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Case No. 44798-3-II

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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

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Johnson Brothers Contracting, Inc.

Appellant,

v.

Simpson Tacoma Kraft Company, LLC,

Respondent.

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APPELLANT'S REPLY BRIEF

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I. APPELLANT'S REPLY TO THE RESPONDENT SIMPSON'S FACTUAL ARGUMENTS MADE TO THIS COURT:

A. Simpson first argues that the plaintiff mitigated its damages, incorrectly implying the appellant was never harmed, but this is misleading and avoids the fact that appellant lost significant amounts money as a result of the breach of the oral agreement which the appellant relied on and performed upon.

At the time of Simpson's breach, Johnson Brothers (JBC) had already invested nearly \$200,000 in fully setting up the requested special high production local hog fuel processing site built specifically for long term service in close proximity to and specifically for Simpson, all per Simpson's request and in full reliance the assurances promised in exchange for the same. CP-132, lines 19-20. Simpson's agent, Mr. Disbrow met with Ernie Johnson of Johnson Brothers to break the contract and told JBC to cut its losses (the \$200,000 invested) and to go ahead and terminate the new processing site lease and shut everything down as quickly as possible. CP-133, lines 14-17. JBC promptly shut down the site as instructed by Simpson and by August of 2009 Johnson Brothers then sold the accumulated hog fuel material that had been ground up for Simpson to a different purchaser, BUT AT A LOSS. CP-

133, lines 20-23; CP-79 (page 78, lines 20-23). Simpson's misplaced emphasis on the sale of materials actually had the effect of conceding that the materials processed for Simpson at the site constructed for Simpson were fully acceptable without objection in the industry as the facts are construed in the light most favorable to the non-moving party JBC. Also, JBC could and would have seasonably cured any properly specified concerns, if any.

B. Next, Simpson improperly argues that Simpson's use of a written contract on just two prior isolated and unique occasions somehow implies in the light most favorable to Simpson that the parties expected a written contract had to be signed prior to any reliance or performance or contact formation, despite the fact that Simpson mostly operates without any written contracts just like these parties in the case at bar usually did on every other occasion as well.

Unfortunately for Simpson, any and all assertions by Simpson which are premised on asking this appellate Court's de novo review to construe all the evidence in Simpson's own favor are completely inappropriate. To the contrary, this Court must consider all the material evidence and all reasonable

inferences thereon, in the light most favorable to the nonmoving party - Johnson Brothers. Mountain Park Homeowners Association v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). Simpson's entire response brief simply consists of nothing more than self-serving spins on the facts, which Simpson is simply not entitled to, and it only highlights exactly why their summary judgment motion should have never been granted.

Simpson tries to get the Court to think that the course of dealing was such that a written contract had to be signed or there simply was no deal at all. The exact opposite facts were true. Neither Simpson nor Johnson Brothers insisted on a written contract to honor their word on this deal or on the thousands of tons of other hog fuel that JBC had previously sold to Simpson on other successfully honored and completely oral agreements. In fact, an actual, WRITTEN contract being requested by Simpson was "almost unheard of" in Simpson's transactions with other companies too, and usually the only paperwork on hog fuel and wood chip deals, needed to supply Simpson's 50-megawatt power plant with 100 loads a day, were just the bi-monthly payment invoices alone, all based on whatever terms had been orally agreed upon. CP-138, lines 22-25; CP-131, lines 12-13 and lines 19-22.

Simpson itself admitted that it would either sign written contracts when doing “short-term” deals or just “by accepting delivery of hog fuel from suppliers who would then be paid by Simpson for the delivery on a bi-monthly basis.” CP-34, lines 11-14; CP-229, lines 21-23. In fact, there were only two (2) times that there was ever any written contract at all between the parties in this case and that was just when Simpson was only making intentionally limited short-term deals or deals at substantially higher than normal market prices for which Simpson wanted to tightly limit its purchase commitment for. CP-131, line 8-17; CP-138, lines 16-22. One of those two written contracts was a very expensive \$100.00 per ton commitment from Simpson to purchase east side, green wood chips (NOT HOG FUEL). CP-38; CP-81 (page 86, lines 12-17). The only other written contract ever used was a commitment for special east-side orchard wood (hardwood) hog fuel which was carefully limited to just 3 months. CP-41.

However, the disputed transaction at bar was dramatically unlike the two rare instances where a written contract was used to limit the amount being purchased or the amount being paid or the special type of product being requested. To the contrary, this was a whole new situation with the opening

of the large new power plant for which Simpson was now suddenly and actually in “desperate need of quickly developing a cheap, high volume, long term, and necessarily local (if they wanted it affordable) supply of hog fuel” to satisfy a 100 truck load per day hog fuel demand that was about to start for Simpson’s new power plant. CP-136, lines 4-9.

Instead of limiting its commitments as it had done for one very high priced deal or the one other very short term deal, Simpson was trying to buy all the hog fuel it could possibly get processed and delivered on a long term basis, and specifically wanted to find a reputable, highly efficient supplier that could provide Simpson with “at least 90 loads a week” and commit to a low price in exchange for “at least 18 months” of guaranteed purchasing volume. CP-136, lines 9-11; CP-139, lines 1-7.

C. Next, Simpson argues that the factual circumstances surrounding the mixed (services and goods) transaction itself should be construed in Simpson’s favor in order to have the transaction declared to be a sale of goods governed by the U.C.C as a stronger statute of frauds defense against enforceability than is available under the common law for service contracts.

Simpson acknowledged that the predominant factor test applies from Tacoma Athletic Club, Inc. v. Indoor Comfort Systems, Inc., 79 Wash. App. 250, 902 P.2d 175 (1995). In fact, “[t]he proper classification of a contract under the test is a factual issue” Id., at 258. However, again Respondent Simpson refuses to examine let alone allow the facts to be viewed in the light most favorable to Johnson Brothers as required by law. Unfortunately for Simpson, forest slash or the unprocessed goods are as free as air in the sky, but what is needed is for someone to provide the service it takes to get the materials located, gathered, transported, processed and ground up, and then delivered into a burnable form for Simpson’s power plants.

First of all, Tacoma Athletic set the context for the application of the test for whether the UCC or the common law governs a transaction by first examining at the outset whether the negotiations leading up to the contract focused on the goods or the services. Id., at 258. Then, ultimately the predominant fact test, in mixed transactions involving both goods and services, is a factual question, not a legal question, on whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved or is a transaction of

sale, with labor incidentally involved. Id., at 257.

Next, the Court then went even further and examined the contractual breakdown of the price being charged for the goods part of the transaction and the services part of the transaction. It just so happened in Tacoma Athletic that the written contract of the parties in that case actually specified at least \$19,470.00 in parts and supplies, and then merely stated that installation labor was included leading the trial court to conclude at the end of a full blown trial, that labor was the smallest part of the transaction. Id., at 258-259. However, in the case at bar, the labor and proper performance is the biggest and most critical part of the transaction.

What Simpson was only paying for, was a service. THE FOREST SLASH ITSELF WAS FREE. CP-79 (page 77, lines, 7-8). Private people and companies like Weyerhauser needed to get rid of their accumulated forest slash rather than burning it on site or having to pay to get rid of that wood material at the landfill. CP-78 (at page 76, lines 20-24). Johnson Brothers was literally doing the slash suppliers a favor by taking it from them. CP-79 (page 77, lines 1 through page 78, line 10).

The private owners who had slash were the only suppliers, while JBC was just a processor and transporter. Simpson was really only paying for the services of acquisition, processing, transport, and delivery to be performed for them and managed by Johnson Brothers. Simpson was merely paying JBC for that gathering, processing, transporting, and delivery service. That service was merely measured and priced based on the actual net, bone dry tons delivered in each of the 90 truck loads per week to be delivered.

In transactions similar to this one, Courts have held that a contracting party's similar agreement to acquire raw food crops from third-party farmer suppliers (just like how JBC acquired slash from Weyerhaeuser tree farms and from other private owners), and then processing, cleaning, packing and shipping it all for delivery (just like how Johnson Brothers then processed the forest slash into a shredded wood fibre to be transported and delivered to Simpson), is NOT governed by the Uniform Commercial Code for the sale of goods. Smith v. Skone & Connors Produce, Inc., 107 Wash. App. 199, 205, 26 P.3d 981 (2001).

Furthermore, looking at the case at bar, starting with the negotiation

process for putting the deal together, Simpson's 90 load per week delivery commitment was so large and the pricing discount sought was so significant, that Simpson and Johnson Brothers Contracting actually held a special negotiation meeting on March 3<sup>rd</sup>, 2009 to fully discuss the parameters needed for setting up a local high volume supply service and processing site near the source of significant forest slash supplies and also in close proximity to Simpson's high volume delivery location. CP-129, lines 16-23.

The service aspect and all the servicing components that governed the same for negotiation of the ultimate compensation rates, was so critical for being able to commit to the discount on the high volume long term weekly deliveries requested by Simpson, that JBC actually brought along to the meeting and negotiations everyone that would be involved in every phase of the service process affecting Plaintiff's performance and the ultimate pricing commitment thereon. CP-129, lines 16-23.

In fact, Simpson's request for the development of such a large and more affordable source and supply of hog fuel from the creation of a new, local, large scale forest slash grinding site and acquiring leases for access to

local slash materials, and the leasing and transporting of heavy equipment and setting it all up for processing and then making short run deliveries to Simpson, was anticipated to require a huge investment from Johnson Brothers of nearly \$200,00 to \$250,000. CP-130, lines 1-9.

Simpson's argument that it was merely purchasing goods rather than signing up for a long term service, is also inconsistent not just with how the negotiations went or the most predominant part of what was being performed for Simpson, but also the fact that Simpson actually insisted on being added as an additional insured onto the insurance policy obtained by JBC for operations on the new long term processing site lease being entered into near Simpson in order for Johnson Brother to be able to perform on the parties' agreement . CP-132, lines 4-7.

Moreover, Simpson's representatives were also visiting the site (where the bulk of JBC's performance was going to be taking place) to keep eager tabs on JBC's ability to perform and to see when JBC could start the shipping process. CP-132, lines 12-13. Simpson admits visiting the new site "several times" as it was being set up by Johnson Brothers that same spring

of 2009. CP-34, line 15. If the transaction was just for goods, why was Simpson so focused on monitoring performance and being so involved in the production and set up process. CP-132, lines 12-13; CP-34, line 15. Such monitoring was clearly done to encourage and hasten the Plaintiff's continued performance and also to give objective reassurance that Simpson was eagerly expecting and encouraging the reliance and performance by Johnson Brothers as additional proof that the parties definitely had a deal which Simpson expected Johnson Brothers to promptly honor and perform on, as agreed.

D. Simpson also argues that the facts should be construed in Simpson's favor on the appellant's misrepresentation claim against Simpson - i.e. - that Simpson's agent never misrepresented his authority to bind Simpson even though the argument that Simpson's agent overstepped his undisclosed bounds which conflicted with his oral promises was the entire basis for Simpson's defenses to the breach of contract claim.

In order for Simpson to seek summary judgment on the contract claim, Simpson walked right into the misrepresentation claim by arguing that Simpson's original purchasing agent, Steve Regelin, contrary to his

representations to JBC allegedly didn't have any real authority to negotiate any deals making purchasing commitments for any longer than 12 months. This was contrary to the terms of the deal that Plaintiffs' witnesses had all claimed that Regelin had negotiated and represented he was accepting on behalf of Simpson. CP-29, lines 23-25.

However, any such a new allegation by Simpson attempting to dodge contractual liability, if it were ever proven true, then necessarily constituted the admission of Simpson committing a negligent misrepresentation to Johnson Brothers. CP-106, lines 6-10. In any event, there was no evidence that Regelin or Simpson ever communicated or conveyed any such alleged limitation on Steve Regelin's authority to JBC at any time at all, let alone before Johnson Brothers relied, expended \$200,000, and started performing only to be informed of Simpson's decision to breach.

The law is that Simpson committed a Negligent Misrepresentation, regardless of whether any contract legally formed or not, if Simpson: (1) supplied any information for the guidance of others in a business transaction which information was false, (2) Simpson knew or should have known the

false representation made to the Plaintiff would guide the Plaintiff in a business decision, (3) Simpson was negligent in obtaining or communicating the information misrepresented to the Plaintiff, (4) the Plaintiff relied on the false information; (5) the Plaintiff's reliance was justified; and (6) Simpson's misrepresentation was the proximate cause of any damages to the Plaintiff. Lawyers Title Ins. Corp. v. Baik, 147 Wn.2d 536, 545, 55 P.3d 619 (2002)(citing to ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 827-828, 959 P.2d 651 (1998)). Contractual obligations are not even a factor.

Simpson's reply brief evades any actual discussion of the elements of the claim against the facts and in fact baselessly attempts to claim that Simpson has no independent duty to refrain from supplying false information for the guidance of others in business transactions. Moreover, Simpson seems to ignore the significance of Jackowski v. Borchelt, 174 Wn.2d 720 (2012) in which our State Supreme Court found there is a duty not to commit fraud which exists independent of a contract. Id., at 738, (citing to Eastwood v. Horse Harbor Foundation, 170 Wn.2d 380, 390 (2010)).

In fact, the Jackowski Court further held that "The same is true for the

tort of negligent misrepresentation, but only to the extent the duty to not commit negligent misrepresentation is independent of the contract.” Id., at 738. However, Simpson, carrying the entire burden on the issue utterly fails to advance any explanation about how it can possibly allege that its duty to not commit negligent misrepresentations, like its almost identical duty to not commit fraud, is not independent of the contract - i.e.- that Simpson’s duty to not commit negligent misrepresentations was only and completely dependent on the terms of a formed contract all while at the same time Simpson claims that no contract ever formed. Johnson Brothers does not need a contractual promise from Simpson that its agents will not make false representations or promises they are not authorized to make. That duty exists independent of any contract and in fact well before any contract ever forms.

Johnson Brothers submitted credible prima facie evidence from the Declarations of Brent Deroo and Ernie Johnson that Defendant Simpson’s agent Steve Regelin had expressly represented to them that there was an 18 month minimum hog-fuel processing and delivery purchasing commitment that Simpson had agreed to and would verbally honor which Johnson Brothers should immediately proceed upon and perform in full reliance on all

those verbal representations. CP-130, lines 11-19; CP-137, lines 15-25.

However, now Simpson claims that any representation by purchasing agent Steve Regelin promising a purchase commitment longer than 12 months or that Simpson would be bound without a written contract was false and that Mr. Regelin misrepresented his authority even though he clearly had apparent authority and charge over all transactions needed to assure the adequate supply of hog fuel to the plant. Yet, Simpson is claiming that a light most favorable to Simpson is that its purchasing agent Steve Regelin arguably would never or should have never said what he said and that Simpson is not contractually bound.

However, that still does not negate the declarations of Brent Deroo and Ernie Johnson that Regelin did in fact make representations for the guidance of their business decisions to get them to rely, which provide ample legal basis to proceed on a negligent misrepresentation claim. Flower v. T.R.A. Industries, Inc., 127 Wash. App. 13, 31-33, 111 P.3d 1192 (2005).

At best, Simpson's attempt to fall on its sword by defending the

contract claim by confessing to the misrepresentation claim is nothing but just an unexpressed subjective intention which has absolutely no effect on the formation of the contract or its terms. Washington State follows the objective manifestation theory of contracts, which imputes to each party an intention corresponding to the reasonable meaning of their actual words and acts, not what they allegedly subjectively believed or failed to discuss or disclose. Morris v. Maks, 69 Wash. App. 865, 871, 850 P.2d 1357 (1993).

Mr. Regelin's claims about his own personal, subjective and argumentative beliefs that in all his conversations with Johnson Brothers, that he never understood that Simpson was entering into any contract with JBC are completely irrelevant and not dispositive of anything. CP-30, lines 1-3. Ultimately, Simpson's argument was that since their alleged promises and representations on all the Plaintiff's claims were not in writing, Simpson simply had no enforceable, legal liability for JBC's reliance or expectation damages. CP-15, lines 16-24. Simpson essentially claims that all the promises and representations made by Simpson's purchasing agent Steve Regelin were all false and/or were negligent because Simpson now claims that Regelin didn't have any authority to make any verbal, unwritten'

contractual arrangements for any hog fuel purchasing commitments lasting longer than 12 months. CP-29, lines 23-25.

Whether or not any contract was going to form or not, or whether a contract did legally form or not, Simpson and its agents already and independently had a duty NOT to make any misrepresentations to others for guidance in business decisions especially where it actually induced Johnson Brothers to incur nearly \$200,000 in reliance damages by performing in reliance right in front of Simpson's watchful eyes and at Simpson's very request and constant monitoring and encouragement.

E. Simpson claims that setting up a high-capacity processing site all specifically for and in close proximity to Simpson so that Johnson Brothers could service Simpson's very particular and unique, high-volume, long-term affordable delivery needs, did not trigger RCW 62A.2-201(3)(a) if the facts are construed in the light most favorable to Simpson.

RCW 62A.2-201(3)(a) provides that even if the UCC was found to apply and we tried to shove the square peg of this predominantly service

transaction into the round hole of just a sale of goods, a disputed issue to start with, and a company like Simpson invokes the stronger UCC version of the statute of frauds as a technicality defense against the oral agreement Simpson used to induce JBC's reliance and performance, THAT DEFENSE SHALL NOT APPLY "if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of the manufacture or commitments for their procurement". RCW 62A.2-201(3)(a). JBC more than made a substantial beginning and had already secured all the commitments needed for doing so, such that the processing and delivery operation was fully established and JBC actually tendered performance to begin the 18 month service only to be turned away when Simpson elected to breach.

Simpson also avoids the fact that hog fuel from the Plaintiff's \$200,000 processing site which site and product were both specially manufactured just for Simpson and the continued processing of the product from that peculiar fixed location with an oversized high-volume grinder that

cannot be brought into the mountains, as opposed to normal and highly mobile in the woods grinding by smaller portable lower volume grinders, was solely for the benefit of Simpson and only viable for servicing a local high-volume demand only, but not economical for substantially lower volume business with other substantially more distant customers, tries to make the red-herring argument that there was nothing special about hog fuel in general.

However, that is not even the issue examined under RCW 62A.2-201(3)(a), and is especially unfair when the focus of the transaction was for JBC to provide a special type of long-term, high volume, fixed-site, out of the woods, local, custom-proximity, processing service. Simpson has pointed out no other customer, let alone one nearby who was ready to take 90 loads a day from the same processing site with an economical means of delivery at viable transportation costs from that location.

Additionally, as the comments to RCW 62A.2-201(3)(a) make clear, Section 3(a) thereof continues the exclusion from the UCC statute of frauds, of contracts covering such “goods that are specially manufactured for the buyer”, so long as the seller (in this case JBC) substantially changes his

position before notice of repudiation from the buyer. The Section (3)(a) exemption simply negates any application of the UCC Statute of Frauds to this case at all because JBC had already substantially changed its position to the tune of being out \$200,000 before Simpson gave its notice of repudiation and told Johnson Brothers to shut the operation down to avoid further losses.

This west-side hog fuel deal focused on a Tumwater/Olympia processing site strategically and carefully located close to Simpson specifically just for Simpson and it was not economically viable for JBC to serve any other buyer but Simpson. CP-79, page 78, lines 11-23, This fact was highlighted by the fact that JBC took losses on the accumulated materials that were sold for mitigation purposes to Longview Fibre in August of 2009 (after Simpson refused to honor the contract and the materials had to be removed to restore the leased site back to its original condition). CP-133, lines 21-23.

JBC was also then stuck with a huge, over-sized grinder, that it had paid \$140,000 for, which was now too big and impractical to haul up any steep, narrow, muddy logging roads into the mountains to try to use for any

of JBC's normal "in the woods" grinding if it wasn't going to be used to provide high volume long term delivery services from a fixed local site in close proximity to a high-volume customer that had a demand high enough to cover the enormous expense of such a special grinder like Simpson. CP-140, lines 2-5. That left Johnson Brothers out nearly \$200,000, of which \$140,000 was entirely lost from giving up that full amount just to get the lease for the large, over-sized grinder specifically just for Simpson. CP-132, lines 10-12 and lines 18-20.

As such, Section (3)(a) of RCW 62A.2-201 eliminated any UCC Statute of Frauds application at all. Accordingly, Simpson's attempt to invoke RCW 62A.2-201 appears wholly inapplicable from the outset to the situation at all because the Section 3(a) exemption obviously applies to JBC.

II. Simpson's statute of limitations arguments utterly fails because the foreign corporation registration provisions do not actually bar or invalidate plaintiff's timely filing and serving and commencing of this lawsuit.

The Plaintiff has already briefed this at length and invokes the same

authorities in Plaintiff's opening brief as set forth before. Simply put, RCW 23B.15.010 does NOT bar "commencement" of any lawsuit nor does it invalidate a timely commenced lawsuit filed within the statute of limitations, even if or just because a foreign corporation plaintiff was once temporarily unregistered at the time the lawsuit was filed and or served. Simply reading the statute makes that plain as day. Simpson refuses to face the difference between the word "commence" and the word "maintain" and wishes the statute had barred commencement of lawsuits, which the statute does not.

That is the law and that ends the query. Eastman & Co. v. Watson, 72 Wash. 522, 524-525, 130 Pac. 1144 (1913)(citing to State ex rel. Preston Mill Co. v. Howell, 67 Wash. 377, 121 Pac. 861 (1912), which firmly rejecting Simpson's arguments a 100 years ago. The point was driven home even further in the case of Northwest Motor Co. v. Braund, 89 Wash. 593, 594, 154 Pac. 1098 (1916). Simply put, a lack of registration has never had any effect on the validity of the filing and service of the summons and complaint, and Simpson cannot cite a single case to show otherwise.

III. The reason for Simpson's overt push to get this transaction viewed as

a sale of goods under the UCC on their summary judgment motion is because Lige Dickson Co. v. Union Oil Company of California, 96 Wn.2d 291, 635 P.2d 103 (1981), held that the Doctrine of Promissory Estoppel cannot be used to make a contract for the sale of goods enforceable when it does not comply with the UCC Statute of Frauds at RCW 62A.2-201, assuming no RCW 62A.2-201(3)(a) exception already applies outright.

On the other hand, for service contracts not governed by the UCC for the sale of goods, the common law statute of frauds otherwise used to defeat enforceability at RCW 19.36.010, can be tempered by principles of Equity under the Doctrine of Part Performance and Promissory Estoppel so as to avoid an injustice. Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wn.2d 255, 261 at foot note 5, 616 P.2d 644 (1980)(citing to Powers v. Hastings, 93 Wn.2d 709, 612 P.2d 371 (1980); Miller v. McCamish, 78 Wn.2d 821, 479 P.2d 919 (1971); Richardson v. Taylor Land & Livestock Co., 25 Wn.2d 518, 171 P.2d 703 (1946). The common law statute of frauds (RCW 19.36.010) readily yields to the Doctrine of Part Performance and Promissory Estoppel, without any mention of any Section 139 or Section f or Section 90 questions at all. Firth v. Lu, 103 Wash. App. 267, 271 at fn 1, 12 P.3d 618 (2000).

However, Simpson still misses the point. Even if the statute of frauds under both the UCC and or the common law both overcame the doctrines of promissory estoppel and part performance and rendered unenforceable the contract for the benefits of the bargain, Plaintiff JBC is still entitled to use the claim of Promissory Estoppel on its own to obtain JBC's reliance damages at the very least, and regardless of whether the intended transaction was for goods or services.

The Statute of Frauds is really just a defense to a breach of contract claim only. It is solely used to dispute the legal validity of an allegedly formed contract. A Promissory Estoppel cause of action arises even where no contract has formed or alleged, but where a plaintiff is still seeking the Plaintiff's RELIANCE DAMAGES INCURRED IN ORDER TO AVOID rather than the full benefit of any alleged contractual bargain. Flower v. T.R.A. Industries, Inc., 127 Wash. App. 13, 31, 111 P.3d 1192 (2005).

#### IV. ATTORNEY'S FEES

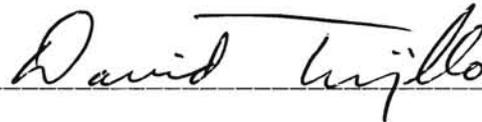
If Johnson Brothers prevails on appeal and ultimately obtains a judgment, then Johnson Brothers will be entitled to statutory fees and costs

under RCW 4.84.010/080, and JBC will comply with RAP 18.1 and 14.4.

#### V. CONCLUSION

For the reasons set forth above, and construing the evidence in the light most favorable to the non-moving Plaintiff JBC, this Court should reverse the trial Court's ruling that Simpson was entitled to summary judgment on any issue and remand for a trial on the merits.

Respectfully submitted this 3<sup>rd</sup> day of December, 2013.

A handwritten signature in cursive script that reads "David B. Trujillo". The signature is written in black ink and is positioned above a horizontal line.

DAVID B. TRUJILLO, WSBA #25580,

Attorney for Appellant Johnson Brothers

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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

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Johnson Brothers Contracting, Inc.

Appellant,

v.

Simpson Tacoma Kraft Company, LLC,

Respondent.

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CERTIFICATE OF SERVICE

OF APPELLANT'S REPLY BRIEF

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I, DAVID B. TRUJILLO, certify and declare under penalty of perjury  
that:

(A) on the 3<sup>rd</sup> day of December, 2013, I sent a copy of the Plaintiff's  
Appellate Reply Brief and a copy of this Certificate of Service, to the attorney  
of record for the Defendant: Andrea McNeely at Gordon Thomas Honeywell,  
LLP, 1201 Pacific Avenue, Suite 2100, Tacoma, WA 98401-1157, via Email  
to [amcneely@gth-law.com](mailto:amcneely@gth-law.com).

SUBSCRIBED AND SWORN TO this 3<sup>rd</sup> day of December,  
2013, in Yakima, Washington.

Attorney for Appellant Johnson Brothers Contracting, LLC:

BY: David Trujillo

DAVID B. TRUJILLO, WSBA #25580