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68336-5

Court of Appeals No. 68336-5-I

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

Timothy J. Goddard,
Appellant/Cross-Appellee,

v.

CSK Auto, Inc.,
Appellee/Cross-Appellant.

BRIEF OF APPELLEE/CROSS APPELLANT CSK AUTO, INC.

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A handwritten signature in black ink is written over a vertical stamp. The stamp contains the text "APPELLEE/CROSS APPELLANT" and "CSK AUTO, INC." along with some numbers.

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INTRODUCTION

Timothy Goddard (“Goddard”) appeals the entry of summary judgment by the Superior Court for King County, Washington (Hon. Judge Hollis Hill) (the “Trial Court”) which (1) dismissed his claims against Defendant/Appellee/Cross-Appellant CSK Auto, Inc. (“CSK Auto”); (2) granted, in part, summary judgment to CSK Auto with respect to its counterclaims against Goddard; and (3) based upon those rulings, granted a final judgment to CSK Auto in the total amount of \$257,226.64.

While, at bottom, this Court should not disturb the recovery awarded to CSK Auto by the Trial Court, in light of Goddard’s appeal, CSK Auto cross-appeals four decisions of the Trial Court: (1) the Trial Court should have granted summary judgment on CSK Auto’s claim for reimbursement of relocation expenses in its entirety, rather than just partially; (2) alternatively, the Trial Court should have granted summary judgment to CSK Auto on its claim for reimbursement under its Relocation Policy; (3) also alternatively, the Trial Court should have granted summary judgment to CSK Auto on its unjust enrichment claim; and (4) the Trial Court should have granted CSK Auto summary judgment on its separate claim for Goddard’s admitted breach of certain restrictive covenants between him and CSK Auto.

CSK AUTO'S ASSIGNMENTS OF ERROR
FOR PURPOSES OF ITS CROSS APPEAL

1. The Trial Court erred when it found that a May 16, 2008, letter between the parties (the "Letter Agreement") prevented CSK Auto from recovering from Goddard monies advanced to him for relocation expenses after July 11, 2008;

2. The Trial Court erred in finding CSK Auto's Relocation Policy was not an independent basis for recovery;

3. The Trial Court erred by not granting summary judgment to CSK Auto on its unjust enrichment claim.¹

4. The Trial Court erred when it granted Goddard summary judgment, and denied summary judgment for CSK Auto, as to CSK Auto's claim for damages associated with Goddard's breach of his employee non-recruitment covenant.

ISSUES RAISED BY GODDARD'S APPEAL
AND CSK AUTO'S CROSS-APPEAL

I. Issues raised by Goddard's appeal.

¹ If this Court agrees with CSK Auto that it is entitled to full reimbursement of the relocation expenses it previously advanced to Goddard pursuant to the Promissory Note between the parties (as explained below), then CSK Auto's alternative claims under the Relocation Policy and for unjust enrichment are rendered moot, as the extent of recovery under the Promissory Note would subsume the other claims. If, however, this Court affirms the Trial Court's holding that CSK Auto is entitled to only partial recovery under the Promissory Note, it should address these claims and enter summary judgment in favor of CSK Auto, as outlined more fully below.

A. Whether the Trial Court properly held that the Rescission Agreement between the parties did not release Goddard from his obligation under the Promissory Note to repay to CSK Auto relocation expenses advanced to him [it did];

B. Alternatively, if the Rescission Agreement released Goddard from his obligations under the Promissory Note, whether Goddard nonetheless was required to repay CSK Auto under its Relocation Policy for relocation expenses advanced to him after the Rescission Agreement was signed [yes]; and

C. If Goddard had no obligation to repay CSK Auto for previously-advanced relocation expenses, whether Goddard is entitled to double damages under RCW 49.52.070 [he is not].

II. Issues raised by CSK Auto's cross-appeal.

A. Whether CSK Auto's promise in the Letter Agreement to provide Goddard relocation benefits after the O'Reilly acquisition on terms "no less favorable" to those provided prior to the merger limits CSK Auto's recovery to pre-merger relocation payments [it does not];

B. Whether the undisputed record testimony requires a finding that CSK Auto was independently entitled to reimbursement of expenses pursuant to its Relocation Policy [it does];

C. Whether CSK Auto is entitled, in the alternative, to summary judgment on its unjust enrichment claim [it is]; and

D. Whether CSK Auto is entitled to summary judgment on its claim that Goddard breached his employee non-recruitment covenant, based upon Goddard's candid admission he breached it[it is].

STATEMENT OF THE CASE

I. Factual Background.

A. Parties and General Background.

CSK Auto was the largest specialty retailer of auto parts and accessories in the Western United States prior to its acquisition by O'Reilly Automotive, Inc. ("O'Reilly") in July 2008.² CSK Auto operates today, but now does so under the fictitious name of "O'Reilly Auto Parts." Goddard is a former senior manager of CSK Auto. Goddard worked for CSK Auto for 25 years, until he voluntarily resigned on July 2, 2009, to go to work for AutoZone, Inc. ("AutoZone"), a competitor.³

B. Goddard's relocation from Arizona to Washington.

During 2008, CSK Auto paid approximately \$360,982.10 to Goddard or on his behalf to relocate Goddard and his family from Arizona to the Seattle, Washington area.⁴ Before agreeing to incur these expenses, CSK Auto received two commitments. First, Goddard signed a Promissory Note dated February 15, 2008 (the "Promissory Note"), that

² CP 178, ¶3.

³ See CP 487.

⁴ CP-178, at ¶5; see also CP 509. When it filed its summary judgment motion, CSK Auto believed that the amount advanced was in excess of \$407,000.00. Subsequent review revealed, however, that certain expenditures had inadvertently been counted twice, resulting in the revised amount described above.

(1) obligates Goddard to repay relocation expenses paid to him or incurred on his behalf by CSK Auto if his employment terminates within two (2) years from the effective date of the transfer; and (2) expressly permits CSK Auto to deduct any such sums from his final paycheck.⁵ Goddard's employment terminated less than two years following his signing of the Promissory Note and relocation to Washington, thereby triggering the contingent repayment obligation under the Promissory Note.⁶

Goddard's relocation was also subject to CSK Auto's then-existing Relocation Policy (the "Relocation Policy").⁷ That policy, which Goddard knew about, read prior to his relocation, and admits governed his relocation,⁸ similarly required Goddard to repay CSK Auto for relocation expenses if Goddard resigned employment "within twelve (12) calendar months following the acceptance of a relocation[.]"⁹

Subsequent to his signing the Promissory Note, Goddard requested that CSK Auto loan him additional amounts in excess of the face amount of the Promissory Note. These additional loans became subject to the terms of the Promissory Note and were also subject to the terms of the Relocation Policy: the face amount of the Promissory Note was \$237,750.50, but the Promissory Note expressly states that it is based upon an "estimated relocation sum of [\$237,750.50]" and states that amount due

⁵ CP 509-510; CP 556.

⁶ See CP 487, 511-512.

⁷ See CP 576-593 ("Relocation Policy").

⁸ CP 514.

⁹ CP 581, #5.

under the Promissory Note would be “adjusted for actual relocation payments made to or for the Maker[.]”¹⁰ Ultimately, Goddard received relocation payments from CSK Auto totaling \$360,982.10.¹¹

C. CSK Auto is acquired by O’Reilly Automotive.

In the midst of Goddard’s relocation, CSK Auto was in discussions with O’Reilly Automotive, Inc. which ultimately resulted in CSK Auto being acquired by O’Reilly on July 11, 2008,¹² after which CSK Auto continued as O’Reilly’s wholly-owned, indirect subsidiary.¹³ Knowing that Goddard’s relocation was progressing at the same time as the merger, the pre-merger management of CSK Auto provided Goddard with a letter agreement dated May 16, 2008 (the “Letter Agreement”), providing that if there was a change in control, CSK would provide relocation benefits “on terms no less favorable than those provided to you prior to the consummation of the Change in Control, and in any event, no less favorable than the CSK Auto, Inc. Relocation Policy as in effect and applicable to you prior to the Change in Control.”¹⁴

Two weeks later, also in anticipation of the merger and immediately prior the execution of the merger agreement, a number of CSK Auto executives, including Goddard, entered into severance agreements entitling them to at least six months’ severance upon a

¹⁰ CP 515-518; CP 556; CP 576-593; CP 178-179 ¶¶ 6-8.

¹¹ CP 180 at ¶¶ 10-11 and footnote 4, above.

¹² CP 180, ¶ 12.

¹³ CP 180-181, ¶ 13.

¹⁴ CP 518-519; CP 598-599.

termination of employment without cause (the “Severance Agreement”).¹⁵ Section 5 of the Severance Agreement contains certain restrictive covenants, including an agreement that, for a period of six (6) months following his termination of employment, Goddard would not “[d]irectly or indirectly, hire or attempt to hire any employee of [CSK Auto].”¹⁶

D. Goddard signs a Voluntary Rescission of Severance Agreement after the O’Reilly acquisition.

Following the merger, O’Reilly wished to keep intact the majority of CSK Auto’s management team. As an inducement for Goddard and other CSK managers to stay employed, CSK Auto offered to accelerate the payment of severance benefits to Goddard and other CSK executives, despite the fact that their employment had not been terminated – in other words, Goddard was offered cash payments equal to six months’ salary in return for his waiving his rights to post-termination severance under the Severance Agreement.¹⁷ Therefore, Goddard and CSK Auto entered into a Voluntary Rescission of Severance Agreement (the “Rescission Agreement”).¹⁸ Pursuant to the Rescission Agreement, the prior Severance Agreement was superseded, and Goddard received a payment equal to six months’ salary (\$88,500) on June 12, 2009.¹⁹

¹⁵ CP 503; CP 533-545.

¹⁶ CP 503; CP 533-545.

¹⁷ See CP 547-551; CP 508.

¹⁸ See CP 547-551; CP 508.

¹⁹ CP 508; CP 181.

The Rescission Agreement is not dated. Goddard cannot remember when he signed it, but thinks it was sometime in August 2008.²⁰ Goddard believes he was provided the Rescission Agreement with another document entitled “Offer of Employment.” The Offer of Employment is dated August 4, and Goddard signed the Offer of Employment on August 25.²¹ He testified he might have signed the Rescission Agreement and the Offer of Employment “at or about the same time.”²² More specifically, however, Goddard testified he signed the Rescission Agreement *before* he was paid additional relocation benefits from CSK Auto related to the loss of equity on the sale of his Arizona home – a payment that was approved on August 5, 2008 and made on August 22, 2008.²³ According to Goddard: “I believe that O’Reilly – yeah, ***I think it was after the rescission of severance***, when they found out that I’d lost even more on my house, they reimbursed half of the loss in equity.”²⁴ Thus, based upon Goddard’s testimony, it appears that the Rescission Agreement was signed prior to August 22 and below the parties used that as the signing date.

While the central purpose of the Rescission Agreement was to cancel the prior Severance Agreement, paragraph 6 of the Rescission Agreement expressly retained and incorporated Section 5 of the Severance Agreement – a restrictive covenant that included a provision prohibiting

²⁰ See CP 504-506.

²¹ See CP 504-506; CP 547-551 and CP 553-554.

²² See CP 506.

²³ See CP 595; CP 565 (showing August 22 payment); CP 516-517.

²⁴ CP 513 (emphasis added).

Goddard from attempting to recruit CSK Auto employees to a competitor for six months after his termination of employment.

As part of the Rescission Agreement, the parties also entered into *differently worded* releases. Paragraph 5(a) of the Rescission Agreement releases CSK Auto from certain things:

In consideration of the Company's entering into this Rescission of Severance Agreement and the payments and benefits set forth herein, the Executive, on behalf of himself and his heirs, executors, administrators, successors and assigns, knowingly and voluntarily waives, releases and forever discharges the Company . . . from any claim, charge, action or cause of action any of them may have against any such released person, whether known or unknown, from the beginning of time through the date of this Rescission of Severance Agreement based upon any matter, cause or thing whatsoever related to or arising out of 1) his employment by the Company or 2) The [Severance] Agreement, other than claims arising out of a breach of this Rescission of Severance Agreement or any claim that cannot be waived by law. All such claims are forever barred by this Rescission of Severance Agreement.²⁵

Section 5(b) releases Goddard from certain things:

The Company hereby agrees not to pursue or further any action, cause of action, right, suit, debt, compensation, expense, liability, contract, controversy, agreement, promise, damage adjustment, demand or claim whatsoever at law or in equity whether known or unknown which the Company ever had, now has, or hereafter can, shall or may have for, upon or by any reason of any matter, cause or thing (collectively "Company Claims") whatsoever occurring up to and including the date Executive signs this Rescission of Severance Agreement against Executive and hereby releases, acquits, and forever absolutely discharges Executive of an from all of the foregoing, except with respect to the obligations of Executive set forth in this Rescission of Severance Agreement.²⁶

²⁵ CP 548-549, ¶ 5(a).

²⁶ CP 549, ¶ 5(b).

E. Goddard resigns, and CSK Auto offsets amounts Goddard owed CSK Auto from his final paycheck.

Goddard resigned on July 2, 2009, a mere twenty days after he received his accelerated “severance” payment equal to six months’ salary.²⁷ CSK Auto offset from Goddard’s final paycheck a portion of the amount Goddard owed CSK Auto pursuant to the Promissory Note and Relocation Policy as his resignation occurred less than two years following his execution of the Promissory Note and less than a year following Goddard’s acceptance of certain relocation benefits.²⁸

But for this setoff, Goddard would have been paid the gross amount of \$5,019.23 in salary, and \$23,957.75 in accrued vacation pay, or \$28,976.98.²⁹ CSK Auto paid Goddard the gross amount of \$615.60 in salary to comply with its minimum wage obligations.³⁰ Thus, the gross amount ultimately offset from Goddard’s final paycheck was \$4,403.63 in salary and \$23,957.75 in vacation pay, or \$28,362.38.³¹

F. Goddard immediately breaches his covenant not to recruit CSK Auto employees.

On July 6, 2009, the Monday after Goddard resigned, he went to work as a regional manager for AutoZone, CSK Auto’s biggest competitor, and promptly began recruiting employees with whom he had worked to leave CSK Auto and work for AutoZone. The first manager to

²⁷ CP 487.

²⁸ CP 182, ¶20.

²⁹ CP 182, ¶21.

³⁰ CP 182, ¶22.

³¹ *Id.* CSK Auto withheld applicable taxes from each of these amounts.

leave CSK Auto was Doney Dawson, a District Manager who had been employed there for over 20 years. On September 25, 2009, CSK Auto received resignation notices from two additional District Managers recruited by Goddard – Jesse Jimenez and Bill Murdock.³² Goddard admits he recruited these employees in violation of his agreements.³³

Goddard recruited other CSK Auto employees to leave CSK Auto for AutoZone. Territory Sales Manager Derek Reid was called by Doney Dawson and then met with Goddard, who attempted to entice him to leave CSK Auto for AutoZone.³⁴ CSK Auto was forced to give Reid a \$5,000 annual salary increase to convince him to stay.³⁵ Goddard admitted that he participated in attempting to recruit Reid to AutoZone. Reid's Declaration was shown to Goddard during Goddard's deposition; Goddard agreed that Reid's description of events was substantially accurate.³⁶

II. Proceedings in the Trial Court.

Goddard sued CSK Auto to recover the amounts CSK Auto set-off from his final paycheck. CSK Auto counterclaimed, seeking recovery of the relocation expenses it previously advanced to Goddard, for an injunction prohibiting Goddard from breaching his restrictive covenants

³² See CP 183, ¶25; CP 607-609, ¶¶ 24-30. Other employees were solicited by Goddard but did not leave CSK Auto. See CP 488-502; CP 529-531, ¶¶1-8; CP 525-527, ¶¶1-5; CP 521-523. ¶¶1-6.

³³ See CP 488-502.

³⁴ See CP 488-502; CP 529-531, ¶¶1-8.

³⁵ CP 608, ¶28; CP 531, ¶8.

³⁶ See CP 499. The only issue Goddard took with Goddard's testimony was immaterial – Goddard believed that Reid had incorrectly stated the job title of another employee who had interviewed Reid at AutoZone.

with CSK Auto, for damages associated with Goddard's breach of the restrictive covenants, and for unjust enrichment. After a temporary removal to federal court, the parties (1) reached agreement on a consent injunction and judgment that prohibited Goddard from further breaches of his restrictive covenants with CSK Auto, (2) conducted discovery, and (3) thereafter filed cross motions for summary judgment.

A. The parties' summary judgment motions.

The parties filed motions for summary judgment on July 22, 2011:

First, CSK Auto moved for summary judgment requesting dismissal of all of Goddard's claims, which included claims for (1) failure to pay wages under RCW 49.48.010, (2) breach of contract, (3) unjust enrichment, (4) double damages pursuant to RCW 49.52.070, and (5) attorney's fees pursuant to RCW 49.48.030 (all related to the same alleged failure of CSK Auto to pay wages). As described above, with respect to each and every one of his claims, Goddard sought to recover the \$28,362.38 CSK Auto had offset from his final paycheck, plus liquidated damages and attorney's fees under Washington's wage payment statute.

Second, CSK Auto offensively moved for summary judgment (as to liability) on its counterclaims against Goddard for the recovery of the relocation expenses previously paid to him or on his behalf. CSK Auto's counterclaim in this respect was threefold, and sought recovery for: (1) Goddard's breach of the Promissory Note; (2) Goddard's breach of his

obligations under its CSK Auto's separate Relocation Policy; and (3) in the alternative, for unjust enrichment.

Third, CSK Auto moved for summary judgment on its counterclaim for Goddard's breach of the employee non-recruitment covenant, based upon Goddard's admission that he had, in fact, violated that covenant by soliciting CSK Auto employees to leave for AutoZone.

Fourth, Goddard offensively moved for summary judgment on liability with respect to his claims, claiming that CSK Auto's offset was improper because it had released Goddard from his relocation expense repayment obligations by means of the Rescission Agreement. *All* of Goddard's arguments were dependent on the contention that his obligation to reimburse CSK Auto for relocation expenses the Company paid to him or on his behalf was extinguished by the Rescission Agreement.

Thus, the lynchpin issues for the competing motions were (1) whether CSK Auto had released Goddard from his relocation expense repayment obligations by means of the Rescission Agreement; (2) whether CSK Auto had an independent basis under its Relocation Policy for recovery of those relocation expenses; and (3) whether Goddard's obligations not to solicit CSK Auto employees had expired.

B. The Court's summary judgment orders.

The Trial Court issued an initial summary judgment Order on August 31, 2011, granting CSK Auto's Motion for Summary Judgment and denying Goddard's, holding:

The Court FINDS that the Severance Agreement Rescission contract does not cover the relocation reimbursement because it covers only matters that occur after [*sic*³⁷] its signing. The obligation to repay relocation monies did not occur until after the Rescission Agreement signing. Furthermore, the Severance Rescission expressly excludes employment matters one of which is the party's agreement regarding the terms under which relocation expenses need be repaid.³⁸

Thereafter, Goddard filed a Motion for Reconsideration, and the subsequent briefs also pointed out that the Trial Court's August 31, 2011 Order did not fully address CSK Auto's other counterclaims. On September 26, 2011, the Trial Court entered an amended Order, which corrected the scrivener's errors in the August 31 Order, but left its central holdings intact. In the September 26 Order, the Trial Court affirmed its prior holding that the Rescission Agreement did not release Goddard from his obligations to repay CSK Auto under the Promissory Note for previously-advanced relocation expenses, for two reasons: (1) because Goddard's obligation to repay CSK Auto for relocation expenses did not mature until after the Rescission Agreement was signed; and (2) the Rescission Agreement expressly did not cover employment-related

³⁷ This was erroneous and should have read "before" its signing. The Trial Court acknowledged and corrected this and other scrivener's errors in its later Orders.

³⁸ CP 712.

matters, except for rescinding and replacing Goddard's prior Severance Agreement with CSK Auto.³⁹ The Court also (1) granted summary for CSK Auto on all of Goddard's claims against CSK Auto; (2) granted summary judgment to Goddard with respect to CSK Auto's claim that he had breached his employee non-recruitment covenant; and (3) requested additional briefing from CSK Auto with respect to the *amount* of relocation expenses it could recover against Goddard and the effect the Court's ruling had on CSK Auto's unjust enrichment claim.⁴⁰

After further briefing, the Court entered its final summary judgment order on November 2, 2011. The November 2 Order affirmed the Trial Court's prior rulings, but for the first time held that the May 16, 2008 Letter Agreement prevented CSK Auto from recovering expenses it had advanced to Goddard *after* the O'Reilly acquisition on July 11, 2008 – a result neither party had advocated or frankly, expected.⁴¹

C. The parties' damages stipulation, and the Trial Court's attorney's fee award and judgment.

After the Trial Court's November 2 Order, the parties reached a Stipulation on the amount of relocation expense damages CSK Auto could recover pursuant to the November 2 Order (*i.e.*, those expenses advanced to Goddard prior to the O'Reilly acquisition on July 11, 2008, plus interest under the Promissory Note) – a total of \$181,166.64.

³⁹ CP 714-717.

⁴⁰ *Id.*

⁴¹ CP 718-721.

CSK Auto thereafter moved for recovery of its attorney's fees, as provided for in the Promissory Note. After briefing, the Trial Court awarded fees to CSK Auto in the amount of \$76,060, and therefore entered a final judgment for damages, interest, and attorney's fees totaling \$257,226.64 (\$181,166.64 (principal and interest) + 76,060.00 (fees)).⁴²

ARGUMENT

The Trial Court properly held that Goddard remained subject to the Promissory Note and owed CSK Auto at least \$257,226.64 in principal, interest, and attorney's fees. It mistakenly held, however, that CSK Auto's right to recovery is limited to expenses paid to Goddard or on his behalf prior to July 11, 2008. Goddard, on the other hand, claims CSK Auto improperly offset \$28,362.38 from his final paycheck and wants to recover from CSK Auto that amount, plus statutory penalties and attorney's fees. Goddard claims he owes CSK Auto nothing and it released him from his repayment obligations by means of the Rescission Agreement. The Trial Court correctly found that the Rescission Agreement did not release CSK Auto's claims against Goddard. CSK Auto was not only entitled to withhold the above-referenced monies, but should also recover from Goddard the base amount of \$332,619.72 for the

⁴² See CP 722-725.

substantial relocation expenses advanced to Goddard that Goddard agreed to repay, plus interest and attorney's fees.⁴³

Goddard's alternative argument is that CSK Auto released him of his obligation to repay the relocation expenses by means of the May 16 Letter Agreement. Neither party contended below that the Letter Agreement effected a partial release of CSK Auto's claims for reimbursement, but the Trial Court nonetheless determined that the Letter Agreement constituted a release by CSK Auto for any relocation expense incurred by Goddard or on his behalf after July 11, 2008.

CSK Auto cross-appeals this portion of the Trial Court's ruling, as well as the Trial Court's dismissal of its claims pursuant to the Relocation Policy, for unjust enrichment, and for Goddard's breach of his non-recruitment covenant with CSK Auto.

I. The release contained in the Rescission Agreement did not waive Goddard's obligations under the Promissory Note.

A. Missouri law applies to the Rescission Agreement.

The Rescission Agreement contains a Missouri choice of law clause.⁴⁴ The Supreme Court has explained that Washington courts "generally enforce contract choice of law provisions . . ."⁴⁵ The parties

⁴³ The Trial Court awarded CSK Auto the base amount of \$141,536 in principal before awarding interest and attorney's fees; CSK Auto seeks the additional principal amount of \$191,084, plus additional attorney's fees and interest occasioned by this appeal.

⁴⁴ CP 550, ¶ 11.

⁴⁵ *McKee v. AT&T Corp.* 191 P.3d 845, 851 (Wash. 2008). O'Reilly is based in Missouri, and the Rescission Agreement was negotiated with representatives of O'Reilly in Missouri, hence the Missouri choice of law provision.

agreed below that Missouri law applied, and the Trial Court similarly (and properly) applied Missouri law in construing the Rescission Agreement. Goddard's brief in this Court similarly argues the case pursuant to Missouri law.⁴⁶

Under Missouri law, "[a]ny question regarding the scope and extent of the release is to be resolved according to what may fairly be said to have been within the contemplation of the parties at the time release was given. This, in turn, is to be resolved in light of all the surrounding facts and circumstances under which the parties acted."⁴⁷ Thus, under Missouri law, *context* is key and must be considered by the Court in construing the scope of the release here. Goddard, however, would have the Court altogether ignore that context as well as the specific language in the Rescission Agreement expressly limiting the scope of the release.

B. The Rescission Agreement does not release Goddard's from repaying previously-advanced relocation expenses.

Both the context surrounding the execution of the Rescission Agreement and its language make clear that Goddard was not released from his obligations under the Promissory Note or Relocation Agreement. The circumstances leading up to the signing of the Rescission Agreement include the merger talks between O'Reilly and CSK Auto; the

⁴⁶ See CP 128-129; CP 550, ¶ 11. Goddard's cursory reference to Washington law on pages 19-20 of his Appeal Brief is therefore extraneous and irrelevant. Regardless, Appellant's discussion of Washington law addresses only general terms of contract construction, he cites no Washington case that addresses the specific issues here, and the outcome under Washington law would be no different.

⁴⁷ *Andes v. Albano*, 853 S.W.2d 936, 941 (Mo. 1993).

determination the merger and acquisition would proceed; and the opportunistic signing of the Severance Agreements by CSK Auto's senior executives on the eve of the presentation of the plan of merger.⁴⁸ That context demonstrates the intent of the Rescission Agreement was to peel back obligations under the Severance Agreement, not eliminate obligations which existed pursuant to other agreements between the parties.

Further, Missouri law is clear that a "general release disposes of the entire *subject matter* involved."⁴⁹ Thus, to address the language in the Rescission Agreement, the Court must first make a determination of the subject matter of the release. To do that, the Court must consider the context in which the release was signed as evidenced, in part, by the terms and structure of the release as a whole.

Nothing about the Rescission Agreement – its terms, its structure, its context, its language, or the parties' course of conduct – suggests CSK Auto intended to release non-matured claims wholly unrelated to the limited subject matter of the Rescission Agreement. The Rescission Agreement's terms and structure demonstrate it was not intended to go beyond a release of obligations related to the Severance Agreement and current claims between the parties. The title says it all: it is a "Voluntary Rescission of *Severance Agreement*" – not a rescission of *all* agreements

⁴⁸ CP 503; CP 533-545. The Severance Agreements are dated March 31, 2008, and the plan of merger was dated April 1, 2008.

⁴⁹ *Goldring v. Franklin Equity Leasing Co.*, 195 S.W.3d 453, 456-457 (Mo. App. 2006) (emphasis added).

(emphasis added). Indeed, the first five “Whereas” clauses make clear its intent is to replace the Severance Agreement.⁵⁰ Moreover, the consideration recited in the Rescission Agreement is limited to two specific things: (1) Goddard’s continued employment following the O’Reilly merger; and (2) accelerated payment of six months’ salary without the employee having to terminate employment.⁵¹ These elements demonstrate the agreement’s limited scope.

For all of Goddard’s reliance on the plain language of the Rescission Agreement, what he cannot avoid is that CSK Auto *expressly excluded* obligations arising from Goddard’s employment from the Rescission Agreement. Section 1 unambiguously states: “*Nothing in this document shall define the employment relationship between CSK as a subsidiary of O’Reilly beyond the obligations set forth herein . . .*” Notwithstanding, however, the Executive is not precluded from entering some additional employment agreement with the Company.”⁵² The Trial Court correctly found this language expressly *excludes* employment matters from the scope of the Rescission Agreement, including the release contained therein, leaving undisturbed Goddard’s obligations to repay expenses under the Promissory Note and/or Relocation Policy.

⁵⁰ See CP 547-551.

⁵¹ *Id.*

⁵² CP 547, ¶ 1 (emphasis added).

The Missouri cases relied upon by Goddard do not help him. In *Givens v. U.S. National Bank of Clayton*,⁵³ the release contained language encompassing claims associated with a specific defined subject matter: the releasee’s “hiring, employment or dismissal by [the employer].”⁵⁴ *Givens* specifically involved employment-related releases and employment-related claims, which is why the court found the releases to be applicable.

Here, the situation is exactly opposite from *Givens*. There is a specific *exclusion* of employment matters in Paragraph 1 of the Rescission Agreement. Remember also that there are *two* releases contained in the Rescission Agreement – CSK Auto released Goddard, and Goddard released CSK Auto. There is no reference to Goddard’s employment in CSK Auto’s release of Goddard, because the limited scope of the release excluding general employment matters is already addressed in Paragraph 1.⁵⁵ Conversely, however, Goddard’s release of CSK Auto *includes* language similar to that in *Givens*:

Executive . . . knowingly and voluntarily waives, releases and forever discharges the Company . . . from any claim, charge, action or cause of action any of them may have against any such released person, whether known or unknown, from the beginning of time through the date of this Rescission of Severance Agreement based upon any matter, cause or thing whatsoever ***related to or arising out of 1) his employment by the Company or 2) The [Severance] Agreement***, other than claims arising out of a breach of this Rescission of Severance Agreement or any claim that cannot be waived by law.⁵⁶

⁵³ 938 S.W.2d 679 (Mo. App. 1997).

⁵⁴ *Givens*, 938 S.W.2d at 681.

⁵⁵ See CP 549, ¶ 5(b).

⁵⁶ CP 548-549, ¶ 5(a) (emphasis added).

The difference in the release language applicable to CSK Auto and to Goddard in the Rescission Agreement is significant – Goddard’s release of CSK Auto expressly covers employment-related matters, whereas CSK Auto’s release of Goddard does not. That is entirely consistent with the express language in Paragraph 1 of the Rescission Agreement providing that the general terms and conditions of Goddard’s employment *were not covered* by the Rescission Agreement, the specific and limited purpose of which was to address Goddard’s prior Severance Agreement.

Similarly important is the express reference to Goddard’s Offer Letter in Section 1 of the Rescission Agreement, signed “at or about” the same time Goddard signed the Rescission Agreement.⁵⁷ If the release contained in the Rescission Agreement did not vitiate the Offer Letter governing Goddard’s employment, it also did not vitiate other agreements governing Goddard’s employment, including the Promissory Note and Goddard’s obligations under CSK Auto’s Relocation Policy.

Missouri courts require consideration of the context and the language of an agreement to determine the subject matter and scope of a release.⁵⁸ The context and language of the Rescission Agreement demonstrate conclusively that Goddard’s prior obligations to repay relocation expenses related to his employment and which had not accrued at the time the Rescission Agreement was signed were *not* released.

⁵⁷ CP 506.

⁵⁸ *Andes*, 853 S.W.2d at 941.

C. The release in the Rescission Agreement does not cover non-matured claims.

It is black-letter law that a release agreement, even a general release, should not be construed to obviate contracts independent of the subject matter of the release, waive future claims, or waive contractual claims that have not yet matured at the time of signing. Missouri law is likewise clear that releases cannot, as a matter of law, be construed to waive non-matured claims.

In *Daniels v. Tip Top Plumbing and Heating, Inc.*,⁵⁹ the Missouri Supreme Court held that a “general release which is not restricted by its terms to particular claims or demands will ordinarily be regarded as embracing all claims or demands which had *matured* at the time of its execution.”⁶⁰ CSK Auto’s contingent claims under the Promissory Note had not matured at the time of the execution of the Rescission Agreement, and might not have ever matured if Goddard had abided by his commitments and continued working for CSK Auto for at least two years following his relocation. Thus, these contingent claims cannot be considered to be affected by the release contained in the Rescission Agreement as a matter of law. *Daniels* makes clear that under Missouri law, non-matured claims are not covered by release agreements – even

⁵⁹ 409 S.W.2d 741 (Mo. 1966).

⁶⁰ *Id.* at 745 (quoting *Williams v. Riley*, 235 S.W.2d 322 (Mo. App. 1951) (emphasis added)).

general release agreements.⁶¹

Other courts agree. For example, in *Sottile v. Gaines Construction Company*,⁶² the plaintiff had agreed in writing to be an indemnitor on a contract entered into by the defendant. In the interim, and before any indemnity obligation arose, the parties entered into a general release agreement very similar to the one at issue here, in which the plaintiff agreed to release the defendant from:

. . . all manner of action and actions, cause and causes of action, suits, *debts*, dues, sums of money, accounts, reckonings, bonds, bills, specialties, *covenants, contracts, controversies, agreements, promises*, variances, trespasses, damages, judgments, executions, claims, and demands whatsoever, in law, in equity, which against it they ever had, now have or which their successors, heirs and administrators, hereafter can, shall or may have, for, upon, or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the date of these presents.⁶³

Even with this broad and general release language, which included (as does the release at issue here) a release of “debts . . . covenants, contracts . . . agreements, [and] promises,” the *Sottile* court recognized that “a general release which is not restricted by its terms to particular claims or demands . . . will ordinarily be regarded as embracing all claims or demands which had *matured* at the time of its execution.” (citing multiple

⁶¹ *Id.* at 745 (quoting *Williams v. Riley*, 235 S.W.2d 322 (Mo. App. 1951) (emphasis added)).

⁶² 281 So. 2d 558 (Fla. App. 1973).

⁶³ *Id.* at 560 (emphasis added).

cases).⁶⁴ As explained by the *Sottile* court: “The claim or debt herein matured after the date of the release by some five years, and the fact that the obligation of the appellant as indemnitor . . . arose prior to the execution of the release is of no consequence.”⁶⁵

Similarly, in *Restifo v. McDonald*,⁶⁶ the court noted that “the general words of [a] release will not be construed so as to bar the enforcement of a claim which has not accrued at the date of the release.”⁶⁷ Likewise, in *Western Chance #2, Inc. v. KFC Corporation*,⁶⁸ the Ninth Circuit Court of Appeals, applying California law, noted that despite a general release that released “any and all claims, demands, causes of action, and liabilities of every kind and nature, known and unknown, suspected and unsuspected . . . ,” such a release “. . . did not, and probably could not, operate to extinguish future claims.”⁶⁹ The *Western Chance #2* court went on to find that despite the general language releasing KFC Corporation from all “liabilities” the agreement “did not necessarily release existing, and then undisputed, rights under [an] oral agreement

⁶⁴ *Id.* at 561. Goddard may argue, as he did below, that *Sottile* was overruled and is no longer applicable. In fact, certain dicta in *Sottile* court on an unrelated issue (relating to claims of “fraud on the court”) was later rejected, but its holding regarding the appropriate construction of release agreements was not. In fact, the *Brown* court noted that the holding in *Sottile* was “eminently correct.” See *Brown v. Brown* 432 So.2d 704, 712-713, fn 8 (Fla. App. 1983). Any argument that *Brown* overruled *Sottile* on the proposition cited by CSK Auto is demonstrably wrong is evident from even a cursory read of the opinion.

⁶⁵ *Id.* at 561.

⁶⁶ 230 A.2d 199 (Pa. 1967).

⁶⁷ *Id.* at 201.

⁶⁸ 957 F.2d 1538 (9th Cir. 1992).

⁶⁹ *Id.* at 1543.

when it signed the General Release.”⁷⁰ These cases make clear that a general release that waives claims for “contracts,” “agreements,” and similar terms do not cancel agreements between the parties that are *unrelated to the subject matter of the release agreement*, but instead can only affect *claims* based upon contracts or agreements that *exist and have matured at the time the release is signed*.

Here, the plain language of the release demonstrates future claims are not released:

The Company hereby agrees not to pursue or further any action, cause of action, right, suit, debt, compensation, expense, liability, contract, controversy, agreement, promise, damage adjustment, demand or claim whatsoever at law or in equity whether known or unknown which the Company ever had, now has, or hereafter can, shall or may have **for, upon or by any reason of any matter, cause or thing (collectively “Company Claims”) whatsoever occurring up to and including the date Executive signs this Rescission of Severance Agreement** . . . (emphasis added).⁷¹

It is undisputed that the basis for CSK Auto’s claims against Goddard – his resigning from the company within two years of the date he signed the Promissory Note and within one year of his receipt of certain relocation payments, thus triggering the obligation to repay the amounts paid to Goddard or on his behalf relating to his relocation – did not come into being until well after August 2008. Indeed, that did not occur until nearly a year later, on July 2, 2009. The release does not cover any claim

⁷⁰ *Id.*

⁷¹ CP 549, ¶ 5(b).

for any “matter, cause, or thing” occurring after the date of the execution of the Rescission Agreement. By the plain language of the Rescission Agreement, it is clear Goddard was not released of his obligation to repay those amounts paid to him or on his behalf pursuant to either the Promissory Note or the Relocation Policy, as no claim for repayment existed at the time the Rescission Agreement was signed.

Goddard cannot distinguish *Daniels*⁷² - controlling Missouri law that holds that non-matured claims cannot be released - and fails to mention *Williams v. Riley*.⁷³ *Williams* involved a similar situation to the one here, where the parties negotiated the cancellation of a prior contract. The settlement agreement cancelling the earlier contract contained a provision which stated, “[E]ach of the parties thereto does by these presents release the other from any other obligations, liabilities or claims which they may have against the other.”⁷⁴ The Missouri Supreme Court determined, by looking at the context in which the settlement agreement was entered into, that the quoted release language did not release the parties from other obligations (specifically, a court judgment) that existed between them:

Except for the mere employment of general language by which each party purported to release the other from ‘any other obligations, liabilities or claims’, there is nothing whatever to support defendant's contention that the effect of the release was to extinguish his further liability under the judgment. On the

⁷² 409 S.W.2d 741 (Mo. 1966).

⁷³ 235 S.W.2d 322 (Mo. App. 1951).

⁷⁴ 235 S.W.2d at XX.

contrary, in the total absence of anything specific which might be taken to indicate that the parties were intending to include the judgment within the scope of the settlement they were making, the natural and logical assumption would be that their only purpose was to terminate the managerial contract for the agreed consideration, and at the same time wipe out any and all possible claims which either of them might have against the other growing out of the contractual relationship which had theretofore existed. To hold otherwise would not only do violence to the rules for the construction of release agreements, but would also work a distortion of the purpose for which the evidence shows that the release was given.⁷⁵

Under this controlling caselaw, Goddard's resort to the Restatement (Second) of Contracts is meaningless.⁷⁶ Regardless, Section 284 of the Restatement, cited by Goddard, fully supports CSK Auto's position in this case as it distinguishes between a release of claims and a covenant not to sue for future, non-matured claims: "A purported release of a duty that is revived on the occurrence of a condition *is not a release, but a contract not to sue.*" (emphasis added). While CSK Auto released Goddard from claims that existed at the time he signed the Rescission Agreement, there is no promise by CSK Auto not to sue later for non-matured claims arising after its signing.⁷⁷

D. The Parties' course of conduct supports the limited scope of the release.

Moreover, the parties' conduct demonstrates that the Rescission Agreement was not intended to release Goddard of wholly unrelated obligations. CSK Auto performed its obligations under the "Offer of

⁷⁵ *Williams v. Riley*, 243 S.W.2d 122, 125 (Mo. Ct. App. 1951).

⁷⁶ Appellant's Brief, p. 23-24.

⁷⁷ If that were the case, one would expect to find the common phrase "and covenants not to sue" following the release language quoted above.

Employment” document it provided to Goddard before he signed the Rescission Agreement, despite Goddard’s release of CSK Auto from “any claim, charge, action or cause of action” relating to his employment.⁷⁸ CSK Auto also continued to perform under the May 16 Letter Agreement upon which Goddard now relies, ensuring that Goddard would receive relocation benefits post-merger “on terms no less favorable than those provided to you prior to the consummation of [the O’Reilly merger]”.⁷⁹

Under Goddard’s construction of the Rescission Agreement, the May 16 Letter Agreement would have been released by the Rescission Agreement. CSK Auto could have ceased payment of relocation expenses mid-move, even those that Goddard had already incurred. Instead, CSK Auto continued to pay those expenses because its commitment to do so remained intact – as did Goddard’s obligations to repay those expenses under the Promissory Note and Relocation Policy.

Except as with respect to the cancellation of Goddard’s pre-merger Severance Agreement, following the signing of the Rescission Agreement, the parties continued to operate as if all other obligations between them remained intact, including CSK Auto’s providing Goddard with relocation benefits under the Relocation Policy, as well as significant stock options, salary and other benefits. This reinforces that the subject matter of the release in the Rescission Agreement was limited and did not affect the

⁷⁸ CP 553-554.

⁷⁹ CP 518-519; CP 598-599.

unrelated agreements governing Goddard's relocation, which continued unabated both before and after the Rescission Agreement was signed.

Additionally, contracts are to be interpreted to avoid absurd results.⁸⁰ It would be an absurdity for CSK Auto to release Goddard from having to repay over \$360,000 in relocation benefits, *and* accelerate a severance benefit to pay Goddard \$88,500, *and* pay Goddard salary, benefits, and stock options in return for an unenforceable promise by Goddard to remain an at-will employee of CSK Auto.

III. The May 16 Letter Agreement did not affect Goddard's obligations under the Promissory Note.

Despite contending that the Rescission Agreement vitiated the Promissory Note, Goddard inconsistently argues that CSK Auto somehow released him from his obligations under the Promissory Note by means of the May 16 Letter Agreement.⁸¹ Somewhat similarly, the Trial Court found that the Letter Agreement required Goddard to reimburse CSK Auto for *only* those relocation expenses paid by CSK Auto on his behalf that were incurred before O'Reilly bought CSK Auto on July 11, 2012.

Both positions are wrong, and CSK Auto cross-appeals the Trial Court's ruling in that regard. The Letter Agreement provides that Goddard would be provided relocation benefits on terms "no less favorable" than those that existed prior to the O'Reilly merger – in other words, not *worse*

⁸⁰ See *Rathbun v. CATO Corp.*, 93 S.W.2d 771, 781 (Mo. App. 2002) (the more probable and reasonable of two available constructions should be utilized to the exclusion of one which produces an absurd, and therefore unreasonable result.)

⁸¹ See CP 598-599.

than the deal Goddard struck with CSK Auto previously. The agreement between Goddard and CSK Auto for relocation included *both* his obligations under the Promissory Note *and* under the Relocation Policy.

All the Letter Agreement did was ensure that CSK Auto did not impose *less* favorable relocation terms following the merger, in other words, the intent was to maintain the *status quo*; it did *not* provide Goddard with *better* relocation terms than he was already getting. The Letter Agreement emphasizes only that CSK Auto would provide the same scope of relocation expenses and not quit paying for them post-merger: the preamble reiterates the Company's current commitments relating to Goddard's relocation, and the body emphasizes that it will continue to honor those commitments "on terms no less favorable" than those existing prior to the O'Reilly acquisition. This language makes clear that all the Letter Agreement is intended to do is preserve the parties' pre-existing and on-going obligations, not change them in any way.⁸²

Importantly, Goddard's argument reveals he always has recognized the limited scope of the releases contained in the Rescission Agreement. Remember that in the Rescission Agreement Goddard also released CSK Auto. If the mutual releases in the Rescission Agreement affected Goddard's relocation obligations, then Goddard's release of CSK Auto in

⁸² The Letter Agreement's reference to the Relocation Policy is consistent with this view – the Relocation Policy discusses the *scope* of benefits to be provided to a relocating employee, and the Letter Agreement ensured that those benefits would be in place for Goddard post-acquisition.

the Rescission Agreement would have obviated the very Letter Agreement Goddard relies upon now. Goddard cannot have his cake and eat it too – his reliance on the Letter Agreement is further evidence that CSK’s release contained in the Rescission Agreement was never intended to affect Goddard’s relocation obligations.

IV. The Trial Court incorrectly dismissed CSK Auto’s claim that it had an independent right of recovery against Goddard under its Relocation Policy.

CSK Auto made the alternative argument below that CSK Auto’s Relocation Policy provided a basis for recovery independent of the Promissory Note. The Trial Court agreed that the Relocation Policy applied, but found that Goddard’s relocation obligations under the Relocation Policy had expired by the time he left for AutoZone on July 2, 2009. That decision was wrong, and CSK Auto cross-appeals it here.⁸³

Goddard acknowledges CSK Auto’s Relocation Policy applied to his relocation from Arizona to Washington.⁸⁴ The Relocation Policy provided that if Goddard voluntarily terminated his employment “within twelve (12) calendar months following the acceptance of a relocation, he/she will be required to refund all or part of the monies extended to him/her by the company or its agents.”⁸⁵ CSK Auto therefore has a right,

⁸³ It should be noted, however, that this issue is mooted should this Court find that the Promissory Note requires reimbursement for all expenses previously advanced to Goddard by CSK Auto – because the obligations are concurrent, any claim for reimbursement under the Relocation Policy is necessarily subsumed by a fully-applicable Promissory Note.

⁸⁴ CP 514.

⁸⁵ CP 581.

independent of the Promissory Note, to recover expenses paid pursuant to the Relocation Policy which were accepted by Goddard.⁸⁶ Importantly, Goddard *never* argues that his obligations under CSK Auto’s Relocation Policy were released by the Rescission Agreement – obligations that arose, in part, prior to his signing the Rescission agreement – yet again underscoring that Goddard fully understood the limited scope of the release in the Rescission Agreement and is trying to avoid it now.

Instead, Goddard argued below and the Trial Court found that Goddard complied with the Relocation Policy, which provides that if Goddard voluntarily terminated his employment “within twelve (12) calendar months *following the acceptance of a relocation*, he/she will be required to refund all or part of the monies extended to him/her by the company or its agents.”⁸⁷ Goddard argued below that this language is unambiguous, and the 12-month period began to run on the “effective date” of his transfer to Seattle on January 28, 2008.⁸⁸ The problem, however, is that the Relocation Policy expressly provides that CSK Auto’s interpretation of its terms prevails in any dispute over its meaning.⁸⁹ Goddard never spoke to anyone at CSK Auto as to what this language in the Relocation Policy meant.⁹⁰ The *only* declarant with knowledge of the

⁸⁶ *Id.*

⁸⁷ *Id.* (emphasis added).

⁸⁸ CP 234-235.

⁸⁹ CP 581, #8 “In all cases where there is a question of interpretation of policy, the decision of [the] Relocation Services Senior Travel Manager shall prevail.”

⁹⁰ CP 516.

meaning of that language is Jack Morefield, who explains that the Relocation Policy creates a rolling 12-month obligation period requiring Goddard to repay to CSK Auto any relocation payments accepted by him or made by CSK Auto on his behalf in the 12-month period prior to his termination of employment.⁹¹

The forgoing testimony remains undisputed. Goddard has admitted he has no personal knowledge regarding the operation of this language in the Relocation Policy. The Trial Court wrongly ignored this undisputed and controlling testimony in granting summary judgment to Goddard on this issue. Under the policy and the undisputed testimony in the record, Goddard was obligated to repay any amounts paid to him or on his behalf for relocation within a year prior to his termination of employment, which occurred on July 2, 2009.

Thus, even if the Rescission Agreement operated to release any prior claims for repayment held by CSK Auto (which it did not), any relocation expenses paid for Goddard on or after the Rescission Agreement was signed on or about August 22, 2008, remain recoverable by CSK Auto under the Relocation Policy. CSK Auto paid relocation expenses for Goddard on or after August 22, 2008, in amounts well above the amount it offset from Goddard's final paycheck.⁹² Thus, even if the Rescission

⁹¹ CP 179, ¶ 8.

⁹² CP 180, ¶¶10-11. Moreover, the language in the Relocation Policy constitutes an express obligation by Goddard to repay those amounts, thereby meeting the requirements of RCW 49.48.010 (2).

Agreement operated to cancel the Promissory Note, Goddard has no defense to CSK Auto's right to recover that sum under the Relocation Policy, and its prior offset against Goddard's final paycheck was appropriate.⁹³ If this Court were to find that the Rescission Agreement bars CSK Auto's counterclaim for expenses incurred prior to its signing, it should reverse the Trial Court's grant of summary judgment to Goddard and remand to the Trial Court for a determination of CSK Auto's additional damages.

V. Goddard cannot state a claim under RCW 49.52.050 and 49.52.070 because CSK Auto has not improperly rebated amounts owed to Goddard.

Under RCW 49.52.050, an employer cannot "rebatе" wages from an employee's paycheck unless required by law or with the express consent of the employee. In *Cameron v. Neon Sky, Inc.*⁹⁴ the Washington Court of Appeals held that a deduction for an alleged debt upon termination of employment, even if improperly made, does not constitute a willful withholding of wages in violation of RCW 49.52.050.⁹⁵ As the *Cameron* court explained, the purpose of the statute was to "prevent abuses by employers in a labor-management setting, e.g., coercing rebates

⁹³ Assuming, *arguendo*, the Court finds claims for payments made prior to the execution of the Rescission Agreement are barred, Defendant does not waive its claim for repayment of relocation expenses made to or on behalf of Goddard between August 2, 2008 and August 22, 2008 under the Relocation Policy. CSK Auto is entitled to summary judgment in its favor for all payments made after August 22, 2008, when Goddard believes he signed the Rescission Agreement, but by his own testimony Goddard may have signed the Rescission Agreement as early as August 2.

⁹⁴ 41 Wn. App. 219; 703 P.2d 315 (Wash. App. 1985).

⁹⁵ *Id.* at 222.

from employees in order to circumvent collective bargaining agreements.”⁹⁶ Where, as CSK Auto did here, an employer “freely acknowledge[s] the full amount of wages and severance pay due . . . [t]here was no ‘intent to deprive the employee of any part of his wages,’ the act proscribed by the statute.”⁹⁷ Unless a deduction is a complete “ruse”, there is no violation and no exemplary damages can be awarded.⁹⁸

There is no ruse here – CSK Auto acknowledged that but for its taking a legitimate offset against Goddard’s final paycheck, it would have paid the full amount owed to him. Goddard’s obligation to repay CSK Auto for relocation expenses remains valid, or at the very least CSK Auto has a good-faith basis for believing so – indeed, the Trial Court’s grant of summary judgment to CSK Auto conclusively demonstrates that CSK Auto had a good faith basis for taking the offset. Consequently, Goddard’s claims for violation of 49.52.050 and for double damages pursuant to RCW 49.52.070 are barred and were properly dismissed on summary judgment, regardless of whether the Rescission Agreement applies.

VI. CSK Auto is entitled to summary judgment on its claim that Goddard breached his non-recruitment covenant.

With zero discussion or analysis, the Trial Court dismissed CSK Auto’s counterclaim based upon Goddard’s admitted breaches of restrictive covenants he had with CSK Auto. CSK Auto cross-appeals that

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

portion of the Trial Court's Orders.

As discussed above, the Rescission Agreement, which specifically incorporates Section 5 of the Severance Agreement, contains a Missouri choice of law provision.⁹⁹ Missouri's approach to the enforcement of restrictive covenants is as follows:

First, the covenant must be reasonable in scope as to geography and time. Second, the covenant must be reasonably necessary to protect certain narrowly defined and well-recognized employer interests.¹⁰⁰

A. CSK Auto has a protectable interest in the continuity of its workforce.

Missouri law expressly provides employers with a protectable interest in maintaining employee continuity, and authorizes covenants not to solicit employees that are less than one year in duration. The statute states: "A reasonable covenant in writing promising not to solicit, recruit, hire or otherwise interfere with the employment of one or more employees shall be enforceable and not a restraint of trade . . ." ¹⁰¹ The statute specifically provides that no other protectable interest is needed for such a covenant to be enforceable, provided that it is less than one year in duration and does not apply to clerical personnel.¹⁰²

⁹⁹ CP 547-551.

¹⁰⁰ *Washington County Mem'l Hosp. v. Sidebottom*, 7 S.W.3d 542, 545 (Mo. Ct. App. 1999).

¹⁰¹ 28 Mo. Stat. Ann. § 431.202.1

¹⁰² 28 Mo. Stat. Ann. § 431.202.1(4).

B. The employee non-recruitment covenant to which Goddard is subject is reasonable.

The duration of the restrictive covenants at issue here is only six (6) months, within the time period permitted by the Missouri statute cited above. This short timeframe is eminently reasonable to protect CSK Auto from unfair competition by a senior executive following his voluntary resignation of employment. Moreover, a covenant not to solicit or attempt to hire away employees has been held to be reasonable in under Missouri law. Courts have regularly enforced similar covenants.¹⁰³

C. Goddard admitted he violated his covenant not to solicit CSK Auto's employees.

Goddard candidly admitted in his deposition that he began soliciting CSK Auto employees to work for AutoZone shortly after he began working for AutoZone.¹⁰⁴ As a result, CSK Auto is entitled to summary judgment in its favor as to liability with respect to its counterclaim for breach of those covenants.

D. Goddard's argument that his non-compete obligations expired before he left CSK Auto is inconsistent with the Severance and Rescission Agreements.

Goddard wrongly argued below, and will likely argue here, that the only period during which he could not compete with CSK Auto occurred while he was employed there. To analyze this issue, one must examine the interplay of Goddard's Severance Agreement and the Rescission

¹⁰³ See *Haines v. Verimed Healthcare Network, LLC*, No. 4:08CV791, CDP 2009 U.S. Dist. LEXIS 23247 (W.D. Mo., March 24, 2009).

¹⁰⁴ See CP 488-502; CP 521-523, CP 525-527, and CP 529-531.

Agreement. The Severance Agreement defined the duration of Goddard's post-termination non-compete as the "Severance Period". The "Severance Period" is defined in paragraph 2.2(b) of the Severance Agreement as "the longer of (i) six months or (ii) one week for every full year [Goddard] was employed by the Company and its Affiliates prior to the date [Goddard's] employment was terminated."¹⁰⁵ Here, Goddard's "Severance Period" was indisputably six (6) months. Note that the "Severance Period" is *purely* definitional – there is no requirement in the Severance Agreement that Goddard actually be paid during the Severance Period; that definition simply sets the amount of severance potentially due Goddard and the timeframe for the restrictive covenants.

Whereas the Severance Agreement contemplated periodic post-termination payments, the Rescission Agreement changed the severance obligation in two ways: first, it accelerated the payment of severance benefits – they became payable to Goddard *while he was employed with CSK Auto* – despite the fact that his employment had not been terminated; second, it provided for a lump sum payment. The provisions of the Severance Agreement must therefore be read in light of those modifications. To do that, one must first look at Section 5.2(a) of the Severance Agreement, which prohibits Goddard from engaging in certain activities "[w]hile employed by the Company and during the Severance

¹⁰⁵ See CP 533-545.

Period *following the Executive's termination of employment* under circumstances entitling the Executive to the Standard Severance Benefits (the "Non-Compete Period")."¹⁰⁶ Construing that provision in light of the modifications occasioned by the Rescission Agreement, Goddard was prohibited from engaging in certain competitive activities during two separate timeframes: (1) while employed with CSK Auto ("While employed with the Company . . ."); and (2) "during the Severance Period *following the Executive's termination of employment . . .*" under circumstances where Goddard was entitled to receive severance benefits. The fact that two separate time periods are contemplated is underscored by the conjunctive language of paragraph 5.2(a): "While employed by the Company *and* during the Severance Period following the Executive's termination of employment . . ." Pursuant to Severance Agreement, therefore, the Severance Period is a period "following Executive's termination of employment . . ." and its duration is the period for which Goddard received severance – *i.e.*, six months.¹⁰⁷

The Severance Agreement makes clear that Goddard's post-termination restrictive covenants only come into effect "under circumstances entitling [Goddard] to the Standard Severance Benefits."¹⁰⁸ As modified by the Rescission Agreement, in order to become entitled to

¹⁰⁶ CP 537, §5.2(a).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

those benefits, Goddard had to remain employed with CSK Auto until July 1, 2009, which he did. Therefore, Goddard's *post-termination* non-compete obligations attached when Goddard qualified for and received his severance benefits. Goddard was paid his severance benefits on June 12, 2009.¹⁰⁹ Payment of the benefits triggered Goddard's non-compete obligation "during the Severance Period [defined as six months] following [Goddard's] termination of employment."

Goddard's argument that the non-compete period was between January 2009 and June 2009 – *i.e.*, while he was employed – leads to a nonsensical reading of paragraph 5.2 of the Severance Agreement. First, common sense demonstrates this interpretation is wrong: why would CSK Auto preserve Goddard's non-compete obligations if it did not intend for them to extend following his termination of employment? Goddard already had a fiduciary obligation under state law not to compete with CSK Auto while he was employed there. Second, the non-compete covenants, by their express terms, did not come into effect until *after* Goddard became entitled to his severance benefits – thus if Goddard had left CSK Auto during the non-compete period espoused by Goddard (*i.e.*, January –June 2009), CSK Auto could not have enforced the restrictive covenants because there was no consideration (*i.e.*, no obligation to pay severance) and they were not yet in effect. Goddard argued below that

¹⁰⁹ See CP 508; CP 182, ¶ 20.

Section 5.2(a) of the Severance Agreement should be read to prohibit competition while Goddard was “employed by the Company” and “while employed by the Company between January and June 2009.” This renders superfluous the language prohibiting Goddard from engaging in competitive activities “[w]hile employed by the Company,” and is contrary to the canons of contractual construction.¹¹⁰

E. CSK Auto was damaged by Goddard’s unlawful solicitation of Derek Reid.

Goddard admitted he solicited CSK Auto Territory Sales Manager Derek Reid shortly after he joined AutoZone.¹¹¹ In conjunction with CSK Auto’s previously-filed motion for preliminary injunction to enforce its restrictive covenants against Goddard, Reid signed a declaration, under oath, clearly stating, among other things: (1) that Goddard solicited Reid to leave CSK Auto for AutoZone; and (2) that Reid decided to stay with CSK Auto due, in part, to his annual pay being increased by \$5,000.¹¹² Reid now works for AutoZone with Goddard, and in the Trial Court submitted a second declaration, undoubtedly procured by Goddard, which attempted to back away from his prior unequivocal testimony. But that second declaration is of no import whatsoever, because *Goddard* admitted

¹¹⁰ *Newsom v. Miller*, 42 Wn.2d 727, 731, 258 P. 2d 812 (1953) (An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective); *Bremer v. Mt. Vernon Sch. Dist.* 320, 34 Wn. App. 192, 199, 660 P.2d 274 (1983) (construction of a contract requires that, if possible, each part thereof be given some effect).

¹¹¹ CP 488-502; CP 521-523, CP 525-527, and CP 529-531.

¹¹² See CP 529-531, ¶¶ 6 and 8.

under oath that Reid's *first* declaration is correct. Goddard's was shown Reid's original declaration in deposition and asked if it was accurate.

Goddard responded as follows:

Q. Have you had an opportunity to look at Exhibit-8?

A. Yes.

Q. And I recognize that you may not have any information as it relates to paragraph 8, but as it relates to paragraphs 1 through 7, do you disagree with anything in there?

A. Yes, I disagree with paragraph 7.

Q. And which part of that do you disagree with?

A. He didn't meet with a divisional vice-president or my boss.

Q. Do you know if he met with anyone other than you?

A. I'm not certain. I believe he met with the zone sales manager, which is a commercial sales manager.

* * *

Q. Okay. Anything else you disagree with, other than that portion?

A. No.

Paragraphs 1-6 of Reid's original declaration describes Goddard's solicitation of Reid to work for AutoZone. Reid's sham second declaration does not bar summary judgment for CSK Auto because Goddard *admits* he solicited Reid. The Trial Court erred in dismissing these claims.

VI. CSK Auto should be granted summary judgment on its unjust enrichment claim.

The Trial Court also wrongly dismissed CSK Auto's counterclaim for unjust enrichment. "Unjust enrichment is the method of recovery for

the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it.”¹¹³ It is an equitable remedy sounding in quasi-contract.¹¹⁴ The elements of the claim are: (1) the defendant receives a benefit, (2) the received benefit is at the plaintiff’s expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment.¹¹⁵

Goddard was unjustly enriched by continuing to accept relocation benefits from CSK Auto if he truly believed that the Rescission Agreement had released him from any obligation under the Promissory Note or Relocation Policy. Goddard admits he received substantial relocation benefits both before and after he signed the Rescission Agreement. Further, it is clear that CSK Auto at all times expected Goddard to live up to his obligations under the Promissory Note and Relocation Policy, as evidenced by its offsetting amounts owed from Goddard’s final paycheck. It would be inequitable and unjust for Goddard to reap the benefits of continued relocation payments following the execution of the Rescission Agreement, made with the expectation that he would repay them pursuant to the Promissory Note and Relocation Policy, if he believed the Rescission Agreement terminated his obligation to repay

¹¹³ *Young v. Young*, 164 Wn.2d 477, 483; 191 P.3d 1258 (Wash. 2008)

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 484-485

CSK Auto if he resigned. For the foregoing reasons, CSK Auto is entitled to summary judgment on its counterclaim for unjust enrichment.

VII. CSK Auto’s attorney’s fees in this case are reasonable.

Goddard’s only specific challenges to Defendant’s time and billing record are: (1) two lawyers worked on preparing for Goddard’s deposition and on the critical summary judgment hearing in this case – characterized by Goddard as “duplicative”; (2) defense counsel devoted too much time to Court-ordered mediation in this case; and (3) CSK Auto used its national counsel for this case and therefore needed to retain local counsel. Goddard provides lots of rhetoric, but little in the way of concrete argument challenging the reasonableness of CSK Auto’s defense costs. Goddard nitpicks defense counsel’s billing records and can identify only these three instances over the course of *two years* of litigation about which to complain.

A. Defense counsel’s billing are not duplicative.

Goddard alleges only two instances where purported “duplication” occurred. First, Goddard complains that Mr. Polly spent 13.2 hours preparing for *and taking* Goddard’s deposition, and that Mr. Boyd spent 14.3 hours assisting Mr. Polly in preparing for Goddard’s deposition. The plaintiff’s deposition in an employment case is critical, and preparing for a full-day plaintiff’s deposition usually takes considerably more time than the deposition itself. Here, Mr. Boyd’s time was spent identifying issues, identifying, organizing and analyzing documents, and preparing an outline.

Contrary to Goddard's insinuation, while Mr. Boyd attended Goddard's deposition and assisted Mr. Polly during that deposition, he did not bill for that time. There is no duplication here; only a division of efforts by the two attorneys who were principally involved in this case for CSK Auto.

The same is true with regard to Mr. Boyd and Mr. Polly's preparation for and attendance at the hearing on the parties' cross-motions for summary judgment. Again, a summary judgment hearing is a critical juncture in any case – particularly so where, as here, the parties filed cross-motions for summary judgment. It is not at all surprising that two attorneys devoted time in developing strategy and preparing for the summary judgment hearing in this case. As described previously, this case was a complicated one involving multiple claims and counterclaims and the interpretation of multiple contracts between the parties. Goddard's Motion for Partial Summary Judgment alone cited twenty-nine cases from multiple jurisdictions. The amount of time spent in preparation is not at all unreasonable, given the number of issues involved, caselaw from multiple jurisdictions, and the importance of summary judgment to the outcome.

B. The time billed for mediation is not excessive.

Counsel for CSK Auto did not bill too much time for the Court-ordered mediation in this case. CSK Auto entered into the mediation with the intention of trying to reach a resolution. A large portion of CSK Auto's preparing for mediation was identifying for Goddard, line by line, the

hundreds of pages of documents that supported CSK Auto's damages in this case. Further, counsel met with and prepared CSK Auto's corporate representative in advance of the mediation. The likely reason Goddard's mediation preparation was so meager is that he went into the mediation without any real expectation of resolving the case – a position communicated by Goddard's counsel to CSK Auto's counsel prior to the mediation. His argument that CSK Auto's counsel billed too much to prepare for and participate in the mediation has no merit.

C. CSK Auto should not be penalized for using national counsel with whom it has a longstanding relationship.

Last, Goddard complains that CSK chose to use counsel from outside Washington and therefore was required to engage local counsel. CSK Auto has the right to counsel of its choosing – especially where it has a longstanding relationship with that counsel. CSK Auto's attorneys were admitted *pro hac vice* without objection from Goddard. CSK Auto's use of local counsel was reasonable and minimal: it sought only \$1,867.50 in local counsel fees below – only 2.4% of the entire amount sought.

The nature of defense counsel's relationship with CSK Auto also supports the fee requested. Mr. Polly has represented O'Reilly Automotive, Inc. (CSK Auto's parent company) for over seven years and in more than twenty-five matters in multiple states across the country. The fees charged by HPT&Y are the result of arms-length assessments of reasonable rates for such work by both parties. Finally, Goddard makes no argument

whatsoever that the fees charged by CSK Auto's attorneys and paralegals are inconsistent with their experience, reputation, and ability. Goddard fails in his effort to characterize CSK Auto's attorney's fees as unreasonable. The fees requested are based upon reasonable rates, actual time worked, and are commensurate with the skills and experience of the attorneys involved. They are consistent with the nature of the case and its successful outcome for CSK Auto. Indeed, Goddard identifies only three (3) instances where he could even *attempt* to challenge the reasonableness of CSK Auto's fees, and as described above those challenges have no merit.

REQUEST FOR ATTORNEY'S FEES

Pursuant to RAP 18.1, the Promissory Note, and upon equitable principles, CSK Auto requests attorney's fees on appeal. RAP 18.1 provides for an award of fees where applicable law provides for that right. Here under the Promissory Note, CSK Auto is entitled to all fees associated with its enforcement. The Trial Court awarded CSK Auto its fees on that basis, and it similarly requests them here. Should CSK Auto prevail on appeal, it will file a timely motion for additional attorney's fees.

CONCLUSION

Goddard's claims rise and fall on his erroneous contention that the Rescission Agreement allows him to avoid significant contractual obligations he voluntarily assumed. There was no release of those claims for the reasons described above, and even if there was, CSK Auto has an

independent right under the Relocation Policy to recover all relocation expenses paid for Goddard on or after the execution of the Rescission Agreement. Consequently, CSK Auto requests the following relief:

1. That the Court of Appeals affirm the Trial Court's ruling that the Rescission Agreement does not release Goddard from his obligations to repay CSK Auto for relocation expenses pursuant to the Promissory Note;

2. That the Court of Appeals reverse the Trial Court's ruling that the Letter Agreement limits CSK Auto's recovery to only those expenses paid to Goddard or on his behalf prior to July 11, 2008, and remand for further proceedings to establish the additional damages recoverable by CSK Auto;

3. That the Court of Appeals reverse the Trial Court's grant of summary judgment to Goddard on CSK Auto's claim for breach of Goddard's non-recruitment covenants, and remand for further proceedings to establish the damages associated therewith;

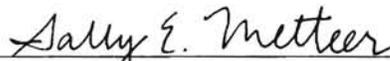
4. That the Court of Appeals reverse the Trial Court's dismissal of CSK Auto's alternative claims under the Relocation Policy, and grant CSK Auto summary judgment as to those claims as an alternative and independent avenue of recovery;

5. That the Court of Appeals reverse the Trial Court's dismissal of CSK Auto's alternative claim for unjust enrichment, and

grant CSK Auto summary judgment as to that claim, also as an independent and alternative avenue of recovery; and

6. To award CSK Auto its additional attorney's fees and interest related to this appeal, pursuant to the Promissory Note.

DATED this 16th day of July, 2012.



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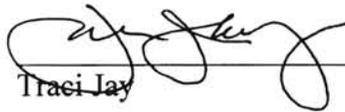
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CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington that on the below date I caused to be served the foregoing document by electronic mail and legal messenger on:

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SIGNED this 16th day of July, 2012 at Seattle, Washington.


Traci Jay

STATE OF WASHINGTON
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