

NO. 64122-11

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

---

WILLIAM B. THOMPSON, D.D.S.

Appellant,

v.

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

Respondents.

---

**AMENDED BRIEF OF RESPONDENTS**

---

THE COLLINS LAW GROUP PLLC

Adam C. Collins, WSBA No. 34960  
Sheri Lyons Collins, WSBA No. 21969  
2806 NE Sunset Blvd., Suite A  
Renton, WA 98056  
(425) 271-2575

MARSTON ELISON, PLLC

Terry Marston WSBA No.  
Jami K. Elison WSBA No. 31007  
Anderson Park Building  
16880 NE 79<sup>th</sup> St.  
Redmond, WA 98052  
(425) 861-5700

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2018 MAY 10 AM 11:07

## TABLE OF CONTENTS

INTRODUCTION .....	1
ASSIGNMENTS OF ERROR AND RELATED ISSUES .....	3
STATEMENT OF THE CASE.....	4
A. Factual Background .....	4
1. Mr. Smith’s company, Smithworks LLC, existed prior to Ram Jack Northwest LLC and performed foundation and other construction work, including foundation work on Dr. Thompson’s Residence, and the parties did not agree to limit Smithworks’ scope of work .....	4
2. Ram Jack’s scope of work. ....	7
B. Procedural History .....	10
1. Procedural History of Summary Judgment Motion.....	10
2. Procedural History at Trial.....	11
3. Post Trial.....	13
ARGUMENT.....	14
A. Standards of Review .....	14
B. Dr. Thompson did not meet his burden of production to defeat summary judgment on the usurpation claims.....	16
1. There was no agreement restricting Smithworks’ scope of work .....	16
2. Dr. Thompson and Mr. Smith’s Agreement Regarding Ram Jack NW’s Scope of Work Included No Work Beyond Piering Work .....	19
3. Smithworks did not perform piering work .....	27

C. As Dr. Thompson failed to object to the jury instruction regarding frivolous lawsuit, and he has not shown a valid objection on constitutional grounds, there were no error .....	29
D. The Jury’s Verdict should not be disturbed .....	34
E. The jury’s advisory verdict that Dr. Thompson’s lawsuit was frivolous was not inconsistent with its finding a breach of fiduciary duty and no damages .....	36
F. The trial court’s post-trial award of fees does not duplicate damages or invade the province of the jury .....	38
G. The trial court properly awarded fees under CR 11 and RCW 4.84.185 .....	40
H. The trial court properly awarded fees under CR 11 and RCW 4.84.185 .....	42
RESPONDENTS REQUEST FOR ATTORNEY FEES ON APPEAL.....	47-50
CONCLUSION.....	50

## TABLE OF AUTHORITIES

### TABLE OF CASES

#### WASHINGTON

<i>Adair v. Weinberg</i> , 79 Wn. App. 197, 901 P.3d 340 (1995) .....	30
<i>Alexander v. County of Walla Walla</i> , 84 Wn. App. 687, 929 P.2d 1182 (1997) .....	14
<i>Alpine Indus., Inc. v. Gohl</i> , 30 Wn. App. 750, 760, 637 P.2d 998, 645 P.2d 737 (1981) .....	33
<i>Biggs v. Vail</i> , 119 Wn.2d 129, 830 P.2d 350 (1992) .....	41
<i>Bowles v. Dept. of Retirement Sys.</i> , 121 Wn. 2d 52, 70, 847, P. 2d 440 (1993) .....	47-48
<i>Buchman v. Buchman</i> , 150 Wn. App. 730, 740, 207 P. 3d 478 (2009)...	48
<i>City of Kirkland v. O'Connor</i> , 40 Wn. App. 521, 698 P.2d 1128 (1985) .....	30
<i>Dept. of Ecology v. Anderson</i> , 94 Wn.2d 727, 620 P.2d 76 (1980).....	33
<i>Fischer-McReynolds v. Quasim</i> , 101 Wn. App. 801, 6 P.3d 30 (2000) ....	15
<i>Forbes v. American Bldg. Maintenance Co. West</i> , 148 Wn. App. 273, 300, 198 P. 3d 1042 (2009).....	47-48
<i>Green v McAllister</i> , 103 Wn. App. 452, 461-62, 469-70, 472, 14 P.3d 795 (2000) .....	33
<i>Grimwood v. Univ. of Puget Sound, Inc.</i> , 110 Wn.2d 355, 753 P.2d 517 (1988) .....	15, 16, 22
<i>Hamilton v. Dep't of Labor &amp; Indus.</i> , 111 Wn.2d 569, 761 P.2d 618 (1988) .....	30
<i>Highland School Dist. No. 203 v. Lacy</i> , 149 Wn. App. 307, 202 P.3d 1024 (2009) .....	43
<i>Hisle v. Todd Pac. Shipyards Corp.</i> , 151 Wn.2d 853, 93 P.3d 108 (2004) .....	14
<i>Hsu Ying Li v. Tang</i> , 87 Wn.2d 796, 799, 557 P.2d 342 (1976).....	32

<i>Interlake Porsche &amp; Audi, Inc. v. Buchholz</i> , 45 Wn. App. 502, 728 P.2d 597 (1986) .....	36
<i>Int'l Ultimate, Inc. v. St. Paul Fire &amp; Marine Ins. Co.</i> , 122 Wn. App. 736, 87 P.3d 774 (2004) .....	15
<i>Island Air, Inc. v. LaBar</i> , 18 Wn. App. 129, 566 P.2d 972 (1977).....	16
<i>Keystone Land &amp; Dev't Co. v. Xerox Corp.</i> , 152 Wn.2d 171, 94 P.3d 945 (2004) .....	15, 19, 23
<i>Madden v. Foley</i> , 83 Wn. App. 385, 922 P.2d 1364 (1996).....	47
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632 (1998). .....	43
<i>McCormick v. Dunn &amp; Black, P.S.</i> , 140 Wn. App. 873, 167 P.3d 610 (2007) .....	23
<i>North Coast Elec. Co. v. Selig</i> , 136 Wn. App. 636, 151 P.3d 211 (2007) .....	46
<i>Peterson v. Littlejohn</i> , 56 Wn. App. 1, 781 P.2d 1329 (1989) .....	29
<i>Quick-Ruben v. Vail</i> , 136 Wn.2d 888, 969 P.2d 64 (1998) .....	16, 41, 43
<i>Qwest Corp. v. City of Bellevue</i> , 161 Wn.2d 353, 166 P.3d 667 (2007) ...	14
<i>Rasor v. Retail Credit Co.</i> , 87 Wn.2d 516, 554 P.2d 1041 (1976) .....	34, 35, 37
<i>Rogerson Hiller Corp. v. Port of Port Angeles</i> , 96 Wn. App. 918, 927-28, 982 P. 2d 131.....	48
<i>Ruff v. King County</i> , 125 Wn.2d 697, 887 P.2d 886 (1995).....	19
<i>Ryder's Estate v. Kelly-Springfield Tire Co.</i> , 91 Wn.2d 111, 587 P.2d 160 (1978) .....	29
<i>Sea-Van Invs. Assocs. v. Hamilton</i> , 125 Wn.2d 120, 881 P.2d 1035 (1994) .....	19
<i>Skimming v. Boxer</i> , 119 Wn. App. 748, 82 P.3d 707 (2004).....	34
<i>Tincani v. Inland Empire Zoological Society</i> , 124 Wn.2d 121, 875 P.2d 621 (1994).....	36
<i>Touchet Valley Grain Growers, Inc. v. Opp &amp; Seibold General Const., Inc.</i> , 119 Wn.2d 334, 831 P.2d 724 (1992).....	18

<i>Travis v. Tacoma Pub. Sch. Dist.</i> , 120 Wn. App. 542, 85 P.3d 959 (2004) .....	15, 22
<i>Valdez-Zontek v. Eastmont School Dist.</i> , 154 Wn. App. 147, 225 P.3d 339 (2010) .....	29
<i>Weiss v. Bruno</i> , 83 Wn.2d 911, 914, 523 P.2d 915 (1974).....	32
<i>Yakima County Fire Prot. Dist. No 12 v. City of Yakima</i> , 122 Wn.2d 371, 858 P.2d 245 (1993).....	19
<i>Young v. Key Pharms., Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989) ....	15, 22

**FEDERAL**

<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).....	15
--	----

**STATUTES**

RCW 4.84.185 .....	2, 4, 14, 16, 31-35, 38-45, 46, 47, 48
--------------------	--

**RULES**

CR 11 .....	2, 4, 14, 16, 34, 35, 38, 39, 40, 43, 44, 45, 46, 47, 48
CR 51 .....	31
RAP 2.5.....	30, 32
RAP 18.1.....	47

## **INTRODUCTION**

This appeal arises from a dispute between two former business associates, Dr. William Thompson, a dentist, and Kris Smith, a contractor. Mr. Smith owned and operated a construction business, Smithworks LLC (“Smithworks”). That company did not have rights to a specific proprietary product and system referred to as the Ram Jack system. After Smithworks had performed an extensive remodel, including significant foundation work, upon Dr. Thompson’s house, the parties began to discuss forming a company that would utilize the proprietary piling system licensed by Ram Jack Oklahoma that could be used in reinforcing foundations. They formed Ram Jack Northwest LLC (“Ram Jack NW”) to provide this specific service.

Dr. Thompson agreed to provide the capital of this new company and Mr. Smith agreed to provide the expertise. The parties agreed that Ram Jack NW would use the proprietary system to drive piers. They did not reach agreement on whether Ram Jack NW would perform any further foundation work. Once Ram Jack was in operation, Dr. Thompson demanded that the previously existing Smithworks entity limit and Ram Jack Northwest expand their relative scopes of work.

After discovery, Smithworks sought summary judgment on Dr. Thompson’s claims that Mr. Smith and Smithworks had usurped Ram

Jack's business opportunities. Mr. Smith used the parties' documented contractual agreements and Dr. Thompson's own admissions through deposition testimony to establish that the parties had neither agreed to limit Smithworks' scope of work nor expand Ram Jack Northwest's scope of work beyond installation of piercing systems. Dr. Thompson failed meet his burden of production of evidence to defeat the motion, notably failing to provide any evidence that there was a meeting of the minds as to any work to be done by Ram Jack NW beyond piercing, and, accordingly, of any usurpation of business opportunities. Dr. Thompson never identified a genuine basis for concluding that Ram Jack Northwest owned business opportunities that were usurped.

By trial, all of Dr. Thompson's claims had been dismissed except for a breach of contract claim and breach of fiduciary duty claim. At trial, the jury awarded Mr. Smith \$70,000 for breach of fiduciary duty on his counterclaim and awarded Dr. Thompson nothing, finding no damages even if there was a breach by Kris Smith. The jury further rendered an advisory verdict, without any exception or objection from Dr. Thompson, that Dr. Thompson's lawsuit was frivolous. The court granted Mr. Smith's request for fees under CR 11 and RCW 4.84.185 in post-trial motions.

**APPELLANT'S ASSIGNMENTS OF ERROR  
AND RELATED ISSUES**

1. The Court properly decided that the parties, as a matter of law, did not agree that Ram Jack NW would do any work beyond that related to piercing, that there was no evidence of any agreement limiting Smithwork's scope of work and that Dr. Thompson's usurpation of business claims could not stand and a new trial is not required. Appellant's Brief ("App. Brief") at 2,3.

2. The Court did not err in instructing the jury regarding the law on frivolous lawsuits, particularly where Dr. Thompson did not object to said instruction. App. Brief at 2, 3-4.

3. The Court properly entered judgment and denied Dr. Thompson's motion for a new trial because there was no conflict in the jury's verdict. App. Brief at 2, 3-4.

4. Sufficient evidence of breach of fiduciary duty supports the jury's award of damages to Mr. Smith and its award should be upheld. App. Brief at 4.

5. The court did not abuse its discretion in finding that Dr. Thompson's lawsuit was: frivolous, conducted without a reasonable investigation, unwarranted by existing facts or law, advanced without a reasonable basis and advanced for an improper purpose. Further, the court

did not abuse its discretion in awarding Mr. Smith his attorneys fees under CR 11 and RCW 4.84.185, and the Order adequately supports its decision. App. Brief at 2-4.

6. The Court properly denied Dr. Thompson's motion for new trial. App. Brief at 4.

## STATEMENT OF THE CASE

### A. Factual Background

**1. Mr. Smith's company, Smithworks LLC, pre-existed Ram Jack Northwest LLC and performed foundation and other construction work, including foundation work on Dr. Thompson's residence—the parties never limited Smithwork's scope of work.**

Prior to forming Ram Jack NW, Mr. Smith through his solely-owned company Smithworks, performed foundation work, including the forming and pouring of concrete. CP 282. Notably, Mr. Smith and Smithworks performed extensive foundation work on Dr. Thompson's personal residence prior to the forming of Ram Jack NW, including the demolition and repair of his north basement wall and foundation. CP 298-303.<sup>1</sup> Dr. Thompson agreed that this work was done. CP 313 (at pp. 159 (ll. 9-25), 160 (ll. 1-15)).<sup>2</sup>

---

<sup>1</sup> These invoices reflect that Smithworks performed tasks such as reinstalling a subfloor, rebuilding basement wall, reconstructing rim joists, and basement walls, installed wall at basement, patched foundation wall, waterproofed inside and outside of new concrete threshold at north basement wall, prepped basement walls for new sheet rock, removed a basement wall and prepped for new, and installed build up for exterior foundation walls.

On May 23, 2006, Dr. Thompson and Mr. Smith formed Ram Jack NW as equal owners. (CP 282). Ram Jack NW utilizes a patented and licensed steel piercing system created by Ram Jack Systems Distribution LLC that is used to secure structure built, or to be built, directly upon unstable soils to prevent or correct settling issues.<sup>3</sup> *Id.* When Ram Jack NW was formed, the undisputed evidence shows that Dr. Thompson and Mr. Smith agreed that Ram Jack NW would perform (or be responsible for) all excavation for piers, all driving of piers and all securing of structure to the driven piers using the patented and licensed piercing system and products. *Id.* Dr. Thompson did not dispute that only Ram Jack NW and not Smithworks has performed this pier driving construction service. CP 317 (at p.175 (ll.9-24)).

Dr. Thompson later contended that he and Mr. Smith agreed to limit Smithworks' scope of work to "non-foundation work (such as a 'kitchen remodel')" or a "bathroom remodel". CP 534, 320 (at pp. 246 (ll.16-25), 247 (ll.1-9), 534). However, in forming Ram Jack NW, Dr. Thompson and Mr. Smith signed the Ram Jack Dealership Agreement.

---

<sup>2</sup> The exhibit referenced in Dr. Thompson's deposition testimony appears herein at CP 286-95.

<sup>3</sup> The steel piers are driven deep into the ground to depths determined by geotechnical engineers to be the source of "stable" earth. *See* CP 282. Once the structure is attached to the piers, the load of the structure is transferred from the settling, or prone to settling, soils to the stable earth below. *Id.*

CP 286-95. This agreement includes, in Paragraph 10(c), a non-compete clause in which there is a specific exemption from that clause of Smithworks' foundation work in the form of an exception for "previously owned". CP 289-90. The legal effect of the contract, which Dr. Thompson signed (RP 49:16-23), expressly authorized Mr. Smith's previously owned business, Smithworks to do foundation work. Dr. Thompson and Mr. Smith initialed the clause that carves out "previously owned" business from non-compete language:

... [N]either Dealer nor [KS WBT] will directly or indirectly:  
(i) own, manage, operate, join, control or be employed by and/or participate in the ownership, management, operations or control of, or be connected in any manner with a person, entity or business that performs foundation repair, structural repair or new construction on residential, commercial or industrial properties in, or within the 100 miles of, the Territory, **unless previously owned**, ...<sup>4</sup>

CP 283, 289-90. Nowhere in the record does Dr. Thompson dispute that he signed and initialed this agreement. Dr. Thompson agreed and acknowledged that Mr. Smith was authorized to "own, manage, operate,

---

<sup>4</sup> The provision states in full "For the consideration of granting Dealer the rights and benefits contained in this Agreement, including the right to operate within the Territory (in some respects to the exclusion of Distributor), and for other good and valuable consideration, during this Agreement, and for a period of 24 months after the date this Agreement is terminated, neither Dealer nor [initials of Mr. Smith and Plaintiff] will, directly or indirectly . . . own, manage, operate, join, control, or be employed by and/or participate in the ownership, management, operations or control of, or be connected in any manner with a person, entity or business that performs foundation repair, structural repair or new construction on residential, commercial or industrial properties in, or within the 100 miles of, the Territory, unless previously owned."

join, control” ... Smithworks even if Smithworks is a “business that performs foundation repair, structural repair.”

Furthermore, Dr. Thompson admitted in deposition that he did not request that Smithworks cease doing foundation work:

246

23 Q. You didn't tell him, "Kris, Smithworks has to

24 quit doing foundation work," did you?

25 A. I didn't say it in so many words.

CP 320.

## **2. Ram Jack's scope of work.**

Dr. Thompson's usurpation claims against Smithworks and Mr. Smith depended on his assumption that Smithworks performed foundation work that Ram Jack NW had the exclusive right to perform per agreement between him and Mr. Smith. CP 227-29 (Third amended claims in c/o). Therefore, the entirety of Dr. Thompson's claims, personal and derivative, against Smithworks and the interference claims against Mr. Smith depended solely on one question: Did Smithworks perform work that Dr. Thompson and Mr. Smith agreed Ram Jack NW would perform? CP 319, (at p. 227 (ll. 15-20)).

Thus a critical issue in this appeal, as in the litigation below is whether there was an agreement between Mr. Smith and Dr. Thompson concerning the scope of work of Ram Jack NW and what the evidence

shows that agreement was. The parties did not sign a formal LLC Agreement for Ram Jack NW. See CP 315 (at p. 169 (ll. 2-14)). As a result, most of their agreements concerning Ram Jack NW were oral. See CP 283; 220.

It is undisputed that the only reason Mr. Smith needed Dr. Thompson for Ram Jack NW was for financing of new pier driving work, and that, furthermore, Dr. Thompson was aware of this:

247

6 Q. When Kris first came to you and talked about  
7 an opportunity, it was an opportunity related to Ram  
8 Jack products, primarily the piercing bracket products,  
9 right?

10 A. Right.

11 Q. And that's why he needed you, was because you  
12 either had or had access to the money to buy the  
13 dealership to get those Ram Jack products. Is that  
14 right?

15 A. Yes.

CP 320.

There is no dispute that Dr. Thompson and Mr. Smith agreed that Ram Jack NW would excavate and drive piers: their dispute is whether there is an agreement that Ram Jack NW would do more than excavate and drive piers. See CP 317; 318 (at pp. 176 (ll. 3-7, 21-25), 177 (ll. 1, 10-25), 178 (ll. 1-16)). *See also* CP 322; 323. The only agreement signed by the parties, the distributorship agreement, specified the work narrowly

as follows: “[D]istributes an hydraulically advanced piercing system ... and other related manufactured products.” CP 286.

Although it was established to provide a specific piercing service, under Dr. Thompson’s theory Ram Jack NW had somehow obtained from Smithworks an exclusive right to perform all work related to foundations, whether or not Ram Jack NW was even equipped to do such work. Dr. Thompson presented no such written agreement or evidence of any such agreement, nor did he present any evidence of any legal consideration for any such an agreement to take work from Smithworks. Finally, Plaintiff admitted that he and Mr. Smith still have not reached any such agreement.

178

1 Q. Kris states here that he understood you had  
2 an agreement that anything outside of Ram Jack, which  
3 he identifies as excavating for and driving piers,  
4 Smithworks would handle.

5 A. No, that was never our agreement.

6 Q. Okay. When did you reach your agreement?

7 Let me ask you this.

8 A. Well, it's evident that *we have not reached*  
9 *an agreement* because we're still arguing about it.

10 Q. Okay. All right. So if I said that you  
11 never did reach an agreement, then we would actually  
12 agree on that.

13 A. Well, I said in my e-mail that I think we  
14 needed to come to an agreement in order to have a  
15 smoother operation of our business so we didn't have  
16 conflict.

CP 318 (emphasis added).

Furthermore, Dr. Thompson did not dispute that Smithworks never performed or was never compensated for any pier-related work and that Ram Jack NW was fully compensated for all pier-related work it contracted and performed. *See* CP 283; CP 317 (at p. 175 lines 20-24)

**B. Procedural History**

**1. Procedural History of Summary Judgment Motion**

Dr. Thompson's Interference claims were solely based on a theory that Mr. Smith and/or Smithworks performed some undefined foundation work that Ram Jack NW somehow had obtained an exclusive right to perform. Mr. Smith and Smithworks moved for summary judgment on that issue, and, after the issue was fully briefed and oral argument was heard before the trial court, the interference claims were dismissed because Dr. Thompson presented no admissible or credible evidence to support his claims. CP 687-689.

Dr. Thompson relied primarily upon two declarations submitted with his opposition, his own, and one of Charles Brastrup. Mr. Brastrup's declaration was almost exclusively hearsay. CP 564-71. Dr. Thompson's declaration did not state with any specificity the scope of work to which he contended the parties agreed, merely that Ram Jack NW was to provide "foundation solution work" (CP 533) as opposed to "handyman type jobs" (CP 582) or "kitchen remodel." He failed to identify even one

specific example of interference or any admissible evidence to contradict the evidence put forth by Mr. Smith, relying instead on nothing more than a restatement of vague allegations from the complaint.

## **2. Procedural History at Trial**

At trial, Dr. Thompson only presented evidence on his remaining claims for breach of contract and breach of fiduciary duty. RP 3:12 – 10:8. The sole basis of Dr. Thompson’s breach of fiduciary duty and breach of contract claims at trial was his contention that Mr. Smith did not provide enough accountings to him when requested, his other claims based upon his interference and usurpation of business having been dismissed on summary judgment. *Id.* He proceeded to trial on the theory that he did not receive enough accountings despite that fact that he was unable to articulate any evidence regarding damages for the alleged breaches. At best he testified that, as a result of the lawsuit he filed, he was stressed, his wife was stressed (RP 350:7-13), he had to take a couple days off work (RP 350:14-16) and then he offered rambling and contradictory testimony about whether he loaned or contributed cash to Ram Jack NW (RP 344:22 – 350:2, 107:24 -110:17 – 111:25, 126:19 – 127:3), how much he loaned or contributed (RP 344:22 – 350:2, RP 31:10 – 32:24, 63:11 – 66:21, 68:10 – 81:23, 109:9 – 110:5), and how much he

was paid back by Ram Jack NW (RP 344:22 – 350:2, 62:20 – 63:15, 118:22 – 119:3, 122:17 – 123:23).

Dr. Thompson's erroneous and conflicting, off-the-cuff personal accounting testimony at trial (RP 350:25 – 353:15) is refuted directly by the trial testimony of his own identified accounting expert, Lane Strickland (RP 239:15 – 239:17). Mr. Strickland testified that he "did not find anything that indicates any intention by one party to mislead the other or anything that is out of the ordinary with respect to the recordkeeping for a small business" (RP 229:7-12), that the Ram Jack NW bookkeeping was reasonable (RP 233:8-13), and that there was nothing inappropriate about the Ram Jack NW books (RP 233:14-17). Instead of being owed money by Ram Jack NW as Dr. Thompson claimed, his expert accountant confirmed that Dr. Thompson was paid, as of December 31, 2007 two weeks after he filed this lawsuit, \$7,082.22 more than he put in. RP 231:10-23. After the \$6,000 in unauthorized withdrawals in January and March 2008 on a secret checkbook (RP 138:1 – 138:6, 199:11 – 199:19, 200:3 – 200:5) Dr. Thompson had made on the business account, Mr. Strickland agreed that Dr. Thompson's debt to Ram Jack NW was at least \$13,082.22 for these types of items. RP 231:24 - 232:4.

Mr. Smith's counterclaim at trial was that Dr. Thompson breached his fiduciary duty for withdrawing funds without authorization or accounting and bringing a harassing, unmeritorious suit against Mr. Smith (RP 176:16 – 177:2, 199:2 – 203:13, 300:2 – 301:7, 303:17 – 307:32, 353:16 – 354:19). Mr. Smith presented evidence that Dr. Thompson's unauthorized withdrawal of funds inhibited the operation of Ram Jack NW by causing the company to be unable to pay its bills when due and obtain new business. (Id.) Bringing the harassing suit against Mr. Smith caused damage because it resulted in expenditures of time and on litigation that would have been spent getting more business for Ram Jack NW and Smithworks. (Id.)

Mr. Smith also requested an advisory verdict on whether the suit was frivolous. *See* App. A., Instruction 30. Notably, as Dr. Thompson admits, he did NOT object to this instruction. App. Brief 31. The jury returned a verdict for \$70,000 for Mr. Smith. It found against Dr. Thompson on both his claims: it found there was no breach of contract, and although it found a breach of fiduciary duty, it found that no damages resulted. (CP 1238-1240).

### **3. Post Trial**

After trial, Dr. Thompson opposed entry of judgment, arguing that the jury's finding that Mr. Smith breached of fiduciary duty and the

finding that Dr. Thompson's case was frivolous were inconsistent. (CP 1284). (CR 1333-34) The Court found no merit in the argument and entered judgment in this lawsuit. Later Dr. Thompson unsuccessfully moved for a new trial or JNOV on the same grounds. (CP 1333-34).

Mr. Smith and Smithworks moved after trial for fees pursuant to CR 11 and RCW 4.84.185. (CP 1262-73). Not once did Dr. Thompson ever dispute the reasonableness of the fees that were requested in that motion (CP 1290-92). In fact, Dr. Thompson's own attorneys fees were \$212,000 as testified at trial (RP 350:10-12).(See also CP 1272). Mr. Smith's and Smithworks's fees totaled just over \$153,000 through trial as represented to the trial court in the motion for fees (CP 1272).

## **ARGUMENT**

### **A. Standards of Review**

Summary judgment orders are reviewed de novo. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007). A trial court properly grants summary judgment when no genuine issues of material fact exist, thereby entitling the moving party to a judgment as a matter of law. CR 56(c). All reasonable inferences from the facts are drawn in the light most favorable to the nonmoving party. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004). And questions of fact may be determined on summary judgment as a matter of law only where

reasonable minds could reach but one conclusion. *Alexander v. County of Walla Walla*, 84 Wn. #App. 687, 692, 929 P.2d 1182 (1997).

Once the moving party meets its burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law, the nonmoving party has the burden to show otherwise. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 808, 6 P.3d 30 (2000). If a plaintiff “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,” summary judgment is proper. *Young*, 112 Wn. 2d at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986)).

The nonmoving party may not rely on speculation or “mere allegations, denials, opinions, or conclusory statements” to establish a genuine issue of material fact. *Int’l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004) (citing *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988)). The nonmoving party may not rely on having its affidavits considered at face value. *Travis v. Tacoma Pub. Sch. Dist.*, 120 Wn. App. 542, 549, 85 P.3d 959 (2004) (nonmoving party has burden of production and may not rely on having its affidavits considered at face value).

Supporting affidavits must contain admissible evidence that is based on personal knowledge. *Grimwood*, 110 Wn 2d at 359. A party's self-serving opinion and conclusions are insufficient to defeat a motion for summary judgment. *Id.* at 359-61, 753. "A nonmoving party attempting to preclude summary judgment may not rely upon argumentative assertions or on having its affidavits considered at their face value, for upon the submission by the moving party of adequate affidavits the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue of material fact exists." *Island Air, Inc. v. LaBar*, 18 Wn. App. 129, 136, 566 P.2d 972 (1977).

The standard of review for fee awards under RCW 4.84.185 and CR 11 is abuse of discretion. *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 892, 969 P.2d 64 (1998).

**B. Dr. Thompson did not meet his burden of production to defeat summary judgment on the usurpation claims.**

1. There was no agreement restricting Smithworks' scope of work

Smithworks is an entity solely owned and operated by Mr. Smith. It is indisputable that it performed foundation work prior to the formation of Ram Jack NW. In fact, the only relationship Smithworks had to Dr. Thompson implicates foundation work: it performed an extensive

remodel of Plaintiff's personal residence prior to Ram Jack NW's formation in 2006, which included foundation work. See CP 298-303.

Dr. Thompson never obtained any agreement from Smithwork nor any agreement from Mr. Smith limiting the work performed by Smithworks. He even admitted that he has never reached an agreement to take scope of work away from Smithworks:

246

- 23 Q. You didn't tell him, "Kris, Smithworks has to  
24 quit doing foundation work," did you?  
25 A. I didn't say it in so many words.

(CP 320). Moreover, Dr. Thompson had signed a writing agreeing and acknowledging that Mr. Smith was authorized to "own, manage, operate, join, control" ... Smithworks even if Smithworks was a "business that performs foundation repair, structural repair." CP 289-90.

Having had no contractual or other restrictions placed upon its scope of work, Smithworks was entitled, through its agent Mr. Smith, under freedom of contract principles to obtain construction work and pursue profits. *See Keystone Land & Dev't Co. v. Xerox Corp.*, 152 Wn.2d 171, 176, 94 P.3d 945 (2004) ("[u]nder the principle of freedom to contract, parties are free to enter into, and courts are generally willing to enforce, contracts that do not contravene public policy"). Dr. Thompson, on the other hand, having failed to obtain any agreement limiting the

scope of Smithworks's business<sup>5</sup>, had no basis to claim any entitlement to any work performed by Smithworks or any right to interfere with work performed by Smithworks. If Dr. Thompson, a highly educated and successful professional, had wanted to alter or limit the work performed by Smithworks, it was his burden to negotiate and provide consideration for that type of a deal with Mr. Smith when they entered their agreement.

As noted, Dr. Thompson had signed a writing agreeing and acknowledging that Mr. Smith was authorized to "own, manage, operate, join, control" ... Smithworks even if Smithworks is a "business that performs foundation repair, structural repair," To the extent that Smithworks would potentially compete with Ram Jack Northwest, LLC, Dr. Thompson waived any objection when he signed the contract. *See Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Const., Inc.*, 119 Wn.2d 334, 355, 831 P.2d 724 (1992) (finding clear and unambiguous subrogation waiver). In sum, Dr. Thomson did not produce evidence regarding any agreement to limit Smithworks' scope of work that would create a genuine issue of material fact, and reasonable minds could only conclude that Mr. Smith and Dr. Thompson did not contract to limit Smithworks' scope of work.

---

<sup>5</sup> In fact, as noted above, he assented to Smithworks's continued work through his act of initialing the exception to the non-compete provision in the licensing agreement.

2. Dr. Thompson and Mr. Smith's Agreement Regarding Ram Jack NW's Scope of Work Included No Work Beyond Piering Work.

As noted, Dr. Thompson and Mr. Smith did not sign a formal LLC agreement in forming Ram Jack NW. Nonetheless, whether Ram Jack NW, a creation of contract and statute, has the right to contract for work depends on what its owners agreed its scope of work would be. Washington follows the objective manifestation test for contracts. *Keystone Land Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177-78, 94 P.3d 945 (2004) (citation omitted). As such, the parties must objectively manifest their mutual assent to form a contract. *Id.* at 177 (citing *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993)). Whether the parties have mutually assented is generally a fact question for the jury. *Keystone*, 152 Wn.2d at 178 n.10 (citing *Sea-Van Invs. Assocs. v. Hamilton*, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994)). But a trial court may determine the issue as a matter of law if reasonable minds could reach only one conclusion. *Id.* (citing *Ruff v. King County*, 125 Wn.2d 697, 703-04, 887 P.2d 886 (1995)).

Mr. Smith produced undisputed evidence that, the parties did not agree to limit Smithworks' scope of work, and, in fact, had carved out an exception to Ram Jack Oklahoma's Distributor Agreement in order to permit Smithworks to continue its former work. He further produced

evidence that in forming Ram Jack NW, Dr. Thompson and Mr. Smith had agreed that it would provide a new pier driving service to customers. *See* Smith Dec.; CP 202, CP 311 (at p.60 (ll. 13-20), CP 212 (at p.151 (ll. 6-25), p. 152 (ll. 1-5)). There was no other reason for Mr. Smith to enter an agreement with Dr. Thompson.<sup>6</sup> The only consideration provided was for purchasing a dealership specifically defined by and limited to pier driving. It is undisputed that Dr. Thompson and Mr. Smith agreed that Ram Jack NW would perform all pier-related work. It is also undisputed that Dr. Thompson and Mr. Smith did not agree on a work scope for Ram Jack NW any greater than pier-related work.

In fact, Dr. Thompson himself admitted that there was no agreement regarding Ram Jack NW's scope of work outside of excavating and driving piers. In testifying regarding a communication to Mr. Smith dated June 12, 2007<sup>7</sup>, more than a year *after* Ram Jack NW was operating, he stated unequivocally in his deposition that Mr. Smith and Dr. Thompson did not agree, and have not agreed, upon any greater scope of work:

177

10 Q. Now, in Kris's e-mail at the back of  
11 Exhibit-8, in June 14, 2007, do you see the line where  
12 it states, "I was under the understanding that we had

---

<sup>6</sup> In fact, Smithworks is not licensed by Ram Jack Systems Distribution LLC to do piling work, and therefore cannot do piling work. *See* CP 283.

<sup>7</sup> This exhibit was erroneously identified in the deposition as dated June 14, 2007.

13 discussed this matter and were in agreement that  
14 anything outside of Ram Jack, parens, excavating for  
15 and driving piers, closed parens, Smithworks would  
16 handle. As I understand that to mean according to Ram  
17 Jack Oklahoma, parens, Ivan, Ron, and Chris Bacon,  
18 closed parens, Ram Jack only drove piers." Do you see  
19 that part of his e-mail?

20 A. Yes.

21 Q. Do you dispute that?

22 A. Yes.

23 Q. Is it your testimony that you never did have  
24 an agreement as summarized by Kris in this e-mail?

25 A. What specifically are you referring to?

178

1 Q. Kris states here that he understood you had  
2 an agreement that anything outside of Ram Jack, which  
3 he identifies as excavating for and driving piers,  
4 Smithworks would handle.

5 A. No, that was never our agreement.

6 Q. Okay. When did you reach your agreement?

7 Let me ask you this.

8 A. Well, it's evident that *we have not reached*  
9 *an agreement* because we're still arguing about it.

10 Q. Okay. All right. So if I said that you  
11 never did reach an agreement, then we would actually  
12 agree on that.

13 A. Well, I said in my e-mail that I think we  
14 needed to come to an agreement in order to have a  
15 smoother operation of our business so we didn't have  
16 conflict.

CP 318 (emphasis added). *See also* discussion (CP 315-18C) (at pp. 168-78). The undisputed evidence shows that the parties did not agree upon any scope of work *beyond* pier-related work.

Dr. Thompson had the burden to establish that the parties had bargained for and agreed that Ram Jack NW would perform any work

beyond excavating and placing piling. *See Young*, 112 Wn.2d at 225. But he presented only a self-serving declaration in which he attempted to explain away his statement that the parties had not reached an agreement as meaning that they did not have an agreement “resolving reaching into Ram Jack’s pockets.” CP 534. This attempt on summary judgment to confuse and obfuscate a clear admission in his deposition, where he was represented by counsel and had to opportunity to clarify his testimony, if clarification was necessary, does not create a genuine factual dispute. *See Grimwood*, 110 Wn.2d at 359-61 (a party's self-serving opinion and conclusions are insufficient to defeat a motion for summary judgment). *See also Travis*, 120 Wn. App. at 549 (nonmoving party has the burden of production and may not rely on affidavits considered at face value).

Neither did Mr. Brastrup’s declaration present evidence that would create a genuine issue of material fact. His testimony regarding the parties’ agreement is based upon an “understanding” garnered from a number of unidentified conversations with Dr. Thompson and Mr. Smith. (CP 567). This is clearly inadmissible hearsay and/or inadmissible opinion evidence, and is not based upon personal knowledge and as such does not help Dr. Thompson meet his burden of production on summary judgment. *See Grimwood*, 110 Wn.2d at 359 (supporting affidavits must contain admissible evidence that is based on personal knowledge). Nor

does Mr. Brastrup provide any specific statements made by either party that would be admissible in one of the exceptions to the hearsay rule. Also conspicuously absent from the 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.

Dr. Thompson admitted in deposition that he has not reached an agreement with defendants to expand the scope of Ram Jack's work to capture more than the work scope involving the Ram Jack systems. Courts do not rewrite or create new agreements between litigants. *See McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 891-92, 167 P.3d 610 (2007). But that is what Dr. Thompson asked this Court to do by pursuing causes of action based on claims of right against Smithworks, an authorized previously owned business that never performed any Ram Jack NW work.

Under the objective manifestation test, parties must objectively manifest their mutual assent to form a contract. *Keystone*, 152 Wn.2d at 177. Here, in the face of Dr. Thompson's signed agreement *not* to limit Smithworks' scope of work, the signed agreement defining Ram Jack NW's scope of work as a Ram Jack "distributor," his testimony that Ram Jack NW was created to do piercing work, and his own testimony as to the absence of any agreement allocating foundation and other work between

Smithworks and Ram Jack NW, it is apparent that Dr. Thompson failed to meet his burden of production, and reasonable minds could reach only one conclusion – there was no agreement that Ram Jack NW would perform work beyond the specialized piercing work the company had been formed to undertake. Negotiations and/or discussions are just statements and evidence of what a party wants and do not create an agreement. Without an agreement, there was no meeting of the minds, and without a meeting of the minds there was no agreement that Ram Jack NW would perform any work beyond pier-related work. If there was no agreed upon right to such work, there was no business expectancy from such work.

Dr. Thompson claims that the Smithworks and Ram Jack NW insurance policies evidence some sort of agreement. There is absolutely no evidence in the record that these policies' respective coverages or descriptions were based on the terms of any agreement. There is certainly no language in the documents cited by Dr. Thompson that reference any sort of agreement. Dr. Thompson never refers to any policy language or testimony from the broker who created these policies to evidence any such agreement. In fact, the documents themselves state that they are “issued as a matter of information only” (CP 549, 556) or an incomplete part of the whole (CP 547-48; 551-53; 557-59). Not one of these documents evidences that Smithworks was not covered for foundation

work. These documents are not even sufficient evidence of coverage afforded under the policies, let alone support the re-creation of some phantom work scope agreement between Dr. Thompson or Mr. Smith concerning either company. Further, there is no dispute that Ram Jack NW only does foundation repair, which its policies accurately describe (CP 557, 558), and that Smithworks does a broader scope of carpentry work than Ram Jack NW, including the “construction, reconstruction, repair or erection of buildings,” (CP 553) which necessarily includes foundations. This argument concerning the policies is simply a red herring put forth by individuals who know nothing about construction or insuring construction projects. In fact, there is no evidence or testimony from anyone besides Dr. Thompson, a dentist, that these policies evidence any agreed upon work scopes of either Ram Jack NW or Smithworks other than those consistently followed by Mr. Smith.

As for the Yellow Pages ad referred to by Dr. Thompson, even if it were an actual manifestation of some sort of agreement between Dr. Thompson and Mr. Smith, and it is not, Dr. Thompson provided no evidence whatsoever that Smithworks ever did or was paid for any of the items in the ad on any project where Ram Jack NW also performed work.

Dr. Thompson also says the truck logo stating “foundation solutions” is evidence of an agreement. There is no evidence that this

logo, which is the logo required to be used by Ram Jack Systems Distribution, was created on the basis of some undefined, expanded work scope agreement between Dr. Thompson and Mr. Smith.

Dr. Thompson also refers to an alleged Smithworks “flyer” (CP 561-62) as evidence that Smithworks did not do foundations. Nevermind the fact that Dr. Thompson did not assert any basis or foundation for his assumption that this accurately describes Smithworks’s scope of work or was used by Smithworks to advertise its business. There is not even evidence that anyone other than Mr. Smith ever saw this document before. Even if Dr. Thompson were correct in that this was a Smithworks marketing document, it necessarily implicates foundation work – “Room additions, ... Build Out, Deck additions, Gazebo’s [sic], ... Garage additions” all require foundations.

There is no evidence that Dr. Thompson ever voiced his contention on page 9 of App. Brief 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. It is in that same email, by the way, that Dr. Thompson very clearly asserts that the parties needed to come to an agreement, which was not in place, on the respective scopes of work of Smithworks and Ram Jack NW, i.e. limiting Smithworks while expanding Ram Jack NW.

3. Smithworks did not perform piling work.

Smithworks and Ram Jack NW worked on the same projects from time to time. Plaintiff's claims require that, in those jobs where both Smithworks and Ram Jack performed work, Smithworks performed and was compensated for work that Ram Jack NW either contracted for or had the right to contract for per agreement between the Parties. It is undisputed that Ram Jack NW performed all the work it contracted to do. It is also undisputed that Smithworks never performed or was paid for pier driving work.

175

9 Q. Ram Jack Northwest. You understand that Ram  
10 Jack Northwest LLC excavates and drives piers?

11 A. Yes, that's part of what we do; that's my  
12 understanding.

13 Q. Do you understand that Smithworks doesn't do  
14 any excavating for or driving of piers?

15 A. I don't think they should. He's -- as far as  
16 I know that's not been an issue.

17 Q. Okay. Do you know of any place where  
18 Smithworks did excavate for and drive piers?

19 A. How would I know that?

20 Q. Okay. So you don't know of any -- I need to  
21 know what allegations you're making. Are you  
alleging

22 that Smithworks excavated for and drove piers?

23 A. I have no knowledge that Smithworks has ever  
24 driven any piers. I would hope they wouldn't.

(CP 317).

Because Dr. Thompson did not produce any competent evidence of an agreement with Mr. Smith expanding the scope of work of Ram Jack NW beyond the scope of work it performed (all pier-related work) and his own evidence also indicates the lack of any such agreement, and because he did not produce evidence that Smithworks performed or was compensated for any of Ram Jack NW's pier-driving work, he failed to produce any evidence that Ram Jack NW had a contract or business expectancy that was interfered with by Smithworks or Mr. Smith. Any other work that Dr. Thompson alleged to have belonged to Ram Jack NW (not having achieved agreement for Ram Jack NW to perform such work) is not the proper subject of an Interference claim, as there was no other work within the parties' agreed upon scope of business for Ram Jack NW.

Thus, having failed to establish any of the elements for the tortious interference claims against Smithworks, the claims could not stand under the law. In fact, Dr. Thompson agreed that if there is no evidence or law supporting his belief of the scope of work of Ram Jack NW, then there is no reason to accuse Mr. Smith of any impropriety or misdealings. See CP 319 (at p. 227 (ll. 15-20)). Accordingly, no claims of Smithworks taking Ram Jack NW's business could lie, and the trial court's decision on summary judgment should be affirmed.

As the evidence shows through Plaintiff's own testimony and written communications with Mr. Smith, reasonable minds could reach only one conclusion – there was no actual agreement or meeting of minds that Ram Jack NW would perform work beyond the specialized piercing work that the company had been formed to undertake. Negotiations and/or discussions are just statements and evidence of what a party wants and do not create an agreement. Without an agreement, there is no meeting of the minds, and without a meeting of the minds there is no agreement that Ram Jack NW would perform any work beyond pier-related work. If there is no agreed upon right to such work, there is no business expectancy from such work.

**C. Dr. Thompson failed to object to the jury instruction regarding frivolous lawsuit, and he has not shown a valid objection on constitutional grounds.**

Dr. Thompson neither took exception the frivolous lawsuit instruction during the exceptions hearing on jury instructions, nor objected to the verdict form that was presented to the jury. RP 362-73. Failure to object to jury instructions waives objection on appeal. *Valdez-Zontek v. Eastmont School Dist.*, 154 Wn. App. 147, 165, 225 P.3d 339 (2010) (citing *Peterson v. Littlejohn*, 56 Wn. App. 1, 11, 781 P.2d 1329 (1989) (citing *Ryder's Estate v. Kelly-Springfield Tire Co.*, 91 Wn.2d 111, 587 P.2d 160 (1978))). Nor has he shown that the trial court committed a

“manifest error affecting a constitutional right” or cited any case, statute or rule to support the proposition that he has the right to object now for the first time or that he has grounds to rely upon RAP 2.5(a).

*City of Kirkland v. O'Connor*, 40 Wn. App. 521, 522, 698 P.2d 1128 (1985), is a criminal DUI case in which a judge, *sua sponte*, instructed the jury that they should not draw conclusions or inferences from the lack of a breathalyzer test. Unlike in the instant situation, counsel for defendant timely objected to the *sua sponte* instruction, but was overruled and defendant was convicted of a crime. *Id.* at 522-23. Appeal was taken under RAP 2.3(d). The court did not address whether the appeal would have been allowed under RAP 2.5(a), and thus it is of no assistance in this matter. Likewise, *Adair v. Weinberg*, 79 Wn. App. 197, 205, 901 P.3d 340 (1995), is of no assistance. In *Adair*, the court held that reminding the jury that the court and not the lawyer is the giver of law did not constitute an impermissible comment on the evidence. *Id.*

In fact, as one of Dr. Thompson’s own cited cases notes: “an instruction which does no more than accurately state the law pertaining to an issue does not constitute an impermissible comment on the evidence by the trial judge” under Const. Art. 4 § 16. *Hamilton v. Dep’t of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988) (*rev’g* court of appeals decision in which instruction was held to be impermissible comment on

the evidence). Here, the instruction tracked the language of the statute, RCW 4.84.185, and caselaw concerning the statute. Dr. Thompson had the opportunity to object but did not. App. Brief at 31. Dr. Thompson cannot and does not argue that this instruction does not accurately state the law.

Dr. Thompson also objects to the effect of Instruction 15, yet another instruction to which he did not object, arguing that it helps create the “impression” that the breach of contract claim was baseless. Dr. Thompson cannot bootstrap his argument that he can appeal a jury instruction to which he did not object upon yet another instruction to which he failed to object.

Washington law certainly provides that a judge shall not comment on the evidence, and, in fact, the very same rule that addresses this also provides the means for a party to raise and for a court to timely cure any potential problems: CR 51(f) provides that

[c]ounsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.

CR 51(f). Dr. Thompson does not claim that he suffered a procedural due process violation: that the trial court failed to allow him an opportunity to

object. Instead, he admits that he failed to avail himself of the remedy to any impermissible “comment” by the court upon the evidence provided by the rules. App. Brief at 31. He declined to object and elected, instead, to wait until after the jury had deliberated and come to a decision and to try his luck with this Court. Dr. Thompson has cited no case, statute or rule that would tend to show he has a right to challenge under RAP 2.5 an instruction at trial to which he did not object at trial.

Moreover, even if Dr. Thompson had adequately preserved this issue for appeal, the instruction is hardly a comment upon the evidence. Advisory verdicts are permitted under Washington law. CR 39(c) states that an advisory jury verdict is allowed “[i]n all actions not triable of right by a jury.” RCW 4.84.185 is an equitable remedy that can only be handed down by the Judge on motion “after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action.” Further, “the power to award attorney fees ‘springs from [the Court’s] inherent equitable powers, (and) [the Court is] at liberty to set the boundaries of the exercise of that power.’” *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 799, 557 P.2d 342 (1976), quoting *Weiss v. Bruno*, 83 Wn.2d 911, 914, 523 P.2d 915 (1974). The Court, by statute, is the fact-finder under RCW 4.84.185. Presenting the issue to the jury for verdict results, as a matter of law, in an advisory verdict, which is

not binding on, but may be considered by, the Court in making its ruling. E.g. *Green v McAllister*, 103 Wn. App. 452, 461-62, 469-70, 472, 14 P.3d 795 (2000) (Court affirmed “the judgment on the jury’s advisory verdict on the fair market value” of land at issue). “If a jury is empanelled to decide equitable issues, its verdict is advisory only unless both parties consent to be bound by the verdict.” *Alpine Indus., Inc. v. Gohl*, 30 Wn. App. 750, 760, 637 P.2d 998 (citing *State ex rel. Dept. of Ecology v. Anderson*, 94 Wn.2d 727, 620 P.2d 76 (1980)). The trial court has discretion on whether to follow an advisory verdict. *See Alpine Indus.*, 30 Wn. App. at 761.

Further, Dr. Thompson has not argued or shown that the instruction did not accurately state the law. RCW 4.84.185 states that:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action ... was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action.... This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

RCW 4.84.185 “is designed to discourage abuses of the legal system by providing for an award of expenses and legal fees to any party forced to defend against meritless claims advanced for harassment, delay, nuisance, or spite.” *Skimming v. Boxer*, 119 Wn. App. 748, 756, 82 P.3d 707 (2004). “A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts.” *Id.* Instruction 30 is an accurate restatement of the law. No facts or evidence or parties are discussed whatsoever in Instruction 30, and the instruction simply restates the law. It is not a comment on any evidence, and Dr. Thompson was afforded his due process right to object to any instructions he did not like. In sum, Dr. Thompson does not have the standing to raise this objection for the first time on appeal, and even if he did, this instruction, which only states the law, is not a comment upon the evidence.

**D. The Jury’s Verdict should not be disturbed.**

Dr. Thompson argues this court should reverse because, except for \$7,000 that he owed Ram Jack NW, the jury’s award must necessarily have been impermissibly based upon CR 11 and RCW 4.84.185. Dr. Thompson is wrong on all counts.

The amount of damages is “a matter within the discretion of the jury. Neither the trial court nor any appellate court should substitute its judgment for that of the jury as to the amount of damages.” *Rasor v.*

*Retail Credit Co.*, 87 Wn.2d 516, 531, 554 P.2d 1041 (1976) (citations and internal quotation marks omitted). The appellate court should “not disturb an award of damages made by a jury unless it is outside the range of substantial evidence in the record, or shocks [the] conscience, or appears to have been arrived at as the result of passion or prejudice.” *Id.* (citations omitted).

Besides the reimbursement of over-withdrawals (which Mr. Strickland, Dr. Thompson’s identified accounting expert, confirmed to total over \$13,000, not \$7,000) a contractual issue with regard to which Dr. Thompson concedes the sufficiency of evidence, Dr. Smith presented evidence that he was damaged by lost business opportunities, diverted and lost time and mental suffering which manifested physically in lost sleep and weight gain. Additionally, as an element of his claim for breach of fiduciary duty – NOT his claim for fees under CR 11 and RCW 4.84.185 - Mr. Smith claimed his attorneys’ fees.

Mr. Smith set forth evidence regarding business interruptions, debts owed by Dr. Thompson to Ram Jack NW that Mr. Smith was forced to cover, lost opportunities and mental suffering. Such testimony was sufficient by itself for the jury to reach its verdict of \$70,000. *See Rasor*, 87 Wn.2d at 530-31 (plaintiff’s evidence that her insurance premiums increased, her business and personal reputation suffered and she suffered

emotionally as a consequence of an adverse credit report sufficient to support award of damages). There is no law that prohibits the award of attorneys fees for breach of fiduciary duty under these circumstances. However, more importantly, there is no evidence that at least \$63,000 (as Dr. Thompson contends) of the jury's verdict was for attorneys fees. Such a contention is unsupported and speculative, and does not warrant reversal of the jury's verdict for Mr. Smith. To the contrary, it is rational that none of the award was for attorney fees.

**E. The jury's advisory verdict that Dr. Thompson's lawsuit was frivolous was not inconsistent with its finding a breach of fiduciary duty and no damages.**

Plaintiff argues that the jury's verdict is inconsistent because the jury checked "yes" on its verdict form for the question "[d]id Kris Smith breach fiduciary duties owed to William B. Thompson" but found that Dr. Thompson's lawsuit was frivolous. As previously argued, the jury found that there were no damages for the breach, and without damages there is no legal claim. *See, e.g., Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn.App. 502, 509, 728 P.2d 597 (1986) (essential elements of a breach of fiduciary duty claim are "(1) a breach of fiduciary duty . . . and (2) the breach was the proximate cause of the losses sustained.") The Court has already necessarily, and correctly, found in Defendants' favor on this issue. *See* (CP 1311-12).

*Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 142, 875 P.2d 621 (1994), is inapposite. In *Tincani* the Court concluded the verdict's answers "conflict irreconcilably." *Id.* It explained that the jury seemed to have concluded both that the zoo had a duty and did not have a duty. *See* discussion at *Id.* at 142-145. There is no such conflict in the instant case where the jury found that there were acts upon which a breach of fiduciary duty could be based if there were damages, but, that no, there were no damages. The jury's verdict harmonizes along the simple and well established truth that a cause of action for a breach of a duty must contain duty, breach, causation and damages.

The jury was entitled to make credibility determinations, not only from evidence presented but from Dr. Thompson's demeanor and other intangible observations peculiarly within their province and to conclude that Dr. Thompson did not have any real, credible evidence of damage. Additionally, the fact that Dr. Thompson gave two different and conflicting figures regarding his damages, each of which also conflicted with the testimony of Mr. Strickland the CPA hired to review the books, must bear on his credibility. These are matters within the sound discretion of the jury, not to be second-guessed by the court of appeals after the fact. *Rasor*, 87 Wn.2d at 531.

As noted, the jury was asked for an advisory verdict on whether the lawsuit was frivolous.<sup>8</sup> The jury determined that the Dr. Thompson had filed it “without reasonable investigation, [that it was] not reasonably based upon existing law or fact, or is based upon an improper purpose such as to harass or cause [Mr. Smith] to incur expenses.” *See* App. A at 30. This is in no way inconsistent with its finding that Dr. Thompson incurred no damages from any delay in receiving accountings. It was within the jury’s sound discretion to hear the evidence and make its observations about witnesses, including veracity and demeanor, and including the content of testimony by Dr. Thompson, who admitted that he filed the lawsuit to “hold Kris’s feet to the fire.” (RP 353:16 – 354:19). Just because Dr. Thompson attempted to present some evidence of injury from delayed or erroneous accountings does not preclude the jury from deciding that his evidence was unfounded or a fabrication. In short, the jury’s verdict was not inconsistent and judgment should be affirmed.

**F. The trial court’s post-trial award of fees does not duplicate damages or invade the province of the jury.**

Dr. Thompson argues both that the jury could not award fees under CR 11 and RCW 4.84.185 and that for the trial court to do so “usurps the

---

<sup>8</sup> Contrary to Dr. Thompson’s repeated assertions in his brief, this is an issue separate and apart from the question of damages for breach of fiduciary duty. *See supra*.

jury's role." Dr. Thompson again misstates the basis of Mr. Smith's request for attorney fees, which was breach of fiduciary duty, not violation of CR 11 or RCW 4.84.185. Furthermore, as previously noted, Dr. Thompson only assumes but does not show whether or how much of the jury's damage award, if any at all, represented attorney fees for breach fiduciary duty. There was sufficient evidence for the jury to find that the award was based on pecuniary and other consequential damages.

In reality, Dr. Thompson repeatedly attempts to mischaracterize Mr. Smith's request for attorneys fees, which was one of the elements of damages requested for his breach of fiduciary duty claim as one under RCW 4.84.185 and CR 11 in order to rehash the argument he made in his opposition that Mr. Smith is collaterally estopped from requesting fees. *See* CP 1292-93. However, the requests are not the same, and including attorney fees pursuant to common law breach of fiduciary duty rights does not preclude a post-trial request for fees under RCW 4.84.185 and CR11.

As Mr. Smith showed below, a request for fees under the rule and statute is separate and distinct from one under his common law fiduciary duty rights. At trial Mr. Smith requested attorney fees resulting from Dr. Thompson's breaches of fiduciary duty (including his action of filing the lawsuit to hold Mr. Smith's "feet to the fire" and force him into an unfair and unfavorable buyout of his interests in Ram Jack NW and his repeated

improper raiding of Ram Jack NW's operating account). On the other hand, with regard to the post-trial motion for fees, Mr. Smith requested fees due to Dr. Thompson's lack of investigation into his claims and pursuit of the lawsuit even as it became increasingly obvious that he had no evidence for any of his claims.<sup>9</sup> See CP 1262-73.

With regard to Dr. Thompson's claim that least \$63,000 of the jury's damages award was for attorneys fees, he made a similar argument below, in his opposition to the motion for attorney fees. In awarding Mr. Smith the full amount requested by him, without offset, the court implicitly determined that the jury's award did not include attorney fees, or, even if it did, the fee award granted was justified under the applicable rules and statutes. Dr. Thompson's argument that it was somehow improper to "lay" the determination of the fees motion (including amount to be awarded) "at the trial court's feet" (see App. Brief at 43) is baffling. The trial court did not err in hearing and granting Mr. Smith's post-trial motion for fees and this court should affirm.

**G. The trial court properly awarded fees under CR 11 and RCW 4.84.185**

Dr. Thompson argues, citing to *dicta*, that a fee award was inappropriate under RCW 4.84.185 because some claims advanced to trial.

---

<sup>9</sup> The motion sets forth numerous specific examples of lack of investigation into various aspects of the lawsuit and failure to present evidence in oppositions to motions for summary judgment, among other examples.

See App. Brief at 36, 38. He further argues that a post-trial fee motion under CR 11 cannot be awarded because it was not “frivolous in its entirety” or “as a whole” because the jury found that Mr. Smith had breached his fiduciary duty, but found no damages. See App. Brief at 36. The latter argument has already been addressed (damage is required for any claim to be justiciable) and will not be further addressed here.

First and most importantly, Dr. Thompson cannot argue on appeal that because a claim advanced to trial the lawsuit was not frivolous because he did not raise argument in his opposition in the trial court. Even if he could raise the argument for the first time on appeal, it must fail. Dr. Thompson cites to only one case, which in *dicta* misstates the holding of *Biggs v. Vail*, 119, Wn.2d 129, 830 P.2d 350 (1992) to support his argument.

In *Biggs*, the trial court had tried four issues, found for the defendant on one of them, found that the other three were frivolous and awarded defendant attorneys fees under RCW 4.84.185. *Biggs v. Vail*, 119 Wn.2d 129, 132, 830 P.2d 350 (1992). The issue before the Supreme Court was whether recovery could be had piecemeal “claim by claim” under the statute. *Id.* at 135-36. The Supreme Court reversed the fee award because one of Plaintiff’s claims was not frivolous, and that meant that the action as a whole was not frivolous. *Id.* at 137. Note that *all* the

claims in this matter had “advanced to trial”, the issue of whether a claim had “advanced to trial” was not determinative, the important point was that one of Plaintiff’s four claims was not frivolous. In *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 892, 969 P.2d 64 (1998), the Supreme Court affirmed a fee award imposed under the statute after dismissal of Quick-Ruben’s action upon a motion to dismiss. In discussing *Biggs v. Vail*, the Court erroneously stated in *dicta* that because one of the claims had advanced to trial, the suit could not be frivolous in its entirety or sustained under the statute. *Quick-Ruben*, 136 Wn.2d at 903-04. As *dicta*, this interpretation of *Biggs* was not necessary to its holding and is not binding.

In the instant case, Mr. Smith’s motion for fees set forth specific conduct showing that Dr. Thompson failed to investigate his claims and that he continued to pursue his claims as it became more and more apparent that he had no evidence for his claims or for his alleged damages. Additionally, Dr. Thompson himself admitted that he brought suit to hold Mr. Smith’s “feet to the fire,” (RP 353:16-354:9) which is clear evidence that his action was a “spite, nuisance [and/]or harassment suit[,]” just the type of suit to which RCW 4.84.185 was intended to apply. See *Quick-Ruben*, 136 Wn.2d at 903.

**H. The trial court’s findings were sufficient to support fees.**

Dr. Thompson seeks reversal on grounds that the trial court's findings were insufficient, arguing that because the court did not adequately explain why sanctions were awarded or consider and make written findings with regard to the attorney fee award. In essence, Dr. Thompson seeks *de novo* review of the award of sanctions.

Attorney fee awards under RCW 4.84.185 and CR 11 are reviewed under an abuse of discretion standard. *Quick-Ruben*, 136 Wn.2d at 903.

Dr. Thompson cited no cases that would require the trial court to include in its order its analysis of reasonableness of attorney fees awarded under CR 11 or RCW 4.84.185, or to address therein whether "fees were duplicative, whether services were unnecessary, and whether hourly rates are reasonable." App. Brief at 45. In essence, Dr. Thompson argues that the lodestar method of calculating attorney fees should apply. *See* App. Brief at 43-44. Under the lodestar method, the party seeking fees carries the burden of proving reasonableness of fees. *Mahler v. Szucs*, 135 Wn.2d 398, 433-34, 957 P.2d 632 (1998). *Mahler*, unlike the instant situation, concerned the application of the lodestar method in the context of an insured's entitlement to attorney fees after successfully litigating the validity of an exclusion from coverage. *Id.* at 430-31. Dr. Thompson has cited no authority for the proposition that the lodestar method with its

burden-shifting approach should be applied in the instant case. In fact, the only case that could be located on this issue provides that while the lodestar method *may* be used in awards for frivolous lawsuits, it need not be used. *Highland School Dist. No. 203 v. Lacy*, 149 Wn. App. 307, 314-15, 202 P.3d 1024 (2009) (“no abuse of discretion in the decision to reimburse for actual costs”). In short, Dr. Thompson has cited no authority holding that Mr. Smith has the burden of showing reasonableness of fees for a RCW 4.84.185 or CR 11 fee award, nor has he cited any authority which requires that the trial court include a detailed analysis of reasonableness in its opinion.

Significantly, Dr. Thompson interposed no challenge to the reasonableness of attorneys fees in his opposition to Mr. Smith’s motion for fees. Indeed, this may have been an implausible argument for him to make, as his own pre-trial attorneys fees, exceeded \$200,000. Mr. Smith’s statements for attorney fees incurred prior to trial were admitted as exhibits at trial, and additional statements regarding fees incurred during trial were presented with the motion for fees. CP 1278-82. Despite ample opportunity to object to the reasonableness of the fees, Dr. Thompson did not contest them below. *See* CP 1289-92. Dr. Thompson has not shown that the trial court abused its discretion in determining that Mr. Smith’s attorney fees were reasonable. CP 1328.

In his motion for fees, Mr. Smith presented many specific instances of conduct that would support a fee award pursuant to RCW 4.84.185 and CR 11, including conduct and admissions showing: 1) that Dr. Thompson failed to investigate or misrepresented the factual basis of his lawsuit (CP 1263-64); 2) that Dr. Thompson failed to investigate the legal basis of his lawsuit (CP 1264-65); 3) Dr. Thompson's bad faith and intent to harass and intimidate Mr. Smith (CP 1265-66); 4) that Dr. Thompson asserted claims were barred pursuant to established Washington law by the economic loss rule and failed to produce evidence to oppose Mr. Smith's and Smithworks' three summary judgment motions (CP 1266-68); and 5) of Dr. Thompson's flagrant and repeated violations of court rules (CP 1268-69). Dr. Thompson, in his opposition, did not argue that he had performed an adequate investigation into his claims or make any argument that addressed the many examples Mr. Smith's request for fees. On the contrary, Dr. Thompson's sole grounds for opposing the request for fees was 1) the jury's finding that Mr. Smith breached his fiduciary duty though it found no damages and thus no justiciable claim, meant that the action was not frivolous, 2) CR 11 sanctions could not be awarded after trial for pre-trial conduct, and 3) Mr. Smith and Smithworks were collaterally estopped from getting fees under

CR 11 and RCW 4.84.185 because of the jury verdict for \$70,000. See CP 1290-93.

Dr. Thompson chose NOT to dispute any of the examples of frivolous conduct enumerated in the motion or to present any evidence or argument that his investigation into his claims was adequate or any other ameliorating evidence or argument. The trial court, finding no merit in Dr. Thompson's opposition upon his chosen grounds, and Dr. Thompson's failure to investigate his claims or produce evidence and his bad faith not being challenged or opposed, entered an order for Mr. Smith and Smithworks, and findings of fact and conclusions of law. CP 1320-24.

Dr. Thompson is not entitled to *de novo* review of the trial court's fee award. Not having opposed the specific examples of frivolous conduct, or presented any ameliorating evidence, he has no standing to challenge the trial court's findings of fact and conclusions of law now on any other grounds besides what he argued below. On the same note, he cannot now complain that the trial court's order was not specific enough to allow meaningful review. What is clear is that the trial court rejected Dr. Thompson's arguments, and in fact, these were raised in Thompson's Opposition. Equally clear is the basis of the trial court's fee award: specific conduct and admissions set for in the motion for fees that were NOT challenged by Dr. Thompson. In this case, a more detailed order is

not required. Unlike the situation in *North Coast Elec. Co. v. Selig*, 136 Wn. App. 636, 650, 151 P.3d 211 (2007), where the appellate court could not determine the basis of the trial court's finding that the lawsuit was frivolous and advanced without reasonable cause, here the grounds of the trial court's decision are clear: detailed, numerous and unopposed examples set forth in Mr. Smith and Smithworks' motion for fees.

Based upon the presentations of the parties the court did not abuse its discretion in awarding fees. See *Madden v. Foley*, 83 Wn. App. 385, 388-89, 922 P.2d 1364 (1996) (in reviewing a fee award under CR 11, court of appeals looked outside the trial court's order when trial court entered no specific findings therein for basis of fee award). As Dr. Thompson failed to show that the trial court abused its discretion in awarding attorneys fees under CR 11 and RCW 4.84.185, the trial court's award of fees under CR 11 and RCW 4.84.185 should be affirmed.

#### **RESPONDENTS REQUEST FOR ATTORNEY FEES ON APPEAL**

Attorney fees were awarded below and are requested on appeal. Under RAP 18.1 and recognized Washington law, this Court may award attorney fees on appeal if authorized by contract, statute, or a recognized ground in equity. RAP 18.1; *Forbes v. American Bldg. Maintenance Co. West*, 148 Wn. App. 273, 300, 198 P.3d 1042 (2009), citing *Bowles v.*

*Dep't of Retirement Sys.*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993). “The equitable ground of bad faith may justify attorney fees.” *Forbes*, 148 Wn. App. at 300-01. This Court recognizes three types of bad faith that warrant attorney fees: 1) prelitigation misconduct, which refers to “obstinate conduct in bad faith that wastes private and judicial resources”; 2) procedural misconduct, which includes “vexatious conduct during litigation and is unrelated to the merits of the case”; and 3) substantive bad faith, which “occurs when a party intentionally brings a frivolous claim, counterclaim, or defense for the purpose of harassment.” *Forbes*, 148 Wn. App. at 301, citing *Rogerson Hiller Corp. v Port of Port Angeles*, 96 Wn. App. 918, 927-28, 982 P.2d 131.

All three grounds for awarding attorney fees to Mr. Smith in equity on appeal are present here. As discussed at length *supra*, Mr. Smith proved below that Dr. Thompson failed to investigate or misrepresented the factual basis of his lawsuit (CP 1263-64), failed to investigate the legal basis of his lawsuit (CP 1264-65), filed the lawsuit in bad faith with an intent to harass and intimidate Mr. Smith (CP 1265-66), asserted claims that were barred by the economic loss rule and failed to produce evidence to oppose Mr. Smith's and Smithworks' three summary judgment motions (CP 1266-68), and engaged in flagrant and repeated violations of court rules (CP 1268-69). Dr. Thompson admitted at trial that his sole intention

in maintaining the lawsuit was to hold Mr. Smith's "feet to the fire." RP 353:16-354:9. The trial court agreed that Dr. Thompson engaged in that bad faith conduct and awarded Mr. Smith his attorney fees below under CR 11<sup>10</sup> and RCW 4.84.185.

Conduct below is a proper basis for an attorney award on appeal. *Cf. Buchanan v. Buchanan*, 150 Wn. App. 730, 740, 207 P.3d 478 (2009) ("A party's intransigence at the trial level may support an award of attorney fees on appeal."). Now on appeal and as shown *supra*, Dr. Thompson continues this conduct by asking this Court: 1) to reverse a summary judgment order that he opposed with no cognizable evidence, pointing only to hearsay and inadequate re-allegations from his complaint; 2) even though he failed to preserve the issue for appeal and never objected below, to grant him a new trial based on the use of a jury instruction that accurately stated the law; 3) to overturn the jury verdict, the form of which he agreed with, because of a non-existent conflict between the verdict on Mr. Smith's fiduciary duty and advisory verdict on Dr. Thompson's filing of a frivolous lawsuit; 4) to overturn the damages

---

<sup>10</sup> In full candor to the Court, Division 2 of the Washington Court of Appeals has held a fee award on appeal may not be based on CR 11: "[T]he rule is intended for use in superior court, not in the appellate court. While CR 11 sanctions were formerly available on appeal under RAP 18.7, a 1994 amendment to RAP 18.7 and 18.9 eliminated the reference to CR 11 in RAP 18.7 and provided for sanctions on appeal only under RAP 18.9." *Building Industry Association of Washington v. McCarthy*, 152 Wn. App. 720, 750, 218 P.3d 196 (2009). Accordingly, the request for fees is not based on CR 11.

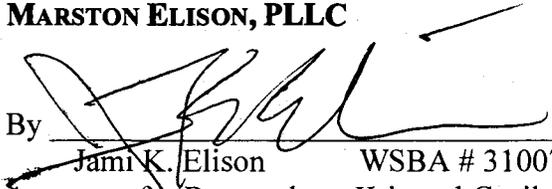
award to Mr. Smith because Dr. Thompson asserts that the damages award did not meet his unknown, unstated, and unsupported evidentiary criteria, and; 5) to overturn the fees award based on his unknown, unstated, and unsupported legal criteria. Dr. Thompson's meritless appeal and continued abuse of the legal system and disregard for its rules to try to exact some sort of vendetta against Mr. Smith amounts to prelitigation misconduct, procedural misconduct, and substantive bad faith under Washington law justifying an award of Mr. Smith's attorney's fees on appeal. Accordingly, Mr. Smith respectfully requests from this Court an award of his attorney fees on appeal.

### CONCLUSION

This Court of Appeals should affirm.

DATED this 7<sup>th</sup> day of May, 2010.

**MARSTON ELISON, PLLC**

By 

Jami K. Elison

WSBA # 31007

Attorneys for Respondents Kris and Cecile  
Smith and Smithworks, LLC.

**PROOF OF SERVICE**

I certify under penalty of perjury that on the 26th day of April, 2010, I served a copy of Brief of Appellee via US Mail on the following:

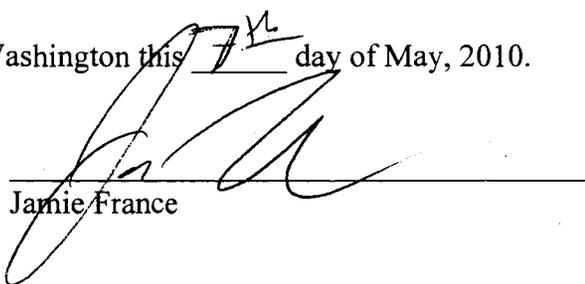
Counsel for Appellant

Thomas Burke  
Burke Law Offices, PS  
612 S. 227<sup>th</sup> Street  
Des Moines, WA 98198

Co-Counsel for Appellant

Shelby R. Frost Lemmel  
Wiggins & Masters, PLLC  
241 Madison Avenue North  
Bainbridge Island, WA 98110  
Phone: 206-780-5033

Dated at Redmond, Washington this 7<sup>th</sup> day of May, 2010.

  
\_\_\_\_\_  
Jamie France