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COURT OF APPEALS
DIVISION II

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

Case No. 37557-5-II

KENNETH VELDHEER and KAREN VELDHEER,
husband and wife,
Plaintiffs/Respondents,

v.

PREMIER COMMUNITIES, INC., a Washington State registered
contractor; INSURANCE COMPANY OF THE WEST,
Washington State Contractor's Bond No. 2174030,
a foreign surety company; and, DEVELOPERS SURETY &
INDEMNITY CO., Washington State Contractor's Bond No. 572746C,
a foreign surety company,
Defendants/Appellants.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Appellant Premier Communities, Inc. (“Premier”) is a home builder operating principally in Pierce and Thurston Counties. Respondents Kenneth and Karen Veldheer (the “Veldheers”), purchased a home from Premier in a residential subdivision known as “Cooper Crest” located in Thurston County.

The Purchase and Sale Agreement (“PSA;” CP 216-226) provided the Veldheers with a sole warranty “as contained in the 2-10 Home Buyers Warranty Booklet” (the “Warranty”). (CP 223 at ¶ 26). Paragraph 25 of the PSA (at CP 223) provides that all disputes between the parties shall be subject to binding arbitration pursuant to “the most recent edition of the Warranty Booklet.”

The Warranty Booklet is CP 300-331. In sum, the Warranty provides the exclusive remedy available to the homeowner and requires all disputes relating to the home be resolved in binding arbitration. *See* Section VII of the Warranty (CP 304-306). The Warranty, likewise, contains no provision allowing an award of attorneys’ fees to the prevailing party in the arbitration.

The Veldheers claimed in arbitration that there were defects in the home subject to coverage under the Warranty. After making an arbitration demand (CP 290-298), the Veldheers filed a lawsuit (CP 10-21) asserting a variety of claims all of which fell within the express scope of the arbitration provision of the Warranty.

Although an award of damages is not a remedy available to the parties under the Warranty, the Arbitration Award (the “Award;” CP 391-

394) made an award of damages to the Veldheers. In confirming the Award, the Trial Court awarded attorneys' fees and costs of both the arbitration and the Trial Court proceeding to the Veldheers (CP 478-484) despite the fact that the Arbitrator expressly declined to award attorneys' fees in the Award and, on the face of the Award, Premier had prevailed on major issues in the arbitration.

II. ASSIGNMENTS OF ERROR

Premier makes the following assignments of error to the Trial Court:

1. The Trial Court committed error by confirming an Award where the Arbitrator had exceeded the authority granted to the Arbitrator under the agreements between the parties and applicable American Arbitration Association Home Construction Industry Arbitration Rules ("ARB") limiting the Arbitrator to a "remedy or relief...within the scope of the Agreement between the parties." (ARB 43 at CP 452-453).

2. The Trial Court committed error by awarding attorneys' fees and costs exclusively to the Veldheers where: (i) there was no applicable attorneys' fee provision in the agreements between the parties; (ii) the Arbitrator expressly declined to award attorneys' fees; and (iii) Premier was the prevailing party on the statutory causes of action with a fee provision.

3. The Trial Court committed error by failing to conclude that, on the face of the Award, the Veldheers did not meet their burden of proof.

III. STATEMENT OF THE CASE

A. The PSA.

The PSA was mutually accepted on November 17, 2004. The PSA required Premier to construct a home for the Veldheers. Construction was subsequently undertaken and the transaction contemplated under the PSA closed on November 29, 2005.

Paragraph 18 of the PSA provides:

Purchaser acknowledges that Purchaser has not relied on any representations, opinions or statements, oral or implied, made by the Seller or Seller's Agent...concerning the [P]roperty condition, noise, views, grounds, future improvements, ownership, status, zoning and/or pending encroachments, school district boundaries, square footage of lots or buildings, road improvements, county records, fact or preview sheets provided by any agent, or any other matter not contained in this Agreement. Purchaser agrees to rely solely on Purchaser's own independent analysis and inspections of the Property, and written agreements between Seller and Purchaser. The foregoing list is not exhaustive, but intends to illustrate Purchaser's obligation and willingness to assure himself or herself of Purchaser's satisfaction with all aspects of the Property.

(CP 216 -226 at 221).

Paragraph 19 of the PSA provides: "Seller and Purchaser agree that Seller shall provide no warranty, express or implied, in addition to the Builder's Complete [2-10] Warranty." (CP 222). Paragraph 26 of the PSA provides: "The warranty contained in the 2-10 Home Buyers Warranty Booklet is the sole warranty provided to Purchaser. Any other warranty or warranties, whether express or implied, are disclaimed by Seller and waived by Purchaser, unless otherwise prohibited..." (CP 223-224). Paragraph 26 of the PSA again disclaims and waives a warranty of

habitability concluding: "Purchaser acknowledges and agrees that Seller is relying on this waiver and would not agree to build the Home for the Purchaser without this waiver." (CP 224). In short, the terms of the PSA preclude a claim based on any warranty or representation not contained in the Warranty.

Paragraph 25 of the PSA provides as follows:

This Agreement provides that all disputes between you and [S]eller will be resolved by BINDING ARBITRATION. THIS MEANS THAT YOU AND THE SELLER EACH GIVE UP YOUR RIGHT TO GO TO COURT to assert or defend rights under this Agreement. (EXCEPT for matters that may be taken to SMALL CLAIMS COURT)...

It is hereby agreed that all claims, disputes, and controversies arising between Purchaser and Seller arising from or related to the Property identified herein, or to any defect in or to the Home or the Lot on which the Home is situated, or the sale of the Home by Seller, including but not limited to, any claim for breach of contract, negligent or intentional misrepresentation, nondisclosure in the inducement, execution or performance of any contract, including this arbitration agreement and breach of any alleged duty of good faith and fair dealing shall be submitted to binding arbitration by and pursuant to the arbitration provision contained in the most recent edition of the Warranty Booklet...

(CP 223) (Emphasis in original).

B. The Warranty.

The Warranty Booklet is CP 300-331. Section VII of the Warranty

(CP 304-307 at 304) provides:

WAIVER OF IMPLIED REMEDIES. You have accepted the express Limited Warranty provided in this Warranty Booklet, and all other express or implied warranties, including any oral or written statements or representations made by Your Builder or any implied**

warranty of habitability, merchantability or fitness, are hereby disclaimed by Your Builder and are hereby waived by You to the extent possible under the laws of Your state.

EXCLUSIVE REMEDY AGREEMENT. Effective one year from the Effective Date of Warranty, You have waived the right to seek damages or other legal or equitable remedies from Your Builder...under any other common law or statutory theory of liability, including but not limited to negligence and strict liability...Your only remedy in the event of a defect in or to Your Home or in or to the real property on which Your Home is situated is as provided to You under this express Limited Warranty...**

(Emphasis in original). The Request for Arbitration executed by both of the Veldheers states the effective date of the Warranty as “11/23/05.” (CP 290-298 at 291).

The coverage provided by the Warranty is described in Section II. (CP 302). The basic coverage is that the home will be “free from Defects...as defined in the Construction Performance Guidelines in Section IX.” (CP 302).

Section III of the Warranty (CP 302) governs the reporting of defects and states that in the event of a covered defect: “Your Builder should repair or, at its option, pay to You the cost of repair of these defects.”

Section VII of the Warranty (CP 304-306) is the arbitration provision. Under Section VII of the Warranty, if it is determined that there is a defect covered under the Warranty, the coverage provided by the Warranty is as follows: “REPAIR. The Builder or the Warranty Insurer shall have the option to repair, replace or pay You the reasonable cost of

repair of any covered Defect or Structural Defect.” (CP 305). So, the same provision which provides for mandatory binding arbitration limits the relief the Arbitrator can grant. Under the Warranty, it is not intended that the Arbitrator be empowered to award monetary damages to the exclusion of the option to repair the defect. That option remains up to the “Builder or the Warranty Insurer.”

Section VII of the Warranty provides that: “Any and all claims, disputes or controversies between the homeowner, Builder, Warranty Insurer and/or HBW [the warranty company] shall be settled by binding arbitration.” (CP 305). This expressly includes, “without limitation, any claim of breach of contract, negligent or intentional misrepresentation or nondisclosure in the inducement, execution or performance of any contract, including this arbitration agreement, and breach of any alleged duty of good faith and fair dealing...” (CP 305).

Section VII of the Warranty goes on to state:

This arbitration provision shall inure to the benefit of, and be enforceable by, the Builder’s subcontractors, agents, vendors, suppliers, design professionals, insurers and any other person alleged to be responsible for any defect in or to the subject home...

This arbitration agreement shall be deemed to be self-executing. Any disputes concerning the interpretation or the enforceability of this arbitration agreement or voidability for any cause...shall be decided by the arbitrator.

(CP 305-306).

While the Warranty provides for an award of attorneys’ fees “incurred in enforcing this arbitration agreement,” there is no provision

which allows an award of attorneys' fees to the prevailing party in the arbitration.

C. Relevant Procedural History.

This matter was initiated by the Veldheers' Request for Arbitration on July 10, 2007 (CP290-298). The Request stated claims under four of the Construction Performance Guidelines in Section IX:

- 1.2 - Improper Surface Drainage;
- 2.1 - Cast-In Place Concrete (Cracking);
- 5.1 - Leaks in Basement or in Foundation/Crawl Space; and
- 7.3 - Hard Surfaces.

Each of these guidelines defines the scope of coverage for each enumerated defect. For example, ¶ 2.1 of the Warranty provides that the builder (Premier) shall "repair non-structural cracks" in cast in place concrete "by surface patching." (CP 309). The Warranty defines expressly the repair obligation of the builder with respect to each enumerated category of defect.

In August 2007, subsequent to the Veldheers' Arbitration Demand, the Veldheers filed a Complaint in Trial Court (CP 10-21) alleging negligent or intentional misrepresentation, breach of an implied warranty of habitability, and violation of the Consumer Protection Act, together with a claim for attorneys' fees. The Complaint also named Premier's bonding companies pursuant to RCW 18.27.040. All of the claims asserted in the Complaint fell within the scope of the arbitration provisions in both the PSA and Warranty.

With respect to the bonding companies, the liability under RCW 18.27.040 for the contractor's breach of contract was expressly

within the arbitration provision of ¶ 25 of the PSA which extended to “any claim for breach of contract.” In ¶ 26 of the PSA, the Warranty Booklet is expressly incorporated by reference as part of the PSA. (CP 223). The arbitration provision in the Warranty expressly inured “to the benefit of, and be enforceable by, the Builder’s ... insurers ...” (CP 305-306).

Acting on behalf of Premier and the bonding companies, Premier sought an order requiring the Veldheers to arbitrate the claims (CP 31-50), and the Trial Court action was ultimately stayed pending arbitration (CP 231-232).¹

The Award at issue is CP 391-394. In sum, the Arbitrator found that the Veldheers had failed to meet their burden of proof on two of the four claims under the Warranty and, the Consumer Protection Act claim. The Arbitrator awarded the Veldheers \$32,500 on the claim under Construction Guideline 5.1 and an additional \$536 on the “hard surface” claim.

With respect to the water intrusion claim which the Arbitrator concluded involved a covered defect, the Award states: “Claimant’s expert testified that the evident defects can be cured at a cost of \$32,500.” (CP 393). “Can be cured” meaning the repairs have not yet been undertaken. The arbitration provisions states that: (1) the homeowner has “*waived the right to seek damages;*” (emphasis in original) and (2) “The Builder or the Warranty Insurer shall have the option to repair, replace or pay You the reasonable cost of repair of any covered Defect or Structural Defect.” (CP 305) (Emphasis added). Notwithstanding, the Arbitrator

¹ If the entitlement to fees is indeed limited to a party successfully enforcing the arbitration provisions, then the award should have been made to Premier.

awarded *damages* for repairs which had not been undertaken without recognition of the Builder's (Premier) right to undertake the repairs at its own expense.

The Arbitrator further found:

Claimant's request for an award of attorneys fees is denied. Claimant's evidence failed to establish a breach by the Respondent of the Consumer Protection Act. Therefore, there is no basis for an award of attorneys fees under RCW 19.86. At the hearing, the Claimant also asserted entitlement to attorneys fees under RCW 18.27. The Arbitrator determines that an award of attorneys fees under that statute is not warranted.

(CP 393).

The Trial Court entered an Order reducing the Award to judgment, confirming the award of damages to the Veldheers. (CP 478-474). Notwithstanding the decision of the Arbitrator not to award attorneys' fees, the Trial Court awarded the Veldheers \$18,000 in attorneys' fees incurred both in the arbitration and the Trial Court actions.

IV. ARGUMENT

A. Issue No. 1: Did the Trial Court commit error by confirming an award where the Arbitrator granted relief not awardable under either the applicable AAA Rule or the Arbitration Agreement?

A trial court addressing an arbitration award is in effect a court of review. The scope of that review is strictly limited to the statutory grounds enumerated in the arbitration statute:

After the arbitrators' award, RCW 7.04.150 provides any party may apply to the court for an order confirming the award "and the court shall grant such an order unless the award is beyond the jurisdiction of the court, or is vacated, modified, or corrected, as provided in RCW 7.04.160 and

7.04.170.” Those referenced statutes state the grounds upon which the trial court may vacate or modify the award;...

See Price v. Famers Ins. Co., 133 Wn.2d 490, 946 P.2d 388 (1997).

The Arbitration Statute has been recodified since *Price*. The statutory bases for review now appear in RCW 7.04A.220 through .240. Under RCW 7.04A.230(1)(d), an award may be vacated where the arbitrator has exceeded his authority.

The authority of the arbitrator is defined by the agreement to arbitrate, *Price* at 495 FN 3 (“[P]arties are only bound to arbitrate those issues which by *clear language they have agreed to arbitrate*; arbitration agreements will not be extended by construction or implication.”) (emphasis in original) and the arbitration rules specified in that agreement; *Northern State Constr. Co v. Banchemo*, 63 Wn.2d 245 at 249, 386 P.2d 625 (1963):

Arbitration is a statutory proceeding and the rights of the parties to it are controlled by statutes. We have now what amounts to a code of arbitration. RCW 7.04.020 *et seq.* There is no claim here or showing that the parties or arbitrators failed to comply with either the statutes or ***the rules for arbitration adopted by agreement.***

(Emphasis added).

As the Veldheers acknowledged before the Trial Court (*see* CP 446) this arbitration was governed by ARB 43 the text of which appears at CP 452-453. ARB 43(a) states: “The arbitrator may grant any legally available remedy or relief that the arbitrator deems just and equitable and within the scope of agreement of the parties.” ARB 43(e) further provides that: “The arbitrator may grant any remedy, relief or

outcome the parties could have received in court.” To determine what remedy could be awarded by a Court, a Court would have to look at what remedies are available under the agreement between the parties.

Paragraph 25 of the PSA provides:

It is hereby agreed that all claims, disputes, and controversies arising between Purchaser and Seller arising from or related to the Property identified herein, or to any defect in or to the Home or the Lot on which the Home is situated, or the sale of the Home by Seller...shall be submitted to binding arbitration by and pursuant to the arbitration provision contained in the most recent edition of the Warranty Booklet...

(CP 223). The arbitration provision of the Warranty is Section VII which states as follows:

You have waived the right to seek damages or other legal or equitable remedies from Your Builder...under any other common law or statutory theory of liability, including but not limited to negligence and strict liability...Your only remedy in the event of a defect in or to Your Home or in or to the real property on which Your Home is situated is as provided to You under this express Limited Warranty...

(CP 304) (Emphasis in original).

Again, Section VII of the Warranty defines the obligation of the Builder (Premier) in the event that it is determined that there is a defect covered under the Warranty: “REPAIR. The Builder or the Warranty Insurer shall have the option to repair, replace or pay You the reasonable cost of repair of any covered Defect or Structural Defect.” (CP 305). Under Section VII of the Warranty, the arbitration provision, the Arbitrator is not empowered to award monetary damages for repairs which have not been undertaken to the exclusion of the option to repair the defect

granted to the Builder. That option remains up to the “Builder or the Warranty Insurer.”

The Arbitrator was limited under ARB 43 to granting the relief that would have been awardable by a Court under the parties’ agreement. If the Trial Court had been presented the issue instead of the Arbitrator, under the clear and unambiguous language of those agreements, the Trial Court would not have been able to award damages. The relief granted by the Arbitrator was clearly outside the scope of the Arbitrator’s authority under ARB 43. For the Trial Court to confirm an award granting relief unavailable to the Arbitrator is clear error.

B. The Attorney’s Fees Issue.

The Veldheers sought attorneys’ fees under RCW 18.27.040(6)¹ and RCW Chap. 19.86 (*see* CP 463-464). In other words, the Veldheers sought to be awarded attorneys’ fees on two statutory causes of action which had been asserted in a lawsuit filed in contravention of the arbitration provisions in both the PSA and Warranty and subsequently tried before the Arbitrator.

In the Award, the Arbitrator declined to award attorneys’ fees stating that an award of attorneys’ fees under either RCW Chap. 19.86 or 18.27 was not warranted. Nevertheless, in its Judgment on the Award (CP478-484), the Trial Court awarded \$18,000 in attorneys’ fees, including attorneys’ fees incurred in both the arbitration and the Trial Court. (CP 236-246).

¹ RCW 18.27.040(6) is a prevailing party statute: “The prevailing party in an action filed under this section against the contractor and contractor’s bond or deposit, for breach of contract by a party to the construction contract involving a residential homeowner, is entitled to costs, interest, and reasonable attorneys’ fees.”

Under *Price v. Famers Ins. Co.*, 133 Wn.2d 490 at 496-497, 946 P.2d 388 (1997), the authority of the Trial Court in reviewing is extremely limited:

The confirming court does not have collateral authority to go behind the face of the award or to determine whether additional award amounts are appropriate. Nor is a trial court permitted to conduct a trial de novo upon confirmation or search the four corners of the document to discern the parties' intent. Although a party may apply to the court to confirm an arbitration award, that is not the same as bringing an original action to obtain a monetary judgment. A confirmation action is no more than a motion for an order to render judgment on the award previously made by the arbitrators pursuant to contract. If the court does not modify, vacate, or correct the award, the court exercises a mere ministerial duty to reduce the award to judgment.

Nowhere in their pleadings seeking confirmation of the Award did the Veldheers seek relief under either RCW 7.04A.230 (vacation) or RCW 7.04A.240 (modification/correction), or make a record that any of the statutory prerequisites for vacation or modification/correction were satisfied. (CP 244-246; CP 440-450; CP 461-463). The only thing the Trial Court was empowered to do was the "mere ministerial" act of entering Judgment.

However, even if the Veldheers had sought to modify or correct the Award, there would have been no basis for doing so because there is no obvious error on the face of the Award. In this regard, the case is very similar to *Phillips Building Co., Inc. v. An*, 81 Wn. App 696, 915 P.2d 1146 (1996). In *Phillips*, the arbitrator had declined to award attorneys' fees to either party. The Trial Court refused to modify the award to allow

attorneys' fees because it concluded "that it was reasonable to conclude that the arbitration panel determined that neither side had prevailed." *Id.* at 703 FN 5. The Court of Appeals concluded:

It is clear that the arbitrators considered the issue of attorney's fees and, presumably, determined that neither party prevailed. After issuing the award, the arbitrators denied the Ans subsequent motion for attorney fees as the prevailing party, stating again that each party shall bear its own attorney fees and costs. We are not allowed to go behind the face of the award to determine the merits of that decision.

Id. at 704.

Here, the Arbitrator found for Premier on four of the six claims made in the litigation; two of the warranty claims, the CPA claim and the RCW Chap. 18.27 claim. Under these circumstances, the Arbitrator could clearly decline to award attorneys' fees based on the conclusion that the Veldheers were not the sole prevailing party. In this case, the Trial Court could not make an award of attorneys' fees without making its own independent analysis of who was the prevailing party, something it is clearly not entitled to do.

The Veldheers request for attorneys' fees was an attempt to get the Trial Court to do just exactly what it is not entitled to do, look beyond the award, at multiple levels. First, the Velheers asserted that, in stating that an award of attorneys' fees under RCW Chap. 18.27 was not warranted, "the Arbitrator made an extremely nuanced decision." (CP 449). "The reason for the Arbitrator's nuanced decision is that the *arbitration*, strictly speaking, was not an *action* filed under RCW 18.27." *Id.* (Emphasis in

original). Well, neither was the CPA claim, but the Arbitrator resolved that claim: “Claimant’s evidence failed to establish a breach by Respondent of the Consumer Protection Act.” There is absolutely nothing on the face of this Award that suggests that all issues arising under RCW Chap. 18.27 were not similarly resolved.

The Veldheers assert that the lawsuit filed in violation of the arbitration provision somehow authorized the Trial Court to grant additional relief. Section VII of the Warranty, the arbitration provision, states that the Homeowner has waived the right to relief under any common law or statutory theory of liability outside the Warranty. There is no attorneys’ fee provision in the Warranty that would allow an award of the attorneys’ fees incurred in the arbitration. The provision states: “This arbitration provision shall inure to the benefit of, and be enforceable by, the Builder’s...insurers and any other person alleged to be responsible for any defect in or to the subject home...” (CP 305-306). In other words, the agreement provides sole authority to the arbitrator to resolve all issues involving anyone who may be responsible for the claim. The Trial Court clearly lacked the authority to make an award of attorneys’ fees independent of the Arbitrator.

Second, the Veldheers argued: “If the Veldheers do not receive an award of attorneys’ fees, every dollar that they spent in this action and on this arbitration will be one less dollar that they will have to spend on repairs for their house...” (CP 463). The Trial Court could not possibly adopt this argument as a basis for awarding attorneys’ fees without going outside the award. This basis for awarding attorneys’ fees is simply an

argument that the relief granted by the Arbitrator is inadequate. However, a Trial Court is not empowered to second guess the decision of the arbitrator as to the adequacy of the relief granted.

C. The Burden of Proof Issue.

At Section C of the Award (CP 392-393), the Arbitrator stated the basis for the award of damages under Section 5.1 - Waterproofing. The Arbitrator states:

There was no dispute in the hearing that water was actually migrating through the foundation wall at the the cold joint and where the sanitary sewer drain pipe penetrates the foundation wall. ***There was no evidence introduced at the hearing that effectively explained the cause of the water...***It appears that the water intrusion results from ineffective water proofing of the cold joint and sewer pipe penetration, ***possibly*** in combination with inadequacies in the footing drain system.

(Emphasis added.) For the Arbitrator to award \$32,500 in damages to rectify a problem where there was ***no adequate evidence*** on the cause of the water intrusion but that it ***possibly*** had something to do with the footing drains is error on the face of the Award.

To prevail on a claim for breach of contract, a plaintiff must show by a preponderance of the evidence that the contract imposed a duty, the duty was breached, and the breach proximately caused damage to the plaintiff. See, NW Indep. Forest Mfrs. v. Dep't of Labor & Indus., 78 Wn. App. 707, 712, 899 P.2d 6 (1995). Thus, it is not enough for a plaintiff to show that a breach occurred. See Commercial Inv. Co. v. Nat'l Bank of Commerce, 36 Wash. 287, 293, 78 P. 910 (1904). A plaintiff must also establish the damages resulting from the breach with a reasonable degree of certainty. Larsen v. Walton Plywood Co., 65 Wn.2d

1, 15, 390 P.2d 677 (1964). Damages need not be proven with mathematical certainty, but must be supported by evidence that provides a reasonable basis for estimating the loss and does not amount to mere speculation or conjecture. *Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 840, 786 P.2d 285 (1990).

No adequate evidence of the cause and possible involvement of the footing drains simply does not meet the standard of proof. In this case, if you cannot tell why there is a water intrusion problem or that it is probable that the footing drain system is at fault, an award of damages can be based on nothing other than speculation both as to the cause of the problem and the cost of completing the repairs.

V. CONCLUSION

Overall, the effect of the ruling may ultimately be to assure that the Veldheers will not have an effective remedy under the Warranty. This is best seen by simply comparing what would have happened if the Arbitrator had confined himself to the relief provided under the Warranty with what is likely to happen here.

Under the plain language of the Warranty, the Arbitrator should have ordered Premier to either repair the defect or reimburse the Veldheers for the costs of having the repairs done by a third party contractor. The cause of the water intrusion or, whether the footing drains are contributing to the water intrusion, are equally irrelevant because, as part of its obligation to repair, Premier would have to definitively identify the cause of the water intrusion. Moreover, whatever sums were expended by the Veldheers as attorneys fees, the repairs would still be completed at

Premier's expense because, one way or the other, Premier would have been obligated to fund the costs of repair in the entirety.

However, because the Veldheers elected to pursue an award of damages, rather than allowing a repair Premier was willing to make, the parties ended in this dispute. From Premier's perspective, it has little choice but to ask this Court to address its obligations under the Warranty because Premier has obligations under hundreds of similar warranties.

Under the Award, the Veldheers are given a lump sum of money. Because the cause of the intrusion was not identified in the Arbitration, as the Arbitrator states expressly, the Veldheers could use the funds to excavate the whole footing drain system and discover that the footing drains are not the problem. The Veldheers cannot, at that point, go back to Premier to solve the problem. Whether the Veldheers will then have sufficient funds to complete the repairs is problematic.

Because the Trial Court cannot look beyond the face of the award and second guess the decision of the arbitrator not to award attorneys fees, the award of fees must be reversed. Those fees will likely approach the amount of the award by the time this appeal is complete. If, as the Veldheers have asserted, "every dollar that they spent in this action and on this arbitration will be one less dollar that they will have to spend on repairs for their house..." (CP 463), the Veldheers may not have sufficient funds to actually do any repairs. The only ones who will have ultimately benefitted will be the Veldheers' lawyers.

The Warranty was set up to provide the specific relief it does for a reason. As Stephen Graham, a representative of the Warranty Insurer testified:

Under the HBW Warranty, it is not intended that the Arbitrator would be empowered to award monetary damages to the exclusion of the option to repair the defect. In general, this is because the repair by the original builder would be less costly and more expeditious than a third-party vendor.

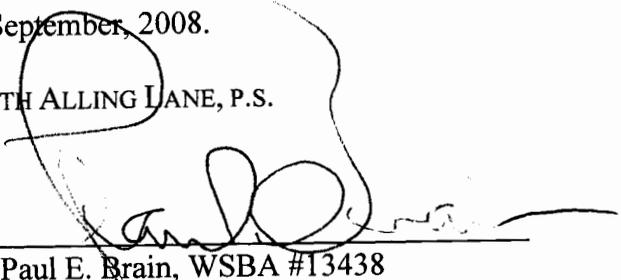
CP 249-250.

But for the fact that the Veldheers sought relief other than to just have Premier fix the problem, we would not be here. By creating a situation where Premier had to defend not just the claim but the terms of hundreds of other warranties, Premier was left with little choice. Whatever the cost of rectifying the problem might be, the costs of this proceeding are likely to be greater. When the Arbitrator decided to go outside the Warranty and the Trial Court outside its authority, we assume both were trying to help the Veldheers. Unfortunately, it is likely to have the opposite effect.

In any case, Premier respectfully submits that this matter should be remanded to the Trial Court with direction to vacate the award for the reasons stated above. At that point, the Arbitrator can enter the Order it should have entered in the first place and the Veldheers can get meaningful relief.

DATED this 29th day of September, 2008.

SMITH ALLING LANE, P.S.

By: 
Paul E. Brain, WSBA #13438

Attorneys for Defendants/Appellants

CERTIFICATE OF SERVICE

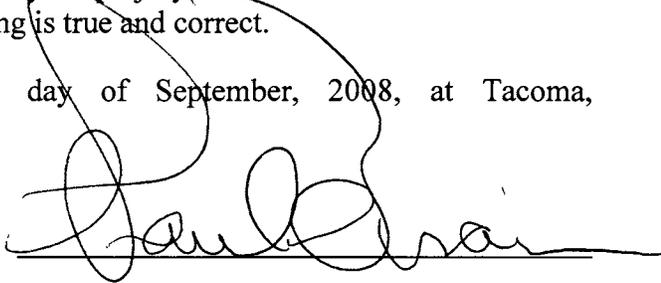
I hereby certify that I have this 29th day of September, 2008, served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

Attorneys for Plaintiffs/Respondents:

Clydia J. Cuykendall	<input type="checkbox"/>	Hand Delivered
Cushman Law Offices, P.S.	<input checked="" type="checkbox"/>	U.S. Mail (first-class, postage prepaid)
924 Capitol Way South	<input type="checkbox"/>	Overnight Mail
Olympia, WA 98501	<input checked="" type="checkbox"/>	Facsimile
	<input type="checkbox"/>	Email (cjcuyken@cushmanlaw.com)

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

DATED this 29th day of September, 2008, at Tacoma, Washington.



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