

72420-7

72420-7

FILED
Feb 02, 2015
Court of Appeals
Division I
State of Washington

NO. 72420-7

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

C&K REMODEL, INC.
and WESCO INSURANCE COMPANY,

Appellants,

v.

KIMBERLY GALE,

Respondent.

APPELLANT C&K REMODEL, INC.'S OPENING BRIEF

Francis S. Floyd, WSBA No. 10642
Amber L. Pearce, WSBA No. 31626
FLOYD, PFLUEGER & RINGER, P.S.
200 West Thomas Street, Suite 500
Seattle, WA 98119
Tel. 206-441-4455

Of Attorneys for Appellant C&K
Remodel, Inc.

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR..... 2

III. ISSUES PERTAINING TO ASSIGNMENTS OF
ERROR.....2

IV. STATEMENT OF THE CASE.....3

A. Gale Hired C&K to Repair Flooding Damage in Her
Home.....3

B. Gale Filed Suit Against C&K Remodel, Inc. and its
Bonding Company6

C. C&K Appeared, its Owner Had Two Deaths in His Family;
and C&K Withdrew6

D. Gale Moved for Default; C&K filed its Answer Before the
Hearing8

E. On July 2, Gale Moved to Shorten Time and Strike C&K’s
Answer on July 3.....10

F. The Trial Court Shortened Time, Struck C&K’s Answer,
Entered Default, and Entered Judgment Against C&K.....12

G. The Trial Court Denied C&K’s Motion to Set Vacate the
Default Judgment15

V. ARGUMENT.....17

A. Court Rules Are Reviewed De Novo and the Imposition
of Sanctions is reviewed for Abuse of Discretion.....17

B.	The Trial Court Abused Its Discretion by Not Giving C&K Time to Cure Its Deficient Answer, Pursuant to CR 11(a).....	17
C.	The Standard of Review Is Abuse of Discretion for a Motion to Vacate a Default Judgment.....	22
D.	Inferences of a <i>Prima Facie</i> Defense Are Viewed Most Favorably to the Moving Party-Here Appellant C&K.....	24
E.	Defendant C&K Has a Meritorious Defense.....	25
	i. Breach of Contract and Negligence.....	25
	ii. Consumer Protection Act.....	28
F.	The Failure to Timely Answer Was Due to Mistake, Excusable Neglect or Irregularity in Obtaining the Judgment.....	31
G.	C&K Acted With Due Diligence After Notice of the Default Judgment.....	33
H.	Gale Will Not Suffer a Substantial Hardship If the Default Judgment is Vacated.....	33
I.	The Trial Court Abused Its Discretion in Failing to Determine Gale’s “Actual” Damages Under the CPA.....	34
J.	The Trial Court Abused its Discretion by Not Segregating and Disallowing Attorneys’ Fees for Non-CPA Claims.....	36
K.	The Trial Court Abused Its Discretion By Not Determining the Reasonableness of Attorney’s Fees.....	38
VI.	CONCLUSION.....	40

TABLE OF AUTHORITIES

CASES

Attwood v. Albertson’s Food Ctrs., Inc.,
92 Wn. App. 326, 966 P.2d 351 (1998).....27

Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.,
140 Wn. App. 191, 165 P.3d 1271 (2007).....25

Biggs v. Vail,
124 Wn.2d 193, 876 P.2d 448 (1994).....17

Biomed Comm., Inc. v. Dep’t of Health,
146 Wn. App. 929, 193 P.3d 1093 (2008).....19, 20, 21

Birchfield v. Harford,
86 Wn. App. 259, 936 P.2d 48 (1997),
review denied, 135 Wn.2d 1011 (1998).....31

Boeing Co. v. Sierracin Corp.,
108 Wn.2d 38, 738 P.2d 665 (1987).....37

Bowers v. Transamerica Title Ins. Co.,
100 Wn.2d 675 P.2d 193 (1983).....39

Calhoun v. Merritt,
46 Wn. App. 616, 731 P.2d 1094 (1986).....33

Cook v. Seidenverg,
36 Wn.2d 256, 217 P.2d 799 (1950).....28

Dutch Village Mall v. Pelletti,
162 Wn. App. 531, 256 P.3d 1251 (2011),
review denied, 173 Wn.2d 1016 (2012).....21, 22

<i>Finn Hill Masonry, Inc. v. Dep't of Labor & Indus.</i> , 128 Wn. App. 543, 116 P.3d 1033 (2005), review denied, 156 Wn.2d 1032 (2006).....	20
<i>Griffith v. City of Bellevue</i> , 130 Wn.2d 189, 922 P.2d 83 (1996).....	21
<i>Griggs v. Averbek Realty, Inc.</i> , 92 Wn.2d 576, 599 P.2d 1289 (1979).....	23
<i>Ha v. Signal Elec., Inc.</i> , 182 Wn. App. 436, 332 P.3d 991 (2014).....	23, 24, 30
<i>Ivan's Tire Serv. Store, Inc. v. Goodyear Tire & Rubber Co.</i> , 10 Wn. App. 110, 517 P.2d 229 (1973), <i>aff'd</i> , 86 Wn.2d 513, 546 P.2d 109 (1976).....	39
<i>Johnson v. Cash Store</i> , 116 Wn. App. 833, 68 P.3d 1099 (2003), review denied, 150 Wn.2d 1020 (2003).....	24
<i>Little v. King</i> , 160 Wn.2d 696, 161 P.3d 345 (2007).....	24
<i>Lloyd Enter., Inc. v. Longview Plumbing & Heating Co.</i> , 91 Wn. App. 697, 958 P.2d 1035 (1998), review denied, 137 Wn.2d 1020 (1999).....	18, 20, 22
<i>Mason v. Mortgage Am., Inc.</i> , 114 Wn.2d 842, 792 P.2d 142 (1990).....	35
<i>Merritt v. Graves</i> , 52 Wn. 57, 100 P. 164 (1909).....	31, 33
<i>Morin v. Burris</i> , 160 Wn.2d 745, 161 P.3d 956 (2007).....	23

<i>Nordstrom, Inc. v. Tampourlos</i> , 107 Wn.2d 735, 733 P.2d 208 (1987).....	37, 38
<i>Pfaff v. State Farm Mut. Auto. Ins. Co.</i> , 103 Wn. App. 829, 13 P.3d 837 (2000), <i>review denied</i> , 143 Wn.2d 1021 (2001).....	30, 34
<i>Short v. Hoge</i> , 58 Wn.2d 50, 360 P.2d 565 (1961).....	28
<i>Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.</i> , 64 Wn. App. 553, 825 P.2d 714 (1992).....	35
<i>Smith v. Behr Process Corp.</i> , 113 Wn. App. 306, 54 P.3d 665 (2002).....	35, 38, 39
<i>Spokane County v. Specialty Auto & Truck Painting, Inc.</i> , 153 Wn.2d 238, 103 P.3d 792 (2004).....	17
<i>Travis v. Wash. Horse Breeders Ass'n, Inc.</i> , 111 Wn.2d 396, 759 P.2d 418 (1988).....	37
<i>White v. Holm</i> , 73 Wn.2d 348, 438 P.2d 581 (1968).....	23, 30

STATUTES

RCW 4.64.030.....	14
RCW 18.27.114.....	5
RCW 18.27.350.....	28
RCW 19.86.020.....	35
RCW 19.86.090.....	13, 14, 34, 35, 37, 38

RULES

CR 11.....Passim
CR 55.....23
CR 60.....23, 31
KCLR 7(b).....32

I. INTRODUCTION

This appeal results from a disturbing departure from Washington's well-settled precedence establishing that a trial court must allow a corporate entity reasonable time to cure a deficient Answer pursuant to CR 11(a). Here, the trial court either misinterpreted CR 11(a) or abused its discretion by striking Appellant C&K Remodel's *pro se* Answer, then immediately entering a default and default judgment against it. The trial court abused its discretion by refusing to set aside the default and vacate the default judgment.

The trial court committed further error by not segregating Plaintiff/Respondent Gale's Consumer Protection Act-based attorney's fees from her attorney's fees arising from other theories. Finally, the trial court erred by not determining the reasonableness of Gale's attorney's fees by applying the lodestar method. Instead, Gale submitted a line-item amount of her fees in her Amended Judgment, which the trial court summarily granted without any analysis.

Here, the trial court failed to exercise its authority "equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done." C&K Remodel respectfully requests that the Court reverse the trial court's numerous rulings and remand for a trial on the merits.

II. ASSIGNMENTS OF ERROR

The trial court erred in striking Defendant C&K's Answer; entering Default and Default Judgment against C&K; and not setting aside the Default and vacating the Default Judgment.

The trial court erred in failing to calculate and segregate the *actual* damages arising solely from Gale's Consumer Protection Act claim before awarding the maximum amount of treble damages under the CPA.

The trial court erred in awarding Plaintiff Gale's attorney's fees without first: (1) segregating those fees arising from CPA violations from other non-CPA theories; and (2) determining the reasonableness of those segregated fees?

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court commit a legal error or abuse its discretion by not allowing C&K Remodel, a corporate entity, reasonable time to cure its deficient Answer (*i.e.*, not signed by an attorney pursuant to CR 11(a)) before striking the Answer; entering Default; entering Default Judgment, then refusing to set aside the Default and vacate the Default Judgment? (Assignment of Error 1)

Did the trial court abuse its discretion when it did not segregate Gale's actual CPA damages from her non-CPA damages before awarding

her the maximum treble damages under the CPA of \$25,000.00?
(Assignment of Error 2)

Did the trial court abuse its discretion when it awarded Plaintiff Gale her attorney's fees without first: (1) segregating those fees earned from prosecuting the CPA claim from non-CPA theories; and (2) calculating the reasonableness of the CPA-based attorney's fees by applying the *Lindy* factors and lodestar method? (Assignment of Error 3)

IV. STATEMENT OF THE CASE

A. Gale Hired C&K to Repair Flooding Damage in Her Home.

Plaintiff/Respondent Kimberly Gale ("Gale") experienced a flood in her home resulting from a pressure surge in the City of Seattle's water line. (CP 214, ¶ 3) On January 28, 2013, Gale hired Defendant/Appellant C&K Remodel (C&K") to repair the flooding damage in her home. (CP 214, ¶ 2) When C&K started working, it discovered that previous contractors had performed faulty work that needed to be corrected first. (CP 171, ¶ 3) C&K attempted to repair the faulty work as best it could, and also worked extensively with Farmers Insurance, Gale's homeowner's insurer, to determine the type of repair work that Famers Insurance would cover under her policy. (CP 172, ¶ 3). Gale was paying C&K personally with a credit card for its work, with the expectation that Farmers would reimburse her later. (CP 172, ¶ 3).

A dispute developed between Farmers and Gale regarding how much of C&K's work would be covered under her homeowner's policy. (CP 172, ¶ 5) At the time of the dispute, Gale had already authorized over \$20,000 in payments to C&K on her credit card. (CP 172, ¶ 5)

In an effort to help Gale in her dispute, C&K's owner, Chris Greer, introduced her to his lawyer, Gerald Robison. She consulted with him about persuading Farmers to either cover the repair work or reimburse Gale for the work. (CP 172, ¶ 5; CP 227 at 17:7-11; CP 227 at 18:3-8) Mr. Greer paid Mr. Robison's retainer fee on behalf of Gale. (CP 172, ¶ 5)

Eventually, Gale decided that she did not want to pay C&K for all of the work that it had performed to date. (CP 172, ¶ 6) Gale placed a "stop payment" on the credit card payments to C&K that she had been previously authorized. (CP 172, ¶ 6) C&K stopped working on Gale's property on June 28, 2013. (CP 227 at 20:20-24; CP 262)

C&K then hired attorney Jeffrey N. Rupert solely for the purpose of placing a lien on Gale's property because she owed C&K approximately \$27,521.00 for work performed at the time that she stopped payment. (CP 172, ¶ 6) On September 24, 2013, Gale hired a new attorney who requested that Mr. Rupert voluntarily remove the lien because C&K did not serve Gale with the "Right to Lien Notice to

Customer” before commencing work as required by RCW 18.27.114. (CP 98; CP 226) C&K voluntarily released the lien. (CP 264)

On September 25, 2013, Gale’s counsel also advised Mr. Rupert that C&K was not a registered contractor with the Department of Labor & Industries (“L&I”) at the time it performed work on Gale’s residence, and was not bonded from April 17, 2012 to March 25, 2013. (CP 267)

In C&K’s 30(b)(6) deposition, Chris Greer, C&K’s owner and president, testified that C&K was, in fact, bonded between April 17, 2012 and March 25, 2013, but that the bond had not been delivered to L&I. (CP 229 at 27:14-21) The next bond, through Wesco Insurance, was received by L&I on March 25, 2013. (CP 229 at 27:4-9)

Mr. Greer also testified that he was unaware that L&I had suspended C&K’s license and registration. Mr. Greer found out from his new insurance agent, after the fact, that C&K’s license and registration had been suspended. (CP 229 at 28:2-13) However, the license, registration, and bond were all correctly up-to-date and filed with L&I for the remainder of C&K’s work on Gale’s residence—from March 26, 2013 to June 28, 2013, when Gale terminated the contract. (CP 227 at 20:20-24; CP 262)

B. Gale Filed Suit Against C&K Remodel, Inc. and its Bonding Company.

On October 21, 2013, Gale filed suit against C&K for breach of contract, negligence, and Consumer Protection Act violations associated with C&K's allegedly faulty residential repair work. (CP 2) Gale also sued C&K's bonding company, Wesco Insurance Company ("Wesco"), to recover C&K's bond. (CP 6) On October 30, 2013, Wesco entered a Notice of Appearance through the firm of Yusen & Friedrich. (CP 16-17).

C. C&K Appeared, its Owner Had Two Deaths in His Family; and C&K Withdrew.

On November 2, 2013, C&K was served with Gale's Summons and Complaint. (CP 22) C&K retained Stuart Sinsheimer because C&K's prior attorney, Mr. Robison, notified C&K that he had a conflict due to helping Gale in her dispute with Farmers. (CP 172, ¶ 7) On November 12, 2013, Mr. Sinsheimer entered a Notice of Appearance for both C&K and Wesco (CP 18-19), then subsequently filed a Notice of Withdrawal and Substitution of Counsel, withdrawing as counsel for Wesco, but remaining as counsel for C&K. (CP 20-21)

Around the same time when the lawsuit was served, Mr. Greer had two deaths in his family that required him to travel back and forth to the interior of British Columbia, Canada, and expend considerable time, money, and effort to attend to his personal affairs. (CP 173, ¶ 8; CP 234 at

46:19-22) Mr. Greer was unable to devote time on the lawsuit against C&K. (CP 173, ¶ 8) He testified that his “long-term” trips to Canada ended sometime after the first of the year, 2014. (CP 237 at 59:14-16) Thereafter, he spent most of his time in the Seattle area with his wife and daughter, but testified that he continued to frequently travel back and forth to Canada due to “responsibilities to take care of.” (CP 237 at 58:20-22; CP 237 at 60:17; CP 238 at 62:4-9)

On February 5, 2014, Mr. Sinsheimer mailed his Notice of Intent to Withdraw as C&K’s counsel, *effective* February 19, 2014. (CP 25) The Notice provided C&K’s last known address, and was accompanied by a Declaration of Mailing the Notice of Intent to Withdraw, dated February 5, 2014, to Gale’s attorney, and to C&K. (CP at 25-28) There is no evidence in the record explaining why he did not file an Answer before withdrawing.

On April 15, 2014, Gale filed the Confirmation of Joinder, Parties, Claims and Defenses stating that “Defendant C&K Remodel, Inc. has failed to file an Answer. Plaintiff will note and serve Motion for Default.” (CP 29)¹

¹ There is no Certificate of Service in the record demonstrating that Gale served a copy of the Confirmation on C&K.

D. Gale Moved for Default; C&K filed its Answer Before the Hearing.

On June 24, 2014, Gale noted a Motion for Default for hearing (without oral argument) on July 3, 2014 before King County Superior Court Judge Monica Benton. (CP 30) Gale filed and served: (1) Motion for Default (CP 32-34); (2) her personal declaration with exhibits (CP 38-63); Declaration of Joachim Damstrom (a construction repair estimator) with an exhibit (CP 64-66); and Gale's counsel's declaration, with exhibits. (CP 67-101) Gale also filed a Certificate of Service, dated June 23, 2014, of the foregoing documents on C&K, *pro se*, and Wesco, his bonding company. (CP 36-37)

Gale's Motion for Default states that her damages caused "by way of Defendant's violations of the Consumer Protection Act cannot be reasonably segregated from damages caused by Defendant's negligence and breach of contract." (CP 34 at lines 16-18) She claimed total and unsegregated damages of \$136,153.50, upon which she then relied in requesting CPA-based treble damages of the maximum \$25,000.00. (CP 34 at lines 9-13) Similarly, her attorney's declaration states that "Defendant's negligence, breach of contract, and violation of the Consumer Protection Act caused Gale damages in the principal amount of

\$136,153.50, which amounts cannot be practically segregated between the three causes of action.” (CP 68, ¶ 10)

Thereafter, Mr. Greer’s bonding company’s attorney informed him that Gale had moved for default against C&K for not filing an Answer. (CP 173, ¶ 9) Wesco’s attorney advised him to file an Answer on behalf of C&K, an action that would forestall the default motion. *Id.* Wesco’s attorney also provided Mr. Greer with some forms to use in filing the Answer. *Id.*

On June 30, 2014, C&K, *pro se*, filed its Answer and Affirmative Defenses to Gale’s Complaint with the court and placed a copy of the Answer in the Judge’s mailbox. (CP 173, ¶ 10; CP 438-41) The Answer contained admissions and denials, along with C&K’s affirmative defense that it “is owed \$27,521.00 from the Plaintiff in payments just due for work performed.”² (CP 438-41) Mr. Greer signed the Answer and a stamped Certificate of E-Mailing. (CP 441)

On June 30, Mr. Greer spoke with Gale’s attorney, requesting his address so that he could send a copy of the Answer to him via next-day delivery. (CP 173, ¶ 10; CP 239 at 65:6-11; CP at 438-41) On July 1, Gale’s attorney called Mr. Greer, stating that he had not received anything

² The Answer contains the correct caption and cause number, but is mistakenly titled “Answer and Affirmative Defenses of Defendant Surety.” However, the first page references C&K five times. (CP 438)

in the mail. (CP 239 at 65:14-20) During the July 1 conversation, Mr. Greer stated he could not speak with him because he had hired an attorney. (CP 239 at 66:1-7) However, Mr. Greer did not disclose his lawyer's identity because Mr. Greer did not believe that he should talk anymore with Gale's attorney. (CP 239 at 66:8-11)

E. On July 2, Gale Moved to Shorten Time and Strike C&K's Answer on July 3.

Gale received the Answer in the afternoon of July 2, 2014. (CP 107) Gale immediately moved to shorten time within which to strike C&K's Answer and Affirmative Defenses, such that the Motion to Strike could be heard *the next day*, July 3—the day on which the Motion for Default was scheduled. (CP 107-08)

Gale stated that it was necessary to strike C&K's Answer because C&K's owner "is not an attorney licensed to practice law in the State of Washington, and Corporations must appear in court proceedings through licensed attorneys." (CP 107) Later that afternoon, Gale left a voice mail with C&K, stating that she "would seek an Order Shortening Time for Plaintiff's Motion to Strike." (CP 108)

Gale's Motion to Shorten Time states that upon receipt of the Answer at 12:30 p.m., he "immediately commenced drafting a Motion to Strike Mr. Greer's document pursuant to CR 11(a) on the basis that Mr.

Greer is not an attorney licensed to practice law in the State of Washington, and Corporations must appear in court proceedings through licensed attorneys.” (CP 107)

Gale’s Reply in Support of Default and her Motion to Strike (one document) quotes CR 11(a), including this sentence: “If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.” (CP 122) Gale also cited cases in favor of striking an Answer pursuant to CR 11(a). (CP 120-21)

Mr. Greer “was unaware of the requirement that a corporation has to file an appearance through a lawyer.” (CP 173, ¶ 11) He stated that no one had alerted him to this fact, and “it was a mistake on my part.” (CP 173, ¶ 11)

At 3:46 p.m. on July 2, 2014, Gale e-filed with the King County Superior Court:

- (1) Note to Shorten Time to July 3 (CP 104-060);
- (2) Motion to Shorten Time to hear the Motion to Strike (CP 107-09);
- (3) Declaration of Brent L. Nourse in Support of Motion to Shorten Time and Motion to Strike, attaching C&K’s Answer (CP 110-15);
- (4) Note for Motion to Strike (CP 116-17);

(5) Reply in Support of Motion for Default and Motion to Strike C&K's Answer and Affirmative Defenses (CP 119-22); and

(6) Declaration of Service that the foregoing documents were served via "legal messenger" to C&K Remodel (CP 123-24).

F. The Trial Court Shortened Time, Struck C&K's Answer, Entered Default, and Entered Judgment Against C&K.

In the afternoon of July 3, 2014, Mr. Greer met with Mr. Rupert, to rehire him as an attorney to represent C&K in this case. (CP 173, ¶ 12) Mr. Greer had previously employed Mr. Rupert to prepare and file a lien against Gale's property for payment due. (CP 173, ¶ 12) During that July 3 meeting, Mr. Rupert informed Mr. Greer that the default hearing had been heard by the trial court at 9 a.m. that morning. (*Id.*) Mr. Rupert then contacted Gale's attorney (after faxing to Gale's attorney a Notice of Appearance, which was not filed until July 15), but Gale's attorney had not heard back from the trial court about its rulings. (*Id.*)

On July 3, 2014, the trial court:

- Granted Gale's Motion to Shorten Time (CP 136);
- *Struck* C&K's Answer and Affirmative Defenses (CP 438-41) "pursuant to Civil Rule 11," and *sealed* the Answer by directing the Clerk to "Remove the Document entitled

“Answer and Affirmative Defenses of Defendant Surety”
from the file for this case.” (CP 138-39);

- Granted Gale’s Motion for Default—finding that “C&K had failed to answer, plead, or otherwise defend in this action” and thereby ordered that “C&K is declared to be in the default for failing to answer or defend in this action;” and in the same order affirmed Judgment against C&K for \$214,334.16—though the amount for attorneys’ fees and costs was crossed out. (CP 133-34).

On the same day, July 3, 2014, the trial court also:

- Entered a Default Judgment against C&K, finding that:
 - the principal amount of damages of \$136,153.50 was a sum certain;
 - Gale was entitled to “exemplary damages in the amount of \$25,000.00 pursuant to RCW 19.86.090” [Consumer Protection Act], and
 - “Plaintiff is also further entitled to attorneys’ fees in the amount of \$53,180.66 pursuant to RCW 19.86.090,”
 - for a total judgment of \$214,334.16; plus
 - 12% post-judgment interest. (CP 131-32)

Gale had not filed and served a Motion for Attorneys' Fees and accompanying Declaration regarding counsel's attorney fee rates, hours expended, and reasonableness of the hours and rates. Instead, Gale simply added an extra one-third—\$53,180—of her claim for damages to the total judgment, “pursuant to RCW 19.86.090.”

Similarly, there is no evidence in the record that Gale's actual CPA-based damages (upon which the discretionary award of the maximum treble damages of \$25,000.00 was based) were segregated from her damages arising from breach of contract and negligence.

After the July 4 holiday, Mr. Greer learned that the trial court had struck C&K's Answer, and entered Default Judgment against C&K. (CP 173, ¶ 13)

On July 15, 2014, Gale moved the trial court for an Amendment of Judgment and Entry of Amended Judgment because “the Judgment form did not include a Judgment Summary pursuant to RCW 4.64.030” and set it for hearing on July 23, 2014. (CP 141-46) The Motion for Amendment of Judgment; the Note for Hearing; and Gale's attorney's Declaration all included Certificates of Service designating two separate attorneys now representing C&K: (1) Mr. Rupert; and (2) David Wiles. (CP 143; CP 146)

G. The Trial Court Denied C&K's Motion to Set Vacate the Default Judgment.

On July 18, 2014, C&K, through attorney Mr. Wiles, filed and served C&K's Motion to Set Aside the Default and Vacate the Default Judgment, and the Declaration of Chris Greer. C&K also requested oral argument. (CP 160-88) The Motion to Vacate states that "Mr. Greer made every effort to file an answer on behalf of C&K to forestall the default. Mr. Greer filed an answer and served the opposing side and provided a copy to the Judge before the hearing occurred." (CP 167 at lines 19-21) Further, "Mr. Greer had no idea that a corporation would have to appear through a lawyer." Mr. Greer had no reason to think that the answer he had filed would be stricken by the Court." (CP 167-68) Accordingly, "no one can deny that Mr. Greer made a good faith effort to address the pending default motion." (CP 168)

On July 30, 2014, Gale's counsel deposed Mr. Greer. (CP 223)

On July 31, 2014, Judge Monica Benton signed the Order Amending the July 3, 2014 Default Judgment Against C&K Remodel and the Amended Default Judgment. (CP 196-97; CP 193-95)

On August 26, 2014, the trial court heard oral argument, and denied C&K's Motion to Set Aside the Default and Vacate the Default Judgment of \$214,334.16. (CP 400-02) C&K's proposed Order stated that

“C&K shall file an Amended Answer forthwith,” which the judge crossed out. (CP 416)

Judge Benton ruled that C&K had not met the CR 60(b) criteria to vacate the default judgment, namely mistake, excusable neglect, and/or irregularity in the proceedings. (Verbatim Report of Proceedings (VRP) at 16:9-23 (Aug. 26, 2014)). C&K argued that there was an irregularity in obtaining the judgment, however, the trial court stated “[t]here’s no motion before me on this. I’ve already ruled.” (VRP at 17:24-25). When C&K clarified that an “irregularity in proceedings” was another basis for the motion to vacate, Judge Benton stated “I’m not persuaded.” (VRP at 18:1-4).

The next morning, Gale applied for a Writ of Garnishment. (CP 403-10) On September 2, 2014, C&K filed a Notice of Appeal of (1) the Amended Default Judgment Against C&K, entered on July 31, 2014; and (2) the Order Denying Motion to Vacate the Default Judgment. (CP 419-25) The Order Denying Motion to Vacate the Default Judgment specifically states:

1. The July 3, 2014 Order granting Plaintiff Kimberly Gael’s [sic] Motion for Default is not set aside;
2. The July 3, 2013 Default Judgment Against Defendant C&K Remodel, Inc. is not vacated; and

3. ~~C&K shall file an Amended Answer forthwith.~~ (CP 416)

On September 8, 2014, a Notice of Cash Deposit as *Supersedeas* Bond was filed. (CP 429-32)

V. ARGUMENT

A. Court Rules Are Reviewed De Novo and the Imposition of Sanctions Is Reviewed for Abuse of Discretion.

The appellate court reviews the trial court's interpretation of a court rule *de novo*. *Spokane County v. Specialty Auto & Truck Painting, Inc.*, 153 Wn.2d 238, 244, 103 P.3d 792 (2004). Review of the trial court's imposition of CR 11 sanctions is for abuse of discretion. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). Here, the trial court either misinterpreted CR 11(a) or abused its discretion when it struck C&K's *pro se* Answer without giving it reasonable time to obtain an attorney's signature.

B. The Trial Court Abused Its Discretion by Not Giving C&K Time to Cure Its Deficient Answer, Pursuant to CR 11(a).

On June 30, C&K, *pro se*, filed its Answer and Affirmative Defenses with the trial court, delivered a courtesy copy to the judge, and paid \$20 for express mail delivery to Gale, who received it on July 2, 2014. On July 2, Gale immediately moved to Shorten Time to the next day, July 3, and filed a Reply in Support of the Motion for Default and Motion to Strike Answer and Affirmative Defenses. (CP 119-22) The

next day, the trial court struck and sealed C&K's Answer, then entered Default and Default Judgment against C&K.

CR 11(a) instructs that “[e]very pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney’s individual name, whose address and Washington State Bar Association membership number shall be stated.” CR 11(a) also states that a “party who is not represented by an attorney shall sign and date the party’s pleading, motion, or legal memorandum and state the party’s address.”

Here, Chris Greer, owner of C&K, drafted, signed, dated, and supplied an address for C&K's Answer. (CP 438-41) Nevertheless, “Washington law, with limited exception, requires individuals appearing before the court on behalf of another party to be licensed in the practice of law.” *Lloyd Enter., Inc. v. Longview Plumbing & Heating Co.*, 91 Wn. App. 697, 701, 958 P.2d 1035 (1998), *review denied*, 137 Wn.2d 1020 (1999). Corporations are artificial entities that can only act through their agents. *Id.* Accordingly, “corporations appearing in court proceedings must be represented by an attorney.” *Id.* (citations omitted). C&K admits that Mr. Greer is not a licensed attorney, and that C&K's Answer and Affirmative Defenses were not signed by a licensed attorney in compliance with CR 11(a).

CR 11(a) further provides that if a “pleading, motion, or legal memorandum is not signed [by a licensed attorney], it shall be stricken *unless it is signed promptly after the omission is called to the attention of the pleader or movant.*” CR 11(a) (emphasis added).

C&K submits that the trial court abused its discretion by not giving C&K a reasonable opportunity to cure the Answer’s defect. “Although dismissal of the corporation’s petition for lack of an attorney’s signature was a proper exercise of discretion, the failure to provide a reasonable opportunity to cure that defect after entry of that order was not.” *Biomed Comm., Inc. v. Dep’t of Health*, 146 Wn. App. 929, 935, 193 P.3d 1093 (2008).

In *Biomed*, the Court of Appeals analyzed this identical issue, holding that “a court may strike a pleading of a corporation that is not signed by an attorney, *provided the court gives the corporation a reasonable time to correct the error.*” *Id.* at 931 (emphasis added). The *Biomed* Court reversed the trial court because it did not give Biomed “any opportunity to cure by having an attorney sign its petition within a reasonable period of time.” *Id.* The same outcome is warranted here. C&K should have been given an opportunity to cure by having an attorney sign the Answer within a reasonable time.

The *Biomed* Court relied on well-settled precedent in reaching its holding, including *Finn Hill Masonry, Inc. v. Dep't of Labor & Indus.*, 128 Wn. App. 543, 545, 116 P.3d 1033 (2005), *review denied*, 156 Wn.2d 1032 (2006). Division II discussed *pro se* corporate representation, and stated that if the [Plaintiff/Respondent] Department had raised the issue in the superior court or appellate court “we assume that the court would have struck the pleadings and allowed [defendant/appellant] Finn Hill time to obtain counsel. As well, if the Department had appropriately raised the issue before us, we would probably have struck the brief and allowed Finn Hill time to obtain counsel.”

The *Biomed* Court also relied on *Lloyd Enter., Inc. v. Longview Plumbing & Heating Co.*, 91 Wn. App. 697, 699, 958 P.2d 1035 (1998), wherein the non-attorney president of a corporate defendant filed an Answer to Plaintiff's Complaint, *pro se*. The trial court granted Plaintiff's Motion to Strike the Answer, but gave the corporate entity “20 days to file an answer signed by an attorney” before entering a Default Judgment. *Id.* at 700. The entity failed to comply, so the trial court entered a Default Judgment in favor of the plaintiff.

In *Lloyd*, the Court of Appeals ruled that the trial court acted appropriately under CR 11, and that the entity's “continued failure to file an answer *when given extra time to comply* justified the trial court's

exercise of its authority under CR 55 in entering default judgment.” *Id.* at 702 (emphasis added). In the case at bar, the trial court, at a minimum, should have given C&K extra time to comply with CR 11(a) before exercising its authority under CR 55 in entering Default Judgment. Instead, the trial court entered a Default and Default Judgment *immediately* after striking C&K’s Answer.

Here, the trial abused its discretion and failed to adhere to CR 11(a), which allows a pleading to be stricken “unless it is signed promptly after the omission is called to the attention of the pleader or movant.” *See also Griffith v. City of Bellevue*, 130 Wn.2d 189, 194, 922 P.2d 83 (1996) (holding that a timely application for a writ of certiorari that contains a verification lacking a signature should be dismissed under CR 11 *only where the appellant fails to sign the verification promptly after the omission is called to his attention*) (emphasis added).

More recently, in *Dutch Village Mall v. Pelletti*, 162 Wn. App. 531, 256 P.3d 1251 (2011), *review denied*, 173 Wn.2d 1016 (2012), a limited liability company filed a Complaint without retaining counsel. The trial court granted Defendant’s Motion to Strike the pleadings. The Order “provided that the pleadings would be stricken unless, *within 30 days*, [plaintiff] Dutch Village mall obtained the signature of an attorney on the pleadings.” *Id.* at 535 (emphasis added).

The Court of Appeals, relying on *Lloyd*, *Biomed*, and the plain wording of CR 11(a), ruled that “the trial court correctly granted the motion to strike the pleadings of Dutch Village Mall unless, within 30 days, they were either withdrawn or signed by an attorney.” *Id.* at 539.

Here, the facts compel a similar outcome. The Court of Appeals should reverse (1) the trial court’s Order denying C&K relief to “file an Amended Answer forthwith” (CP 416); and (2) the trial court’s Order denying C&K’s Motion to Set Aside the Default and Vacate the Default Judgment. (*Id.*) C&K’s proposed Order expressly stated that “C&K shall file an amended Answer forthwith, which the trial court crossed out. (CP 416) By the afternoon of July 3, Mr. Greer had rehired an attorney, who could have cured the deficient Answer so that the case could proceed equitably on the merits. (CP 239 at 67:23-24)

C. The Standard of Review Is Abuse of Discretion for a Motion to Vacate a Default Judgment.

If the Court of Appeals declines to reverse the trial court’s decision on the basis that it failed to give C&K reasonable time to cure its deficient Answer, then C&K respectfully submits that the trial court abused its discretion in denying C&K’s Motion to Vacate. The Court of Appeals reviews a trial court’s decision on a Motion to Vacate a Default

Judgment for abuse of discretion. *Morin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007).

The trial court “should exercise its authority liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done.” *White v. Holm*, 73 Wn.2d 348, 351, 438 P.2d 581 (1968). A trial court abuses its discretion when it is exercised on untenable grounds or for untenable reasons. *Morin*, 160 Wn.2d at 753. Abuse of discretion is less likely to be found if the Default Judgment is set aside. *White*, 73 Wn.2d at 351-52. Here, the Default Judgment was not set aside.

Default judgments are generally disfavored in Washington. *Ha v. Signal Elec., Inc.*, 182 Wn. App. 436, 446, 332 P.3d 991 (2014), citing *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 581-82, 599 P.2d 1289 (1979). As stated in *Ha*, “Courts prefer to determine cases on their merits rather than by default.” *Id.* Accordingly, in “reviewing an entry of default, the court’s principal inquiry should be whether the default judgment is just and equitable.” *Id.* at 581-82. A default judgment may be set aside in accordance with CR 60(b). *See* CR 55(c)(1) (“For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if the judgment by default has been entered, may likewise set it aside in accordance with rule 60(b)”).

The *Ha* Court explained that a party moving to vacate under CR 60(b)(1) must show that: (1) there is substantial evidence supporting a *prima facie* defense; (2) the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) the defendant acted with due diligence after notice of the default judgment; and (4) the plaintiff will not suffer a substantial hardship if the default judgment is vacated. *Id.* at 449, citing *Little v. King*, 160 Wn.2d 696, 703-04, 161 P.3d 345 (2007). According to *Little*, factors (1) and (2) are primary; factors (3) and (4) are secondary. *Id.* at 704. However, the test is not mechanical. *Id.* Whether or not a default judgment should be set aside is a matter of equity. *Id.*

D. Inferences of a *Prima Facie* Defense Are Viewed Most Favorably to the Moving Party—Here Appellant C&K.

“The trial court must examine the evidence and reasonable inferences in the light most favorable to the moving party.” *Ha*, 182 Wn. App. at 449, citing *Johnson v. Cash Store*, 116 Wn. App. 833, 841, 68 P.3d 1099 (2003), *review denied*, 150 Wn.2d 1020 (2003). In this case, all reasonable inferences must be viewed in the light most favorable to C&K, the moving party.

The *Ha* decision explains that the “trial court need only determine whether the defendant is able to demonstrate any set of circumstances that

would, if believed, entitle the defendant to relief.” *Id.* at 449, citing *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 203, 165 P.3d 1271 (2007).

E. Defendant C&K Has a Meritorious Defense.

i. Breach of Contract and Negligence.

Gale sued C&K for (1) breach of contract; (2) negligent construction; and (3) Consumer Protection Act (“CPA”) violations. C&K has a meritorious defense to these claims.

With respect to the breach of contract claim, Gale’s Complaint does not specify which provision of the contract she contends constitutes “a material breach.” (CP 4, ¶ 4.2) Gale also alleges that C&K was negligent in failing “to perform its services in conformance with the applicable standard of care” and that such negligence caused damage to Plaintiff’s House.” (CP 6, ¶¶ 6.3, 6.4)

C&K’s liability defense to the breach of contract and negligence claim is that the allegedly defective work pre-existed C&K’s arrival at the residence. Mr. Greer’s Declaration states that at the time C&K was hired, another contractor, Evergreen, had been performing mold remediation work in the basement of Gale’s home. (CP 171, ¶ 2).

It was Mr. Greer’s understanding that Gale’s insurance company had hired Evergreen to perform mold remediation work due to her

sensitivity to allergens. (*Id.*) However, Gale “did not like the work Evergreen was performing, so she decided to hire C&K instead. When C&K started performing work, it discovered that the previous contractors which had worked on the home had performed faulty work.” (CP 171, ¶ 3).

Gale hired C&K to repair the flooding damage in her home on January 28, 2013. (CP 214, ¶ 2). “C&K attempted to remediate as much of the previous faulty work as possible in an effort to help out Ms. Gale.” (*Id.*) Due to Gale’s sensitivity to mold and allergens, C&K managed to bring a representative from the American Lung Association on site to observe the work being performed. (CP 172 ¶ 4)

C&K also “worked with Farmers Insurance’s adjuster extensively to determine the type of work Farmers would cover under the homeowner policy.” (*Id.*) According to Gale, C&K’s scope of work included plumbing, electrical, framing, insulation, sheetrock removal and replacement, and painting. (CP 38, ¶ 3).

Gale agreed that Evergreen performed work in her home, but maintains that Evergreen’s work was performed five years earlier and that she had no complaints about the work. (CP 215, ¶ 5) She did not dispute that a representative from the American Lung Association was on site to observe to C&K’s repair work; that C&K worked extensively with

Farmers Insurance to determine the type of work it would cover under her policy; or that C&K noted pre-existing faulty work.

Gale also does not dispute that Mr. Greer introduced Gale to his lawyer to help her draft letters to Farmers Insurance about covering the repair work or reimbursing Gale for the work. (CP 172, ¶ 5; CP 227 at 17:7-11; CP 227 at 18:3-8) She also does not dispute that Mr. Greer paid Mr. Robison's retainer fee on her behalf. (CP 172, ¶ 5)

C&K states that it performed all work according to accepted industry standards. (CP 172, ¶ 6) Damstrom Renovations, LLC, another general contractor like C&K, opines that C&K's work did not comply with construction industry standards. (CP 65, ¶ 3). However, Damstrom Renovations does not: (1) identify with any specificity which construction "standards" it contends that C&K did not follow; (2) distinguish between pre-existing damage and damage allegedly caused by C&K; or (3) offer any opinions on a "more probable than not basis." Evidence establishing proximate cause must rise above speculation, conjecture, or mere possibility. *Attwood v. Albertson's Food Ctrs., Inc.*, 92 Wn. App. 326, 331, 966 P.2d 351 (1998). The expert must be able to testify that the alleged negligence "more likely than not" caused the harmful condition leading to injury. *Id.* at 331.

Finally, with regard to Gale's itemized damages, several elements are speculative and/or seemingly unsupported, including the following: \$7,500.00 for repairs by the City "to correct the defective and unworkmanlike work by C&K [on the underground sewer below the City's sidewalk and right-of-way];" (CP 40, ¶ 11); \$17,640.00 for "increased construction loan costs and interest;" (CP 41, ¶ 12(a)); \$5,000.00 for damage to personal property (CP 42, ¶ 14); and \$8,360.00 for estimated relocation costs during future repairs (CP 42, ¶ 16). The total of these items is \$38,500.00.

ii. Consumer Protection Act.

Gale alleged that C&K violated the CPA by working while its license was suspended, which is a *per se* violation of the CPA. She contends that she is entitled to damages, attorneys' fees, costs, and interest. (CP 5, ¶¶ 5.3 to 5.6) For Gale to recover for a *per se* violation of the Consumer Protection Act, she must prove: (1) the existence of a pertinent statute (here, RCW 18.27.350); (2) its violation; (3) *that such violation was the proximate cause of damages sustained*; and (4) that she was within the class of people the statute sought to protect. *Cook v. Seidenverg*, 36 Wn.2d 256, 258-59, 217 P.2d 799 (1950); *Short v. Hoge*, 58 Wn.2d 50, 54, 360 P.2d 565 (1961).

At his deposition, Mr. Greer explained why he was not aware that C&K's license had been suspended between April 17, 2012 and March 25, 2013, and that it performed the work despite the suspension.

Q: Do you recall having a bond through any other entity delivered to L&I between April 17, 2012 and March 25th, 2013?

A: Yes, sir. We had another bond. It was not delivered to L&I.

Q: So, you know for a fact that it was not delivered to L&I?

A: That is correct.

Q: And are you aware that a contractor's license and registration is suspended—

A: Yes.

Q: —in the absence of a bond received by L&I?

A: Yes.

Q: So, isn't it true, then, that C&K Remodel, Incorporated's license and registration was suspended between April 17, 2012 and March 25, 2013?

A: Not that I was aware.

(CP 229 at 27:14 to 28:5) He explained that he “did not know that we were suspended at the time” because C&K “was between insurance companies.” (CP 231 at 35:12-14) His testimony demonstrated that the suspension resulted from miscommunication between bond/insurance

carrier (with respect to bonding coverage and general liability insurance) and L&I. (CP 231 at 35:10 to 36:4) However, C&K was fully licensed, bonded, and insured for *over three months* while working at Gale's residence—from March 26, 2013 to June 28, 2013, when Gale stopped paying him. (CP 96; CP 227 at 20:20-24; CP 262)

The *per se* violation of the CPA, then, was from January 28, 2013, when C&K was hired, through March 25, 2013, but there was no violation from March 26, 2013 until the day Gale fired him, June 28, 2013. C&K contends that it “performed all work according to industry standards.” (CP 172, ¶ 6) There is no evidence in the record that C&K's suspended license while on the job for two months actually *caused* property damage to Gale's property—one of the elements of a CPA violation.

Here, C&K submits that it has met its burden to establish that it has a defense that would at least carry decisive issues to the finder of facts in a trial on the merits. *See Ha*, 182 Wn. App. at 450; *White*, 73 Wn.2d at 352-53. When evaluating whether a meritorious defense exists, the Court must take all inferences in favor of the moving party, here C&K. *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 13 P.3d 837 (2000), *review denied*, 143 Wn.2d 1021 (2001).

F. The Failure to Timely Answer Was Due to Mistake, Excusable Neglect or Irregularity in Obtaining the Judgment.

C&K relies on CR 60(b)(1) as the basis for requesting relief from the Default Judgment—namely mistake, excusable neglect or irregularity in obtaining the Default Judgment.

An “irregularity,” within the meaning of this rule, has been defined as “the want of adherence to some prescribed rule or mode of proceeding; and it consists either in the omitting to do something that is necessary for the due and orderly conducting of a suit, or in doing it in an unreasonable time or improper manner.” *Merritt v. Graves*, 52 Wn. 57, 59, 100 P. 164 (1909).

Here, an irregularity occurred when the trial court (1) granted Gale’s one-day Motion to Shorten Time; (2) Struck C&K’s Answer; and (3) failed to give C&K reasonable time to correct the Answer’s deficiency “after the omission [was] called to the attention of the pleader” under CR 11(a). This was a procedural defect in which the trial court failed to follow the prescribed rule. *See Birchfield v. Harford*, 86 Wn. App. 259, 264, 936 P.2d 48 (1997), *review denied*, 135 Wn.2d 1011 (1998) (“irregularities occur when there is a procedural defect, such as failing to follow a prescribed rule.”).

Additionally, Gale did not demonstrate “good cause” required to shorten time to move to strike C&K’s Answer *from six court days* (KCLR 7(b)(4)) *to 24 hours* (KCLR 7(b)(9)). At best, shortening time opportunistically ensured a quick judgment. *Gale knew as early as July 1, 2014, that C&K was trying to hire an attorney*—which he did hire on July 3, 2014, after the trial court had already shortened time, struck the answer, granted default, and entered default judgment. (CP 239 at 66:4-24).

Alternatively, excusable neglect exists because Mr. Greer was under tremendous stress due to two deaths in his family, in Canada. (CP 173, ¶ 8) Mr. Greer was also frequently traveling to and from Canada to handle the affairs, and did not have either the time or resources to dedicate to the lawsuit. (*Id.*) In the early part of 2014, Mr. Greer began traveling to Canada less frequently. (CP 238 at 62:4-6) Based on Mr. Greer’s testimony, it is not clear if he was in Canada or Seattle when Gale moved for Default and the attorney for his bonding company alerted him that a Motion for Default had been filed. (CP 238 at 63:4-14). In any event, Mr. Greer filed an Answer on June 30, 2014.

Alternatively, the Default Judgment should be vacated due to a mistake. Mr. Greer states that after he filed and served C&K’s Answer, he “assumed the default motion would be a non-issue. All this time, I was unaware of the requirement that a corporation has to file an appearance

through a lawyer. No one alerted me to this fact. It was a mistake on my part.” (CP 173, ¶ 11; *see also* CP 167:17 to CP 168:2).

G. C&K Acted With Due Diligence After Notice of the Default Judgment.

Gale—after shortening time and striking C&K’s Answer—received a Default and Default Judgment against C&K on July 3, 2014. On July 18, 2014—two weeks later—C&K moved to Vacate the Default Judgment. (CP 160-74) A party must use diligence “in asking for relief following notice of the entry of the default.” *Calhoun v. Merritt*, 46 Wn. App. 616, 619, 731 P.2d 1094 (1986). A party that moves to vacate a default judgment within one month of notice satisfies CR 60(b)’s diligence prong. *Cash Store*, 116 Wn. App. at 842. Based on the foregoing, C&K acted with due diligence.

H. Gale Will Not Suffer a Substantial Hardship If the Default Judgment Is Vacated.

C&K submits that Gale will not suffer a substantial hardship if the default judgment is vacated. This basis is a secondary, not a primary, factor when deciding whether to vacate the Default Judgment. *Little*, 160 Wn.2d at 704. If the trial court had given C&K reasonable time to submit an attorney-signed Answer, then the trial would have already been over. The trial was originally scheduled for January 5, 2015. (CP 8) Conversely, the possibility of a trial is an insufficient basis for the court to find

substantial hardship on the nonmoving party. *Pfaff*, 103 Wn. App. at 836; *see also Cash Store*, 116 Wn. App. at 842 (“vacation of a default inequitably obtained cannot be said to substantially prejudice the nonmoving party merely because the resulting trial delays resolution on the merits”). This reasoning is consistent with Washington's policy that prefers parties resolve disputes on the merits, as opposed to default proceedings.

I. The Trial Court Abused Its Discretion in Failing to Determine Gale’s “Actual” Damages Under the CPA.

The Default Judgment should be vacated because the trial court abused its discretion by awarding “exemplary damages in the amount of \$25,000.00 pursuant to RCW 19.86.090.” (CP 409) This is the maximum amount of treble damages. However, the amount of \$136,153.50 that she identified as her “actual damages” is an amalgamation of damages arising from her breach of contract, negligence, and CPA claim. (CP 33 at lines19-21)

Under RCW 19.86.090 she is only entitled to three times the amount of her “actual” damages arising solely from the CPA violation. RCW 19.86.090 states, in relevant part, that a person may:

bring a civil action in superior court to enjoin further violations, recover the *actual damages* sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney’s fee. In addition, the court, may, in its

discretion, increase the award of damages up to an amount not to exceed three times *the actual damages* sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed twenty-five thousand dollars[.]

RCW 19.86.090 (emphasis added). The statute expressly states that a violation of RCW 19.86.020 is the condition precedent for potentially recovering three times a person's "actual" damages. RCW 19.86.020 states: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

Here, Gale lumped *all of her damages* for alleged breach of contract, negligence, and CPA damages into a sum certain: \$136,153.50. (CP 33 at lines 19-21) Gale asserts that her damages "by way of Defendant's violation of the Consumer Protection act cannot be reasonably segregated from damages caused by Defendant's negligence and breach of contract." (CP 34 at lines 16-18). However, in "contrast to the general damages, CPA damages depend on facts relevant to the CPA violations." *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 337, 54 P.3d 665 (2002); *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 565, 825 P.2d 714 (1992).

An award of treble damages is based only on *actual* damages arising from a CPA violation. RCW 19.86.090; *Mason v. Mortgage Am.*,

Inc., 114 Wn.2d 842, 855, 792 P.2d 142 (1990). Accordingly, the trial court abused its discretion in awarding the maximum amount of trebled damages because the treble damages were based on Gale's underlying damages arising from breach of contract and negligence (in addition to a CPA violation). The Court of Appeals should reverse and remand so that treble damages, if any, may be awarded solely on Gale's CPA claim.

J. The Trial Court Abused Its Discretion by Not Segregating and Disallowing Attorneys' Fees for Non-CPA Claims.

Gale stated that she was prosecuting "her "claims under a contingent fee arrangement pursuant to which Gale's attorney is entitled to recover 33% of any award or judgment in Gale's favor."³ (CP 33 at lines 23-25) Indeed, her attorneys's fee award is \$53,180.66. (CP 132) She added one-third to her principal amount of damages of \$136,153.50 arising *collectively* from the breach of contract, negligence, and CPA violation for a total award of \$214,334.16. (CP 132) She states that the damages she incurred "by way of Defendant's violation of the Consumer Protection Act cannot be reasonably segregated from damages caused by Defendant's negligence and breach of contract." (CP 34 at lines 16-16)

Here, the trial court abused its discretion in awarding an automatic one-third of fees to her total damages for all claims. Attorneys' fees are

³ The Contingent Fee Agreement is at CP 98-101.

only recoverable for time expended for the actions that constitute a CPA violation. *Travis v. Wash. Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 410, 759 P.2d 418 (1988) (the court must segregate time spent on a CPA claim from other legal theories).

In *Travis*, the Supreme Court analyzed the “crucial question” of whether an attorney may recover the entirety of fees under the CPA for prosecuting multiple claims. The Court held that the trial court erred because some of the fee award related to non-CPA claims. *Id.*; see also *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987) (fees awarded under RCW 19.86.090 “should only represent the reasonable amount of time and effort expended which should have been expended for the *actions* of [the defendant] which constituted a Consumer Protection Act violation”) (emphasis added).

The *Travis* Court relied on *Nordstrom* as well as *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 66, 738 P.2d 665 (1987) (affirming a fee awarded under a different statute, but citing *Nordstrom* for the proposition that: “[A]ttorney fees should be awarded only for those services related to the causes of action which allow for fees.”)

Like *Gale* in the case at bar, *Travis* asserted that the claims “overlapped and were intertwined” and that some basic facts were essential to each cause of action. The Supreme Court stated that “while

there may be an interrelationship as to the basic facts, the legal theories which attach to the facts are different. Thus, the court must separate the time spent on those theories essential to the CPA and the time spent on legal theories relating to the other causes of action.” *Id.* at 411. The Court stated that on remand, the trial court “must include, on the record, a segregation of the time allowed for the legal theories pertaining to the CPA as well as to the other legal theories in the case.” *Id.*

Here, trial court signed an Amended Judgment (based on the pleadings) that awarded one-third attorneys’ fees for all causes of action. (CP 420-21) However, the trial court had an legal obligation to only award fees associated with prosecuting Gale’s CPA claim. The trial court’s award must be reversed and the case remanded for a recalculation of appropriate attorney’s fees. *Smith*, 113 Wn. App. at 344-45 (remanding case for *required* segregation of fee award among CPA and other claims).

K. The Trial Court Abused Its Discretion By Not Determining the Reasonableness of Attorney’s Fees.

Under the CPA, Gale may only recover “reasonable attorney’s fees.” *See* RCW 19.86.090. In awarding attorney’s fees, the trial court, instead of merely relying on a line-item amount submitted by the plaintiff’s attorney, should make an independent decision as to what represents a reasonable amount for attorney’s fees. *Nordstrom*, 107 Wn.2d

at 744. Further, regardless of difficulty, the trial court must segregate the time spent on CPA issues from other issues when awarding attorney's fees under this section. *Smith*, 113 Wn. App. at 344-45.

A contingent fee agreement is not binding on a court in its determination of a reasonable attorney's fee. *Ivan's Tire Serv. Store, Inc. v. Goodyear Tire & Rubber Co.*, 10 Wn. App. 110, 517 P.2d 229 (1973), *aff'd*, 86 Wn.2d 513, 546 P.2d 109 (1976). Rather, there are two principal steps to computing an award of fees. First, a "lodestar" fee is determined by multiplying a reasonable hourly rate by the number of hours reasonably expended on the lawsuit. Second, the "lodestar" is adjusted up or down to reflect factors, such as the contingent nature of success in the lawsuit or the quality of legal representation, which have not already been taken into account in computing the "lodestar" and which are shown to warrant the adjustment by the party proposing it. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 593-94, 675 P.2d 193 (1983) (analyzing all of the factors that must be considered before awarding reasonable attorney's fees).

The trial court in this case made no effort to segregate attorney's fees awarded for CPA violations from fees incurred generally. Instead, and contrary to Washington law, the trial court simply accepted Gale's number, based on the contingent fee agreement, with no analysis

whatsoever. Given the limited motion practice and discovery that preceded the entry of the default, and the amount of time devoted solely to the CPA claim, it is likely that the \$53,180.66 attorney's fee award may be significantly reduced. The Court of Appeals should reverse and remand the attorney's fee award so that its reasonableness may be correctly determined, after the CPA fees are segregated from the non-CPA fees.

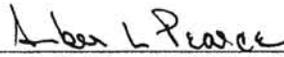
VI. CONCLUSION

C&K respectfully requests that the Court of Appeals reverse the trial court's denial of C&K's combined Motion to Vacate and Motion to Set Aside the Default, and give C&K reasonable time to cure its deficient Answer so that the case may proceed equitably on the merits. (CP 423) Likewise, C&K requests that the Court of Appeals reverse the Amended Judgment. If the Court of Appeals declines to reverse the trial court's denial of the Motion to Vacate and Set Aside the Default, then C&K requests that the Court reverse and remand the Amended Judgment with instructions that the trial court (1) exercise discretion in awarding CPA-based treble damages arising from her *actual* CPA damages; (2) segregate Gale's CPA-based attorney's fees from her non-CPA fees; and (3) apply the *Lindy* factors and lodestar in computing her reasonable attorney's fees.

Respectfully submitted,

DATED this 2nd day of February, 2015.

FLOYD PFLUEGER & RINGER, P.S.



Francis S. Floyd, WSBA No. 10642

Amber L. Pearce, WSBA No. 31626

Attorneys for Appellant C&K Remodel, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the date noted below, a true and correct copy of the foregoing was delivered and/or transmitted in the manner(s) noted below:

Brent L. Nourse	<input checked="" type="checkbox"/> Via Messenger
Paramount Law Group, PLLC	<input checked="" type="checkbox"/> Via Email
1000 Second Avenue, Suite 3000	<input type="checkbox"/> Via Facsimile
Seattle, WA 98104	<input type="checkbox"/> Via U.S. Mail

Counsel for Plaintiff

Jeffrey N. Rupert	<input checked="" type="checkbox"/> Via Messenger
Attorney at Law	<input checked="" type="checkbox"/> Via Email
410 SW 153 rd Street	<input type="checkbox"/> Via Facsimile
Burien, WA 98166	<input type="checkbox"/> Via U.S. Mail

*Personal Attorney for Defendant
C&K Remodel, Inc.*

Jeff H. Yusen	<input checked="" type="checkbox"/> Via Messenger
Yusen & Friedrich	<input checked="" type="checkbox"/> Via Email
215 NE 40 th Street, Suite C-3	<input type="checkbox"/> Via Facsimile
Seattle, WA 98105	<input type="checkbox"/> Via U.S. Mail

*Attorney for Defendant Wesco
Insurance Company*

DATED this 2nd day of February, 2015.



Sopheary Sanh, Legal Assistant