

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 REPLY 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. REPLY ARGUMENT.....1

A. The Trial Court’s Error in Striking Defendant’s Answer Was Properly Raised and Preserved.....1

B. Alternatively, the Court of Appeals May Exercise its Discretion to Review Errors Not Previously Raised.....4

C. Under De Novo Review, the Trial Court Erred in its Application of CR 11 and Put Form Over Substance.....6

D. C&K Remodel Established a Meritorious Defense.....9

E. The Failure to Timely Answer Was Due to Excusable Neglect or Irregularity in Obtaining the Judgment.....13

F. Gale Does Not Address the “Irregularity” in the Trial Court.....16

G. The Trial Court Committed Legal Error in Failing to Determine Gale’s “Actual” Damages Under the Consumer Protection Act.....16

H. The Trial Court Committed Legal Error by Not Segregating and Disallowing Attorneys’ Fees for Non-CPA Claims.....20

I. The Trial Court Committed Legal Error By Not Determining the Reasonableness of Attorney’s Fees.....22

II. CONCLUSION..... 23

TABLE OF AUTHORITIES

CASES

Attwood v. Albertson's Food Ctrs., Inc.,
92 Wn. App. 326, 966 P.2d 351 (1998).....10

Bennett v. Hardy,
113 Wn.2d 912, 784 P.2d 1258(1990).....3

Biomed Comm., Inc. v. Dep't of Health,
146 Wn. App. 929, 193 P.3d 1093 (2008).....6, 8

Birchfield v. Harford,
86 Wn. App. 259, 936 P.2d 48 (1997), *review denied*,
135 Wn.2d 1011 (1998).....15

Cash Store
116 Wn. App. 833, 68 P.3d 1099.....15

Cook v. Seidenverg,
36 Wn.2d 256, 217 P.2d 799 (1950).....12

Dutch Village Mall v. Pelletti,
162 Wn. App. 531, 256 P.3d 1251 (2011), *review denied*,
173 Wn.2d 1016 (2012).....6, 8

East Gig Harbor Imp. Ass'n v. Pierce Cy.,
106 Wn.2d 707, 724 P.2d 1009.....3

In re Ellern,
23 Wn.2d 219, 160 P.2d 639 (1945).....17

Finn Hill Masonry, Inc. v. Dep't of Labor & Indus.,
128 Wn. App. 543, 116 P.3d 1033 (2005), *review denied*,
156 Wn.2d 1032 (2006).....7, 8

First Fed. Sav. & Loan Assn. v. Ekanger,
93 Wn.2d 777, 613 P.2d 129 (1980).....9

<i>Griffith v. City of Bellevue</i> , 130 Wn.2d 189, 922 P.2d 83 (1996).....	7, 8
<i>Lloyd Enter., Inc. v. Longview Plumbing & Heating Co.</i> , 91 Wn. App. 697, 958 P.2d 1035 (1998).....	6, 8
<i>Merritt v. Graves</i> , 52 Wn. 57, 100 P. 164 (1909).....	16
<i>Nordstrom, Inc. v. Tampourlos</i> , 107 Wn.2d 735, 733 P.2d 208 (1987).....	21, 22
<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).....	12, 15
<i>Port of Port Angeles v. CMC</i> , 114 Wn.2d 670, 790 P.2d 145 (1990).....	17, 18
<i>Smith v. Behr Process Corp.</i> , 113 Wn. App. 306, 54 P.3d 665 (2002).....	20, 21, 22
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999), <i>overruled on other</i> <i>grounds by State v. Jones</i> , 182 Wn.2d 1, 338 P.3d 278 (2014).....	5
<i>State ex rel. Green v. Superior Court</i> , 58 Wn.2d 162, 361 P.2d 643 (1961).....	18
<i>Travis v. Wash. Horse Breeders Ass'n, Inc.</i> , 111 Wn.2d 396, 759 P.2d 418 (1988).....	20, 21

RULES AND STATUTES

CR 11.....	<i>passim</i>
CR 60(b)(1).....	16

RAP 1.2(a).....	5
RAP 2.5(a).....	3, 5
RCW18.27.350.....	12
RCW 19.86.020.....	19
RCW 19.86.090.....	18, 19, 20, 22

I. REPLY ARGUMENT

A. The Trial Court's Error in Striking Defendant's Answer Was Properly Raised and Preserved.

Respondent Kimberly Gale contends that Appellant C&K Remodel, Inc. ("C&K") did not sufficiently challenge the trial court's error in striking its Answer, therefore it should not be considered on appeal. *See* Response Brief at 17-18. However, C&K's motion to vacate Gale's default and default judgment was inherently intertwined with striking the Answer; and C&K's motion raised the fact that (1) the trial court struck its Answer; and (2) C&K's owner was unaware of the requirement that a corporation had to appear through an attorney. CP at 165:1-6.

C&K argued to the trial court that it made every effort to file an Answer to forestall the default, provided a working copy to the trial court, and served opposing counsel. CP at 167:19-25. C&K also argued that striking the Answer was an irregularity in the proceedings, and that but for striking the Answer, "C&K would not be here now contesting a default judgment." CP at 168:20-169:3. C&K attached its stricken Answer to its motion to vacate the default and default judgment. CP at 179:13; CP at 185-88.

In response to C&K's motion to vacate, Gale explained that she had moved to strike "on the grounds that Mr. Greer could not represent the company and only an attorney licensed in Washington could do so," thus invoking CR 11. CP at 205:17-18. In reply, C&K argued that "Plaintiff completely failed to abide by the local rules and superior court rules in filing and setting the motion to strike and motion to shorten time." CP at 346:21-22. While not specifically *citing* CR 11, C&K argued that the motion to shorten time to strike the Answer did not cite "good cause" contrary to LCR 7(10). CP at 347:4-7.

At oral argument on the motion to set aside the default and judgment, Gale argued that "Mr. Greer is not an attorney. I immediately moved to for an order to shorten time and also an order to strike pursuant to CR 11." Verbatim Report of Proceedings ("VRP") at 5:21-23 (Aug. 26, 2014). Notably, Gale's motion to strike (subsumed in her reply in support of default) quotes CR 11 in its entirety, including this pivotal 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 at 120:14-15 (emphasis added). Gale motion also relied on the same cases interpreting CR 11 upon which C&K relied

in its Opening Brief. *Compare* CP at 120:20-121 *with* C&K's Opening Brief at 17-22.¹

Finally, at oral argument, C&K argued that moving to shorten time to strike the Answer was an irregularity in the proceedings. VRP at 17:5-22. C&K's proposed Order vacating the default and default judgment included the relief that "C&K shall file an Amended Answer forthwith," which the trial court struck out. CP at 423.

While the foregoing is not a model of clarity, the general principles were argued to the trial court. In *Bennett v. Hardy*, 113 Wn.2d 912, 917-18, 784 P.2d 1258 (1990) the Supreme Court noted that "[p]laintiff's may have framed their argument more clearly at this stage, but so long as they advanced the issue below, thus giving the trial court an opportunity to consider and rule on the relevant authority, the purpose of RAP 2.5(a) is served and the issue is properly before this court." Similarly, in *East Gig Harbor Imp. Ass'n v. Pierce Cy.*, 106 Wn.2d 707, 709 n.1, 724 P.2d 1009 (1986) the respondents, relying on RAP 2.5(a), argued that the appellant failed to raise the issue of standing in the court below. The Supreme Court stated that "[a]lthough the issue was not

¹ Inexplicably, Gale opines that C&K "admitted" that "striking the answer was appropriate." *See* Response Brief at 19. This is incorrect. Instead, C&K admitted 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)." *See* Opening Brief at 18.

clearly framed in the court below the parties did argue the issue and did discuss relevant authority in their briefs. As long as the trial court had sufficient notice of the issue to know what legal precedent was pertinent this court will not refuse to consider the issue.”

Here, the trial court was fully apprised that CR 11 was the basis for striking C&K’s Answer. Likewise, striking the Answer was the *condition precedent* to granting the motion for default and default judgment, which in turn, was the basis for C&K’s motion to vacate the default and default judgment. The parties addressed the motion to strike and the application of CR 11. *The trial court specifically denied C&K’s request to file an Amended Answer* and denied vacating the default and default judgment—and the trial court’s order is the subject of this appeal. CP at 419-25.

C&K submits that (1) the issue of improperly striking the Answer; and (2) failing to give C&K sufficient time to promptly correct the omission of an attorney’s signature under CR 11 and cases interpreting CR 11 were properly raised and preserved errors.

B. Alternatively, the Court of Appeals May Exercise its Discretion to Review Errors Not Previously Raised.

If the Court of Appeals is unpersuaded that the trial court’s error (of striking the Answer without giving C&K reasonable time to correct a

technical deficiency) was properly raised or preserved, then C&K requests that the Court exercise its discretion to consider the issue.

RAP 2.5(a) states that the appellate court “may refuse” to review errors that were not properly preserved. However, RAP 2.5(a) does allow the court in its discretion to consider an issue raised for the first time on review. *See State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (holding that RAP 2.5(a) is “discretionary rather than absolute,” thus “the rule never operates as an absolute bar to review”), *overruled on other grounds* by *State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014).

Additionally, RAP 1.2(a) states that the appellate “rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits.” Accordingly, “[c]ases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to restrictions in rule 18.8(b).” C&K respectfully requests that the Court reach the merits of the issues presented on review, including the error of striking the Answer without allowing C&K reasonable time to correct a technicality. Any failure, here, to preserve issues of error was neither clear nor unmistakable. The Court of Appeals should overlook technical failings because the record reflects substantial compliance with the preservation of error rule.

C. Under De Novo Review, the Trial Court Erred in its Application of CR 11 and Put Form Over Substance.

In response to the key cases interpreting CR 11, Gale admits that “it’s true” that “the [appellate] courts ordered the respective parties be given additional time to cure the lack of an attorney’s signature on the pleadings at issue” in the cases cited by C&K. *See* Response Brief at 19-20. These cases include:

- *Biomed Comm., Inc. v. Dep’t of Health*, 146 Wn. App. 929, 931, 193 P.3d 1093 (2008) (Division I 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.*”);
- *Lloyd Enter., Inc. v. Longview Plumbing & Heating Co.*, 91 Wn. App. 697, 699, 958 P.2d 1035 (1998) (Division I noting that the trial court struck the Answer, but gave the corporate entity “20 days to file an answer signed by an attorney” before entering a Default Judgment);
- *Dutch Village Mall v. Pelletti*, 162 Wn. App. 531, 535, 256 P.3d 1251 (2011), *review denied*, 173 Wn.2d 1016 (2012) (Division I stating that the pleadings would be stricken

unless, *within 30 days*, [plaintiff] Dutch Village mall obtained the signature of an attorney on the pleadings”);

➤ *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 stating “we assume that the court would have struck the pleadings and allowed [defendant/appellant] Finn Hill time to obtain counsel”); and

➤ *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).

Gale argues that the above-referenced cases are distinguishable because the Answers were timely filed before the trial court granted *additional time* to secure a proper signature from a licensed attorney. *See* Response Brief at 20. Gale argues that, in contrast, C&K waited eight months to file an Answer.

First, this proposed distinction is without a difference. The triggering event prompting additional “reasonable” time is a *pro se*

corporation filing a pleading, regardless of whether it was timely filed under CR 12. Once a technically deficient pleading, such as an Answer, is filed CR 11 clearly allows the *pro se* corporation time to correct the technical deficiency “promptly after the omission is called to the attention of the pleader or movant.” Likewise, the Court of Appeals’ consistent interpretation of CR 11 similarly instructs that: “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*, 146 Wn. App. at 935.

Second, it is not obvious from the above-referenced cases (particularly *Lloyds*, which, like here, involved a *pro se* Answer by a corporate entity), whether the pleading at issue was, in fact, timely filed. In any event, *Biomed Communication*, *Lloyd Enterprises*, *Dutch Village Mall*, *Finn Hill Masonry*, and *Griffith* do not discuss the timeliness of the pleading, or draw a bright line between late or timely-filed pleadings. The bottom line in each case is whether the trial court gave the party reasonable time to cure a technically deficient pleading.

Here, the trial court struck and sealed the Answer because it was signed *pro se* by a corporate entity, and thus technically deficient. The trial court then failed to give C&K reasonable time to cure the deficiency as

required by CR 11. The trial court erred because it applied the rules of civil procedure in such a way that form prevailed over substance. “[T]he basic purpose of the new rules of civil procedure is to eliminate or at least to minimize technical miscarriages of justice inherent in archaic procedural concepts once characterized by Vanderbilt as the sporting theory of justice.” *First Fed. Sav. & Loan Assn. v. Ekanger*, 93 Wn.2d 777, 781-782, 613 P.2d 129 (1980) (internal citations omitted); *see also* CR 1 (the rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action”).

D. C&K Remodel Established a Meritorious Defense.

Gale lightly addresses C&K’s meritorious defenses. First, she belittles C&K’s position that it performed all construction work according to accepted industry standards, characterizing C&K’s position as “self serving.”² *See* Response Brief at 26. However, Gale relied on Damstrom Renovations, LLC, another general contractor like C&K, to opine that C&K’s work *did not* comply with construction industry standards. CP at 65, ¶ 3.

But C&K’s liability defense also includes the argument that Gale cannot establish: (1) duty; or (2) breach. Damstrom Renovation did not: (1) identify with any specificity which construction “standards” it

² *See* Opening Brief at 27, relying on CP at 172, ¶ 6. This is a bit hypercritical since Gale’s numerous declarations could be, likewise, characterized as “self serving.”

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.” *See* Opening Brief at 27. 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. This is a *prima facie* defense.

Gale also states that the allegedly defective work by Evergreen did not pre-exist C&K’s arrival at her residence. *See* Response Brief at 10 (relying on Gale’s signed declaration). In fact, Gale states that she was “satisfied with Evergreen’s performance.” *See* Response Brief at 26. However, her Response Brief and declaration are at odds with an email that she sent to C&K on July 9, 2013, stating in item #5 that “due to 2008 water damage and sticky plastic being placed on the soaked carpet the day the refrigerator line puncture by Evergreen, [Aileen] Gagney [of the American Lung Association] advised removal of all contiguous carpet.” (*See* Appendix at 1).³ In item #6, Gale likewise explains to C&K that “R&R of all drywall from 2008 flood caused by Evergreen with water

³ No discovery occurred in this case, except for Gale’s deposition of C&K’s owner. The undersigned obtained a copy of C&K’s email communication with Gale and represents that the July 9, 2013 email appended hereto is a true and correct copy.

flowing out of the light fixtures[.]” *Id.* Gale notes that “[m]old was found in the utility area on ceiling drywall.” *Id.* This was the pre-existing defective work that C&K was trying to repair.

Notably, Gale does not dispute that (1) her insurance company had previously hired Evergreen to perform mold remediation work for her 2008 claim with Farmers; (2) she is sensitive to allergens; and (3) when C&K started performing work for the 2013 flood, it discovered that the Evergreen had performed faulty work. (CP at 171, ¶ 3). Further, she does not dispute that in response to her 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. *See* Opening Brief at 26. It is odd that C&K would go to the trouble of bringing an American Lung Association representative to the job site if pre-existing mold (involving Evergreen) was not an issue.

Nor does Gale dispute that C&K also “worked with Farmers Insurance’s adjuster extensively to determine the type of work Farmers would cover under the homeowner policy.” *See* Opening Brief at 26. Gale also does not dispute that Mr. Greer introduced her to his lawyer to help her draft letters to Farmers Insurance about covering the repair work and reimbursing Gale (and in turn, C&K) for the work. *See* Opening Brief at

27. Nor does she disagree that C&K's owner paid the attorney's retainer fee on her behalf. *Id.*

C&K's defense to Gale's Consumer Protection Act claim for a *per se* violation of RCW 18.27.350 is that there is no evidence in the record that the *per se* violation of a suspended license was a proximate cause of the property damages she sustained. *Cook v. Seidenverg*, 36 Wn.2d 256, 258-59, 217 P.2d 799 (1950) Gale also ignores the fact that 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. *See* Opening Brief at 30. Thus, the *per se* violation was temporary.

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). C&K submits that it has met its burden to establish that it has a defense to the negligence and breach of contract claim⁴ that would at least carry decisive issues to the finder of facts in a trial on the merits. Additionally, the CPA violation was temporary, and as C&K explained in its Opening Brief, C&K was

⁴ Neither the contract nor its provisions have ever been identified, thus it is impossible to guess what was allegedly breached.

unaware that its license has been temporarily suspended due to a lapse in insurance coverage.

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

C&K filed its Answer on June 30; Gale received it July 2. Gale argues that C&K “could not have been mistaken about the requirement for an attorney to sign C&K’s pleading because he was informed of the requirement by Gale’s counsel prior to the hearing on the Motion to Strike and Motion for Default.” *See* Response Brief at 27. Gale’s position is unavailing because she readily admits that as soon as she received C&K’s Answer on July 2, she hurriedly moved to shorten time and to strike—filing both at 3:46 p.m. on July 2. *See* Opening Brief at 10-11; Response Brief at 7. After this *fait accompli*, she later spoke with C&K. There is no evidence that C&K understood what Gale was explaining and its implications—he testified that he did not remember the specific conversation. Nevertheless, she apparently expected C&K to correct the Answer’s technical deficiency on July 3,⁵ the very same day that the Honorable Monica Benton granted the motion to shorten time, struck and

⁵Gale repeatedly conflates the date that C&K hired an attorney. C&K’s owner consistently testified that C&K hired attorney Jeffrey Rupert on July 3, when he met with Rupert *that afternoon*. C&K was unrepresented between February 28 and July 3, 2014. While C&K may have spoken with Rupert on July 1 and the week prior, the record is unclear that such communication related to C&K. *See* CP at 239.

sealed the Answer and Affirmative Defenses, granted the motion for default, and granted the default judgment. To expect this much from a *pro se* plaintiff—who believed he was doing everything possible to prevent a default against his company—stretches credulity.

Gale also contends that she followed “both the letter and spirit of the law” precisely. *See* Response Brief at 28. If that was really the case, then this appeal would be unnecessary. For example, her motion to shorten time did not state any cause, much less “good cause.” And ironically, Gale—not the trial court—alerted C&K to the fact that it needed an attorney’s signature on a corporate defendant’s answer—but then failed to give C&K reasonable time to “promptly” correct the omission under CR 11. Instead, she had a default judgment of \$214,334.16 within 24 hours of moving to strike the technically deficient Answer. C&K believes that neither the letter nor the spirit of the law was followed.

Disparagingly, Gale faults C&K for not acting with due diligence in moving to set aside the default and default judgment because “it never filed an Answer bearing a proper signature.” *See* Response Brief at 28. But filing a technically perfect Answer is not the touchstone of due diligence—timely moving to vacate the default judgment invokes due diligence. In fact, retroactively filing an Answer “bearing a proper

signature” would have been superfluous, since the default and default judgment of \$214,334.16 had been granted. Procedurally, and logically, the next step was to move to vacate or set aside both the default and default judgment—which C&K did with urgency. When C&K asked permission from the trial court to file an Amended Answer, the trial court denied its request. CP at 416.

Gale contends that she will be “forced to endure a further delay” and will suffer a non-specific “substantial hardship” if the default judgment is vacated—blaming C&K for waiting nine months to file an Answer. *See* Response at 28-29. However, Gale could have moved for a default within 20 days of serving her Complaint. If the trial court had given C&K reasonable time to submit an attorney-signed Answer, then the trial, set for January 5, 2015, would have already been over.

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. 833, 842, 68 P.3d 1099 (“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.

F. Gale Does Not Address the “Irregularity” in the Trial Court.

An “irregularity,” within the meaning of CR 60(b)(1), 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, C&K contends that irregularity occurred when the trial court (1) granted Gale’s one-day motion to shorten time, despite an absence of “good cause;” and (2) struck *and sealed* C&K’s Answer without giving 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). These were a procedural defects in which the trial court failed to follow the prescribed rules. *See Birchfield v. Harford*, 86 Wn. App. 259, 264, 936 P.2d 48 (1997), *review denied*, 135 Wn.2d 1011 (1998) (same). Gale’s Response Brief does not refute this argument.

G. The Trial Court Committed Legal Error in Failing to Determine Gale’s “Actual” Damages Under the Consumer Protection Act.

C&K’s Opening Brief argued that de novo review, including errors of law, applied to the appellate court’s interpretation of court rules (CR 11). *See* Opening Brief at 17. However, in analyzing Gale’s CPA

damages and attorney's fees, C&K utilized the abuse of discretion standard of review. *See* Opening Brief at 34-36. In response, Gale argued that C&K did not preserve the error; that the issue was waived; and "segregating CPA damages was not practical" because the *per se* violation "implicated all of Gale's attendant claims." *See* Response Brief at 29-31.

Upon further analysis, however, the "abuse of discretion" standard of review is inapplicable to the trial court's failure to segregate CPA damages and award attorney's fees non-CPA claims. Nor has C&K waived the right to raise a legal error with respect to these discrete issues.

Questions of law may only be raised by direct appeal. In *Port of Port Angeles v. CMC*, 114 Wn.2d 670, 790 P.2d 145 (1990), the trial court entered a default judgment against CMC, and the trial court denied a motion to vacate the judgment under CR 60(b)(1). CMC's motion to vacate was premised on excusable neglect and a meritorious defense, however, CMC also argued that the interplay between CR 41(a) and CR 15(a) should have allowed CMC more time to file an Answer. The trial court denied the motion to vacate. The Port "argued that the alleged error by the trial court raises a question of law which may only be raised by a direct appeal, not by motion to set aside the judgment under CR 60(b)(1)."⁶

⁶ The Supreme Court explained that the "distinction between errors of law and irregularities is outlined in *In re Ellern*, 23 Wn.2d 219, 222, 160 P.2d 639 (1945)."

The Supreme Court explained that it “has long recognized the principle that an error of law will not support vacation of a judgment.” *Id.* at 673. The Supreme Court, relying on a line of cases, stated that “[i]f . . . the court decided the issue wrongly, the error, if any, may be corrected by that court itself . . . or by this court on appeal, but the motion to vacate the judgment is not a substitute.” *Id.* (quoting *State ex rel. Green v. Superior Court*, 58 Wn.2d 162, 164-65, 361 P.2d 643 (1961)). The Supreme Court held that the trial court’s decision (in construing CR 41(a)) “was not a failure to follow a prescribed rule, but, instead, was a ruling of law which can only be reviewed by a direct appeal.” *CMC*, 114 Wn.2d at 677.

It is and has been C&K’s position that the trial court erred in awarding “exemplary damages in the amount of \$25,000.00 pursuant to RCW 19.86.090.” (CP at 409) Under RCW 19.86.090 she is only entitled

An error of law is committed when the court, either upon motion of one of the parties or upon its own motion, makes some erroneous order or ruling on some question of law which is properly before it and within its jurisdiction to make.

Examples of error of law are: erroneous rulings on motions and demurrers directed to pleadings; rulings on qualifications of a juror or the admissibility of evidence; and other matters of like character made in the course of an action.

.....

An irregularity is defined to be the want of adherence to some prescribed rule or mode of proceeding; and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time or improper manner.

to three times the amount of her “actual” damages arising solely from the CPA violation. However, the trial court awarded CPA damages based on the sum total of damages arising from her breach of contract, negligence, and CPA claim. (CP at 33:19-21) This is an error of law, subject to de novo review.

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.”

Gale simply contends that it is not practical to segregate her CPA damages from her other damages arising from negligence and breach of contract. However, she cites no authority to support this contention. “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).

Accordingly, the trial court erred as a matter of law 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 and exclusively on Gale’s CPA claim.

H. The Trial Court Committed Legal Error by Not Segregating and Disallowing Attorneys’ Fees for Non-CPA Claims.

Gale does not dispute that the trial court erred by not segregating and disallowing attorney’s fees for her non-CPA claims. Instead, she states that C&K essentially waived this argument and that she is entitled to attorney’s fees on appeal—again in the totality, rather than solely for her CPA claim. *See* Response Brief at 31.

Gale requested an attorney’s fee of \$53,180.66. CP at 132 This amount was one-third of 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 at 132 But attorneys’ fees are 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); *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).

Like Gale, 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.” *Travis*, 111 Wn.2d 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, 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).

I. The Trial Court Committed Legal Error 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 have made an independent decision as to what represented 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.

Here, the trial court made no effort to determine the reasonableness of Gale's attorney's fees. Instead, and contrary to Washington law, the trial court simply accepted Gale's number, based on the contingent fee agreement. 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, \$53,180.66 in attorney's fees is significantly high. 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.

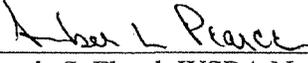
II. CONCLUSION

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 technically deficient Answer so that the case may proceed equitably on the merits. Likewise, C&K requests that the Court of Appeals reverse the Amended Judgment. If the Court 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) award 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 6th day of April, 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
Paramount Law Group, PLLC
1000 Second Avenue, Suite 3000
Seattle, WA 98104

Via Messenger
 Via Email
 Via Facsimile
 Via U.S. Mail

Counsel for Plaintiff

Jeffrey N. Rupert
Attorney at Law
410 SW 153rd Street
Burien, WA 98166

Via Messenger
 Via Email
 Via Facsimile
 Via U.S. Mail

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

Jeff H. Yusen
Yusen & Friedrich
215 NE 40th Street, Suite C-3
Seattle, WA 98105

Via Messenger
 Via Email
 Via Facsimile
 Via U.S. Mail

*Attorney for Defendant Wesco
Insurance Company*

DATED this 6th day of April, 2015.



Sopheary Sarh, Legal Assistant

APPENDIX

From: Kimberly Gale <kimberlygale@comcast.net>
Date: July 9, 2013 at 5:45:29 PM PDT
To: Chris Greer <ckremodel@hotmail.com>
Cc: Kimberly Gale <kimberlygale@comcast.net>
Subject: Requests from Farmers to complete claims info.

Chris,
Here are the claim numbers for-

Attic- #8001714008-1

Soffit/bed/box- #8001727943-1

I am not sure why any of the info you presented at our meeting with Jerry Robison Attny on 6/28/13 was not sent to Farmers. Since responsiveness and file familiarity/location have been a problem with his office I have arranged with Hummel to forward what you send me after I review it to expedite my 4 claims and get them to her supervisors for coverage consideration.

I have sent her the SRc.R reference you texted earlier. We'll see if that is what she wants.
Thanks.

The other requests are that all items be separated per claim, labeled with claim # , and submitted with photos labeled with claim # and tabbed for location id.

These are the invoices that Hummel has not received as of 7/5/13:

- 1). Exterior soffit/bed/box repair.
- 2). Garage interior door replacement/repair due to access if water damage.
- 3). Garage shelves and 2work benches(one with shelves beneath)
- 4). Storage area where the water damage created black mold on the paper that had no wallboard between it and the shelves and all stored items in the storage area. Also storage room water mitigation, moving exposed items to storage and storage costs.
- 5). R&R of all carpet in utility, stairs, family room and adjacent bedroom with contiguous carpeting that was not remediated properly in 2008. Mold spreads according to Aileen Gagney of the Am. Lung Assn at her site visit. Due to 2008 water damage and sticky plastic being placed on the soaked carpet the day of the refrigerator line puncture by Evergreen, Gagney advised removal of all contiguous carpet.
- 6). R&R of all drywall from 2008 flood caused by Evergreen with water flowing out of the light fixture at the bottom of the stairs in the utility room. Mold was found in the utility area on ceiling drywall. Please provide NVL testing results. None have been taken by the light fixture as of date.
- 7). 3/4" cedar for entire ceiling of garage and west wall with interior door, access.

I have forwarded Aileen Gagney's recommendations and the mattress quotes to Maggie. Hummel has stated that the pics previously sent are sufficient and that the previous invoices are ok. I am available for questions on the items requested, and hope to get them to Hummel as soon as you get your computer back and can forward them to me.
Thank you,
Kimberly Gale

Sent from my iPhone