

No. 63918-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

THE MARINA CONDOMINIUM HOMEOWNERS ASSOCIATION,
Respondent,

v.

THE STRATFORD AT THE MARINA LLC,
Appellant,

APPELLANT'S REPLY BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON

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- I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THE ASSOCIATION DID NOT SHOW ENTITLEMENT TO JUDGMENT AS A MATTER OF LAW.**
- A. The Association’s Arguments Regarding the Implied Warranty of “Quality” Rest Upon Language Removed from the Washington Condominium Act in 1992.**

The Association moved for partial summary judgment on the grounds that certain features of the Marina Condominium violated the implied warranty of quality workmanship, materials, and construction contained in RCW § 4.34.445(2)(a)-(d). CP 41. The Stratford at the Marina LLC (“SAM”) showed, in its opening brief, that it did not “ma[ke] or contract for” the construction that the Association alleges is defective and therefore did not make any implied warranty of quality regarding such construction. Opening Br. at 27-29. In its opposition brief, the Association does not dispute that SAM did not make or contract for the construction in question. Assoc. Br. at 23-24. Instead, relying on legislative history cited in *Park Avenue Condominium Owners Ass’n v. Buchan Development, L.L.C.*, 117 Wn. App. 369, 380 (2003), the Association argues that the implied warranty of quality workmanship applies to the entire condominium, even if SAM had no involvement in the allegedly defective construction. Assoc. Br. at 23.

The Association is mistaken. Its argument rests on language that was removed from the Washington Condominium Act (“WCA”) in 1992,

more than 13 years before the condominium at issue here was created. CP 50-125. Prior to 1992, RCW § 64.34.445(2) extended the implied warranty of quality workmanship not only to improvements that the declarant “made or contracted for,” but also to improvements “made by any person before the creation of the condominium.” Session Laws, Ch. 220, § 26, at 1032. In 1992, the legislature passed Substitute Senate Bill 6042, which specifically removed that language, as follows:

(2) A declarant and any dealer impliedly warrants . . . that any improvements made or contracted for by ~~((the person, or made by any person before the creation of the condominium,))~~ such declarant or dealer will be

Id. Thus in 2005, when the Marina Condominium Project at issue in this case was created, the implied warranty of quality extended only to improvements “made or contracted for by [the] declarant or dealer.”

In its motion for summary judgment, the Association stated that the alleged defects were “the result of original construction and/or installation and no evidence exists that any subsequent event caused these defects,” CP 42 (emphasis added). Thus, the Association admitted below, and does not dispute on appeal, that SAM did not make, or contract for, the original 1962 construction and/or installation alleged to be defective.¹ Because SAM did not make an implied warranty of quality with respect to

¹ See CP 289, 305, 513.

the allegedly defective construction, the Association's motion for partial summary judgment could not, and did not, demonstrate that SAM breached that warranty as a matter of law, as required by CR 56(c).

B. The Association Does Not Dispute That The Construction Defect Evidence It Submitted Was Purportedly Based on Inspection of a Different Project: "The Regata Project."

SAM's opening brief points to a second, independent basis for holding that the Association's motion for partial summary judgment does not demonstrate entitlement to judgment as a matter of law. Opening Br. at 30. Specifically, there is insufficient foundation for the assertion that there are construction defects at the project. The sole evidence supporting the Association's defect arguments is the inspection conducted by the Association's expert, Keith Soltner. CP 127-32. Mr. Soltner, however, based his conclusions on inspection of an entirely different project:

I have had the opportunity to observe the conditions at the Regata project when siding, trim and other material have been removed to allow examination of underlying components. These opportunities have enabled me to observe construction conditions that are normally hidden from sight.

CP 128 ¶ 6 (emphasis added). As the Association itself argues later in its brief, CR 56(e) prevents summary judgment unless the moving party demonstrates "the affiant is competent to testify to the matters stated therein," and the affiant or declarant must provide foundational facts that would be necessary if the expert were testifying at trial." Assoc. Br. at 37

(quoting CR 56 (e) and 15A *Washington Prac.* § 25.9). Because Mr. Soltner's declaration provides no competent evidence that the necessary inspection of the Marina Condominiums occurred, the Association's moving papers do not demonstrate any foundation for alleged construction defects.² The Association's moving papers therefore fail to demonstrate entitlement to judgment as a matter of law.

These errors are properly before this Court for review, because SAM's opposition pleadings specifically argued that the allegedly defective construction was not conducted by SAM, CP 158-61, 203-51, 259-62, 275-332, and also because they show a failure to establish facts upon which relief can be granted. RAP 2.5(a). This Court should reverse the trial court's order granting summary judgment on the Association's claims that the implied warranty of quality workmanship was violated and vacate the resulting judgments.

C. The Association Cannot Save Its Summary Judgment Order by Asking This Court to Adjudicate A Different Motion.

The Association's motion for summary judgment addresses only the implied warranty of quality. CP29, 41-42. SAM therefore opposed

² The Association suggests that it filed an errata correcting this problem. Assoc. Br. at 5 n.1; CP 153. To the contrary, the Association's errata addressed the caption on Mr. Solter's declaration. CP 153. The Association reaffirmed that "[t]he body of the declaration, however, is correct." *Id.*

that motion on those grounds. More specifically, SAM showed that the allegedly defective conditions did not relate to improvements that SAM made or contracted for. Opening Br. at 14-15; CP 303-332.

Having failed to establish a violation of the implied warranty of quality, the Association argues that this Court should allow it, on appeal, to seek summary judgment on an entirely different legal theory without giving SAM any opportunity to present evidence in opposition to such motion. Assoc. Br. at 25-26. That request is contrary to CR 56 and SAM's Due Process rights and should therefore be denied.³

The Association argues, however, that RAP 2.5(a) allows it to bring this new motion for summary judgment on appeal because the Association, in essence, is merely seeking to affirm the trial court on different grounds. As discussed below, the power to affirm on other legal grounds is limited to arguments presented and fully developed before the trial court. That did not happen here. In addition, the Court should be especially chary of the Association's invitation to rule on the scope of the implied warranty of suitability because such warranty is markedly

³ Both CR 56 and Due Process require that SAM be given an opportunity to know the grounds on which summary judgment is being sought and to submit evidence and argument in opposition to summary judgment. *See* CR 56(c); *cf. Smith v. Behr*, 113 Wn.2d 306, 333-34, 54 P.3d 665 (2002) (noting that even defaulted defendants have a Due Process right to notice

different than the implied warranty of quality workmanship, and there are no appellate opinions addressing the scope of construction defects that are “so serious as to render the condominium unsuitable for ordinary purposes of real estate of similar type.” *Park Avenue*, 117 Wn. App. at 380. Appellate rulings in this unsettled and important area of law should not be issued without a developed record and explicit briefing below.

The Association cites two cases in support of its argument that this Court can, on appeal, grant summary judgment on entirely different grounds than those set forth in the Association’s motion. Neither case, however, supports the Association’s argument. In fact, in the primary case on which the Association relies, *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 160 P.3d 1089 (2007) (*Lunsford II*), the Court of Appeals specifically remanded on similar facts. There, the defendant had prevailed on summary judgment. *Id.* at 337. On appeal, the grant of summary judgment was revealed to be in error, and the defendant sought to defend its summary judgment on alternative grounds. *Id.* Specifically, the defendant argued that the rule imposing strict liability could not be imposed retroactively. *Id.* at 337. This Court refused to consider that issue on appeal, holding that because “[the defendant] had not presented

and a hearing at which they can present evidence, before a judgment can be entered against them).

its retroactivity argument to the trial court below, this court declined to address that issue, leaving it to [the defendant] to raise on remand.” *Id.* ; see also *Lunsford v. Saberhagen Holdings, Inc.*, 125 Wn. App. 784, 792, 106 P.3d 808 (2005) (*Lunsford I*). On remand, the defendant again moved for summary judgment, and both parties specifically were able to address the “‘retroactivity’ argument.” *Lunsford II*, 139 Wn. App. at 339. Because both parties had addressed the issue, the Court of Appeals held that the issue was properly before it. *Id.*

Here, in contrast, the Association did not address the implied warranty of suitability anywhere in its moving papers or supporting declarations, and SAM therefore did not have occasion to address that warranty in its opposition papers. Opening Br. at 14-15; CP 303-332. As this Court held in *Park Avenue*, there are substantial differences between the implied warranties of quality and suitability. 117 Wn. App. at 379-83. For example, a building code violation can serve as a violation of the implied warranty of quality but does not violate the warranty of suitability unless the violation is “so serious as to render the condominium unsuitable for ordinary purposes.” *Id.* at 383. Thus, the facts of this case are akin to those in *Lunsford I*, in which this Court remanded to allow consideration of the new legal argument.

The Association also cites *Home Realty Lynnwood, Inc. v. Walsh*, 146 Wn. App. 231, 189 P.3d 253 (2008), but that case does not assist the Association. There, the party who had prevailed on summary judgment before the trial court urged that the Court of Appeals affirm on alternative grounds. *Id.* at 239-42. The Court declined to do so, even though both parties had “an adequate opportunity to present materials and argument in rebuttal,” *id.* at 236, because there was not “conclusive evidence” on that point, and the Court therefore “remand[ed] to the trial court for further proceedings,” *id.* at 242. Here, unlike in *Home Realty*, SAM has not had an “adequate opportunity” to address the Association’s newly raised argument regarding the implied warranty of suitability. Thus, remand is proper. Even if SAM had been given an “adequate opportunity,” *Home Realty* would still require remand because the record here, as in *Home Realty*, does not contain “conclusive evidence” regarding alleged lack of suitability.⁴ Accordingly, there is no basis for allowing the Association to seek summary judgment on grounds not addressed in its moving papers.

⁴ The Association cites three defects that purportedly demonstrate a breach of the implied warranty of suitability. Assoc. Br. at 28. Two of the three relate to alleged failure to follow building codes. As this Court held in *Park Avenue*, however, “[c]ode compliance is part of the warranty of quality,” 117 Wn. App. at 381, and it is not implicated in the suitability warranty unless the code violation is “so serious as to render the condominium unsuitable for ordinary purposes of real estate of similar type.” *Id.* at 383. There is no evidence provided—and certainly not

Finally, even if this Court believed that it could reach the implied warranty of suitability, it should not do so as a prudential matter, because no Washington appellate court has yet addressed the quantum of evidence necessary to establish a violation of the implied warranty of suitability, and that issue is critically important to untold number of pending cases and potential cases. Because this Court's guidance is important to lower courts and to the building industry, it should not reach that issue on an incomplete record, in a case in which the issue was not briefed below. The Court should deny the Association's request to affirm the trial court's summary judgment ruling on a legal theory not presented below.

II. THE TRIAL COURT ERRED IN DISREGARDING SAM'S SUMMARY JUDGMENT OPPOSITION DECLARATIONS BASED ON THE LACK OF EVIDENTIARY FOUNDATION.

If the Court agrees with SAM that the Association's moving papers do not demonstrate that the Association is entitled to judgment as a matter of law, it need not address this issue. If the Court disagrees, however,

“conclusive evidence”—that the alleged code violations were so serious as to render the condominium unsuitable. The Association likewise points to the conclusory statement that there were “framing components water stained and damaged from window leakage.” CP 128. There was no evidence of where, how extensive, or how severe this alleged damage was. There certainly was nothing sufficient to establish that this alleged damage was “so serious as to render the condominium unsuitable for ordinary purposes of real estate of similar type.” *Park Avenue*, 117 Wn. App. at 380. There is no basis for a summary judgment order that SAM violated the implied warranty of suitability.

reversal of the trial court's summary judgment order is still necessary because the Court erred in refusing to consider the declarations SAM submitted in opposition to the summary judgment motion.

SAM's opposition declarations were considered by the trial court when it ruled on the Association's summary judgment motion. The court's March 11, 2009 order granting summary judgment notes that the pleadings before the court include the "opposing pleadings submitted by Defendants [sic]." CP 680. Likewise, the trial court's April 27, 2009 order notes that "[d]espite the unusual manner of presentation of this Defendant's claims and defenses to said Motion for Summary Judgment the Court has reviewed the materials presented . . .," CP 686 (emphasis added), and the order goes on to say that "the Court has reviewed the Defendant's Response to Plaintiff's Motion for Partial Summary Judgment . . .," CP 687. Thus, in ruling on summary judgment, the Court considered the declaration of SAM's expert, Donald D. Schellberg, AIA, and the declaration of George Webb, each of which were originally filed on February 19, 2009 and re-filed in March 2009. Assoc. Br. at 34 (admitting that SAM's opposition pleadings were served on February 19, 2009); CP 259-62 (declarations of Webb and Schellberg filed on February 19), 287-

332 (expert reports filed with the Schellberg declaration on February 19).⁵

The trial court nonetheless granted summary judgment for the Association solely because⁶ it held that submitted declarations did not provide adequate foundation for the statements that otherwise would have raised genuine issues of material fact. CP 711-12. The trial court gave three reasons for its ruling, but as shown in SAM's opening brief, each of those reasons was in error. Opening Br. at 35-40.⁷

The Association attempts to defend the trial court's ruling by contrasting its expert declaration, which it asserts contained proper foundation, with SAM's declarations, which the Association asserts lacked proper foundation. Far from helping its case, the Association's argument exposes the trial court's error because the Association's declaration lacks the foundation that purportedly caused exclusion of SAM's declaration.

The Association first argues that Mr. Schellberg's declaration and

⁵ The contents of the Schellberg declaration were, of course, well known to the Association, because Schellberg's report had been provided to the Association in July 2008 as part of mediation. Opening Br. at 9-10, 14-15.

⁶ The Association argues that this Court can affirm the trial court because SAM's opposition papers were untimely. Assoc. Br. at 33-34. That is not correct, because in reviewing a summary judgment order, this Court reviews the record that was before the trial court. RAP 9.12.

⁷ The Association incorrectly argues that SAM did not assign error to the trial court's ruling excluding SAM's opposition pleadings based on lack of foundation. Assoc. Br. at 37. To the contrary, Assignment of Error 2, Issue 3 related to the Assignments of Error, and pages 35-40 of SAM's Opening Brief all address that error in detail.

scope of work lacked proper foundation because Mr. Schellberg did not provide, in the text of his declaration, a sworn statement containing his qualification and competency to testify. Assoc. Br. at 37-39. Mr. Schellberg's qualifications and competence, however, were demonstrated in his report, which was an exhibit to his declaration. The Association argues that qualifications set forth in exhibit 1 of the Schellberg declaration are not sufficient because they are not sworn under oath. That argument is incorrect, however, because the Association's own expert—Keith Soltner—provided his qualifications exclusively through an exhibit attached to his declaration that was referenced using identical language.

To establish his qualifications, the Association's expert states: "My resume is attached as **Exhibit 1**." CP 127 (emphasis added). SAM's expert declaration likewise states: "Attached as Exhibit 1 is a true and correct copy of my July 24, 2008 scope of repairs," which contains Mr. Schellberg's qualifications to testify. CP 277 (emphasis added). If the Association's expert declaration is sufficient to establish that the matters in exhibit 1 are sworn under oath, then SAM's expert declaration is likewise sufficient to establish that the matters in exhibit 1 are sworn under oath.

The trial court's inconsistent treatment of the two declarations was error. The exhibits to both declarations should have been treated the same,

with both exhibits properly treated as being sworn under oath. Once that error is corrected, the information in Exhibit 1 to Mr. Schellberg's declaration amply demonstrates his qualifications and competence to testify as to the matters therein. Opening Br. at 35-38.⁸ Indeed, the Association does not dispute (and the trial court appeared to recognize) that the information in Exhibit 1 of the Schellberg Declaration is sufficient to establish Mr. Schellberg's qualification and competence to testify. Assoc. Br. at 39.

The Association separately argues that Mr. Schellberg's report cannot be considered because Mr. Schellberg did not state that the matters in Exhibit 1 (the report) were sworn under oath. As mentioned, Mr. Schellberg did, in fact, make such a declaration in precisely the same manner that the Association's expert did regarding the qualifications set forth in his resume. Because the trial court found the Association's declaration sufficient to establish that the contents of the exhibit were submitted under oath, it must treat SAM's declaration the same.

Finally, the Association argues that Mr. Schellberg's declaration cannot be considered because it does not state "what inspection of the

⁸ Conversely, if Mr. Soltner's resume is excluded because the matters therein are not sworn under oath, his sole qualification sworn under oath is being a "licensed architect," CP 127, which is exactly the same qualification that Mr. Schellberg includes in his sworn declaration. Opening Br. at 38 & n.18 (noting sworn testimony of Mr. Schellberg's "AIA" qualification, which is only available to licensed architects).

property he conducted,” what “documents he reviewed,” and does not state that he reviewed “construction documents of any kind.” Each of those statements is simply incorrect. With respect to the inspection of the property, Mr. Schellberg’s report shows that he made four site visits in 2008 (May 16, 30; June 4, 5), during which he:

- examined both interior and exterior features;
- engaged in intrusive inspections of internal systems, including the roof, structural components, decks, and pipes and drainage;
- examined the project files, which included the Scope of Work construction documents, daily job reports, and emails related to actual construction;
- examined building codes and files related to the permits granted;
- examined all documentation and photographs of others’ intrusive inspections, including the pre-conversion 2005 intrusive inspection and the intrusive inspection conducted by the Association’s expert.

See Opening Br. at 39; CP 305, 306, 312, 315, 316, 317, 320-21, 322-25, 329, 331.⁹

With respect to the Association’s argument that Mr. Schellberg did

not review the construction documents on file with the City of Des Moines, Assoc. Br. at 40, the record flatly contradicts that statement, showing that Mr. Schellberg's conclusions are "based on review of the City of Des Moines files pertaining to the job." CP 311. The Association also argues incorrectly that Mr. Schellberg did not say what documents he reviewed and did not review "construction documents of any kind." Assoc. Br. at 40. To the contrary, Mr. Schellberg reviewed (among other things) the full "project files," CP 316, "the written and observed scope of work," CP 306, and "daily job reports" CP 320; *see also* Opening Br. at 39 (discussing the scope of documents Mr. Schellberg reviewed). In sum, the Association's assertions in support of its foundation argument are simply incorrect.

With respect to the Webb declaration, the Association makes two arguments. It first argues that Mr. Webb's declaration does not satisfy CR 56 (e) because it does not provide "specific facts." Although Mr. Webb's testimony is not extensive, he properly notes that as manager of SAM's conversion-related construction, he has personal knowledge of the matters set forth in Mr. Schellberg's declaration and he adopts the specific factual

⁹ Mr. Schellberg's declaration and report provide far more foundation for his inspection than does the Association's declaration, because the only reference to an inspection contained in the Association's declaration is for

statements in that report as his own, based on his personal knowledge. CP 261.

The Association argues that Mr. Webb’s declaration is an admission that there are no disputed issues of material fact. To the contrary, Mr. Webb’s declaration recounts that the factual statements in the report, which he adopted, demonstrate numerous disputed issues of material fact between the Association’s argument that there were numerous violations of the implied warranty of quality and SAM’s argument that there were essentially no violations of that warranty because SAM did not make or contract for the work alleged to be defective. CP 261-62. Mr. Webb notes that such factual disputes cannot be resolved on summary judgment and must be resolved at trial. *Id.* Contrary to the Association’s argument, such statements are not an admission that summary judgment was proper.

In sum, the trial court’s rulings—although not a model of clarity—show that she considered the Schellberg and Webb Declarations in both rulings granting the Association’s summary judgment motion.¹⁰ The trial

a completely different project, “the Regata project.” CP 128 ¶ 6; *see also supra* p. 10.

¹⁰ The Association argues that that the Court’s order denying summary judgment should be reviewed as a denial of a motion for reconsideration. Assoc. Br. at 42-43. The Association is mistaken. As the Court indicated, it did consider SAM’s opposition pleadings in both its written order granting summary judgment and in its “reconsideration” order in which the trial court actually re-issued its summary judgment order. In neither

court nonetheless declined to give those declarations any substantive weight for three erroneous reasons. The summary judgment ruling should be reversed, and the related judgment should be vacated.

III. THE TRIAL COURT LACKED JURISDICTION, AND ABUSED ITS DISCRETION, IN ENTERTAINING THE MOTION FOR DEFAULT WITHOUT THE REQUIRED CONFERENCE BETWEEN COUNSEL.

The Association does not dispute that it did not attempt to conduct the conference required by CR 26(i) and King County LCR 37 before filing a motion for discovery sanctions. Assoc. Br. at 13, 43.¹¹ Such a conference likely would have obviated the need for a sanctions motion because the Association's motion to compel had been granted just three court days beforehand and present counsel contemporaneously and repeatedly contacted the Association's counsel "to make sure that the Association had the documents it needed." CP 925-26. The Association did not respond to those contacts. *Id.*¹²

case did the trial court actually deny reconsideration. Instead, in both cases it substantively decided the summary judgment motion. *See supra* p. 10-11, 16.

¹¹ The heading for Section IV.F of the Association's brief (at p. 43) does state "A Discovery Conference Occurred," but there is no discussion of any such conference in the text of the brief, nor any citation to the record showing such conference, because no such conference occurred.

¹² The requirement for "contemporaneous, two-way communication" is important because it allows discovery disputes and sanctions motions to be avoided through "non-judicial" solutions, as SAM's counsel attempted to do here. *Case v. Dundom*, 115 Wn. App. 199, 204, 58 P.3d 919 (2002).

The Association's sole argument is that SAM forfeited its right to challenge this violation of CR 26(i) and LCR 37(e) by not raising the issue in its later opposition to the motion for entry of default judgment. The Association relies on RAP 9.12 to justify that argument, but RAP 9.12 merely addresses the evidence this Court can consider when reviewing a summary judgment order. It does not address the issue here, which is SAM's request for review of the Court's default sanction. Indeed, elsewhere in its brief, the Association concedes that SAM's briefing regarding default judgment specifically "reserved its right to appeal" the order entering the default sanction. Assoc. Br. at 17; CP 1122-32.

The only appellate rule arguably applicable here, RAP 2.5 (a), allows SAM to seek review of the default order. In fact, all three provisions of RAP 2.5 justify review here because the trial court lacked jurisdiction to issue its order, the Association failed to establish facts—including the requisite discovery conference—upon which relief can be

Because the Association's counsel did not even attempt to confer as required by Civil Rule 26(i), "the [trial] court lacked discretion to award default." *Id.*; see also *Rudolph v. Empirical Research Sys., Inc.*, 107 Wn. App. 861, 867, 28 P.3d 813 (2001). But see *Amy v. Kmart of Washington LLC*, ___ P.3d ___, 2009 WL 5094763 (Dec. 28, 2009). *Amy* is not apposite here, because it involved technical non-compliance with the certification requirement in CR 26(i), rather than actual failure to conduct a discovery conference. *Id.* at *5. Here, there was no effort to try to solve the discovery problems occasioned by the overwhelming calamities SAM suffered and deliberate refusal to discuss discovery. CP 925-26.

granted, and manifest error occurred impacting SAM's Due Process rights.¹³ RAP 2.5. Accordingly, the Association's forfeiture arguments fail. Because the Association did not even attempt to confer before seeking a default sanction, the trial court lacked discretion and/or abused its discretion in ordering default.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING DEFAULT AS A DISCOVERY SANCTION.

A. The Trial Court Made No Specific Findings on the Record Regarding Substantial Prejudice, and There Is No Evidence of Substantial Prejudice.

In its opening brief, SAM pointed out that the default order was an abuse of discretion because the trial court did not consider the practical effect of the unreceived discovery and did not cite a single way in which the discovery violations prejudiced the Association's ability to prepare for trial. Opening Br. at 42-43. In general, of course, "a trial court's reasons for imposing discovery sanctions should 'be clearly stated on the record so that meaningful review can be had on appeal.'" *Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 583, 220 P.3d 191 (2009). When the trial court fails to provide any reasons for concluding that the moving party suffered substantial prejudice, as was the case here (CP 691), the trial

¹³ It is well established that a default order implicates the defaulted party's due process rights. *See, e.g., Smith v. Behr*, 113 Wn. App. 306, 325, 54 P.3d 665 (2002).

court abuses its discretion and its order must be reversed.

The Association attempts to defend the trial court's ruling, but it likewise fails to identify a single issue that the Association was not able to prepare for trial because of SAM's discovery failings. In fact, the Association's prejudice argument is contained in a single paragraph, which simply states, twice, that the Association was "clearly prejudiced" and states that the Association was unable to "obtain the basic discovery it sought." Assoc. Br. at 45-46. Such conclusory statements fall well short of evidence required in cases such as *Magaña*, where the trial court entered detailed findings showing that the discovery failures caused 12 of 18 potential witnesses to become unreachable or to no longer have evidence. *Id.* at 587-88. There is simply no showing of prejudice here.

The Association does claim, falsely, that SAM failed to produce any documents. To the contrary, and despite a catastrophic fire, a financial collapse that caused most employees with knowledge to leave, and a computer crash (Opening Br. at 46), SAM produced nearly 1,000 pages of documents, CP 391 (886 pages). The Association also was able to obtain documents from the general contractor for the project. CP 400. Most importantly, the Association had full access to the property alleged to be defective and undisputedly had extensive reports about the condominium from its own experts and reports from SAM's experts, all of

which had been exchanged in advance of mediation. *See, e.g.*, CP 287-332, 513-27 (reproducing some of the expert reports and responses thereto). Because the trial court did not make a finding of substantial prejudice, and because the record shows no such prejudice, the trial court abused its discretion and reversal and remand is required.

B. The Trial Court Made No Specific Findings on the Record Regarding Wilfulness, and There Is No Evidence of Wilfulness.

As with substantial prejudice, the trial court failed to articulate on the record its basis for finding that SAM's discovery failings were willful. The Association scours the record for facts to support such a finding, but its arguments miss the mark. The Association first notes that three lawyers withdrew from the case over time. Assoc. Br. at 45. As SAM explained, however, SAM simply lacked the resources to pay its counsel. Opening Br. at 10-11. The inability to pay counsel does not demonstrate willfulness. The Association next argues that SAM's statements regarding its lack of resources to defend the action or participate in arbitration somehow show willfulness. Assoc. Br. at 45. Again, however, SAM's lack of resources is an unfortunate reality, not a basis for a finding of willfulness. The Association notes that SAM did not respond to the motion to compel or the motion for a default sanction. Assoc. Br. at 45. Once again, the fact that SAM lacked resources to file opposition briefs

does not demonstrate willful conduct with respect to discovery. Finally, the Association claims that SAM did not comply with the order compelling discovery, but that is not correct.¹⁴ As shown above, and in SAM's opening brief, SAM did its best to provide discovery despite overwhelming challenges, and very soon after the order compelling discovery was entered, counsel repeatedly contacted the Association's seeking to work cooperatively to identify and provide the documents that the Association was requesting but received no response to repeated queries. CP 925-26.

The Association agrees that a discovery violation is willful only if it is "without reasonable excuse or justification." Assoc Br. at 45. As SAM has explained, there were three, separate (and reasonable) excuses provided for its discovery failings: (1) the catastrophic office fire SAM suffered; (2) the computer crash of the former employee most knowledgeable about the project; and (3) the financial losses that caused the departure of nearly every employee with knowledge of the project. Opening Br. at 45-46. Because the trial court failed to consider any of those reasonable excuses on the record, and because some (if not all) of the discovery problems were driven by bickering and acrimony between

¹⁴ The Association argues that SAM did not comply with the Sanction Order. SAM cannot determine what the Association is referring to, as the order imposing sanctions did not impose any obligations on SAM. CP 690-92.

the parties, as in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 497, 933 P.2d 1036 (1997), the trial court abused its discretion in entering default.

V. THE TRIAL COURT ERRED IN GRANTING THE UNTIMELY MOTION FOR FEES AND COSTS.

The Association concedes that its motion to amend the judgment was untimely. The Association argues, however, that the parties and the Court agreed to extend the deadline to amend the judgment to award fees and costs, which qualifies as the required order extending time. Assoc Br. at 46. That is not correct. The Association made the same argument in its reply brief below, CP 668, but the trial court's resulting orders do not accept that argument, and the trial court specifically declined to enter an untimely, amended judgment. CP 721-30, 732-34.¹⁵

The Association's other argument is that the trial court had discretion to violate the civil rules, and appellate courts will not enforce CR 54(d) and 59(h) unless the trial court abused its discretion. Assoc. Br. at 47. That argument fails for two reasons. First, whether a petition for fees and costs must be excluded as untimely, pursuant to CR 54(d) and 59(h), is reviewed *de novo* rather than for abuse of discretion. *See, e.g.,*

¹⁵ The Association argues that SAM never contested this "agreement" below or in its opening brief. SAM had no opportunity to deny the agreement below, because the Association did not raise the issue until its reply brief. The arguments in SAM's opening brief (at 47-48) plainly are inconsistent with any such agreement and therefore serve as a denial.

Corey v. Pierce County, ___ P.3d ___, 2010 WL 255956, at *11 (Jan. 25, 2010). Second, the Association is simply wrong in arguing that Washington appellate courts do not enforce the time limits in CR 54(d) and CR 59(h).¹⁶ See, e.g., *Corey*, 2010 WL 255956, at *11 (denying fees because “Corey submitted her request for fees after the time limitation established by CR 54(d)(2)”); *Wash. Dep’t of Health Unlicensed Practice Program v. Yow*, 147 Wn. App. 807, 831, 199 P.3d 417 (2008) (denying fees because “Yow’s petition for attorney fees at superior court was untimely under CR 54(d)(2).” Because the Association’s request for award of fees and costs was untimely, it cannot be granted, and the Court should reverse the trial court’s order awarding such fees and vacate the resulting judgment.

VI. THE TRIAL COURT ABUSED ITS DISCRETION IN ENTERING CR 11 SANCTIONS.

The Association does not defend the trial court’s CR 11 sanctions. The Association does, however, spend several pages reviewing the complex jurisprudence related to the instances in which a non-lawyer may represent an entity in legal proceedings. Assoc. Br. at 32-33. Mr. Webb, relying on authority from the *Illinois Business Law Journal*, made a good faith argument for an extension of such law to permit him to represent

¹⁶ The universe of cases in which this issue has arisen is relatively small because the 10-day requirement was not added to CR 54(d) until 2007.

SAM. CP 285-86. There was no showing that, in making such arguments, Mr. Webb acted in anything other than good faith, based on his dire financial circumstances. The CR 11 sanctions should be reversed.

CONCLUSION

For the foregoing reasons, the Court should: (1) reverse the trial court's summary judgment order; (2) reverse the trial court's order entering default on the Association's causes of actions as a discovery sanction; (3) reverse the order granting the Association's untimely motion to amend the Judgment; (4) reverse the order granting CR 11 sanctions against SAM; and (5) vacate the July 1, 2009 Judgment and August 7, 2009 Additional Judgment based on the reversed orders above.

RESPECTFULLY SUBMITTED this 24th day of February, 2010.

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See Corey v. Pierce County, __ P.3d __, 2010 WL 255956, at *11 (Jan. 25, 2010).

DECLARATION OF SERVICE

I declare, under penalty of perjury, under the laws of the State of Washington, that on this date I served a copy of the foregoing document by mailing the same, properly addressed and prepaid, to:

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