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## I. INTRODUCTION

Karen and Richard Applegate (the “Applegates”) appeal multiple issues in this matter. The vast majority of these issues involve co-defendant Washington Federal Savings (“WFS”), the bank that administered the Applegates’ custom home construction loan. The only appellate issues raised against Harbor Home Design and Charles and Jane Doe Bucher (hereafter referred to collectively as “HHD”) involve evidentiary rulings and irrelevant character evidence properly excluded.

The Applegates request that this Court second guess the trial court’s evidentiary rulings and substitute its judgment as to which witnesses were proper to present to the jury. Ultimately, no trial court decision deprived the Applegates of their opportunity to present their legal and factual theories to a Pierce County jury, which soundly rejected their ill-conceived and exaggerated claims against both defendants in this matter.

The jury adamantly rejected these ill-conceived and far reaching claims. Now, the Applegates ask this Court to reverse the jury’s findings, not because it erred – it did not – but because two largely irrelevant witnesses were correctly prohibited from testifying: Diana Behrens, a disgruntled former HHD customer whose testimony was unrelated to the case at hand; and Robert Floberg, an expert witness who never disclosed

his final opinions.

These witnesses were properly excluded. However, even if the exclusions were somehow improper, this does not constitute reversible error and should not entitle the Applegates to retry this case.

## **II. COUNTERSTATEMENT OF ISSUES PRESENTED**

1. Did the trial court properly exercise its discretion to exclude the testimony of Robert Floberg when, after obtaining a continuance to disclose his expert opinions, the Applegates failed to disclose any conclusive opinions before trial?

2. Were the Plaintiffs able to argue their conversion claim against HDD to the jury in spite of the fact that the trial court excluded the testimony of Robert Floberg, when Mr. Applegate testified that he did not sign the check or Certificate at issue?

3. Did the trial court properly exercise its discretion to exclude the testimony of Diana Behrens where she was offered to testify that HHD purportedly “overcharged” on another project in order to prove that HHD allegedly “overcharged” the Applegates on their home construction project?

4. Were the Plaintiffs able to argue to the jury that HDD overcharged them on the construction project and/or committed fraud or conversion in spite of the trial court’s ruling to exclude the testimony of

Diana Behrens?

5. Is HHD entitled to its reasonable attorney's fees incurred in defending this appeal pursuant to RAP 18.1?

### **III. STATEMENT OF FACTS**

#### **A. Factual Background**

The underlying litigation arises out of a custom home construction project located in Gig Harbor, Washington. After lengthy negotiations and a significant redesign, the Applegates hired HHD on June 17, 2007 to build a custom home for a fixed price of \$773,272.60. CP 77-86. The construction contract contained, as "Exhibit A," a line item breakdown of each aspect of the construction project. CP 86. As established therein, the Applegates agreed to pay a specific sum for each line item on the project, including a \$26,000 "contingency" fund. *Id.* The contract further provided for a twenty percent profit. *Id.* The contract does not state that construction payments will be based upon what the builder paid to various subcontractors. *Id.*

Work commenced in the summer of 2007, and the contract progressed without significant incident for approximately 13 months.

WFS, administered the Applegates' custom construction loan. Over the course of the project, HHD submitted a monthly "draw request" to WFS. CP 298, 2275-2291. Those draw requests contained an itemized

list of the items HHD had completed, or had partially completed, and request funds from the Applegate's construction loan funds. *Id.* After receiving the draw requests, WFS disbursed funds from the contract line items based on the amount of money the Applegates contractually agreed to pay for each respective line item. CP 301. WFS never disbursed more money for any particular line item than the Applegates contractually agreed to pay. *Id.* In fact, there was a significant amount of money left to be paid when the Applegates took over the project. CP 301-302.

Throughout the project, the Applegates met with Mr. Bucher and signed checks to fund the project. The Applegates also signed "Certificates of Job Progress" (CJP) which would enumerate the percentage of project completion. CP 299.

In March, 2008, about half way through the construction project, Mr. Bucher submitted a draw request for approximately \$108,000. CP 2282. A representative from WFS discussed the check with the Applegates, who were out of town, and made contemporaneous notes of their concerns and ultimate approval. CP 1207. Mr. Applegate then gave Mr. Bucher authorization to sign the check on his behalf because he was out of town and unavailable to sign. CP 2260. After returning to the Gig Harbor area, Mr. Applegate signed the CJP confirming the payment. CP 425.

In the summer of 2008, after some shadows on a ceiling could not be resolved to their satisfaction, the Applegates withheld payments from the contractors. In September, 2008, after relations between the parties broke down irretrievably, the Applegates took the project over and fired HHD. CP 74, 557-558, 1299. They changed the locks on the house and refused to return phone calls. At that time, construction of plaintiffs' custom home was approximately 75 percent complete. Thereafter, the Applegates continued to work on their home without HHD's involvement.

**B. Procedural History**

On or about January 4, 2010, fourteen months after terminating their builder, the Applegates brought suit against HHD, Mr. Bucher, WFS, and Kitsap Bank<sup>1</sup> in Pierce County Superior Court. Therein, they blamed HHD and Mr. Bucher, as well as the bank which oversaw their loan application, for every perceived shortcoming in the house including the home's view to problems with additions the Applegates had completed themselves. The Applegates claimed they should not have to pay for items they ordered, approved and installed. They claimed that HHD was not entitled to payment for such items as the roof, decking, trusses, and plumbing rough-in. They even alleged theft and fraud.

Nonetheless, the Applegates' suit against HHD alleged that HHD

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<sup>1</sup> Claims against Kitsap Bank did not go to trial.

and Mr. Bucher committed “fraud” by charging them the amounts listed in the contract, rather than based upon what HHD paid to its subcontractors. See, e.g. CP at 589-590. Throughout the litigation, HHD repeatedly disputed this characterization, arguing that the contract was “fixed price” and not “cost plus.” See, e.g., CP 758-759, 984-985, 1285-1286. HHD never classified this interpretation of the contract as a “mistake” or argued that it “mistakenly” charged the Applegates in accordance with the contract they signed. During trial, HHD demonstrated that at the time that the Applegates terminated the contract, HHD had received 20.1 percent profit, as agreed.<sup>2</sup> RP 10/31/11 at 446.

After a four-week trial, on November 1, 2011, a jury returned a verdict in favor of all defendants. Plaintiffs eventually filed this appeal.

Leading up to and during trial, the trial court made numerous rulings regarding the admissibility of evidence. With respect to the appeal against HDD, the Applegates have taken issue with two specific evidentiary rulings.

- 1. After allowing repeated opportunities to cure deficiencies in the Plaintiffs’ expert witness disclosure, the Trial Court struck the testimony of expert witness, Robert Floberg.**

On or about September 30, 2011, the trial court struck the

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<sup>2</sup> The Applegates also argue to this Court that HHD misappropriated a \$52,172.50 deposit. As demonstrated to the jury, this deposit was utilized to cover design costs and was applied against HHD’s profit.

Plaintiffs' document expert, Robert Floberg. This ruling was the culmination of a long, drawn out discovery dispute, and only after the granting the Plaintiffs an additional three months to disclose Mr. Floberg's opinions.

According to disclosures made after the discovery cutoff, Mr. Floberg was hired to examine two documents: the contract between the parties, and a March, 2008 CJP confirming the \$108,000 check that Plaintiffs claim HHD converted. The only document at issue in this appeal is the CJP. See Brief of Appellants at 6, 8-9, 30-33.

The Applegates incorrectly claim that HHD was well aware that they disputed Mr. Applegate's signature on the CJP throughout the litigation. Brief of Appellants at 31, 33. Before discovery closed, HHD knew only that Mr. Applegate did not remember signing multiple CJPs and similarly did not remember signing the March, 2008 CJP. CP 3555, 3557-3558. Despite extensive probing, Mr. Applegate failed to dispute the authenticity of his signature on the CJP during his deposition. *Id.* At that time, and consistently thereafter, he merely maintained that he did not remember signing that document – just as he did not remember signing many other documents during the pendency of the construction project. *Id.* He further testified that he did not remember ever refusing to sign a CJP when presented with one. CP 248. Defendants did not receive any

notice that Mr. Applegate's signature on the March, 2008 CJP was actually in dispute until August 18, 2011, approximately six weeks before trial and two days after the discovery cutoff.

The Applegates had more than eighteen months to retain Mr. Floberg and disclose his opinions before the discovery cutoff, and were in fact granted an extension to do so. They originally filed the lawsuit in January, 2010. Thereafter, the parties stipulated on several occasions to a new trial date in order to allow enough time to complete discovery. CP 3292, 3408. After three continuances, the trial court set a trial date of June 20, 2011. *Id.*, 3405. At that time, the case schedule mandated that the parties complete discovery by May 2, 2011, and exchange witness and exhibit lists by May 16, 2011. CP 3292-3293, 3311.

On April 15, 2011, approximately two weeks before the discovery cutoff, the Applegates disclosed seven new witnesses, including three purported expert witnesses, for the first time. CP 3293, 3313-3316. One purported expert witness was Robert Floberg. Other than noting that Mr. Floberg was an expert witness, the Applegates did not disclose his opinions or the bases therefore as mandated by PCLR 26. *Id.* Further, they did not provide HHD or Mr. Bucher with any information as to which documents Mr. Floberg was reviewing or for which signatures, if any, they disputed authenticity. *Id.* Instead, the Applegates merely disclosed:

Mr. Floberg is a forensic documents examiner. He is expected to testify regarding authenticity of signatures and documents submitted by Charles Bucher. CV attached.

CP 3315.

Defendants moved to strike the seven newly disclosed witnesses because expert opinions were not disclosed and because there was insufficient time to depose the witnesses before trial. CP 3407. The trial judge declined to strike the witnesses, and instead continued the trial a fourth time to October, 2012. CP 3402-3405, 3408. In so ruling, the Court explained:

And I'm going to have to set a new discovery cut-off date, as well, because they have an opportunity to depose your witnesses and respond accordingly. I want that one to be a line in the sand that will not be [interruption omitted]... stepped over.

RP 5/6/2011 at 16-17.

The Applegates' counsel interrupted the judge's oral ruling to demand that discovery be limited to the newly disclosed witnesses, and specifically requested that it not be "open ended." *Id.* The court and counsel for HHD agreed to this request, and the order reflected a new discovery cutoff of August 16, 2011, limiting discovery to the newly disclosed witnesses. CP 3402-3406.

Thereafter, HHD's counsel sent the Applegates requests to supplement discovery, in particular to provide opinions for the

Applegates' three new expert witnesses. CP 3470, 3478-3485. Mr. Floberg's deposition was noted for August 16, 2011, in an effort to allow as much time as possible for Mr. Floberg to reach opinions. CP 3422, 3470, 3474-3475. The deposition notice was sent July 1, 2011 along with a letter reminding the Applegates that "should your experts form opinions after this date, which is the court-ordered discovery cutoff, we will move to strike their testimony." CP 3470.

On August 12, 2007 – four days before the discovery cutoff, the Applegates stated that their experts had not yet reached opinions, and unilaterally cancelled all depositions scheduled for August 16, 2011. CP 3422. The Applegates gave no explanation as to why Mr. Floberg, who had been retained for four months, was unable to reach any opinions by the judicially-mandated discovery cutoff. *Id.*

On August 18, 2007, the Applegates identified the documents Mr. Floberg would be analyzing and, for the first time, stated that one such document was Mr. Applegate's signature on the March, 2008 Certification of Job Progress. CP 3535. Via that email, the Applegates stated that original copies of certain documents "would be helpful." *Id.* No formal discovery request for the original documents was submitted, and Plaintiff's counsel did not indicate that originals were necessary for the expert to issue opinions. *Id.*

Two weeks after the fourth discovery cutoff in this case, on August 30, 2011, Mr. Floberg issued a preliminary report. CP 3492. Therein, Mr. Floberg specifically stated that “original documents are normally required for a comprehensive examination.” *Id.* While he noted “an abnormality” in Mr. Applegate’s signature on the March, 2008 CJP, he requested the original document for “a microscopic examination of the inked signature.” *Id.* He specifically did not opine that Mr. Applegate’s signature appeared forged, and noted that the signature on the Certificate of Job Progress had “many similar and consistent characteristics of his known signatures.” *Id.*

Via email enclosing the written report, on August 31, 2011, the Applegates’ attorney demanded (for the first time) that original copies of these signatures be produced “by the end of next week.” CP 3491. This request was in violation of the court’s ruling, mandating that discovery be limited to the newly disclosed witnesses. Nonetheless, the email explained that if “the originals are not timely produced, it will impede your ability to thoroughly examine Mr. Floberg prior to trial.” *Id.*

Although the original documents were never requested in discovery, HHD’s counsel made a diligent effort to locate the original CJP, to no avail.<sup>3</sup> However, counsel for WFS located the original March,

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<sup>3</sup> HHD did locate the original contract between the parties, and offered it to Plaintiff’s counsel at her office for inspection, but Plaintiff’s counsel was not responsive to that

2008 CJP and made it available for Plaintiff's inspection at WFS's counsel's office in Seattle on multiple days. RP 9/30/11 at 24. Plaintiff's counsel failed to respond to this offer. *Id.* Once again without final opinions from Mr. Floberg, and with trial fast approaching, HHD moved to strike his testimony.

In response to HHD's Motion to Strike, the Applegates argued that Mr. Floberg's late-disclosed opinions were "preliminary" and stated that the original documents were required to form any "conclusive opinions." CP 3501-3502. Nonetheless, the Applegates provided no reason why they failed take advantage of multiple offers to examine the original documents pursuant to CR 34 except that they did not want to incur the expense of travelling from Tacoma to Seattle. RP 9/30/2011 at 14-15. Further, the Applegates falsely argued to the trial court that HHD had not requested Mr. Floberg's opinions or noted his deposition. Compare RP 9/30/2011 at 25 to CP 3470, 3474-3475, 3478-3480.

Without access to the original documents, Mr. Floberg was unable to issue any final opinions up to and including the day the Motion to Strike his testimony was argued: September 30, 2011, **two business days** before trial. Mr. Floberg was therefore excluded because the Applegates had yet again failed to disclose his opinions. RP 9/30/2011 at 26. The court noted

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offer. CP 3531, 3551, 3538, 3566. As above, the Applegates' appeal relates only to the March, 2008 CJP.

that “The fact that somebody doesn’t want to travel up to Seattle to review originals is their decision, and the Court’s not bound by the fact that they find that to be an inconvenience.” *Id.*

**2. The Trial Court excluded the testimony of Diana Behrens, a former HHD customer.**

The Trial Court also excluded the testimony of lay witness Diana Behrens. Ms. Behrens was the personal friend of the Applegates and a former customer of HDD. Ms. Behrens would purportedly testify that HDD “overcharged” them during her own custom home construction project.<sup>4</sup> Her testimony was explicitly refuted by her husband, David Behrens. CP 785-786.

Ms. Behrens’s testimony was excluded as improper character evidence after a Motion in Limine. RP 10/6/11 at 62. The Applegates never requested the opportunity to submit an offer of proof.

**IV. ARGUMENT**

**A. Discovery orders are reviewed for abuse of discretion.**

A trial court’s discovery rulings will not be disturbed on appeal unless the court clearly abused its discretion. *Mayer v. Sto Indus., Inc.*, 156 Wash. 2d 677, 684, 132 P.3d 115, 118 (2006) (citing *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 229, 548

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<sup>4</sup> Other testimony by Ms. Behrens was submitted during HDD’s motion for Summary Judgment, but is not included in the record before this Court. Should the Applegates submit any additional testimony, HDD respectfully requests the right to address the same.

P.2d 558 (1976)). Such is the case when a trial court's decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.* Such a decision may only be overturned if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is "manifestly unreasonable;" if "the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'" *State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Lewis*, 115 Wash.2d 294, 298-99, 797 P.2d 1141 (1990)).

The Applegates do not even attempt to argue that a "manifestly unreasonable" abuse of judicial discretion occurred here.

**B. The trial court properly exercised its discretion in excluding Mr. Floberg.**

**1. Exclusion of Mr. Floberg's testimony was justified given Plaintiffs' repeated failure to properly disclose his opinions.**

Mr. Floberg was not permitted to testify because the Applegates explicitly violated the trial court's order to disclose Mr. Floberg's opinions by August 16, 2011, and further failed to disclose Mr. Floberg's 'conclusive opinions' before trial.

In Pierce County, expert witness disclosure is governed by PCLR 3, which requires a Court to issue a schedule to govern several important

milestones during litigation. These milestones include, but are not limited to, the Plaintiff's deadline to disclose witnesses, including expert witnesses. For expert witnesses, the disclosure must include a "summary of the expert's anticipated opinions and the basis therefore and a brief description of the expert's qualifications or a copy of curriculum vitae if available." PCLR 26(d)(3).

The local rules permit a trial court to sanction a party who fails to comply with the disclosure requirements:

(k) Enforcement. The assigned judicial department, on its own initiative or on motion of a party, may impose sanctions or terms for failure to comply with the Case Schedule established by these rules. If the court finds that an attorney or party has failed to comply with the Case Schedule and has no reasonable excuse, the court may order the attorney or party to pay monetary sanctions to the court, or terms to any other party who has incurred expense as a result of the failure to comply, or both; in addition, the court may impose such other sanctions as justice requires. As used in this rule, "terms" means costs, attorney fees, and other expenses incurred or to be incurred as a result of the failure to comply; the term "monetary sanctions" means a financial penalty payable to the court; **the term "other sanctions" includes but is not limited to the exclusion of evidence.**

PCLR 3(k) (emphasis added).

Courts interpreting a nearly identical rule in King County have stricken expert witnesses where opinions were not disclosed in accordance with the case schedule, and such rulings are upheld on appeal. See, *e.g.*,

*Lancaster v. Perry*, 127 Wn.App. 826, 830, 113 P.3d 1 (2005).

Further, under CR 26(e)(1)(B) a party is under a duty seasonably to supplement his response with respect to the substance of an expert's testimony. Courts frequently strike expert witnesses when a party does not timely supplement expert discovery. See *Stevens v. Gordon*, 118 Wn.App. 43, 50-52, 74 P.3d 653 (2003) (upholding a trial court's exclusion of an expert witness not included in answers to interrogatories and only declared as a likely witness six weeks before trial). Here, HHD specifically requested this supplementation on June 10 and July 1, 2011 but received no supplementation. CP 3470, 3478-3485.

In *Lancaster*, a defendant timely disclosed potential expert witnesses who could conduct a CR 35 examination and testify as to the results thereof. However, the defendant failed to specifically identify which witness would conduct the examination and failed to provide a summary of the expert's opinions in the time provided by the local rule. Well before the discovery cutoff, the Plaintiff moved to strike the defense witnesses because opinions were not timely disclosed. The trial court struck the witnesses, and was upheld on appeal. The Court noted that:

Because the unspecified expert witness would not know the substance of his testimony, having not conducted a CR 35 examination, Lancaster would not be able to obtain any useful information through a deposition.

*Id.* at 832. Here, the Applegates first failed to disclose Mr. Floberg as required by the case schedule and failed to provide a summary of his opinions as required by PCLR 26. HHD moved to strike based upon these failures. The motion was denied and the trial judge gave the Applegates an additional three months in which to disclose opinions. To give the Applegates as much time as possible, HHD noted Mr. Floberg's deposition for the day of the judicially-mandated discovery cutoff. The Applegates did not disclose Mr. Floberg's opinions or supplement discovery, and ultimately their counsel cancelled his deposition.

Only after the discovery cutoff in this case did the Applegates present, for the first time, Mr. Floberg's preliminary report. Contrary to the Applegates' assertions herein, Mr. Floberg did not opine that Mr. Applegate's signature on the CJP appeared forged, and instead opined that it had "many similar and consistent characteristics of his known signature" but bared an "abnormality." Mr. Floberg requested the original document for further examination.

The Applegates never requested the original document in discovery, and refused to respond to counsel for WFS when it offered to make the document available for inspection after the discovery cutoff. Thus, just as in *Lancaster*, the information the expert required to issue final opinions was not made available to him nor was it properly

requested. Like in *Lancaster*, without that document, Mr. Floberg “would not know the substance of his testimony” and therefore a deposition would be futile. It is noteworthy that when Defendant’s second Motion to Strike was argued – two business days before trial – Mr. Floberg had still failed to issue any final opinions in this case.

PCLR 26(e) is clear: “Any person not disclosed in compliance with this rule shall not be called to testify at trial, unless the court orders otherwise for good cause...” Appellants never addressed this requirement or attempted to argue that they had “good cause” for failing to disclose Mr. Floberg’s opinions before the discovery cutoff (after they obtained an extension to do so). Instead, the Applegates argued that they had no duty to disclose Mr. Floberg’s opinions **at all** because he was merely an “impeachment” witness. CP 3500. These arguments led to no other conclusion than that the Applegates never intended to provide HHD with enough notice of Mr. Floberg’s opinions to allow HHD to properly prepare for trial.

As in *Lancaster*, the trial court did not abuse its discretion in concluding that the Applegates did not comply with the requirements of PCLR 26 and failed to establish good cause for this failure. The Applegates further failed to supplement their answers to Interrogatories, despite multiple requests. Given that they had already obtained an

extension for disclosing expert opinions, the court had clearly considered lesser sanctions, applied them, and the Applegates themselves demonstrated that these lesser sanctions were inadequate. With trial two days away and no final opinions disclosed, the trial court had little choice but to strike Mr. Floberg's testimony.

This Court should decline the Applegates' invitation to substitute its judgment for the judgment of the trial court. The trial court did not abuse its discretion in striking Mr. Floberg's testimony under these circumstances.

**2. Even if the trial court had erred in striking Mr. Floberg, any possible error was harmless.**

Contrary to the Applegates' argument, striking Mr. Floberg's testimony did not prevent them from effectively arguing their forgery and conversion claim. As above, these claims related to a claim that Mr. Bucher forged Mr. Applegate's name on a reimbursement check for \$108,000. Despite the Applegates' suggestions otherwise, see Brief of Appellants at 33, Mr. Bucher never denied signing Mr. Applegate's name to the check, and therefore any purported testimony by Mr. Floberg that this signature was forged (none was proffered) would not have been relevant.

The Applegates next try to argue that, had Mr. Floberg been

permitted to testify, he would have testified that Mr. Applegates' signature on the CJP *confirming* this check was a forgery. Notably, this was not disclosed at any time prior to trial, as extensively documented above. Regardless, the trial court's order excluding Mr. Floberg did not preclude Mr. Applegate from claiming that he did not sign the CJP at trial – he did so testify, and this was extensively argued at trial. See RP 10/31/11 at 407-408.

Thus, the trial court's exclusion of Mr. Floberg's testimony did not prevent the Applegates from arguing their conversion case, and was therefore not prejudicial.

**C. The testimony of Diana Behrens was properly stricken pursuant to ER 404(b).**

Appellants claim that the trial court erred in striking testimony from Diana Behrens that a different custom home construction project went “astronomically over budget” by approximately \$75,000. CP 788. This testimony was explicitly refuted by Ms. Behrens' husband, David Behrens, who testified merely that their project experienced some cost overruns, but that HHD was not “deceptive or purposefully unfair in any manner.” CP 785-786. HHD moved in limine to exclude Ms. Behrens' testimony on the basis that it was character evidence, inadmissible pursuant to ER 404(b), which states:

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The Applegates contested the motion, arguing without analysis that Ms. Behrens' testimony was necessary to show the defendant's "intent, plan, and/or absence of mistake or accident in converting Plaintiffs [sic] funds and in poorly constructing their home." CP 1495.

"ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gresham*, 173 Wash. 2d 405, 420, 269 P.3d 207, 213 (2012). The burden of demonstrating a proper purpose is on the proponent of the evidence. *State v. DeVincentis*, 150 Wash.2d 11, 17, 74 P.3d 119 (2003). Evidence of prior misconduct, however, is presumably inadmissible. See ER 404(b), *DeVincentis*, 150 Wash.2d at 17, 74 P.3d 119. Doubtful cases regarding admission of prior bad acts evidence should be resolved in favor of the defendant. *State v. Wade*, 98 Wn.App. 328, 989 P.2d 576 (1999).

The party seeking to introduce evidence of other alleged wrongs has the burden of establishing by a preponderance of the evidence: (1) that the misconduct occurred at all, the purpose for which the evidence is

sought to be introduced, and demonstrate that the evidence is relevant to prove an element of the crime charged. *State v. Gresham*, 173 Wash.2d at 421, (citing *State v. Vy Thang*, 145 Wash.2d 630, 642, 41 P.3d 1159 (2002), *DeVincentis*, 150 Wash.2d at 17, 74 P.3d 119). If elements are established, the trial court must weigh the probative value against the potential prejudice to the defendant. *Id.*

Appellants herein fault the trial court for failing to conduct this balancing analysis. See Brief of Appellants at 34-35. However, they cite no authority for the proposition that the balancing test must be conducted before character evidence is *excluded*, only before it is *admitted*. See *Id.*<sup>5</sup> As above, ER 404(b) presumes that such evidence is excluded, and does not demand any particular analysis before exclusion occurs.

Despite having the burden of proving these elements by a preponderance of the evidence, Appellants never addressed them. Instead, they concluded with no analysis that Ms. Behrens's testimony was necessary to refute arguments of "accident or mistake." See CP 1495, RP 10/6/2011 at p. 62. Notably, HHD's defense theory – accepted by the jury – was that it properly charged the Applegates pursuant to the terms of the contract, not that it "accidentally" charged them more than it paid

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<sup>5</sup> Where no authorities are cited in support of a proposition, the Court of Appeals is not required to search them out, but may assume that counsel, after a diligent search, has found none. *DeHeer v. Seattle Post-Intelligencer*, 60 Wash.2d 122, 126, 372 P.2d 193 (1962).

subcontractors on particular items. See, e.g., CP 758-759, 984-985, 1285-1286, RP 10/31/11 at 446.

Regardless, the trial court did not abuse its discretion in ultimately excluding Ms. Behrens's testimony. The first element of the balancing test was not met: the Applegates could not prove by a preponderance of the evidence that the alleged misconduct – which was refuted by the witness's husband – occurred at all. In striking Ms. Behrens, the trial court noted that her testimony amounted merely to "allegations" and were "just simply her opinion as to what occurred in her situation." RP 10/6/2011 at 63. Finding that this amounted to propensity evidence, the court correctly struck Ms. Behrens's testimony.

This ruling should not be overturned on appeal unless "no reasonable judge would have ruled as the trial court did." *State v. Mason* 160 Wash. 2d 910, 934, 162 P.3d 396, 408 (2007) (en banc) (certiorari denied 128 S.Ct. 2430, 553 U.S. 1035, 171 L.Ed.2d 235 (2007)). The trial judge properly excluded the testimony of a disgruntled HHD customer who purported to testify merely to other alleged wrongs and misdeeds in a separate project.

**D. HHD should be awarded prevailing party attorney fees on appeal.**

HHD respectfully requests this Court award it attorney fees on appeal. RAP 18.1.

## V. CONCLUSION

The Applegates had the opportunity to fully present their claims to a jury in October, 2011, and this opportunity was not affected by the exclusion of Mr. Floberg, who had no final opinions, and Ms. Behrens, who had no testimony relevant to the Applegate project and whose testimony would have been improper.

Despite naming Mr. Floberg as a witness in April, 2011 and obtaining a continuance to disclose his opinions, Appellants failed to produce even preliminary opinions until after the discovery cutoff. Ultimately, they refused to travel to Seattle to examine the critical original signature which was necessary for Mr. Floberg to reach full opinions. As such, Mr. Floberg never formed any opinion that any signatures were “forged” and, because he had no final opinions, he was not permitted to testify.

Diana Behrens’ testimony was based on her own personal dissatisfaction of a separate and unrelated HHD project, and was refuted by her estranged husband. It was purely character evidence, unilaterally prohibited by ER 404(b). The Applegates made but a conclusory argument otherwise, and Ms. Behren’s testimony was properly stricken.

The trial court did not abuse its discretion in striking these two witnesses. HHD respectfully submits that the verdict in this case was proper and supported by the evidence, and should stand.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of December, 2012.

ANDREWS ▪ SKINNER, P.S.

By   
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STATE OF WASHINGTON

BY  DEPUTY

### DECLARATION OF SERVICE

I, LIZ CURTIS, hereby declare as follows:

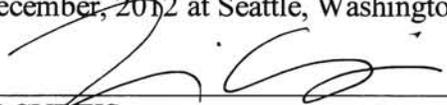
1. That I am a citizen of the United States and of the State of Washington, living and residing in King County, in said State, I am over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness therein.

2. On the 21<sup>st</sup> day of December, 2012, I caused a copy of the attached to be served upon the following in the manner noted:

<p><b><u>Attorney for Appellants:</u></b> Justin D. Bristol, WSBA #29820 Gourley Bristol Hembree PO Box 1091 Snohomish, WA 98291-1091 <a href="mailto:jdb@snocolaw.com">jdb@snocolaw.com</a> <a href="mailto:jdbristol@piercecoun tylaw.com">jdbristol@piercecoun tylaw.com</a> <b><u>Via Email and Regular US Mail</u></b></p> <p>Philip Albert Talmadge, WSBA #6973 Sidney Charlotte Tribe, WSBA #33160 Talmadge/Fitzpatrick 18010 Southcenter Pkwy Tukwila, WA 98188-4630 <a href="mailto:phil@tal-fitzlaw.com">phil@tal-fitzlaw.com</a> <a href="mailto:sidney@tal-fitzlaw.com">sidney@tal-fitzlaw.com</a> <b><u>Via Email and Regular US Mail</u></b></p>	<p><b><u>Respondent/Cross Appellant</u></b> <b><u>Washington Federal Savings:</u></b> Scott C. Wakefield, WSBA #11222 Todd &amp; Wakefield 1501 Fourth Ave., Suite 1700 Seattle, WA 98101-3660 <a href="mailto:swake@twlaw.com">swake@twlaw.com</a> <b><u>Via Email and Regular US Mail</u></b></p>
<p><b><u>Court of Appeals:</u></b> Court of Appeals, Division II Clerk's Office 950 Broadway, Suite 300 Tacoma, WA 98402 <a href="mailto:coa2filings@courts.wa.gov">coa2filings@courts.wa.gov</a> <b><u>Via Email</u></b></p>	

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

DATED this 21<sup>st</sup> day of December, 2012 at Seattle, Washington.

  
LIZ CURTIS