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RELATED CASE OPINION

ORDER OF THE SUPREME COURT OF WASHINGTON (NOVEMBER 9, 2022)

THE SUPREME COURT OF WASHINGTON

WALL STREET APARTMENTS, LLC, ET AL.,

Appellants,

v.

ALL STAR PROPERTY MANAGEMENT, LLC, ET AL.,

Appellees.

No. 101073-7

Court of Appeals No. 37512-9-III

Before: Chief Justice GONZALEZ and Justices JOHNSON, OWENS, Gordon MCCLOUD, and MONTOYA-LEWIS.

Department I of the Court, composed of Chief Justice González and Justices Johnson, Owens, Gordon McCloud, and Montoya-Lewis, considered at its November 8, 2022, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied. That the "Appellants' Motion to Stay Proceedings; and Remand the Forwarded Motions, Responses and Replies", the "Appellants' Motion for Extension to File Reply in Support of Motion to Stay Proceedings; and Remand the Forwarded Motions, Response and Replies" and the "Appellants' Motion to Modify Clerk's Rulings filed August 8, 2022, and August 30, 2022" are also denied.

DATED at Olympia, Washington, this 9th day of November, 2022.

For the Court

/s/ González, C.J.
Chief Justice

OPINION OF THE COURT OF APPEALS FOR THE STATE OF WASHINGTON (APRIL 19, 2022)

UNPUBLISHED OPINION
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION THREE

WALL STREET APARTMENTS, LLC, A WASHINGTON LIMITED LIABILITY COMPANY; AND ALAA ELKHARWILY, M.D.,

Appellants,

v.

ALL STAR PROPERTY MANAGEMENT, LLC, A WASHINGTON LIMITED LIABILITY COMPANY; GIEVE PARKER, INDIVIDUALLY AND ON BEHALF OF HER MARITAL COMMUNITY,

Respondents,

JOHN DOES and JANE DOES I THROUGH X,

Defendants.

No. 37512-9-III

Before: PENNELL, Judge.

PENNELL, J. — Wall Street Apartments, LLC and Dr. Alaa Elkharwily (collectively Wall Street) appeal an adverse judgment in favor of All Star

Property Management, LLC and Gieve Parker (collectively All Star). We affirm and award All Star attorney fees on appeal.

FACTS

Dr. Alaa Elkharwily was the CEO of Wall Street Apartments. Through Wall Street, Dr. Elkharwily owned an apartment building at 225 South Wall Street (the Wall Street building) in Spokane. On September 2, 2012, Wall Street entered into an agreement with All Star to manage units in the Wall Street building. All Star was owned by Ronald and Gieve Parker.

The management agreement tasked All Star with duties:

1. To use due diligence in the management of the premises . . . and agrees to furnish services for the renting, leasing, operating, and managing of the above mentioned premises.

2. To render monthly statement of receipts, expenses, and charges and to remit the same to the Owner together with receipts less disbursement. In the event the disbursements are in excess of the rents collected by All Star Property Management, the Owner hereby agrees to pay such excess promptly upon demand . . . .

3. To deposit all receipts collected for the Owner (less any sums properly deducted or as otherwise provided for herein) in a pooled Trust account . . . .

4. To advertise the availability for rental of the above-referenced premises . . . to sign, renew

> and/or cancel or terminate leases for the premises or any part thereof; to collect rents due or to become due and give receipts therefore; to terminate tenancies and to sign documents in the Owner's name.
>
> . . .
>
> 6. To make or cause to be made and to supervise repairs, expenses, and charges and to remit to Owner receipts less disbursement. In the event the disbursements shall exceed of [sic] the amount of rents collected by All Star Property Management, the Owner hereby agrees to pay such excess promptly upon demand . . . .
>
> 7. To make or cause to be made and to supervise any alterations, and to do maintenance on the above-referenced premises; to purchase supplies and pay all bills thereof. All Star Property Management agrees to secure the prior approval of the Owner on all expenditures in excess of $1.00 for any one item . . . .
>
> . . . .
>
> 9. To hire, discharge, and supervise all labor and employees required for the operation and maintenance of the premises. . . .

Ex. P1, at 1-2. In consideration for All Star's work, Wall Street agreed to pay six percent of the monthly rental rate, $100.00 for each new signed lease, all rental income in excess of $533.00, and $0.55 per mile to pick up and deliver materials to any job site.

In meetings with the Parkers around the time the management agreement was signed, Dr. Elkharwily

expressed his intent to renovate the interior of the Wall Street building. All Star did not agree to perform the remodeling.

On September 12 and 13, 2012, All Star secured tenants for apartment 19 of the Wall Street building. Ms. Parker collected $685.00 from the new tenants and placed the funds in trust accounts. Ms. Parker also collected $300.00 in rent from apartment 18 on September 22. A receipt dated September 22 noted the apartment as "# 5 Was 18." Ex. D133. In the month of September, All Star incurred $1,517.39 in expenses for travel and materials at the direction of Wall Street.

On September 26, demolition began on an interior wall in the lobby of the Wall Street building. At 4:00 p.m. that day Ms. Parker sent a text message to Dr. Elkharwily containing a photo of Christopher Godwin, a handyman for Dr. Elkharwily who lived at the Wall Street building, demolishing the lobby wall. On the wall were two components of the building's fire alarm system—a fire panel, and a fire box (i.e., the electric box supplying the fire alarm system with power).

At 10:25 a.m. on September 27, Ms. Parker sent Dr. Elkharwily a text message informing him she quit after the two had a heated dispute over garbage bags. Dr. Elkharwily accepted the resignation. After she quit, Mr. Godwin helped Ms. Parker load her truck with various supplies from the Wall Street building, which had been purchased by All Star. Ms. Parker returned some of these supplies to the stores where they were purchased. Ms. Parker made multiple trips to the Wall Street building to collect items from the building's hall and the office after she quit. Mr. Godwin ultimately departed the Wall Street building with Ms. Parker after the last trip.

Around 7:00 p.m. on September 27, Dr. Elkharwily became aware that the lobby wall had been demolished and the fire alarm system disconnected. The fire department had called Dr. Elkharwily and informed him the Wall Street building was without a working fire alarm system, and would be condemned unless he established a fire watch program. Dr. Elkharwily proceeded to hire individuals to perform a constant fire watch until the fire alarm system could be replaced several days later.

Over the ensuing days, Dr. Elkharwily accused Ms. Parker of dismantling the lobby wall and removing the fire alarm system. Ms. Parker denied the accusations, directed him to call the phone number on the fire box, and demanded payment for All Star's unpaid $1,517.39 in expenses.

On October 12, Ms. Parker sent Dr. Elkharwily two envelopes via certified mail. One envelope contained all the apartment and office keys. The other contained invoices for All Star's outstanding expenses, account statements, leases, and a check for funds in tenant trust accounts.

In 2015, Wall Street sued All Star. The complaint contained nine causes of action, including breach of contract, breach of implied covenant of good faith and fair dealing, and violation of Washington's Consumer Protection Act (CPA), chapter 19.86 RCW.

All Star answered the complaint and also asserted a counterclaim for $1,517.39 in outstanding expenses.

Most of Wall Street's claims were dismissed on summary judgment based on a lack of evidence. The trial court later characterized Wall Street's surviving claims as follows:

1. Whether [All Star] breached its management duties concerning due diligence, collecting and turning over rent, demolishing a lobby wall [without permission], and incurring unauthorized purchases over $1.

2. Whether [All Star] breached its implied covenant of good faith and fair dealing concerning production of monthly statements, the demolition of the lobby wall . . . and the removal of the fire alarm [system].

Clerk's Papers (CP) at 1098.

The remaining claims initially went to mandatory arbitration in January 2019. An arbitrator found in favor of Wall Street, issuing an award of $7,949.00 against All Star. Wall Street exercised its right to request a trial de novo under former[1] Superior Court Mandatory Arbitration Rule (MAR) 7.1 (2011) and Spokane County Local Superior Court Mandatory Arbitration Rule (LMAR) 7.1(a). All Star later offered to settle with Wall Street for $2,796.30, a figure All Star arrived at by subtracting a $5,152.70 judgment it had against Wall Street in another case from the $7,949.00 arbitration award.

Wall Street rejected All Star's settlement offer and proceeded with a de novo bench trial. At trial, the parties presented conflicting testimony over what happened during their short business relationship. Dr. Elkharwily testified that Ms. Parker engaged in a course of intentionally wrongful conduct. He claimed

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[1] The Superior Court Mandatory Arbitration Rules (MAR) were renamed the Superior Court Civil Arbitration Rules (SCCAR) effective December 3, 2019.

Ms. Parker was solely responsible for tearing down the lobby wall and did so out of frustration; she made unauthorized purchases of supplies; and after her departure, business records, supplies, and tools were missing. Ms. Parker denied Dr. Elkharwily's allegations. According to Ms. Parker, Dr. Elkharwily was responsible for directing the destruction of the lobby wall. She also denied removing any business records or making unauthorized purchases.

The trial court ruled in favor of All Star, fording Wall Street had submitted insufficient facts and the conflicting testimony favored All Star. The court concluded Wall Street breached its duty to pay All Star for expenses, and awarded All Star $1,321.57 in damages.

Wall Street subsequently moved for reconsideration, a new trial, amended findings, and relief from judgment. The parties represent[2] that the court granted Wall Street's motion in part, and entered amended findings of fact and conclusions of law. The trial court's amended findings did not change the case's ultimate disposition.

All Star moved for an award of attorney fees and costs. First, All Star requested $29,920.00 in post-arbitration attorney fees and $997.73 in costs under RCW 7.06.060 and former MAR 7.3.[3] Second, All Star requested $28,526.80 in prearbitration attorney fees and $633.60 in costs under RCW 4.84.185 and CR 11. In

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[2] Neither the trial court's order granting the appellants' motion in part nor the amended findings of fact and conclusions of law are included in the record on review.

[3] *See* footnote 1, *supra.*

response, Wall Street contended All Star's post-arbitration fee request was duplicative of work performed prior to arbitration.

The trial court granted All Star's requests. It found Wall Street failed to improve its position on trial de novo, entitling All Star to fees and costs under RCW 7.06.060 and former MAR 7.3. The court also found Wall Street should have known it was unlikely to prevail at trial due to a lack of supporting evidence, entitling All Star to fees and costs under RCW 4.84.185. Finally, it found:

> Elkharwily pursued litigation against Defendants in bad faith and for an improper purpose. This includes relying on incoherent, inadmissible, and nonexistent evidence at summary judgment, at which time all but one of Plaintiffs' claims were dismissed, as well as producing indecipherable testimony and exhibits at trial.

Order Granting Defs.' Mot. for Att'y's Fees and Costs at 3. This entitled All Star to attorney fees and costs under CR 11. The court found the amounts presented and detailed by All Star to be reasonable and necessary to defend against Wall Street's claims, and awarded it the amounts requested.

Wall Street now appeals the order granting partial summary judgment, the judgment in favor of All Star, and the order granting All Star's attorney fees and costs.

ANALYSIS

This appeal raises four issues: (1) whether substantial evidence supports the trial court's findings

in favor of All Star on the two substantive claims submitted at trial, (2) whether the trial court properly granted summary judgment on Wall Street's CPA claim, (3) whether the trial court properly awarded attorney fees, and (4) whether All Star should be awarded attorney fees on appeal.

Substantial Evidence

We review the factual findings of a trial court in a bench trial for substantial evidence. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). "'Substantial evidence' is evidence sufficient to persuade a fair-minded person of the truth of the matter asserted." *In re Marriage of Chandola*, 180 Wn.2d 632, 642, 327 P.3d 644 (2014). "[T]his court must defer to the finder of fact in resolving conflicting evidence and credibility determinations." *State v. NB.*, 7 Wn. App. 2d 831, 837, 436 P.3d 358 (2019).

Wall Street's arguments on appeal fail to acknowledge the applicable standard of review. Rather than recounting the evidence in a manner consistent with the trial court's findings, Wall Street construes the evidence in its favor and then disingenuously claims the evidence is admitted or uncontested. Wall Street's failure to recognize the standard of review renders its briefing largely unhelpful and undercuts its claim for relief on review.

The Alarm System

All Star presented substantial evidence showing Ms. Parker was not aware of the dismantlement of the fire alarm system, and did not assume responsibility for its removal. The Parkers both testified they did not expect the lobby wall to be demolished in September

2012. Ms. Parker testified she quit on the morning of September 27. She testified that the last time she saw the lobby wall in the Wall Street building, the fire alarm system was still connected. Both Ms. Parker and Mr. Godwin testified she had no involvement in the removal of the fire alarm system. All parties agree Ms. Parker left the building for the final time before 7:00 p.m. on September 27, when the first evidence the fire alarm system had been dismantled arose. No evidence of Ms. Parker's direct involvement in the dismantlement of the fire alarm system was ever presented. The trial court had ample evidence to support the conclusion that Ms. Parker did not know of, or personally become involved in, the removal of the fire alarm system.

Return of Property and Documents

The trial court's finding that Ms. Parker returned all keys, documents, and a refund check to Dr. Elkharwily was supported by substantial evidence. Ms. Parker testified she sent Dr. Elkharwily two envelopes containing her keys,[4] account statements, leases, and a check. She denied removing any business records from the Wall Street building's office, and Mr. Godwin provided similar testimony.

Ms. Parker's Return to the Wall Street Building

The trial court's finding that Ms. Parker did not return to the Wall Street building after she quit on September 27 was, in context, supported by substantial

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[4] Contrary to Wall Street's repeated assertions, Ms. Parker did not admit to retaining the only set of keys that would have allowed access to the fire alarm system. She testified her keys were all duplicates.

evidence. Wall Street is correct that after she quit, Ms. Parker made multiple trips to and from the Wall Street building to collect and return unused supplies to the store. However, the court's finding should not be read in isolation. The finding pertained to Wall Street's claims that Ms. Parker returned to the Wall Street building at some point on September 27 to move a tenant and collect $2,200 in rent. Wall Street presented no evidence at trial to support its claim that Ms. Parker returned to the Wall Street building on September 27 to do these things. On the contrary, the receipt and invoice referred to by Wall Street clearly state the rent was collected on September 22. The only evidence of Ms. Parker's activities at the Wall Street building after she quit was testimony from Ms. Parker and Mr. Godwin that Ms. Parker collected supplies from the hall and office of the building. Substantial evidence supports the court's finding.

Provision of Receipts

The parties' management agreement required All Star "[t]o render monthly statement of receipts, expenses, and charges and to remit the same to the Owner together with receipts less disbursement." Ex. P 1, at 1. This language did not specifically require All Star to provide return receipts to Wall Street for items purchased on Wall Street's behalf but returned to the store. The meaning of "receipts" becomes clear when read in the context of the management agreement as a whole. For example, the agreement assigned All Star the duty "to collect rents due or to become due and give receipts therefore" and then "No deposit all receipts collected for the Owner (less any sums properly deducted or as otherwise provided for herein) in a pooled Trust account." Ex. P 1, at 1.

Substantial evidence supports the trial court's determination that Ms. Parker provided receipts as the term is set forth above. Neither the trial court nor this court is required to accept Dr. Elkharwily's personal opinion regarding the definition of receipts.

Calculation of Damages

The trial court's damage calculation falls within the range of the trial evidence. All Star presented an invoice detailing $1,517.39 in expenses they had incurred for purchases pre-authorized purchase for supplies and related mileage. The court dedicated substantial time at trial to the issue of these unpaid expenses, and its final damage award of $1,321.57 was within the range of evidence presented and between the amounts argued for by both parties. As the finder of fact, the court was entitled to disregard Wall Street's evidence and arguments as to the proper calculation of damages. While the court's exact reasoning for arriving at this precise figure is unclear, mathematical exactness is unnecessary. *See Mason v. Mortg. Am., Inc.*, 114 Wn.2d 842, 850, 792 P.2d 142 (1990). The court's award of damages does not exist outside the range of evidence, shock the conscience, or result from passion or prejudice. The calculation of damages was not an abuse of discretion and will not be disturbed on appeal.

Summary Judgment

We review a summary judgment order de novo, "performing the same inquiry as the trial court." *Colo. Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wn. App. 654, 661, 246 P.3d 835 (2011). "When ruling on a summary judgment motion, the court is to view all

facts and reasonable inferences therefrom most favorably toward the nonmoving party." *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). "A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.*

The summary judgment process involves burden shifting between the parties. A defendant moving for summary judgment initially bears the burden of showing the absence of a material issue of fact for trial. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If this is met, the burden shifts to the plaintiff as the party with the ultimate burden of proof at trial. *Id.* The plaintiff must proffer the existence of admissible evidence sufficient to sustain each element of its case. *Id.* If the plaintiff fails to meet this burden, the defendant is entitled to judgment as a matter of law. *Id.*

The trial court properly dismissed Wall Street's CPA claim on summary judgment. After All Star moved for summary judgment on the CPA claim, Wall Street argued, for the first time, that its claim rested on the assertion that Ms. Parker filed a lien without providing the necessary prefiling notice. But Wall Street failed to back up this assertion with any proof. Given Wall Street's failure to support its legal claim with admissible evidence, the trial court properly granted summary judgment.

Trial Court's Award of Attorney Fees

Wall Street makes four challenges to the trial court's award of attorney fees. First, that the award of prearbitration fees was unwarranted under CR 11

and RCW 4.84.185. Second, that postarbitration fees were improper because Wall Street had reasonable grounds for requesting a trial de novo. Third, that the amount of fees awarded to All Star for trial work was excessive because the preparation was duplicative. And fourth, that public policy did not favor an award of fees due to All Star's wrongdoing at trial. We address each claim in turn.

Prearbitration Attorney Fees

RCW 4.84.185 authorizes the trial court to award attorney fees if it finds an action was "frivolous and advanced without reasonable cause . . . unless otherwise specifically provided by statute." CR 11 similarly authorizes sanctions for filing a claim for an improper purpose, or one that is not grounded in fact or law. A lawsuit brought for purposes of harassment constitutes an improper purpose for which sanctions may be imposed. *In re Recall of Lindquist*, 172 Wn.2d 120, 136, 258 P.3d 9 (2011). A trial court's award of sanctions under either provision is reviewed for abuse of discretion. *Kilduff v. San Juan County*, 194 Wn.2d 859, 874, 453 P.3d 719 (2019).

The trial court here adequately exercised its discretion in imposing attorney fees as a sanction. The trial court pointed to the lack of evidence supporting Wall Street's claims and the incoherence of many of its positions as the basis for sanctions. The record supports this determination. Of Wall Street's nine original claims, seven were dismissed at summary judgment for a complete lack of evidence. Wall Street presented very little coherent evidence in support of its remaining two claims at trial. Wall Street's case largely rested on Dr. Elkharwily's self-serving testimony

and speculation. When read in conjunction with the angry and accusative e-mails directed at Ms. Parker by Dr. Elkharwily, the trial court could properly infer Wall Street's suit was not filed in good faith, but with an intent to harass. The court did not abuse its discretion by imposing attorney fees as a sanction under CR 11 and RCW 4.84.185.

Postarbitration Attorney Fees

Under RCW 7.06.060(1), "[t]he superior court shall assess costs and reasonable attorneys' fees against a party who appeals the [arbitration] award and fails to improve his or her position on the trial de novo." Costs and reasonable attorney fees means all reasonably necessary expenses incurred after the request for a trial de novo is made. RCW 7.06.060(2). Likewise, former MAR 7.3 requires a court to impose "costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo."

"The purpose of the fee-shifting provision in [former MAR] 7.3 is 'to encourage settlement and discourage meritless appeals." *Bearden v. McGill*, 190 Wn.2d 444, 448, 415 P.3d 100 (2018) (quoting *Niccum v. Enquist*, 175 Wn.2d 441, 451, 286 P.3d 966 (2012)). Former MAR 7.3 "deters frivolous appeals by penalizing pyrrhic victors: a party who congests a trial court's docket by requesting a trial de novo in order to lose money shall succeed in that endeavor, and parties who wish to appeal close calls do so at their own peril." *Id.*

When determining whether an appellant achieved a better result in the trial de novo, the trial court should compare (1) damages and statutory costs awarded by the arbitrator, with (2) damages and statutory costs

awarded by the trial court. *Id.* at 451. "If a party offers to settle prior to trial, that settlement offer replaces the arbitration award when determining whether the party who requested trial de novo improved his or her position." *Nelson v. Erickson*, 186 Wn.2d 385, 388, 377 P.3d 196 (2016).

Here, the trial court appropriately awarded All Star its postarbitration attorney fees under RCW 7.06.060 and former MAR 7.3. At arbitration, Wall Street won a judgment of $7,949.00. All Star later offered Wall Street $2,796.30 to settle the matter. At the trial de novo, the court ruled against Wall Street on all of their claims, and awarded the defendants $1,321.57 on their counterclaim. Needless to say, Wall Street did not improve its position after trial. Accordingly, the court did not err by awarding All Star its postarbitration attorney fees.

Reasonableness of Fees

Wall Street argues the trial court's fee award was unreasonable in light of the duplicative nature of All Star's work preparing for arbitration and the trial de novo. Our review is for abuse of discretion. *Berryman v. Metcalf*, 177 Wn. App. 644, 656-57, 312 P.3d 745 (2013).

The trial court did not abuse its discretion. The court made minimally sufficient findings, supporting its award in the face of Wall Street's claim of duplicative work. The trial court found the work by All Star's counsel to be reasonable and necessary. This adequately addressed Wall Street's arguments. Indeed, anyone who has had to retry a case knows that preparation can be extensive. The trial court's fee award was not an abuse of discretion.

Public Policy

Finally, Wall Street attempts to argue the award of attorney fees was contrary to public policy because All Star engaged in wrongdoing at trial. Wall Street's argument appears to assume that it has prevailed against All Star. It has not. The record does not support Wall Street's public policy claim.

APPELLATE ATTORNEY FEES

Both parties request attorney fees on appeal. We award fees to All Star.[5] RAP 18.1(a) allows a party to recover attorney fees or expenses incurred on appeal, so long as applicable law permits such a recovery. Under former MAR 7.3, a party who requested trial de novo after mandatory arbitration and fails to improve their position on appeal to the Court of Appeals must pay the other party's reasonable attorney fees. Given our agreement with the trial court's rulings, Wall Street has, on appeal, again failed to improve its position. As a result, All Star is entitled to an award of reasonable attorney fees.

CONCLUSION

The orders on appeal are affirmed. All Star is awarded reasonable attorney fees, subject to compliance with RAP 18.1(d).

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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[5] Wall Street's fee request lacks factual or legal support.

/s/ Pennell
J.

WE CONCUR:

/s/ Lawrence-Berrey
A/C.J.

/s/ Fearing
J.

ORDER OF THE COURT OF APPEALS FOR THE STATE OF WASHINGTON DENYING MOTION FOR RECONSIDERATION AND AMENDING OPINION (JUNE 7, 2022)

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

WALL STREET APARTMENTS, LLC, A WASHINGTON LIMITED LIABILITY COMPANY; AND ALAA ELKHARWILY, M.D.,

Appellants,

v.

ALL STAR PROPERTY MANAGEMENT, LLC, A WASHINGTON LIMITED LIABILITY COMPANY; GIEVE PARKER, INDIVIDUALLY AND ON BEHALF OF HER MARITAL COMMUNITY,

Respondents,

JOHN DOES and JANE DOES I THROUGH X,

Defendants.

No. 37512-9-III

Before: PENNELL, FEARING and LAWRENCE-BERREY, Judges.

THE COURT has considered appellants Wall Street Apartments, LLC and Alaa Elkharwily, M.D.,'s motion for reconsideration of our April 19, 2022, opinion; and the record and file herein.

IT IS ORDERED that the appellants' motion for reconsideration is denied.

IT IS FURTHER ORDERED that the court's April 19, 2022, opinion is amended as follows:

The second sentence in the first paragraph on page eight, including footnote two, is stricken from the opinion and replaced with the following:

> The trial court denied Wall Street's motions for reconsideration, a new trial, and relief from judgment, but granted in part the motion for amended findings of fact and conclusions of law. *See* CP 1382-1407.

FOR THE COURT:

/s/ Laurel H. Siddoway
Chief Judge

SUPERIOR COURT
FINDINGS OF FACTS AND
CONCLUSIONS OF LAW
(FEBRUARY 13, 2020)

SUPERIOR COURT, STATE OF WASHINGTON,
COUNTY OF SPOKANE

WALL STREET APARTMENTS, LLC,
A WASHINGTON LIMITED LIABILITY COMPANY; AND
ALAA ELKHARWILY, M.D.,

Plaintiffs,

v.

ALL STAR PROPERTY MANAGEMENT, LLC, A
WASHINGTON LIMITED LIABILITY COMPANY; GIEVE
PARKER, INDIVIDUALLY AND ON BEHALF OF HER
MARITAL COMMUNITY, AND JOHN DOES AND
JANE DOES I THROUGH X,

Defendants.

No. 15-2-04021-3

Before: Maryann C. MORENO, Judge.

Trial was conducted in this matter, without a jury, commencing on September 30, 2019, before the Honorable Maryann C. Moreno. Plaintiff Alaa Elkharwily appeared personally at the trial and through his attorneys of record, Richard T. Wylie and Brian K. Dykman. Plaintiff Wall Street Apartments,

LLC appeared at the trial through its attorneys of record, Richard T. Wylie and Brian K. Dykman. Defendants Gieve Parker and All Star Property Management, LLC, appeared personally at the trial and through their attorney of record, Hailey L. Landrus of Stamper Rubens, P.S.

The parties were requested to present their closing remarks and proposed Findings of Fact and Conclusions of Law in writing by October 25, 2019. By motion, Plaintiffs requested an extension of time. That motion was granted and the time was extended to November 8, 2019. This court received Plaintiff's final version of its proposed Findings and Conclusions with errata on November 16, 2019.

As a preliminary matter, and similar to comments this court made at the time of the summary judgment ruling, it was extremely difficult to decipher some of the testimony and the exhibits. This is mainly due to the lack of adequate recordkeeping by both parties and the manner in which the parties operated. This also is likely due to the lapse of time and failure of memories by some of the witnesses.

The following claims were presented at trial:

1. Breach of contract;
2. Breach of implied covenant of good faith and fair dealing.

The following counterclaims were presented at trial:

1. Breach of contract;
2. Claims for payment of mileage and expense reimbursement.

Nature of the claims:

1. Whether Defendant All Star Property Management breached its management duties concerning due diligence, collecting and turning over rent, demolishing a lobby wall, and incurring purchases exceeding $1.
2. Whether Defendant All Star Property Management breached its implied covenant of good faith and fair dealing concerning production of monthly statements, the demolition of the lobby wall at the Wall Street Apartments building, and the removal of the fire alarm box at the Wall Street Apartment building.
3. Whether Plaintiffs breached their duties to pay monies owed to Defendants under the Management Agreement.

The following witnesses were called and testified at the trial:

Plaintiff's Witnesses

1. Alaa Elkharwily
2. Thomas Brown
3. Christopher Godwin
4. Ronald Parker
5. Gieve Parker

Defendant's Witnesses

1. Ronald Parker
2. Gieve Parker
3. Thomas Brown
4. Christopher Godwin

The following exhibits were admitted into evidence and considered by the Court:

A. Plaintiff's Exhibits

P-1	Management Agreement dated 9/2/2012
P-3	Screen shots of text messages between Parker and Plaintiff
P-6	Fire watch time sheet
P-19 (p. 3 only)	All Star Invoice #2381
P-20	Emails from Plaintiff to Parkers between October 1-11, 2012
P-21	Craigslist advertisements placed and printed on 9/2/2012
P-25	All Star Invoice #2325, All Star Invoice #2321, All Star Invoice #2312, Sherwin Williams charge invoices (Bates Nos. P-000000121-P000000140)
P-26	Contractor's lien
P-28 (pp. 148 and 152 only)	Fraud Investigation Form
P-36	Checks to Fawn Tipton and Tom Kimbrel
P-37 (pp. 4-8 only)	Receipts for flooring, repairs, etc.
P-40	Exterior photos of Grand Blvd. house

P-45	Photo of demolition of lobby wall
P-60	Plaintiffs' 2011 Federal Income Tax Return
P-61	Plaintiffs' 2012 Federal Income Tax Return
P-62	Plaintiffs' 2013 Federal Income Tax Return
P-63	Plaintiffs' 2014 Federal Income Tax Return
P-64	Plaintiffs' 2015 Federal Income Tax Return
P-65	Plaintiffs' 2016 Federal Income Tax Return
P-66	Plaintiffs' bank statements (8/2012, 10/2012, 1/2013)
P-68 (pp. 1-2 only)	Pictures of Wall

B. Defendant's Exhibits

D-102	All Star Property Management/ Longhofer Lease Agreement, deposit receipt, money order
D-103	Defendants' receipts/invoices for materials, supplies, and returns
D-104	All Star Invoice No. 2326
D-107	Certified mail receipt and green card

D-108	Copy of Defendant's Check #1459 issued to Plaintiff Wall Street Apartments, LLC
D-109	Petition, Declaration, and Notice of Hearing for Temporary Anti-Harassment
D-113	Defendant's Chase online deposit receipt re Straub security deposit
D-114	Photos of Wall Street Apartments — office
D-115	Photos of Wall Street Apartments — office
D-117	Photos of Wall Street Apartments — units
D-118	Photos of Wall Street Apartments — units subject to Management Agreement
D-119	Photos of Grand Blvd. house — exterior
D-120	Photos of Grand Blvd. house — interior
D-121	Photos of Grand Blvd. house — workmanship examples
D-123	Defendant All Star's Bank Statements re Account #1120
D-124	Defendant All Star's Bank Statements re Account #7810
D-125	Defendant All Star's Bank Statements re Account #8449

D-126	Craigslist advertisement for Wall Street Apartments posted 9/9/2012
D-127	Craigslist advertisement for Grand Blvd. house posted 9/24/2012
D-128	All Star invoice #2312
D-129	All Star invoice #2321
D-130	All Star invoice #2325
D-132 (p. 1 only)	All Star invoice #2327
D-133	All Star invoice #2329
D-135	All Star invoice #2388
D-136	September 2012 Text Messages between G. Parker and Elkharwily
D-137	Photos of improvements to Wall Street Apartments lobby
D-141	Text messages between G. Parker and Elkharwily

I. Findings of Fact

Having reviewed the records and files in this matter, the above-listed admitted exhibits and the testimony of the witnesses presented at trial, the Court makes the following Findings of Fact:

1. Plaintiff Wall Street Apartments, LLC, ("Wall Street") asserted ownership of the Wall Street Apartment building in Spokane. Plaintiff Alaa Elkharwily, MD, ("Elkharwily) asserted that he is an owner and officer of Wall Street.

2. Plaintiff Elkharwily asserted that he owns the rental house at 2321 S. Grand Street, Spokane.

3. Defendant All Star Property Management, LLC, (All Star) is a property management Company, and Defendant Gieve Parker (Parker) asserted that she and her husband Ron are owners and agents of All Star.

4. On September 2, 2012, the parties signed a Property Management Agreement (Agreement) under which All Star assumed management responsibilities for units 2, 3, 4, 5 and 19 at Wall Street, and the Grand Street house. Additional units 12 1/2, 22, and 35 at Wall Street would be managed when they became available after eviction. Wall Street and Elkharwily managed the remainder of the units at Wall Street.

5. The Agreement had an initial term of 6 months with potential renewal on an annual basis. The Agreement allowed either party to terminate the agreement after the first 3 months on 30 days' written notice.

6. The Agreement also provided that upon termination, "the Owner assumes all financial and contractual obligations entered into by All Star . . . prior to termination of this agreement."

7. The Agreement provided that All Star would:

a. Use due diligence in the management of the premises . . . upon the terms herein provided and agrees to furnish services for the renting, leasing, operating and managing of the . . . premises.

b. Render monthly statement of receipts, expenses and charges and to remit the same

to the Owner, together with receipts, less disbursement.

c. Make or cause to be made and to supervise any alteration, and to do maintenance on the above-referenced premises, to purchase supplies and to pay all bills thereof.

d. Agree to secure the prior approval of Owner on all expenditures in excess of $1.00 for any one item, except monthly or recurring operating charges and/or emergency repairs in excess of the maximum . . .

e. To make or cause to be made and to supervise any alterations . . .

8. The Agreement was terminated on September 27, 2012 at 10:35 a.m. by defendants through a text message from Parker to Elkharwily stating, "I can't work like this anymore. I quit."

9. Elkharwily claims that Parker breached the Agreement and he brought numerous claims against her and All Star, including claims for breach of contract, breach of implied covenant of good faith and fair dealing, conversion, damages to real property, tortious interference with economic relationship, electronic impersonation, fraud, violation of the Washington Consumer Protection Act, and defamation. All claims but for the claims of breach were dismissed on summary judgment.

Removal of Wall and Fire Alarm

10. Elkharwily testified that Parker ordered the tearing down of a wall in the lobby of the Wall Street apartments without authority. He further contends

that she failed to take steps necessary to assure that the fire alarms were connected and that this failure resulted in unsafe conditions, violation of fire code, and ultimately damages because of lost tenants.

11. Christopher Godwin testified at trial. Godwin was a handyman hired by Elkharwily who provided handyman services for Wall Street as well as the Grand property and other properties in return for rent. Godwin had been providing such services for Elkharwily prior to the engagement of All Star as property manager.

12. Thomas Brown testified at trial. Brown was a tenant at Wall Street during the time relevant to the tearing down of the wall and witnessed part of the incident.

13. Prior to and at the time of the Agreement, Elkharwily was in the process of wide scale improvements to the Wall Street Apartments in order to make them fit to rent. Elkharwily expressed his plan in detail to Parker and her husband, Ron; and they toured different hotel lobbies and building exteriors throughout Spokane in order to observe examples of the open concept and archways he liked. Subsequent to the Agreement, All Star prepared and posted rental advertisements for Wall Street, emphasizing a complete renovation over two to three months. The Agreement does not require All Star to renovate or improve the apartments.

14. Elkharwily admits that he had discussions with Parker about renovating the lobby, including installing a decorative arch, but he denied ever instructing Parker or Godwin to tear out the subject wall. He contends that he first learned of it on

September 26, 2012, when Parker texted him a photo of Godwin holding a hammer and tearing out the wall.

15. Elkharwily testified that after he saw the picture he called Parker. He indicated that during the call, Parker said that she told Godwin to take the wall down because she was frustrated. He testified that when he arrived at the apartments on September 26, he observed that the wall was down, there was a mess on the floor, and the flooring was damaged and the two fireboxes were disconnected and hanging from the wall.

16. Elkharwily and Parker both testified that they spoke by phone the next day and that Parker sent the text indicating that she was quitting.

17. Parker testified that when she went to the Wall Street Apartments on September 26, she did so in order to show an apartment to a prospective tenant. When she saw Godwin tearing down the wall, she was surprised and took a picture of it; she then left to show the Grand property. She testified that when she saw the wall, the fire boxes were still attached and intact. She denied ever telling anyone to tear down the wall and indicated that the demolition of the wall was part of Elkharwily's planned renovation.

18. Parker testified that she had previously consulted with the fire alarm company to inquire about the dismantling of the wall and had reported what she learned from them to Elkharwily.

19. Parker testified that working for Elkharwily was very difficult because he kept changing his mind on what he wanted done and was quite volatile. According to Parker, she quit on September 27 because of Elkharwily's unreasonable demand that she drive

out of her way to pick up trash bags to use at Wall Street; she claims that he yelled and screamed at her and the stress became too much and she quit.

20. During trial, reference was made to the transcript of a March 2014 proceeding conducted by the Board of Industrial Insurance Appeals, the subject matter of which was Elkharwily's challenge to the granting of L&I benefits to Godwin (P30). In that transcript, Godwin testified that he was instructed to tear down the wall by Parker at the direction of Elkharwily. In that transcript, Godwin testified that the fire alarm company had taken down the fire alarm boxes, however, could not recall that testimony at trial. Parker's testimony in that transcript regarding the wall and her termination of the Agreement was consistent to her testimony at trial.

21. Brown testified that he called Elkharwily on September 26 to notify him that the wall and fire boxes were down. Brown claimed that Parker was physically assisting in taking down the wall. Brown claims that Elkharwily told Parker that he wanted the wall to be demolished and the fire alarm boxes removed and that he overheard him say that on speakerphone. Later Brown admitted that two days prior to trial he contacted Elkharwily and told him that he heard Elkharwily tell Parker via speaker phone not to take the wall down.

22. P-45 is a photo taken by Parker of the wall with fire boxes intact and Godwin working on it. The photo was texted to Elkharwily on September 26, 2012 at 4:01 p.m. R-136.

23. There are no other texts between Parker and Elkharwily on September 26 until the following day,

September 27, 2012. In a series of texts occurring after Parker quit, the parties bickered over payment for repairs and work done at a different property. There were no texts about the wall until 7:00 p.m. when Elkharwily sent the following text: "Gieve, did you tell Chris to get the rest of the wall down? Yesterday I told everyone and you said the same we can't get the fire panel down unless we have the fire alarm guy there to move it professionally. You advised you called Allied to get them to look at it and if you don't elect them to do the work you will have your guy electrician to do it." P-3. He further texts that he isn't sure if Chris took down the wall on his own or if he was directed to by Parker.

24. All Star was not responsible for performing renovations to the apartments; however, Parker did purchase and install planter boxes for the exterior of the unit.

25. It is undisputed that Elkharwily was in the process of renovating the Wall Street Apartments and that part of the design was the construction of arches in the lobby of the complex. It is also clear that the wall would need to be removed and the fire boxes disconnected from the wall at least temporarily. It is not likely that Parker instructed Godwin to begin the renovation of the lobby without direction from Elkharwily. It is also unlikely that Godwin tore down the wall without direction from Elkharwily or Parker. The texts clarify that there had been a discussion among the three of them about the wall coming down; that discussion included concerns about the fire alarm.

26. It is unclear what plan, if any, was in place regarding the deactivation of the alarm boxes. Parker testified that when she left the Wall Street Apartments

on September 26 the boxes were intact. The photo she took confirms that. Elkharwily testified that when he arrived the wall was down and the boxes were not connected. However, on the 27th the texts show in real time that there was no sense of urgency until the early evening of the 27th. By that time, of course, Parker had quit.

27. The language of the Agreement states: Either party may terminate this Agreement upon thirty (30) days written notice after the expiration of three (3) months from the commencement date. The Agreement was signed on September 2, 2012; Parker terminated the Agreement 25 days later. The contract term requires written notice ONLY after 3 months; it can also be interpreted as not allowing termination until after 3 months. This ambiguity was not addressed at trial.

28. There are insufficient facts to support the claim that All Star and Parker breached the Agreement or violated the implied covenant of good faith and fair dealing. The evidence suggests that the wall was removed at the direction of Elkarwily, either directly from him or through Parker; however, there is no evidence suggesting that Parker or All Star had assumed responsibility for the fire alarm system or knew it was going to be or had been dismantled.

Collecting & Turning Over Rent

1. The Agreement requires All Star to "use due diligence in the management of the premises for the period and upon the terms herein provided, and agrees to furnish services for the renting, leasing, operating and managing of the above-referenced premises." The

apartments that were specifically part of the Agreement included units number 2, 3, 4, 5, 19, 12.5, 22 and 35.

2. The Agreement also requires All Star to "deposit all receipts collected for Owner (less any sums properly deducted or as otherwise provided for herein) in a pooled Trust account maintained in a licensed institution qualified to engage in the banking or trust business. This Trust account shall be maintained separate apart from All Star Property Management's business operations accounts or personal accounts."

3. All Star opened and maintained two trust accounts for Wall Street, one of which was for the deposit of tenant rent and security deposits.

4. Parker showed the Wall Street Apartment Unit 19 (which was the show unit) as well as the Grand house as part of her duties to provide management services.

5. Elkharwily contends that Parker collected and withheld rent collected from the tenant in Unit 18. He testified that the tenant owed $2200 in back rent. He claims that Parker moved her from Unit 18 to Unit 5 and that she collected the back rent and failed to forward it to him. He further alleges that he was unable to remove the tenant from Unit 5 for six months after Parker quit because he did not have the lease agreement.

6. Exhibit P-3 is a copy of text messaging sent from Elkharwily to Parker indicating that Alex, the tenant in Unit 18, owed $2200 plus late fees and that she was being evicted. That message was sent on September 26, 2012 at 3:16 p.m., the day prior to Parker quitting. Unit 18 was not covered by the Agreement.

7. The October 2 invoice sent to Elkharwily from All Star acknowledges that $300 was received from the tenant in "unit 5 that was unit 18."

8. There is no evidence that Parker returned to the Wall Street Apartments after she quit on September 27th. Elkharwily put forth no evidence as to when Parker would have collected $2200 or when she would have moved Alex to apartment Unit 5. On September 28, 2012, Elkharwily texted to Parker that he had just met with prospective tenants for Unit 5. This presumes that Unit 5 was vacant.

9. Elkharwily has proposed that this Court make findings relative to the collection of rent from Unit 18, the failure to turn it over and the unauthorized rental of Unit 5. There is no competent evidence to support Elkharwily's claim that Parker received $2200, that she withheld it from Elkharwily or that she rented Unit 5.

Unauthorized Purchases-Purchases Exceeding $1

1. The Agreement at paragraph 7 requires All Star to purchase supplies and to obtain prior approval for all expenditure exceeding $1.

2. At the Wall Street Apartments and at the Grand house, handyman and tenant Godwin cleaned, painted, repaired plumbing, did landscaping and other types of renovations and repairs.

3. Parker testified that part of her responsibility as property manager was to pick up materials that Elkharwily ordered from various vendors, such as Sherwin Williams, Lowe's, and Home Depot. Parker testified that Elkharwily gave her a temporary credit

card to use to pay for the items; if she didn't have that card with her, she would use her own Lowe's account. Sometimes Elkharwily would pay for the items when he ordered them. She testified that she always received receipts for items that she picked up on behalf of Elkharwily. D-103 at page 14 is a copy of a temporary credit card in the name of Elkharwily with an expiration date of September 20, 2012. The last four numbers of the temporary card are 0532. The last four numbers of the All Star credit card used to pay for items Elkharwily ordered are 8931. D-103, page 17.

4. All of the Lowe's receipts contained in D-103 were charged to the All Star credit card.

5. Parker testified that she picked up supplies and materials almost daily and that any items returned were returned because they were not used. After she quit, Parker claims that she returned everything that was not opened. That included items picked up for Wall Street as well as for All Star. D-103 contains a receipt from Lowe's showing returns of $564.60, which she attributes to merchandise returned on behalf of Wall Street. The receipt further indicates that $564.60 was credited to the Lowe's temporary card 0532. That is further reflected on Elkharwily's Exhibit P-8 as having been credited to the temporary account.

6. D-104 represents the invoice that Parker sent to Elkharwily after she quit and contains a list of items ordered by Elkharwily and charged to the All Star account. That invoice also reflects mileage charges per the Agreement.

7. P-25 represents unauthorized charges claimed by Elkharwily to have been charged to his account (0523) without his approval. Some of the transactions

contained therein represent returns; the only evidence before the court is that those returns were made by Parker as she described.

8. There is no proof that Parker made any unauthorized purchases on behalf of Wall Street, either on the All Star credit card or the temporary Wall Street card.

Unauthorized Work at Grand House

1. Wall Street alleges that Parker and All Street, without authorization, removed a disposal in the kitchen, broken pipes, clogged toilets, and cut down ivy.

2. Wall Street claims that he had to hire a plumber and a painter to do the repairs and seeks reimbursement for the value of the ivy.

3. Wall Street claims that it lost 2 months of rent due to these repairs and asks for the value of all.

4. There is no evidence that Parker or All Star did any repairs, painting, plumbing, or ivy removal at the Grand house. Pursuant to the testimony, any actions taken by Godwin were either directly from Elkharwily or indirectly from him through Parker.

Keys and Business Records

1. Elkharwily claims that Parker and All Star retained the keys to the Wall Street units, office, storage and mechanical rooms and documents pertaining to rental agreements with tenants. Elkharwily claims that Parker refused to return them to him upon his request. He claims that this refusal ultimately resulted in loss of rental income, inability to contact tenants who moved out for expenses due, replacement of the

doors to all the units, and the purchase of replacement keys.

2. Parker contends that she returned all the keys, documents, and a refund check to Elkharwily by mail on October 12, 2012. P-107 and P-108. She further claims that she did not possess the only keys to the units and rooms mentioned above.

3. The evidence suggests that Parker retained the above items over a 2-week span of time. At best, Parker should not have retained those items and should have returned them immediately to Elkharwily. However, Elkharwily's claim that Parker retained them permanently is not credible. Elkharwily alleges damages for the permanent retention of the items. This court cannot find that damages resulted from the delay in returning the items.

Defendants' Breach of Contract Claim — Due Diligence & Payment of Money Owed

1. The Agreement authorized Defendant All Star to deduct proper charges and expenses from all receipts collected prior to remitting net receipts, if any, to Plaintiff Wall Street.

2. Paragraphs 3 and 6 of the Agreement required Wall Street to pay All Star all expenses and charges that exceed rental receipts promptly upon demand of All Star.

3. In addition to providing for reimbursement of expenses All Star incurred for Plaintiffs, the Agreement requires payment of a management fee of 6% of the monthly rental rate, an additional management fee of all rental income received in excess of $533, a leasing fee of $100.00 for each new signed lease at Wall Street

Apartments, a percentage leasing fee for leasing the Grand house, and 55 cents per mile to pick up and deliver materials to a job site or property.

4. All Star was owed and properly deducted $60.87 for a cash advance to and labor for drilling holes in planter pots at Wall Street. That is not disputed.

5. All Star's compensation for leasing Wall Street Apartments Unit 11 consisted of a $100 newly signed lease fee, plus a management fee of $34.50 (6% of $575), plus an additional management fee of $42 (all rents in excess of $533). All Star charged only $173.98 and properly deducted $173.98 from September 2012 rents collected.

6. All Star was owed $144.33 for mileage charges for picking up and delivering materials ordered by Elkharwily and properly deducted $93.17 to pay a portion of those mileage charges.

7. All Star incurred, with Elkharwily's authorization, $1,321.57 for purchasing materials for Wall Street and for mileage charges for picking up and delivering materials.

Based on the above findings, the Court makes the following Conclusions of Law:

II. Conclusions of Law

1. A contract claim is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. *C 1031 Properties, Inc., v. First American Title Ins. Co.,* 175 Wn. App. 27, 301 P.3d 500 (2013).

2. All Star did not breach its duties under the Agreement by ordering the removal of the wall and the dismantling of the fire alarm system.

3. All Star did not breach its duty under the Agreement to not make unauthorized purchases over $1.

4. All Star did not breach its duties under the Agreement to use due diligence and render monthly statements of receipts, expenses, and charges to Plaintiffs.

5. All Star did not breach its duties under the Agreement to be diligent and collect rent.

6. All Star did not breach its duty under the Agreement to be diligent and remit net receipts to Plaintiffs.

7. All Star did not breach its duty to manage and supervise alterations, repairs and maintenance relative to the demolition of the wall.

8. Plaintiffs failed to prove by a preponderance of the evidence the elements of causation and damages as to all of its claims.

9. Under Washington law, "[t]here is in every contract an implied duty of good faith and fair dealing" that "obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991).

10. Defendants had no duty to manage or supervise renovation work performed on the Wall Street Apartments building lobby.

11. Defendants did not breach their implied duty of good faith and fair dealing regarding the management and supervision of alterations, repairs, and maintenance.

12. Defendants did not breach their implied duty of good faith and fair dealing regarding the production of monthly statements, as the statements, although produced late, were timely under the circumstances.

13. Defendants did not breach any implied duty of good faith and fair dealing regarding the demolition of the lobby wall at Wall Street Apartments or the removal of Wall Street Apartment's fire alarm box.

14. All Star did not breach its duty of good faith and fair dealing by late return of business records and keys to Wall Street.

15. Plaintiffs failed to establish causation or damages by a preponderance of the evidence.

16. Plaintiffs failed to prove the necessary elements to establish their breach of implied duty of good faith and fair dealing.

17. Plaintiffs had a duty to pay All Star all proper expenses and charges exceeding rental receipts promptly upon demand of All Star.

18. Plaintiffs breached the Agreement by refusing to pay All Star all expenses and charges exceeding rental receipts upon All Star's demand.

19. Plaintiffs' breach actually and proximately caused All Star damages in the amount of $1,321.57.

20. Defendants would not have incurred the expenses and charges but for the Agreement containing Wall Street's promise to pay mileage charges and

reimburse expenses for materials purchased on behalf of Plaintiffs.

21. Defendants would have no legal claim for payment of these expenses and charges if Plaintiff Wall Street, having promised to pay, had paid Defendants.

22. Defendants have established by a preponderance of the evidence that Plaintiffs are liable to Defendants for breach of contract.

23. Judgment shall be entered in favor of Plaintiffs against Defendants in the amount of $1,321.57.

24. Defendants shall be awarded post-judgment interest at a rate of 12% per annum.

25. Any request for attorney fees shall be made by separate motion.

DATED this 13 day of February, 2019. [sic, should be 2020]

/s/ Maryann C. Moreno
Judge

MANDATORY ARBITRATION AWARD
(FEBRUARY 7, 2019)

SUPERIOR COURT OF WASHINGTON
COUNTY OF SPOKANE

MANDATORY ARBITRATION

Plaintiffs: Wall Street Apartments, LLC

vs.

Defendant: All Star Property Management, LLC

Case No. 15-2-04021-3

MANDATORY ARBITRATION AWARD

This issues in arbitration having been heard on January 23 & 24, 2019.

I make the following award to: (specify party) Wall Street Apartments, LLC & Alaa Elkharwily

Total amount of award: $7,949.00

Terms of award: Against Defendant All Star Property Management, LLC-Only.

Was any part of this award based on the failure of a party to participate at the hearing? (MAR 5.4)

No

Signed:

/s/ James A. Domanico
Arbitrator

Dated: 2-7-19

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Re: Wall Street Apartments, LLC v. All Star Property Mgmt, LLC Spokane County Cause No.: 15-2-04021-3

Dear Counsel:

I appreciated the chance to decide the issues in the dispute between Wall Street Apartments and All-Star Property Management.

The dispute arose from the contract between the parties and I focused on the contract. The first thing that I see as important to this case is the fact that All Star Property Management did not manage the entire property they only were responsible to manage eight (8) of the units and the home on Grand Blvd. The Plaintiff was trying to enlarge the scope of All Star's duties to the other apartments, other tenants' issues and to the general repairs being done at the Wall Street Apartments. All Star Property management in an attempt to demonstrate its abilities seemed to accept those additional responsibilities that were not contemplated in the contract.

I do find that All Star did earn the fees for renting apartment 12.5 and 11. The Defendants Ex. D4; the All Star invoice for $1,395.94 is valid but sales taxes on purchases and mileage are not valid.

The Plaintiffs large damage claims center on the removal of the wall in the lobby and the fire alarm system being dismantled. There is no question that Dr. Elkharwily's employee took down the wall. Dr.

Elkharwily was his employer and not All Star. Ms. Parker when she saw the wall took a picture and sent it to Mr. Elkharwily. I did not see sufficient evidence to suggest Ms. Parker directed Mr. Godwin to take the wall down. I think that they both (Ms. Parker and Dr. Elkharwily) were aware at some point the wall would be changed to put in an arched wall. Mr. Godwin took it upon himself to start on the project prior to getting approval from Dr. Elkharwily. The fire alarm system disappeared. There is no evidence that Ms. Parker was involved or knew of that. It did disappear and was most likely stolen. Ms. Parker and All Star are not responsible for the losses attributed to that problem.

All Star filed a lien on the property. The parties did not address the lien validity. All Star was entitled to file a lien under RCW 60.42.010 which is only on personal property and not on real property. Dr. Elkharwily claimed the lien cost him $14,800 when he refinanced. The lien was improper and Dr. Elkharwily is entitled to damages for having to hire an attorney and removing the lien. Damages are awarded in the amount of $940.00.

I also find that All Star did breach its duties to Dr. Elkharwily and Wall Street. It left the office unlocked and it did not return the keys timely. The contract addresses how the contract can be terminated which is upon 30 days written notice. That notice was not given. The parties seem to have agreed it was unnecessary or waived the notice. Ms. Parker did have an obligation on termination to provide the keys and leases to its client and preserve the client's property.

Ms. Parker mailed the keys on October 12, 2012. Dr. Elkharwily never received them. The keys were needed immediately after All Star terminated the

agreement and the Plaintiff is entitled to all costs in rekeying the apartment complex and the Grand Ave. house. ($3,200 + $887 + $117).

All Star also left the office and storage room unlocked after termination of the contract. This created a situation where the files and records in the office were stolen and the storage room was looted. There was no testimony on the value of the cases and files that were stolen. Dr. Elkharwily did testify he could not recover $2,200 from Apt. 18 because he was unable to prove she owed back rent. He also testified that without the property condition report that was completed on move in, he could not require tenants to pay for damages to the apartment. There was no testimony on what those losses would be.

In the police report P-22 the Dr. estimated $6,000 to $7,000 in supplies and paint was stolen along with cameras. That seems very high when considering that All Star was purchasing supplies and paint for the apartment complex. The reasonable value of the supplies and items that were stolen is $2,000.

The other damages claimed by Dr. Elkharwily are too speculative to be awarded. The loss of rental income of $225,365 was not established.

The damages done to the lobby flooring, walls, and for two units is not recoverable against All Star ($600 + $4,635 + $2,652. The cleaning and hauling is also not recoverable $1,300. The cost of the L&I claim is not damages that All Star is responsible for $2,500. The purchase at Lowes was authorized so no damages are awarded.

All Star is not responsible for damages caused by the fire alarm systems and theft or the fire watch $2,500 + $120.

The Grand Ave. house needed to be painted and was in the process of being fixed up. All Star did not damage the property. Dr. Elkharwily's employer, Mr. Godwin did the work or damage that Dr. Elkharwily is now claiming. The only damages awarded on Grand Ave are for the new locks.

Summary:

Repair & Replace Doors & Locks	$3,200
Locks & Keys — special door	$ 887
New locks — Grand Ave.	$ 117
Lien Damages	$ 940
Back rent payment, #18	$2,200
Stolen Supplies & Property	$2,000
	$9,344
Amount owed to All Star-	$1,395.94
	$7,949.00

I hope the reasoning provided is helpful.

Very truly yours,

Crary, Clark & Domanico, P.S.

/s/ James A. Domanico
Attorney at Law

APPELLATE COURT DOCKET
NO. 37512-9-III, EXCERPT

06-29-22	Letter	Sent by Court
07-07-22	Stayed	Status Changed
07-07-22	Other Filing	Received by Court
07-07-22	Petition for Review	Filed
07-11-22	Letter	Received by Court
07-19-22	Other Filing	Received by Court

EMAIL CORRESPONDENCE BETWEEN TRISTEN AND WYLIE (AUGUST 26, 2022)

From: Worthen, Tristen
To: Spence, Barb; Dressler, Sam
Subject: FW: Wall Street Apartments, LLC et al v. All Star Property Mangement, LLC et al, Court of Appeals No. 37512-9-III
Date: Friday, August 26, 2022 1:45:01 PM

FYI – we can talk about this on Monday when Barb is back in the office.

Tristen

From: rickwlaw@aol.com <rickwlaw@aol.com>
Sent: Friday, August 26, 2022 1:22 PM
To: Worthen, Tristen
<Tristen.Worthen@courts.wa.gov>
Cc: chagermann@stamperlaw.com;
dykmanlaw@msn.com; rickwlaw@aol.com
Subject: Wall Street Apartments, LLC et al v. All Star Property Mangement, LLC et al, Court of Appeals No. 37512-9-III

Dear Ms. Worthen,

I am co-counsel for the Appellants in the above matter.

This is to request advice concerning all filings made by the Appellants and Respondents that Division III has forwarded/transmitted to the Supreme Court to date. Also please advise the title of the filings, dates of the filings, and the dates the filings were forwarded/

transmitted to the Supreme Court and the reason for the transmittal. Also, please advise whether the transmittal, if any, was formal or informal.

A docket caption shown for one of Appellants' filings on August 23, 2022, (shown on the docket "August 24") is described as an objection to attorney's fees. Is this the same filing as Appellants' "APPELLANTS' REPLY IN SUPPORT OF MOTION TO MODIFY A RULING/ACTION BY THE CLERK; AND TO DISQUALIFY THE CLERK; AND TO DISQUALIFY THE COURT. AND RESPONSE TO RESPONDENTS' "MOTION" FOR ATTORNEY FEES"?

Also, Appellants on August 23, 2022, made three filings

The Reply, etc mentioned above;
An appendix; and
Motion to waive word limit.

These documents show as having been "filed", per the court's stamps, on August 23. However, the docket shows they were "received" by the court. Is this different than a "filed" status?

The docket shows two of the three August 23 filings as "other filings." Please advise if the Appendix and the Reply were merged by the court into one filing and specify which one is the reply on the motion to modify and to disqualify.

Please advise if any of Appellants' August 23 filings has or will be forwarded to the Supreme Court or is going to be considered by the court of appeals panel, and if so has it been set on the calendar. Has there been any written order or direction made regarding this?

Finally, please provide copy of the filing (ruling or otherwise) that was filed in the court of appeals on May 26, 2022.

Thank you for your assistance,

Richard T. Wylie

LETTER FROM
SUPREME COURT DEPUTY CLERK
(JULY 11, 2022)

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THE SUPREME COURT
STATE OF WASHINGTON

TEMPLE OF JUSTICE
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OLYMPIA, WA 98504-0929

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LETTER SENT BY E-MAIL ONLY

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Hon. Tristen Worthen, Clerk
Court of Appeals, Division III
500 North Cedar Street
Spokane, WA 99201

Re: Supreme Court No. 101073-7 – Wall Street Apartments, LLC, et al. v. All Star Property Management, LLC, et al.

Court of Appeals No. 37512-9-III

Clerk and Counsel:

The Court of Appeals has forwarded the "PETITION FOR REVIEW OF APPELLANTS" filed there on July 7, 2022, in the referenced matter. The matter has been assigned the Supreme Court cause number indicated above. The Court Appeals also forwarded to this Court the "PLAINTIFFS/ APPELLANTS' MOTION TO MODIFY CLERK'S ORDER FILED JUNE 7, 2022."

It is noted that there was a pro hac vice attorney involved in this case at the Court of Appeals and we have included them on this initial letter as a courtesy. However, if the pro hac vice attorney intends to be involved in this case at the Supreme Court, a motion for pro hac vice admission should be served and filed. See APR 8(b).

It appears as though the Court of Appeals forwarded to this Court the motion to modify the clerk's order along with the petition for review because the case there is now closed. As the Supreme Court cannot act on the motion to modify, the motion will be placed in the file without further action.

The $200 filing fee did not accompany the petition. The petition will be held until July 18, 2022, to allow the Petitioner time to pay the filing fee to this Court. If the filing fee is not received by July 18, 2022, it is likely that this matter will be dismissed.

The parties are advised that upon receipt of the filing fee, a due date will be established for the filing of any answer to the petition for review.

Counsel are referred to the provisions of General Rule 31(e) regarding the requirement to omit certain

personal identifiers from all documents filed in this court. This rule provides that parties "shall not include, and if present shall redact" social security numbers, financial account numbers and driver's license numbers. As indicated in the rule, the responsibility for redacting the personal identifiers rests solely with counsel and the parties. The Clerk's Office does not review documents for compliance with the rule. Because briefs and other documents in cases that are not sealed may be made available to the public on the court's internet website, or viewed in our office, it is imperative that such personal identifiers not be included in filed documents.

Counsel are advised that future correspondence from this Court regarding this matter will most likely only be sent by an e-mail attachment, not by regular mail. For attorneys, this office uses the e-mail address that appears on the Washington State Bar Association lawyer directory. Counsel are responsible for maintaining a current business related e-mail address in that directory.

Sincerely,

/s/ Sarah R. Pendleton
Supreme Court Deputy Clerk

SRP:jm

PLAINTIFF/APPELLANT'S PETITION TO WITHDRAW/RECALL OPINION (4/19/2022) AND TO CORRECT THE RECORD SUPPLEMENTAL TO MOTION TO RECONSIDER (MAY 25, 2022)

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

WALL STREET APARTMENTS, LLC, AND ALAA ELKHARWILY, M.D.,

Plaintiffs/Appellants,

v.

ALL STAR PROPERTY MANAGEMENT, LLC, ALL STAR CONSTRUCTION, LLC, GIEVE PARKER, INDIVIDUALLY AND JOHN DOES AND JANE DOES I THROUGH X,

Defendants/Respondents.

No. 37512-9-III

[TOC Omitted]

EXHIBIT A–
DECLARATION OF ALAA ELKHARWILY
(APRIL 03, 2020)

SUPERIOR COURT, STATE OF WASHINGTON,
COUNTY OF SPOKANE

WALL STREET APARTMENTS, LLC,
A WASHINGTON LIMITED LIABILITY COMPANY; AND
ALAA ELKHARWILY, M.D.,

Plaintiffs,

v.

ALL STAR PROPERTY MANAGEMENT, LLC, A WASHINGTON LIMITED LIABILITY COMPANY; GIEVE PARKER, INDIVIDUALLY AND ON BEHALF OF HER MARITAL COMMUNITY, AND JOHN DOES AND JANE DOES I THROUGH X,

Defendants.

No. 15-2-04021-3

Alaa Elkharwily, for his declaration herein, states as follows:

1. I am one of the Plaintiffs herein in this action.

2. During the trial, Gieve Parker testified that she called a representative of "General Fire" to ask about what to do with the fire alarm system at Wall Street during remodeling. She also testified that she told me whatever he told her.

3. Gieve Parker, during trial, testified that a Richard Kimbrel, who worked for General Fire, was the person she spoke with.

4. Previously in this case she testified that she spoke with someone whose company was on a sticker on the fire alarm system–"Fire West" or similar name.

5. The only name on any sticker on the fire alarm system at Wall Street was Allied.

6. In July 2019, Defendants produced an alleged email, a copy of which is attached hereto as Exhibit 1. It was allegedly sent by a "John Johnson" to Gieve Parker and allegedly signed by "Richard Kimbrel," again allegedly on behalf of "Fire West Systems" claiming they made a survey and removed the panel while on the phone with Mrs. Parker.

7. In any event, the first time "General Fire" was mentioned by Parker was during trial.

8. During trial I could not reach anyone General Fire to confirm or deny that the newly mentioned General Fire had been called by Gieve Parker regarding removal of the fire box and whether a John Johnson or Richard Kimbrel ever worked for General Fire and if Johnson or Kimbrel or any one at General Fire ever worked, unhooked, rebooked or removed the Wall Street fire boxes and or if that company had ever performed a consult or any other task regarding the Wall Street Apartments building.

9. Finally, on February 27, 2020, a man named Jason from General Fire, left a message for me and I called him back. He told me he had been with that company for 23 years and after checking company records, did not believe that the company had ever

had any one by the name of Richard Kimbrel nor had General Fire worked at Wall Street Apartments at any time, whether for a survey or removal or even consultation, back in 2012 nor at any other time. This conversation had led to the CEO Darrell Siria and Jason Knauft providing a declaration which has been filed herein.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this March 13, 2020.

/s/ Alaa Elkharwily, MD

Working Copy

John Johnson
Wall Street Apartments
October 26, 2012 at 10:48 AM

To Whom it may concern

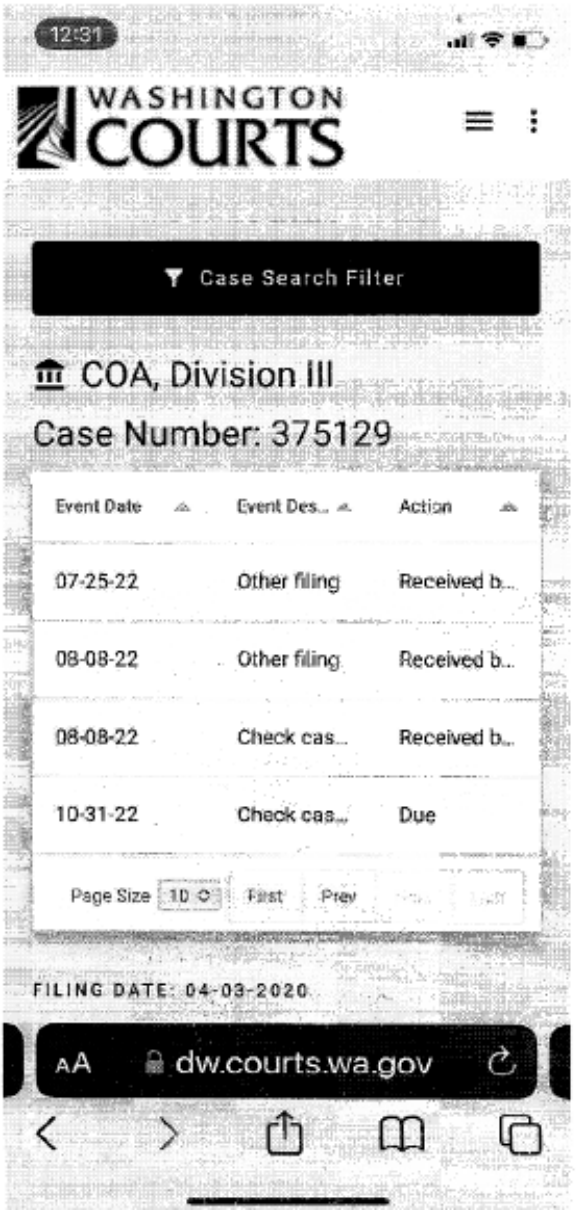
My Name Richard Kimbrell. I am an alarm service Tech for Fire system west Inc. I was called out to the wall street apartments to survey to remove the fire alarm panel from the wall. There was only 2 people on site when this was conveyed to me to pull panel off the wall so the demo. Could be done. No one representing allstar propertys was on site nor in contact when I was told to remove panel. However, I was told to remove it by one of the reps from the wall street apartment complex. I don't remember the persons name. I know he had to call someone to get the ok. I was on the phone with allstar prop. When the ok was given by the rep of the apartments. Lean had not nor was not in the position to give the go a head to do such word. If you have any question feel free to call me 509.599.9341

Thank you
Richard K.

SCREEN SHOTS OF THE DOCKET OF DIVISION III TAKEN AUGUST 15 AND 17

Screen shot taken August 15.

It shows on August 8, 202, the court made available only one "other filing" on the docket, the reply to Plaintiffs' uncontested motion to modify. But not the "other filing", the motion to modify and motion to disqualify the clerk or the court.


12:31
WASHINGTON COURTS
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COA, Division III
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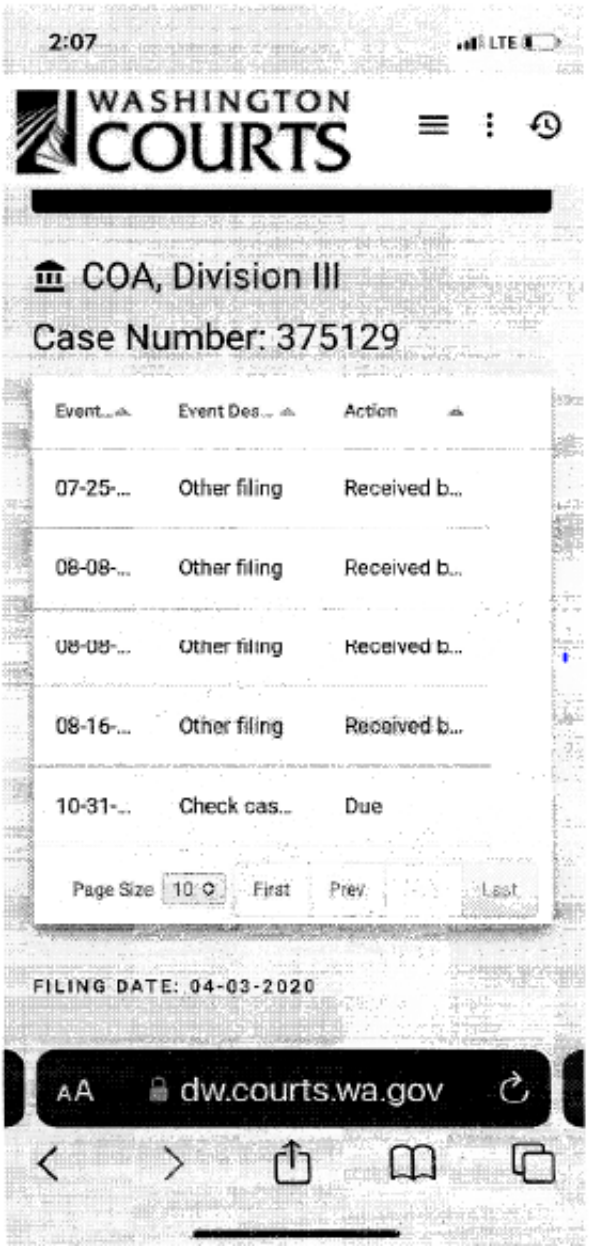
This screen shot was taken on August 17, 2022.

The "other filing" of August 8, 2022, shows on the docket, only after filing of the supplement, filed August 16, about the case manager statements concerning the motion to disqualify and forwarding said motions to the Supreme Court. The two disqualifying motion shows on the docket almost ten days after the filing.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COA, Division III
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OPINION OF THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION III ON *IN RE CUSTODY OF C.S.* (JUNE 2, 2022)

UNPUBLISHED OPINION

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

IN THE MATTER OF THE CUSTODY OF: C.S.+

WAYNE JANKE and DORIS STRAND,

Respondents,

v.

RONALD SIMON and TERESA SIMON,

Appellants.

No. 38056-4-III

Before: PENNELL, J., SIDDOWAY, C.J., FEARING, J.

+ To protect the privacy interests of the minor child, we use their first and last name initials throughout the body of this opinion. Gen. Order 2012-1 of Division III, *In re Use of Initials or Pseudonyms for Child Victims or Child Witnesses* (Wash. Ct. App. June 18, 2012), https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2012_001&div=III.

PENNELL, J.

Ronald and Teresa Simon appeal from the trial court's denial of reconsideration of an order striking their CR 60 motion for relief from judgment and imposing attorney fees as a CR 11 sanction. We affirm in part and reverse in part. The order striking the CR 60 motion is affirmed but we reverse the CR 11 sanction, without prejudice, based on insufficient findings. This matter is remanded for further proceedings.

FACTS

Ronald and Teresa Simon are the biological parents of C.S. In 2015, Wayne Janke and Doris Strand petitioned for nonparental custody of C.S. Extensive litigation ensued, including the appointment of a guardian ad litem (GAL). Ultimately, in 2018 the petition was granted and both parties were ordered to pay a share of the GAL fees.

In 2019, the Simons moved for relief from judgment under CR 60, arguing they had newly discovered evidence as well as evidence of fraud.[1] The court denied the motion, ruling (1) the fraud alleged was not perpetrated by an opposing party, (2) the Simons failed to make a showing of fraud, and (3) the Simons failed to show the alleged newly discovered evidence could not have been uncovered earlier.

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[1] The Simons appear to have filed a similar motion in August 2018. *See* Clerk's Papers (CP) at 3584; 1 Report of Proceedings (Apr. 12, 2019) at 31. This motion does not appear to be included in the appellate record.

In 2020, the Simons filed another CR 60 motion. This motion raised several new factual arguments concerning the alleged conspiracy against them, but shared the same fundamental legal defects as their prior motion. In response, Doris Strand moved to strike the Simons's motion, asserting it was duplicative of the previous CR 60 motion. The trial court granted the motion to strike and imposed on the Simons $2,500 in attorney fees as a CR 11 sanction due to the "repetitive nature" of the motion. Clerk's Papers (CP) at 4831. The Simons then unsuccessfully moved for reconsideration of this order.

The Simons now appeal from the trial court's denial of reconsideration of the order striking their CR 60 motion and imposing attorney fees as a CR 11 sanction.

ANALYSIS

Order striking the CR 60 motion

Under CR 12(f), a party may move in the trial court to strike any redundant or immaterial portion of a pleading or motion prior to filing a responsive pleading. CR 60 sets forth the procedures governing motions for relief from judgment. A motion for relief from judgment based on newly discovered evidence must be made within one year. CR 60(b)(11). A motion for relief based on fraud must be made within "a reasonable time." *Id*. We review a trial court's disposition of a CR 60 motion for abuse of discretion. *Coogan v. Borg-Warner Morse Tec Inc.*, 197 Wn.2d 790, 820, 490 P.3d 200 (2021). Motions to strike under CR 12(f) are reviewed under the same standard. *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 244,

178 P.3d 981 (2008). Our case law permits us to affirm the trial court on any basis supported by the record and the law. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

The Simons's motion for relief from judgment was untimely under the plain terms of CR 60. To the extent the motion was based on newly discovered evidence, it was not filed within one year of the 2018 nonparental custody order. To the extent the CR 60 motion was based on fraud, it was not filed within a reasonable amount of time, particularly in light of the Simons's prior litigation.

The Simons's motion also fails on the merits. In order to justify vacating a judgment on the basis of newly discovered evidence, the Simons must show new evidence:

> (1) would probably change the result if a new trial were granted, (2) was discovered since trial, (3) could not have been discovered before the trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching.

Jones v. City of Seattle, 179 Wn.2d 322, 360, 314 P.3d 380 (2013).

To obtain relief from a judgment due to fraud, a party must demonstrate fraudulent conduct or a misrepresentation that caused the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense. *Lindgren v. Lindgren*, 58 Wn.App. 588, 596, 794 P.2d 526 (1990). The moving party must establish fraud with clear and convincing evidence. *Id.*

> The nine fraud elements are: (1) a representation of an existing fact; (2) the fact is material; (3) the fact is false; (4) the defendant knew the fact was false or was ignorant of its truth; (5) the defendant intended the plaintiff to act on the fact; (6) the plaintiff did not know the fact was false; (7) the plaintiff relied on the truth of the fact; (8) the plaintiff had a right to rely on it; and (9) the plaintiff had damages.

Baddeley v. Seek, 138 Wn.App. 333, 338-39, 156 P.3d 959 (2007).

The Simons fail to point to any newly discovered evidence that is material to their case, or any evidence of fraud. The Simons's arguments requesting relief from judgment are difficult to understand and appear to be based on allegations of an elaborate conspiracy involving the court and the GAL. The Simons fail to address the elements of fraud, do not allege fraud by an adverse party (*i.e.* not the court or the GAL), and fail to describe why they were unable to discover the claimed new evidence or fraud sooner than the time of filing. These are similar to the defects that led the trial court to deny the Simons's CR 60 motion in 2019. Indeed, due to the similarity of subject matter between the two motions, the 2020 CR 60 motion can easily be interpreted as another attempt at the failed prior motion. Thus, it was not an abuse of discretion for the trial court to rule the Simons's 2020 CR 60 motion was repetitive, grant the motion to strike under CR 12(f), and deny the Simons's subsequent motion for reconsideration.

CR 11 sanction

"[CR 11] permits a court to award sanctions, including expenses and attorney fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation." *Delany v. Canning*, 84 Wn.App. 498, 509-10, 929 P.2d 475 (1997). The rule applies to pro se parties as well as attorneys. *See West v. Wash. Ass'n of County Officials*, 162 Wn.App. 120, 136, 252 P.3d 406 (2011). We review the imposition of a CR 11 sanction for abuse of discretion. *Kilduff v. San Juan County*, 194 Wn.2d 859, 874, 453 P.3d 719 (2019).

The trial court here found that "[b]ased on the repetitive nature of several successive CR (60) motions on the same grounds, CR (11) sanctions are appropriate." CP at 4831. The court did not explicitly find the Simons had filed their CR 60 motion for an improper purpose such as harassment. Nor did the court find the Simons made a baseless filing without a reasonable inquiry into law and facts.

The trial court's finding was insufficient to support the CR 11 sanction. "[I]n imposing CR 11 sanctions, it is incumbent upon the court to specify the sanctionable conduct in its order." *Biggs v. Vail*, 124 Wn.2d 193, 201, 876 P.2d 448 (1994). "The court must make a finding that either the . . . [pleading, motion, or legal memorandum] is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose." *Id*. "If a . . .[pleading, motion, or legal memorandum] lacks a factual or legal basis, the court cannot impose CR 11 sanctions unless it also finds that the attorney [or party] who signed and filed the . . . [pleading, motion, or legal memorandum] failed to conduct a reasonable inquiry into the factual and

legal basis" of the filing. *In re Jones v. A.M.*, 13 Wn.App. 2d 760, 768, 466 P.3d 1107 (2020) (*quoting Bryant v. Joseph Tree, Inc.* 119 Wn.2d 210, 220, 829 P.2d 1099 (1992)).

Because the trial court's findings were insufficient to support the attorney fee award as a CR 11 sanction, we reverse the sanction and remand so that the trial court may consider whether a CR 11 sanction is appropriate in light of the aforementioned standards. *See Biggs v. Vail*, 124 Wn.2d at 202 (setting forth procedure for remand on CR 11 findings).

APPELLATE ATTORNEY FEES

Doris Strand requests an award of attorney fees under RAP 18.1 for having to defend against a frivolous appeal. Because the Simons have prevailed in part on their appeal, we cannot find the appeal was wholly frivolous. The request for attorney fees on appeal must be denied.

CONCLUSION

The order striking the Simons's CR 60 motion is affirmed. The trial court's award of attorney fees as a sanction under CR 11 is reversed without prejudice. This matter is remanded for further proceedings.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

/s/ Pennell
J.

WE CONCUR:

/s/ Siddoway
C.J.

/s/ Fearing
J.