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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

THE MARINA CONDOMINIUM HOMEOWNERS ASSOCIATION,
Respondent,

v.

THE STRATFORD AT THE MARINA LLC,
Appellant,

APPELLANT'S AMENDED OPENING BRIEF

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February 25, 2010

ORIGINAL

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INTRODUCTION

In approximately 2005, The Stratford at the Marina, LLC (“SAM”) began converting a 1962 apartment building into a condominium, known as the Marina Condominium. The work performed as part of the conversion was limited, in part because the goal was to create relatively inexpensive housing units. The units at the Marina Condominium ultimately sold for prices between the low \$100,000 and high \$200,000.

The Marina Condominium Homeowners Association (the “Association”) sued SAM in late 2007. As the case progressed, SAM suffered a catastrophic fire in its offices and suffered extreme financial hardship that caused most of its employees to depart and its counsel to withdraw. SAM continued to defend the case, and provide discovery, as best it could. SAM ultimately was able to secure replacement counsel.

In early 2009, the Association moved for summary judgment under RCW § 64.34.445(2). That provision requires “improvements” that are “made or contracted for” to satisfy an implied warranty of quality materials and workmanship. Rather than focus on the work SAM performed as part of the conversion, however, the Association argued (contrary to the plain language of the statute) that any allegedly defective condition at the Marina Condominium is covered by this implied warranty. The trial court erroneously accepted that argument and entered

summary judgment and awarded \$1.7 million in damages, despite the absence of any showing that the Association was entitled to judgment as matter of law. The trial court also erroneously refused to consider the declarations SAM filed, which showed abundant, disputed issues of material fact precluding summary judgment.

Later, when there were only about five weeks remaining before the discovery cutoff, the Association served new written discovery, and the Association then moved to compel responses just three days before the discovery cutoff. A few days after that motion was granted—and without attempting to meet and confer as required by governing rules—the Association moved for default, and that motion was granted despite the absence of any jurisdiction to consider it and despite the failure to satisfy the mandatory showing that the discovery violations were willful and they substantially prejudiced the ability to prepare for trial.

A default judgment was entered, and the Association then filed an untimely motion to amend the judgment to add attorneys' fees and costs, which the trial court erroneously allowed and granted, in part. The court also erred in entering CR 11 sanctions on the basis of a pleading that SAM filed based on a good faith argument for an extension of Washington law, namely that Limited Liability Companies in SAM's situation should be permitted to be represented by non-lawyers.

ASSIGNMENTS OF ERROR

1. The trial court erred in granting the Association's motion for partial summary judgment that SAM violated the implied warranty of workmanship under RCW § 64.34.445(2) and caused \$1,713,282 in "repair damages."
2. The trial court erred in refusing to consider the declarations of SAM's witnesses in opposition to the Association's motion for partial summary judgment as reflected in the trial court's renewed order granting summary judgment, which is misnamed as an order denying reconsideration.
3. The trial court erred in entering default and default judgment against SAM on all of the Association's causes of action as a discovery sanction.
4. The trial court erred in entering an Additional Judgment that included an award of attorneys' fees and costs based on an untimely motion for award of such fees and costs.
5. The trial court erred in imposing CR 11 sanctions against SAM in the amount of \$681.25 for attempting to represent itself through a non-attorney.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should a motion for partial summary judgment be granted when the motion and its supporting declarations do not establish that the moving party is entitled to judgment as a matter of law? (Assignment of Error No. 1).

2. Should a motion for partial summary judgment be granted when the declarations filed in opposition are considered by the trial court, when viewed in the light most favorable to the non-moving party, demonstrate disputed issues of material fact as to liability and damages? (Assignment of Error No. 1).

3. Should the trial court refuse to consider declarations submitted in opposition to a motion for partial summary judgment, when such declarations are based on competent and admissible evidence and were specifically considered by the trial court in renewing her grant of partial summary judgment? (Assignment of Error No. 2).

4. Should a trial court entertain a motion for discovery sanctions pursuant to CR 26 and CR 37 when the motion is filed in violation of CR 26(i) and King County Local Civil Rule 37(e)-(f)? (Assignment of Error No. 3).

5. Does a trial court abuse its discretion when it enters a default sanction for discovery violations when there is no showing of substantial prejudice? (Assignment of Error No. 3).

6. Does a trial court abuse its discretion when it enters a default sanction for discovery violations when there is no showing that such violations were willful and the trial court fails to consider the reasonable excuses for such violations? (Assignment of Error No. 3).

7. Should a trial court award attorneys' fees and costs through an "Additional Judgment" when the motion for such fees and costs is untimely under CR 54(d) and 59(h)? (Assignment of Error No. 4).

8. Should a trial court enter CR 11 sanctions against a party when the party takes actions based on a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law? (Assignment of Error No. 5).

STATEMENT OF THE CASE

A. The Original Construction of the Sea Aire Apartment Complex in 1962

The buildings at issue in this case—the Marina Condominiums—were constructed in 1962 as an apartment complex comprising “three separate buildings connected by exterior egress decks and stairs.” CP 289. The apartment complex—known as the Sea Aire Apartments (*see* CP 513)—was constructed in accord with the then-current building codes,

which evidently included “the 1961 edition of the *Uniform Building Code* (UBC).” CP 289 (emphasis in original); CP 305.¹

B. Prior to Converting the Sea Aire Apartments to Condominiums, SAM Hires Architect Ronald G. Vigil To Perform a Building Inspection, and SAM Conducts Specific—and Limited—Work As Part of the Conversion

In 2005, Architect Ronald G. Vigil was hired to perform a building inspection “prior to conversion [of the apartments] into condominiums.” CP 305. Mr. Vigil issued a report—dated September 10, 2005—detailing the results of his inspection. CP 289.²

Mr. Vigil’s report, and other expert reports in this case, detail the specific, and limited, work performed as part of the conversion. CP 289, 305-06. Such work included changes to “floor coverings,” “plumbing, light fixtures, cabinets, appliances, and some drywall.” CP 289. The work performed was also detailed in permits acquired from the City of Des Moines related to the conversion project. Such permits were

¹ The history of the Sea Aire apartments is set forth, briefly, in the February 19, 2009 Declaration submitted by SAM’s litigation expert, Donald D. Schellberg, AIA. CP 277-78 (Text of Declaration), 287-332 (Exhibits to Declaration). That history is two reports prepared by the Association’s expert, Keith Soltner. CP 513.

² Regrettably, in light of the fact that SAM was not represented by counsel during key periods of this litigation, Mr. Vigil’s report was never made part of the record in this case.

reviewed and described by SAM's expert in the case, Donald D.

Schellberg, AIA:

- “*Remodel interiors . . .*,” CP 305 (italics in original);
- “Install toilets, bath tubs, sinks, hot water heaters, dishwashers, and washing machines for 19 units,” *id.*;
- “[R]emove[e] and replac[e] old subpanel and baseboard heat . . .,” CP 306 (italics in original); and
- “Install 20 fans[,] 6 dryer booster fans[,] 24 roof hoods[,] 12 louvers[,] and all associated duct work,” CP 306 (italics in original).

C. Sales of the 20 Units, Warranty Work on Those Units, and the Association’s Unfortunate Decision to Sue SAM For Alleged Construction Defects

One reason that the conversion involved a relatively modest scope of work is that the Marina Condominiums were designed to be inexpensive housing: Units were sold for prices ranging from the “[v]ery low 100s up to high 200s.” SCP 844 (Webb Deposition Transcript³ at 73, May 8, 2009 Strauss Decl. Ex. 7).⁴ Nonetheless, after the unit owners took

³ The full transcript of Mr. George Webb’s deposition in this matter is contained in exhibit 7 to the May 8, 2009 Strauss Declaration. For ease of reference, that exhibit hereafter is referred to simply as the “Webb Deposition Transcript.”

⁴ The Public Offering Statement notified unit purchasers about the limited work done on the condominium. For example, it stated that SAM made “no representation whatsoever with regard to the useful life of any structural components or mechanical and electrical installations”

possession, it was a standard process to generate a “punch list” and various warranty work was done on the units. SCP 853 (Webb Deposition Transcript at 82).

The Association evidently was not happy with the warranty work performed, however, and on December 24, 2007, the Association brought an action against SAM. CP 1-20. The Association’s Complaint asserted various causes of action related to alleged construction defects, including allegations that the limited “improvements” that SAM made during the conversion process breached the implied warranty of quality workmanship under RCW § 64.34.445(2). CP 9-11.

D. SAM Moves to Compel Arbitration and the Parties’ Experts Investigate the Marina Condominium and Prepare Reports

In May 2008, SAM moved to compel arbitration pursuant to RCW § 64.55.100, and that motion was granted on May 20, 2008. SCP 1168-69.⁵ Shortly thereafter, “the parties performed their respective investigation of the project and issued expert reports and costs of repair.” SCP 1172 (Plaintiffs’ Motion to Terminate Arbitration at 3).

Further, recommended repairs or other courses of action in those reports were not necessarily performed or followed by Declarant. Each unit must independently verify the condition of the Unit and Common Elements” CP 124.

⁵ See also SCP 1166-67 (Reply to Defendant’s Motion to Compel Arbitration at 1-2 (explaining why a motion to compel arbitration was necessary)).

The Association's Expert, Keith Soltner, AIA, CSI, ICBO, previously had prepared a "Summary of Concerns" dated September 14, 2007. On July 7, 2008, Mr. Soltner issued a Summary Scope of Repairs. CP 513-27. Those two documents—the "Summary of Concerns" and "Summary Scope of Repairs" identify the conditions that Mr. Soltner identified as defective. *Id.*

SAM's expert Donald D. Schellberg, AIA, of Madsen, Kneppers & Associates, Inc., responded to the report prepared by Mr. Soltner. Specifically—in Mr. Schellberg's July 24, 2008 report—he lists each of the concerns raised by Mr. Soltner and explains SAM's contrary view of the underlying facts and outlines the evidence that supports that contrary view. CP 303-332.⁶

For example, Section 3.0 of the Schellberg report is titled: "Soltner Group Summary of Concerns – Aluminum Framed Windows and Sliding Glass Doors." CP 310. That portion of the report notes that the windows and sliding glass doors date from the original 1962 construction of the apartment building, and the report explains that condensation on such windows "is not a construction defect as all windows of this

⁶ Mr. Schellberg issued a second report, dated July 28, 2008, in which he responded to the concerns raised by another of the Association's experts, Dibble Engineers, Inc. CP 287-303. Dibble's analysis is not relevant to this appeal.

construction type perform in a similar manner.” CP 311. The Schellberg report goes on note that windows were not replaced as part of the conversion project. *Id.* Also, the report notes that any damage to the building allegedly caused by window or sliding glass door performance could not have been discovered by SAM during its limited renovations performed as part of the conversion. *Id.* The remainder of the Schellberg report goes on to address, in detail, all other concerns raised in the Soltner report, usually by noting that the areas of concern identified do not relate to any work that SAM performed as part of the conversion. CP 312-32.

Having exchanged their respective views of the case, the parties were on track to conduct Mediation on October 8, 2008, and arbitration in February 2009. SCP 1172 (Plaintiffs’ Motion to Terminate Arbitration at 3); (SCP 1189-92 (Nov. 18, 2008 Strauss Decl. Ex. 4)).

E. SAM’s Disastrous Autumn of 2008—Financial Meltdown and Catastrophic Office Fire

In the Autumn of 2008, SAM’s financial situation became dire. It lacked funds to pay its counsel and its debts. SCP 1172 (Plaintiffs’ Motion to Terminate at 3). The financial pressures on SAM caused the departure of employees with knowledge of the work performed as part of the conversion. SCP 833 (Webb Deposition Transcript 62). SAM’s designated representative, George Webb, nonetheless participated in

mediation on October 8, 2008, and he attempted to negotiate a settlement that involved assignment of insurance rights and/or repurchase of any unit that was not satisfactory to its owner. CP 285-86. Regrettably, that effort was not successful.

In October 2008, the offices at which SAM had its records suffered a catastrophic fire. SCP 808-09 (Webb Deposition Transcript at 37-38). Efforts were made to salvage paper and electronic documents, including documents related to this conversion project. SCP 820-23 (Webb Deposition Transcript at 49:3 to 52:10). The Association was told of the fire and was told that documents regarding the conversion project were being recovered. SCP 822-23 (Webb Deposition Transcript at 51-52).

F. The Disastrous Autumn of 2008 Leads Counsel to Withdraw and Foils Mediation and Arbitration

On September 23, 2008, SAM's counsel withdrew due to lack of payment. SCP 737-38 (Notice of Intent to Withdraw); CP 285 (explaining financial hardship that led to withdrawal of counsel).

Regrettably, after the mediation in early October 2008 failed, SAM was forced to concede in late October 2008 that it had "no funds to go forward with arbitration." SCP 1189-92 (Nov. 18, 2008 Strauss Decl. Ex. 4). In response, the Association properly moved to terminate the arbitration and reinstate the original case scheduling order. SCP 1170-74

(Plaintiffs' Motion to Terminate Arbitration at 1-5). That motion was granted on December 2, 2008. SCP __ (Order Granting Plaintiffs' Motion to Terminate Arbitration).

G. The Association Moves for Partial Summary Judgment, Relying on the Expert Analysis the Parties Previously Performed

On January 8, 2009, the Association filed a motion for partial summary judgment. The sole issue raised in the Association's motion was whether the limited improvements SAM made to the Marina Condominiums violated the implied warranty of quality workmanship under RCW § 64.34.445(2). CP 28-46.⁷ In fact, the motion is explicit that the implied warranty of quality workmanship applies only to

⁷ There are two implied warranties under RCW § 64.34.445(2). The first warranty is "that a unit and the common elements in the condominium are suitable for the ordinary uses of real estate of its type" That "suitability" warranty was not addressed in the Association's motion for partial summary judgment. Instead, the Association's motion focuses on the second of the two implied warranties: the "quality of materials and workmanship" warranty. *See generally Park Avenue Condominium Owners Ass'n v. Buchan Development, L.L.C.*, 117 Wn. App. 369, 378 (2003) (distinguishing the implied warranty of "suitability" from the implied warranty of "quality"). The quality of materials and workmanship warranty applies only to "improvements" that the declarant "made or contracted for." RCW § 64.34.445(2)(a)-(d). The Association's moving papers focuses solely on the "warranty of quality," CP 41, and they do not even mention the suitability warranty. CP 41. Thus, this appeal does not present any issue regarding the applicability or scope of the implied warranty of "suitability" under RCW § 64.34.445(2).

“improvements [that SAM] made or contracted for.” CP 41 (emphasis added).

Before bringing its motion, the Association and its experts certainly understood that the Marina Condominiums were a “converted apartment complex.” CP 513. Indeed, they had “reviewed the conversion plans approved by the City of Des Moines building department for the Marina project.” CP 506. The motion for partial summary judgment reflects that understanding, at least in part. In the motion, the Association points out that some of the alleged construction defects identified in the motion related to work performed as part of the conversion process. *See, e.g.*, CP 33 (identifying, as problems 7 and 8, alleged deficiencies in improvements made as part of the conversion); CP 35 (identifying, as problem 15, various issues with respect to “[u]nit interior modifications” made as part of the conversion).

Rather than focus the motion for partial summary judgment on the improvements that SAM “made or contracted for,” the Association’s motion faults the Marina Condominium (which was built in 1962) for not complying in all respects with 2003 building codes. CP 31-39. Thus, the Association’s motion quixotically argues that an implied warranty covering “improvements” applies to original features of a 1962 building that were not altered as part of the conversion process. CP 31-35, 41-44.

The sole factual support for the Association's argument that certain conditions at the Marina Condominium were defective was a declaration of the aforementioned expert Keith Soltner. CP 31-35. More specifically, Mr. Soltner identified sixteen (16) conditions alleged to be defective. Those 16 conditions were taken directly from the "Summary of Concerns" and Summary Scope of Repairs Mr. Soltner previously had prepared in advance of mediation, which SAM's expert Mr. Schellberg had specifically rebutted by explaining that the allegedly defective conditions did not relate to any work SAM performed. CP 31-35, 42-44, 126-36, 303-32, 513-27.

Despite Mr. Schellberg's prior rebuttal, neither the Soltner declaration nor the Association's motion made any effort to link alleged defects to "improvements" that SAM "made or contracted for," as required to establish a violation of RCW § 64.34.445(2).

H. SAM Relies on Its Previously-Circulated Expert Report To Show That There Are Disputed Issues of Material Fact, but SAM's Lack of Counsel and the Odd Procedural Posture Cause the Trial Court To Commit Error.

1. SAM's Opposition Properly Relied on the Point-by-Point Refutation of the Association's Arguments Set Forth in the Schellberg Report

Given that the Association's motion for partial summary judgment relied on the Soltner expert report prepared in July, it is unsurprising that

SAM's opposition relied on a declaration of Mr. Schellberg and Mr. Schellberg's report, which refutes the Soltner report point-by-point. CP 259-60, 288-332. As mentioned, in opposing the Association's motion for partial summary judgment, SAM relied on its expert report pointing out that most of the construction defects that the Association classified as "improvements" linked to the conversion were instead problems linked to the original construction. CP 260, CP 314-31. The small number of concerns raised with respect to SAM's conversion work rested on a misunderstanding of applicable building code or were areas in which SAM had satisfied its obligations under the implied warranty of workmanship.

Id. Specifically:

- Alleged Defective Conditions 1 & 2 (windows and sliding glass doors). Schellberg pointed out that the windows and sliding glass doors were part of the original construction and SAM performed no work on them. CP 260, CP 310-11. SAM likewise did not perform any "improvements" as part of the conversion that would have caused or revealed alleged problems with window framing components. CP 310-11.
- Alleged Defective Conditions 3-10 (roof and related issues). With respect to Conditions 3-6, Schellberg pointed out that the roof was not installed by SAM, and purchasers knew that the roof had only a 5-year

useful life remaining at the time they purchased their condos, based on the original building report prepared by architect Ron Vigil. CP 315-16; *see also supra* p. 7 (discussing Vigil's pre-conversion inspection). At the time of inspection, the roof certainly showed signs of wear, as would be expected for a roof with only "two years left in its service life," CP 316, but no water intrusion was observed and drainage was sufficient. *Id.* With respect to appliance exhausts and vent pipes (Condition 7), Schellberg explained that most of the alleged problems related to the original construction, and with one small exception, the work SAM performed does "not appear to be causing damage." CP 317. With respect to Condition 8 (wood facia), Schellberg explains why the Association's arguments rest on a misreading of the relevant building codes, CP 317-18, and with respect to Condition 9 and part of Condition 10, Schellberg notes that Soltner likewise misinterprets the building code, but small repairs may be necessary. CP 317-18.

- Alleged Defective Conditions 10-12 (exterior cladding). With respect to Condition 10 (related to sealant on plywood siding), Schellberg again explained "sealant condition was an existing condition at the time of conversion" and no work was done on that siding as part of the conversion. CP 319. Likewise, with respect to alleged problems with stucco siding control joints (Condition 11), Schellberg indicated that

no stucco repairs were performed as part of the conversion. CP 319-20. Also, with respect to complaints about incomplete painting (Condition 12), Schellberg explained that painting was performed only where work was performed. 319, 320. Mr. Schellberg noted that much of the paint work the Association challenged, predates (and is unrelated to) the conversion work. CP 320. Schellberg did indicate that some of the paint applied as part of the conversion work was improperly applied and some minimal repairs would be necessary. CP 320-21.

- Alleged Defective Condition 13 (structural). Mr. Schellberg again provided a detailed response, explaining that most areas of concern related to original instruction rather than any improvements. CP 322-26. Mr. Schellberg did note that there were a few areas in which additional inspections should be undertaken and small repairs made. *Id.*
- Alleged Defective Condition 14 (decks). Schellberg explained that concerns related to deck coating were a maintenance issue rather than a construction defect, and the work that was performed was not defective. CP 327, 328-29.

- Alleged Defective Condition 15 (unit interiors). Schellberg indicated that loose electrical boxes should be fixed, but booster fans were not necessary, and indicated what repairs were required. CP 328-30.
- Alleged Defective Condition 16 (drainage). Mr. Schellberg noted that the conversion did not involve any grade work to the west side of the building, and thus the Association’s concerns did not relate to any improvement SAM had made. CP 331. In addition, Mr. Schellberg noted drainage problems appear to have been caused by the unit owners after they purchased their units. *Id.* Also, Mr. Schellberg noted that problems with storm drains—which his firm identified by digging and inspecting such pipes—were unknown at the time of conversion and were not related to any improvements made as part of the conversion. *Id.*

Thus, in the Schellberg declaration and report, SAM provided an immensely detailed, point-by-point response to the Association’s motion for partial summary judgment, showing that in virtually every case, the alleged defective conditions had nothing to do with “improvements” that SAM made as part of the conversion. CP 206-51, 259-60, 277-78, 287-332; *see also* CP 261-62 (Webb Declaration indicating, under penalty of perjury, that he likewise reached the same conclusion as Schellberg with

respect to the issues addressed, and noting that Schellberg's and Webb's assertions create issues of fact precluding summary judgment).

2. SAM's Lack of Counsel and the Odd Procedural Posture Lead Cause the Court To Commit Error.

The Association originally noted its motion for summary judgment on February 6, 2009. CP 711. On February 5, SAM's designated representative, Mr. George Webb, filed for a continuance. CP 180 (motion); CP 158-62 (supporting declaration).⁸ The following day, the trial court continued the summary judgment motion for two weeks and instructed SAM to obtain new counsel. CP 285; CP 711. One week later, Mr. Webb sent a letter to the Court, essentially asking the Court to reconsider and explaining the basis for allowing him to represent SAM in the matter. CP 285-86. Among other reasons, Mr. Webb noted that the Association's decision to pursue claims only against an insolvent entity was an obvious precursor to an attempt to establish personal liability against individuals, including himself. CP 286.⁹ Regrettably, that fear was manifest when the Association finally deposed Mr. Webb, on the final

⁸ The Court subsequently issued an order striking the motion to continue pleadings, CP 263-64, and the Court imposed CR 11 sanctions, CP 700-01.

⁹ As discussed below, Mr. Webb's plausible basis for extending Washington law establishes—at a minimum—a good faith basis for extension of existing law. CR 11 sanctions against him were entered erroneously.

day of discovery. The Association's counsel asked him extensive questions about distributions he received from SAM, whether he owned real property, whether he had bank accounts, and what assets he owned personally, which he refused to answer. SCP 859 (Webb Deposition Transcript at 88).

Unfortunately, SAM was not able to find counsel in the short time provided, and on February 19, the day before the February 20 summary judgment hearing, two witnesses—Mr. Schellberg and Mr. Webb—submitted declarations outlining the disputed issues of material fact. CP 203-51 (Opposition Brief with Schellberg attaching declaration referenced in Schellberg Decl.), 259-60 (Schellberg Decl.), CP 261-62 (Webb Decl.). The trial court ignored those factual declarations and orally indicated that summary judgment for the Association would be granted. CP 710. A few weeks later, on March 11, 2009, the trial court signed the Association's proposed order granting summary judgment, without change. CP 593-98. The trial court awarded the Association \$1,713,282 in "repair damages pursuant to RCW 64.34.445(8)." CP 598.

SAM ultimately was able to find counsel and timely moved for reconsideration. CP 333-36. The motion for reconsideration consisted largely of asking the trial court to correct its error in refusing to consider the Schellberg declaration and report incorporated therein. CP 334-35.

(Such report, of course, had been in the Association's possession since July 2008. *See supra* pp. 9-11).

In response to the motion for reconsideration, the trial court entered a written order. CP 710-12. In that order, the trial court made clear that it had reconsidered its ruling on summary judgment in light of the Schellberg and Webb declarations and had determined that such declarations did not create a genuine issue of material fact. CP 711-12. Accordingly, the trial court reaffirmed its prior summary judgment ruling, having added the Schellberg and Webb declarations to the pleadings and papers considered in reaching its decision. *Id.*

I. The Association Serves Discovery Requests at the Close of Discovery

On March 12, 2009—just five weeks from the discovery cutoff—the Association served written discovery requests on SAM. CP 361. After 30 days had passed, the Association initiated a “meet and confer” session on April 16, just four days before the discovery cutoff. At that meeting, counsel for SAM indicated that it was not able to provide responsive documents. CP 362-63. As Mr. Webb would testify at his deposition a few days later, “many documents were destroyed” in the office fire in October 2008, and what remained was in “fire-burned boxes.” SCP 822 (Webb Deposition Transcript at 51:10-12). SAM was making efforts to salvage paper and electronic documents, including

documents related to the conversion project. SCP 820-23 (Webb Deposition Transcript at 49:3 to 52:10).

Regrettably, however, the atmosphere of the deposition was poisoned by improper questions, bickering, and concerns by Mr. Webb (who was unrepresented) that the questions asked were designed solely to impose liability on third parties not named in the lawsuit. *See generally* SCP 772-864 (Webb Deposition Transcript *passim*). The questions asked by the Association’s counsel were deliberately intimidating. For example, counsel for the Association stated: “When I ask a question you’re compelled to answer it.” SCP 778 (Webb Deposition Transcript at 7:6-7); *see also* SCP 787 (Webb Deposition Transcript at 16:13-14 (“You have no choice as to what you can and cannot answer.”) (emphasis added)). Moreover, at the outset of the deposition, the Association’s counsel repeatedly threatened Mr. Webb with incarceration if he did not do what he was told. SCP 777 (Webb Deposition Transcript at 6:13-14, 17-19). Also, counsel for the Association plainly was using the deposition to attempt to conduct discovery into ways to enforce the summary judgment obtained against other persons. *See, e.g.*, SCP 786, 788, 830, 831-32 (Webb Deposition Transcript at 15, 17, 59, 60-61).

J. The Association Moves to Compel Discovery Responses at the Close of Discovery

Three days before the discovery cutoff, on April 17, 2009, the Association moved—evidently for the first time—to compel discovery responses. CP 361. The trial court granted that motion on May 7, 2009,

which was after the discovery cutoff and approximately one-month before trial. SCP 1193-95 (Order compelling discovery).

K. The Association Moves for the Most Significant Discovery Sanctions Available Without Taking Any Additional Steps to Resolve the Discovery Disputes and Without Conducting the Discovery Conference Required by CR 26(i)

Five days after the motion to compel was granted, and without making any attempt to convene the discovery conference required by CR 26(i) or King County Local Civil Rule 37, the Association moved for entry of default as a discovery sanction. CP 390-401.¹⁰

L. The Trial Court Grants a Default Sanction Without a Hearing and Without Any Specific Findings To Support Such Sanction

On May 27, 2009, the Court granted the Association's motion for a default sanction. CP 714-16. The trial court's order made no mention of the catastrophic office fire that SAM had suffered and its undisputed impacts on hard copy and electronic discovery. The order likewise made no mention of the fact that employees with knowledge of the project had left the company due to extreme economic hardship. Nor did the order mention a computer crash that caused a loss of documents.

The order likewise failed to mention that a motion to compel was first filed only five weeks before the end of the discovery cutoff, and the order granting that motion came only a few days before the discovery

¹⁰ Tellingly, the Association refers in its motion to the alleged misconduct of "Centex Homes," CP 396, 402, making clear that the Association's counsel simply "cut and paste" the motion from another pleading.

cutoff. Nor did the order indicate why other sanctions, coupled with a continuance, could not cure any prejudice to the Association. Instead, the order simply recited in conclusory fashion that “the Court has considered lesser sanctions and found them to be inadequate.” CP 715.

M. The Association Moves for Judgment, New Counsel Enters, and the Trial Court Recuses Herself

The Association moved for entry of judgment on May 29, 2009, and on June 12, 2009, the trial court entered an order to show cause as to why default judgment for damages, attorney’s fees and costs should not be entered. CP 431.¹¹

On June 22, 2009, new counsel (K&L Gates LLP) substituted for SAM’s prior counsel. SCP 1119-21 (Notice of Withdrawal and Substitution). Because SAM’s new lead counsel had served on the trial court’s election committee, counsel for the Association asked Judge Hill to recuse herself, and she did. SCP 1196 (Recusal of Judge). The case was re-assigned to Judge Andrea Darvas. SCP 1197 (Order for Change of Judge).

N. Judgment Is Entered In the Amount Previously Established In the Order Granting Partial Summary Judgment

¹¹ The order was amended on June 23, 2009 to correct typographical errors and to reflect the trial court’s true intent. CP 430.

On July 1, 2009, the parties agreed that judgment in the amount of \$1,713,282 should be entered as the damages established through the summary judgment ruling. CP 722. There likewise was no dispute that the Court's default order necessarily established liability against SAM on all causes of action they Association had brought. CP 722. Accordingly, the Court entered judgment in the amount of \$1,713,282 and reserved for future motion the issue of the amount of fees, expenses, and additional damages to be awarded. *Id.*; *see also* CP 718-19.

O. Additional Judgment Is Entered and Appeal Is Filed

The Association subsequently moved for: (i) an award of attorneys' fees in the amount of \$545,671.21; (ii) additional damages in the amount of \$24,921.82; (iii) expert expenses of \$62,826.72; (iv) litigation expenses in the amount of \$17,192.17; and (v) Rule 11 sanctions in the amount of \$681.25. SAM opposed the motion for fees and costs on the ground that it was untimely under Civil Rules 54 and 59, and on the basis that inadequate support was provided to justify the amounts sought. CP 633-45.

The trial court entered detailed findings of fact and conclusions of law and ultimately awarded about 26% of the attorneys' fees sought (\$141,948.12), about 17% of the litigation expenses sought (\$2,971.85), and the full amount of additional damages, expert expenses, and Rule 11

sanctions requested. CP 730. SAM timely appealed the original judgment and the additional judgment. CP 672-695; 696-735.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING THE ASSOCIATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The Court reviews summary judgment orders de novo. *Coast to Coast Seafood, Inc. v. Assurances Generales de France*, 112 Wn. App. 624, 629, 50 P.3d 662 (2002). This Court engages in the same inquiry as the trial court, “viewing all facts and reasonable inferences in the light most favorable to the nonmoving party, finds no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law.” *Miller v. Farmers Bros. Co.*, 136 Wn. App. 650, 655, 150 P.3d 598 (2007). Here, summary judgment is not appropriate for two reasons.

First, the Association's moving papers do not demonstrate that the Association is entitled to judgment as a matter of law. The Association's motion identifies 16 allegedly defective conditions at the Marina Condominiums, and states that all of them were “the result of original construction and/or installation and no evidence exists that any subsequent event cause these defects.” CP 42 (emphasis added). There can be no dispute that the “original construction” occurred in 1962. Any defect based on such original construction is insufficient, as a matter of law, to

establish that SAM violated the implied warranty of workmanship under RCW § 64.34.445(2) because such warrant applies only to “improvements” made by the declarant. *Id.* Because the Association’s moving papers indicate that most, if not all, of the allegedly defective conditions do not relate to SAM’s work as part of the conversion, the Court erred in entering partial summary judgment in the Association’s favor.

Second, there is extensive evidence (contained primarily in the Schellberg declaration) demonstrating that—for each of the “conditions” alleged to be defective—there is a genuine issue of material fact as to whether any defects actually exist and whether the defects that do exist were caused by “improvements” linked to the conversion. This Court should reverse the trial courts order granting summary judgment and vacate the July 1, 2009 judgment in the amount of \$1,713,282 that was entered pursuant to the trial court’s summary judgment ruling.

A. The Association’s Motion for Partial Summary Judgment Fails to Demonstrate that the Association is Entitled to Judgment as a Matter of Law

The implied warranty of quality workmanship applies only to improvements that the declarant “made or contracted for by [the]

declarant.” RCW § 64.34.445(2).¹² Here, the Association’s own moving papers demonstrate that most of the allegedly defective conditions are not related to any work—whether “improvements” or otherwise—performed by SAM when it converted the apartment complex to a condominium. Instead, the defects relate to the original 1962 construction of the Sea Aire Apartments. Accordingly, the implied warrant of quality workmanship is simply inapplicable.

The declaration that the Association’s expert Keith Soltner submitted reflects that reality. It begins by stating: “I have reviewed the conversion plans approved by the City of Des Moines building department for the Marina project.” CP 128 (emphasis added).¹³ The Soltner declaration went on to indicated the instances in which allegedly defective conditions were related to the limited work that SAM had performed as

¹² As indicated, there are two implied warranties under RCW § 64.34.445(2). The first warranty—the warranty of “suitability” was not at issue in the Association’s motion for partial summary judgment. Instead, the Association relied solely on the implied warranty of “quality of materials and workmanship.” See *generally Park Avenue*, 117 Wn. App. at 378 (contrasting the implied warranty of “suitability” from the implied warranty of “quality”). This appeal does not present any issue regarding the applicability or scope of the implied warranty of “suitability” under RCW § 64.34.445(2).

¹³ The Soltner declaration is the sole factual support for the Association’s argument that defective conditions exist. CP 31-35. The motion does not even attempt to link those defective conditions to work that SAM performed as part of the conversion.

part of the conversion. CP 129 (“Renovations included the installation of new appliances in the units” (emphasis added)); CP 130 (“New roof perimeter wood fascia and coping cap was installed during the conversion.” (emphasis added)); *id.* (“Many areas [of painting] were omitted and remain the original blue.” (emphasis added)); CP 131 (“Unit interior modification occurred” as part of the “[c]onversion scope of work.” (emphasis added)).

Also, as mentioned, the Association’s motion specifically concedes that the alleged defects identified in the moving papers are “the result of original construction and/or installation and no evidence exists that any subsequent event caused these defects.” CP 42 (emphasis added). Thus, when the facts are viewed properly—in a light most favorable to SAM—it is clear that the allegedly defective conditions generally do not relate to any “improvement” that SAM “made or contracted for.” RCW § 64.34.445(2). In fact, the Association does not even assert, or attempt to show, that the allegedly defective conditions relate to improvements that SAM made or contracted for. Accordingly, the Association’s motion fails to demonstrate that the Association is entitled to judgment as a matter of law that RCW § 64.34.445(2) was violated.

There is a second, and independent, basis for concluding that the Association’s motion fails to show that the Association is entitled to

judgment as a matter of law. As mentioned, the sole factual support of the Association's allegations that defective conditions exist is the declaration of its expert Keith Soltner. That declaration depends critically upon knowledge that Mr. Soltner allegedly gained by inspecting the interior and underlying components of the Marina Condominium. The declaration submitted by the Association's expert, however, does not contain any evidence that Mr. Soltner actually conducted such an inspection. Instead, Mr. Soltner's declaration states only that he made such an inspection at another, unrelated condominium project, "the Regata project." CP 128 (¶ 6).

Many of the alleged defects at issue in the Association's motion are related to the "underlying components" for which there is no evidence of any inspection. *See, e.g.*, CP 128 (¶ 9) (allegations of defects related to interior window framing components); CP 130 (¶ 18) (allegations of defects related to wall assembly components). As a result, the Association's moving papers fail to provide competent evidence regarding many of the alleged defective conditions.

In light of these deficiencies in its moving papers, the Association failed to demonstrate that it is "entitled to judgment as a matter of law."

CR 56(c).¹⁴ This Court should reverse the trial court's order granting summary judgment on the Association's claims that the implied warranty of quality workmanship was violated and that such violation caused repair damages in the amount of \$1,713,282. The Court should also vacate the July 1, 2009 judgment in the amount of \$1,713,282 that was entered pursuant to the trial court's summary judgment ruling.

B. The Declarations SAM Submitted In Opposition to the Motion for Partial Summary Judgment Raised Genuine Issues of Material Fact and Precluded Summary Judgment

1. The Declarations Demonstrated Disputed Issues of Material Fact

SAM submitted two declarations in opposition to the Association's motion for partial summary judgment. The first declaration is that of Don Schellberg. CP 259-60, 277-78. Mr. Schellberg's declaration refers to, and incorporates, the reports he prepared in July 2008 as a point-by-point response to the reports prepared by the Association's experts, including expert Keith Soltner. CP 206-51, 259-60, 277-78, 287-332. As described in detail above,¹⁵ the Schellberg declaration makes clear that the vast majority of allegedly defective conditions are unrelated to any

¹⁴ It appears that the Association improperly attempted to "cut and paste" a motion for partial summary judgment related to a newly constructed condominium.

¹⁵ See *supra* pp. 16-20 (providing detailed discussion about the conclusions set forth in Schellberg's declaration).

improvements that SAM made or contracted for:

- Alleged Defective Conditions 1 & 2 (windows and sliding glass doors). Schellberg pointed out that the windows and sliding glass doors were part of the original construction, and SAM performed no work on them, nor did it perform any work that would have revealed any of the alleged problems to the underlying structures. CP 260, CP 310-11.
- Alleged Defective Conditions 3-10 (roof and related issues). Schellberg pointed out that the vast majority of roof related concerns were unrelated to any work that SAM made or contracted for as part of the conversion. CP 315-18.
- Alleged Defective Conditions 10-12 (exterior cladding). Schellberg explained that issues related to exterior cladding—and most of the concerns regarding painting—did not relate to any improvements that SAM made or contracted for. CP 319-20.
- Alleged Defective Condition 13 (structural). Schellberg again explained that most areas identified by Soltner as being of concern related to original construction rather than any improvements SAM made as part of the conversion. CP 322-26.
- Alleged Defective Condition 16 (drainage). Schellberg reported that the conversion did not involve any grade work to the west side of the

building, which was the Association's concern. CP 331. Nor did SAM improve the portions of the storm drains identified by the Association as an area of concern. *Id.*

With respect to the few portions of the Soltner declaration that address work that SAM did perform as part of the conversion, the Schellberg declaration demonstrates that there was generally no violation of the implied warranty of workmanship.¹⁶

- Alleged Defective Condition 8-10 (roof and related issues). With respect to Condition 8 (wood fascia), Schellberg explains why the Association's arguments rest on a misreading of the relevant building codes, CP 317-18, and with respect to Condition 9 and part of Condition 10, Schellberg likewise notes that the building codes have been misinterpreted. CP 317-18.
- Alleged Defective Condition 14 (decks). Schellberg explained that any failure of deck coating was a result of improper maintenance

¹⁶ Schellberg's report does note that there are a few, very small areas, in which there may be defects with respect to improvements that were made. For example, SAM may need to repair some small issues related to vent pipes and exhaust hoods, CP 317, some electrical work, CP 318, some painting of the roof fascia, CP 320, some repair of loose electrical boxes, CP 320, some roof fascia repair, CP 320-21, and some inspection and possible limited repair may be necessary of certain structural features, CP 323-25.

rather than a code violation or construction defect, and the work that was performed was not defective. CP 327, 328-29.

- Alleged Defective Condition 15 (unit interiors). Schellberg indicated that loose electrical boxes should be fixed, but booster fans were not necessary, and indicated what repairs were required. CP 328-30.

These points are merely a summary of the detailed responses and refutations submitted by Mr. Schellberg in opposition to the Association's motion for partial summary judgment. *See generally supra* pp. 16-20 (providing a more detailed discussion of the Schellberg declaration); CP 277-78, 287-332 (full copies of the Schellberg declaration and reports).

In sum, the Schellberg declaration raises a genuine issue of material fact regarding every allegedly defective condition identified by the Association in its motion for partial summary judgment. With respect to most of the allegedly defective conditions, the Schellberg declaration removes all doubt that the conditions are unrelated to any "improvement" that SAM made or contracted for. With respect to other allegedly defective conditions, the Schellberg declaration explains that the Association's expert is wrong, and there are no code violations.

The second declaration filed, the Webb declaration (CP 261-62), independently creates disputed issues of material fact. In the declaration, Mr. Webb indicates that he was involved in the conversion project in a

management capacity and based on his personal knowledge believes Mr. Schellberg's declaration and report to be accurate. CP 261. Because the primary opposition to the Association's motion is based on the fact that the allegedly defective conditions do not relate to improvements that SAM made or contacted for, Mr. Webb's declaration is sufficient to create an issue of material fact precluding summary judgment.

2. The Schellberg and Webb Declaration Are Competent Evidence for Purposes of Summary Judgment and the Trial Court Erred in Disregarding Them

The trial court erred in refusing to consider the Schellberg and Webb declarations. The trial court provided three reasons that the Schellberg declaration was not competent evidence: (1) Schellberg did not demonstrate that he was qualified to testify as to the matters contained in his report; (2) Schellberg's reference to his report was not sufficiently clear to establish that its contents were sworn under oath; and (3) it is not clear that Schellberg's investigation was sufficient to establish personal knowledge. All three of those bases for refusing to consider Schellberg's declaration are in error.

First, the Court erred in ruling that Mr. Schellberg did demonstrate that he was qualified to testify as to the matters in his report. As the Association's moving papers indicate, the issues raised in the Association's motion are primarily issues of fact. CP 43 (noting that

much of the testimony from the Association's declarant, Keith Soltner, were "conclusions of fact"). In fact, with respect to the fundamental issue before the Court—whether any of the alleged defects identified were improvements SAM made or contracted for—Mr. Schellberg had far more knowledge than Mr. Soltner. Mr. Soltner claims knowledge of the work performed as part of the conversion because he "reviewed the conversion plans approved by the City of Des Moines building department for the Marina project and performed an investigation of the buildings located at Marina." CP 128. Mr. Schellberg took exactly those same steps, and more. Like Mr. Soltner, Mr. Schellberg: reviewed the "permits related to the conversion . . . filed with the City of Des Moines," CP 305; he conducted an investigation that included four site visits, on May 16, 2008, May 30, 2008, June 4, 2008, and June 5, 2008; and he reviewed reports and photographs from the Association's expert. CP 306. In addition, and unlike Mr. Soltner, Mr. Schellberg actually reviewed the Project Files for the conversion to ascertain the work that was performed. The files he reviewed included (among other things) detailed internal email related to the construction work performed, "two separate Scopes of Work contained in the project files," and "daily job reports." CP 306, 312, 319-320.

Mr. Schellberg and his company also conducted detailed, invasive inspections, CP 292, and they observed areas where improvements such as

wood framing were replaced and where they were kept as original. CP 300. Mr. Schellberg's inspections included "remove[al of] portions of the roofing material." CP 315. Mr. Schellberg's company also inspected vent pipes and hoods. CP 317. Mr. Schellberg also examined the painting and diagnosed problems. CP 320-21. He also conducted detailed inspections of structural components. CP 322-25. Mr. Schellberg also inspected decks, CP 329, and he inspected drainage—including excavation of various pipes, CP 331. Accordingly, the testimony Mr. Schellberg provided regarding his investigation of the Marina Condominium is far more extensive than the corresponding testimony of the Association's expert, not least because the Association's expert's declaration mistakenly rests on an investigation he performed on an unrelated project, the Regatta condominium. CP 128.¹⁷ Accordingly, Mr. Schellberg's qualifications to opine on the factual issues raised in the motion for partial summary judgment are equal to or greater than those of Mr. Soltner.

With respect to professional qualifications to serve as an expert, which are relevant only to the small number of areas in which SAM's opposition rests on disputing the Association's interpretation of 2003 building codes or otherwise challenging the assertion that the

¹⁷ As mentioned above, this gap in the Association's proof is sufficient—standing alone—to require reversal of the trial court's summary judgment

improvements made do not demonstrate quality workmanship, Mr. Schellberg again adequately established his qualifications. For example, Mr. Schellberg's declaration indicates that he bears the professional qualification of "AIA," which indicates that he is a licensed architect. CP277.¹⁸ Mr. Schellberg's reports also indicate his qualifications to perform independent analysis of structural issues. CP 294. There is ample evidence of Mr. Schellberg's qualifications.

Second, the Court erred in ruling that Mr. Schellberg did not indicate that his report was part of his declaration and the investigation detailed in his report was sworn under oath. CP 711. Mr. Schellberg swore under oath that he created two scopes of repair based on his investigation. CP 277. He also swore under oath that true and correct copies of such scopes of repair were attached to his declaration. *Id.* Finally, and most importantly, Mr. Schellberg swore under oath that he had reached certain conclusions based on his investigations and scopes of work. CP 278. When read as a whole, Mr. Schellberg's declaration makes clear that his conclusions flowed directly from, and necessarily

ruling.

¹⁸ The Court may take judicial notice that an individual must be an architect licensed in the United States to obtain the "AIA" designation. See http://www.aia.org/join_categories/AIAS076857 (current as of October 31, 2009).

were based on, the investigation and analysis detailed in the scopes of work he attached.

Third, the Court erred in ruling that there was not sufficient evidence that Mr. Schellberg's investigation was sufficient to support the statements in his declaration. As mentioned: (i) Mr. Schellberg conducted four site visits, at which he examined and reported on the exterior and interiors of the condominium project, CP 305, 306; (ii) he reviewed project files (including detailed internal email related to construction work performed, "two separate Scopes of Work contained in the project files," and "daily job reports"), photographs, and building codes, CP 306, 312; (iii) he and his company conducted intrusive roof inspections, CP 315; he and his company inspected vent pipes and hoods, CP 317; he and his company examined the painting and diagnosed problems, CP 320-21; he and his company conducted detailed inspections of structural components, CP 322-25; he and his company inspected decks, CP 329, and they inspected drainage—including excavation of various pipes, CP 331. In sum, the Schellberg declaration fully supports that Mr. Schellberg's investigation was sufficient to support the conclusions reached. The Court erred in refusing to consider Mr. Schellberg's declaration.

The same is true regarding George Webb's declaration. In that declaration, Mr. Webb explained that he had a managerial role with

respect to SAM's conversion-related construction. CP 261. Based on that knowledge, Mr. Webb indicated his concurrence with the conclusions reached in Mr. Schellberg's reports. CP 261-62. Although Mr. Webb's testimony is limited, it demonstrates that Mr. Webb's personal experience in managing the conversion allowed him to reach the same conclusion as Mr. Schellberg with respect to the issues addressed. CP 261. Viewed in the light most favorable to SAM, Mr. Webb's declaration reinforces that there were genuine issues of material fact precluding summary judgment that the "improvements" SAM made or contracted for violated the implied warranty of workmanship.

II. THE TRIAL COURT ERRED IN ORDERING DEFAULT AS A DISCOVERY SANCTION

The trial court's order granting default against SAM as a discovery sanction reflects two errors. The first is an error of law, which is reviewed *de novo*. The second is an abuse of discretion, and is reviewed accordingly.

A. The Trial Court Erred In Entertaining the Association's Motion for Discovery Sanctions Because the Association Failed To Comply With CR 26(i) and King County Local Civil Rule 37(e)-(f).

Civil Rule 26(i) and King County Local Civil Rule ("LCR") 37(e)-(f) prevent trial courts from "entertaining any motion . . . with respect to Civil Rules 26 through 37, unless it affirmatively appears that counsel

have met and conferred with respect thereto.” LCR 37(e); CR 26(i).

Here, the Association moved for sanctions under CR 26(e)(4) and CR 37(d) without first meeting and conferring, in person or by telephone, as required by the rule. The failure to meet and confer before filing a motion seeking relief under CR 26 and CR 37 divested the trial court of jurisdiction to entertain the motion. CR 26(i); LCR 37(e)-(f).

Accordingly, the trial court’s order must be reversed and the default order and resulting judgments vacated.

Notably, the Association’s failure to attempt to meet and confer was especially unfortunate here, because new counsel for Mr. Webb had just become involved in the case, and approximately one week after the motion for discovery sanctions was filed, that new counsel contacted the Association’s counsel on multiple occasions (without response) in an effort to solve discovery dispute. SCP 925-26 (May 20, 2009 Declaration of Theodore J. Angelis). Had the Association complied with the rule requiring a meet and confer session, much of the ensuing acrimony may have been unnecessary.

B. The Trial Court Abused Its Discretion In Ordering Default Because There Was No Evidence of Substantial Prejudice to the Association

As Division II of this Court recently emphasized, “cases should be resolved on the merits rather than by default judgment.” *Hyundai Motor*

America v. Magana, 141 Wn. App. 495, 515, 170 P.3d 1165 (2007), *rev. granted*, 164 Wn.2d 1020, 195 P.3d 89 (2008). The issue of “whether a default judgment is appropriate depends on whether it is a just result.” *Id.* Here, the trial court did not take the necessary steps to ensure that its discovery sanctions ruling created a just result. Specifically, the trial court neglected its duty to ensure that there was substantial prejudice before entering a default. *Id.* at 510. Accordingly, the trial court abused its discretion in entering default as a discovery sanction. The default order should be reversed; the resulting default judgment and additional judgment should be vacated; and the matter should be remanded for imposition of appropriate sanctions.

1. The Association Did Not Establish Substantial Prejudice Because It Did Not Indicate What Information or Documents, If Any, It Had Not Been Able to Obtain

In its motion for sanctions, the Association indicates that it was able to obtain documents from the general contractor for the project, and the Association alleges that such documents establish the existence of construction defects at the Marina Condominiums and SAM’s knowledge of such defects. CP 400. The Association likewise indicates that it received various documents from SAM in response to its discovery requests. CP 391. The Association did not, however, indicate what documents it had not received and why such documents had any bearing

on its ability to investigate or present its case. That failure prevents a finding of substantial prejudice. *See Magana*, 141 Wn. App. at 516-19.

In deciding whether to enter a default sanction, a court must consider the practical effect of the discovery violations and must find substantial prejudice in the affected party's ability to prepare for trial before default can be entered. *Id.* at 517 n.19 (“[N]ot only is it appropriate for us to consider the practical affect of [the defendant's] violation, it is necessary to do so to safeguard [the defendant's] constitutional right to due process.”). Neither the Association's moving papers nor the trial court's ruling indicate any basis for concluding that documents allegedly not received caused substantial prejudice to the Association. Accordingly, as was the case in *Magana*, a finding that the Association was significantly prejudiced “is unfounded.” *Id.* at 520-21. Here, as in *Magana*, lesser sanctions “could adequately address the goal of encouraging good faith compliance with discovery requests and timely trial preparation.” *Id.* at 520.

2. The Association Did Not Establish Substantial Prejudice Because It Did Not Move To Compel Discovery Until Four Days Before the Discovery Cutoff

The Association served discovery requests approximately five weeks before the discovery cutoff. CP 361. When responses were not immediately forthcoming, counsel for the parties had a discovery conference approximately 4 days before the discovery cutoff. During that conference, counsel for SAM indicated that it was not able to provide

responsive documents. CP 362-63. As Mr. Webb would testify at his deposition a few days later, “many documents were destroyed” in the office fire that SAM had suffered in October 2008, and what remained was in “fire-burned boxes.” SCP 822 (Webb Deposition Transcript at 51:10-12). SAM was making efforts to salvage paper and electronic documents, including documents related to the conversion project. SCP 820-23 (Webb Deposition Transcript at 49:3 to 52:10).¹⁹

The Association’s decision to wait until three days before the discovery cutoff to file a motion to compel discovery precludes a finding of substantial prejudice. In fact, the delay in moving to compel in this case is far worse than the delay that was found sufficient to prevent a finding of substantial prejudice in *Magana*. There, Division II of this Court noted that the defendants waited until four months before the

¹⁹ Regrettably, at his deposition, Mr. Webb did not answer questions asking him about the progress of recovering fire-damaged electronic and paper files. That failure was due in part to the poisonous atmosphere created by the conduct of the Association’s counsel. For example, counsel for the Association stated: “When I ask a question you’re compelled to answer it.” SCP 778 (Webb Deposition Transcript at 7:6-7); *see also* SCP 787 (Webb Deposition Transcript at 16:13-14 (“You have no choice as to what you can and cannot answer.”)). Counsel also bickered with the witness claiming that he could ask whatever he wanted, including what the witness “had at breakfast.” SCP 785 (Webb Deposition Transcript at 14). Moreover, at the outset of the deposition, the Association’s counsel repeatedly threatened Mr. Webb with incarceration. SCP 777 (Webb Deposition Transcript at 6:13-14, 17-19). Also, counsel for the Association plainly was using the deposition to attempt to conduct discovery into ways to enforce the summary judgment obtained against other persons. *See, e.g.*, SCP 786, 788, 830, 831-32 (Webb Deposition Transcript at 15, 17, 59, 60-61).

scheduled trial date to request a discovery update and approximately three months before the scheduled trial date to file a motion to compel. 141 Wn. App. at 506. The Court of Appeals held that such delay precluded a finding of prejudice in preparing for trial in part because the plaintiff “did not request additional discovery until shortly before trial.” *Id.* at 517. The Court emphasized that it was the plaintiff’s “choice to pursue additional discovery shortly before trial,” and the Court indicated that “it is unclear why [the plaintiff] requested additional evidence if the time required to investigate would have substantially prejudiced [its] case.” *Id.* at 519. The same is true here. The Association waited until the last possible moment to serve new discovery requests and waited until just days before the discovery cutoff to file a motion to compel. Here, as in *Magana*, the plaintiff evidently wanted more time to obtain discovery and analyze such discovery before trial. Such actions could not have been taken without “anticipating a trial date continuance.” *Id.* at 516. Accordingly, there is no showing of substantial prejudice.

In *Magana*, the Court emphasized that “a default judgment is tantamount to awarding [the plaintiff] a several million dollar verdict without requiring him to prove his case. Absent substantial prejudice, such a sanction is contrary to law.” *Id.* at 520. Here, the Association did not demonstrate substantial prejudice.

C. The Trial Court Abused Its Discretion Because It Did Not Make a Finding on the Record Regarding Willfulness, and No Such Finding Could Be Supported by the Evidence on the Record

The trial court was aware that SAM had suffered a catastrophic office fire that hampered its ability to produce electronic and paper documents. SCP 822 (Webb Deposition Transcript at 51:10-12). The trial court likewise was aware that a former employee with knowledge of the project had suffered a computer crash that caused some documents to be destroyed. CP 391. In addition, the trial court was aware that SAM was in a precarious financial situation that had caused most employees with knowledge to leave the company. CP 285-86, CP 393 (citing Mr. Webb's testimony). The trial court nonetheless—and without conducting any hearing into any of these underlying facts—held that failure to produce discovery was willful. CP 715.

A discovery violation is willful if done without reasonable excuse. *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 686-87, 41 P.3d 1175 (2002). Here, there were three, separate excuses provided for SAM's discovery failures: (1) the office fire SAM suffered; (2) the computer crash of the former employee most knowledgeable about the project; and (3) the loss of employees with knowledge of the project and potentially responsive discovery. The Association attempted to cast doubt on the reasonableness of those excuses by suggesting that there was conflicting testimony regarding the computer crash. CP 391-92. Even a cursory reading of that testimony, however, demonstrates no conflicting testimony. Mr. Webb testified only that there would have been some paper documents that were not lost in the computer crash. CP 391-92; CP

377. Such documents were, however, affected by the office fire. *See supra* pp. 12, 23, 48.

The trial court's finding of willfulness must be overturned if the trial court abused its discretion by relying on untenable grounds or for untenable reasons. *Magana*, 141 Wn. App. at 509 (citing *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)). Here, the trial court failed to consider on the record whether any of the excuses provided by SAM were reasonable. The Supreme Court has warned that the reasons justifying a default sanction "should, typically, be clearly stated on the record so that meaningful review can be had on appeal." *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). That instruction is especially important in a case such as this one, in which there are multiple reasons given for non-compliance with discovery obligations, and as in *Burnet*, some of the discovery problems were driven by bickering and acrimony between the parties. *Id.* at 497. The trial court's failure to consider the reasonable excuses offered by SAM for its discovery failings constitutes an abuse of discretion.

III. THE TRIAL COURT ERRED IN ENTERTAINING AN UNTIMELY MOTION TO AMEND THE JUDGMENT TO INCLUDE AN AWARD OF ATTORNEYS' FEES AND COSTS

On July 1, 2009, the Court entered judgment against SAM in the amount of \$1,713,282, which was the amount of damages established under the court's summary judgment order. CP 718-19. On July 14, 2009, the Association moved to amend the judgment to include additional

amounts, including an award of attorneys' fees and costs. CP 432-43. That motion, however, was untimely under Civil Rules 54(d)(1), (d)(2) and 59(h). Accordingly, the trial court erred in awarding fees and costs. This legal error is reviewed de novo.

Civil Rule 54(d)(1) and (d)(2) require, respectively, that a cost bill and/or a motion for an award of attorneys' fees and expenses must be filed within 10 days after the entry of judgment. Likewise, Civil Rule 59(h) provides that "[a] motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment." The Civil Rules make clear that if a party does not timely move for an award of fees and costs, the only fees and costs recoverable are those that the clerk can award, and such costs must be taxed automatically pursuant to CR 78(e). CR 54(d)(1).

Here, judgment was entered by the Court on July 1, 2009. Plaintiff's motion for fees and expenses was not filed until July 14, 2009, which is after the 10-day deadline set forth in CR 54(d)(1), CR 54(d)(2) and CR 59(h). The trial court improperly sought to sidestep the issue of the untimely request for fees and costs by characterizing such award as an "additional judgment." CP 732-34. The Civil Rules, however, provide a time limit for seeking fees and costs. Because the Association's motion was untimely, it should have been denied. This Court should reverse the trial court's ruling granting fees and costs and remand with instructions to amend the judgment to remove the fees and costs awarded.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING CR 11 SANCTIONS AGAINST SAM FOR SEEKING TO REPRESENT ITSELF PRO SE

On February 5, 2009, SAM moved to continue the Association's motion for partial summary judgment. CP 180 (motion); CP 158-62 (supporting declaration). The motion and declaration were not filed by counsel, but rather by George Webb, who indicated he was the designated representative for SAM. Although the Court ultimately granted a brief continuance, the Court issued an order striking the motion to continue, CP 263-64, and the Court imposed CR 11 sanctions on SAM. CP 700-01.

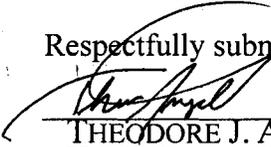
The Court's decision to impose CR 11 sanctions is reviewed for abuse of discretion. CR 11 indicates that a pleading complies with the rule if it is "warranted by . . . a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law." CR 11(a). Here, Mr. Webb provided a good faith basis for allowing him to represent SAM. CP 281-86. Specifically, he relied on policy arguments set forth in the *Illinois Business Law Journal* and his well-founded concern that the Association would seek to hold him personally liable for any judgment against SAM. CP 285-86. The issue of Mr. Webb's representation of SAM ultimately became moot, when SAM appeared with new counsel in early march 2009. The Court should not, however, have entered CR 11 sanctions against Mr. Webb because his actions were based on a good faith argument for the extension or modification of existing law.

CONCLUSION

For the foregoing reasons, the Court should:

- Reverse the trial court's summary judgment order imposing liability and \$1,713,282 in "repair damages" for violation of the implied warranty of workmanship under § 64.34.445(2) and vacate the resulting July 1, 2009 Judgment and the August 7, 2009 Additional Judgment.
- Reverse the trial court's order entering default on all of the Association's causes of action against SAM as a discovery sanction and vacate the resulting Judgment and Additional Judgment.
- Reverse the order granting the Association's untimely motion to amend the Judgment, and vacate the fees and costs awarded in the Additional Judgment.
- Reverse the order granting CR 11 sanctions against SAM.

Respectfully submitted,



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