No. 86281-2-I

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

MADERO CONSTRUCTION, LLC,
a Washington limited liability company,

Respondent,

v.

FULLWILER CONSTRUCTION, INC., a Washington corporation; 2217 NW 62ND ST, LLC, a Washington limited liability company; MERCHANTS BONDING COMPANY (MUTUAL), a surety; FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF PORT ANGELES, a Washington Bank Corporation; THE OHIO CASUALTY INSURANCE COMPANY, a surety,

Petitioners.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Fullwiler Construction, Inc. ("Fullwiler") seeks review of the Court of Appeals decision set forth in Part B.

B. COURT OF APPEALS DECISION

Division I filed its decision on February 24, 2025. A copy is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. While this Court has established that contributory negligence is not a bar to recovery in a negligent misrepresentation claim when the claimant's reliance on a misrepresentation was reasonable, did the trial court err in concluding a party failed to prove that reliance on a false statement was "free of negligence?"

2. Although a party has the burden to prove damages with admissible evidence, did the trial court err in shifting the burden to the defendant to disprove damages, and in awarding damages where no admissible evidence supported a portion of the damage award?

D. STATEMENT OF THE CASE

Division I's opinion sets forth the facts and procedure in this case, op. at 1-4, but a more robust factual discussion is merited.

This case involves the construction of six townhomes in the Ballard neighborhood of Seattle. The developer for the Ballard project was 2217 NW 62nd St. LLC. The general contractor was Fullwiler. On July 6, 2021, Fullwiler entered into a framing subcontract with Madero for the Ballard project. Ex. 109.

Madero began construction on the project under an hourly contract, undertaking work framing the townhomes, starting work on July 6, 2021; Madero was to be paid $70.00 per hour, per worker. Ex. 109. Before this dispute arose, Fullwiler had already paid Madero $82,619.04 for framing work completed for the Ballard project. CP 20; RP 178-79.

A dispute arose when it became clear that Madero did not complete the framing work according to the approved plans. Madero claimed that it did not understand the plans, that it asked for clarification from a temporary, onsite superintendent, and that superintendent authorized Madero complete the framing work in a way that deviated from the plans. CP 342-47 (unchallenged

findings of fact). Fullwiler disputed that it should have to pay Madero to have the framing work redone according to the approved plans or otherwise corrected when the parties' contract provided that subcontractors must perform their work "free from defects in materials or workmanship," and that "Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective." Ex. 109.

After Madero sued Fullwiler and its sureties, Fullwiler filed an answer and counterclaim in response to Madero's complaint, CP 57-65, claiming that Madero breached the subcontract by failing complete its framing work according to approved building plans and seeking damages incurred spent to repair and correct the faulty framing work by Madero and bring the Ballard project back into compliance with the approved building plans and the Seattle Building Code. CP 62-63, 99-106.

The subcontract required Madero to certify that it had liability insurance covering its work, and Madero certified under

penalty of perjury that it did. Ex. 109; CP 90-91. During discovery, Fullwiler asked Madero to produce that liability insurance policy. Madero produced a copy of the policy taken out before Madero started work on the Ballard townhomes. Ex. 137. But that policy contained an endorsement excluding liability coverage for any construction work Madero did on the new construction of any townhome, effectively providing no coverage for Madero's work on the project. Ex. 137. Had Fullwiler known that Madero was effectively uninsured despite the mandate of the parties' subcontract and Washington contractor law, it would have refused to allow Madero to work on the project or would have stopped work immediately. CP 338 (FF 40).

Fullwiler amended its counterclaim, adding a claim for negligent misrepresentation and requested rescission of the subcontract as a remedy. CP 63-64.

Critically, Fullwiler moved for summary judgment, arguing that Madero could not prove its damages, particularly

where its invoices to Fullwiler stood at odds with wages Madero reported to the IRS and the Department of Labor & Industries for the very same workers. CP 81-84. The trial court denied the motion, finding genuine issues of material fact. CP 303.

At trial, Madero again sought $132,791.61 in total damages for work it allegedly performed on the project without pay, work that occurred in August/September 2021. CP 1-7. Madero allegedly billed for this work using three invoices;[1] however, at trial, Madero only presented evidence related to the first invoice, totaling $50,172.57 in claimed wages not paid. Ex. 10. Madero not only failed to introduce testimony about the

[1]

Invoice No.	**Exhibit No.**	**Amount**
896008	Ex. 10 (admitted)	$50,172.57
896009	Ex. 11 (not admitted)	$64,738.80
896010	Ex. 12 (not admitted)	$17,880.24
TOTAL		$132,791.61

other two invoices, it failed to introduced the invoices themselves and *even objected* when Fullwiler offered them as exhibits. CP 316, 352 (CL 38).[2] The trial court correctly observed that Madero elicited no "specific testimony" about the latter two invoices. CP 353 (CL 38).

Thus, the trial court only had a demonstrative exhibit prepared by Fullwiler as a summary, as "proof" of Madero's damages. Ex. 151. That exhibit was not admitted; Madero *also objected* to its admission at trial. CP 316. Admitting that there was no "specific testimony" about the latter two invoices and testimony about Madero's alleged damages was "scant," the trial court, nevertheless, relied on the purported damages shown in exhibit 151. CP 352 (CL 39). It concluded that Madero proved all $132,791.61 "by a thin reed" because Marjorie Hefley, a Fullwiler employee, testified generally about exhibit 151, even

[2] Madero's actions persisted on appeal. When the trial court clerk did not retain the two exhibits not admitted at trial, Madero opposed Fullwiler's motion to make them part of the appellate record.

though her testimony did not address invoices 896009 and 896010, exhibits 11 and 12. CP 353 (CL 40, 42). Given these evidentiary deficiencies, Madero failed to prove with substantial evidence $82,619.04 of $132,791.61 of its claimed damages (62 percent), that were awarded by the trial court.

The trial court also found that although Fullwiler proved four of the six elements of its negligent misrepresentation claim because Madero made a plainly false statement on which Fullwiler relied – that Madero had actual liability insurance for the project – the claim failed because Fullwiler's reliance was not reasonable. CP 349-51. The trial court held Fullwiler did not act reasonably because it was partially negligent and could have done more to confirm that Madero had sufficient insurance as required by the parties' contract. *Id.*

The court believed Fullwiler should not have relied on the information provided by Madero *under penalty of perjury*; CP 335 (FF 26), because: (1) Fullwiler did not *also* secure a certificate of insurance from Madero showing the liability

insurance Madero was carrying for the Ballard project; and/or (2) Fullwiler did not buy on its own alternative liability coverage on behalf of Madero, which the parties' contract allowed it to do. CP 349-51.

In a ruling that contradicts this Court's established precedent, the court held that Fullwiler's reliance had to be "free of negligence" and Fullwiler could have done more to investigate Madero's insurance coverage. CP 351 (CL 35). Because it concluded the fifth element of negligent misrepresentation was not satisfied, the court did not make findings on the sixth element of a negligent misrepresentation claim, damages, nor did it address Fullwiler's remedy. CP 351 (CL 36).

Division I upheld the trial court's rulings in a decision meriting this Court's review. RAP 13.4(b).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

(1) Division I Upheld the Trial Court Legal Error in Applying the Incorrect Law on Negligent Misrepresentation

Division I's decision on the reliance element of a negligent

misrepresentation misapplies this Court's law and upholds the trial court decision that Fullwiler's claim failed because it believed Fullwiler had to be "free of negligence" in relying on Madero's misrepresentations. CP 351 (CL 35). This Court should grant review. RAP 13.4(b)(1).

To prevail on a claim for negligent misrepresentation, Fullwiler had to prove six elements of the tort by clear and convincing evidence. *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 55 P.3d 619 (2002). The trial court correctly articulated these elements and properly found that Fullwiler met the first four elements by clear and convincing evidence. CP 348 (CL 22-29).

Madero supplied false information that it maintained actual liability insurance that covered the Ballard project. CP 349 (CL 27). This is important because in order to do business as a licensed contractor in Washington, Madero was required to maintain general liability insurance at all times to retain its general contractor's license. RCW 18.27.050(1), (2); CP 338

(FF 39).

Madero also knew or should have known that the false information would have affected Fullwiler's decision on Madero's subcontract. CP 349 (CL 27). "Fullwiler Construction would not have entered into a framing subcontract with Madero if Madero did not possess liability insurance covering the Ballard project, and that he would have stopped work if he later learned of any missing required insurance until the coverage issue could be corrected." CP 338 (FF 40).

Madero was negligent in obtaining or communicating the false information. CP 349 (CL 28). Madero should have investigated the contents of its own liability insurance policy with its relevant exclusions before communicating the policy contents to others who foreseeably would rely on those representations. *Id.*

Fullwiler relied on the false information. CP 349 (CL 29). Framing is hazardous work, and there are obvious risks that framer employees may be injured on the job. Rationally, Fulwiler

would not have run the risk of its framing subcontractor being effectively uninsured. CP 338 (FF 40).

As for element five, the trial court found that Fullwiler's claim failed because its reliance on Madero's false statement was not reasonable under the circumstances. CP 349-51 (CL 29-36). "Where the standard of proof is clear, cogent, and convincing evidence, the Court cannot find that Fullwiler Construction was free of negligence under these circumstances and that it reasonably relied on Madero' misrepresentations." CP 351 (CL 35). But that determination, condoned by Division I, was legally erroneous where this Court has expressly rejected the notion that a plaintiff seeking to prove negligent misrepresentation must be "free of negligence." *Baik*, 147 Wn.2d at 550-54.

Comparative fault in negligent misrepresentation cases has a history in this Court. There is no doubt that Washington is a comparative fault state. RCW 4.22.005. That statute does not "bar recovery" because a plaintiff is at fault.

In *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820,

831, 959 P.2d 651 (1998), this Court held that statute applies to negligent misrepresentation claims, but left open its application to the reliance element of the tort. The Court then resolved this question in *Baik*, holding that a claimant need not be "fault free" when establishing the "justifiable reliance" element of a negligent misrepresentation claim. 147 Wn.2d at 550-51. Because "comparative negligence applies to negligent misrepresentation claims, we believe that application of a contributory negligence bar to the 'justifiable reliance' element would be confusing and contradictory." *Id.* at 551.[3] The Court determined that there is no "clear-cut way to distinguish between a plaintiff's reasonableness in relying on a misrepresentation and a plaintiff's culpability in causing his or her own damages." *Id.*

[3] The *Baik* court specifically *rejected* the *Restatement (Second) of Torts* § 552(1) (1977), which suggests that a claimant's negligence in relying on a misrepresentation is a bar to recovery. "Our rejection of section 552A means that [a claimant] *need not have been fault-free* in its reliance on" a negligently misrepresented statement to succeed on a negligent misrepresentation claim. *Id.* at 551. (emphasis added).

Instead, "where a plaintiff *reasonably reposes* some trust in a misrepresentation and shows that that reliance proximately caused some damages, the automatic preclusion of a negligent misrepresentation claim on the grounds that the plaintiff could have done something more" will not bar recovery. *Id.*

Division I's opinion simply reintroduces the "confusing and contradictory" analysis of this element of the tort rejected by the *Baik* court. Review and reversal are necessary to correct this conflict. RAP 13.4(b)(1).

It did not matter that Fullwiler failed to "do something more" beyond what it actually did – relying on the sworn statement of a licensed contractor, in determining whether Madero possessed insurance applicable to its work on the Ballard project. Yet this was precisely what Division I did in upholding the trial court's decision. CP 350-51 (CL 31-36). It decided that Fullwiler's failure to take *additional* steps to confirm the accuracy of Madero's representations about insurance coverage defeated Fullwiler's claim that it justifiably relied on Madero's

false representation regarding its insurance coverage. Op. at 9-14.

The trial court cited *Ross v. Kirner*, 162 Wn.2d 493, 500, 172 P.3d 701 (2007), for the proposition that Fullwiler must not have been negligent in relying on Madero's representation regarding insurance, a decision Division I approved. Op. at 9.[4] Although the *Ross* opinion says that in passing when laying out the purported elements of a negligent misrepresentation claim, 162 Wn.2d at 500, it is *dicta*, not the Court's holding. The issue in that case was not whether negligent reliance barred a claim,

[4] Not noted by Division I's opinion, the trial court also relied on *Condor Enterprises, Inc. v. Boise Cascade Corp.*, 71 Wn. App. 48, 856 P.2d 713 (1993), CP 349-50 (CL 30), a case where Division II applied the *Restatement* standard later rejected in *Baik*, holding that contributory negligence by a plaintiff bars recovery in an action for negligent misrepresentation. *Id.* at 52. The *Condor* court did not address whether Washington's then newly adopted comparative fault principles codified at RCW 4.22.005 and .015 applied, apparently because neither party argued that principles of comparative fault applied in that case. *Id.* at 52 n.1. *Condor*'s holding was rejected by this Court's *ESCA* and *Baik* decisions that comparative fault principles apply to negligent misrepresentation claims, including the reasonable reliance element, effectively overruling *Condor*.

but whether the Court of Appeals properly concluded that negligent misrepresentation occurred as a matter of law.

The *Ross* decision itself first cited *Baik*, in setting out the six distinct elements necessary to establish a negligent misrepresentation claim. 162 Wn.2d at 499. As noted above, the *Baik* court expressly rejected adopting *Restatement* and held a claimant need not be "fault free" when establishing the "justifiable reliance" element of a negligent misrepresentation claim. *Baik*, 147 Wn.2d at 550-51. Thus, a claimant can be somewhat negligent in relying on a misrepresentation, and that negligence will not bar recovery but merely factor into a claimant's damages.

Simply put, the *dicta* in *Ross* does not overrule *Baik*, where the Court expressly rejected adopting the *Restatement* and that held a claimant need not be "fault free" when establishing the "justifiable reliance" element a negligent misrepresentation claim. *Baik*, 147 Wn.2d at 550-51. As the Court held when directly addressing the issue in that case and *ESCA*, the issue of

comparative fault by a plaintiff in relying on a misrepresentation goes to the issue of damages, not justifiable reliance. *ESCA*, 135 Wn.2d at 827.

Division I applied the wrong legal standard, a standard this Court rejected in *Baik*. The issue of whether comparative fault applies to the reliance element of negligent misrepresentation persists, as Division I's opinion attests. Review is merited. RAP 13.4(b)(1).

Although the legal error above requires reversal, Division I also upheld the trial court's findings on justifiable reliance that are not supported by substantial evidence, op. at 12-14, compounding its legal error where the findings are contradicted by uncontested facts.

The trial court concluded that Madero met its obligation to Fullwiler to *carry liability insurance* by possessing general liability insurance, regardless of whether that insurance *actually covered* the work Madero was hired to do. The trial court held that Fullwiler's reliance on Madero's false representations that it

possessed liability insurance that *actually covered* the Ballard project was not justified because Fullwiler did not ask for, or review, Madero's certificate of insurance for the Ballard project. But Fullwiler did not have to do so. Madero swore under penalty of perjury that it provided actual insurance coverage.

Nothing contained in a certificate of insurance (Ex. 164) would have alerted Fullwiler to the presence of the "newly built construction" exclusion contained in Madero's liability insurance policy that effectively negated any insurance coverage for Madero's work on the Ballard project, making the cost of "coverage" cheaper for Madero. A certificate would merely have confirmed that Madero *carried* liability insurance as called for in the framing subcontract. RP 117-18. Normally, that would be enough, but here it was not because of the coverage-defeating policy exclusion that made coverage cheaper for Madero.

Likewise, the trial court held Fullwiler's reliance on Madero's false information about insurance was not justifiable, despite Madero's certification under penalty of perjury it had

liability insurance coverage as the subcontract required, because Fullwiler could have purchased liability insurance for Madero and billed that cost back to Madero. Again, the court barred recovery to Fullwiler for not doing "something more" than requiring a sworn statement from its framing subcontractor partner, a licensed contractor with a legal obligation to have actual insurance coverage for its work. RCW 18.27.050(1), (2).

In essence, the trial court determined that Fullwiler possessed some sort of duty – be it contractual or at common law – to take the additional step during the contract formation process or construction of the Ballard project to review Madero's actual liability insurance policy to ensure it actually provided insurance coverage applicable to the Ballard project. Neither the trial court, nor Division I, ever identified the basis for this implied duty to review Madero's *actual liability insurance coverage*. There is no such duty.

The trial court's conflation of carrying liability insurance, in general, as being the same as possessing liability coverage that

actually covered the work Madero had been contracted to do on the Ballard project is commercially unreasonable. *Wilson Ct. P'ship v. Tony Maroni's*, 134 Wn.2d, 692, 705, 952 P.2d 590 (1998) (business contracts must be given a "commercially reasonable" reading). The parties' contract stressed the need for actual insurance coverage – it is obviously paramount when undertaking construction work that can risk serious injury and other liability exposure – and Madero falsely certified that it was covered. Fullwiler was not negligent for relying on Madero's certification and assuming a licensed contractor had the business sense to understand what it was certifying.

At no point in the contract formation process, the construction of the Ballard project, or any time prior to Madero filing this lawsuit did Fullwiler know, have reason to know or possess the ability to discover the "newly built construction" exclusion contained in Madero's liability insurance policy that negated any insurance coverage for the Ballard project. The "false information" that is central to proving negligent

misrepresentation in this lawsuit is the *exclusion* contained in Madero's liability *policy* that no amount of due diligence during the contract formation process or construction of the Ballard project could have been discovered by Fullwiler.

Comparative fault as to the reliance element has been a source of confusion. The *Baik* court resolved that confusion, only to have Division I resuscitate that unnecessary confusion. Review is needed. RAP 13.4(b)(1), (4).

(2) Division I Erred in Condoning Placement of the Burden of Disproving Damages on Fullwiler and Upholding a Damage Award Unsupported by Admissible Evidence

Division I lowered the bar far too low for providing damages, creating conflicts with precedent and confusion on settled issues that trial courts deal with every day across Washington. This issue also warrants the Court's review. RAP 13.4(b)(1), (2), (4).

Washington's damages principles are well-established. In a breach of contract case, the plaintiff has the burden of proving

by sufficient admissible evidence that the defendant breached the contract, that the plaintiff incurred actual economic damages because of the breach, and the amount of the damages. *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn. App. 66, 83, 248 P.3d 1067 (2011); *Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 715-16, 315 P.3d 1143 (2013), *review denied*, 180 Wn.2d 1011 (2014). This requires "more than a scintilla" of evidence. *Hardcastle v. Greenwood Sav. & Loan Ass'n*, 9 Wn. App. 884, 888, 516 P.2d 228 (1973). Generally, evidence of damage is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture. *Clayton v. Wilson*, 168 Wn.2d 57, 72, 227 P.3d 278 (2010). Division I's opinion conflicts with these well-established authorities, warranting this Court's review. RAP 13.4(b)(1), (2).

The trial court erroneously observed that *Fullwiler* did not put on evidence that invoices 896009 and 896010 were inaccurate, CP 352 (CL 42), when Fullwiler had no duty to

disprove Madero's unproven damages.[5] In order to sustain its burden of proof on damages, *Madero* had to provide admissible evidence to support them. It failed to do so.

There was *no evidence* introduced at trial to demonstrate by a preponderance of the evidence Madero was entitled to recover $82,619.04 of the $132,791.61 it was awarded by the trial court, contrary to Division I's analysis. Op. at 4-8. Rather, Madero alleged it sustained damages based on three invoices, only one of which, exhibit 10, was admitted into evidence. The other two exhibits, exhibits 11, 12 (invoices 896009 and

[5] It is reversible error if a court improperly imposes the burden to disprove an element for which another party carries the burden. *Home Builders Ass'n of Kitsap County v. City of Bainbridge Island*, 137 Wn. App. 338, 346-48, 153 P.3d 231 (2007) (reversing because city had burden of proof to reasonableness of its fees for processing applications; home builders association did not have the burden to disprove their reasonableness); *In re Marriage of Watson*, 132 Wn. App. 222, 237, 130 P.3d 915 (2006) (reversing because the court believed a party should disprove allegations of child abuse before visitation occurred); *Briglio v. Holt & Jeffery*, 85 Wash. 155, 147 P. 877 (1915) (reversing because an instruction in a negligence case suggested the burden was on defendant to disprove the plaintiff's allegations).

896010), were *never admitted into evidence*, and Madero actually *opposed* their admission. CP 316, 353 (CL 38).

Nor did exhibits 14, 60, raised at oral argument and discussed in Division I's opinion at 5-6, somehow prove Madero's damages indirectly. Rather, exhibit 14 is a *claim* of lien and exhibit 60 is a *notice* of default. Neither document even attached the invoices Madero failed to present. Both are like pleadings, and facts alleged in pleadings are *not admissible evidence*. RCW 5.40.010. Neither exhibit proves Madero's damages, as one is merely a claim and the other a notice. Fullwiler did not "admit" that anything in either document was correct. Ex. 63.

Even the trial court knew these exhibits did not prove damages. The trial court found that it had "no substantive documentary evidence" to support the damages Fullwiler contests on appeal. CP 352 (FF 38, 39). Madero did not cross appeal that finding which is now a verity on appeal. *Seven Hills, LLC v. Chelan County*, 198 Wn.2d 371, 384, 495 P.3d 778

(2021). Division I departed from established precedent in contradicting it, essentially making its own findings that there was documentary evidence of Madero's damages. *See, e.g.*, *Marcum v. Dep't of Soc. & Health Servs.*, 172 Wn. App. 546, 560, 290 P.3d 1045 (2012) ("An appellate court does not make findings."). This conflict in precedent warrants review. RAP 13.4(b)(1), (2).

Madero *chose* not to present evidence of its damages even though it knew that these damage calculations had been contested by Fullwiler on summary judgment. CP 81-84. Fullwiler argued that Madero's invoices were questionable, given the labor expenses and other financial information Madero reported on payroll and tax records. *Id.* The trial court found that the evidence showed a "genuine issue of material fact about the extent and amount of Plaintiff's claimed damages," necessitating that Madero prove them at trial. CP 303. Madero

failed to do so.[6]

The *only* evidence the trial court concluded supported the amounts reflected in invoices 896009 or 896010 was a demonstrative summary by Hefley, Fullwiler's employee. Ex. 151. That exhibit was *demonstrative only*, was not admitted into evidence, and Madero even objected to it. *See* CP 316 (Madero's objection); RP 780 (Madero's attorney admitting that exhibit 151 was not admitted into evidence and was only "demonstrative").

Contrary to Division I's view, op. at 6, demonstrative evidence cannot prove a fact independently, its purpose is very limited – "to aid the trier of fact in understanding *other evidence*." *Norris v. State*, 46 Wn. App. 822, 827, 733 P.2d 231 (1987) (emphasis added).[7] The substance of a demonstrative

[6] It is likely that Madero's decision to hold back evidence of damages was a tactical choice. As Fullwiler argued on summary judgment, Madero wage numbers were fictitious or inflated, and Madero likely did not want to run afoul of the IRS or Labor & Industries by making illegitimate claims.

[7] Demonstrative evidence has no independent probative value; it is derivative of other actual admissible evidence. Robert

evidence is inadmissible without "preliminary testimony as to the accuracy of the data upon which the exhibits were based, submitted by someone who could have been cross-examined as to their accuracy." *Owens v. City of Seattle*, 49 Wn.2d 187, 194, 299 P.2d 560 (1956). In *Owens*, this Court reversed because the trial court relied on information depicted on a graph used to summarize water measurements on a roadway, measurements taken by a city's engineering department, without testimony from anyone competent to testify that the underlying data was accurate.

Hefley did not testify at all with respect to invoices 896009 or 896010 at trial. Exs. 11, 12. Her testimony on exhibit 151 was exceedingly limited, merely verifying that it compiled various invoices accurately. RP 82-85. On cross-examination,

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D. Brain & Daniel J. Broderick, *The Derivative Relevance of Demonstrative Evidence: Charting Its Proper Evidentiary Status*, 25 U.C. Davis L. Rev. 957, 973 (1992). *See also*, Robert H. Aronson, *The Law of Evidence in Washington*, 103-4 (3d ed. 1998) (demonstrative evidence is "used for explanatory or illustrative purposes only" and is "not 'real' evidence").

Hefley referenced invoice 896008, but in no way testified that the amounts requested in it were actually incurred by Madero. RP 115. Thus, the *only* testimony Hefley gave at trial concerned invoice 896008 on exhibit 151's summary of damages, not anything else. Hefley never once mentioned either invoice 896009 or 896010, or whether Madero's wage claims in those invoices were legitimate.

Nor could she. Hefley was a Fullwiler employee. She lacked *personal knowledge* to testify about the damages Madero incurred. She lacked foundation for any testimony *on Madero's work*. Although Madero did not ask her, at best she could say whether copies of exhibits were accurate depictions of invoice Fullwiler received. But Madero laid no foundation that Hefley could accurately document the number of hours Madero employees spent that allegedly went unpaid or that the work Madero invoiced was compensable under the parties' subcontract. She lacked personal knowledge to verify Madero's alleged damages.

Madero could have proven the substance of the wage claims in exhibits 11, 12, had it chosen to do so. Madero called its bookkeeper Karla Luna to testify. RP 127-217. Madero promised during opening that she would testify about the invoices. RP 60 ("and Karla will testify…when the invoice was due and how other invoices were paid by Fullwiler Construction"). But she, too, testified only about invoice 896008. RP 144-45. She never testified regarding the two invoices not admitted at trial, failing to provide any foundation that they were accurate depictions of compensable work performed on the Ballard project.

The trial court even conceded Madero elicited "no specific testimony" about the missing invoices through any witness. CP 353 (CL 38). In short, Madero offered *no testimony whatsoever* regarding the pay periods, wages claimed or total amounts shown on either invoices 896009 or 896010 or the summary of damages.

Division I forged new ground in accepting a demonstrative exhibit without foundational support from a qualified witness or

admitted exhibit as evidence of damages. In the guise of a liberal standard for proof of damages, op. at 4-8, Division I condoned a party's failure to offer *any* admissible proof of damages *at all*. That party opposed admission of its own two invoices documenting its alleged damages; contrary to this Court's *Owens* decision, it allowed demonstrative evidence to constitute substantive evidence; and it treated the testimony of an opponent's witness, who lacked any foundation for her putative testimony concerning the opponent's invoices to support the award. Division I's opinion distorts proof of damages beyond any rational basis, conflicting with established authorities like *Owens*, 49 Wn.2d 187 and *Norris*, 46 Wn. App 822. RAP 13.4(b)(1), (2). This issue is important for guidance to trial courts that frequently use demonstrative evidence. This Court's review is necessary. RAP 13.4(b)(1), (2), (4).

F. CONCLUSION

This Court should grant review and reverse the dismissal of Fullwiler's negligent misrepresentation claim with

instructions to find that Fullwiler met the justifiable reliance element,[8] and remand the case for further proceedings on Fullwiler's claim. It should vacate the final judgment and finding that Madero prevailed on the merits until Fullwiler's negligent misrepresentation claim is fully adjudicated and the trial court reevaluates the relief achieved by the parties. At a minimum, the Court should grant review and vacate $82,619.04 in unproven damages and interest awarded on that amount.

This document contains 4,998 words, excluding the parts of the document exempted from the word count by RAP 18.17.

[8] Regarding the sixth negligent misrepresentation element, the trial court never reached it, nor did it reach any remedy available to Fullwiler. CP 405 ("The Court need not reach the question of proximate cause and damages. Likewise, the Court cannot rescind the Trade Contractor Agreement."). The Court's remand should direct the trial court to apply the proper legal standard for a negligent misrepresentation claim and to address this element along with a remedy, including rescission, that the trial court correctly held in an unchallenged finding may be a remedy for material misrepresentation. CP 348 (citing *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 384, 745 P.2d 37 (1987)).

DATED this 19th day of March, 2025.

Respectfully submitted,

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APPENDIX

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DIVISION ONE

UNPUBLISHED OPINION

FELDMAN, J. — Fullwiler Construction, Inc. (Fullwiler) appeals the trial court's award of damages to Madero Construction, LLC (Madero) on Madero's breach of contract claim and its dismissal of Fullwiler's negligent misrepresentation counterclaim. We affirm.

I

In June 2021, Fullwiler was the general contractor for a townhome construction project in Ballard (the Ballard Project). Its sole shareholder, Jerry

Fullwiler (referred to herein by his full name to avoid confusion with Fullwiler), asked Jose Ulloa, the owner of Madero, to perform framing work on the townhomes as a subcontractor. On July 6, Madero began working on the Ballard Project, and Jerry Fullwiler signed a Trade Contractor Agreement (TCA) memorializing the parties' agreement.

The next day, Fullwiler's office manager, Mallorie Hefley, e-mailed Ulloa the TCA and a "starter packet" with two attached addenda regarding insurance coverage (Addenda A and B) and asked him to complete, sign, and return the documents to her. The TCA required Madero to maintain insurance during the contract period for claims arising out of the work and provide Fullwiler with a certificate of insurance. Ulloa filled out and signed the contract documents and returned them to Hefley. Unbeknownst to Fullwiler, Madero's insurance policy had an exclusion for "newly built residential construction," which applied to the Ballard Project. Ulloa did not notify Fullwiler of this exclusion, nor did he supply a certificate of insurance to Fullwiler.

Madero's laborers were initially supervised by Fullwiler's assistant superintendent, Jacob Minzghor. In mid-July, Ulloa advised Minzghor that certain aspects of the approved building plans were internally inconsistent. To resolve this issue, Minzghor instructed Ulloa to construct the roofs in a manner that deviated from the approved building plans. Madero continued constructing the roofs per Minzghor's instructions for several weeks. Then, on August 11, a replacement superintendent noticed the roofs were not being constructed according to the approved building plans. Madero's laborers worked over a period

of approximately two weeks, at Fullwiler's direction, to tear down the framing and reconstruct it according to the approved building plans.

While Madero was reconstructing the roofs, Fullwiler refused to pay invoice #896008 (Invoice 8), in the amount of $50,172.57, submitted by Madero on August 16 for work it performed between August 2 and August 13. Madero then sent a "notice of default" to Fullwiler on September 1 that referenced Invoice 8 and "a second invoice, #896009 [Invoice 9], dated August 28, 2021 for $64,738.80." On September 2, Madero ceased working on the Ballard Project. It then generated its final invoice, Invoice #896010 (Invoice 10), totaling $17,880.24, for work it performed after August 28. Madero also recorded a mechanic's lien on September 13, stating the "[p]rincipal amount for which the Lien is claimed is . . . $132,791.61," which is the total of the foregoing invoices ($50,172.57 + $64,738.80 + $17,880.24).

In March 2022, Madero filed a complaint against Fullwiler alleging breach of contract and seeking damages totaling $132,791.61.[1] In response, Fullwiler asserted counterclaims alleging Madero breached the parties' contract by performing faulty and defective work and negligently misrepresented the extent of its insurance coverage. Following a bench trial, the court found (a) Madero did not breach the contract by performing faulty or defective work because it was instructed by Fullwiler's agent to deviate from the approved building plans, (b)

[1] Madero's complaint also named as defendants the property owner (2217 NW 62nd St., LLC) and two sureties (Merchants Bonding Company (Mutual) and The Ohio Casualty Insurance Company). This opinion refers to these defendants collectively as "Fullwiler" because they filed a joint appellate brief in which they collectively refer to themselves as "Fullwiler Construction," are represented by the same counsel, and have otherwise acted in concert throughout this litigation. A fifth defendant, First Federal Savings & Loan Association of Port Angeles, was voluntarily dismissed.

Fullwiler breached the contract by failing to pay Madero for all the work it performed on the Ballard Project through September 2, 2021, and (c) Fullwiler had failed to establish its negligent misrepresentation claim. Turning to the amount of Madero's damages, the trial court found Madero "did sufficiently demonstrate (albeit by a thin reed) that Madero was deprived of a total of $132,791.61 ($50,172.57 + $64,738.80 + $17,880.24) due to Fullwiler Construction's refusal to pay the invoices." Fullwiler appeals.

II

A

Fullwiler argues Madero "never offered evidence or testimony" regarding Invoices 9 and 10 and therefore "failed to prove with substantial evidence $82,619.04 of $132,791.61 of its claimed damages (62 percent), that were wrongfully awarded by the trial court." We disagree.

"The general measure of damages for breach of contract is that the injured party is entitled to (1) recover all damages that accrue naturally from the breach and (2) be put into as good a pecuniary position as [the injured party] would have had if the contract had been performed." *224 Westlake, LLC v. Engstrom Props., LLC*, 169 Wn. App. 700, 729, 281 P.3d 693 (2012). While damages must be proved with reasonable certainty, this certainty requirement "'is concerned more with the *fact of damage than with the extent or amount of damage*.'" *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 717, 845 P.2d 987 (1993) (quoting *Gaasland Co., Inc. v. Hyak Lumber & Millwork, Inc.*, 42 Wn.2d 705, 712-13, 257 P.2d 784 (1953)). As to the amount of damage, "'Evidence of damage is sufficient

if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.'" *Clayton v. Wilson*, 168 Wn.2d 57, 72, 227 P.3d 278 (2010) (quoting *State v. Mark*, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984)).

Where a trial court has weighed the evidence and entered findings of fact, as the trial court did in this case, "we review the trial court's factual findings for substantial evidence to support them." *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 497, 254 P.3d 835 (2011). "'Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.'" *Id.* (quoting *Brin v. Stutzman*, 89 Wn. App. 809, 824, 951 P.2d 291 (1998)). "There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence." *Id.* Lastly, we "defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses." *Id.*

Substantial evidence supports the trial court's damages award. Contrary to Fullwiler's argument that Madero "never offered evidence or testimony" regarding Invoices 9 and 10, the record establishes the amount of both invoices. The trial court admitted as exhibit 60—without objection from Fullwiler—the notice of default Madero sent to Fullwiler on September 1, 2021 referencing the $50,172.57 requested in Invoice 8 and "a second invoice," referring to Invoice 9, "dated August 28, 2021 for $64,738.80." The trial court also admitted as exhibit 14—again without objection from Fullwiler—the mechanic's lien Madero recorded on

September 13, 2021 stating it "perform[ed] labor, provide[d] professional services, [and] suppl[ied] material or equipment" at the site of the Ballard Project from July 6 to September 2, 2021, and the "[p]rincipal amount for which the Lien is claimed is . . . $132,791.61."[2]

The trial court's damages award is also supported by exhibit 151, a spreadsheet entitled "Madero Construction Billing Summary," which the trial court admitted for demonstrative purposes. While demonstrative evidence "is not itself evidence," it is nonetheless "appropriate to aid the trier of fact in understanding other evidence, where the trier of fact is aware of the limits on the accuracy of the evidence." *State v. Lord*, 117 Wn.2d 829, 855-56, 822 P.2d 177 (1991), *overruled on other grounds by State v. Schierman*, 192 Wn.2d 577, 438 P.3d 1063 (2018). Where, as here, an exhibit is admitted for demonstrative purposes, the fact finder is "free to judge the worth and weight of the evidence." *Id.* at 855-56.

Consistent with these legal principles, the trial court properly relied on exhibit 151, along with the evidence it summarizes, in determining Madero's damages for its breach of contract claim. The exhibit is a detailed spreadsheet listing the invoices Madero submitted to Fullwiler for its work on the Ballard Project. The spreadsheet indicates Invoice 9 pertains to work Madero performed from "8/16 – 8/28/21" in the amount of "$64,738.80," Invoice 10 pertains to work Madero performed from "8/31 – 9/2/21" in the amount of "$17,880.24," and the unpaid Invoices 8, 9, and 10 total "$132,791.61." These amounts match those reflected

[2] While we agree with Fullwiler's assertion at oral argument that exhibits 14 and 60 are not substantive evidence of liability, they are additional evidence regarding the *amount* of Madero's damages (the issue before us on appeal) and we consider them solely for that purpose.

on exhibits 14 and 60—which were admitted as substantive evidence—with respect to Invoice 9 and the total of the three unpaid invoices, respectively. Additionally, Fullwiler prepared and offered exhibit 151 for use during trial, and Hefley (its Chief Operations Officer at the time of trial) testified she was involved in creating the exhibit and had "reviewed it for accuracy."

These circumstances are markedly different from those in *Owens v. City of Seattle*, 49 Wn.2d 187, 299 P.2d 560 (1956), which Fullwiler cites in support of its argument. The Supreme Court in *Owens* held that the trial court erred in admitting a chart and map summarizing data collected from the scene of an automobile accident because there was no "preliminary testimony as to the accuracy of the data upon which the exhibits were based, submitted by someone who could have been cross-examined." *Id.* at 194. Here, in contrast, Hefley (Fullwiler's own employee) testified regarding the preparation and accuracy of exhibit 151, and Fullwiler could cross-examine her (among other witnesses) regarding her testimony that the amounts reflected on the exhibit were accurate. Unlike the trial court in *Owens*, the trial court in this case did not err in relying on exhibit 151, along with exhibits 14 and 60 and Hefley's testimony, in awarding $132,791.61 as damages for Madero's breach of contract claim.

Fullwiler argues the trial court's finding that "Fullwiler Construction did not put on evidence that Invoices [9 and 10] were inaccurate" constitutes improper burden-shifting. While Fullwiler correctly observes that the party seeking damages bears the burden of proving them, *224 Westlake*, 169 Wn. App. at 729, the trial court's finding is not to the contrary; rather, the finding was merely an observation

that Fullwiler failed to contest the accuracy of exhibit 151. As the next sentence of the finding clarifies, "Hefley conceded the amounts in question[] for those two periods were accurate." In this context, the trial court was referring to Fullwiler's failure to undermine the weight of Madero's evidence supporting the amount of its damages once it satisfied its burden of proving the fact of damage.

Lastly, Fullwiler cites two cases rejecting conclusory damages awards, but both cases are distinguishable. In *Mutual of Enumclaw Insurance Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 723-24, 315 P.3d 1143 (2013), a jury awarded $1.5 million for tortious interference with a business relationship where the only evidence quantifying the claimant's injury was an interrogatory response stating it was seeking "$10,000 in reputation damages." And in *Hardcastle v. Greenwood Savings and Loan Ass'n*, 9 Wn. App. 884, 888, 516 P.2d 228 (1973), we held that the trial court erred in entering a finding as to damages where "[a] review of the evidence shows that this finding is supported at most only by highly speculative testimony." In sharp contrast to the damage claims in these cases, Madero's damages could be calculated with precision, and there is evidence from which the trier of fact could calculate these damages without resorting to speculation. The trial court's damages award is neither legally nor factually flawed.[3]

[3] Fullwiler repeats many of the above arguments in a statement of additional authority submitted following oral argument. Madero has filed a motion to strike the statement. As this court has previously explained, "the 'purpose of RAP 10.8 is to provide parties with an opportunity to bring to the court's attention cases decided after the parties submitted their briefs.'" *City of Edmonds v. Edmonds Ebb Tide Ass'n of Apt. Owners*, 27 Wn. App. 2d 936, 945 n.2, 534 P.3d 392 (2023) (quoting *Whitehall v. Emp't Sec. Dep't*, 25 Wn. App. 2d 412, 419 n.3, 523 P.3d 835 (2023)). Despite our admonition in *City of Edmonds*, Fullwiler's statement of additional authority does not cite or discuss any such cases. We therefore grant the motion to strike the statement and decline to consider it.

B

Next, Fullwiler claims the trial court applied "the incorrect law on negligent misrepresentation" and its "finding on justifiable reliance is not supported by sufficient evidence." We disagree.

As noted previously, the trial court rejected Fullwiler's negligent misrepresentation claim based on the evidence presented at trial. In its findings of fact and conclusions of law, the trial court correctly recited the six-element test from *Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007), for establishing such a claim:

> (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages.

The trial court also noted, as *Ross* confirms, *id*., that these elements must be proven "by clear, cogent, and convincing evidence."

The trial court found (and Madero does not dispute on appeal) that Fullwiler satisfied the first four elements of a negligent misrepresentation claim. But the court found that Fullwiler had not proven the fifth element. The court explained, "Where the standard of proof is clear, cogent, and convincing evidence, the Court cannot find that Fullwiler Construction was free of negligence under these circumstances and that it reasonably relied on Madero's misrepresentations." Based on this finding, the trial court concluded Fullwiler had failed to prove its

negligent misrepresentation claim and did not reach the sixth and final element regarding proximate cause and damages.

Fullwiler argues the trial court's legal analysis is contrary to our Supreme Court's opinion in *Lawyers Title Insurance Corp. v. Baik*, 147 Wn.2d 536, 55 P.3d 619 (2002). The court there addressed whether to continue to apply contributory fault principles, rather than comparative fault principles, to negligent misrepresentation claims in accordance with section 552 of the Restatement (Second) of Torts (1977). Regarding that issue, the court held:

> We reject the applicability of section 552A to negligent misrepresentation claims in Washington. In *ESCA* [*Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 959 P.2d 651 (1998)], we held that RCW 4.22.005, the uniform comparative fault statute, applies to negligent misrepresentation claims. 135 Wash.2d at 831, 959 P.2d 651. In weighing that question, we observed that, "[b]y adopting comparative negligence, the harsh result of denying recovery was eliminated because the plaintiff's culpability was considered in determining total damages." *Id*. at 830, 959 P.2d 651. In light of our holding that comparative negligence applies to negligent misrepresentation claims, we believe that application of a contributory negligence bar to the "justifiable reliance" element would be confusing and contradictory. As we held in *ESCA*, "justifiable reliance" is properly defined for the jury as "'reliance [that] was reasonable under the surrounding circumstances.'" *Id*. at 828, 959 P.2d 651 (quoting CP at 1359 (Jury Instruction 17)). We see no clear-cut way to distinguish between a plaintiff's reasonableness in relying on a misrepresentation and a plaintiff's culpability in causing his or her own damages. We believe that, where a plaintiff reasonably reposes some trust in a misrepresentation and shows that that reliance proximately caused some damages, the automatic preclusion of a negligent misrepresentation claim on the grounds that the plaintiff could have done something more would be the sort of "harsh result" that the comparative fault statute sought to forestall in tort claims. *Id.* at 830, 959 P.2d 651. Thus, we hereby reject the applicability of section 552A to negligent misrepresentation claims and reaffirm our determinations in *ESCA* that reliance is justifiable if it is reasonable under the circumstances and that negligent misrepresentation defendants are not entitled to a jury instruction based on section 552A. *Id.* at 828, 959 P.2d 651.

Baik, 147 Wn.2d at 550-51 (internal footnote omitted). According to Fullwiler, the court in *Baik* "expressly rejected the notion that a plaintiff seeking to prove negligent misposition [sic] must be 'free of negligence.'"

Fullwiler misreads *Baik*. The court there did not eliminate the reasonable reliance element for establishing a negligent misrepresentation claim. To the contrary, the court explained that comparative fault principles apply *after* the plaintiff has established that element: "*[W]here a plaintiff reasonably reposes some trust in a misrepresentation* . . . the automatic preclusion of a negligent misrepresentation claim on the grounds that the plaintiff could have done something more would be the sort of 'harsh result' that the comparative fault statute sought to forestall in tort claims." *Id.* at 551 (quoting *ESCA*, 135 Wn.2d at 830) (emphasis added). The court also stated that, upon remand for a trial on Lawyers Title Insurance Corporation's negligent misrepresentation claim, "*If the jury finds justifiable reliance*, it may nevertheless reduce Lawyers Title's award proportionally upon a finding that the company was to some degree negligent in causing or increasing its own damages." *Id.* at 552 (emphasis added).

Confirming this approach, the Supreme Court's opinion in *ESCA* similarly distinguishes between "the issues of justifiable reliance (the right to recover) [and] damage (the proper amount of recovery)." 135 Wn.2d at 829. And following *Baik*, the court reiterated in *Ross* that "the plaintiff must not have been negligent in relying on the representation" to prove a negligent misrepresentation claim. 162 Wn.2d at 500. Here, the trial court correctly recited this principle from *Ross* and, applying the principle, stated it "cannot find that Fullwiler Construction was free of

negligence under these circumstances and that it reasonably relied on Madero's misrepresentations." In rejecting Fullwiler's claim on that basis, the trial court did not misapply the law on negligent misrepresentation.

Nor has Fullwiler persuaded us that "the trial court's findings on justifiable reliance are not supported by substantial evidence." To satisfy the fifth element of a negligent misrepresentation claim, the plaintiff must prove by clear, cogent, and convincing evidence that its reliance on the defendant's misrepresentation was "reasonable under the circumstances." *Baik*, 147 Wn.2d at 551. "The extent to which the representee must verify the truth of the representation, if he or she must do so at all, depends upon the circumstances of the case." *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 384, 745 P.2d 37 (1987). As noted previously, we review the trial court's findings regarding this issue for substantial evidence. *See supra* at 5. In doing so, there is a presumption in favor of the trial court's findings, and we defer to the trial court in resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. *Id.*

Substantial evidence supports the trial court's finding that Fullwiler's reliance on Madero's misrepresentations was not reasonable under the circumstances. Fullwiler had never worked with Madero before hiring it as the framing subcontractor on the Ballard Project. Based on the information Madero provided in its starter packet, Hefley believed that Madero began operating as a business "that same day." Also, Madero supplied incomplete information about its insurance. In Addendum A, Madero did not include its insurance company or a complete policy number, and Madero never provided a certificate of insurance.

Upon receipt of this incomplete information, Fullwiler, as the trial court noted, did not follow up with Madero to verify that its insurance policy covered the Ballard Project.

The record also shows that Fullwiler itself recognized the importance of obtaining complete insurance information from its subcontractors. The starter packet that Fullwiler provided to Madero stated, "Any subcontractor who fails to meet the requirements described in [Addendum B], regarding Certificates of Insurance, will be invoiced at the rate described in item 2 of [Addendum B]." Addendum B then clarified that if Madero did not maintain insurance covering the Ballard Project, Fullwiler would obtain such insurance on Madero's behalf and charge Madero for doing so. When Madero did not provide a certificate of insurance, Fullwiler failed to obtain insurance on Madero's behalf, which Hefley admitted was an "oversight." Substantial evidence supports the trial court's finding that Fullwiler did not prove by clear, cogent, and convincing evidence that its reliance on Madero's misrepresentations was reasonable under the circumstances.

Lastly, Fullwiler contends its failure to obtain a certificate of insurance from Madero did not render its reliance unreasonable because "there was nothing in a certificate of insurance that would have alerted Fullwiler Construction as to the 'newly built construction' exclusion contained in Madero's actual liability insurance policy that negated insurance coverage for the Ballard project." This argument is self-defeating; if a certificate of insurance would not have disclosed whether Madero was properly insured to work on the Ballard Project, then it was not

reasonable under the circumstances for Fullwiler to rely on Madero's representation that it had sufficient insurance—as specified in the contract documents—without asking for additional information verifying such coverage. The trial court's findings regarding Fullwiler's negligent misrepresentation claim are neither legally nor factually flawed.

III

Both parties request attorney fees on appeal pursuant to RAP 18.1 and the attorney fee provision in the TCA, which states, "The prevailing party shall have the right to collect from the other party its reasonable costs, necessary disbursements and attorneys' fees incurred in enforcing this Agreement." If attorney fees are allowable in the trial court, the prevailing party may recover those fees on appeal. *Aiken v. Aiken*, 187 Wn.2d 491, 506, 387 P.3d 680 (2017). Because the trial court correctly awarded fees in favor of Madero as the prevailing party at trial and Madero is also the prevailing party on appeal, we grant Madero's request for attorney fees on appeal subject to compliance with RAP 18.1 and deny Fullwiler's competing request.

Affirmed.

Feldman, J.

WE CONCUR:

Díaz, J.

Chung, J.

DECLARATION OF SERVICE

On said day below I electronically delivered a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division I Cause No. 86281-2-I to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: March 19, 2025, at Seattle, Washington.

/s/ Matt J. Albers
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