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Court of Appeals Case No. 71307-8
King County Superior Court Case No. 12-2-12705-1 SEA

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

JAMES O'BRIEN,

Plaintiff/Appellant,

v.

iLOOP MOBILE, INC., LENCO MOBILE, INC.,
and MATTHEW R. HARRIS,

Defendants/Respondents.

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STATE OF WASHINGTON
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APPELLANT'S REPLY BRIEF

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I. Introduction

Defendants persuaded the trial court not to enforce the terms of James O'Brien's Lenco Retention Bonus Agreement (the "December RBA") in order to prevent him from receiving what they argued would be a substantial financial windfall. The trial court's judgment was legally erroneous. Contract law does not permit a court to rewrite the unambiguous language of an agreement, especially for the benefit of the parties who drafted it, based on some generalized sense of unfairness. Defendants' arguments on appeal cannot change the legal reality that they triggered the Good Reason to resign paragraph of the December RBA by reducing Mr. O'Brien's salary on January 1, 2012, from \$200,000 to \$185,000 without his express written consent.

Defendants' assertion that all they did was "overpay" Mr. O'Brien by \$123 for the final three days of 2011 is sophistry. As even the trial court recognized, defendants made a deliberate decision to pay all of their employees, including Mr. O'Brien, their pre-iLoop/Lenco merger *salaries* through December 31, 2011, for defendants' own administrative convenience. A salaried employee's "pay" is his "salary" as a matter of legal definition. Defendants' awkward verbal gymnastics cannot obscure the fact that they reduced Mr. O'Brien's salary on January 1, 2012, and on no other date. The trial court, however, refused to deem defendants'

actions to be a breach of his December RBA. The Superior Court avoided this logically inevitable conclusion by disregarding black-letter principles of contract law and the plain language of the parties' agreement. The trial court also invoked the legally inapplicable doctrine of "promissory estoppel" to preclude Mr. O'Brien from prevailing on his claims.

This Court should reject the Superior Court's misconstruction of the parties' contract and unreasonable interpretation of the evidence. The Court should hold the trial court (1) erred as a matter of law by ruling that "then current salary" under paragraph 5.6(ii) of the December RBA meant "\$185,000" when it unambiguously refers to the employee's salary at the time of any future reduction; (2) erred by finding, contrary to all of the company's payroll and personnel documents, that defendants reduced Mr. O'Brien's salary upon the closure of the merger on December 28, 2011, rather than on January 1, 2012; (3) erred by ruling that Mr. O'Brien had agreed to the reduction of his salary to \$185,000; (4) erred by ruling that the \$15,000 reduction of Mr. O'Brien's salary was not a "material" one; and (5) erred legally and factually by applying the doctrine of "promissory estoppel" to excuse defendants' contractual breach. Because Mr. O'Brien is legally entitled to prevail on all of his claims relating to the December RBA, this Court should reverse the judgment of the trial court in favor of defendants and remand for entry of judgment in plaintiff's favor.

II. No Reasonable Third Party Reading the Language of the December RBA Could Conclude that “then Current Salary” in Paragraph 5.6(ii) Meant “\$185,000.”

The trial court relied on extrinsic evidence to decide “then current salary” as used in paragraph 5.6(ii) of the December RBA means “\$185,000.”¹ Defendants do not dispute Delaware follows the “plain meaning rule” and that a court may not consider extrinsic evidence in deciding whether a contract is ambiguous. The trial court, however, never articulated what reasonable meaning a third party, reading only the language of the December RBA, could give to the phrase “then current salary” *other than* the employee’s salary level at the time of a future material reduction. Defendants cannot provide one either.

Defendants assert a “reasonable person would understand” the “salary” mentioned in paragraph 5.6(ii) “can only mean the annual compensation for the position of Lenco Vice-President of Administration.” Resp. Br. at 22. Yet defendants concede the “contract does not say in what position O’Brien will be employed following the merger or what his salary will be for providing those services.” *Id.* at 24. This Court should wonder how anyone could “understand” that a key contractual term means something that is never mentioned or referenced in

¹ That paragraph provides that “Good Reason” to resign includes “a material reduction in the Recipient’s then current salary and/or benefits, unless the salary and/or benefits of all other Recipients of the Company are proportionately reduced at the same time.”

the contract. Contractual silence is not the same as contractual ambiguity. Mere contractual silence does not permit a court to go beyond the four corners of the agreement to determine its meaning. *Cf.* Resp. Br. at 24.

If, as defendants suggest, “then current salary” refers to what Mr. O’Brien’s salary was upon the closing of the merger, *id.* at 23-24, Mr. O’Brien wins. His salary on the effective date of the December RBA was \$200,000. But as set forth in Mr. O’Brien’s Opening Brief, this interpretation of the agreement unreasonably converts “then current salary” into “now current salary.” See O’Brien Br. at 30-32. Under paragraph 5.6(ii), what an employee’s “then current salary” is can be determined *only* when a material reduction to it occurs. As Mr. O’Brien’s salary was never reduced below \$185,000, the trial court’s conclusion “then current salary” means \$185,000 is linguistically impossible.

Defendants vainly argue that “then current salary” cannot mean what paragraph 5.6(ii) actually says because it would lead to “unusual, unfair, or improbable” results. Resp. Br. at 26. They assert that under Mr. O’Brien’s interpretation of the contract defendants could have reduced his salary to \$365 per year on or before the effective date of the December RBA and he would have had no recourse under “the Good Reason” language of paragraph 5.6(ii). It is legal truism that a party cannot claim breach of a contractual term based on conduct occurring before the

contract has taken effect. Had defendants reduced Mr. O'Brien's salary to \$365 per year effective December 28, 2011, he would not have had "Good Reason" to resign based on paragraph 5.6(ii) of the December RBA.² That does not change the plain meaning of "then current salary."

Defendants invite the Court to disregard the plain meaning of paragraph 5.6(ii) based on what defendants claim were the purposes of the December RBA. Resp. Br. at 27-28. This argument fails for two reasons. First, "[i]t is, of course, axiomatic that a court may not, in the guise of construing a contract, in effect rewrite it. . . ." *Conner v. Phoenix Steel Corp.*, 249 A.2d 866, 868 (Del. 1969). Second, interpreting "then current salary" under paragraph 5.6(ii) to mean the employee's current salary level at the time of a future material reduction would in no way undermine *any* of the purposes of the December RBA defendants identify.

Defendants could have written the December RBA to provide recipients of that agreement with "Good Reason" to resign only if their salaries were reduced below the levels set at the closure of merger. Defendants could have written Mr. O'Brien's December RBA to provide that he would have "Good Reason" to resign only if they reduced his salary below \$185,000. But they didn't. The court's duty is to enforce the

² Mr. O'Brien would, however, have had a claim for rescission of the December RBA based on fraudulent inducement. The parties never discussed a salary of less than \$185,000 for Mr. O'Brien's post-merger employment.

contract the parties actually entered into in this case, not a contract the defendants now wish they had made.

III. It is an Objective Historical Fact that Defendants Reduced Mr. O'Brien's Salary to \$185,000 on January 1, 2012, not December 28, 2011, and his Repeated Misrecollection of the Correct Date during His Deposition is Irrelevant.

Defendants assert Mr. O'Brien's deposition testimony that his salary upon the closure of the iLoop/Lenco merger on December 28, 2011, was \$185,000 by itself provides substantial evidence for the trial court's finding that defendants reduced his salary on that date and not on January 1, 2012. See Resp. Br. at 1-2, 25, 33. Defendants are wrong. What Mr. O'Brien's salary was as of the closing of merger on December 28, 2011, is just as much of an objective historical fact as the date the merger closed. In their motion for summary judgment, defendants erroneously stated the iLoop/Lenco merger closed on December 27 rather than December 28. CP 18. Sworn deposition or trial testimony that the merger closed on December 27 would not provide substantial evidence for a finding that the merger closed on that date in the face of irrefutable documentary evidence establishing the iLoop/Lenco merger really closed on December 28.

Similarly, Mr. O'Brien's repeated, mistaken deposition testimony that his salary from December 29-31, 2011, was \$185,000 does not change the fact that his salary during that period was actually \$200,000. All of the

personnel and payroll documents in the record, on summary judgment and at trial, establish beyond controversy that defendants reduced Mr. O'Brien's salary from \$200,000 to \$185,000 on January 1, 2012, and not upon closure of the merger on December 28, 2011:

1. On December 15, 2011, Lenco Chief Financial Officer Thomas J. Banks transmitted to Mr. O'Brien a payroll document stating the **2012** salary for the position of Vice-President of Administration would be \$185,000. Ex. 44. At the time, the iLoop/Lenco merger was set to close before Christmas 2011.
2. On December 27, 2011, iLoop Chief Executive Officer Matthew Harris emailed all iLoop employees that there would be no change to their compensation or benefits before January 1, 2012. He also informed them they would receive an offer letter from their managers specifying the pay rate that "will be effective the start of the year." Ex. 54.
3. On December 28, 2011, Mr. O'Brien received an offer letter from Mr. Banks, his post-merger manager, offering him the position of Vice-President of Administration at a salary of \$185,000 per year **effective January 1, 2012**. Ex. 56.
4. Defendants paid Mr. O'Brien \$200,000 per year for the period of December 29-31, 2011, and \$185,000 per year effective

January 1, 2012. Defendants also paid all other iLoop employees their pre-merger salaries until January 1, 2012.

5. On March 9, 2012, the day after Mr. O'Brien's resignation took effect, iLoop/Lenco readjusted his **salary** from \$185,000 to \$200,000 **retroactive to January 1, 2012**. Ex. 31.

The Superior Court's finding that Mr. O'Brien's salary for the period of December 29 through 31, 2011 was \$185,000 rather than \$200,000 is clearly erroneous. Indeed, the Superior Court's findings on this issue are contradictory. On the one hand, the trial court found that Mr. O'Brien's salary for the final three days of 2011 was \$185,000. On other hand, the trial court found that "[h]e and other employees were compensated for the remainder of the year based on their prior (pre-merger) iLoop salaries." FF 22 (CP 456). The Court further found that "[t]he payroll department did not implement Mr. O'Brien's \$185,000 salary change until the January 1-15 [2012] payroll period, which meant that his pay for December 29-31, 2011, was calculated based on his iLoop CFO salary level of \$200,000." FF 31 (CP 458).

Defendants try to reconcile these irreconcilable factual findings by arguing that although they *paid* Mr. O'Brien at the rate of \$200,000 per year for the period of December 29-31, 2011, his *salary* during that time period was only \$185,000. Resp. Br. at 29. This contention is meritless.

Mr. O'Brien was a salaried employee. A salaried employee's "pay" is legally his "salary." See 29 C.F.R. § 541.602(a) (setting forth the "salary basis test"). The trial court specifically found that Mr. O'Brien was paid his pre-merger *salary* for the period of December 29-31, 2011, and that the payroll department did not implement his *salary change* until the January 1-15, 2012, payroll period. On summary judgment, Mr. Harris submitted a sworn declaration admitting that all iLoop employees were paid their "prior salaries for the rest of 2011." CP 153, 405. On March 9, 2012, the company retroactively restored Mr. O'Brien's *salary* to \$200,000 effective January 1, 2012, not December 28, 2011. Defendants' attempt to contrast Mr. O'Brien's "pay" for the period of December 29-31, 2011, with his "salary" for that time period is unavailing.

Substantial evidence does not support the Superior Court's finding that defendants never reduced Mr. O'Brien's salary during the term of the December RBA. The December RBA became effective upon the closure of the merger on December 28, 2011. Mr. O'Brien's salary remained at its prior level of \$200,000 per year until defendants reduced it on January 1.

IV. Defendants Concede the Trial Court Erred by Finding Mr. O'Brien Agreed on October 25, 2011, to the Position of Vice-President of Administration at a Salary of \$185,000.

Defendants do not defend on appeal the trial court's clearly erroneous finding that Mr. O'Brien agreed "to the Vice-President of

Administration position and salary in an October 25, 2011 email to Mr. Harris.” FF 11 (CP 429). In his Opening Brief, Mr. O’Brien demonstrated that this finding is contrary to both fact and law. O’Brien Br. at 37-39. Defendants also do not contest that the Superior Court’s grant of their motion for summary judgment with respect to Mr. O’Brien’s claims under his March 2011 Employment Agreement judicially estopped them from relying on any agreements Mr. O’Brien allegedly made prior to December 23, 2011. See *id.* at 39-41. Defendants instead argue the erroneous finding that Mr. O’Brien agreed to the position of Vice-President of Administration and \$185,000 salary on October 25, 2011 was immaterial to the trial court’s decision. Resp. Br. at 30. In truth, the trial court’s finding that Mr. O’Brien accepted the position of Vice-President of Administration at \$185,000 was the lynchpin for its entire decision.

In an attempt to provide some basis to uphold the trial court, defendants claim for the first time on appeal that Mr. O’Brien’s acceptance of the December RBA was *ipso facto* an agreement to accept the position of Vice-President of Administration at an annual salary of \$185,000. Resp. Br. at 31. Defendants make this remarkable claim even while acknowledging the December RBA “does not say in what position O’Brien will be employed following the merger or what his salary will be for providing those services.” *Id.* at 24. Defendants’ argument comprises

the following propositions: 1. The trial court determined based on extrinsic evidence that the phrase “then current salary” as used in paragraph 5.6(ii) of the December RBA meant \$185,000; 2. Mr. O’Brien agreed to the December RBA; 3. Therefore, Mr. O’Brien agreed that his salary for the position of Lenco Vice-President of Administration would be \$185,000. *Id.* at 31.

Defendants’ syllogism is a classic example of an argument from false premises. As set forth above, and in Mr. O’Brien’s Opening Brief, the trial court wrongly determined that “then current salary” meant \$185,000. The very extrinsic evidence upon which the Superior Court relied to make this determination was the parties’ non-existent agreement “that Mr. O’Brien would be paid \$185,000 to work as Vice-President of Administration upon the closing of the merger.” CL 11 (CP 437); see also FF 17 (CP 430) (“Mr. O’Brien was given a Lenco Retention Bonus Agreement because he had agreed to provide post-merger services as the Vice-President of Administration for a salary of \$185,000”). As defendants concede, there was no such agreement prior to the parties’ execution of the December RBA. The trial court’s construction of “then current salary” to mean \$185,000 was based on clear legal error. Because “then current salary” does not, and logically and linguistically cannot, mean \$185,000, defendants’ assertion that Mr. O’Brien’s acceptance of

the December RBA was tantamount to acceptance of the position of Vice-President of Administration at \$185,000 falls under its own weight.

Defendants' own actions belie any argument that Mr. O'Brien's December *Retention Bonus Agreement* was functionally an employment agreement between Mr. O'Brien and the company for the position of Vice-President of Administration at a salary of \$185,000. Throughout 2011 Mr. O'Brien had both an iLoop Retention Bonus Agreement and an iLoop Employment Agreement. The latter, but not the former, specified his position (Chief Financial Officer) and his salary (\$200,000). *Compare* Exhibit 1 *with* Exhibit 33. Upon the closure of the iLoop/Lenco merger on December 28, 2011, the December Lenco RBA replaced the March iLoop RBA. On that same date, Mr. O'Brien received an offer letter for the position of Lenco Vice-President of Administration at a salary of \$185,000, effective January 1, 2012. Ex. 56. Mr. O'Brien did not sign this offer letter and so informed his manager, Mr. Banks.

The job offer defendants extended to Mr. O'Brien in December 2011 was his job offer letter, not his Retention Bonus Agreement. The "Employment" paragraph of the December RBA states in its entirety: "Effective as of the date hereof, Recipient will continue to be employed by the Company." Ex. 50, ¶ 1. Defendants' claim that Mr. O'Brien's agreement to the December RBA in and of itself constituted acceptance of

the position of Vice-President of Administration at \$185,000 is without any factual foundation.

Defendants have abandoned their previous argument that Mr. O'Brien's performance of the duties of Vice-President of Administration beginning on December 29, 2011, constituted acceptance of the reduction of his salary to \$185,000 on January 1, 2012. The offer letter defendants sent to Mr. O'Brien provided: "if the terms outlined above . . . are acceptable to you, please sign below and return" Ex. 56. Where an offer prescribes the manner for its acceptance, it can be accepted only in the manner specified in the offer. *Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 536, 424 P.2d 290 (1967); 25 Wash. Prac., Contract Law and Practice § 18-301.3 (November 2012). In other words, where an offer specifies a particular method of acceptance, that method must be used or else there is no acceptance. Mr. O'Brien never signed and returned the offer letter—the only manner specified for its acceptance—precisely because the terms of the offer were unacceptable to him.

An offer can be accepted by the rendering of a performance only if the offer invites such an acceptance. Restatement (Second) of Contracts § 53(1); *Discover Bank v. Ray*, 139 Wn. App. 723, 727, 162 P.3d 1131 (2007). Here, the offer letter did not invite acceptance by performance. Therefore, Mr. O'Brien's performance of the duties of Vice-President of

Administration at a salary of \$200,000 did not accept defendants' written offer of employment at a salary of \$185,000 beginning January 1, 2012. Defendants, however, accepted Mr. O'Brien's performance of the job of Vice-President of Administration at a salary of \$200,000 from the close of business on December 28 through December 31, 2011. They then reduced his salary for that position to \$185,000, effective January 1, 2012.

Moreover, the critical question under paragraph 5.6(ii) of the December RBA is whether Mr. O'Brien ever gave "express written consent" to the reduction of his salary. Under Delaware law, the "expression" of "written consent" requires more than just the execution of some writing. *Empire of Carolina, Inc. v. Deltona Corp.*, 514 A.2d 1091, 1095 (Del. 1986). "Express written consent" requires written communication not only of consent but also written communication of the nature of the act as to which consent is being given. *Id.* Mr. O'Brien refused to sign the offer letter the company had sent to him because doing so would have constituted "express written consent" to the proposed reduction in his salary. Mr. O'Brien immediately informed Mr. Banks he would not sign the offer letter. When the company reduced Mr. O'Brien's salary to \$185,000 on January 1, 2012, it knew it was doing so without the "express written consent" the December RBA required. That action provided Mr. O'Brien with Good Reason to resign under paragraph 5.6.

V. Washington, not Delaware, Law Establishes the Standard of Appellate Review of the Trial Court's Determination that the \$15,000 Reduction in Mr. O'Brien's Salary was Not Material, and that Review is De Novo.

Defendants wrongly assert that this Court must “defer” to the trial court’s determination whether defendants’ \$15,000 reduction of Mr. O’Brien’s salary on January 1, 2012, was a “material” reduction within the meaning of paragraph 5.6(ii) of the December RBA. Defendants contend that (1) “materiality” is a mixed question of fact and law and (2) under Delaware law an appellate court defers to a trial court’s resolution of such mixed questions. Resp. Br. at 32. Assuming *arguendo* defendants are correct that “materiality” is a mixed question of fact and law rather than a legal conclusion, *cf.* O’Brien Br. at 41, defendants are incorrect that Delaware law provides the standard for this Court’s review of that question. Washington law provides the standard for this Court’s appellate review of all questions decided in the trial court, even those involving the substantive law of another state. *See, e.g., Rice v. Dow Chemical Co.*, 124 Wn.2d 205, 208, 875 P.2d 1213 (1994) (applying Washington standards of review to trial court determinations in a case arising under Oregon substantive law).

“Analytically, resolving a mixed question of law and fact requires establishing the relevant facts, determining the applicable law,

and then applying that law to the facts.” *Erwin v. Cotter Health Centers*, 161 Wn.2d 676, 687, 167 P.3d 1112 (2007). An appellate court gives deference to the trial court’s factual findings under the substantial evidence standard but reviews the trial court’s application of the law to those facts de novo. *Franklin County Sheriff’s Office v. Sellers*, 97 Wn.2d 317, 329-30, 646 P.2d 313 (1982). Here, the trial court made *no* factual findings regarding the issue of materiality, so there is nothing for this Court to give deference. The only matter for this Court to review is the trial court’s conclusory determination that defendants’ \$15,000 reduction of Mr. O’Brien’s salary was not a “material reduction” within the meaning of paragraph 5.6(ii) of the December RBA. CL 17 (CP 463). This Court’s review of that application of law to fact is de novo.

Defendants do not call the Court’s attention to any evidence in the record that even arguably supports the trial court’s conclusion that defendants’ reduction of Mr. O’Brien’s salary by \$15,000 was not a “material reduction” in his salary. For indeed, there is none. The only evidence presented at trial was Mr. O’Brien’s unrebutted and unimpeached testimony that the loss of 7.5% of his annual salary was significant to him. This was legally sufficient. This Court should reverse the trial court’s conclusion regarding “material reduction.”

VI. Mr. O'Brien's Motives for Invoking, on February 6, 2012, his Rights under the "Good Reason" Provision of the December RBA are Irrelevant.

Defendants spent considerable time at trial trying to prove that concerns about the company's future financial stability motivated Mr. O'Brien to invoke paragraph 5.6(ii) of the December RBA and provide Mr. Harris with written notice of his Good Reason to resign under that provision on February 6, 2012. Defendants continue to assert that immaterial argument on appeal. Resp. Br. at 11, 26 n.10, 32-34.

In the absence of fraud, a party's motives for invoking the express terms of a contract are irrelevant. *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1055 (Del. Ch. 1984). "A party does not act in bad faith by relying on contractual provisions for which that party bargained. . . ." *Nemec v. Shrader*, 991 A.2d 1120, 1128 (Del. 2010). A party is legally entitled to invoke his contractual rights to further his own economic interests. *Gilbert*, 490 A.2d at 1055. Simply put, it doesn't matter *why* Mr. O'Brien decided on February 6, 2012, to invoke his rights under paragraph 5.6(ii) of the December RBA. What matters is that defendants breached their obligations to Mr. O'Brien under that contractual provision.

Defendants have not reasserted on appeal their earlier argument that Mr. O'Brien's performance of the position of Vice-President of Administration after January 1, 2012, knowing he was being paid a salary

of only \$185,000, waived his right to invoke the Good Reason provision of the December RBA. The December RBA expressly gave Mr. O'Brien 90 days from onset of his salary reduction to provide notice that the condition constituted "Good Reason" for him to resign. He provided that notice 37 days after his salary was reduced. The December RBA gave Mr. O'Brien six months from onset of the salary reduction to resign. He resigned on March 8, 2012, after 68 days. Mr. O'Brien did not waive any of his rights under the December RBA and his motives for invoking it on February 6, 2012, are irrelevant as a matter of law.

VII. There is No Legal or Factual Basis for the Trial Court's Invocation of the Doctrine of Promissory Estoppel.

Defendants continue to defend the trial court's erroneous invocation of the legal doctrine of "promissory estoppel" to bar Mr. O'Brien from recovering on his legal claims against defendants. Resp. Br. at 32-36. Both the Superior Court and defendants have confused "promissory estoppel" with "equitable estoppel." They are, however, separate and distinct concepts. *See, e.g., Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 254, 259-59, 616 P.2d 644 (1980). The Superior Court made no factual findings regarding equitable estoppel and defendants have waived any argument that equitable estoppel, rather than promissory estoppel, applies to this case. Moreover, the test for estoppel

is “exacting.” *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1977 (2014). Defendants admit it requires proof by clear and convincing evidence. A court may find that a party is estopped from pursuing his legal claims in court where he has engaged in “intentionally misleading representations concerning his abstention from suit.” *Petrella*, 134 S. Ct. at 1977. The evidence in the record, even taken in the light most favorable to defendants, falls far short of meeting the exacting test for estoppel.

At no time on February 24, 2012, did Mr. O’Brien represent to, assure, or promise Mr. Harris that Mr. O’Brien had withdrawn his claim that defendants had triggered paragraph 5.6(ii) of the December RBA. There is literally *no* testimonial support for the trial court’s finding that Mr. O’Brien had “promised” Mr. Harris that he and the company had reached an agreement that had addressed the concerns that had led him to submit his February 6 notice of Good Reason to resign. Defendants cite none. See Resp. Br. at 12, 32-34. Although Mr. Harris testified he personally thought he and Mr. O’Brien had reached an agreement that resolved Mr. O’Brien’s concerns, RP 412:4-6, Mr. Harris acknowledges the last thing Mr. O’Brien said to him during their February 24 meeting was they would have a future discussion where they would “try to put something together.” RP 414:11. As a matter of fact and law, no agreement occurred on February 24 between Mr. Harris and Mr. O’Brien.

Furthermore, defendants do not dispute Mr. Harris lacked the authority to make an agreement to change the payment of Mr. O'Brien's retention bonus. See O'Brien Br. at 45. Defendants also do not contest that Mr. Harris asked Mr. O'Brien during their meeting on February 24 to have his lawyer send Mr. Harris a letter explaining the legal basis for Mr. O'Brien's claim the company had triggered paragraph 5.6(ii) of the December RBA. Mr. Harris still expected to receive such a letter after his meeting with Mr. O'Brien on February 24 had concluded. See O'Brien Br. at 46. If Mr. O'Brien really had assured Mr. Harris on February 24 that he was no longer asserting he had Good Reason to resign, why would Mr. Harris still be waiting on a letter from undersigned counsel to set forth the legal basis for Mr. O'Brien's claim? Defendants do not say.

Defendants do say that Mr. O'Brien "insisted" to Mr. Harris on February 24 that he did not want to be CFO and that led Mr. Harris to believe that he did not need follow through on his prior directive to restore Mr. O'Brien's salary to \$200,000. Resp. Br. at 34. Once again, defendants' argument proceeds from a false premise. Mr. Harris had informed Mr. O'Brien on February 23 that effective immediately he was restoring Mr. O'Brien's prior title of CFO of **iLoop**. Ex. 62. Mr. O'Brien never told Mr. Harris on February 24 that he did not want the title of CFO of **iLoop**. Mr. O'Brien said that if he ultimately decided to stay with the

company, he did not want to be a corporate officer of **Lenco**. See Resp. Br. at 34. No reasonable person could construe Mr. O’Brien’s statement to Mr. Harris on February 24 that he did not want to be a corporate officer of **Lenco**—because he didn’t want to be individually liable for its non-payment of wages to other employees, see *id.* at n. 11,—to be equivalent to an “assurance” that Mr. Harris could safely countermand the directive he had given the day before restoring Mr. O’Brien’s salary to \$200,000.

There is no factual support for the trial court’s conclusion that Mr. O’Brien attempted to obtain “accelerated bonus payments through deception.” CL 25 (CP 464). The company’s then-Director of Human Resources, Jill Uppal, testified that Mr. O’Brien had informed her prior to his resignation he had not “agreed to anything” during his meeting with Mr. Harris on February 24. The company’s then-General Counsel Richard Ballard testified that Mr. O’Brien had informed him after Mr. O’Brien’s meeting with Mr. Harris on February 24 that Mr. O’Brien still planned to resign effective March 8. This testimony was unimpeached and unrebutted. iLoop and Lenco are legally charged with their own high-level managers’ knowledge of these facts. *E.g., Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 794-795, 98 P.2d 1264 (2004). General Counsel Ballard took no action because he wrongly believed that Mr. Harris and Mr. O’Brien were still discussing a negotiated resolution.

A party cannot invoke “promissory estoppel” to relieve itself of the consequences of its own mistaken assumptions. As a former practicing attorney, Mr. Harris either knew or should have known that Mr. O’Brien did not represent during their meeting on February 24 that he was abandoning his contention that he had Good Reason to resign. This Court should reverse the trial court’s faulty conclusion that defendants established by clear and convincing evidence at trial that Mr. O’Brien should be estopped from recovering on his legal claims arising from defendants’ breach of paragraph 5.6(ii) of the December RBA.

VIII. The Record Evidence on Summary Judgment Did Not Establish Either a Genuine Material Dispute or a Bona Fide Dispute Regarding Mr. O’Brien’s Legal Entitlement to Accelerated Payment of his Full Retention Bonus.

Defendants assert the novel legal argument that the Superior Court’s denial of Mr. O’Brien’s motion for summary judgment is unreviewable on appeal. Resp. Br. at 5 n.3, 37 n.12. *Johnson v. Rothstein*, 52 Wn. App. 303, 759 P.2d 471 (1988), holds that following a *jury trial* a party cannot challenge the denial of a motion for summary judgment because trial counsel will have had the opportunity to make an appealable CR 50 motion to preserve any claimed errors from the denial of the summary judgment motion. A party cannot make a CR 50 motion in a bench trial. *See* CR 50(a). The *Johnson* rule prohibiting appeals of orders

denying motions for summary judgment where there has been a jury trial does not apply here. This Court has de novo review of the Superior Court's denial of Mr. O'Brien's motion for summary judgment.

The evidence before the court on summary judgment revealed that this matter was a straightforward breach of contract case where there was no genuine dispute as to the few facts material to the resolution of Mr. O'Brien's legal claims.³ Those material facts are as follows:

1. The December RBA entitled Mr. O'Brien to resign for "Good Reason," which included a "material reduction" in his "then current salary" without his "express written consent."
2. A resignation for Good Reason entitled Mr. O'Brien to immediate payment of his full retention bonus.
3. The December RBA became effective on December 28, 2011.
4. Mr. O'Brien's salary for the period of December 28-31, 2011, was his existing salary of \$200,000, and defendants reduced his salary to \$185,000 effective January 1, 2012. (Any claim Mr. O'Brien's "annual salary did not change between the merger and the date he resigned," Resp. Br. at 40, is contrary to fact and law.)

³ Mr. O'Brien does not understand defendants' assertion that he failed to identify the evidence considered by the trial court on summary judgment. See Rep. Br. at 36. In accordance with CR 56(h), the Superior Court's summary judgment orders identify the evidence that was considered. CP 387-390. The parties have included all of that evidence in the Clerk's Papers. CP 36-189; 218-324; 343-352; 370-373.

5. Mr. O'Brien never gave "express written consent" to the reduction of his salary and refused to sign the December 27, 2011, offer letter for the position of Vice-President of Administration at a salary of \$185,000, beginning on January 1, 2012.
6. Defendants did not reduce the salary of all other recipients of the December RBA when they reduced Mr. O'Brien's salary.
7. Per paragraph 5.6(ii) of the December RBA, on February 6, 2012, Mr. O'Brien gave timely written notice of Good Reason to resign based in part on the January 1, 2012, salary reduction.
8. Defendants did not cure his Good Reason within 30 days.
9. Mr. O'Brien resigned effective March 8, 2012.
10. Defendants have refused to pay Mr. O'Brien \$282,993.00 in outstanding retention bonus payments.

These not-genuinely disputed facts entitled Mr. O'Brien to judgment as a matter of law on his breach of contract and RCW 49.48 claims.

The Superior Court should also have granted Mr. O'Brien's summary judgment motion on his claim for willful withholding of wages under RCW 49.52. There was, and is, no *bona fide* dispute over Mr. O'Brien's legal entitlement to the bonus payments due under the December RBA. Judicial resolution of this case involved no novel or evolving legal doctrines about which reasonable legal minds could differ.

Defendants' assertion that their interpretation of the December RBA was "an objectively reasonable" one, Resp. Br. at 41, does not make it so. Defendants' alleged "genuine belief that no payments were due" to Mr. O'Brien was founded on a fundamentally erroneous understanding of the law that is not "fairly debatable." *E.g., id.* at 40. There is "no pure heart, empty head" defense to an RCW 49.52 claim. Because correct application of black-letter contract law required the entry of judgment in Mr. O'Brien's favor, the Superior Court erred in holding defendants could invoke the "bona-fide dispute" defense to his RCW 49.52 claim.⁴

IX. Conclusion

This Court should reverse the judgment of the trial court for defendants and direct the entry of judgment in Mr. O'Brien's favor on all claims arising from the December RBA against all defendants.

RESPECTFULLY SUBMITTED this 22nd day of July 2014.

FRANK FREED SUBIT & THOMAS LLP

By: 

Michael C. Subit, WSBA No. 29189
Attorneys for Appellant James O'Brien

⁴ Defendants' reliance on *Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn. App. 52, 79, 199 P.3d 991 (2008), is misplaced. The employee in *Duncan* signed each amendment to the employee compensation plan, and each amendment provided for the next occasion on which the employer would review the employee's compensation. Here, by contrast, Mr. O'Brien never signed any agreement in which he consented to the reduction in his salary to \$185,000. Moreover, the employee in *Duncan* did not have a contract that required his "express written consent" to any salary reduction.

CERTIFICATE OF SERVICE

I, Janet Francisco, certify and state as follows:

1. I am a citizen of the United States and a resident of the State of Washington; I am over the age of 18 years and not a party of the within entitled cause. I am employed by the law firm of Frank Freed Subit & Thomas LLP, whose address is 705 Second Avenue, Suite 1200, Seattle, Washington 98104.

2. I caused to be served the foregoing document upon counsel of record at the address and in the manner described below, on July 22, 2014: **APPELLANT’S REPLY BRIEF.**

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

DATED at Seattle, Washington this 22nd day of July, 2014.



Janet Francisco