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No. 69155-4-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

DIVISION I

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DEAN CURRY

APPELLANT

v.

VIKING HOMES, INC.

RESPONDENT

APPEAL FROM SNOHOMISH COUNTY CAUSE NO. 09-2-07715-9

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

This Appeal originates from the dismissal of a construction defect case in which the remaining Plaintiff, Dean Curry (“Mr. Curry”), seeks to resurrect his claims against Defendant Viking Homes, Inc. (“Viking”), by alleging facts, raising issues and creating arguments, which he did not raise in the 35 months his case languished on the Snohomish County docket.

Mr. Curry claims that the trial court erred when it granted Viking’s Motion for Summary Judgment because, in 35 months of litigation, Mr. Curry failed to provide any cognizable legal theories upon which his claims could survive, failed to provide evidence supporting any of the claims asserted in his Complaint, and failed to adhere to any of the court ordered case scheduling deadlines.

As the trial court recognized, Mr. Curry did not provide evidence to support his claims, did not identify experts or expert opinions, and did not respond to discovery requests for over two years, in violation of the Case Scheduling Order, the Rules of Civil Procedure, and Washington law. As a result, the trial court properly dismissed all of Mr. Curry’s claims against Viking, with prejudice. Viking respectfully requests that this Court affirm the dismissal that was entered on July 6, 2012.

## II. STATEMENT OF THE CASE

This action arises out of the construction of a single-family home located at 12521 Sixth Avenue Northeast in Marysville, Snohomish County, Washington (the "Home"). CP 77. Viking was the general contractor for the Home, which was substantially completed in April 2007. CP 77. Mr. Dean Curry and his wife, Mrs. Cheris Curry ("The Currys") purchased the Home from Viking in March 2007, pursuant to a Residential Real Estate Purchase and Sale Agreement ("PSA"). CP 77. The PSA contained an inspection contingency clause conditioning the PSA on the "buyers subjective satisfaction with inspections of property and improvements on the property." CP 77.

Five days after the execution of the PSA, The Currys hired Home Inspections Plus to inspect the Home. CP 77. After the inspection, on March 23, 2007, The Currys requested that Viking perform additional work at the Home. CP 77. Viking worked to accommodate The Currys new requests. CP 77. On March 27, 2007, The Currys and Viking executed an Addendum to the PSA, removing the inspection contingency, subject to Viking addressing The Currys' new requests at the Home. CP 77. After Viking and its subcontractors completed the additional work, there was a final walkthrough of the Home on April 13, 2007. CP 77.

During the final walkthrough of the Home, The Currys added modifications to the walkthrough punch list. CP 77. Though Viking and its subcontractors worked for several months to accommodate The Currys, The Currys' demands for new and additional modifications to the Home continued to escalate. CP 77. Viking finally notified The Currys that the work had been completed, and Viking and its subcontractors would no longer continue responding to The Currys' requests for additional modifications to the Home. CP 77.

On August 12, 2009, The Currys filed suit against Viking and Developers Surety and Indemnity Bond No. 59006C. CP 2. The Complaint listed four causes of action: Breach of Contract, Breach of Contract – Settlement Contract, Violation of the Contractor Registration Act, and Violation of the Washington Consumer Protection Act. CP 2. The Complaint does not list the statutory bases for the alleged Breach of the Contractor Registration Act or the alleged Consumer Protection Act violations. CP 2. In the Complaint, The Currys alleged 49 defects at the Home. CP 2.

Prior counsel for Viking served discovery requests on The Currys in November 2010, which were never answered. CP 77. Current counsel for Viking assumed defense of this case on July 21, 2011. CP 77. At that point, The Currys' case had been on file in Snohomish County for 23

months, and the Currys had provided no evidence, information, or other bases for the claims they had filed, other than the allegations listed in the 2009 Complaint. CP 2, 77. For this reason, Viking worked to get a Joint Case Scheduling Order in place, which would require the case to move forward on an agreed timeline. CP 77. The Joint Case Scheduling Order set out the following dates:

February 17, 2012	Plaintiffs' discovery of various expert testimony
February 17, 2012	Plaintiffs' disclosure of areas of non-expert testimony
March 16, 2012	Plaintiffs' disclosure of identity and opinions of expert witnesses
May 15, 2012	All parties will produce or make available for inspection and copying all non-privileged documents related to:  <ol style="list-style-type: none"><li>1. The original construction of the property;</li><li>2. Repairs or remediation completed, attempted or proposed, prior to litigation; and</li><li>3. Any other documents which relate to alleged construction deficiencies/ damages (excluding from this production any expert files.)</li></ol>
May 25, 2012	Simultaneous disclosure of rebuttal experts and reports
June 15, 2012	The parties shall participate in private mediation on or before

CP 14. The Currys failed to adhere to any of the dates set out in the Joint Case Scheduling Order. CP 77.

After the trial court signed the Joint Case Scheduling Order, Viking and The Currys executed a Stipulation to File a Third-Party Complaint. CP 14. The Third-Party Complaint allowed Viking to engage the relevant subcontractors in this litigation pursuant to their respective contractual duties to defend and indemnify Viking in the event that claims were raised against Viking for work performed by the subcontractors. CP 14, 15, 17, 77. The Third-Party Complaint was filed in December 2011, with the understanding that all parties would have the immediate opportunity to inspect the Home, and obtain evaluations of The Currys' claims. CP 17, 77.

Subsequent to filing the Third-Party Complaint, counsel for Viking and Third-Party Defendants received no further cooperation or communication from The Currys in response to inquiries, requests to inspect, or discovery requests. CP 77, 123, 137. Neither Viking, nor Third-Party Defendants were provided access to the Home, and they never received any evidence concerning the causes of action or claimed defects. CP 77, 123, 137. In its continued attempts to obtain evidence related to The Currys' claims, Viking served The Currys with discovery requests on

February 24, 2012, which went unanswered. CP 77. In addition, Third-Party Defendant, A Plus Siding, propounded discovery on December 22, 2011, which went unanswered. CP 77. Third-Party Defendants, C to C Construction and Protek Roofing, propounded discovery on January 30, 2012, which went unanswered. CP 77, 90. Counsel for Viking served the required CR 26(i) letter on April 3, 2012, setting a discovery conference, and counsel for The Currys failed to attend or otherwise respond. CP 77. Counsel for The Currys withdrew on April 25, 2012, having represented The Currys for the first 32 months of the case. CP 77.

By May 2012, The Currys' case had been on file for 33 months and they had still failed to provide any information, documentation, or evidence supporting any of their claims or the 49 alleged defects at the Home, nor had they allowed inspection of the Home by Viking or any of the Third-Party Defendants. CP 77.

Viking filed its Motion for Summary Judgment on May 11, 2012, seeking dismissal of The Currys' claims against Viking. CP 77. Subsequent to receiving notice of the pending Summary Judgment Motion, Mrs. Cheris Curry individually engaged counsel, Ryan Sternoff, who contacted counsel for Viking and requested that Mrs. Curry be allowed to dismiss her claims against Viking with prejudice, with the Agreement that Viking would not pursue her to recoup costs and fees. CP

123. Counsel for Mrs. Curry indicated that The Currys were in the midst of marital dissolution proceedings and that Mr. Curry was no longer residing in the Home. CP 123. Viking agreed to the dismissal, and on June 13, 2012, the trial court signed the Stipulated Dismissal of Mrs. Curry's claims against Viking, with prejudice. CP 125. This left only Mr. Curry as a Plaintiff in the case. CP 125.

Mr. Curry failed to respond to the Summary Judgment Motion, but appeared at the June 15, 2012 hearing, requesting a continuance. CP 129, 139. The trial court ordered sanctions against Mr. Curry in the amount of \$5,000 for failing to timely respond to the Summary Judgment Motion, which sanctions were ordered to pay the time of the attorneys who appeared for the June 15, 2012 hearing. CP 129. The trial court continued the hearing to July 6, 2012, and ordered that Mr. Curry could only respond to the Summary Judgment Motion once he had paid his sanctions into the court registry. CP 129. Prior to the July 6, 2012 Summary Judgment hearing, Mr. Curry engaged new counsel, Edward Chung, who entered a limited appearance for the purpose of responding to the Summary Judgment Motion. CP 132. Mr. Curry's Response to the Summary Judgment Motion provided no additional information or evidence supporting any of his claims, but rather re-stated the allegations from the

Complaint. CP 133. Mr. Curry also filed a Declaration containing nothing more than unsupported conclusory statements. CP 133.

In her July 6, 2012 ruling, the trial court judge stated on the record that she had reviewed the entire file. RP 3. In fact, she brought the entire physical court file into the courtroom with her at the time of the hearing, stating

[a]s the parties may be able to discern, I have had a chance to review the entire file, including all of the submissions by all of the parties, and so I look forward to oral argument.

RP 3. When discussing her ruling at the end of oral argument, the trial court further discussed the case file and submissions she had reviewed at length:

[a]mong the materials that I have reviewed, some that I found most important to my decision today, include the Complaint which was filed in August 2009; the Answer which was filed in December of 2010; Viking's First Interrogatories, and there appear to be three sets of them; one set was answered in December 2009, another set was propounded in November of 2010, and a third set was propounded in February of 2012; Plaintiffs' First Requests for Admission were propounded in December of 2009 and thereafter answered; the Joint Status Scheduling Memorandum filed on October 21, 2011; Viking's Motion for Summary Judgment filed in May of this year; Viking's June 13, 2012 Reply; Plaintiffs' subsequent Summary Judgment Response filed on June 27<sup>th</sup> of this year; the Declaration of Attorney Chung filed on June 27<sup>th</sup>; and the Declaration of Mr. Curry filed on June 27<sup>th</sup>.

RP 17.

Attorney Matthew Robinson appeared with Mr. Curry at the July 6, 2012 hearing. RP 1. Mr. Curry's counsel provided nothing in oral argument other than a re-statement of Mr. Curry's allegations. RP 1-27. As the trial court noted in its ruling,

[t]he purpose of the summary judgment motion is to test the sufficiency of the evidence and to apply it to the legal theories present in the case. I find no evidence of a prima facie showing of any of the causes of action based upon the evidence before me.

RP 18. The trial court dismissed all of Mr. Curry's claims against Viking with prejudice. CP 154; RP 24.

### **III. STANDARD OF REVIEW**

“The standard of review of an order of summary judgment is *de novo*, and the Appellate Court performs the same inquiry as the trial court.” *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003) *citing*, *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

#### IV. ISSUES ON APPEAL

1. WHETHER THE TRIAL COURT PROPERLY STATED THE BASES IT RELIED UPON IN GRANTING VIKING'S MOTION FOR SUMMARY JUDGMENT.
2. WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT.
3. WHETHER THE TRIAL COURT'S DISMISSAL OF CURRY'S CLAIMS WAS PROCEDURALLY CORRECT.

#### V. ARGUMENT

1. **The trial court clearly stated the bases upon which it granted Viking's Motion for Summary Judgment.**

In rendering her July 6, 2012 ruling, the trial court judge brought the entire court file to the hearing and indicated, on the record, that she had reviewed the entire file. RP 3. When rendering her ruling at the end of the hearing, the judge re-stated that she had reviewed the entire file, and enumerated the documents she found most helpful in rendering her decision. RP 3, 17.

The courts in Washington have consistently held that, as long as the court has made the bases for its ruling clear, and enumerated the documents reviewed in rendering its decision, any technical error in the listing of such documents in the order of summary judgment is immaterial. *W.R. Grace & Co. v. Dep't of Revenue*, 137 Wn.2d 580, 590-591, 973 P.2d 1011, (1999).

However, because the trial court indicated it had indeed read six of the seven affidavits, and the affidavits are included in the record before us, DOR's assertion that CR 56(h) and RAP 9.12 require the listing of such evidence in the judgment is of no moment. Because the affidavits are included in the record on appeal, any error in failing to list the affidavits in the summary judgment order is harmless. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). (An error, not of constitutional magnitude, is harmless if there is a reasonable probability that absent the error the result would have been the same).

*Id.* The written transcript of the July 6, 2012 hearing, which has been provided to this Court, provides compliance with the requirement that the bases for a summary judgment ruling, and the documents relied upon by the trial court, be provided to the Court of Appeals for review. Furthermore, the case that Mr. Curry relies upon in his first assignment of error does not support his position that the “trial court’s order granting summary judgment [sic] failure to state what evidence it relied upon in providing relief was improper.” Appellant’s Brief p. 1. The case Mr. Curry cites addressed this issue and dismissed it by stating that,

[t]he summary judgment order here, unfortunately, does not designate the evidence relied upon as required by CR 56(h). We will nonetheless view all facts in this record and their inferences in a light most favorable to the non-moving party.

*Barker v. Advanced Silicon Materials*, 131 Wn. App. 616, 623, 128 P.3d 633 (2006). In the case at bar, the court stated, on the record, which documents it reviewed in preparation for the hearing, and which

documents it found most helpful in rendering its decision. This information was transcribed and provided to the Court of Appeals. RP 3, 17. Therefore, there is no error, because the Court of Appeals has a transcribed record enumerating the documents the trial court reviewed in preparing for the July 6, 2012 Summary Judgment hearing.

**2. The trial court properly granted Viking's Summary Judgment Motion**

Summary judgment is proper when the pleadings, depositions, and admissions on file demonstrate there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c); *Kesinger v. Logan*, 113 Wn.2d 320, 325, 779 P.2d 263 (1989).

A material fact is defined by Washington Courts as one that controls the outcome of the litigation. *Simons v. Tri-State Construction Co.*, 33 Wn. App. 315, 655 P.2d 703 (1982); *Grimwood v. University of Puget Sound*, 110 Wn.2d 355, 753 P.2d 517 (1988). Once a party moving for summary judgment makes an initial showing that there is no genuine issue of material fact, the non-moving party must demonstrate the existence of such an issue by setting forth specific facts which go beyond mere unsupported allegations. *Brame v. St. Regis Paper Co.*, 97 Wn.2d 748, 752, 649 P.2d 836 (1982); CR 56(e). In order to make this showing, the party opposing summary judgment must submit, "competent testimony

setting forth specific facts, as opposed to general conclusions to demonstrate a genuine issue of material fact.” *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993).

In this case, the trial court properly ruled on Mr. Curry’s obligation to present evidence to defeat the Viking Summary Judgment Motion, by stating that

[i]t’s really the Plaintiff’s obligation based upon the status of these proceedings to provide the information for the Court to be able to determine whether there are actionable claims that can proceed.

RP 22. Mr. Curry, as the non-moving party, could not rest upon the mere allegations or denials in his pleadings. CR 56(e). In order for the non-moving party to defeat a motion for summary judgment, the party must either, by affidavits or as otherwise provided in the rule, set forth specific facts showing that there is a genuine issue for trial. *Id.* Furthermore, the non-moving party may not rely on speculation or argumentative assertions that unresolved factual issues remain, but instead “must set forth specific facts that sufficiently rebut the moving party’s contentions.” *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

The trial court correctly determined that Mr. Curry had relied solely upon argumentative assertions as the bases for his claims when it

ruled that there was a lack of sufficient evidence or information to defeat the summary judgment motion.

Counsel's brief, filed by Mr. Chung, which characterizes the Defendants' position as essentially ludicrous and audacious, is a concern. Mr. Chung appeared to take a position that allegations alone are sufficient to overcome a motion for summary judgment. Mr. Robinson has echoed that in his argument today. Yet the brief acknowledges that the law requires more. In fact, it requires evidence of how plaintiff plans to establish his prima facie case as to each cause of action and then make a showing that he has competent evidence to establish each element of each cause of action. It has not occurred here.

In filing its Motion for Summary Judgment, Viking challenged the sufficiency of the Plaintiff's evidence as related to his claims. *Las v. Yellow Front Stores*, 66 Wn. App. 197, 831 P.2d 744 (1992). As such, the burden shifted to Mr. Curry to produce admissible evidence to prove the existence of a genuine issue of material fact. *Id.* Mr. Curry failed to submit competent testimony or specific facts in support of his position. CP 2, 133, 134, 135. Mr. Curry filed a Declaration in support of his Response to Viking's Motion for Summary Judgment, which did not provide any new information, and sought to claim Mr. Curry as a construction defect expert in his own case. CP 135. There are numerous problems with this, not the least of which is the fact that the dates for designation of such witnesses and testimony had passed long before the Summary Judgment Motion was filed. CP 2, 133, 135. In addition, the declaration provided no evidence to

support any of Mr. Curry's claims. CP 2, 133, 135. Rather, Mr. Curry continued to provide general, conclusory statements, which was insufficient defeat summary judgment. *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555-56, 860 P.2d 1054 (1993). The trial court correctly stated,

I have Mr. Curry's Declaration that there are defects that he's complained of, that they are violative of one or more contracts, but I don't have a contract. And it is not Mr. Curry's role or responsibility to determine that an action is a violation of a contract that is a question of law.

In the record before the trial court, Mr. Curry failed to cite any statutes, building codes, case law, or otherwise provide any evidence necessary to prove the the elements of the four causes of action in his Complaint, or any causal nexus between his claims and alleged damage. CP 133; RP 1-27. The trial court properly dismissed Mr. Curry's claims in their entirety. RP 23-24.

### **The Contractor Registration Act**

The trial court correctly dismissed the Contractor Registration Act Claim. The third cause of action in Mr. Curry's Complaint alleges violation of the Contractors Registration Act. CP 2. Mr. Curry failed to enumerate the elements of this cause of action, cite any statutory authority for the claim, provide a causal nexus between the alleged violation of the act and alleged damages, or cite any case law supporting his claim. CP 2, 133, 134, 135. Mr. Curry did not address the Contractor Registration Act

in his Response to the Viking Summary Judgment Motion. CP 133. At the July 6, 2012 Summary Judgment hearing, counsel for Mr. Curry did not address this claim. RP 1-27. The trial court confirmed this in its ruling,

[w]ith respect to the violation of the Contractors Registration Act, there is an absence of proof on that cause of action.

RP 19. There is nothing in the trial court record to support a cause of action for violation of the Contractor Registration Act, and it was proper for the trial court to dismiss the claim.

### **Consumer Protection Act**

The trial court correctly dismissed Mr. Curry's Consumer Protection Act claim. The fourth cause of action in Mr. Curry's Complaint, alleges violation of the Washington Consumer Protection Act ("CPA"). CP 2.

In order for Mr. Curry to have prevailed on his Consumer Protection Act claim, he must have proven either a per se violation or an unfair or deceptive practice on the part of Viking. See, e.g., *Watkins v. Peterson Enterprises, Inc.*, 57 F.Supp.2d 1102, 1109 (1999); *Evergreen Collectors v. Holt*, 60 Wn. App. 151, 154, 803 P.2d 10 (1991). "A per se unfair trade practice exists when a statute [that] has been declared by the Legislation to constitute an unfair or deceptive act in trade or commerce has been violated." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*,

105 Wn.2d 778, 786, 719 P.2d 531 (1986). Mr. Curry did not allege a per se violation of the CPA. CP 2, 133, 135, RP 1-27. Without a per se violation, there is only a private CPA action available to a plaintiff, and the *Hangman* Court confirmed the five statutory elements, all of which a plaintiff **must prove** in order to prevail in a private CPA action:

- (1) an unfair or deceptive act or practice,
- (2) occurring in trade or commerce,
- (3) which affects the public interest,
- (4) an injury to the plaintiff's business or property, and
- (5) causation.

*Hangman, supra* at 780. In consumer transactions, when analyzing a CPA claim, the court must also look at the potential for repetition. Factors they consider include:

- (1) were the alleged facts committed in the course of defendant's business;
- (2) are the acts part of a pattern or generalized course of conduct;
- (3) were repeated acts committed prior to the act involving plaintiff;
- (4) is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff; and
- (5) were many consumers affected or likely to be affected by the transaction, if the act involved a single transaction.

To prevail on a CPA claim, the *Hangman* test requirements must be met. *Cited id. at 790-791.* Mr. Curry provided no facts or evidence to show that his alleged claims related to acts that were part of a pattern or generalized course of conduct separate and apart from the Home, that the alleged acts were repeated acts committed prior to the act involving Mr. Curry, and that there was a real and substantial potential for repetition involving Mr. Curry. CP 133, 135; RP 12-13.

Mr. Curry failed to, 1) cite any statutory authority in support of his CPA claim; 2) identify the elements of the cause of action as related to his CPA claim; 3) show any causal nexus between alleged acts and damage suffered by Mr. Curry; and 4) failed to provide any case law supporting his CPA claim. CP 2, 133, 135. Mr. Curry's Response to the Viking Summary Judgment Motion failed to address the CPA claim. 133. The Declarations in support of Mr. Curry's Response to the Summary Judgment Motion also failed to provide any information or documentation in support of the CPA claim. CP 134, 135. The only time Mr. Curry addressed this issue was at the July 6, 2012 Summary Judgment hearing, when counsel for Mr. Curry stated,

[s]ome of what my counterpart for the other side was talking about, it was the CPA and the five part test. These are substantive arguments, your Honor. This has nothing to do with the Motion we are arguing here today. All of that, whether or not we meet the burden for those CPA claims,

has to go to trial, at least have to have some sort of recognition of what was handed—and if we haven't then at a later date they can file for a motion for summary judgment after Plaintiffs' rest. We just don't think this is the proper time for a motion for summary judgment...

RP 12, 13. This was the extent of the information provided by Mr. Curry in support of his CPA claims. As the court held in her ruling on the CPA claim,

[t]here would have to be a prima facie showing of the elements under the *Hangman* case, and there is nothing.

RP 20. The trial court properly dismissed Mr. Curry's CPA claims.

### **Contract Claims**

There is nothing in the trial court record to support Mr. Curry's breach of contract claims. Mr. Curry's Complaint contains allegations of breach of contract and breach of contract-settlement contract, and he has never provided any evidence, statutory basis, contractual basis, alleged damages or a causal nexus between his claims and alleged damages related to these claims. Mr. Curry's Summary Judgment Response stated that his Complaint was sufficient to overcome summary judgment,

[i]t is in fact flabbergasting that Defendant Viking has the audacity to claim that no factual disputes exist when Plaintiff's Complaint alleged each defect creating a genuine issue of material fact as to whether there was a material breach.

CP 133. Mr. Curry's Response continued by stating,

[h]ere, Plaintiff's Complaint alleged in detail the specific defects with the work that was performed on the family home. These averments go far beyond the procedural requirements needed to provide in detail the specific facts which overcome Viking's Motion for Summary Judgment.

CP 133. Counsel for Mr. Curry did not address the contract claims at the July 6, 2012 hearing. RP 1-27. The trial court noted this in its ruling, stating,

I don't even see a legal argument from which I can begin to evaluate a claim for an oral contract.

RP 22.

The essential elements of a contract in Washington are, "the subject matter of the contract, the parties, the promise, the terms and conditions, and (in some but not all jurisdictions) the price or consideration." *Bogle & Gates v. Holly Mountain Res.*, 108 Wn. App. 557, 561, 32 P.3d 1002 (2001), citing *DePhillips v. Zolt Constr. Co., Inc.*, 136 Wn.2d 26, 31, 959 P.2d 1104 (1998), (quoting *Family Med. Bldg., Inc. v. DSHS*, 104 Wn.2d 105, 108, 702 P.2d 459 (1985)).

In this case, there was no evidence that met the required elements necessary to prove an oral or written contract that was breached. CP 133; RP 1-27. Mr. Curry affirmatively declined to provide argument or evidence on this issue anywhere in the trial court record, in his Response to the Viking Summary Judgment Motion, or at the hearing on July 6,

2012, beyond his position that his Complaint was sufficient to overcome summary judgment. The trial court properly dismissed Mr. Curry's breach of contract claims.

**3. The trial court's dismissal of Curry's claims at summary judgment was procedurally correct.**

Curry argues that Viking's Motion for Summary Judgment was premature. Appellant's Brief. P. 4. Viking waited 33 months for The Currys to provide the legal bases, evidence and expert opinions supporting the four causes of action listed in the Complaint. CP 77. The Currys failed to respond to discovery requests dating from November 2010, in violation of the Washington Civil Rules of Procedure. CP 77. Viking propounded discovery requests upon The Currys, through prior counsel, in November 2010. Subsequent to that date, after entering into a Joint Case Scheduling Order, Viking, through current counsel, propounded discovery upon The Currys. The Currys again failed to respond. CP 77. Subsequent to the filing of the Third-Party Complaint in December 2011, several Third-Party Defendants propounded discovery requests upon The Currys, which also went unanswered. CP 77. Washington Civil Rule 37(d) provides

[i]f a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the

officer who is to take his or her deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for production of documents or inspection submitted under rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under sections (A), (B), and (C) of subsection (b)(2) of this rule.

Washington Civil Rule 37(b)(2)(C) provides,

[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party.

The Civil Rules authorize a trial court to dismiss a complaint with prejudice, if “the circumstances of the case warrant such a severe remedy.” *Peterson v. Cuff*, 72 Wn. App. 596, 601, 865 P.2d 555 (1994). In the instant case, the issue was not just one of Mr. Curry’s failure to provide some discovery responses, it was the complete failure to provide any evidence in support of his claims for 33 months prior to Viking’s Summary Judgment Motion. CP 77. This includes the failure to designate witnesses, experts, lay and expert areas of testimony, evidence supporting the causes of action in the Complaint, evidence providing a causal nexus between the alleged claims and damages, access to the subject property, and discovery responses propounded twice by counsel for Viking and

three different Third-Party Defendants over the course of 17 months. As the Court noted in its ruling, Mr. Curry produced, for the first time at summary judgment, some responses that were allegedly provided to discovery in 2009, stating,

[f]urther, while Mr. Curry's new lawyer has produced interrogatory answers with the Summary Judgment response, the answers...do not identify the questions they are responding to. And I spent some time trying to align those answers with any of the interrogatory forms that were in the court files, and I was not able to do so. They don't appear to sync up to anything that is in the court file. So I have verified answers but I don't have the questions that they pertain to, and I can't divine what value that information has, if any.

RP 20, 21. The trial court went on to say,

I will also note that in the filings submitted on behalf of the Plaintiff, there is a document titled Exhibit 1 which appears to be a punch list maintained by Mr. Curry, but it's not authenticated and it appears to be an Exhibit to something not before me.

RP 21. The information Mr. Curry provided with his June 27, 2012 Response to the Viking Summary Judgment Motion, does not provide evidence, statutory bases or legal theories upon which his claims were based. CP 133, 135.

In fact, it is worth noting that the individuals Mr. Curry claims to have listed as witnesses in the "answers" he provided to the 2009 discovery responses were, in fact, the subcontractors who built the house

with Viking and who were the Third-Party Defendants in this case. CP 133, 17. They were not experts, were not engaged by Mr. Curry, and were never designated by him as witnesses pursuant to the Joint Case Scheduling Order. CP 17, 77. As this Court is aware, third-party practice in a construction defect case is standard, and Viking filed suit against the subcontractors to enforce fulfillment of their contractual obligations to defend and indemnify Viking in the event that claims were raised against Viking for work performed by the subcontractors. CP 14, 15, 17, 77.

Mr. Curry's position that the Summary Judgment was premature is contrary to the facts of the case, the documents on file with the Court, the Rules of Civil Procedure, and Washington law. The case had been on the Snohomish County docket for 35 months when it was dismissed. During this time, for 32 months, Mr. Curry had the same attorney, who finally withdrew from the case in April 2012 due to the lack of client cooperation. CP 139. During the 35 months the case was active, Mr. Curry failed to provide anything other than unsubstantiated allegations of defect and damage. At no time did Mr. Curry provide the evidence necessary to establish a prima facie case supporting any of the four causes of action alleged in his Complaint. As the court stated in its ruling,

While there are disputed facts, Plaintiff has failed to establish how they are material to any of their causes of action.

RP 23. The trial court's dismissal of Mr. Curry's claims was timely and appropriate.

## V. CONCLUSION

The trial court's decision to grant Viking's Summary Judgment Motion dismissing Mr. Curry's claims was proper. Viking respectfully requests this Court affirm the judgment that was entered July 6, 2012.

Dated this 11<sup>th</sup> day of February, 2013.

LORBER, GREENFIELD & POLITO, LLC

By: 

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Attorneys for Respondent

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7 COURT OF APPEALS, DIVISION I OF THE STATE OF WASHINGTON  
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9 DEAN CURRY,

10 Appellant,

11 vs.

12 VIKING HOMES, INC.,

13 Respondent.  
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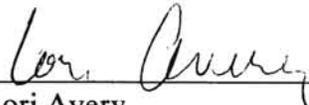
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AFFIDAVIT OF DELIVERY

16  
17 I, LORI AVERY, being first duly sworn, on oath, depose and say: that on February  
18 11, 2013, I caused to be served the foregoing: 1) Brief of Respondent; 2) Affidavit of Mail,  
19 and 3) Respondent's Designation of Clerk's Papers on the following via hand delivery:

20 Edward Chung  
21 Chung, Malhas, Mantel & Robinson, PLLC  
22 600 First Avenue, Suite 400  
Seattle, WA 98104

Court of Appeals, Division I  
600 University Street  
One Union Square  
Seattle, WA 98101-1176

23  
24   
25 \_\_\_\_\_  
Lori Avery

26 SUBSCRIBED AND SWORN to before me this February 11, 2013.



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Notary Public in and for the State  
of Washington residing in King County  
My commission expires: 10-15-15

AFFIDAVIT OF MAILING

LORBER, GREENFIELD & POLITO, LLP  
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