

Court of Appeals No. 63918-1-1<sup>8</sup>

IN THE WASHINGTON COURT OF APPEALS  
DIVISION ONE

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THE MARINA CONDOMINIUM HOMEOWNER'S  
ASSOCIATION,

Respondent/Plaintiff,

v.

THE STRATFORD AT THE MARINA LLC

Defendant/Appellant,

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FILED  
COURT OF APPEALS DIVISION #1  
STATE OF WASHINGTON  
2010 JAN 25 PM 1:05

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

This case involves an action by the Marina Condominium Homeowner's Association, ("HOA") against the Stratford at the Marina LLC ("SAM") for construction defects relating to the conversion of an apartment building to a condominium. The property at issue in this case is a building consisting of 20 residential units located in Des Moines, King County, Washington ("Property").

It is also a case on the severe consequences that can befall a litigant who does not hire and retain competent counsel, but rather chooses to represent oneself. Here, Mr. George Webb, the principal of SAM (collectively referred to as "Webb/SAM"), engaged four separate sets of attorneys to represent him in this matter. At the key times in this litigation (i.e. when the HOA moved for partial summary judgment and the subsequent discovery motions), Mr. Webb attempted to go it alone. He failed miserably in his attempts to be his own lawyer: he did not timely serve a response to the partial summary judgment motion, he failed to meet his burden in opposing a summary judgment motion and he offered declarations which did not meet the minimal evidentiary requirements for summary judgment. As to other motions, he simply ignored them.

This litigation strategy resulted in the entry of judgment against SAM in the amount of \$1,713,282. Webb/SAM now appeals to this court to save him from the poor choices he made below. This court should decline to do so and affirm the trial court in all respects.

## **II. RESTATEMENT OF THE ISSUES**

Issue No. 1: Did the HOA establish that is was entitled to summary judgment as a matter of law for the repair costs of the myriad of defects in the Property?

Issue No. 2: Did the trial court abuse its discretion by refusing to consider Webb/SAM's untimely response to the motion for partial summary judgment as they were not served and filed with the court at 4:05 p.m. the day before the scheduled hearing?

Issue No. 3: Did the trial court err by refusing to consider Webb/SAM's declarations offered in support of its opposition to the HOA's motion for partial summary judgment when those declarations (1) did not meet the evidentiary requirements of CR 56(e) and (2) failed to set forth with specificity which facts it contended were genuine issues of material fact as required by CR 56(e)?

Issue No. 4: Did the trial court abuse its discretion in entering an order compelling Webb/SAM to provide answers to discovery requests and an order issuing sanctions against it for failure to do so when it failed to respond to those two motions among other reasons?

Issue No. 5: Did the trial court err by entering judgment against Webb/SAM either as a default and/or based on an order granting partial summary judgment?

Issue No. 6: Did the trial court err in entering judgment for attorneys fees and costs against Webb/SAM when the motion was made according to an agreement made in open court?

### **III. RESTATEMENT OF THE CASE**

#### **A. PROCEEDINGS BEFORE THE PSJ MOTION: TWO SETS OF ATTORNEYS WITHDRAW FOR SAM AND THE CASE IS RETURNED TO THE TRIAL COURT FROM ARBITRATION**

On December 24, 2007, the HOA filed suit against Webb/SAM seeking to recover for the myriad of defects in the Property. CP 3-20. In its complaint, the HOA asserted the following causes of action which include claims within the Washington Condominium Act ("Act") and other relevant claims:

1. Breach of Implied Warranties;
2. Breach of Implied Warranty of Habitability;

3. Breach of Contract;
4. Violation of the Washington Consumer Protection Act, RCW Ch. 19.86;
5. Breach of Fiduciary Duty;
6. Liability Under RCW 64.34.344;
7. Breach of Duty to Repair Common Elements;
8. Misrepresentation and Breach of RCW 64.34 to Repair Common Elements; and,
9. Misrepresentation and Breach of RCW 64.34.405 and 64.34.410.

Webb/SAM, through the law firm of Linville Ursich, filed an answer and affirmative defenses on March 10, 2008. CP 21-26. On April 18, 2008, the attorneys at Linville Ursich withdrew as counsel and the Foster Pepper law firm was substituted for counsel for Webb/SAM. CP 735-736.

On May 16, 2008, the trial court granted SAM's motion to compel arbitration in the case under RCW 64.55.100. CP 1168-1169. The case was then referred to arbitration.

On September 23, 2008, the attorneys at Foster Pepper PLLC withdrew as counsel for Webb/SAM. CP 737-738.

On November 19, 2008, the HOA moved to terminate the arbitration and resubmit the case to the court. CP 1170-1192. The basis for the motion was the fact that Webb/SAM, who had

demanded arbitration, had a responsibility to pay the cost of arbitration under RCW 64.55.140(2)(a)(i). Mr. Webb stated that he did not have the money to pay for the arbitration so the HOA sought to terminate the arbitration. CP 1170-1192. On December 2, 2008 the court granted the motion and returned the matter to the trial court and issued a new case schedule. CP 425-429. Under that new case schedule, trial was set for June 8, 2009.

#### **B. THE SUMMARY JUDGMENT PROCESS; WEBB ENTERS THE LAWYER'S REALM**

About a month after the case was returned to the court from arbitration, on January 8, 2009, the HOA filed a PSJ Motion ("PSJ Motion"). CP 28-46. The HOA raised the implied warranties set forth under RCW 64.34.445(2) as the only claim in the motion. CP 41-45. The motion was based in part on the Declaration of Keith Soltner<sup>1</sup> ("Soltner Dec.") Mr. Soltner generally opined as follows:

- There are deficiencies in the windows and sliding glass doors.

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<sup>1</sup> At Page 30 of his brief, Webb/SAM take issue with Mr. Soltner's declaration arguing that it appears to be related to a different case and project. This is not true. On January 12, 2009, the HOA filed an errata correcting the obvious scrivener's error. CP 153. Mr. Soltner's declaration clearly relates to the HOA and not any other project—any suggestion to the contrary is based on a scrivener's error. CP 153. *State v. Vickers*, 148 Wn.2d 91, 109, 59 P.3d 58 (2002) (incorrect date in warrant affidavit an immaterial scrivener's error).

- Water leakage from the windows causing mold growth, delaminated and rotting plywood sheathing, and decaying framing components.
- Damaged roofing membrane with deflection suggesting damaged sheathing beneath.
- Water intrusion in at least one unit from the damaged roofing membrane.
- The roof suffers from a minimal slope and does not have adequate drains.
- The roof mounted vents necessary for the new appliances installed in the units were not installed in accordance with building codes and industry standards.
- The new roof perimeter wood fascia and coping cap was not installed to building codes or industry standards.
- The electric supply lines for the building are not supported by the weather head and are in contact with the metal roof coping thus violating the Uniform Electrical Code.
- The exterior building lighting is powered by an extension cord.
- The stucco siding control joints allow for water entry and subsequent damage.
- The painting was not complete.
- The elevated decks do not conform to industry standards or sound engineering practices.
- As to some of the unit modifications, the electrical receptacle boxes were not secured properly violating the Uniform Electrical Code.

- Dryer booster fans were not installed per the plans submitted.

CP 126-132.

The remainder of the HOA's claims were thus unaffected by the motion. The hearing was set for February 6, 2009. CP 28.

Webb/SAM did not file a response to the PSJ Motion eleven days prior to the hearing as required by CR 56. Rather, on February 5, 2009, the day before the hearing on the motion, SAM, through its "Designated Representative" George Webb, filed a motion to continue the PSJ Motion. CP 180; 337-339. Mr. Webb stated in his supporting declaration:

3. Due to lack of funds Defendant has been forced to release counsel and is now representing itself.
4. We have been unable to secure copies of engineering reports countering Plaintiffs [sic] claims since a recent fire that destroyed our office. We are working on this now.
5. Construction defects claimed are largely for systems not changed by Defendant and many were disclosed to Buyers in Public offering Statement [sic]. There are many disputes of fact that merit further response.

("1<sup>st</sup> Webb Decl.") CP 158-59; *see also* CP 275-332. Mr. Webb did not include any documentation to support his statements. This motion for continuance was provided to trial counsel for HOA by

email on February 4, 2009, the day before the scheduled hearing by February 5, 2009. CP 184.

Later that day, the HOA filed an objection and a motion to strike the motion for a continuance pointing out that Webb/SAM had not had counsel involved in the matter since September 2008 (nearly 5 months), that corporations were prevented, as a matter of law, from representing themselves, and that Webb/SAM had failed to comply with CR 56 as it had not presented a response in the time required. CP 154-157. The HOA also sought CR 11 sanctions. Additionally, the HOA filed a separate Motion for Attorneys Fees and Costs under CR 11. CP 194-196. On February 9, 2009, the HOA filed another motion for attorneys fees and costs pursuant to RCW 64.34.455. CP 267-272.

On February 13, 2009, Mr. Webb sent an *ex parte* letter to the trial court arguing that he should be permitted to represent SAM. CP 285-286. The court disregarded this letter.

On February 18, 2009, the trial court granted the HOA's motion for attorney's fees and costs pursuant to CR 11 and awarded it \$681.25 ("CR 11 Order"). CP 676-677.

The trial court granted the request for a continuance and set the hearing on the PSJ Motion for February 20, 2009. CP 252. SAM

(through its "Designated Representative" George Webb) filed a response to the PSJ Motion on February 19, 2009 (again, the day before the scheduled hearing). CP 203-260. In that response, Webb/SAM made the broad statement that numerous issues of material fact existed on the RCW 64.34.445(2) claims and attached copies of a report and a draft report issued by Mr. Donald Schellberg. CP 206-251. Mr. Webb submitted an additional declaration and stated:

I was involved in the conversion project in a management capacity on behalf of the Defendant. I have reviewed the inspection report and declaration prepared by Donald Schellberg and believe them to be accurate. There are disputes of material fact in every section of the reports prepared by the experts for Plaintiff and for Defendant. **Each of these disputes of material fact must be addressed and are not able to be adequately addressed in a summary judgment hearing**, which is why I support the Defendants opposition to the PSJ Motion.

("2d Webb Dec."; Emphasis added.) CP 261-262. Mr. Schellberg also submitted a declaration in support of Webb/SAM's opposition to the PSJ Motion ("Schellberg Dec.") CP 259-260.

On February 19, 2009, the HOA filed a reply indicating it had not received a response to the PSJ Motion. CP 197-198; 252-253. Later that day, it again filed an objection to Webb/SAM's opposition to the PSJ Motion claiming again that Webb/SAM could not

represent SAM and that the opposition did not comply with CR 56 as it was again untimely. CP 199-202. The HOA again asked for attorneys fees. CP 202. Despite Webb/SAM's ongoing argument that he was permitted to represent SAM, attorney Cynthia Massa appeared for Webb/SAM at the hearing on the PSJ Motion and made substantive arguments claiming that genuine issues of material fact existed on the record before the court and thus the motion should be denied.

I'm here, I'm happy to represent him in this matter, but my understanding with the motion for summary judgment is there has to be an absence of material facts, and based on the documents that he has provided to the court and his responses, at least based on what was provided when he was represented by counsel, that there are still material matters at fact that have to be decided, and given his situation, I don't know why going to trial would not be allow because there are material, you know, instances of fact that should be decided at trial.

RP 8, Lines 9-19.

On March 11, 2009, the trial court granted the PSJ Motion ("PSJ Order"). CP 679-684. In its order, the court ruled that Webb/SAM was liable for the cost to repair damages "pursuant to RCW 64.34.445(8) in the amount of \$1,713,282.00 ("PSJ Order"). CP 684. Further, the trial court did not consider Webb/SAM's submissions in opposition to the PSJ Motion namely the brief (CP 203-251) the Schellberg declaration (CP 259-260) or the 2d Webb

declaration (CP 261-262) as those documents are not identified in the PSJ Order. CP 680. The court also stated that it would not consider these documents. RP 30-31.

### **C. PROCEEDINGS AFTER THE SUMMARY JUDGMENT MOTION**

After the summary judgment motion, the battle ensued between Webb/SAM and the HOA.

#### **1. Webb/SAM's Motion for Reconsideration is Denied**

On March 3, 2009, Webb/SAM, filed a motion for reconsideration of the PSJ Order through attorney Cynthia Massa ("Reconsideration Motion"). CP 333-336. Ms. Massa contended that the court had committed an error of law by (1) not allowing Mr. Webb to appear for Webb/SAM and (2) surprise that the court had not informed Mr. Webb of the need to engage counsel and (3) that genuine issues of material fact existed. CP 333-336. In support of the motion, Ms. Massa again submitted the Schellberg Dec. (CP 275-332) and an additional brief (CP 337-339). The HOA opposed the motion. CP 340-342. The trial court, while it considered the motion paperwork submitted by Webb/SAM through Ms. Massa, denied the Reconsideration Motion on April 27, 2009 ("Reconsideration Order"). CP 686-688.

On March 5, 2009, the HOA filed a reply on its motion for attorneys fees informing the court that Webb/SAM had not responded to the motion brought under RCW 64.34.455 (CP 739-740). CP 739-740. The trial court did not enter an order on this motion.

**2. Webb/SAM Fail to Answer Discovery Requests; the Court Grant's the HOA's Motion to Compel**

On April 16, 2009, trial counsel<sup>2</sup> for the HOA and Ms. Cynthia Massa, then counsel for Webb/SAM, had a telephonic discovery conference to discuss Webb/SAM's responses to Plaintiff's Second Requests for Production of Documents to Defendant, the Stratford at the Marina, LLC which were served on them on March 12, 2009 pursuant to CR 26(i). CP 344. In this conversation, Ms. Massa stated that Webb/SAM had not provided documents to her that were responsive to the Discovery Requests. CP 344. Ms. Massa was informed that the HOA would bring a motion to compel responses to the Discovery Requests. CP 344.

On April 17, 2009, the HOA moved to compel Webb/SAM to answer the Discovery Requests ("Compel Motion"). CP 361-367.

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<sup>2</sup> The Law Office of Catherine C. Clark PLLC was not involved in this matter at the trial court level but rather, is appellate counsel.

Webb/SAM did not respond. On May 7, 2009, the trial court granted the Compel Motion and ordered SAM to “immediately make their records available” (“Compel Order”).<sup>3</sup>

**3. A Third Attorney Withdraws from Representing Webb/SAM**

On May 12, 2009, less than a month before the schedule June 8, 2009 trial date, Ms. Massa filed a Notice of Intent to Withdraw with an effective date of May 29, 2009. CP 741-742. The HOA objected. CP 872-873. Ms. Massa replied arguing that she had not represented herself as trial counsel and claimed that Webb/SAM did not have any resources to pay for additional legal fees. CP 881.

**4. The Court Imposes Discovery Sanctions on Webb/SAM for Failure to Answer the Discovery Requests**

Also on May 12, 2009, the HOA filed a motion seeking discovery sanctions against Webb/SAM including striking its answer (“Sanction Motion”). CP 390-401. The basis for the motion was Webb/SAM's willful withholding of responsive documents based not only on the refusal to provide documents but Mr.

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<sup>3</sup> A supplemental designation of clerk's papers has been made to transmit this order to this Court.

Webb/SAM's failure to respond to deposition questions and its failure to comply with the Compel Order. CP 403-414. Webb/SAM did not respond to the Sanction Motion. On May 26, 2009, the trial court granted the Sanction Motion and ruled that Webb/SAM was in default ("Sanction Order"). CP 690-692. The court stated:

Based upon the above findings and pursuant to CR 26(e)(4) and CR 37(d), the Court grants Plaintiff's motion for sanctions and it is hereby ordered that a default be entered on all claims of the Plaintiff, and that further proceedings be conducted to determine only the amount of the damages to be awarded to the Plaintiff.

CP 691. No trial on the merits was held.

Additionally, on May 12, 2009, the HOA brought a motion to compel and for contempt against Mr. Webb/SAM, individually based on his failure to comply with a subpoena served upon him. CP 866-871. As with the Sanction Motion, the HOA pointed out to the court that Mr. Webb failed to answer 80 questions put to him at his deposition and walked out of it before it was completed. CP 871. Mr. Webb refused to answer even the simplest questions relating to these documents as the following exchange at his deposition indicates:

Q: And who were the people trying to recover electronic documents?

A: I'm not going to answer that.

Q: Of the boxes you're trying to locate, where are those boxes?

A: I'm not going to answer that.

CP 388, Line 25 through CP 389, Line 5.

On May 19, 2009, the HOA made a motion to exclude Webb/SAM's witnesses and exhibits based not only on their failure to answer the Discovery Requests but also based on the failure to identify witnesses in a primary or supplemental witness disclosure as required by the trial court's scheduling order. CP 419-429.

Webb/SAM did not oppose this motion.

On May 20, 2009, Webb/SAM, through its present counsel, Mr. Theodore J. Angelis of K&L Gates LLP, filed an opposition to the motion to compel and for contempt against Mr. Webb as an individual. CP 899-901. The basis for the opposition was that Mr. Webb had not been properly served with the subpoena, which also did not seek the production of documents from him, and therefore the motion should be denied. With regard to Mr. Angelis' participation in the case, his appearance was apparently limited solely to responding to the motion against Mr. Webb as an individual. CP 902. The HOA filed a reply disagreeing with Webb/SAM's contentions. CP 941-944. The trial court did not enter an order on this motion.

## **5. The HOA Moves for Default**

On May 29, 2009, the HOA moved for default against Webb/SAM ("Default Motion"). CP 1076-1083. The basis for the motion was not only the fact that Webb/SAM had failed to comply with the Compel Order and the Sanction Order but also the PSJ Order wherein it granted the HOA's motion and held that \$1,713,282.00 was the amount necessary to repair the costs of the breaches of the implied warranties contained in RCW 64.34.445(2). CP 703-708. The HOA also sought an award of attorneys fees in the amount of one third of the total recover and costs in the amount of \$93,606.93 for a total amount of \$510,603.52. CP 1080.

In support of the Default Motion, the HOA submitted another Declaration of Keith Soltner ("2d Soltner Dec."; CP 1097-1118) and another Declaration of Brian Johnson ("2d Johnson Dec."; CP 1084-1096). Mr. Johnson, who also submitted a declaration in support of the PSJ Motion (CP 137-139) again stated in support of the Default Motion that the cost of the repairs for the breaches of the implied warranties was \$1,713,282.00. CP \_\_\_\_.

## **6. Judgment is Entered Against Webb/SAM**

On June 22, 2009, Mr. Angelis and Mr. Athan E. Tramountanas of K&L Gates substituted as counsel for Ms. Massa

for Webb/SAM. CP 1119-1121. On June 23, 2009, the trial court entered an amended order to show cause directing the parties to appear to advise the court as to why a default judgment should not be entered and attorneys fees and costs should not be awarded against Webb/SAM ("Show Cause Order"). CP 430-431. On June 29, 2009, Webb/SAM filed a response to the Default Motion contesting the amount of and methodology of the HOA's claim for attorneys fees and costs. CP 1122-1132. Webb/SAM did not contest the entry of judgment on the principal amount claimed for \$1,713,282.00 but reserved its right to appeal. On July 1, 2009, the trial court entered a judgment against Webb/SAM in the principle amount of \$1,713,282.00 ("Judgment"). CP 694-695. The trial court further stated:

Plaintiff may move to present an amended additional judgment against defendant for attorneys fees, expenses and other taxable costs plus other out of pocket repair costs and investigation costs and the court will consider briefing on those matters at a later hearing. Plaintiff may also move to reduce previously ordered sanctions against defendant to judgment.

CP 695. On July 13, 2009, the HOA made a motion for attorney fees and expenses incurred in the case ("Fees Motion"). CP 432-443. Webb/SAM opposed the motion again contesting that the HOA's methodology was incorrect and the amount requested

should be reduced. CP 633-647. The HOA disagreed in reply. CP 667-671.

On August 7, 2009, the trial court entered Findings of Fact, Conclusions of Law and Order (“Findings/Conclusion”) on the Fees Motion. CP 721-730. It ordered that the following amounts be reduced to judgment:

Attorneys Fees:	\$141,948.12
Litigation expenses (experts)	\$62,826.79
Litigation expenses (costs)	\$2,971.85
Costs of repair	\$24,921.82
Sanctions	\$681.25.

CP 730. The court then entered an additional judgment against Webb/SAM for these amounts (“Additional Judgment”). CP 732-734. This appeal followed.

#### **IV. ARGUMENT**

##### **A. STANDARD OF REVIEW**

As there are seven different rulings before this Court<sup>4</sup> (five orders and two judgments) both the *de novo* standard of review and the abuse of discretion standard of review are applicable here.

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<sup>4</sup> The Amended Notice of Appeal lists the following as decisions from the trial court presented to this Court for review: The Judgment, the Additional Judgment, the CR 11 Order, the PSJ Order, the Reconsideration Order, the Sanction Order and the Findings/Conclusions. CP 696-734. The Compel Order has not been appealed.

## **1. Summary Judgment Orders are Reviewed *De Novo***

“An order granting summary judgment is reviewed de novo.”

*Alhadeff v. Meridian on Bainbridge Island, LLC*, \_\_\_ Wn.2d \_\_\_,  
\_\_\_ P.2d \_\_\_ (2009) WL 4070947.

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff “fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,” then the trial court should grant the motion.

(Citations and footnote omitted.) *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-226, 770 P.2d 182 (1989). Summary judgment will be affirmed if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(d); *Huff v. Budbill*, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000).

## **2. The Court's Other Orders are Reviewed for an Abuse of Discretion**

In *Magana v. Hyundai Motors*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2009 WL 4070952 (November 25, 2009, Docket No. 80922-

4)<sup>5</sup>, the Washington Supreme Court recently addressed the propriety of default as a sanction for discovery abuses. It stated:

We review a trial court's discovery sanctions for abuse of discretion. "A trial court exercises broad discretion in imposing discovery sanctions under CR 26(g) or 37(b), and its determination will not be disturbed absent a clear abuse of discretion." A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds." "A discretionary decision rests on 'untenable grounds' or is based on 'untenable reasons' if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is 'manifestly unreasonable' if 'the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'

(Citation and footnote omitted.) *Magana*, Slip Op. ¶20, p. 4 -5.

"The abuse of discretion standard is best applied when the trial court is in the best position to make a factual determination." *State v. Ortega*, 120 Wn. App. 165, 171, 84 P.3d 935 (2004), *review granted in part, case remanded on other grounds by* 154 Wn.2d 1031 (2005). Thus, as for the orders other than the summary judgment order, the abuse of discretion standard applies. *E.g. Lilly v. Lynch*, 88 Wn. App. 306, 321, 945 P.2d 727 (1997) (the

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<sup>5</sup> WEBB/SAM relied heavily on Division Two's opinion in *Magana v. Hyundai*, 141 Wn. App. 495, 170 P.3d 1165 (2008). The Supreme Court's opinion cited above overrules this Division Two case.

abuse of discretion standard of review applies to a denial of reconsideration).

## **B. THE HOA PROVED IT WAS ENTITLED TO SUMMARY JUDGMENT**

As is shown below, the HOA met its burden of showing that no genuine issues of material fact existed and that it was entitled to judgment as a matter of law.

### **1. The Rules of Construction of the Act Support the HOA**

Again, this action was brought under the Washington Condominium Act RCW 64.34. There are some general rules set forth in the WCA which are relevant here. RCW 64.34.030 provides:

Except as expressly provided in this chapter, provisions of this chapter may not be varied by agreement, and rights conferred by this chapter may not be waived. A declarant may not act under a power of attorney or use any other device to evade the limitations or prohibitions of this chapter or the declaration.

RCW 64.34.070 provides:

The principles of law and equity, including the law of corporations and unincorporated associations, the law of real property, and the law relative to capacity to contract, principal and agent, condemnation, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance, or other validating or invalidating cause supplement the provisions of this chapter, except to the extent inconsistent with this chapter.

RCW 64.34.090 provides: “Every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement.” RCW 64.34.100(1)<sup>6</sup> provides:

The remedies provided by this chapter shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. However, consequential, special, or punitive damages may not be awarded except as specifically provided in this chapter or by other rule of law.

With these rules in mind, the court did not err in granting the PSJ Motion.

**2. The PSJ Motion Was Brought under RCW 64.34.445(2), Implied Warranties Applicable to all Condominiums**

The HOA brought its PSJ Motion under RCW 64.34.445(2) which provides for the following implied warranties for condominiums:

A declarant and any dealer impliedly warrants that a unit and the common elements in the condominium are suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by such declarant or dealer will be:

- (a) Free from defective materials;

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<sup>6</sup> In *Satomi Owners Assoc. v. Satomi, LLC*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2009 WL 4985689 (December 24, 2009, Docket No. 80480-0, 80584-9 & 81083-4) the Washington Supreme Court held that subsection (2) of RCW 64.34.100 was pre-empted by the Federal Arbitration Act, 9 U.S.C.A. § 2. Any questions relating to the failed arbitration in this matter have not been presented to this Court and thus, *Satomi* does not affect the proceedings here.

- (b) Constructed in accordance with sound engineering and construction standards;
- (c) Constructed in a workmanlike manner; and
- (d) Constructed in compliance with all laws then applicable to such improvements.

In *Park Avenue Condo. Owners Assoc. v. Buchan*

*Development*, 117 Wn. App. 369, 71 P.3d 692, and reconsideration at 75 P.3d 974 (2003), this Court explained the two warranties contained in RCW 64.34.445(2); the first being the warranty of suitability and the second being the quality of materials and construction.

### **3. The Warranty of Quality Construction Applies to Webb/SAM as it Failed to Disclaim It**

As to the warranty of quality construction within RCW 64.34.445(2), this Court stated that it applies to work performed by the declarant or by any person before the creation of the condominium:

According to the legislative history, however, the warranty of *quality construction* was intended to overturn the old rule that a “professional seller of real estate makes no implied warranties of quality,”<sup>FN25</sup> and to provide broader protection than simple suitability:

The warranty as to quality of construction for improvements made or contracted for by the declarant ***or made by any person before the creation of the condominium*** is broader than the warranty of suitability. Particularly, it imposes liability

for defects which may not be so serious as to render the condominium unsuitable for ordinary purposes of real estate of similar type.<sup>FN26</sup>

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FN25: 2 SENATE JOURNAL, 51<sup>st</sup> Leg., Reg. Session, 1<sup>st</sup> & 2d Spec. Sess., at 2089 (Wash. 1990).

FN26: *Id.* at 2090.

(Emphasis added.) *Park Avenue*, 117 Wn. App. at 380.

Thus, the warranty of quality construction applies to all condominiums, whether they are converted structures or not, and to all construction relating to them whether performed by the declarant Webb/SAM, its agents, or not, as a matter of law. *Park Avenue*, 117 Wn. App. at 380.

While RCW 64.34.030 provides that generally the provisions of the Act may not be varied by agreement, the Legislature has provided a limited mechanism for a declarant to disclaim the implied warranty of quality construction contained in RCW 64.34.445(2) through RCW 64.34.450. In RCW 64.34.450, such implied warranties of quality may be excluded or waived or disclaimed. This Court has acknowledged this option in both *Park Avenue*, 117 Wn. App. at 376-377 and in *Marina Cove Condominium Owners Association v. Isabella Estates*, 109 Wn.

App. 230, 34 P.3d 870 (2001) *abrogated on other grounds as stated in Satomi Owners Ass'n v. Satomi, LLC.*

However, the record before this Court, and that presented to the trial court at the summary judgment hearing, does not contain any evidence or argument that Webb/SAM attempted to exclude or waive or disclaim any of these implied warranties as required by the statute as stated in RCW 64.34.450. Thus, as a matter of law, Webb/SAM is subject to the implied warranty of quality construction whether he performed the work or not.

**4. The Evidence Presented to the Trial Court Supports a Finding that Webb/SAM Violated the Implied Warranty of Suitability**

At page 12 of the Appellant's Brief Webb/SAM argues that the warrant of suitability is not before this Court. This is not correct. First, it was plead in the complaint as a claim for relief. CP \_\_\_\_\_. Second, the PSJ Motion was made based on RCW 64.34.445(2) which includes both the warranty of suitability and the warranty quality construction. Third, if the court is not inclined to agree, then RAP 2.5(a) specifically authorizes this Court to consider the argument as an additional ground for affirming the trial court.

A party may present a ground for affirming the trial court decision which was not presented to the trial court if the

record has been sufficiently developed to fairly consider the issue.

RAP 2.5(a); *Home Realty Lynnwood, Inc. v. Walsh*, 146 Wn. App. 231, 240, 189 P.3d 253 (2008). If an issue is “arguably related” to issues raised in the trial court, a court may exercise its discretion to consider newly-articulated theories for the first time on appeal. *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, 160 P.3d 1089 (2007). Here, as is shown below, the HOA sufficiently developed the record for this Court to consider the warranty of suitability.

RCW 64.34.445(2) again provides: “A declarant and any dealer impliedly warrants that a unit and the common elements in the condominium are suitable for the ordinary uses of real estate of its type.” In *Park Avenue*, this Court stated:

The WCA warranty of *suitability* is a standard of ordinary use (“suitable for the ordinary uses of real estate of its type”<sup>FN 23</sup>) and thus resembles the UCC warranty of merchantability, that goods are suitable for the ordinary purposes for which they are used.<sup>FN 24</sup>

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FN23: RCW 64.34.445(2)

FN24: RCW 64.34.445(2); UCC §2-314; RCW 62A.2-314.<sup>7</sup>

*Park Avenue*, 117 Wn. App. at 379-80. The warranty of suitability thus only “resembles” the warranty of merchantability as Washington courts recognize that real estate is unique and therefore not a fungible good. *E.g. Carpenter v. Folkerts*, 29 Wn. App. 73, 76, 627 P.2d 559 (1981).

RCW 64.34.445(7)<sup>8</sup> sets forth the plaintiff’s obligations when claiming a violation of the implied warranties under RCW 64.34.445(2) as follows:

In a judicial proceeding for breach of any of the obligations arising under this section, the plaintiff must show that the alleged breach has adversely affected or will adversely affect the performance of that portion of the unit or common elements alleged to be in breach. As used in this subsection, an “adverse effect” must be more than technical and must be significant to a reasonable person. To establish an adverse effect, the person alleging the breach is not required to prove that the breach renders the unit or common element uninhabitable or unfit for its intended purpose.

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<sup>7</sup> RCW 62A.2-314 states that in order for a good to be merchantable, it “must be at least such as”: (a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and (e) are adequately contained, packaged, and labeled as the agreement may require; and (f) conform to the promises or affirmations of fact made on the container or label if any.

<sup>8</sup> The HOA specifically addressed the burden under RCW 64.34.455(7) at the summary judgment hearing. RP 12-14.

The evidence presented to the trial court easily meets this requirement and thus proves that the HOA was entitled to summary judgment as a matter of law:

The Act does not define “reasonable person”. The SECOND (RESTATEMENT) OF TORTS, §283 *Conduct of A Reasonable Man*:

*The Standard* Comment b states:

*Qualities of the “reasonable man.”* The words “reasonable man” denote a person exercising those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others. It enables those who are to determine whether the actor's conduct is such as to subject him to liability for harm caused thereby, to express their judgment in terms of the conduct of a human being. The fact that this judgment is personified in a “man” calls attention to the necessity of taking into account the fallibility of human beings.

Again, for example, Mr. Soltner identified the following general issues with the Property: (1) water leaking from the windows causing mold, decaying wood and framing components; (2) conversion work was not completed per applicable codes; (3) electrical systems and components were not installed per applicable codes. CP 126-136. Webb/SAM do not disagree that these conditions did not exist, rather it claims only that it is not responsible for them.

A reasonable person would conclude that these three conditions (apart from the others proven) would “affect the performance of that portion of the unit or common elements alleged to be in breach” as outlined by RCW 64.34.445(7). The law reports the long recognized hazards of mold growth by way of health problems and property damage. *E.g. Westlake View Condo. Ass'n v. Sixth Ave. View Partners, LLC*, 146 Wn. App. 760, 193 P.3d 161 (2008) (property damage); *Toxic Mold in Residences & Other Buildings; Liability & Other Issues*, 114 A.L.R.5<sup>th</sup> 397. The failure to comply with applicable building codes subjects a property owner not only to a code enforcement action but also monetary sanctions and a potential criminal offense under the Des Moines Municipal Code. DMMC §14.04.210; DMMC Ch. 1.24. Such concern of course is separate from whether electricity is properly provided to the Building and the units here, which it has not been.

These uncontested facts clearly prove that the Building is not suitable under both RCW 64.34.445(2) and 64.34.445(7). A reasonable person would easily conclude that adverse effects exist as a result of these conditions. Summary judgment in the HOA's favor was proper.

## **5. The Proper Measure of Damages was the Cost of Repair**

At the summary judgment hearing, the HOA argued that the proper measure of damages was the cost of repair under RCW 64.34.445(8). RP 14-21. The statute provides:

Proof of breach of any obligation arising under this section is not proof of damages. Damages awarded for a breach of an obligation arising under this section are the cost of repairs. However, if it is established that the cost of such repairs is clearly disproportionate to the loss in market value caused by the breach, then damages shall be limited to the loss in market value.

The HOA provided the Soltner Dec. (CP 126-136) and the Declaration of Brian Johnson (CP 137-149) outlining the cost of repair at \$1,710,282.00 and claimed that this was the proper basis for damages. RP 14-21. At that point, the burden shifted to Webb/SAM to establish that the cost of these repairs was clearly disproportionate to the loss in market value caused by the claimed breach of implied warranties under RCW 64.34.445(2). RCW 64.34.445(8).

Webb/SAM did not provide any evidence or argument challenging the HOA's position on damages under RCW 64.34.445(8) either at the trial court or in this Court. Thus, this Court need not consider this issue. RAP 2.5(a); *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992) (issues not brought to the attention

to the lower courts and not briefed before the appellate court are not considered).

**D. THE TRIAL COURT DID NOT ERR IN IGNORING WEBB/SAM'S RESPONSE TO THE PSJ MOTION**

With regard to the PSJ Motion, the trial court did not consider Webb/SAM's documents submitted in opposition as they are not listed in the PSJ Order which is consistent with the trial court's statement from the bench that the documents would not be considered. RP 30-31;CP 680. CR 56(h) requires that a summary judgment order "designate the documents and other evidence called to the attention of the trial court". As is shown below, the trial court did not err in not considering Webb/SAM's opposition documents.

**1. There is No Evidence in the Record that Webb/SAM is The Sole Officer, Director and/or Shareholder of SAM**

In the Reconsideration Order, the trial court stated:

The Partial Summary Judgment upon which the Motion to Reconsider is based applies only to the Defendant LLC which under Washington Law may not proceed *pro se* in this matter.

Finding No. 2, CP 687Webb/SAM contends that Mr. George Webb should have been able to represent it as a "Designated Representative". The general rule is that a corporation may not

represent itself in a court of law is a long held rule in Washington State. *Finn Hill Masonry, Inc. v. Dep't of Labor & Industries*, 128 Wn. App. 543, 116 P.3d 1033 (2005); *Lloyd Entr., Inc. v. Longview Plumbing & Heating, Co.*, 91 Wn. App. 697, 701, 958 P.2d 1035 (1998), *rev. denied*, 137 Wn.2d 1020 (1999). There are some exceptions to this rule such as certain administrative proceedings (WAC 263-12-020(3)) and other proceedings where the practice is specifically authorized. See generally *Propriety & Effect of Corporations Appearance Pro Se Through Agent Who Is Not Attorney*, 8 A.L.R.5<sup>th</sup> 653.

Washington State also recognizes an exception to the general rule and has permitted an individual who is the sole officer, director and shareholder of a corporation to represent that entity in a court of law. In *Willapa Trading Co., Inc. v. Muscanto, Inc.*, 45 Wn. App. 779, 786-787, 727 P.2d 687 (1986), this Court stated:

While it may be somewhat unusual, we find no abuse of discretion in permitting Wheeldon to appear on his own behalf and for Willapa Trading Co., Inc., a corporation. Wheeldon was the president, director, and sole stockholder of Willapa. In acting for Willapa, he was, in fact, acting on his own behalf. No financial interests other than Wheeldon's were involved. Furthermore, the record reflects that Wheeldon sought permission from the court to appear for himself and his wholly-owned corporation. If granting that permission was error, it was invited error, which he cannot now use to gain relief on appeal.

(Citation omitted.) *Willapa Trading Co., Inc.*, at 786-787.

In this case, however, the record before the court at summary judgment does not reflect who the members and managers of SAM were. There is no evidence in the record that Mr. Webb was acting on his own behalf or that his own financial interests were involved in this matter. Thus, there is no record before this Court on which it could apply the exception set forth in *Willapa Trading*. The trial court did not err in so holding in refusing to allow Mr. Webb to represent SAM. It further did not err in assessing CR 11 sanctions against him as no factual basis for this argument was presented to the trial court.

## **2. Webb/SAM Failed to Comply with the Applicable Civil Rules**

Even if this Court allowed Mr. Webb to represent SAM, the submissions made by him were grossly untimely. *Pro se* litigants must follow the rules of law and court rules—they are not subject to a different standard than practicing attorneys.

*Pro se* litigants are held to the same standard as practicing attorneys. Although functioning *pro se* through most of these proceedings, Petitioner—not a member of the bar—is nevertheless held to the same responsibility as a lawyer and is required to follow applicable statutes and rules.

*In re Connick*, 144 Wn.2d 442, 455, 28 P.3d 729 (2001).

As an additional basis to support the trial court's decision not to consider the Webb/SAM opposition papers at summary judgment, these documents were not submitted until the day before hearing. CR 56(c) provides that such documents should have been filed and served on the HOA eleven days before the scheduled hearing. Here, they were filed on February 19, 2009 (the day before the scheduled hearing on February 20, 2009) but not served on the HOA's counsel. CP 197-198; 252-253. Thus, the HOA was deprived of its opportunity to respond to them as outlined by CR 56(c). The trial court properly disregarded Webb/SAM's opposition papers. As such, there was no opposition properly before the court and it was thus presented with an unopposed motion.

**D. WEBB/SAM'S RESPONSE DID NOT MEET THE EVIDENTIARY REQUIREMENTS SUFFICIENT TO DEFEAT THE HOA'S SUMMARY JUDGMENT MOTION**

As stated above, Webb/SAM is held to the same standards as attorneys. *In re Connick*, 144 Wn.2d at 455. Even if this Court were to consider Webb/SAM's submissions in opposition to the PSJ Motion, it still failed to meet the legal requirements needed to defeat it.

**1. Webb/SAMS Submissions Failed to Meet the Summary Judgment Standard Imposed on Responding Parties**

As a matter of law, the HOA met its burden on summary judgment. The burden then shifted to Webb/SAM as follows:

In making this responsive showing, the nonmoving party cannot rely on the allegations made in its pleadings. CR 56(e) states that the response, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

*Young*, 112 Wn.2d at 225-226.

This standard of review does not mean that an appellant gets a second bite at the apple on appeal. RAP 9.12 addresses this point in particular and provides in relevant part:

On review of an order granting or denying a PSJ Motion the appellate court will consider only evidence and issues called to the attention of the trial court.

The Appellate Courts of this State regularly refuse to consider issues not raised at the trial court. *E.g. Nelson v. McGoldrick*, 127 Wn.2d 124, 896 P.2d 1258 (1995); *Southcenter View Condominium Owners' Ass'n v. Condominium Builders, Inc.*, 47 Wn. App. 767, 736 P.2d 1075 (1986) (factual allegations raised in appellate brief did not preclude summary judgment where unsupported in trial court record), *review denied*, 107 Wn.2d 1028 (1987).

The purpose of the limitation in RAP 9.12 is to effectuate the rule that the appellate court engages in the same inquiry as the trial court on review of summary judgment.

*Washington Fed'n of State Employees Coun. v. Office of Fin. Mgt.*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993). Furer, RAP 2.5(a), provides: "the appellate court may refuse to review any claim of error which was not raised at the trial court."

Here, the majority of the Appellants' Brief raises new arguments and which Webb/SAM did not present to the trial court. Consequently, the majority of their argument is not properly before this Court and should not be considered by it.

**2. The Schellberg Declaration Does Not Meet the Requirements Necessary to Defeat a Summary Judgment Motion**

Webb/SAM based its opposition to the PSJ Motion in part on the Declaration of Donald Schellberg. CP 259-260. With regard to the Schellberg Declaration, the trial court found in the Reconsideration Motion:

Nonetheless, the Court reviewed the Defendants Response to the Plaintiff's PSJ Motion submitted for the first time by counsel in support of its Motion to Reconsider. The declarations submitted therewith fail to provide information based on sworn personal knowledge to support 1) that Donald Schellberg is qualified to testify to matters contained in Exhibit 1 to his declaration; 2) that the matters contained in said Exhibit 1 are themselves sworn under oath; 3) that Schellberg's "investigation" was sufficient to support the statements in his declaration. Further, the Declaration of

George Webb in support of Defendant's Motion to Reconsider and Response to Plaintiff's Partial PSJ Motion concluding that there are material issues of fact in this case is insufficient to support a finding of the existence of material issues of facts.

CP 687-688. Webb/SAM do not challenge this finding in the Appellant's Brief either by way of an assignment of error or argument. As is shown below, trial court did not err in refusing to consider the Schellberg Dec. As is shown below, it is insufficient as a matter of law to withstand the PSJ Motion.

CR 56(e) addresses the form of affidavits submitted in support of or in opposition to summary judgment motions and provides in relevant part:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Further, Washington Practice advises:

When presenting expert opinion in an affidavit or declaration, counsel should take care to include a statement of the expert's qualifications, and any other foundational facts that would be necessary if the expert were testifying at trial. *Lilly v. Lynch*, 88 Wash. App. 306, 945 P.2d 727 (Div. 2 1997) (portion of affidavit properly refused because expert's qualifications were not sufficiently established); *Doherty v. Municipality of Metropolitan Seattle*, 83 Wash. App. 464, 921 P.2d 1098 (Div. 2 1996) (same).

15A WASHINGTON PRACTICE § 25.9 *Affidavits and declarations – Expert opinion.*

ER 705, allowing an expert to express an opinion without first explaining the basis for that opinion, does not apply to summary judgment proceeding. In a summary judgment proceeding, if an expert's opinion is offered in the form of an affidavit or declaration, the factual basis for that opinion must also be explained in the Webb/Same document. If it is not, the expert's opinion will not be considered. *Anderson Hay & Grain Co., Inc. v. United Dominion Industries, Inc.*, 119 Wash. App. 249, 76 P.3d 1205 (Div. 3 2003).

15A WASHINGTON PRACTICE § 25.9.

In *Lilly v. Lynch*, 88 Wn. App. 306, 945 P.2d 727 (1997), the court disregarded a portion of a declaration of a surveyor offered in opposition to a PSJ Motion in boundary line dispute case. The court stated:

An expert's affidavit submitted in opposition to a PSJ Motion must be factually based and must affirmatively show that the affiant is competent to testify to the matters stated therein. The opinion of an expert that is only a conclusion or that is based on assumptions does not satisfy the summary judgment standard.

(Citations omitted.) *Lilly*, at 320. When analyzing the challenged declaration, the court stated:

Wagner does not state how he came to his conclusion in the first sentence, and upon what facts it was based. Nor does Wagner state how he is qualified to make the determination recited in the second sentence. His affidavit states that he is "Director of Surveys working for ACE Inc." He does not explain how he is qualified to determine whether a structure is an attribute of certain property. The trial court did not abuse its discretion when it struck these two sentences.

*Id.* Mr. Schellberg's declaration is similarly deficient. He first states:

I am an expert in the above-entitled action. I am of legal age, have personal knowledge of the testimony contained in this declaration, and am otherwise competent to testify.

CP 259. No copy of Mr. Schellberg's resume or *curriculum vitae* is attached to his declaration nor referenced therein. He does not recite his experience, his education or what his profession is. The trial court did not err in finding:

The declarations submitted therewith fail to provide information based on sworn personal knowledge to support 1) that Donald Schellberg is qualified to testify to matters contained in Exhibit 1 to his declaration ...

CP 688. Further, the trial court stated in its Reconsideration Order:

The declarations submitted therewith fail to provide information based on sworn personal knowledge to support ... 2) that the matters contained in said Exhibit 1 are themselves sworn under oath ...

CP 688. Exhibit 1 attached to the Schellberg Declaration a copy of Mr. Schellberg's July 24, 2008 scope of repairs for the property.<sup>9</sup>

CP 259. The trial court was and is correct; Mr. Schellberg nowhere states that the content of his July 24, 2008 report is submitted under oath. It is further interesting to note that the July 24, 2008 report in the record is a "draft" document as indicated by the

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<sup>9</sup> Actually, the document is attached to Webb/SAM's brief in opposition to the HOA's PSJ Motion. CP 222-251. Relative to Mr. Schellberg's July 28, 2008 report (CP 287-302), at Page 9, n.6 of the Appellants Brief, Webb/SAM states that it is not relevant to this appeal.

watermark contained on each page. CP 222-251. Again, the trial court did not err.

The trial court then went on to say:

The declarations submitted therewith fail to provide information based on sworn personal knowledge to support ... 3) that Schellberg's "investigation" was sufficient to support the statements in his declaration.

Mr. Schellberg does not explain what, if any, inspection of the property he conducted. He does not state what documents he reviewed and in fact nowhere does he state that he reviewed the construction documents on file with the City of Des Moines or other construction documents of any kind. The reports attached as exhibits do not recite such foundational facts but only reach conclusions regarding what repairs are appropriate to be made in his opinion and those which are not in his mind. Mr. Schellberg states he only reviewed the HOA's expert reports and scope of repairs. He does not say that he has reviewed the construction documents like Mr. Soltner did. There is no expressed foundation for any differentiation between what work he claims was performed by Webb/SAM and what was not and thus the declaration violates

CR 56(e)<sup>10</sup>. The Schellberg Dec. was properly disregarded by the trial court and should be by this Court as well.

**3. The 2d Webb Declaration Does Not Evidence a Genuine Issue of Material Fact**

Mr. Webb states in his second declaration:

I was involved in the conversion project in a management capacity on behalf of the Defendant. I have reviewed the inspection report and declaration prepared by Donald Schellberg and believe them to be accurate. There are disputes of material fact in every section of the reports prepared by the experts for Plaintiff and for Defendant. **Each of these disputes of material fact must be addressed and are not able to be adequately addressed in a summary judgment hearing**, which is why I support the Defendants opposition to the PSJ Motion.

(Emphasis added.) CP 261-262. In the Reconsideration Order, the trial court found:

... the Declaration of George Webb in support of Defendant's Motion to Reconsider and Response to Plaintiff's Partial Summary Judgment Motion concluding that there are genuine issues of material fact in this case is insufficient to support a finding of the existence of materials [sic] issues of facts [sic].

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<sup>10</sup> The rule provides in relevant part:

When a PSJ Motion is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, **must set forth specific facts** showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

CP 711-712.

The trial court did not err. First, and again, the 2d Webb Dec. does not meet the evidentiary standards set forth in CR 56(e) as Mr. Webb failed to set forth specific facts in contention. Second, Mr. Webb's statement "Each of these disputes of material fact must be addressed and are not able to be adequately addressed in a summary judgment hearing" is actually an admission that there are no genuine issues of material fact presented in the summary judgment paperwork as that is exactly what Webb/SAM were obligated to do under CR 56. The 2d Webb Declaration is an admission that Webb/SAM cannot meet its burden as a matter of law.

**E. WEBB/S AM DOES NOT MAKE ANY ARGUMENT UNDER CR 59**

While the Reconsideration Order was included in the Notice of Appeal and the Amended Notice of Appeal, Webb/SAM do not devote any argument that the court abused its discretion in entering it under CR 59. It is thus an issue not properly before this Court. RAP 10.3; *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290, *review denied*, 136 Wn.2d 1015 (1998) ("... passing

treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.”).

**F. A DISCOVERY CONFERENCE OCCURRED – THE ENTRY OF THE ORDER ON DISCOVERY SANCTIONS WAS PROPER**

At Page 40-41 of the Appellant’s Brief, Webb/SAM complain that a discovery conference was not held regarding the HOA’s Default Motion and thus the trial court was divested of jurisdiction to hear the motion. It thus asks this Court to vacate the default order and resulting judgments.

Webb/SAM failed to bring this issue to the attention of the trial court in its response to the HOA’s Default Motion. CP 1122-1132. It is thus not properly before this Court. RAP 9.12. Rather, in that opposition paperwork, Webb/SAM argued whether attorney’s fees and costs were appropriately entered against it and also stated that judgment was properly entered against it under CR 58. CP 1131, Line 5. Further, Webb/SAM did not contest the entry of the judgment based on the trial court’s SJ Order and Reconsideration Order. CP 1131.

**G. THE ENTRY OF JUDGMENT AGAINST WEBB/SAM WAS PROPER**

In reviewing a default judgment by the trial court, the following standard must be met.

... since the trial court is in the best position to decide an issue, deference should normally be given to the trial court's decision. *Fisons*, 122 Wash.2d at 339, 858 P.2d 1054. A trial court's reasons for imposing discovery sanctions should "be clearly stated on the record so that meaningful review can be had on appeal." *Burnet v. Spokane Ambulance*, 131 Wash.2d 484, 494, 933 P.2d 1036 (1997). If a trial court's findings of fact are clearly unsupported by the record, then an appellate court will find that the trial court abused its discretion. *Mayer*, 156 Wash.2d at 684, 132 P.3d 115. An appellate court can disturb a trial court's sanction only if it is clearly unsupported by the record. See *Ermine v. City of Spokane*, 143 Wash.2d 636, 650, 23 P.3d 492 (2001) (noting that a reasonable difference of opinion does not amount to abuse of discretion).

(Footnote omitted.) *Magana*, Slip Op. ¶¶20-21 p. 4 -5. As is shown below, WEBB/SAM has failed to meet its burden of proof.

### **1. Default Was an Appropriate Sanction**

Webb/SAM complains that a default judgment was not appropriate against it as the record does not support a finding of willfulness by the trial court. Appellant's Brief, pp. 45-47. This is incorrect.

If a trial court imposes one of the more "harsher remedies" under CR 37(b), then the record must clearly show (1) one party willfully or deliberately violated the discovery rules and orders, (2) the opposing party was substantially prejudiced in its ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would have sufficed. *Burnet*, 131 Wash.2d at 494, 933 P.2d 1036. "The purposes of sanctions orders are to deter, to punish, to compensate and to educate." *Fisons*, 122 Wash.2d at 356, 858 P.2d 1054.

*Magana*, 220 P.3d at 198. Further,

What the record shows is that Webb/SAM hired and apparently was fired by three separate lawyers until three weeks before trial when Mr. Angelis appeared. It shows that Webb/SAM continually argued that it did not have the financial resources to defend this action or participate in the arbitration it demanded. It shows that Webb/SAM did not provide timely answers to the Discovery Requests, that it did not respond to the Motion to Compel and that it did not respond to the Sanction Motion all of which formed a basis for the Motion for Default. Further, Webb/SAM did not comply with the Compel Order or the Sanction Order<sup>11</sup>. Such conduct is obviously willful. "A party's disregard of a court order without reasonable excuse or justification is deemed willful." *Magana*, 220 P.3d at 198. The record supports the courts findings.

The HOA is clearly prejudiced. Webb/SAM failed to provide any documents in response to the Discovery Requests. When asked at deposition regarding the location of documents which could be located, Mr. Webb simply refused to answer. This willful conduct clearly prejudiced the HOA as it was unable to obtain the

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<sup>11</sup> In this Court, Webb/SAM has not appealed from the Compel Order and the Sanction nor does it offer any evidence that it complied with these orders. Rather, it only contends that a default judgment should not have been entered against it.

basic discovery it sought in preparation for the then fast approaching trial. The trial court did not abuse its discretion in entering the Judgment as a default.

## **2. The Judgment Was Properly Entered Based on the PSJ Order**

As an additional basis to affirm the trial court, entry of judgment based on the PSJ Order would have also been proper. The Judgment was properly entered against Webb/SAM.

## **H. THE TRIAL COURT PROPERLY ENTERED THE AMENDED JUDGMENT**

At Pages 47-48 of the Appellant's Brief, Webb/SAM contend that the HOA's Motion for Attorneys Fees and Costs (CP 432-443) was untimely as at it claims that it was made on July 14, 2009, more than ten days after the entry of the Judgment on July 1, 2009. CP 633-647. The cited basis for this argument is CR 54(d)(1), CR 54(d)(2) and CR 59(h). The HOA does not disagree that this ten day requirement is imposed by these rules. However, as pointed out by the HOA, an agreement was made in open court as follows: "Plaintiffs suggested filing the petition within 30 days [from the date of the Judgment July 1, 2009], and the court and Defendant's counsel agreed." CP 668. Nowhere in the record or in its opening brief does Webb/SAM contest this agreement. Here, the Fees

Motion was filed within that agreed upon thirty day period on July 13, 2009.

Additionally, Webb/SAM does not set forth how it was prejudiced by the filing of the Fees Motion on July 13, 2009. Finally, Webb/SAM does not cite a case in which a Washington court (or any other court) vacated or otherwise reversed the entry of a judgment based on the 10 day requirement set out in CR 54(d)(1), CR 54(d)(2) or CR 59(h). Of course to do so would violate CR 1, which requires that the Civil Rules be construed "to secure the just, speedy and inexpensive determination of every action." The trial court did not abuse its discretion in entering the Additional Judgment.

As Webb/SAM further failed to assign error to any of the Findings of Fact contained in the Findings & Conclusions on Attorneys Fees, those findings are verities in this Court. RAP 10.3(a)(4). As Webb/SAM has not made any argument that the Conclusions of Law are not supported by the Findings of Fact, the issue is not before this Court. The entry of the Amended Judgment was thus proper as a matter of law and should not be disturbed by this Court.

## **I. THE HOA IS ENTITLED TO ITS ATTORNEYS FEES ON APPEAL**

Pursuant to RAP 18.1, the HOA requests its attorneys fees and costs on appeal under RCW 64.34.455 which provides:

If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award reasonable attorney's fees to the prevailing party.

For the above stated reasons, the HOA is the prevailing party below and in this Court. It is entitled to an award of its fees.

## **VI. CONCLUSION**

Since at least 1829, it has been acknowledged that the practice of law is a demanding vocation.

This metaphor for the sometimes quixotic pleasures of the practice of law can be traced to Supreme Court Justice Joseph Story, that the law "is a jealous mistress and requires a long and constant courtship. It is not to be won by trifling favors but by lavish homage." Joseph Story, Inaugural Address as Dane Professor of Law at Harvard University, on the subject of the Value and Importance of Legal Studies (Aug. 5, 1829), in JOHN BAROTLETT, FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE 447 (Emily Morison Beck ed., Little Brown & Co.1980).

*Stevens v. Meaut*, 264 F.Supp.2d 226, 227 n.1 (E.D.Pa.,2003). It is further commonly held that one who represents oneself ... well,

Justice Blackmun said it best in his dissent in *Faretta v. California*,  
422 U.S. 806, 45 L.Ed.2d 562, 95 S. Ct. 2525 (1975):

If there is any truth to the old proverb that 'one who is his own lawyer has a fool for a client,' the Court by its opinion today now bestows a constitutional right on one to make a fool of himself.

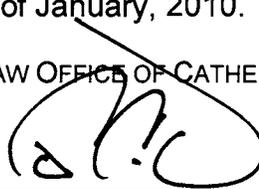
*Id.* at 852.

SAM's troubles fall squarely on Mr. Webb. He holds himself out as one and the same with SAM, has hired four separate law firms to represent SAM and/or himself personally in this matter; he has refused to provide any responses to discovery requests, he refused to answer even the simplest of deposition questions, he vociferously argues that he has the right to represent SAM but then fails to provide a response within the requirements of the law to the PSJ Motion and other motions he simply ignored. SAM has been done in by Mr. Webb as is show above, *passim*.

The trial court should be affirmed in all respects.

Dated this 25<sup>th</sup> day of January, 2010.

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**Certificate of Service**

I hereby certify that I caused the foregoing document to be served upon the below named individual in the identified manner this 25th day of January, 2010

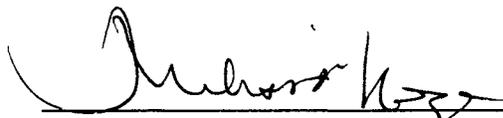
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