

64122-1

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NO. 64122-1-I

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

WILLIAM B. THOMPSON, D.D.S.,

Appellant,

v.

KRIS AND CEILE SMITH, husband and wife and the marital
community comprised thereof, and SMITHWORKS, a Washington
L.L.C.,

Respondents.

BRIEF OF APPELLANT

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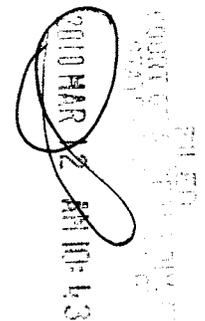


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INTRODUCTION

The heart of this appeal is the dispute between appellant William Thompson and respondent Kris Smith over the terms of their agreement to form Ram Jack NW. Thompson unequivocally stated that the parties agreed that Ram Jack NW would provide foundation services and all related services and that Smith's remodeling company Smithworks could do remodel-type of work for Ram Jack NW customers so long as Smithworks did not do foundations. Smith states that the parties agreed only that Ram Jack NW would do foundation work limited to the patented technology it purchased. Despite this plainly contradictory testimony, the trial court granted partial summary judgment that there was no agreement preventing Smithworks from doing foundation work for Ram Jack NW customers.

The erroneous summary judgment ruling triggered a series of errors at trial. The trial court commented on the evidence, instructing the jury to determine whether Thompson's lawsuit was frivolous. The court entered judgment on an irreconcilably conflicted verdict and retried attorneys fees, which had been submitted to the jury. And the court's findings are inadequate.

This Court should reverse and remand.

ASSIGNMENTS OF ERROR

1. The trial court erred in ruling as a matter of law that the parties did not agree that Ram Jack NW would do more than excavate for and drive steel foundation piers using patented piercing system purchased from Ram Jack Oklahoma. CP 687-89.

2. The court erred in instructing the jury to determine whether Thompson's lawsuit was frivolous. RP 395¹ (instruction); CP 1240 (special verdict form).

3. The trial court erred in entering judgment on the jury's irreconcilably conflicted verdict. CP 1311-13.

4. The court erred in finding that Thompson filed this lawsuit without conducting a reasonable investigation. CP 1323, FF 1.

5. The court erred in finding that Thompson's lawsuit was not warranted by existing facts. CP 1323, FF 2.

6. The court erred in finding that Thompson's lawsuit was not warranted by existing law. CP 1323, FF 3.

¹ While preparing the brief of appellant, counsel became aware that the written jury instructions were not in the trial court's file. Although the instructions were read and electronically recorded, the transcript has many "inaudibles" due to poor recording. RP 382-96. Counsel has moved the trial court to order that the written instructions will serve as the corrected report of proceedings. A copy of the written instructions is attached as App. A.

7. The court erred in finding that Thompson advanced his lawsuit without a reasonable basis. CP 1323, FF 4.

8. The court erred in finding that Thompson filed and advanced the lawsuit for an improper purpose. CP 1323, FF 5.

9. The court erred in entering an order awarding Smith fees based on the court's findings that Thompson's lawsuit was frivolous. CP 1320-21.

10. The trial court erred in denying Thompson's motion for a new trial. CP 1429-31.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the trial court err in ruling as a matter of law that Smith did not wrongfully usurp Ram Jack NW business opportunities, where Smith concedes that his company Smithworks did foundation work for Ram Jack NW customers, and Thompson and Brastrup testified that the parties agreed that Ram Jack NW would do all foundation work?

2. Is a new trial required where the trial court's erroneous summary judgment ruling gutted Thompson's case?

3. Is reversal and remand required, where the trial court denied Thompson's motion for a new trial even though the jury

found that Smith breached his fiduciary duty to Thompson, but found that Thompson's lawsuit was frivolous?

4. Is there insufficient evidence to support the jury's damages award, where the jury could not properly award Smith damages for his attorney fees and Smith's only other damages evidence was that he "may" have lost business, felt stressed and put on weight?

5. Did the trial court improperly usurp the jury's role and duplicate the jury's award, where it awarded Smith all of the fees Smith requested, even though the jury's verdict necessarily included a fee award?

6. Are the court's findings on sanctions insufficient, where the court simply repeated CR 11's language and summarily concluded that Smith's fees are reasonable, but failed to provide any detail that would allow this Court to exercise meaningful review?

STATEMENT OF THE CASE

A. Thompson and Smith formed an LLC to operate a full service foundation business.

Thompson and Smith met when Smith's remodeling company Smithworks, LLC, was subcontracted to do the kitchen

demolition on Thompson's kitchen remodel.² CP 526. The scope of Smithwork's work grew when Smith discovered water damage when removing old fixtures. *Id.* The water damage had spread to some major support timbers that needed to be replaced, and it became apparent that the foundation needed to be repaired as well. *Id.*

Thompson's house was Smith's first "major" remodel. CP 527. Smith told Thompson that his experience was limited to "handyman type projects" and that he had never before lifted a house to repair the foundation. CP 526. Smith and the general contractor worked together to lift the house and Smith arranged for a subcontractor to do some concrete work. CP 526-27.

Smith worked on Thompson's remodel nearly every day for five-to-six months, and the parties became friends. CP 527. In late 2005, shortly after Smith finished his work on Thompson's house, Smith asked Thompson about going into business together to do foundation work with a patented system developed by Ram Jack of Oklahoma. CP 527. Ram Jack Oklahoma had developed a

² Since Thompson challenges the trial court's summary judgment ruling, the facts for the most part are taken from Thompson's declarations in opposition to summary judgment. This Statement appropriately accepts all Thompson's evidence as true and gives Thompson the benefit of all inferences arising from the evidence.

hydraulic system to install structural steel “pile pipes,” providing structural support for foundation walls. CP 565. Smith primarily wanted Thompson to fund the business, which would include purchasing the rights to use the Ram Jack system. CP 527.

Thompson agreed and Smith, Thompson and a third partner Dave Newcombe formed Ram Jack of Washington to purchase dealership rights to the exclusive use of the Ram Jack technology in the King county area. *Id.* Thompson put up \$35,000 to purchase the dealership rights to the Ram Jack technology, but before the parties could form an LLC, Smith and Newcombe had a sharp disagreement over the scope of Smithworks’ business in relation to Ram Jack of Washington’s business. *Id.* The parties abandoned Ram Jack of Washington and refunded Thompson’s money. CP 527-28.

Smith later approached Thompson again about purchasing dealership rights to the Ram Jack technology without a third partner, and in March 2006, the parties went to Ram Jack headquarters in Oklahoma to explore doing business together. CP 528. While in Oklahoma, Thompson and Smith met several other dealers and realized that by using Ram Jack services and products,

they could market a “full service’ foundation business.” *Id.*

Thompson stated (*id.*):

In addition to being able to provide foundations for new construction and remodeling and repair, we discussed using the Ram Jack distributorship for other construction services such as house lifting, soil stabilization, retaining walls (e.g. sea walls) and basement waterproofing.

A full service foundation business seemed like a good business venture with a potentially large market. *Id.*

While in Oklahoma, Thompson and Smith agreed to go into business together as equal partners, sharing the profits 50/50. *Id.* Thompson agreed to put up the \$35,000 distributorship fee and some cash for an operating account. *Id.* In exchange, Smith would be primarily responsible for operating the company. CP 529.

The parties finalized the specifics of their agreement while in Oklahoma. CP 528. Thompson “agreed with Smith that [their] partnership would be a full-service foundation business.” *Id.* The parties even attended Ram Jack meetings, where they learned to market their business as providing a “full-service approach to all aspects related to foundations.” CP 528.

Thompson told Smith that he was “ok” with Smithworks providing “‘handyman’ type services” for customers that hired the parties’ LLC, “Ram Jack NW” to do a foundation. CP 529.

Thompson never consented to Smith running Smithworks as a competing foundation business. *Id.*

B. The parties advertised Ram Jack NW as providing foundation solutions and related services, such as walkways, patios, and retaining walls.

When they returned to Seattle, the parties agreed that Ram Jack NW should be an LLC. CP 529. Smith took care of the legal paperwork through an attorney he knew. CP 529, 530.

Initially Thompson let Ram Jack NW use his truck, and paid for start up expenses such as the trailer, tools, and logo painting. CP 529. The parties worked on advertising together, putting together website and phonebook advertisements. CP 529. They used the marketing strategy they had learned in Oklahoma for marketing Ram Jack NW to provide comprehensive “foundation solutions,” as well as related services, such as retaining walls, walkways, and patios. CP 529, 530.

The parties placed the Ram Jack NW advertisement under “Foundation Contractors.” CP 530. A series of bullet points states:

- ◆ Patented Foundation Stabilization, Repair, Leveling
- ◆ Retaining Walls, Walkways, Patios, Cement Slabs
- ◆ Build on Unstable or Steep Sloping Property
- ◆ Residential and Commercial
- ◆ Licensed, Bonded and Insured. Free Consultation.

CP 544.

C. The parties agreed that Ram Jack NW could provide Smithworks with business, such as a kitchen remodel, so long as it was not competing with Ram Jack NW.

When Smith worked on Thompson's remodel, he did not have a business listing for Smithworks, relying instead on word-of-mouth advertising. CP 531. Smithworks' only marketing was a "flyer" that describes Smithworks as providing the following "Handyman" and "Remodeling" services:

Handyman – Minor electrical repairs, Minor plumbing repairs, Sheetrock repair, Door installed, Windows installed, Trim work, Floors installed, Decks repaired, Roofs patched, Siding repaired.

Remodeling – Room additions, Bathrooms, Kitchens, Build up, Build out, Deck additions, Gazebo's [*sic*], Arbors, Trellis, Garage additions, Complete Home Remodel.

CP 561-62 (*punctuation added*).

After the Ram Jack NW ads were in place, the parties again discussed that Smith would continue operating Smithworks – his "handyman" business – and would operate Ram Jack NW as well. CP 532. Since Smithworks did not advertise, the parties again discussed the potential that a Ram Jack NW might generate work for Smithworks. *Id.* Thompson reiterated that he did not have any problem with Smithworks "pick[ing] up some extra work such as a kitchen remodel." *Id.* Thompson was happy for Smithworks to

prosper, so long as it was not taking business away from Ram Jack NW. *Id.* That was “exactly” what Thompson had told Smith when the parties reached their original agreement in Oklahoma. *Id.*

D. Ram Jack NW’s insurance policy indicates that it is a foundation repair business, while Smithwork’s policy indicates that it is a carpentry contractor.

Smith consistently described Smithworks to Thompson as being a “carpentry contractor.” CP 531. This is consistent with Smithworks’ insurance policy (*id.*), which provides that Smithworks’ “Business Description” is “carpentry contractor.” CP 547, 548, 552. Part of the policy defines the business as “carpentry – interior.” CP 552. The “Premium” section includes the following classifications:

- ◆ Contractors - subcontracted work – in connection with construction, reconstruction, repair or erection of buildings.
- ◆ Dry Wall or Wallboard Installation.
- ◆ Floor Covering Installation – not ceramic tile or stone.
- ◆ Painting – interior – building or structure.

CP 553. The “Business Description” on Ram Jack NW’s insurance policy is “foundation repair.” CP 557.

E. In June 2007, Thompson learned that Smith was doing most of the foundation work through his company Smithworks, and using Ram Jack NW only to provide the patented piling system developed by Ram Jack Oklahoma.

Thompson and Smith met on Fridays over breakfast to discuss Ram Jack NW’s progress. CP 530. At one such meeting

in June 2007 – when Ram Jack NW had been operating for about a year – Smith reported that Ram Jack NW had secured a number of smaller jobs and one large project that would produce revenues over \$250,000 (the “King job”). CP 533. King had responded to Ram Jack NW’s foundation services ad. CP 535.

Smith told Thompson that the King job was nearly complete and Thompson was expecting to recoup his capital investments and share in the profits. CP 533. But Smith told Thompson that the King job was primarily a Smithworks job, not a Ram Jack NW job. *Id.*

Smith’s claim that the lion’s share of the King job – and profits – belonged to Smithworks shook Thompson’s trust in Smith. CP 534. Thompson strongly suspected that Smith was funneling Ram Jack NW business opportunities and funds into Smithworks, and Thompson wanted a written resolution of the conflict Smith had caused by “self-dealing.” *Id.* To that end, Thompson sent Smith an email spelling out his understanding – from the beginning – that Ram Jack NW was supposed to do all foundation-related work:

I strongly disagree with your position that all jobs are Smithworks jobs and that Ram Jack is a subcontractor for Smithworks. . . . I told you I would totally support Smithworks gaining work from a Ram Jack customer and I still do, providing the scope of the work is outside that of

foundation work. But that is distinctly and vastly different from your recent idea that all jobs are Smithworks and Ram Jack gets a role as subcontractor providing only the placement of piers as part of the overall job. . . . That is not OK and not what we set up originally.

CP 322.

Smith responded that Ram Jack NW's sole function was to excavate for piers and drive piers and that Smithworks could provide all other foundation services for Ram Jack NW customers:

I was under the understanding that we had discussed this matter and were in agreement that anything outside of Ram Jack (excavating for and driving piers), Smithworks would handle. . . . No concrete work, no raising house, no building forms, no carpentry, etc

CP 323. Thompson found it "amazing" that Smith took the position that Ram Jack NW was only to provide piercing services and that Smithworks would perform all other foundation work. CP 530. Thompson agreed Smithworks could provide ancillary non-foundation services for Ram Jack NW customers, such as a kitchen remodel, but never agreed that Smithworks could do all foundation work other than excavating for and driving foundation piers. CP 538. Smithworks was not supposed to convert Ram Jack NW opportunities and customers and Smith was not supposed to self deal. *Id.*

During the next six months, Smith became secretive and aloof. CP 537-38. Smith was in control of all bank records and other Ram Jack NW documents. *Id.* He withheld documents and communications from Thompson about the King job and other Ram Jack business. CP 538.

F. Procedural history.

1. Thompson filed suit after Smith refused to mediate.

Thompson tried to convince Smith to mediate their disagreement, but Smith refused. CP 538. Thompson and Smith had reached an insurmountable impasse by December 2007. CP 534. Thompson filed suit. *Id.*

2. Based on his conversations with Smith, Ram Jack NW employee Charles Brastrup understood the parties' agreement to be that Ram Jack NW would provide complete foundation services and related services.

Charles Brastrup, one of Thompson's patients, had many years of experience as a foundation contractor and was available to work for Ram Jack NW. CP 532. Smith, who had met Brastrup when Smith was working on Thompson's remodel (CP 567), agreed that Brastrup would be perfect to oversee the technical aspects of Ram Jack NW's foundation work. CP 532. Ram Jack NW hired Brastrup as a sales representative. *Id.*

Brastrup was primarily responsible for finding and securing new business for Ram Jack NW and to help Smith with the technical aspects of working on foundation projects. CP 567. Brastrup was involved in the estimating and bidding process, including on the King job. CP 569, 570. Brastrup also managed the King job while Smith was on vacation, for which he was paid an hourly wage, in addition to his Ram Jack NW salary. CP 569. Smith paid Brastrup's salary from Ram Jack NW, but paid his additional wage on the King job from Smithworks. *Id.*

Smith moved for summary judgment that Smith did not – as a matter of law – improperly usurp Ram Jack NW's business opportunities for Smithworks. CP 265-77. Smith's motion also asked the court to rule, as a matter of law, that the parties never agreed that Ram Jack NW would perform services other than "services related to piling." CP 265-66.

In his declaration in support of Thompson's opposition to Smith's summary judgment motion, Brastrup stated that he had a "clear understanding" that the parties formed Ram Jack NW to provide "a complete foundation 'package'" and that customers he helped secure "would provide projects or business opportunities that belonged to Ram Jack NW . . . including any aspect of the

project that was in any way related to foundation construction or work.” CP 567.

Brastrup’s understanding of the parties’ agreement as to Ram Jack NW’s scope was based on his many conversations with Smith (and with Thompson) when he was originally hired, when he traveled with Smith to Oklahoma for training, and when he and Smith worked together to solicit new business for Ram Jack NW.

Id. Brastrup summarized his understanding of the parties’ business relationship as follows (CP 567-68):

In conversations with [Smith] and [Thompson] (together) and also with [Smith], separately, it was my understanding that in the process of providing services for Ram Jack NW customers, it was possible that some type of ‘remodel’ opportunity (unrelated to the primary foundation contract) could surface. For example, while doing a foundations remodel or repair job, [Smith] could find out that kitchen cabinets need replacing, providing an opportunity for him to provide ‘Smithoworks’ services. I was aware that [Thompson] agreed that it was ok for [Smith] to pick up extra side jobs that were not a part of the Ram Jack NW foundation work.

3. Smith incorrectly argued in his summary judgment motion that Thompson acknowledged that the parties had never agreed about the scope of the services Ram Jack NW would provide.

In his summary judgment motion, Smith argued that Thompson admitted in his deposition that the parties never agreed that Ram Jack NW would do anything more than “pier-related

work.” CP 273, 274. But when Thompson stated that the parties had not reached an “agreement,” he was referring to an agreement resolving Smith’s June 2007 claim that all work other than pier related work belonged to Smithworks. CP 534. Thompson’s deposition testimony on this point referred back to Thompson’s request, in his June 12, 2007 email, that Smith work with Thompson to “spell out in writing the procedure for determining what portion of a Ram Jack job might be termed Smithworks.” CP 322, 534. Thompson’s deposition testimony plainly explains that he was referring to an agreement to fix the problem that arose by Smithworks’ overreaching – not to the parties’ original agreement regarding the scope of Ram Jack NW’s services (referring to Smith’s email response to Thompson’s June 2007 email, CP 318):

Q. [Smith] states here that he understood you had an agreement that anything outside of Ram Jack, which he identifies as excavating for and driving piers, Smithworks would handle?

A. No, that was never our agreement.

Q. Okay, when did you reach your agreement? . . .

A. Well, it’s evident that we have not reached an agreement because we’re still arguing about it.

Q. Okay. Alright. So if I said that you never did reach an agreement, then we would actually agree on that?

A. Well, I said in my [June 2007] email that I think we needed to come to an agreement in order to have a smoother operation of our business so we didn't have conflict.

4. The trial court dismissed the heart of Thompson's case on summary judgment.

The trial court entered summary judgment in Smith's favor, ruling as a matter of law that: (1) Thompson and Smith did not agree to Ram Jack NW's scope of work beyond piercing foundations, such that Smithworks did not interfere with Ram Jack NW's business by doing foundation work (CP 687-89); (2) Thompson breached his fiduciary duty to Ram Jack NW by removing funds from the business, such that he should be judicially removed from Ram Jack NW (CP 1029-32); and (3) Thompson's claims against Smithworks for comingling funds should be dismissed and Smithworks should be dismissed with prejudice. CP 1033-35.

Following the trial court's summary judgment orders, Thompson's remaining claims included breach of contract and breach of fiduciary duty (both claims based on Smith's management of and accounting for Ram Jack NW). RP 4, 9-10. Smith's counterclaims included breach of contract (based on Thompson's alleged failure to capitalize Ram Jack NW), and

breach of fiduciary duty (based on Thompson filing suit against Smith and Smithworks). CP 94-96; RP 297.

5. Smith's primary damages argument was that Thompson should have to pay Smith's attorney fees.

Smith claimed that he was damaged by having to respond to Thompson's lawsuit. RP 304-05. Smith's primary damages claim was that he incurred over \$150,000 in attorney fees. RP 305-07. He also claimed personal injury-type of damages – that he gained weight, had trouble sleeping, and felt “stressed out.” RP 305. He testified that he “may” have lost business by focusing on the lawsuit. *Id.* The trial court overruled Thompson's objection that Smith's testimony was speculative. *Id.*

6. The trial court instructed the jury to decide whether Thompson's lawsuit was frivolous.

The last question on the special verdict form asked the jury to determine whether “Thompson's act of filing this lawsuit . . . was frivolous.” CP 1240. The final jury instruction, other than the charge, defined frivolous lawsuit as follows:

A lawsuit is frivolous if it is initiated without a reasonable investigation, is not reasonably based on existing law or fact, or is based on an improper purpose such as to harass or cause another party to incur expense.

RP 395; App. A, Instruction 30. Other than the charge, this was the last instruction the trial court read to the jury. RP 395.

7. The jury returned a \$70,000 verdict for Smith and found that Thompson's lawsuit was frivolous, despite finding that Smith breached his fiduciary duty to Thompson.

The trial court gave numerous instructions regarding breach of contract, including one instruction summarizing Smith's allegation that Thompson breached the parties' contract by failing to capitalize Ram Jack NW. RP 390; App. A, Instruction 15. Although that instruction purports to summarize both parties' breach of contract claims, there is no summary of Thompson's claim. *Id.* The court also instructed the jury that the only fiduciary duty partners owe to one another is the duty of loyalty and the duty of care. RP 389; App. A, Instruction 12.

The special verdict form required the jury to determine whether the parties had (1) breached the parties' contract; and/or (2) breached their fiduciary duty. CP 1239. The jury found that neither party had breached the contract. *Id.* The jury found that both parties had breached their fiduciary duty, found that Thompson's breach caused Smith \$70,000 in damages, but found that Smith's breach did not cause Thompson any damages. *Id.* Despite finding that Smith breached his fiduciary duty, the jury found that Thompson's lawsuit was frivolous. CP 1239-40.

8. The trial court awarded Smith over \$150,000 in attorney fees, finding that Thompson's lawsuit was frivolous.

Smith concurrently moved the court to enter judgment for \$70,000 based on the jury's verdict (CP 1262-73) and for an attorney-fee award based on the jury's verdict. CP 1262-73. Smith sought fees under RCW 4.84.185 and CR 11. CP 1262. Among other things, Smith argued that the jury's finding that Thompson's suit was frivolous amounted to an "advisory verdict." CP 1263.

Thompson opposed Smith's motion for entry of judgment, arguing that the jury's verdict was inconsistent, where the jury found that Smith had breached his fiduciary duty to Thompson, but found that Thompson's lawsuit was frivolous. CP 1284-85. Thomson also reserved his right to move for a new trial based on the inconsistent verdict. *Id.*

Thompson opposed Smith's fee request on the same ground, arguing that his lawsuit could not be frivolous, where the jury found – in Thompson's favor – that Smith breached his fiduciary duty to Thompson. CP 1290-92. Thompson also argued that awarding Smith fees would amount to a double recovery, where the jury had already awarded Smith damages based on his testimony regarding attorney fees. CP 1292-94.

The court entered a \$70,000 judgment for Smith and Smithworks³, reserving ruling on Smith's fee claim. CP 1311-12. The court subsequently found that Thompson's lawsuit was frivolous and that Smith was entitled to fees under RCW 4.84.185 and CR 11. CP 1323. The court ordered Thompson to pay Smith \$153,264.50 in fees (CP 1320-21), entering one finding on fees: Smith's "documented attorneys' fees [were] reasonable." CP 1323.

9. The trial court denied Thompson's motion for a new trial.

Thompson subsequently moved for a new trial, Judgment Notwithstanding the Verdict, and reconsideration or vacation of the summary judgment order, arguing (among other things) that the jury's verdict was inconsistent, where the jury found that Smith had breached his fiduciary duty to Thompson, but found that Thompson's lawsuit was frivolous. CP 1328, 1333-34. The court denied Thompson's motion. CP 1429-31.

Thompson timely appealed. CP 1491-1500.

³ The trial court entered judgment for Smithworks even though the court dismissed Smithworks with prejudice on summary judgment. CP 1034.

ARGUMENT

A. Standards of review.

1. Summary judgment.

This Court reviews “summary judgment order[s] de novo, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party.” *King v. Rice*, 146 Wn. App. 662, 668, 191 P.3d 946 (2008), *rev. denied*, 165 Wn.2d 1049 (2009). Summary judgment is proper only where there is no “genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Shields v. Enter. Leasing Co.*, 139 Wn. App. 664, 670, 161 P.3d 1068 (2007); CR 56. The evidence must be such that “reasonable minds could reach but one conclusion.” *Shields*, 139 Wn. App. at 670.

2. Fee award based on RCW 4.84.185 and CR 11.

Under RCW 4.84.185, a trial court may award attorneys’ fees incurred in opposing an action that is “frivolous and advanced without reasonable cause.” Fees are appropriate only if the action is frivolous as a whole. *Jeckle v. Crotty*, 120 Wn. App. 374, 387, 85 P.3d 931, *rev. denied*, 152 Wn.2d 1029 (2004). “An action is frivolous if it ‘cannot be supported by any rational argument on the

law or facts.” **Jeckle**, 120 Wn. App. at 387. The Court reviews fee awards for an abuse of discretion. *Id.*

A court may award attorneys’ fees incurred due to a failure to comply with CR 11, where (1) the claims are filed in bad faith or for an improper purpose, or are not well grounded in fact; or (2) the claims are not warranted by existing law; and (3) the attorney who signed the pleading has failed to conduct a reasonable inquiry into the claims’ factual or legal basis. **Skimming v. Boxer**, 119 Wn. App. 748, 754, 82 P.3d 707, *rev. denied*, 152 Wn.2d 1016 (2004); **Manteufel v. Safeco Ins. Co. of Am.**, 117 Wn. App. 168, 176, 68 P.3d 1093, *rev. denied*, 150 Wn.2d 1021 (2003). This Court reviews the award or denial of CR 11 sanctions for an abuse of discretion. **Manteufel**, 117 Wn. App. at 176. The trial court abuses its discretion if it “relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.” **Gildon v. Simon Prop. Group, Inc.**, 158 Wn.2d 483, 494, 145 P.3d 1196 (2006); *see also In re Guardianship of Johnson*, 112 Wn. App. 384, 388, 48 P.3d 1029 (2002).

B. The trial court erred in ruling as a matter of law that Thompson and Smith did not agree that Ram Jack NW would do all foundation work.

Thompson plainly testified that he and Smith agreed that Ram Jack NW would be a full service foundation company. As part of their agreement, Thompson even defined the type of work Smithworks could take from Ram Jack NW customers without improperly competing – kitchen remodel-type of work. Brastrup testified to the same based primarily on his conversations *with Smith*. The trial court erred in granting summary judgment that there was no agreement as to Ram Jack NW's scope. This Court should reverse.

The trial court ruled as a matter of law that Smithworks did not usurp business opportunities from Ram Jack NW. CP 687-89. It is uncontested that Smithworks performed significant foundation work for customers who came to Ram Jack NW through Ram Jack NW's advertising. *Supra*, Statement of the Case § E. As such, the court's ruling that Smithworks did not usurp Ram Jack NW's business necessarily encompasses the court's "find[ing]" that the parties "did not, as a matter of law, agree on a scope of work of Ram Jack Northwest LLC beyond the piercing-related work it performed." CP 688.

Taking all facts and reasonable inferences in Thompson's favor, this Court should reverse the trial court's ruling. *King*, 146 Wn. App. at 668. Thompson unequivocally stated that while the parties were in Oklahoma meeting with the Ram Jack dealership, Thompson "agreed with Smith that [Ram Jack NW] would be a full-service foundation business." CP 528. Thompson told Smith that that he did not have any problem with Smithworks "pick[ing] up some extra work such as a kitchen remodel" so long as Smithworks was not taking foundation work from Ram Jack NW. CP 532.

The parties reiterated their agreement after Ram Jack NW's advertising came out, when Thompson repeated "exactly" what he had told Smith in Oklahoma – Smithworks could perform kitchen remodel type-of-work for Ram Jack NW customers, so long as Smithworks was not taking foundation work from Ram Jack NW. CP 532. And when Thompson learned that Smith was taking Ram Jack NW business opportunities for Smithworks, Thompson reminded Smith of the parties' original agreement that Ram Jack NW would do all foundation-related work and that Smithworks could do tangential remodel work for Ram Jack NW customers (CP 322):

I told you I would totally support Smithworks gaining work from a Ram Jack customer and I still do, providing the scope of work is outside that of foundation work. But that is

distinctly and vastly different from your recent idea that all jobs are Smithworks and Ram Jack gets a role as subcontractor providing only the placement of piers as part of the overall job. . . . That is not OK and not what we set up originally.

According to Smith, however, the parties agreed that Ram Jack NW would only excavate for and drive foundation piers:

When Ram Jack NW was formed, [Thompson] and I agreed that Ram Jack NW would perform (or be responsible for) all excavation for piers, all driving of piers and all securing of structure to the driven piers using the patented and licensed piercing system and products.

CP 282. In other words, while Thompson plainly stated that the parties agreed that Ram Jack NW would perform all foundation work and that Smithworks could do only unrelated remodel type-of-work, Smith contends that the parties agreed that Ram Jack NW would do only pier-related work, leaving Smithworks free to do all other foundation work for Ram Jack NW customers. The conflicting versions of the parties' agreement create a fact dispute rendering summary judgment inappropriate. **Shields**, 139 Wn. App. at 670.

Moreover, Thompson's version of the agreement – that Ram Jack NW would provide a complete package of foundation services and related services – is consistent with the parties' actions (except of course, Smith taking Ram Jack NW business opportunities for Smithworks):

- ◆ While in Oklahoma, the parties learned how to provide a “full-service approach to all aspects related to foundations.” CP 528.
- ◆ The parties advertised Ram Jack NW as providing retaining walls, walkways, patios, and cement slabs, in addition to foundations. CP 544.
- ◆ The parties insured Ram Jack NW as a “foundation repair” business (CP 557), while Smith insured Smithworks as a “carpentry contractor.” CP 552.

And the nature of the parties’ agreement is not just a matter of Thompson’s word against Smith’s word. Brastrup, Ram Jack NW’s only employee, also testified about the scope of the parties’ agreement. *Supra*, Statement of the Case § F.2. Brastrup knew both Thompson and Smith before coming to work for Ram Jack NW. CP 564. He thought Smith did quality construction work. CP 567.

Brastrup understood that the parties had agreed that Ram Jack NW would perform “any aspect of the project that was in any way related to foundation construction or work.” CP 567. Brastrup’s understanding of the parties’ agreement was based on conversations he had with Thompson and Smith together, and with Smith alone. CP 567-68. Brastrup knew that Thompson had agreed that Smithworks could perform “extra side jobs” for Ram Jack NW customers that were not part of Ram Jack NW’s

foundation work. CP 567-68. These “extra side jobs” were “remodel” opportunities, such as replacing kitchen cabinets. *Id.*

Brastrup was a Ram Jack NW employee – not a Smithworks employee. CP 565-66. Ram Jack NW paid Brastrup’s salary. CP 566, 569. His primary duty was to help secure new business for Ram Jack NW. CP 567. To that end, it would have been absolutely necessary that Brastrup understood the scope of Ram Jack NW’s business. It was not his job to secure business, make estimates, or bid on jobs for Smithworks.

The trial court’s conclusion that the parties did not, as a matter of law, reach an agreement that Ram Jack NW would do anything other than “pier-related work” is plainly at odds with (1) Thompson’s statement that he “agreed with Smith that [Ram Jack NW] would be a full-service foundation business” (CP 528); and (2) Brastrup’s testimony that *based on his conversations with Smith* he understood the parties’ agreement to be that Ram Jack NW would provide all foundation services and related services. CP 567. These statements go directly to an agreement reached between the parties, based on the parties’ mutual representations. *Id.* They are not statements about intentions Thompson never manifested to Smith.

Moreover, the advertising and insurance policies also support that Ram Jack NW was supposed to be doing all foundation-related work. This sharply conflicting evidence precluded summary judgment. This Court should reverse.

C. The incorrect summary judgment ruling gutted Thompson's case requiring a complete retrial.

Thompson's argument that Smith was improperly usurping Ram Jack NW business opportunities for Smithworks is plainly central to both of his claims – breach of contract and breach of fiduciary duty. The trial court's summary judgment ruling on usurpation denied Thompson a fair opportunity to pursue these claims. And the jury could not fairly determine Smith's claims against Thompson without hearing the evidence that Smith was self-dealing. This Court should reverse and remand for a new trial on Thompson's claims and Smith's counterclaims.

Although the trial court instructed the jury to determine whether Smith had breached the contract, Thompson was not allowed to argue that the parties' agreement was that Ram Jack NW would provide all foundation services. If Thompson had been permitted to argue that Ram Jack NW was supposed to perform all foundation work and related services, then Smith's breach would

have been obvious – Smith does not deny that Smithworks provided foundation services for Ram Jack NW customers. CP 276-77.

And although the jury found that Smith breached his fiduciary duty to Thompson, it found no damages. CP 1239. Again, damages would be obvious if Thompson had been permitted to argue that Smith was improperly taking Ram Jack NW business opportunities for Smithworks.

The improper summary judgment also undermines the verdict for Smith. CP 1239. The jury awarded damages for Thompson's breach of fiduciary duty to Smith. *Id.* Smith's breach of fiduciary duty claim was based primarily (if not entirely) on his theory that Thompson involved Smith in a frivolous lawsuit. RP 305-07. If the court had permitted the jury to decide whether Smith was usurping Ram Jack NW business opportunities, its findings on breach of fiduciary duty and frivolity could plainly be different.

The remaining arguments illustrate serious errors that occurred at trial. These errors are, however, secondary to the erroneous summary judgment ruling, reversal of which requires a new trial on all issues.

D. The trial court improperly commented on the evidence when it instructed the jury to determine whether Thompson's lawsuit was frivolous.

The frivolous lawsuit instruction allowed the jury to infer that the judge doubted Thompson's evidence. This constitutes an impermissible comment on the evidence. Although Thompson did not object to this instruction, it is a manifest error affecting a constitutional right, which this Court will consider for the first time on review. RAP 2.5 (a)(3). This Court should reverse.

Our Constitution provides that "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. 4, § 16; see *also* CR 51(j). The purpose of this constitutional prohibition is to prevent the judge's opinion of the evidence from influencing the jury. ***City of Kirkland v. O'Connor***, 40 Wn. App. 521, 523, 698 P.2d 1128 (1985) (reversing a DUI conviction, holding that instructing the jury not to infer anything from the absence of a breathalyzer test is an unlawful comment on the evidence).

A jury instruction constitutes an impermissible comment on the evidence if it allows the jury to infer the judge's opinion regarding the "credibility, weight or sufficiency of some evidence introduced at the trial." ***Kirkland***, 40 Wn. App. at 523; ***Hamilton v.***

Dep't of Labor & Indus., 111 Wn.2d 569, 571, 761 P.2d 618 (1988) (an instruction is an impermissible comment in the evidence of it “allows the jury to infer . . . that the judge personally believed or disbelieved the particular testimony in question”); **Adair v. Weinberg**, 79 Wn. App. 197, 205, 901 P.2d 340 (1995) (same). Whether the instruction is an improper comment turns on the facts and circumstances of each case. **Kirkland**, 40 Wn. App. at 523.

The special verdict form required the jury to determine whether Thompson’s lawsuit was “frivolous.” CP 1240. The court instructed the jury that “a lawsuit is frivolous if it is initiated without a reasonable investigation, is not reasonably based on existing law or fact, or is based on an improper purpose such as to harass or cause another party to incur expense.” RP 395, App. A, Instruction 30. This was the last instruction the court read to the jury before the charge. *Id.*

This instruction is an impermissible comment on the evidence because it allowed the jury to infer that the trial judge doubted all of Thompson’s evidence. **Kirkland**, 40 Wn. App. at 523. In **Kirkland**, this Court held that a jury instruction telling the jury not to infer anything from the absence of a breathalyzer test was an impermissible comment on the evidence, where “it was

possible that the jury understood the instruction to mean it was not to consider that the evidence might be insufficient without a Breathalyzer test result.” 40 Wn. App. at 523. Since the instruction prohibited the jury from considering the lack of evidence on intoxication, it was a comment on the evidence. *Id.*

The frivolous lawsuit instruction has a similar impact. The frivolous lawsuit instruction suggests to the jury that the judge doubted the evidence Thompson presented. This is so because simply giving the instruction implies that the evidence Thompson put on might be so deficient that it was not even reasonable for him to bring suit. This necessarily taints the jury’s ability to fairly decide Thompson’s claims.

Moreover, the instructions must be read as a whole. ***Kirkland***, 40 Wn. App. at 523. Instruction 15 purports to summarize the parties’ breach of contract claims, but summarizes only Smith’s claim against Thompson. RP 390; App. A. This instruction suggests that Thompson filed a breach of contract claim, but does not really have a breach claim. Read with the frivolous lawsuit instruction, this certainly creates the impression that at least the breach of contract claim was baseless.

Finally, Smith's belated argument that the jury's finding that Thompson's lawsuit was frivolous is an "advisory verdict" betrays the bias instructing the jury on this point created. CP 1263. The trial court did not need the jury's advice to determine whether Thompson's case was frivolous. Submitting the question to the jury purely for advisory purposes did nothing but contaminate the jury.

Instructing the jury to determine frivolity was a manifest error affecting a constitutional right. RAP 2.5(a)(3). The right to a trial free from the judge's opinions on the evidence is preserved in Washington's Constitution, Article 4, § 16. The frivolity instruction creates a manifest error because it tainted to jury's perception of Thompson's entire case.

In short, the frivolous lawsuit instruction was a comment on the evidence, where it implied to the jury that the trial court doubted Thompson's evidence. This Court should reverse.

E. The jury's verdict is fundamentally conflicted, where the jury found that Smith breached a fiduciary duty to Thompson, but also found that Thompson's claims were frivolous.

The jury's verdict is plainly inconsistent, where the jury found that Smith breached his fiduciary duty to Thompson, but found that Thompson's lawsuit was frivolous. Since a lawsuit is frivolous only

if it is frivolous in its entirety, Thompson's lawsuit cannot be frivolous given the jury's finding that Smith breached his fiduciary duty to Thompson. The trial court erred in entering judgment on the jury's verdict over Thompson's objections that the verdict is inconsistent. CP 1284, 1311-12. This Court should reverse and remand.

If a jury gives conflicting answers to the special verdict and the court cannot reconcile the answers, "[T]he only proper recourse is to remand the cause for a new trial." *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 131, 875 P.2d 621 (1994) (quoting *Blue Chelan, Inc. v. Dep't of Labor & Indus.*, 101 Wn.2d 512, 515, 681 P.2d 233 (1984)). Neither the trial court nor an appellate court may substitute its judgment for the jury's findings. *Tincani*, 124 Wn.2d at 131 (quoting *Blue Chelan*, 101 Wn.2d at 515).

The jury's finding that Thompson's lawsuit is frivolous irreconcilably conflicts with its finding that Smith breached his fiduciary duty to Thompson. CP 1239-40. Smith argued that Thompson's lawsuit was frivolous under both RCW 4.84.185 and CR 11. CP 1262-1274. Under RCW 4.84.185, "a court cannot pick and choose among those aspects of an action that are frivolous

and those that are not.” **Jeckle**, 120 Wn. App. at 387. Rather, the lawsuit is frivolous only if it is frivolous “as a whole.” *Id.* A lawsuit is not frivolous under RCW 4.84.185 “[i]f any claims advance to trial.” **State ex rel. Quick-Ruben v. Verharen**, 136 Wn.2d 888, 904, 969 P.2d 64 (1998).

Under CR 11, sanctions are appropriate “only when it is patently clear that a claim has absolutely no chance of success.” **Skimming**, 119 Wn. App. at 755. It is not enough that a complaint does not prevail on its merits.⁴ *Id.*

The jury found in Thompson’s favor on liability for breach of fiduciary duty, so Thompson’s lawsuit could not have been “frivolous in its entirety” or “as a whole.” **Skimming**, 119 Wn. App. at 756; **Jeckle**, 120 Wn. App. at 387. Smith incorrectly claimed that Thompson’s lawsuit was frivolous – despite the finding that Smith breached his fiduciary duty to Thompson – stating that the jury “found that [Thompson] presented no evidence of harm.” CP 1315. To the contrary, although the parties agreed to share profits 50/50,

⁴ In addition to being an improper comment on the evidence, the instruction fails to adequately state the law. The instruction simply told the jury that a lawsuit is frivolous if it is not adequately investigated or lacks sufficient legal or factual basis. RP 395; App. A, Instruction 30. This in no way adequately conveys the extremely high standard that a lawsuit must be frivolous in its entirety to be frivolous. **Skimming**, 119 Wn. App. at 756.

Smith drew nearly \$20,000 from Ram Jack NW profits, but claimed that Ram Jack NW had insufficient funds to pay anything to Thompson. RP 186, 336-37. Smith could have split this \$20,000 with Thompson.

And although Thompson also withdrew some funds from Ram Jack NW, he put on evidence that he contributed \$50,000 more than he took out:

	Thompson paid	Thompson received	Running total of net contributions
Start-up capital. RP 63-65, 253-54.	\$24,000		\$24,000.00
Payment to Ram Jack Oklahoma. Ex 84; RP 20, 253.	\$35,000		\$59,000.00
Start-up expenses, including trailer. Exs 84, 108.	\$10,425.50		\$69,425.50
Transfer of funds from Alaska Airlines Visa to CitiBank credit line. (Thompson makes all payments). Exs 84, 85, 167.		\$25,000	\$44,425.50
Payments on CitiBank credit line. Exs 85, 167.	\$1,764.08		\$46,189.58
Balance on CitiBank credit line (transferred to Bank of America and later to Chase. Thompson makes all payments). Exs 81, 85, 86, 167; RP 71.	\$24,500		\$70,689.58
Payment from Ram Jack NW. Exs 86, 107; RP 81.		\$2,000	\$68,689.58

Transfer of funds from Thompson's Visa to Ram Jack NW's Bank of America Visa. Ram Jack NW initially makes payments. Exs 84, 164; RP 21; RP 110.		\$20,000	\$48,689.58
Balance on Ram Jack NW's Bank of America Visa when Thompson took over payments in December 2007. Exs 82, 164; RP 142-43.	\$16,082.54		\$64,772.12
Payment by Ram Jack NW for Bank of America Visa after Thompson took over payments. Exs 106, 164; RP 81.		\$3,000	\$61,772.12
Ram Jack NW payment to Thompson. RP 62-63, 118-19.		\$12,000	\$49,772.12
Incidentals for Ram Jack NW. Exs 82, 124; RP 90.	\$8,919.95		\$58,692.07
Ram Jack NW Payment to Thompson for incidentals. Exs 82, 124, 159; RP 90, 129.		\$8,688.38	\$50,003.69

The fact that the jury rejected Thompson's damages evidence does not make Thompson's lawsuit frivolous. *Skimming*, 119 Wn. App. at 756.

Moreover, Thompson's lawsuit cannot be frivolous for the simple fact that his breach of fiduciary duty claim and breach of contract claim "advance[d] to trial." *Quick-Ruben*, 136 Wn.2d at 904. In *Biggs v. Vail*, our Supreme Court reversed a fee award

under RCW 4.84.185, holding that the lawsuit was not frivolous as a whole, where the trial court found that three of the four claims were frivolous. 119 Wn.2d 129, 137, 830 P.2d 350 (1992). In **Quick-Ruben**, the Supreme Court held that “[u]nder **Biggs** . . . if any claims advance to trial, a trial court’s award of fees under RCW 4.84.185 cannot be sustained.” 136 Wn.2d at 904.

Further, a party must move for CR 11 sanctions “as soon as it becomes aware they are warranted.” **North Coast Elec. Co. v. Selig**, 136 Wn. App. 636, 649, 151 P.3d 211 (2007). “Prompt notice” that a party may seek CR 11 sanctions can curb unnecessary litigation, fulfilling CR 11’s purpose. **North Coast Elec.**, 136 Wn. App. at 649-50. This rule of law necessarily suggests that CR 11 sanctions are not appropriately decided by a jury after a full trial on the merits.

In short, Thompson’s lawsuit simply was not frivolous, where (1) two claims advanced to trial; and (2) the jury found that Smith breached his fiduciary duty to Thompson. Reversal and remand is required. **Tincani**, 124 Wn.2d at 131.

F. The evidence is insufficient to support the jury's damages award.

Smith plainly cannot recover the same attorney fees from both the jury and the judge.⁵ Thus, the jury's verdict and the court's fee award can both stand only if the damages evidence – other than Smith's attorney fees – is sufficient to support the jury's \$70,000 verdict. It is not.

Smith asserted damages based on the following: (1) \$150,000 in attorney fees; (2) reimbursement for \$7,000 Thompson took out of Ram Jack NW; (3) lost business; and (4) weight gain and trouble sleeping. RP 231, 305-07. Smith's fee request was the focus of his damages claim. *Id.* Smith did not attempt to quantify the business he "may have lost" due to time spent on the lawsuit. *Id.* at 305. The trial court nonetheless overruled Thompson's speculation objection. *Id.*

Smith cannot recover damages for lost business. Smith's claim that he "may have lost business" is speculative. RP 305. He did not give one example or attempt to quantify the business he thought he "may" have lost. *Id.* Without any estimate of lost profits,

⁵ As discussed below, the trial court erred in awarding Smith all of his attorney fees and entering judgment on the verdict, which appears to have also incorporated an attorney fee award. *Infra*, Argument § G.

the jury could not possibly put a number of Smith's speculative lost business. The trial court erred on overruling Thompson's speculation objection. *Id.*

Nor could the jury have reasonably awarded Smith \$70,000 damages for "sleepless nights" and weight gain, and there is no indication that the jury intended to do so. RP 305. Rather, it appears that the award was for attorney fees, which was undeniably the focus of Smith's damages claim. RP 305-07.

In short, the evidence simply does not support a damages award based on anything other than Smith's request for attorney fees, and \$7,000 in funds Thompson allegedly owed Ram Jack NW. Since the jury could not award fees under RCW 4.84.185 or CR 11, the award is wholly inappropriate. This Court should reverse.

G. The trial court cannot retry issues submitted to the jury just because Smith does not like the verdict.

Smith chose to submit his attorney fee request to the jury. Smith cannot repudiate his decision after-the-fact just because the jury did not award him everything he asked for. But the trial effectively allowed Smith to do just that.

The trial court erroneously awarded Smith attorney fees over Thompson's objection. CP 1292-94. The trial court usurped the jury's role, awarding Smith more damages than the jury was willing to award him. And the trial court's award granting Smith's entire fee request duplicates the fee award included in the verdict. This Court should reverse.

The trial court's fee award impermissibly usurps the jury's role. The court instructed the jury to decide whether Thompson's lawsuit was frivolous and the jury found that it was. CP 1240. Having heard that Smith incurred over \$150,000 in attorney fees defending Thompson's lawsuit (and prosecuting his counterclaims), the jury awarded Smith \$70,000 – less than half the fees he requested. *Compare* RP 305 *with* CP 1239.

Smith does not get a do-over with the trial court just because the jury awarded him less than he asked for. Right or wrong, Smith elected to submit his fee request to the jury. He cannot repudiate that decision in favor of the trial court re-trying the issue.

Rather, if Smith thought that the jury's award was too small, then his option was to move for an additur. If granted, Thompson would have the option to accept the additur or have a new trial. But Smith did not move for an additur – he simply asked the court to

retry the frivolous lawsuit issue and to award him more damages than the jury had already awarded him. CP 1272. The court erroneously did just that. CP 1321.

Even if the trial court could retry an issue the jury decided – and award Smith more than the jury was willing to – the trial court could not duplicate the jury’s award. As discussed above, the jury’s \$70,000 award must encompass Smith’s request for his attorney fees. *Supra*, Argument § F. Yet the trial court awarded Smith \$153,264.50, the entire amount billed by both of his attorneys. CP 1272, 1276, 1282, 1321.

Smith argued that the trial court could reduce his fee request if it was convinced that the verdict included attorney fees. CP 1316 n.2. Smith cannot lay his burden at the trial court’s feet. And since there is no way of knowing what part of the \$70,000 award is for attorney fees, the trial court would have to deduct the full \$70,000 from Smith’s fee request to avoid a double recovery. At most, the trial court could have awarded Smith \$83,264.50.

H. The trial court findings are insufficient to support fees under RCW 4.84.185 and CR 11.

The trial court did not enter any findings explaining why Thompson’s lawsuit was frivolous. CP 1322. And the trial court

entered only one finding on Smith's attorney fee request, stating simply that Smith's "documented attorney fees are reasonable." CP 1323. A trial court cannot just summarily conclude that sanctions are appropriate under RCW 4.84.185 and/or CR 11. **North Coast Elec.**, 136 Wn. App. at 649-51. And the single perfunctory finding on fees is insufficient to support the fee award. **Mahler v. Szucs**, 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998). This Court should reverse.

If a trial court awards sanctions under CR 11, it must enter written findings detailing the sanctionable conduct and specifying why each claim was not adequately investigated or is not well grounded in law or fact. **North Coast Elec.**, 136 Wn. App. at 649. It is not sufficient to simply parrot CR 11's language:

Although the court summarily found that Selig's counterclaims were not, after reasonable inquiry, well grounded in fact and warranted under existing law, it did not state with specificity Selig's sanctionable conduct. For example, it did not make findings regarding the steps taken by Selig's attorney in inquiring into the claims or specifically address each claim and explain why it was not well grounded in fact or law.

136 Wn. App. at 649. The court must also "make explicit findings as to which pleadings violated CR 11 and as to how such pleadings

constituted a violation of CR 11.” *Id.* at 649. The court’s order must set out the sanctionable conduct. *Id.*

Under RCW 4.84.185, it is also insufficient for a trial court to summarily find that claims were frivolous and advanced without reasonable cause. *Id.* at 650. If a trial court fails to specify why a claim is “baseless,” then this Court cannot “determine whether the trial court abused its discretion in granting attorney fees under this statute.” *Id.*

Similarly, the trial court must enter written findings sufficient to allow the appellate court to exercise meaningful review of an attorney fee award. ***Mahler***, 135 Wn.2d at 435. The trial court must consider whether any fees were duplicative, whether services were unnecessary, and whether the hourly rates are reasonable. 135 Wn.2d at 435. Although attorney fee awards are within the trial court’s discretion, this Court must “exercise [its] supervisory role to ensure that discretion is exercised on articulable grounds.” *Id.*

The trial court’s findings on Smith’s frivolous lawsuit claim fall far short. CP 1322-24. The court simply entered findings repeating CR 11’s language, failing to specify why Thompson’s claims were inadequately investigated or are not supported by law or fact. *Compare* CP 1322-24 *with* CR 11(b). And the trial court’s

solitary finding that Smith's fees are reasonable is also woefully inadequate. ***Mahler***, 135 Wn.2d at 435. Since this Court cannot meaningfully review the trial court's fee award, reversal is required. *Id.*; ***North Coast Elec.***, 136 Wn. App. at 649.

CONCLUSION

The trial court's summary judgment order is plainly erroneous. Thompson and Brastrup unequivocally testified that the parties agreed that Ram Jack NW would do all foundation work and that Smithworks could do work for Ram Jack NW customers, so long as it was not foundation work. Contrary to this evidence, the trial court concluded as a matter of law, that the parties never reached such an agreement. This Court should reverse.

Numerous errors at trial also require reversal. The trial court commented on the evidence when it instructed the jury to determine whether Thompson's lawsuit was frivolous. This unconstitutional comment led to an irreconcilably conflicted jury verdict. The trial court then erred by entering judgment on the conflicted verdict, and compounded that error by duplicating the jury's award in its fee award. Even still, the court's findings are insufficient to support sanctions. For these reasons as well, this Court should reverse.

RESPECTFULLY SUBMITTED this 11 day of March, 2010.

WIGGINS & MASTERS, P.L.L.C.

A handwritten signature in black ink, appearing to read 'Shelby R. F. Lemmel', written over a horizontal line.

Shelby R. F. Lemmel, WSBA 33099
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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF APPELLANT** postage prepaid, via U.S. mail on the 11 day of March 2010, to the following counsel of record at the following addresses:

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**THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

WILLIAM B. THOMPSON,

Plaintiff,

v.

**KRIS D. AND CECILE SMITH,
A Washington Marital Community and
SMITHWORKS, a Washington LLC,**

Defendants.

NO. 07-2-39553-9 KNT

THE COURT'S INSTRUCTIONS TO THE JURY

Date: _____

**CHERYL B. CAREY
Judge of the Superior Court**

1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe

accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so.

These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

4

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

A person acts willfully when he or she acts knowingly.

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression “if you find” is used, it means that you must be persuaded, considering all the evidence in the case that the proposition on which that party has the burden of proof is more probably true than not true.

You should decide the case of each defendant and the cross-claim defendant as if they were separate lawsuits. The instructions apply to defendants unless a specific instruction states that it applies only to a specific defendant.

There are multiple claims in this case. The instructions apply to all claims unless a specific instruction states that it applies only to a specific claim.

A statute provides that:

A limited liability company shall keep at its principal place of business the following:

1. Unless contained in its certificate of formation or limited liability company agreement, a written statement of:

(i) The amount of cash and a description of the agreed value of the other property or services contributed by each member (including that member's predecessors in interest), and which each member has agreed to contribute;

(ii) The times at which or events on the happening of which any additional contributions agreed to be made by each member are to be made; and

(iii) Any right of any member to receive distributions which include a return of all or any part of the member's contribution.

2. A copy of the limited liability company's federal, state, and local tax returns and reports, if any, for the three most recent years; and

3. A copy of any financial statements of the limited liability company for the three most recent years.

(2) The records required by subsection (1) of this section to be kept by a limited liability company are subject to inspection and copying at the reasonable request, and at the expense, of any member during ordinary business hours.

A statute provides that:

Management of the business or affairs of the limited liability company shall be vested in the members; and

Subject to any provisions in the limited liability company agreement or this chapter restricting or enlarging the management rights and duties of any person or group or class of persons, the members shall have the right and authority to manage the affairs of the limited liability company and to make all decisions with respect thereto.

A statute provides that:

Unless otherwise provided in the limited liability company agreement:

(1) A member or manager shall not be liable, responsible, or accountable in damages or otherwise to the limited liability company or to the members of the limited liability company for any action taken or failure to act on behalf of the limited liability company unless such act or omission constitutes gross negligence, intentional misconduct, or a knowing violation of law.

(2) Every member and manager must account to the limited liability company and hold as trustee for it any profit or benefit derived by him or her without the consent of a majority of the disinterested managers or members, or other persons participating in the management of the business or affairs of the limited liability company from (a) any transaction connected with the conduct or winding up of the limited liability company or (b) any use by him or her of its property, including, but not limited to, confidential or proprietary information of the limited liability company or other matters entrusted to him or her as a result of his or her status as manager or member.

A statute provides that:

The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care as set forth below:

A partner's duty of loyalty to the partnership and the other partners is limited to the following:

(a) To account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;

(b) To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and

(c) To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

A statute provides that:

The profits and losses of a limited liability company shall be allocated among the members, and among classes or groups of members, in the manner provided in a limited liability company agreement. If the limited liability company agreement does not so provide, profits and losses shall be allocated in proportion to the agreed value (as stated in the records of the limited liability company required to be kept pursuant to RCW 25.15.135 of the contributions made, or required to be made, by each member.

14

A contract is a legally enforceable promise or set of promises. In order for a promise or set of promises to be legally enforceable, there must be mutual assent.

The following is a summary of the contract claims of the parties provided to help you understand the issues in this case. You are not to take this instruction as proof of the matters claimed. It is for you to decide, based upon the evidence presented, whether a claim has been proved.

The defendant Smith counterclaims that the plaintiff Thompson entered into a contract with him to provide capital to Ram Jack LLC. Smith claims that Thompson breached this contract failing to pay the money.

Smith also claims that he sustained damages as a result of this breach of the contract, and he seeks a judgment against Thompson for these damages.

Thompson denied this claim.

A promise is an expression that justifies the person to whom it is made in reasonably believing that a commitment has been made that something specific will happen or not happen in the future. A promise may be expressed orally, in writing, or by conduct.

In order for there to be mutual assent, the parties must agree on the essential terms of the contract, and must express to each other their agreement to the same essential terms.

A duty of good faith and fair dealing is implied in every contract. This duty requires the parties to cooperate with each other so that each may obtain the full benefit of performance. However, this duty does not require a party to accept a material change in the terms of its contract.

Smithworks did not perform any illegal act nor did it receive any benefit from Ram Jack Northwest LLC.

It is the duty of the court to instruct you as to the measure of damages.

In order to recover actual damages, the claimant has the burden of proving that the defendant breached a contract with him and that he incurred actual economic damages as a result of the defendant's breach, and the amount of those damages.

If your verdict is for claimant on claimant's breach of contract claim and if you find that claimant has proved that he incurred actual damages and the amount of those actual damages, then you shall award actual damages to the claimant

Actual damages are those losses that were reasonably foreseeable, at the time the contract was made, as a probable result of a breach. A loss may be foreseeable as a probable result of a breach because it follows from the breach either

- (a) in the ordinary course of events, or
- (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

In calculating the claimant's actual damages, you should determine the sum of money that will put the claimant in as good a position as he would have been in if both claimant and defendant had performed all of their promises under the contract.

The burden of proving damages rests with the claimant and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence. You must be governed by your own judgment, by the evidence in the case, and by these instructions, rather than by speculation, guess, or conjecture.

21

A party who sustains damage as a result of another's breach of contract has a duty to minimize the loss. A party is not entitled to recover for any part of the loss that could have been avoided with reasonable efforts. Each party has the burden to prove the other's failure to use reasonable efforts to minimize the loss, and the amount of damages that could have been minimized or avoided.

22

“Willful misconduct” means conduct which involves the deliberate, intentional or wanton conduct in doing or omitting to act with knowledge that danger or damage is likely to result therefrom.

To constitute “willful misconduct” there must be actual knowledge of the peril or danger to be apprehended, coupled with a conscious failure to avert that injury or damage.

“Gross negligence” is failure to exercise slight care. But this means not the total absence of care but care substantially or appreciably less than the quantum of care inhering in ordinary negligence. It is negligence substantially and appreciably greater than ordinary negligence. Ordinary negligence is the act or omission which a person of ordinary prudence would do or fail to do under *like* circumstances or conditions. There is no issue of gross negligence without substantial evidence of serious negligence

“Knowing violation of the law” means that a person had actual knowledge that an action was a violation of a statute, ordinance or administrative rule, and took the action with a specific intention of violating the law.

When determining damages, Dr. William Thompson's rights to receive distributions from Ram Jack Northwest must terminate by March 8, 2008. If you determine Dr. Thompson paid expenses on behalf of Ram Jack Northwest after March 8, 2008, the jury may consider such evidence.

In this case there have been allegations about “commingling.” “Commingling” of partnership funds with the personal funds of a partner is not, in and of itself, a violation of any Washington law or statute, unless such “commingling” is a breach of fiduciary duty. Under Washington law, “commingling” of partnership funds with the personal funds of a partner is a breach of fiduciary duty only when a partner fails to account for such “commingling” in the partnership books. In order to find in favor of the Plaintiff on his claim for “commingling,” you must find that such “commingling” was a breach of fiduciary duty because it was not accounted for on the partnership books.

In this case each member of the Ramjack Northwest LLC allege that the other member is liable for damages based on certain acts of that member. A member or manager shall not be liable, responsible, or accountable in damages or otherwise to the limited liability company or to the members of the limited liability company for any action taken or failure to act on behalf of the limited liability company unless such act or omission constitutes gross negligence, intentional misconduct, or a knowing violation of law.

Under Washington law, a limited liability company has a duty to keep records available and the limited liability company must respond to a reasonable request by a member or member's agent by making the records subject to inspection and copying. In this case there are allegations made by Mr. Thompson regarding business records. In order to find that Mr. Smith breached this duty to Ram Jack Northwest LLC, you must find that: 1) he was the member solely responsible for maintaining the accounting records at issue and 2) that he failed to maintain the accounting records and 3) that he failed to make the records available for inspection and copying at Dr. Thompson's reasonable request. You must further find, if Mr. Smith failed to maintain the accounting records and failed to make them available for inspection and copying, that in doing so he was either grossly negligent or engaging in intentional misconduct.

A lawsuit is frivolous if it is initiated without a reasonable investigation, is not reasonably based on existing law or fact, or is based on an improper purpose such as to harass or cause another party to incur expenses.

When you are taken to the jury room to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence, these instructions, and verdict form[s] for recording your verdict. Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If you need to ask the court a question that you have been unable to answer among yourselves after reviewing the evidence and instructions, write the question simply and clearly. The presiding juror should sign and date the question and give it to

the bailiff. The court will confer with counsel to determine what answer, if any, can be given.

In your question to the court, do not indicate how your deliberations are proceeding. Do not state how the jurors have voted on any particular question, issue, or claim, or in any other way express your opinions about the case.

In order to reach a verdict, five (5) of you must agree. When five (5) of you have agreed, then the presiding juror will fill in the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with it. The presiding juror will then inform the bailiff that you have reached a verdict. The bailiff will conduct you back into this courtroom where the verdict will be announced.