

- FILED
COURT OF APPEALS
DIVISION II

2012 DEC 17 AM 9:33

STATE OF WASHINGTON
BY [Signature]
DEPUTY

No. 42940-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Appellant/Cross-Respondent,

vs.

GREGG ROOFING, INC.,

Respondent/Cross-Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COUNTY
THE HONORABLE DANIEL STAHNKE

REPLY BRIEF OF CROSS-APPELLANT

SMITH GOODFRIEND, P.S.

BENNETT, BIGELOW
& LEEDOM, P.S.

By: Howard M. Goodfriend
WSBA No. 14355
Ian C. Cairns
WSBA No. 43210

By: William J. Leedom
WSBA No. 2321

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

1700 7th Ave, Ste 1900
Seattle, WA 98101
(206) 622-5511

Attorneys for Respondent/Cross-Appellant

pm 12/14/12
e11/1/121 wd

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	REPLY ARGUMENT IN SUPPORT OF CONDITIONAL CROSS-APPEAL	1
	A. MOE Concedes That The Trial Court Erroneously Prevented Gregg Roofing From Asserting A Claim For Negligent Supervision Against MOE.....	1
	B. In The Event Of A New Trial, The Trial Court Should Expressly Instruct The Jury That Gregg Roofing May Recover Reputational Damages.	2
III.	CONCLUSION.....	3

TABLE OF AUTHORITIES

STATE CASES

Freedom Found. v. Washington State Dept. of Transp., Div. of Washington State Ferries, 168 Wn. App. 278, 276 P.3d 341 (2012)..... 1

Sunland Investments, Inc. v. Graham, 54 Wn. App. 361, 773 P.2d 873 (1989)..... 2

OTHER AUTHORITIES

Restatement (Second) of Torts § 774A (1979)..... 2

I. INTRODUCTION

Mutual of Enumclaw concedes that Gregg Roofing should be able to assert a claim for negligent supervision in the event of a new trial and that a plaintiff may recover reputational damages caused by a defendant's tortious interference. Given the parties substantial agreement on these issues, should this court remand for a new trial it should authorize Gregg Roofing to assert a negligent supervision claim and direct the trial court to expressly inform the jury that Gregg Roofing may recover reputational damages.

II. REPLY ARGUMENT IN SUPPORT OF CONDITIONAL CROSS-APPEAL

A. MOE Concedes That The Trial Court Erroneously Prevented Gregg Roofing From Asserting A Claim For Negligent Supervision Against MOE.

Recognizing that “[t]he elements of agency and negligent supervision” are different, MOE “does not oppose” Gregg Roofing’s request to assert an alternative claim of negligent supervision against MOE in the event of a new trial. (Reply Br. 24 n.9; see also Resp. Br. 36-39) This court should instruct the trial court to allow Gregg Roofing to pursue a negligent supervision claim against MOE should it remand for a new trial. See *Freedom Found. v.*

Washington State Dept. of Transp., Div. of Washington State Ferries, 168 Wn. App. 278, 297-98, ¶ 37, 276 P.3d 341 (2012) (accepting party's concession on appeal and remanding for action consistent with concession).

B. In The Event Of A New Trial, The Trial Court Should Expressly Instruct The Jury That Gregg Roofing May Recover Reputational Damages.

MOE concedes that Gregg Roofing may recover damages for the harm MOE's tortious inference caused to its reputation, but inconsistently defends the trial court's damages instruction that did not inform the jury of this recoverable element of damages. (Reply Br. 21 n.8) A plaintiff may recover all damages proximately caused by a defendant's tortious interference, including harm to reputation. **Sunland Investments, Inc. v. Graham**, 54 Wn. App. 361, 364, 773 P.2d 873 (1989); Restatement (Second) of Torts § 774A(1)(c) (1979). This court should reject MOE's defense of an instruction it concedes excluded a recoverable element of damages.

MOE misconstrues Gregg Roofing's cross-appeal by reiterating its arguments on the nature of damages recoverable by corporations and individuals. (Reply Br. 21 n.8) Gregg Roofing did not ask that it be allowed to recover damages unique to individuals,

but asked that the jury "be given proper guidance that it may award damages for injury to reputation in connection with Gregg Roofing's tortious interference claim" and noted that its proposed damages instruction appropriately asked the jury to consider this element of damages. (Resp. Br. 40) In the event of a remand, the trial court should expressly instruct the jury that Gregg Roofing may recover damages for harm to its reputation as all parties agree is appropriate.

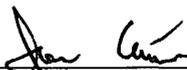
III. CONCLUSION

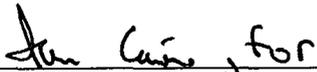
In the event of a remand for a new trial, the trial court should allow the jury to consider Gregg Roofing's negligent supervision claim and instruct the jury that Gregg Roofing may recover damages for harm to its reputation.

Dated this 14th day of December, 2012.

SMITH GOODFRIEND, P.S.

BENNETT, BIGELOW
& LEEDOM, P.S.

By: 
Howard M. Goodfriend
WSBA No. 14355
Ian C. Cairns
WSBA No. 43210

By:  for
William J. Leedom
WSBA No. 2321

Attorneys for Respondent/Cross-Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 14, 2012, I arranged for service of the foregoing Reply Brief of Cross-Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Brent Beecher Hackett Beecher & Hart 1601 Fifth Avenue, Suite 2200 Seattle, WA 98101-1651	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
William J. Leedom Jennifer Gannon Crisera Bennett, Bigelow & Leedom PS 1700 7th Avenue, Suite 1900 Seattle, WA 98101-1355	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 14th day of December, 2012.



 Victoria K. Isaksen

BY

 DEPUTY

2012 DEC 17 AM 9:33

FILED
 COURT OF APPEALS
 DIVISION II