I think that's probably why I said yeah I must have read it.

. . . .

Q. When you say, I was probably aggravated when I went through this, you mean when you answered these questions?

A. Yes.

(CP 724-729)

Finally, Thomas Fassler testified he had "read the Okubo Report" prior to acquiring an ownership interest in his unit. (CP 732) In deposition testimony, he stated he relied upon counsel in responding to written discovery requests, and acknowledged the testimony was false:

> Q. Do you have any recollection sitting here today of reviewing the Marx/Okubo report other than your recollection of the pictures?
>
> A. Other than remembering I saw these pictures, no.
>
> . . . .
>
> Q. Interrogatory number nine asks, Did you read the Okubo report referred to your amended complaint prior to the date identified in your response to interrogatory number eight, and the response is yes. Did you provide input into that question and response?
>
> A. I don't recall. At a board meeting in a general way, I might have, but I don't recall specifically.
>
> Q. Why did you answer yes to the question, did you read the Okubo report referred to in your amended complaint prior to the date identified in your response to interrogatory number eight if you didn't recall?
>
> A. Again, I trusted counsel who had all the notes from the meetings.
>
> . . . .
>
> Q. And what I'm really after is if you have a recollection of reading anything specific in the Marx/Okubo report sitting here today.
>
> A. Specifically, no.

(CP 736-43)

Civil Rule 26(g) is the discovery pleadings counterpart to CR 11. The rule provides that a signature on a discovery request "constitutes a certification that he has read the . . . response . . . and that to the best of his knowledge, information and belief formed after a reasonable inquiry it is . . . consistent with these rules . . . ." CR 26(g). Like CR 11, CR 26(g) provides for sanctions:

> If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

CR 26(g) (emphasis added). CR 26(g) sanctions are appropriate where inaccurate and/or misleading responses to discovery requests cause a party to incur unnecessary deposition expenses. Clipse v. State, 61 Wn. App. 94, 102, 808 P.2d 777 (1991) ("Clipse's discovery disclosure was misleading and respondent's efforts toward deposing these individuals caused them unnecessary expenditures of time and money." Footnote omitted.). Once a court finds CR 26(g) was violated, sanctions are mandatory. Clipse, supra, 61 Wn. App. at 99 ("Although the nature of the sanction is a matter of judicial discretion, the rule mandates imposing sanctions if they are appropriate under the rule.").

In Washington State Physicians Ins. Exchange & Ass'n. v Fisons Corp., 122 Wn.2d 299, 858 P.2d 1054 (1993), the supreme court outlined what a court should do when faced with a request for CR 26(g) sanctions:

> . . . CR 26(g) makes the imposition of sanctions mandatory, if a violation of the rule is found. . . . what the sanctions should be and against whom they should be imposed is a question that cannot be fairly answered without further factual inquiry and that is the trial court's function. While we recognize that the issue of imposition of sanctions upon attorneys is a difficult and disagreeable task for a trial judge, it is a necessary one if our system is to remain accessible and responsible. . . .
>
> The purpose of sanction orders are to deter, to punish, to compensate and to educate. Where compensation to litigants is appropriate, then sanctions should include a compensation award. . . . In the present case, sanctions need to be severe enough to deter these attorneys and others from participating in this kind of conduct in the future.

Fisons, 122 Wn.2d at 354-6.

Plaintiffs Fuller, Crettol, Miller, Jones, Donaldson, White, Fidler, Perry and Fassler falsely asserted in responses to Marx/Okubo's discovery requests that they had relied upon Marx/Okubo's Property Condition Assessment and/or Reserve Study prior to purchasing their units. They were apparently instructed by counsel to "confirm it was read during purchase" in their answers. (CP 676, CP 678) When Marx/Okubo deposed these plaintiffs they acknowledged their written discovery responses were false. Under CR 26(g) and Fisons the trial

court should have awarded as sanctions the costs and attorney's fees Marx/Okubo incurred obtaining truthful responses from these plaintiffs through depositions.

The trial court provided no explanation for its decision to deny sanctions under CR 26(g). The fact that the certification rule was violated is so clear from the evidence presented that the trial court must have applied an incorrect legal standard. "Where, as here, the trial judge has applied the wrong legal standard to evidence consisting entirely of written documents and argument of counsel, an appellate court may independently review the evidence to determine whether a violation of the certification rule occurred." Fisons, supra, 122 Wn.2d at 345-6.

Based upon the facts presented and applicable law, this Court should reverse the trial court's order denying CR 26(g) sanctions and remand to the trial court for imposition of adequate sanctions.

D. Marx/Okubo is Entitled to Attorney's Fees on Appeal.

"A contractual provision that allows for attorneys fees and costs is authority to grant such fees and costs on appeal to the prevailing party." Evergreen Moneysource Mortg. Co. v. Shannon, ___ Wn. App. ___, ___, 274 P.3d 375, 384 (February 16, 2012). See also Gray v. Bourgette Construction, LLC, 160 Wn. App. 334, 343, 249 P.3d 644 (2011) ("[I]n general, where a prevailing party is entitled to

attorney fees below, they are entitled to attorney fees if they prevail on Appeal."). Because Marx/Okubo was entitled to attorney's fees in the trial court, it is entitled to attorney's fees on appeal. Therefore, this Court should award Marx/Okubo its attorney's fees pursuant to RAP 18.1.

V. CONCLUSION

Marx/Okubo is entitled to an award of prevailing party attorney's fees under RCW §4.84.330 and the doctrine of equitable estoppel. Therefore, the trial court's order denying Marx/Okubo's request for fees was error. The Court should reverse the trial court's order and remand for entry of an attorney's fee award.

Plaintiffs Carter, Crettol, Rockey, Winkler, Dannenberg, Gresette, Peterson, Octave, Harrison, Trujillo, Berry, Jones, Perry, Fuller, Donaldson, Fidler and Fassler asserted and pursued claims against Marx/Okubo after their testimony established they could not demonstrate essential elements of their claims. CR 11 sanctions were warranted against these plaintiffs. The trial court's denial of CR 11 sanctions was error. The Court should reverse the trial court's order and remand for entry of appropriate sanctions.

Plaintiffs Fuller, Crettol, Miller, Jones, Donaldson, White, Fidler, Perry and Fassler provided false responses to written discovery requests in violation of CR 26(g). Sanctions under CR 26(g) were

warranted and the trial court's order denying Marx/Okubo's motion was error. The Court should reverse the trial court's order and remand for imposition of appropriate sanctions.

Marx/Okubo was entitled to attorney's fees below and therefore is entitled to attorney's fees on appeal. The Court should award Marx/Okubo its attorney's fees on appeal.

DATED this 1st day of June, 2011.

Respectfully submitted,

Kenneth G. Yalowitz, WSBA 12017
Amber L. Hardwick, WSBA 41828
Natalya P. Markovich, WSBA 43099
Attorneys for Appellant
Marx/Okubo, Ltd.

GREEN & YALOWITZ, PLLC
1420 Fifth Avenue, Ste. 2010
Seattle, WA 98101-4087
206-622-1400
206-583-2707 (fax)
kgy@gyseattle.com

\\gyserver\usershares\laurawilkinson\gy\2032\marxokubo.madera\p\mo-appellate brief 6.1.12.docx

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the United States and the State of Washington that on this date I served in the manner noted below, a true and correct copy of the foregoing document on the following:

Todd Skoglund Casey & Skoglund PLLC 114 W. McGraw St. Seattle, WA 98119 *Attorneys for Plaintiffs* todd@casey-skoglund.com	*Via Messenger and Email*
Robert L. Bowman Cozen O'Connor 1201 Third Avenue, Ste. 5200 Seattle, WA 98101 *Attorneys for Steadfast Construction, Inc.* rbowman@cozen.com	*Via Messenger and Email*

DATED this 1st day of June, 2012, at Seattle, Washington.

Laura Wilkinson