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Division I  
State of Washington

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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McCLINCY BROTHERS FLOOR COVERINGS, INC.,

Appellant,

v.

COLLIN CARPENTER and TRISH CARPENTER, husband and wife, and  
RANDALL V. BROOKS,

Respondents.

~

COLLIN CARPENTER and TRISH CARPENTER, husband and wife,  
Third Party Plaintiffs,

v.

TIMOTHY McCLINCY,

Appellant,

and

CROWN MOVING CO., INC.,

Third-Party Defendant

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BRIEF OF APPELLANT

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## **I. INTRODUCTION**

McClincy Brother's Floor Coverings, Inc. ("McClincy's") was hired in May of 2011 to repair water damage to the home of Collin and Trish Carpenter ("the Carpenters"). The work was being paid for by their homeowners insurance, Encompass. When the work was still ongoing a year later, owner Tim McClincy ("McClincy") went to the property to see why it was taking so long. When he got there, he saw that in addition to the insurance repair work, his company also was remodeling the Carpenters' home, for which it had no records and had never been paid.

He confronted his project manager, Randall Brooks ("Brooks"), who was managing the work. Brooks admitted that he was "behind on his paperwork." Mr. Carpenter signed a supplement and paid \$49,951.95 for some of the remodeling at an August 2, 2012 meeting. He also signed a supplement authorizing an additional \$40,736.07 insurance payment to McClincy's.

McClincy later learned that McClincy's also had been managing a large addition to the Carpenter home, again managed by Brooks. Brooks originally submitted a McClincy's bid over \$400,000 for that work in 2011, but the Carpenters rejected it as too expensive. However, the Carpenters and Brooks proceeded with the project under McClincy's name, but without a contract and without notifying or paying McClincy's.

The Carpenters' homeowners insurance accompany, Encompass Insurance, also took an interest in the job. In addition to the repair costs, Encompass was paying for the Carpenters to live in an apartment and storage expenses for some of their furniture while the work was done. Encompass was concerned that the work was taking too long, and it

questioned whether the expenses that it was paying were attributable to the remodeling. As a result of its investigation, Encompass concluded that the Carpenters had made misrepresentations, and it ceased all payments on the claim. Encompass also threatened to seek reimbursement of some payments. The August 2 insurance supplement that Carpenter signed was one of the canceled payments. As a result, McClincy's did not receive the money.

The Carpenters refused to pay the supplement themselves, and McClincy's ultimately terminated the contract for nonpayment. The Carpenters had the work completed by another contractor for \$40,800.

When McClincy's terminated the agreement, the Carpenters owed a \$44,715.72 balance on the \$260,000 construction contract. McClincy's sued the Carpenters for the \$44,715.72 contract balance and for unjust enrichment in connection with the remodeling. McClincy's also sued Brooks for doing work on the side in violation of a noncircumvention provision in his employment agreement. The Carpenters and Brooks asserted a number of counterclaims.

Shortly after the lawsuit was filed, the Carpenters sought a Preliminary Injunction for the return of the furniture that had been put in storage while the work was done. McClincy's refused to release it until its bill was paid. The Carpenters asked the court to order McClincy's to return the furniture, but King County Superior Court Judge Barbara Linde denied that request, and instead ordered McClincy's not to move or transfer it. McClincy did later move the furniture to his own warehouse, and Judge Linde held McClincy in contempt of the injunction. She ordered McClincy

to return the furniture to the Carpenters on December 13, 2013, which he did.

Following the contempt order, Judge Linde systematically ruled against McClincy's at each and every opportunity. Many of her rulings rules defy explanation.

On June 23, 2014, Judge Linde granted McClincy's motion for leave amend its Complaint and assert an unjust enrichment claim for the addition. At the time, a motion for summary judgment on certain contract claims was pending. When that motion was heard on July 15, 2014, Judge Linde dismissed the unjust enrichment claim that she had just allowed McClincy's to plead. The motion did not refer to the unjust enrichment claim because it had not been pled when the motion was filed. The same day, Judge Linde dismissed McClincy's claim under the non-circumvention provision because a noncompete provision in the agreement was not supported by consideration. No claim was ever made under the noncompete provision.

Although Judge Linde ordered McClincy's to retain the furniture while the lawsuit was pending, she ruled after trial that doing so constituted conversion and violated the Consumer Protection Act.

Judge Linde found that the Carpenters' refusal to deliver the insurance check to McClincy's was justified because the contract did not require payment until the work was complete. However, she relied on a provision for payments from the homeowner and ignored the provision requiring the Carpenters to deliver any insurance checks to McClincy's within ten days.

Judge Linde also found that McClincy Encompass Insurance refused to reissue an insurance check because McClincy told it to. Not only is the

record devoid of any such evidence, but the Carpenters also later signed a settlement agreement with Encompass in which they acknowledged that Encompass made that decision based on its own investigation.

Judge Linde found that the Carpenters paid \$44,715.72 less than they agreed to for the work, and she awarded them \$40,800 to complete the job after McClincy's terminated. However, she ruled that McClincy's was not entitled to be paid for work that it had performed because it breached the agreement. She awarded the Carpenters \$44,715.72 of free work on top of their damages.

Judge Linde awarded the Carpenters prejudgment interest on all of their damages, which she described as a "conservative estimate" of the damages.

She found for Brooks on his overtime claim, which she calculated based on a 40-hour workweek because McClincy's failed to establish the required hours. However, the exhibit on which she based her award requires "a minimum of 40 hours per week and a maximum of 70 hours per week."

Judge Linde awarded over \$500,000 of attorney fees to the Carpenters and Brooks. She signed both their proposed orders without making any substantive changes. Judge Linde awarded exactly the amount of fees and costs requested.

In the end, Judge Linde's decision seems to be as much about who McClincy is as it is about what he did. Judge Linde made a number of gratuitous findings that are completely without support in the record, including "McClincy's repeatedly uses litigation as a business tool to intimidate and bully his customers;" "McClincy' s uses its many corporate identities in an unfair and deceptive manner;" McClincy's has a "negative

ethos of company.” Judge Linde even went to so far as to rule that McClincy’s violated by the Consumer Protection Act by “suing the Carpenters.”

This appeal raises an unusual number of issues and calls into question the fairness of the trial. The respondents will no doubt jump on this and accuse McClincy’s of histrionics and conspiracy theories, but this appeal is grounded in the record and the law. McClincy’s respectfully requests that the Court give serious and thoughtful consideration to this appeal and grant such relief as is appropriate.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in refusing to offset the Carpenters’ contract damages by the balance owing under the construction contract.
2. The trial court erred in granting summary judgment on McClincy’s claim for unjust enrichment.
3. The trial court erred in granting the Carpenters’ CR 41(b)(3) motion on McClincy’s claim for unjust enrichment.
4. The trial court erred in ruling that McClincy’s converted the Carpenters’ furniture.
5. The trial court erred in ruling that McClincy’s violated the Consumer Protection Act.
6. The trial court erred in awarding the Carpenters prejudgment interest.
7. The trial court erred in granting summary judgment on McClincy’s contract claims against Brooks.
8. The trial court erred in calculating the overtime pay award to Brooks.

9. The trial court erred in making findings of fact that were not supported by substantial evidence. **September 12, 2014:** Findings 1.6, 1.31, 1.32, 1.39, 1.44, 1.78, 1.90, 1.93. **September 18, 2014:** Findings 7, 10; and findings of fact in Conclusion 4. **October 14, 2014:** Findings of fact in Conclusions 1.9, 1.24, 1.29, 1.31, 1.32.

10. The trial court erred in its determination of reasonable attorney fees.

11. The trial court erred in authorizing the receiver to sell the receivership property.

### **III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Whether the measure of damages for the Carpenters' contract damages requires an offset for the balance owing to McClincy's. (First Assignment of Error)

2. Whether material issues of fact precluded summary judgment on McClincy's unjust enrichment claim against the Carpenters. (Second Assignment of Error)

3. Whether the Carpenters established an accord and satisfaction as a matter of law? (Third Assignment of Error)

4. Whether compliance with a Preliminary Injunction is a defense to a claim for conversion. (Fourth Assignment of Error)

5. Whether compliance with a Preliminary Injunction is a defense to a claim for violation of the Consumer Protection Act. (Fifth Assignment of Error)

6. Whether the Carpenters' claims were liquidated. (Sixth Assignment of Error)

7. Whether a lack of consideration for a noncompete clause renders otherwise enforceable provisions of the same agreement void. (Eighth Assignment of Error)

8. Whether Brooks' work week while employed by McClincy's was fixed or fluctuating. (Ninth Assignment of Error)

9. Whether the trial court's findings of fact were contrary to undisputed evidence. This applies to the following findings: **September 12, 2014:** Findings 1.6, 1.26. **September 18, 2014:** Findings 7, 10; and findings of fact in Conclusion 4. **October 14, 2014:** Findings of fact in Conclusions 1.9, 1.24, 1.29, 1.31, 1.32. (Seventh Assignment of Error)

10. Whether the trial court's findings of fact were supported by any evidence. This applies to the following findings: **September 12, 2014:** Findings 1.31, 1.32, 1.39, 1.44, 1.78, 1.90, 1.93. **September 18, 2014:** Findings 7, 10; and findings of fact in Conclusion 4. **October 14, 2014:** Findings of fact in Conclusions 1.9, 1.24, 1.29, 1.31, 1.32. (Seventh Assignment of Error)

11. Whether Brooks and the Carpenters adequately supported their motions for awards of attorney fees. (Tenth Assignment of Error)

12. Whether a custodial receiver may sell receivership property other than in the ordinary course. (Eleventh Assignment of Error)

#### **IV. STATEMENT OF THE CASE**

##### **A. Factual Statement of the Case.**

###### **1. The Leak and Repair Contract.**

The Carpenters discovered a water leak in their home in May, 2011 and reported the loss to their homeowner's insurer, Encompass Insurance ("Encompass"). CP 2250 at ¶ 1.1. The Carpenters selected McClincy

Brothers to do the repair and restoration work. CP 2250-51 at ¶¶ 1.2, 1.5. Brooks was the assigned project manager. CP 2251 at ¶ 1.7.

The scope of work and the contract were finalized in September 2011. Exhibit 8. Because the leak rendered the kitchen unusable, the Carpenters moved out while the work was done. CP 2251-2252 at ¶ 1.13. Encompass paid for an apartment under the alternative housing provision in the insurance policy. CP 2251-52 at ¶ 1.13. In addition, some of the Carpenters' belongings were placed in storage while the work was being done. CP 2251 at ¶¶ 1.9-1.11.

## **2. The Additional Inside Remodeling.**

The Carpenters also asked Brooks if McClincy's could do some remodeling to their home while the water work progressed. CP 2252 at ¶ 1.20. Brooks agreed to do the work, but neither Brooks nor the Carpenters ever presented any bids, estimates, or contract for it. CP 2252 at ¶ 1.20. Under Brooks' supervision, the remodeling was quickly completed. CP 2251 at ¶ 1.22.

The trial court found that "[t]he Carpenters agreed to pay McClincy's directly from their own funds for this additional work," but it is undisputed that no records or invoices were prepared while the work was being done, and no payments were made to McClincy's even when the work was finished. CP 2251 at ¶¶ 1.20., 1.22. Not a single document was presented indicating that the Carpenters were expected to pay McClincy's for that work or intended to do so.

During the summer of the following year, Tim McClincy went to the property to see why the water repair work was taking so long. According to the trial court,

However, Tim McClincy did not visit the vacant job site until June or July, 2012. At that time he walked in and around the building, observing materials and work that had been performed for which there were no “supplements” to McClincy’s original contract with the Carpenters and which appeared to exceed the scope of work authorized by the Carpenters’ insurance company.

CP 2269-2270 at ¶ 5.

The trial court found that when McClincy saw this undocumented work, he “immediately jumped to the conclusion that he was being wronged.” CP 2270 at ¶ 5. When confronted by McClincy, Brooks “admitted that he was ‘behind on his paperwork.’” *Id.* In truth, Brooks had no paperwork at all for the additional work.

### **3. The Outside Addition.**

The Carpenters also renewed earlier plans for an addition to the home and an outdoor covered patio. CP 2252 at ¶ 1.23. Brooks provided the Carpenters with a \$400,000 bid for that work in August 2011, but they rejected it as too expensive. Exhibits 44A and 44B; CP 2253 at ¶ 1.25.

The trial court found that the Carpenters decided to proceed with the work as their own contractor. CP 2253 at ¶ 2253. Judge Linde further found that:

the Carpenters worked with their designers and engineers to secure a new permit for this separate project. The permit was issued in late May, 2012 by the City of Medina, and excavation and concrete footings for the patio were in place by August 1, 2012 by contractors hired by the Carpenters.

CP 2253 at ¶ 1.27. Judge Linde found that Brooks “stayed connected” to the project on a limited basis in the hope that he might secure some of the inside finish work for McClincy’s, but that Mr. Carpenter managed the project as his own contractor. CP 2253 at ¶ 1.28; CP 2271 at ¶ 7.

Judge Linde’s findings could not be farther from the truth. Mr. Carpenter was not his own contractor. McClincy’s was the contractor. The

February 3, 2012 permit application identifies “McClincy’s” as the contractor for the project. Exhibit 63 at page MC-CARP-PL 00125. Brooks signed the Medina Construction Code of Conduct as the General Contractor. Exhibit 63 at MC-CARP-PL 00160. Brooks submitted plan revisions on March 9, April 25, and May 8, 2012. Exhibit 63 at MC-CARP-PL 00115–00117. The permit itself was issued on May 16, 2012 and also identifies McClincy’s as the contractor. Exhibit 63 at page MC-CARP-PL 00104.

Mr. Carpenter did later become his own contractor, but not until July 31, 2012. Exhibit 63 at page MC-CARP-PL 00157. Judge Linde’s findings and conclusions never mention that McClincy’s was the named contractor.

McClincy’s was not the contractor in name only. Brooks oversaw and managed the work. That is evident from a sampling of the emails that were admitted as trial exhibits. On June 12, 2011, Mr. Carpenter emailed his designer that “We will be using McClincy’s who does remodel and construction.” Exhibit 37. In addition to applying for the permit and submitting plan revisions, Brooks actively managed the project once the permit was issued.

Brooks’ involvement is made clear in his emails. On June 13, 2012, Brooks sent Carpenter an email stating:

I’m putting together a project plan for work at the house to provide to you. I’d like to get most of the dust removed from the house before installing appliances..... Will install wood under stairs beginning Monday next week and will put the third coat on- then we’ll spray the millwork following and get appliances in. We’ll leave the paint for the great room and master to be done in another phase. Inside work will be in concert with the exterior. Lights for the laundry room will go in before we paint.

Exhibit 52 at page Carpenter 563. On June 25, 2012, he wrote emailed the designer and said:

Attached is the patio layout that we will need your help with. The city would like to see a drawing with the perimeter shown. The perimeter wall will extend 18 inches above finished slab with the exception of the south wall which will be sided. There will be 3 steps coming down from the family/sun room. The stair will have a raked edge on either side that will extend 18 inches above steps. We will only use steel to support the north side of the roof structure

Exhibit 52 at Carpenter 570. On July 26, 2012, he emailed Carpenter to inform him of the progress:

This week we have installed the ledger that is necessary to later install the stone veneer. I'm awaiting a response from the first water feature professional, but in the interim I've met with another to get additional thoughts.

Exhibit 55 at Carpenter 610.

Judge Linde's findings are completely silent about all of this. She made no findings about McClincy's being the named contract or about Brooks' creating a project plan for the work. Instead, she found that Brooks "was engaged in 'aggressive marketing'" in the hope that he could get some of the finish work for McClincy's. CP 2271 at ¶ 7.

#### **4. The August 2, 2012 Meeting and September 2012 Supplements.**

Work on the outside addition was interrupted by McClincy's discovery of the inside remodeling in June or July of 2012. A meeting was scheduled for August 2, 2012 to discuss the inside work. Exhibit 18; RP 7/17/14 at 39-40 (C. Carpenter).

This presented something of a difficulty for the Carpenters because McClincy's was still the contractor of record for their addition. He delivered a notice to the City that he would begin acting as his own contractor just two days before the August 2 meeting. Exhibit 63 at page MC-CARP-PL 00157.

At the meeting, McClincy submitted two contract supplements to Carpenter. The first was for certain identified work on the inside remodeling and totaled \$52,449.95 including a contingency and tax. CP 2253 at ¶ 1.30. The second was to authorize payment of an additional \$40,736.07 supplement that Encompass had just approved for the water repair. CP 2354 at ¶ 1.33.

Carpenter objected to the contingency in the remodeling supplement, and the parties agreed to remove it, reducing the amount to \$49,951.95. CP 2354 at ¶ 1.32. Carpenter gave McClincy a check in that amount at the meeting. CP 2354 at ¶ 1.32. The trial court ruled as a matter of law that this check was given as an accord and satisfaction. CP 2253-2254 at ¶ 1.32.

Judge Linde ruled that the payment was an accord and satisfaction not just for the work identified in the supplement, but for all of the remodeling in the house, specifically “including the upstairs.” CP 2253 at ¶ 1.31. The reference to the upstairs was significant because it contained a master suite and four other rooms, all of which were remodeled. CP 2253 at ¶ 1.31; RP 7/28/14 at 72. However, the supplement that Carpenter paid on August 2, 2012 itemizes the work and includes work in master bedroom but not in the other four rooms. Exhibit 5.

The Check itself has no “payment in full” or other notation of satisfaction. Exhibit 131. No one testified at trial that the check was offered or accepted as payment in full for the inside remodeling work, and no one testified about discussions of the upstairs in connection with the payment.

Judge Linde explained that she based her determination on an email from Brooks to Carpenter sent the day before the meeting.

The email tells the Carpenters that they will be presenting a statement of account, and details supporting that statement of account as a supplemental to show what is owed for the balance of work done.

It is pretty -- it's a pretty comprehensive statement in that email indicating "When we meet tomorrow we're going to be presenting you with the work that's been done and money that's owed". And it indicates, in the Court's view, that that is to be inclusive.

RP 7/24/14 at 61-64. The email that Brooks sent does not live up to Judge Linde's recollection.

I just wanted to confirm our meeting tomorrow at 10:00 am at your house and provide you with a statement of account along with the detail of corresponding supplemental work. We have received the last check from the mortgage company and will need your endorsement. I've attached the additional supplements. McClincy would like to receive payment on the balance of work tomorrow when we meet so that we can continue production at your house. Please give me a call with any questions.

Exhibit 18.

What happened after August 2 is far more probative on the question of accord and satisfaction. Following the meeting, McClincy took over the project, and in September 2012, he sent the Carpenters two additional proposed supplements for non-insurance work that he said he had discovered. Exhibits 106-107; CP 2255 at ¶¶ 1.47, 1.48. Carpenter responded by requesting a meeting to discuss it.

I am surprised to hear that you believe there was work done by McClincy company outside of the insurance work that has not yet been paid to you. Please provide those documents that you refer to and let's try to resolve the issues on Monday so this job can be finished quickly.

*Id.* The Carpenters never even asserted accord and satisfaction as a defense until their answer to the Second Amended Complaint was filed the day before the trial started. CP 2156 at ¶ 12.12; *see* CP 15-15 (Answer); CP 223-224 (Amended Answer).

**5. The Encompass Insurance Check, Investigation and Settlement.**

After the August 2 meeting, McClincy demanded that Carpenter turn over the \$40,736.07 Encompass check as soon as he received it. CP 2254 at ¶ 1.34. Mr. Carpenter knew that he was obligated to hand over the check, but he did not want to because he feared that he would lose any leverage over McClincy's.

So, I knew in my contract that was signed early on that I was required to pay McClincy within ten days of receipt of any check from the insurance company. And I was that if I paid, received the insurance money, that I'd have no clout over this guy.

RP 7/17/14 at 55. To maintain his clout, Mr. Carpenter emailed the insurance adjuster that "I just spoke to my lawyer and was advised to have a stop pay and check reissued to me at address so that I can fulfill payment to McClincy's at finish of job." Exhibit 21 at Page Carpenter 96; *see* CP 2254 at ¶ 1.38.

McClincy's argued that the stop payment was a breach of the contract, but Judge Linde found that the contract "states that full payment by the Carpenters is not due until 'completion of the work.'" CP 2251 at ¶ 1.6. She therefore found the stop payment justified. CP 2254 at ¶ 1.38.

The Contract does in fact contain the language quoted by the trial court, but it applies when the homeowner is personally paying for the work. Exhibit 8 at p. 1. The very next sentence of the contract has a different rule for insurance checks.

However if full payment is not paid by your insurance company/mortgage company/financial institution, the balance due or total payment becomes the responsibility of you, the Customer, and is due upon completion of work. Further, you agree that upon receiving an insurance check it will be endorsed and delivered to McClincy's within ten (10) days after the issue date of the insurance check regardless of any other payment terms set forth within this agreement.

Exhibit 101 at page 1, first paragraph. Mr. Carpenter was correct that his contract required him to deliver the check.

As it happens, after Carpenter stopped payment on the Check, Encompass made its own decision not to reissue it. When the insurance repair work took longer than was expected, Encompass began asking questions and eventually opened a fraud investigation. RP 7/24/14 at 9 (Chesterman); RP 7/17/14 at 150.

Encompass proceeded to investigate whether it was paying living expenses for the Carpenters' remodeling. RP 7/17/14 at 158, 167. After completing its investigation, Encompass concluded that the Carpenters had fraudulently obtained living expense payments. A March 22, 2013 letter to the Carpenters' attorney from Encompass said:

Encompass has determined that your clients fraudulently obtained no less than \$57,233.52 in insurance proceeds from Encompass, to which they're not entitled. At this time Encompass is taking steps to determine what action it will take in order to recoup these fraudulently obtained insurance proceeds.

RP 7/17/14 at 218; *see* RP 7/17/14 at 158, 161-162, 215-216.

As a result of its investigation, Encompass ceased all payments under the claim, and it canceled payments that had been approved but not yet paid, including the \$40,736.07 supplement. RP 7/17/14 at 160; Exhibit 163. That decision led to a dispute of some kind between Encompass and the Carpenters, which was resolved in a June 8, 2014 Mutual Release Agreement between Encompass and the Carpenters. Exhibit 163.

Under the settlement, Encompass released its claim for reimbursement, and the Carpenters released any claims for insurance benefits, including the \$40,736.07 supplement. Exhibit 163 at ¶¶ 2-3. The Carpenters did not receive the \$40,736.07 insurance payment because they

negotiated it away in their settlement with Encompass, not because of McClincy's instructions.

Although the Mutual Release was prominent in the trial, Judge Linde made no reference at all to it in her findings. However, she did find that "Encompass has no claims against the Carpenters for insurance fraud or anything else." CP 2260 at 1.99.

#### **7. The Carpenters' Personal Property.**

When the Carpenters moved out of the house, some of their belongings were put in storage with Crown Moving and Storage to prevent damage. CP 2251 at ¶ 1.10. One consequence of the delays in the project was that additional storage costs were incurred. The \$40,736.07 insurance supplement that Carpenter agreed to pay on August 2, 2012 included a line item of 2,380.50 for additional storage fees. Exhibit 16.

When Carpenter refused to pay that invoice, McClincy removed the property from Crown. He put most of it in his own warehouse and the rest in a different storage facility. CP 2256 at ¶ 1.52. When the Carpenters learned on January 4, 2013 that their furniture had been moved, they demanded its return. McClincy's refused to return the furniture until its bill was paid. CP 102.

Shortly after this action was filed, the Carpenters sought a preliminary injunction ordering the return of the furniture. CP 59-67. Judge Linde granted the motion for an injunction, but instead of ordering McClincy's to return the furniture, she ordered it not to move or transfer it. CP 128-131. Judge Linde did not order McClincy's to return the furniture until December 13, 2013. CP 476-482.

In her findings and conclusions, trial, Judge Linde concluded that McClincy's retention of the furniture constituted conversion. CP 2377 at ¶ 1.27. That conversion occurred over 348 days from January 4, 2013 to December 18, 2013. CP 2258-2258 at ¶ 1.78. The Restraining Order and Preliminary Injunction prohibiting the transfer of the property were in effect for all but the first 26 days of that period. *See* CP 70-72 (Restraining Order).

Judge Linde awarded conversion damages only for loss of use. CP 2259 at ¶ 1.80. She awarded the Carpenters \$32,864.70 using a "simple calculation."

The Carpenters Medina home is 5,000 square feet, and four times the size of the rental apartment. The furniture stored by Crown represented at least 50% if not 75% of all the furniture in the Carpenter's Medina home. Using a simple calculation of the monthly rental rate of the furniture multiplied by two to account for furniture in half of the square footage of the Carpenter's home equates to \$2,849.88. This amount multiplied by eleven and one half months starting on January 4, 2013, the date the Carpenters first demanded the furniture and ending on December 18, 2013 when the furniture was returned, totals \$32,864.70.

CP 2258-2259 at ¶ 1.78.

The trial court's finding that half of the furniture from the Carpenter house was put in storage seems to have been derived from the testimony of Trish Carpenter, who proposed the formula at trial. However, Ms. Carpenter testified that 50% of the house was affected by the water, not that 50% of the furniture from the house was put in storage.

Q: Why did you double that calculation?

A: Because we took 50% of our -- of our house. And that was the area primarily affected with the water loss.

RP 7/28/14 at 131 (Trish Carpenter). Some furniture in the affected areas was placed in storage, while other items were simply moved around in the house. RP 7/24/14 at 77-78 (C. Carpenter). Judge Linde appears to have

misunderstood this testimony to mean that half of the furniture in the house was put into storage.

Judge Linde likewise appears not to have remembered Ms. Carpenter's testimony about the time when the furniture could not be used. Ms. Carpenter testified that the Carpenters suffered damages for loss of use starting in July 2013 when they moved back into the home.

Q: Tell us what damages that cost you, please.

A: Well, no furniture. We had no kitchen -- I'm speaking now to when we've moved back into the house. So, when we moved back into the house we had no furniture.

RP 7/28/14 at 110; RP 7/17/14 at 50 (Collin Carpenter). That makes sense because before then, the Carpenters could only have put the furniture in a different storage location, which also explains why their proposed order for the Preliminary Injunction required McClincy's to "allow the Carpenters to transfer their household belongings to an independent location chosen by the Carpenters." CP 130 at ¶ 3.

#### **8. Brooks' Employment With McClincy's.**

Brooks filed a counterclaim against McClincy's for breach of an employment contract and for wage withholding under RCW 49.52.050. CP 146-47. Those claims were included in the trial of the Carpenter claims.

Brooks was employed by McClincy's in 2008. CP 2275 at ¶ 4. Judge Linde found that Exhibit 208 sets forth the terms of Brooks' employment. CP 2274 at ¶ 10; Exhibit 208; RP 8/5/14 at 31-32 (Brooks). She found that Brooks was owed overtime for three and a half years of employment. CP 2276 at ¶ 4.

Judge Linde awarded Brooks "8.9 hours of overtime due for 52 weeks for 3.5 years." CP 2276 at ¶ 4. In other words, she awarded Brooks overtime pay for every single weekday over three and a half years, including

holidays. She did not deduct vacations even though Brooks testified that he took at least one two week vacation in 2011. RP 08/06/14 at 13. The 8.9 hours appears to be some kind of average and is not a calculation based on actual hours worked in any specific week. Using a 40-hour workweek, Judge Linde determined that Brooks had a regular rate of \$34.62 and awarded an overtime rate of \$51.92, resulting in an award of \$84,100.02. CP 2267 at ¶ 4

McClincy's argued that Brooks had a fluctuating workweek and that his overtime should be calculated on that basis, but Judge Linde found that "McClincy's did not establish the required hours of work for Brooks's salary, so it is determined to be 40 hours." CP 2276 at ¶ 4. Brooks' employment agreement itself states that he will work "a minimum of 40 hours per week and a maximum of 70 hours per week," but Judge Linde made no findings about that provision. Exhibit 208.

**B. Procedural History.**

McClincy Brothers commenced this action on January 23, 2013, asserting a number of claims to the effect that the Carpenters breached the contract, that Brooks and the Carpenters had colluded to have work done on the Carpenter home at the expense of McClincy Brothers, and that Brooks breached his noncircumvention agreement. CP 1-27. The Carpenters and Brooks answered and asserted counterclaims. The Complaint and Answers were amended on multiple occasions. Crown Moving and Storage was joined as third party defendant and then dismissed. The case was ultimately tried to the court over 13 days from July 15, 2014 to August 8, 2014.

On February 20, 2013, Judge Linde granted a Preliminary Injunction prohibiting transfer of the Carpenters' furniture. CP 128-131.

On June 23, 2014, the trial court granted McClincy's motion for leave to file a Second Amended Complaint to assert a claim against the Carpenters for unjust enrichment in connection with the outdoor addition. CP 1844. On July 15, 2014, the trial court granted summary judgment dismissing that claim. CP 2200-2201.

On July 15, 2014, the trial court also granted Books' motion for summary judgment to dismiss McClincy's contract claims. CP 2195-2197.

The case was tried to the court intermittently between July 15, 2014 and August 6, 2014.

The Court entered Findings of Fact and Conclusions of Law on the Claims involving the Carpenters on September 12, 2014. In response to a Motion for Reconsideration, Amended Conclusions of Law were entered on October 10, 2014, and Second Amended Conclusions of Law were entered on October 14, 2014. Finding and Conclusions for Brooks were entered on September 18, 2014.

The Carpenters noted a motion for attorney fees for hearing on December 10, 2014. CP 2381-2403. Judge Linde signed their proposed order without substantive changes. CP 2525-2532.

Brooks noted his motion for fees for January 30, 2015. Judge Linde again signed the proposed order without any substantive changes. CP 2650-2658.

The final judgment was not entered until February 10, 2015. CP 2659-2667. McClincy's, then represented by Philip Talmadge, filed a Notice of Appeal on February 12, 2015. CP 2668-2679.

Talmadge withdrew by notice filed with this Court on April 6, 2015. The undersigned counsel appeared on May 21, 2015. New counsel

discovered that Talmadge had erroneously failed to include McClincy in the Notice of Appeal. With its Notice of Appearance, counsel also filed a Motion for Joinder to correct the mistake and add McClincy as an appellant. On June 11, 2015, Commissioner Neel referred that question to this panel.

On April 10, 2015, the trial court granted a motion for a custodial receiver of some of McClincy's property. On August 11, 2015, the trial court granted the Carpenters' motion to permit the receiver to sell the property. McClincy filed a Notice of Appeal on August 21, 2015.

McClincy then filed a motion to consolidate the appeals, which was granted.

## **V. ARGUMENT**

### **A. Standard of Review.**

In an appeal from a bench trial, this Court's role is limited to determining if the trial court's findings are supported by substantial evidence and whether the findings support the conclusions of law. *Pham v. Corbett*, 187 Wn.App. 816, 825, 351 P.3d 214, 219 (2015).

### **B. Carpenter Issues.**

#### **1. Breach of Contract.**

In her Conclusions of Law, Judge Linde ruled that McClincy's breached its contract with the Carpenters (Exhibit 8) by making "dishonest and incomplete representations to the Carpenters, Encompass and Crown" (CP 2375 at ¶ 1.12), and "by repudiating and abandoning the contract and by intentionally interfering with the Carpenters performance under the contract" (CP 2375 at ¶ 1.6).

Assuming for the sake of argument that at least one of those is supported by evidence and would be a breach of the agreement, the measure

of damages is the benefit of the bargain. The Washington Supreme Court adopted the Restatement measure of damages for cases like this in in *Eastlake Const. Co., Inc. v. Hess*, 102 Wn.2d 30, 46-49, 686 P.2d 465, 473-75 (1984).

Subject to the limitations stated in §§ 350–53, the injured party has a right to damages based on his expectation interest as measured by

(a) the loss in the value to him of the other party’s performance caused by its failure or deficiency, plus

(b) any other loss, including incidental or consequential loss, caused by the breach, less

(c) any cost or other loss that he has avoided by not having to perform.

*Id.* at 46 (quoting Restatement (Second) of Contracts § 347.

With respect to the first element of the rule, Judge Linde found that Carpenters’ cost to complete the work was \$40,800. CP 2257 at ¶ 1.62; CP 2379 at ¶ 3. Appellants do not dispute this finding.

Under the second part of the rule, an injured party may also recover other incidental or consequential losses. The Carpenters never alleged defective performance or property damage, Judge Linde did not find any such damages. The amount of the second element of the rule therefore is zero.

The third part of that rule is “less any cost or other loss that he has avoided by not having to perform.” *Eastlake*, 102 Wn.2d at 46. Judge Linde found that contract amount was \$260,021.17 (CP 2260 at ¶ 1.88), of which the Carpenters paid \$215,305.45 (CP 2260 at ¶ 1.92). There was never a question at trial that the Carpenters owed a balance of the \$44,715.72 difference.

Judge Linde, however, ruled that McClincy's was not entitled to the balance owing because it breached the contract.

The Carpenters are not liable for the difference in the amount due under the McClincy's Contract and the amount paid because McClincy's materially breached the McClincy's Contract.

CP 2376 at ¶ 1.14. In doing so, she ignored the third element of the Restatement measure of damages and the long-established principles of contract damages.

In *Eastlake* itself, the Supreme Court affirmed the trial court's award of "damages for breach of contract, less the amount owing to Eastlake under the contract." *Eastlake*, 102 Wn.2d at 33. Judge Linde should have done the same. The measure of damages for breach of contract is the amount necessary to put the injured party in the same position it would have been in if the contract had been performed, not a better position. *Diedrick v. Sch. Dist. 81*, 87 Wn.2d 598, 609-10, 555 P.2d 825, 833 (1976).

If McClincy's had performed the contract, it would have delivered the promised work and the Carpenters would have paid \$260,021.17 (CP 2260 at ¶ 1.88) for it. Instead, McClincy's terminated the contract, and the Carpenters spent \$40,800 to complete the work in addition to the \$215,305.45 they paid McClincy's (CP 2260 at ¶ 1.92). Because the trial court refused to deduct the costs avoided by the Carpenters, they received the benefits for which they agreed to pay \$260,021.17, but only paid \$256,105.45.

A cardinal rule of contract damages has always been that the plaintiff cannot be put in a better position than if the contract had been performed. This rule predates *Eastlake* and has been consistently enforced by Washington courts.

The purpose of awarding damages for breach of contract is neither to penalize the defendant nor merely to return to the plaintiff that which he has expended in reliance on the contract. It \*\*375 is, rather, to place the plaintiff, as nearly as possible, in the position he would be in had the contract been performed. He is entitled to the benefit of his bargain, *i. e.*, whatever net gain he would have made under the contract. *Munson v. McGregor*, 1908, 49 Wash. 276, 94 P. 1085; *Herbert v. Hillman*, 1908, 50 Wash. 83, 96 P. 837; *Herrett v. Wershing*, 1932, 170 Wash. 417, 16 P.2d 608; *Hardinger v. Till*, 1939, 1 Wash.2d 335, 96 P.2d 262; *Williston on Contracts*, § 1338; *McCormick on Damages*, § 137.

The plaintiff is not, however, entitled to more than he would have received had the contract been performed. If the defendant, by his breach, relieves the plaintiff of duties under the contract which would have required him to spend money, an amount equal to such expenditures must be deducted from his recovery. *Gould v. McCormick*, 1913, 75 Wash. 61, 134 P. 676, 47 L.R.A., N.S., 765; *Robbins v. Seattle Peerless Motor Co.*, 1928, 148 Wash. 197, 268 P. 594; *Rathke v. Roberts*, 1949, 33 Wash.2d 858, 207 P.2d 716; *Restatement, Contracts*, §§ 329, 333, 335; *McCormick on Damages*, § 143.

*Platts v. Arney*, 50 Wn.2d 42, 46, 309 P.2d 372, 374-75 (1957).

In *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 849, 792 P.2d 142 (1990), the Supreme Court held that an award of rescission and damages in connection with the sale of a mobile home had to be reduced by the amount of the value of site work that was properly performed and benefitted the plaintiff. The trial court had not made that deduction, and the Supreme Court reversed, explaining:

However, there is a problem with this computation of damages in that it allows the purchasers to have their property reconveyed to them and to receive the benefit of the site preparation work without having paid any fee for such improvements. We thus conclude that while the damage award is sustainable, it must be reduced by the amount of the contract between the lender and the purchasers. If the lender had fully performed the contract to supervise the site preparation, the purchasers would have had to pay the lender \$8,525. Therefore, the trial court's award of \$12,500 damages to the purchasers must be diminished by that contract amount. By awarding the sum of money necessary to complete the site preparation work, reduced by the agreed contract price, purchasers will be put in the same position they would have been in had the contract been fully performed.

*Id.* at 851. Here, just Linde allowed the Carpenters to retain the benefit of McClincy's work without paying for it.

In *Ducolon Mech., Inc. v. Shinstine/Forness, Inc.*, 77 Wn. App. 707, 713-14, 893 P.2d 1127, 1131 (1995), the court held that a defaulting subcontractor who was wrongfully terminated could recover damages for the termination, but that the award had to be reduced by the general contractors' cost to complete an correct the work. When both parties are in default, the award is determined with an offset. *Id.*

Judge Linde did not put the Carpenters in as good as position as if the contract had been performed, but in a better position. This Court should correct that error by offsetting the cost to complete the work by the balance owing. Because that results in a net amount owed to McClincy's, the Court should remand for judgment in its favor in the amount of \$3,915.72.

## **2. Unjust Enrichment Claim for Patio Addition.**

On May 30, 2014, the Carpenters brought a motion for summary judgment seeking the dismissal of plaintiff's claims for an "alleged unsigned, unwritten contract." CP 1297-1300. The motion was brought in response to McClincy's testimony at a May 9, 2014 deposition. CP 1299.

A week and a half later, McClincy's filed a motion for leave to file a Second Amended Complaint and assert a claim for unjust enrichment relating to the addition. CP 1512-1513. On June 23, 2014, Judge Linde granted the motion for leave to assert that claim. CP 1843-1844.

When Judge Linde ruled on the contract motion three weeks later, she dismissed the new unjust enrichment claim. CP 2200-2201. The summary judgment motion did not discuss the unjust enrichment claim because it had not even been pled when the motion was filed. Instead, the

motion argued that the contract claim was improperly asserted in a deposition and that McClincy's could not establish the elements of a claim for breach of contract. CP 1297-1300.

The timeliness issue for the unjust enrichment claim was raised in opposition to the Motion for Leave to Amend (CP 1756-1757) and resolved when the trial court granted the Motion. The contract argument was irrelevant to the unjust enrichment claim.

The Carpenters did address the unjust enrichment claim in their Reply Brief. CP 1838-1842. However, that was not just a new argument on reply, but a totally different argument about a totally different claim on reply, and it should not even have been considered. *Admasu v. Port of Seattle*, 185 Wn. App. 23, 40, 340 P.3d 873, 881 (2014). Although this was pointed out to the trial court, it granted the motion and dismissed the claim for unjust enrichment. CP 2199-2201.

A party moving for summary judgment has the initial burden of demonstrating the absence of material fact in its motion. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182, 187 (1989). The Carpenters could not meet that initial burden with respect to the unjust enrichment claim because it was not mentioned and did not even exist at the time. When, as here, the moving party fails to meet that burden, the motion must be denied. *Jacobsen v. State*, 89 Wn.2d 104, 110, 569 P.2d 1152, 1156 (1977). This Court should reverse the order of summary judgment on the unjust enrichment claim.

### **3. Unjust Enrichment Claim for Indoor Remodeling.**

McClincy's also pled a claim for unjust enrichment in connection with the indoor remodeling. After McClincy's rested its case at trial, the

Carpenters brought a motion under CR 41(b)(3) to dismiss that claim. RP 7/24/14 at page 17 *et seq.* The trial court heard the motion, took a recess and then granted the motion as a matter of law.

The Court's view is that as a matter of law with respect to the Unjust Enrichment Claim, the claim fails and must be dismissed.

\* \* \* \*

The Court finds that that is -- establishes the defense of accord and satisfaction, and as a matter of law, the Unjust Enrichment Claim fails.

RP 7/24/14 at 61-64. In contrast, Judge Linde dismissed McClincy's contract claims as a matter of fact in the same motion. RP 7/24/14 at 66 ("So, I did weigh the evidence in the McClincy claim against the Carpenters for Breach of Contract.").

When a judge dismisses a claim under CR 41(b)(3) as a matter of law, "review is de novo viewing the evidence in the light most favorable to the nonmoving party." *In re Dependency of H.S.*, 135 Wn. App. 223, 229, 144 P.3d 353, 356 (2006).

The law of accord and satisfaction is well established and well defined: "accord and satisfaction can be shown only if the debtor (1) tenders payment (2) on a disputed claim, (3) communicating that the payment is intended as full satisfaction of the disputed claim, and (4) the creditor accepts the payment." *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 297, 38 P.3d 1024, 1028 (2002); *see also Kibler v. Frank L. Garrett & Sons, Inc.*, 73 Wn.2d 523, 525, 439 P.2d 416, 418-19 (1968) (setting for rules for accord and satisfaction).

Moreover, the party asserting accord and satisfaction "must have made his intention clear." *Id.* at 526. "The tender must be accompanied by conduct and declarations by the debtor from which the creditor cannot fail

to understand that the money is tendered on the condition that its acceptance constitutes satisfaction.” *U.S. Bank Nat. Ass’n v. Whitney*, 119 Wn. App. 339, 351, 81 P.3d 135, 142 (2003). For that reason, “No accord is established where the amount owed remains open to further negotiation.” *Id.*

No matter how the evidence and findings are viewed, the Carpenters did not prove an accord and satisfaction. The Carpenters were the debtors. To create an accord and satisfaction, they had to tender a payment to McClincy’s in full payment of the debt. No such tender was made. Instead, the Carpenters paid the amount demanded and negotiated.

Mr. Carpenter must have communicated to McClincy that the payment was being offered in full satisfaction of a debt. Instead, the trial court found that McClincy stated that the supplement was for the full amount. Mr. Carpenter never testified that he offered his check as payment in full. His check (Exhibit 131) has no notation of payment in full. There was no evidence that Mr. Carpenter and Mr. McClincy reached any agreement other than how much Carpenter would pay that day.

An accord and satisfaction cannot be created when the amount owing is open to further negotiation. When McClincy’s demanded more money, Carpenter did not stand on an accord and satisfaction, but instead asked to negotiate. The accord and satisfaction was a fabrication devised on the eve of trial.

Judge Linde did not even rely on what was said at the August 2 meeting. Judge Linde instead stated that she based her determination on an email from Brooks to Carpenter sent the day before the meeting.

The email tells the Carpenters that they will be presenting a statement of account, and details supporting that statement of

account as a supplemental to show what is owed for the balance of work done.

It is pretty -- it's a pretty comprehensive statement in that email indicating "When we meet tomorrow we're going to be presenting you with the work that's been done and money that's owed". And it indicates, in the Court's view, that that is to be inclusive.

RP 7/24/14 at 61-64. However, that email does not even say what Judge Linde claimed.

I just wanted to confirm our meeting tomorrow at 10:00 am at your house and provide you with a statement of account along with the detail of corresponding supplemental work. We have received the last check from the mortgage company and will need your endorsement. I've attached the additional supplements. McClincy would like to receive payment on the balance of work tomorrow when we meet so that we can continue production at your house. Please give me a call with any questions.

Exhibit 18. An email sent the day before cannot possibly be the basis to find the nature of an agreement made in a meeting the next day.

Finally, even if an accord and satisfaction did occur, it could only be an accord and satisfaction of the amounts claimed in the supplement. In Finding of Fact 1.31, Judge Linde found that the August 2 supplement "covered all of the 'non-insurance' work that McClincy's had completed in the interior of the Carpenters' home including the upstairs." No witness at trial said that. The Supplement itself plainly identifies the work it covers, and does not include most of the upstairs. Exhibit 5.

The Court should reverse the CR 41(b)(3) dismissal of the unjust enrichment claim for the indoor remodeling and remand for trial.

#### **4. Conversion of Furniture and Personal Property.**

On February 20, 2013, the trial court signed an Order Granting Preliminary Injunction that prohibited McClincy's from "transferring, assigning, selling, removing, encumbering, changing title to, concealing or in any way disposing of the Carpenter's household furnishings." CP 130.

The order states that the injunction “shall go into effect immediately and shall remain in effect until further order of this Court.” *Id.* McClincy’s was under court order to keep the furniture where it was.

Judge Linde could have ordered McClincy’s to return the property, and that relief was requested in the motion for a preliminary injunction, but he struck that provision from the proposed order before signing it. CP 130. The Carpenters could have sought a modification of the injunction to order the return of the furniture, but they chose not to. Judge Linde may consider her ruling unwise in hindsight, but she cannot award damages against McClincy’s for obeying it. However, that is exactly what she did. CP 2377 at ¶¶ 1.27-1.28.

Moreover, if the Court does not reverse the conversion award, it should reverse the damage award. The trial court explained the award as a “simple calculation” as if it were a matter of math. CP 2258-2259 at ¶ 1.78.

The Carpenters Medina home is 5,000 square feet, and four times the size of the rental apartment. The furniture stored by Crown represented at least 50% if not 75% of all the furniture in the Carpenter’s Medina home. Using a simple calculation of the monthly rental rate of the furniture multiplied by two to account for furniture in half of the square footage of the Carpenter’s home equates to \$2,849.88. This amount multiplied by eleven and one half months starting on January 4, 2013, the date the Carpenters first demanded the furniture and ending on December 18, 2013 when the furniture was returned, totals \$32,864.70.

CP 2258-2259 at ¶ 1.78. However, the components of that calculation are erroneous.

No evidence was presented at trial that half of the furniture from a 5000 square foot home was put into storage. As set forth above, the testimony was that half of the house was affected by the leak. RP at 7/28/14 at 131.

Moreover, the trial court's calculation included time when the house was uninhabitable. The Carpenters could not have used the furniture before they moved back in, as Trish Carpenter acknowledged when she testified that "when we moved back into the house we had no furniture." RP 7/28/14 at 110. As the court stated in *DePhelps v. Safeco Ins. Co. of Am.*, 116 Wn. App. 441, 451, 65 P.3d 1234, 1239 (2003), "decisions on lost rents and loss of use support the notion that hypothetical losses are *not* recoverable." No loss of use occurred until July 2013.

This Court should reverse the award for conversion because McClincy's was acting under and in compliance with a court order. If it does not reverse the conversion award, the Court should remand for an appropriate determination of damages on the existing record to the extent that it is possible.

#### **5. Consumer Protection Act.**

On July 26, 2013, the trial court granted the Carpenters' leave to amend their Answer to assert a counterclaim under the Consumer Protection Act. CP 214-215. The Amended Answer alleged violations for breaching the contract and for taking the furniture.

McClincy's actions in breaching the McClincy Contract and McClincy Contract Supplements, removing the Carpenters' furniture from Crown without the Carpenters' authorization and refusing to return the Carpenters' furniture constitutes unfair or deceptive acts or practices.

CP 233. The Carpenters' Answer to the Second Amended Complaint contained the same language., CP 2165.

Judge Linde did not find that McClincy's violated the Consumer Protection Act by breaching its agreement with the Carpenters. That is not surprising because a breach of contract by itself does not violate the

Consumer Protection Act. *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 701, 106 P.3d 258, 267 (2005).

With respect to the furniture, Judge Linde concluded that McClincy's removal of the furniture and "disingenuous negotiations with the Carpenters after converting their furnishings" constituted deceptive acts or practices. CP 2377-2378 at ¶ 1.33. The trial court made no findings or conclusions that McClincy's later transfer of some of the property to a different storage location was an unfair or deceptive act or practice.

Judge Linde also found a dozen other unfair or deceptive acts, none of which were pled as part of the claim. As set forth in the Second Amended Conclusions of Law, these include: "repeatedly us[ing] litigation as a business tool to unfairly intimidate and bully their customers (1.31); us[ing] its many corporate identities in an unfair and deceptive manner (1.32); "trespassing upon the Carpenters' property after terminating the McClincy's contract, suing the Carpenters, using its trade names interchangeably and refusing to comply with this Court's orders" (1.33); "Tim McClincy's false and secret statement to Encompass Insurance that he "fired" Brooks" (1.39); and premis[ing] its collection actions against the Carpenters on an invalid contract between McClincy's Home Decorating and Brooks" (1.41). CP 2374-2380.

Judge Linde ruled McClincy's statement to Encompass that he fired Brooks when he only removed him from the Carpenter job, and his use of a trade name in his employment contract with Books both constituted per se violations of the Consumer Protection Act that injured the Carpenters. She cited RCW 48.30A.005, which is a statement of Findings in a statute regulating the insurance industry. She cited RCW Chapter 18.27, which

regulates the conduct of contractors, but not their contracts with employees. Moreover, the name on Brooks' contract (Exhibit 208) is an active registered trade name of McClincy's, and it is free to contract in that name. Exhibit 145; RCW 19.80.010.

This Court should reverse the Consumer Protection Act award in its entirety.

**6. Prejudgment Interest.**

The trial court awarded the Carpenters prejudgment interest on all of their claims. CP 2377; CP 2380. Prejudgment interest may be awarded only when a claim is liquidated, meaning that "the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion.". *Rekhter v. State, Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 124, 323 P.3d 1036, 1047 (2014); *Scoccolo Const., Inc. ex rel. Curb One, Inc. v. City of Renton*, 158 Wn.2d 506, 519, 145 P.3d 371, 377 (2006).

Judge Linde made no finding that the amounts awarded were liquidated. Her findings are quite the opposite. She found that the \$40,800 of contract damages was a "conservative estimate." CP 2259 at ¶ 1.80. Whether conservative or not, an "estimate" is not liquidated. She awarded conversion damages based on a finding that between 50-75% of the Carpenters' furniture was put in storage. CP 2258 at ¶ 1.78. A range is not liquidated either.

To the extent that the Court affirms the trial court, it should reverse the award of prejudgment interest.

**C. Brooks Issues**

**1. Dismissal of Claim Against Brooks on Summary Judgment.**

McClincy's sued Brooks for violation of an agreement that contains confidentiality, non-circumvention and noncompete provisions. CP 1747. On June 2, 2014, Brooks brought a motion for summary judgment asking the court to dismiss the noncircumvention claim because the noncompete provision in the agreement lacked the independent consideration. CP 1449, 1453-1454.

In its response, McClincy's pointed out that it was not attempting to enforce the noncompete provision. CP 1730. Rather, it sought to enforce "Brooks' agreement not to 'solicit, divert [or] damage' Plaintiffs existing customer relationships while he was employed." CP 1729. The conduct alleged to violate the agreement all took place while Brooks was employed by McClincy's.

No argument was made that the non-circumvention provision itself required independent consideration. At-will employment can be modified without additional consideration. *Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn. App. 52, 76, 199 P.3d 991, 1003 (2008). Rather, the question was whether the noncompete and non-circumvention agreements were severable. CP 1727-1734, 1845-1853. Judge Linde granted summary judgment because the noncompete provision lacked consideration and the agreement was not severable. CP 2195-2197.

In 2000, the Supreme Court rather emphatically rejected the argument that the lack of consideration for part of an agreement renders the entire agreement void. *Waterjet Tech., Inc. v. Flow Int'l Corp.*, 140 Wn.2d 313, 996 P.2d 598 (2000). An earlier Court of Appeals decision (*Machen*,

*Inc. v. Aircraft Design, Inc.*, 65 Wn. App. 319, 828 P.2d 73 (1992)) made just such a ruling, and the Court reversed it.

*Machen, Inc.* provided no reason why an entire employment agreement should be invalidated especially when, as here, the agreement may contain numerous terms unrelated to patent assignments. Its holding is unpersuasive and contrary to the legislative purpose behind the statute.”

*Waterjet*, 140 Wn.2d at 322. The agreement here likewise contains numerous terms unrelated to the noncompete provision. Including the non-circumvention agreement. *Waterjet* conclusively answers this question. Whether the noncompete provision was supported by consideration is utterly irrelevant to this case.

In his reply brief on the motion, Brooks raised the new argument that the agreement was not enforceable because it was in the name of McClincy Home Decorating, Inc. CP 1850-1851. This was a new argument in Reply to which McClincy could not respond, and could not be the basis for granting the motion. *Admasu v. Port of Seattle*, 185 Wn. App. 23, 40, 340 P.3d 873, 881 (2014).

McClincy Home Decorating does exist, and it can enter into contracts. Trial Exhibit 145 is a list of the registered trade names for McClincy Brothers Floor Coverings, Inc., and it includes “McClincy’s Home Decorating” as an active registered trade name. Because “McClincy’s Home Decorating” is a registered trade name, McClincy’s has every right to “conduct, or transact business” under that name. RCW 19.80.010. It is noteworthy that Brooks’ employment agreement itself also was in the name of McClincy’s Home Decorating, but the court had no problems with enforcing it. Exhibit 208. If the argument has merit, then

Brooks' entire employment agreement is void, and the judgment should be reversed for that reason.

The trial court erroneously granted summary judgment, and this Court should reverse that order.

## **2. Overtime Calculation.**

Brooks' employment contract was identified and admitted as Trial Exhibit 208. CP 2274 at ¶ 10; RP 8/5/14 at 27, 31-32 (Brooks). Brooks' title changed in 2011 from Sales Representative to Project Manager, but the terms of his employment did not change. RP 8/5/14 at 27, 31-32 (Brooks).

Judge Linde found that Brooks was entitled to overtime for three and a half years. CP 2276 at ¶ 4. Instead of calculating the amount owing for each week, she applied some kind of average and determined that Brooks worked 49.4 hours per week with half an hour off for lunch. *Id.* Judge Linde awarded Brooks overtime pay for "for 52 weeks for 3.5 years." CP 2276 at ¶ 4.

In other words, Judge Linde not only failed to account for a single day of vacation over three years, but also gave Brooks credit for working every holiday that did not fall on a weekend. According to Judge Linde, Brooks worked 2,542.8 hours per year. It is a fact that Brooks did take some vacation time, including a 12-day trip to Italy in 2011. RP 08/06/14 at 13.

In *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 525, 7 P.3d 807, 811 (2000), the Washington Supreme Court held that the fluctuating work week standard adopted by the Department of Labor and Industries was valid. *Id.* at 534-35. Under that standard, if an employee's workweek is defined at 40 hours, the regular rate is determined by dividing the weekly pay by 40, and overtime hours are compensated at one and a half times that amount. *Id.* at

528-29. However, if the agreed work week fluctuates and may be more than 40 hours, then the regular rate for any week is calculated by dividing the weekly pay by the actual number of hours worked, and overtime is an additional 50% of that amount for each hour in excess of 40. *Id.*

Judge Linde ruled that the fluctuating workweek rule did not apply here because “McClincy’s did not establish the required hours of work for Brooks’s salary, so it is determined to be 40 hours.” CP 2276 at ¶ 4. However, the very employment agreement on which Judge Linde based her award does define the workweek:

Sales Representatives must work a minimum of 40 hours per week and a maximum of 70 hours per week in order to obtain their sales quotas.

Exhibit 208 at p. 2. Although this was repeatedly pointed out to Judge Linde, she never acknowledged it in her findings or in any of her rulings. CP 2293 (Motion to Modify Findings); 2372-73 (Order).

Judge Linde’s decision to use a 40-hour work week resulted in an award of \$84,100.02, while a fluctuating workweek would produce a result of \$22,936.37. That assumes that Brooks did not have a day off for three and a half years.

Judge Linde also did not award Brooks overtime pay for the actual hours that he worked. Instead, she used an average. Even if the workweek were 40 hours, Brooks has to prove his actual overtime hours, not some theoretical average.

The Court should reverse the overtime award and remand to the trial court for a determination of the actual number of overtime hours worked and an award of overtime pay based on the fluctuating workweek rule.

**D. Unsupported Findings of Fact.**

A trial court's findings of fact must be supported by substantial evidence. Although that standard is lenient, it does require some evidence.

[I]t may be well again to call attention to our rule with reference to the character of evidence necessary to establish the affirmative of an issue. We have long since held that a scintilla of evidence, as these terms are commonly defined, is not sufficient for that purpose; that, on a question of fact, before the trier of the fact is warranted in finding the fact established, there must be substantial evidence in its support. This does not mean that the fact sought to be established must be supported by direct evidence, or mean that it may not be established by the proof of facts from which the fact sought to be established is necessarily or reasonably inferred, but it does mean that a disputed question of fact, by whatever character of evidence it is sought to be proven, must have in its support that character of evidence which would convince an unprejudiced thinking mind of the truth of the fact, before it can be said to be established.

*Hillhaven Properties Ltd. v. Sellen Const. Co., Inc.*, 133 Wn.2d 751, 766, 948 P.2d 796, 803 (1997) (quoting *Smith v. Yamashita*, 12 Wn.2d 580, 582-83, 123 P.2d 340 (1942)). When the record contains no evidence at all to support a finding, it cannot stand. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 345, 858 P.2d 1054, 1079 (1993).

As discussed in more detail elsewhere in this Brief, many of Judge Linde's findings are simply not supported by any evidence admitted at trial, while other findings contradict undisputed evidence. In either case, the finding is not supported by substantial evidence.

**Carpenter Findings (CP 2249-2266)**

1.6 Finding that full payment by the Carpenters is not due until completion of work contrary to Exhibit 8.

1.31 Finding that McClincy said the August 2 supplement included all remodeling not supported by any evidence.

1.32 Finding that McClincy accepted August 2 check as payment in full not supported by any evidence.

1.39 Finding that McClincy convinced Encompass to stop payment and not reissue check unsupported by any evidence.

1.44 Finding that McClincy's abandoned the job in August 2012 not supported by any evidence.

1.78 Finding the 50-75% of Carpenters' furniture put in storage not supported by any evidence.

1.90 Finding that Encompass check not reissued because of McClincy representation not supported by any evidence.

1.93 Finding that McClincy's involved in 40 lawsuits not supported by any evidence (Exhibit 150 not admitted).

1.99 Finding that Encompass has no claim against Carpenters not supported by any evidence.

**Findings in Second Amended Conclusions of Law (CP 2374-80)**

1.9 Finding that Encompass check not reissued because of McClincy representation not supported by any evidence.

1.24 Finding that Carpenter has loss of use for 11.5 months not supported by any evidence.

1.29 Finding that Carpenters suffered 32,864.70 damages from loss of use not supported by any evidence.

1.31 Finding that Tim McClincy, uses litigation as a business tool to unfairly intimidate and bully their customers not supported by any evidence.

1.32 Finding that McClincy's uses its many corporate identities in an unfair and deceptive manner not supported by any evidence.

**Brooks Findings (CP 2267-2278):**

7 Findings that Brooks only provided assistance on outside addition and that Carpenter acted as own attorney not supported by any evidence.

10 Finding that McClincy's involved in 40 lawsuits not supported by any evidence

Conclusion 4. Finding that McClincy's failed to establish Brooks' workweek contrary to Exhibit 208.

**E. Attorney Fees.**

On November 26, 2014, the Carpenters filed a 23-page motion for attorney fees. CP 2381-2403. It was supported by a 20-page declaration of Tim Graham with 40 pages of attachments (CP 2404-2465), and an 11-page declaration of Jennifer Karol with 28 pages of attachments (CP 2471-2510). Graham and Karol were co-counsel for the Carpenters but work for different firms. All told, the motion sought \$382,829 of attorney fees for 1,457 hours of attorney time.

On December 8, 2014, McClincy's objected that the request did not comply with *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013) because it used block billing, lacked detail and failed to provide the information in a format that permitted the claims of two firms working on the same case to be evaluated. CP 2511-2515. McClincy's asked that the court deny the motion with leave to refile. *Id.*

On December 9, 2014, the Carpenters filed their Reply in which they argued that *Berryman* was distinguishable. In fact, they argued that "*Berryman's* value is that it reiterates the rules of *Bowers* and *Mahler*. The similarity ends there." CP 2520. They further argued that "No authority has

been submitted that holds that block billing is inherently insufficient” (CP 2521) and that the request was justified by the purpose of the CPA’s fee award” (*Id.*).

Judge Linde signed the proposed order six days later. CP 2525-2532. She made a few ministerial changes to the order, but awarded everything that was requested.

Brooks filed a 21-page motion for fees on January 22, 2015. CP 2549-2569. The declaration of Mr. Corning and exhibits filed with it total 65 pages. Brooks claimed that he segregated a total of \$8,700 of fees for claims for which he was not awarded fees, but he never identified which fees or which time that represented. CP 2569; CP 2574-2576. McClincy’s responded on January 29, 2015, primarily arguing that fees had not been segregated and to the extent ostensibly segregated had not been identified. CP 2636-2640. Brooks filed his reply on January 29, 2015, arguing that McClincy’s demands for more information were just “another example of McClincy’s strategy to ‘make work’ for Brooks’ attorney. CP 2644.

The next day, Judge Linde signed Brooks’ proposed order awarding him \$164,525 for 541.75 hours of work. CP 2653. As before, Judge Linde made a few minor edits to the order, but granted exactly the relief requested.

In *Berryman v. Metcalf*, 177 Wn. App. 644, 650, 312 P.3d 745, 750 (2013), which was decided about a year before the fee award in this case, this Court provided extensive guidance to attorneys in making fee applications and to courts in deciding them. The *Berryman* court explained that block billing does not permit the required review, but the Carpenters and Brooks submitted nothing but block billing. *Berryman v. Metcalf*, 177 Wn. App. 644, 663-64, 312 P.3d 745, 756 (2013); CP 2425-2461. The

*Berryman* court explained that staffing a case with two attorneys requires consideration of the resulting inefficiencies. *Berryman v. Metcalf*, 177 Wn. App. 644, 662-63, 312 P.3d 745, 756 (2013). Here, the Carpenters had not just two attorneys, but two law firms. The law requires segregation of fees to claims for which fees are recoverable, but the Carpenters and Brooks baldly asserted that segregation was not possible. CP 2398. Brooks did not even provide enough information to begin verifying or refuting his claim. He did not, for example, even identify the 29 hours that he claimed to have segregated from his request. CP 2639.

The fee petitions in this case are nowhere near close to the requirements of *Berryman*. They are impenetrable stacks of documents without any means to cross reference or analyze them. They really are little more than bare allegations that the requests are reasonable. It would have been a simple matter for Judge Linde to require proper submissions, but she instead signed the proposed orders without making any changes or even demonstrating that she had given the requests thoughtful consideration. If *Berryman* has any meaning, the award of fee cannot be upheld.

**F. The Court Should Reverse the Trial Court's Order Authorizing the Sale of McClincy's Property.**

On April 10, 2015, the trial court entered an Order Appointing David S. Kerruish, P.S. Custodial Receiver Over the Certain Real Property And Granting Receiver Full Authority Over All Records and All Property And Proceeds Related To, Arising From, And Incidental To The Real Property. CP 2741-2762.

The form of proposed order signed by Judge Linde included authority to sell the properties, but Judge Linde struck those provisions and wrote "Reserved" over them. CP 2744, 2746-47.

On June 15 2015, the Carpenters filed a motion entitled Motion To (1) Compel Compliance with Receivership Order, an Accounting, and Turnover of Receivership Assets and (2) Amend Receivership Order to Allow Sale of Real Property Including Judgment Debtor's Personal Residence. CP 2765-2772. The Motion asked the trial court to authorize the receiver to sell the receivership property pursuant to RCW 7.60.260. CP 2670-71.

McClincy responded to the motion by pointing out that the very statute cited by the Carpenters, RCW 7.60.260, expressly prohibits such a sale by a Custodial Receiver. RCW 7.60.260(1) provides:

(1) The receiver, with the court's approval after notice and a hearing, may use, sell, or lease estate property other than in the ordinary course of business. Except in the case of a leasehold estate with a remaining term of less than two years or a vendor's interest in a real estate contract, estate property consisting of real property may not be sold by a custodial receiver other than in the ordinary course of business.

Given that the order appointing Kerruish commences with the words “Order Appointing David S. Kerruish, P.S. Custodial Receiver” it does not seem possible to argue that Kerruish is anything other than a custodial receiver. Give the equally clear prohibition against the sale of real property by a custodial receiver other than in the ordinary course, one might expect the Carpenters to rethink their motion. However, if one did, one would be disappointed.

Instead, the Carpenters argued that the Court could just look at the first sentence of RCW 7.60.260(1) that authorizes sales generally and could just ignore the second sentence. CP The Carpenters baldly asserted that “The exceptions in the next sentence are not involved here.” CP 2771. They did not explain why that was the case.

For the Court to grant the relief requested, it would also have to find that “other available remedies either are not available or are inadequate.” RCW 7.60.025(1). The Carpenters have the power to cause an execution sale of the property if they comply with the statutory requirements. CP 2901-02. However, the Carpenters do not want to do that because McClincy would have redemption rights. CP 2930-31.

In their reply, the Carpenters actually had the audacity to argue that a Sheriff’s sale was inadequate precisely because McClincy would have redemption rights. “Sheriffs sales would also be inadequate because it would grant McClincy redemption rights for one year.” CP 2930. While the right of redemption universally afforded to judgment debtors in Washington may be inconvenient for the Carpenters, it represents a conscious policy decision of the state.

Redemption statutes “are benevolent and remedial in character, having as their main object the prevention of the oppression of a debtor and the sacrifice of his property.” F.C. Hackman, *Statutory Redemption Rights*, 3 Wash.L.Rev. 177, 177 (1925).

*Pumilite Tualatin, Inc. v. Cromb Leasing, Inc.*, 82 Wn. App. 767, 772, 919 P.2d 1256, 1258 (1996). The idea that a judgment debtor can sidestep the judgment debtor’s redemption rights with the contrivance of a receivership is remarkable and wrong.

Lastly, McClincy pointed out that the Carpenters do not even have the right to bring this motion. Paragraph 2.12 of the Order Appointing Receiver states that

The Receiver ~~of Plaintiff~~ at any time may apply to the Court for further or other instructions, clarification, modifications of this Order for further powers necessary to enable the 9 10 Receiver to properly perform his duties, for termination of the Receiver's appointment as receiver or the Real Property, or for other relief.

CP 2748 (strikeout reflects trial court's interlineation). Even if the receiver had the power to sell the property, whether to request that permission is for the receiver, not the Carpenters. In that regard, paragraph 2.9 of the Order appoint Kerruish states that: "The Receiver shall not be subject to the control of any of the parties to this matter, but shall be subject only to the Court's direction in the fulfillment of the Receiver's duties." CP 2747. The Order even establishes the rights that the Carpenters do have to bring a motion concerning the receiver.

Nothing in the Order shall limit Carpenter/Brooks ability to move the Court to convert this custodial receivership into a general receivership, as provided in RCW 7.60.015.

CP 2747 at ¶ 2.7.

What Judge Linde thought about these arguments is a mystery. McClincy again requested oral argument (CP 2993), and Judge Linde again denied that request. The Carpenters' proposed order simply appeared with her signature on it.

**G. Motion for Joinder.**

Commissioner Neel referred the motion for joinder to this panel. As set forth in that motion and accompanying declarations, McClincy Brothers Floor Coverings, Inc. and Tim McClincy jointly retained Philip Talmadge to represent them in this appeal. When Talmadge filed the Notice of Appeal, Tim McClincy was inadvertently omitted. This error was not discovered until after Talmadge withdrew, and a motion for joinder was promptly filed.

RAP 5.3(f) and 5.3(i) are designed precisely for this kind of situation. Tim McClincy bears no responsibility for his omission from the Notice of Appeal, and joining him as a party does not affect any issue in the appeal in any way. It simply causes the decision to apply to both parties who

are jointly and severally liable under the same judgment. The Court should grant joinder.

**H. Motion for Award of Attorney Fees.**

Pursuant to RAP 18.1, Appellants request that the Court award them their reasonable attorney fees to the extent that they prevail in this appeal.

Judge Linde found that the Carpenter contract has an attorney fees provision. CP 2527 at ¶ 1.12. In their Answer to Second Amended Complaint, the Carpenters requested relief in the form of an award of attorney fees jointly and severally against McClincy and McClincy's under the Consumer Protection Act. CP 2166 at ¶ 4. They also requested a joint and several judgment for attorney fees against McClincy and McClincy's under the contract. CP 2166 at ¶ 5. Irrespective of the actual contract terms, the Carpenters are therefore liable for attorney fees incurred by McClincy or McClincy's under the principle of mutuality of remedy discussed in *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 788, 197 P.3d 710, 713 (2008).

Brooks asserted wage claims under an employment agreement that contained an attorney fee provision. CP 2653 at ¶ 1.9. All of the claims between Brooks and McClincy's were founded on contract.

To the extent that Appellants prevail, they therefore are entitled to an award of reasonable attorney fees on appeal and at the trial court to the extent that claims are reversed.

**VI. CONCLUSION**

As long and complicated as this appeal may seem, it comes down to a few basic principles.

First, contract damages are intended to put the injured party in the same position it would be in if the agreement were performed and may not

put in a better position. The trial court put the Carpenters in a position \$44,715.72 better than if the contract had been fully performed, and the Court should correct that by remanding for judgment in McClincy's favor in the amount of \$3,915.72

Second, retaining property in compliance with a Preliminary Injunction cannot be wrongful. The trial court's award of damages for conversion and violation of the Consumer Protection Act should be reversed.

Third, a contract that requires 40-75 hours of work per week establishes a flexible workweek, and overtime must be awarded based on the actual hours worked in a given week. The Court should remand the overtime determination for a proper calculation.

Fourth, dismissal of a claim as a matter of law is proper only on notice and when the claim is not supported by admissible evidence. The dismissal of the unjust enrichment claim against the Carpenters and consideration of the capacity to contract issue in Brooks' motion for summary judgment were improper. The trial court's ruling that McClincy's unjust enrichment claim was barred by accord and satisfaction as a matter of law was erroneous because factual issues are presented. The order granting summary judgment on McClincy's contract claim against Brooks because an unrelated provision in the agreement was not supported by consideration was contrary to clear Supreme Court authority.

This Court should dismiss the Carpenters' claims, remand for entry of judgment for McClincy's in the amount of \$3,915.72 on the contract balance, remand the unjust enrichment claims against the Carpenters for trial, remand Brooks' overtime claim for recalculation, reverse the summary

judgment dismissal of McClincy's contract claims against Brooks, and remand the attorney fee awards for disposition based on the results on remand and the standards set forth in *Berryman*.

DATED this 21<sup>st</sup> day of December, 2015

**BRACEPOINT LAW**

By   
Matthew F. Davis, WSBA No. 20939  
Attorneys for Appellants

## **DECLARATION OF SERVICE**

I, Matthew Davis, hereby declare as follows:

1. I have personal knowledge of the facts set forth herein and am competent to testify thereto.
2. On December 21, 2015, I served the foregoing document on the parties identified in paragraph 3.
3. The documents identified in paragraph 2 were served on the following persons at the email addresses stated pursuant to agreement of counsel.

### **Counsel for Carpenter Respondents**

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DATED this 21<sup>st</sup> day of December, 2015 at Seattle, Washington.



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Matthew F. Davis