61817-2

61817-2

No. 61817-2-I

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2009 JUN -5 PM 2:55

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

MICHAEL J. CIOCCO and KAREN T. CIOCCO,
husband and wife, and the marital
community composed thereof,

Appellants,

v.

FUMIO DOUGLAS IKEGAMI and PATRICIA IKEGAMI,
husband and wife, and the marital
community composed thereof, and
ADZAM, INC., a Washington Corporation
d/b/a Doug's Lynwood Mazda

Respondents.

RESPONSE BRIEF OF RESPONDENTS FUMIO DOUGLAS IKEGAMI, PATRICIA IKEGAMI, AND ADZAM, INC.

K&L GATES

David J. Lenci, WSBA #7688
Michael K. Ryan, WSBA #32091
Christopher M. Wyant, WSBA #35561
Attorneys for Respondents

K&L GATES
925 Fourth Avenue
Suite 2900
Seattle, WA 98104-1158
(206) 623-7580 (phone)
(206) 623-7022 (facsimile)

Table of Contents

Page

I. INTRODUCTION.....1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....4

III. COUNTER-STATEMENT OF THE CASE.....5

A. Facts Relevant to Frivolous Finding.....6

1. Ciocco's Claims Against the Ikegamis.....5

2. Discovery into Ciocco's Claims.....7

3. The Dismissal of Ciocco's Claims.....8

4. The Ikegamis' Motion for Determination that Ciocco's Claims were Frivolous.....9

5. The "Buy Fee" Issue on Appeal.....11

6. No Accepted Definition of "Buy Fee" at Trial.....12

7. No Agreement as to the "Buy Fee" Arrangement.....14

8. Ciocco's Portion of the Buy Fees were Used to Pay an Expense of the Hyundai Store and Ciocco Accepted that Use of the Funds.....17

9. Ciocco's Alleged Damages for Unpaid Buy Fees were Based on Speculation.....20

10. Ciocco's Lack of Credibility at Trial.....22

B. Facts Relevant to Imposition of Terms Against Shepherd.....23

IV. ARGUMENT.....26

A. Standard of Review.....26

1. Standard of Review Under RCW 4.84.185.....26

2. Standards of Review Regarding Terms.....27

B. The Trial Court Did Not Abuse Its Discretion in Finding that Ciocco's "Alternative" Claim for Breach of Employment Contract was Frivolous.....28

1. The Court Should Not Consider Assignments of Error as to Ciocco's Partnership, Fiduciary Duty, Fraud, Unjust Enrichment Claims, or to the Majority of his Employment Claims.....30

2. The Argument Ciocco Raises on Appeal—that He was Not Paid a Portion of the Buy Fees—is Not Based on the Claim Asserted in the Complaint or at Trial.....32

3. The Trial Court's Finding that the Buy Fee Claim was Frivolous was Based Upon the Entire Record.....33

4. The Trial Court's Finding that there was No Agreement as to Buy Fees until 2001 is Supported by Substantial Evidence.....34

5. The Trial Court's Finding that Ciocco Received All Buy Fee Compensation to which He was Entitled is Supported by Substantial Evidence.....37

6. The Trial Court's Finding and Conclusion Regarding Damages is Supported by Substantial Evidence because Ciocco's Testimony was Entirely Speculative.....38

7. Ciocco's Claim for Buy Fees was Barred by the Statute of Limitations.....40

8. There is Substantial Evidence in the Record that Ciocco's Testimony Regarding Buy Fees—which is the Only Evidence Supporting his Claim—was Not Credible.....43

9. The Trial Court Did Not Abuse its Discretion in Finding Ciocco's Buy-Fee Claim Frivolous.....43

C. The Trial Court Did Not Abuse Its Discretion in Awarding Terms Against Shepherd.....44

D. The Ikegamis Are Entitled to Fees on Appeal.....49

V. CONCLUSION.....50

Table of Authorities

Page

Washington State Cases

Biggs v. Vail,
119 Wn.2d 129, 830 P.2d 350 (1992).....29

Colo. Structures Inc. v. Ins. Co. of the W.,
161 Wn.2d 577, 167 P.3d 1125 (2007) 46

Cowiche Canyon Conservancy v. Bosley,
118 Wn.2d 801, 828 P.2d 549 (1992).....31

Daubner v. Mills,
61 Wn. App. 678, 811 P.2d 981 (1991).....40

Escude v. King County Pub. Hosp. Dist.,
117 Wn. App. 183, 69 P.3d 895 (2004) 39

Fluke Capital & Mgmt. Servs. Co. v. Richmond,
106 Wn.2d 614, 724 P.2d 356 (1986).....26

Gensman v. West Coast Power Co.,
3 Wn.2d 404, 101 P.2d 316 (1940) 42

Geonerco, Inc. v. Grand Ridge Props. IV LLC,
146 Wn. App. 459, 191 P.3d 76 (2008) 36

Habitat Watch v. Skagit County,
155 Wn.2d 397, 120 P.2d 56 (2005).....31

Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.,
143 Wn. App. 345, 177 P.3d 755 (2008) 28

Heasley v. Riblet Tramway Co.,
68 Wn.2d 927, 416 P.2d 331 (1966) 42

Hudson v. Condon,
101 Wn. App. 866, 6 P.3d 615 (2000) 43

In re Firestorm 1991,
129 Wn.2d 130, 916 P.2d 411 (1991).....46

In re Recall of Pearsall-Stipek,
136 Wn.2d 255, 961 P.2d 343 (1998).....27

Kearney v. Kearney,
95 Wn. App. 405, 974 P.2d 872 (1999) 29

Koch v. Mutual of Enumclaw Ins. Co.,
108 Wn. App. 500, 31 P.3d 698 (2001) 40

Leer v. Whatcom County Boundary Review Bd.,
91 Wn. App. 117, 957 P.2d 251 (1998) 27

Macchia v. Salvino,
64 Wn.2d 951, 395 P.2d 177 (1964) 41, 42

Malted Mousse, Inc. v. Steinmetz,
150 Wn.2d 518, 79 P.3d 1154 (2004).....49

Mayer v. Sto Indus., Inc.,
156 Wn.2d 677, 132 P.3d 115 (2006).....27

Miller v. Badgley,
51 Wn. App. 285, 753 P.2d 530 (1988) 34

Northwest Land & Inv., Inc. v. New West Federal Sav. and Loan Ass'n,
57 Wn. App. 32, 786 P.2d 324 (1990) 39

Oliver v. Fowler,
161 Wn.2d 655, 168 P.3d 348 (2007).....26

*Richards v. Pacific Nat'l Bank of Washingt*on,
10 Wn. App. 542, 519 P.2d 272 (1974) 42

Skimming v. Boxer,
119 Wn. App. 748, 82 P.2d 707 (2004) 34

State v. Olson,
126 Wn.2d 315, 893 P.2d 629 (1995).....31

State v. S.H.,
102 Wn. App. 468, 8 P.3d 1058 (2000) 46, 48

State v. Thomas,
150 Wn.2d 821, 83 P.3d 970 (2004) 31

Washington v. Boeing Co.,
105 Wn. App. 1, 19 P.3d 1041 (2000) 41

Wilson v. Henkle,
45 Wn. App. 162, 724 P.2d 1069 (1986) 47

Zink v. City of Mesa,
137 Wn. App. 271, 152 P.3d 1044 (2007) 33

Washington State Statutes

RCW 4.16.080(2).....41

RCW 4.16.080(3) 41

RCW 4.84.185.....*passim*

Court Rules

CR 56(c).....44

GR 17(5).....44

RAP 18.1(a).....49

RAP 18.9(a) 49

SCLCR 7(b)(5)(F) 48

Other Sources

Restatement (Second) of Contracts § 352 (1981) 39

I. INTRODUCTION

After receiving almost $4 million compensation over the course of his eight-year employment at two car dealerships, Michael Ciocco abruptly quit his employment in May 2004. Shortly thereafter, Ciocco sent his employers, Fumio "Doug" Ikegami, Patricia Ikegami and their business, Adzam, Inc. (collectively, the "Ikegamis") a letter demanding an additional $2.5 million dollars as his claimed interest in the dealerships. His demand letter said nothing about "buy fees."

In August 2004, Ciocco filed the Complaint in this case asserting five claims, including (1) breach of an alleged oral partnership agreement, (2) breach of fiduciary duties, (3) fraud, (4) unjust enrichment, and (5) an "alternative" claim for breach of employment contract. Other than the alternative employment contract claim, all of Ciocco's claims arose out of his allegation that he had an oral partnership agreement with the Ikegamis as to the two dealerships.

The employment contract claim was based on Ciocco's alternative theory that, if he was not a partner, he was owed additional employment compensation. One aspect of Ciocco's alternative employment claim—which is the sole issue raised in this appeal—was that Ciocco was owed, but not paid, all of the "buy fees" that were attributed to automobiles purchased for re-sale at the dealerships. Although the testimony at trial

conflicted as to what the parties understood a "buy fee" was, and how it was accounted for, Ciocco's claim as to the fees could not have been more clear:

> Q. And you're claiming what? All of the buy fees during the entire time you were there?
>
> A. Yes.

(3/12/08 VRP 65).

After a five-day bench trial before Judge Richard Thorpe, the court dismissed all of Ciocco's claims at the close of his case-in-chief. Thereafter, the trial court ruled that Ciocco's claims were frivolous pursuant to RCW 4.84.185. After considering the entire record, the trial court granted the Ikegamis' motion. Pursuant to his frivolousness determination and RCW 4.84.185, and after a hearing on reasonableness, Judge Thorpe awarded the Ikegamis $634,267.23 in attorneys' fees and costs associated with defending against Ciocco's claims.

Recognizing that the claims were entirely baseless, Ciocco does not appeal the trial court's finding that his four claims related to an alleged "oral partnership" were frivolous. Nor does Ciocco appeal the finding that several aspects of his employment-contract claim (*i.e.*, that the Ikegamis charged improper expenses to the business's operations) were frivolous. In fact, Ciocco does not even challenge the determination that the "buy

fee" claim that was actually addressed at trial—for 100 percent of the buy fees—was frivolous. Instead, Ciocco attempts to reinvent his buy-fee claim in this appeal as one for a percentage (30 or 40 percent) of the buy fees that accrued during a limited period (1996-2001). This was, however, not what Ciocco claimed at trial. At trial, Ciocco, by his own testimony, sought 100 percent of the buy fees and that is the claim the trial court found frivolous. On this basis alone, the trial court should be affirmed.

In addition to concocting a buy-fee claim that was never asserted at trial, Ciocco's appeal incorrectly suggests that the "frivolousness" finding was based on the limited Findings of Fact and Conclusions of Law that dismissed Ciocco's claims at the close of his case-in-chief. While all of those particular findings are supported by substantial evidence, they were not the sole basis for the trial court's finding that all of Ciocco's claims were frivolous. Rather, the trial court considered several declarations, the entire trial record, all pleadings on file, and the Findings of Fact and Conclusions of Law. The totality of this evidence provides more than ample support for the trial court's frivolousness finding. Thus, the trial court did not abuse its discretion and must be affirmed.

Apart from the buy-fee issue, Ciocco's former counsel, Shepherd Abbott Carter ("Shepherd"), failed to comply with several court rules in filing a responsive pleading to the Ikegamis' Motion for Summary

Judgment. Ultimately, as a result of Shepherd's inappropriate conduct, the pre-trial motions court (Judge James Allendoerfer) awarded the Ikegamis $12,020 in terms to compensate them for the additional expense and inconvenience of having to re-prepare for the claims related to an alleged oral partnership—the primary claims in this case. Judge Allendoerfer did not abuse his discretion in awarding those terms and, therefore, that order should be affirmed as well.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court's (Judge Thorpe) findings that Ciocco's claim for 100 percent of the "buy fees" was frivolous is effectively unchallenged and, in any event, supported by substantial evidence.

2. The trial court did not abuse its discretion when it concluded the lawsuit was frivolous as a whole because none of Ciocco's claims were supported by the law and facts.

3. The trial court did not abuse its discretion when it concluded that the Ikegamis were entitled to an award of fees under RCW 4.84.185.

4. The pre-trial motions court (Judge Allendoerfer) did not abuse its discretion in awarding the Ikegamis $12,020 in terms against Ciocco's attorney, Shepherd, when Shepherd failed to comply with the applicable court rules.

III. COUNTER-STATEMENT OF THE CASE

Given that two briefs have been filed on this appeal, which raise two distinct issues, the Ikegamis will independently set forth the facts relevant to each brief.

A. Facts Relevant to Frivolous Finding.

1. Ciocco's Claims Against the Ikegamis

Between May 1996 and May 2004, Ciocco was paid in excess of $4 million during his employment as manager at two car dealerships owned by the Ikegamis—Doug's Hyundai and Doug's in Everett. (3/14/08 VRP 3-4). During his employment with the Ikegamis, Ciocco's compensation was based on a percentage of gross profits. (CP 59) (FOF A.2). From 1996 to 1999, he managed one sales location (Doug's Hyundai) and was paid 30 percent of net profits. (CP 59-60) (FOF A.2, A.5, A.7). From 1999 to 2004, he also managed a second location (Doug's in Everett) and was paid 40 percent of net profits from both locations. *Id.* In May 2004, Ciocco quit working for the Ikegamis and sent them a brief letter demanding $2.5 million with respect to his purported interest in the dealerships. (CP __) (Sub No. 168) (Ryan Decl. on RCW 4.84.185 Mot., Ex. A) (Appendix A at A-5).[1]

---

[1] There are numerous exhibits to this declaration that are not germane to the issues on appeal. The attached Appendix A includes only the

Ciocco initiated this case on August 19, 2004, with a complaint asserting five separate claims against the Ikegamis. (CP 3024-34) (Summons and Complaint). Those five claims were: (1) breach of partnership agreement; (2) breach of fiduciary duty; (3) fraud; (4) unjust enrichment; and (5) breach of employment agreement. (CP 3031-32).

Ciocco's primary claim was that he was a partner in those two car dealerships, and was therefore entitled to an ownership interest above and beyond his $4 million in compensation. (CP 3028-31). In conjunction with the breach of partnership claim, Ciocco alleged that the Ikegamis breached the fiduciary duties owed to him as a partner, defrauded him as a partner, and were unjustly enriched by overcharging expenses to the business that reduced his alleged partnership interest. *Id.* With respect to the partnership claims, Ciocco alleged that he was entitled to an additional $1,180,000-$900,000 as an ownership interest in the dealerships. Ciocco further claimed more than $800,000 in damages for improper charges pursuant to the fiduciary duty, fraud and unjust enrichment claims. (3/12/08 VRP 113); Appellant's Br., Appendix G. Thus, four of Ciocco's five claims were related to the allegation that he was a "partner" in the two car dealerships, and he sought approximately $2 million in damages based

---

declaration itself and the relevant exhibit.

on those claims.

Ciocco's fifth claim—for breach of an employment agreement—was alleged in the alternative to his partnership allegations and is set forth in full as follows:

> F. In the alternative, Defendants' failure to pay salary, commissions, and $250 buy fees constitute a breach of an employment agreement. Defendants' concealment of income and charging of non-business expenses also constitute a breach of employment agreement to the extent that the employment agreement is based on income to the dealerships.

(CP 3031-32) (emphasis added).

2. Discovery into Ciocco's Claims

Over the course of the ensuing three and-a-half years, the Ikegamis responded to extensive discovery efforts by Ciocco, including producing over 57,000 pages of documents and counsel's participation in 21 separate depositions. (CP __) (Sub No. 168) (Ryan Decl. on RCW 4.84.185 Mot., ¶ 12) (Appendix A at A-3). The Ikegamis were also required to answer 12 sets of discovery requests and engage in numerous discovery motions and other pre-trial proceedings related to this massive discovery effort. (CP __) (Sub No. 209) (Lenci Decl. on Def.'s Application for Expenses, ¶¶ 15-17) (Appendix B at B-5, B-6).[2] Finally,

[2] The exhibits to this declaration are voluminous. The attached Appendix B includes only the declaration itself.

the Ikegamis were also required to retain an expert to oppose Ciocco's expert regarding the partnership valuation issue. *Id.* (Appendix B at B-8).

3. The Dismissal of Ciocco's Claims

All of Ciocco's claims against the Ikegamis were ultimately dismissed. Ciocco's fraud claim was dismissed before trial upon the Ikegamis' motion to dismiss in December 2007. (CP __) (Sub No. 76) (Order Granting Mot. to Dismiss). Thereafter, Judge Allendoerfer granted the Ikegamis' motion for summary judgment as to the partnership and fiduciary duty claims on February 22, 2008. (CP 3144). As discussed below, however, that order was later rescinded on the first day of trial when it was revealed that Ciocco's counsel, Shepherd, had mistakenly failed to submit a complete set of Ciocco's opposition papers to the court. *See* Section III.B below. Thus, the parties proceeded to trial on Ciocco's partnership, fiduciary duty, unjust enrichment and employment claims.

A five-day bench trial was held before Judge Thorpe on March 10 through 17, 2008, which culminated in the trial court granting the Ikegamis' motion for judgment as a matter of law at the conclusion of Ciocco's case-in-chief. (3/17/09 VRP 29-33). Judge Thorpe dismissed each of Ciocco's claims on multiple grounds, as set forth in its formal

Findings of Fact and Conclusions of Law. (CP 58-85).

4. Judge Thorpe's Determination that Ciocco's Claims were Frivolous.

The Ikegamis filed a post-trial motion for a finding that Ciocco's claims were "frivolous and advanced without reasonable cause" pursuant to RCW 4.84.185. (CP __) (Sub No. 167) (Mot. for Fees and Expenses Pursuant to RCW 4.84.185) (Appendix C). As explained in the motion, despite years of time consuming and expensive discovery taken by Ciocco, the overwhelming evidence presented at trial, including Ciocco's own testimony that was presented in his case-in-chief, contradicted all of Ciocco's claims. *Id.*

Ciocco filed a limited opposition to the Ikegamis' motion to declare his action frivolous. (CP __) (Sub No. 195) (Pl.'s Memo. in Opp.) (Appendix D). Ciocco argued only that a claim is not frivolous if it reaches trial and is subject to a credibility determination. *Id.*. Notably, Ciocco did not argue the issue now raised in this appeal—that his claim for buy fees was not frivolous. *Id.*

After a hearing, Judge Thorpe found each of Ciocco's five claims frivolous and advanced without reasonable cause. Appellant's Br., Appendix C. The trial court's order on the RCW 4.84.185 motion did not rely exclusively on the Findings of Fact and Conclusions of Law that

resolved the claims at trial. *Id.* In finding Ciocco's claims frivolous, the court considered (1) the declarations of the parties, (2) the Findings of Fact and Conclusions of Law, (3) "[a]ll testimony, exhibits and argument at trial," and (4) the pleadings and papers on file. *Id.*

Pursuant to RCW 4.84.185, the Ikegamis submitted a detailed application for attorneys' fees and costs incurred in defending against Ciocco's claims. (CP __) (Sub No. 207) (Def.'s Application for Reasonable Expenses) (Appendix E). That application was supported by a declaration submitting all of the Ikegamis' billing records and third-party declaration by Everett attorney Mitchell Cogdill stating that the fees and costs were reasonable given the nature of the case and the jurisdiction. (CP __) (Sub # 208 and 209) (Decl. of David Lenci in Support of Application) (Declaration of Mitchell Cogdill) (Appendices B and F).

On June 27, 2008, the trial court held a hearing on the fee application and on the Ikegamis' separate but related motion for contempt.[3] After a hearing, the trial court granted the application, finding that $634,267.23 in fees and costs were reasonably expended in defending

[3] The motion for contempt arose after the frivolous finding was entered but before a hearing on the amount of fees and costs. During that interim period, Ciocco threatened the Ikegamis with contacting lending institutions and/or criminal justice agencies to suggest that the Ikegamis were somehow acting improperly, unless the Ikegamis dropped the request for fees. (6/27/08 VRP 18-22); CP __ (Mot. for Contempt).

against Ciocco's frivolous claims. Appellant's Br., Appendix D. In addition, the trial court made the following comment with respect to the contempt motion:

> We will now turn to the contempt issue. And if I had the slightest amount of uncertainty about my ruling that the initial cause of action was frivolous, any doubt was swept away by the conduct of [Ciocco] in attempting the extortion that he attempted.

(6/27/08 VRP 18-22).

Notably, Ciocco does not challenge the amount of the fees awarded on appeal; rather, he only challenges the trial court's finding that a subset of one claim (buy fees) was frivolous.

5. The "Buy Fee" Issue on Appeal

Ciocco has appealed but one aspect of his breach of employment claim, which itself is only one of five claims dismissed by the trial court: whether the trial court abused its discretion in finding that Ciocco's claim for 100 percent of the "buy fees" was frivolous. Appellant's Br. at 9-10. Ciocco has made no argument as to the trial court's ruling that his partnership, fiduciary duty, fraud and unjust enrichment claims were frivolous and advanced without reasonable cause. *Id.*; Appellant's Br., Appendix C. Nor has Ciocco appealed the trial court's ruling that the other aspects of his employment claim—such as his claim that he was improperly charged "inspection fees" and other expenses for many

years—were frivolous and advanced without reasonable cause. Appellant's Br. at 25 and Appendix C. Thus, for purposes of this appeal, Ciocco creates a new version of his buy-fee allegations, which is but one subset of the employment contract claim.

6. No Accepted Definition of "Buy Fee" at Trial

Mike Ciocco and Doug Ikegami had a very different understanding of the nature of buy fees. Doug Ikegami first testified that buy fees were, and always had been, an accounting expense added to the cost of each car and held in a reserve fund to pay for the unexpected expenses of operating a car dealership:

> Q. And what is your understanding of what the term "buy-fees" means in relationship to your business dealings with Mr. Ciocco?
>
> A. Well, we always had buy-fees. It was there before Mike Ciocco ever started, we had buy-fees. It's just a charge that we put on each and every car – used cars, excuse me.
>
> Q. So if we talk about buy-fees and someone trades in a car to you for $8,000 and you give them a trade-in value of $8,000, then do you put a buy-fee on top of that cost of the car?
>
> A. That's what we called it, but, yes, it's a form of an extra pack or a hard pack.
>
> . . .
>
> Q. So, hypothetically, if the buy-fee is 250, on the books and records of the company, the cost of that vehicle without other costs that may go on it would be $8,250, correct?

A. Yes.

(3/11/08 VRP 41-42). Thus, if the hypothetical car described above ultimately sold for $10,000, the accounting profit would be $1,750, although the cash profit (difference between the purchase price and sale price) would be $2,000. (3/11/08 VRP 42). The difference was held in reserve to pay for unexpected operational expenses:

> Q. Do you know what the corporation did with the [buy fee] money? Was this in the nature of a reserve account?
>
> A. Yes.
>
> Q. Do you know what, if anything, the company would do with the money that was held in the reserve account?
>
> A. There were times I would – if our cars, we did too much expenses, wrote off – there were too many expenses on a car. Let's say the engine blows up or something happens, I would use that fund to reduce that car, different things.

(3/11/08 VRP 60). *See also* (3/11/08 VRP 75).

In contrast, Ciocco testified that he believed buy fees were akin to a fee for the task of purchasing a car for re-sale:

> Q. Okay. I'd like to return to the notion of buy fees. And especially in terms of your conception of buy fees as sort of a finder's fee. The person who locates the car should get a fee for that effort. Is that your understanding of finder's fees and buy fees as a finder's fee?

A. I never used or – really never heard the word finder's fee. Just buyer – buy fees.

Q. Isn't that your characterization of it?

A. Not my characterization of it, no. It's just a buy fee for going out and, you know, buying the car.

(3/14/2008 VRP 96) (emphasis added).

7. No Agreement as to the "Buy Fee" Arrangement

The testimony at trial demonstrated that the parties had disparate views as to the terms of Ciocco's employment, at least with respect to buy fees. While there was no dispute that Ciocco's initial compensation was to be 30 percent of the net profits of the Hyundai store he managed, Ciocco testified that the issue of buy fees was not raised when he began his employment:

Q. When did you start at the Hyundai location?

A. It was May of '96.

Q. In May of '96, was there any discussions as regards buy-fees before you started?

A. No.

(3/12/08 VRP 65).

Several months into Ciocco's employment, the person responsible for purchasing automobiles for re-sale was terminated and Ciocco was given that responsibility. (3/12/08 VRP 65). Doug Ikegami testified that,

pursuant to the agreed upon 70/30 split of the net profits, Ciocco was entitled to only 30 percent of the buy fees:

> Q. Do you recall a discussion with him about, particularly, buy-fees and whether he should get some or all of the buy-fees?
>
> A. The terms were that he got his percentage of them, and we set them out every, monthly.
>
> Q. And what was his percentage?
>
> A. 30 percent before and 40 percent later.

(3/11/08 VRP 54-55).

Following Doug Ikegami's testimony as to his understanding of the buy-fee arrangement, Ciocco disagreed during his own subsequent examination, claiming at trial that he was to be paid the <u>entire</u> $150 buy fee that was applied to each automobile he was tasked with purchasing:

> Q. Okay. And were there any discussions around the time, was there a [of] discussion getting rid of this person about what would happen with the buy-fees?
>
> A. . . . After I got the store up and running, then I conceded with Doug, and I got rid of Jim. You know, Doug's suggestion at that time, I don't want to pay him, I will pay you. So that was the deal.
>
> Q. <u>So your initial understanding was you were going to get all the buy-fees</u>?
>
> A. <u>Yes, sir</u>.

(3/12/08 VRP 65-66) (emphasis added).[4] There was absolutely no evidence, neither written nor testimonial, to corroborate Ciocco's statement that he was entitled to "all" of the buy fees between September 1996 and May 2001:

> Q. Yeah. The original deal was 30 percent, right?
>
> A. Not of the buy fees.
>
> Q. Oh. It's your position that you were entitled to all of the buy fees?
>
> A. That's what it was.
>
> Q. Is there any – is that in writing anywhere?
>
> A. Just conversations. You know, we were paying $150. We didn't take a percentage of his. You know, to Jim the buyer.

(3/14/08 VRP 40-41). *See also* (3/14/08 VRP 41) (Ciocco stating that there is no record supporting his claim that he was always entitled to the buy fees); (3/13/08 VRP 8-9) (Patricia Larson, Adzam's bookkeeper, stating that Ciocco did not raise the buy-fee issue for several years and, when he did raise the issue, he was paid).

---

[4] Ciocco also suggested that, after the parties finally reached an agreement and he began receiving 40 percent of the buy fees on a monthly basis in June 2001, he claimed an additional $50 per car during that period. (3/14/08 VRP 68). Ciocco apparently does not argue that the trial court erred in finding this portion of his buy-fee claim frivolous. Appellant's Br. at 25-26 (noting that "from June 2001 on" he was paid the buy fees).

Thus, Ciocco's claim during the trial of this case was not that he was entitled to 30 percent of buy fees between September 1996 and May 2001 and that those sums were unpaid. Rather, Ciocco's claim—the claim that was found frivolous by the trial court—was that he was entitled to all of the buy fees throughout his employment. (3/14/08 VRP 65).

8. Ciocco's Portion of the Buy Fees were Used to Pay an Expense of the Hyundai Store and Ciocco Accepted that Use of the Funds.

Beginning in June 2001, Ciocco requested and received the percentage of the buy-fee reserve that was attributable to his 40 percent employment compensation.[5] (3/14/08 VRP 32-33). On a monthly basis from June 2001 until he quit in May 2001, Ciocco was paid 40 percent of the buy fees that accrued on all used cars sold at the locations he managed, which at that point were set at $250 per car. *Id.*

The portion of buy fees that accrued to Ciocco's benefit before he began receiving monthly payments in June 2001 had been held in reserve and used to pay unexpected operational expenses of the Hyundai location:

> Q. Now at some point in time, did the understanding regarding whether you would get all of [the buy fees] or 30 percent of it, did that discussion come

[5] Ciocco's initial 30 percent compensation was based on his management of one location (Doug's Hyundai). Later, Ciocco began managing a second location (Doug's in Everett) and the parties agreed his compensation would increase to 40 percent of the net profits from both locations. CP 59-60 (FOF A.1-7).

up?

A. Not for about four years, four plus years.

Q. How did that discussion come up?

A. Well, I found out that the buy-fee account was empty. I never took payment from the buy-fee account for the first, it has got to be, at least four years. I was making enough money, I didn't need it. I was just saving it up. I just figured we would have a pretty nice payment down the road. And when I went to get the money and finally wanted the money, it was gone – or the majority of it was gone. There might have been a little bit left. I don't remember the particulars at this time.

Q. Would you tell the Court about that conversation [with Doug Ikegami].

A. I was just livid about the – I wasn't real upset with him because it was probably two or three days old, but I was very upset, and I talked to Doug about where did the money go, and I understood that he paid a $100,000 Hyundai – Hyundai Motor Company had fined him a hundred thousand dollars and that's where the money came from, and I said: What do I have to do with that? And he said: The money was in – we are partners in this thing, that's where the money went. And so I accepted it.

(3/12/08 VRP 66-68) (emphasis added). Despite extensive discovery taken over the course of three years, Ciocco was unable to present any evidence that the buy fees were used for any purpose other than payment of expenses at the Hyundai location, which was a part of his overall compensation plan (i.e., 30/40 percent of net profits).

Ciocco not only "accepted" that his portion of the buy fees that accrued in the reserve account were used to pay expenses of the Hyundai location, but he never asked to be paid for those fees. Nor did he quit as a result of not being paid. Nor did he ever threaten to sue the Ikegamis for the amount he claimed he was owed. Ciocco conceded this at trial:

> Q. Okay. Did you ever tell [the Ikegamis] that you would sue them if they didn't pay you these fees – accrued buy fees at that period?
>
> A. There is that one point I told Pat Larson I was going to leave.
>
> Q. I'm asking you if you were going to quit and sue them?
>
> A. No. I never said that.
>
> Q. After you started to receive the $40 car – or 40 percent buy fee share, did you then say, Okay, now I want my back – I want to go back and get what wasn't paid to me that I think I should get?
>
> A. I don't know if I – if I asked for it. You know, I was just making a lot of money.

(3/14/08 VRP 36). *See also* (3/11/2008 VRP 204) (Larson stating that she could not recall Ciocco demanding payment for past buy-fees). Indeed, when Ciocco finally quit (without notice) in May 2004, he sent a letter to the Ikegamis demanding payment for his alleged partnership damages. (CP __) (Sub No. 168) (Ryan Decl. on RCW 4.84.185 Mot., Ex. A) (Appendix A at A-5). There is no mention whatsoever in that letter of any

unpaid buy fees. *Id.*; (3/14/08 VRP 109-10).

9. Ciocco's Alleged Damages for Unpaid Buy Fees were Based on Speculation

In addition to the bald, after-the-fact allegation that he was owed 100 percent of the buy fees, Ciocco testified, and continues to concede in this appeal, that the damage claim for unpaid buy fees was speculative. Appellant's Br. at 26 ("And these buy fees, by Ciocco's estimation, totaled $262,000.") (emphasis added). Ciocco tried to quantify the number of cars on which he claimed a buy fee interest between September 1996 and May 2001, but that testimony was based on guess work:

> Q. We talked about this. All of these cars [purchased between 1996 and 2004] were not the cars at the cars at the Everett location or the Hyundai location, probably, are they?
>
> A. They were not all cars that I purchased.
>
> Q. Some of them would be cars that Mr. Ikegami purchased, correct?
>
> A. And various other people.
>
> Q. And what percentage of these cars do you believe would be cars purchased by people other than you?
>
> A. Well, I just thought a fair assessment was probably 10 percent.

(3/12/08 VRP 87) (emphasis added). In other words, Ciocco failed to submit any cogent evidence of the cars on which he was allegedly owed a

buy fee; he merely claimed that a certain number of sales occurred (without presenting documentation of those sales) and arbitrarily reduced that amount by ten percent to reflect purchases made by others. *Id.* Moreover, in this appeal—as opposed to at trial—Ciocco advances a theory that he was entitled to all cars sold from the two dealerships.

At trial, Ciocco presented expert testimony from an accountant with respect to his alleged partnership interest. (CP __) (Sub # 182) (Declaration of Alan Knutson) (Appendix G) (expert "retained as plaintiffs' expert regarding value [sic] of plaintiff Ciocco's 40% partnership interest in August of 2007."). Yet, Ciocco did not present any expert testimony with respect to either (1) his stated claim for 100 percent of the buy fees between 1996 and 2001, or (2) his assertion (for the first time) in this appeal that he was actually claiming 30/40 percent of the buy fees during that period. In fact, Ciocco's accounting expert was not retained to opine about the buy-fee issue, and was excluded pre-trial from addressing it. (3/10/08 VRP 26-27) (excluding Ciocco's accounting witness from testifying beyond partnership valuation issue); 3/12/08 VRP 117-119 (acknowledging that Ciocco's accounting witness was not disclosed to testify about buy fees in case-in-chief).

Given Ciocco's inability to present any non-speculative evidence as to the amount of his alleged buy-fee damages, the trial court made the

following finding:

> Mr. Ciocco received all of the financial compensation from Defendants to which he was entitled under his employment contract. Plaintiffs failed to show on a more probable than not basis that he was cheated or that his income was improperly reduced.

(CP 64) (FOF C.13).

10. Ciocco's Lack of Credibility at Trial

On several issues of fact, Judge Thorpe found that Ciocco lacked credibility at trial. *See* (CP 62-63) (FOF A.15, B.3, C.6). For example, with respect to the principal claim that Ciocco was a partner in the two car dealerships, the trial court found:

> Mr. Ciocco's own self-serving testimony that Mr. Ikegami told him they were "partners" in conjunction with money that went into buying the land on which Doug's in Everett was located is not credible.

(CP 62) (FOF A.15). The trial court noted "overwhelming" evidence that contradicted Ciocco's claim that he was a partner, including tax returns, testimonial admissions that Ciocco and Ikegami never discussed the terms of the partnership, and letters written by Ciocco during his employment in which he disavowed any ownership interest in the dealerships. *Id.* (FOF A.14). The trial court similarly found that Ciocco's alleged agreement regarding his right to 100 percent of the buy fees was not credible. (CP 63) (FOF B.6). To state it bluntly, the court did not believe that Ciocco

testified at all truthfully in support of his claims. *See* (CP 62-63).

In considering Ciocco's credibility, the trial court also heard evidence of Ciocco's several prior convictions for theft and fraud. (3/14/08 VRP 104-106); Trial Ex. 107. The court heard further evidence that Ciocco failed to disclose those convictions in response to direct interrogatory requests:

> Q. Okay. And do you recall that one of the interrogatory questions was, "Please identify as defined here any other legal actions, civil or criminal, to which you have been a party either as a defendant or a plaintiff." Do you remember being asked that question?
>
> A. Yes.
>
> Q. And you answered "none," right?
>
> A. Yes.
>
> Q. But that wasn't true, was it?
>
> A. No.

(3/14/08 VRP 99). Ciocco testified that he signed the interrogatory answers under oath. (3/14/08 VRP 98-99).

B. Facts Relevant to Imposition of Terms Against Shepherd.

The Ikegamis noted a motion for summary judgment before the trial court for February 22, 2008. Prior to oral argument, Ciocco's counsel, Shepherd, failed to provide the court that heard the motion (Judge

Allendoerfer) with working copies of their response and supporting declarations. (CP 3107-08 & 3049). Accordingly, Judge Allendoerfer granted, in part, the Ikegamis' Motion, which took the flagship issue in the case—the partnership claim—out of the trial. (CP 2373-75).[6] After this ruling, Ciocco filed a Motion for Reconsideration before Judge Allendoerfer, which Shepherd failed to serve on the Ikegamis. (3/10/09 VRP 3); (CP 3108) ("You've made a motion for reconsideration but haven't provided opposing counsel with copies of it.").

After trial had already commenced, Judge Allendoerfer granted Ciocco's Motion for Reconsideration noting:

> Plaintiffs' motion is based on new evidence <u>not available to the court on February 22, 2008</u>. On said date all the court had before it from Plaintiffs was Plaintiffs brief. The original declarations supporting said brief had been sent to the Court Clerk on February 11, 2008 by fax; however, original pleadings are not available to a trial judge on such short notice. The judge's working copies must be delivered directly to the judge in paper format (not fax) per GR 17(5). This was not done in the instant case until the actual commencement of the summary judgment hearing on February 22, 2008, <u>in violation of the eleven day rule found in CR 56(c). This was explained to Plaintiffs' counsel at the summary judgment hearing, and he elected to proceed ahead anyway.</u>

(CP 3092-94). Judge Allendoerfer also noted that the Ikegamis could

[6] Shepherd's Brief erroneously refers to this Order as the "March 10, 2008 Order", *see* Shepherd's Br. at 5, yet the Order is dated February 22, 2008.

"seek terms for the inconvenience and costs caused by Plaintiffs' failure to properly follow applicable court rules." (CP 3094). In response, the Ikegamis filed a Motion for Reconsideration of this ruling, and it was heard the next day, once again interrupting the trial proceedings. (3/11/08 VRP 6-9).

Although Judge Allendoerfer denied the Ikegamis' Motion for Reconsideration, he confirmed with Shepherd that Shepherd had failed to comply with the applicable court rules. (CP 3107-10). Judge Allendoerfer also noted that, rather than uphold his summary judgment dismissal, he would entertain a request from the Ikegamis for terms based on the inconvenience and additional costs of having to re-prepare to defend against the flagship issue in the case—the partnership claim. (CP 3112). The trial then proceeded accordingly before Judge Thorpe.

After receiving briefing from the parties, in a letter ruling dated April 18, 2008, the trial court stated:

> I agree with Defendants' observation that Plaintiffs have sidestepped the core issue now before the Court. <u>The Court has previously found that Plaintiff violated GR17 and CR 56(c) by their untimely response to the Defendants' motion for summary judgment.</u> This violation deprived the Court of advance notice of Plaintiffs' evidence, and resulted in a summary judgment being issued, which had to be retracted 17 days later. Mr. Shepherd appropriately acknowledged his own procedural errors in this regard in open court on February 22, 2008 and again on March 11, 2008. However, <u>Mr. Shepherd now reverses himself, for whatever reason,</u>

> and denies any responsibility whatsoever. He, his associate and his legal assistant blame others and ignore prior findings made by the Court and admissions made by Mr. Shepherd. This pattern of denial and "spinning" of the facts is not a professional approach to the pending motion.

(CP 3049) (emphasis added). On June 3, 2008, Judge Allendoerfer awarded the Ikegamis $12,020 in terms for Shepherd's failure to comply with the court rules and in doing so noted: "It is disturbing that Plaintiffs' attorney remains in denial relating to his role in the rule violations which began this unfortunate series of events on February 22, 2008." (CP 3042) (emphasis added). Shepherd ultimately paid the terms and filed the pending appeal.

IV. ARGUMENT

A. Standard of Review

1. Standard of Review Under RCW 4.84.185

An award of fees under RCW 4.84.185 is reviewed for an abuse of discretion and will not be disturbed "in the absence of a clear showing of abuse of discretion." *Fluke Capital & Mgmt. Servs. Co. v. Richmond*, 106 Wn.2d 614, 625, 724 P.2d 356 (1986) (emphasis added). "Abuse of discretion occurs where the trial court's action is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. A manifestly unreasonable decision results if a court adopts a view that no reasonable person would take." *Oliver v. Fowler*, 161 Wn.2d 655, 663, 168 P.3d 348

(2007) (citations and internal quotations omitted). Similarly, "[a] discretionary decision rests on untenable grounds or is based on untenable reasons if the trial court relies on unsupported facts or applies the wrong legal standard." *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

This court should not upset any factual findings made by the trial court where such facts are supported by substantial evidence. *See, e.g.*, *Leer v. Whatcom County Boundary Review Bd.*, 91 Wn. App. 117, 126, 957 P.2d 251 (1998) (substantial evidence is evidence of a sufficient quantity to persuade a fair-minded person of the truth of the declared premise).

2. Standard of Review Regarding Terms.

With respect to the terms imposed against Shepherd, a trial court generally has broad discretion in imposing sanctions and "its determination will not be disturbed absent a clear abuse of discretion." *See, e.g.*, *Mayer* at 684; *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 265, 961 P.2d 343 (1998) ("An award of attorney fees is left to the trial court's discretion and will not be disturbed absent a clear showing of abuse.") (citations omitted).[7]

[7] Despite citing to this very case, *see* Shepherd Brief at 8 & 9, Shepherd still argues that the trial court's decision to impose terms should be

B. The Trial Court Did Not Abuse Its Discretion in Finding that Ciocco's "Alternative" Claim for Breach of Employment Contract was Frivolous.

Under RCW 4.84.185, the trial court has the authority to find an action frivolous and advanced without reasonable cause at any stage of litigation, including after a trial:

> In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. . . .

(Emphasis added).

The fundamental "purpose of RCW 4.84.185 is to discourage

---

reviewed *de novo*. Shepherd Brief at 7. This view is erroneous under Shepherd's own case law. Moreover, the cases upon which Shepherd relies address only the interpretation of awarding fees under performance bonds or contractual provisions, and do not rise in the context of an award of sanctions. *See, e.g.*, *Colo. Structures Inc. v. Ins. Co. of the W.*, 161 Wn.2d 577, 586, 167 P.3d 1125 (2007) (performance bond); *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 143 Wn. App. 345, 363, 177 P.3d 755 (2008) (indemnity addendum).

frivolous lawsuits and to compensate the targets of such lawsuits for fees and expenses incurred in fighting meritless cases." *Biggs v. Vail*, 119 Wn.2d 129, 137, 830 P.2d 350 (1992) (emphasis added); *see also Kearney v. Kearney*, 95 Wn. App. 405, 416-17, 974 P.2d 872 (1999). Here, the Ikegamis were the target of a frivolous lawsuit brought by a disgruntled ex-employee, and the trial court correctly found that they should be compensated for having to defend against that lawsuit.

The trial court's finding that Ciocco's lawsuit was frivolous is supported by substantial evidence. Consider the following:

Ciocco argues only that one aspect of one "tag along" claim was not frivolous, yet the claim he describes on appeal is **not** the claim he pressed at trial. At trial, Ciocco claimed 100 percent of the $150 buy fees from September 1996 to May 2001. The trial court found that claim frivolous. On appeal, Ciocco now suggests for the first time that he was seeking only 30 to 40 percent of the fees. Moreover, the appellate version of the buy fee claim encompasses all cars acquired during the relevant period. Yet, at trial, Ciocco limited his claim for the buy fees to only those cars that he was tasked with purchasing (*i.e.,* 90 percent of the total). Ciocco should not be permitted to revamp his buy-fee claim on appeal, only to argue that the trial court abused its discretion in finding that new, fictional claim frivolous.

The trial court's finding that the lawsuit was frivolous was based on consideration of the declarations in support of the motion, the entire trial record, and the Findings of Fact and Conclusions of Law, and the pleadings on file. The trial court did not, as Ciocco suggests, rely exclusively on the findings and conclusions that disposed of his claims.

To the extent the findings that disposed of Ciocco's buy-fee claim have been challenged, that challenge lacks merit. There is substantial evidence in the record to support the trial court's findings that (1) there was no agreement regarding buy fees from 1996-2001, (2) Ciocco was paid any compensation he might have been owed, (3) Ciocco's alleged damages were speculative, (4) Ciocco's claims were barred by the statute of limitations, and (5) Ciocco lacked credibility as a witness.

As set forth in further detail below, the trial court did not abuse its discretion in determining that the Ciocco's lawsuit was frivolous.

1. The Court Should Not Consider Assignments of Error as to Ciocco's Partnership, Fiduciary Duty, Fraud, Unjust Enrichment Claims, or to the Majority of His Employment Claims.

Ciocco has ostensibly assigned error to six orders, eighteen findings of fact, and thirteen conclusions of law. Appellant's Br. at 4-9. Yet, Ciocco admittedly only submits argument related to a small subset of one of his several claims (buy fees), offering no citation to the record or argument as to the vast majority of the trial court's orders, findings and

conclusions. Appellant's Brief at 25 ("Rather than disputing the trial court's findings on each of Ciocco's claim, this brief will focus on his strongest claim at trial—that Ciocco's employer promised him a percentage of the buy fees, but did not pay them.").[8] Appellate courts "'will not review issues for which inadequate argument has been briefed or only passing treatment has been made.'" *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 416, 120 P.2d 56 (2005) (quoting *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004)).

There is, therefore, no dispute that the following claims were frivolous and advanced without reasonable cause pursuant to RCW 4.84.185: (1) breach of partnership agreement, (2) breach of fiduciary duties, (3) fraud, (4) unjust enrichment, and (5) the breach of employment contract as to the alleged imposition of improper expenses. Any consideration by this Court of the assignments of error with respect to those claims, which are made in passing and not supported by <u>any</u> argument, would be unnecessary and unwarranted, and would greatly prejudice the Ikegamis. The Ikegamis cannot present counter-arguments to arguments that have not been made. *See, e.g., State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995). Nor should it be this Court's task to comb through the record to find evidence supporting Ciocco's unstated arguments. *See, e.g., Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992). Accordingly, this Court should not

[8] Despite these assignments of error, Ciocco does not challenge the dismissal of his underlying claims.

consider assignments of error that reach beyond the narrow issue of whether Ciocco's claim for 100 percent of the buy fees between September 1996 and May 2001 was frivolous.

2. The Argument Ciocco Raises on Appeal—that He was Not Paid a Portion of the Buy Fees—is Not Based on the Claim Asserted in the Complaint or at Trial.

In this Appeal, Ciocco tries to improperly reinvent his claim for buy fees: "[T]his brief will focus on [Ciocco's] strongest claim at trial – that Ciocco's employer promised him a percentage of buy fees, but did not pay them." Appellant's Br. at 25 (emphasis added). However, this was not Ciocco's claim at trial. In reality, Ciocco claimed at trial that he was owed 100 percent of the buy fees:

> Q. Yeah. The original deal was 30 percent, right?
>
> A. Not of the buy fees.
>
> Q. Oh. It's your position that you were entitled to all of the buy fees?
>
> A. That's what it was.
>
> . . .
>
> Q. And you're claiming what? All of the buy fees during the entire time you were there.
>
> A. Yes.

(3/12/08 VRP 40-41, 65) (emphasis added). Moreover, Ciocco initially claimed a buy fee only for those cars he purchased. It is this claim and testimony that the trial court found frivolous based on the entire record.

Ciocco fails to cite anything in the record or present any argument that the trial court abused its discretion in finding his claim for "all of the buy fees" on the cars he purchased frivolous. On this basis alone, the trial court should be affirmed.

3. The Trial Court's Finding that the Buy Fee Claim was Frivolous was Based Upon the Entire Record.

In addition to mischaracterizing his buy-fee claim, Ciocco incorrectly attempts to characterize the trial court's finding that the claim was frivolous as arising solely from the Findings of Fact and Conclusions of Law that dismissed his case. In fact, those findings and conclusions were but one of the trial court's many considerations. (CP __) (Appellant's Br., Appendix C) (Order stating that the court "considered" the parties' declarations, the findings and conclusions, all of the evidence at trial, and the pleadings on file). Thus, the trial court found the buy-fee claim frivolous based on the totality of the facts and circumstances—including the credibility of witnesses, the exhibits that were and were not admitted at trial, the pleadings on file and, of course, the findings and conclusions that ultimately disposed of Ciocco's claims.

Given that this case was tried to the bench, the trial court was in a unique position to make the frivolousness determination based on the totality of the evidence and circumstances. *See Zink v. City of Mesa*, 137

Wn. App. 271, 277, 152 P.3d 1044 (2007) (in reviewing a RCW 4.84.185 determination, the appellate court "does not enjoy the vantage point of the trial court," which "conducted lengthy interrelated proceedings involving the [party's] actions"); *Skimming v. Boxer*, 119 Wn. App. 748, 754 & n.1, 82 P.2d 707 (2004) ("Our deference accounts for the trial judge's personal and sometimes exhaustive contact with the case."). As this Court noted in a related context, the trial court has "tasted the flavor of the litigation and is in the best position to make these kinds of determinations." *Miller v. Badgley*, 51 Wn. App. 285, 300, 753 P.2d 530 (1988) (citation and quotation omitted). Accordingly, when determining whether the trial court "clearly" abused its discretion, this Court must be mindful of the unique perspective of the judge who tried this case.

Although the trial court's finding that the buy-fee claim was frivolous was based on <u>all of the evidence</u>, the specific findings that were necessary to dismiss that claim are, in fact, supported by substantial evidence for the reasons set forth below.

4. <u>The Trial Court's Finding that there was No Agreement as to Buy Fees until 2001 is Supported by Substantial Evidence.</u>

The trial court made two findings of fact specific to the absence of an agreement regarding buy fees:

C. Breach of Employment Contract Claim

> . . .
>
> 6. There is no credible evidence as to the exact terms of Mr. Ciocco's employment contract, such as the allocation of any given business expense or the allocation of buy fee revenue.
>
> . . .
>
> 10. There was no agreement between Mr. Ciocco and Adzam regarding the terms of splitting "buy fees" until the parties began negotiating the purchase of the Everett property on which Doug's in Everett was located. That date occurred [in] approximately 2000-2001.

(CP 63-64) (emphasis added). The findings that there was no agreement to pay Ciocco 100 percent of the buy fees are supported by substantial evidence given the disparate testimony regarding (1) the very nature of the buy fees, and (2) when, how much and in what form Ciocco was to be compensated for buy fees.

After Doug Ikegami testified that buy fees were an accounting expense held in reserve for unexpected expenses, Ciocco testified that buy fees were something very different—a payment akin to compensation for the work associated with purchasing a vehicle for re-sale. He further testified at trial that his claim was for 100 percent of the buy fees for cars he himself purchased, and that such fees were to be set aside for him in an account and/or paid to him monthly. No other witness or document corroborated Ciocco's testimony, in which he related events occurring more than a decade before trial.

In contrast, Doug Ikegami testified that buy fees were an accounting expense that allowed a portion of vehicle sale proceeds to be held in a reserve account for unexpected costs. Ikegami and Patricia Larson, the head of accounting, further testified that 30 percent and, later, 40 percent of the so-called "buy fees" were an accounting item, held in reserve for Ciocco's portion of those unexpected expenses. This testimony was buttressed by evidence that the value of these fees was in fact held in reserve, were used to pay unexpected operational and business expenses (*e.g.*, a fine from Hyundai), Ciocco accepted the application of the fees for that purpose, and Ciocco did not demand monthly payment until June 2001, at which point the parties reached an agreement to actually pay out buy fees to Ciocco.

There is ample evidence in the record that Ikegami and Ciocco never reached a "meeting of the minds" as to buy-fee compensation until June 2001, after which Ciocco received payment. *See Geonerco, Inc. v. Grand Ridge Props. IV LLC*, 146 Wn. App. 459, 465, 191 P.3d 76 (2008) ("An enforceable contract requires a 'meeting of the minds' on the essential terms of the parties' agreement."). Thus, the trial court's findings regarding the absence of an agreement were supported by substantial evidence.

5. The Trial Court's Finding that Ciocco Received All Buy Fee Compensation to which He was Entitled is Supported by Substantial Evidence.

Even assuming the parties had reached some agreement regarding buy fees in 1996, the trial court found that Ciocco was paid all of the compensation he was owed under his oral employment agreement. (CP 64) (FOF C.13) ("Mr. Ciocco received all of the financial compensation from Defendants to which he was entitled under his employment contract with Adzam."). While Ciocco alleged that he was entitled to 100 percent of the buy fees, there was no dispute that he was told in 1999 that the buy fees held in reserve had been used to pay expenses of the dealership (*e.g.*, a Hyundai fine), and Ciocco accepted that explanation. (3/12/08 VRP 66-68). Moreover, Ciocco continued to work at the Hyundai and Everett locations from 1999 to 2001 with the understanding that his portion of buy fees were held in reserve and used for unexpected expenses because: "I was just making a lot of money." (3/14/08 VRP 36). Thus, given how much money he was making at the time, Mr. Ciocco simply acquiesced to the compensation plan the Ikegamis had instituted. The trial court's finding that Ciocco was paid all employment compensation to which he was owed is supported by substantial evidence.

6. The Trial Court's Finding and Conclusion Regarding Damages is Supported by Substantial Evidence because Ciocco's Testimony was Entirely Speculative.

The trial court found as a matter of fact, and concluded as a matter of law, that Ciocco fell far short of proving the existence of any damages. (CP 64 and 66) (FOF C.13; COL C.6). These findings and conclusions were supported by substantial evidence. Indeed, Ciocco's speculative testimony at trial alone establishes the frivolousness of his buy-fee claim.

Ciocco testified that after he quit in May 2004, he retained copies of every car sale for the two dealerships he managed during his 1996-2001 tenure. (3/12/08 VRP 83-84). Despite his access to this information before he filed suit against the Ikegamis, and despite nearly four years of discovery before trial, Ciocco failed to present any meaningful evidence of his damages claim. Ciocco did not introduce any written evidence of the car deals on which he was allegedly owed a buy fee. Nor did he present expert testimony analyzing or calculating the amount claimed. Indeed, the very expert that Ciocco claims could have established his buy-fee damages admitted in a declaration that he was only "retained as plaintiffs' expert regarding value [sic] of plaintiff Ciocco's 40% partnership interest in August of 2007." (CP __) (Sub # 182) (Declaration of Alan Knutson)

(Appendix G).[9] *See Escude v. King County Pub. Hosp. Dist.*, 117 Wn. App. 183, 194, 69 P.3d 895 (2004) (finding of frivolousness upheld where expert testimony necessary to support claim had been stricken, but plaintiff pressed on with claim anyway).

At trial, Ciocco simply claimed to have added up all of the car deals he oversaw, reduced that figure by an arbitrary ten percent to reflect car purchases made by others, and multiplied the resultant number of cars by the $150 buy fee. (3/12/08 VRP 87). From the inception of the Complaint (where a $250 buy fee was sought) through the close of his case-in-chief at trial (where a $150 buy fee was sought), Ciocco knew that he had no basis to calculate his alleged damages with any reasonable certainty. *See Northwest Land & Inv., Inc. v. New West Federal Sav. & Loan Ass'n*, 57 Wn. App. 32, 43, 786 P.2d 324 (1990) (breach of contract damages must be proved with reasonable certainty); *Restatement (Second) of Contracts* § 352 (1981) (same).

As early as 1999, Ciocco knew that he was not being paid 100 percent of the buy fees and that cars were continually purchased by him and others without an accounting of any amount that might be owed under his theory of the agreement. Yet, Ciocco did not obtain or keep records

[9] Ciocco's counsel made no offer of proof during trial as to what, if anything, his accounting expert would testify to with respect to buy fees.

sufficient to determine what he could be owed. Instead, he waited five years before bringing forth a claim for those fees with no basis to calculate damages. This is the virtual definition of a claim that "cannot be supported by any rational argument on the law or facts." *Daubner v. Mills*, 61 Wn. App. 678, 684, 811 P.2d 981 (1991); *see also Koch v. Mutual of Enumclaw Ins. Co.*, 108 Wn. App. 500, 509-10, 31 P.3d 698 (2001) (claims found frivolous under RCW 4.85.185 in part because plaintiff failed to present evidence of damages).

7. Ciocco's Claim for Buy Fees was Barred by the Statute of Limitations.

The trial court found that "[e]ven if Mr. Ciocco might have been improperly charged under pre-existing terms of the parties' employment contract, any actionable charges would have occurred more than three years prior to his filing of this lawsuit." (CP 64) (FOF C.14). The trial court concluded that "any breach of contract claim is further barred by the three-year statute of limitations, because no breach of contract occurred less than three years before this suit was filed." (CP 66) (COL C.6).

There is no dispute that Ciocco's claim for buy fees related entirely to events that occurred more than three years prior to the initiation of the lawsuit. The Complaint was filed on August 19, 2004. As of June 2001, Ciocco testified that he was being paid 40 percent of the buy fees on a

monthly basis per the parties' oral agreement to do so. The only issue is whether the statute of limitations applies to a claim for unpaid compensation that had fully accrued under a prior alleged oral contract—a contract that was superseded more than three years before the suit was filed (*i.e.*, between September 1996 and May 2001).

Ciocco contends that the trial court erred as to the statute of limitations finding and conclusion because he was a continuous employee. *See* Appellant's Br. at 30 (citing *Macchia v. Salvino*, 64 Wn.2d 951, 395 P.2d 177 (1964)).[10] The *Macchia* case stated that a wages claim by a continuous, salaried employee did not begin to run until the contract is terminated. In *Macchia*, the employee worked for more than a decade under a contract paying a monthly salary of $500. 64 Wn.2d at 955. The *Macchia* court found that the employee worked for 138 months, which entitled him to $69,000, but the employee was able to show at trial that he had received only $68,108.56. *Id.* at 956. *Macchia* simply stands for the

---

[10] Ciocco also cites *Washington v. Boeing Co.,* 105 Wn. App. 1, 19 P.3d 1041 (2000). The *Boeing* case is inapposite because it relates to a discrimination claim and does not apply to breach of employment contract claims, which are governed by RCW 4.16.080(3). 105 Wn. App. at 7-8 n.8 (noting that the action was governed by RCW 4.16.080(2)). Moreover, the plaintiff's claim in *Boeing* was time barred because she could not show that the claims fell under the "continuing violation doctrine," a doctrine which would not apply by analogy in this case because the practice complained of (alleged failure to pay buy fees) ceased more than three years before the suit. *Id.* at 8-10.

narrow proposition that unpaid salary is not barred by the statute of limitations until three years after termination of the employment, and it is readily distinguishable from this case.[11]

Mr. Ciocco was an at-will, non-salaried employee claiming extra compensation (akin to a commission or overtime pay) based on an alleged oral agreement regarding unpaid buy fees. By Ciocco's own testimony, the oral agreement at issue was terminated or superseded in June 2001, when he began receiving a partial percentage of buy fees on a monthly basis. The Washington Supreme Court ruled that similar claims accrue for purposes of the statute of limitations when the payment is missed, not upon termination. *See Gensman v. West Coast Power Co.*, 3 Wn.2d 404, 413-14, 101 P.2d 316 (1940) (affirming dismissal of claim for overtime wages based on oral contract where such wages allegedly accrued more than three years before filing suit). Because Mr. Ciocco was paid on a percentage-of-profit basis under an oral contract that terminated more than three years before his suit, it is difficult (if not impossible) to look back to 1996-2001 and determine what, if anything, he should have been paid.

---

[11] Indeed, since the opinion was published in 1964, *Macchia* has only been cited twice for the proposition relied upon by Ciocco. *See Heasley v. Riblet Tramway Co.*, 68 Wn.2d 927, 416 P.2d 331 (1966); *Richards v. Pacific Nat'l Bank of Washington*, 10 Wn. App. 542, 519 P.2d 272 (1974).

Indeed, preventing such stale claims is the reason the statute of limitations exists. *Hudson v. Condon*, 101 Wn. App. 866, 972, 6 P.3d 615 (2000).

8. There is Substantial Evidence in the Record that Ciocco's Testimony Regarding Buy Fees—which is the Only Evidence Supporting His Claim—was Not Credible.

Judge Thorpe found that that Ciocco was not a credible witness at trial, and specifically found that there was no credible evidence that he was owed additional employment compensation. Ciocco's general lack of credibility was amply supported in the record. He testified he was a "partner" in two car dealerships despite overwhelming written and testimonial evidence to the contrary. The trial court also considered evidence of multiple prior theft and fraud convictions, and that Ciocco failed to disclose those convictions in response to direct interrogatory inquires. The trial court's findings regarding Ciocco's lack of credibility are supported by substantial evidence.

9. The Trial Court Did Not Abuse its Discretion in Finding Ciocco's Buy-Fee Claim Frivolous.

Ultimately, the single issue raised in this appeal is the trial court's finding that "Plaintiffs' breach of employment contract claim was frivolous and advanced without reasonable cause." (CP __) (Appellant's Br., Appendix C). For the many reasons stated above, that particular finding is supported by substantial evidence. Thus, the trial court did not

abuse its discretion in ruling that the Ikegamis were entitled to their reasonable attorneys' fees and costs pursuant to RCW 4.84.185.[12]

C. The Trial Court Did Not Abuse Its Discretion in Awarding Terms Against Shepherd.

Judge Allendoerfer's imposition of terms was not an abuse of discretion and should be affirmed. The judge awarded the Ikegamis terms based on Shepherd's failure to comply with GR 17(5) and CR 56(c). (CP 3049 & 3092-94). The court also noted that Shepherd's failure to comply with the court rules placed the Ikegamis "at a strategic disadvantage," requiring the Ikegamis' counsel to "madly work[ ] up the partnership issue" for trial. (CP 3137).

Shepherd states several times that "the sanctions were related to [their] failure to provide working copies to an assigned judge until <u>two days before a summary judgment hearing</u>." Shepherd Br. at 1-2, 4 (asserting that Judge Allendoerfer received working copies prior to hearing). This statement is simply wrong and is contradicted by the trial court's findings. In arguments on March 11, the trial court stated:

> THE COURT: This, Mr. Shepherd, is what did not get to the Court. This is your entire case before me. You were arguing from the seat of your pants in front of me on February 22 because <u>this was not in front of me until it was handed to me at oral argument</u>. So you've basically had no

[12] In this appeal, Ciocco <u>does not</u> challenge the amount of the award; rather, the only challenge is to the Ikegamis' entitlement to the award.

> case in front of me, and that's why you lost.
>
> MR. SHEPHERD: I wondered that when the Court's – when you say how do you respond to his bullet point, I said we go to this declaration, and you said I don't want to hear from declarations. What you meant is you'd already read their declarations and you didn't know I was talking about moving to mine.
>
> THE COURT: No, I hadn't seen any of these. This is, what, two inches worth of declarations that you had failed to provide me until the morning of the hearing instead of 11 days before the hearing. So that was the reason you lost, basically, on February 22. You hadn't given me any arguments. And now, I guess you're kind of in the same position. You've made a motion for reconsideration but haven't provided opposing counsel with copies of it.

(CP 3132-33) (emphasis added). The trial court's order on the Motion for Reconsideration also acknowledges this fact. (CP 3093).

Shepherd continues to refuse to acknowledge that the trial court did not receive Ciocco's supporting papers until the morning of the summary judgment hearing, attempting to cast doubt on the court's findings by asserting that copies were, in fact, provided to the trial court prior to the summary judgment hearing. This is the same "pattern of denial and 'spinning' of facts" that the trial court noted was "not a professional approach." (CP 3049). Indeed, this was not the first time that Shepherd delayed a hearing in this matter "due to [his] failure to provide [the court] with judges working copies." (CP __) (Sub No. 168) (Ryan Decl. on RCW 4.84.185 Mot., Ex. I) (Appendix A at A-6).

"Where sanctions are not expressly authorized, 'the trial court is not powerless to fashion and impose appropriate sanctions under its inherent authority to control litigation.'" *State v. S.H.*, 102 Wn. App. 468, 473, 8 P.3d 1058 (2000) (quoting *In re Firestorm 1991*, 129 Wn.2d 130, 139, 916 P.2d 411 (1991)). Here, the trial court exercised its inherent authority and awarded terms against Shepherd in an amount that was significantly less than what the Ikegamis requested. (CP 3045). Thus, not only did the trial court properly exercise its inherent authority correctly, it did so in a manner whereby Shepherd was not severely punished for his misconduct. This was manifestly reasonable and should be affirmed.

Shepherd argues that a <u>specific</u> finding of "bad faith" is required to impose terms like those awarded here. Shepherd Brief at 8-9. This is still an open question in Washington. *State v. S.H.*, 102 Wn. App. at 474 ("[N]o Washington case has expressly held that a finding of bad faith is required before a court may invoke its inherent authority to sanction litigation conduct[.]"). In *S.H.*, however, the court did "hold that a trial court's inherent authority to sanction litigation is <u>properly</u> invoked upon a finding of bad faith." *Id.* at 475 (emphasis added). "A party may demonstrate bad faith by, *inter alia*, delaying or disrupting litigation." *Id.* (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)). Indeed, this Court has upheld a trial court's award of

attorney fees under the trial court's inherent authority based on the "inappropriate and improper conduct" of counsel. *Wilson v. Henkle*, 45 Wn. App. 162, 173, 724 P.2d 1069 (1986).

Here, the trial court found on at least two occasions that Shepherd acted inappropriately and improperly by not just failing to follow the court rules, but also by failing to accept responsibility for the consequences of his failures. For example, in its letter ruling, the trial court noted: "[Shepherd], his associate and his legal assistant blame others and ignore prior findings made by the Court and admissions made by Mr. Shepherd. This pattern of denial and 'spinning' of the facts is not a professional approach to the pending motion." (CP 3049). Similarly, the trial court's order states: "It is disturbing that Plaintiffs' attorney remains in denial relating to his role in the rule violations which began this unfortunate series of events on February 22, 2008." (CP 3045). These findings are "tantamount to a finding of bad faith" and supported by the record in this case. *Wilson*, 45 Wn. App. at 175.

First, Shepherd's failure to comply with the court rules regarding service of pleadings on the court was not an isolated incident. (CP __) (Sub # 168) (Ryan Decl. on RCW 4.84.185 Mot., Ex. I) (Appendix A at A-6) Second, despite statements to Judge Thorpe regarding Shepherd's acceptance of responsibility "for the position the two courts are in,"

(3/11/08 VRP 10-11), Shepherd took a different position before Judge Allendoerfer and this Court, seeking to cast blame at the feet of "others and ignore prior findings made by the Court and admissions made by Mr. Shepherd." (CP 3049). Indeed, Shepherd continues to argue that the trial court received the pleadings at issue before the hearing, which is contrary to what Judge Allendoerfer said and found.[13] Thus, the purposes underlying the imposition of terms would be served by affirming the trial court's discretionary decision.[14]

---

[13] In a bizarre twist, Shepherd now attempts to blame the Ikegamis for his failure to comply with the court rules. Shepherd Br. at 10 ("SCLCR (5)(f) required that the moving papers disclose the jurist assigned, if any. Ikegami's moving papers did not disclose to [Shepherd] the jurist assigned."). There is no local rule "SCLCR (5)(f)." However, SCLCR 7(b)(5)(F) states, in part: "All working copies shall state, in red ink in the upper right corner, the following: the date and time of such hearing, the jurist assigned, if any, and the Department or room number of the department where the motion is to be heard." (emphasis added). Nothing in the rule requires that copies provided to opposing counsel, as Shepherd suggests, include the judge's name. Shepherd's misreading of the SCLCRs serves to underscore their inability to comply with, or understand, the applicable court rules and the difficulties such failures manifest.

[14] Even were this Court to conclude that a finding tantamount to bad faith was not made by the trial court, the proper remedy is not to "vacate and reverse" the trial court's ruling. *See* Shepherd Br. at 10. Rather, this Court should remand the matter. *See, e.g.*, *S.H.*, 102 Wn. App. 476 ("Nonetheless, if the trial court fails to enter a finding that amounts to bad faith, remand is required."); Moreover, if this Court vacates the award, and upholds Judge Thorpe's frivolousness ruling; then the Ikegamis are entitled to receive payment from Ciocco for this amount because Judge Thorpe reduced the Ikegamis' award by this amount to avoid any double

D. The Ikegamis Are Entitled to Fees on Appeal.

With respect to Ciocco's and Shepherd's appeal, the Ikegamis respectfully request an award of fees under RAP 18.1(a), 18.9(a), and RCW 4.84.185. "An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal." *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 535, 79 P.3d 1154 (2004) (quotation and citation omitted). Here, both appeals meet this standard.

With respect to Ciocco's appeal, Judge Thorpe did not abuse his discretion in determining that Ciocco's lawsuit was frivolous. Indeed, Ciocco contends only that a claim he did not make (for a percentage of the buy fees, rather than the entire fees) was not frivolous. For the reasons discussed above, this argument lacks all merit. All of the challenged findings are supported by substantial evidence and, accordingly, Judge Thorpe's ruling that the action was frivolous must be affirmed. This appeal is particularly frivolous because Ciocco seeks to avoid the consequences of his actions by recasting his buy-fee claim after-the-fact into something quite different from the claim the tried to Judge Thorpe, which was found frivolous.

With respect to Shepherd's appeal, Judge Allendoerfer did not

---

recovery. (6/27/09 VRP 7, 15).

abuse his discretion by imposing terms against Shepherd for his failure to follow the court rules and the concomitant costs that the Ikegamis had to bear based on such failures. The terms imposed were a proper exercise of Judge Allendoerfer's inherent authority to control his courtroom and to adequately compensate the Ikegamis for Shepherd's failures. Reasonable minds cannot disagree that Judge Allendoerfer properly exercised his discretion. Shepherd's continued refusal to accept responsibility in the face of the court's clear finding that he did not comply with the court rules warrants additional fees and costs in this appeal.

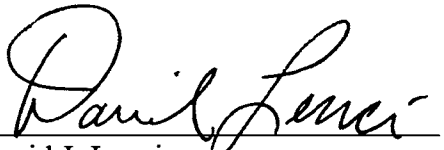
V. CONCLUSION

For the reasons stated above, the Ikegamis respectfully request that the Court affirm the decisions by Judge Thorpe and Judge Allendoerfer, and award the Ikegamis their fees and costs on appeal.

DATED this 5th day of June, 2009.

Respectfully submitted,

K&L GATES

By 

David J. Lenci, WSBA #7688
Michael K. Ryan, WSBA #32091
Christopher M Wyant, WSBA #35561
Attorneys for Respondents

Appendix A

Honorable Richard J. Thorpe

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

MICHAEL J. CIOCCO and KAREN T. CIOCCO, husband and wife, and the marital community composed thereof, Plaintiffs, v. FUMIO DOUGLAS IKEGAMI and PATRICIA IKEGAMI, husband and wife, and the marital community composed thereof, and ADZAM, INC., a Washington Corporation d/b/a Doug's Lynnwood Mazda, Defendants.	No. 04-2-05628-2 DECLARATION OF MICHAEL K. RYAN IN SUPPORT OF DEFENDANTS' MOTION FOR REASONABLE ATTORNEYS' FEES AND COSTS UNDER RCW 4:84.185 AND CIVIL RULE 11

I, Michael K. Ryan, do hereby declare as follows:

1. My name is Michael K. Ryan. I make this declaration of my own personal knowledge, and I am over the age of 18 and competent to testify to the matters set forth below. I am a resident of Seattle, Washington.

2. I am an attorney with Kirkpatrick & Lockhart Preston Gates & Ellis LLP, counsel of record in this action for Adzam, Inc., Fumio Douglas Ikegami and Patricia Ikegami (collectively, "Adzam"). I have personal knowledge of the facts discussed in this declaration and, if called as a witness, I could and would testify to such facts.

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

3. Attached as Exhibit A to this declaration is a true and correct copy of Mr. Ciocco's May 14, 2004 letter to Adzam, which was admitted as Exhibit 14 during trial.

4. Attached as Exhibit B to this declaration is a true and correct copy of Plaintiffs' Complaint.

5. Attached as Exhibit C to this declaration is a true and correct copy of Plaintiffs' 2004 tax return, which was admitted as Exhibit 100 during trial.

6. Attached as Exhibit D to this declaration is a true and correct copy of Mr. Ciocco's November 2001 letter to his attorney, which was admitted as Exhibit 22 during trial.

7. Attached as Exhibit E to this declaration is a true and correct copy of Plaintiffs' Answers to Adzam's First Set of Interrogatories.

8. Attached as Exhibit F to this declaration is a true and correct copy of the Court's order granting Adzam's Motion to Compel.

9. Attached as Exhibit G to this declaration is a true and correct copy of Plaintiffs' Answers to Adzam's Second Set of Interrogatories.

10. On numerous occasions, via both phone conference and email, we tried to ascertain exactly how Plaintiffs were calculating their damages and made numerous requests of Plaintiffs' counsel to provide us with that information. Rather than provide such information in a timely fashion, Plaintiffs' counsel instead sent us a letter on March 5, 2008—5 days before trial—setting out the purported damages. This letter was styled as an amended interrogatory answer. Once again, however, Plaintiffs and their counsel did not provide any methodology or back up analysis for any of the purported damages. Attached as Exhibit H to this declaration is a true and correct copy of Plaintiffs counsel's Supplemental Answer to Adzam's Damages Interrogatories dated March 5, 2008, which were only signed by Mr. Shepherd and not verified by either of the Plaintiffs.

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

11. In early December 2007, Defendants' filed a Motion to Dismiss Plaintiffs fraud allegations for failing to state the instances of fraud with the requisite specificity as required by Civil Rule 9(b). The hearing for this matter was originally set for December 7, 2007; however, due to Plaintiffs' counsel's failure to serve the Court with working copies of their Response, the hearing had to be rescheduled. Attached as Exhibit I to this declaration is a true and correct copy of a December 6, 2007 letter from Shepherd Abbott Carter describing their failure to provide working copies. The parties presented argument on the Motion to Dismiss before Judge Cowsert on December 11, 2007, and Judge Cowsert dismissed the fraud claims in their entirety based on Plaintiffs' failure to specify the exact nature of the fraud alleged. This dismissal occurred over three years after the initial lawsuit was filed and after substantial discovery had occurred.

12. During the course of this litigation, Adzam provided Plaintiffs' counsel with over 57,500 pages of documents and 21 depositions were taken.

13. Attached as Exhibit J to this declaration is a true and correct copy of Plaintiffs' Answer to Adzam's counterclaims.

I declare under penalty of perjury that the foregoing is true and correct:

EXECUTED this 14th day of April, 2008 at Seattle, Washington.

Michael K. Ryan

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

Exhibit A

Friday, May 14th, 2004

Doug,

I believe that it is time for us to bring our business to a conclusion with all the assets accumlated over the past 8 years plus. Now, we can either start itemizing everything involved or we can come to an agreement on it's worth like gentlemen, this will be for you to decide. I believe that a fair and equitable figure is roughly $2.5 million dollars. Please let me have your answer and your plan for payment by May 20th 2004 to avoid any further legal or very detrimental actions.

Sincerely,

Michael J. Ciocco

PENGAD 800-631-6989

42

Exhibit I

Shepherd · Abbott · Carter

A partnership of professional service corporations

Joe Abbott, P.S.
Carrie M. Coppinger Carter, P.S.
Douglas R. Shepherd, P.S.
Edward S. Alexander, Associate

December 6, 2007

Honorable Kenneth L. Cowsert
Snohomish County Superior Court
3000 Rockefeller Avenue M/S 605
Everett, WA 98201

RE: Ciocco vs. Ikegami, et al.
Snohomish County Superior Court Case No: 04-2-05628-2

Dear Judge Cowsert:

It was brought to my attention by your assistant that you have requested the parties re-note the pending motion for another date due to my failure to provide you with judges working copies.

Enclosed please find a copy of Plaintiff's Response to Defendants' Civil Rule 12(c) Motion for Dismissal of Fraud Claims. I apologize to the court and to opposing counsel.

Please call or write with any questions. Thank you.

Respectfully,
SHEPHERD ABBOTT CARTER

Douglas R. Shepherd

DRS/hs
Enclosures: (1) ref.
CC: David Lenci, Esq.
Michael Ryan, Esq.

Appendix B

Honorable Richard L. Thorpe
Noted for Consideration: June 27, 2008 at 9:00 a.m.

FILED
MAY 27 2008
SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

MICHAEL J. CIOCCO and KAREN T. CIOCCO, husband and wife, and the marital community composed thereof, Plaintiffs, v. FUMIO DOUGLAS IKEGAMI and PATRICIA IKEGAMI, husband and wife, and the marital community composed thereof, and ADZAM, INC., a Washington Corporation d/b/a Doug's Lynnwood Mazda, Defendants.	No. 04-2-05628-2 DECLARATION OF DAVID J. LENCI IN SUPPORT OF DEFENDANTS RCW 4.84.185 APPLICATION FOR EXPENSES, INCLUDING ATTORNEYS FEES

2008 MAY 27 PM 4:19
SNOHOMISH COUNTY
SUPERIOR COURT
COPY RECEIVED

I, David J. Lenci, do hereby declare as follows:

1. My name is David J. Lenci. I make this declaration of my own personal knowledge, and I am over the age of 18 and competent to testify to the matters set forth below. I am a resident of Seattle, Washington.

2. I am the lead trial attorney for defendants Fumio Douglas Ikegami, Patricia Ikegami, and Adzam, Inc. (collectively "Adzam") in the matter of Ciocco v. Ikegami, et al., Snohomish County Cause No. 04-2-05628-2. I have personal knowledge of the facts discussed in this declaration and, if called as a witness, I could and would testify to such facts.

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

3. I submit this declaration in accordance with the Court's order declaring Plaintiffs' claims "frivolous and advanced without reasonable cause" pursuant to RCW 4.84.185.

ATTORNEYS' FEES

4. In the course of this litigation, Adzam incurred $551,989.50 in attorneys' fees from Preston Gates & Ellis and later its successor Kirkpatrick & Lockhart Preston Gates Ellis LLP (together, "K&L Gates) in defending against plaintiffs' claims. A summary of the work performed by K&L Gates lawyers is reflected in the table below.

Timekeeper	Title	Hours	Value[1]
David J. Lenci	Partner	745	$322,462
Michael K. Ryan	Associate	653	$179,661
Christopher Wyant	Associate	107	$25,632
Alison Bettles	Associate	88	$18,920
Martha Rodriguez-	Associate	29	$4,365
TOTAL		1,622	$551,989.50

Table 1

5. In order to compute the value of fees subject to reimbursement, Adzam has deducted $10,000 from the total amount to represent time devoted by its attorneys to prosecuting Adzam's conversion counterclaim against Plaintiffs. The counterclaim was narrowly addressed in work done during the pleading, discovery and summary judgment state of this case. While $10,000 is likely to be substantially more than the actual value of the counterclaim work, that figure was used because of the difficulty associated with

[1] Since the attorneys' hourly rates varied over time, the "Value" figures reflect the hours worked at by the particular attorney at his or her hourly rates in place at the time.

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

calculating the actual value. Thus, the amount of attorneys' fees incurred by K&L Gates attorneys in actively defending against Plaintiffs' frivolous claims is **$541,989.50**.

6. Attached hereto as Exhibit A are a true and correct copies of the relevant billing reports from K&L Gates for this matter. Certain entries have been partially redacted to delete information that may disclose attorney-client privileged communications or attorney work product, but unredacted entries will be provided to the Court, on request, for *in camera* review.

7. I am a 1971 graduate of Dartmouth College. I graduated from the University of Washington School of Law with highest honors in 1977. I worked five years as a trial attorney for the United States Department of Justice from 1977 to 1982. Thereafter, I worked for the law firm of Culp Dwyer Guterson & Grader—later Culp Guterson & Grader—where I was a partner in the commercial litigation group. Following the dissolution of the Culp firm in 1996, I served as the Chief Civil Litigator in the Snohomish County Prosecutor's Office until 1999 when I came to the Preston Gates & Ellis firm, now known as K&L Gates. Since coming to this firm, I have practiced in the field of complex commercial litigation. I was the attorney primarily responsible for representing Adzam in this litigation and lead counsel for Adzam during the trial.

8. I, along with associate Michael K. Ryan, provided the vast majority of the work in this matter, including investigating the claims, conducting discovery, drafting pre-trial motions, and trying the case. To the extent possible, I used associates with lower billing rates than my own to do much of the work in this matter.

9. Michael K. Ryan is a litigation associate at the K&L Gates firm. Mr. Ryan graduated from Rutgers College in 1996 and Georgetown Law School in 2001, after which he served as clerk for the Honorable Frank J. Magill of the United States Court of Appeals for the Eighth Circuit. Mr. Ryan has practiced in litigation exclusively at the

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

K&L Gates firm since finishing his clerkship in 2002. Mr. Ryan was the primary associate throughout this case.

10. Christopher M. Wyant is a litigation associate at the K&L Gates firm. Mr. Wyant graduated from Pacific Lutheran University in 2001 and Seattle University School of Law in 2004, after which was a law clerk for the Honorable Justice Susan Owens, Washington State Supreme Court, and the Honorable Thomas S. Zilly, United States District Court, Western District of Washington. Mr. Wyant has practiced litigation exclusively at the K&L Gates firm since finishing his clerkships in 2006. Mr. Wyant began work on this case in 2008, providing assistance with Adzam's summary judgment motion, trial preparation and post-trial motions.

11. Alison Bettles graduated from Santa Clara University in 2004 and the Seattle University School of Law 2007. Ms. Bettles has practiced in litigation exclusively at the K&L Gates firm since graduating from law school in 2007. Ms. Bettles began work on this case in 2008, providing assistance with Adzam's motion to compel, trial preparation and post-trial motions.

12. Other K&L Gates attorneys, including Martha Rodriguez-Lopez, an associate who provided research and drafting for a motion for protective order, provided vital services to Adzam over the course of this case. Ms. Rodriguez-Lopez graduated from Williams College in 1997 and Stanford Law School in 2002, after which she was a law clerk for the Honorable Chief Judge Jose A. Fuste of the United States District Court for the District of Puerto Rico.

13. The legal work performed in this matter by the lawyers at K&L Gates can be roughly divided into five stages: (1) Investigation/Responsive Pleading; (2) Discovery; (3) Pre-trial Motions; (4) Trial Preparation/Trial; and (5) Post-Trial Motions and Submissions.

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

14. **Investigation/Responsive Pleading**. Both before and after Plaintiffs filed their complaint, attorneys at K&L Gates held several telephone conferences with the principals of Adzam, reviewed the Complaint and researched the basis for the claims, reviewed the documents initially identified as relevant, held discussions with Plaintiffs' counsel and drafted an Answer. This phase of the case consumed approximately 21 attorney hours.

15. **Discovery**. Discovery in this case was extensive and protracted. Adzam was required to answer 12 sets of discovery requests (four sets of interrogatories and requests for production to each of the three defendants). These requests were very detailed. For example, on December 21, 2004, Plaintiffs served their First Requests for Production of Documents to Defendant Adzam, Inc. and First Interrogatories and jSecond Requests for Production of Documents to Defendant Adzam, Inc. *See* Exhibit B to this Declaration. These voluminous discovery requests were also served on Mr. Ikegami and Mrs. Ikegami, individually. These two sets of discovery requests contained 49 interrogatories and 18 document requests addressed to each defendant. In responding to document requests, Adzam had to review and produce approximately 58,000 pages of documents.

16. In order to understand Plaintiffs' claims, Adzam sent Plaintiffs two sets of discovery requests and reviewed 2000 hard copy documents and additional computer records and electronically-stored information produced by Plaintiffs. Adzam's counsel also had to travel to various locations to review such records held by Plaintiffs. Deposition discovery was even more extensive given the number of witnesses identified by Plaintiffs and Adzam's inability to receive complete written discovery from Plaintiffs. In fact, K&L Gates attorneys were required to take or defend depositions on 21 separate occasions, including a second deposition of Mr. Ciocco made necessary because (1)

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

Adzam received new damage calculations just days before trial and (2) Plaintiffs failed to disclose that they had previous criminal convictions in their written disclosures until Adzam discovered that information independently. K&L attorneys spent approximately 897 hours working on discovery matters.

17. **Pre-Trial Motions.** In the course of this case, K&L Gates attorneys litigated five pre-trial motions. First, in August 2005 Adzam moved for a protective order, which was granted. Second, in December 2007, Adzam moved to dismiss Plaintiffs' fraud claim, which was granted. Third, in February 2008, Adzam moved for summary judgment dismissal of Plaintiffs remaining claims. That motion was granted in part by Judge Allendoerfer, but he later reversed his ruling. Fourth, Adzam filed a motion to compel discovery documents in March 2008, which was granted. Finally, Adzam was forced to respond to Plaintiffs' motion for reconsideration of the summary judgment motion (with which Adzam was not served) on the first day of trial. In total, approximately 250 hours of attorney time was expended on motions.

18. **Trial Preparation and Trial.** The trial was originally scheduled to cover two weeks, and we prepared accordingly. K&L Gates' attorneys undertook all the various tasks normally associated with trial preparation. Such tasks included completing Adzam's ER 904 submission and reviewing Plaintiffs' submission, discussing the trial with the clients, preparing witnesses, drafting motions in limine, drafting a motion to exclude an expert witness, drafting an extensive trial brief, preparing witness examination outlines, reviewing and selecting documents as trial exhibits, attending a mandatory mediation, and coordinating various matters with Plaintiffs' counsel. Additionally, as a result of the Court granting Plaintiffs' last-minute motion for reconsideration, K&L Gates attorneys were required to re-prepare several witnesses, revise their trial strategy to incorporate the partnership issues, and re-engage Adzam's expert witness. Trial lasted approximately five

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

and-a-half days, until the Court dismissed the case at the end of plaintiffs' evidence. During that time, K&L Gates attorneys were working long days to both prepare for and conduct trial. Defendants had prepared another four to five days of testimony: ready to present had we needed to put on our defense case. K&L Gates attorneys devoted approximately 654 hours to pre-trial preparation and the trial itself.

19. **Post-Trial Motions and Submissions.** Since trial concluded on March 17, 2008, K&L Gates attorneys have addressed several post-trial matters. Adzam drafted and argued formal Findings of Fact and Conclusions of Law, as well as the motion for fees and expenses under RCW 4.84.185 and CR 11, which is the basis for this Application. Adzam also drafted several pleadings related to its request for sanctions before Judge Allendoerfer, which relates to Plaintiffs' misfiling of their summary judgment papers and failure to serve Adzam with their motion for reconsideration. In all, approximately 235 hours were expended on post-trial matters and other submissions.

20. **Application for Expenses.** Finally, K&L Gates attorneys expended considerable amounts of time gathering and assembling information, and work on the pleadings for this Application since the latest billing records were collected and calculated (May 18, 2008). Adzam will supplement its Application with those figures in its reply brief and provide copies of the relevant records to Plaintiffs' counsel and the Court.

21. The hours and fees attributable to each category are closely approximated as follows:

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

CATEGORY	HOURS	VALUE[2]
Investigation/Responsive Pleading	23	$5,513.50
Discovery	657	$235,875.50
Pre-trial Motions	246	$66,970.00
Trial Preparation/Trial	461	$165,769.00
Post-Trial Motions and Submissions	235	$82,425.50

Table 2

22. As with most firms, lawyers' hourly rates tend to adjust upward over time. K&L Gates is no exception. Table 3 below shows how the yearly rates for each attorney who worked on the case charged over the duration of this litigation.

YEAR	ATTORNEY	VALUE
2004	David Lenci	$345
	Michael Ryan	$175
2005	David Lenci	$360
	Michael Ryan	$195
	Martha Rodriguez-Lopez	$150
2006	David Lenci	$395
	Michael Ryan	$235
2007	David Lenci	$420
	Michael Ryan	$270
2008	David Lenci	$450
	Michael Ryan	$315

[2] As noted above, since the attorneys' rates varied our time, the "value" figures reflect the hours worked at the rates in place at the time.

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

	Christopher Wyant	$240
	Alison Bettles	$215

Table 3

OTHER EXPENSES

23. In addition to its attorneys' fees, Adzam incurred substantial out-of-pocket expenses during the life of this case. Such costs included paralegal assistance, computer assisted research, expert witnesses, travel/lodging, photocopying and document production, telephone charges, court reporter costs, filing fees and courier services and were incurred during work performed by or for K&L Gates in defending against Plaintiffs' claims.

24. For example, paralegal Patrick Felde provided indispensable services in the form of reviewing documents, preparing pleadings and creating exhibits for depositions and trial use. He also provided support during the trial itself.

25. Those expenses are listed below by category:

CATEGORY	AMOUNT
Paralegal Assistance (Patrick Felde)	$34,283.00
Computer Research	$5,348.47
Expert Witness Fees	$22,450.70
Copying Costs/Document Production	$10,452.17
Phone/Fax	$258.77
Travel/Lodging	$3,652.96
Court Reporter costs	$7,927.11
Court Fees/Filing Fees	$302.50
Courier Fees/Service Fees	$1,602.51
TOTAL	**$86,278.19**

Table 4

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

26. These out-of-pocket expenses were incurred defending against Plaintiffs' claims. All of the expenses listed above have been paid. Most of these costs are reflected in the billing statements in Exhibit A.

27. True and correct copies of the invoices from Adzam's expert witness, Diane Murphy of Moss Adams, are attached as Exhibit C to this declaration.

28. A true and correct copy of a calculation of the travel and lodging expenses is attached as Exhibit D to this declaration. Those costs were paid directly by Adzam.

29. It should be noted in closing that Adzam also incurred other fees and expenses in this case that it is not requesting. First, Adzam as noted earlier, is not requesting fees related to its conversion counterclaim. The counterclaim was narrowly addressed in work done during the pleading, discovery and summary judgment state of this case. As a result, Adzam has deducted $10,000 from the total fee request, although that estimate is almost certainly substantially in excess of the actual fees incurred with respect to the counterclaim. Second, several members of K&L Gates' legal support staff, including librarians, document clerks and legal assistants, provided minor clerical services over the course of this case. The fees for those individuals, which were paid by Adzam, total approximately $9,000. Adzam is not requesting those fees. Finally, Adzam is not requesting miscellaneous costs totaling approximately $900.00.

SUMMARY

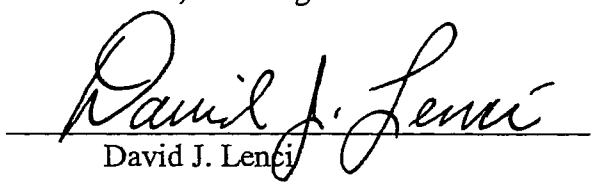
30. The total of all attorneys fees and out-of-pocket expenses incurred in opposition to Plaintiffs' frivolous claims are set forth below:

Attorneys' Fees	**$541,989.50**
Other Expenses	**$86,278.19**
TOTAL	**$628,267.69**

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

I declare under penalty of perjury that the foregoing is true and correct:

EXECUTED this 27th day of May, 2008 at Seattle, Washington.



David J. Lenci

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

Appendix C

COPY RECEIVED
2008 APR 16 AM 11:08
SNOHOMISH COUNTY
SUPERIOR COURT

Honorable Richard J. Thorpe
Noted for Consideration: May 13, 2008 @ 1 p.m.
Oral Argument Set

FILED
APR 16 2008
SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

MICHAEL J. CIOCCO and KAREN T. CIOCCO, husband and wife, and the marital community composed thereof, Plaintiffs, v. FUMIO DOUGLAS IKEGAMI and PATRICIA IKEGAMI, husband and wife, and the marital community composed thereof, and ADZAM, INC., a Washington Corporation d/b/a Doug's Lynnwood Mazda, Defendants.	No. 04-2-05628-2 DEFENDANTS' MOTION FOR REASONABLE ATTORNEYS' FEES AND COSTS UNDER RCW 4.84.185 AND CIVIL RULE 11

I. RELIEF REQUESTED AND INTRODUCTION

Defendants Fumio Douglas Ikegami, Patricia Ikegami and Adzam, Inc. ("Adzam") respectfully request that the Court direct Plaintiffs Michael and Karen Ciocco (collectively "Plaintiffs") to pay Adzam's reasonable attorneys' fees and costs under RCW 4.84.185. Adzam also requests an award of fees and costs under Civil Rule 11.

As demonstrated below and at trial, this case, from the very outset, was not grounded in law or fact, and Plaintiffs' counsel failed to undertake a reasonable prefiling investigation into both the facts and the law. Had such an investigation occurred, this

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580

highly contentious litigation, and the substantial attorneys' fees and litigation expenses it generated, could have been avoided. As a result, Adzam is entitled an award of litigation expenses under RCW 4.84.185 and sanctions under Civil Rule 11.

II. STATEMENT OF GROUNDS

Adzam's Motion is based on the standards set forth under RCW 4.84.185 and Civil Rule 11.

III. STATEMENT OF ISSUES

1. Whether the Court should grant Adzam's Motion under RCW 4.84.185 because Plaintiffs' action was frivolous and advanced without reasonable cause.

2. Whether the Court should grant Adzam's Motion because of Plaintiffs' and their counsel's failure to comply with Civil Rule 11.

IV. EVIDENCE RELIED UPON

Adzam relies upon the Declaration of Michael K. Ryan ("Ryan Decl.") and exhibits thereto, in support of its Motion, the papers and pleadings on file with the Court, and the testimony adduced and exhibits admitted at trial.

V. RELEVANT FACTS[1]

In early May 2004, without any notice to Adzam, Mr. Ciocco quit his employment with the Adzam organization. At that time, Mr. Ciocco did not tell Mr. Ikegami why he quit, nor did he demand any additional compensation or an accounting of partnership assets. A few weeks later, on May 14, 2004, Mr. Ciocco wrote a letter to Mr. Ikegami demanding $2.5 million dollars for Mr. Ciocco's interest in the alleged partnerships. Ryan Decl., Exhibit A (May 14 Letter). Notably, this letter made no mention of buy fees,

[1] Rather than reiterate those facts established at trial, Adzam will only set forth those facts relevant to the issues presented in this Motion and, when appropriate, will address those facts established in the Court's March 17, 2008 Oral Ruling on Adzam's Civil Rule 41(b)(3) Motion.

KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158

"inspections fees," or other expenses, that later were the grist of the trial. In any event, Plaintiffs subsequently initiated this lawsuit on August 19, 2004.

In their Complaint, Plaintiffs asserted various causes of action based on the creation of an oral partnership(s), breach of a fiduciary duty, fraud, unjust enrichment and breach of an employment agreement. Ryan Decl., Exhibit B (Plaintiffs' Complaint).[2] In particular, Plaintiffs' flagship claim alleged the creation of a partnership in Doug's Lynnwood Hyundai and Doug's in Everett, or alternatively, the creation of two separate partnerships. Ryan Decl., *Id.* at ¶¶ 7 & 8. With respect to Plaintiffs' fraud claims, which were ultimately dismissed pursuant to Civil Rule 9(b), they alleged that Adzam fraudulently charged the partnership for non partnership expenses. *Id.* at ¶ 23. Plaintiffs also alleged that Adzam would be unjustly enriched by retaining any "money paid for services not rendered." *Id.* at ¶ 24. Finally, as an alternative claim, Plaintiffs' alleged that "Defendants' failure to pay salary, commissions, and $250 buy fees constitute a breach of an employment agreement." *Id.* at ¶ 26. None of these contentions were supported by facts or law, and with reasonable prefiling investigation the true facts should have become apparent.

During the course of this litigation, Adzam provided Plaintiffs' counsel with over 57,500 pages of documents and 21 depositions were taken. Ryan Decl. at ¶ 12. During the course of discovery, not a single document surfaced that demonstrated any partnership between Adzam or Mr. Ikegami and Mr. Ciocco in either of the two car sales operations. To the contrary, during discovery, Plaintiffs' produced to Adzam numerous documents, including Plaintiffs' own tax returns and written statements, that expressly demonstrated that no such partnership existed between the parties. *See, e.g.*, Ryan Decl., Exhibit C

[2] Notably, Plaintiffs' Complaint was signed by Mr. Douglas Shepherd of Shepherd and Abbott (which later became Shepherd, Abbot & Carter), and Plaintiffs provided no verification.

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158

(2004 Tax Return) & Exhibit D (November 15, 2001 letter from Mr. Ciocco to his attorney). In fact, Plaintiffs' own 2004 tax return, which was actually filed over a year after this suit began, reported no income from any partnership with Adzam. Despite this damning evidence, Plaintiffs continued to pursue their partnership claim, while also pursuing their employment and quasi-contract claims.

On June 6, 2005, Plaintiffs' provided answers on Adzam's First Set of Interrogatories, which were certified by Plaintiffs' counsel Mr. Edward Alexander and verified by both Mr. and Mrs. Ciocco. Ryan Decl., Exhibit E (Plaintiffs' Answers to First Set of Interrogatories). Several of the answers given in those interrogatories were unsupportable by the facts or simply false. For example, in answering Interrogatory No. 9, which requested, *inter alia*, a list of any criminal actions that either of Plaintiffs was involved in, the answer stated "None." *Id.* at p. 9. As this Court is aware, this answer was patently false and Adzam had to file a Motion to Compel, which was granted, to get Plaintiffs and their counsel to amend this answer.[3] Ryan Decl., Exhibit F (Ruling on Motion to Compel).

Not only were the claims specious as to liability, there was never any tangible objective evidence demonstrating financial loss. On December 10, 2007, Plaintiffs' attempted to answer a set of discovery requests from Defendants seeking information regarding Plaintiffs' damages claims. These answers were certified by Mr. Douglas Shepherd and verified by Mr. Ciocco. Ryan Decl., Exhibit G (Answers to Second Interrogatories). In response to questions regarding the amount of damages and how such damages were calculated, Plaintiffs' merely set forth general dollar amounts for the years 1996 to 2004 and failed to provide any explanation as to how those figures were derived.

[3] Although the Commissioner granted Adzam's Motion to Compel, she noted that she was leaving the decision on whether to award fees to the Trial Court. Adzam requests an award of fees for having to file its Motion to Compel.

KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158

Id. at Exhibit "A", pp. 2-3. Moreover, Adzam's discovery requests attempted to ascertain exactly what damages were connected to which of the claims being made by Plaintiffs, and tendered specific interrogatories tracking the language used in Plaintiffs' complaint. *Id.* at pp. 11-14. Once again, rather than providing answers to the questions at issue, Plaintiffs' counsel objected on the grounds that the "work product" privilege excused them from providing such information. *Id.* at Exhibit "A", p. 3. Thus, Plaintiffs and their counsel stymied Adzam's efforts to determine exactly what Plaintiffs' claims were. This was improper.

After several "meet and confer" sessions, Plaintiffs' counsel, Mr. Shepherd, finally provided supplemental answers to Adzam's damages request, 5 days before trial was to commence. Ryan Decl., ¶ 10 & Exhibit H (March 5, 2008 letter). Notably, this supplemental response was not verified by either of the Plaintiffs and only signed by Mr. Shepherd. Once again, even the supplemental answers were woefully inadequate. For example, with respect to any claims for "**expenses for Mazda store charge [sic] erroneously to Creative/Everett,**" Plaintiffs' counsel merely stated that such expenses totaled $531,500, yet provided no explanation whatsoever as to how that amount was arrived at and exactly which "expenses" were erroneously charged to the locations that Mr. Ciocco managed. *Id.*, (March 5, 2008 letter at p. 2) (emphasis added). Eventually, at trial, Mr. Ciocco frankly admitted that he had no specifics as to any expenses that were misapplied, and that his $531,000 figure was "speculation."

Also, in early December 2007, Defendants' filed a Motion to Dismiss Plaintiffs' fraud allegations for failing to state the instances of fraud with the requisite specificity as required by Civil Rule 9(b). Ryan Decl., ¶ 11. The hearing for this matter was originally set for December 7, 2007; however, due to Plaintiffs' counsel's failure to serve the Court with working copies of their Response, the hearing had to be rescheduled. *Id.* at Exhibit I

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158

(Letter to Court). Judge Cowsert ultimately dismissed the fraud claims and such occurred over three years after the initial lawsuit was filed and after substantial discovery had occurred. *Id.*

VI. LEGAL AUTHORITY AND ARGUMENT

A. Legal Standard Under RCW 4.84.185.

RCW 4.84.185 authorizes a trial court to award a prevailing party its reasonable expenses, including attorney's fees. Such expenses are awarded against the party, not the party's attorney.[4] *See, e.g.*, *Skimming v. Boxer*, 119 Wn. App. 748, 756, 82 P.3d 707 (2004). "The frivolous lawsuit statute has a very particular purpose: that purpose is to discourage frivolous lawsuits and to compensate the targets of such lawsuits for fees and expenses incurred in fighting meritless cases." *Biggs v. Vail*, 119 Wn.2d 129, 137, 830 P.2d 350 (1992) (interpreting former RCW 4.84.185, which included the phrase "as a whole.") ("*Biggs I*").

The statute provides, in pertinent part:

> In any civil action, the court having jurisdiction may, upon written findings by the judge that the action . . . <u>was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action</u>[.] This determination shall be made upon motion by the prevailing party after a . . . final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such a motion be filed more than thirty days after entry of the order.

RCW 4.84. 185. (emphasis added). "A frivolous action has been defined as one that cannot be supported by any rational argument on the law or facts." *Layne v. Hyde*, 54 Wn. App. 125, 135, 773 P.2d 83 (1989) (citing *Bill of Rights Legal Found. v. Evergreen State College*, 44 Wn. App. 690, 696-97, 723 P.2d 483 (1986)); *see also Tiger Oil Corp.*

[4] Civil Rule 11 allows for sanctions against a party's attorney and/or the party.

KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE (206) 623-7580

v. Dept. of Licensing, State of Wash., 88 Wn. App. 925, 938, 946 P.2d 1235 (1997) ("A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts.").

The decision regarding whether to award such fees is within this Court's sound discretion. *Zink v. City of Mesa*, 137 Wn. App. 271, 276, 152 P.3d 1044 (2007). Because this Court is in the unique position of viewing the witnesses and presiding over the proceedings, appellate courts are loathe to "substitute [their] judgment" for this Court's. *Id.* at 277.

B. Legal Standards Under Civil Rule 11.

As an alternative in addition to RCW 4.84.185, Defendants request sanctions against Plaintiffs' counsel and/or Plaintiffs under CR 11. Civil Rule 11 states in pertinent part:

> The signature of a party or of an attorney constitutes a certificate by the party or an attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. . . . If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, <u>may impose upon the person who signed it, a represented party, or both, an appropriate sanction,</u> which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

Civil Rule 11(a). Courts have construed CR 11 to allow a "trial court to impose sanctions, including reasonable expenses and attorney fees incurred because of the <u>filing</u> of a frivolous lawsuit." *Manteufel v. Safeco Ins. Co. of Am.*, 117 Wn. App. 168, 175-76, 68

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158

P.3d 1093 (2003) (emphasis added); *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994) ("*Biggs II*") (CR 11 is meant to "deter baseless filings and to curb abuses of the judicial system") (quotation, emphasis and citation omitted). The determination regarding whether to assess such sanction is left to the sound discretion of the trial court. *Manteufel* at 176.

In assessing terms against an attorney, the court must consider and "evaluate a party's prefiling investigation by inquiring what was reasonable for the attorney to have believed at the time he filed the complaint." *Id.*; *Biggs II* at 197 (CR 11 requires inquiry into "what was reasonable to believe at the time the pleading, motion or legal memorandum was submitted.") (quotation and citation omitted). When imposing such sanctions the court must specify which conduct is sanctionable and make a finding regarding the propriety of filing the claim. *McNeil v. Powers*, 123 Wn. App. 577, 590-91, 97 P.3d 760 (2004). Finally, the simple fact that a claim ultimately makes it to trial does not preclude an award of sanctions. *See, e.g.*, *In re Estate of Tosh*, 83 Wn. App. 158, 164, 920 P.2d 1230 (1996) ("Her similar failure to substantiate her claim at trial supports the trial court's findings and its award of CR 11 sanctions.")

C. Argument

Plaintiffs' action against Adzam was frivolous. The claims asserted were without any support in either law or fact, or both. The gist of this lawsuit was that Mr. Ciocco's business relationship with Defendants was such that he was entitled to millions of dollars more than the $4 million in compensation received from them over the prior eight years. As shown by the paucity of the evidence at trial, that view is unfounded and baseless, both factually and under the law. Accordingly, Adzam is entitled to its reasonable litigation expenses and fees under RCW 4.84.185. Alternatively, or in combination therewith, Adzam is also entitled to an award of sanctions under Civil Rule 11 because there was no

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158

basis in law or fact with respect to the Complaint, and several of Plaintiffs' answers to Interrogatories, which were all certified by Plaintiffs' counsel and/or verified by Plaintiffs, were either false or woefully inadequate and therefore not in compliance with Rule 11.

1. Partnership Claim

The primary issue in this case was whether Mr. Ciocco was a partner or co-owner with Mr. Ikegami and/or Adzam in either (or both) the Doug's Lynnwood Hyundai and the Doug's In Everett car sales locations. This claim was not well-grounded in fact or law.

Plaintiffs' Complaint alleges that "[i]n or around 1996, Michael J. Ciocco and Mr. Ikegami and/or Mr. Ikegami for and on behalf of Adzam, Inc., entered into an oral partnership agreement for the purposes of operating a business engaged in selling cars under the name of Doug's Hyundai[.]." Ryan Decl., Exhibit B at ¶ 7. Similarly, it alleges that a second partnership was formed in or around 1999 with respect to Doug's in Everett. *Id.* at ¶ 8; *see also* Ryan Decl, Exhibit J at ¶ 5 ("[P]laintiffs affirmatively allege that after May 1, 1996, defendants and plaintiffs entered into a partnership[.]") (Plaintiffs' Answer to Defendants' Counterclaims). These two allegations are inconsistent with Mr. Ciocco's own testimony at trial where he testified that maybe the partnership began in 1999 or sometime in late 2001. Furthermore, the Complaint also states that "typical employment agreements" generally included a "$250 buy fees for each vehicle purchased for the dealerships." Ryan Decl., Exhibit B at ¶ 10. This allegation also has no basis in fact because the evidence demonstrated that no employee of Adzam ever received a $250 "finder's fee" for purchasing vehicles.

Despite voluminous discovery in this case, Plaintiffs were unable to find a single document that objectively demonstrated the existence of a partnership or co-ownership arrangement between Mr. Ciocco and Adzam. By contrast, Plaintiffs' own tax returns and

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158

Mr. Ciocco's own written correspondence show that he truly did not believe he was a co-owner in the business, and that such a claim was simply an after-the-fact attempt to extract additional money from Adzam. In addition, Plaintiffs' own expert testified that, based on his review of the financial records, in his opinion no partnership existed between Mr. Ciocco and Adzam. Despite this testimony and the knowledge that Plaintiffs' expert came to this conclusion as early as December 2007, Plaintiffs still pursued their partnership claim through to trial, aided by their own glitch in dealing with the summary judgment motion. This reckless course of litigation and intentional disregard of their own expert's view lends further support to a finding that Plaintiffs' partnership claim was frivolous. *See, e.g.*, *Koch v. Mutual of Enumclaw Ins. Co.*, 108 Wn. App. 500, 510, 31 P.3d 698 (2001) (upholding award under RCW 4.84.185 where party's "own physician provided no support for her claim").

2. Fraud Claim

Also, in early December 2007, Defendants' filed a Civil Rule 12(b)(6) Motion to Dismiss Plaintiffs' fraud allegations for failing to particularize the instances of fraud with the requisite specificity as required by Civil Rule 9(b). Ryan Decl., ¶ 11. The hearing for this matter was originally set for December 7, 2007; however, due to Plaintiffs' counsel's failure to serve the Court with working copies of their Response, the hearing had to be rescheduled. *Id.* at Exhibit J. The parties presented argument on that Motion before Judge Cowsert on December 11, 2007 and he dismissed the fraud claim in its entirety based on Plaintiffs' failure to specify the exact nature of the fraud alleged. This dismissal occurred over three years after the initial lawsuit was filed and after substantial discovery had occurred. *Id.* Plaintiffs never bothered to seek leave to amend this claim to make the requisite particularized allegations, but let the fraud claim just drop out of the case. There

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158

was no basis in law or fact to substantiate their fraud claim and this is supported by Judge Cowsert's dismissal of this claim.

3. Breach of Employment Contract Claim

With respect to Plaintiffs' breach of employment contract claim, the law is well-settled that an employer may unilaterally alter or amend the terms and conditions of employment if an employer gives the employee reasonable notice of the change and the employee continues working. *See, e.g.*, *Gagliardi v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 434, 815 P.2d 1362 (1991). That this rule of law was firmly established long before Plaintiffs filed this lawsuit only further demonstrates the frivolous nature of their claims. *See, e.g.*, *Layne*, 54 Wn. App. at 135 (1989) ("The law is well settled in the areas of judicial immunity, abuse of process, and conspiracy. This is not a case of a creative theory being applied in an unsettled area of law. Therefore, the trial court did not abuse its discretion in awarding attorney's fees and costs . . . pursuant to CR 11 and RCW 4.84.185."); *cf. Déjà vu-Everett-Federal Way, Inc. v. City of Federal Way*, 96 Wn. App. 255, 264, 979 P.2d 464 (1999). In fact, Plaintiffs' cited absolutely no authority attempting to contradict or distinguish the rule of law established in *Gagliardi*, yet proceeded to trial under the alternate theory that Mr. Ciocco's "employment contract" was somehow breached every time Mr. Ikegami did not give Mr. Ciocco what he wanted. This failure further demonstrates that Plaintiffs' claim on this score was frivolous. *See, e.g.*, *Koch*, 108 Wn. App. at 510 (2001) (upholding award under RCW 4.84.185 where party "cited no relevant authority to support [its] argument").

With respect to CR 11, the same is true: "[R]easonable legal and factual research would have revealed" that *Gagliardi* precluded any claim based on an employment contract under the circumstances of this case and that Plaintiffs' Complaint "was not well grounded in fact." *Manteufel*, 117 Wn. App. at 176-77 (affirming sanctions and noting

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158

that fees under RCW 4.84.185 and CR 11 are not duplicative). Had Plaintiffs' counsel employed reasonable prefiling diligence and undertook a inquiry as to the actual facts and law, they would have concluded that any such claim based on an at-will employment contract had no basis in law or fact. For example, prefiling investigation would have demonstrated that each and every time Mr. Ciocco complained to Mr. Ikegami, or his charges, about his pay that it was either taken care of in a favorable manner or Mr. Ciocco was told that that was the way it was going to be and he continued his employment. Knowing these facts, counsel should have understood that *Gagliardi* barred Plaintiffs' claims. Indeed, Plaintiffs' own Answers to Interrogatories demonstrate that Plaintiffs' counsel had knowledge of these facts yet still continued to pursue this litigation. *See, e.g.*, Ryan Decl., Exhibit E (Answer to Interrogatory No. 6 at p. 9) ("I demanded my share. Mr. Ikegami agreed to pay me my share going forward, but would not pay for any he had previously received.") & Exhibit B (Plaintiffs' Complaint at ¶ 19) ("After Michael J. Ciocco pointed out these irregularities, Ikegami usually appeared to have corrected them.").

4. Unjust Enrichment Claim

The so-called unjust enrichment claim was clearly the catch-all residuary claim in this case. Plaintiffs never articulated in their discovery, trial brief, opening statement or trial evidence any cogent theme or theory that mapped this equitable doctrine to the facts of their case. Essentially, the question before the Court was whether the Defendants had received more "value added" from Mr. Ciocco's work performance, than the $4 million they had already compensated him. Defendants submit that the answer is a resounding "No", and that it was a waste of judicial resources and Defendants' time and money to bring this question to court.

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158

Moreover, there was also no reasonable argument advanced as to why the statute of limitations did not apply to the amounts that Plaintiffs claimed they were owed under their unjust enrichment theory. *See, e.g.*, *Reid v. Dalton*, 124 Wn. App. 113, 123, 100 P.3d 349 (2004) (upholding trial court's where actions were barred by statute of limitations and party "nevertheless proceeded with his action."). Plaintiffs' counsel should have recognized as much, and with reasonable diligence and research, should have concluded that Mr. Ciocco own actions, as well as the timing of such alleged damages, were precluding by the statute of limitations for unjust enrichment, which is three years.

5. Speculative Damages

Finally, if there remains any doubt about the dubious nature of Plaintiffs' claims, Mr. Ciocco's complete failure to articulate in any meaningful way exactly what additional money he was owed or why he was owed such additional money, further underscores the frivolous nature of Plaintiffs' claims. Indeed, despite Adzam's repeated request for a rational meaningful explanation of such damages and how they were calculated, Plaintiffs and their counsel repeatedly refused to provide any such calculations and simply kept Adzam, and its counsel, guessing as to the exact nature of Plaintiffs' damages claims. For example, in a letter dated March 5, 2008, Plaintiffs' counsel averred that Plaintiffs' were owed $531,500 in improperly charged "expenses", yet provided absolutely no factual or even theoretical basis for this figure. Ryan Decl., Exhibit H (March 5, 2008 letter). Indeed, when pressed on this issue at trial, Mr. Ciocco simply reduced this amount to $400,000. But when further pressed, he was unable to explain how or why the original amount was reduced by $131,500 or how he arrived at $400,000. Put simply, Plaintiffs' damages calculations were no more than guesswork, advanced by both Plaintiffs and their counsel all the way through trial. Even then, the Plaintiffs spent hours having witnesses

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158

testify about "buy fee schedules" and ledgers trying in vain to parse out some ill-defined financial shortfall. These efforts bore no fruit.

VII. CONCLUSION

Defendants respectfully request that the Court grant its Motion, and award Adzam their attorneys' fees under RCW 4.84.185 and/or Civil Rule 11 because Plaintiffs' claims were frivolous and advanced without reasonable cause. Had Plaintiffs' counsel conducted a reasonable investigation of both the law and the facts before filing the Complaint and signing discovery responses, this entire litigation could have been avoided.

DATED this 14th day of April, 2008.

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP

By _____
David J. Lenci, WSBA # 7688
Michael K. Ryan, WSBA # 32091
Attorneys for Defendants
Fumio and Patricia Ikegami and Adzam, Inc.

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580

Appendix D

Honorable Judge Thorpe
Hearing set for May 13, 2008, @ 1:00 p.m.

IN THE SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

MICHAEL J. CIOCCO and KAREN T. CIOCCO, husband and wife, and the marital community composed thereof, Plaintiffs, vs. FUMIO DOUGLAS IKEGAMI and PATRICIA IKEGAMI, husband and wife, and the marital community composed thereof, and ADZAM, INC., a Washington Corporation d/b/a Doug's Lynnwood Mazda, Defendants.	**CAUSE NO. 04-2-05628 –2** **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' SECOND MOTION FOR FEES AND COSTS** **SENT ON 5/09/08 VIA FAX FOR FILING IN SNOHOMISH COUNTY SUPERIOR COURT**

SHEPHERD ABBOTT CARTER
ATTORNEYS AT LAW
1616 CORNWALL, SUITE 100
BELLINGHAM, WASHINGTON 98225
PHONE (360) 647-4567 OR (360) 733-3773
FACSIMILE (360) 647-9060

COME NOW plaintiffs, through counsel, and in opposition to defendants' RCW 4.84.185 and CR 11 motions, argues as follows:

I – RCW 4.84.185

> In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

RCW 4.84.185.

In any civil action, before the trial court can determine the action was frivolous it must determine that the entire lawsuit, all claims, were frivolous. To be frivolous all claims must not be supported by any rational argument on the law or facts as testified to. The standard "is facts as testified to" not facts believed. A lawsuit cannot be frivolous because the finder of fact did not believe the facts submitted by plaintiff.

Defendant, moving party, understood that this litigation, in large part, would be won or lost based on credibility. And, defendants understood that to win defendants needed to convince the court that Mr. Ciocco was not credible.

> "[T]he court is not required to accept the Plaintiff's evidence as true . . . What it may do at this point is weigh the credibility of the testimony . . . It may believe or disbelieve Plaintiff's evidence. It may resolve testimonial conflicts at this point. . . . [Plaintiffs have presented . . . discussion between Mr. Ciocco and Mr. Ikegami that such a partnership

SHEPHERD ABBOTT CARTER
ATTORNEYS AT LAW
1616 CORNWALL, SUITE 100
BELLINGHAM, WASHINGTON 98225
PHONE (360) 647-4567 OR (360) 733-3773
FACSIMILE (360) 647-9060

> exists, where no one else witnessed those conversations. Mr. Ikegami says those conversations didn't occurred. Mr. Ciocco say they do.
>
> At this point, you can weigh the credibility of the testimony.

VR of Motion to Dismiss, argument of Mr. Ryan, pages 3-4.

Not only does defendants' argument in support of their motion at the close of plaintiffs' case prohibit fees and costs under RCW 4.84.185, so do defendants' proposed findings of facts and conclusions of law.

> A(15). Mr. Ciocco's own self-serving testimony . . . is not credible. . . ."
> B(3). Mr. Ciocco's testimony regarding damages was not credible . . ."
> C (13). . . . . "Plaintiffs failed to show on a more probable than not basis that he was cheated or that his income was improperly reduced."

The above proposed findings demonstrate defendants understanding and belief that defendants prevailed at trial because that the fact finder did not believe plaintiff and without plaintiff's testimony being believed, plaintiffs did not carry their burden of proof.

> [T]he language and the history of the frivolous lawsuit statute (RCW 4.84.185) are clear. The lawsuit, as a whole, that is in its entirety, must be determined to be frivolous and to have been advanced without reasonable cause before an award of attorneys' fees may be made under the statute.
> *Id.* at 137, 830 P.2d 350. In *Biggs I*, we reversed the trial court's award of fees under RCW 4.84.185 because the trial court found only three of four claims asserted by Biggs to be frivolous. Because the fourth claim advanced to trial, the suit could not be considered frivolous in its entirety. Thus,fees under RCW 4.84.185 were not appropriate. *Id.* at 132, 137, 830 P.2d 350. Under *Biggs I*, **if any claims advance to trial, a trial court's award of fees under RCW 4.84.185 cannot be sustained**. (Emphasis added.)

State es rel. Quick-Rubenv. Verharen, 136 Wn.2d 888, 903-04, 969 P.2d 64 (1998)

SHEPHERD ABBOTT CARTER
ATTORNEYS AT LAW
1616 CORNWALL, SUITE 100
BELLINGHAM, WASHINGTON 98225
PHONE (360) 647-4567 OR (360) 733-3773
FACSIMILE (360) 647-9060

II – CR 11

(a) Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address. Petitions for dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and modification of decrees issued as a result of any of the foregoing petitions shall be verified. Other pleadings need not, but may be, verified or accompanied by affidavit. The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact ; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

CR 11(a).

SHEPHERD ABBOTT CARTER
ATTORNEYS AT LAW
1616 CORNWALL, SUITE 100
BELLINGHAM, WASHINGTON 98225
PHONE (360) 647-4567 OR (360) 733-3773
FACSIMILE (360) 647-9060

Before awarding sanctions under CR 11, the court is required to make a finding either that the claim or argument is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or that the pleading was filed for an improper purpose. *Biggs v. Vail,* 124 Wn.2d 193, 200-01, 876 P.2d 448 (1994) (Biggs II).

CR 11 is intended "to deter baseless filings and to curb abuses of the judicial system." *Id.,* 124 Wn.2d at 197.

As regards the allegation that plaintiffs' first and second answers to Interrogatory No. 9 require fees is not supported by the rule or application of the rule. There is no evidence that plaintiffs or plaintiffs' lawyer knew a different answer when first asked. In fact if plaintiff had known differently at the time of the first answer, disclosing two or three misdemeanors over ten years old would have been providing completely irrelevant information. ER 404.

> **b) Time Limit.** Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

ER 609(b).

The rules of evidence seem to anticipate that 20 year old convictions have little or no evidentiary value. Therefore, before they are used or discussed the party/witnesses with the conviction has a right to prior notice. In part, prior notice provides the party/witnesses with time to review, refresh

SHEPHERD ABBOTT CARTER
ATTORNEYS AT LAW
1616 CORNWALL, SUITE 100
BELLINGHAM, WASHINGTON 98225
PHONE (360) 647-4567 OR (360) 733-3773
FACSIMILE (360) 647-9060

memory and contest the old convictions. To suggest that counsel should not take time to investigate, review and discuss Deposition Exhibit 176 before supplementing a discovery response is not appropriate. CR 11 requires the witness and the attorney to inquiry reasonably under the circumstances. That is precisely what occurred.

Finally, defendants CR 11 argument, that the supplemental answer should have been consistent with defendants' documents or plaintiffs' document and not consistent with what Mr. Ciocco understood to be the truth, is an argument that Mr. Ciocco and his attorneys should have violated CR 11 just to satisfy the defendants, or perhaps just to make Mr. Ciocco look better, even when Mr. Ciocco believed the record to be incorrect.

Plaintiffs' factual response to defendants other discovery allegations are contained in the First and Second Declarations of Shepherd filed herewith. However, even assuming defendants were correct as regards the damage matters, and defendants are not, defendants motion under CR 11 must be denied.

> CR 11 applies to 'every pleading, motion, and legal memorandum' . Since Clipse's discovery disclosure is neither a complaint, an answer, a reply to a counterclaim, an answer to a cross claim, a third party complaint, or a third party answer, it is not a 'pleading' under CR 7(a). *See* Black's Law Dictionary 1037 (5th ed. 1979) (defining 'pleadings' and citing Fed.R.Civ.P. 7(a)). The term "legal memorandum" might be broad enough to encompass a discovery disclosure. [FN1] However, the Advisory Notes to the 1983 amendments to the Federal Rule 11indicate that Rule 26(g) should govern discovery disclosures. We, therefore, conclude that Clipse's discovery disclosure is neither a "pleading, motion, or legal memorandum" under CR 11 and that the trial court erred in awarding sanctions under CR 11.

Clipse v. State, 61 Wn.App 94, 97, 808 P.2d 777 (1991).

SHEPHERD ABBOTT CARTER
ATTORNEYS AT LAW
1616 CORNWALL, SUITE 100
BELLINGHAM, WASHINGTON 98225
PHONE (360) 647-4567 OR (360) 733-3773
FACSIMILE (360) 647-9060

III – CR 26(i) and CR 37

Defendants apparently expect the court to ignore the fact that their CR 11 motion dos not address pleadings but complains about discovery. Defendants CR 11 motion seems to be a CR 37 motion post trial. Defendants' argument focuses on discovery issues and documents.

Defendants do not seek recovery for attorney's fees for alleged discovery abuses because Washington law requires specific steps to be taken before such fees are awarded and defendants know they did not comply with those steps.

> If counsel has not conferred as regards a CR 37(a) motion "to compel" or if a CR 37 motion does not include counsel's certification that the conference requirements were complied with, the court "does not have discretion to entertain the motion. The rule precludes the trial court from hearing such a motion. *Rudolph v. Empirical Research Systems, Inc.,* 107 Wn.App. 861, 866-67, 28 P.3d 813 (2001).
> The court will not entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. If the court finds that counsel for any party, upon whom a motion or objection in respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under rule 37(b). Any motion seeking an order to compel discovery or obtain protection shall include counsel's certification that the conference requirements of this rule have been met.
>
> We interpret court rules by reference to rules of statutory construction. *State v. Greenwood,* 120 Wash.2d 585, 592, 845 P.2d 971 (1993). In drafting CR 26(i), our Supreme Court selected the words "will not" and "shall." These words are mandatory, as opposed to "may" which is permissive. *Scannell v. City of Seattle,* 97 Wash.2d 701, 704, 648 P.2d 435 (1982),656 P.2d 1083 (1983).

Case v. Dundom, 115 Wn.App 199, 202, 58 P.3d 919 (2002).

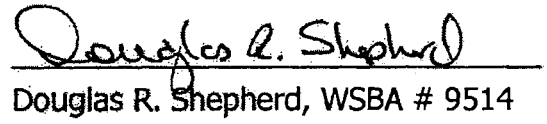
SHEPHERD ABBOTT CARTER
ATTORNEYS AT LAW
1616 CORNWALL, SUITE 100
BELLINGHAM, WASHINGTON 98225
PHONE (360) 647-4567 OR (360) 733-3773
FACSIMILE (360) 647-9060

IV – CONCLUSION

Defendants' second post trial motion for fees and costs under both RCW 4.84.185 and CR 11 must be denied.

Respectfully submitted this 9th day of May 2008.

SHEPHERD ABBOTT CARTER



Douglas R. Shepherd, WSBA # 9514
Of Attorneys for Plaintiffs

SHEPHERD ABBOTT CARTER
ATTORNEYS AT LAW
1616 CORNWALL, SUITE 100
BELLINGHAM, WASHINGTON 98225
PHONE (360) 647-4567 OR (360) 733-3773
FACSIMILE (360) 647-9060

Appendix E

Honorable Richard L. Thorpe
Noted for Consideration: June 27, 2008 at 9:00 a.m.

FILED
MAY 27 2008
SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH.
2008 MAY 27 PM 4:19
SUPERIOR COURT
COPY RECEIVED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

MICHAEL J. CIOCCO and KAREN T. CIOCCO, husband and wife, and the marital community composed thereof, Plaintiffs, v. FUMIO DOUGLAS IKEGAMI and PATRICIA IKEGAMI, husband and wife, and the marital community composed thereof, and ADZAM, INC., a Washington Corporation d/b/a Doug's Lynnwood Mazda, Defendants.	No. 04-2-05628-2 DEFENDANTS' APPLICATION FOR REASONABLE EXPENSES AND ATTORNEYS' FEES PURSUANT TO RCW 4.84.185

I. INTRODUCTION AND RELIEF REQUESTED

In August 2004, Plaintiffs Michael and Karen Ciocco filed an action against Defendants Fumio Douglas Ikegami, Patricia Ikegami and Adzam, Inc. (collectively, "Adzam") alleging five claims: (1) the existence of a partnership; (2) breach of fiduciary duties; (3) breach of an employment contract; (4) unjust enrichment; and (5) fraud. Over the course of the ensuing 45 months, the parties engaged in protracted litigation, culminating in a five-day bench trial, which concluded with the dismissal of all claims at

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158

the conclusion of Plaintiffs' case-in-chief. On May 13, 2008, the Court granted Adzam's motion for an award of expenses pursuant to RCW 4.84.185, ruling that Plaintiffs' case was frivolous in its entirety and advanced without reasonable cause. A proposed written order reflecting the Court's ruling has been tendered to Plaintiffs' counsel, but not yet entered.

During the course of the proceeding, Plaintiffs' alleged claims for damages upwards of $2.5 million. Given the amount in issue, Adzam was forced to litigate extensively with aggressive Plaintiffs' counsel, including investigation of the claims, discovery, pre-trial motions practice, trial preparation and presentation, and post-trial motions practice. Adzam reviewed and produced nearly 60,000 pages of documents, took or defended 21 deposition, argued five pre-trial motions, and engaged in a five-day trial on Plaintiffs' case-in-chief. Adzam would not have incurred any expenses for that work had Plaintiffs not instituted and prosecuted their frivolous claims. Accordingly, this Application represents Adzam's request for all reasonable expenses associated with defending against Plaintiffs' frivolous claims, including attorneys' fees and out-of-pocket expenses.

II. STATEMENT OF GROUNDS

Adzam's Motion is based on the provisions of RCW 4.84.185, which state::

> In any civil action, the court having jurisdiction may, upon written findings by the judge that the action . . . was frivolous and advanced without reasonable cause, **require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action**[.]

Emphasis added.

III. STATEMENT OF ISSUES

1. What amount should be awarded to Adzam as reasonable expenses, including attorneys' fees, incurred in defending against Plaintiffs' frivolous action.

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580

IV. EVIDENCE RELIED UPON

Adzam relies upon the accompanying Declaration of David J. Lenci in Support of Application for Expenses ("Lenci Decl."), the accompanying Declaration of W. Mitchell Cogdill ("Cogdill Decl."), the papers and pleadings on file with the Court, and the testimony adduced at trial.

V. STATEMENT OF FACTS

A. Attorneys Working on the Case.

Plaintiffs sent an initial demand letter regarding their claims in June 2004 and filed their Complaint in August 2004. Compl., dkt. no. 1. Between 2004 and the conclusion of this case, five different attorneys from the law firm of Preston Gates & Ellis, now known as Kirkpatrick & Lockhart Preston Gates Ellis, LLP ("K&L Gates") on Adzam's behalf. ("Lenci Decl.") ¶ 4. A summary of the hours worked by K&L Lawyers is contained in the following table:

Timekeeper	Title	Hours	Value[1]
David J. Lenci	Partner	745	$322,462
Michael K. Ryan	Associate	653	$179,661
Christopher Wyant	Associate	107	$25,632
Alison Bettles	Associate	88	$18,920
Martha Rodriguez-	Associate	29	$4,365
TOTAL		1,622	$551,989.50

Table 1

Adzam's primary defense counsel were partner David Lenci and associate Michael Ryan. *Id.* ¶ 8. Mr. Lenci and Mr. Ryan performed the vast majority of the work in this

[1] Since the attorneys' rates varied over time, the "Value" figures reflect the hours worked at the rates in place at the time.

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158

matter, including investigating the claims, conducting discovery, drafting pre-trial motions, trying the case, and overseeing post-trial matters. *Id.*

In 2005, Mr. Lenci and Mr. Ryan required research and drafting assistance regarding several discovery disputes and a motion for a protective order, which was provided by junior associate Martha Rodriguez-Lopez (approximately 29 hours). *Id.* ¶ 12. Finally, beginning in January 2008, junior associates Christopher Wyant and Alison Bettles provided additional assistance with Adzam's summary judgment motion, Adzam's motion to compel, and various trial preparation matters, such as motions in limine and Adzam's trial brief. *Id.* ¶ 11. Mr. Wyant and Ms. Bettles continue to assist with the post-trial motions.

B. Attorney Hours Worked

The work by Adzam's attorneys in defending against Plaintiffs' frivolous claims may be broken down into five categories: (1) Investigation/Responsive Pleading; (2) Discovery; (3) Pre-trial Motions; (4) Trial Preparation/Trial; and (5) Post-Trial Motions. A brief description of the work undertaken and a close approximation of the hours spent on each task is as follows:

1. Investigation/Responsive Pleading

Both before and after Plaintiffs filed their complaint, Adzam's counsel held several telephone conferences with Adzam, reviewed the Complaint, and researched the basis for the claims, reviewed the documents initially identified as relevant, held discussions with Plaintiff's counsel and drafted an Answer. Lenci Decl. ¶ 14.[2]

Approximately 21 hours incurred on these tasks.

---

[2] Adzam is not requesting fees related to its counterclaim, which was drafted at the same time as the Answer. Although the counterclaim was narrow, whenever a time entry involved both the Answer and counterclaim, Adzam reduced that amount requested for that entry by at least half. *See* Lenci Decl., Ex. A (entries for October 4, 5, 21, 22, 29, 2004).

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580

2. Discovery

Discovery in this case was extensive and protracted. Lenci Decl. ¶ 15. Adzam was required to answer 12 sets of discovery requests (four sets of interrogatories and requests for production to each of the three defendants). *See, e.g.,* Exhibit B to Lenci Declaration: containing two very extensive discovery requests from Plaintiffs served on each defendant December 21, 2004. There were 40 Interrogatories and 18 individual document requests addressed to each defendant. In responding to document requests, Adzam had to review and produce approximately 58,000 pages of documents. In order to understand Plaintiffs' claims, Adzam sent Plaintiffs two sets of discovery requests and reviewed 2000 hard copy documents and additional computer records produced by Plaintiffs. Adzam's counsel also had to travel to various locations to review such records held by Plaintiffs. *Id.* In a case involving a multimillion dollar claim, each page of discovery must be reviewed. Cogdill Decl., ¶ 9(B).

Deposition discovery was even more extensive given the number of witnesses identified by Plaintiffs and Adzam's inability to receive complete written discovery from Plaintiffs. Lenci Decl. ¶ 15. In fact, Adzam was required to take or defend depositions on 21 separate occasions, including a second deposition of Mr. Ciocco made necessary because (1) Adzam received new damage calculations just days before trial and (2) Plaintiffs failed to disclose that they had prior convictions in their written disclosures until Adzam discovered that information independently. *Id.*

The total hours worked on these discovery tasks were approximately 657.

3. Pre-Trial Motions

In the course of this case, Adzam litigated five pre-trial motions. First, in August 2005 Adzam moved for a protective order, which was granted. Second, in December 2007, Adzam moved to dismiss Plaintiffs' fraud claim, which was granted. Third, in

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580

February 2008, Adzam moved for summary judgment dismissal of Plaintiffs remaining claims. That motion was granted in part by Judge Allendoerfer, but he later reversed his ruling. Fourth, Adzam filed a motion to compel discovery documents in March 2008, which was granted. Finally, Adzam was forced to respond to Plaintiffs' motion for reconsideration of the summary judgment motion (with which Adzam was not served) on the first day of trial.

The total hours spent on these tasks were approximately 246.

4. Trial Preparation/Trial

The trial of the case was set for two-weeks' duration. Adzam's counsel undertook all the various tasks normally associated with trial preparation. Such tasks included completing Adzam's ER 904 submission and reviewing Plaintiffs' submission, discussing the trial with the clients, preparing witnesses, drafting motions in limine, drafting a motion to exclude an expert witness, drafting an extensive trial brief, preparing witness examination outlines, reviewing and selecting documents as trial exhibits, attending mandatory mediation, and coordinating various matters with Plaintiffs' counsel. Lenci Decl. at ¶ 18. Additionally, as a result of the Court granting Plaintiffs' last-minute motion for reconsideration, Adzam's counsel was required to re-prepare several witnesses, revise its trial strategy to incorporate the partnership issues, and re-engage Adzam's expert witness. *Id.*

Trial lasted approximately five and-a-half days. *Id.* During that time, Adzam's attorneys were working long days to both prepare for and conduct trial. *Id.* Adzam also prepared its motion for judgment as a matter of law, which was argued and granted at the close of Plaintiffs' case-in-chief. *Id.* The fact that Plaintiffs' claims were dismissed at the close of their case did not reduce the trial preparation time for Adzam, as Adzam's counsel had to prepare as if Adzam was going to present its case. Cogdill Decl. ¶ 9(D).

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580

The total hours worked on these tasks were approximately 461 hours.

5. Post-Trial Motions and Submissions

Since trial concluded on March 17, 2008, Adzam has addressed several post-trial matters. Adzam drafted and argued formal Findings of Fact and Conclusions of Law, as well as the motion for fees and expenses under RCW 4.84.185 and CR 11, which is the basis for this Application. Lenci Decl. at ¶ 19. Adzam also drafted several pleadings related to its request for sanctions before Judge Allendoerfer, which relates to Plaintiffs' misfiling of their summary judgment papers and failure to serve Adzam with their motion for reconsideration. *Id.* Finally, Adzam's counsel spent several hours preparing and drafting this Application and supporting materials. *Id.*

The total hours of work effort performed on these tasks were approximately 235.

Table 2 reflects the volume of attorney time worked on different areas of this case. *Id.*

CATEGORY	HOURS	VALUE[3]
Investigation/Responsive Pleading	23	$55,13.50
Discovery	657	$235,875.50
Pre-trial Motions	246	$66,970.00
Trial Preparation/Trial	461	$165,769.00
Post-Trial Motions and Submissions	235	$82,425.50

Table 2

Lenci Decl. at ¶ 21.

[3] Since the attorneys' rates varied our time, the "value" figures reflect the hours worked at the rates in place at the time.

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580

C. Attorney Rates

As with most law firms, lawyers' hourly rates tend to adjust upward over time. That phenomenon occurred at K&L Gates over the four years of this action. The yearly rates charged by each attorney described above are set forth as follows:

YEAR	ATTORNEY	RATE
2004	David Lenci	$345
	Michael Ryan	$175
2005	David Lenci	$360
	Michael Ryan	$195
	Martha Rodriguez-Lopez	$150
2006	David Lenci	$395
	Michael Ryan	$235
2007	David Lenci	$420
	Michael Ryan	$270
2008	David Lenci	$450
	Michael Ryan	$315
	Christopher Wyant	$240
	Alison Bettles	$215

Table 4

Lenci Decl. at ¶ 22.

The rates described above were the established, customary rates charged by each K&L Gates attorney. These rates are not only customary for K&L Gates, but also for similar firms in the greater Seattle metropolitan market. Cogdill Decl., ¶ 9(E). Moreover, the rates charged for junior associates are not disproportionately greater than those billed by non-senior associates in Snohomish County. *Id.* The rates charged are reasonable given the nature of the case and attorneys involved. *Id.* ¶ 9(E), 10.

D. Non-Attorney Expenses

In addition to attorneys' fees, Adzam also incurred several types of out-of-pocket expenses defending against Plaintiffs' frivolous claims. Those costs are summarized as follows:

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

CATEGORY	AMOUNT
Paralegal Assistance	$34,283.00
Computer Research	$5,348.47
Expert Witness Fees	$22,450.70
Copying Costs/Document Production	$10,452.17
Phone/Fax	$258.77
Travel/Food/Lodging	$3,652.96
Court Reporter costs	$7,927.11
Court Fees/Filing Fees	$302.50
Courier Fees/Service Fees	$1,602.51
TOTAL	**$86,278.19**

Table 4

Lenci Decl. ¶ 25.

Adzam would not have had to pay these litigation costs had Plaintiffs not pursued their frivolous claims. *Id.* For the reasons set forth below, these expenses are recoverable under Washington law.

E. Non-Reimbursable Expenses

In addition to the attorney fees and non-attorney expenses discussed above, Adzam also incurred other expenses in this case for which it is not requesting reimbursement. For example, Adzam is not requesting fees related to its conversion counterclaim (approximately $10,000.00). Also, Adzam is not including $9,900 in and strictly clerical work by secretaries and document clerks and other miscellaneous expenses.[4]

Lenci Decl. ¶ 29.

[4] Fees for several K&L Gates staff and one attorney were not requested in this Application because those fees were either related to Adzam's counterclaim or minor clerical work.

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580

VI. LEGAL AUTHORITY AND ARGUMENT

The frivolous lawsuit statute, found at RCW 4.84.185, provides as follows:

> In any civil action, the court having jurisdiction may, upon written findings by the judge that the action . . . was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the **reasonable expenses, including fees of attorneys, incurred in opposing such action[.]** This determination shall be made upon motion by the prevailing party after a . . . final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such a motion be filed more than thirty days after entry of the order.

(Emphasis added). The purpose of this statute is "to discourage frivolous lawsuits and to compensate the targets of such lawsuits for fees and expenses incurred in fighting meritless cases." *Biggs v. Vail*, 119 Wn.2d 129, 137, 830 P.2d 350 (1992). This Court has already ruled that the action is frivolous. The only remaining issue for the Court is an award "reasonable expenses, including fees of attorneys" incurred in defending against Plaintiffs' claims.

A. Adzam is Entitled to an Award of All Attorneys' Fees Incurred in Defending Against Plaintiffs'' Frivilous Claims

The proper method for calculating a reasonable fee award is the Lodestar method, which requires the multiplication of a reasonable hourly rate by the reasonable number of hours spent on the lawsuit. *See Crest v. Costco Wholesale Corp.*, 128 Wn. App. 760, 773, 115 P.3d 349 (2005). The trial court can supplement the Loadstar methodology with an analysis of factors governing the reasonableness of fees under Rule of Professional Conduct 1.5(a). Those factors include in relevant part: (1) the time and labor required, the novelty and difficulty of the questions involved, the skill required to perform the legal service properly and the terms of the fee agreement between the lawyer and client; (2) the fee customarily charged in the locality for similar legal services; (3) the amount involved

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580

in the matter on which legal services are rendered and the results obtained; (4) the time limitations imposed by the client or by the circumstances; (5) the nature and length of the professional relationship with the client; and (7) the experience, reputation and ability of the lawyer or lawyers performing the services. The reasonableness of a Loadstar request depends on the circumstances of each individual case. *Schmidt v. Conerstone Invs., Inc.*, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990). Given these factors, and for the reasons discussed below, Adzam's counsel's rates and hours worked were reasonable.

1. The Hours Worked by Adzam's Counsel are Reasonable.

The reasonableness of the hours worked may be established by "contemporaneous records documenting the hours worked," which need not be exhaustive, but should inform the court of the type of work performed and category of attorney who performed the work. *See Mahler v. Szucs.*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998). Adzam has produced copies of all monthly bills issued by K&L Gates, which identify each attorney and a description of his or her work for each day. Lenci Decl., Ex. A. Adzam has also categorized these fees by task and by each attorney's total number of hours worked. See Table 2 above.

Washington courts have held that a frivolous case or claim is not necessarily disposed of quickly. *Reid v. Dalton*, 124 Wn. App. 113, 127-28, 100 P.3d 349 (2004). Indeed, RCW 4.84.185 specifically contemplates that the "frivolous" determination may be made upon "final judgment after trial." (Emphasis added). In this case, Plaintiffs' claims—although entirely baseless—were not disposed of quickly because the parties engaged in extensive discovery and Adzam was unable to obtain summary judgment dismissal of several claims largely due to Plaintiffs' non-compliance with the Local Rules. As described above, Adzam was required to respond to dozens of written discovery requests, review and produce nearly 60,000 pages of documents, and take or defend 21

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

depositions. Adzam also filed two discovery motions and a motion to dismiss Plaintiffs' fraud claim, all of which were granted.

Although Adzam was granted summary judgment dismissal of the partnership claims before trial, that order was rescinded on the day of trial due to Plaintiffs' failure to file working papers correctly. Moreover, many of the claims asserted by Plaintiffs are not normally amenable to dismissal on summary judgment given their nature. Cogdill Decl. ¶ 9(F). Ultimately, after five full days of trial, this Court determined that there was no substantial evidence supporting any of Plaintiffs' various claims. Given the size and nature of this case, the attorney hours for which reimbursement is sought here are reasonable.

2. Adzam's Counsel's Hourly Rates are Reasonable

When lawyers have an established rate for billing clients, that rate will likely be considered reasonable. *See Bowers v. Transam. Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). Moreover, in private actions, when hourly rates increase over time, the hourly rates in effect at the time the services were rendered is the appropriate basis to compute the fee award. *See Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 798 P.2d 799 (1990). Here, Adzam's counsel charged their established rates, which were entirely reasonable given the experience and ability of the attorneys involved. Lenci Decl. ¶ 22; Cogdill Decl. ¶9(E). Mr. Lenci and Mr. Ryan are experienced litigators who have conducted numerous trials and hearings. Lenci Decl. ¶¶ 7-9. Whenever possible, less complicated tasks and research issues were assigned to junior associates or paralegals with much lower billing rates in order to lower Adzam's expenses. *Id.* ¶ 8.

Additionally, in examining the fees customarily charged in the "locality," courts are not limited to the specific city or county in which the case was heard. *See Crest, Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 773-74, 115 P.3d 349 (2005) (trial court's

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

award of fees reversed where trial court limited its review to fees customarily charged in Whatcom County (where the case was filed), which was only one factor to consider). In this case, the "locality" is the greater Seattle metropolitan market, in which Adzam's counsel is located, rather than the city or county where the case is tried.[5] As noted, Adzam's counsel have charged Adzam their established yearly rates since 2004, and those rates are reasonable within this market. Cogdill Decl. ¶¶ 9(E), 10.

Plaintiffs knowingly instituted their frivolous action against defendants located in the greater Seattle metropolitan market. Adzam has long been represented by its current counsel and, given the amount demanded and nature of Plaintiffs' claims, Plaintiffs knew or should have known that Adzam would continue to rely on Seattle-based counsel, charging Seattle-based rates. Lenci Decl. Though this case was tried in Snohomish County, Adzam is entitled to hire the counsel of its choice and it was reasonable to retain its existing, experienced counsel to defend against the significant claims asserted by Plaintiffs. Accordingly, the Court should apply the rates actually charged to Adzam as the Loadstar rate in this case.

B. Adzam's Other Expenses are Reasonable

Beyond attorneys' fees, Washington courts have deemed the following out-of-pocket expenses recoverable and reasonable: (1) fees for non-lawyer paralegals where the person is qualified through education, training or experience to provide substantive legal assistance; (2) computer assisted research; (3) expert witness fees; (4) transportation; (5) lodging; (6) parking; (7) telephone expenses; and (8) photocopying expenses. *See Panorama Village Condo. Owners Assoc. Bd. of Dir. v. Allstate Ins. Co.*, 144 Wn.2d 130,

[5] If fee rates for a Seattle-based firms were *per se* unreasonable for a case based outside Seattle, all Seattle-based firms charging their ordinary rates in such cases could be in violation of RPC 1.5(a). Such an interpretation of RPC 1.5(a) would be illogical and is unsupported by Washington law. Thus, Adzam's counsel's fees cannot be said to be unreasonable under the "locality" test.

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

142-44, 26 P.3d 910 (2001) (the phrase "reasonable attorneys fees and expenses" includes out-of-pocket expenses beyond statutory costs, including expert witness fees); *Nordstrom, Inc. v. Tampourlos*,107 Wn.2d 735, 743, 733 P.2d 208 (1987) (while not statutory costs, photocopying and telephone charges may be recoverable as part of a "reasonable attorney fee" award); *Morgan v. Kingen,* 141 Wn. App. 143, 164, 169 P.3d 487 (2007) ("A party is entitled to compensation for a paralegal's services for legal work performed as long as the rate reflects a reasonable hourly rate"); *Absher Constr. Co. v. Kent School Dist. No. 415*, 79 Wn. App. 841, 845-848, 917 P.2d 1086 (1996) (legal assistants and computerized research costs).

In this case, Adzam incurred a great deal of recoverable, non-attorney expenses throughout this litigation. These expenses include paralegal time spent on legal tasks, expert witness fees, computerized research, transportation and lodging, photocopying and document production costs, filing fees, courier costs, court reporter costs, and telephone charges. But for Plaintiffs having brought their frivolous claims, Adzam would not have incurred any of these costs. Accordingly, Adzam should be awarded its non-attorney expenses totaling **$86,278.19**.

VII. CONCLUSION

For the reasons set forth above, Adzam respectfully requests that the Court enter an order finding that Adzam is entitled to reasonable expenses, including attorneys' fees, in the total amount of **$628,267.69**, based on the following:

Attorneys' Fees	**$541,989.50**
Other Expenses	**$86,278.19**
TOTAL	**$628,267.69**

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580

DATED this 27th day of May, 2008.

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP

By
David J. Lenci, WSBA # 7688
Michael K. Ryan, WSBA # 32091
Attorneys for Defendants
Fumio and Patricia Ikegami and Adzam, Inc.

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

Appendix F

FILED
MAY 27 2008
SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SNOHOMISH

MICHAEL J. CIOCCO and KAREN T. CIOCCO, husband and wife, and the marital community composed thereof, Plaintiffs, v. FUMIO DOUGLAS IKEGAMI and PATRICIA IKEGAMI, husband and wife, and the marital community composed thereof, and ADZAM, INC., a Washington Corporation d/b/a Doug's Lynnwood Mazda, Defendants.	Cause No.: 04-2-05628-2 DECLARATION OF W. MITCHELL COGDILL REGARDING ATTORNEY'S FEES AND EXPENSES

COPY RECEIVED
2008 MAY 27 PM 4:19
SNOHOMISH COUNTY
SUPERIOR COURT

I, W. Mitchell Cogdill, do hereby declare as follows:

1. My name is W. Mitchell Cogdill. I make this declaration based upon my own personal knowledge, education, experience, and the review of certain documents that I will describe below.

2. I am an attorney licensed to practice law in the State of Washington and have been so licensed since 1968 when I was admitted to the Bar. I am a 1965 graduate of the University of

COGDILL NICHOLS REIN WARTELLE ANDREWS
3232 Rockefeller Avenue
Everett, WA 98201
Phone: (425) 259-6111
Fax: (425) 259-6435

Washington, where I received my Bachelors Degree and a 1968 graduate of the University of Washington School of Law where I received my Law Degree.

3. During the course of my practice, I have litigated Union based claims, individual employment claims, injury claims including medical, dental, and legal malpractice, complex dissolutions, and complex commercial claims involving corporations, partnerships, LLCs, the relationship of parties to these entities, business agreements, and securities based litigation.

4. My current practice focuses on plaintiff's work involving injury, commercial and business matters, and labor/employment issues. Approximately ninety percent of my practice is litigation related.

5. I have tried over 150 jury and non-jury cases in Snohomish, Skagit, Whatcom, Island, King and Thurston counties, as well as in Federal District Court. I have also tried to conclusion between 100 and 150 grievances, arbitrations, and unfair labor practice complaints before arbitrators and state hearing examiners (Public Employment Relations Commission).

6. My trials have consisted of jury trials of six to seven weeks in duration as well as bench trials and administrative hearings of weeks in duration.

7. I was requested by David J. Lenci, one of the attorneys for the Defendants in this case, to review documents, pleadings, motions, briefs, and related material that was generated in this case and provide an opinion as to the reasonableness of the fees and expenses incurred in the successful defense of the instant lawsuit.

Specifically I reviewed plaintiff's Complaint; the Answer and Counterclaims including the Answer to Defendants' Counterclaim, plaintiffs' and defendants' Trial Briefs, defendants' Motion for Reasonable Attorney's Fees and Costs Under RCW 4.84.185 and Civil Rule 11; Proposed Findings of Fact, Conclusions of Law and Judgment; the Declaration of Michael K. Ryan in

COGDILL NICHOLS REIN WARTELLE ANDREWS
3232 Rockefeller Avenue
Everett, WA 98201
Phone: (425) 259-6111
Fax: (425) 259-6435

Support of Defendant's Motion for Reasonable Attorney's Fees and Costs under RCW 4.84.185 and Civil Rule 11; the Declaration of David J. Lenci in Support of Defendants' RCW 4.84.185 Application for Expenses Including Attorney's Fees as well as the summary of hours, hourly rates, and total fees of all firm members and staff working on the case; Plaintiffs' Memorandum in Opposition to Defendants' Second Motion For Fees and Costs; as well as numerous other declarations, replies, and legal authority concerning the request for fees.

8. In assessing and determining the reasonableness of fees and expenses incurred in pursuing or defending a case, I routinely look to the following factors:

a) The nature of the case including the degree of difficulty in pursuing or defending it;

b) The amount of and difficulty in discovery, including depositions, document production, document review, motions, and ancillary issues surrounding discovery;

c) The dollar amount in controversy or claimed;

d) The number of pretrial motions required;

e) The degree of contention in the case as well as the length of trial;

f) The hourly rates charged, and the number of hours spent on the case; and

g) The outcome.

9. Analysis/Review.

A. From my review of the pleadings and briefs it is obvious this case became a difficult case to defend because of the multiple theories plead, the lack of specific evidence available or presented on partnership, employment, fraud and damages, and in some instances the late delivery of documentation/answers to discovery to defendants.

COGDILL NICHOLS REIN WARTELLE ANDREWS
3232 Rockefeller Avenue
Everett, WA 98201
Phone: (425) 259-6111
Fax: (425) 259-6435

The partnership claim is an example of this. The partnership claim appears to have been dismissed on defendants' Motion for Summary Judgment only to be revived and presented at trial in a manner that is somewhat unclear to me as I prepare this declaration. Nevertheless, that theory/claim appears to have been argued at trial. In speaking to one of defendants' attorneys, David J. Lenci, I became aware that defendants were required because of this partnership issue at trial to recast, reset and retool much of their argument as it related to the partnership issue.

B. Defendants presented over 57,000 pages of documents in response to plaintiffs' discovery requests. Obviously when that occurs in the face of a multimillion dollar claim each page must be reviewed by the defense. In fact, it would be negligent not to review each and every page and document in the face of a claim like this. It is my understanding in reviewing the Proposed Findings of Fact, Conclusions of Law and Judgment as well as the transcription of the Court's Oral Decision, that the Court did not find any evidence that would support a partnership or a breach of an employment agreement between plaintiffs and defendants.

In addition, some 21 depositions as I understand it were taken and/or defended. Presumably those depositions were necessary to parse out the evidence that supported the claims and defenses asserted.

C. I was struck in reviewing the documents that I have described above not only by the claims and the amount in controversy (over $2,000,000.00), but by the lack of any documentary evidence that would seem to establish the claims.

D. Defendants prevailed in this case on each issue and claim they defended. Some were dismissed on summary judgment pretrial, while the remainder of the claims were dismissed following the conclusion of plaintiffs' case.

COGDILL NICHOLS REIN WARTELLE ANDREWS
3232 Rockefeller Avenue
Everett, WA 98201
Phone: (425) 259-6111
Fax: (425) 259-6435

The fact that the plantiffs' remaining claims were dismissed after the presentation of their case shortened the trial by several days, but of course didn't reduce any of the trial preparation that defendants had to undertake in defense of the case.

E. I have reviewed the hourly rates of the attorneys and staff who worked on this case for the years involved 2004, 2005, 2006, 2007, and 2008. While these hourly rates for partners and the senior associates involved in the case exceed the hourly rates charged by Snohomish County attorneys, I am personally aware because of the nature of my practice that these rates are commensurate with the rates charged in Seattle by large firms engaged in the type of work involved here. Interestingly, the rates billed by K&L Gates for its non-senior associates are not disproportionately greater than those billed by the litigation firms in Snohomish County.

F. In reviewing the hours spent on this case by K&L Gates attorneys and staff, I determined that the hours spent appeared to be greater than hours that would be spent by Snohomish County firms. However, Snohomish County firms and attorneys do not have the resources available including man/woman power, support staff, and other resources to the devote to complex cases including complex commercial cases, that large Seattle firms do, including K&L Gates. The time spent on the case by defendants was clearly valuable given the result in the face of the claims, the information available to support and defend the claims, and the amount in controversy.

The claims made by plaintiffs are normally not amenable in my experience to dismissal on summary judgment. Thus, this was a case from the outset that any experienced attorney would know would likely end up with one or more the claims proceeding to trial thus necessitating preparation from the outset, as if the case were going to trial. That mindset and attendant preparation by definition increases the time and cost of the litigation.

COGDILL NICHOLS REIN WARTELLE ANDREWS
3232 Rockefeller Avenue
Everett, WA 98201
Phone: (425) 259-6111
Fax: (425) 259-6435

10. In conclusion I find that given the nature of the case, the claims made, the discovery involved and the amount in controversy, as well as the success of the defense, the time spent as well as the rates charged as contained and summarized in the Declaration Of David J. Lenci In Support of Defendants' RCW 4.84.185 Application For Expenses, Including Attorney's Fees, are within the boundaries of reasonableness.

I have further taken into account the reputation of the law firm K&L Gates as well as the reputation and expertise of David J. Lenci in reaching this conclusion. I am personally familiar with both the reputation of K&L Gates and the reputation of David J. Lenci, which is very good, having tried cases against K&L Gates attorneys, and Mr. Lenci when he was a Snohomish County Deputy Prosecuting Attorney.

I declare under penalty of perjury that the foregoing is true and correct:

Executed this 23rd day of May, 2008 at Everett Snohomish County, Washington.

W. Mitchell Cogdill

COGDILL NICHOLS REIN WARTELLE ANDREWS
3232 Rockefeller Avenue
Everett, WA 98201
Phone: (425) 259-6111

Appendix G

Honorable James H. Allendoerfer
No Hearing Date Set, Hearing requested

IN THE SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

MICHAEL J. CIOCCO and KAREN T. CIOCCO, husband and wife, and the marital community composed thereof, Plaintiffs, vs. FUMIO DOUGLAS IKEGAMI and PATRICIA IKEGAMI, husband and wife, and the marital community composed thereof, and ADZAM, INC., a Washington Corporation d/b/a Doug's Lynnwood Mazda, Defendants.	**CAUSE NO. 04-2-05628 –2** **DECLARATION OF ALAN KNUTSON, CPA/ABV** **SENT ON 5/08/08 VIA FAX FOR FILING IN SNOHOMISH COUNTY SUPERIOR COURT**

SHEPHERD ABBOTT CARTER
ATTORNEYS AT LAW
1616 CORNWALL, SUITE 100
BELLINGHAM, WASHINGTON 98225
PHONE (360) 647-4567 OR (360) 733-3773
FACSIMILE (360) 647-9060

Alan Knutson, declares under penalty of perjury, under the laws of the state of Washington, that the following is true and correct:

1. I was retained as plaintiffs' expert regarding value of plaintiff Ciocco's 40% partnership interest in August of 2007. I wrote my preliminary opinion in December of 2007. At that time I billed plaintiffs a total of $1,630.00 for my work in this matter.

2. My next bill was for work done which related to my deposition. I took 1.5 hours to prepare for my deposition and billed 2.25 hours for the deposition.

3. After my deposition I reviewed two defense expert reports and met with Mr. Shepherd to discuss the reports provided by those experts. The time to review the reports and meet with Mr. Shepherd was 1.75 hours. Mr. Shepherd's main focus was whether Certified Public Accounts or business evaluators (defendant's experts) who are not attorneys are qualified to express opinions on whether two or more people are intending to operate a business as a partnership, LLC or corporation. I advised Mr. Shepherd that I was not qualified to express such an opinion. I further advised Mr. Shepherd that it was my understanding that such an opinion could only be expressed by an attorney, if at all. Both Mr. Shepherd and I felt it was very peculiar that defendants' experts were not hired to express an opinion on value and seemed simply to be hired to express an opinion on whether or not the parties had agreed to or operated their business as a partnership.

4. After meeting with Mr. Shepherd to discuss defendants' experts, I understood I would not be needed at trial because the partnership claim had been dismissed.

5. In the middle of trial, on March 11, 2008, I received a call from Mr. Shepherd's office and was advised I would be needed to testify at trial because the partnership claim had been reinstated. I spent 1.25 hours to review my work in this case on March 11, 2008. I have testified at depositions and trials for more than 20 years on similar issues. My experience is that my pre-trial preparation for deposition or trial testimony usually takes 1 to 2 hours at most.

SHEPHERD ABBOTT CARTER
ATTORNEYS AT LAW
1616 CORNWALL, SUITE 100
BELLINGHAM, WASHINGTON 98225
PHONE (360) 647-4567 OR (360) 733-3773
FACSIMILE (360) 647-9060

I felt that 1.25 hours was more than sufficient for me to prepare for my trial testimony in this case.

6. The morning of my testimony, I met with Mr. Shepherd for about one-half hour to discuss my testimony. I billed .25 hours. Again, this time was very typical. I have worked and testified for Mr. Shepherd and his firm on other occasions on other matters and my preparation on March 11, 2008 and our preparation on March 12, 2008 was typical. I have also testified against Mr. Shepherd's firm in another auto partnership dispute, and my preparation time was similar to this case.

7. I have provided expert testimony in business disputes in litigation on more than fifty (50) occasions. I have never had anyone spend more than 1.0 hour preparing me for my testimony. I have never been prepared by an attorney for trial testimony a week or two before the hearing or trial. My trial preparation always has taken place after the trial started and just before my testimony. I believe it would be a waste of time to prepare days or weeks before the testimony.

8. I have reviewed the billings of defendants expert in this case and find it difficult if not impossible to believe she spent $13,200 re-preparing, during trial, for her trial testimony or that it was duplicated work.

9. I cannot help but comment that Ms. Anderson Murphy's January 31, 2008 letter, at page 5, seems to indicate that she was hired to express the following opinion: "Ultimately, the documents and information analyzed do not indicate the intent of the parties to form a partnership." This is an opinion I would not be able to express and it is an opinion I understand would require legal expertise. And, I do not know how a lawyer, as an expert, would be able to testify as to the intent of a party to a lawsuit. Ms. Murphy's January 31, 2007 letter is attached hereto as Exhibit 1.

10. Apparently, on January 31, 2008, Ms. Murphy was not yet prepared to express an opinion of what the value of a 40% interest in the business enterprise would be.

SHEPHERD ABBOTT CARTER
ATTORNEYS AT LAW
1616 CORNWALL, SUITE 100
BELLINGHAM, WASHINGTON 98225
PHONE (360) 647-4567 OR (360) 733-3773
FACSIMILE (360) 647-9060

11. My accounting for my time and billing in this matter is attached hereto as Exhibit 2.

Executed this 7th day of May 2008 at Bellingham, Washington.

Alan Knutson

SHEPHERD ABBOTT CARTER
ATTORNEYS AT LAW
1616 CORNWALL, SUITE 100
BELLINGHAM, WASHINGTON 98225
PHONE (360) 647-4567 OR (360) 733-3773
FACSIMILE (360) 647-9060

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2009 JUN -5 PM 2:55

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

MICHAEL J. CIOCCO and KAREN T. CIOCCO, husband and wife, and the marital community thereof, Appellants, v. FUNIO DOUGLAS IKEGAMI and PATRICIA IKEGAMI, husband and wife, and the marital community thereof; ADZAM, INC., a Washington corporation, Respondents.	No. 61817-2-1 DECLARATION OF SERVICE

The undersigned, under penalty of perjury of the laws of the State of Washington, declares as follows:

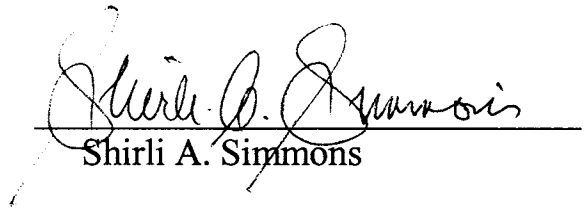
1. I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, and competent to be a witness in the above action, and not a party thereto.

2. On the 5th day of June, 2009, I delivered true and correct copies of RESPONSE BRIEF OF RESPONDENTS FUMIO DOUGLAS IKEGAMI, PATRICIA IKEGAMI, AND ADZAM, INC. via email and by depositing in the U.S. mail, first class, postage prepaid, addressed as follows:

Mr. Douglas R. Shepherd
Shepherd Abbott Carter
1616 Cornwall Ave Ste 100
Bellingham, WA 98225
Email: dougshepherd@saclawfirm.com

Philip J. Buri, Esq.
Buri Funston Mumford, PLLC
1601 F. Street
Bellingham, WA 98225
Email: philip@burifunston.com

EXECUTED this 5th day of June, 2009 at Seattle, Washington.



Shirli A. Simmons