

64122-1

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NO. 64122-1-I

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

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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.

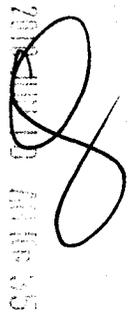
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**REPLY BRIEF**

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## INTRODUCTION

Opposing summary judgment, William Thompson swore that from the very outset of their business relationship, the parties agreed that Ram Jack NW would be a full service foundation company and that Smithworks would not provide foundation services for Ram Jack NW customers. Charles Brastrup, Ram Jack NW's only employee, corroborated Thompson's sworn statements. The manner in which the parties insured and advertised Ram Jack NW is consistent with the parties' agreement that Ram Jack NW would be a full service foundation company.

Smith contends that the only agreement ever reached was that Ram Jack NW would have the exclusive right to use the patented Ram Jack technology. But it is fundamentally illogical that Ram Jack NW would advertise for services that Smithworks would perform and pay an employee to secure jobs – and profits – primarily for Smithworks' benefit.

There could not be a plainer dispute of material facts. Summary judgment was inappropriate.

The erroneous summary judgment ruling led to numerous errors at trial, also requiring reversal. This Court should reverse and remand for a new trial.

## REPLY TO STATEMENT OF THE CASE

Smith's statement of the case is entirely argumentative and repeatedly assumes facts in Smith's favor, even though Smith was the moving party on summary judgment.<sup>1</sup> In this reply to the statement of the case, Thompson addresses Smith's claims regarding the work Smithworks performed on Thompson's home remodel and regarding the parties' sworn statements supporting and opposing summary judgment on the parties' agreement. In his argument section, Thompson responds to Smith's argument that the dealership agreement defines the agreement between Ram Jack NW and Smithworks.

Smith claims that foundation work was a major component of Smithworks' enterprise when Smith did some remodel work on Thompson's home before the parties formed Ram Jack NW. BR 4.<sup>2</sup> But at the time, Smith's experience was limited to "handyman type projects." CP 526. Smith had never previously lifted a house to repair the foundation. *Id.* And Smith, a subcontractor on Thompson's house, did not repair Thompson's foundation on his

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<sup>1</sup> This Court must take the facts and reasonable inferences from the facts in Thompson's favor, as he was the non-moving party on summary judgment. *King v. Rice*, 146 Wn. App. 662, 668, 191 P.3d 946 (2008), *rev. denied*, 165 Wn.2d 1049 (2009).

<sup>2</sup> Smith filed an Amended Brief of Respondent. "BR" refers to the amended brief.

own, but worked with the general contractor to lift the house and brought in another subcontractor to do concrete work. CP 526-27.

Smith claims that “undisputed evidence shows 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.” BR 5. It is irrelevant that Ram Jack NW – not Smithworks – had the right to use the patented Ram Jack technology. Smith correctly acknowledges that the real question on appeal is whether the parties agreed that Ram Jack NW would provide all foundation services. BR 8. In any event, Smith’s unilateral version of events is not “undisputed evidence” of the parties’ agreement. BR 5.

Smith claims that Thompson failed to provide any evidence that Ram Jack NW – not Smithworks – would perform foundation services. BR 9. But Thompson plainly states that the parties “agreed” that Ram Jack NW would be a “full service foundation business” and that Smithworks could perform “‘handyman’ type services” for Ram Jack NW customers. BA 7 (quoting CP 528-29). Thompson consistently told Smith that it was okay for Ram Jack NW to generate work for Smithworks – such as a bathroom remodel – as long as Smithworks did not compete with Ram Jack

NW. BA 9-10. And Ram Jack NW employee Charles Brastrup understood the parties' agreement to be that Ram Jack NW – not Smithworks – would provide foundation services. BA 13-15.

Smith argues that Thompson's declarations were not specific enough to create material fact questions and that Brastrup's declaration is hearsay. BR 10-11. Smith did not object to Brastrup's declaration or otherwise assert that it contained hearsay, probably because most of Brastrup's conversations were with Smith, so were not hearsay under ER 801(d)(2). CP 596-606. And Thompson's declarations plainly stated the nature of the parties' agreement – no more specificity is required to withstand summary judgment. BA 4-7, 10-13.

Ignoring Thompson's opening brief, Smith claims that Thompson "admitted" in his deposition "that he and Mr. Smith still have not reached [an] agreement." *Compare* BA 15-17 *with* BR 9. As explained in the opening brief, Thompson testified that the parties had failed to reach an agreement resolving Smithworks' improper competition with Ram Jack NW. BA 15-17. Thompson was not referring to the parties' original agreement defining the scope of Ram Jack NW's business. *Id.*

In short, the only “evidence put forth by Mr. Smith” allegedly establishing the absence of an agreement limiting the scope of Smithworks’ work (BR 11) was Smith’s own declaration denying Thompson’s sworn statements pertaining to the parties’ agreement. Contrary evidence creates a fact dispute rendering summary judgment inappropriate.

### **REPLY ARGUMENT**

**A. Fact questions as to the parties’ agreement preclude summary judgment. (BA 24-29, BR 19-26).**

**1. Thompson plainly outlined the parties’ agreement that Ram Jack NW would be a full-service foundation company.**

Thompson unequivocally states that he and Smith agreed that Ram Jack NW would be a full-service foundation company and that Smithwork’s would not perform work for Ram Jack NW clients other than remodel-type work. BA 25-26. The parties discussed this “exact[]” agreement at least twice. *Id.* The agreement was consistent with the parties’ actions, such as the manner in which they were trained, advertised Ram Jack NW, and insured Ram Jack NW. BA 26-27. And Brastrup, Ram Jack NW’s only employee, understood that Ram Jack NW would perform “any aspect of the project that was in any way related to foundation construction or work.” BA 27 (quoting CP 567).

Smith claims that “[t]here is no evidence that Dr. Thompson ever voiced his contention . . . that he had no problem with Smithworks picking up some extra work such as a kitchen remodel until Dr. Thompson’s email of June 12, 2007.” BR 26 (citing BA 9). To the contrary, Thompson’s declarations plainly relay his conversations with Smith regarding their agreement. BA 9-10 (citing CP 532). Thompson’s declarations are “evidence” regardless of how many times Smith claims they are not. BR 26.

Smith argues that Brastrup’s declaration is hearsay and or inadmissible opinion evidence. But Smith did not object to Brastrup’s declaration. In any event, Brastrup had to understand the nature of the parties’ agreement to perform his job, which included making bids for full service foundation work on behalf of Ram Jack NW. BA 14. Contrary to Smith’s claims, Brastrup’s declarations were based on his “personal knowledge” –

conversations with Smith (a party opponent) and Thompson, as well as on his experience working for Ram Jack NW. BR 22.<sup>3</sup>

It is truly remarkable that Smith claims that there is “undisputed evidence that, [sic] the parties did not agree to limit Smithworks’ scope of work . . . .” BR 19. Smith could reach that conclusion only by ignoring Thompson’s sworn statements and Brastrup’s sworn statements. But all facts must be taken in Thompson’s favor.

Repeating the word “undisputed” ad nauseam does not make it so. BR 19, 20. The only truly “undisputed” point is that only Ram Jack NW was to use the patented Ram Jack technology because it held the dealership rights. BR 20. But the parties’ agreement that Ram Jack NW would exclusively use the patented Ram Jack technology does not answer the real question before the Court – whether there is a fact question regarding the parties’ agreement that Ram Jack NW would provide all foundation services. BR 8.

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<sup>3</sup> Smith implies that the parties had to reduce their agreement to writing, stating “conspicuously absent from [Brastrup’s] declaration is any claim that Mr. Brastrup saw any writings that would evidence the parties agreement as to the scope of work or any documents whatsoever.” BR 23. This is irrelevant. Smith did not argue before the trial court nor does he argue on appeal that a writing was required. In fact, Smith agrees that the parties’ oral agreement defines the scope Ram Jack NW’s and Smithwork’s work. BR 19.

**2. Thompson never “admitted” that there was no agreement limiting the scope of Smithworks’ work.**

As discussed above, Thompson plainly stated that he and Smith agreed that any work Smithworks performed for Ram Jack NW customers would be limited to remodel-type work. Yet Smith repeatedly claims that Thompson admitted in his deposition that the parties had never reached an agreement limiting the scope of Smithworks’ work. BR 7, 17, 20. As discussed in the opening brief, this argument is just as incorrect on appeal as it was when Smith raised it on summary judgment. BA 15-17. Smith ignores Thompson’s opening brief. BR 7, 17, 20.

Smith belatedly suggests that Thompson’s declarations are an improper, self-serving attempt to contradict his deposition testimony. BR 22. But a declaration is objectionable on the ground that it contradicts prior testimony only if the contradiction is plain and there is no explanation. ***Eagle Group, Inc. v. Pullen***, 114 Wn. App. 409, 419, 58 P.3d 292 (2002). Thompson’s declaration explains the so-called contradiction. BA 15-17; CP 534. In any event, Smith did not object or move to strike Thompson’s declarations. It is too late to make this claim now.

**3. Ram Jack NW's advertising and insurance policies are consistent with Thompson's version of the parties' agreement.**

Consistent with their agreement, the parties advertised Ram Jack NW as providing an array of foundation services and related services, including retaining walls, walkways, patios, and cement slabs. BA 26-27. Consistent with the services it was to provide, the parties insured Ram Jack NW as a "foundation repair" business. *Id.* Smith insured Smithworks as a "carpentry contractor." *Id.*

Smith argues that "[t]here is absolutely no evidence in the record that these policies' respective coverages or descriptions were based on the terms of any agreement." BR 24. Smith's overblown response to this rather minor point is telling. BR 24-25. The policies speak for themselves – Ram Jack NW carries insurance as a foundation service contractor and Smithworks does not. It does not take an expert in "construction or insuring

construction projects” to know that an insurance policy reflects the services the insured intends to provide.<sup>4</sup> BR 25.

Smith attacks the Yellow Pages advertisement in a similar vein, arguing that it is not “an actual manifestation of some sort of agreement between Dr. Thompson and Mr. Smith. . . .” BR 25. Smith misses the point, which is that the ad is consistent with Thompson’s version of events – that the parties agreed that Ram Jack NW would be a full service foundation company – so advertised as such.<sup>5</sup>

Finally, Smith argues that his flyer, which never specifically mentions foundation work, is not evidence that Smithworks did not do foundation work, where (1) Thompson failed to prove that Smith actually used the flyer or that it accurately described Smithworks’ work; and (2) Smithworks advertised build outs and additions, which necessarily “require foundations.” BR 26. Smith again impermissibly reads all inferences (however unreasonable) in his

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<sup>4</sup> Smith also claims that “there is no dispute that Ram Jack NW only does foundation repair” work and that Smithworks’ more broadly defined scope of work “necessarily includes foundations.” BR 25 (citing CP 553, 557, 558). Smith cannot escape the fact that his insurance policy for Smithworks says nothing specific about foundation work. CP 552-53. In any event, Clerk’s Papers 557 and 558 have to do with a completely unrelated subject.

<sup>5</sup> Smith claims that Thompson argued that his truck logo “foundation solutions” was indicative of the parties’ agreement. BR 25 (no citation). Thompson did not raise this argument.

own favor. Smith prepared the flyer and told Thompson that he did not advertise other than the flyer. BA 9. It is unreasonable to think that Smith never disseminated the flyer (BR 26) – Smith’s sole source of advertising. The flyer plainly supports Thompson’s argument that the parties agreed that Smithworks would not do foundation work.

And it is not “necessarily” the case, as Smith claims, that building a deck or a gazebo requires a foundation. BR 26. Pouring a couple of concrete footings is not the same thing as building a foundation. And advertising “Build out . . . Garage additions” does not mean that Smithworks actually provided any foundation services. BR 26.

**4. The dealership agreement the parties entered into with Ram Jack Oklahoma does not define the agreement between the parties.**

Smith argues (in his facts) that a non-compete clause in the dealership agreement with Ram Jack Oklahoma “expressly authorized . . . Smithworks to do foundation work.” BR 6. But the dealership agreement is between Ram Jack NW and Ram Jack Oklahoma. CP 286. Smith signed the dealership agreement only in his capacity as Ram Jack NW’s president. CP 291. Like the rest of the dealership agreement, the non-compete clause defines Ram

Jack NW's agreement with Ram Jack Oklahoma, not the parties' agreement regarding Ram Jack NW and Smithworks.

Smith also argues (in his facts) that the dealership agreement limits that scope of Ram Jack NW's work "as follows: '[D]istributes an hydraulically advanced piercing system . . . and other related manufactured products.'" BR 8-9 (citing CP 286). This introductory clause in the dealership agreement simply defines the product Ram Jack Oklahoma licensed to Ram Jack NW. CP 286. This has no bearing on the parties' agreement.

**5. It is irrelevant that Smithworks did not perform piercing work and that Ram Jack NW may not have performed foundation work other than piercing work.**

Smith concedes that Smithworks provided the full panoply of foundation services to Ram Jack NW customers, excepting only that Smithworks did not use the patented Ram Jack technology. BR 27-29. Smith claims that by setting aside the use of the patented Ram Jack technology for Ram Jack NW, he avoided breaching any duty to Thompson. *Id.* This ignores the primary basis of Thompson's appeal, which is that Ram Jack NW had the right to do all foundation work and that Smithworks usurped those business opportunities, improperly limiting Ram Jack NW's work to

foundation work requiring the patented Ram Jack technology; *i.e.*, excavating for and driving piers. BA 1.

It is simply irrelevant that Smithworks did not do foundation work using the patented Ram Jack system – all that proves is that Smith failed to steal every shred of foundation work from Ram Jack NW. BR 27-29. Finally, Smith oddly suggests that the fact that Smithworks performed foundation services proves that it had the right to do so. BR 27-29. That is a non sequitur.

**B. The incorrect summary judgment ruling gutted Thompson's case requiring a complete retrial. (BA 29-30).**

Thompson's argument that Smith was improperly usurping Ram Jack NW business is plainly central to his claims for breach of contract and breach of fiduciary duty. The trial court's summary judgment ruling on usurpation gutted Thompson's case, denying him a fair opportunity to pursue his claims, and preventing the jury from fairly determining Smith's counterclaims. Smith does not respond. This Court should reverse and remand for a new trial on Thompson's claims and Smith's counterclaims.<sup>6</sup>

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<sup>6</sup> If the Court reverses the summary judgment issue, the Court should still resolve the remaining issues on frivolity, discussed below, which could arise on remand.

**C. The trial court improperly commented on the evidence when it instructed the jury to determine whether Thompson's lawsuit was frivolous. (BA 31-34, BR 29-34).**

Smith again attempts to create confusion, but Thompson acknowledged up front that he did not object to the frivolous lawsuit instruction. BA 31. Thompson argues that an improper comment on the evidence is a manifest error affecting a constitutional right, allowing this Court to review an issue raised for the first time on review under RAP 2.5(a)(3). BA 31-34. There can be no doubt that an impermissible comment on the evidence affects a constitutional right, as our Constitution prohibits such comments in the first instance. BA 31 (citing Const. art. 4, § 16 and CR 51(j)). Thus, the only question remaining under RAP 2.5(a)(3) is whether the trial court's error in giving the frivolous lawsuit instruction was "manifest."

Instructing the jury to determine frivolity was a manifest error because it undermined Thompson's entire case. BA 31-34. 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." *City of Kirkland v. O'Connor*, 40 Wn. App. 521, 523, 698

P.2d 1128 (1985); *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988). Giving the frivolous lawsuit instruction certainly suggests to the jury that the judge doubted the credibility, weight and/or sufficiency of Thompson's evidence. BA 31-34. In fact, the instruction implies that Thompson's evidence might be so deficient that it was not even reasonable for him to bring suit. *Id.* This necessarily taints the jury's ability to fairly decide Thompson's claims. *Id.*

Smith's primary response is that Thompson did not object to the frivolous lawsuit instruction and did not cite any authority allowing him to raise the issue for the first time on appeal. BR 29-32. But as discussed above (and in the opening brief), giving the frivolous lawsuit instruction satisfies RAP 2.5(a)(3). BA 31-34. Smith does not address this argument. BA 31-34; BR 29-32.

Smith's secondary response is that the instruction is not a comment on the evidence where Washington law permits advisory verdicts. BR 32-33. This is another non-sequitur. Smith did not "request[]" an advisory verdict – he proposed the frivolity instruction and began referring to the jury's verdict as "advisory" only after the fact. *Compare* BR 13 *with* CP 1263.

But even assuming that the frivolity finding is an advisory verdict, the fact remains that instructing the jury to determine frivolity tainted the jury's view of all of the evidence Thompson presented. How could it not? The instruction put in the juror's minds that Thompson's case might be so weak that he never should have pursued his claims. Again, Smith never really addresses this point.

Smith equally misses the mark in claiming that Thompson attempts to appeal from Instruction 15, which purports to summarize the parties' breach of contract claims, but summarizes only Smith's claim against Thompson. *Compare* BA 33 with BR 31. Thompson's argument is simply that this Court must read the frivolous lawsuit Instruction along with the other instructions to determine whether it was improperly given. BA 33. This Court performed the same analysis in *Kirkland v. O'Connor*, 40 Wn. at 523-24.

Finally, Smith incorrectly claims that the frivolity instruction was properly given because it accurately states the law. BR 30-31, 33-34. Contrary to Smith's claim (*id.*), Thompson plainly argued that the instruction does not accurately state the law. BA 36 n.4. But Smith again misses the point. Instructing the jury to determine

whether Thompson's lawsuit was frivolous improperly tainted the jury's view of Thompson's case, regardless of whether the instruction accurately states the law on frivolity.

**D. The jury's verdict is fundamentally conflicted. (BA 34-39, BR 36-38).**

Washington law clearly provides that a lawsuit is frivolous under CR 11 and/or RCW 4.84.185 only if the suit is entirely frivolous, which is to say that it is entirely without merit. BA 34-36 (citing *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 904, 969 P.2d 64 (1998); *Skimming v. Boxer*, 119 Wn. App. 748, 756, 82 P.3d 707, *rev. denied*, 152 Wn.2d 1016 (2004); *Jeckle v. Crotty*, 120 Wn. App. 374, 387, 85 P.3d 931, *rev. denied*, 152 Wn.2d 1029 (2004)). A lawsuit is not frivolous simply because it is unsuccessful. BA 36 (citing *Skimming*, 119 Wn. App. at 755).

Our law is equally clear that if a jury gives conflicting answers to the special verdict form 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)). As such, if this Court holds that the jury's finding that

Smith breached a fiduciary duty to Thompson is inconsistent with its finding that Thompson's lawsuit was frivolous, the "only proper recourse is to remand the cause for a new trial." *Tincani*, 124 Wn.2d at 131. These two jury findings are plainly inconsistent.

Thompson proved that Smith breached his fiduciary duty to Thompson. In other words, Thompson's lawsuit was successful, in part, even though the jury ultimately rejected his damages claim. As such, his lawsuit cannot be frivolous under CR 11 or RCW 4.84.185. *Quick-Ruben, Skimming, and Jeckle, supra*.

Smith re-raises the same incorrect argument that Thompson addressed in his opening brief – that Thompson's lawsuit was frivolous because "without damages there is no legal claim." BA 36-38; BR 36. Again, Thompson brought a damages claim – the jury rejected it. BA 36-38. Juries often reject damages claims. That does not make the lawsuit frivolous.<sup>7</sup> *Skimming*, 119 Wn. App. at 756-57.

And Thompson is not asking this Court to "second-guess[]" the jury's damages finding. BR 37. Smith plainly misunderstands Thompson's argument, stating that the jury's frivolity finding "is in

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<sup>7</sup> Smith's attempt to distinguish *Tincani* fails for the same reason. BR 37. In any event, Thompson cited *Tincani* for its correct statement of the law, not as an analogous case. BA 35.

no way inconsistent with its finding that Dr. Thompson incurred no damages . . . .” BR 38. Thompson’s argument is that the jury cannot find that Smith breached his fiduciary duty to Thompson and also find that Thompson’s lawsuit was frivolous. BA 36-38. This argument has nothing do to with the jury’s damages finding. *Id.* Smith never addresses Thompson’s actual argument.

Finally, Smith takes issue with Thompson’s argument that sanctions were inappropriate because his lawsuit was not “frivolous as a whole,” where his breach of fiduciary duty claim and breach of contract claim “advance[d] to trial.” BA 38-39 (quoting ***Quick-Ruben***, 136 Wn.2d at 904, and citing ***Biggs v. Vail***, 119 Wn.2d 129, 137, 830 P.2d 350 (1992)); BR 40-42. Contrary to Smith’s claim, it is impossible to tell whether one or all four of the claims in ***Biggs*** advanced to trial. BR 41-42. In any event, our Supreme Court’s statement in ***Quick-Ruben*** that a lawsuit cannot be frivolous in its entirety if a claim advances to trial is not dicta because this statement of the applicable law was necessary to the Court’s holding. 136 Wn.2d at 904. ***Quick-Ruben*** is controlling authority.

**E. The evidence is insufficient to support the jury's damages award. (BA 40-43, BR 34-36).**

As discussed in the opening brief, the jury's verdict (and the trial court's fee award) can stand only if the damages evidence (other than Smith's attorney fees) is sufficient to support the jury's \$70,000 verdict. BA 40-41. Smith's damages claim undeniably focused on his attorney fees. *Id.* Aside from \$7,000 Thompson allegedly owed Ram Jack NW, Smith's only other damages claims included his speculation<sup>8</sup> that he "may have lost" business in an unquantified amount, and his claim that he had trouble sleeping and gained weight. *Id.* The jury could not have awarded Smith \$70,000 for these unsubstantiated claims, nor is there any indication that it intended to do so. *Id.* Rather, it appears the jury impermissibly awarded Smith "damages" for his attorney fees. *Id.*

Smith argues that his testimony was sufficient to support the \$70,000 verdict and that there is no indication that the jury intended any of the award to compensate Smith for attorney fees. BR 35-36. But Smith's one-sentence claim that Smithworks "may have lost" business (RP 305) is not "evidence" – it is speculation. BR 35.

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<sup>8</sup> As discussed in the opening brief, the trial court erred on overruling Thompson's speculation objection to Smith's lost business claim. BA 40.

And Smith did not even attempt to place a value on the business he “may have” lost. RP 305. Nor did he attempt to quantify his weight gain and sleep problems. RP 305-07. The jury cannot just pick a number out of thin air as Smith suggests. BR 35.

And contrary to Smith’s claim, every indication is that the verdict is based on Smith’s fee request. BR 35. Smith does not deny that the vast majority of his damages argument was based on his attorney fees. *Compare* BA 40 *with* BR 34-37. And Smith misses the point entirely in claiming that he could collect fees based on his breach of fiduciary duty claim – regardless of the basis of the fee request, Smith cannot collect fees from the jury and from the trial court, totaling 1.5 times his total fee request.

**F. The fee award gives Smith a double-recovery. (BA 41-43, BR 38-40).**

As discussed above, Smith asked the jury to award him attorney fees and the jury did just that, albeit awarding Smith only \$70,000 of the \$150,000 he requested. The trial court nonetheless awarded Smith fees again – usurping the jury’s role, and awarded Smith the full amount he requested – duplicating the jury’s award. BR 41-43. Although it seems plain that the trial court could not retry the fee claim after the jury had already decided fees,

assuming for the sake of argument that the trial court did not err in that regard, the trial court certainly could not duplicate the jury's award. This Court should reverse.

Smith again misses the point. BR 39. Smith argues that Thompson's objection to the jury's fee award is that the jury could not award fees under CR 11 or RCW 4.84.185. *Id.* While it is true that it is entirely inappropriate for the jury to levy a sanction, Thompson's argument is that the jury and the trial court could not both award Smith fees, totaling more than he requested, regardless of the basis of the fee request. BA 41-43.

Finally, there is no indication that the trial court "implicitly determined that the jury's award did not include attorney fees." BR 40. Rather, the trial court granted Smith's fee request without any discussion. CP 1320-21. In any event, if the trial court implicitly rejected Thompson's duplication argument then it erred in doing so. This Court should reverse.

**G. The findings are insufficient to support fees under RCW 4.84.185 and CR 11. (BA 43-46, BR 42-47).**

The findings on fees simply repeat CR 11's language, failing to specify any sanctionable conduct. *Compare* CP 1322-24 with CR 11(b). And the solitary finding on the amount of fees simply

states that the award is reasonable.<sup>9</sup> CP 1323. As Thompson discussed at length in the opening brief, the findings fail to satisfy the standards set forth in ***Mahler v. Szucs***, 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998) and ***North Coast Elec. Co. v. Selig***, 136 Wn. App. 636, 649-50, 151 P.3d 211 (2007).

Yet Smith repeatedly claims that Thompson failed to cite any cases supporting his argument. BR 43-47. ***Mahler*** and ***North Coast Electric*** (*supra*) are more than sufficient to support the well-documented contention that a trial court cannot impose attorney fees as a CR 11 sanction without entering findings detailing the sanctionable conduct and the reasonableness of the amount awarded. BA 43-45. And it is not a novel concept that a party must show that the fees he requests are reasonable. BR 44.

Also contrary to Smith's claims, Thompson does not seek *de novo* review or ask this Court to apply the loadstar method. BR 43, 46. Smith resorts to hyperbole and obfuscation because he has no real response. *Id.*

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<sup>9</sup> Smith claims that Thompson did not argue that Smith's attorney fee request was unreasonable. BR 44. Thompson's argument that Smith's request was unreasonable was that Smith had already received an attorney fee award from the jury, so sought an improper "windfall" from the trial court. CP 1293.

**H. The Court should deny Smith's fee request.**

Smith seeks appellate fees, arguing that Thompson brings his appeal in bad faith. BR 47-50. Smith is plainly incorrect in asserting that "prelitigation misconduct" (even assuming such existed) could give rise to an award of appellate fees. BR 48. And Smith points to no "vexatious conduct" on appeal. *Id.* Smith's argument is really that Thompson brought his appeal in bad faith because the appeal is frivolous for the same reasons that Smith alleges Thompson's lawsuit was frivolous. BR 47-50.

Thompson's appeal is not frivolous. Thompson has shown fact disputes making summary judgment improper – Thompson and Brastrup unequivocally testified that the parties agreed that Ram Jack NW would do all foundation work and that Smithworks could perform only remodel-type work for Ram Jack NW customers. Thompson also raises numerous errors occurring at trial: (1) the trial court's improper comment on the evidence; (2) the irreconcilably conflicted verdict; (3) the fee award duplicating the jury's award; and (4) the insufficient findings.

And Smith does not actually point to any evidence of bad faith, nor did the trial court find bad faith as Smith claims. CP 1323-24. In short, it is Smith's fee request that is without merit.

**CONCLUSION**

For the reasons stated above, this Court should reverse.

RESPECTFULLY SUBMITTED this 9 day of June,  
2010.

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**CERTIFICATE OF SERVICE BY MAIL**

I certify that I mailed, or caused to be mailed, a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail on the 9 day of June 2010, to the following counsel of record at the following addresses:

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