

65728-3

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No. 65728-3

COURT OF APPEALS - DIVISION ONE  
IN AND FOR THE STATE OF WASHINGTON

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R&R CONCRETE, INC

*Appellants/Cross Respondent,*

v.

MICHAEL AND MARILEE COAKER ET AL,

*Respondents/Cross Appellant.*

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**BRIEF OF APPELLANT**

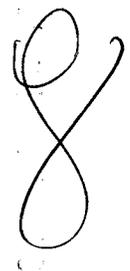
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King County Local Rule 37(g)

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Civil Rule 26(e)(4)

## **A. ASSIGNMENT OF ERROR**

1. The trial court erred by denying appellant's motion to exclude respondent's untimely disclosed expert witness from testifying

## **B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. KCLR 26 requires timely disclosure of witnesses.
2. KCLR 26 and case law creates an ongoing discovery obligation.
3. The last minute witness disclosure lacks a reasonable excuse.

## **C. STATEMENT OF THE CASE**

### **1. Procedural Facts**

Appellant, R&R Concrete, Inc, filed a complaint for breach of contract against Respondents Michael and Marilee Coaker. The Coakers counterclaimed for breach of contract. The matter went to a bench trial beginning on May 26, 2010. The trial concluded on May 27, 2010. The Trial Court ruled in favor of Appellant, but reduced its award for perceived deficiencies in the construction. The net result was a recovery in favor of R&R Concrete in the amount of \$3,570. Appellant timely filed a motion for reconsideration on the admittance of the expert testimony. The Trial Court denied that motion.

## 2. Background

Respondent, a general contractor by trade, hired Appellant to perform concrete work on his personal residence. Respondent had previously hired another concrete company to lay the driveway, patio, and stairs. Respondent was dissatisfied with the work the first company performed so he Appellant to tear out the newly laid patio and stairs and complete the driveway. Mr. Rausch, of Appellant R&R Concrete, and Respondent entered into a mutually negotiated contract on September 24, 2007. Work on the property began shortly thereafter.

At trial, the parties disputed which party was responsible for supplying the color of the concrete; and whether the driveway, patio and stairs were constructed to meet industry standards.

## 3. Facts pertaining to assignment of error

On second day of the trial, Respondent sought to admit the testimony of an expert, Mr. Deress. RP 3. This expert was not disclosed as a part of Appellant's discovery requests nor was the witness disclosed as required pursuant to King Count Local Rules on discovery. RP 31-33; 35-36. The expert witness was not disclosed to Appellant until one day before the commencement of

trial. RP 33. Appellant objected numerous times to the testimony of this expert, and asked the court to strike this expert's entire testimony at the conclusion of the examination. RP 91.

The day before the trial, Respondent's counsel, Brad Powell, emailed Appellant's counsel, Justin Elsner, asking Mr. Elsner to call him about one of his witnesses. RP 10. Mr. Elsner promptly called Mr. Powell. Mr. Powell informed Mr. Elsner that Ms. Woods (the previously disclosed expert) would not be appearing at the trial and instead her boss, Mr. Deress, would be testifying.

Appellant objected to the testimony insofar as it exceeded the data collected in Ms. Woods report. The court allowed Mr. Deress to testify on the report and his personal observations. RP 10-12. Mr. Deress continued to testify extensively about the contract between the parties, invoices, Ms. Wood's report, and his personal observations and measurements of the concrete project. RP 10-12. On cross-examination, Appellant elicited testimony from Mr. Deress that he had performed an investigation and site visit during the first day of the trial. RP 54-55. Additionally, Mr. Deress possessed notes, measurements, calculations, pictures, and curriculum vitae which were never provided to Appellant's counsel. RP 27.

Respondent argued that Appellant was not prejudiced because Appellant knew someone from the expert's firm would testify, Appellant had not deposed Ms. Woods, and the notes were available for Appellant to review for the first time while the trial was underway. Despite Appellant's repeated requests, the court refused to strike Mr. Deress's testimony. RP 91.

#### **D. ARGUMENT**

Respondent's last minute expert witness disclosure, failure to comply with discovery requests and witness disclosure deadlines unfairly prejudiced Appellant. It was error for the trial court to permit Respondent's expert, Mr. Deress, to testify.

Barci v. Intalco Aluminum Corp. sets forth numerous factors the trial court must weigh in deciding whether to allow late witness disclosure. 11 Wn.App. 342, 349-50, 522 P.2d 1159 (1974).

Those factors include determining:

- (a) the presence or absence of good faith attempts by the proponent of the witness to comply with the rules of discovery,
- (b) the availability or discoverability of the witness at an earlier time,
- (c) the circumstances of the proponent at the time of the securing of the witness, i.e., whether a physical injury or illness had progressed to a point where diagnosis and/or prognosis was possible and/or whether the passage of time had made the consequences of the acts of the parties discernible to an expert witness at an earlier time,
- (d) the materiality of the proposed testimony to the proponent,

(e) the extent of surprise to the opponent,  
(f) the availability of opportunity to the opponent to depose the witness,  
(g) the availability of opportunity to the opponent to prepare for cross-examination,  
(h) the opportunity to the opponent to secure contradicting witnesses,  
(i) the prejudice presented to a proponent or opponent's case if a continuance is granted,  
(j) the impact upon both parties of the expenses of delay, and  
(k) the ability of an imposition of costs on a proponent to remedy any hardship imposed on an opponent by the late calling of a witness. Barci, 11 Wn.App. at 349-50.

**1. KCLR 26 requires timely disclosure of witnesses.**

Respondent failed to comply with witness disclosure timelines. KCLR 26 requires that the parties *shall* disclose all possible witnesses according to the case schedule. See KCLR 26(b). Additional requirements apply to experts. For experts, a summary of the expert's opinions and the basis therefore and a brief description of the expert's qualifications must be provided. See KCLR 26(b)(3)(C). Any person not disclosed in compliance with this rule may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires. See KCLR 26(b)(4).

Mr. Deress was not disclosed until the day before trial. Respondent cannot show good cause for the failed disclosure.

**2. KCLR 26 and case law creates an ongoing discovery obligation.**

KCLR 26 requires a party to “seasonably supplement responses to discovery requests or otherwise to comply with discovery before the deadlines set by this rule.” See KCLR 26(e). KCLR 37 requires that absent stipulation of the parties, or a court order entered upon good cause shown, all discovery, *including supplementations*, must be completed no later than 35 calendar days before trial. See KCLR 37(g) (emphasis added).

Washington appellate courts have routinely upheld the exclusion of testimony based on untimely disclosed witnesses. In one case, the appellate court ruled that the trial court improperly allowed Lampard (the late disclosing party) to call a witness whose name had not been disclosed in the answers to interrogatories and improperly continued the trial to allow disclosure. Lampard v. Roth, 38 Wash.App. 198, 201, 684 P.2d 1353 (1984). The trial court subsequently permitted Lampard to supplement the answers to interrogatories during trial. Id. Roth, the affected party, claimed surprise and prejudice because he was unable to adequately prepare to cross-examine the witnesses, or to locate and call responsive witnesses. Id. Toward the end of the trial, Lampard

called two expert witnesses. Id. One had been listed as a non-expert witness in the supplemental answers. Id. The other had not been listed in either the original or supplemental answers. Id. Roth argued that the admission of this testimony resulted in surprise and prejudice. Id.

The appeals court found that the trial court erred in two respects. First, the appellate court ruled that a continuance to permit the surprised party to depose the witnesses and to locate and call others is seldom a satisfactory resolution to untimely disclosed witnesses. Id. To do so places the burden on the innocent party, who must prepare again for a lengthy trial. Id. Such preparation is costly to the parties, risks the loss of much of the original trial preparation, and burdens the other litigants on the court's trial calendar. Id. Second, the court also ruled that permitting the innocent party's attorneys to speak to previously undisclosed witnesses before they testified did not permit reasonable preparation for effective cross examination or presentation of rebuttal witnesses. Id. Roth's attorneys were required to conduct their investigation of the case while simultaneously involved in the course of the trial. Id.

The court went on further to rule that it was a willful failure not to promptly respond to and supplement discovery, or to comply with the court order. Id. The party had not disclosed the expert witness until he was called to testify at trial. The appellate court concluded that these actions and inactions were a willful failure to comply with discovery rules. Id. at 202.

In a second case, the trial court was found to have properly denied the testimony of a witness disclosed telephonically two days before trial. Rupert v. Gunter 31 Wash.App. 27, 640 P.2d 36 (1982). The party attempting to disclose a witness at that time was ruled to fall short of the continuing disclosure requirements of CR26(e)(1)<sup>1</sup>. Id. The appellate court upheld the exclusion of the testimony as an appropriate remedy under CR 26(e)(4)<sup>2</sup>. Id.

In yet another case, the appellate court upheld exclusion of an expert witness disclosed after the first day of trial. The court

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<sup>1</sup> Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows: (1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to: (A) the identity and location of persons having knowledge of discoverable matters; and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

<sup>2</sup> (4) Failure to seasonably supplement in accordance with this rule will subject the party to such terms and conditions as the trial court may deem appropriate.

ruled that not disclosing the witness until after the first full day of trial violated rules and orders setting discovery cutoff dates well before trial, and the duty to “seasonably to supplement” responses to expert witness interrogatories. M/V La Conte, Inc. v. Leisure 55 Wash.App. 396, 401-2, 777 P.2d 1061 (1989).

The aforementioned cases are consistent with the need for a fair and equitable litigation process. The discovery rules are intended to “ ‘make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.’ ” Taylor v. Cessna Aircraft Co., Inc. 39 Wash.App. 828, 835, 696 P.2d 28 (1985). *Citing* Gammon v. Clark Equip. Co., 38 Wash.App. 274, 279-80, 686 P.2d 1102. If witnesses are not disclosed until after the trial begins, the surprised party is put at a serious disadvantage. Lampard v. Roth 38 Wash.App. 198, 201 684 P.2d 1353 (1984) *citing* Davis v. Marathon Oil Co., 528 F.2d 395, 404 (6th Cir.1975) (disclosing witnesses 3 days prior to trial caused unfair surprise).

Respondent failed to comply with discovery requests. In August 2008, Appellant propounded on Respondents interrogatories and requests for production seeking extensive information about its experts. Mr. Deress was not listed among the

expert witnesses. At no point did Respondents provide Appellant with any information about Mr. Deress, aside from his name, which was not provided until the day before trial.

**3. The last minute witness disclosure lacks a reasonable excuse.**

Respondent's failure to timely disclose their expert witness was willful and unconscionable and should have caused the trial court to exclude the expert witness. Exclusion of testimony is a proper remedy when the failed disclosure was an intentional nondisclosure, willful violation of a court order, or other unconscionable conduct. Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) *citing* Fred Hutchinson Cancer Research Ctr. v. Holman, 107 Wn.2d 693, 706, 732 P.2d 974 (1987). A violation of the discovery rules is willful if done without a reasonable excuse. Gammon v. Clark Equip. Co., 38 Wash.App. 274, 280, 686 P.2d 1102 (1984).

The appeals court has upheld trial court decisions to exclude the testimony of a witness who had not been revealed until "the trial was virtually set to begin" when the only excuse provided for violating the pretrial order was the attorney's "inadvertent mistake." Falk v. Keene Corp. 53 Wash.App. 238, 250 – 51, 767 P.2d 576

(1989). The appellate court ruled that the absence of a reasonable excuse for noncompliance with a discovery order was sufficient to support a finding that the noncompliance was willful. Falk v. Keene Corp. 53 Wash.App. 238, 251 767 P.2d 576 (1989) *citing* Taylor v. Cessna Aircraft Co., 39 Wash.App. 828, 836, 696 P.2d 28 (1985).

In our case, the Respondents did not provide a good explanation why Ms. Woods was not present. The only excuse given was that she was no longer with the company. There was no testimony that she was unavailable. Additionally, Respondent did not provide an explanation why it did not know that Ms. Woods was not with her past employer until the day before trial. Respondent's case mismanagement should not be to the prejudice of Appellant.

Lastly, Respondent did not provide an explanation why it did not call its other expert witness who had been timely disclosed. Respondent had two expert witnesses listed on its witness list (Ms. Woods and Mr. Delony). Mr. Delony was timely disclosed. Respondent could have called that witness, but chose to call the undisclosed witness. There was no need for Respondent to create this scenario.

## E. CONCLUSION

The Trial Court erred by permitting the testimony of the undisclosed expert witness. Using the testimony of the undisclosed expert, the Trial Court ruled that portions of the construction project (driveway, patio, and stairs) did not meet industry standards and reduced Appellant's award based on those conclusions. RP 16; RP 10-19.

Pursuant to RAP 18.1, Appellant seeks recovery of attorneys' fees and costs as the party's contract provides for attorneys' fees to the prevailing party.

Respectfully submitted this 15<sup>th</sup> day of December, 2010.

By  \_\_\_\_\_  
Justin Elsner, WSBA 39251  
Attorney for  
Appellant R&R Concrete, Inc

## Justin Elsner

---

**From:** Bradley L. Powell [Powell@OLES.com]  
**Sent:** Tuesday, May 25, 2010 2:36 PM  
**To:** Justin Elsner  
**Subject:** RE: Coaker / R&R

Justin -- Please give me a call about one of our witnesses. Thanks.

Bradley L. Powell  
206 623-3427

---

**From:** Justin Elsner [<mailto:justin@elsnerlawfirm.com>]  
**Sent:** Monday, May 24, 2010 4:27 PM  
**To:** Bradley L. Powell  
**Subject:** RE: Coaker / R&R

He's not interested in settling at this point.

Justin

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**From:** Bradley L. Powell [<mailto:Powell@OLES.com>]  
**Sent:** Monday, May 24, 2010 3:48 PM  
**To:** Justin Elsner  
**Subject:** FW: Coaker / R&R

Justin -- Still not looking too good for Thursday. Any word from Roger? BLP

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**From:** Bradley L. Powell  
**Sent:** Monday, May 24, 2010 8:43 AM  
**To:** 'Justin Elsner'  
**Subject:** Coaker / R&R

Justin -- We need to talk about scheduling, continuance, and settlement (hopefully the latter.) Give me a call when you can. Please figure a way to settle this for the 20K amount.

Bradley L. Powell  
206 623-3427

**LCR 26. Disclosure of Possible Lay and Expert Witnesses and Scope of Protective Order.**

(a) **Scope.** This rule shall apply to all cases governed by a Case Schedule pursuant to LCR 4.

(b) **Disclosure of Primary Witnesses. Required Disclosures.**

(1) **Disclosure of Primary Witnesses:** Each party shall, no later than the date for disclosure designated in the Case Schedule, disclose all persons with relevant factual or expert knowledge whom the party reserves the option to call as witnesses at trial.

(2) **Disclosure of Additional Witnesses:** Each party shall, no later than the date for disclosure designated in the Case Schedule, disclose all persons whose knowledge did not appear relevant until the primary witnesses were disclosed and whom the party reserves the option to call as witnesses at trial.

(3) **Scope of Disclosure:** Disclosure of witnesses under this rule shall include the following information:

(A) **All Witnesses.** Name, address, and phone number.

(B) **Lay Witnesses.** A brief description of the witness's relevant knowledge.

(C) **Experts.** A summary of the expert's opinions and the basis therefore and a brief description of the expert's qualifications.

(4) **Exclusion of Testimony.** Any person not disclosed in compliance with this rule may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires.

(c) **Motions to Seal.** A motion to seal must be made separately and cannot be submitted as part of a protective order. When the court has entered an order permitting a document to be filed under seal, the filing party must comply with the requirements of LCR 79(d)(6) and (7).

Comment: See LCR 77 and LFLR 11 for procedures relevant to motions to seal.

(d) **Discovery Limits.**

(1) **Interrogatories.**

(A) **Cases With Court-Approved Pattern Interrogatories.**

In cases where a party has propounded pattern interrogatories pursuant to LCR 33, a party may serve no more than 15 interrogatories, including all discrete subparts, in addition to the pattern interrogatories.

(B) **Cases Without Court-Approved Pattern Interrogatories.** In cases where a party has not propounded pattern interrogatories pursuant to LCR 33, a party may serve no more than 40 interrogatories, including all discrete subparts.

(2) **Depositions.** A party may take no more than 10 depositions, with each deposition limited to one day of seven hours; provided, that each party may conduct one deposition that shall be limited to two days and seven hours

per day.

**(3) Requests for Admission.** A party may serve no more than 25 requests for admission upon any other party in addition to requests for admission propounded to authenticate documents.

**(4) Modification.**

**(A) Stipulation of the parties:** These limitations may be increased or decreased by written stipulation of the parties based on the scope of the legal and factual issues presented. Nothing in this rule precludes the parties from engaging in the informal exchange of information in lieu of formal discovery. The parties may establish a written timetable for discovery and develop a discovery plan that will facilitate the economical and efficient resolution of the case. Such plan need not be submitted to the court for approval.

**(B) Court order:** If the parties do not agree that discovery in excess of that provided by these rules is necessary, a party may file a motion to submit additional discovery pursuant to LCR 7(b). The proposed order shall include details of what additional discovery is required. A certificate of compliance as required by LCR 37(f) shall be filed with the motion.

**(5) Discovery requests in violation of rule**

**(A)** Unless authorized by order of court or written stipulation, a party may not serve requests for admission or interrogatories or note depositions except as authorized by this rule.

**(B)** Absent a court order or stipulation altering the scope of discovery, the party served with interrogatories or requests for admission in violation of this rule shall be required to respond only to those requests, in numerical order, that comply with LCR 26(d). No motion for protective order is required. The party shall indicate in the answer section of the Interrogatories or Requests for Admission that the party is refusing to respond to the remaining questions because they exceed the discovery limits.

**(C)** Absent a court order or stipulation altering the scope of discovery, a party served with a notice of deposition in violation of this rule shall inform all parties to the case that he or she will not be attending the deposition. This notification shall occur as soon as possible and, absent extraordinary circumstances, shall not be later than 24 hours before the scheduled deposition. Notice shall be in writing and shall be provided in the manner that is most likely to provide actual notice of the objection. Fax or e-mail notification is permitted, provided (1) the parties have previously agreed to receive pleadings in this manner or (2) the objecting party also provides telephonic notification.

**(6) Applicability.** These discovery limitations do not apply to family law proceedings as defined by LFLR 1, supplemental proceedings undertaken pursuant to LCR 69(b) or other post-judgment proceedings.

**(e) Discovery Not Limited.** This rule does not modify a party's responsibility to seasonably supplement responses to discovery requests or otherwise to comply with discovery before the deadlines set by this rule.

[Adopted effective January 1, 1990; amended effective September 1, 1992; September 1, 2001; September 1, 2003; September 1, 2005, September 1, 2007; September 1, 2008; September 1, 2010]

### Official Comment

This rule does not require a party to disclose which persons the party intends to call as witnesses at trial, only those whom the party might call as witnesses. Cf. LCR 4(j) (requiring the parties, not later than 21 days before trial, to exchange lists of witnesses whom each party "expects to call" at trial) and Official Comment to LCR 4 All Witnesses must be listed, including those whom a party plans to call as a rebuttal witness. The only exception is when the party calling a witness could not reasonably anticipate needing that witness before trial.

This rule sets a minimum level of disclosure that will be required in all cases, even if one or more parties have not formally requested such disclosure in written discovery. The rule is not intended to serve as a substitute for the discovery procedures that are available under the civil rules to preclude or inhibit the use of those procedures. Indeed, in section (e) the rule specifically provides to the contrary.

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## LCR 37. FAILURE TO MAKE DISCOVERY; SANCTIONS

**(a)-(c) [Reserved].**

**(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Production or Inspection.** If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his or her deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for production of documents or inspection submitted under CR 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others, it may take any action authorized under CR 37. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by CR 26(c). For purposes of this section, an evasive or misleading answer is to be treated as a failure to answer.

**(e) Conference of Counsel.** See CR 26 (i)

**(f) Certificate of Compliance.** See CR 26 (i)

**(g) Completion of Discovery.** Unless otherwise ordered by the Court for good cause and subject to such terms and conditions as are just, all discovery allowed under CR 26-37, including responses and supplementations thereto, must be completed no later than 49 calendar days before the assigned trial date (provided that deadlines shall be 28 days in all parentage cases and 35 days in all other family law proceedings as defined in LFLR 1). Discovery requests must be served early enough that responses will be due and depositions will have been taken by the cutoff date. Discovery requests that do not comply with this rule will not be enforced. Nothing in this rule shall modify a party's responsibility to seasonably supplement responses to discovery requests or otherwise to comply with discovery prior to the cutoff.

[Adopted effective January 1, 1983; amended effective September 1, 1986; January 1, 1990; September 1, 1992; September 1, 1999; September 1, 2001; September 1, 2007; September 1, 2008; September 1, 2010.]

### Official Comment

Paragraph (d) of this rule requires a party who disagrees with the scope of production, or who wishes not to respond to seek a protective order consistent

with CR 37(d); a party may not withhold discoverable materials. *Physicians Insurance Exchange v. Fisons Corp.*, 122 Wn.2d 299 (1993) at 353 and 354; *Johnson v. Mermis*, 91 Wash. App. 127, at 133 (1998); *Pamelin Industries v. Sheen-USA, Inc.*, 95 Wn.2d 398 (1981). If a responding party does not fully respond and/or interposes objections, and if the responding party does not seek a protective order or obtain the agreement of the party seeking the discovery to narrow the requested discovery, upon motion, the Court will ordinarily impose sanctions for such failure. If the requested relief is sanctions, a motion to compel is not a prerequisite. See *Fisons*, supra, at 345.

If an attorney's or party's lateness in responding to discovery requests makes it necessary for another party to request an extension of the discovery deadlines, the Court should ordinarily impose sanctions on the attorney or party whose responses were late. If the attorney or party requesting extension of the discovery deadlines delayed unreasonably in taking action to enforce its discovery requests, the Court may also impose sanctions upon the attorney or party requesting extension of the discovery deadline.

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RULE CR 26  
GENERAL PROVISIONS GOVERNING DISCOVERY

- (a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.
- (b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
- (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that:

- (A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- (C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).
- (2) Insurance Agreements. A party may obtain discovery and production of:
- (i) the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and
- (ii) any documents affecting coverage (such as denying coverage, extending coverage, or reserving rights) from or on behalf of such person to the covered person or the covered person's representative. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this section, an application for insurance shall not be treated as part of an insurance agreement.
- (3) Structured Settlements and Awards. In a case where a settlement or final award provides for all or part of the recovery to be paid in

the future, a party entitled to such payments may obtain disclosure of the actual cost to the defendant of making such payments. This disclosure may be obtained during settlement negotiations upon written demand by a party entitled to such payments. If disclosure of cost is demanded, the defendant may withdraw the offer of a structured settlement at any time before the offer is accepted.

- (4) Trial Preparation: Materials. Subject to the provisions of subsection (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this section, a statement previously made is:

- (A) a written statement signed or otherwise adopted or approved by the person making it; or
- (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.
- (5) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
- (A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules. (ii) A party may, subject to the provisions of this rule and of rules 30 and 31, depose each person whom any other party expects to call as an expert witness at trial.
- (B) A party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, only as provided in rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.
- (C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a

reasonable fee for time spent in responding to discovery under subsections (b) (5) (A) (ii) and (b) (5) (B) of this rule; and (ii) with respect to discovery obtained under subsection (b) (5) (A) (ii) of this rule the court may require, and with respect to discovery obtained under subsection (b) (5) (B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

- (6) Claims of Privilege or Protection as Trial-Preparation Materials for Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; and must take reasonable steps to retrieve the information if the party disclosed it before being notified. Either party may promptly present the information in camera to the court for a determination of the claim. The producing party must preserve the information until the claim is resolved.
  - (7) Discovery From Treating Health Care Providers. The party seeking discovery from a treating health care provider shall pay a reasonable fee for the reasonable time spent in responding to the discovery. If no agreement for the amount of the fee is reached in advance, absent an order to the contrary under section (c), the discovery shall occur and the health care provider or any party may later seek an order setting the amount of the fee to be paid by the party who sought the discovery. This subsection shall not apply to the provision of records under RCW 70.02 or any similar statute, nor to discovery authorized under any rules for criminal matters.
  - (8) Treaties or Conventions. If the methods of discovery provided by applicable treaty or convention are inadequate or inequitable and additional discovery is not prohibited by the treaty or convention, a party may employ the discovery methods described in these rules to supplement the discovery method provided by such treaty or convention.
- (c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
- (1) that the discovery not be had;
  - (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
  - (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
  - (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
  - (5) that discovery be conducted with no one present except persons designated by the court;
  - (6) that the contents of a deposition not be disclosed or be disclosed only in a designated way;

- (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
- (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

- (d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.
- (e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:
  - (1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to:
    - (A) the identity and location of persons having knowledge of discoverable matters; and
    - (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.
  - (2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which:
    - (A) he knows that the response was incorrect when made; or
    - (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
  - (3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.
  - (4) Failure to seasonably supplement in accordance with this rule will subject the party to such terms and conditions as the trial court may deem appropriate.
- (f) Discovery Conference. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:
  - (1) A statement of the issues as they then appear;
  - (2) A proposed plan and schedule of discovery;
  - (3) Any limitations proposed to be placed on discovery;
  - (4) Any other proposed orders with respect to discovery; and

- (5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion.

Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party.

Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by rule 16.

- (g) Signing of Discovery Requests, Responses, and Objections. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is:

- (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
- (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
- (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection and a party shall not be obligated to take any action with respect to it until it is signed.

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.

- (h) Use of Discovery Materials. A party filing discovery materials on order of the court or for use in a proceeding or trial shall file only those portions upon which the party relies and may file a copy in lieu of the original.
- (i) Motions; Conference of Counsel Required. The court will not entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the

moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. If the court finds that counsel for any party, upon whom a motion or objection in respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under rule 37(b). Any motion seeking an order to compel discovery or obtain protection shall include counsels certification that the conference requirements of this rule have been met.

(j) Access to Discovery Materials Under RCW 4.24.

- (1) In General. For purposes of this rule, "discovery materials" means depositions, answers to interrogatories, documents or electronic data produced and physically exchanged in response to requests for production, and admissions pursuant to rules 26-37.
- (2) Motion. The motion for access to discovery materials under the provisions of RCW 4.24 shall be filed in the court that heard the action in which the discovery took place. The person seeking access shall serve a copy of the motion on every party to the action, and on nonparties if ordered by the court.
- (3) Decision. The provisions of RCW 4.24 shall determine whether the motion for access to discovery materials should be granted.

[Amended effective July 1, 1972; September 1, 1985; September 1, 1989; December 28, 1990; September 1, 1992; September 17, 1993; September 1, 1995, January 12, 2010.]

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

R & R CONCRETE, INC., a Washington corporation,

Plaintiff,

vs.

MICHAEL COAKER and MARILEE COAKER, husband and wife, and the marital community composed thereof; SUNDANCE BUILDERS, INC., a Washington corporation; and TRAVELERS CASUALTY & SURETY CO., Bond No. 103490929,

Defendants.

No. 08-2-18373-4 SEA

PLAINTIFF'S FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS PROPOUNDED TO DEFENDANTS COAKER AND THE ANSWERS THERETO

*Judge Chris Washington*

TO: MICHAEL COAKER and MARILEE COAKER, Defendants  
AND: BRADLEY L. POWELL, Attorney for Defendants

Pursuant to Rule 33 and 34 of the Civil Rules of Procedure of the State of Washington, the following discovery is submitted to be answered fully under oath within 30 days of the date of service upon you. You are required to furnish not only the information requested in your possession, but also such requested information that might be in the possession of your agent or your investigator.

PLAINTIFF'S FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS PROPOUNDED TO DEFENDANT'S COAKER - 1

**MARSH MUNDORF PRATT SULLIVAN  
+ MCKENZIE, P.S.C.**  
16504 9TH AVENUE S.E., SUITE 203  
MILL CREEK, WA 98012  
(425) 742-4545 FAX: (425) 745-6060

1 Defendants are requested to produce and permit Plaintiff to inspect and copy the  
2 documents hereinafter designated which are in the possession, custody or control of  
3 Defendants. It is requested to produce documents hereinafter designated at the offices of  
4 MARSH MUNDORF PRATT SULLIVAN + McKENZIE, P.S.C., 16504 9<sup>th</sup> Avenue SE,  
Suite 203, Mill Creek, Washington 98012 within thirty (30) days of the date of service  
upon you.

5 PRELIMINARY STATEMENT

6 A. In answering these requests, you are required to furnish all information  
7 available to you, including information in the possession of your investigators, agents,  
8 representatives, attorneys, investigators for your attorneys, and any other person or persons  
acting on your behalf.

9 B. If you cannot answer any of the following requests in full, after exercising  
10 due diligence to secure the information to do so, so state and answer to the extent possible,  
11 specify your inability to answer the remainder, and state whatever information or  
knowledge you have concerning the unanswered portion.

12 C. Each request is intended to and does request that each and every part be  
13 answered with the same force and effect as if the party were the subject of and were asked  
by a separate request.

14 D. Each request calls not only for the knowledge of Defendants, but also for  
15 all knowledge that is available to them by reasonable inquiry, including inquiry of their  
representatives and attorneys.

16 E. In answering these requests, the following instruction and definitions  
17 apply:

18 1. "Defendants" or "you" includes Michael Coaker and Marilee  
19 Coaker, and all agents, representatives, employees, attorneys or accountants of  
them.

20 2. "Documents" shall be construed in its broadest sense, and includes  
21 any original, reproduction or copy of any kind of written or documentary material,  
22 or drafts thereof, including, but not limited to, correspondence, memoranda, notes,  
23 journals, desk calendars, diaries, contract documents, appointment books,  
24 publications, calculations, maps, working papers, vouchers, minutes of meetings,  
25 invoices, reports, studies, computer tapes, photographs, negatives, slides, video or  
audio tapes, telegrams, notes of telephone conversations and notes of any other oral  
communications.

1           3.       Whenever any person must be “identified,” the person shall be  
2 identified by name, last known address, telephone number, and employer.

3           4.       Whenever the term “Property” is used, it should be read as the real  
4 property involved in this lawsuit located at 12217 268<sup>th</sup> Drive NE, Duvall, WA  
98019.

5           5.       Whenever any oral communication must be “identified,” then all  
6 persons (as defined in paragraph 3) who engage in such communication shall be  
7 identified, the times and places where each such communication took place shall  
8 be identified, and the substance of each communication shall be identified.

9           6.       Whenever any document, as defined above, must be “identified,”  
10 the persons involved or connected with such written communication must be  
11 identified; additionally, Defendants should identify whether copies of such written  
12 communication remain in existence, and identify the location and person or  
13 persons having custody and control of such written communication.

14           7.       For purposes of these requests, words in the masculine gender  
15 include the feminine and neuter, singular numbers include the plural and the plural  
16 includes the singular, and the conjunctive includes the disjunctive and vice versa.

17           8.       Any other words used herein shall be defined according to standard  
18 American usage, as shown in a dictionary of the English language.

19           F.       These requests are continuing and therefore require supplemental answers  
20 if you or your attorneys obtain further information between the time answers are served  
21 and the time of trial. You are hereby notified that the undersigned may apply to the court  
22 for an order directing that these requests be deemed continuing; that, upon acquiring any  
23 responsive information after your service of responses, you be required to serve  
24 supplemental responses containing such later acquired information; and that you be  
25 precluded at the trial of this action from introducing evidence relating to the subject matter  
of these requests which has not been disclosed by the responses or supplemental responses  
thereto.

          G.       If it is claimed that an answer (in whole or in part) is privileged or  
otherwise protected from discovery, identify such information by its subject matter, and  
state the nature and basis of each such claim.

          H.       If you withhold any document requested herein on the basis of a claim that  
it is protected from disclosure by privilege, work product or otherwise, provide the  
following information separately for each such document:



1           3.        Responding Defendants object to Plaintiff's requests for production to  
2 the extent that they request information that is not relevant or reasonably calculated to  
3 lead to the discovery of admissible evidence.

4           4.        Responding Defendants object to Plaintiff's requests for production to  
5 the extent that they seek information that is protected by the attorney-client privilege  
6 and/or work product doctrine.

7           5.        Responding Defendants object to Plaintiff's requests for production  
8 insofar as they are directed to knowledge of persons or entities not subject to control of  
9 the responding parties at the time when these answers were prepared.

10          6.        Responding Defendants object to Plaintiff's requests for production to  
11 the extent they seek information and/or the production of documents already in  
12 Plaintiff's possession.

13          7.        Responding Defendants object to Plaintiff's requests for production to  
14 the extent they are unduly burdensome and seek information as readily available to  
15 Plaintiff as to the Defendants.

16          8.        Responding Defendants object to Plaintiff's interrogatories to the extent  
17 they exceed the number of interrogatories allowable under LCR(d)(1)(B).  
18  
19

20                **INTERROGATORY NO. 1:** Please identify by name, address, telephone  
21 number, employer, job description, and affiliation of every person who was consulted or  
22 who has assisted in the answering of these discovery requests, or who furnished  
23 information which was used in answering them.

24                **ANSWER: OBJECTION:** Responding Defendants object to this Interrogatory on  
25 the basis that: a) it seeks information protected by the attorney-client privilege and/or the  
work product doctrine; and b) it improperly seeks the identification of consulting expert

1 witnesses. Without waiving the foregoing objections, the following persons have assisted  
2 with the responses to these interrogatories and requests for production:

3 Michael Coaker  
4 c/o Oles Morrison Rinker & Baker, LLP  
5 701 Pike Street, Suite 1700  
6 Seattle, WA 98101  
7 (206) 623-3427

8 Mr. Coaker is a principal of Mike's Roofing, Inc., and Sundance Builders, Inc. and is a  
9 named defendant in this matter.

10 Marilee Coaker  
11 c/o Oles Morrison Rinker & Baker, LLP  
12 701 Pike Street, Suite 1700  
13 Seattle, WA 98101  
14 (206) 623-3427

15 Ms. Coaker is a principal of Mike's Roofing, Inc., and Sundance Builders, Inc. and is a  
16 named defendant in this matter

17  
18 **INTERROGATORY NO. 2:** For each person identified under Answer to  
19 Interrogatory No. 1, please state the educational background of each such person,  
20 including vocational training, the name of each high school, vocational school, college, or  
21 university such person has attended, and dates of attendance and degrees attained.

22  
23 **ANSWER: OBJECTION:** Responding Defendants object to this interrogatory on  
24 the basis that it is not narrowly tailored so as to illicit information either relevant to this  
25 action or reasonably calculated to lead to the discovery of admissible evidence.  
Without waiving said objection, Michael Coaker attended Mountlake Terrace High  
School in Mountlake Terrace, Washington. Marilee Coaker is a graduate of Nathan  
Hale High School in Seattle, Washington.

1           **INTERROGATORY NO. 3:** Please state whether you are currently or have ever  
2 been involved in any other legal action within the last seven (7) years, either as defendant  
or plaintiff. For any such legal action, please give the following information:

- 3           a.       The date and place such action was filed;  
4           b.       The name of the court in which the action was filed, case title, and cause  
              number;  
5           c.       The name of the other party or parties involved;  
6           d.       A description of the nature and action; and  
              e.       The result of the action.

7           **ANSWER: OBJECTION:** Responding Defendants object to this interrogatory on  
8 the bases that: a) it is not narrowly tailored so as to illicit information either relevant to  
9 this action or reasonably calculated to lead to the discovery of admissible evidence; and  
b) it seeks information protected by the attorney-client and/or work product privileges.

10  
11  
12           **INTERROGATORY NO. 4:** Please identify each and every person known to  
13 you or anyone acting on your behalf, including your attorneys, who have knowledge or  
14 claim to have knowledge of facts and circumstances relating or pertaining to any of the  
allegations referred to in this litigation. For each such person, please state the following:

- 15           a.       Full name;  
16           b.       Last known address, giving street number, street, city, and state;  
17           c.       Last known telephone number;  
18           d.       The substance of each person's knowledge; and  
19           e.       Occupation.

20           **ANSWER: OBJECTION:** Responding Defendants object to this interrogatory on  
21 the bases that: a) it is not narrowly tailored so as to illicit information either relevant to  
22 this action or reasonably calculated to lead to the discovery of admissible evidence; and  
b) it seeks information protected by the attorney-client and/or work product privileges.  
Without waiving such objections, to the Responding Defendants' knowledge, the  
following persons have non-privileged information responsive to this interrogatory:

23           Michael Coaker  
24           c/o Oles Morrison Rinker & Baker, LLP  
25           701 Pike Street, Suite 1700  
              Seattle, WA 98101  
              (206) 623-3427

1 Mr. Coaker has knowledge of the hiring of Plaintiff for work on the Coaker residence, as  
2 well as knowledge as to Plaintiff's failures of performance on that project.

3 Marilee Coaker  
4 c/o Oles Morrison Rinker & Baker, LLP  
5 701 Pike Street, Suite 1700  
6 Seattle, WA 98101  
7 (206) 623-3427

8 Ms. Coaker has knowledge of the hiring of Plaintiff for work on the Coaker residence, as  
9 well as knowledge as to Plaintiff's failures of performance on that project.

10 Jon W. Delony, P.E.  
11 8325—128th Avenue NE #107  
12 Kirkland, WA 98033  
13 (425) 463-6765

14 At the Coakers' request, Mr. Delony reviewed the concrete work performed by Plaintiff at  
15 the Coaker residence, and has provided observations and recommendations to the Coakers  
16 about that work.

17 Steven Craig  
18 201 E. Jonathan Road  
19 Bothell, WA 98012  
20 (425) 774-6760

21 Mr. Craig was working on the Coaker Residence at the time R&R was performing its  
22 work. It is anticipated that Mr. Craig will testify regarding his observations of R&R's  
23 performance.

24 Paul Stead  
25 P.O. Box 519  
Duvall, WA 98019  
(425) 766-2712

Mr. Stead was present at the Coaker Residence at the time R&R was performing its work.  
It is anticipated that Mr. Stead will testify regarding his observations of R&R's  
performance.

Ryan Thompson  
510 15th Street NE  
East Wenatchee, WA 98802  
(509) 884-6997

1 Mr. Thompson was working on the Coaker Residence at the time R&R was performing its  
2 work. It is anticipated that Mr. Thompson will testify regarding his observations of R&R's  
3 performance.  
4

5 **INTERROGATORY NO. 5:** With regard to each expert you expect to call as an  
6 expert witness at the time of trial, please indicate the following:

- 7 a. The name, address, and telephone number;
- 8 b. The subject matter about which the expert is expected to testify;
- 9 c. The substance of the facts and opinions about which the expert is expected  
10 to testify;
- 11 d. A summary of the grounds for each opinion;
- 12 e. All of the educational background relied upon by said expert witness in  
13 arriving at the above-referenced opinion, indicating for each degree  
14 obtained:
  - 15 1. The name of the degree;
  - 16 2. The year of the degree;
  - 17 3. The institution granting said degree;
- 18 f. All experience, skills, and/or training that qualifies him or her as an expert  
19 in this case;
- 20 g. All memberships and/or associations with professional organizations which  
21 he/she has pertaining to the subject area on which he/she will testify as an  
22 expert;
- 23 h. Whether he/she is licensed by the State of Washington, or any county or  
24 city in which he/she does business, or whether he/she is licensed by any  
25 federal agency, state, county, or city, and if so licensed, state the date  
his/her first license was issued, where it was issued, and the expiration date  
of any current license he/she holds;
- i. All professional experience in the field or fields which relate to the  
opinions offered by said individual;
- j. The name, publisher, and date of publication of all published materials  
relied upon in forming the opinions identified above, including learned  
treatises;
- k. All information, in detail, which was supplied by you or your counsel to  
the expert which was relied upon by the expert in arriving at his/her  
opinion;
- l. Any other material relied upon by said expert witness in arriving at his/her  
opinions, setting out specifically the information provided and the source of  
said information;
- m. With regard to any testing performed by said expert witness, please  
indicate the nature of said testing and the results of said testing; and

1 n. The rate of compensation charged by said expert in this case.

2 **ANSWER: OBJECTION:** Responding Defendants object to this interrogatory  
3 to the extent that it: a) is premature, as Defendants have yet to determine whether they will  
4 identify any expert witness to be called at trial; b) it is not narrowly tailored so as to illicit  
5 information either relevant to this action or reasonably calculated to lead to the  
6 discovery of admissible evidence; c) it seeks the disclosure of information or materials  
7 not in the possession of Responding Defendants. Without waiving said objection,  
8 Responding Defendants identify the following expert, who may be called upon to testify at  
9 trial:

7 Jon W. Delony, P.E.  
8 8325—128th Avenue NE #107  
9 Kirkland, WA 98033  
(425) 463-6765

10 To the best of Responding Defendants' current knowledge, Mr. Delony is a civil engineer  
11 with significant experience with the kind of concrete work performed at the Coaker  
12 Residence by Plaintiff. Responding Defendants are aware that Mr. Delony has reviewed  
13 Plaintiff's work in place, and has discussed the expected scope and specification for the  
14 concrete work with Responding Defendants.

14 **REQUEST FOR PRODUCTION NO. 1:** Please produce copies of the  
15 following:

- 16 a. Any resume or curriculum vitae setting out the background of any expert  
17 witness referred to in response to the immediately preceding Interrogatory;  
18 b. A copy of all written correspondence in the possession of said expert  
19 witness pertaining to this case, including but not limited to, correspondence  
20 from your counsel for you and to your counsel from you, as well as to or  
21 from any other person;  
22 c. A copy of any notes made by any expert witness in connection with this  
23 case; and  
24 d. A copy of any tests, data, or results recorded by said expert witness in  
25 connection with this case.

22 **RESPONSE: OBJECTION:** Responding Defendants object to this request for  
23 production to the extent that it: a) is premature, as Defendants have yet to determine  
24 whether they will identify any expert witness to be called at trial; b) it is not narrowly  
25 tailored so as to illicit information either relevant to this action or reasonably calculated  
to lead to the discovery of admissible evidence; c) it seeks the disclosure of information  
or materials not in the possession of Responding Defendants.

1 Without waiving said objections, attached hereto is a resume for Jon W. Delony, P.E, and  
2 a letter from Mr. Delony to Responding Defendants dated November 19, 2007, each of  
3 which is responsive to this Request for Production  
4

5 **INTERROGATORY NO. 6:** Do the Defendants have in their possession any of  
6 the following: photographs, maps, graphs, letters, books, pamphlets, periodicals, reports,  
7 memoranda, notations, messages, telegrams, cables, records, working papers, charts,  
8 indexes, audio or video tapes, applications, contracts, receipts, invoices, records, or  
9 purchase or sale correspondence, facsimiles, electronic or other transcriptions or tapes of  
telephone or personal conversations or conferences, or any other graphic matter, however  
produced or reproduced, which may be pertinent to this lawsuit and not otherwise provided  
for? If so, for each such item, please state:

- 10 a. The name, address, and telephone number of the individual who prepared  
the item or took the photograph;  
11 b. The number of photographs or items;  
12 c. The name, address, and telephone number of the individual in whose  
custody such photographs or items are currently held; and  
13 d. What each item or photograph depicts or describes.

14 **ANSWER: OBJECTION:** Responding Defendants object to this interrogatory  
15 to the extent that it: a) calls for legal conclusions; b) seeks information protected by the  
attorney-client privilege and/or work product doctrines; c) seeks information from non-  
16 testifying expert witnesses; and d) is compound and/or duplicative of other requests for  
production propounded by Plaintiff.

17 Without waiving said objections, Responding Defendants have a number of items in their  
18 possession that are responsive to this request for production. Those include:

- 19 1. Handwritten and typewritten notes regarding Plaintiff's  
performance.  
20 2. Copies of facsimiles sent by Responding Defendants to Plaintiff.  
21 3. Copies of invoices and packing slips for materials purchases  
relating to the concrete work at the Coaker Residence  
22 4. Full color brochures colored concrete and patterned concrete  
paving  
23 5. Color photographs of R&R's work in progress, taken on the dates  
indicated.

1           **REQUEST FOR PRODUCTION NO. 2:** Please produce true and correct copies  
2 of any and all items identified in the preceding Interrogatory.

3           **RESPONSE:** Copies of those documents identified in the Answer to Interrogatory  
4 No. 6 above are attached hereto.

5  
6           **INTERROGATORY NO. 7:** Please identify each occasion you notified Plaintiff  
7 of any deficiency or claim regarding Plaintiff's work on the Property and whether such  
8 notice was written or oral. For each occasion, please provide the name of the person  
9 giving such notice and date on which such notification occurred and the substance of such  
10 notification.

11           **ANSWER:** Please refer to the records provided in response to Request for  
12 Production No. 2.

13           **REQUEST FOR PRODUCTION NO. 3:** Please produce all e-mails, phone  
14 notes, recorded messages, correspondence, or other documents related to the parties'  
15 communications regarding the project.

16           **RESPONSE:** Please refer to the records provided in response to Request for  
17 Production No. 2.

18           **REQUEST FOR PRODUCTION NO. 4:** Please provide any and all estimates,  
19 invoices, bills, notes, correspondence and other documentation of all work done to the  
20 Property, together with the names, addresses, professional credentials, licenses, and  
21 professional associations of the entity performing the work in the last 5 years.

22           **RESPONSE:** **OBJECTION:** Responding Defendants object to this Request for  
23 Production to the extent that it: a) is overly broad; b) is unduly burdensome; c) seeks  
24 information already in the possession of Plaintiff; and d) is not narrowly tailored so as to  
25 illicit information either relevant to this action or reasonably calculated to lead to the  
discovery of admissible evidence.

1           **INTERROGATORY NO. 8:** Identify all contractors, subcontractors, suppliers or  
2 laborers hired to perform any improvements to the subject property in the last 5 years.

3           **ANSWER: OBJECTION:** Responding Defendants object to this Interrogatory to  
4 the extent that it: a) is overly broad; b) is unduly burdensome; c) seeks information  
5 already in the possession of Plaintiff; and d) is not narrowly tailored so as to illicit  
6 information either relevant to this action or reasonably calculated to lead to the  
7 discovery of admissible evidence.

8           **INTERROGATORY NO. 9:** Were all contractors, subcontractors, suppliers and  
9 laborers paid one hundred percent of their claimed contract earnings? If not, please  
10 identify the payments made and the reasons for any holdbacks or discounts.

11           **ANSWER: OBJECTION:** Responding Defendants object to this Interrogatory as:  
12 a) vague; and b) requiring the responding party to interpret undefined terms.

13 Without waiving said objections, Responding Defendants have paid in full all contractors,  
14 subcontractors and suppliers who provided labor, equipment and materials for the work  
15 done on the Coaker Residence project.

16           **REQUEST FOR PRODUCTION NO. 5:** Provide all documents reflecting  
17 your choice of colored material and any documents communicating information about  
18 coloring to R & R Concrete, Inc.

19           **RESPONSE: OBJECTION:** Responding Defendants object to this Request for  
20 Production to the extent it: a) is duplicative of other Requests for Production; and b) seeks  
21 documents already in the possession of Plaintiff.

22 Without waiving said objections, see those documents furnished in response to Request for  
23 Production No. 2 above.  
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**REQUEST FOR PRODUCTION NO. 6:** Provide copies of all invoices, trip tickets, purchase orders, or other documents identifying material purchased by you or any company buying products on your behalf for improvements related to the work performed by R & R Concrete, Inc.

**RESPONSE: OBJECTION.** Responding Defendants object to this Request for Production to the extent it: a) is duplicative of other Requests for Production; and b) seeks documents already in the possession of Plaintiff.

Without waiving said objections, see those documents furnished in response to Request for Production No. 2 above.

**REQUEST FOR PRODUCTION NO. 7:** Provide all plans, sketches, or other documents describing the work to be performed by R & R Concrete, Inc.

**RESPONSE:** Responding Defendants are in possession and/or control of no such documents.

**INTERROGATORY NO. 10:** Identify any deadlines or time requirements communicated from you to R & R Concrete, Inc.

**ANSWER:** Responding Defendants were informed by Roger Rausch, that Plaintiff would complete its work in three weeks from the date of its commencement.

**INTERROGATORY NO. 11:** Identify any damages you assert were caused by any delay in R & R Concrete, Inc.'s work.

**ANSWER: OBJECTION:** Responding Defendants object to this interrogatory as: a) vague; and b) calling for a legal conclusion.

Without waiving said objections, Responding Defendants assert that damages caused by R&R include, but are not limited to, additional costs incurred by Responding Defendants, because of R&R's failure to have completed its work within the promised time period. Those costs are associated with the fact that the incomplete status of the driveway limited

1 access to the project site, and caused contractors and suppliers to incur additional time and  
2 expense in transferring materials and equipment on the project site. Additionally, the  
3 delay in completion of the concrete work required Responding Defendants to renew their  
4 building permit and incur an additional fee for so doing.

5 **REQUEST FOR PRODUCTION NO. 8:** Provide all documents regarding the  
6 delays and/or damages identified by you in the preceding Interrogatories.

7 **RESPONSE:** See the documents provided in response to Request for Production  
8 No. 2 above.

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10 **INTERROGATORY NO. 12:** Identify any document describing the curb work  
11 you assert was not done or was done incorrectly by R & R Concrete, Inc.

12 **ANSWER:** No such documents exist. The agreement between the parties  
13 regarding the concrete curbing was oral, and is confirmed by the fact that Plaintiff began  
14 the curb work on the second day on the Coaker Residence site, though it failed to complete  
15 that work.

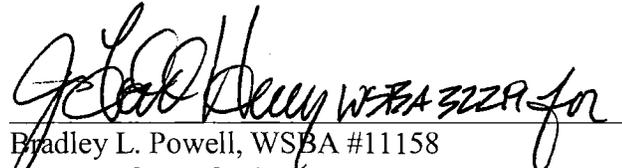
16  
17 **REQUEST FOR PRODUCTION NO. 9:** Provide copies of any document  
18 described in the preceding Interrogatory.

19 **RESPONSE:** See the Answer to Interrogatory No. 12 above.

20  
21 **INTERROGATORY NO. 13:** Identify any communications between you and  
22 Roger Rausch or any other employee of R & R Concrete, Inc. regarding the issue of  
23 whether the installation of curbing was within the scope of work under R & R Concrete,  
24 Inc.'s contract.

25 **ANSWER:** All such communication was oral, although some record of that  
communication is contained in the records provided in response to Request for Production  
No. 2 above.

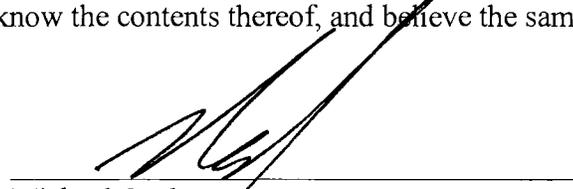
1 The undersigned attorney for Defendants has read the foregoing First  
2 Interrogatories and Requests for Production of Documents Propounded to Defendant  
3 Coaker and answers thereto, and hereby certifies they are in compliance with CR26(g).

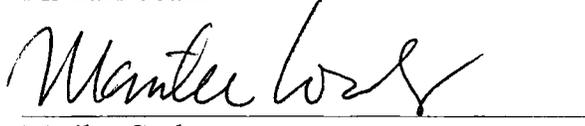
4   
5 Bradley L. Powell, WSBA #11158  
6 Attorney for Defendants

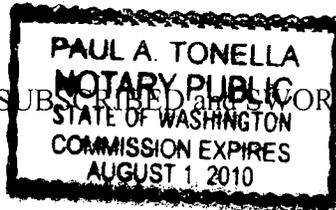
7 STATE OF WASHINGTON )  
8 ) ss.  
9 COUNTY OF KING )

10 Michael Coaker and Marilee Coaker being first duly sworn on oath depose and  
11 say:

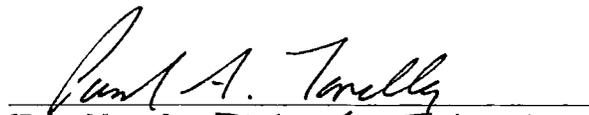
12 We are two of the named defendants herein, and as such have read the foregoing  
13 Interrogatories and Answers thereto, know the contents thereof, and believe the same to be  
14 true, accurate and complete.

15   
16 Michael Coaker

17   
18 Marilee Coaker



19 SUBSCRIBED and SWORN to before me this 13 day of November, 2008.

20   
21 [Print Name] PAUL A. TONELLA  
22 NOTARY PUBLIC in and for the State of  
23 Washington, residing at BURIEN, WA  
24 My commission expires: 8-1-2010

25 S:\Clients\Rausch, Roger & Susan\R & R Concrete, Inc\Coaker Claim\Discovery - 1st Interrog & RFPs to PL.doc