

**FILED**

**MAR 23 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 291774-III

COURT OF APPEALS, DIVISION III  
THE STATE OF WASHINGTON

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MARK BROTHERTON and GEORGIE BROTHERTON,  
Husband and Wife,

Plaintiff/Respondent,

v.

KRALMAN STEEL STRUCTURES, INC.,

Defendants/Appellants,

NICKALAS AND HIS MARITAL COMMUNITY d/b/a  
KINCAID CONCRETE, AMERICAN CONTRACTORS  
INDEMNITY CO., and OLDREPUBLIC SURETY CO.,

Defendants.

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APPELLANT'S REPLY BRIEF

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## **A. ARGUMENT**

### The Damages' Award Includes Betterment.

The Agreement between Kralman Steel Structures, Inc. (“Kralman”) and Mark Brotherton and Georgie Brotherton (“Brotherton”), was to “remove and replace” the old driveway. RP 27, Line 23 to Page 28, Line 1; RP 28, Line 24 to Page 29, Line 4. There was no evidence that the original drive was thicker than 3 ½ inches. There was no evidence that the original drive had any reinforcing. There was no evidence that the original drive had any dowels into the house. The award of damages included the cost of 5 inch concrete, RP 58, Line 11-25. The award of damages includes the cost of doweling into the foundation, RP 63, Line 13-19, the award of damages apparently includes fiber mesh in lieu of reinforcing. See, RP 63, Line 22 to Page 64, Line 10.

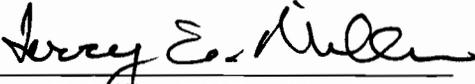
The Supreme Court's Ruling in *Cosmopolitan Engineering v Ondeo Degremont, Inc.*, is Still Binding on the Award of Attorney Fees.

In three Amendments to RCW 18.27 since *Cosmopolitan Engineering v Ondeo Degremont, Inc.*, 159 Wn.2d 292, 149 P.3d 666 (2006) the legislature has failed to address the Supreme Court's limitation of attorney fees awards. The legislature could have addressed *Ondeo, supra*, in any one of those amendments but did not.

**B. CONCLUSION**

The Court's Award should be free of any betterment. The award of attorney fees should be reversed.

RESPECTFULLY SUBMITTED this 22 day of March, 2011.

  
Terry E. Miller, WSBA #14080  
Attorney for Appellants/Defendants