No. 101073-7

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 37512-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

WALL STREET APARTMENTS, LLC, a Washington limited liability company, and ALAA ELKHARWILY, M.D.,

Plaintiffs/Appellants,

v.

ALL STAR PROPERTY MANAGEMENT, LLC, a Washington limited liability company; GIEVE PARKER individually and on behalf of her marital community; and JOHN DOES AND JANE DOES I through X,

Defendants/Respondents.

RESPONDENT'S ANSWER TO APPELLANT'S PETITION FOR REVIEW

STAMPER RUBENS, P.S.

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I. IDENTITY OF RESPONDENTS

The Respondents are All Star Property Management, Gieve Parker, individually and on behalf of her marital community, and John and Jane Does I through X.

II. CITATION TO COURT OF APPEALS DECISION

Wall Street Apartments, LLC, et al v. All Star Prop. Mgmt., LLC, et al, 37512-9, 2022 WL 1153458 (April 19, 2022), *as amended on denial of reconsideration* (June 7, 2022).

III. STATEMENT OF THE ISSUE PRESENTED

Whether the Appellants met their burden under RAP 13.4(b) when Appellants failed to establish a specific decision of this Court or the Court of Appeals is in conflict with the Court of Appeals' decision in this matter, and fails to demonstrate that review should be granted as to an issue of substantial public interest.

IV. STATEMENT OF THE CASE

On September 2, 2012, All Star Property Management, LLC ("All Star"), entered into a Management Agreement

("Agreement") with Wall Street Apartments, LLC ("Wall Street"), owned by Alaa Elkharwily ("Elkharwily") (collectively "Plaintiffs"). RP 26-27, Ex. P-1. The Agreement concerned properties located at 2321 S. Grand Boulevard and 225 S. Wall Street in Spokane and stated, "All Star will manage Unit #2, 3, 4, 5, & 19 also after eviction Unit #12 1/2 & 22 & 35." Ex. P-1.

All Star's duties included (1) managing the units, (2) providing rental and operating services, (3) rendering monthly statements of receipts, expenses and charges, (4) advertising available units, and (5) making or causing to be made and supervising repairs, expenses, and charges. *Id.* All Star would make or cause to be made and supervise alterations, would purchase supplies, and would pay bills but had to obtain Wall Street's prior approval of expenses exceeding $1.00.

In consideration, Wall Street agreed to pay All Star six percent of the monthly rental rate for management services, $100 per new signed lease, all advertising costs, all rental income over

$533.00, and $.55 per mile to pick up and deliver materials to job sites. *Id.*

On or about September 12, 2012, All Star secured tenants for Wall Street Apartment Unit #19. RP 347-48. The tenants paid first month's rent and a security and key deposit. RP 347. On September 24, 2012, All Star posted advertisements on Craigslist for the units it was managing for Wall Street. CP 56. All Star and Parker made no other postings related to Plaintiffs. *Id.*

Between September 4 and September 27, 2012, pursuant to the Agreement and Wall Street's instruction, All Star incurred $1,517.39 in costs and expenses for travel and various supplies. CP 55 & 91-92.

Plaintiffs' employee, Chris Godwin ("Godwin"), was remodeling the lobby of the Wall Street Apartments. RP 37-38, 51, 162, 182. All Star Construction submitted no bids for the project and performed no work. CP 54. Apparently, Elkharwily ordered the removal of a wall and the fire alarm system in the

lobby. RP 172-74, 177, 182-83. All Star and Gieve Parker ("Parker") had nothing to do with the removal of the wall or fire alarm system. CP 54; RP 192.

All Star, through Parker, terminated the Agreement on September 27, 2012, after a verbal dispute with Elkharwily. RP 393. Elkharwily accepted her resignation, demanding instant return of keys. Ex. D-109. All Star sent Plaintiffs a September 2012 invoice for reimbursement of fuel costs and expenses totaling $1,517.39. CP 55. Even after Defendants returned all deposits, documents, and keys to Plaintiffs, Plaintiffs refused pay the invoice. *Id.* Defendants filed a lien against Plaintiff for the unpaid invoice. CP 56.

After Defendants terminated the Agreement, Elkharwily continued to make unwanted contact with Parker, leading Parker to seek a protection order. *Id.* Parker filed documents in support of the order that included communications between Elkharwily and Parker documenting the details of the termination of the

Agreement and its aftermath. CP 130-33. Three years later, Plaintiffs initiated this action asserting multiple claims against Defendants. Defendants counterclaimed for breach of contract. On August 10, 2018, the Honorable Judge Maryann Moreno granted partial summary judgment against Plaintiffs and dismissed most of Plaintiffs' claims, including a claim of violation of the Washington Consumer Protection Act. CP 1003-1009. The CPA violation claim, and specifically the allegation that Defendants failed to provide a pre-lien notice of mechanic's lien, is the only aspect of summary judgment that Plaintiffs appealed. *See Appellants' Opening Brief*, p. 1.

Subsequently, the case want to arbitration on the remaining issues before the court, after which Plaintiffs sought a trial de novo. After hearing testimony on September 30, 2019, October 1, 2019, and October 3, 2019, Judge Moreno ruled on October 3, 2019. RP 3. Findings of Fact and Conclusions of Law were signed on February 13, 2020. CP 1097-1115. Later, after

Plaintiffs' Motion for Reconsideration, Amended Findings of Fact and Conclusions of Law were entered on July 24, 2020. CP 1382-1407. Consistent with the Amended Findings of Fact and Conclusions of Law, Judge Moreno entered an Order Granting Defendants' Motion for Attorney's Fees on October 2, 2020. *Amended Notice of Appeal*, p. 3-6.

V. ARGUMENT

A. Standard of Review

Plaintiffs seek review of the Court of Appeals decision under RAP 13.4(b)(1), (2), and (4). To obtain review under RAP 13.4(b), Plaintiffs must persuade this Court that the Court of Appeals' decision conflicts with a decision of this Court or another division of the Court of Appeals, or that it presents an issue of substantial public interest. *Id.*, *see also*, *In re Pers. Restraint of Coats*, 173 Wn.2d 1213, 132-33, 267 P.3d 324 (2011).

Plaintiffs cannot meet the criteria of RAP 13.4(b). Plaintiffs' briefing fails to identify specific decisions of this

Court or the Court of Appeals that allegedly conflict with the Court of Appeals decision. Furthermore, Plaintiffs' sole argument that public policy interests are implicated is premised on the mere fact that the Court of Appeals ruled against them. This is not the standard. Defendants respectfully request that Plaintiffs' Petition for Review be denied.

B. The Court of Appeals did consider the trial court's Amended Findings of Fact and Conclusions of Law in reaching its decision.

Clearly, the Court of Appeals did consider the Amended Findings of Fact and Conclusions of Law entered at the trial court level. The amendment to the Court of Appeals' decision specifically refers to them: "The trial court denied Wall Street's motions for reconsideration, a new trial, and relief from judgment, but granted in part the motion for amended findings of fact and conclusions of law. See CP 1382-1407. The trial court's amended findings did not change the case's ultimate disposition." *See Wall St. Apartments, LLC*, 21 Wash. App. 2d 1057 at 3 (2022), as amended on denial of reconsideration (June 7, 2022).

The claim that the Court of Appeals failed to consider the applicable findings of fact in this matter is a willful misrepresentation of the record.

C. The Court of Appeals need not change its analysis based on the Amended Findings.

Plaintiffs claim that the Court of Appeals, by adding reference to the Amended Findings, erred by "acknowledging the error of the missing records...without review." However, the Court of Appeals explicitly stated in the amended opinion that the language of the Amended Findings did not alter its original opinion – the Court of Appeals is not required to write a new opinion merely to accommodate Plaintiffs' desires.

D. The Court of Appeals need not supplement the record to make its decision.

Plaintiffs next argue in footnotes that the Court of Appeals relied on improper evidence and should have supplemented the record after reaching a decision. Specifically, that the Court should have added new documents that were not identified in the Designation of Clerks Papers, and which were never relied on by

the Court of Appeals. Plaintiffs argue that the Declaration of Alaa Elkharwily, provided at CP 1327-1329, should be stricken and a different declaration of Elkharwily transmitted to supplement the record. There is no valid reason why Plaintiffs failed to examine the record on appeal for nearly two years, despite filing three substantive briefs in the Court of Appeals prior to raising that alleged "error." The Court of Appeals properly prevented Plaintiffs from causing delay from their lack of reasonable diligence, particularly given that as the appealing party, Plaintiffs were obligated to ensure transmission of the record on appeal. RAP 9.6.

There is no actual evidence that the declarations provided in the record *by Plaintiffs* are anything other than genuine. Furthermore, the Court of Appeals did not rely on CP 1327-1329 to reach its decision. Plaintiffs provide no explanation of why

denying a post-decision request to supplement the court record in any way meets the standards of RAP 13.4(b). It does not.[1]

Furthermore, the second version of Elkharwily's Declaration, attached in the appendix to Plaintiffs' Petition for Review at Ex. 3, was never necessary for the Court of Appeals to make a decision. *Compare Buckley v. Snapper Power Equip. Co.*, 61 Wash. App. 932, 941, 813 P.2d 125, 130 (1991). The attachment was an un-signed statement not made under the penalties of perjury, and could not be considered by any court under ER 802, regardless. When, as here, allegedly "newly discovered evidence" is merely designed to contradict a witness in the trial, a new trial is not warranted. *Town of Selah v. Waldbauer*, 11 Wn. App. 749, 757, 525 P.2d 262 (1974). The email in question relates only to the trial court's denial of Plaintiffs' motion for a new trial. Plaintiffs have not met their

[1] RAP 13.4 does not allow for review of the Court of Appeals' decision on Plaintiff's Motion to Withdraw Opinion and to Correct the Record Supplemental to Motion to Reconsider.

burden to show that the Court of Appeals' decision affirming that denial in any way meets the standards set forth in RAP 13.4(b).

E. The Court of Appeals properly gave deference to the Trial Court's findings of fact.

The Court of Appeals correctly stated the standard of review for factual findings in a bench trial: "We review the factual findings of a trial court in a bench trial for substantial evidence. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). "'Substantial evidence' is evidence sufficient to persuade a fair-minded person of the truth of the matter asserted." *In re Marriage of Chandola*, 180 Wn.2d 632, 642, 327 P.3d 644 (2014). "[T]his court must defer to the finder of fact in resolving conflicting evidence and credibility determinations." *State v. N.B.*, 7 Wn. App. 2d 831, 837, 436 P.3d 358 (2019)." *Wall St. Apartments, LLC*, 2022 WL 1153458 at 3. Plaintiffs have not directed this court to any case in Washington to the contrary.

1. There is no "judicial admission" for the Court to consider.

Plaintiffs baselessly argue that there are "judicial admissions" that bind the trial court and the Court of Appeals, but cite no alleged admissions. Any references to evidence in the record must be supported by references to the record itself. *See* RAP 10.3(a)(5).

Defendants have made no judicial admissions to impact the ruling in this case. Parker has been clear that she was not involved in removing the fire alarm system after she ended her contract with Plaintiffs. Parker testified she called the fire alarm company posted on the fire alarm box "long before" the wall was demolished. RP 409. She told Elkharwily what the fire alarm company told her. RP 410. Elkharwily said he planned to tear down the lobby wall and remodel the lobby within two months. RP 409-10. Parker was shocked to find that demolition of the wall had begun on September 26 because she had never been told that it would begin that day. RP 410. She notified Elkharwily

right away by text message. *Id.* Parker testified she had nothing to do with removing the fire alarm boxes or disconnecting the system. RP 403. She actually quit before the fire alarm box was removed. RP 414. The evidence shows no text message conversation between Elkharwily and Parker about the fire alarm boxes between the afternoon of September 26, 2012, until September 27, 2012, at 7 p.m. After 7 p.m. on September 27, Elkharwily told Parker the fire alarm system was down. RP 411. That was the first time Parker became aware the fire alarm system had been removed. *Id.*

Plaintiffs cannot simply claim there is a "judicial admission" with no support to obtain further review from this Court. The mere existence of contradictory testimony does not meet the standards necessary to establish a judicial admission. *See, e.g., Casper v. Esteb Enterprises, Inc.*, 119 Wash. App. 759, 767, 82 P.3d 1223, 1228 (2004) (even CR 30(b)(6) testimony is not a judicial admission); *Whitney v. State*, 24 Wash. App. 836,

842, 604 P.2d 990, 994 (1979) (Washington makes no distinction between testimony of a party and testimony of a witness, neither of which are a judicial admission).

Contradictory testimony is not a judicial admission, but rather, a question of credibility. "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This Court has gone so far as to state that "...credibility determinations cannot be characterized as inaccurate. Conflicting evidence may still be substantial, so long as some reasonable interpretation of it supports the challenged findings. That there may be other reasonable interpretations of the evidence does not justify appellate court reversal of a trial court's credibility determinations." *In re the Personal Restraint Petition of Gentry*, 137 Wn. 2d 378, 410-11, 972 P.2d 1250 (1999) (internal citations and quotations omitted). Plaintiff does not get to choose what evidence the trier of fact finds to be credible.

2. There is no conflict in Washington case law regarding the appropriate standard of review.

Plaintiffs contend, without support, that there is "confusion amongst lower courts" about the standard of review of a fact finder's determinations at trial. There is no conflicting authority, and the Court of Appeals acted consistently with well-settled Washington State case law in giving deference to a fact-finder, as set forth above. Although Plaintiffs attempt to assert as a judicial admission the purported CR 30(b)(6) testimony of Gieve Parker – no deposition pursuant to CR 30(b)(6) ever took place in this case. A witness's association with a business does not turn their deposition into a CR 30(b)(6) deposition. Regardless, this case could not resolve whether testimony in a CR 30(b)(6) deposition amounts to a judicial admission, since no such deposition ever took place.

F. Neither the trial court nor the Court of Appeals refused to admit statements of a party opponent for consideration.

Plaintiffs argue that "[r]elevant admissions of a party-opponent are not among those matters with which the trial court has such broad discretion." Pursuant to ER 801(d)(2) – admissions of a party-opponent are *admissible as evidence* – they are not conclusive. Plaintiffs have not cited anywhere in the trial record where the Superior Court wrongfully excluded evidence from being presented. Plaintiffs are merely displeased with the fact that the trial court found Elkharwily was not credible, and had not presented a persuasive case.

Plaintiffs cite irrelevant law, which does not present any legal controversy that this Court need resolve. *See Powers v. Hastings*, 20 Wn. App. 837, 582 P.2d 897 (1978), *aff'd* 93 Wn.2d 709, 612 P.2d 371 (1980) (statute of frauds does not bar enforcement of a lease with an option to purchase where all parties acknowledged the existence of that agreement in testimony at trial); *Key Design Inc. v. Moser*, 138 Wash. 2d 875,

888, 983 P.2d 653, 661, *amended*, 993 P.2d 900 (1999) (refusing to adopt a judicial admission exception to the rule requiring that contracts for the sale of real property include a legal description of the property). *Key Design*, in particular, was a Supreme Court case and not bound by the Court of Appeals in *Powers*. Furthermore, the case of *Sea-Van Invs. Assoc. v. Hamilton*, 71 Wn. App. 537, 861 P.2d 485 (1993) – on which Plaintiffs rely – was *reversed* by this Court at 125 Wn.2d 120, 881 P.2d 1035 (1994) when this Court refused to adopt a rule that judicial admissions can supply a missing material element to a contract. None of these cases apply to the present matter where the statute of frauds does not apply. The disagreement is about what occurred after the contract ended. Plaintiffs are correct that testimony is an equivalent to signed depositions – but this Court limited that to the purpose of *creating a writing sufficient to satisfy the statute of frauds*. *Powers*, 20 Wn. App. at 486.

G. There is no controversy pertaining to Plaintiffs' CPA claim to justify review pursuant to RAP 13.4(b).

The elements of a CPA claim are well-established. *Patrick v. Wells Fargo Bank, N.A.*, 196 Wn. App. 398, 385 P.3d 165 (2016), *review denied*, 187 Wn.2d 1022, 390 P.3d 346 (2017) (CPA claim requires (1) an unfair or deceptive act or practice; (2) in conduct of trade or commerce; (3) that has an impact on public interest; (4) which causes an injury to the plaintiff in their business or property; and (5) a causal link between the unfair practice or deceptive act and the injury.). In this case, Plaintiffs' alleged for the first time in their summary judgment briefing that Defendants violated the WCPA by "filing a lien deceptively and frivolously and without giving the pre-lien notice, model lien notice in violation of RCW 18.27.114." *Appellants' Opening Brief*, p. 43. This allegation of a violation of RCW 18.27.114, however, was not pled in Plaintiff's Complaint. As a result, as of the time that the Motions for Summary Judgment were ruled on, Plaintiffs had failed to give

Defendants fair notice of this allegation. It should not be considered by this Court. *Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wn. App. 846, 857, 22 P.3d 804 (2001).

To survive a Motion for Summary Judgment, an opposing party cannot simply allege material factual disputes. They must show there is admissible evidence of a material factual issue that, when resolved, would have a direct impact on the outcome of the litigation before the Court. *Trimble v. Wash. State Univ.*, 140 Wn. 2d 88, 93, 993 P.2d. 259 (2000). In this case, Plaintiffs did not even allege that Defendants violated RCW 18.27.114 in Mr. Elkharwily's own affidavit. *See* CP 418-425. Without admissible factual evidence, Plaintiffs cannot rely on speculation or argumentative assertions in their briefing – without so much as an affidavit to support their claim to defeat summary judgment. *White v. State*, 131 Wn. 2d 1, 9, 929 P.2d 396 (1997). The trial court properly granted summary judgment in favor of Defendants as to the CPA claim in its entirety.

H. Attorney fees were properly awarded in this case for both pre- and post-arbitration fees.

Plaintiffs once again rely on inapplicable law in an attempt to manufacture an argument where there is none. RCW 11.84.900 applies only to *probate* actions. *Moore v. Wash State Health Care Auth.*, 181 Wash. 2d 299, 332 PP.3d 461 (2014) also does not apply. The trial court found no wrongdoing by Defendants. Plaintiffs' numerous meritless claims were denied either at summary judgment or trial, and only Defendants presented meritorious claims. "[A]ttorney fees may be recovered only when authorized by statute, a recognized ground of equity, or agreement of the parties." *Perkins Coie v. Williams,* 84 Wn. App. 742-43, 929 P.2d 1215 (1997). The trial court properly granted Defendant's request for attorney fees pursuant to MAR 7.3, RCW 7.06.060, RCW 4.84.185, and CR 11.

RCW 7.06.060 and MAR 7.3 each require the superior court to assess reasonable attorneys' fees and costs against a party who appeals an arbitration award and fails to improve his

position on trial de novo. "If a party offers to settle prior to trial, that settlement offer replaces the arbitration award when determining whether the party who requested trial de novo improved his or her position." *Nelson v. Erickson*, 186 Wn.2d 385, 388, 377 P.3d 196 (2016) (citing RCW 7.06.050(1)(b)).

"MAR 7.3 'was meant to be understood by ordinary people who, if asked whether their position had been improved following a trial de novo, would certainly answer 'no' in the face of a superior court judgment against them for more than the arbitrator awarded.'" *Bearden v. McGill*, 190 Wn.2d 444, 451, 415 P.3d 100 (2018), *as amended* (June 21, 2018) (quoting *Cormar, Ltd. v. Sauro*, 60 Wn. App. 622, 623, 806 P.2d 253 (1991)). Similarly, "an ordinary person would consider that the 'amount' of an offer of compromise is the total sum of money that a party offered to accept in exchange for settling the lawsuit." *Nelson v. Erickson*, 186 Wn.2d 385, 390, 377 P.3d 196

(2016) (citing Webster's Third New International Dictionary 72 (2002)).

The arbitrator here entered a net total arbitration award of $7,949.00 in Plaintiffs' favor. On September 26, 2019, Defendants offered to settle this case by *paying* Plaintiffs $7,949.00, less the principal amount of the judgment entered against Plaintiffs in a separate lawsuit ($5,152.70), and a full satisfaction of judgment in the second lawsuit, for a total payment to Plaintiffs of $2,796.30.

In its Findings of Fact and Conclusions of Law, the Court concluded that judgment should be entered for Defendants and not Plaintiffs. Judgment for $1,321.57 was entered for Defendants on March 6, 2020. Plaintiffs plainly failed to improve their position on trial de novo. Plaintiffs went from receiving a net of $2,796.30 from Defendants to owing Defendants $1,321.57.

Plaintiffs continue to argue against pre-arbitration fees, but fail to recognize that RCW 4.84.185 authorizes an award of reasonable attorneys' fees and costs to the prevailing party upon a written finding by the court that the losing party's action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause. RCW 4.84.185 does not require a party seeking attorney fees to show that the opposing party acted in bad faith; attorney fees can be awarded simply upon a showing that the opposing party should have realized that he or she had no chance of prevailing on the merits. *Highland School Dist. No. 203 v. Racy*, 149 Wn. App. 307, 202 P.3d 1024 (2009).

Furthermore, "CR 11 permits reasonable attorney fees and costs incurred because of a bad faith filing of pleadings for an improper purpose or by filing pleadings that are not grounded in fact or warranted by law." *Skimming v. Boxer*, 119 Wn. App. 748, 754, 82 P.3d 707 (2004). CR 11 exists to deter baseless

filings and abuses of the judicial system where it is clear a claim has no chance of success. *Id.* at 54-55. CR 11 sanctions depend on "whether a reasonable attorney in a like circumstance could believe his or her actions to be factually and legally justified." *Id.* at 54. "[A] filing is baseless if it is not well grounded in fact, or not warranted by existing law or a good faith argument for altering existing law." *Id.*

Plaintiffs had no chance of prevailing on the merits of their claims due to lack of evidence. Furthermore, Plaintiffs' incessant and harassing litigation tactics clearly meet the CR 11 standard of filings interposed for improper purpose.

In September 2012, Plaintiff Elkharwily repeatedly threatened to sue Defendants and to report them and have them investigated by multiple administrative agencies whether they settled their differences or not:

> I think if you don't correct your actions, pay damages, write an apology, I am taking you to court and every single administration. Of course any

> criminal or illegal activity will be reported whether You settle damages or not.

Exhibit D-109;

> I am filing a complaint with real estate, L and I, and fraud investigation units and Washington realtor. And I am filing a law suit against you for damaging my properties. Including Grand house. I think you really need a lawyer. I am getting you audited too.

Exhibit D-9.

Despite his factually baseless claims, Elkharwily made good on his threats. He questioned Parker *ad nauseam* as a witness at Wall Street Apartment, LLC's Labor & Industries appeal hearing on a decision for employee Godwin's worker's compensation claim. Elkharwily questioned Parker about their Agreement and actions arising from it. Exhibit P-30 (P-000000339-343). In an effort to deflect his liability to All Star Construction, Elkharwily questioned Parker about an untrue and incorrect copy of the party's Agreement, which stated, "Owner **has chosen** All Star Construction . . . as owner's contractor [for] repair and maintenance" to argue that Defendants, not Plaintiffs,

employed Godwin, and was responsible for his worker's compensation claim. *Id.* (P-000000343). In fact, the true and correct Agreement states, "Owners **may choose** to use All Star Construction or any other owner-selected contractor for repairs and maintenance." Exhibit P-1. Elkharwily's questioning of Parker was "very upsetting" to her and caused her to shake. Exhibit P-30 (P-000000341, 345).

To further carry out his threats, Elkharwily filed a Labor & Industries complaint against Defendants. Exhibit P-30 (P-000000382). Plaintiffs first sued Defendants in *Elkharwily v. Parker, et al.*, Spokane County Superior Court Cause No. 14-2-04219-6 in October 2014, but the lawsuit was dismissed for want of prosecution in April 2016. Plaintiffs filed this lawsuit against Defendants on September 25, 2015 (the day before the 6-year statute of limitations ran on Plaintiffs' breach of contract claims). Plaintiffs sought multiple continuances and a stay, delaying proceedings for over three years. In addition, Plaintiffs filed a

third, nearly identical, lawsuit against Defendants in *Wall Street Apartments, LLC, et al. v. All Star Property Management, LLC, et al.*, Spokane County Superior Court Cause No. 18-2-03886-8, which was dismissed with sanctions imposed against Plaintiffs under CR 11 and RCW 4.84.185.

Plaintiffs should have realized they would not prevail on the merits of their nine causes of action or their defense to Defendants' counter-claim. Plaintiffs relied upon incoherent, inadmissible and non-existent evidence on summary judgment and produced indecipherable testimony and exhibits at trial. Plaintiffs' claims and defense to Defendants' counterclaim failed for lack of proof of causation and damages. These arguments have nonetheless persisted in numerous post-decision motions in the Court of Appeals that are not permitted by court rule.

Plaintiffs produced no evidence of their tort claims, and should have known they had no chance to prevail on claims for conversion, damages to real property, tortious interference,

electronic impersonation, fraud, violation of the WCPA, and defamation. Plaintiffs failed to produce any fact-based defense to Defendants' counter-claim for breach of the Agreement. They actually produced evidence showing they *knew* they owed Defendants money. *See, e.g.,* Exhibit P-3 (P-00000056).

Plaintiffs should have realized they had no factual basis to prevail on claims for breach of contract and breach of good faith because they again had no proof of causation or damages, two essential elements of each claim. *Amended Findings of Fact and Conclusions of Law (Revised)*, p. 18 (Conclusion of Law No. 15). Concerning the removal of the apartment building's lobby wall and fire alarm, Plaintiffs knew (1) Plaintiffs were remodeling the Wall Street apartment building; and (2) Plaintiffs did not or hire Defendants to renovate the apartment building. Concerning Plaintiffs' claim that Defendants failed to pay collected rent, Plaintiffs knew they had no evidence that Defendants received and failed to turn over rent money in the amount of $2,200.

Amended Findings of Fact and Conclusions of Law (Revised), p. 13 (Finding of Fact No. 9). With regard to Plaintiffs' claim that Defendants made unauthorized purchases, Plaintiffs knew it had no proof Defendants made unauthorized purchases for Plaintiffs or on Elkharwily's Lowe's account. *Findings of Fact and Conclusions of Law (Revised)*, p. 14 (Finding of Fact No. 8). Plaintiffs do not challenge on appeal any of the above-listed findings of the trial court. Concerning Plaintiffs' claim alleging Defendants retained Wall Street apartment building keys and business records, Plaintiffs knew the keys and business records had been returned to them.

Based on the lack of evidence produced by Plaintiffs, the trial court properly determined that Plaintiffs' claims and defenses were frivolous, not grounded in fact, and were filed for the purpose of harassing Defendants for over seven years. The court correctly awarded both pre-trial de novo attorney fees, as well as fees and costs incurred after they sought trial de novo.

Plaintiffs' attempt to dispute counsel's attorney fees as being unreasonable or duplicative is nonsensical. Counsel was forced to prepare a motion for summary judgment, which prevailed; to successfully defend against the Plaintiffs' motion; to prepare witnesses for trial; and to conduct necessary legal research. It is impossible for any competent attorney to perform no work whatsoever on a case pending trial de novo simply because there was a prior arbitration trial. Plaintiffs' actions necessitated the work performed by Defendants' attorneys, which directly led to the attorneys' fees granted by the trial court.

Plaintiffs' actions on appeal further bolster Defendants' claims for attorney fees, and specifically for CR 11 fees and sanctions. Plaintiffs filed not one but two *titled* Motions for Reconsideration before the Court of Appeals in violation of RAP 12.4(h); Plaintiffs sought to alter the record *they caused to be transmitted* only after receiving an adverse ruling; after both Motions for Reconsideration were denied, Plaintiffs then chose

to file *five* motions titled "Motion to Modify Clerk's Order" which upon review are clearly further Motions for Reconsideration titled by another name. At every turn, Plaintiffs have acted in bad faith and with no valid legal argument to support their position.

I. There is no public policy interest.

Plaintiffs repeatedly assert that there is a public policy interest to justify review by this Court. No public policy interest has been identified, save that Plaintiffs have personally been impacted by the decision. This is insufficient under RAP 13.4(b).

VI. CONCLUSION

Plaintiffs failed to meet their burden under RAP 13.4(b) in all respects. The Court of Appeals decision follows well settled law and is appropriate. Defendants respectfully request that Plaintiffs' petition for review be denied.

Dated this 10th day of August, 2022.

CERTIFICATION OF WORD COUNT

Undersigned counsel certifies pursuant to RAP 18.17(b) that this brief is 4,960 words in length.

STAMPER RUBENS, P.S.

By: _____

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 10, 2022, I arranged for service of the foregoing Respondent's Answer to Appellant's Petition for Review, to the court and to the parties to this action as follows:

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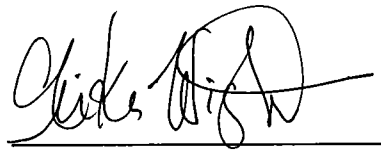

Erika Wight

STAMPER RUBENS, P.S.

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Transmittal Information

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