

NO. 73066-5-I
(consolidated with No. 73861-5-I)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Appellant,

v.

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

Respondents,

and

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

Third Party Plaintiffs,

v.

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

Third Party Defendants.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Barbara Linde

BRIEF OF RESPONDENT BROOKS

Nicholas F. Corning, WSBA No. 4586
THE CORNING LAW FIRM
4616 25th Ave. N.E., #315
Seattle, Washington 98105
Telephone: (206) 789-6503
Facsimile: (206) 525-1514

Attorney for Respondent Brooks

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COURT OF APPEALS DIV I
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I. INTRODUCTION

This case arises out of a dispute between the Appellant, McClincy Brothers Floor Covering, Inc. (McClincy's), a general contractor, and its customers, Respondents Collin Carpenter and Trish Carpenter (Carpenter). They own a residence in Medina, Washington, where the Appellant performed water damage repairs, restoration and upgrades during 2011 and 2012. The Respondent, Randall V. Brooks (Randy), was an employee of McClincy's and served as the Project Manager at the Carpenters' worksite until early August, 2012. At that time, McClincy's principal, Tim McClincy, replaced Randy as the Project Manager on that job. Randy was not fired by McClincy, but he resigned as an employee of McClincy's in a letter of resignation dated August 13, 2012. (Trial Exhibit 204.)

Tim McClincy is a man who is not always right, but he is always certain. He persuaded himself that Randy and the Carpenters, colluded to engage in "secret" transactions to circumvent the Appellant's involvement in portions of the restoration and remodeling work related to two phases of the Carpenter's project. The first phase was related to restoration and upgrades to their existing home (the "inside" project). The second phase was related to an addition to their home, with an outside patio area (the "outside" project). Randy was the Project Manager on a portion of the

"inside" project and was authorized by Tim McClincy to make a bid or bids for all or portions of the "outside" project. (*See Plaintiff's Second Amended Complaint, CP 1890, page 4, line 22.*) Tim McClincy had access to the Carpenter's home at all times during McClincy's work there, because the house was vacant. The Carpenters' homeowners' insurance company had authorized them to move into an apartment until the construction was complete. Tim McClincy went to the vacant job site in June or July, 2012, and observed materials and work that had been performed for which there were no "supplements" to their original contract and which appeared to exceed the scope of work authorized by the Carpenter's insurance company. He confronted his Project Manager, Randy, who admitted that he was "behind on his paperwork", but that the Carpenters were honest, trustworthy customers who would pay for additional work they had authorized on the "inside" project. In fact, two supplements to the contract were completed by Randy and Tim McClincy which were presented to the Carpenters and signed on or about August 2, 2012. At that time Tim McClincy notified the Carpenters that he was personally replacing Randy as their Project Manager. During that period of time Randy was dealing with personal issues relating to health issues of his aging parents and his own hospitalization. On August 9, 2012, he wrote a letter to Tim McClincy, expressing his concerns about the

Plaintiff's hostile work environment and his mistreatment. [Trial Exhibit 203]. On August 13, 2012, he wrote a letter of resignation, ending their employer-employee relationship. [Trial Exhibit 204]. While serving as the Project Manager for the Carpenter's project, Randy learned that the Carpenters had previously designed an addition to their home, including an outside patio with a built-in barbecue. He spoke to Tim McClincy about this addition and "outside" project and was authorized to obtain bids from subcontractors to see if McClincy's could get that job. Randy began working with the Carpenters' architect, trying to get adequate drawings to determine the scope of work and its requirements so that he could solicit bids from the appropriate subcontractors. In the process he learned that the City of Medina had rezoned the Carpenters' property, complicating the ability to acquire a building permit. Randy prepared two bids on behalf of the Plaintiff for the "outside" project, but they were deemed too expensive by the Carpenters, who rejected them. However, Randy knew that the addition contemplated by the Carpenters would require "inside" finishing, which was McClincy's area of expertise, and he thought he could ultimately obtain some of that work for McClincy. In the meantime, Collin Carpenter told Randy that he had talked to a neighbor who encouraged him to act as his own general contractor on the "outside project", hiring his own subcontractors. Randy continued to counsel Mr.

Carpenter and assisted him to obtain a building permit from the City of Medina, in hopes that he could get additional business for McClincy's. However, Tim McClincy wrongfully interpreted Randy's activities as evidence of betrayal and efforts to circumvent McClincy's for Randy's personal benefit. He remains certain (but not *right*) that Randy was paid cash for assisting Mr. Carpenter, but he could not explain why Randy had nothing to do with the Carpenter's "outside" project after he resigned from McClincy's employment and was free to do so. In fact, Randy was a loyal employee who never attempted to circumvent McClincy and never received any compensation from anyone other than McClincy's for performing services within the scope of his employment as an authorized agent of McClincy's. [CP 2659, Finding of Fact 7, p. 5, ll 23-25.]

McClincy's is a serial litigator, having been a plaintiff or defendant in over 40 lawsuits in King, Snohomish and Pierce County alone, according to each court's public records and the testimony of Randy, McClincy's employee assigned to participate in the preparation of McClincy's volume of litigation. [RP 07/29/14 at p. 53-54 and p 71-79.] As is its practice, McClincy's filed this lawsuit and has employed "scorched earth" litigation tactics, including many motions intended to punish the Respondents by requiring them to spend vast sums defending

themselves. As part of Tim McClincy's vendetta against Randy, McClincy's filed a second lawsuit against him, also involving their employment agreement, shortly after this lawsuit was filed (*McClincy's Brothers Floor Covering, Inc. v. Randall V. Brooks*, King County Superior Court Cause No. 13-2-17322-1 SEA). That lawsuit was voluntarily dismissed on October 30, 2014, by an Order of the Court declaring Randy to be the prevailing party and awarding him statutory costs and attorney fees. Still not satisfied, McClincy's filed a *third* lawsuit against Brooks, duplicating the second lawsuit (*McClincy's Brothers Floor Covering Inc. v. Randall V. Brooks*, King County Superior Court Cause No. 15-2-26906-2 KNT). That third lawsuit against Randy is now subject to summary dismissal because he was never served with the Summons and Complaint. As the trial court found in the case at hand, Randy has been the victim of McClincy's vendetta. [RP 8/6/14, Court's Ruling p 200, l.14].

Former and current McClincy employees, including Randy Brooks testified at trial that they all had written, signed employment agreements that compensated them on a commission system based on a "credit toward production" formula. Tim McClincy testified, under oath, at his deposition on June 11, 2014, that he "could not find" Brooks' written employment agreement in his personnel file, where McClincy would

expect it to be. In Tim McClincy's Declaration dated May 30, 2014 [CP 1389] he testified: "At no time during Brooks' employment did I or McClincy's ever sign a written agreement setting forth the terms of Brooks compensation or benefits, nor was there ever a written agreement between McClincy's or myself and Brooks in which Brooks was promised a percentage of any insurance recovery associated with any insurance claims or the resulting litigation." [CP 1389 p. 7.] Randy testified, under oath, at his deposition and in his declaration dated June 16, 2014, that "I signed a written agreement setting forth the terms of my compensation as an employee of the plaintiff's, including a commission system based on a "credit toward production" formula." [RP 8/5/14, pp. 26-28].

Part of Randy's job at McClincy's was to assist Tim McClincy¹⁷ prepare and prosecute many lawsuits he and his former counsel of record, Eric Zubel, filed on behalf of McClincy's against customers, vendors and others. Randy personally observed Tim McClincy alter, conceal and destroy evidentiary documents. [RP 7/29/14, pp. 61-64.] The trial court was asked to consider the credibility of McClincy and Brooks carefully to determine whether or not McClincy's engaged in wrongful spoliation of evidence in this case and whether or not McClincy's owed Randy commissions earned while in its employment. The Court had to resolve those issues of fact pertaining to McClincy's concealment or destruction of

evidence and determined that McClincy's "willfully" withheld wages or other compensation from Randy within the meaning of RCW 49.52.050 and 49.52.070. [RP 8/6/14, p. 210, ll. 18-23].

Throughout Randy's employment by the Plaintiff, he and other coworkers were required to keep time records which were turned into the Plaintiff's bookkeeper, Karen McClincy, Tim McClincy's sister. He and others were also required to spend a significant portion of their workweek in McClincy's showroom. Neither Randy nor his coworkers were ever paid overtime. McClincy's characterized Randy and others as "outside salespersons" to the Washington Department of Labor and Industries to obtain an exemption from the overtime requirements. However, Randy and the others qualify for overtime pay because McClincy's required them to spend more than 20% of their time doing inside office work, not related to outside sales. This requirement takes Randy and the others out of the definition of "overtime-exempt outside sales workers", under Washington state law. State overtime rules apply if they are more favorable to the worker than the federal overtime rules. (*See Section C, infra.*)

During this litigation McClincy's consistently failed and refused to disclose internal business records sought by the Carpenters and Brooks in pretrial discovery. Instead, McClincy's often "found" documents in its possession only when it deemed the documents to be helpful to its claims.

(See Exhibit A to the Plaintiff's First Amended Complaint [CP 1890-1901] and Exhibit 1 to Tim McClincy's Declaration dated June 17, 2014 [CP 1726-1750].

Randy Brooks was an employee of McClincy's from prior to February, 2008, until August 13, 2012, when he submitted his letter of resignation. [Trial Exhibit 204.] The Hon. Barbara Linde presided over the trial for 14 Court days between July 15, 2014 to August 8, 2014, and heard conflicting testimony from over 16 witnesses and concluded that at the time of his resignation, there was (*and remains*) wrongfully withheld compensation due and owing to him consisting of overtime and commissions due on completed jobs. Judge Linde denied Randy's claims for unpaid sick time, vacation time, and commissions due on work in progress or project files that McClincy's had not yet closed. McClincy's compensation program, based on sharing of cash receipts attributable to the Plaintiff's services, created a fiduciary relationship and required McClincy's, by law, to keep proper books of account so the cash receipts, costs, profits and apportionment thereof can be readily determined. (*See* WAC 296-128-025, which requires employers to maintain such records and open them to employees upon reasonable request.) However, despite Randy's repeated requests and demands, McClincy's breached that fiduciary relationship and failed, refused or neglected to maintain or

provide proper books or an accurate accounting to him of his share of the receipts and profits or of the accounts receivables or work in progress on the employer's books at the time of his resignation. [RP 8/6/14, pp. 200-210.]

The Final Judgment of the trial court was entered on February 10, 2015 [CP 2659-2667]. McClincy's filed this appeal raising only three Assignments of Error pertaining to Randy: (1) "The trial court erred in granting summary judgment on McClincy's contract claims against Brooks [Assignment of Error #7], (2) "The trial court erred in calculating the overtime pay award to Brooks." [Assignment of Error #8] and (3) "The trial court erred in its determination of reasonable attorneys' fees." [Assignment of Error #10] For the reasons herein stated, McClincy's appeal should be denied in its entirety, particularly as it relates to respondent Randall V. Brooks, because the issues raised by the appellant are factual determinations of the trial court and are verities on appeal. The trial court's Findings of Fact, Conclusions of Law and Judgment are based upon the facts and law of this case and should be upheld.

II. BROOKS' COUNTERSTATEMENT OF THE ISSUES

A. Did the trial court properly granted a pretrial summary judgment dismissing McClincy's contract claims against Randy Brooks because they were based on provisions in contracts that lack consideration and were made between Randy and a nonparty entity "McClincy's Home Decorating, Inc." which lacked the capacity to enter into contracts

because it never was incorporated in accordance with Washington state law?

B. Are the trial court's Findings of Fact pertaining to Randy Brooks supported by substantial evidence?

C. Should the trial court's calculation of Randy Brooks' overtime pay be upheld because they are accurate and/or because the Appellant waived the issue by raising an alternative method of calculation for the first time on appeal?

D. Did the trial court properly award Brooks reasonable attorneys fees?

E. Should the Motion for Joinder of Tim McClincy be denied where there has been no showing of "extraordinary circumstances" to warrant granting an extension of time under the narrow application of the 30 day time limit specified in RAP 18.8 and the narrow application pertaining to multiple parties on a side of the case where fewer than all parties on that side of the case timely file a Notice of Appeal?

III. ARGUMENT

A. The trial court properly granted a pretrial summary judgment dismissing McClincy's contract claims against Randy because they were based on provisions in contracts that lacked consideration and were between Randy and a nonparty entity, "McClincy's Home Decorating, Inc." that lacked the capacity to enter into contracts because it was never incorporated in accordance with Washington state law.

1. McClincy's Assignment of Error #7 relies on evidence not called to the attention of the trial court, in violation of RAP 9.12.

RAP 9.12, entitled "Special Rule for Order on Summary Judgment" states, in pertinent part:

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

Argument on countervailing motions for partial Summary Judgments brought by McClincy's, Carpenter and Brooks were all heard by the court on June 27, 2014. [RP 6/24/14 at p.5.] All parties filed their motions, replies and responses prior to the hearing. The court's Order [CP 2199-201] listed the pleadings and documents brought to the attention of the court at that time which does *not* include Trial Exhibit 145, a list of the registered trade names for McClincy's. That document was not brought to the court's attention for another month when it was admitted into evidence on July 28, 2014. RAP 9.12 prohibits it from being evidence to be considered by the court in this appeal. The purpose of this limitation is to effectuate the rule that the appellate court engages in the same inquiry as a trial court." *Washington Fed'n of State Employees v. Office of Financial Management*, 1212 Wn.2d 152, 157, 849 P. 2d 1201 (1993), quoted with approval in *Mithoug v. Apollo Radio of Spokane*, 128 Wn.2d 460, 909 P.2d 291 (1996).

2. The trial court properly granted Brooks' Partial Summary Judgment, dismissing McClincy's claims for breach of contract against Randy because the contracts were void because they lacked consideration, the maker

of the contracts was an unregistered Corporation that lacked the capacity to make contracts, and was a nonparty to the litigation.

To understand the disputed facts resolved by the trial court on June 24, 2014, it is necessary to know some of the procedural background confronting the parties and the court. First, there were numerous countervailing motions for summary judgment brought by McClincy's, Carpenter and Randy, so there were numerous pleadings exchanged among all the parties prior to the hearing. Randy's Motion was directed at a purported contract dated April 16, 2008, entitled "Employee Confidentiality, Nonsolicitation and Non-Circumvention Agreement." That was never disclosed by McClincy's in pretrial discovery, despite Requests for Production of Documents seeking "all correspondence, emails, documents, agreements and contracts between the Plaintiff and Brooks, including but not limited to, his job description, his signed employment agreement(s), signed noncompete agreements and any other documents, by whatever name, regarding Plaintiff's relationship with Brooks over 10 years". That purported contract appeared for the first time as Exhibit A to McClincy's Amended Complaint dated March 7, 2014. [CP 509]. Paragraph 3.2 Of the Amended Complaint alleged that Randy "commenced his employment at McClincy's on April 16, 2008, at which time he entered into an Employee Confidentiality, Nonsolicitation and

Non-Circumvention Agreement, a copy of which is attached as Exhibit A to this Amended Complaint by reference incorporated herein.” [CP 509]. On May 30, 2014, Randy served and filed the Motion for Partial Summary Judgment here at issue, containing evidence that Randy actually commenced employment in February, 2008, not April 16, 2008, thereby causing that purported contract void for lack of consideration under Washington state law. McClincy’s, fearing the dismissal of its breach of contract claims against Randy, suddenly found *another undisclosed signed contract*, dated February 5, 2008, which was attached as Exhibit 1 to the Declaration of Tim McClincy In Support of Response of McClincy Brothers Floor Covering, Inc., dated June 17, 2014. [CP 1734-1750]. To rebut this new evidence Randy filed Defendant Brooks’s Reply to Plaintiff’s Response to his Motion for Partial Summary Judgment, pointing out to the court that both *new found* contracts were created and signed by Tim McClincy on behalf of “McClincy’s Home Decorating, Inc.” However, no such entity has ever been incorporated in the state of Washington. One essential characteristic for a valid contract is that both parties must have the legal capacity to enter into contracts. The power vested in corporations to enter into contracts is found in RCW 23B.03.020(2)(g), which authorizes corporations to "make contracts." However, a prerequisite to that general power requires compliance with

the Washington Business Corporation Act (RCW 23B), including proper registration, filing, payment of fees, etc. Activities conducted without compliance with the Washington Business Corporation Act are deemed to be *ultra vires* and the entity's power to act can be challenged in a proceeding by the Corporation against an employee or agent of the purported Corporation under RCW 23B.03.040. McClincy's then filed the "Declaration of Tim McClincy re: Reply in Support of Motion for Partial Summary Judgment on Carpenters' CPA Claims" (sic), [CP 1739], which was actually responding to Defendant Brooks' Reply, described above. Therein McClincy's alleged that it had four registered trade names with the Department of Labor and Industries and admitted "McClincy's Home Decorating has never been a Corporation...". [CP 1739 at p. 2, ll.16-17] That sealed McClincy's fate because there was no issue of fact that McClincy's Home Decorating, Inc. was never a licensed or registered Corporation and lacked the capacity to enter into any contracts, lacks the capacity to sue and is not a party to this litigation, entitling Randy to a Partial Summary Judgment of dismissal of the appellant's breach of contract claims, as a matter of law. The trial court also found that both purported contracts lacked consideration, which may be moot, in light of the fact that they were void by reason of the maker's lack of capacity to enter into any contracts.

McClincy's argues for the first time on appeal that Randy improperly sought summary judgment against the non-party, non-corporate entity by raising it in his reply in support of his motion. However, the appellate record does not reveal any opposition to Randy's rebuttal, constituting a waiver of that issue on appeal. *Turner v. Kohler*, 54 Wn. App. 688, 775 P.2d 474 (1989). Moreover, the Appellant's reliance on *Adamasu v. Port of Seattle*, 185 Wn. App. 23, 340 P.3d 873 (2014) fails to recognize its distinctions from the present case. First, in this case, there were countervailing motions that required rebuttals by all parties. McClincy's added entirely new evidence in its responsive pleadings by introducing a previously undisclosed purported contract dated February 5, 2008, conflicting with its previous evidence that Randy was not employed by McClincy's prior to April 16, 2008. Moreover, McClincy's *did* file a rebuttal Declaration of Tim McClincy dated June 17, 2014, [CP 1739] providing the trial court with sufficient facts and law to rule on the issues. By contrast, *Adamasu* involved a moving party that did not seek summary judgment on claims that were in the case when the motion was made, then tried to use a reply to widen the scope of the motion to encompass those claims. *See Adamasu, supra* at 40–41. Here, Randy's rebuttal was offered in reply to new matters introduced by McClincy's reply pleadings. In discussing rebuttal evidence this court has

held that “... The question of admissibility of evidence on rebuttal rests largely on the trial court’s discretion, and error in denying or allowing it can be predicated only upon a manifest abuse of that discretion. *Kremer v. Audette*, 35 Wn. App. 643, 668 P. 2d 1315 (1983).

Similarly, McClincy’s reliance on *Waterjet Tech. v. Flo International Corp.*, 140 Wn. 2d 313, 996 P.2d 598 (2000) to argue that an at will employment contract can be modified without consideration ignores the distinction between the public policies pertaining to the Uniform Trade Secrets Act (RCW 19.10 8.2010 *et seq.*), Washington state patent laws (RCW 49.4 4.140) and the statutes involved in this case that forbid employers from withholding wages due to an employee. (RCW 49.52.010 *et. seq.*) *Waterjet Tech, supra*, was very fact specific interpreting the requirements of RCW 49.44.140 in an action to compel an employee to assign his rights to a patent to his employer. Although the facts of that case led the court to hold that “... Given the language of the... Agreement and the fact patent 824 related directly to the business of the employer, RCW 49.44.140(3) required nothing further *under the facts of this case.*” (*Waterjet Tech, supra*, at 321, emphasis added.) Even there, the Court indicated that “Overreaching portions of the agreement should be stricken as against public policy.” (*Waterjet Tech, supra*, at 322) The trial court in the present case held: “But, the Court is persuaded by the

argument and materials presented by the Defendant Brooks that it [the purported contract] is unenforceable, unenforceable. I am persuaded that it does lack consideration. And it is not a contract between the Plaintiff and the Defendant Brooks. It is another entity that is, since we are looking at the enforceability of specific language in a written instrument, I think it is extremely important that the written instrument has what I agree is, a fatal flaw. So, for those reasons I am granting that motion.” [RP 6/27/14, at pp. 46-47, ll. 24-13].

Finally, McClincy’s argues on appeal that Brooks’ Motion for Partial Summary Judgment should have been denied because the purported contracts involve Confidentiality Agreements rather than Noncompetition Agreements. This argument raises a distinction without a difference. In *Machen, Inc. v. Aircraft Design, Inc.*, 65 Wn. App. 319, 828 P.2d 73 (1992), the court ruled that, “Although cases cited by the parties involved noncompetition agreements rather than confidentiality agreements, we see no reason to distinguish between the two when the issue is the sufficiency of consideration to support them.” That decision also held, “Contractual provisions which conflict with the terms of a legislative enactment are illegal and unenforceable.” There, as here, the trial court, based on undisputed facts, ruled that the written agreement was unenforceable, as a matter of law, even if supported by sufficient

consideration. The Court did not error in dismissing McClincy's claim against Randy for breach of contract.

B. The trial court's findings of fact are supported by substantial evidence.

"It is a well-known rule that in a case tried to the court its findings of fact will not be disturbed unless the evidence preponderate against them. *Hardman v. Younkers*, 15 Wn.2d 483, 131 P.2d 177 (1942, cites omitted). Unchallenged findings of fact are verities on appeal. *Marriage of Kim*, 179 Wn. App 232, 246, 317 P.3d 555, *rev. denied*, 180 Wn. 2d 1012 (2014). In determining whether substantial evidence exists to support a finding of fact, the appellate court reviews the record in the light most favorable to the party in whose favor the findings are entered. *Marriage of Gillespie*, 89 Wn. App. 390, 404, 948 P.2d 1338 (1997).

McClincy's challenges only two findings of fact pertaining to Brooks (Brief of Appellant, p. 40): (1) FOF #7, "Findings that Brooks only provided assistance on outside addition and that Carpenter acted as own attorney (sic) not supported by any evidence." and (2) FOF #10, finding that McClincy's was involved in over 40 lawsuits is not supported by any evidence." Both of these challenges are without merit because they are supported by substantial evidence. Substantial evidence is that which is sufficient to persuade a fair minded person of the truth of the matter asserted. *Marriage of Katare*, 175 Wn.2d 23, 35, 283 P.3d 546

(2012). As to Brooks' FOF #7, one must assume the Appellant's Brief means findings that Brooks only provided assistance on outside addition and that Carpenter acted as his own "general contractor", which is supported by testimony of Collin Carpenter [RP 7/7/14 at pp. 35-39; RP 7/21/14 at p. 32] and testimony of Randall Brooks [RP 7/16/14 at pp. 178-181]. This challenge to Brook's FOF #7 is without merit because it is supported by substantial evidence.

In a nonjury bench trial, the court appraises the credibility of the testimony and the force of any exhibits, resolves testimonial conflicts, evaluates circumstantial evidence, draws reasonable and allowable inferences and otherwise appropriately determines, as a trier of facts, the facts revealed and sustainable by the evidence before the court. If the court then makes findings setting forth the pertinent facts as it found them to be, the Court of Appeals will accept such findings of fact as verities, because it cannot substitute its findings for those of the trial court. *See N. Fiorito v. State of Washington*, 69 Wn.2d 616, 419 P.2d 586 (1966).

As to Brooks' FOF #10, Randall Brooks testified that between 2008 and 2013 McClincy's was involved in more than 40 pieces of litigation. [RP 7/29/14 at pp. 53-54 and pp. 71-79]. Again, this challenge to Brooks' FOF #10 is without merit because it is supported by substantial evidence.

C. The trial court properly calculated overtime pay McClincy's owed to Randall Brooks in accordance with the facts and law of this case.

The trial court's calculations of the Randy Brooks's damages for unpaid overtime are correct because the evidence at trial was that the Defendant Brooks was a "salaried employee" and the Plaintiff failed to establish a specified number of hours per week for which the salary is intended to compensate the employee, creating the mandatory assumption that the salary is based upon a 40 hour workweek. (See the Washington Department of Labor and Industry Administrative Policy Number: ES.A.8.2, entitled "How to Compute Overtime", a true and correct copy of which is attached as Exhibit "A" to the Declaration of Nicholas F. Corning, dated October 8, 2014, [CP 2350-2355] and as Appendix "A" hereto.

The Brief of Appellant argues that the trial court erred by failing to interpret Randy's disputed employment contract to require the calculation of unpaid overtime using a formula for a fluctuating workweek. However, that argument was never made at the trial court level. McClincy's failed to preserve that issue for appellate review. See *Seattle First National Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240 -241, 588 P.2d 1308 (1978) (citations omitted). McClincy's relies on *Innis v. Tandy*, 141 Wn.2d 517, 7 P.3d 807 (2000). That case is distinguishable from the

present case because it involved a compensation plan the parties boldly stated “is not an employment contract”. The trial court in *Innis* was not required to decide whether it was an express contract, a quasi-contract, a unilateral contract or a bilateral contract because, “Neither party challenged the validity of the compensation plan which was acknowledged by Petitioners and Respondent to be a valid operating document.” *Innis, supra*, at P. 535. By contrast, the very employment agreement that McClincy’s is now contending is applicable, is one that it denied was valid or enforceable. The court was required to decide disputed facts about the contract and McClincy’s never argued that Randy worked a fluctuating workweek. Because this issue was not raised at the trial court level, McClincy waived this challenge to the evidence. See *Turner v. Kohler*, 54 Wn. App. 688 91 n.1, 775 P.2d 474 (1989). The trial court in this case ruled, “The court finds that Tim McClincy’s testimony opposing Brooks wage and overtime claims was not credible.” [CP 2274]. Brooks’ award for unpaid overtime was based upon the facts and law of this case.

D. The trial court properly awarded Brooks reasonable attorney fees.

The trial court’s award of Brooks’ attorney fees can be reversed only if the trial court manifestly abused its discretion by exercising that discretion on untenable grounds or for untenable reasons. *Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007) (citations omitted).

Attorney fees are appropriate if the charges are reasonable and the services are necessary. The presiding trial judge has wide discretion in awarding attorney fees because they are in the best position to see the time, skills and effort required to prevail in complex litigation.

This case involved almost twenty-four months of litigation, eighteen months of discovery, investigation of the thirty-five witnesses disclosed by McClincy, twenty depositions, motions for a temporary restraining order and a preliminary injunction, discovery motions, a contempt motion, five summary judgment motions, motions *in limine*, and thirteen trial days over four weeks. CP 2520 (summary of procedural scope). The damages claimed by McClincy's exceeded \$300,000 before attorney fees and costs. CP 2524.

Randy's petition for attorney fees was supported by meticulous, contemporaneous, and meaningful billing entries. [CP 2571-2635.] Brooks' trial attorney submitted declarations setting forth billing records with detailed descriptions of time spent on tasks, amounts charged, and never charged for *any* spent time by his paralegal, which is normally charged at the rate of \$60.00 per hour. Randy submitted the expert testimony of Mark Barber in support of his attorney's fee application. Mr. Barber is the current Olympia City Attorney who was the Senior Assistant City Attorney for the City of Renton and the former managing shareholder

of the Renton law firm of Warren, Barber and Fontes, P.S. He is a past President of the Washington State Trial Lawyers Association (WSTLA) with extensive experience in complex litigation. He also has extensive experience in hiring and supervising outside counsel for Municipalities, making him very familiar with hourly rates charged by civil litigators in this area. His Declaration [CP 2542-2548] opined that Brooks' attorney charged a "shockingly low" hourly rate, "well below current market rates for attorneys of similar reputation and abilities in the Seattle-King County legal community." Mr. Barber conferred with Brooks' trial attorney to get an understanding of the issues involved in the case, reviewed the case pleadings, reviewed trial counsel's billing records, and reviewed Randy's fee application. [CP 2542 at pp. 4-9]. He opined that the rates of the Brooks' trial attorneys very reasonable and the time spent was well within the range of reasonableness and was appropriate given the complexity of the case and McClincy's litigation tactics. [CP 2542-2548]. McClincy's offered no rebuttal to this expert testimony. The ultimate measure of the reasonableness and necessity of attorney fees and services rests with the client who pays the bills. Randy Brooks filed a Declaration advising the Court that he deemed his attorney's fees reasonable and necessary. [CP 2547 at p. 9]. McClincy's offered no rebuttal to Brooks' testimony.

McClincy claims that the Carpenters' fee request did not comply with the requirements for fee requests set forth by this Court in *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013). McClincy's sweeping argument that Brooks' billing records are inadequate is not supported by the record. Trial counsel's billing records demonstrate that each task was clearly described and unambiguous. *See* CP 2404-65 and CP 2471-2510.

The trial court's order granting the Carpenters' fee application was detailed and included numerous findings of fact, to which no error has been assigned. [CP 2650-2658]. The trial court specifically noted and rejected virtually every argument that McClincy's is making to this Court (including the *Berryman* argument being advanced again on appeal), finding that it was McClincy's abusive tactics that compelled Brooks to incur the fees he did. [Order Granting Brooks' Application for Attorney Fees and Costs at CP 2650-2658, (FOF 1.2-1.16)]. In sum, the trial court did not abuse its discretion, and Brooks' attorney fee award should be affirmed.

E. Tim McClincy's Motion for Joinder Should Be Denied.
(Commissioner Mary S. Neel referred Tim McClincy's Motion for Joinder to this panel, but included *dicta* that is not binding on the court and was not part of her order pertaining to the Appellant's Motion to Consolidate.)

1. The Appellant's Motion for Joinder relies on RAP 1.2(a), asking the court to liberally interpret the

court rules, but ignores the fact that RAP 18.8 expressly requires a narrow application of the 30 day time limit within which a party must file a Notice of Appeal. The Motion for Joinder provides the court with absolutely no evidence that the moving party or his counsel exercised reasonable diligence to file a timely appeal nor evidence of "extraordinary circumstances" to warrant granting an extension of time.

Tim McClincy's Motion for Joinder quotes RAP 1.2(a) that the rules on appeal "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits." (Motion for Joinder, page 2, line 19), but ignores the express requirements of RAP 18.8 to apply a narrow application of any party's request to extend the time to file a Notice of Appeal. In *Beckman v. The Department of Social and Health Services (DSHS)*, 102 Wn. App. 687, 693 (2000), the Court said, "in contrast to the liberal application we generally give to the Rules of Appellate Procedure (RAP), RAP 18.8 expressly requires a narrow application: the appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal.... The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section...."

It is undeniable that failure to include Tim McClincy as an appellant in this case was either (1) deliberate or (2) accidental. There is no evidence in the record that his exclusion was accidental, except Tim

McClincy's conclusive allegation that one of Washington's preeminent appellate court lawyers and former Supreme Court Justice Phil Talmage "forgot" to include his name in the all-important Notice of Appeal. Really? Is that credible? Where is the evidence to support that allegation? The Brief of the Appellant states, without any supporting evidence, that former Justice Talmadge "inadvertently" omitted Tim McClincy from the all-important Notice of Appeal. Really? There is no evidence in the record to support that allegation. Even if it is true, would that constitute "extraordinary circumstances"?

The phrase "extraordinary circumstances" was defined in *Reichelt v. Raymark Indus, Inc.*, 52 Wn. App. 763, 765 (1988). There, the Court of Appeals refused to extend the time for filing a Notice of Appeal that was filed only 10 days late. The court summarized the cases allowing late filings indicating that in each case the defective filings were upheld due to "extraordinary circumstances," i.e., circumstances wherein the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control. In such a case, the lost opportunity to appeal would constitute a gross miscarriage of justice because of the Appellant's reasonably diligent conduct. *See also Shumway v. Payne*, 136 Wn.2d 383, 964 P.2d 349 (1998), reiterating and reemphasizing the stringent standards of RAP 18.8(b); *Schaefco, Inc.*

v. *Columbia River Gorge Comm'n*, 121 Wn.2d 366, 849 P.2d 366 (1993); and *Pybas v. Paolino*, 73 Wn. App. 393, 869 P.2d 1272 (1994). In each case, the court found the lack of prejudice to the respondents irrelevant, but noted that the prejudice of granting an extension of time would be "to the appellate system and the litigants generally, who are entitled to an end to their day in court." *Reichelt, supra* at 766, n.2.

In the present case, the Appellant has had three law firms representing it since the Final Judgment was entered by the trial court. (The Bracepoint Law Firm, by Mark V. Jordan and Matthew F. Davis; the Talmage/Fitzpatrick/Tribe Law Firm, by former Justice Philip A. Talmadge and the law firm of Lasher, Holzapfel, Sperry & Ebberson by Tyler J. Moore (see Notices of Appearances filed herein). The Appellant has presented no evidence to demonstrate reasonable diligence, excusable error, circumstances beyond the party's control or other "extraordinary circumstances" to explain why this virtual army of attorneys did not timely file a Notice of Appeal on behalf of Tim McClincy, the individual. Instead, they rely solely on the Declaration of Tim McClincy In Support of Motion for Joinder who admits that he received the Notice of Appeal, stating, "... I did not read it" Is this motion asking the Court to conclude that none of the Appellant's army of attorneys read it either? If so, apparently they did not read the Notice of Withdrawal either, because it reads, in part, "Please

take notice that the law firm of Talmadge/Fitzpatrick/Tribe hereby withdraws as attorney for Appellant McClincy Brothers Floor Covering, Inc., in the above captioned case." Again, Tim McClincy's Declaration says only, "Mr. Talmadge withdrew from this case on April 6, 2015. I do not know why." (Declaration of Tim McClincy In Support of Motion for Joinder, page 2, line 2). Incidentally, the unspoken implication of the Appellant's Motion for Joinder in that Philip A. Talmadge, a former legislator, former State Supreme Court Justice and renowned appellate attorney simply "forgot" to include Tim McClincy as a party in the Notice of Appeal filed in this case. A more likely assumption is that Mr. Talmadge recognized a conflict of interest between Tim McClincy and the corporate appellant and advised him to retain independent counsel to preserve his opportunity to appeal the trial court's judgment against him. When Tim McClincy failed, refused or neglected to follow Mr. Tallmadge's advice, he withdrew as a counsel of record in this case. In any event, neither Tim McClincy nor any of his attorneys have demonstrated reasonably diligent conduct that was due to excusable error or beyond Tim McClincy's control to preserve his opportunity to timely appeal the judgment against him. "Negligence, or the lack of 'reasonable diligence,' does not amount to "extraordinary circumstances." *Beckman v. DSHS, supra*, at 695, citing with approval, *Shumway*, 136 Wn. 2d 383; *Reichelt* 52 Wn. App 763;

and *State v. One 1977 Blue Ford Pickup Truck*, 447 A.2d 1226 (Me. 1982) (states negligent office procedures, which resulted in late filing of appeal of adverse civil judgment, were insufficient grounds upon which to allow a late filing). Neither McClincy's conduct nor that of his renowned legal counsel demonstrates reasonable diligence or other "extraordinary circumstances" warranting an extension of time to join this appeal. There is no declaration from former Justice Talmage corroborating McClincy's conclusory allegation that he "forgot" to include one of his clients in the Notice of Appeal despite the fact he had copies of the trial court pleadings with captions that listed all of the Judgment Debtors. The desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time. The Appellant's Motion for Joinder should be denied.

2. **The Appellant's Motion for Joinder relies on RAP 5.3(f), asking the court to liberally interpret the Notice of Appeal filed in this case, but ignores RAP 5.3(i) which expressly requires a narrow application pertaining to multiple parties on a side of the case where fewer than all parties on that side of the case timely file a Notice of Appeal, limiting relief to only those whose rights or duties are derived from the rights or duties of the party who timely filed a notice or if the party's rights or duties are dependent upon the appellate court determination of the rights or duties of a party who timely filed a notice.**

RAP 5.3 pertains to the content and filing of a Notice of Appeal. Again, in contrast to the liberal application generally given to the

Rules of Appellate Procedure, RAP 5.3(i) expressly requires a narrow application. It states:

If there are multiple parties on a side of the case and fewer than all of the parties on that side of the case timely file a notice of appeal... The appellate court will grant relief only (1) to a party who has timely filed a notice, (2) to a party who has been joined as provided in this section or (3) to a party if demanded by the necessities of the case. The appellate court will permit the Joinder on review of a party who did not give notice only if the party's rights or duties are derived through the rights or duties of a party who timely filed a notice or if the party's rights or duties are dependent upon the appellate court determination of the rights or duties of a party who timely file a notice. (Emphasis added.)

In the present case, Tim McClincy's liability to the Judgment Creditors/Respondents arose because of his *ultra vires* acts and omissions beyond the scope of his employment by the Appellant McClincy Brothers Floor Covering, Inc. For example, a substantial portion of the judgment rendered on behalf of the Judgment Creditor/Respondent Randall V. Brooks arises out of the costs and attorney fees Brooks incurred to obtain a dismissal of claims Tim McClincy made at trial that Brooks had violated Noncompetition Agreements entered into by Brooks and other corporate entities, not the Appellant. These agreements were proved to be void and enforceable because Tim McClincy's contracts were signed on behalf of an unregistered, nonexistent corporate entity, separate and distinct from the corporate Appellant. One of the Findings of Fact and Conclusions of Law as to Brooks reads:

8. Brooks successfully challenged two Confidentiality, Nondisclosure, Noncompete and Non-circumvention contracts sued upon by McClincy's, dated February 5, 2008 and April 16, 2008. Each contract entitled the prevailing party to an award of costs and attorneys' fees. The Court found both contracts to be void in an Order Granting Brooks's Motion for Summary Judgment dated July 15, 2014. Brooks, the employee, is the prevailing party and is entitled to an award of attorneys' fees, regardless of whether the contracts were invalidated in whole or in part, in accordance with *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004) and cases cited therein. The amount of the litigation costs and reasonable attorneys' fees shall be determined in a hearing with the presentation by the Defendant Brooks's counsel of record of the necessary costs and reasonable attorneys' fees incurred defending this litigation to be included in the Judgment to be entered herein. The Plaintiff's counsel of record will be afforded an opportunity to oppose or agree to any requested attorneys' fees or costs of suit, prior to the final Judgment to be entered herein.

The present motion is unsupported by any evidence that the party who did not give notice (Tim McClincy) has rights or duties derived from the rights or duties of the party who timely filed a notice or that his rights or duties are dependent upon the appellate court determination of the rights or duties of the party who timely filed the notice. The Motion for Joinder should be denied.

To the extent that the trial court's Judgment imposes joint and several liability, Tim McClincy's several liability contains independent disputes over different sums of money than those ordered against the corporate appellant. His remedy for failing to file a timely appeal exists against his Corporation or his army of legal counsel who were not

reasonably diligent and failed to file a timely appeal on his behalf. The Appellant's Motion for Joinder should be denied because there is no evidence supporting the narrow exceptions to Rule 5.3 requiring the notice of appeal to specify the party or party seeking review nor evidence of reasonable diligence or other "extraordinary circumstances" required by the narrow application expressly required by RAP 18.8.

IV. RAP 18.1 FEE REQUEST

Randy Brooks is entitled to an award of fees under the same authority by which fees were awarded by the trial court. *See* CP 2650-2658, awarding attorney fees pursuant to contract and in accordance with RCW 49.48.030 and RCW 49.52.070, pertaining to the willful wrongful withholding of wages.

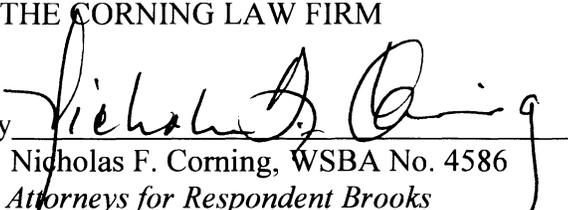
V. CONCLUSION

The Trial Court's Findings of Fact, Conclusions of Law and Judgment should be affirmed, in their entirety.

Respectfully submitted this 17th day of May, 2016.

THE CORNING LAW FIRM

By


Nicholas F. Corning, WSBA No. 4586
Attorneys for Respondent Brooks



HOW TO COMPUTE OVERTIME

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

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

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

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

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

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

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

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

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

CERTIFICATE OF SERVICE

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

Mark V. Jordan
Matthew V. Davis
Bracepoint Law
2775 Harbor Avenue SW, Suite D
Seattle, WA 98126-2138
Email: mjordan@bracepointlaw.com
mdavis@bracepointlaw.com

Tyler J. Moore
2600 Two Union Square
601 Union Street
Seattle, WA 98101
Email: moore@lasher.com

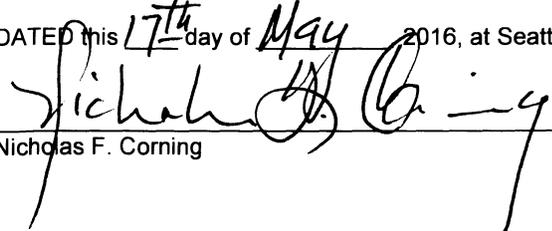
Jennifer Karol, Attorney for Defendants Carpenter
PO Box 1470
Maple Valley, WA 98038
Email: jkarol@cedarriverlaw.com

Timothy Graham, Attorney for Defendants Carpenter
2229 112th Ave. N.E., Suite 200
Bellevue, WA 98004
Email: tgraham@hansonbaker.com

Michael King, Attorney for Defendants Carpenter
Carney Badley Spellman PS
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
Email: king@carneylaw.com

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

DATED this 17th day of May, 2016, at Seattle, WA.



Nicholas F. Corning