No. 94481-4

SUPREME COURT
OF THE STATE OF WASHINGTON

McCLINCY BROTHERS FLOOR COVERINGS, INC. a Washington corporation dba McClincy's,

Appellant,

v.

COLLIN CARPENTER and TRISH CARPENTER, husband and wife, the Carpenter marital community; and RANDALL V. BROOKS, a single man,

Respondents,

and

COLIN CARPENTER and TRISH CARPENTER, husband and wife, and the Carpenter marital community,

Third Party Plaintiffs,

v.

TIMOTHY McCLINCY, a single man, and CROWN MOVING CO., INC., a Washington corporation,

Third Party Defendants.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Barbara Linde

RESPONDENT BROOKS' ANSWER TO APPELLANTS' PETITION FOR REVIEW

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TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Page(s)

Other Authorities

I. INTRODUCTION

This case arises out of a dispute between the Appellant, McClincy Brothers Floor Covering, Inc. (McClincy's), a general contractor, and its customers, Respondents Collin Carpenter and Trish Carpenter (Carpenters). The Carpenters own a residence in Medina, Washington, where the Appellant performed water damage repairs, restoration and upgrades during 2011 and 2012. McClincy's sole owner, officer and director is the other appellant, Tim McClincy (McClincy). The Respondent, Randall V. Brooks (Brooks), was an employee of McClincy's and served as the Project Manager at the Carpenters' worksite until early August, 2012. At that time, McClincy replaced Randy as the Project Manager on that job. Brooks was not fired by McClincy, but he resigned as an employee of McClincy's in a letter of resignation dated August 13, 2012 (Trial Exhibit 204). McClincy persuaded himself that Brooks and the Carpenters colluded to engage in "secret" transactions to circumvent McClincy's to do Phase Two of the Carpenters project. The first phase was related to restoration and upgrades to their existing home (the "inside" project). The second phase related to an addition to their home, with an open outside patio area with a fireplace and other amenities (the "outside" project). Brooks was a Project Manager on a portion of the "inside" project and was authorized by McClincy make a bid or bids for

all or portions of the "outside" project. (See Plaintiff's Second Amended Complaint, CP 1890, page 4, line 22.)

The Carpenters vacated their home and lived in an apartment while McClincy's performed demolition, restoration and construction work on their home. Although McClincy had open access to the Carpenters' vacant home at all times during McClincy's work there, he did not go to that job site until June or July, 2012. He observed materials and work that had been performed for which there were no "supplements" to McClincy's original contract and which appeared to exceed the scope of work authorized by the Carpenters' insurance company. He confronted his Project Manager, Brooks, who admitted that he was "behind on his paperwork", but that the Carpenters were honest, trustworthy customers who would pay for the additional work that they authorized on the "inside" project. Brooks had presented the Carpenters with two bids for McClincy's to do the "outside" project but they were deemed too high and not accepted. Two Supplements to McClincy's original contract were completed by Brooks and Tim McClincy which they presented to the Carpenters and signed on or about August 2, 2012. At that time, McClincy notified the Carpenters and Brooks that he was personally replacing Brooks as their Project Manager. Additionally, McClincy saw evidence of work commencing on the "outside" project and found that

Brooks had consulted the Carpenters' architect and assisted the Carpenters to obtain a building permit from the City of Medina. Although Brooks was trying to procure additional work for McClincy's, Tim McClincy wrongly interpreted Brooks' activities as evidence of his betrayal and efforts to circumvent McClincy's for Brooks' personal benefit. Brooks was humiliated and felt mistreated. On August 13, 2012, he wrote a letter of resignation, ending their employer-employee relationship. [Trial Exhibit 204].

McClincy's sued Carpenters and Brooks in King County Superior Court. The Carpenters and Brooks both countersued McClincy's and its principal, Tim McClincy. The trial court, the Hon. Barbara Linde, presided over numerous pretrial motions and hearings, as well as 13 days of a bench trial with 16 witnesses and over 200 exhibits. After spending over four weeks presiding over the trial, she found that Brooks was a loyal employee who never attempted to circumvent McClincy's and never received any compensation from anyone other than McClincy's, working within the scope of his employment as an authorized agent of McClincy's. [CP 2659, Finding of Fact 7, p. 5, LL 23-25. A true and correct copy of Brooks' Findings of Fact and Conclusions of Law entered by the Court on September 18, 2014 is attached hereto as Appendix "A".]

McClincy's is a serial litigator, having been a plaintiff or defendant in over 40 lawsuits in King, Snohomish and Pierce County alone, according to each court's public records and the testimony of Brooks, McClincy's employee assigned to participate in the preparation of McClincy's volume of litigation [RP 7/29/14 at p.53-54 and p.71-79]. As is its practice, McClincy's filed this lawsuit and has employed "scorched earth" litigation tactics including many motions intended to punish the respondents by requiring them to spend vast sums defending themselves. Judge Linde found that Brooks has been the victim of McClincy's vendetta. [RP 8/6/14, Court's Ruling, p.200, l.14]. As part of McClincy's vendetta against Brooks, McClincy's filed two other lawsuits against him, involving the disputed employment agreement, after this lawsuit was filed. *See McClincy's Brothers Floor Covering, Inc. vs. Randall V. Brooks*, King County Superior Court Cause No. 13–2-17322–1 SEA and *McClincy's Brothers Floor Covering, Inc. vs. Randall V. Brooks*, King County Superior Court Cause No. 15-2-26906-2 KNT. The first was voluntarily dismissed on October 30, 2014, by an order of the court declaring Brooks to be the prevailing party and awarding him statutory costs and attorneys' fees. The other identical lawsuit was dismissed because the plaintiff did not appear to prosecute the case on the assigned day of trial. McClincy's appeal of Judge Linde's

Findings of Fact, Conclusions of Law and Judgment to the Court of Appeals and the pending Petition for Review to the Supreme Court of Washington is in furtherance of that vendetta. This Court should deny the Appellants' Petition for Review and award Brooks all reasonable attorneys' fees and expenses incurred to respond, in accordance with RAP 18.1(j).

II. COUNTERSTATEMENT OF THE CASE

The Appellants are seeking discretionary review by the Supreme Court of Court of Appeals decision terminating review. RAP 13.4 (b)(1-4) sets forth four limited considerations governing acceptance of review. The Appellants' Petition for Review tacitly acknowledges that the Court of Appeals decision in this case does not involve an issue of substantial public interest, does not involve a significant question of law under the Constitution of the State of Washington or of the United States, and that it is not in conflict with another decision of the Court of Appeals. Instead, Appellants' Petition for Review pertaining to Brooks is limited to allegations that the Court of Appeals' decision only conflicts with two decisions of this Court.

First, is the allegation that the Court of Appeals decision in this case conflicts with *Waterjet Tech., Inc. vs. Flow Int'l. Corp., 140 Wn.2d 313, 996 P.2d 598 (2000)*, pertaining to the enforceability of an

"Employer Confidentiality Non-Solicitation and Non-Circumvention Agreement" Brooks signed in April, 2008 with an unincorporated non-party, McClincy's Home Decorating, Inc., approximately four months after starting work for McClincy Brothers Flooring Coverings, Inc. Second, is the allegation that the Court of Appeals decision in this case conflicts with *Innis vs. Tandy, 141 Wn.2d 517, 7 P.3d 807 (2000)*, pertaining to the interpretation of the fluctuating work week rule methodology of calculating Brooks' damages for unpaid overtime. However, the Court of Appeals decision in this case does not conflict with either of the cases relied on by the Appellants and the court should deny McClincy's Petition for Review and award Brooks the reasonable attorneys' fees and expenses he incurred to respond.

III. ISSUES PRESENTED FOR REVIEW THAT PERTAIN TO BROOKS AND ARGUMENT WHY APPELLANTS' PETITION FOR REVIEW SHOULD BE DENIED

A. The Court of Appeals decision does not conflict with *Waterjet Tech., Inc. vs. Flow Int'l. Corp., 140 Wn.2d 313, 322, 996 P.2d 598 (2000)*.

This case is very fact specific. So, let us first get the facts straight. Appellants' current counsel was not present at the trial and takes liberties with facts that are not part of the record and are not true. For example, the Appellants' Petition for Review, at page 17, falsely alleges that "Brooks signed an agreement that he would not divert McClincy

customers while he was employed or for a year afterwards. He then spent a year on McClincy Brothers' time working on an undocumented and unpaid project." First of all, the appellants' argument alludes to an "Employee Confidentiality, Nonsolicitation, and Non-Circumvention Agreement" signed in April, 2008 (CP at 515) between Brooks and a non-party, McClincy's Home Decorating, Inc., which had never been incorporated and was therefore *incapable* of entering into *any* contract with Brooks under RCW 23B.03.020(2)(g). Brooks never worked a minute for "McClincy's Home Decorating, Inc.", and never worked on any undocumented and unpaid project of the appellant, McClincy Brothers Floor Covering, Inc. To the contrary, the Trial Judge, the Hon. Barbara Linde, had the benefit of conducting many pretrial hearings, reviewing documentary exhibits, and weighing the credibility of sixteen (16) witnesses during a four week trial. She also considered the weight of documentary and forensic exhibits admitted at trial and concluded that Brooks was a loyal employee who never attempted to circumvent McClincy's and never received any compensation from anyone other than McClincy's for performing services within the scope of his employment as an authorized agent of McClincy's. [CP 2659, Finding of Fact 7, page 5, lines 23-25; *see* Appendix "A" hereto.] This case was a nonjury bench trial where Judge Barbara Linde appraised the credibility of the testimony

of the witnesses, resolved testimonial conflicts, evaluated circumstantial evidence, drew allowable inferences and otherwise determined the sustainable evidence before the court. Her findings of fact are deemed to be verities on appeal because appellate courts do not substitute their findings for those of the Trial Court. *See N. Fiorito vs. State of Washington*, 69 Wn.2d 616, 419 P.2d 856 (1966). The Appellants' allegations to the contrary are just not true.

The Appellants' Petition for Review also places false reliance on the case of *Waterjet Tech., Inc. vs. Flow Int'l. Corp., 140 Wn.2d 313, 322, 996 P.2d 598 (2000)*, to argue that any at-will employment contract can be modified without consideration by ignoring the distinctions in applicable laws and facts between the two cases. *Waterjet Tech., supra,* was also a very fact specific case interpreting the requirements of RCW 49.44.140 in an action to compel an employee to assign his rights to a patent to his employer. The court in that case was interpreting the public policies pertaining to the Uniform Trade Secrets Act (RCW 19.108.2010 *et. seq.)* and Washington state patent laws (RCW 49.44.140), not the statutes involved in this case that forbid employers from withholding earned wages owed to an employee. (RCW 49.52.010 *et. seq.*) *Waterjet, supra*, does not contradict the Court of Appeals in this case because it is distinguishable. Although the facts of that case led the court to hold that

"... Given the language of the... Agreement and the fact patent 824 related directly to the business of the employer, RCW 49.44.140(3) required nothing further *under the facts of this case*." (*Waterjet Tech*, supra at 321, *emphasis added.*) Even there, the court indicated that "Overreaching portions of the agreement should be stricken as against public policy." (*Waterjet Tech*, *supra* at 322). The Trial Court in the present case held: "But, the Court is persuaded by the argument and materials presented by the Defendant Brooks that it [the purported contract] is unenforceable, unenforceable. I am persuaded that it does lack consideration. It is not a contract between the Plaintiff [McClincy Brothers Floor Covering, Inc.] and the Defendant Brooks....the written instrument has what I agree is a fatal flaw. So, for those reasons I am granting that motion." [RP 6/27/14, at pp. 46-47, lines 24-13].

The Court of Appeals recognized that the Appellants' argument that the contract at issue involved "Confidentiality Agreements" rather than "Non-Competition Agreements" raised a distinction without a difference. In *Machen, Inc. vs. Aircraft Design, Inc.*, 65 Wn. App. 319, 828 P.2d 73 (1992), the court ruled that, "although cases cited by the parties involved noncompetition agreements rather than confidentiality agreements, we see no reason to distinguish between the two when the issue is the sufficiency of consideration to support them." That decision

also held, "contractual provisions which conflict with the terms of the legislative enactment are illegal and unenforceable." There, as here, the Trial Court ruled on undisputed facts, finding that the written agreement was unenforceable, as a matter of law, even if supported by sufficient consideration. Here, the Court of Appeals recognized that the appellants were not relying on an employment agreement, but a separate agreement it contended was to "Protect and preserve the confidential and/or proprietary nature of certain information, materials, and relationship of [McClincy Brothers Floor Covering, Inc.] that may be disclosed or made available to [Brooks] in connection with his employment." (CP at 515) The Court of Appeals said, at page 26:

> [Appellant] argues that only some provisions should be characterized as agreements not to compete and the court may sever those from the others. This is not persuasive. The purpose of the entire agreement is to protect McClincy's business by restraining Brooks. That includes the provisions McClincy's alleges Brooks violated. This agreement is a noncompete agreement.
>
> Accordingly, in order for the noncompete agreement to be valid, McClincy needed to provide additional consideration to support it. McClincy's does not dispute that there is no consideration for this agreement. Therefore, the Trial Court did not err by granting Brooks' Motion for Partial Summary Judgment.

The Court of Appeals decision in this case does not conflict with the decision entitled *Waterjet Tech, Inc., supra*. The Appellants' Petition for Review should be denied because the Court of Appeals correctly

upheld the Trial Court's dismissal of McClincy's claim against Brooks for breach of contract.

B. The Court of Appeals decision does not conflict with *Innis v. Tandy,* 141 Wn 2d 517, 7 P.3d 807 (2000).

Again, both of these cases are very fact specific. And again, the Appellants' Petition for Review overlooks the factual distinctions between this case and the facts in *Innis vs. Tandy,* 141 Wn.2d 517, 7 P.3d 807 (2000). Although that case also involved a dispute over calculating unpaid overtime owed to employees, those parties boldly stated that the document in dispute "is not an employment contract." But unlike this case, "neither party challenged the validity of the compensation plan which was acknowledged by Petitioners and Respondent to be a valid operating document." *Innis, supra,* at 535. By contrast, the very employment agreement that McClincy's is now contending is applicable, is one that it denied was valid or enforceable at the time of trial. The court was required to decide disputed facts about the contract and McClincy's never contended at trial that Brooks worked a fluctuating work week. The trial court in this case ruled, "The Court finds that Tim McClincy's testimony opposing Brooks' wage and overtime claims was not credible." [CP 2274] The evidence at trial was that Brooks was a "salaried employee" and McClincy's failed to establish a specified number of hours a week for which the salary is intended to compensate Brooks, creating the

mandatory assumption that his salary is based upon a 40 hour work week. [See Washington Department of Labor and Industries Administrative Policy Number: ES.A.8.2, entitled "How to Compute Overtime", a true and correct copy of which is attached as Exhibit "A" to the Declaration of Nicholas F. Corning, dated October 8, 2014, (CP 2350-2355) and attached as Appendix "B" hereto].

The Court of Appeals recognized that the Appellant had not produced "sufficient evidence at trial to prove that Brooks and McClincy's had a clear understanding that Brooks agreed to a fluctuating work week at a fixed salary. It does not specify a weekly salary or mention overtime. The Trial court did not err by calculating overtime using a 40 hour work week." (Opinion at page 28).

The Court of Appeals in this case accurately explained Washington law regarding the calculation of overtime pay at pages 27-28, stating:

> Washington's Minimum Wage Act (MWA) Chapter 49.46 RCW, requires employers to compensate their employees for any hours they work in excess of 40 hours a week at a rate of 1.5 times their regular rate of pay. RCW 49.46.130(1). An employee may be "paid for a fluctuating workweek" when the employee is paid a fixed salary and "it is clearly understood and agreed upon by both employer and employee that the hours will fluctuate from week to week and that the fixed salary constitutes straight time pay for all hours of work." *Fiore vs. PPG Indust., Inc.*, 169 Wn. App. 325, 344, 279 P.3d 972 (2012) (quoting Wash. Dept. of Labor and Indus. Administrative Policy ES.A.8.1(6), at 5 (issued November 6, 2006).

> If the employee agrees to a fixed salary with a fluctuating workweek, the regular rate of pay is the fixed weekly salary, divided by the number of hours worked. *Innis vs. Tandy, 141 Wn.2d 517, 529 n.42, 530, 7 P.3d 807 (*2000*)*. For each hour of overtime the employee works, the employer must pay him an additional .5 times the regular rate of pay. *Innis, 141 Wn.2d at 529 n.42, 530.* The overtime pay must be in addition to the fixed salary for the week. *Innis, 141 Wn.2d at 529 n. 42, 530.*
>
> Here, the trial court concluded that McClincy's had not established Brooks required hours....The trial court did not err by calculating overtime using a 40-hour work week....The only case McClincy's relies on, *Innis,* is distinguishable. *141 Wn.2d at 530-531.* There, the court held that the employer had established the employees' agreement to a fluctuating workweek as a matter of law because their compensation plan had a chart explaining the salary formula, with over time, or 54-hour work week. *Innis, 141 Wn.2d at 531.*

By contrast, McClincy disputed the very existence of a written employment agreement with Brooks and failed to prove that there was a clear understanding that the parties agreed to a fluctuating workweek with a fixed salary. The Court of Appeals referred to the disputed employment agreement and noted, "It does not specify a weekly salary or mention overtime". Opinion Page 28.

The Court of Appeals decision in this case does not conflict with *Innis v. Tandy, supra*, because the prerequisites for use of the fluctuating workweek method of overtime wage calculation were not met here. There is no conflict because the cases are distinguishable, based upon the facts and law of each case.

IV. RAP 18.1 REQUEST FOR FEES AND COSTS

The Trial Court and Court of Appeals awarded Brooks' reasonable attorneys' fees and expenses because he prevailed on his wage violation claim and breach of contract claim, both of which allow for the recovery of attorney's fees. RCW 49.48.030. Brooks respectfully requests attorneys' fees and expenses incurred preparing and filing his answer to the Appellants' Petition for Review if review is denied. RAP 18.1(j). The Appellants' Petition for Review, as to Brooks, only raises issues specifically directed at Brooks' wage violation claim and breach of contract claim, so it is necessary and appropriate to award reasonable attorneys' fees and expenses incurred for the preparation and filing of a timely answer, in accordance with RAP 18.1(j).

V. CONCLUSION

This Court should deny McClincy's petition for review and award Brooks his reasonable attorneys' fees and costs.

Respectfully submitted this 4th day of August, 2017.

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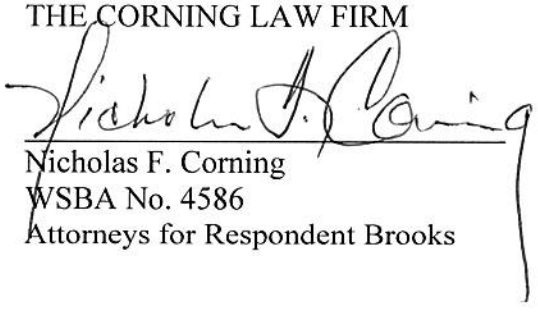

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CERTIFICATE OF SERVICE

On this date I caused to be delivered, by electronic mail, a true and correct copy of the document on which this certificate is affixed, to the following counsel of record:

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

DATED this 4th day of August, 2017, at Seattle, WA.

Nicholas F. Corning

IN THE SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF KING

McCLINCY BROTHERS FLOOR COVERING, INC., a Washington corporation dba McClincy's,

Plaintiff,

vs.

COLIN CARPENTER and TRISH CARPENTER, husband and wife, the Carpenter marital community; and RANDALL V. BROOKS,

Defendants.

COLIN CARPENTER and TRISH CARPENTER, husband and wife, and the Carpenter marital community;

Third Party Plaintiffs,

vs.

TIMOTHY McCLINCY, a single man, and CROWN MOVING CO., INC., a Washington corporation,

Third Party Defendants.

No. 13-2-03051-9 SEA

DEFENDANT BROOKS'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

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APPENDIX "A"

THIS MATTER came on regularly before the above entitled court for a nonjury trial, the Honorable Barbara Linde, King County Superior Court Judge, presiding. The Defendant Randall V. Brooks, a single man, was represented by his counsel of record, Nicholas F. Corning of The Corning Law Firm. The Defendants Collin Carpenter and Trish Carpenter, husband and wife, and the marital community composed thereof, were represented by Jennifer Karol of the Law Office of Jennifer T. Karol, PLLC and Timothy J. Graham of Hanson Baker Ludlow Drumheller P.S. The Plaintiff, McClincy Brothers Floor Covering Inc., and the Third Party Defendant, Tim McClincy, a single man, were represented by their counsel of record, Eric Zubel of Eric Zubel PC, and Conrad Zubel, of Zubel Law Offices PC.

The Court having heard the testimony of all witnesses called by all parties in open court; and the Court having examined the exhibits and documentary evidence submitted by all parties and having determined the credibility of the witnesses and the truth of the matters asserted; and having reviewed the pleadings and records on file herein and being otherwise fully informed, hereby makes and enters the following:

FINDINGS OF FACT

1. The Plaintiff, McClincy Brothers Floor Covering Inc., is a corporation duly organized and authorized to conduct business in accordance with the laws of the state of Washington, with its principal place of business in Renton Washington, doing business as "McClincy's." Its sole shareholder, officer and director is Tim McClincy, a single man, residing in Maple Valley, Washington. All acts and/or omissions of Tim McClincy were performed on behalf of himself individually and said corporation. McClincy's is engaged in the business of a general contractor that performs remedial services to homeowners who have

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suffered water damage as well as restoration, repairs, remodeling and other construction through the use of subcontractors.

2. The Defendants Collin Carpenter and Trish Carpenter are husband and wife, constituting a marital community under the laws of the state of Washington. They reside in Medina, Washington. The Carpenters suffered water damage to their home while they were away and hired McClincy's to perform remedial services, restoration, repairs and other construction that was conducted in 2011 and 2012.

3. The Defendant Randall V. Brooks (Brooks) is a single man, residing in Renton, Washington. Randy Brooks was employed by McClincy's from early February, 2008, until he resigned in a letter of resignation dated August 13, 2012. Brooks was assigned and served as McClincy's Project Manager at the Carpenters' worksite until August 2, 2012, at which time the Plaintiff's principal, Tim McClincy, replaced Brooks as the Project Manager on that job only.

4. Construction work at the Carpenters' residence evolved into two phases after the initial drying out and remedial work. The first phase was related to restoration and upgrades to their existing home (the "inside" project). The second phase was related to an addition to their home, with an outside patio area (the "outside" project). Brooks was the Project Manager for a portion of the "inside" project and was authorized by Tim McClincy to make a bid or bids for all or portions of the "outside" project.

5. Tim McClincy had ~~constant~~ unrestricted access to the Carpenters' home at all times during the Plaintiff's work there. The house was vacant, except for McClincy's subcontractors, because the Carpenters' homeowners' insurance had authorized them to move into an apartment until the construction was completed. However, Tim McClincy did not

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visit the vacant job site until June or July, 2012. At that time he walked in and around the building, observing materials and work that had been performed for which there were no "supplements" to McClincy's original contract with The Carpenters and which appeared to exceed the scope of work authorized by the Carpenters ' insurance company. He confronted the Project Manager, Brooks, who admitted that he was "behind on his paperwork", but that the Carpenters were honest, trustworthy customers who would pay for the additional work they had authorized on the "inside" project. In fact, two supplements to the original contract were completed by Brooks and Tim McClincy which were presented the Carpenters and signed on or about August 2, 2012. At that time, McClincy notified Brooks and the Carpenters that he was personally replacing Brooks as of their Project Manager.

6. At this same time, Brooks was dealing with personal issues relating to health issues of his aging parents and his own hospitalization. On August 9, 2012, he wrote a letter to Tim McClincy, expressing his concerns about the Plaintiff's hostile work environment and his mistreatment. On August 13, 2012 he wrote a letter of resignation, ending their employer-employee relationship.

7. While serving as the project manager for the Carpenters' project, Brooks learned that the Carpenters had previously designed an addition to their home, including an outside patio with a built-in barbecue. They told him that they wanted to proceed with that project while construction was occurring at their home. Brooks spoke to Tim McClincy about this addition and "outside" project and was authorized to obtain bids from subcontractors to see if McClincy's could get that additional work. Brooks began working with the Carpenters' architect, trying to get adequate drawings to determine the scope of work and its requirements so he could solicit bids from the appropriate subcontractors. In the

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process, he learned that the city of Medina had rezoned the Carpenters' property, complicating the ability to acquire a building permit. Brooks prepared two bids on behalf of the Plaintiff for the addition and the "outside" project, but both exceeded $400,000.00 and they were deemed too expensive by the Carpenters, who rejected them. However, Randy knew that the addition contemplated by the Carpenters would require "inside" finishing work, which was McClincy's area of expertise, and he thought he could ultimately obtain some of that work for McClincy's. In the meantime, Collin Carpenter told Brooks that he had talked to a neighbor who encouraged him to act as his own general contractor on the "outside project", hiring his own subcontractors. Brooks continued to counsel Mr. Carpenter and assisted him to obtain a building permit from the city of Medina, in hopes that he could get additional business for McClincy's. The Court finds that Brooks was engaged in "aggressive marketing" and that Tim McClincy wrongfully interpreted Randy's activities as evidence of betrayal and efforts to circumvent McClincy's for Brooks's personal benefit.

The Carpenters made statements to its insurer in an Examination Under Oath, indicating that they had paid Brooks cash for work at their home, but they both gave credible testimony at trial, disavowing and refuting that testimony and its adverse interpretation. The Court finds that Brooks received no cash or other compensation of any kind from anyone other than his employer, McClincy's, for performing services within the scope of his employment as its authorized agent. The evidence at trial established that Brooks was a loyal employee of McClincy's and never attempted to circumvent McClincy's. As to the Plaintiff's claim against the Defendants and their opposing evidence, the Court finds the Carpenters and Brooks credible and Tim McClincy not credible.

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8. McClincy's attached an Employee Confidentiality, Nonsolicitation and Non-Circumvention Agreement dated April 16, 2008, signed by Tim McClincy and Randy Brooks. This document was not disclosed in pretrial discovery and Tim McClincy signed and filed a Declaration, under oath, testifying that Randy Brooks had been hired on April 16, 2008. This was a false statement, under oath. The Defendant Brooks filed a Motion for Summary Judgment, contending that he was hired in February, 2008, and that this contract was void for lack of independent consideration (*see Labriola v. Pollard Group Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004)). McClincy's then filed a Sales Employee Confidentiality And Nondisclosure Agreement, dated February 5, 2008, signed by Tim McClincy and Randy Brooks. This document was also not disclosed in pretrial discovery and Tim McClincy signed and filed another Declaration, under oath, testifying that Randy Brooks had been hired on February 5, 2008. Both of these contracts purported to be between Brooks and "McClincy's Home Decorating, Inc.", but no such entity has ever been incorporated in the state of Washington and the court found that both of these agreements are void because the nonparty, nonentity called "McClincy's Home Decorating Inc." lacked the capacity to enter into any contracts. The Court also found that the Employee Confidentiality, Nonsolicitation and Non-Circumvention Agreement dated April 16, 2008, was void for lack of independent consideration. Accordingly, McClincy's Fifth Claim for Relief (For Damages for Breach of Contract Against Brooks) contained in the Plaintiff's Second Amended Complaint was dismissed, with prejudice.

9. After the Plaintiff rested its case in chief, the Defendant Brooks moved for a dismissal in accordance with CR 41(b)(3) on the grounds that the facts and the law presented by the Plaintiff had shown no right to relief. The Court, in accordance with *N. Fiorito*

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Company v. The State of Washington, 69 Wn.2d 616, 419 P.2d 586 (1966), weighed the evidence adduced and the credibility of the witnesses offered in support of the Plaintiff's claims and determined that the credible evidence of established facts precluded the recovery on the Plaintiff's claims against the Defendant Brooks. Accordingly, the Plaintiff's Fourth Claim for Relief (Against Brooks for Breach of Fiduciary Duty), the Plaintiff's Sixth Claim for Relief (Against Brooks for Intentional Interference With the Contract Between McClincy's and Carpenter) and the Plaintiff's Seventh Claim for Relief (Against Brooks for Interference With Business expectancy and Prospective Economic Advantage) contained in McClincy's Second Amended Complaint were dismissed, with prejudice.

10. Brooks and others testified at trial that they had written employment agreements that included compensation at a base salary level plus commissions or bonuses, calculated on a "credit toward production" formula. Tim McClincy denied the existence of any signed written employment agreement with Brooks. Brooks testified that part of his job at McClincy's was to assist Tim McClincy and his counsel of record, Eric Zubel, to prepare litigation in which McClincy's was involved. McClincy is a prodigious litigator, appearing as a party in more than 40 cases in King, Snohomish and Pierce County Superior Court within the last ten years, including two pending suits against Randy Brooks (Carpenters Exhibit 150). Brooks testified in Declarations, under oath, and at trial that he had observed Tim McClincy alter, conceal and destroy relevant evidence in other cases and accused Tim McClincy of destroying his signed written employment contract, which was never produced or offered as evidence in this case. Despite many opportunities, Tim McClincy never denied those accusations.

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The evidence at trial established, on a more probable than not basis, that Brooks's compensation was based on the terms of the written employment agreement, including base salary pay plus a bonus/commission calculated on a "credit toward production" formula. Tim McClincy denied owing any wages to Brooks, but the Court finds that McClincy's willfully and wrongfully withheld wages from Brooks by failing and refusing to pay him earned bonuses/commissions due to him for services rendered in the amount of $8,492.50. Further, the Court finds that these earnings were wilfully and wrongfully withheld and are to be doubled, totaling $16,985.16, together with costs of suit and a sum for reasonable attorneys' fees, in accordance with RCW 49.48.030 and RCW 49.52.070. The Court finds that Tim McClincy's testimony opposing Brooks's wage and overtime claims was not credible.

11. Brooks failed to prove that Tim McClincy promised to pay Brooks 10% commission on recoveries from McClincy's insurance carrier(s) or other responsible third-parties, for claims arising out of water damage claims for repairs and restoration at McClincy's office building in Renton and at Tim McClincy's private residence. Brooks's testimony on this subject was not credible because he was a sophisticated businessperson who the Court believes would have confirmed these oral agreements in writing and/or demanded payment from McClincy's in his letters dated August 9, 2012, or his letter of resignation dated August 13, 2012.

12. Throughout Brooks's employment by McClincy's, he was required to keep time records. McClincy's characterized his position as an "outside salesperson" to the Washington Department of Labor and Industries to obtain an exemption for overtime pay requirements. Brooks sought overtime for the four and one half years of his employment, but the Court finds that he held an administrative position for the first year. However, Brooks

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qualified for overtime pay throughout the last three and one half years of his employment because he was engaged in outside sales during that time, but McClincy's required him to spend more than 20% of his time doing inside office work, not related outside sales. Accordingly, the Court finds that the Plaintiff wrongfully withheld overtime pay due to Brooks in the amount of $84,100.02.

McClincy's never pleaded the affirmative defense of the statute of limitations as required by CR 8(c) and never argued it in Court prior to resting its case. Accordingly, the Plaintiff waived this affirmative defense. The Court finds that the employer, McClincy's had a good faith dispute with Brooks over his qualifications for overtime, so this amount is not willful, within the meaning of RCW 49.52.070. Brooks is not entitled to double damages, costs of suit or attorneys' fees to recover unpaid overtime otherwise called for in that statute.

Based on the foregoing FINDING OF FACTS, the Court enters the following:

CONCLUSIONS OF LAW

1. All parties and the subject matter hereof are within the jurisdiction of the above-entitled court.

2. All acts and/or omissions of Tim McClincy were performed for and on behalf of himself, individually, and the corporate Plaintiff, McClincy Brothers Floor Covering Inc., a Washington Corporation.

3. The Plaintiff, McClincy Brothers Floor Covering, Inc., failed to prove any causes of action or claims made against the Defendant Randall V. Brooks and he is entitled to a Judgment of Dismissal of all claims against him, with prejudice.

4. The Plaintiff hired the Defendant Randy Brooks in February, 2008. Brooks remained fully employed by the Plaintiff until he resigned in a letter dated August 13, 2008,

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"effective immediately." During his first year of employment he held an administrative position, exempt from overtime pay regulations of RCW 49.46.130. However, McClincy's lost that exemption during Brooks's last three and one half years of employment by assigning him to be an "outside salesperson", but requiring him to spend more than 20% of his time doing inside office work not related to outside sales (RCW 49.49.010(3)(c) and WAC 296-128-54). McClincy's did not establish the required hours of work for Brooks's salary, so it is determined to be 40 hours. His "regular rate" of hourly pay is found to be $34.62, calculated in accordance with WAC 296-128-550. The Court finds that Brooks worked 9.4 hours per week over 40 hours, less one half hour for lunch, equaling 8.9 hours of overtime due for 52 weeks for 3.5 years, at the rate of $51.92 per hour, totaling $84,100.02, in accordance with RCW 49.46.130.

5. Brooks worked for McClincy's under terms that entitled him to be compensated with a regular salary plus bonus or commission based on a "credit toward production" formula documented by McClincy's employment agreements, both signed and unsigned. Prior to 2012, Brooks's credit toward production had a negative balance because it failed to exceed his paid salary because McClincy's "carried over" a negative balance from his early employment when he did little or no sales work. In 2011, Tim McClincy promised Brooks that the negative carry-over would be eliminated and he would "start fresh" in qualifying for the bonus over his salary. Thereafter, Brooks earned bonuses in excess of his salary.

Although McClincy's made regular calculations of Brooks's bonus and commissions throughout his employment, it failed and refused to pay him for bonuses earned in 2012, constituting a "willful" withholding of wages within the meaning of RCW 49.52.050 and

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RCW 49.52.070. The testimony and evidence at trial established (summarized in Brooks's Illustrative Exhibit 253) that McClincy's wrongfully withheld $8,492.50 in bonus/commissions due to Brooks, for which he is entitled to a judgment for twice this amount, $16,985.16, plus his costs of suit and reasonable attorneys' fees (RCW 49.48.030 and RCW 49.52.070).

6. During the time that Brooks worked for McClincy's, he was entitled to be paid for sick leave and vacation time, but he failed to prove that he was entitled to compensation for any unused sick leave or unused vacation after his resignation, so this cause of action is dismissed, with prejudice.

7. During the time the Randy Brooks worked for the Plaintiff, he was authorized, instructed and required by Tim McClincy to assist in the preparation of water damage claims at the Plaintiff's office in Renton and Tim McClincy's residence. Brooks claimed he did so in reliance on Tim McClincy's oral promise that he would be compensated by receiving 10% of the recovery against McClincy's insurers or any other responsible third party. However, Brooks failed to prove this claim and it is dismissed, with prejudice.

8. Brooks successfully challenged two Confidentiality, Nondisclosure, Noncompete and Non-circumvention contracts sued upon by McClincy's, dated February 5, 2008 and April 16, 2008. Each contract entitled the prevailing party to an award of costs and attorneys' fees. The Court found both contracts to be void in an Order Granting Brooks's Motion for Summary Judgment dated July 15, 2014. Brooks, the employee, is the prevailing party and is entitled to an award of attorneys' fees, regardless of whether the contracts were invalidated in whole or in part, in accordance with *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004) and cases cited therein. The amount of the litigation costs

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and reasonable attorneys' fees shall be determined in a hearing with the presentation by the Defendant Brooks's counsel of record of the necessary costs and reasonable attorneys' fees incurred defending this litigation to be included in the Judgment to be entered herein. The Plaintiff's counsel of record will be afforded an opportunity to oppose or agree to any requested attorneys' fees or costs of suit, prior to the final Judgment to be entered herein.

9. ~~The amounts proved to be owed to Brooks constitute "liquidated" back pay. Although disputed, these damages are for fixed amounts and fixed time periods, allowing the recovery amount to be computed with exactness, so Brooks is entitled to recover prejudgment interest. The amounts awarded to Brooks for back pay and unpaid overtime shall bear interest at the highest rate allowed by law, ____% per annum, from the date they became due until the entry of a judgment herein.~~

DONE IN OPEN COURT this 18 day of September, 2014.

HON. BARBARA LINDE

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Department of Labor and Industries
Employment Standards Program

ADMINISTRATIVE POLICY
NUMBER: ES.A.8.2

HOW TO COMPUTE OVERTIME

HOURS WORKED — Covered employees must be paid for all hours worked in a workweek. In general "hours worked" includes all time an employee must be on duty, on the employer's premises, or at any other prescribed place of work. Also included is any additional time the employee is "suffered or permitted" to work. For example, an employee may voluntarily continue to work at the end of the shift. He or she may be a clerical worker who wants to finish an assigned task or correct errors; or a piecework employee may choose to remain and finish a unit or complete a roof due to changes in weather; a bookkeeper may want to remain and post work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that the work is continuing; thus, it must be counted as working time.

COMPUTING OVERTIME PAY — The Washington State overtime law, RCW 49.46.130, requires overtime compensation to be paid at a rate of at least 1-1/2 times the employee's "regular rate" for each hour worked in a workweek in excess of 40 hours. Generally, the regular rate for other than a single hourly rate includes all payments made by the employer to or on the behalf of the employee (excluding certain exceptions), and is determined by dividing the total compensation for an employee in any workweek by the total number of hours worked in the workweek for which such compensation was paid.

HOURLY RATE — If the employee is employed solely on the basis of a single hourly rate, the hourly rate is the "regular rate". If more than 40 hours is worked in the workweek, at least 1-1/2 times the **regular rate** for each hour over 40 is due. The hourly rate will not be the regular rate if additional compensation or incentive pay is earned by the employee during the workweek.

EXAMPLE: An employee paid $9.00 an hour works 44 hours in a workweek. The employee is entitled to at least 1-1/2 times $9.00, or $13.50, for each hour over 40. Pay for the week should be $360.00 for the first 40 hours of work, plus $54.00 (4 hours x $13.50), for the four hours of overtime; a total of $414.00.

HOURS WORKED EACH DAY							Single Hourly Rate = $9.00				OVERTIME
Sun	Mon	Tue	Wed	Thu	Fri	Sat	Hours Worked	Hourly Rate	Unpaid OT Hrs	OT Rate (1-1/2 Hourly Rate)	
31-Jan	1-Feb	2-Feb	3-Feb	4-Feb	5-Feb	6-Feb					
off	8	8	8	8	8	4	44	$9.00	4	$13.50	$54.00

EXAMPLE: An employee paid $9.00 an hour works 44 hours in a workweek. The employer pays the employee an additional $100.00 for the week as a bonus, representing 10% of the profits. The straight time earnings for the week is $496.00 (44 hours x $9.00 = $396.00 + $100.00 bonus). The weekly earnings ($496.00) divided by the actual hours worked (44) reflects a $11.27 per hour regular rate of pay for that week. Since the $496.00 is the total straight time pay for all 44 hours, all that is owed for the overtime is the half-time rate of $5.64 ($11.27 divided by 2), times four hours, or $22.56. The total wages, including overtime, owed for that particular week would therefore be $518.56.

HOURS WORKED EACH DAY							$9.00 Hourly Rate + $100.00 Weekly Bonus = $11.27 Reg Rate +2 = $5.64 OT Rate								OVERTIME OWED (OT Hrs x OT Rate)
Sun	Mon	Tue	Wed	Thu	Fri	Sat	Hours Worked	Hourly Rate	Straight Time Earn	Weekly Bonus	Weekly Earn Tl	Tl Hrs Worke	Regular Rate	OT Rate (1/2 Hrly	Unpaid OT	
31-Jan	1-Feb	2-Feb	3-Feb	4-Feb	5-Feb	6-Feb										
off	8	8	8	8	8	4	44 x	$9.00 =	$396.00 +	$100 =	$496.00 +	44 =	$11.27 ÷ 2 =	$5.64 x	4 =	$22.56

WORKING AT TWO OR MORE HOURLY RATES — Where an employee in a single workweek works at two or more different types of work for which different rates of pay (of not less than the applicable minimum wage) have been established, the regular rate for that week is the weighted average of such rates. That is, the total earnings are computed to include the compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs in that workweek.

EXAMPLE: An employee works 45 hours in a workweek and is paid $9.50 an hour for 5 hours and $15.00 an hour for 40 hours. The straight time earnings for the week is $647.50 (5 hours x $9.50 = $47.50 + $15.00 x 40 = $600.00; a total of $647.50). The weekly earnings ($647.50) divided by the actual hours worked (45) reflects a $14.39 per hour regular rate of pay for that week. Since the $647.50 is the total straight time pay for all 45 hours, all that is owed for the overtime is the half-time rate of $7.20 ($14.39 divided by 2), times five hours, or $36.00. The total wages, including overtime, owed for that week would therefore be $683.50.

APPENDIX "B"