Supreme Court No. 97519-1

Court of Appeals No. 78014-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DAVID ESSIG,
Respondent

v.

MICHAEL LAI, et al.,
Petitioners.

Answer to Petition for Review

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Rules

I. IDENTITY OF RESPONDENT

Respondent David G. Essig is the plaintiff in this suit for breach of an employment contract with the Petitioners / Defendants. Essig prevailed after a bench trial in the trial court, and prevailed at the Court of Appeals. Essig does not seek review on any issue.

II. COUNTERSTATEMENT OF ISSUE PRESENTED FOR REVIEW

This petition presents the following issue: Does the term "wages" in RCW 49.52.050 and 49.52.070 include back pay owed under a contract?

For further context, the issue may be framed as follows: Under the Wage Rebate Act (Chapter 49.52 RCW), an employer who pays an employee a lower wage than the employer is obligated to pay the employee by contract shall be liable for twice the amount of wages wrongfully withheld. Petitioners entered into an employment contract to employ Respondent Essig for two years. Petitioners breached that contract by failing to pay Essig for the first 7 weeks of his work, which justified Essig not working any longer. Essig sued for breach of the contract. The trial court awarded him damages calculated as the contract wages for the two-year period of the contract and exemplary damages under RCW 49.52.070 for the two-year period of the contract. Did the trial court correctly apply the exemplary-damages provision of RCW 49.52.070 to the wages Essig was owed under the contract for the two-year contract period?

III. COUNTERSTATEMENT OF THE CASE

Respondent Essig presents this counterstatement of the case, consistent with Essig's response brief below[1] and the Court of Appeals decision.

Respondent David Essig ("Respondent" or "Essig") began work for the Rainier Valley Community Development Fund in 2006. He managed the real-estate investment loan aspect of the organization to attract development and other development funding to the Rainier Valley area of Seattle. Through this work, Essig met Michael Lai, who managed a real-estate brokerage. Essig worked with Lai's firm on two successful loan transactions, and had other interactions with Lai. From time to time, Lai asked Essig about working for him as a real-estate agent. Essig was not interested, and told Lai so.

In late 2014 and throughout early 2015, Lai continued to ask Essig to work for him. Lai was planning a real-estate development business and asked Essig to be a partner on developments, but Essig told Lai he did not have the financial capacity to do so. Lai asked Essig to work for Lai as a consultant or independent contractor, but Essig told Lai he was not interested in working in those capacities. They discussed Essig becoming Lai's employee to help build a development organization. Lai asked Essig to prepare a proposal to do so. Essig did, and provided Lai with a proposed

[1] In the Court of Appeals, some citations to the Clerk's Papers in Respondent Essig's response brief were incorrect. Attached as an Appendix to this Answer is a corrected version. Respondent Essig's counsel apologizes for the error and any resulting confusion.

employment contract. After they negotiated changes to the contract, on May 29, 2015, Essig entered into the employment contract with Lai and a number of businesses that Lai owned or controlled.

Under the employment contract, Lai and his businesses agreed to employ Essig for a minimum of two years, with an annual salary of $114,000, health and dental benefits for Essig and his spouse, an expense account, office space, office support, periodic bonuses, and a $5,000 signing bonus. Lai gave Essig a check for $5,000, which Essig deposited. Under the employment contract, Essig was to start work on July 13, 2015. Essig resigned from the Rainier Valley Community Development Fund in reliance on the employment contract.

Essig began performing work under the employment contract on July 13, 2015. Over the next several weeks, he attended meetings and site visits with Lai, meeting with Lai, and engaging in continuous phone, email, and text message communication with Lai regarding the business. At no point did Lai indicate that Essig was *not* employed by Lai or Lai's companies.

On July 30, 2015, Essig emailed Lai about medical insurance and benefits for Essig and his wife, which were owed under the contract. On August 18, 2015, having not yet been paid after approximately one month of work, Essig sent Lai a letter demanding payment of his wages and benefits under the contract. Essig continued to work for Lai until August 26, 2015, including multiple communications and meetings with Lai from August 24–26, 2015.

On August 27, 2015, having not been paid for over 6 weeks of work, Essig notified Lai that Lai and his businesses were in breach of the contract, that Essig was stopping work because of the breach, and that Essig would seek other employment. Essig then engaged in efforts the trial court determined were reasonable to find comparable replacement employment, searching in Seattle, Oklahoma City, and nationwide. He was unable to find comparable replacement employment for the remainder of the two-year contract period.

Essig sued. After a three-day bench trial, the trial court found for Essig for breach of contract against Lai, the marital community comprised of Lai and his spouse Veeny Van, and five entities. The trial court awarded Essig lost wages of $228,000 (two years at $114,000 per year), $13,263 in medical benefits, $85,890 in attorney fees, and $708.28 in costs. The trial court also awarded exemplary damages under RCW 49.52.070 of $228,000.

At the Court of Appeals, Respondents sought review of the award of exemplary damages and the trial court's finding that Essig reasonably mitigated his damages. The Court of Appeals affirmed, holding that Essig was entitled to exemplary damages and that the trial court did not err in finding that Essig reasonably mitigated his damages.

Respondents now seek review only of the first issue, arguing that Essig is not entitled to exemplary damages under RCW 49.52.070.

IV. ARGUMENT AND AUTHORITY WHY REVIEW SHOULD BE DENIED

A. Petitioners Identify No Consideration Supporting Review Under RAP 13.4(b).

Rule 13.4 of the Rules of Appellate Procedure sets out the considerations governing acceptance of review. This Court has determined that it will only accept a petition for review if one of four considerations are met: the decision appealed from conflicts with a decision of this Court; the decision appealed from conflicts with a decision of the Court of Appeals; the appeal raises a significant state or federal constitutional question; or the appeal involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(1)–(4).

Petitioners fail to invoke this rule or identify which of these four considerations their petition meets. That alone should suffice to deny the Petition, as this Court should not have to guess why a petitioner seeks review. Nonetheless, Respondent Essig will address whether the Petition raises questions of a conflict with decisions of this Court or the Court of Appeals or whether the Petition raises an issue of substantial public interest that should be determined by this Court (no constitutional issue is even alluded to, let alone raised).

B. The Court of Appeals Correctly Concluded that Wages Owed Under a Contract as Back Pay Are Wages Subject to Doubling as Exemplary Damages Under RCW 49.52.070.

The trial court awarded exemplary damages under RCW 49.52.070. That statute states in relevant part (emphasis added):

> Any employer and any officer, vice principal or

> agent of any employer who shall violate any of the provisions of RCW 49.52.050 (1) and (2) shall be liable in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of the *wages* unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees …

Section 49.52.070 refers to RCW 49.52.050, which states in relevant part:

> Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who
> …
> (2) Wilfully and with intent to deprive the employee of any part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract;
> …
> Shall be guilty of a misdemeanor.

Even though the issue presented for review involves only these two statutes, an analysis of this issue involves provisions of the Wage Rebate Act (Chapter 49.52 of the Revised Code of Washington, referred to as the "WRA"), the Minimum Wage Act (Chapter 49.46 of the Revised Code of Washington, the "MWA"), and the Wage Payment Act (Chapter 49.48 of the Revised Code of Washington, the "WPA").

The Wage Rebate Act does not define "wages." This Court in *LaCoursiere v. Camwest Development* acknowledged this, and looked to the definition of "wage" in the Minimum Wage Act for such a definition. *LaCoursiere v. Camwest Dev't, Inc.*, 181 Wn.2d 734, 741–742, 339 P.3d 963 (2014). The MWA defines "wage" as "compensation due to an employee by reason of employment." RCW 49.46.010(7). This Court in *LaCoursiere* evaluated certain bonuses and held that they were "wages"

for purposes of section 49.52.070 of the WRA. This Court stated both that the bonuses there were "due by reason of employment" and "earned for work performed." *Id*. at 743. It distinguished those bonuses from payments that were "purely gratuitous," which the Court of Appeals had previously held were not wages because the purely gratuitous nature of other bonuses rendered them not paid "by reason of employment." *Id.* at 742–44. While this Court certainly explained that bonuses were "wages" under section 49.52.070 of the WRA because they were paid for work performed, it did certainly did not hold that wages is *limited* to compensation paid for work performed.

Other cases bear this out and make it clear that while wages under these three acts *include* compensation for work performed, wages are not *limited* to compensation paid for work performed, but rather include all compensation "due by reason of employment." For example, in *Gaglidari v. Denny's Restaurants*, this Court evaluated whether back pay owed for wrongful termination in breach of an employment contract formed under an employee handbook were "wages" for purposes of determining whether attorney fees were owed under section 49.48.030 of the Wage Payment Act. *Gaglidari v. Denny's Restaurants*, 117 Wn.2d 426, 815 P.2d 1362 (1991). The Wage Payment Act does not include a definition of "wages," so this Court relied on a prior Court of Appeals decision that looked to the definition of "wages" in the Minimum Wage Act for the appropriate definition, just as this Court had under *LaCoursiere*. *Id.* at 449–50, *citing Hayes v. Trulock*, 51 Wn. App. 795, 755 P.2d 830 (1988). In *Gaglidari*, the

employer made almost precisely the same argument Petitioners make here, arguing that back pay owed for breach of an employment contract did not amount to "wages owed" under the Wage Payment Act. This Court rejected that argument, explaining that "lost wages damages are in lieu of compensation for services. They represent wages that the plaintiff would have received had she not been discharged." *Gaglidari*, 117 Wn.2d at 450. Thus, this Court held, if an employee had to sue to recover back pay owed for breach of an employment contract, the employee could recover attorney fees for doing so under section 49.48.030 of the Wage Payment Act. *Id.* at 450–51.

At least two decisions of the Court of Appeals have used similar reasoning to reach similar conclusions. Division Two of the Court of Appeals in *Dice v. City of Montesano* evaluated whether three months of severance owed under a severance agreement were "wages" both for purposes of exemplary damages under section 49.52.070 of the Wage Rebate Act and for attorney fees under section 49.48.030 of the Wage Payment Act. *Dice v City of Montesano*, 131 Wn. App. 675, 128 P.3d 1253 (2006). The Court of Appeals focused its analysis on section 49.48.030 of the Wage Payment Act. It looked to the Minimum Wage Act for the definition of "wages." *Id.* at 689. The Court of Appeals specifically explained that "wages" went beyond compensation for work performed, explaining: "Because it is a remedial statute, our courts have interpreted RCW 49.48.030 broadly, demonstrating that the award of attorney fees under the statute *is not limited to judgment only for wages and salaries*

earned for work performed, but, rather, such fees are recoverable for *any type of compensation due by reason of employment*." *Id.* at 689 (emphasis added).

Similarly, Division Three of the Court of Appeals in *Bates v. City of Richland* evaluated whether pension payments were "wages" both for purposes of section 49.52.070 of the WRA and section 49.48.030 of the WPA. *Bates v. City of Richland*, 112 Wn. App. 919, 51 P.3d 816 (2002). It also focused its analysis on section 49.48.030 of the WPA, and it also incorporated the definition of "wages" from section 49.46.010 of the Minimum Wage Act. *Id.* at 939–40. It held that pension payments were "wages" for purposes of the Wage Payment Act, explaining its reasoning: "Courts have also interpreted 'wages or salary owed' to include back pay, front pay, commissions, and reimbursements for sick leave. … These cases demonstrate that awards for attorney fees under RCW 49.48.030 are *not limited to judgments for wages or salary earned for work performed*, but, rather, that attorney fees are recoverable under RCW 49.48.030 whenever a judgment is obtained for *any type of compensation due by reason of employment*." *Id.* at 940 (emphasis added).

Division Three of the Court of Appeals in *Allstot v. Edwards* addressed whether back pay owed for wrongful termination constituted "wages" for the statute at issue here: the exemplary damages provision in section 49.52.070 of the WRA. *Allstot v. Edwards*, 114 Wn. App. 625, 60 P.3d 601 (2002). The employer had argued, and the trial court had held, that because the back pay was not owed as compensation for hours

worked, it did not fall under the definition of "wages." *Id.* at 631–32. The Court of Appeals rejected that argument and held that back pay could, indeed, constitute "wages" under section 49.52.070 of the WRA. *Id.* at 632–35. It remanded the case for a determination of whether the failure to pay the back pay was willful, another aspect of the exemplary damages provision. *Id.*at 635.

Each of these decisions held (or relied on cases that held) that the definition of "wages" found in section 49.46.010 of the Minimum Wage Act included any compensation due by reason of employment, regardless of whether the compensation was owed for work performed. This Court in *LaCoursiere* incorporated the definition of "wages" from section 49.46.010 of the Minimum Wage Act into the Wage Rebate Act's section 49.52.070. Accordingly, "wages" for purposes of the section 49.52.070 of the WRA includes all "compensation due by reason of employment," not just that owed for "work performed."

Petitioners argue that, despite this Court's incorporation of the definition of "wages" from the Minimum Wage Act into the Wage Rebate Act, that should not be the case because the Wage Rebate Act includes potential criminal penalties in section 49.52.050. This ignores that the Minimum Wage Act *also* includes potential criminal penalties for failure to pay employees the minimum wage. RCW 49.46.100(1). For that matter, the Wage Payment Act (under which some cases interpreting the definition of "wages" arise) *also* include potential criminal penalties for failure to pay employees as required. RCW 49.48.020. The possibility of criminal

penalties (which are not at issue in this case), therefore does not distinguish the Wage Rebate Act from the Wage Payment Act or the Minimum Wage Act or justify a different definition of "wages" for any of these three acts.

To the contrary, all three acts share a similar purpose: the protection of employee wages. *International Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002) (Chapter 49.48 RCW, the WPA, advances the "strong policy in favor of payment of wages due employees"); *Hill v. Xerox Business Services, LLC*, 191 Wn.2d 751, 760–61, 426 P.3d 703 (2018) (Chapter 49.46, the MWA, was enacted to ensure that minimal employment standards were met, including a guaranteed minimum wage); *Schilling v. Radio Holdings Inc.*, 136 Wn.2d 152, 159, 961 P.2d 371 (1998) (Chapter 49.52 RCW, the WRA, advances the legislature's intent to "protect employee wages and assure payment"). Given these purposes, all three are to be construed liberally. It is therefore not surprising that all three rely on the same definition of "wages" found in the Minimum Wage Act and construe it broadly to include all compensation due by reason of employment, regardless of whether it was owed for hours worked or otherwise owed by reason of employment.

The Court of Appeals decision here is entirely consistent with these cases and correctly held that the full amount of back pay owed to Essig under his employment contract with Respondents constituted "wages" subject to doubling as exemplary damages under section 49.52.070 of the Wage Rebate Act. The decision was correct.

C. The Court of Appeals Decision Does Not Conflict With Any Decision of This Court or the Court of Appeals.

Petitioners' general argument is that the penalties under RCW 49.52.070 of the WRA do not apply to wages owed under a contract unless the employee has performed work in exchange for the wages owed. This interpretation was rejected by the Court of Appeals. (It was not raised with the trial court.) Not only is this interpretation inconsistent with the language of the applicable statute, it is inconsistent with the cases Petitioners rely upon. Nonetheless, Petitioners appear to argue the Court of Appeals decision here conflicts with decisions of this Court or the Court of Appeals. Because the Petition should be granted only if the Court of Appeals decision conflicts with another applicable decision, we evaluate each of the decisions identified by Petitioners.

1. LaCoursiere v. Camwest Development, Inc.

Petitioners argue *LaCoursiere* holds that "wages" under the WRA is limited to amounts owed for work performed. (Pet. at 10.) That is incorrect. This Court in *LaCoursiere* evaluated whether certain bonuses were included in the definition of wages under section 49.52.070 of the WRA and held that bonuses given for work performed, as opposed to truly gratuitous bonuses, were wages. *LaCoursiere*, 181 Wn.2d at 741–44. It did not hold that wages included *only* bonuses or other compensation given for work performed. Put differently, this Court in *LaCoursiere* held that wages under the WRA *includes* bonuses paid in exchange for work performed, but it did not evaluate nor hold that wages under the WRA are *limited* to compensation paid or owed in exchange for work performed.

The Court of Appeals decision here does not conflict with *LaCoursiere*.

2. Hisle v. Todd Pacific Shipyards Corp.

Petitioners argue *Hisle* holds that "wages" under the Minimum Wage Act are only compensation in exchange for "hours worked." (Pet. at 10–11.) That is incorrect. This Court in *Hisle* evaluated whether retroactive payments agreed to in a later collective bargaining agreement were "wages" for purposes of determining whether overtime was owed for the retroactive payments under the MWA. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 861–63, 93 P.3d 108 (2004). The amount of retroactive payments owed to each individual worker was tied to the amount of time they worked during the retroactivity period. This Court contrasted these retroactive payments with "ratification inducement" payments at issue in a federal case under federal minimum wage law and held that, unlike such ratification-inducement payments, these retroactive payments, calculated by reference to hours actually worked, were included as wages under the MWA. *Id.* As in *LaCoursiere*, this Court did not hold that the definition of wages under the WRA was *limited* to compensation in exchange for hours worked, as Petitioners argue. The Court of Appeals decision in this case therefore does not conflict with *Hisle*.

3. Allstot v. Edwards

Petitioners argue the Court of Appeals misapplied *Allstot* and argues that *Allstot* is "irreconcilable" with *LaCoursiere*. (Pet. at 16-17.) *Allstot* is consistent with *LaCoursiere*. This Court in *LaCoursiere* held that certain bonuses were "wages" under section 49.52.070. *LaCoursiere*, 181

Wn.2d at 741–44. The Court of Appeals in *Allstot* held that back pay owed for wrongful termination could be "wages" under section 49.52.070. *Allstot*, 114 Wn. App. at 631–35. Because this Court did not hold in *LaCoursiere* that wages includes only payments in exchange for hours worked or in exchange for work performed, *Allstot* does not conflict with *LaCoursiere*. Both decisions provide examples of types of payments or compensation that this Court and the Court of Appeals have found to be "wages" under section 49.52.070 or the MWA or the WPA. The Court of Appeals decision in this case does not conflict with *Allstot*.

4. Ford v. Trendwest Resorts, Inc.

Petitioners argue the Court of Appeals decision conflicts with *Ford v. Trendwest* because Petitioners argue *Ford* prohibits criminal penalties or punitive damages for breach of contract. This is incorrect. In *Ford*, this Court evaluated the narrow issue of "whether lost earnings are an appropriate measure of damages when an employer breaches a contract to hire an at-will employee." *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 152, 43 P.3d 1223 (2002). This Court held that in that narrow circumstance, future lost earnings were not appropriate contract damages because the contract (which this Court found was implied) was not for a specific period of employment. *Id.* at 155–56. This Court's analysis contrasted tort damages with contract damages. *Id.* at 152–58. This Court in *Ford* did not address specific statutory penalties, such as those the legislature specifically authorized in section 49.52.070 of the WRA for failure to pay wages owed under a contract. The Court of Appeals decision

here does not conflict with *Ford*.

5. Gaglidari v. Denny's Restaurants, Inc.

Petitioners argue the Court of Appeals decision conflicts with *Gaglidari* for several reasons. First, Petitioners assert that this Court in *Gaglidari* held that damages for breach of an employment contract "not involving the willful failure to pay" are limited to expectation damages. (Pet. at 13.) This Court made no such holding in *Gaglidari*. *Gaglidari*, 117 Wn.2d 455–48. Moreover, that is not the circumstance here, where the trial court ruled that Petitioners had willfully withheld the wages owed, a legal conclusion not challenged by Petitioners. (CP 433, Finding 40.) Petitioners next refer to this Court's discussion in *Gaglidari* of contract consideration. (Pet. at 15, n.12.) The import of this reference is unclear; Petitioners do not dispute whether there was an employment contract or that the parties to that gave sufficient consideration for that contract. And Petitioners quote from *Gaglidari* for the notion that allowing tort damages for emotional distress in breach-of-contract cases impacts commercial stability. (Pet. at 17–18.) But tort damages for emotional distress are not at issue here; this appeal involves statutory penalties for specific conduct — failing to pay wages owed under a contract. Applying the statutory language of the legislature in this case does not conflict with *Gaglidari*.

6. Schilling v. Radio Holdings, Inc.

Petitioners cite and quote this Court's decision in *Schilling* for the proposition that the WRA is intended to protect employees' wages from, among other things, underpayment. (Pet. at 9.) In *Schilling*, this Court did

not address the definition of wages, but instead addressed the willfulness component of the WRA. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157–64, 961 P.2d 371 (1998). Petitioners selectively quote from *Schilling*, which itself quoted from *State v. Carter*, 18 Wn.2d 590, 621, 140 P.2d 291, 142 P.2d 401 (1943). The full quote is instructive, as it confirms that the purpose of the WRA is to protect the full amount of wages an employee is entitled to receive by contract:

> [T]he fundamental purpose of the legislation, as expressed in both the title and body of the act, is to protect the wages of an employee against any diminution or deduction therefrom by rebating, underpayment, or false showing of overpayment of any part of such wages. The act is thus primarily a protective measure, rather than a strictly corrupt practices statute. *In other words, the aim or purpose of the act is to see that the employee shall realize the full amount of the wages which by statute, ordinance, or contract he is entitled to receive from his employer, and which the employer is obligated to pay,* and, further, to see that the employee is not deprived of such right, nor the employer permitted to evade his obligation, by a withholding of a part of the wages …

Schilling, 136 Wn.2d at 159, quoting *Carter*, 18 Wn.2d at 621 (all emphasis added). This Court in *Schilling* described the fundamental purpose of the WRA as encompassing precisely what occurred here: ensuring an employee receives the full amount of wages he or she is entitled to receive by contract by penalizing an employer who does not pay the full amount of wages owed to the employee by contract. The Court of Appeals decision does not conflict with *Schilling*.

7. Morgan v. Kingen

Petitioners refer to this Court's decision in *Morgan v. Kingen* as

well as the Court of Appeals decision in *Morgan*. (Pet. at 9, 16.) Neither are inconsistent with the Court of Appeals decision in this case. First, the Court of Appeals in *Morgan* did note that exemplary damages such as those authorized by RCW 49.52.070 are "intended to punish and deter blameworthy conduct." *Morgan v. Kingen*, 141 Wn. App. 143, 161, 169 P.3d 487 (2007). The Court of Appeals went on to affirm the assessment of such exemplary damages against individual representatives of the employer in that case. *Id.* at 161–62. That is not inconsistent with the Court of Appeals decision in this case.

Petitioners assert that this Court in *Morgan* held that the legislature's rationale for the WRA was *limited* to ensuring the payment of "wages earned," quoting *Morgan* at 166 Wn.2d at 538. This Court did use the phrase "wages earned" in that case when describing "a" (not "the") legislative intent behind the WRA. *Morgan v. Kingen*, 166 Wn.2d 526, 538, 210 P.3d 995 (2009). But this Court faced a different issue in *Morgan* than here: in *Morgan* the employees sought payment for work they had performed, and this Court evaluated whether individuals associated with the employer faced liability for the statutory penalties associated with failure to pay them. This Court in *Morgan* did not address whether the exemplary damages provisions of the WRA apply to wages owed under a contract after the employer wrongfully breached that contract. The Court of Appeals decision does not conflict with this Court's decision or the Court of Appeals decision in *Morgan*.

8. Failla v. FixtureOne Corp.

Petitioners refer to this Court's decision in *Failla* for its quote from *Morgan* that the WRA expresses a legislative policy ensuring the payment of the full amount of "wages earned." (Pet. at 9.) Yet neither *Morgan* nor *Failla* involved the question here: whether wages under the WRA includes those owed as back pay due to the employer's breach of contract. The issue addressed and decided in *Failla* was whether Washington courts could assert personal jurisdiction over an out-of-state CEO of an employer for individual liability under the WRA. *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 649–55, 336 P.3d 1112 (2014). That was not at issue here. The Court of Appeals decision does not conflict with *Failla*.

9. Navlet v. Port of Seattle

Finally, Petitioners refer to this Court's decision in *Navlet* for the proposition that wages "are, in substance, property." (Pet. at 11.) *Navlet* does not stand for that proposition, nor is it at issue here. This Court in *Navlet* evaluated whether promises to provide retirement benefits in a collective bargaining agreement provided benefits that were vested such that the employer making the promise to pay them was bound by them. *Navlet v. Port of Seattle*, 164 Wn.2d 818, 194 P.3d 221 (2008).

10. Conclusion: There Is No Conflict

In short, the Court of Appeals decision does not conflict with any decision of this Court or the Court of Appeals. Review is therefore not warranted under Rule 13.4(b)(1) or (2).

D. The Petition Raises No Issue of Substantial Public Interest that Should Be Determined By This Court.

Though Petitioners do not clearly articulate whether they seek review under RAP 13.4(b)(4), Respondent will treat their argument about "unreasonably curtail[ing] economic activity" as having been intended to fall under this consideration. To be sure, whether employers pay employees is matter of public interest. But the Petition does not address that, but instead raises a question of whether enforcing penalties the Legislature clearly set out by statute and that courts, including this Court, have upheld, risks unreasonably curtailing economic activity in this state.

As an initial matter, this is a new argument, and one that Petitioners did not raise at the trial court or before the Court of Appeals. As such, and as an argument for reversing a decision (as opposed to affirming one), this Court need not address it. RAP 2.5(a).

When evaluated substantively, Petitioners' argument is mere speculation that contradicts this Court's prior statements about the purpose of the exemplary damages provision of section 49.52.070 of the WRA. For example, in *Morgan*, the employer argued that exemplary damages under section 49.52.070 of the WRA risked a "chilling effect on entrepreneurship in Washington," a position also advanced by amici in that case. *Morgan*, 166 Wn.2d at 538. This Court evaluated and rejected that argument, confirming that the penalties advance the public policy of ensuring the payment of wages owed to employees. *Id.*

The Legislature presumably weighed public policy considerations when enacting the exemplary damages and revisiting it. (The statute was

last amended in 2010 when sections 49.52.050 and 49.52.070 of the WRA were both changed to correct gender-based terms; presumably the Legislature had the opportunity to also review it substantively yet chose not to.) Few statutes impose additional exemplary damages for a party's breach of contract; section 49.52.070 of the WRA is among them. The Court has recognized, in *Morgan* and other decisions, that the imposition of additional, exemplary damages for breach of a specific type of contract — a contract for the payment of wages — advances a public policy.

V. CONCLUSION

Petitioners failed to identify any considerations under Rule 13.4(b) for review. Even if they had, the Court of Appeals decision in this case does not conflict with any decision of this Court or the Court of Appeals. The Petition does not raise an issue of substantial public interest that should be determined by this Court. The parties tried their case. The trial court correctly applied the law. The Court of Appeals correctly affirmed the trial court's decision, and in a published decision accurately stated Washington law on this issue consistent with this Court's prior decisions. This Court may, and should, deny the Petition.

Respectfully submitted this 21st day of October, 2019.

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Appendix

NO. 78014-0-I

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

DAVID ESSIG,
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v.

MICHAEL LAI, et al.,
Appellants.

Appeal from the Superior Court for King County
Cause No. 16-2-07723-4 SEA

Brief of Respondent David Essig

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent David Essig ("Respondent" or "Essig") entered into a two-year employment agreement with Appellants Michael Lai ("Lai"), ML Companies LLC, USASIA Pacific Inc., PT Holding LLC, Realty Network Team Inc. and Seattle Modern Living on 35th LLC. (Collectively, Appellants Lai, the marital community comprised of Michael Lai and Veeny Van, ML Companies LLC, USASIA Pacific Inc., PT Holding LLC, Realty Network Team Inc. and Seattle Modern Living on 35th LLC are referred to as "Appellants." Lai and Van are referred to by their last names. The remaining appellants are collectively referred to as the "Entity Defendants.") Essig began work, though he was not paid. After approximately six weeks of work with no payment, Essig notified Appellants that he was stopping work due to Appellants' breach of the agreement.

Essig sued Appellants. The trial court, with Judge Bradshaw presiding, conducted a three-day bench trial, decided in Essig's favor, issued findings of fact and conclusions of law, and entered judgment in Essig's favor. Appellants appealed.

Appellants raise what are essentially four issues in their appeal. Each lacks merit. As an initial matter, Appellants did not raise any of these issues with the trial court below, so this Court may decline to review them. If this Court addresses them substantively, each fails on the merits.

First, Appellants argue that the trial court erred in awarding double damages under the provisions of RCW 49.52.050(2) and 49.52.070

because, they argue, amounts owed under an employment contract are not "wages" under those statutes unless the employee actually works. This position is unsupported by and inconsistent with Washington law. Second, they argue that the trial court erred in determining that Appellants' failure to pay Essig the wages he was owed under the employment contract was willful. The trial court heard and evaluated the evidence on this issue and issued findings of fact and conclusions of law on this issue. The findings are supported by substantial evidence, and the conclusions are consistent with the findings. Third, Appellants argue that the trial court erred in concluding that there was no bona fide dispute as to whether wages were owed or the amount of such wages. Again, the trial court heard and evaluated the evidence on this issue and issued findings of fact and conclusions of law on this issue. The findings are supported by substantial evidence, and the conclusions are consistent with the findings. Finally, Appellants argue that the trial court erred in concluding that Essig engaged in reasonable efforts to mitigate his damages. And again, the trial court heard and evaluated the evidence on this issue and issued findings of fact and conclusions of law on this issue. The findings are supported by substantial evidence, and the conclusions are consistent with the findings.

Because the trial court did not err on these four issues, this Court should affirm the trial court's judgment in its entirety.

II. ASSIGNMENTS OF ERROR

Respondent Essig does not assign any error to the trial court's pretrial rulings, the verdict or judgment, or post-trial rulings. This Court should affirm in all respects.

III. ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR

Respondent Essig reframes the issues pertaining to Appellants' assignments of error to account for applicable standards of review as follows:

1. Are amounts owed under an employment contract "wages" under the willful withholding provisions of RCW 49.52.050(2) and the civil liability, double damages, and attorney fee provisions of RCW 49.52.070? **Yes.**

2. Was there substantial evidence to support the trial court's conclusion that Appellants' failure to pay Essig's wages was willful? **Yes.**

3. Was there substantial evidence to support the trial court's conclusion that there was no bona fide dispute that Appellants owed Essig wages or the amount of the wages owed? **Yes.**

4. Was there substantial evidence to support the trial court's conclusion that Essig engaged in reasonable efforts to mitigate his damages? **Yes.**

Based on these issues, the trial court's judgment should be affirmed in its entirety.

IV. COUNTER-STATEMENT OF THE CASE

Appellants Lai and Van were, for time periods material to this action, married to each other. (VRP 217; 255–56) Together or individually, they own or control the Entity Defendants: ML Companies LLC, USASIA Pacific Inc., PT Holding LLC, Realty Network Team Inc., and Seattle Modern Living on 35th LLC. (VRP 202–14; VRP 228–29; 235–36; 237–38; 241–42; 245–46.)

Essig entered into an employment agreement with "ML Companies Inc., Michael Lai, and affiliated companies." (Ex. 3)[1] (ML Companies Inc. is not a legal entity, but rather a name that Lai uses to identify another of his businesses, ML Companies LLC. VRP 229–31) They entered into this employment agreement on May 29, 2015. Under the agreement, Essig was guaranteed employment by Appellants for two years, with a base salary of $114,000 per year, a signing bonus of $5,000, annual bonuses, health and dental benefits for Essig and his spouse, paid leave, and other employment perks and benefits, and with a start date of July 13, 2015. (Ex. 3)

The agreement was entered into after a lengthy on-and-off period of negotiation between Essig and Lai. During that period, Lai had repeatedly asked Essig to join Lai's businesses in the capacity of a partner and of an independent contractor. Essig was not interested in those forms of relationship and conveyed that to Lai. Eventually they agreed that Essig would join Lai and Lai's companies as an employee. In early May 2015, Lai asked Essig to prepare a proposal for Essig to join Lai's organization.

[1] "Ex." refers to exhibits offered and admitted at trial.

Essig prepared a first draft of an employment agreement, and sent it to Lai on May 19, 2015. Ten days later, on May 29, 2015, Essig and Lai met to discuss the written employment agreement. Lai presented Essig with a written version of the employment agreement, with Lai's revisions. They discussed the terms and made handwritten changes to the written agreement Lai presented, with each of them initialing the changes and each of them signing the agreement. (VRP 68–87, Exs. 2, 3)

Essig resigned from his then-current employment in reliance on this employment agreement. (VRP 91) Essig showed up for work for Appellants on July 13, 2015, and worked for Appellants until August 27, 2015. (VRP 98–134) Essig had been hired as the Director of Operations, with responsibility for providing technical support and day-to-day management of operations for development activities related to Lai's companies. (Ex. 3) Consistent with that job and his experience, Essig spent his time during this first six weeks reviewing development project plans, visiting job sites, reviewing public records on permitting, and other activities. He also met with Lai, and they visited job sites together. He and Lai attended a meeting with the architect and a proposed replacement construction manager regarding one of Lai's then-current projects. (VRP 130–31) Subsequently, he and Lai had a phone call with a civil engineer and a land-use attorney about the same project. (VRP 131) Lai included Essig on a number of email messages about his companies' projects. (Exs. 33, 34, 37–39)

Appellants did not pay Essig for his work during this six-week period. (VRP 397–98) Instead, during this period, while Essig was performing work for Appellants, Lai made several proposals to Essig to renegotiate the agreement, none of which Essig accepted; each of Lai's proposals would have materially changed the agreement, changing it from a two-year guaranteed employment relationship to an at-will, independent-contractor relationship that Appellants could end at any time. (VRP 98–134, Exs. 41, 48) Because Essig had not been paid, and because Lai had repeatedly tried to renegotiate the employment agreement on terms less favorable to Essig, on August 27, 2015, Essig notified Appellants that he was stopping performance because they were in material breach of the agreement. (VRP 134–135, Ex. 44)

Essig immediately began efforts to secure comparable work. Despite his efforts, Essig was unable to do so. He was offered no comparable employment during the two-year period covered by the employment agreement. (VRP 146–158, Exs. 65, 70, 72, 81, 99, 128, 150, 155, 156)

Essig sued Lai, Van, and the Entity Defendants in this action. After Appellants engaged counsel and obtained a trial continuance, they engaged in discovery and then disengaged with their counsel, with the trial court's approval and "presumption that Defendants will seek no further continuances." (~~CP 29–31~~ CP 75-77; CP 449–451; CP 452–456; CP 457–459; CP 460; CP 461–463; CP 464–468; CP 469–470) Trial was set for August 21, 2017. Lai and Van appeared for trial on that date pro se and requested

another continuance to retain counsel. The continuance was granted, and the trial court ordered that the Entity Defendants would not be permitted to participate in the continued trial, as they had not appeared on August 21, 2017 for trial (because Lai and Van, not lawyers, could not represent the Entity Defendants). (CP 471–472; CP 473–474)

The trial court conducted a bench trial on October 30, October 31, and November 2, 2017. Lai and Van appeared through counsel. The Entity Defendants did not appear. (VRP 23) The trial court gave an oral decision on November 2, 2017. (VRP 401–05) Lai and Van (not the Entity Defendants) filed a motion for reconsideration, which the trial court denied. (~~CP 257–71~~ CP 333-47; ~~CP 357–58~~ CP 416-17) On January 24, 2018, the trial court entered findings of fact and conclusions of law, and entered the judgment in this case. (~~CP 234–41~~ CP 427-34; ~~CP 242–45~~ CP 435-38) This appeal followed.

V. ARGUMENT AND AUTHORITY

A. Standard of review

The standard of appellate review is informed by the procedure at the trial court below. The judgment in this case was the result of a bench trial at which the trial court weighed the evidence. Therefore, this Court's review "is limited to determining whether the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings, in turn, support the conclusions of law and the judgment."[2]

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[2] *Washington Belt & Drive Sys., Inc. v. Active Erectors*, 54 Wn. App. 612, 615-16, 774 P.2d 1250, 1252 (1989).

"Substantial evidence" is "evidence of a sufficient quantum to persuade a fair-minded person of the truth of the declared premise."[3] When evidence is conflicting, this Court need not review the evidence proffered by the party that did not prevail at trial or weigh the evidence; instead, this Court need only to review the evidence that favors the challenged factual finding and determine whether it supports the challenged factual finding.[4] Issues of law and conclusions of law are then reviewed de novo to determine if they are supported by the factual findings.[5]

One of Appellants' assignments of error involves a legal question, while the other three relate to the trial court's factual findings and the trial court's conclusions of law. Therefore this Court need not consider the descriptions and characterizations by Appellants of the evidence submitted at trial. Instead, this Court need only consider the evidence identified by Essig, evaluate whether it supports the trial court's findings of fact, and evaluate whether those findings of fact support the trial court's conclusions of law and the judgment. With that standard in mind, Essig addresses Appellants' issues and assignments of error.

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[3] *Edmonson v Popchoi*, 155 Wn. App. 376, 383, 228 P.3d 780, 784 (2010).

[4] *Washington Belt*, 54 Wn. App. at 615-16, 774 P.2d at 1252.

[5] *Edmonson*, 155 Wn. App. at 383, 223 P.3d at 784.

B. Compensation payable under the employment agreement is "wages," so statutory penalties apply.

Appellants argue that the unlawful withholding provisions RCW 49.52.050 (2) and the civil liability and penalty provisions of RCW 49.52.070 apply *only* to remuneration owed to an employee for work performed, and not for any other reason. Appellants' argument and reasoning is incorrect and inconsistent with Washington law.

Appellants did not raise this issue with the trial court. This argument does not appear in Appellants' opening statement or closing argument. (VRP 43–49 [Appellants' opening statement]; VRP 389–400 [Appellants' closing argument]) Appellants filed a motion for reconsideration and new trial in which this argument does not appear. (~~CP 257-71~~ CP 333-47) Under Rule of Appellate Procedure 2.5(a), this Court need not address claims of error not raised at the trial court below.[6] Thus, this Court need not address any "issue, theory, argument, or claim of error presented at the trial court level."[7] Because Appellants did not raise this issue below, this Court need not consider it.

Should this Court do so, it should still affirm. Under RCW 49.52.050(2), an employer or officer, vice principal, or agent of any employer may not "willfully and with intent to deprive the employee of any part of his or her wages, … pay an employee a lower wage than the employer is obligated to pay such employee by any statute, ordinance, *or*

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[6] RAP 2.5.

[7] *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1, 5 (2001).

contract."[8] Under RCW 49.52.070, any employer or officer, vice principal, or agent of any employer who does so is liable to the employee "for twice the amount of the wages unlawfully … withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney fees."[9] Appellants argue that "wages" in .050 encompasses *only* those wages due in remuneration for work actually performed by the employee. In doing so, Appellants point only to cases that held that "wages" include remuneration for work performed, and argue that these cases must therefore mean that "wages" encompasses *only* remuneration for work performed. Numerous cases demonstrate that is not the case.

For example, Washington courts have held that severance payments are "wages" under .050(2) and .070. In *Dice v City of Montesano*,[10] an employee and employer entered into contract with a severance provision: if the employer terminated the employee without cause, the employer agreed to pay a lump sum equal to three months' salary.[11] Such a payment, by its nature, is *not* remuneration in exchange for work performed, but is instead payment for work not performed. Though it did not squarely address the issue raised by Appellants here, the Court of Appeals held that the severance payment was "wages" under

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[8] RCW 49.52.050(2) (emphasis added).

[9] RCW 49.52.070.

[10] *Dice v. City of Montesano*, 131 Wn. App. 675 (2006).

[11] *Id.* at 680-81.

.050(2) and .070, and would award to the employee double damages on the failure to make the payment.[12]

Similarly, cases interpreting other wage statutes do not limit "wages" to remuneration for work performed. For example, in 1991 in *Gaglidari v. Denny's Restaurants, Inc.*, the Washington Supreme Court evaluated whether back pay and front pay awards to an employee for breach of an employment contract were "wages" for purposes of the attorney fee provision in RCW 49.48.030.[13] The employer argued exactly what Appellants argue here (albeit with respect to different wage statutes: 49.48.030, as opposed to 49.52.050 and .070): "wages" did not include back pay. The court evaluated and expressly rejected that argument. It succinctly explained:

> Lost wages damages are in lieu of compensation for services. They represent wages that the plaintiff would have received had she not been discharged. Thus, attorney fees are recoverable in actions for lost wages for breach of employment contract.[14]

Gaglidari cited with approval the 1988 decision of this Court in *Hayes v. Trulock*, which held that back and front pay were both "wages" for purposes of the attorney fee provision in RCW 49.48.030.[15] Likewise, in 2002 in *Bates v. City of Richland*, Division Three of the Court of Appeals

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[12] *Id.* at 687-88.

[13] *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 815 P.2d 1362 (1991).

[14] *Id.* at 450, 1375.

[15] *Hayes v. Trulock*, 51 Wn. App. 795, 806, 755 P.2d 830, 836 (1988).

held that pension payments were "wages" for purposes of RCW 49.48.030, and explained what Washington courts have considered as "wages" for that section:

> Courts have also interpreted "wages or salary owed" to include back pay, front pay, commissions, and reimbursements for sick leave. … These cases demonstrate that awards for attorney fees under RCW 49.48.030 are not limited to judgment for wages or salary earned for work performed, but, rather, that attorney fees are recoverable under RCW 49.48.030 whenever a judgment is obtained for any type of compensation due by reason of employment.[16]

Certainly "wages," for purposes of RCW 49.52.050(2) and .070, *includes* remuneration for work performed. But nothing in the language in these or other Washington wage statutes suggests that "wages" refers *only* to remuneration for work performed. No case cited by Appellants holds that, and Washington courts have consistently treated other forms of compensation as "wages" for purposes of wage statutes. Here, Appellants entered into a two-year contract employment contract with Essig, under which they agreed to pay him; those payments are "wages" for purposes of RCW 49.52.050(2) and .070. Appellants' willful failure to pay Essig those wages when they were due violated RCW 49.52.050(2) and gave rise to the double-wage penalty and attorney fees in RCW 49.52.070. The trial court correctly awarded such penalties and fees.

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[16] *Bates v. City of Richland*, 112 Wn. App. 919, 940, 51 P.3d 816, 827 (2002).

C. There was no bona fide dispute as to whether wages were owed or the amount of wages owed.

Under RCW 49.52.070, double-wage penalties and attorney fees are awarded when a failure to pay wages is "willful." Washington courts have explained that the standard for proving willfulness is low: the Washington Supreme Court in 2011 in *Schilling v. Radio Holdings, Inc.* explained that willfulness simply means the decision not to pay is volitional, and that the person making the decision knows what he or she is doing and intends to do so.[17] The *Schilling* court explained that there are only two circumstances in which an employer's failure to pay is not willful: where the employer was careless or made a mistake in failing to pay, or where there was a "bona fide dispute" as to whether wages are due.[18]

Appellants here appear to argue that their failure to pay Essig wages owed to him under the contract was not willful because Lai believed that Appellants were only obligated to pay Essig if Essig actually performed work. This argument fails.

As an initial matter, Appellants did not raise this issue in the trial court below. Nowhere in their opening statement, closing argument, or motion for reconsideration did they raise this argument. Accordingly, under RAP 2.5(a), this Court need not consider this argument.

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[17] *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159-60, 961 P.2d 371 (1998).

[18] *Id.*

Should this Court do so, it should affirm. The trial court concluded that there were "no bona fide disputes as to the fact that wages were owed or as to the amount of wages owed." ~~CP 240~~ CP 433 (¶44). If there is substantial evidence to support this finding, it must be affirmed. There was substantial evidence that there was no bona fide dispute that wages were owed. The parties entered into a two-year employment agreement. Lai asked Essig to draft it. (VRP 74–80 and Ex. 2.) Essig did so, and Lai revised it. Lai and Essig met, made handwritten revisions to Lai's revised version of the agreement, and signed it. (VRP 80-86 and Ex 3; VRP 257–268) Essig worked on behalf of Appellants for approximately six weeks. (VRP 98–134) Lai admitted, months after the relationship deteriorated, that he had entered into a two-year employment agreement with Essig, stating to the Washington State Employment Security Department "We were stuck with him for two years regardless his performance." (VRP 280 and Ex. 46). And at trial, Appellants' counsel agreed that the two-year employment was a valid agreement (VRP 392 and Ex. 3) and that Appellants paid Essig nothing for the month or so of work he performed (VRP 395–96). Appellants offered no evidence whatsoever that they paid Essig anything for the work he performed or for the remainder of the two-year agreement period. This evidence certainly supports the trial court's factual finding that there was no bona fide dispute as to the fact that wages were owed or the amount of wages owed.

Appellants offer and attempt to apply an incorrect standard and incorrect presumptions with respect to this argument. Their argument fails.

First, Appellants suggest an inapplicable standard of proof and review: "Absent substantial evidence an employer did not have a bona fide belief an employment relationship did not exist, the employer cannot be held liable under the WRA." (Appellants' Brief at 24) Appellants then argue that Lai had the reasonable belief that he did not owe Essig anything. (Curiously Appellants do not rely on Lai's actual testimony for this notion, perhaps because the trial court explicitly found Lai to be not credible. VRP 402–03) This argument does not correctly state or apply the law. As explained above, given the procedural posture of this case, the substantial evidence standard of review means the opposite of what Appellants suggest: the trial court's findings must be upheld if there is substantial evidence to support the factual finding.

Substantively, the affirmative defense at issue here is one of a "bona fide *dispute*," not of a "bona fide *belief*." To the extent Appellants draw this from *McNulty v. Snohomish School Dist. No. 201*, a Court of Appeals decision that predated the Washington Supreme Court decision in *Schilling*, it is superseded by *Schilling* to the extent they conflict. *Schilling* made it clear that there must be a bona fide *dispute*, and in fact rejected the notion that a bona fide *belief* was sufficient.[19] As *Schilling* explained, a "bona fide dispute" requires a "fairly debatable" dispute over "whether an employment relationship exists, or whether all or a portion of the wages

[19] *Schilling*, 136 Wn.2d at 163 (rejecting employer's declaration about "belief" and holding that "regardless of what Bingham may have believed earlier,…")

must be paid."[20] Given the evidence that supports the trial court's conclusions that there was an employment relationship (something both Lai and Appellant's counsel conceded at trial), that the relationship was a two-year employment agreement (something Lai acknowledged in a submission to the Employment Security Department regarding Essig's unemployment benefits), and that the employment agreement at issue clearly describes the compensation for this period, there simply is no basis for a conclusion that there was somehow a bona fide dispute about the employment relationship or the amount of base compensation owed under it. This argument fails.

D. The trial court appropriately considered and rejected the notion that Essig's rejection of Lai's purported "offer" cut off his damages for failure to mitigate.

Finally, Appellants argue that Essig's damages should be cut off as of August 28, 2015 because Lai offered to employ Essig on substantially equivalent terms. This argument fails for many reasons.

First, like Appellant's other arguments, this was not raised with the trial court below. Though Appellants made several arguments in closing arguments and their motion for reconsideration regarding mitigation, none of them related to the "offer" Lai supposedly made on August 28, 2015. (VRP 396–98; ~~CP 257–71~~ CP 333-47) Because this issue and argument was not raised at the trial court below, this Court need not consider it. RAP 2.5(a).

[20] *Schilling*, 136 Wn.2d at 161–62.

Should this Court do so, it should affirm. Appellants base their argument on Essig's testimony at trial about a series of text messages he received from Lai on August 28, 2015, though Appellants did not include the messages in the record on appeal. The text of those messages was included in Exhibit 48, which was admitted (VRP 21:21–14), and shows what Lai "offered." (VRP 123:16–124:10; Essig typed out the text of those messages into a single document, which the trial court admitted.) Those text messages read:

> I can take care $120,000.000 per year next 12 months. Then become employees after that. …
>
> Our partnership there are no incentives to perform. There are no termination option, there no employees and employer. You can pretty much do whatever you want there are production goal, effort. I don't have a said much in the production. What is the motivation to perform? ?? Beside get garantee.pay?

(Ex. 48) Essig interpreted the first message as an offer of an independent contractor relationship for one year and possible employment after one year, and interpreted the message that followed a few minutes later as Lai returning "to his old issue about how I didn't have any incentive to perform under the agreement and what was the motivation for me to work, other than the guaranteed payment that I had." (VRP 136) This was reflected in Lai's earlier text messages proposing amendments to the parties' agreement. (Ex. 48)

Appellants are correct that when an employer breaches an employment contract, the employee is entitled to damages in the amount the employee would have received but for the breach. Appellants are also correct that those damages may be reduced if the employer satisfies its burden of proving the employee failed to mitigate those damages. Appellants are also correct that mitigation does not require that an employee accept a position that is not substantially equivalent to the position held before the employer's breach.

Where Appellants are incorrect, and dramatically so, is in their argument that the position Lai "offered" to Essig on August 28, 2015 was substantially the same as the position lost. The trial court, though not specifically addressing this "offer" by Lai, made factual findings regarding Essig's efforts to mitigate:

> 19. Since August 27, 2015, Essig has engaged in efforts to find comparable replacement employment. His efforts have included researching potential employment opportunities in Seattle, Oklahoma City, and nationwide. He has applied for employment for positions he is qualified for. He has participated in interviews for employment. He has engaged in these activities on a frequency that is reasonable under the circumstances. From August 27, 2015 through June 30, 2017, he was not offered employment.

CP 430 (~~CP 237~~) The trial court also made conclusions of law regarding Essig's efforts to mitigate:

> 34. Plaintiff Essig engaged in reasonable efforts to mitigate his damages. Over the period of September 2015 through June

> 2017, Plaintiff Essig routinely researched available employment in Seattle, in Oklahoma, and nationwide. Plaintiff Essig routinely applied for positions for which he was reasonably qualified. Plaintiff Essig participated in interviews for position. During the period of September 2015 through June 2017, Plaintiff Essig was not offered employment.
>
> 35. Lai and the Entity Defendants did not carry the burden of proof as to the defense of failure to mitigate damages.

CP 432
(~~CP 239~~)

Because the trial court made these findings after a bench trial, the factual findings are reviewed for substantial evidence, and the legal conclusions are reviewed de novo to determine if they are factually supported.

Because Appellants did not raise any issue or argument about the impact of Lai's August 28 text messages on a mitigation argument, the trial court's findings and conclusions (drafted and presented by Essig's counsel) did not specifically address the issue. But the trial court's findings and conclusions are consistent with a finding that that the text messages did not convey an "offer" that was substantially similar enough to compel a finding that Essig's refusal to accept it satisfied Appellants' burden at trial to prove Essig failed to mitigate. There are several material differences between the agreement (Ex. 3) and this purported "offer":

- The agreement was for employment; the "offer" suggests the relationship would be a purported independent-contractor relationship, which was a relationship Essig

explicitly rejected before he and Lai entered into the employment agreement.

- The agreement was for a two-year term (something Lai confirmed in his submission to the Employment Security Department, VRP 280 and Ex. 46); the "offer" had no term, with the suggestion that it could be terminated at any point.
- The agreement included health and dental benefits for Essig and his spouse; the "offer" was silent.
- The agreement included the option for bonuses as incentive compensation; the "offer was silent.
- The agreement included a promise of paid vacation, paid holidays, and sick leave; the "offer" was silent.
- The agreement included a promise of office space, office support, and an expense account; the "offer" was silent.

Given these differences, there was sufficient evidence to support the trial court's factual finding that Essig received no offers of comparable employment, including the implied factual finding that this message was not such an "offer." There was, therefore, substantial evidence for the trial court's factual finding, and support for the trial court's legal conclusion.

E. The Entity Defendants did not satisfy their burden of proof on any affirmative defense at trial, because they did not attend or participate at trial.

Finally, with respect to the Entity Defendants, it is important to recall some procedural pretrial history, and the affirmative-defense nature of the bona fide dispute and mitigation issues. Trial in this case was

scheduled for August 21, 2017. On that date, Lai and Van appeared for trial pro se, as the most recent counsel for them and the Entity Defendants had withdrawn as of June 1, 2017. (CP 469–70) They requested a trial continuance so they could secure counsel (despite not having done so in the two months before that trial date). That was granted and trial rescheduled for October 30, 2017, but the trial court ordered that the Entity Defendants were not permitted to participate at trial because they had not appeared for the August 21, 2017 trial date. (CP 471–72, 473–74) At trial, counsel for Lai and Van confirmed that he was not appearing at trial for the Entity Defendants. (VRP 23) The Entity Defendants were not represented at trial, offered no evidence, made no arguments, and put on no defenses. The trial court found that they were parties to the employment agreement (not, as Appellants argue, that their liability is derivative of Lai's). (~~CP 235~~ CP 428 ¶7, ~~CP 238~~ CP 431 ¶23) The trial court found that the Entity Defendants breached the employment agreement, that their breach caused damage, and that they failed to carry their burden regarding mitigation of damages. (~~CP 238–39~~ CP 431-32 ¶¶29–35) The trial court further found that the Entity Defendants were obligated to pay Essig wages under the employment agreement, that they were "employers" under RCW 49.52.070, and that they were liable for penalties and attorney fees under RCW 49.52.070. (~~CP 239–40~~ CP 432-33 ¶¶36–45)

Mitigation of damages is an affirmative defense, meaning the employer bears the burden of proving a former employee failed to mitigate

his or her damages.[21] Likewise, the Washington State Supreme Court has explained that "the burden falls on the employer to show the bona fide dispute exception applies."[22] The Entity Defendants, having failed to appear at trial, offer any evidence, or put on any defense, cannot be said to have carried their burden of proof on these affirmative defenses. Accordingly, even if this Court reverses on either defense as to Lai and Van (which it should not do), it should not do so with respect to the Entity Defendants.

VI. CONCLUSION

The parties tried their case. The trial court thoughtfully considered the evidence, weighed it, entered findings of fact based on the evidence, and entered conclusions of law based on the findings of fact. The trial court entered judgment accordingly. In doing so, the trial court did not err. The trial court's judgment should be affirmed in all respects.

Respectfully submitted this 19th day of November, 2018.

SCHLEMLEIN FICK & SCRUGGS, PLLC

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[21] *Federal Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 433–34, 886 P.2d 172, 183 (1994) (mitigation in breach of contract cases is an affirmative defense).

[22] *Washington State Nurses Ass'n v. Sacred Heart Medical Center*, 175 Wn.2d 822, 834, 287 P.3d 516, 521–22 (2012).

SCHLEMLEIN FICK & SCRUGGS, PLLC

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