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No. 62374-5-I

COURT OF APPEALS,
OF THE STATE OF WASHINGTON
DIVISION I

AECON BUILDINGS, INC.,
f/k/a BFC FRONTIER, INC.

Respondent,

vs.

GLEN A. CASEBEER, d/b/a CHINOOK BUILDERS, INC. ,

Appellant,

and

VANDERMOLEN CONSTRUCTION CO., INC., *et al.*,

Defendants.

BRIEF OF RESPONDENT AECON BUILDINGS, INC.

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ORIGINAL

CORPORATE DISCLOSURE

Respondent Aecon Buildings, Inc. (f/k/a BFC Frontier, Inc.), is a Washington corporation duly organized and existing under the laws of the State of Washington. Aecon's principal place of business is in Snohomish County, Washington.

Aecon Buildings, Inc., is a wholly owned subsidiary of Atlantic Tug and Equipment Company, Inc. ("ATEC"), a Delaware corporation that has no public shareholders. ATEC is owned 100% by Aecon Construction Group, Inc. ("ACGI"), a private federally incorporated Canadian company. ACGI is owned 100% by Aecon Group, Inc. ("AGI"), a federally incorporated Canadian public company that trades on the Toronto Stock Exchange.

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I. INTRODUCTION

Aecon Buildings, Inc. (“Aecon”), was the general contractor for the Quinault Indian Nation (“the Quinault”) for construction of the Quinault Beach Resort and Casino (“the Resort” or “the project”) in Ocean Shores, Washington. Appellant Glen A. Casebeer d/b/a Chinook Builders, Inc. (“Chinook”) was the framing subcontractor on the project.

After the Quinault asserted claims against Aecon for alleged construction defects at the Resort, Aecon tendered claims and initiated suit against some of its subcontractors in January 2005. Further investigation eventually implicated Chinook’s work. Aecon tendered claims for defense and indemnity to Chinook and its insurer, The Hartford, in May 2006.

The following facts are undisputed: (1) Chinook did not respond to Aecon’s tender; (2) Aecon served Glen Casebeer personally on June 15, 2006, with copies of the summons and Aecon’s Fourth Amended Complaint, naming Chinook; (3) Chinook failed to answer or appear in the suit; (4) an order of default was entered on September 6, 2006; (5) nearly a year after the order of default was entered, Chinook’s insurer, The Hartford, reversed its previous denial of defense to Chinook and appointed counsel – without Chinook’s knowledge – to move to set aside the order of default arguing, *inter alia*, that Aecon had “concealed” the litigation from

The Hartford; and (6) the Honorable Sharon Armstrong denied Chinook's motion to set aside the order of default, finding "neither excusable neglect nor due diligence on the part of Glen Casebeer d/b/a Chinook Builders, Inc." If the present appeal had actually been brought by Chinook on its own behalf, the outcome of affirming the trial court would be compelled on these facts alone. But the real appellant here is Chinook's insurer, The Hartford.

What this appeal is really about is protecting The Hartford from a bad faith suit by the ostensive appellant, Chinook. After denying both Aecon's and Chinook's tenders of defense and after being sued by Aecon for bad faith in the handling of Aecon's tender, The Hartford reversed course – as to Chinook – and retained counsel to defend Chinook against Aecon's claims. And all of this was without the knowledge of Glen Casebeer, whom The Hartford and its appointed counsel admit was never contacted. Yet, The Hartford also admits it has no intention of defending or indemnifying Chinook beyond the present appeal. Now, in a manifest demonstration of rank hypocrisy, The Hartford appeals – through its proxy, Chinook – arguing that The Hartford itself was the victim of "inequitable conduct" by Aecon, which, so the argument goes, "concealed" the case against Chinook from The Hartford.

This argument is based solely on two demonstrably false declarations in the record: one from the The Hartford's claims adjuster, who was subsequently found in the bad faith lawsuit between Aecon and The Hartford to have individually committed bad faith in the handling of Aecon's tender, and a declaration from The Hartford's counsel in the bad faith action. As the supplemental evidence admitted into the record on appeal conclusively establishes, "Chinook's" allegations of inequitable conduct by Aecon are totally without merit, being based entirely upon false statements submitted by agents of The Hartford. The trial court committed no abuse of discretion in denying the motion to set aside the order of default. The trial court should be affirmed in all respects.

Similarly, the trial court's entry of default judgment in the amount of \$1,185,212 in damages arising from Chinook's breach of contract was supported by substantial and un rebutted evidence in the record, and so it too should be affirmed.

Finally, because the default judgment contains sufficient findings, both explicit and inherent, to facilitate this Court's review, Chinook's request that this Court vacate the default judgment and remand to the trial court for entry of additional findings should be rejected.

II. AECON'S COUNTER-STATEMENT OF ISSUES

1. Did the trial court abuse its discretion in finding no excusable neglect and no due diligence in denying Chinook's motion to set aside the order of default when it is undisputed that Chinook was properly served with the lawsuit, never answered or appeared prior to entry of the order of default, and waited until over a year after entry of the order of default to move to set aside the order? (Assignment of Error No. 1).

2. Did the trial court abuse its discretion in entering a default judgment against Chinook in the amount of \$1,185,212 based on an expert evaluation of the scope and cost to repair construction defects arising from Chinook's breach of contract when that estimated scope and cost to repair defects was not disputed? (Assignment of Error No. 2).

III. STATEMENT OF THE CASE

A. Claims Against Aecon Arising From Chinook's Work at the Quinault Beach Resort & Casino.

Although Respondent Aecon Buildings, Inc. ("Aecon"), was the general contractor retained by the Quinault Indian Nation ("the Quinault") to construct the Quinault Beach Resort and Casino ("the project" or "the Resort") in Ocean Shores, Washington, CP 102, Aecon did none of the physical construction itself. Instead it retained various specialty trade

subcontractors to do all of the actual construction on the project. Appellant Glen A. Casebeer d/b/a Chinook Builders, Inc. (“Chinook”) was the framing subcontractor on the project. CP 585-629 (Chinook’s scope of work at CP 624).

The project was for a casino and hotel complex located in a coastal area subject to severe weather conditions. Designed by the Seattle architectural firm of Freiheit & Ho, the project had a complex hybrid design comprised of site-built wood and metal frame construction with wood-framed modular hotel units built off-site and then stacked over the site-built first floor of the hotel wing. CP 1184-95; CP 1370.

Construction commenced in 1998 and was substantially completed as of June 9, 2000. CP 233.

B. The Quinault Assert Construction Defect Claims Against Aecon, Resulting in Aecon’s Flow-Through Claims Against the Subcontractors on the Project.

In 2004, the Quinault tendered claims to Aecon alleging a number of construction defects at the Resort. CP 1957-2009; CP 1140-1141; CP 1263. The initial claims primarily concerned moisture problems, whether direct water intrusion or more indirect seepage or condensation. *See ids.*

The Aecon/Quinault contract contained an arbitration provision, requiring arbitration in a forum provided under the auspices of the

American Arbitration Association. Aecon and the Quinault initiated an arbitration proceeding and discovery in that forum. *See* CP 120-121; CP 146 at § 4.5. Aecon, in turn, tendered claims to various subcontractors whose work was implicated in the Quinault's claims before filing suit against the subcontractors in King County Superior Court January 2005. *See* CP 1-3; CP 1138-1144. The case was assigned to the Honorable Sharon Armstrong, who has presided over the case from the beginning. *See* CP __ (Dkt. # 2).

The Quinault's initial concerns at the project were with the building envelope. CP 1026 at 10:22-11:25. Aecon did not recognize this as implicating Chinook's work. CP 3. However, by Spring 2006, as discovery progressed in both the arbitration and lawsuit and further investigations were conducted, the Quinault raised issues that implicated Chinook's work at the project. *See* CP 1-3.

C. Aecon Tenders Claims to Glen A. Casebeer d/b/a Chinook Builders, Inc., and The Hartford.

By letter dated May 3, 2006, Aecon tendered claims for defense and indemnity of the Quinault's claims to Chinook and its insurer, The Hartford, because Chinook was contractually obligated to name Aecon as an additional insured on Chinook's liability policy with The Hartford. CP

297-298 (tender letter); CP 594 at §9.3.1.5 (additional insured provision).

Included with Aecon's tender was a copy of most the recent building report from the Quinault's expert, James Paustian of Pacific Engineering Technologies, dated January 27, 2006. CP 297-298; *See* CP 1611-1661.

Chinook never responded to Aecon's tender. The Hartford assigned Aecon's tender to claims adjuster Pete Harris, who called Aecon's counsel requesting additional information. Aecon's counsel, Linda Chu, provided all of the information requested by Mr. Harris. She told him of the lawsuit against the subcontractors, informing him of the two separate proceedings and that Chinook would be brought into the case "soon." As Mr. Harris acknowledged in his deposition:

Q. Okay. And why, when you receive the May 3rd, 2006 correspondence from Aecon, did you start analyzing coverage for Chinook if this wasn't a tender for Chinook?

A. Well, because they say here that there's going to be – there are these potential issues with Chinook's work. I can't really ignore that. ***When I spoke with Linda Chu within an hour of getting this, she said there's a lawsuit filed against the developer but there's no suit against the insured but they will bring it in soon.***

So I can just pretend that I don't know that suit is coming or I can start now.
That way if a suit does come, I'll be ready.

Harris dep., April 29, 2008, at 75:3-16 (Stolle decl. Exhibit A) (emphasis

added).¹ Later in the same deposition, Mr. Harris elaborated on his conversation with Ms. Chu.

Q. So I just want to be clear, you're not talking about a claim against a complaint, an actual pleading against Aecon; you're talking about Aecon's complaint against the

—

A. I'm talking about both. I had requested the complaint against Aecon. ***And then she mentioned to me that they're going to file against Chinook.***

Id. at 83:23-84:17 (emphasis added). Thus, according to Mr. Harris' own testimony, Aecon's counsel *volunteered*, apparently without being asked, that Aecon intended to file suit against Chinook in the near future. *See id.*

Mr. Harris' sworn testimony admitting that Aecon informed him of its intent to file suit against Chinook is further supported by his contemporaneous entries in the The Hartford's claim file, which were authenticated and admitted as exhibits to his deposition.

there is a lawsuit filed against the dvlpr (developer) but there is no suit against insd (insured) but they will bring in soon. a few weeks out for that. she will send the contract. got the contract.

Stolle decl. Exhibit C (06/09/2006 entry), *compare with* Stolle decl.

¹ Per direction from the Court of Appeals case manager, Aecon cites to additional evidence admitted into the record on appeal in the same manner it was cited in Aecon's Motion to Supplement the Record on Review with Additional Evidence.

Exhibit D (05/09/2006 entry).

Subsequent to Mr. Harris' telephone call and consistent with Ms. Chu's representations to him, Aecon filed a motion on May 12, 2006, requesting leave to file an amended complaint adding Chinook. *See* CP 1-7. Briefing on that motion was completed on May 22, 2006, and the order granting leave to file the Fourth Amended Complaint, adding claims against Chinook, was entered on May 31, 2006. CP 8-14. The summons to Chinook and Aecon's Fourth Amended Complaint were both filed on June 7, 2006. *See* CP 21-23 & CP 30-45. Glen Casebeer was personally served with the summons and complaint against Chinook on June 15, 2006. CP 46.

Chinook never appeared or otherwise responded to Aecon's complaint in any fashion. Aecon filed a motion for order of default against Chinook on August 28, 2006. CP 51-57. Judge Armstrong entered the order of default against Chinook on September 6, 2006. CP 63-65.

Aecon heard nothing more from Mr. Harris or The Hartford after the single telephone call to Linda Chu on May 9, 2006 – the call discussed in his deposition – before receiving a letter from Mr. Harris dated November 3, 2006, denying Aecon's tender of defense and indemnity under Chinook's insurance policy with The Hartford. CP 295. If there

had been additional calls between Mr. Harris and Aecon after the initial call to Linda Chu, those calls would be reflected in the The Hartford's claims file, but they are not.² *See* CP 295; *see generally*, Stolle decl. Exhibits C & D.

Mr. Harris, on behalf of The Hartford, made only a single telephone call to Glen Casebeer on May 10, 2006. But, apparently receiving no answer, he simply gave up further attempts to contact Mr. Casebeer until over a year later. *See ids.*; *see also* CP 294; CP 399-401. On December 11, 2006, Mr. Harris sent Mr. Casebeer a letter denying Chinook's tender to The Hartford. CP 295; CP 399-401. By that date, The Hartford totally disclaimed any coverage or obligation to its insureds.

Meanwhile, however, Aecon continued to litigate on two fronts, defending itself against the Quinault's claims in the arbitration proceeding and prosecuting its flow-through claims against the subcontractors in this case. Aecon reached a partial settlement with the Quinault on June 2, 2006, agreeing to an interim payment of \$1,891,000. CP 252-255. Aecon entered into a final settlement with the Quinault on January 31, 2007. CP

²Mr. Harris did testify two years later, on May 23, 2008, in the federal court case between Aecon and The Hartford that he had a vague recollection of a second telephone call to Aecon's counsel on or about May 12, 2006, but there is no documentation of the alleged call in the claim file or anywhere else. *See* Stolle decl. Exhibits C & D.

257-267. The final and total resolution of the Quinault's claims required a payment of \$3.75 million to the Quinault. *See id.* Of this total, \$75,000 was paid directly to the Quinault by subcontractor Quigg Bros., which left a balance of \$3,675,000 paid by Aecon. *See id.* & CP 816.

During the same time period, Aecon and the defendant subcontractors who had appeared in this lawsuit engaged in several mediations, which resulted in Aecon achieving settlements with all of the subcontractors – other than Chinook – by March 2007, shortly before the scheduled trial date in April. CP 442 (trial date April 16, 2007). From these settlements, Aecon recovered a total sum of \$2,412,500. CP 816; CP 651-675. Amounts payable by the subcontractors under the settlements were undifferentiated lump sums, i.e., there was no itemization among Aecon's claims for breach of contract or indemnity damages, interest on the settlements, or attorneys' fees and costs. *See* CP 651-675.

In April 2007, Aecon filed suit in King County Superior Court against The Hartford, among other insurers, for the bad faith denial of Aecon's tender of defense and indemnity of the Quinault's claims arising from Chinook's work at the Resort. *See* CP 299-302, CP 276-281, CP 442-443. The case was removed to the United States District Court for the Western District of Washington, where it was assigned to the Honorable

Marsha J. Pechman. *See, e.g., Aecon Buildings, Inc. v. Zurich North America, et al.*, 572 F.Supp.2d 1227 (W.D.Wash. 2008) (Pechman, J.).

In July 2007, Aecon asked the state trial court for a determination of the reasonableness of the settlement with the Quinault. It provided notice of the motion, and Aecon's intent to file for a default judgment against Chinook, to the defendants in the federal action, including The Hartford. CP 442 ll. 3-6. Only then, after it had been sued for the bad faith denial of Aecon's tender, did The Hartford reconsider its decision to deny Chinook's tender of defense and indemnity under The Hartford insurance policy issued to Chinook. *See* CP 293-298 & CP 399-401.

Still failing to contact the insured, Glen Casebeer, Mr. Harris appointed counsel from the firm of Alexander & Bierman to file a motion to set aside the order of default. *See* CP 373-382.³ Aecon opposed Chinook's motion, both on the grounds that it was without merit and that counsel appointed by The Hartford did not properly represent Chinook because neither counsel nor The Hartford had ever succeeded in contacting Glen Casebeer. *See* CP 454-465.

³ Pete Harris first appointed counsel from the Law Offices of Sharon Bitcon to appear and seek to set aside the order of default. CP 268-273. After a motion to set aside the order of default was filed and Aecon responded, the motion was withdrawn and new counsel appointed. *See* CP 441-447; CP 456 ll. 12-16; CP 373.

In Chinook's reply, appointed counsel acknowledged that there had been no contact with Glen Casebeer, but maintained that Chinook was duty bound to accept representation by The Hartford's appointed counsel and that The Hartford had the right to appear in the case to protect its own interests. CP 412 ll. 5-15.

Aecon's first argument is that counsel does not represent Chinook. That argument is without merit. The Court has been provided with Chinook's liability policy with The Hartford. The Hartford has admitted to owing Chinook a defense. The attorney-client relationship is established by virtue of the insurance contract which requires the insured to cooperate with its assigned counsel.

Alternatively, The Hartford, as liability insurer, with a potential indemnity obligation, has an interest in appearing in the case for its insured to protect its policy interests.

Id. Thus, the ostensive appellant, Glen Casebeer d/b/a Chinook Builders, Inc., did not participate in and, apparently, had no knowledge of any of the motions and orders that are subject of the present appeal. *See id.*

Significantly, Pete Harris testified that The Hartford had no intention of indemnifying Chinook under the policy and was only assigning defense counsel to get the default set aside.

Q. Okay. So I don't understand, why did

you decide to defend if there was no coverage?

A. To get the default set aside and he [Casebeer] can take over after that. I wasn't planning on defending him after I got the default set aside.

Stolle decl. Exhibit B at 106:21-107:1. And even this limited defense was only offered in hopes of heading off Chinook entering into a settlement and assignment of rights against The Hartford. *See id.* at 108:15-109:2. Thus, The Hartford brought the present appeal – ostensibly on behalf of Chinook – to protect The Hartford, which apparently intends to cut Chinook loose if it prevails. *See id.*

By order dated September 21, 2007, the Honorable Sharon Armstrong denied Chinook's motion to set aside the order of default, "finding neither excusable neglect nor due diligence on the part of Glen Casebeer d/b/a Chinook Builders, Inc." CP 429-430.

Aecon filed its initial motion for default judgment against Chinook on February 5, 2008. CP 474-479. The damages requested were based upon a theory that Chinook, as the "last man standing" in the case, should be liable for the balance of the unrecovered settlement with the Quinault under the indemnity provision of the subcontract. *See id.*; CP 1018 at ¶ 7. Judge Armstrong denied this motion by order dated March 4, 2008, stating

that the court:

finds that damages have not been allocated to Chinook's breach of contract. Attorneys fees and costs have not been allocated to those attributable to Chinook's breach of contract or indemnity obligation.

CP 699-701.

Having received clear direction from the trial court to prepare a calculation of the damages arising from Chinook's breach of contract, Aecon first contacted the expert it had used earlier in the case, Rocco Romero, to prepare the required allocation. CP 1017-1019 at ¶¶ 3, 5, & 8. Mr. Romero had archived his files at the end of the case in April 2007 and, having little specific recollection of the issues at the Resort, believed it would require considerable time to retrieve and review those files prior to preparing the allocation required by Judge Armstrong. *See* CP 1018-1019 at ¶ 8. Because the settlement with the Quinault allowed Aecon to utilize the Quinault's experts, Aecon's counsel then contacted the Quinault's expert, James Paustian, for the court ordered allocation. *See* CP 257; CP 1018-1019 at ¶¶ 8-9.

It turned out that Mr. Paustian was still working with the Quinault regarding various remediation efforts at the Resort, and so remained intimately familiar with the issues identified in his prior building reports.

CP 1019 ¶ 9; CP 790-791. After confirming the Quinault's authorization for him to perform work for Aecon, Mr. Paustian prepared the required allocation of damages attributable to Chinook's breach of the subcontract with Aecon. *See id.*; CP 796-799; CP 1033 at 40:2-25 (re authorization).

On June 30, 2008, Aecon filed a renewed motion for default judgment utilizing Mr. Paustian's estimate of the cost to repair defects and damage arising from Chinook's breach of its subcontract with Aecon. CP 776-788; CP 789-811.

Although Judge Armstrong had denied Chinook's motion to compel Aecon to respond to Chinook's discovery requests, the trial court invited Chinook "to respond to Aecon's damages and fees computation." CP 976. Chinook then submitted voluminous evidence obtained from Aecon by The Hartford in the federal bad faith litigation, along with a report from Ken Simons, The Hartford's expert in the federal bad faith litigation. CP 833-882.

Notwithstanding Chinook's status as a party in default and the trial court's invitation to respond only to Aecon's calculation of damages and fees, and despite Aecon's evidence of Chinook's defective work and Mr. Paustian's scope and estimated cost to repair defects arising from Chinook's breach, Chinook took the untenable position before the trial

court that “Aecon is entitled to zero (0) damages from Chinook.” CP 863. Chinook argued for this result asserting that judicial estoppel (a waived affirmative defense) applied to preclude any allocation to Chinook. CP 866-870. This argument was based upon a declaration from Aecon’s expert, Rocco Romero, submitted by Aecon earlier in the case in response to several subcontractors’ motions for summary judgment and at the direction of Judge Armstrong. CP 959-960; CP 1017-1018 ¶ 5.⁴

In the alternative to a finding of “zero (0) damages” attributable to Chinook’s work by application of judicial estoppel, Chinook argued that application of judicial estoppel placed an absolute “cap” of \$450,000 on damages attributable to Chinook’s work, but that the trial court should still award Aecon zero damages against Chinook. CP 870-871.

Relying on its tactical “all or nothing” judicial estoppel argument, Chinook never offered the trial court any credible evidence disputing the estimate of damages arising from Chinook’s breach of contract that was

⁴ In the federal bad faith action, The Hartford brought a motion to preclude Aecon from utilizing Mr. Paustian’s allocation to Chinook, relying on exactly the same judicial estoppel argument presented to Judge Armstrong in this case. Judge Marsha Pechman denied the motion, finding, *inter alia*, that “it is apparent that Mr. Romero’s report does not address at all whether damages should be attributable to Chinook.” *Aecon v. Zurich North America, et al.*, Case No. C07-832MJP, 2008 WL 3852064, *3-4 (W.D.Wash. August 19, 2008) (Ruling “[b]ecause Aecon does not seek to gain an advantage through the taking of an inconsistent litigation position, application of the doctrine of judicial estoppel is not warranted.”).

prepared by Mr. Paustian and submitted by Aecon. *See generally, id.* Judge Armstrong accepted Mr. Paustian's authoritative and well-supported estimate of damages arising from Chinook's breach of contract and entered an order of default judgment against Chinook in the principal amount of \$1,185,212. CP 1117-1119. Aecon's request for attorneys' fees and costs was deferred pending further briefing. CP 1119. To date, the issue of attorneys' fees and costs is still pending in the trial court.

IV. ARGUMENT

- A. **The Trial Court's Denial of Chinook's Motion to Vacate the Order of Default was Within the Court's Discretion.**
1. **This Court's review is limited to whether the trial court abused its discretion in denying the motion to set aside the order of default.**

The decision whether to set aside an order of default rests within the sound discretion of the trial court. *In re Estate of Stevens*, 94 Wn. App. 20, 29, 971 P.2d 58 (1999) (affirming denial of motion to set aside order of default.); *See Little v. King*, 160 Wn.2d 696, 702-03, 161 P.3d 345 (2007), *citing Yeck v. Dept. of Labor & Indus.*, 27 Wn.2d 92, 95, 176 P.2d 359 (1947). An abuse of discretion will be found "if it is exercised on untenable grounds or for untenable reasons." *Morin v. Burriss*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007). "A judge abuses his discretion

when no reasonable judge would have reached the same conclusion.”
Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989). And
“[c]redibility determinations cannot be reviewed on appeal.” *Morse v.*
Antonellis, 149 Wn.2d 572, 574, 70 P.3d 125 (2003).

Generally, an order of default may be set aside upon a showing of good cause. CR 55(c)(1). To establish good cause, the moving party in default must show both excusable neglect and due diligence. *Stevens*, 94 Wn. App. at 31 (“Although requirements for setting aside an order of default are not exactly the same as those for vacating a default judgment, two factors to be considered are the same, excusable neglect and due diligence.”), *citing Seek Systems, Inc. v. Lincoln Moving/Global Van Lines, Inc.*, 63 Wn. App. 266, 271, 818 P.2d 618 (1991). In the present case, Judge Armstrong denied Chinook’s motion to set aside the order of default, “finding neither excusable neglect nor due diligence on the part of Glen Casebeer d/b/a Chinook Builders, Inc.” CP 430. These findings are unchallenged on appeal.

2. The trial court’s findings of “neither excusable neglect nor due diligence” are verities on appeal.

Here, Chinook has *not* assigned any error to the trial court’s findings of “neither excusable neglect nor due diligence on the part of

Glen Casebeer d/b/a Chinook Builders, Inc.” CP 430; *compare with* Chinook Brief at 2. Thus, these findings are “verities on appeal.” *Davis v. Dept. of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980). Since both excusable neglect and due diligence are required to establish “good cause” under CR 55(c)(1), the trial court’s denial of Chinook’s motion based on its unchallenged findings cannot be an abuse of discretion. The trial court can and should be affirmed on this basis alone.

Even assuming, *arguendo*, that Chinook had challenged the trial court’s findings of neither excusable neglect nor due diligence, there still would be no abuse of discretion. On disputed findings of fact, this Court’s role is limited to determining whether the findings of fact are supported by substantial evidence. *Green v. Normandy Park*, 137 Wn. App. 665, 689, 151 P.3d 1038 (2007) (Div. I). The substantial evidence standard is viewed in the light most favorable to the respondent, *Aecon. P.U.D. No. 2 of Grant County v. NAFTZI*, 159 Wn.2d 555, 576, 151 P.3d 176 (2007). The evidence should be sufficient to persuade a fair minded person of the truth of the declared premise. *Green*, 137 Wn. App. at 689. The trial court’s findings of fact are presumed to be correct, and the party asserting error has the burden to show that the challenged finding is not supported by substantial evidence. *Id.* An appellate court will not substitute its

judgment, even if it might have resolved disputed facts differently. *Id.*

Chinook offered the trial court absolutely no evidence of excusable neglect by Glen A. Casebeer d/b/a Chinook Builders, Inc. In fact, appointed counsel for Chinook admitted that all efforts to contact Mr. Casebeer, such as there were, had been unsuccessful. CP 379. Chinook therefore asked the trial court to assume excusable neglect from Chinook's failure to notify The Hartford of the suit.

Although Chinook has not responded to counsel's calls it is clear that since Chinook turned over the Aecon tender letter to its agent it could be nothing more than excusable neglect and/or mistake on its part not to have turned over the suit to its agent and/or Hartford for defense.

CP 379 ll. 14-17. This "explanation" fails to explain anything. In particular, it does not explain *why* Chinook failed to either retain its own counsel to answer and/or appear on its behalf and/or *why* it failed to tender defense of the suit to The Hartford. *See* CP 373-382. It would have been an abuse of discretion for the trial court to accept such bare theory and conjecture to find excusable neglect and/or mistake by Chinook; it certainly was not an abuse of discretion to decline to do so. Chinook's briefing to the trial court did not even assert due diligence by Chinook, but by The Hartford. *See id.*

What remains, then, on this appeal is The Hartford's allegations on Chinook's behalf that The Hartford was the victim of "inequitable conduct" by Aecon, which allegedly "concealed" the present lawsuit from The Hartford.

3. **The trial court did not abuse its discretion in rejecting Chinook's unsupported assertions of "inequitable conduct" by Aecon.**

Chinook's sole identified issue pertaining its Assignment of Error No. 1, and its principal argument on appeal, is that the trial court abused its discretion in denying Chinook's motion to set aside the order of default because Aecon allegedly committed "inequitable conduct" by "concealing from The Hartford this lawsuit and Aecon's intent to amend the complaint to add Chinook as a defendant." *See* Chinook Brief at 2. Note that the issue raised is *not* that Aecon concealed the lawsuit from Chinook, which it is undisputed was properly served, but failed to answer or appear.

Rather, the issue raised by the present appeal is Aecon's alleged concealment of this case from Chinook's insurer, The Hartford. Chinook Brief at 2. While not an entirely novel argument, its acceptance by this Court on the facts of the present case would be unprecedented.

Chinook's only evidence cited in the record to support its allegation of Aecon's "concealing" this lawsuit from The Hartford is the

demonstrably false and misleading declarations of The Hartford's claims adjuster, Pete Harris, and one of The Hartford's counsel in the federal bad faith case with Aecon. *See* Chinook Brief at 4-7 & 13-16, *citing* CP 293-302.

For legal support, Chinook relies entirely on the *Gutz* case, one of the three cases consolidated on appeal in *Morin v. Burris*. Chinook Brief at 12-13; *see Morin v. Burris*, 160 Wn.2d at 753, *consolidating appeal of Gutz v. Johnson*, 156 Wn. App. 1017, 132 P.3d 734 (2006). Chinook's reliance is misplaced. With regard to the *Gutz* appeal, the Supreme Court stated:

Gutzes's counsel had no duty to inform Allstate of the details of the litigation. But counsel's failure to disclose the fact that the case had been filed and that a motion for default judgment was pending when the Johnsons' claims representative was calling and trying to resolve matters, and when the time for filing an appearance was running, appears to be an inequitable attempt to conceal the existence of the litigation.

Morin, 160 Wn.2d at 759. The present case is readily distinguishable from *Gutz* in several respects.

First, Aecon's counsel, Linda Chu, provided Mr. Harris and The Hartford with completely accurate information concerning the status of

Aecon's claims against Chinook and its intent to sue Chinook, concealing nothing. Ms. Chu had already sent Aecon's tender of the Quinault's claims to both Chinook and The Hartford, which included the most recent building report by the Quinault's expert, James Paustian, dated January 27, 2006. CP 297-98; CP 1611-61. In response to Mr. Harris' telephone call, Ms. Chu informed Mr. Harris of the present litigation and *volunteered* that Aecon would "bring [Chinook] in soon." Stolle decl. Exhibits A, C, & D, *quoted supra* at pp. 6-8. She then sent a copy of Chinook's subcontract, which included Chinook's scope of work. *See id.* Exhibit C, *quoted supra* p. 8. Yet, The Hartford's claims adjuster, Pete Harris, *never* followed up on any of this information before sending a denial of Aecon's tender some six months later. CP 295; *see generally*, Stolle decl. Exhibits C & D. These facts do not support a finding of "inequitable conduct" by Aecon.

Second, there is no evidence – and Chinook does not argue – that Mr. Harris contacted Aecon's counsel attempting to resolve the matter of Aecon's claims for defense and indemnity against Chinook or that he was otherwise representing the interests of Chinook in any respect. Even Mr. Harris did not make this claim to the trial court. CP 293-295. So there was no reason or obligation for Aecon to contact Mr. Harris further about its claims against Chinook. To the contrary, the evidence of record shows

that Mr. Harris was simply gathering information to assist in his evaluation of Aecon's separate tender of defense and indemnity to The Hartford under the insurance policy issued to Chinook. *See generally* Stolle decl. Exhibits C & D at entries May (tender) through December 2006 (denial of tender). Then, having obtained the information he requested from Aecon for his coverage analysis, Mr. Harris never contacted Aecon again before sending his denial letter some six months later. *See ids.*; *see also*, CP 293-95.

Neither is there any evidence even suggesting that Aecon's counsel either knew or should have known that Mr. Harris would rely on Aecon to provide further information regarding Chinook after that initial, solitary, telephone conversation, nor that Mr. Harris did, in fact, rely on Aecon to provide further such information, nor that such reliance – if it existed – was reasonable. In fact, even though he continued to deny having knowledge of this lawsuit at the time he denied coverage to Chinook, Mr. Harris later testified that he would have to “speculate” in answering whether The Hartford would have provided Chinook a defense to Aecon's lawsuit against Chinook if he had known about it at that time.

Q. Okay. When you say – one of the bases for sending out your letter in Exhibit 20 is that there was a lawsuit against Chinook, *are*

you meaning to suggest that if there had been a lawsuit against Chinook on December 11, 2006 when you wrote that Exhibit 18, that you would have defended Chinook back then?

Mr. Hayes: Object. That does call for speculation.

A. So, I'm going to speculate?

Mr. Hayes: I do not want you to speculate.

A. That's the nature of your question, is speculation.

Q. Okay. So you would be speculating to answer that question?

A. As phrased.

Q. Okay. ***Did you anywhere in ex – in your letter set forth in Exhibit 18 say anything about you wanted more information from Chinook about a lawsuit or that you would be defending them if only there were a lawsuit against them?***

A. No.

Stolle decl. Exhibit B at 109:7-25. Exhibit 18 to the deposition was Mr. Harris' original denial letter to Chinook in December 2006. *See id.* at 4:5 & 90:2-15. Thus, there is no evidence that, even if Aecon had unilaterally provided Mr. Harris with a copy of the complaint against Chinook, The Hartford would have provided Chinook with a defense. *See id.* This bare argument on appeal, unsupported by the record, should be rejected.

Third, unlike here, in *Gutz* there was no issue of the insurer coming before the court with unclean hands. As Chinook argues, “[v]acation of a default is governed by equitable principles.” Chinook Brief at 11, *citing*

White v. Holm, 73 Wn.2d 348, 351, 438 P.2d 581 (1968). Aecon agrees. However, “[i]t is a well-known maxim that a person who comes into an equity court must come with clean hands.” *Income Investors v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940). As the Supreme Court stated in *Shelton*:

Equity will not interfere on behalf of a party whose conduct in connection with the subject-matter of the transaction in litigation has been unconscientious, unjust, or marked by the want of good faith and will not afford him any remedy.

Id., citing 1 POMEROY’S EQUITY JURISPRUDENCE (4th Ed.) 739, § 398.

Chinook cannot rely on The Hartford’s claims of inequitable conduct by Aecon (which are demonstrably false in any event) because The Hartford has unclean hands – in fact, very dirty hands.

The doctrine of unclean hands applies in the present case because, *inter alia*, The Hartford is the admitted real party in interest seeking equitable relief to protect The Hartford’s own interests. See CP 412, ll. 6-15 (“The Hartford, as liability insurer, with a potential indemnity litigation, has an interest in appearing in the case for its insured to protect is (sic) policy interests.”). Yet, The Hartford, the asserted victim of Aecon’s alleged “inequitable conduct,” was adjudged liable for bad faith

arising from Mr. Harris' total mishandling of Aecon's tender – the very transaction that was the occasion of Mr. Harris' contacts with Aecon's counsel. *See, e.g., Aecon Buildings, Inc. v. Zurich North America, et al.*, 572 F.Supp.2d 1227, 1237-38 (W.D.Wash. 2008) (“Because he speculated without conducting a reasonable investigation, and because that speculation resulted in a denial without a basis in the policy or in fact, Mr. Harris' handling of the claim constitutes bad faith.”). Thus, the claim for equitable relief arising from alleged inequitable conduct by Aecon toward The Hartford is precluded because The Hartford's “conduct in connection with the subject-matter of the transaction in litigation has been ... marked by the want of good faith.” *Shelton*, 3 Wn.2d at 602, *compare with Aecon*, 572 F.Supp.2d at 1237-38. Accordingly, this Court “should not afford [The Hartford] any remedy.” *Id.*

On the facts of record, this case is entirely different from *Gutz*, in which the insurance claims representative called the plaintiff's counsel several times after suit was filed, in an apparently good-faith effort to negotiate a settlement on the defendant insured's behalf. There, plaintiff's counsel repeatedly put the adjuster off while surreptitiously obtaining a default judgment against the insured defendant. *See Morin*, 160 Wn.2d at 759.

The facts of this case are actually very similar to another case in which a default judgment was entered against plaintiff without notice to the insurer. *See, e.g., Caouette v. Martinez*, 71 Wn. App. 69, 856 P.2d 725 (1993). In the *Caouette* case, plaintiff's counsel sent a letter to the defendant's insurer informing it that a lawsuit had been filed against the insured, but that the defendant insured had not yet been served, which at that time was true. *Caouette*, 71 Wn. App. at 71. There was no further contact between plaintiff and the insurer, although the insurer's representative subsequently "claimed that he made several attempts" to call plaintiff's counsel. *Id.* at 77-78. After obtaining court authorization, plaintiff served defendant by publication. *Id.* at 71. When defendant failed to appear or answer, plaintiff took a default judgment. *Id.*

On appeal, the insurer expressed surprise at the default judgment because its representatives claimed they "did not know a suit had been filed." *Id.* at 78. Without commenting on the veracity of this assertion, the Court of Appeals, Division II, responded as follows:

We do not believe that a plaintiff's failure to notify a nonparty insurer of her intention to obtain a default judgment against an insured is a basis for vacation of a default order and judgment. *Caouette* has cited no authority, and our research has revealed none, that stands for the proposition that it is

inequitable to enter a default judgment against a defaulting party without first notifying that party's insurer.

Caouette, 71 Wn. App. at 78; *accord*, *Colacurcio v. Burger*, 110 Wn. App. 488, 497 fn. 2, 41 P.3d 506 (2000) (Division I). Thus, while the Supreme Court carved out a possible exception in *Morin* for the situation – such as in *Gutz* – in which an insurer is acting to represent the insured's interests in the litigation, the general rule applicable in this case remains that the plaintiff is under no duty to notify an insurer before obtaining an order of default or a default judgment against the insured. *See id.*, *compare with Morin*, 160 Wn.2d at 759.

In addition, not only did The Hartford act inequitably toward Aecon in committing insurance bad faith regarding Aecon's tender of defense, it (and its proxy, Chinook) also acted inequitably *toward the trial court* and Aecon in submitting the false and misleading statements in the declarations of its claims adjuster, Mr. Harris, and of its counsel in the federal bad faith action in support of its motion to set aside the order of default. Because of their collective unclean hands toward the trial court and Aecon, neither The Hartford, nor its proxy, Chinook, is entitled to equitable relief in the Court of Appeals to redress any asserted abuse of discretion by the trial court in denying Chinook's motion.

In sum, the allegations of inequitable conduct by Aecon toward Chinook's insurer, The Hartford, are demonstrably false. Even assuming, *arguendo*, the truth of the allegation, The Hartford and its proxy, Chinook, come in equity with unclean hands on multiple levels. Thus, the entire argument is a red herring. The trial court properly rejected Chinook's allegations of "inequitable conduct" asserted against Aecon, and this Court should affirm the trial court's denial of Chinook's motion to set aside the order of default. (Assignment of Error No. 1).

B. The Default Judgment Damages are Supported by Substantial Evidence in the Record and the Trial Court's Findings of Fact and Conclusions of Law are Sufficient for Review.

Chinook's second Assignment of Error asserts that "the trial court erred in accepting Aecon's allocation of damages to Chinook and entering judgment against Chinook." Chinook Brief at 2. This is really two assignments of error in one, as the trial court potentially could have entered judgment against Chinook for zero damages, just as Chinook requested, but Chinook challenges both the award of damages and the entry of judgment. Chinook indicates as much in its Issues Pertaining to Assignments of Error B & C. However, Aecon submitted a veritable mountain of evidence in support of its claimed damages, which Chinook failed to rebut. The trial court did not abuse its discretion in entering

judgment for damages in the un rebutted amount requested by Aecon, and there is no need to remand for entry of additional findings of fact to facilitate this Court's review. Accordingly, the default judgment of the trial court should be affirmed in all respects.

1. **The trial court's award of damages in the amount of \$1,185,212 is supported by substantial and un rebutted evidence in the record.**

"The amount of damages in a default judgment must be supported by substantial evidence." *Little v. King*, 160 Wn.2d at 704, citing *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 240-42, 974 P.2d 1275 (1999). The substantial evidence standard is viewed in the light most favorable to the respondent, Aecon. *P.U.D. No. 2 of Grant County v. NAFTAZI*, 159 Wn.2d 555, 576, 151 P.3d 176 (2007). The evidence should be sufficient to persuade a fair minded person of the truth of the declared premise, and the trial court's findings of fact are presumed to be correct. *Green, supra*, 151 P.3d at 1050. The default judgment in this case easily meets this standard.

The amount of damages is a question of fact which this Court reviews for an abuse of discretion standard. *See, e.g., Harmony at Madrona Park Owners Ass'n v. Madison Harmony Development, Inc.*, 143 Wn. App. 345, 358, 177 P.3d 755 (2008), citing *Bunch v. King County*,

155 Wn.2d 165, 175, 116 P.3d 381 (2005). An abuse of discretion will be found only if “a decision is manifestly unreasonable, exercised on untenable grounds, or based on untenable reasons.” *Id.* Because there is substantial evidence in the record supporting the damages amount and the trial court acted within its discretion in awarding the specific amount estimated by Mr. Paustian for damages arising from Chinook’s breach of contract, this Court should affirm the trial court’s default judgment against Chinook in the amount of \$1,185,212.

- a. **Although a hearing was not required, the trial court allowed Chinook to submit extensive briefing and evidence to oppose Aecon’s requested damages.**

Entry of a default judgment is governed by Civil Rule 55(b).

Because the amount of damages arising from Chinook’s breach of contract were not certain at the time Aecon sued and served Chinook, Aecon believes that Civil Rule 55(b)(2) likely applies. That rule provides:

(2) When Amount Uncertain. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings as are deemed necessary or, when required by statute, shall have such matters resolved by a jury. Findings of fact and conclusions of law are

required under this section.

CR 55(b)(2) (emphasis added). Thus, no hearing is required, except to the extent the trial court deems one necessary. *See id.*

Chinook's briefing seems to suggest that the trial court was "required" to hold oral argument on Aecon's motion or provide an evidentiary hearing and that the absence of such open hearings shows that "the trial court uncritically accepted the damage allocation prepared by Aecon's expert witness, James Paustian, who attributed \$1,185,212 of the cost of remediating defects to Chinook." Chinook Brief at 21. Nothing could be further from the truth. First, as indicated in CR 55(b)(2), no hearing is required and, second, failing to request oral argument or an evidentiary hearing, Chinook has waived this issue on appeal.

b. The trial court's entry of default judgment was supported by substantial and un rebutted evidence of damages arising from Chinook's breach of contract.

Although neither party requested oral argument on Aecon's motion for default judgment, the damages requested by Aecon were hotly contested by Chinook. Judge Armstrong invited Chinook to respond to Aecon's motion for default judgment (CP 976). Chinook submitted some 118 pages of briefing, declarations, and exhibits in opposition to Aecon's requested damages. *See* CP 833-951. Yet, in none of its voluminous

submissions did Chinook actually dispute Mr. Paustian's scope of work or estimated cost of repair. *See id.*

Instead, Chinook tactically rolled the dice – and lost – with an “all or nothing” strategy on damages in the trial court, arguing that (1) Aecon was judicially estopped from allocating any damages to Chinook, and/or (2) Mr. Paustian's estimate of the cost to repair defects arising from Chinook's work should be given “no weight” because he prepared a contractual allocation, rather than an equitable allocation of damages. CP 873. Chinook has dropped its judicial estoppel argument on appeal.

In the alternative to its judicial estoppel argument, Chinook argued at great length that Mr. Paustian should have prepared an equitable allocation of damages to all parties responsible in whole or in part for defects at the Resort, rather than the allocation for breach of contract allocation that Mr. Paustian prepared in accordance with the trial court's prior order denying Aecon's previous motion for default judgment. *See* CP 871–873; *see also*, CP 700-701. Chinook simply reiterates and expands on this same argument on appeal. *See* Chinook Brief at 22-27. However, the more Chinook details its arguments, the more apparent their lack of merit becomes.

For example – as it did in the trial court – Chinook again argues

that another subcontractor, Britco, was responsible for the placement of the prefabricated modular hotel units and, when it did so, “the exterior walls of some of the modules were not flush but were offset slightly.” Chinook Brief at 24, *citing* CP 1047. Chinook admits that it “installed sheathing over the offset.” *Id.* But it complains that Mr. Paustian allocated full responsibility to Chinook for correction of the offsets. *Id.* However, as Mr. Paustian testified, the offset issue only became a problem because Chinook failed to install furring strips to fill the offset-caused gaps between the module walls and the exterior sheathing, which resulted in shear wall nails having to span the gaps. CP 1047 at 92:15 – CP 1048 at 93:19; CP 1064 at 16:4 – CP 1065 at 161:12-162:24. This, in addition to too few nails and over-driving the nails that were installed, caused the shear walls to fail to meet the building code and potentially compromised the structural integrity of the building. CP 1062 at 152:6 – CP 1063 at 155:19. Consequently, the work of multiple other trades had to be removed and reinstalled to correct Chinook’s defective installation of the shear walls. CP 1051 at 107:4-108:7; CP 1057 at 131:14-132:10.

Similarly, Chinook argues that the allocation to Chinook of roughly \$18,000 for improperly installed windows was improper because Chinook installed windows only on the first floor of the Resort, while

another subcontractor, Britco again, installed windows on floors 2 through 4. Chinook Brief at 23-24. However, Chinook misstates the record, alleging that “Paustian allocated all of the damage caused by leakage around the windows to Chinook.” *Id.* at 24. That is not Mr. Paustian’s testimony, nor is it reflected in his report.

The roughly \$18,000 allocated to Chinook with regard to window issues is actually but a small fraction [7.2%] of the some \$250,000 in total estimated costs to repair issues with the windows and sliding glass doors at the Resort. *Compare CP 798 with CP 802* (McBride cost estimate attached to Paustian report). The testimony of Mr. Paustian that is cited by Chinook merely confirms that he did no allocation to other subcontractors; rather, he did the breach of contract analysis that he was asked to prepare in accordance with the trial court’s prior order. *See Chinook Brief at 24, citing CP 1069.* That does not mean that he allocated all costs of repair to Chinook; on the contrary, Mr. Paustian only allocated to Chinook those costs arising from Chinook’s breach of contract. *Compare CP 798, with CP 800-811.*

Related to this, Chinook complained to the trial court, and continues to complain on appeal, that it “is counterintuitive, to say the least, to attribute 31% of the liability for defective workmanship to the

subcontractor which did 1% of the work.” Chinook Brief at 26. This is a logical fallacy; if Chinook was the only contractor whose work was found defective, it would have been allocated 100% of the liability. Also, Chinook again ignores that Mr. Paustian’s estimate was for the cost to repair defects arising from Chinook’s breach of contract. Accordingly, that there were alleged issues with the weather resistant barrier installed by another subcontractor, Vandermolen, is irrelevant to the calculation to repair defects arising from Chinook’s work because the weather resistive barrier, i.e., building paper and siding, necessarily has to be removed in order to repair defects in Chinook’s installation of the sheathing underneath. CP 1051 at 107:4-108:7; CP 1057 at 131:14-132:10; *See, e.g., Harmony at Madrona Park Owners Ass’n v. Madison Harmony Development, Inc.*, 143 Wn. App. 345, 358, 177 P.3d 755 (2008). As this Court reasoned in *Harmony*:

The trial court held that the total cost to repair and replace defects within Serock’s scope of work was \$255,000. Serock contends that this exceeded Serock’s scope of work because it included the cost of repairing work done by other subcontractors. However, substantial evidence supports the court’s finding that, ***in the course of repairing Serock’s defective work, the work of other subtrades had to be destroyed and replaced. Therefore, it was not***

unreasonable for the trial court to include in the damages award the cost of replacing work done by subcontractors other than Serock.

Id. (emphasis added); see also *Mutual of Enumclaw Ins. Co. v. T & G Construction, Inc.*, 165 Wn.2d 255, 269-70, 199 P.3d 376 (2008).

Similarly, the *T & G Construction* case concerned an insurance coverage dispute, in which the insurer, Mutual of Enumclaw (“MOE”), disputed whether property damage coverage under the policy encompassed removal and replacement of undamaged work to repair the insured’s defective work. The Supreme Court rejected MOE’s position.

MOE focuses on the siding and argues that it was not damaged property under the insurance contract so it should not have to pay to have it remediated. But the subsurface and interior walls were not installed by T & G and damage to these areas was property damage covered by the policy. ***Removing and repairing the siding is simply part of the cost of repairing the damage to the interior walls*** and was properly treated as property damage by the trial court.

T & G Construction, 165 Wn.2d at 270 (emphasis added). The same reasoning applies here: because it was not unreasonable to include the cost of removing and reinstalling the weather resistant barrier as necessary to repair Chinook’s defective sheathing work, there was no abuse of

discretion in including those costs in the award of damages in the default judgment.

As Mr. Paustian testified:

Q. And you attribute a million dollars to repairing the exterior shear walls?

A. Yes, to take off the siding, to take off the weather resistive barrier, to take off the gypsum sheathing, to get to the shear walls to do the necessary repairs to the shear walls, to put the gypsum sheathing back on, to put the weather resistive barrier back on. It includes the painting of the building. It includes the scaffolding. Those types of items are all included in this.

CP 1051 at 107:23-108:7. Thus, the repairs in this case are of the same nature as those at issue in *Harmony* and *T & G Construction*, and the same principle applies: that the cost of removing and replacing the perfectly good work of other subtrades necessary to complete repairs to the defective work of the defendant is properly included in the total cost estimated to repair that defendant's defective work. *See Harmony*, 143 Wn. App. at 358; *T & G Construction*, 165 Wn.2d at 270.

In contrast to Mr. Paustian's report and testimony, Chinook's damages expert, Ken Simons, who was The Hartford's damages expert in the federal action, conceded at deposition, *inter alia*, that he simply did not

have enough information to form an opinion as to defects in Chinook's work and he was never asked to prepare any allocation of damages to Chinook, whether contractual or equitable. CP 1114 at 55:1-7; *see* CP 963-965. Thus, particularly in the absence of an alternative scope of repair and estimated cost to repair defects within that scope from Chinook, the trial court was well within its discretion in rejecting Chinook's "nothing" argument and awarding Aecon "all" of Mr. Paustian's estimated damages against Chinook, which were both unrebutted and supported by substantial evidence in the record. *See* CP 789-811; CP 1024-1098.

Moreover, neither Aecon, nor Vandermolen, nor any other subcontractor (other than Chinook) was ever found liable for any defects at the Resort. Rather, the relative responsibility of Aecon and of its other subcontractors on the project was the subject of disputed claims resolved through a series of arm's length negotiated settlements. CP 257-267; CP 651-675. Neither Chinook – a party in default – nor its insurer, The Hartford, is entitled to litigate questions "that were resolved in the liability case by judgment or arms's length settlement." *T & G Construction*, 165 Wn.2d at 268. For this reason, as well, the cost to remove and replace the weather resistant barrier in order to repair Chinook's defective work is properly part of the cost of repair allocated to Chinook.

Finally, Chinook's charge that the trial court was "uncritical" in reviewing Mr. Paustian's scope of work and estimated costs of repair ignores three salient facts. *See* Chinook Brief at 21. First, the trial court *denied* Aecon's first motion for default judgment, directing Aecon to allocate damages attributable to Chinook's breach of contract. CP 700. Second, it invited Chinook to "respond to Aecon's damages and fees computation" (CP 976), and Chinook submitted voluminous briefing, declarations, and exhibits to oppose Aecon's damages. CP 833-951. Third, even on Aecon's renewed motion for default judgment, the trial court did not grant all of Aecon's requested relief, declining to award Aecon prejudgment interest and deferring a determination of Aecon's attorneys' fees and costs for further briefing by the parties. *See* CP 1130-1131. Thus, contrary to Chinook's bald assertions, the record reflects that the trial court gave great care and consideration to protecting the interests of Chinook, despite its status as a party in default – or, perhaps, because of it. The allegation that the trial court "uncritically accepted" Mr. Paustian's damages allocation to Chinook is wholly without merit.

In sum, Chinook was provided with ample opportunity to respond to Aecon's motion for default judgment and, in fact, took full advantage of that opportunity to challenge Aecon's damages against Chinook in the trial

court. That it chose to tactically rely on an “all or nothing” argument, rather than submitting an alternate scope of repair and cost of repair estimate, was Chinook’s choice. It was not an abuse of discretion for the trial court to reject Chinook’s “nothing” or “zero” argument and enter judgment based upon the un rebutted scope of repair and damages estimated by Mr. Paustian. Accordingly, the trial court’s entry of the default judgment against Chinook in the principal amount of \$1,185,212 should be affirmed in all respects.

c. **Chinook misconstrues the indemnity provision of the subcontract, and raises the argument for the first time on appeal.**

Chinook also raises a brand new argument on appeal: that “Paustian’s analysis is fatally flawed because it is inconsistent with the terms of the indemnity provision.” Chinook Brief at 21. Before the trial court, Chinook raised the indemnity provision only with regard to Aecon’s request for attorneys’ fees and costs. CP 874-78. The indemnity provision was not asserted as a basis for attacking Mr. Paustian’s breach of contract analysis or Aecon’s requested damages. *See* CP 863-82. Thus, even assuming the argument had merit, this would be “invited error” by Chinook. *See Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 771, 82 P.3d 1223 (2004); *see also, Sovak v. Chugai Pharm. Co.*, 280 F.3d

1266, 1270 (9th Cir. 2002) (“one cannot complain of errors below for which he is responsible.”). A finding of abuse of discretion can never be premised on an argument never presented to the trial court.

Moreover, Chinook harps on a supposed difference between Mr. Paustian’s choice of the term “related to” Chinook’s work, as against the indemnity provision’s “arising out of and in connection with or incident to” language. Chinook brief at 21. This is both hairsplitting to the “Nth” degree and entirely beside the point. Mr. Paustian undisputedly did a breach of contract analysis, not an indemnity analysis, and under the flow down provisions of the subcontract, Chinook was responsible to Aecon for breach to the same extent that Aecon was responsible to the Quinault, completely independent of the indemnity provision of the subcontract. *See* CP 590 at § 12.1.1.

Finally, Chinook’s argument that the indemnity provision only entitled Aecon to recover from Chinook for Chinook’s relative “negligence” was properly rejected by the trial court. Chinook’s argument has been soundly rejected in the appellate courts of this state, as Aecon briefed to the trial court. *See* CP 965-67, *citing and discussing MacLean Townhomes L.L.C. v. Am. 1st Roofing & Builders, Inc.*, 133 Wn. App. 828, 833, 138 P.3d 155 (2006). In short, Chinook’s argument that Mr.

Paustian's breach of contract analysis must be rejected as inconsistent with the indemnity provision of the subcontract is flat wrong and an improper basis for finding an abuse of discretion by the trial court.

2. **The default judgment includes sufficient explicit and inherent findings to facilitate this Court's review and remand for additional findings is not necessary.**

In its last Issue Pertaining to Assignments of Error, Chinook asks that "the default judgment be vacated and remanded for entry of findings and conclusions as required by CR 55(b)(2)." Recognizing that application of the holding in *Little v. King*, cited *supra*, would likely be dispositive against its appeal of this issue, Chinook argues that "[t]his case is totally unlike *Little v. King*." Chinook brief at 29. Aecon begs to differ.

In *Little v. King*, the Washington Supreme Court considered whether adequate findings and conclusions were entered to support a default judgment in an auto-accident case of uncontested liability. *Little v. King*, 160 Wn.2d at 706-708. The pro-se defendant did contest "the amount of damages as unreasonable," and the trial court requested that plaintiff's counsel supplement the record, presumably to better substantiate the requested damages. *Id.* at 702. After the requested supplementation, the trial court entered judgment for plaintiff for \$2,155,835.58. *Id.* After obtaining counsel, the defendant and plaintiff's

UIM carrier both appealed, asserting, *inter alia*, that the judgment should be vacated because no formal findings of fact or conclusions of law were entered by the trial court when granting the default judgment. *Id.*

The Court of Appeals found that the entry of judgment in an exact amount “necessarily implies a finding of fact that Little suffered damages in the given amounts and the conclusion of law that Little was entitled to recover those sums from King.” *Id.* at 707. Agreeing with the Court of Appeals, the Supreme Court held that, “in this case, these implied findings are sufficient to allow appellate review. *Id.*

As noted by the Supreme Court:

CR 55(b)(2) does not define what constitutes adequate findings of fact and conclusions of law or the consequences of failure to file them. ***We require findings and conclusions in part to allow appellate scrutiny of the trial court’s decision in uncontested cases.*** This protects the integrity of the judicial system because it allows the reviewing court (and others) to evaluate the factual and legal basis for the trial court’s decision.

Little, 160 Wn.2d at 706.

Chinook attempts to distinguish *Little v. King* as a case of admitted liability. Chinook Brief at 29. However, this, too, is a case of admitted liability, as entry of the order of default precluded Chinook from

contesting liability to Aecon. *See Smith v. Behr Process Corp.*, 113 Wn. App. 306, 333, 54 P.3d 665 (2002). Even if liability were not admitted, the trial court made an explicit finding of Chinooks liability for breach of contract and indemnity. CP 1131. Also, like the trial court in *Little*, the trial court in this case recited a list of all the materials considered. *See* CP 1130-31. And this was not simply a perfunctory listing included in a proposed order submitted by Aecon, but an order prepared and signed by the trial court. *See id.*

Chinook accepts that the trial court's entry of judgment in the amount estimated by Mr. Paustian may allow this Court to conclude that Judge Armstrong implicitly found that Aecon suffered the damages awarded against Chinook. Chinook Brief at 29. But Chinook then argues that this Court should not do so because "Paustian's allocation is legally incorrect." *Id.* Thus, Chinook does not actually dispute the sufficiency of the trial court's findings of fact and conclusions of law. Rather, it simply asserts a tautology of Chinook's prior argument regarding the sufficiency of the evidence, which should be rejected here for the same reasons already discussed *supra*.

Even if Chinook actually presented a reasonable basis for remanding this case to the trial court for entry of additional findings and

conclusions, vacating the default judgment is inappropriate. *See, e.g., Little*, 160 Wn.2d at 707 (“We note that if more formal findings of fact and conclusions of law were necessary for appellate review, remand for their entry would be appropriate, not vacation of the default judgment.”).

Because Chinook fails to assert that the explicit and implicit findings of fact and conclusions of law entered in the default judgment are insufficient for this Court’s review, and the findings and conclusions are sufficient in any event, this Court should decline to remand this case for entry of further findings of fact and conclusions of law.

C. Request for an Award of Fees Under RAP 18.1

RAP 18.1(a) and (b) provide that if a party has a right to recover reasonable attorney fees or expenses on review before the Court of Appeals or Supreme Court, the party must request an award of fees in its Brief. Aecon requests that it be awarded its reasonable attorney fees on appeal if it prevails. Aecon is entitled to an award of fees under the attorney’s fees provision of Subparagraph 11.11.1 of the Supplemental Conditions, which states:

In the event of litigation between the Subcontractor and Contractor to enforce the rights under this subparagraph, reasonable attorneys fees shall be allowed to the prevailing party.

CP 596 at § 11.11.1. This is a fair and equitable provision which confers the same contract right to attorney fees to any party, whether Aecon or Chinook, and contract is a recognized basis for such an award. *See Alejandro v. Bull*, 159 Wn.2d 674, 691, 153 P.3d 864 (2007).

In addition, the flow down provisions of the Prime Contract and the subcontract also provides a separate basis for an award of attorneys' fees on appeal to Aecon. *See* CP 590 at § 12.1.1, CP 172-173 at § 4.5.7. Thus, in addition to the terms of the subcontract itself, Aecon is entitled to an award of attorneys' fees on appeal by application of the flow-down provisions of both the contract and subcontract documents. Therefore, Aecon respectfully requests that this Court grant its request for its attorney fees on appeal based upon the attorneys' fee provisions in the parties' contract.

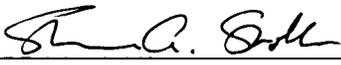
V. CONCLUSION

Chinook's appeal must meet an "abuse of discretion" standard. Because Chinook cannot demonstrate that no reasonable judge would have denied Chinook's motion to set aside the order of default, nor that no reasonable judge would have entered the default judgment in the amount of \$1,185,212, the trial court's orders and judgment at issue on this appeal

should be affirmed in all respects. *See Sofie, supra.* In addition, Aecon should be awarded its fees and costs on appeal in accordance with the parties' contract.

RESPECTFULLY SUBMITTED this 29th day of July, 2009.

Martens + Associates | P.S.

By 
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Steven A. Stolle, WSBA #30807
Counsel for Aecon Buildings, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2009, I caused to be served true and correct copies of the foregoing Brief of Respondent Aecon Buildings, Inc., on the court and counsel as follows:

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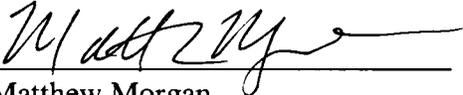
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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 29th day of July, 2009.


Matthew Morgan
Paralegal for Martens + Associates | P.S.