

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE**

WILLIAM B. THOMPSON, D.D.S.,)	
and JULIE A. THOMPSON,)	
)	No. 64122-1-I
Appellants,)	
)	
v.)	
)	
KRIS and CECILE SMITH, husband)	UNPUBLISHED OPINION
and wife and the martial community)	
thereof; SMITHWORKS, a Washington)	
limited liability company, LLC,)	
)	
Respondents.)	FILED: <u>December 20, 2010</u>

spearman, j. — This appeal involves a dispute between William Thompson and Kris Smith about the terms of their agreement in forming Ram Jack Northwest, a limited liability company, (Ram Jack NW). Thompson contends that the parties agreed that Ram Jack NW would provide all foundation-related services and that Smith’s remodeling company, Smithworks, LLC, (Smithworks) could do remodel work for Ram Jack NW customers as long as it did not do foundation work. Smith, on the other hand, contends that the parties agreed only that Ram Jack NW would do foundation work that required the use of its patented piercing technology and that Smithworks would not do this type of work. But he also asserts that the parties did not agree to any other limitations

No. 64122-1-1/2

on the type of work Smithworks could perform. The trial court granted partial summary judgment, dismissing Thompson's interference with business expectancy claim. Trial took place on the claims of breach of contract and breach of fiduciary duty. The jury found that there was no breach of contract but that both parties had breached their fiduciary duty. The jury also found that Smith sustained damages of \$70,000 but that Thompson sustained no damages, and that Thompson's lawsuit was frivolous. Pursuant to the jury's finding that Thompson's lawsuit was frivolous, Smith moved for an award of attorney fees based on CR 11 and RCW 4.84.185, which the trial court granted in the amount of \$153,264.50. Thompson moved for a new trial, which was denied. Thompson appeals, arguing that the trial court erred in: (1) granting partial summary judgment; (2) instructing the jury to determine whether Thompson's lawsuit was frivolous; (3) entering judgment on the jury's verdict; (4) awarding Smith attorney's fees based on the jury's finding that Thompson's lawsuit was frivolous; (5) entering certain findings of fact and conclusions of law; and (6) denying Thompson's motion for a new trial. We hold that the trial court erred in granting summary judgment, and reverse and remand for a new trial. In light of our disposition, we do not consider Thompson's other arguments.

FACTS

William Thompson, D.D.S. and contractor Kris Smith met in June 2005, when Smith's company Smithworks, was a subcontractor on Thompson's kitchen remodel. According to Thompson, Smith said that the project was his first

No. 64122-1-I/3

“major” remodel and that he had never before lifted a house to repair the foundation.¹ Smith and the general contractor worked together to lift Thompson’s house. Smith worked on the remodel for five to six months, and he and Thompson became friends.

In late 2005, Smith asked Thompson about going into business together to do foundation work using a patented and proprietary steel piercing system developed by Ram Jack Systems Distribution LLC.² In March 2006, Smith and Thompson traveled to Ram Jack headquarters in Oklahoma. Thompson paid the dealership fee of \$35,000 on March 24, 2006. In April 2006, the parties arranged to place Ram Jack ads in the yellow pages.³

Smith and Thompson entered into an agreement to form Ram Jack NW as equal owners and filed a certificate with the Secretary of State on May 23, 2006. Ram Jack NW obtained the exclusive right to operate using the patented pier-driving technology within the King County territory. Thompson agreed to provide

¹ In his declaration, Smith states that prior to forming Ram Jack NW, Smithworks performed foundation work, and describes the work he did on Thompson’s house. However, he does not state that he worked on foundations before working on Thompson’s house. At trial, he testified that Smithworks did foundation work, although it is unclear whether this included the time before Ram Jack NW was formed.

² The system is used to secure structures built on unstable soils to prevent or correct settling issues. Steel piers are driven deep into the ground to the point of “stable” earth, and the structure is attached to the piers, whereupon the load of the structure is transferred to the stable earth.

³ One advertisement, under the heading “Ram Jack: Foundation Repair Systems” stated:
Transferable Lifetime Warranty
-Patented Foundation Stabilization, Repair Leveling
-Retaining Walls, Walkways, Patios, Cement Slabs
-Build On Unstable or Steep Sloping Property
-Residential and Commercial
-Licensed, Bonded and Insured-Free Consultation

No. 64122-1-I/4

capital while Smith agreed to provide expertise and perform managerial duties. The parties did not file a formal limited liability company (LLC) agreement and the terms of their agreement respecting Ram Jack NW were oral. Ram Jack NW hired Charles Brastrup, a patient of Thompson's, as a construction and project manager. Brastrup had been a contractor for over twenty years and had extensive experience doing foundation work. He was responsible for finding and securing new business for Ram Jack NW and helping Smith with technical aspects of foundation work.

Thompson and Smith met almost every week after the formation of Ram Jack NW. In June 2007, Thompson became aware that Smith had been doing foundation work through Smithworks, and using Ram Jack NW only for its patented piercing system. Smith told Thompson that Ram Jack NW had secured a number of smaller jobs and one large project that would produce revenues of over \$250,000 the (King job). The King job came about in response to Ram Jack NW's ad in the phone directory. Smith told Thompson that the King job was nearly complete, but that it was primarily a Smithworks job, not a Ram Jack NW job.

Thompson filed suit on December 14, 2007, alleging, among other causes of action, breach of contract, breach of fiduciary duty, and interference with business expectancies. He alleged that Smith failed to timely make payments on behalf of the LLC, causing it to incur penalties and interest; converted income from the King job to himself and Smithworks; refused to provide an accounting of

No. 64122-1-I/5

the LLC's finances to Thompson; commingled Ram Jack NW assets with Smithworks' and Smith's own assets; and committed other acts and omissions. Smith counterclaimed, asserting breach of contract and breach of fiduciary duty. Smith alleged that Thompson did not provide the full promised amount (\$150,000) of start-up capital, personally withdrew more than \$13,000 from Ram Jack NW and caused it to be unable to pay its bills, incurred personal debt he put on Ram Jack NW's books, and committed other acts and omissions.

Smith moved for partial summary judgment on Thompson's claim that Smith had "usurped" Ram Jack NW's business opportunities. The trial court granted the motion, finding that (1) the parties did not, as a matter of law, agree on a scope of work of Ram Jack NW beyond the piercing-related work it performed; (2) Smithworks' permissible scope of work was not narrowed by any agreement of the parties; and (3) Smithworks never performed or interfered with work within Ram Jack NW's agreed-upon scope of work. The court dismissed with prejudice all interference claims against Smith and Smithworks.

Before trial ensued on the parties' remaining claims of breach of contract and breach of fiduciary duty, counsel for Smith requested an order that Thompson be barred from introducing evidence about the dismissed cause of action. Counsel for Thompson stated that although he would not go into that cause of action, some facts might become relevant. He requested that opposing counsel object if he got off track. The trial court reserved ruling on Smith's motion. During Thompson's direct examination, he began to discuss the King

No. 64122-1-I/6

job and was asked whether he had any concerns about Ram Jack NW's finances as a result of Smithworks running that job. After the jury was excused, counsel for Smith referenced this testimony and asked the court for a jury instruction that, as a matter of law, Smithworks had not converted any Ram Jack opportunities. He also requested that there be no further discussion regarding "theories about Smithworks taking Ram Jack work." The trial court agreed that Thompson could not present such evidence. Later, the court instructed the jury that, "Smithworks did not perform any illegal act nor did it receive any benefit from Ram Jack Northwest LLC." Thompson did not object.

The jury entered a verdict on July 2, 2009, finding that neither party breached his contract with the other, but that both Smith and Thompson breached fiduciary duties owed to each other. It found that Smith's damages were \$70,000 while Thompson's damages were \$0. It also answered "yes" to the question "Did you find that William Thompson's act of filing this lawsuit against Kris D. and Cecile Smith and Smithworks was frivolous?" Smith moved for entry of judgment on the jury's verdict and for attorney fees under CR 11 and RCW 4.84.185. The court entered judgment of \$70,000, the amount of the jury award, granted Smith's motion for attorney fees in the amount of \$153,264.50 and entered findings of fact and conclusions of law.

On August 7, 2009, Thompson moved for a new trial, judgment notwithstanding the verdict, and reconsideration or vacation of the summary judgment order, arguing, among other things, that the jury's verdict was

No. 64122-1-I/7

inconsistent where the jury found that Smith had breached his fiduciary duty to Thompson but also found that Thompson's lawsuit was frivolous. The court denied the motions. On appeal, Thompson assigns error to the trial court's decisions granting partial summary judgment, instructing the jury to determine whether Thompson's lawsuit was frivolous, entering judgment on the jury's verdict, awarding Smith attorney's fees based on the jury's finding that Thompson's lawsuit was frivolous, entering certain findings of fact and conclusions of law, and denying Thompson's motion for a new trial.

DISCUSSION

The court reviews summary judgment decisions de novo, engaging in the same inquiry as the trial court. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003). "When ruling on a summary judgment motion, the court is to view all facts and reasonable inferences therefrom most favorably toward the nonmoving party." Lybbert v. Grant County, State of Wash., 141 Wn.2d 29, 34, 1 P.3d 1124 (2000) (citing Weyerhaeuser Co. v. Aetna Cas. & Sur. Co., 123 Wn.2d 891, 874 P.2d 142 (1994)). Summary judgment is proper if the pleadings, depositions, answers, and admissions, together with the affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

At summary judgment, Thompson provided his own declaration and the declaration of Ram Jack NW employee Charles Brastrup. In his declaration, he stated, "I agreed with Smith that our partnership would be a full-service

No. 64122-1-I/8

foundation business. While we were in Oklahoma together, I told Kris that I was 'ok' with Smithworks providing 'handyman' type services for Ram Jack customers. I never consented to Kris running a competing foundation business." He described the trip to Ram Jack headquarters in Oklahoma and the two of them learning how to market the business as offering "foundation solutions" and a "full-service" approach. He also pointed to Ram Jack NW's yellow pages ad, which was placed under "Foundation Contractors" and offered services beyond piling work. Smithworks' advertising efforts, on the other hand, described "handyman" and home remodeling services, and did not mention foundation work. Thompson also pointed out that the companies were insured differently: Ram Jack NW for "foundation repair" and Smithworks for "carpentry contracting."

Brastrup's declaration stated that he understood that Ram Jack NW had been founded to provide a complete foundation package. He stated, "My understanding is the new customers that I helped to find or secure would provide projects or business opportunities that belonged to Ram Jack NW . . . including any aspect of the project that was in any way related to foundation construction or work." His understanding came from his conversations with Smith and Thompson as well as with Smith alone.⁴

⁴ Brastrup also described the King job and how he oversaw it in Smith's absence. The King job involved "significant foundation work." He stated that he was paid by Smithworks for his hours spent onsite at the King job and paid by Ram Jack NW for his salary related to the King job. His work in bidding and estimating for the King job was as an employee of Ram Jack NW. He had no knowledge of whether the King job paid Ram Jack NW, Smithworks, or both.

No. 64122-1-I/9

On appeal, Thompson contends that he and Smith agreed that Ram Jack NW would provide all foundation work and that Smithworks could do non-foundation work. Smith contends that they agreed that Ram Jack NW would only do pier-related work and that, beyond the use of Ram Jack NW's patented technology, there was no agreement limiting the scope of Smithworks' services. Thompson argues that their conflicting versions create a fact dispute making summary judgment improper. He argues that the trial court's ruling gutted his entire case by preventing him from arguing to the jury that the parties' agreement was that Ram Jack NW would provide all foundation services. He contends that because this allegation was central to his claims of breach of contract and breach of fiduciary duty, the trial court's ruling denied him a fair opportunity to pursue those claims. He points out that the jury may have awarded him damages if he had been permitted to argue that Smith improperly took business opportunities from Ram Jack NW. Finally, he argues that the trial court's ruling on summary judgment undermined the verdict for Smith, because Smith's breach of fiduciary duty claim was based primarily on his theory that Thompson involved him in a frivolous lawsuit.

Smith argues that it is undisputed that Smithworks performed foundation work prior to the formation of Ram Jack NW, and that Thompson admitted that he never told Smith that Smithworks had to quit doing foundation work. Smith contends that the parties "carved out" an exception to Ram Jack Oklahoma's Distributor Agreement in order to permit Smithworks to continue its former work.⁵

No. 64122-1-I/10

He contends that Thompson presented only a self-serving declaration and that Brastrup's declaration was inadmissible. "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 piling work that the company had been formed to undertake." Smith also contends that Thompson presented no evidence of any legal consideration for "any such agreement to take work from Smithworks." Smith argues that the following statement by Thompson during his deposition was proof that the parties did not reach an agreement that Ram Jack NW would do all foundation work:

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

A: No, that was never our agreement.

Q: Okay. When did you reach your agreement? Let me ask you this.

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

Q: Okay. All right. So if I said that you never did reach an

⁵ The "Dealer and License Agreement" between Ram Jack NW and Ram Jack Systems Distribution LLC contains the following non-compete provision:

For the consideration of granting Dealer the rights and benefits contained in this Agreement, including the right to operate within the Territory . . . 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 [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 . . ." (Emphasis added).

Smith points to this provision as permitting Smithworks to continue doing foundation work.

No. 64122-1-I/11

agreement, then we would actually agree on that.

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

(Emphasis added).

We hold that the trial court erroneously granted partial summary judgment. It is undisputed that the terms of the parties' agreement were oral. At a minimum, Thompson's evidence creates an issue of material fact as to whether the parties had an agreement about the scope of Ram Jack NW's business and the scope of Smithworks' business, and an issue of material fact as to whether Smith violated that agreement by taking Ram Jack NW's business for Smithworks. Moreover, even assuming the lack of a material dispute regarding the absence of a non-compete agreement summary judgment was still improper because there remains disputed evidence as to whether Smith took work from Ram Jack NW for Smithworks. For example, Thompson claimed, among other things, that Smithworks obtained work through ads that were paid for by Ram Jack NW.

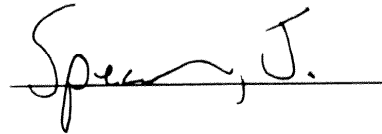
Smith argues that Thompson gave no consideration for any agreement "to take work from Smithworks." However, it is undisputed that Thompson provided the capital for Ram Jack NW. Smith also argues that the yellow pages ad is not evidence of the parties' mutual intent. But as Thompson points out, the ad is evidence inconsistent with Smith's testimony and consistent with Thompson's version of the agreement, i.e., that Ram Jack NW was a full-service foundation

No. 64122-1-I/12

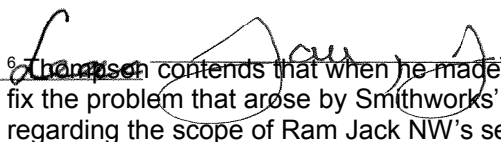
company. Furthermore, the fact that Smith himself placed at least one of the ads may be construed as an admission from him as to the agreed scope of Ram Jack NW's work. Regarding the provision in the dealership agreement, Thompson is correct in noting that the agreement was between Ram Jack NW and Ram Jack Oklahoma, not between Thompson and Smith. Finally, although Smith places much emphasis on Thompson's deposition statement "Well, it's evident that we have not reached an agreement because we're still arguing about it," we find his statement to be equivocal.⁶

We reverse and remand. Furthermore, because the trial court's ruling substantially affected and curtailed the presentation of Thompson's breach of contract and breach of fiduciary duty claims as well as his ability to defend against Smith's counterclaims, we vacate the jury verdict, judgment on the verdict, and award of attorney fees with respect to those claims, and remand for a new trial.⁷

Reversed and remanded.



WE CONCUR:



⁶ Thompson contends that when he made this statement, he was referring to "an agreement to fix the problem that arose by Smithworks' overreaching – not to the parties' original agreement regarding the scope of Ram Jack NW's services. . . ."

⁷ We note, for purposes of re-trial of this matter, that during the first trial, the issue of whether Thompson's pursuit of his claims against Smith was frivolous was submitted to the jury. While we do not reach the issue of whether the instruction was a comment on the evidence (the claim Thompson makes respecting the jury instruction), the trial court's submission of this issue to the

jury was error. Whether the instigation of a claim or proceeding violates CR 11 is a matter for the court to determine. Watson v. Maier, 64 Wn. App. 889, 899–900, 827 P.2d 311 (1992). Likewise, RCW 4.84.185 states:

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
(Emphasis added).

It also provides that “[t]he judge shall consider all evidence presented” in making the determination of frivolousness. (Emphasis added). Thus, under the text of the statute, whether a claim is frivolous is a matter for the court.