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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 33897-5-III
COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

NORTHWEST BUSINESS FINANCE, LLC, a Washington limited
liability company,

Appellant,

vs.

ABLE CONTRACTOR, INC. also known as ABLE CONTRACTORS,
INC., a Washington corporation; LINDA K. HOBSON individually and
the marital community of LINDA K. HOBSON and JIM HOBSON, wife
and husband; BANNER BANK; WESTERN CONSTRUCTION
SERVICES, INC., a Washington corporation; SD DEACON OF
OREGON, INC., a Washington corporation,

Respondents.

BRIEF OF RESPONDENT
WESTERN CONSTRUCTION SERVICES, INC.

Averil Rothrock, WSBA #24248
Farron Curry, WSBA #40559
Darien Loiselle, WSBA #22648
SCHWABE, WILLIAMSON & WYATT, P.C.
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711
Attorneys for Respondent Western Construction Services, Inc.

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I. INTRODUCTION

A jury found in favor of Respondent Western Construction Services, Inc. (“Western”). The jury rejected the claims of Appellant Northwest Business Finance, LLC (“Northwest”) that Western owed Northwest money arising from a factoring agreement between Northwest and one of Western’s subcontractors, Able Contractors, Inc. (“Able”). But Northwest assigned no error to the trial or verdict. Northwest instead asks this Court to revisit the trial court’s denial of Northwest’s motion for summary judgment prior to trial. The denial is not reviewable. This warrants denial of Northwest’s appeal.

The Court also should deny the appeal if it reaches the merits. The trial court was correct to deny Northwest’s motion for summary judgment. Both the law and material issues of fact prevented judgment in favor of Northwest, as the trial court held and the jury ultimately confirmed.

II. STATEMENT OF THE ISSUES

1. Whether this Court cannot and should not review the denial of Northwest’s summary judgment motion—denied on the basis that material issues of fact prevented judgment—after trial of the dispute?

2. Whether, if the Court reaches the merits of Northwest’s appeal, the trial court correctly denied judgment to Northwest because both the law and the facts demonstrated Northwest was not entitled to judgment as a matter of law?

3. Whether the Court should award Western attorney fees and costs incurred to defend this appeal pursuant to RAP 18.9(a) because the

appeal is frivolous where the denial of the summary judgment is not reviewable or the law advanced by Northwest does not support reversal.

III. COUNTER STATEMENT OF THE CASE

Northwest's claim against Western arose from a 2008 "Security Agreement" (the "Agreement") between Northwest and Western's subcontractor Able. In the Agreement, Able agreed to factor, sell, and assign to Northwest certain of Able's acceptable accounts receivable. CP 28 at ¶¶ 7–8 (Complaint) and CP 32–39 (Complaint at Ex. A). Western was not a party to that agreement, or any agreement with Northwest. CP 67–68 at ¶ 2 (Decl. of Kain). Western never saw a copy of the Agreement until Northwest commenced the instant lawsuit against it. *See* RP 13 at lines 6–7; CP 67–68 (Kain Decl.). As a General Contractor who hired Able, Western was one of Able's customers. CP 68 at ¶ 3 (Kain Decl.).

The following facts are recounted from the record related to Northwest's summary judgment motions.

A. Northwest and Able Contractor entered into a Security Agreement.

Pursuant to the Agreement between Northwest and Able, Able would "obtain short-term financing by factoring, selling and assigning to [Northwest] acceptable accounts receivable at a discount below face value." CP 32 (Complaint at Ex. A). The term "acceptable account" is a defined term meaning a right to payment which is (1) an accurate

and undisputed statement of indebtedness for a sum due to Able by a customer and (2) an accurate statement of a bona fide sale, delivery and acceptance of merchandise or performance of service by Able to a customer. *See* CP 32–33 ¶¶ 3, 15 and 16 (Complaint at Ex. A).

B. Able factored some accounts receivable with Northwest on an invoice-by-invoice basis, including some due from General Contractor Western from 2010 to 2012.

The Agreement between Northwest and Able explicitly stated that Able would “from time to time at [Able]’s option sell, transfer and assign accounts to [Northwest] and said accounts shall be identified by separate and subsequent written assignments on a form to be provided to [Able] by [Northwest].” CP 34 (Complaint at Ex. A). According to Northwest, “[u]pon the terms specified in the Agreement and pursuant to a legitimate Able invoice, Plaintiff Northwest would purchase an outstanding and current account receivable of Able. The account receivable would *then* be collectible by Northwest.” CP 28 at ¶ 8 (Complaint) (emphasis added).

Over the years, Able factored and assigned to Northwest some, but not all, of its invoices to Western as a subcontractor on Western’s construction projects. CP 68 at ¶¶ 3, 4 (Kain Decl); Opening Brief 6. The Assignment of Proceeds Notification Agreement stated that Able “has sold and assigned the proceeds *of accounts*” to Northwest. *See* CP 157;

see also CP 45 (emphasis added). When Able elected to factor and assign to Northwest a particular Western invoice, Able and/or Northwest would notify Western that Able had elected to factor and assign that particular invoice by sending that invoice to Western with a notice of assignment sticker and, sometimes, a copy of an Assignment of Proceeds Notification Agreement attached. CP 68 ¶ 3 (Kain Decl); CP 148 ¶ 6 (Decl. of Rund). The Notice Sticker informed Western that “***This account*** has been sold, assigned, and is payable to Northwest.” *See, e.g.*, CP 152; CP 79 (emphasis added). Upon receipt of Able’s invoice marked with a notice of assignment sticker, Western would determine whether the factored invoice was legitimate and, if it was, Western would issue a check payable to both Able and Northwest jointly. CP 68 at ¶ 3 (Kain Decl). That check would then be retrieved from Western’s corporate office by an Able representative. *Id.*

When Able did not elect to factor an invoice to Western, Able would send only an Application for Payment to Western and then Western would issue a check payable to Able only. CP 68 ¶ 3 (Kain Decl). Those checks also would then be retrieved from Western’s corporate office by an Able representative. *Id.* This was the parties’ practice from at least 2010 to 2012. CP 148 ¶¶ 5–8 (Rund Decl.).

C. General Contractor Western hired Able as a subcontractor on the Tumwater Fred Meyer Project.

In March 2012, Western hired subcontractor Able to perform demolition work on a remodel of a Fred Meyer store located in Tumwater, Washington. CP 277–28 ¶ 2 (Decl. of McDermott). Western sent Able a subcontract for the Tumwater Fred Meyer project, which included and attached Western’s required Billing Procedures. CP 278 ¶ 3 and CP 284–302 (McDermott Decl and its Ex. A). Able signed and returned the subcontract to Western on March 29, 2012. CP 278 ¶ 3 (McDermott Decl). Pursuant to Western’s Billing Procedures, Able was not entitled to any payments for the Tumwater Fred Meyer project until the signed subcontract was returned to Western. CP 302 ¶ 1.

The total subcontract amount was for \$177,000¹ to be paid in monthly progress payments based on the percentage of work completed by Able. CP 278 ¶ 4 and CP 284–302 (McDermott Decl and its Ex. A). Able was to submit one invoice to Western per month by the twenty-fifth day. CP 278 ¶ 4 and CP 284–302 (McDermott Decl and its Ex. A). Western required that any and all “invoices must match contract terms and be submitted on Western’s Application for Payment Form.” CP 302 ¶ 3

¹ As explained below, Western ultimately did not owe or pay Able the total \$177,000 because Able did not finish its work on the project.

(Billing Procedures). Each monthly Application for Payment Form was to reflect the percentage of work on the project that Able had completed to date.² CP 278 ¶ 4 and CP 284–302 (McDermott Decl and its Ex. A). When Able sent a monthly invoice to Western, Project Manager Martin McDermott would review the invoice to verify that it matched the contract terms, was submitted on Western’s Application for Payment Form, and that Able had actually completed the amount of progress reflected in the Application for Payment. CP 278 ¶ 4 (McDermott Decl). If those criteria were met, payment was approved; if those criteria were not met, no payment was required or made by Western.

Able was to begin work on the Tumwater Fred Meyer project April 9, 2012 and complete work by October 12, 2012. CP 278 ¶ 5 (McDermott Decl). Able timely began its work, but Able did not complete its work by October 12, 2012 or ever. *Id.*

D. Western paid four progress payment invoices from Able, only one of which had been factored with Northwest and properly paid jointly to Northwest and Able.

According to the parties’ established practices, Western made four progress payments, or “Draws,” to Able for Able’s work on the Tumwater

² For example, if Able had completed 10% of the scope of its work on the project, Able would submit an invoice for \$17,700 (10% of \$177,000), minus retention and any discounts.

Fred Meyer project before Able quit showing up to work and Western terminated Able's subcontract. CP 278–80 and 281–82 (McDermott Decl). Northwest did not put at issue in its summary judgment motion (*see* CP 236–244), but now argues that three of those progress payments totaling \$81,000—Draws 1, 2 and 4—supports its claims. *See* Opening Brief 3 and 15.

Regarding Draw 1, Able had requested during its subcontract negotiations an initial mobilization payment from Western before Able began its work to allow Able to mobilize or activate a crew to start the work. CP 278–79 ¶ 6 (McDermott Decl). Western agreed to make that initial mobilization payment. *Id.* When Able sent Western the signed subcontract, Able also sent Western an Application for Payment of the initial mobilization payment. CP 278–79 ¶ 6 and CP 307 (McDermott Decl and its Ex. B). The Application for Payment did not include any indication or notice that Able had elected to factor and assign that particular invoice. CP 278–79 ¶ 6 and CP 307 (McDermott Decl); CP 113 (Northwest's RFA responses); CP 68–69 ¶ 4 and CP 73 (Kain Decl and its Ex. A). According to the parties' practices, Western paid Able Draw 1 (\$25,000 initial mobilization payment, minus 10% retention and a 5% discount). CP 278–79 ¶ 6 (McDermott Decl); CP 68–69 ¶ 4 and CP 73 (Kain Decl and its Ex. A).

Regarding Draw 2, Able had sent Western on April 25, 2012 an Application for Payment for its first progress payment seeking \$20,000. CP 279 ¶ 7 (McDermott Decl); CP 69 ¶ 5 and CP 76 (Kain Decl and its Ex. B). The Application for Payment did not include any indication or notice that Able had elected to factor and assign that particular invoice. *Id.* According to the parties' practices, Western paid Able Draw 2 (\$20,000 minus 10% retention and a 2% discount). CP 279 ¶ 7 (McDermott Decl); CP 69 ¶ 5 and CP 77 (Kain Decl and its Ex. B).

Regarding Draw 3, Able sent Western on May 18, 2012 an Application for Payment in the amount of \$35,000 for its May progress payment (Draw #3). CP 279 ¶ 8 (McDermott Decl); CP 69 ¶ 6 and CP 79 (Kain Decl and its Ex. C). This Application for Payment was accompanied by an Invoice in the amount of \$35,000 **and a notification** that Able *had* elected to factor and assign that payment. *Id.* Based on the parties' practices, Western paid Draw 3 via a check made payable to both Able and Northwest jointly (\$35,000 minus 10% retention and a 5% discount). CP 279 ¶ 8 (McDermott Decl); CP 69 ¶ 6 and CP 79 (Kain Decl and its Ex. C). Because the check was jointly issued, this draw is not at issue.

Regarding Draw 4, Able sent Western on June 25, 2012 an Application for Payment in the amount of \$50,000 for its June progress

payment. CP 279 ¶ 9 (McDermott Decl); CP 69 ¶ 7 and CP 83 (Kain Decl and its Ex. D). The Application for Payment did not include any indication or notice that Able had elected to factor and assign that particular invoice. *Id.* Western paid Able Draw 4 (\$50,000 minus 10% retention and a 5% discount). CP 279 ¶ 9 (McDermott Decl); CP 69 ¶ 7 and CP 84 (Kain Decl and its Ex. D).

E. Able never finished its work on the Tumwater Fred Meyer Project.

Able abruptly stopped showing up to the Tumwater Fred Meyer Project in June 2012. CP 281–82 ¶ 12 (McDermott Decl). As a result, Western terminated the subcontract. CP 281 ¶ 12 (McDermott Decl). Western had to hire another subcontractor to finish the incomplete work. *Id.* The subcontract provided that Able’s “[f]ailure to comply with construction schedule will result in supplemented labor and [sic] deducted from subcontract.” CP 281-82 ¶ 12 and CP 288 (McDermott Decl and its Ex. A). Western deducted from the subcontract amount the cost of supplemental labor and materials required to finish Able’s job. CP 282 ¶ 12 (McDermott Decl).

F. Western refused to pay fraudulent invoices from Able, including the “Tumwater Invoices” giving rise to Northwest’s claim against Western.

Northwest in its summary judgment motion premised its claim against Western on fraudulent invoices created by Able. CP 236–244.

Western learned for the first time in Northwest's motion for summary judgment of five Able invoices that Northwest contends Able submitted to Northwest for factoring and then submitted to Western between February and June 2012. CP 238–39 (Northwest's summary judgment brief); CP 148 ¶ 9 and CP 152–56 (Decl. of Rund and Ex. A). These invoices are fraudulent. Northwest never was entitled to judgment against Western for these invoices.

The five invoices underlying Northwest's claims were labeled 2398-1 through –5. *Id.* Northwest admitted that Western properly paid one of the five invoices, Invoice 2398-3.³ This appeal therefore concerns Northwest's contention that Western wrongly paid the other four “Tumwater Invoices” —Invoices 2398-1, 2398-2, 2398-4 and 2398-5—to Able only. *See* Opening Brief 7–8. None of these allegations are true and none were established by Northwest as a matter of law in its motion for summary judgment.

The Tumwater Invoices were illegitimate invoices. CP 280–81 ¶

³ Invoice 2398-3 was sent to Western with a matching Application for Payment in the amount of \$35,000 for Able's May progress payment (Draw 3, discussed above), and was stamped with a notification to Western that Able had elected to factor and assign that invoice. CP 279 ¶ 8 (McDermott Decl); CP 69 ¶ 6 and CP 79 (Kain Decl and its Ex. C). Western paid the Application for Payment related to Draw 3 via a check made payable to both Able and Northwest, jointly (\$35,000 minus 10% retention and a 5% discount). CP 69 ¶ 6 and CP 79 (Kain Decl and its Ex. C) and CP 115 (RFA No. 15).

10 (McDermott Decl). Western never owed or paid any money to Able in satisfaction of the Tumwater Invoices because they were not legitimate. *Id.* Western submitted evidence of this fact in response to Northwest's motion for summary judgment. *See, e.g., id.* Western submitted testimonial evidence from Western Project Manager Martin McDermott explaining that the Tumwater Invoices upon which Northwest's claim was based were illegitimate and never paid by Western. CP 280–81 ¶ 10 (McDermott Decl). The details of this testimony includes that Invoice 2398-1 dated February 6, 2012 for \$15,000 was an illegitimate invoice that Able created and sent to Western before Western even sent Able the Tumwater subcontract, before Able signed the subcontract, and before Able began any work on the project. CP 280 ¶ 10(a) (McDermott Decl). Able never submitted any Application for Payment to Western in the amount of \$15,000. *Id.* Western never paid Able for Invoice 2398-1. *Id.*

Similarly, Invoice 2398-2 dated March 2, 2012 for \$45,000 is an illegitimate invoice that Able similarly issued before Western sent Able the subcontract, before Able signed the subcontract, and before Able began any work on the project. CP 280 ¶ 10(b) (McDermott Decl). Able never submitted any Application for Payment to Western in the amount of \$45,000. *Id.* Western never paid Able for Invoice 2398-2. *Id.*

Invoice 2398-4 dated May 18, 2012 for \$45,000 is also an

illegitimate invoice. CP 280 ¶ 10(c) (McDermott Decl). This invoice did not and does not match any Application for Payment that Able submitted to Western. *Id.* Able was only entitled to one May progress payment. *Id.* Able's May progress payment was for \$35,000, not \$45,000, and, as discussed above, Western paid Able's May progress payment of \$35,000 minus retention and discount with a check payable to Able and Northwest Business jointly. *Id.* Western never paid Able for Invoice 2398-4. *Id.*

Finally, Invoice 2398-5 dated June 20, 2012 for \$20,000 is also an illegitimate invoice. CP 280 ¶ 10(d) (McDermott Decl). That invoice did not and does not match any Application for Payment that Able submitted to Western. *Id.* Able was only entitled to one June progress payment. *Id.* Able's June progress payment was submitted on June 25, 2012 for \$50,000. *Id.* Western never paid Able for Invoice 2398-5. *Id.*

The record on summary judgment showed that at least by the Spring of 2012 Able had been issuing illegitimate and fictitious invoices to Northwest. This fraud was the basis for Northwest's claim against Able in this lawsuit. CP 27–31 (Complaint).

In addition, in the Spring of 2012 Western received from Northwest an invoice Able had sent Northwest for \$50,000 allegedly related to work Able contended it performed for Western on a "Fred Meyer *Hollywood* project." CP 281 ¶ 11 (McDermott Decl) (emphasis

added). That invoice was fictitious and illegitimate. *Id.* Able did not perform any work for Western on the Fred Meyer Hollywood project. *Id.* Western did not award Able the Fred Meyer Hollywood project. *Id.* When Western received the illegitimate Fred Meyer Hollywood invoice from Northwest, Mr. McDermott called and informed Northwest that the invoice was fictitious and that Able had not been awarded the Fred Meyer Hollywood project or performed any work on that project. *Id.* Northwest never asked Western for the \$50,000 in that illegitimate invoice or sued Western for that money.

G. Additional facts and testimony came out after denial of Northwest's motion for summary judgment.

When the Honorable John O. Cooney ruled on Northwest's motion for summary judgment, he considered all of the facts and evidence detailed above. After denial of the summary judgment motion, the parties developed additional relevant evidence, including through the post-summary judgment deposition of Northwest's sole owner Tony Rund. Northwest has provided no record of the testimony presented at trial and thus has made no showing that the record at trial was identical to the prior record submitted for the summary judgment hearing. It was not.

Northwest fails to address how the Court fairly can review the denial of summary judgment when an entire trial with additional, live

testimony subsequently took place on the same issues.

IV. ARGUMENT

This appeal arrives in a posture that does not permit review. Northwest assigns error to the trial court's denial in May 2015 of its motion for summary judgment. The trial court held that issues of material fact prevented summary judgment to Northwest. RP 21-22. Such a ruling is not subject to review. The factual issues on which the trial court denied summary judgment merged into the subsequent trial of the case. Northwest failed during the trial to move for judgment as a matter of law before submission of the case to the jury. Northwest has failed to assign error to any aspect of the trial, the verdict or the resulting judgment. Northwest has no appellate recourse.

If the Court were to review the decision to deny Northwest's motion for summary judgment, it should affirm. The trial court's denial was proper. In its Opening Brief, Northwest cherry-picks facts most favorable to its position in an attempt to convince the Court that its motion for summary judgment was based on a single issue arising from a simple set of undisputed facts. Such an impression is inaccurate. Neither the legal issues nor the facts were simple or clear-cut. Northwest leaves out numerous material details that were at the heart of the trial court's reasoned decision denying Northwest's motion for summary judgment due

to disputed material facts.

A. Northwest Seeks Review of a Decision That Is Not Reviewable

This Court will not review denial of summary judgment when the trial court has ruled that disputed issues of material fact preclude summary judgment, like here. The jury's verdict takes pre-eminence. After Northwest's motion for summary judgment was denied and the case proceeded to trial, Northwest should have moved for judgment as a matter of law under CR 50 if Northwest believed the facts presented at trial required judgment in its favor. It failed to do so. The appeal of the prior denial of summary judgment should be rejected.

Washington appellate courts have joined "the vast majority of other jurisdictions which have ruled that an order denying summary judgment, based upon the presence of material, disputed facts, will not be reviewed when raised after a trial on the merits." *Johnson v. Rothstein*, 52 Wn. App. 303, 306, 759 P.2d 471 (1988). In *Johnson*, the Court of Appeals refused to review the trial court's denial of a motion for partial summary judgment seeking dismissal of two claims, the very claims on which the jury returned a verdict against appellant. The Court held that "a denial of summary judgment cannot be appealed following a trial if the denial was based upon a determination that material facts are in dispute

and must be resolved by the trier of fact.” *Id.* at 304. The Court’s analysis was thorough and supports dismissal of the present appeal.

The *Johnson* Court first explained that RAP 2.2 directed this result. “[O]nly two subsections of [RAP 2.2] might be thought to apply to the circumstances of this case: (1) RAP 2.2(a)(1), allowing an appeal from a final judgment; and (2) RAP 2.2(a)(3), allowing an appeal from a decision determining the action.” 52 Wn. App. at 305. The Court explained that once a trial on the merits is held, “neither of these subsections permits review of a pretrial order denying summary judgment when such denial is based on a trial court’s determination of the presence of disputed, material facts.” *Id.* The Court concluded that review of denial of a summary judgment “is not a final judgment within the meaning of RAP 2.2(a)(1) because it is irrelevant to a final judgment on a verdict.” *Id.* “Summary judgment is not a substitute for a trial; it exists as a mechanism to decide whether there exists any truly disputed material facts. Once the determination is made, **rightly or wrongly**, that there are issues of fact that can be resolved only after full hearing, the summary judgment procedure has no further relevance[.]” *Id.* (emphasis added), citing *Morgan v. American Univ.*, 534 A.2d 323, 327 (D.C. 1987).

The Court also rejected that denial of summary judgment based on a trial court’s determination of the presence of material, disputed facts is a

decision determining the action pursuant to RAP 2.2(a)(3) because the action is not decided. 52 Wn. App. at 306-05. Instead, “the trial court’s decision here ensured resolution of the parties’ disputes by a trier of fact.” *Id.* at 306.

This analysis and the Court’s conclusion are proper. This Court should follow *Johnson* and deny this appeal. Final judgment should “be tested upon the record made at trial, not the record made at the time summary judgment was denied.” *Id.* at 306, citing *Evans v. Jensen*, 655 P.2d 454, 459 (Idaho Ct. App. 1982). “This will prevent a litigant who loses a case, after a full and fair trial, from having an appellate court go back to the time when the litigant had moved for summary judgment to view the relative strengths and weakness of the litigants at that earlier stage.” *Id.* After a trial, the case should not be tested based on its merit at the time the interlocutory motion was heard.

The *Johnson* court further reasoned that any other approach “would be unjust to the party that was victorious at the trial, which won judgment after the evidence was more completely presented, where cross-examination played its part and where witnesses were seen and appraised.” *Id.* at 307, citing *Home Indem. Co. v. Reynolds & Co.*, 187 N.E.2d 274, 278 (1962). These considerations are compelling, and apply to the circumstances of this case.

Finally, the *Johnson* court reasoned that “[t]he primary purpose of a summary judgment procedure is to avoid a useless trial.” *Id.*, citing *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980); *Ryder v. Port of Seattle*, 50 Wn. App. 144, 148, 748 P.2d 243 (1987). “Once a trial on the merits is had, review of a denial of a motion for summary judgment would do nothing to further this purpose.” *Id.* Whether genuine, material issues existed during the prior motion practice “has no further relevance.” *Id.*, citing *Morgan v. American Univ., supra*. The *Johnson* court also remarked that principles of merger and mootness support this approach, because the outcome of the prior summary judgment motion becomes moot and any error in denying the summary judgment motion merges with the trial. Any error also should be considered “harmless,” because the “ultimate trial on precisely the same issues demonstrated that there were genuine issues of material fact and that the evidence supported a judgment for the party opposing summary judgment.” *Id.*, citing *Graham v. Pavarini*, 458 N.E.2d 421, 428 (1983).

The analysis and holding of *Johnson* are controlling here. This Court should reject Northwest’s appeal.

Washington courts have recognized only one exception to the interdiction on review of denial of a summary judgment motion. Review can be had in circumstances when “the parties dispute no issues of fact

and the decision on summary judgment turned solely on a substantive issue of law.” *Univ. Vill. Partners v. King Cy.*, 106 Wn. App. 321, 23 P.3d 1090 (2001). In *Univ. Vill. Partners*, the Court of Appeals conducted review of the denial of a summary judgment motion regarding the legal issue of the uniformity of a tax assessment. Noting the rule that the Court “ordinarily” will not review an order denying summary judgment after a trial on the merits, the Court agreed to the review “[b]ecause the parties in this case agree as to all material facts and the summary judgment was based on a legal conclusion. . . .” *Id.* That is not the case here. Judge Cooney did not deny Northwest’s motion based on a legal conclusion. To the contrary, the trial court denied the motion because issues of material fact required resolution. VR 21-22.⁴

The Supreme Court explained in *Adcox v. Children's Orthopedic Hosp. & Medical Ctr.*, that, after a jury trial, an appellant may longer rely on review of a ruling on a motion for summary judgment, but must appeal based on the verdict. 123 Wn.2d 15, 864 P.2d 921 (1993). In *Adcox*, the appellant hospital assigned error “not to the jury's verdict, but instead to the trial court's denial of its motion for partial summary judgment on this

⁴ The Court stated, “In reviewing everything that has been submitted so far, the Court finds there are genuine issues of material fact that relate to both motions. . . .The Court finds there are genuine issues of material fact, that the defendant is not entitled to judgment as a matter of law, and that the plaintiff is not entitled to judgment as a matter of law.”

issue.” 123 Wn.2d at 35 n. 9. The hospital attempted to rely on the evidence submitted at the summary judgment hearing to argue its appeal, as Northwest has done here. The Supreme Court explained that “[t]hese arguments miss the mark.” *Id.* “When a trial court denies summary judgment due to factual disputes, as here, and a trial is subsequently held on the issue, the losing party must appeal from the sufficiency of the evidence presented at trial, not from the denial of summary judgment.” *Id.* citing *Johnson v. Rothstein*, 52 Wn. App. 303, 759 P.2d 471 (1988). *See also Winbun v. Moore*, 143 Wn.2d 206, 213, 18 P.3d 576 (2001) (after a trial, appeal must be from the sufficiency of the evidence presented at trial). The evidence presented at the summary judgment hearing has been superseded by the evidence presented at the trial. Northwest’s appeal is improper because it seeks consideration of the evidence presented in pre-trial proceedings instead of the evidence submitted at the trial.

Northwest cites no authority where an appellate court has agreed to review denial of a motion for summary judgment in like circumstances. Its authorities are distinguishable. *See* Opening Brief 14-15. For example, in *Columbia Park Golf Course, Inc. v. City of Kennewick*, the appellant not only had moved for summary judgment, but had also moved for a directed verdict “and, following the jury's verdict, for judgment as a matter of law.” 160 Wn. App. 66, 79, 248 P.3d 1067 (2011). In contrast,

Northwest failed to move for judgment as a matter of law during the trial, preventing the trial court from considering any legal ground for judgment based on the facts presented at trial, unlike in *Columbia Park Golf Course*.

In *Washburn v. City of Fed. Way*, the appellant similarly had brought both a summary judgment motion on the existence of a legal duty under CR 56, and a motion for judgment as a matter of law during the trial under CR 50 on the duty issue. 178 Wn.2d 732, 753, 310 P.3d 1275 (2013). The Court addressed reviewability not of the prior summary judgment motion but of the CR 50 motion. *Id.* at 749-52. The Court held that the City had preserved its right to appeal denial of the motion for judgment as a matter of law under CR 50. *Id.* at 752. The Court reiterated the general rule that appellate review of denial of a summary judgment motion “is inappropriate after a trial unless the motion turned [on] pure issues of law,” but specifically declined to address whether, had the CR 50 motion not preserved the legal error, the CR 56 motion would have. *Id.* at 752, n. 8. *Washburn* does not support Northwest’s argument that denial of its summary judgment motion in this case is reviewable.

Similarly, in *Kaplan v. Nw. Mutual Life Ins. Co.*, the appellate court reiterated the approach Western has briefed to oppose this appeal, stating, “A summary judgment denial cannot be appealed following a trial if the denial was based upon a determination that material facts are

disputed and must be resolved by the factfinder." 115 Wn. App. 791, 799, 65 P.3d 23 (2003). The *Kaplan* court cited to *Univ. Vill. Ltd. Partners, supra*, for the exception that review can be had if the parties dispute no issue of fact and the decision on summary judgment "turned solely on a substantive issue of law." *Id.* at 801.⁵ As already discussed, the trial court denied summary judgment not on the basis of substantive law, but on the basis of disputed facts. Therefore, *Kaplan* does not support Northwest.

Northwest cannot evade the clearly established rules of appellate review by arguing that the trial court was wrong that summary judgment was precluded by issues of material fact. The *Johnson* court answered that argument when it said that, "rightly or wrongly," the trial court's ruling on the summary judgment motion becomes irrelevant and all eyes must turn, instead, to the resolution of the dispute by the trier of fact.

Denial of Northwest's summary judgment motion is not reviewable. Northwest failed to raise any other assignment of error. Opening Brief 3. This appeal should be denied.

⁵ *Kaplan* also provides citation to *Brothers v. Pub. Sch. Employees of Washington*, 88 Wn. App. 398, 945 P.2d 208 (1997). There, the Court of Appeals refused to review a summary judgment denial where "the issue of whether PSE repudiated the contract or withdrew its repudiation *has been tried*." 88 Wn. App. at 409 (emphasis added). Similarly, the issues Northwest attempts to raise on appeal *have been tried*.

B. On the Merits, Northwest Was Not Entitled to Summary Judgment Based on the Law and the Disputed Facts.

In its motion for summary judgment, Northwest contended that it was entitled to judgment because Western had notice that the Tumwater Invoices had been factored and assigned to Northwest and that Western should have, therefore, paid those invoices to Able and Northwest jointly rather than to Able only as a matter of law. In order to prevail on its motion for summary judgment, Northwest had the burden of proving “that there is no genuine issue as to any material fact and [Northwest] is entitled to a judgment as a matter of law.” CR 56(c). Northwest failed to meet its burden. Its motion was properly denied.

1. The law supported denial of Northwest’s motion for summary judgment.

It was undisputed on summary judgment, and remains undisputed today, that Able factored its customers’ accounts on an invoice-by-invoice basis. CP 148 ¶¶ 6–8 (Rund Decl) and CP 237 (Northwest’s MSJ); Opening Brief 6. Northwest contended in its motion for summary judgment that Western owed it \$81,000 that it believed Western had paid Able solely, instead of Able and Northwest jointly, for four particular factored invoices (“the Tumwater Invoices”). CP 238–39 (Northwest’s MSJ) and CP 148–49 ¶¶ 9 and 13. But Western never paid those invoices.

a. *Northwest failed to prove that Western paid the Tumwater Invoices.*

Northwest failed to put forth sufficient evidence to establish that the \$81,000 Western paid to Able was for the Tumwater Invoices. The evidence of record at the time of Northwest's motion for summary judgment established that the \$81,000 Western paid to Able was *not* for the Tumwater Invoices and that Western did *not* pay any of the Tumwater Invoices to Able. CP 278-81 (McDermott Decl) and CP 69 (Kain Decl). The Tumwater Invoices were illegitimate. As a result, Western never paid them, to Able or to anyone at all. This was fatal to Northwest's claim where RCW 62A.9A-406 requires that a valid obligation due or to become due from the account debtor is the subject of an assignment.⁶ To establish its claim against Western, Northwest's theory required it to prove that Western paid Able for a legitimate invoice for an amount due from Western for which Western had received notice of an assignment.

⁶ RCW 62A.9A-406(a) states, with emphasis added:

(a) Discharge of account debtor; effect of notification. Subject to subsections (b) through (j) of this section, *an account debtor* on an account, chattel paper, or a payment intangible may discharge *its obligation* by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that *the amount due or to become due* has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.

Northwest did not offer proof of this.

Northwest's lack of proof was an adequate and appropriate reason to deny Northwest's motion for summary judgment.

b. Northwest was not entitled to payment for any of the Tumwater Invoices.

Northwest also failed to establish its claim against Western because Western had an ultimate defense against paying any of the Tumwater Invoices. Northwest admitted at the time of its summary judgment motion (CP 243 at lines 2–3, citing *Kendrick v. Davis*, 75 Wn.2d 456, 452 P.2d 222 (1969)), and again in its Opening Brief at 13 the basic premise of assignment law that an assignee “takes all the rights of the assignor” when the debtor receives notice. Here, the record demonstrated that Western had defenses that prevented judgment.

RCW 62A.9A-404 provides that, with respect to any invoice that was actually and properly assigned to Northwest by Able, Northwest's rights thereunder as an assignee are subject to:

(1) All terms of the agreement between the account debtor [Western] and assignor [Able] and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and (2) Any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee.

RCW 62A.9A-404(a). In other words, “[t]he assignor can assign no greater interest than he has, and the assignee gets no greater right than the

assignor had, at the time notice of the assignment was received by the debtor.” *Stansbery v. Medo-Land Dairy, Inc.*, 5 Wn.2d 328, 337, 105 P.2d 86 (1940); *Kendrick, supra*, 75 Wn.2d at 463. At most, Northwest held only those same rights held by Able and only had a right to payment if, and to the extent that, Able had a right to payment on a particular invoice. Northwest failed to demonstrate on summary judgment that Able had a right to payment for the Tumwater Invoices. In fact, evidence showed those invoices were fraudulent. CP 280–81 ¶ 10 (McDermott Decl).

Pursuant to the subcontract between Western and Able, the only document that gave rise to any payment from Western was a request for a progress payment submitted on Western’s Application for Payment Form. CP 302 ¶ 3 (Billing Procedures). No Application for Payment corresponding to the Tumwater Invoices was ever provided to Western. The Tumwater Invoices were illegitimate. They did not comply with the requirements of the subcontract. They were apparently fictitious invoices created by Able (as the parties now know Able repeatedly created in 2012). Able had no right to payment for the illegitimate Tumwater Invoices. As a result, Northwest failed to demonstrate during the summary judgment proceedings that it had a right to payment for the Tumwater Invoices, regardless of whether Able factored the illegitimate Tumwater Invoices or not. Northwest’s claim, and its motion for

summary judgment, against Western failed as a matter of law.

c. *The law did not entitle Northwest to payment for the 3 Applications for Payment.*

Contrary to its position during the summary judgment proceedings, Northwest now appears to concede that the \$81,000 at issue was not paid to satisfy any of the Tumwater Invoices, and was instead paid to satisfy three Applications for Payment that Able did not factor.⁷ Northwest now argues that Western should have paid the \$81,000 to Northwest anyway. Opening Brief 18. In other words, Northwest now argues that all it had to show to obtain a judgment against Western is that it once sent Western a copy of the Assignment of Proceeds Notification Agreement and thereafter Western paid money to Able. Northwest did not make this argument on summary judgment. CP 236–244.⁸ An appellate court will not review theories never advanced to the trial court during a summary judgment proceeding. RAP 9.12; RAP 2.5(a). *See Rogers Walla Walla v. Ballard*, 16 Wn. App. 92, 101, 553 P.2d 1379 (1976). This Court should decline to consider Northwest’s new theory. If the Court considers this theory, it should reject it. Those two facts on their own (that Northwest once sent Western a copy of the Assignment of Proceeds Notification

⁷ CP 278–79 (McDermott Decl) and CP 69 (Kain Decl).

⁸ Northwest made the argument at trial. It failed with the jury.

Agreement and thereafter Western paid money to Able) were insufficient to meet Northwest's burden.

Northwest's claim against Western is governed by RCW 62A.9A-406, which details the effect of notification of an assignment and when notification is ineffective, as follows:

(a) Discharge of account debtor; effect of notification. Subject to subsections (b) through (j) of this section, an account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.

(b) When notification ineffective. Subject to subsection (h) of this section, notification is ineffective under subsection (a) of this section:

(1) If it does not reasonably identify the rights assigned;

(2) To the extent that an agreement between an account debtor and a seller of a payment intangible limits the account debtor's duty to pay a person other than the seller and the limitation is effective under law other than this Article; or

(3) At the option of an account debtor, if the notification notifies the account debtor to make less than the full amount of any installment or other periodic payment to the assignee, even if:

(A) Only a portion of the account, chattel paper, or payment intangible has been assigned to that assignee;

(B) A portion has been assigned to another assignee; or

(C) The account debtor knows that the assignment to that assignee is limited.

Under the statute, in order for Northwest to establish its claim against Western, Northwest must prove that (1) before Western paid Able the \$81,000 at issue for the three Applications for Payment, (2) Western received an authenticated notification (3) that reasonably identified that Able's right to payment of the three Applications for Payment had been assigned to Northwest and (4) that payment of the three Applications for Payment was, therefore, to be made to Northwest instead of Able. RCW 62A.9A-406(a)-(b).⁹ Until Western received "appropriate notification" from Northwest, Western had the right to pay Able. *See* RCW 62A.9A-406 Official Comment 2. And, if Northwest's notification was not authenticated or did "not reasonably identify the rights assigned" to Northwest, then the notification was "ineffective" and Western was entitled to pay the money to Able. *Id.*

Western consistently disputed during the summary judgment

⁹ Contrary to Northwest's assertion in its Opening Brief, RCW 62A.9A-406(b) is indeed applicable to its claim against Western.

hearing that it had received “appropriate notification” of any factored invoices that it failed to pay jointly to Able and Northwest. CP 59–60 (Western’s Motion for Summary Judgment); CP 363-66 (Western’s Response in Opposition to Plaintiff’s Cross-Motion for Summary Judgment at pp. 3–6); CP 382-83 (Western’s Reply in Support of Its Motion for Summary Judgment at pp. 4–5);¹⁰ RP 8–10, 18.

Northwest failed to meet its burden under RCW 62A.9A-406(a)–(b). The evidence before the trial judge during the summary judgment proceedings showed that Northwest’s custom and practice was to provide notification of what rights Able had assigned to it on an invoice-by-invoice basis by delivering to Western a copy of the Assignment of Proceeds Notification Agreement and/or a notification sticker attached, but that for the claims at issue Northwest failed to provide that notification. None of the three Applications for Payment came with an Assignment of Proceeds Notification Agreement or a notification sticker. Accordingly, the trial court correctly concluded that Northwest was unable to prove as a matter of law that Western had breached any duty by sending

¹⁰ Pursuant to RAP 9.6(a), Western filed with its brief a Supplemental Designation of Clerk’s Papers designating (1) Defendant Western Construction Services Inc.’s Response in Opposition to Plaintiff’s Cross-Motion for Summary Judgment and (2) Defendant Western Construction Services Inc.’s Reply in Support of its Motion for Summary Judgment, and extrapolated these corresponding CP citations.

payment for those three Applications for Payment to Able instead of to Northwest.

The law also did not support judgment to Northwest based on any contention that the Assignment of Proceeds Notification Agreement and/or notification stickers provided in the past with certain factored invoices provided adequate notice to Western that the three Applications for Payment later received by Western without any notification stickers had been assigned to Northwest as a matter of law. The issue of adequate notice was a disputed fact. As noted above, Western disputed the meaning and import of these communications. Neither the Assignment of Proceeds Notification Agreement nor the notification sticker “reasonably identify the rights assigned” to Northwest. The Assignment of Proceeds Notification Agreement did not identify or specify on its face which rights Able had assigned to Northwest. It merely referred to unidentified “accounts.” Northwest never provided any “global” notice that all Able invoices were factored. Instead, the evidence demonstrated that Northwest always had identified which rights Able had assigned to Northwest in one way: specific notice on an invoice-by-invoice basis.

At most, the Assignment of Proceeds Notification Agreement was ambiguous. Since any ambiguity must be construed and resolved against the drafter, *Sunset Oil Co. v. Vertner*, 34 Wn.2d 268, 276, 208 P.2d 906

(1949); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 459, 45 P.3d 594 (2002), which in this case was Northwest, it was proper under the law for the trial court to deny Northwest's motion for summary judgment.

Northwest failed to meet its burden of proof on summary judgment. The law supported the trial court's denial of Northwest's motion for summary judgment. Northwest failed before the trial court and fails now to offer a correct legal reason showing it was entitled to judgment.

2. The trial court was correct that genuine issues of material fact precluded entry of summary judgment in Northwest's favor.

Not only did the law support denial of Northwest's motion for summary judgment, but so did the existence of disputed material facts. As the party moving for summary judgment, Northwest had the burden to prove, by uncontroverted facts, that no genuine issue of material fact exists. CR 56(c); *LaPlante v. Washington*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). Western was entitled to consideration of all facts and reasonable inferences in the light most favorable to Western, the nonmoving party. *See Trimble v. Washington State University*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000); *Balise v. Underwood*, 62 Wn.2d 195, 199–200, 381 P.2d 966 (1963). If reasonable persons could reach different

conclusions, then the motion for summary judgment was properly denied. *Yerkes v. Rockwood Clinic*, 11 Wn. App. 936, 941, 527 P.2d 689 (1974).

Here, Northwest's motion for summary judgment was properly denied. Genuine issues of material fact existed. On the summary judgment record, reasonable persons could reach different conclusions. Therefore, it was proper for the trial court to submit the evidence to a jury for it to decide.

The Honorable John O. Cooney expressly ruled that the existence of genuine issues of material fact precluded granting summary judgment in favor of Northwest. Two of the chief material factual disputes were (1) whether the Tumwater Invoices were illegitimate and, if so, what impact that had on Western's obligation to pay them and (2) what notice Western received from Northwest. RP 22.¹¹ Both of those factual issues were material to Northwest's claim against Western.

First, the legitimacy of the Tumwater Invoices was a genuine issue of material fact precluding summary judgment in favor of Northwest.

Northwest's premise in its motion for summary judgment was that

¹¹ Contrary to Northwest's argument in its Opening Brief, Judge Cooney did not rule that the list of factual questions he provided when delivering his decision from the bench was an exclusive list. To the contrary, Judge Cooney made clear that the factual questions he listed were "examples" of some of the unresolved genuine issues of material fact precluding summary judgment. RP 21–22.

Western owed it \$81,000 because it believed Western had paid Able, instead of Northwest, that amount to satisfy the Tumwater Invoices that Able had factored. CP 238–39 (Northwest’s MSJ) and CP 148–49 ¶¶ 9 and 13. Accordingly, if Western did not pay the Tumwater Invoices or if the Tumwater Invoices were not required to be paid, then Northwest’s theory failed. That is precisely what the evidence established.

Western never paid the Tumwater Invoices; the \$81,000 Western paid to Able was not for the Tumwater Invoices. This is made clear by simply comparing the Tumwater Invoices to the checks Northwest claimed should have been made out to Able and Northwest jointly.

Northwest claimed the Tumwater Invoices were for:

- A February 12, 2012 payment of \$15,000;
- A March 2, 2012 payment of \$45,000;
- A May 31, 2012 payment of \$45,000; and
- A June 20, 2012 payment of \$20,000.

CP 148 and 152–56 (Rund Decl ¶ 9 and Ex A). Western wrote three checks to Able for:

- An April payment in the amount of \$21,250;
- A May payment in the amount of \$17,000; and
- A July payment in the amount of \$42,750.

CP 68–69; 74; 77; 84 (Kain Decl). None of the allegedly wrongful payments to Able match any of the Tumwater Invoices. That is because

none of the payments Western made to Able was in satisfaction of the illegitimate Tumwater Invoices.

The evidence established that the Tumwater Invoices were not legitimate invoices. They did not match any Application for Payment submitted by Able to Western. They did not match any progress payment that Able had earned on the Tumwater Fred Meyer project. The legitimacy of the Tumwater Invoices was a genuine issue of material fact because “[a]n assignee steps into the shoes of the assignor, and has all of the rights of the assignor,” nothing more and nothing less. *Carlile v. Harbour Homes, Inc.*, 147 Wash. App. 193, 208, 194 P.3d 280 (2008). Accordingly, if the Tumwater Invoices were illegitimate as the evidence demonstrated, then Western was not obligated to pay the Tumwater Invoices to Able **or to Northwest**. The parties’ dispute as to the legitimacy of the Tumwater Invoices was a material one precluding summary judgment in favor of Northwest.

Second, the most hotly contested issue in this case at trial was which accounts receivable Western had notice that Able had assigned to Northwest. Once Northwest realized that the Tumwater Invoices upon which its claim against Western was based (a) were illegitimate and (b) were not the invoices for which Western had paid the \$81,000 to Able, Northwest changed its argument. Northwest began to argue that the

Assignment of Proceeds Notification Agreement (CP 157; CP 45) and/or Notice Sticker (CP152; CP 79) sent to Western with factored invoices should have put Western on notice that each and every account receivable owed to Able from the date of that Agreement forward had been assigned to Northwest and had to be remitted to Northwest, whether it was factored or not. Whether the Assignment of Proceeds Notification Agreement and/or Notice Sticker did, or even could have, put Western on such notice was a disputed issue of fact. That issue is of course material because Western had no obligation to pay any accounts receivable to Northwest unless and until Western received “appropriate notification” from Northwest that those “reasonably identified” accounts receivable had been assigned from Able to Northwest. RCW 62A.9A-406; *see also id.* at Official Comment 2.

The Assignment of Proceeds Notification Agreement informed Western that Able “has sold and assigned the proceeds *of accounts*” to Northwest. CP 157 (emphasis added). The Notice Sticker that Northwest attached to factored invoices and sent to Western on an invoice-by-invoice basis informed Western that “*This account* has been sold, assigned, and is payable only to Northwest. . . .” CP 152 (emphasis added). The jury properly decided what the parties contested: whether these documents constituted appropriate and authenticated notification from Northwest that

“reasonably identified” that Able’s right to payment of the three Applications for Payment had been assigned to Northwest and that payment of the three Applications for Payment was to be made to Northwest instead of Able. *See* RCW 62A.9A-406(a)–(b). For example, it was a factual issue whether Northwest’s attachment a Notice Sticker and delivery of the Assignment of Proceeds Notification Agreement with each factored invoice it forwarded to Western for payment would lead a reasonable person receiving such notices to believe that only the invoices to which a Notice was attached had been factored and assigned to Northwest. *See* Opening Brief 7. Reasonable persons could reach different conclusions. *See Yerkes, supra*, 11 Wn. App. at 941.

No Washington court has ruled whether the reasonableness and adequacy of a notice under RCW 62A.9A-406 of the Uniform Commercial Code is a question of fact. Analogous law and common sense lead to the conclusion that these issues are questions of fact to be resolved by the fact-finder. For example, other sections of Washington’s UCC make clear that whether a notification that lacks required information is nevertheless sufficient “is a question of fact.” RCW 62A.9A-613(2); *see also* 62A.9A-612(a) (whether a notification was sent within a reasonable time is a question of fact). Moreover, Washington law is clear that if language in a contract is ambiguous and contradictory

evidence is introduced to clarify the ambiguity, a question of fact is created which may not be resolved on summary judgment. *Balise v. Underwood, supra*, 62 Wn.2d at 199-200. An ambiguity exists when there is uncertainty in the meaning of the terms of a written instrument and, therefore, the terms are capable of being understood in two or more senses. *Ladum v. Utility Cartage, Inc.*, 68 Wn.2d 109, 116, 411 P.2d 868 (1966). The terms of the Assignment of Proceeds Notification Agreement and Notice Sticker were capable of being understood in two or more senses and were, therefore, ambiguous. When Western presented substantial evidence in response to Northwest's motion for summary judgment that clarified that the language of the Assignment of Proceeds Notification Agreement and Notice Sticker did not mean what Northwest suggested it to mean, that created a questions of fact which could not be resolved on summary judgment.

Because Northwest has improperly appealed the trial court's denial of its motion for summary judgment, and has not provided a record of the trial testimony, this Court does not have before it all of the additional evidence that was submitted to the jury to support judgment to Western. The jury considered additional testimony from live witnesses before delivering a verdict in favor of Western, including substantial testimony regarding how Northwest's invoice-by-invoice factoring system had

historically worked in practice between the parties. This included elaboration regarding how Western had dealt with Able invoices for years, paying jointly invoices with a Northwest notification sticker, and paying invoices without a Northwest notification sticker on them to Able only. It also included testimony that Western, upon learning about the factoring arrangement between Northwest and Able, called Northwest to confirm the procedures for honoring the factoring agreement between Northwest and Able.

The trial court was correct that unresolved issues of material fact precluded granting summary judgment in favor of Northwest.

Northwest's motion for summary judgment was properly denied.

C. Western Is Entitled to a Fee Award under RAP 18.9(a)

Western seeks attorney fees and costs pursuant to RAP 18.9(a) for its expense defending this frivolous appeal where Northwest has assigned error to an unreviewable decision. Northwest summarily and with scant discussion states that after a jury trial it may appeal from the prior denial of its summary judgment motion. Opening Brief 14-15. Northwest fails to cite to authority on point. Northwest instead cites to cases that recognize the general rule that denials of summary judgment motions are not reviewable. *See id.* As already argued, this Court in *Johnson*

explained that denial of a summary judgment motion is not reviewable where the trial court “rightly or wrongly” has determined that issues of fact require a trial. 52 Wn. App. at 305. The *Johnson* court has instructed that in such circumstances—undisputedly applicable here—“the summary judgment procedure has no further relevance.” *Id.* This authority shows that the appeal is devoid of merit and no reasonable possibility of reversal exists.

An appellate court may award fees for a frivolous appeal if the appeal is so totally devoid of merit that there is no reasonable possibility of reversal. *In re Marriage of Wagner*, 111 Wn. App. 9, 44 P.3d 860 (2002). In deciding to award fees under RAP 18.9(a) for a frivolous appeal, the court considers the following factors:

(1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) 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.

Id. at 19, citing *Delany v. Canning*, 84 Wn. App. 498, 510, 929 P.2d 475 (1997), citing *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187.

These factors support an award.

In *Delany v. Canning*, the Court awarded fees as sanctions where it

concluded that “[e]ven resolving all doubt in favor of [appellants], this appeal has raised no debatable issues upon which reasonable minds could differ.” 84 Wn. App. at 510. The Court observed that the brief cited “no judicial authority and no authority for reversal based on existing law, nor does it make a rational, good-faith argument for modification of existing law.” *Id.* The same is true here regarding reviewability. Northwest barely addresses reviewability of the denial of summary judgment. The authorities do not support reviewability, even where Northwest asserts without discussion that they do. Neither has Northwest argued for a change or modification of the law.

Northwest put Western to the expense and requirement of a jury trial to resolve Northwest’s claim against it. Western prevailed. Northwest now hails Western before the Court of Appeals but fails to assign error to an appealable order. Furthermore, there is no merit to its assertion that denial of the summary judgment motion was error. Northwest simply seeks a chance to get a different decision from a different decision-maker for relatively little expense considering that it did not order the trial record.

Northwest both lacks a solid theory of legal error and pursues an impermissible short cut. In these circumstances, the Court should grant the request for fees and costs.

V. CONCLUSION

The Court should deny the appeal. Northwest assigns error to an act that is not subject to review. If the Court entertains the issues that Northwest has raised, the Court should affirm denial of Northwest's summary judgment motion. This Court should not allow Northwest to succeed at supplanting the decision a jury ultimately made after a full trial on the merits.

Western should prevail and receive an award of fees and costs incurred on appeal.

Respectfully submitted this 29th day of March, 2016.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: Averil Rothrock
Farron Curry, WSBA #40559
Email: fcurry@schwabe.com
Averil Rothrock, WSBA #24248
Email: arothrock@schwabe.com
Darien Loiselle, WSBA #22648
Email: dloiselle@schwabe.com

*Attorneys for Respondent Western
Construction Services, Inc.*

CERTIFICATE OF SERVICE AND MAILING

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: That on the 29th day of March, 2016, I arranged for service *via U.S. Mail and Email* of the foregoing BRIEF OF RESPONDENT WESTERN CONSTRUCTION SERVICES, INC., to the parties to this action as follows:

Ian Ledlin
Sheryl S. Phillabaum
Brian Sheldon
Phillabaum, Ledlin, Matthews & Sheldon, PLLC
1235 N. Post St. #100
Spokane, WA 99201
Email: ian@spokelaw.com
sheryl@spokelaw.com
bsheldon@spokelaw.com

On this same date I filed the brief via U.S. Mail with the Court of Appeals Division III directed to the following:

Clerk of the Court
Court of Appeals: Division III
500 N Cedar St
Spokane, WA 99201



Tanya Garbell

PDX\106612\195120\AAR\17712106.5