IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RICHARD STABBERT, a single man; and GLOBAL MARINE LOGISTICS, LLC, a Washington limited liability company;	)	No. 66619-3-I
	)	DIVISION ONE
Appellants,	)	UNPUBLISHED OPINION
v.	)	
GLOBAL EXPLORER, LLC, a Washington limited liability company; GLOBAL ENTERPRISES, LLC, a Washington limited liability company; FRANK and JANE DOE STEUART, and the marital community composed thereof, and DEEPWATER CORROSION SERVICES, a Texas corporation; STEUART INVESTMENT COMPANY, a Delaware Corporation,	)	
Respondents.	)	FILED: April 2, 2012

Appelwick, J. — Stabbert's claims for compensation under separate oral and written contracts were dismissed on summary judgment. Stabbert argues the trial court

improperly granted summary judgment, failed to adequately define the summary judgment record, improperly sealed declarations submitted by Stabbert's attorneys, and erred by concluding it did not have discretion to consider Stabbert's motion for discovery sanctions. We affirm summary judgment on the written agreement and on the question of the record for summary judgment. We reverse summary judgment on the oral contract and remand for further proceedings. We conclude the motion for sanctions was moot. Concerning the sealed declarations, we remand for the trial court to conduct an appropriate hearing.

FACTS

Richard Stabbert is the sole owner of Global Marine Logistics LLC (collectively, "Stabbert"). Global Explorer LLC, Global Enterprises LLC, Steuart Invest Company, and Frank Steuart are related respondents (collectively, "Global"). Steuart was previously the manager of Global Explorer and is currently the manager of Global Enterprises. Global Explorer owned a dive support vessel, called the Global Explorer, until September 2006 when ownership was transferred to Global Enterprises. Deepwater Corrosion Services Inc. manufactures and sells products used to fight corrosion on underwater pipelines.

This case involves two separate contracts. The first is an oral agreement between Stabbert and Global to market the Global Explorer to third parties. The second is a written agreement between Stabbert, Global, and Deepwater relating to promoting the use of Deepwater products.

I. Oral Agreement

In the Gulf of Mexico, oil companies award contracts to companies that perform construction, inspection, maintenance and repair services on oil platforms and pipelines. Those companies, in turn, charter specialized dive support vessels to facilitate their work. The Global Explorer is one such vessel.

In either 2002 or 2003, Global and Stabbert entered into an oral agreement. The essence of the agreement was that Global would pay Stabbert a five percent commission for any charters he procured for Global.

In November 2006, Global sought to reduce the agreement to writing. Steuart stated that the written agreement was proposed because the verbal agreement "had the potential to lead to and uncertainty regarding the parties' rights and duties." Stabbert refused to sign it. He claimed the agreement was being forced on him to avoid paying him commissions. He was also concerned that a nondisclosure provision in the contract would prevent him from future work in the region and compromise his defense if he was sued because of Global's actions. On February 1, 2007, Global terminated the oral contract with Stabbert.

In 2006, prior to his termination, Stabbert began discussing a charter with Grupo Diavaz S.A. de C.V. (Diavaz), a company that performs repair and maintenance work in the Gulf of Mexico. In August 2007, sixth months after Stabbert's termination, Diavaz and Global entered into a long-term charter.

II. Written Agreement

In April 2006, Stabbert, Global, and Deepwater entered a written agreement. Under the agreement, Stabbert and Global became the exclusive providers of

Deepwater technology in the Gulf of Mexico, and obtained the right to bid and perform contracts using Deepwater technology. In addition, they were entitled to a 10 percent commission for any sales of Deepwater products procured outside the bid process. Stabbert and Global were required to bid and perform contracts using Deepwater's products, obtain and provide financing for the acquisition and installation of Deepwater's products in each bid, and provide the services of vessels to deploy Deepwater's products. The contract also provided that Stabbert and Global would obtain "protected status" for Deepwater technology, and bear the cost of all related expenses, including licensing, registering, maintaining and enforcing those licenses and registrations.

In October 2006, James Britton, a Deepwater representative, sent Global a notice of default indicating that Deepwater may terminate the agreement:

> Dear Frank [Steuart]:
>
> We have informally agreed that our business arrangement must be recast since the Mexican staff of [Stabbert] and Global have been unable to communicate and coordinate effectively with the Deepwater representatives under the April 3, 2006 Services Agreement among [Stabbert], Global and Deepwater. Coordination, without which we cannot succeed, is the obligation of [Stabbert] and Global under Section 4(d).
>
> In the hope of moving things forward, this is Deepwater's notice of default given under Section 6 of the Agreement. Please contact me promptly to discuss the necessary adjustments in our business arrangement. If we can make some progress, it will not be necessary for Deepwater to exercise its right to terminate the Agreement after having given its ten day default notice.

But, after receiving assurances from Global, Deepwater decided not to terminate the agreement. Stabbert claims that, at that time, he was already very close to

obtaining protected status for Deepwater's technology. Nevertheless, on January 23, 2007, Steuart sent an e-mail to Britton with a copy to Stabbert:

> Jim,
>
> I have come to the same conclusion that you have that things aren't progressing with respect to the cathodic protection program. I know you had an interest in terminating the agreement. I actually think that if we did so . . . and knowing the product now . . . that we can then bring a proposal to you . . . discuss a deal . . . should one come up.

(Alterations in original.)

Britton responded that he would call Steuart the next week. Following the e-mail exchange, Stabbert did not communicate with anyone at Deepwater for over two years. During those two years, neither Stabbert nor Global bid or performed any contracts using Deepwater's products. Then, in March 2009, Stabbert wrote to Britton that he was ready to begin selling Deepwater's products. Deepwater was unwilling to continue the relationship. On June 4, 2009, Deepwater exercised its right to terminate the contract due to a lack of sales.

III. Procedural History

Stabbert was originally represented by three attorneys: Scott Stafne, Dennis Moran, and Robert Windes. The attorneys represented another company, Representaciones y Distribuciones EVYA, S.A. de C.V. (EVYA), in related litigation. On September 1, Moran and Windes filed a notice of withdrawal, alleging a conflict of interest, and Stabbert filed a motion to continue the trial.

Two days later, on September 3, Global and Deepwater filed motions for summary judgment.

On September 13, Stabbert filed an objection to the notice of withdrawal. He requested an in camera review on the record to determine whether there was a conflict that necessitated the withdrawal. On September 17, the trial court denied the motion to withdraw and the motion for a continuance. It requested a declaration from Windes explaining the conflict, and indicated that the declaration could be sealed.

On September 20, Stabbert filed a consolidated opposition to the motions for summary judgment, and on September 27 Global and Deepwater filed replies.

On September 30, the trial court sealed a declaration from Windes and a declaration from Moran. That same day, Stabbert and Stafne filed declarations indicating that Stabbert had terminated Moran and Windes. Windes submitted a second declaration sealed by the court on October 1.

On October 1, the trial court held a hearing on the motions for summary judgment. That day, Stafne filed an additional declaration. On October 3, Stabbert signed, and claims he submitted, another declaration.

On October 4, Stabbert filed a motion for sanctions against Deepwater, set for October 12.

On October 11, the trial court granted summary judgment.

On October 20, Stabbert filed a motion for reconsideration.

On January 4, 2011, the trial court denied the motion for sanctions and the motion for reconsideration.

Stabbert appeals.

DISCUSSION

Stabbert claims on appeal that summary judgment was improper, because genuine issues of fact remain. He argues there are remaining issues regarding whether Global owes him commissions for the August 2007 Diavaz charter and whether Global and Deepwater repudiated the written agreement.

Stabbert also asserts a variety of other errors. He argues that the trial court failed to consider the October 1 Stafne and October 3 Stabbert declarations, improperly sealed his former attorneys' declarations, and abused its discretion by denying Stabbert's motion for sanctions.

I. Summary Judgment

We review a summary judgment order de novo. Hadley v. Maxwell, 144 Wn.2d 306, 310-11, 27 P.3d 600 (2001). Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends, in whole or in part. VersusLaw, Inc. v. Stoel Rives, LLP, 127 Wn. App. 309, 319, 111 P.3d 866 (2005). The moving party bears the burden of demonstrating there is no genuine issue of material fact, and we view all facts and reasonable inferences in the light most favorable to the nonmoving party. Id. at 319-20. Once the moving party makes an initial showing of the absence of any genuine issue of material fact, the nonmoving party must respond with more than conclusory allegations, speculative statements, or argumentative assertions of the existence of unresolved factual issues. Ruffer v. St. Frances Cabrini Hosp. of Seattle, 56 Wn. App. 625, 628, 784 P.2d 1288 (1990).

A. Oral Agreement

In general, a broker is not entitled to a commission unless he is the procuring cause of the transaction that is ultimately consummated. Guenther v. Equitable Life Assurance Soc'y of the U.S., 23 Wn.2d, 65, 72, 159 P.2d 389 (1945). A broker is the procuring cause of a transaction when he locates a purchaser who is willing and able to purchase according to the terms of the seller. See Clarkson v. Wirth, 4 Wn. App. 401, 405, 481 P.2d 920 (1971). In other words, it is not enough to locate the purchaser; the broker's efforts must have actually led to the transaction on which the broker claims commissions. Roger Crane & Assocs., Inc. v. Felice, 74 Wn. App. 769, 776-77, 875 P.2d 705 (1994). The deal must be consummated within a reasonable time for the broker to be entitled to a commission. Thayer v. Damiano, 9 Wn. App. 207, 210-11, 511 P.2d 84 (1973).

But, there is nothing that prevents parties from agreeing to a rule other than the procuring cause rule. See, e.g., Prof'ls 100 v. Prestige Realty, Inc., 80 Wn. App. 833, 838, 911 P.2d 1358 (1996) ("Although a contract could provide for payment of commissions to a broker for being something less than the procuring cause of a sale, the language in this contract does not so provide.").

Indeed, Stabbert argues that the parties agreed that all Stabbert had to do was bring a potential client to the table. Determining the terms of an oral agreement is an issue of fact. See, e.g., Duckworth v. Langland, 95 Wn. App. 1, 6-7, 988 P.2d 967 (1998). Thus, if there is a genuine issue as to a material term of the oral agreement, then summary judgment was inappropriate.

Steuart offered the following characterization of the oral agreement:

> In approximately 2003, Global Explorer, LLC and plaintiff Richard Stabbert ("Stabbert") entered into an oral agreement for Stabbert to market the GLOBAL EXPLORER in Mexico (the "Oral Contract"). The terms of the Oral Contract were that Stabbert would be paid a five percent commission on any charters of the GLOBAL EXPLORER which came about as a direct result of Stabbert's efforts to secure a charter. Stabbert worked in this capacity individually and through a company he owns, Global Marine Logistics, LLC ("GML"). Sometimes Stabbert would share his five percent commission with another marketing agent, and at other times he would keep the entire commission for himself and GML. Plaintiffs would only be paid if their efforts resulted in a charter, meaning that if no charter was signed, no commission was paid to Plaintiffs regardless of how much work they put into marketing the GLOBAL EXPLORER. The Oral Contract was terminable at will by either party. Plaintiffs were free to provide marketing services to other vessels while the Oral Contract was in force. The Oral Contract did not include any agreement to indemnify or defend Plaintiffs in any way for any reason.

In contrast, Stabbert stated:

> In late 2002, I entered into an oral contract with Global Explorer LLC to market the vessel, exclusively, in the United States and Mexico for a commission of 5% on all charter revenues. The vessel was marketed initially to U.S. companies, even prior to completion of her certificates. . . . My oral agreement with Global Explorer LLC was to find customers that could utilize the vessel and to educate the customer with regards to the operational capabilities of the Vessel. I would then provide Frank Steuart with the customer name and the general outline of customer requirements. If a charter was eventually entered into with the customer, I would receive a 5% commission on the charter and all extensions for use of the vessel, regardless of what project it performed for the customer. My obligation was to find the customer and to create a successful dialogue between the customer and the vessel owners. I would then make the customer available to Frank Steuart to arrange the terms and conditions of the actual charter and to complete the preparation of a master time charter.

Stabbert stated that he started negotiations with Castro in 2003. In 2006 and 2007, Julio Castro was the executive vice president for Diavaz. Ultimately, his communications led to a November 2006 draft charter agreement for Castro. In

depositions, Steuart did not dispute that Stabbert was in contact with Diavaz in 2006.

Then, in July 2007, Castro wrote an e-mail to Stabbert: "This is to confirm our interest in the [Global] Explorer for a six month contract wi[t]h 2 one month extensions. Please confirm availability and day rate." Castro apparently did not know that Stabbert had been fired.

Nevertheless, in a declaration, Steuart stated that, "[a]ll of Castro's negotiations to charter the GLOBAL EXPLORER were with me exclusively. Stabbert was not involved in negotiating the Diavaz/GE [charter] in any way." In a supporting declaration, Castro stated:

> I first became aware of the GLOBAL EXPLORER at some point prior to late 2006. I recall that my first contact from the GLOBAL EXPLORER was Frank Steuart, and he has been my primary contact with the GLOBAL EXPLORER since then. I have known Richard Stabbert for many years. I do not recall ever negotiating any terms or charters with Richard Stabbert involving the GLOBAL EXPLORER. My negotiations involving any prospective charters of the GLOBAL EXPLORER have always involved Frank Steuart, and never involved Richard Stabbert.

He further stated:

> Shortly before the Diavaz/GE [charter] was signed in early August 2007, I was contacted by Frank Steuart, who informed me the GLOBAL EXPLORER was available for Charter. Following that contact, Frank Steuart and I negotiated the Diavaz/GE [charter] fairly quickly. Diavaz had not considered the GLOBAL EXPLORER for the 2004 Diavaz/PEMEX Contract prior to the summer of 2007, and Richard Stabbert and I never had any negotiations regarding the chartering of the GLOBAL EXPLORER for any work on the 2004 Diavaz/PEMEX contract.

Global claims that the August 2007 charter agreement was for a different project than the one Stabbert was negotiating with Diavaz in 2006. Castro explains that in 2006, Diavaz was bidding on two contracts with PEMEX, a Mexican state-owned oil

company. Those contracts required the use of a moon pool, which is an access way that allows dive operations to occur through the bottom of the vessel, rather than from the deck. Indeed, Stabbert stated he was working on a contract that required a moon pool. And, the draft charter from 2006 mentioned the installation of a moon pool, which the Global Explorer did not have.

But, Castro explained, the August 2007 charter stemmed from a 2004 PEMEX contract that did not require a moon pool. That assertion is consistent with the fact that the August 2007 charter does not contain a moon pool requirement.

The charter agreements themselves do not mention any specific projects or contracts. Thus, the only evidence tying the charters to specific PEMEX contracts is Castro's declaration. But, some of Castro's other statements are contradictory. Castro claimed he never spoke with Stabbert about the Global Explorer, however there is at least one e-mail from Castro to Stabbert inquiring about the vessel's availability. This raises an issue of credibility.

It is not enough to "'merely recite the incantation, "Credibility," and have a trial on the hope that a jury may disbelieve factually uncontested proof.'" Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 627, 818 P.2d 1056 (1991) (quoting Amend v. Bell, 89 Wn.2d 124, 129, 570 P.2d 138 (1977)). But, Stabbert does not merely recite "credibility." Rather, Stabbert alleged in his declarations a different version of the oral contract that would entitle him to a commission. He claims that he created a successful dialogue between Diavaz and Global, and that that is all he had to do to be entitled to a commission. He also asserts that he had the exclusive right to

market the Global Explorer. Diavaz and Global's initial contact undisputedly occurred while Stabbert was still employed by Global. The evidence in the record does not establish conclusively that Stabbert could not have been a procuring cause of the specific charter. In a light most favorable to Stabbert, there are material issues of fact regarding whether Stabbert was the procuring cause of the charter. On the issue of the oral agreement, summary judgment was improper.

B. Written Agreement

A party repudiates a contract when there is "a positive statement or action by the promisor indicating distinctly and unequivocally that he either will not or cannot substantially perform any of his contractual obligations." Lovric v. Dunatov, 18 Wn. App. 274, 282, 567 P.2d 678 (1977). An intent not to perform may not be implied from doubtful and indefinite statements that performance may or may not take place. Wallace Real Estate Inv., Inc. v. Groves, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994).

Stabbert argues that there was a genuine issue of material fact regarding whether Global and Deepwater repudiated the written agreement. He claims that, in addition to lost commissions, he lost the right to use, distribute, market, and install Deepwater's technology.

Stabbert offers various explanations for the alleged repudiation, but very limited evidence. For instance, he places significant emphasis on Global's and Deepwater's economic motives to repudiate. But, economic motive would only explain why Global and Deepwater repudiated the contract. It is not evidence that Global and Deepwater actually repudiated the contract. Moreover, Stabbert has not provided any evidence

that suggests Global or Deepwater actually profited from the alleged repudiation.

Stabbert also argues that, in addition to seeking commissions, he alleged in his complaint that he lost licensing rights, and that Deepwater failed to honor Stabbert's exclusive right to market and install the technology. But, he does not assert that he attempted to bid or perform any contracts, let alone that he did so and Deepwater refused to provide the technology. What Stabbert did or did not allege in his complaint is immaterial if he has no evidence that he actually lost his rights under the contract.

Finally, Stabbert mentions in passing that the repudiation was an attempt to avoid paying commissions under the oral agreement. It is true that Global terminated the oral agreement a week after the e-mail from Steuart to Deepwater. But, nothing in the written agreement mentions the oral agreement or the relationship between Global and Stabbert. Stabbert has not articulated any duty that Global owed him under the written agreement. The agreement entitled Stabbert and/or Global to bid and perform contracts using Deepwater technology. It did not say that Stabbert could only use Global's vessel, or that Global was required to let Stabbert use its vessel. Global's decision not to exercise its rights to bid and perform any contracts using Deepwater technology did not affect Stabbert's legal rights to do so.

Thus, the only evidence of repudiation is limited to the notice of default from Deepwater and the e-mail from Steuart to Deepwater. But, after the notice of default, Deepwater determined it would not terminate the agreement at that time. Stabbert is unable to rebut that assertion.

The e-mail from Steuart to Deepwater is no more helpful for Stabbert. It did not

definitively say that any of the parties would not perform their obligations. Rather, it indicated that "things aren't progressing," that Steuart knew Deepwater had "an interest in terminating the agreement," and that, if they did terminate the agreement, then Steuart and Deepwater should talk about a deal in the future. The e-mail may indicate that Steuart had a desire not to enforce the contract, but indicates nothing about Deepwater's intention. Britton indicated in response that he would call Steuart, not that he agreed termination was desirable. This is not an unequivocal mutual expression of an unwillingness to perform contractual obligations by Steuart and Deepwater.

In March 2009 Stabbert e-mailed Deepwater to express that he was ready to sell Deepwater technology. That e-mail indicates that he did not consider the contract to have been repudiated. Further, he has not presented any evidence that, prior to March 2009, he contested the alleged repudiation or informed Global and Deepwater that he believed they had repudiated the contract.

The e-mail from Steuart could not speak for Deepwater, and Deepwater never responded to the substance of Steuart's message. Britton and Stabbert stated that they never communicated after the e-mail. And, Stabbert has not alleged that Britton or anyone else at Deepwater ever told him the agreement was terminated. Deepwater's mere silence was not a positive statement or action indicating its unwillingness to perform its contractual obligations.

On the issue of the written services agreement, summary judgment was proper. There is no genuine issue of material fact regarding whether Global and Deepwater repudiated the written agreement.

II. Consideration of Declarations

Stabbert alleged in his motion for reconsideration that the trial court failed to precisely specify the documents it considered. He claimed that the trial court's failure to do so was an irregularity that prejudiced him because the record for review was not adequately specified. In particular, he claimed that the summary judgment orders did not specify whether or not the court considered the October 1 Stafne declaration or the October 3 Stabbert declaration.

In its order denying Stabbert's motion for reconsideration, the trial court clarified that it did not consider "any material not listed in the Orders Granting Summary Judgment." The orders granting summary judgment specifically enumerated the documents the trial court considered. The enumerated documents did not include the October 1 Stafne declaration or the October 3 Stabbert declaration. Still, Stabbert argues that the trial court's ruling is ambiguous because the court indicated that it considered "the records and files herein." Stabbert's reading is untenable. The trial court specified precisely what it considered. The more specific statement is not trumped by the general statement that it considered the record. Consequently, Stabbert's argument that he was prejudiced because the summary judgment record was not defined is without merit.

Alternatively, Stabbert argues that the trial court erred if it did not consider the October 1 Stafne declaration or the October 3 Stabbert declaration. Global argues it was within the trial court's discretion to not consider untimely declarations that were filed after the summary judgment hearing. But, Stabbert correctly points out that there

is nothing in the record indicating that Global or Deepwater objected to the timeliness of the declarations. We do not reach the issue of the timeliness of the filings.

Regardless of the trial court's reasoning, Stabbert's argument on appeal is limited to a conclusory statement that the declarations should have been considered. He states that the October 1 Stafne declaration, which contained additional Steuart deposition testimony, indicated that "Steuart's testimony in all the depositions and declarations has been inconsistent." He offers no citation to specific portions of the declarations. He does not explain why the declarations would have precluded summary judgment. He does not articulate the standard of review or the specific rule that the trial court should have granted reconsideration under. His legal argument is limited to a statement that a "party may submit additional evidence after a decision on summary judgment has been rendered, but before a formal order has been entered." Meridian Minerals Co. v. King County, 61 Wn. App. 195, 202-03, 810 P.2d 31 (1991). That argument alone, without any mention of what the additional declarations would have shown, is insufficient to show the trial court abused its discretion by not considering the declarations or granting reconsideration.

We note that there is some confusion surrounding the October 3 Stabbert declaration. In its order denying Stabbert's motion for reconsideration, the trial court indicated that it did not, for purposes of summary judgment, consider "the Declaration of Mr. Stafne dated 10/3/10." It further explained that the declaration and attached exhibits contained substantial amounts of inadmissible hearsay and that the admissible portions did not establish any genuine issues of material fact. Stabbert claims that

does not make sense because there is no October 3 Stafne declaration, only an October 3 Stabbert declaration. Global responds that the trial court must have been referring to a Stafne declaration filed on October 4 in support of Stabbert's motion for sanctions. That declaration indicates on the first page that it was signed by Stafne on October 3.

Global further points out that it is unclear whether the October 3 Stabbert declaration was even filed before the October 11 orders granting summary judgment. Indeed, the first time it appears in the appellate record is as an attachment to a declaration filed in support of Stabbert's motion for reconsideration on October 20.

Nevertheless, we have reviewed the October 1 Stafne declaration, the October 3 Stabbert declaration, and the October 4 Stafne declaration. Even if not untimely filed, none of those declarations, together with their attachments, raise any additional issues that would have precluded summary judgment or justified reconsideration. Accordingly, any error was harmless.

III. Sealed Declarations

Stabbert's motion for reconsideration also alleged that sealing his attorneys' declarations was an irregularity that prejudiced him and justified reconsideration. On appeal, he argues that his sealed declarations were sealed to protect his attorney-client privilege, that he is willing to waive that privilege, and that he should be able to see the documents. He also filed a motion to modify the commissioners July 25, 2011 ruling denying his motion to unseal the declarations.[1]

[1] Together with his motion to modify, Stabbert requests that we compel Global to comply with RAP 10.3 and provide additional citations to the record. Stabbert's request is denied.

GR 15 provides the circumstances under which court files may be sealed. The trial court must hold a hearing and enter findings that the sealing is justified by an identified compelling privacy or safety concern. GR 15(c)(2). Further, the right to a public trial is guaranteed by article I, section 10 of the Washington State Constitution. That right may be limited only to protect significant interests, and any limitation must be carefully considered and specifically justified. Indigo Real Estate Servs. v. Rousey, 151 Wn. App. 941, 948, 215 P.3d 977 (2009). When determining whether to seal a file, the trial court should (1) consider whether the proponent of sealing made a showing of the need for closure; (2) give anyone present the opportunity to object; (3) analyze whether the method from curtailing access is both effective and the least restrictive method; (4) weigh the competing interest of the parties and the public and consider alternative methods; and (5) make a decision that is no broader in application or duration than is necessary to serve its purpose. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982).

Here, the trial court clearly indicated that it did not consider the attorneys' declarations for purposes of summary judgment. We presume that judges are capable of finding adjudicative facts fairly while ignoring incidental influences. Harris v. Hornbaker, 98 Wn.2d 650, 666, 658 P.2d 1219 (1983). The trial court considered the declarations only for purposes of evaluating the attorneys' withdrawal, and Stabbert fired the attorneys before the trial court could even make that determination. Sealing the declarations did not prejudice Stabbert, because they were not considered for purposes of summary judgment. It follows that it was not an abuse of discretion to deny

the motion for reconsideration, because sealing the declarations was not an irregularity that prejudiced Stabbert.

Nevertheless, the trial court did not follow the required procedures for sealing the declarations. Specifically, it did not hold a hearing and enter findings that satisfy either GR 15 or the Ishikawa factors. We remand for the trial court to either hold a hearing and enter appropriate findings, or unseal the declarations. See Indigo, 151 Wn. App. at 951.

IV. Motion for Sanctions

The trial court held a hearing on the summary judgment motions on October 1. Three days later, on October 4, Stabbert filed a motion for discovery sanctions against Deepwater. The motion requested that the trial court order sanctions for failing to respond to interrogatories, compel Deepwater to produce certain documents, and order Deepwater to sign discovery verification pages pursuant to the civil rules. The motion was set to be heard on October 12. On October 11, the trial court granted the motions for summary judgment.

On January 4, the day it denied the motion for reconsideration, the trial court denied the motion for sanctions. It concluded that Stabbert did not comply with CR 26(i), which "precludes this Court from 'entertaining any motion or objection with respect to [r]ules 26 through 37 unless counsel have conferred with respect to the motion or objection.'"

Stabbert correctly points out that CR 26(i) "'should be read as *permitting* a trial court to not consider a motion to compel discovery unless counsel have conferred and

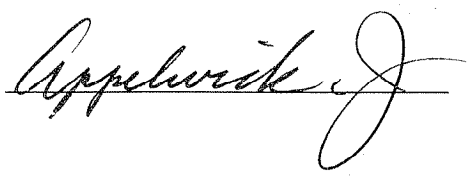
the movant has certified that fact. CR 26(i) should *not* be read as *prohibiting* a trial court from exercising its discretion to waive a conference and certification if, under the particular circumstances, that will fairly and sensibly streamline the progress of the case.'" Amy v. Kmart of Wash. LLC, 153 Wn. App. 846, 853, 223 P.3d 1247 (2009) (quoting Case v. Dundom, 115 Wn. App. 199, 205, 58 P.3d 919 2002) (Morgan, J., Dissenting)).

But, Stabbert did not file his motion for sanctions until after the hearing on summary judgment had been held. He did not request that the trial court shorten the time for the motion for sanctions, nor did he request that the trial court continue the motion for summary judgment until after it had heard the motion for sanctions. Consequently, the trial court granted Deepwater's motion for summary judgment on October 11, a day before the motion for sanctions was set to be heard. At that point, the motion for sanctions was moot.

V. Attorney Fees

Deepwater requests attorney fees pursuant to the services agreement and RAP 18.1. The services agreement provides that "the substantially prevailing party" in any action arising under the agreement shall be entitled to reasonable attorney fees at trial and appeal. As the prevailing party, we award Deepwater reasonable attorney fees for this appeal.

We affirm in part, reverse in part, and remand for further proceedings.



WE CONCUR: