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FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

2012 FEB 15 PM 2: 22

NO.: 67771-3-I

DIVISION ONE OF THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON

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TAE HO CHUNG AND JANE DOE CHUNG AND  
THE MARITAL COMMUNITY COMPOSED  
THEREOF, APPELLANTS

v.

NEW GRACE INVESTMENT, INC.,  
RESPONDENT

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**BRIEF OF APPELLANTS**

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GREGORY E. GLADNICK  
ATTORNEY AT LAW  
4711 AURORA AVENUE NORTH  
SEATTLE, WA 98103  
TELEPHONE (206) 789-3662

**ORIGINAL**

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## **INTRODUCTION**

Appellants appeal because substantial justice has not been done, i.e., substance has not been addressed because the form was defective. Appellants' issues were not reached because their affidavit was not signed with the "penalty of perjury" signature block. Appellants labored long and hard to explain their issues carefully, and would not carelessly let this all go for naught, for lack of a signature, unless they misunderstood the difference in American legal culture. Appellants are immigrants, here on an E-2 visa, who do not know the language and whose familiarity is with the Asian legal system, where a signature seal itself is formal authentication of a document.

In addition, appellants assert that the judge's ostensibly procedural rejection was partly if not largely influenced by his feeling that appellants' issues were weak.

## **ASSIGNMENTS OF ERROR**

A. Is substantial justice done when foreigners lose on a procedural ruling for reasons related to not understanding the language or the culture?

B. Will our legal system make allowance for foreign legal practices in a situation where no one is prejudiced thereby?

C. Can an in-court, in-person, oral verification of a pleading under oath before a judge substitute for a written acknowledgment?

D. Is there an appearance of bias, and therefore abuse of discretion, when a procedural ruling is partly based on issues of substance that should not be a part of procedural deliberation?

E. If issues of substance (i.e., whether there were genuine issues of material fact) were a basis for the ruling, were they improperly dismissed?

F. Were genuine issues of material fact presented?

### **STATEMENT OF THE CASE**

On July 12, 2007, appellant Mr. Chung signed a lease with respondent New Grace Investment, Inc. ("New Grace"), for suites 106 and 107, 16911 Highway 99, Lynnwood. CP 338-360. The suites were then warehouse space, and New Grace agreed in an addendum to install a side boundary wall, HVAC, sink, ceiling, and window by the commencement date, September 1, 2007. CP 368. Mister Chung would then use the premises for an acupuncture clinic. He was to start paying maintenance charges ("NNN") on Sept. 1, and NNN plus the base rent on Dec. 1, 2007. CP 354, 355.

September 1 came and went with nothing done. According to Lynnwood city permits and inspection records, New Grace did not get the landlord's work permit until Sept. 20. CP 83. Then New Grace hired contractor David Kim of White Gold International, d/b/a Hanwoori

Construction, to do both the remodel and the Landlord's Work. CP 138-141. Kim, as it turned out, was unlicensed, his license having been suspended. CP 96-102. As a result the Lynnwood Fire Department denied Mr. Chung's business application and canceled the permit for the Tenant's Work. CP 85, CP 106.

Because of these failures, Mr. Chung withheld the rent on Dec. 1. New Grace then, without notice, terminated the lease, changed the locks, pulled down Mr. Chung's sign, and relet the premises. New Grace then sued Mr. Chung for breach of contract. CP 406-440.

New Grace moved for summary judgment, and the Chungs timely submitted a statement of their issues and supporting evidence. CP 47-163. However, their submission lacked the "penalty of perjury" signature block or any other sworn statement of authentication. New Grace moved to strike it all because of that defect. CP 38.

At the summary judgment hearing, the judge was aware that the Chungs had a language problem (they brought an interpreter). Declaration of Chung, CP 43; court's minute entry, CP 167. The judge asked Mr. Chung if what he had filed was the truth, and he answered yes, CP 44 (he was not asked to put it in writing). He was under oath when he said this. However, the judge then granted the Motion to Strike and granted summary judgment to New Grace. CP 5-7.

Appellants contend that it was an abuse of discretion to throw them out of court on a technicality when they had presented specific issues of material fact and orally attested to them. Civil Rule 56(f) allows a judge to order a continuance. Furthermore, appellants could have put their attestation in writing at the hearing had they been made aware that a signature was required. Declaration of Chung at #6, CP 40.

In addition, as the judge points out in his Order Denying Reconsideration, he mentioned alternative grounds in his Order on Summary Judgment. CP 9. The alternative grounds were that the defense would lose on the merits, i.e., there were no genuine issues of material fact. This cannot be ignored as dictum because there are two implications that can be drawn from his statement:

- (a) He prejudged the merits before considering the Motion to Strike, or
- (b) His order granting the Motion to Strike is a nullity because he himself ignored it and went on to consider the merits.

Situation (a) is a procedural irregularity because the Motion to Strike should have been resolved first. Situation (b) is an abuse of discretion. Either way, it looks as if the order on the Motion to Strike was improperly influenced by "peeking" at evidence that was not supposed to be under

consideration at that point.<sup>1</sup> Either way, the merits are called into question. For that reason, this brief repeats Mr. Chung's arguments on the merits in the event that this Court agrees that the lower court's feelings about the merits infected its supposedly procedural decision.

## ARGUMENT

The Order on Summary Judgment adheres to the letter of the law but perhaps not the spirit. A court, says our Supreme Court, should "interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action." Burnet v. Spokane Ambulance, 131 Wash.2d 484, 498, 933 P.2d 1036 (1997).

### A. The Spirit of the Law Is to Provide Fundamental Justice

It is a principle in Washington that "A procedural rule of court cannot be used to take away substantive rights." State v. Card, 48 Wn.App. 781, 784, 741 P.2d 65 (Div. 3 1987), citing State v. Fleming, 41 Wash.App. 33, 36, 701 P.2d 815 (Div. 3 1985). In Card, the issue was whether the applicability of a court rule could be raised for the first time on appeal. The court said it could "when fundamental justice so requires." *Id.*

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<sup>1</sup> We realize that the Chungs' Response was submitted 6 days prior to plaintiff's Motion to Strike. However, it is incumbent on a court to keep an open mind until all the evidence is in.

What is the "fundamental justice" referred to in Card? This notion may be hard to pin down to particulars, but in a remedial sense it means access to a tribunal without interposition of procedural "gotchas." In Fleming, supra, the trial court struck a jury trial without notice, and the appellate court ruled that this constituted deprivation of a constitutional right without due process. See also Siegler v. Kuhlman, 81 Wn.2d 448, 502 P.2d 1181 (1972) (fundamental justice required application of a strict liability theory, which had not been argued below).

More examples could be adduced, but the bottom line is that the court rules should not be applied inflexibly as a bar to keep people from presenting their case on the merits.

A prime consideration in fundamental justice is the question of who's been hurt and how much. New Grace is not prejudiced here. If the Chungs' Response to the Motion for Summary Judgment is admitted, the New Grace must then rely on the substantive averments in its motion to see whether it can carry the day. This is no more than New Grace anticipated when it filed the motion. Mister and Mrs. Chung, on the other hand, are hurt deeply by having a \$100,000 plus judgment against them with no chance to argue it.

## **B. The Evidence Was Orally Verified**

Signing a pleading—ordinarily—is an averment of its truthfulness, as discussed in CR 11:

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact....

This is what Mr. Chung thought his signature was accomplishing, as it would have done in Asian law (see Declaration of Chung at CP 44) and, per CR 11, normally does in American law too. In summary judgment, however, CR 56 imposes the additional requirement of an affidavit. By definition, an affidavit is a sworn statement. Although it must be in writing, it need not be sworn to in writing by its author; an attestation made orally before an officer authorized to administer oaths may be written and appended to the statement.<sup>2</sup>

At the hearing, the court asked Mr. Chung if what he'd filed was true, and he answered that it was. CP 44. This was an oral attestation: judges are officers authorized to administer oaths, and Mr. Chung was testifying in a court hearing where he was under oath. Had the judge

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<sup>2</sup> "affidavit...: A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths...." BLACK'S LAW DICTIONARY, 2d Pocket Ed. 2001, p.22.

written down his answer at that point, the verification requirement would have been satisfied.<sup>3</sup>

Of course it was late and that means that Mr. Chung's Response was not, strictly speaking, an affidavit when he filed it. The court might have called it a late filing and taken the option to order a continuance or "make such other order as is just." CR 56(f).<sup>4</sup> The court could have reset the hearing date 11 days forward, perhaps imposing terms on the Chungs for making the other side reply again.

Mister Chung has since used a "penalty of perjury" signature to verify in writing what he submitted at the summary judgment hearing. See Declaration of Tae Ho Chung submitted with Motion for Reconsideration, CP 43-45.

### **C. Foreign Legal Usage Is Different**

Documents from Asian countries, authenticated with a *dojang*, *chop*, or whatever the seal may be called, are admitted in American courts. There must be an English translation, and the translation must be authenticated in the American way; but the original document is accepted

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<sup>3</sup> The court minutes are very terse and do not reflect this exchange; and no recording of the hearing was made. CP 167.

<sup>4</sup> **"When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

as is. Here we are asking that the Chungs' Response be considered an equivalent of an Asian document because Mr. Chung composed it in Korean and then had it translated, believing his cursive signature was the equivalent of a *dojang*. See CP44. We ask that Mr. Chung be given the benefit of the doubt for trying to submit a valid document according to his understanding of what was valid.

The trial court had discretion to consider and allow for Mr. Chung's mistake based on his understanding of Asian legalities and ignorance of American legalities. Where the decision of a trial court is a matter of discretion, it may be disturbed on review on a clear showing of abuse of discretion, i.e., discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wash.2d 12, 482 P.2d 775 (1971). Judicial discretion is not amenable to a hard and fast definition; it means a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the trial judge to a just result. State ex rel. Clark v. Hogan, 49 Wash.2d 457, 303 P.2d 290 (1956).

#### **D. Justice Should Be Based on All the Facts**

At least in criminal law, Washington considers it imperative that all the facts be considered. In State v. Grant, 10 Wn.App. 468, 519 P.2d 261 (Div. 2 1974), the court said:

...[I]n State v. Martin, 165 Wash. 180, 4 P.2d 880 (1931) the court determined that the trial court had abused its discretion in not allowing defense witnesses to testify because no list of witnesses had been served upon the prosecuting attorney. It should be noted, however, in Martin, ..., the prosecution did not claim surprise or other disadvantage. The court did declare that there was no reason for penalizing the defendant for not complying with the statute, however inexcusable his neglect may have been, when *his noncompliance put the state to no disadvantage*. The court, in Martin, was seriously split, but in the lead opinion, the author sought to advise trial courts of a reasonable procedure to follow if the state, in the future, should be placed in a disadvantageous position because of the defendant's noncompliance with the statute:

If, in such a case as this, the state should claim surprise, it might become the duty of the court, not to declare that the appellant's evidence should not be received, but that the state should have a reasonable opportunity to prepare itself against surprise; for the Constitution, by guaranteeing an accused person the right to defend himself and to compel the attendance of witnesses by the court's own process, necessarily gives him the right to have attending witnesses heard.

*State v. Martin*, *Supra*, at 187, 4 P.2d at 882.

To the prosecutorial suggestion that chaos would result by permitting flexible application of sanctions for noncompliance with the statute, the author of the lead opinion in *Martin* noted that *the courts had ample disciplinary powers* to deal with those who would unduly delay the court's proceedings or otherwise trifle with the court. The author then was prompted to comment:

By exercising such disciplinary powers, prompt and orderly procedure can be maintained, the statute enforced and the Constitution respected, so that no case shall be submitted for decision without all of the available material facts being made known to the trier of the facts, to the end that *substantial justice shall be done*.

*State v. Martin*, Supra, at 188, 4 P.2d at 882.

In the case at bench, we, too, deem it imperative *that in the absence of totally inexcusable neglect* no criminal case should be submitted to the trier of the facts without all available material facts being made known to the trier of the facts, not only to the end that substantial justice shall be done, but also because in performing its high function in the best way, *justice must satisfy the appearance of justice*. *State v. Madry*, 8 Wash.App. 61, 504 P.2d 1156 (1972).

*Id.* at 473-474 (emphasis added). Granted this quotation is from a criminal case, but it has analogies: Mister Chung's neglect was not totally inexcusable; New Grace was not surprised and is put to no disadvantage if the Court chooses to use its disciplinary powers to compensate New Grace; and the result would be to submit all available material facts to the trier of the facts (which, at summary judgment, is the judge).

### **E. Exclusion of Testimony Is an Extreme Sanction**

In general, nonlawyers acting *pro se* are held to the same procedural standards as lawyers. If they make procedural missteps, the trial court has discretion to apply sanctions. However, that discretion is not unfettered. In a discovery setting, case law has developed levels of sanctions corresponding to the level of culpability. In Burnet, *supra*, the Supreme Court held that to support imposition of one of the greater sanctions (namely excluding the evidence presented, the disobedient party's discovery violation must be "willful or deliberate" and must have "substantially prejudiced the opponent's ability to prepare for trial." *Id.*, at 494; see also Carlson v. Lake Chelan Cmty. Hosp., 116 Wn.App. 718, 737, 66 P.3d 1080, *review granted*, 150 Wn.2d 1017, 81 P.3d 119 (2003). The exclusion of testimony is an "extreme sanction." In re Estate of Foster, 55 Wn.App. 545, 548, 779 P.2d 272 (1989). The same sanction is being applied here, where (if this Court believes Mr. Chung) the omission wasn't willful and New Grace isn't prejudiced. Mister Chung intended to comply with the rules and certainly did not profit by his omission. It was out of ignorance that he failed to observe the procedural form, relying (perhaps unwisely but not contumaciously) on what he understood was true and correct when he filed it.

#### **F. There Is a Potential for a Different Outcome**

The Chungs do have specific arguments to resist summary judgment: their Response is not "mere allegations, denials, opinions, or conclusory statements," as New Grace asserts in its Reply, but bring out detailed facts. Mr. Chung states facts never mentioned by the plaintiff, such as:

- When he entered into the premises, he was not "taking possession" because he did not accept them in that condition, and he timely so informed New Grace;
- The work done by Hanwoori was illegal, as he deduced from information supplied by Washington State Department of Labor and Industries, and that is why he withheld payment;
- When he changed the locks, he gave new keys to New Grace (New Grace denies this);
- The Landlord's Work was not done by September 1 (New Grace says it was "done" without mentioning that date. No other commencement date but Sept. 1 is given in the lease.)
- The drop-down ceiling (which New Grace admits was late) was not a full ceiling.

## **1. Issues of Fact Exist**

In fact, the Chungs' Response contains 18 pages of specific facts and 55 pages of supporting exhibits. It brings out many genuine issues of fact regarding the following:

- a) When did landlord (New Grace) begin performing Landlord's Work?
- b) When did landlord complete Landlord's Work?
- c) Did landlord deliver the premises in the agreed-upon condition by the commencement date?
- d) Did tenant (Mr. Chung) accept the premises' condition?
- e) Did tenant move into and occupy the premises?
- f) Did lease termination by landlord follow lawful procedures?
- g) Did landlord unlawfully evict tenant by unilaterally changing the locks?
- h) Was landlord's unilateral pulling down of tenant's pole sign without prior notice lawful?
- i) Was landlord's leasing the premises to a new tenant without a prior notice lawful?
- j) Did tenant incur any damage because of landlord's unlawful eviction?

New Grace was not legally authorized to even begin the Landlord's Work on the commencement day, September 1, 2007, since the interior remodel permit was issued on September 20. However, New Grace alleges that the Landlord's Work to make the premises in shell condition had been completed by the commencement date.

Unlicensed contractor David Kim started the Landlord's Work and the tenant improvements ("T-I") simultaneously and did not complete the Landlord's Work.

Upon determining David Kim's unlicensed status, Mr. Chung discharged him.

Mister Chung notified New Grace and asked it to finish the Landlord's Work before the T-I was initiated.

On December 6, 2007, New Grace said "Owner responsibility construction is now completed" and "I would be willing to renegotiate from 12/2 to 12/6/07."

The amount New Grace requested for the month of December 2007 was \$1,861, which was prorated by subtracting the rent for 6 days, \$355.67, from the monthly base rent of \$2,216.67.

On December 21, 2007, New Grace said that "your suite has been ready for you to take possession since December 8<sup>th</sup> 2007."

Since New Grace failed to deliver the premises with Landlord's Work completed, Mr. Chung did not pay NNN charges and base rent starting December 2007. He presented New Grace with new negotiations regarding New Grace's breach of contract, but New Grace had rejected.

As a consequence of New Grace's illegal construction work without proper permit and inspection, the Lynnwood Fire Department denied Mr. Chung's business application and the T-I permit expired.

New Grace terminated the lease, changed locks, pulled down the sign, and relet the premises, all without notice to or consent of Mr. Chung.

New Grace's failure to deliver the premises in the specified shell condition directly caused Mr. Chung's failure of possession. Yet New Grace alleges that the breach of contract was Mr. Chung's refusal to pay monthly rent charge and NNN charges.

**2. Respondent's Presentation of Facts is riddled with incorrectness and inconsistency.**

The following statements by New Grace are from the as-numbered paragraphs in the Motion for Summary Judgment, CP 297-313.

**"2.2 The Plaintiff and Defendant entered into a commercial Lease Agreement dated July 11, 2007 for two units in the Building, Suites # 106 and 107 ("Premises")." CP 298.**

The Complaint leaves out the crucial addendum to the Lease Agreement. The body of the Agreement says "Tenant shall take the space in the 'AS-IS' condition. Landlord shall not be called upon to make any repairs/replacements or improvements to the space whatsoever." CP 355.

However, the addendum, clearly agreed and understood by all, clarified "AS-IS" to make it clear that it meant a shell condition.<sup>5</sup> CP 368. Not until later did New Grace's principal Jong Hwang admit that "New Grace was completing construction of a boundary wall, front windows, installing an HVAC system and a drop down ceiling. The premises were being leased 'AS IS' in a shell condition." Declaration of Hwang at CP 331.

On the date the Lease Agreement was made, the premises were not in shell condition as described. Nor were they in that condition on the commencement date (Sept. 1) either.

**"2.4 Defendant took possession of the Premises on September 1, 2007.... Defendant intended to use the Premises for an Acupuncture Clinic." CP 298.**

New Grace contradicts itself here. Mister Chung received the keys from New Grace on that date. However, "receiving keys" is only one manifestation of "taking possession"; it only means that New Grace gave permission for possession. Mister Chung did not accept the premises because they were not in a shell condition as agreed. He so notified New

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<sup>5</sup> "Shell construction typically denotes the floor, windows, walls and roof of an enclosed premises and may include some HVAC, electrical or plumbing improvements but not demising walls or interior space partitioning." Butterfly Lister, REAL ESTATE DEFINITIONS, <http://www.butterflylister.com/Real-Estate-Definitions/Shell-Space.htm>, accessed Sep. 4, 2011.

Grace. CP 206. At that time New Grace acknowledged that he was *not* in "occupancy." CP 235.

New Grace's attorney charged that this failure to take possession was breach of contract, CP 193, but in fact the breach was New Grace's failure to put the premises in the agreed-upon condition. They were not fit for use as an acupuncture clinic or office; instead they were delivered in warehouse condition. Mister Chung had asked New Grace several times to complete the Landlord's Work. CP 196. In addition, New Grace continued to occupy the premises, using them as storage until end of September 2007. CP 268.

New Grace's building manager, via FAX, said New Grace would complete the Landlord's Work by December 1, 2007. CP 198. Again, they failed to deliver. CP 200. Nevertheless New Grace now alleges that Mr. Chung had "moved into" the premises. Plaintiff's Responses to RFAs #82 & #83, CP 247.

**"2.6 Defendant paid the deposit of \$3,742.32 and began paying the monthly NNN charges in September 2007.... Defendant also paid the NNN charges for October 2007 and November 2007."** CP 299.

The dates are wrong. Mister Chung paid the \$3,742.32 as security deposit on July 12 when the Lease Agreement was made. See check, CP

214. Despite the fact that the premises were still not ready, he paid the charges (total \$1,224.99) for September, October, and November because it was agreed in the Lease Agreement.

**"2.7 After signing the Lease, Defendant installed a sign on the Building's main pole sign advertising the Defendant's business. However, the sign was not pre-approved by the Plaintiff and Defendant was directed to remove the sign.... Plaintiff eventually removed Defendant's sign in May 2008." CP 299.**

This was entirely the fault of New Grace. The sign company engaged by Mr. Chung had two designs, one with the word "acupuncture" and one without it. CP 203. Due to miscommunication between Mr. Chung's sign company and New Grace's sign company, New Grace's sign company installed the sign without the word "acupuncture." Photo, CP 286. After Mr. Chung demanded the sign be **replaced** (not '**removed**') with a sign that said "acupuncture," with no result, he ordered a new sign at an expense of \$1,500.00. See receipt and check, CP 203. See notice from New Grace, CP 366. In the meantime, New Grace pulled off the sign without notice, claiming (later) that it was not "pre-approved." See CP 270, CP 286, item 7(g) in CP 258-259.

The last cited exhibit says the sign was removed "when the premises were leased." This is untrue. New Grace relet to a new tenant, H-S Academy, in May 2009, *one year after* the removal of Mr. Chung's sign. Again, this misstatement is not contradicted until the Declaration of Jong Hwang, where he says New Grace removed the sign "to try to locate a new tenant for the premises." Declaration of Hwang, #27, at CP 333-334.

Instead of compensating Mr. Chung for the sign which he had to pay for himself, New Grace charged him \$700.00. Declaration of Hwang, id.; CP 270, 271; CP 386.

**"2.8 Upon taking possession of the Premises the Defendant began making tenant improvements to the Suites." CP 299.**

As stated above, it is not true that Mr. Chung took possession; he merely received the keys. He did *not* begin making T-I upon receiving the keys because the premises were still not in a shell condition and he did not accept them.

The Lynnwood city permit for the premises remodel was issued on September 20, 2007; remodel was allowed to commence from that date and onward. See permit, CP 208; worksheet, CP 210.

New Grace contracted with unlicensed contractor David Kim for remodel on May 4, 2007. Mister Chung contracted with Kim for T-I on July 16, 2007.

New Grace's Landlord's Work was planned to be completed by the commencement date so Mr. Chung's T-I could take place when the premises were in shell condition. But instead of finishing Landlord's Work and then working on the T-I, Kim worked on the two jobs simultaneously. See CP 208, CP 210, photos at CP 276-284.

Mister Chung found that Kim was an unlicensed contractor on September 28, 2007. CP 221-227. He then stopped Kim's work on the T-I. He informed New Grace of Kim's unlicensed status and requested New Grace to complete the Landlord's Work first. CP 196.

**"2.9 On or about November 16, 2007 Defendant changed the locks on the doors of the Premises." CP 299.**

This is an incomplete statement that blames Mr. Chung for something he did not do. Upon confirming that David Kim was an unlicensed contractor, Mr. Chung changed the locks and *handed new keys to New Grace with prior permission from New Grace*. He changed the locks to prevent the unlicensed contractor from entering the premises. Although Mr. Chung made this lock change with notice and permission

from New Grace, New Grace had the temerity to change the locks again, without any notice to Mr. Chung, on March 24, 2008. CP 270; photo, CP 284.

New Grace repeats this untruth in #89 from Defendant's RFAs, "Plaintiff states that the locks were changed in March 2008 because Defendant changed the locks in November 2007 and did not give Plaintiff a key." CP 247; photo, CP 284. Elsewhere New Grace describes its unilateral action as "Plaintiff took steps to protect the premises and mitigate its damages." Item 7(f) in CP 258; photo, CP 284.

Both statements are absurd. If Mr. Chung had not given keys to New Grace, New Grace could not have continued the Landlord's Work, as it did until December 2007.

**"2.10 Defendant engaged a contractor, White Gold International, Inc., d/b/a Hanwoori Construction ("Hanwoori"), to construct the tenant improvements for Defendant." CP 299.**

New Grace contradicts itself here. Mister Chung thought he was hiring David Kim as general contractor. New Grace was already using Kim for the remodel work and introduced him as a general contractor, and Kim so identified himself in documents. CP 263-266.

Upon finding Kim's unlicensed status, Mr. Chung asked Kim for contractor license, insurance, and bond. Kim provided the insurance and bond of Seungman Lee, president of White Gold International, Inc. ("White Gold"). The Governing People of White Gold are Seungman Lee and Esther Lee, the secretary. CP 223. Kim was president of Sabu Investment d/b/a *Hanwori* (with one "o") Construction, where Esther Lee was also the secretary. Information from the Department of Licensing showed that Sabu/Hanwori's contractor license had been suspended in 2006. CP 227.

Kim's business card prints Hanwoori\* (two "o"s) and general contractor by White Gold, Inc. in small size. CP 212. In No.2 from Declaration of Kim, he wrote "I am a manager of White Gold International, Inc., d/b/a Hanwoori construction." Declaration of Kim, CP 318. However, he was an illegal contractor whose license had expired two times. CP 225-227.

New Grace states in one place that "Plaintiff states that David Kim was a principal of contractor." #10 of Defendant's RFAs, CP 241. But it contradicts itself in No. 4(a)-(e) of Defendant's Interrogatory, saying "David Kim was not the contractor. He signed on behalf of the contractor White Gold International, Inc., d/b/a Hanwoori construction, which was

the contractor. Do not know Seungman Lee, but he is identified as the president of White Gold International, Inc.” CP 256.

New Grace’s answer to Defendant’s RFAs #16 says “Plaintiff stated that Plaintiff was provided a license number and a bond number by the contractor.” CP241. However, upon Mr. Chung’s request for production for these, New Grace did not give a response. Nor did it respond to Mr. Chung’s interrogatory asking to identify the general contractor whom New Grace hired.

At some point New Grace too realized that Kim was not doing the job properly. On June 18, 2008, when a dispute between them arose over illegal construction without a permit, New Grace sent a letter to Bryan Youngman of the Lynnwood Fire Department titled ‘Re: Han wooRi construction, David Kim general contracotr *[sic]*,’ writing ‘I hired no good contracotr *[sic]*.’ CP 217.

**"2.11 Plaintiff had previously engaged Hanwoori to perform work on the Building, which included some remodel to the Premises (the “Remodel”).... Plaintiff engaged Hanwoori to perform the following work in the Premises: construct a boundary wall, install HVAC, a drop down ceiling and windows... The Plaintiff agreed to install a**

**sink, which was a tenant improvement, and did install the sink." CP 299-300.**

True, New Grace contracted with Kim for the remodel on May 4, 2007. But there is an untrue statement in No.7 of Declaration of Jong Hwang, where she says "At the time Chung and New Grace entered into the Lease the premises were unfinished and vacant. The premises had been warehouse space but New Grace was completing construction of a boundary wall, front windows, installing an HVAC system and a drop down ceiling." CP 331. Also, in answer to Defendant's RFAs #64, New Grace asserts that "Plaintiff completed building remodel after the Lease was signed and before commencement date...." CP 245; also see permit, CP 208; worksheet, CP 210; photos, CP 276-284.

Again, in #68, New Grace answered that "the boundary wall was built as part of the building remodel and completed by September 1, 2007." CP 245; also see permit, CP 208; worksheet, CP 210; photos, CP 276-284. In #70, New Grace answered that "the roll-up doors were removed as part of the building remodel and completed by September 1 2007." CP 245-246. And in #73, New Grace states that "the ceilings were installed in premises as part of building remodel. Lease agreement speaks for itself." Id.

In addition, in Defendant's interrogatory No. 5(e) New Grace answered that "Plaintiff's Work on Units #106 and #107 was performed in accordance with the Lease Agreement and the boundary wall, HVAC, sink, ceiling and windows were installed. The Plaintiff agreed to install the sink, which was a tenant improvement, and did install the sink. The balance of the items were building remodel and were completed or to be completed by the commencement date." CP 256-257.

All these statements are false. *Nothing was completed by September 1.* The permits and inspections from the City of Lynnwood show that *no* construction in the premises *was even permitted* until September 20, 2007. Permit, CP 208; worksheet, CP 210. According to the inspection request worksheet from the city, framing sheetrock nailing work in the premises, including the boundary wall, was approved on November 9, 2007. CP 210.

**"2.12 A dispute apparently arose between Defendant and Hanwoori regarding the tenant improvements. Defendant directed Hanwoori to charge the costs of the tenant improvements to the Plaintiff, to perform work outside the terms of their contract, and refused to pay Hanwoori for the work performed."** CP 300.

Total expense for Defendant's T-I in the premises was set at \$20,000.00. Mister Chung paid David Kim \$8000.00 as first payment when he made a contract for T-I in the premises. See check, CP 219. First payment was made to cover expenses up through framing inspection. Second payment of \$8000.00 was to be made upon a completion of framing inspection in the premises. The remaining \$4,000.00 was to be paid upon completion of the T-I. CP 322-323.

Upon confirming for himself that Kim was unlicensed, Mr. Chung stopped him from doing T-I work on the premises after the framing inspection. Mister Chung paid the exact amount due for as much of Kim's service as he performed under the contract with Mr. Chung.

**"2.13 Because Hanwoori was doing both the tenant improvements and the Remodel, Hanwoori did not immediately complete the drop down ceiling. In order to be more efficient, Hanwoori planned to complete the ceiling after the tenant improvement partition walls were completed." CP 300.**

This statement could seem to imply that Kim's "plan" had the approval of Mr. Chung. However, Mr. Chung did not approve either the simultaneous work or the delay on the ceiling. New Grace made the remodel contract with Kim on May 4, and Mr. Chung made the T-I

contract on July 16. This gives a 2-month period between those dates, and 4 months between New Grace's contract and the commencement date. Based on the ample amount of time in between, it is evident that the Landlord's Work would have been, and should have been, done before tenant's T-I would begin.

New Grace and Kim did not follow this original plan, and worked on Landlord's Work and T-I simultaneously. Permit, CP 208; worksheet, CP 210. Even following his own "efficient" plan to complete the ceiling last, Kim did not finish framing the walls, including the boundary wall, until November 9, 2007, and did not completely install the ceiling. CP 196, 198, 200, 235.

**"2.14 Hanwoori terminated its relationship with Defendant in December 2007 and did not complete the tenant improvements for Defendant." CP 300.**

False. Hanwoori did not terminate the relationship; Mr. Chung did so when he realized Kim was unlicensed. On September 28, 2007, Mr. Chung received a document from WA State Department of Labor and Industries informing him of Kim's status. CP 221-227. Upon determining for himself that Kim was unlicensed on November 15, 2007, Mr. Chung discharged him.

Mister Chung then asked New Grace to finish the Landlord's Work before Mr. Chung's T-I was initiated. CP 196, CP 235. However, New Grace kept Kim on to do the remodel and Landlord's Work. There were no proper permit and no inspection, as New Grace later found out from the Fire Department on February 25, 2008. As a result, Mr. Chung's business application was denied and T-I permit. Inspection Notice, CP 231.

**"2.15 When Plaintiff learned that Hanwoori was not completing the tenant improvements, Plaintiff directed the drop down ceiling to be completed and the ceiling was completed by December 5, 2007.... The base monthly rent for December 2007 was prorated to December 6, 2007." CP 300.**

False. The drop down ceiling was still incomplete on December 6, 2007, as shown in photo evidence and the inspection request worksheet by the City of Lynnwood. Photos, CP 280, 282, 284; worksheet, CP 85. The inspection report says that the T-Bar ceiling grid system is approved as installed, but no tiles are to be installed prior to electric and fire alarm approval. CP 85.

New Grace illegally continued Landlord's Work through Kim but did not complete it. Consequently, Mr. Chung did not pay the base monthly rent for December 2007.

At the time the lease was signed, the premises were in a warehouse condition with only ¼ of the preexisting ceiling installed. Photo, CP 153. Upon Mr. Chung's multiple requests to complete the ceiling, New Grace's agent responded on December 14 that "the lighting while finished in one portion of the suite and not the other is due to the suites being leased, one was office, one warehouse. Again 'as is' condition applied. It is the tenant responsibility to bring the warehouse portion to the standard office suite." CP 104.

In the Complaint, New Grace states that "the landlord... installed a drop down ceiling in one of the suites at Defendant's request." CP 408. *This is not true.* Mister Chung had neither leased a warehouse nor requested that only one portion of the ceiling to be installed. In fact, New Grace did not even install a drop down ceiling in one of the suites. In contradiction to itself, in answer to Defendant's RFAs #30-33, New Grace admitted that both suite #106 and #107 ("premises") were leased as office, not as warehouse. CP 117.

Because Mr. Chung could no longer trust Kim's work or New Grace, he requested an inspection by a third party. E-mail, CP 112. New Grace did not respond.

**"2.16 Defendant did not complete his tenant improvements."** CP 300.

This is true, but the fault lies with New Grace and Kim. The T-I was halted on November 15, 2007, when Mr. Chung had Kim stop work after his unlicensed status was confirmed. When the T-I permit was canceled by the Fire Department because of illegal work performed by New Grace, CP 231, CP 210, Mr. Chung could no longer continue with the T-I. As a result, he had to lease a temporary small office nearby for three months from March 2008 to mitigate the damages and to provide therapeutic service to his patients. Photo, CP 288.

**"2.17 Defendant did not pay the base rent or NNN charges from December 2007 forward." CP 300.**

This is true, but it was because the premises were never in shell condition. New Grace, however, claims that "Premises were being leased 'as is' in a shell condition" as written in No. 7 of Declaration of Hwang. CP 331.

Despite the incomplete condition of the premises, New Grace began sending bills for base rent and NNN on December 1, 2007. Because the Landlord's Work was not just incomplete, but not even started by the commencement date, Mr. Chung proposed to negotiate for payment. CP 112. New Grace never responded to this request.

**"2.18 Plaintiff issued multiple Notices to Pay or Vacate the Premises." CP 301.**

True, but Mr. Chung could not "vacate" premises he had not moved into. New Grace took note that he had not moved in when it sent a query asking when he would move in. CP 110. Mr. Chung clearly indicated that he would move in after Landlord's Work, first, and then tenant's T-I were completed. Id. Because Mr. Chung did not abandon the premises, he objected and requested to come up with a rational way to resolve the issue each time New Grace sent them. CP 112. New Grace never responded to the requests.

New Grace kept sending bills for beginning balance, base rent, NNN, late fee, and vacate notice until June 9, 2008. CP 233.

**"2.19 Defendant did not pay nor did he vacate the Premises.... Defendant's failure to pay the rent and NNN charges after receiving the notice to pay "constitute[s] a default and breach" of the Lease by Defendant." CP 301.**

The breach was prior to this, and it was by New Grace. Mister Chung did not pay the rent and NNN because he did not get the premises in a shell condition due to New Grace's failure to complete Landlord's Work. Because of this failure, Mr. Chung declined to take possession.

New Grace through its then attorney acknowledged that he had not taken possession. CP 68-69.

This failure to possess the premises does not mean Mr. Chung had abandoned it. Mister Chung did not need to vacate the premises, because he never moved in.

**"2.20 By letter dated March 24, 2008, Plaintiff's then attorney, Rob Trickler, advised Defendant that the Lease was being terminated pursuant to paragraph 17.2 of the Lease." CP 301.**

Mister Chung did not receive the letter from Trickler. Because he was not aware of it, he continued to send objections via faxes and e-mails to New Grace and its agent. CP 112, CP 145-146, CP 148-149. They forwarded Mr. Chung's messages to each other, but they neither replied to him nor mentioned the attorney's letter.

Around September 2008, Mr. Chung was finally informed of the attorney's letter when New Grace sent him a copy. New Grace terminated the lease, changed the locks, posted a "For Rent" sign, and leased the premises to new tenant without Mr. Chung's knowledge. CP 159.

**"2.21 Upon termination of the lease, Plaintiff took action to complete the tenant improvements and re-let the Premises." CP 302.**

Because Mr. Chung did not receive the attorney's letter, he was unaware of New Grace taking these actions. About three weeks after New Grace unilaterally changed the locks, he found about it on April 10, 2008, and sent objection messages regarding that and the "for rent" sign via fax and email. On May 29, 2008, he saw his sign being pulled down and immediately sent objections to New Grace via fax and email. CP 145-146, CP 148-149. New Grace responded to none of these messages. When New Grace found a new tenant, H-S Academy, it resumed the T-I on top of Mr. Chung's T-I that was not finished. Blueprint, CP 393. Instead of refunding Mr. Chung's investment of \$8,000.00 on the T-I, New Grace is claiming against him to pay the additional \$15,000.00 that New Grace expended on the T-I for the new tenant.

New Grace did not follow judicial procedures of Washington when it terminated the lease, changed the locks, and pulled down the sign, all without notice to or consent from Mr. Chung. Despite costing immense damages and losses to Mr. Chung's business, New Grace is claiming against him for \$102,058.19.

Through Defendant's interrogatories Mr. Chung asked New Grace to produce documentation showing that New Grace had followed lawful and valid legal procedures when it changed the lock. New Grace did not provide any record. Also, New Grace did not respond to Defendant's 4<sup>th</sup>

RFAs #12, which asked whether New Grace had obtained a writ from court before changing the locks.

### **3. Respondent's Damages Are Self Inflicted**

New Grace claims the Chungs are responsible for its damages. However, New Grace's damages originate and are caused from New Grace's failure to deliver the premises in a shell condition. The damages are not due to a breach of contract by Mr. Chung, but due to New Grace's own breach, which caused subsequent damages to Mr. Chung as well. Because of New Grace's breach, New Grace did not receive monthly payments for the premises; on the other hand, Mr. Chung suffered a large setback in business.

New Grace should compensate for damages and losses Mr. Chung suffered due to New Grace's unilateral breach of the Lease.

### **CONCLUSION**

"A fair trial consists not alone in an observance of the naked forms of law, but in a recognition and a just application of its principles." State v. Pryor, 67 Wash. 216, 220, 121 P. 56 (1912).

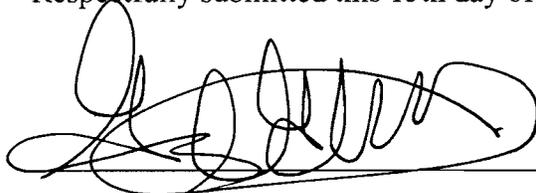
To recap, the arguments of the Chungs are as follows:

- Mister Chung's mistake was not the willful, deliberate sort that calls for an extreme sanction, and it was an abuse of discretion to apply such a sanction.

- He cured his mistake by testifying under oath to the truth of what he submitted.
- The court's decision on the Motion to Strike should not have been influenced by the court's opinion of the merits of the issues the Chungs presented.
- They should have prevailed on the merits because they presented genuine issues tending to show that—
  - The original breach was by New Grace, by not performing its agreed-upon construction obligation in a reasonable time;
  - New Grace did not commence performance within 30 days or diligently prosecute the same to completion (i.e., it hired an unlicensed contractor, causing further delay);
  - Mister Chung did not change the locks without giving keys to New Grace;
  - He did not vacate or abandon the premises;
  - New Grace's termination of the lease was unlawful because Mr. Chung was not in default;
  - The damages awarded New Grace are excessive and unconscionable in view of the many documented failures of New Grace (i.e., the late start, hiring the wrong contractor,

removing the sign, changing the locks, ignoring tenant's  
notices and questions, etc.).

Respectfully submitted this 15th day of February, 2012.

A handwritten signature in black ink, consisting of several loops and flourishes, positioned above a horizontal line.

Gregory E. Gladnick, Attorney for Appellants

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NO: 10-2-10613-6

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

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TAE HO CHUNG and JANE DOE CHUNG, APPELLANT

v.

NEW GRACE INVESTMENT, INC., RESPONDENT

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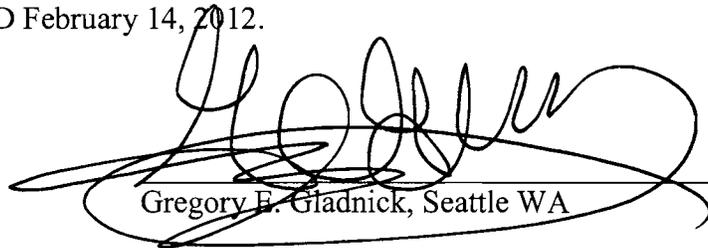
PROOF OF SERVICE OF APPELLANT'S BRIEF

GREGORY E. GLADNICK, WSBA 13,728  
ATTORNEY FOR APPELLANT  
4711 AURORA AVENUE NORTH  
SEATTLE, WASHINGTON 98103-6515  
TELEPHONE (206) 789-3662

On February 14, 2012, I had sent out for service or mailed a true and correct copy of the Appellant's Brief to Respondent's counsel Michael P. Jacobs.

I hereby declare under penalty of perjury under the laws of the State of Washington that the above statement, to the best of my knowledge, is true and correct.

DATED February 14, 2012.



Gregory E. Gladnick, Seattle WA