

January 06 2015 8:30 AM

Honorable Katherine Stolz
KEVIN STOCK
COUNTY CLERK
NO: 14-2-08793-0

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

MAUREEN HAY, a Washington resident;
IGOR SMAL, a Washington resident,
HANNA SMAL, a Washington resident,
JORDAN SMITH, a Washington resident,
CAMERON SMITH, a Washington resident,
ALEX KULIBABA, a Washington resident,
NATALYA MANCHIK, a Washington
resident, DAN HART, a Washington resident,
SHAWNA HART, a Washington resident,
PETER MANNING, a Washington resident,
ADRIENNE MANNING, a Washington
resident, JOHN BETHKE, a Washington
resident, TAWNY CABRAL, a Washington
resident, WHITNEY DeCORIA, a
Washington resident, RYAN DeCORIA, a
Washington resident, VASILIIY LYSYY, a
Washington resident, TATYANA LYSYY, a
Washington resident, JOSEPHINE
PANGAN, a Washington resident, AUBREY
BRADLEY, a Washington resident, OZNUR
BRADLEY, a Washington resident, CODY
WHITNEY, a Washington resident,
YVONNE JOHNSON, a Washington
resident, HAROON SAKHI, a Washington
resident, ADELA SAKHI, a Washington
resident, DARRYL JOHNSON, a
Washington resident, CHRISTINE
JOHNSON, a Washington resident, KEN
EDWARDS, a Washington resident, SHERRI
PENA, a Washington resident, YONG LIM, a
Washington resident, AMBER LEE, a

NO. 14-2-08793-0

PLAINTIFFS' MOTION TO COMPEL
DISCOVERY

PLAINTIFFS' MOTION TO COMPEL DISCOVERY - 1

CASEY & SKOGLUND PLLC
1319 DEXTER AVE. N, SUITE 370
SEATTLE, WA 98109
T: 206.284.8165 | F: 206.770.6427

1 Washington resident, WHITNEY SARGENT,
2 a Washington resident, YEVGENIY “JOHN”
3 ZADNEPROVSKIY, a Washington resident,
4 MARINA ZADNEPROYSKIY, a
5 Washington resident, EUN YOUNG LEE, a
6 Washington resident, KURT BERG, a
7 Washington resident, TRACY BERG, a
8 Washington resident, PETE NITO, a
9 Washington resident, JENELYN NITO, a
10 Washington resident, WILLIAM DUNGER, a
11 Washington resident, TANYA DUNGER, a
12 Washington resident, ANTON OMELIN, a
13 Washington resident, BANNY CHHOEUN, a
14 Washington resident, SARETH CHHOEUN,
15 a Washington resident, ADAM JACKSON, a
16 Washington resident, SARA JACKSON, a
17 Washington resident, LAYLA BUGADO, a
18 Washington resident, BRAD BUGADO, a
19 Washington resident, PHU DO, a Washington
20 resident, HIEN TRAN, a Washington
21 resident, JASON IHDE, a Washington
22 resident, and BETH IHDE, a Washington
23 resident;

24 Plaintiffs,

25 vs.

HIGHMARK HOMES, LLC, a Washington
Corporation; TOM AND JANE DOE
TOLLEN, a marital community,

Defendants.

RELIEF REQUESTED

Defendant Highmark Homes refuses to provide answers to rudimentary discovery inquiries, necessitating this Motion to Compel. The Plaintiffs request the Court identify a date certain for the Defendant to provide the requested information, and award Plaintiffs their reasonable fees associated with having to pursue this motion.

1 The parties participated in a discovery conference October 29, 2014.¹

2 **GENERAL BACKGROUND - FACTS**

3 In 2011 and 2012 Defendant Highmark Homes completed construction of 29 single
4 family homes in Fife Washington. The homes were sold by the Defendant to first time,
5 inexperienced purchasers. The average price of the homes is \$220,000. Shortly after
6 Defendant Highmark sold the homes numerous problems were confirmed, including²:

7 **Undersized nails used to secure shingles resulting in shingle blow-off**

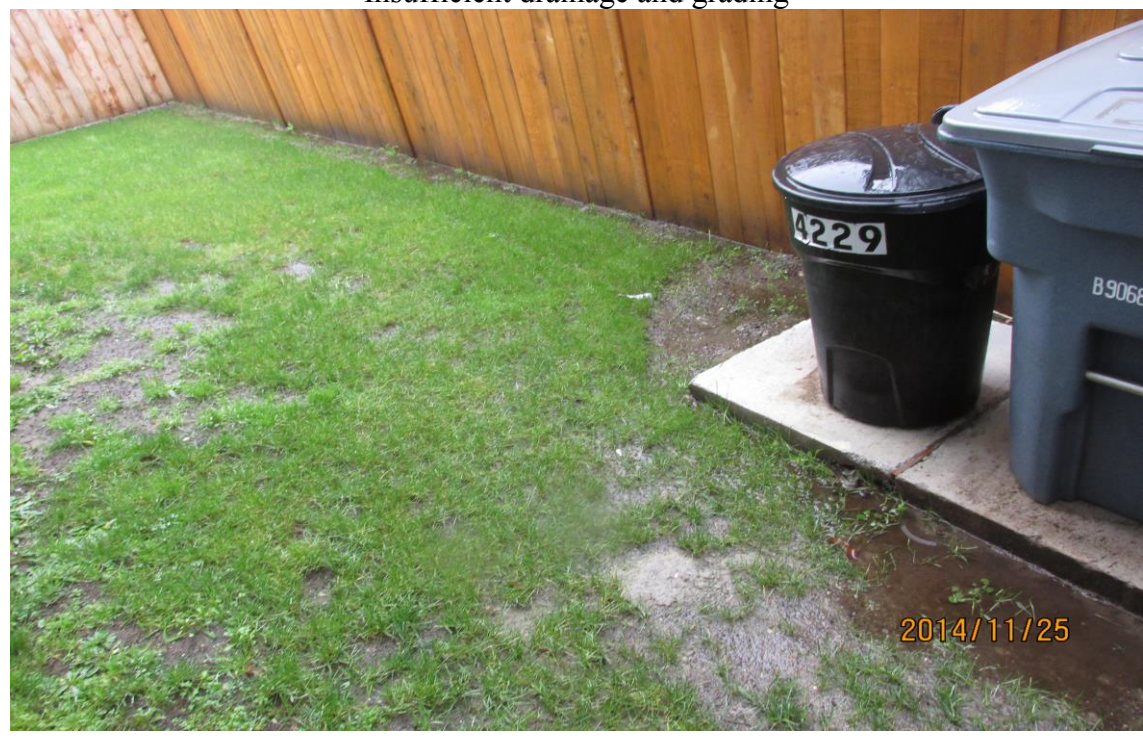


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24 ¹ Please see Decl. Casey.

25 ² Please see Decl. Casey.

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Insufficient drainage and grading



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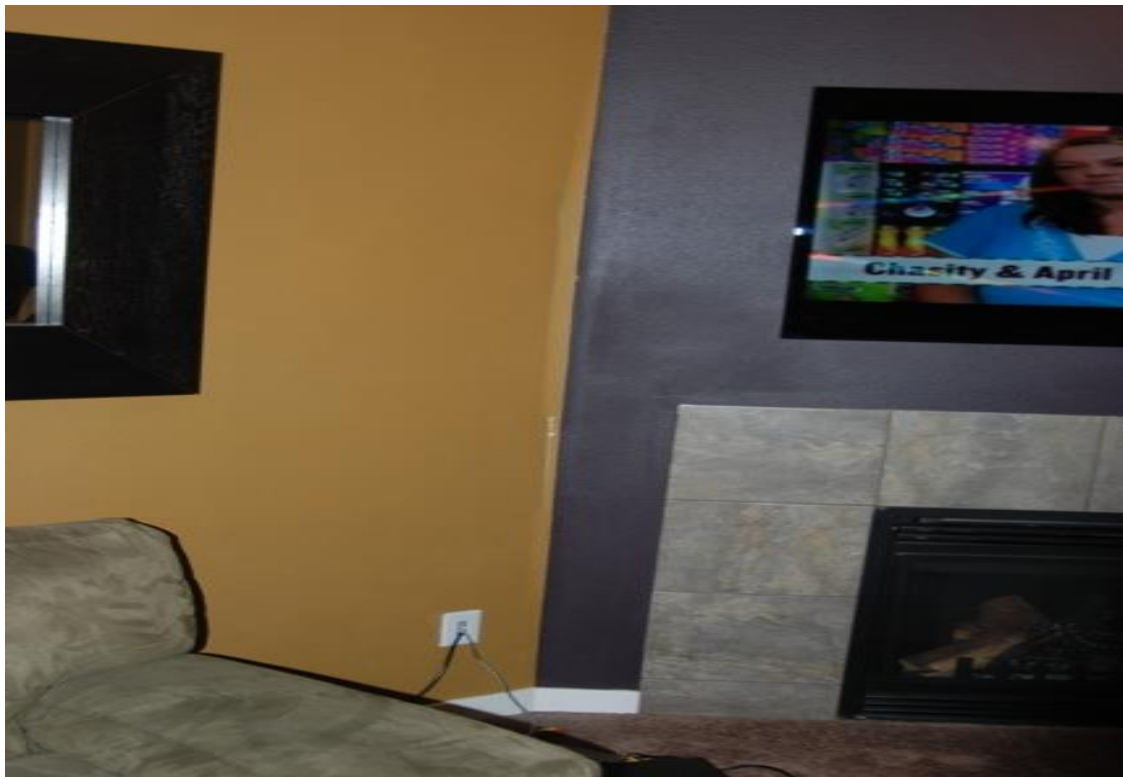
T-111 shear-walls incorrectly sized and left unsecured



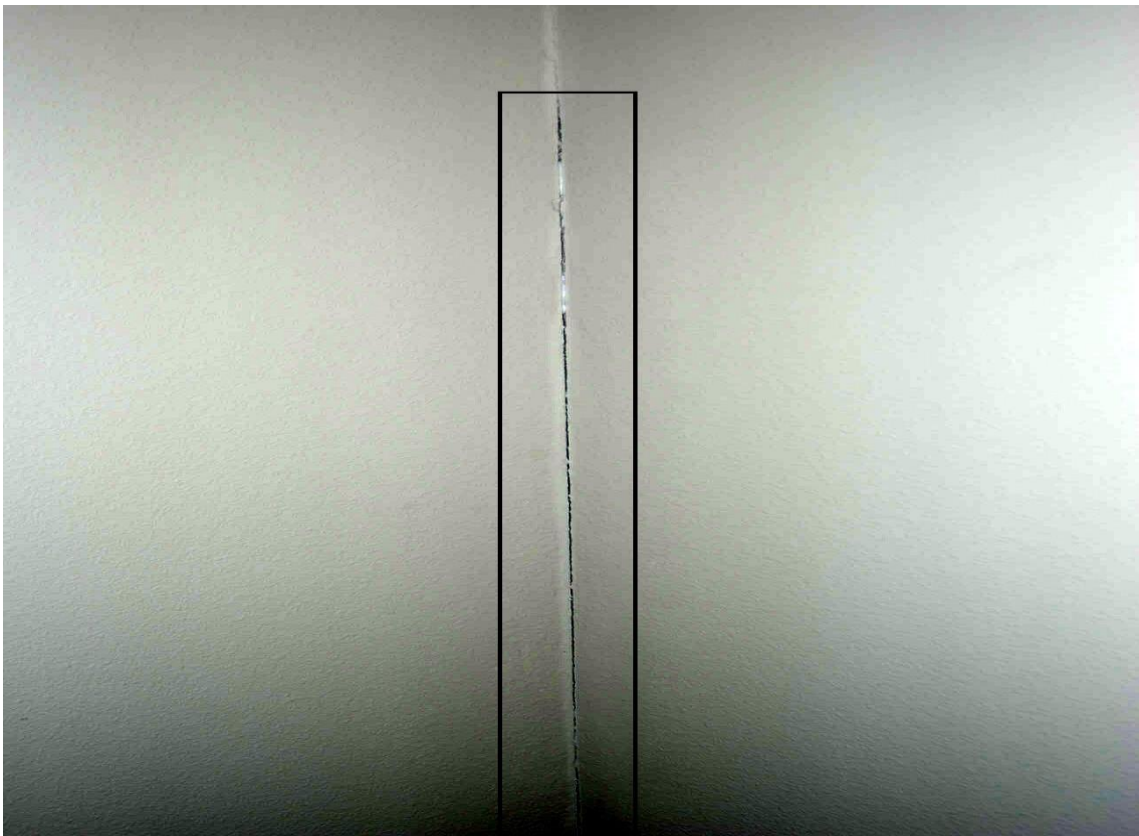
Structural / Shear-wall related damage



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Support columns untreated and water damaged



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Interior water penetrating homes



1 In the fall and winter 2013 the Owners retained construction experts who performed
2 analysis of Defendant Highmark's construction work. On February 24, 2014, after the experts
3 confirmed the endemic nature of the issues the Plaintiffs provided the Defendant with written
4 notice of construction defects, including an attached construction expert report.³ The Plaintiffs
5 invited Highmark Homes to perform its own analysis. Despite receipt of Plaintiffs' February
6 2014 notice of defects and report, Defendant Highmark has never responded to Plaintiffs'
7 invitation to access the property and has not performed any analysis.⁴

8
9 In May 2014, in the face of Defendant's failure to respond, the Plaintiffs filed their
10 action against Defendant Highmark. Defendant Highmark and its attorneys appeared and filed
11 an Answer in June 2014.

12 DEFENDANT'S REFUSAL TO RESPOND

13 In May 2013 the Plaintiffs, via formal discovery, requested Highmark provide specific
14 rudimentary information. Despite Plaintiffs' repeated requests, Defendant Highmark refuses
15 to provide complete answers to the following basic inquiries:

- 16 1. Identify the address of each home Defendant Highmark worked on and,
17 specifically, identify what work Highmark performed at each home identified.⁵

18 In Defendant's *fourth* opportunity to provide an answer again responds
19 equivocally, as follows; "Highmark *may have* self-performed interior cosmetic
20 work, including paint touch up and caulking backsplashes. Highmark personnel
may have self-performed repair work at specific homes. Discovery is ongoing."⁶

21 *Highmark's response appears to argue it needs to pursue discovery upon itself to
22 answer this inquiry. This doesn't make sense. Highmark is in the best position to*

23 ³ Please see Ex. 1, February 24, 2014 Notice of Construction Defect letter, Decl. Casey.

24 ⁴ Please see Decl. Casey.

25 ⁵ Please see Ex. 2, May 2014 discovery, Interrogatory 5, Decl. Casey.

⁶ Please see Ex. 3, Defendant's Fourth Supplemental Responses to First and Second Interrogatories and Requests for Production, Decl. Casey.

1 *identify what work it performed and where. Why or how discovery is required*
2 *before answering this very basic inquiry is unexplained by Defendant Highmark.*

- 3 2. Identity any owner living at the 13 prior multifamily communities Defendant
4 constructed who made similar exterior envelope or structural related complaints.⁷

5 In Defendant's fourth attempt at this question Highmark's response unilaterally
6 relegates the inquiry to prior "lawsuits" (vs. prior complaints). Highmark's answer
7 states "Other than Lambert Creek and Valley Haven lawsuits, none."⁸

8 *There is no authority permitting Highmark to rewrite the interrogatory. The*
9 *Plaintiffs request the Court require Highmark answer the question as presented.*

- 10 3. Identify (i) each of Highmark's subcontractors for the subject homes, (ii) the
11 address of the house or property each worked on and (iii) the specific work each
12 performed at each home or property by each subcontractor.⁹

13 Aside from providing a list of subcontractors, with no further information, the
14 Defendant responds as follows, "Discovery is ongoing. This answer will be
15 supplemented."¹⁰

16 *Plaintiffs presented this inquiry eight months ago and the Defendant is on notice of*
17 *the claims for almost a year, since February 2014. There is no reasonable basis*
18 *for Defendant's continued refusal to respond. It is reasonable to believe that as the*
19 *General Contractor, the Developer and the Seller of the homes Highmark is in a*
20 *superior position to identify (i) who it hired, (ii) which property each*
21 *subcontractor worked on and (iii) what specific work each subcontractor*
22 *performed at each property.*

23 On September 23, 2014 the Plaintiff identified for the Defendant each discovery
24 failure alleged herein via a four page letter.¹¹ On October 29, 2014 the parties engaged in an
25 hour long discovery conference. The Plaintiffs and Defendant separately discussed each of the

⁷ Please see Ex. 2, May 2014 discovery, Interrogatory 21, Decl. Casey.

⁸ Please see Ex. 3, Defendant's Fourth Supplemental Responses to First and Second Interrogatories and Requests for Production, Decl. Casey.

⁹ Please see Ex. 2, May 2014 discovery, Interrogatory 23, Decl. Casey.

¹⁰ Please see Ex. 3, Defendant's Fourth Supplemental Responses to First and Second Interrogatories and Requests for Production, Decl. Casey.

¹¹ Please see Ex. 4, Plaintiffs' September 23, 2014 discovery letter, Decl. Casey.

1 inquiries above, and the Defendant agreed to provide full and complete answers to each.¹²
2 Despite its assurance and Plaintiffs providing the Defendant two extensions to provide full
3 and complete answers the Defendant is unwilling to provide full and complete answers.

4 On June 4, 2014 Plaintiffs served Defendant Highmark with a second set of
5 interrogatories and requests. The discovery only contained seven questions. Despite the
6 brevity of the discovery, the Defendant again refuses to provide answers to basic inquiries:

- 7
- 8 1. (For a second time) Identify (i) each Highmark retained subcontractor, (ii) the
9 address of each property each subcontractor worked on and (iii) the specific work
performed at each property by each subcontractor.¹³

10 Defendant's fourth stab at this inquiry is the following, "Discovery is ongoing.
This answer will be supplemented."¹⁴

11 *This same question is found in Plaintiffs' May 2014 interrogatories. Highmark's*
12 *apparent argument that it needs more than 8 months to provide this basic*
13 *information is not persuasive. Further, it remains a mystery why Defendant alleges*
14 *it must perform discovery (on itself?) before identifying who it hired, which home*
each subcontractor worked on and, specifically, what work each performed at
each property.

- 15
- 16 2. Identify each home that has an associated "Warranty of Construction Completion"
(a document Defendant Highmark signed on behalf of each purchaser who has an
FHA insured loan).¹⁵

17 Defendant's fourth supplemental answer reads "Discovery is ongoing. This answer
18 will be supplemented."¹⁶

19 *Again, it appears Highmark argues it must perform discovery on itself before*
20 *answering. As Highmark is aware, for every home where the mortgage is FHA*
insured (more than 17 of the 29) Highmark was presented with a one page FHA
21 *document it must sign. The document is entitled "Warranty of Construction*

22 ¹² Please see Decl. Casey.

23 ¹³ Please see Ex. 5, June 2014 discovery, Interrogatory 1, 2 and 3, Decl. Casey.

24 ¹⁴ Please see Ex. 3, Defendant's Fourth Supplemental Responses to First and Second Interrogatories and Requests
for Production, Decl. Casey.

25 ¹⁵ Please see Ex. 5, June 2014 discovery, Interrogatory 7, Decl. Casey.

¹⁶ Please see Ex. 3, Defendant's Fourth Supplemental Responses, Decl. Casey.

1 *Completion” and provides written assurances in the body of the document that the*
2 *homes Highmark constructed are free from defective construction or materials. It’s*
3 *logical to presume it should not take more eight months for Highmark to review its*
4 *2012-2013 sales files.*

- 5 3. Provide copies of each Warranty of Construction Completion.¹⁷

6 Defendant’s fourth supplemental response; “Discovery is ongoing. This response
7 will be supplemented.”¹⁸

8 *All Highmark has to do is access its sales files from a year ago and pull out the*
9 *one page document associated with the sale of each of the 29 homes. Pull it out,*
10 *copy it and provide it. It’s not complicated. Presumably it’s not complicated or*
11 *time consuming. In any event, it shouldn’t take 8 or 6 months and it shouldn’t take*
12 *a Court Order to get Highmark to respond.*

- 13 4. Identify any post sale Highmark warranty or other repair or remediation work
14 performed at any of the 29 homes you constructed.¹⁹

15 Defendant’s response, “Discovery is ongoing. This answer will be supplemented.”

16 *Highmark’s argument it has to pursue discovery to identify what repair work it*
17 *performed or had performed defies logic. At some point we get to a place where*
18 *the response “Discovery is ongoing” stops being reasonable and starts looking*
19 *like a delay tactic. This is especially true where the Defendant obviously retains*
20 *the institutional knowledge necessary to address the question without pursuing any*
21 *discovery whatsoever.*

22 The parties participated in a discovery conference as to the inquiries above on October
23 29, 2014.²⁰ The Defendant had up to four opportunities, via its “Fourth Supplemental
24 Responses”, to provide honest straightforward answers. It’s clear it won’t do so absent Court
25 intervention.

EVIDENCE

¹⁷ Please see Ex. 5, June 2014 discovery, Request 5, Decl. Casey.

¹⁸ Please see Ex. 3, Defendant’s Fourth Supplemental Responses”, Decl. Casey.

¹⁹ Please see Ex. 5, June 2014 discovery, Interrogatory 7 (sic), Decl. Casey.

²⁰ Please see Decl. Casey.

1 Plaintiffs rely upon the pleadings and papers on file herein and the Declaration of
2 Plaintiff's attorney, attached hereto.

3 ISSUES

4 Whether the Homeowners are entitled to answers and responses to discovery issued in March
5 and June 2014.

6
7 Whether the Homeowners are entitled to reimbursement of fees incurred in pursuing this
8 issue.

9 ANALYSIS

10 **Standard of Review:**

11 A trial court's ruling on a discovery motion is reviewed under an abuse of discretion standard.

12 A trial court abuses its discretion if its ruling is manifestly unreasonable or based on untenable
13 grounds or reasons. *Lindblad v. Boeing Co.*, 108 Wash.App. 198, 207 (2001).

14 **Order Compelling Discovery and Awarding Fees:**

15 CR 37 (a) confirms Plaintiffs' right to apply to the Court for an order compelling discovery.

16 CR 37 (a)(4) confirms Plaintiffs' right to apply to the Court for an order awarding Plaintiffs
17 reasonable costs necessitated by Defendants' action.

18 CONCLUSION

19 For the reasons identified herein, Plaintiffs request an Order requiring Defendant
20 Highmark Homes provide full and complete answers to the inquiries identified above, and
21 reimburse Plaintiffs for the necessity of pursuing this motion in an amount the Court deems
22 reasonable. To assist the Court, Plaintiffs' counsel spent five hours on the discovery related
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1 issues, and charges \$375 per hour.²¹ A proposed Order is attached.

2 Respectfully submitted this 5th day of January, 2015.

3 CASEY & SKOGLUND PLLC
4

5 By: /s/ Chris Casey
6 Chris Casey, WSBA No. 27684
7 Attorney for Plaintiffs
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25 ²¹ Please see Decl Casey.