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COURT OF APPEALS
DIVISION II

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NO. 40077-4-II

STATE OF WASHINGTON

Pierce County Superior Court No. 08-2-08338-7

BY 
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

JAMES B. ZIMMERMAN,

Plaintiff/Respondent,

v.

W8LESS PRODUCTS, LLC, a Washington
limited liability company; JOHN ARBEENY,
and his marital community; and CHARLES RAU,
and his marital community,

Defendants/Appellants.

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Table of Authorities..... iv-v

I. ASSIGNMENT OF ERROR 1

- A. The trial court erred in summarily ruling that certain individual members of a limited liability company who voted against a motion to pay an unspecified sum for retroactive work were personally liable for wages allegedly due to an employee of the limited liability company, and in denying defendant/appellants’ motion for partial summary judgment dismissing the complaint as to said individuals 1
- B. The trial court erred in summarily dismissing defendants’ CR 11 defense1
- C. The trial court erred in denying appellant’s motion for reconsideration1

Issues Pertaining to Assignments of Error

- 1. Are members of a limited liability company personally liable for alleged wages due to an employee of the limited liability company?1
- 2. Can members of a limited liability company who vote against paying an alleged employee retroactively, where there is no agreement as to the amount of compensation that the employee was entitled to, be said to have acted “willfully” in violation of RCW 49.52.050(2) 1-2

TABLE OF CONTENTS

Table of Authorities..... iv-v

I. ASSIGNMENTS OF ERROR 1

- A. The trial court erred in summarily ruling that certain individual members of a limited liability company who voted against a motion to pay an unspecified sum for retroactive work were personally liable for wages allegedly due to an employee of the limited liability company, and in denying defendant/appellants’ motion for partial summary judgment dismissing the complaint as to said individuals 1
- B. The trial court erred in summarily dismissing defendants’ CR 11 defense 1
- C. The trial court erred in denying appellant’s motion for reconsideration 1

Issues Pertaining to Assignments of Error

- 1. Are members of a limited liability company personally liable for alleged wages due to an employee of the limited liability company? 1
- 2. Can members of a limited liability company who vote against paying an alleged employee retroactively, where there is no agreement as to the amount of compensation that the employee was entitled to, be said to have acted “willfully” in violation of RCW 49.52.050(2) 1-2

TABLE OF CONTENTS (cont.)

3. Can the mere act of voting “no” on a motion be the type of “willful act” prohibited by RCW 49.52.040(2)? 3

II. STATEMENT OF CASE 3

III. SUMMARY OF PROCEEDINGS 8

IV. ARGUMENT 11

A. Standard of Review..... 11

B. Individual members of a limited liability company are not generally liable for the company’s obligations..... 11

C. The question of whether the corporate veil should be pierced is a question of fact that would preclude a summary judgment against members of a limited liability company or dismissal of defenses based on the corporate shield..... 16

D. Individual members of a limited liability company employer cannot be held personally liable under RCW 49.52.050 unless they act “willfully with intent to deprive the employee” of his wages.....17

E. RCW 49.52.050(2) only applies when the employer has an obligation to pay a specific compensation..... 19

TABLE OF CONTENTS (cont.)

F. There cannot be a “willful withholding of wages” under RCW 49.52.052(2) where there is a bona fide dispute as to whether an employment relationship exists..... 21

G. Merely voting “no” on a motion cannot be Considered a willful withholding of wages..... 23

V. **CONCLUSION** 24

TABLE OF AUTHORITIES

CASE CITATIONS

Allstot v. Edwards , 114 Wn. App. 625, 60 P.3d 601 (2002)	20, 21
Champagne v. Thurston County , 163 Wn.2d 69 (2008)	21
Durand v. HIMC Corp. , 151 Wn. App. 818, 214 P.3d 189 (2009)	22
Hemmings v. Tidy Man’s Inc. , 285 F.3d, 1174, 1203 (9 th Cir. 202)	20, 21
Norhawk Invs. Subway Sandwich , 61 Wn. App. 395, 811 P.2d 221 (1991)	14
Post v. City of Tacoma , 167 Wn.2d 300 (2009)	11
Truckweld Equipment Co. v. Olson , 26 Wn. App. 683, 643, 618 P.2d 1017 (1980)	16

STATUTES

RCW 25.15.060	12
RCW 49.48.010	8, 12
RCW 49.48.030	8
RCW 49.48.115	12
RCW 49.52.050	12, 17-18, 20
RCW 49.52.050(2)	2, 19-20, 23-25
RCW 49.52.070	8, 10, 17-18, 20

TABLE OF AUTHORITIES (cont.)

REGULATIONS AND RULES

CR 111, 9-10, 18-19

OTHER AUTHORITY

Washington Practice 1B 13

I. ASSIGNMENTS OF ERROR

A. The trial court erred in summarily ruling that certain individual members of a limited liability company who voted against a motion to pay an unspecified sum for retroactive work were personally liable for wages allegedly due to an employee of the limited liability company, and in denying defendant/appellants' motion for partial summary judgment dismissing the complaint as to said individuals.

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Issues Pertaining to Assignments of Error

1. Are members of a limited liability company personally liable for alleged wages due to an employee of the limited liability company?

2. Can members of a limited liability company who vote against paying an unspecified amount of compensation to an alleged employee retroactively, where there is no agreement as to the amount

of compensation that the employee was entitled to, be said to have acted “willfully” in violation of RCW 49.52.050(2)?

3. Can the mere act of voting “no” on a motion be the type of “willful act” prohibited by RCW 49.52.050(2)?

II. STATEMENT OF CASE

W8Less Products, LLC was formed in 2004 for the purpose of developing, producing and selling lightweight brake discs. The company was originally managed by Dallas Jolley as managing member, who was at the same time a full-time practicing attorney (CP 82).

By November, 2007, the company, under Mr. Jolley’s management, was on the verge of bankruptcy, with \$2.5 million in debt and no revenue or viable products for sale (CP 82). The company bank account statement for November 29, 2007 showed a negative balance (CP 137, for December 28, 2007. It was overdrawn \$18.93 (CP 139), and for January 20, 2008, it was overdrawn \$210.38 (CP 141). In addition, there was a federal tax lien of \$61,476 (CP 164-5). As a result of that situation, the membership voted to create a board of its members to oversee Mr. Jolley’s management of the company (CP 82-83).

In December, 2007, Mr. Jolley was trying to relocate his law practice from Tacoma to Bellevue. He advised some of the members that he had hired James Zimmerman personally to market his law practice, which he had allegedly neglected because of his work on behalf of W8Less Products, LLC (CP 83).

On December 14, 2007, John Arbeeney, who was a member owning an eight percent ownership interest in W8Less Products, LLC (CP 82), heard from another member that Jolley was urging that Zimmerman be hired as Vice President of Marketing by W8Less Products, LLC (CP 83). Arbeeney immediately contacted Jolley and told him that any hiring decisions had to be approved by the newly formed Board of members, not just made on his own. He also advised Jolley that the members of the Board were opposed to taking on any more liabilities, including liability for employees, until the company had secured some additional financing. The company was attempting to obtain a new \$3 million investment in the company, but was first trying to get a \$200,000 bridge loan to keep the operation going until the \$3 million investment could be obtained (CP 83).

Arbeeney also told Jolley at that time that any new hires had to first have a written employment contract (CP 83).

The Management Board of members of the LLC met on December 28, 2007 and one of the items specifically recorded in the minutes was as follows:

“Employment contracts. The current lack of employment contracts is inefficient and opens up a host of accountability issues. All management employees must have employment contracts that clearly explain their duties and responsibilities and where possible layout milestones for accomplishing goals. Compensation must also be addressed and initially may require differing compensation in the form of stock options or other incentives in order to preserve capitalization with the company. Such contracts may require a specialized attorney since it is not within the realm of Barry Davison’s expertise.” (CP 84)

The Management Board met again on January 28, 2008. Mr. Jolley was present at the meeting, as was Zimmerman. Jolley introduced Zimmerman to the Board and extolled his qualifications and why he would be good for the job. The Board voted to “accept” Mr. Zimmerman for the position of Vice President of Marketing/Business Development. However, the acceptance was based upon his apparent qualifications as stated by Jolley, and was subject to obtaining a formal resumé, vetting him with previous employers, obtaining additional funding for the company to be able to pay any salary, and upon execution of a written employment agreement specifying duties and compensation. Zimmerman and Jolley fully understood that the

acceptance was subject to the execution of a formal employment contract (CP 85).

At that same meeting, Arbeeny was elected Chairman of the Board and given the authority to approve, hire, and fire all executive positions. He never hired Mr. Zimmerman (CP 85). Also at the same meeting, the Board agreed to the terms of a \$40,000 interim loan to W8Less Products, LLC which specifically limited the use of the money to future operations and not to past loans and debts (CP 85).

On February 1, 2008, Jolley sent Arbeeny an email with an attached proposed two year employment contract for Zimmerman at \$12,500 per month and a stock vesting and option plan (CP 86 and 90). That email, supposedly from Mr. Jolley, was actually sent from Mr. Zimmerman's computer (CP 88). The email clearly acknowledged that the employment contract required Board of Directors approval (CP 88).

Arbeeny objected to the proposed contract because it has a recitation that the starting date for employment was January 8, 2008, which was not true, in that the Board had not even considered his employment until January 28, 2008. The board had not approved his hiring on January 28, but had only accepted him for the position subject

to getting funding and subject to vetting him and executing a formal written employment contract (CP 85). Also, the proposed contract contained a salary which had not been agreed to by the Board and contained immediate stock vesting and future stock option provisions for Zimmerman which had also never been agreed to by the Board (CP 90). That stock vesting would have given him a 1.6% ownership interest in the company. Under the LLC agreement, the entire membership had to approve any new members (CP 86).

Arbeeny sent a reply email to both Zimmerman and Jolley on February 1, 2008 confirming that there was no deal until a Board meeting could be convened to approve and execute a contract (CP 86 and CP 93).

Jolley apparently had taken Zimmerman with him to a trade show in Chicago. Jolley apparently paid for the trip for himself and Zimmerman out of his own pocket (CP 86).

On February 3, 2008, Arbeeny sent Jolley an email which objected to the proposed contractual provision that recited that Zimmerman's employment had begun on January 8. It also objected to the proposed salary, and the proposed stock vesting and options, as well as numerous other objections (CP 95).

A Board meeting was held by telephone conference on February 5, 2008. Both Jolley and Zimmerman were in on the telephone conference during that meeting. During that meeting, a motion was made by Board member Richard Stevens to retroactively pay Zimmerman for work allegedly performed in January of 2008, without specifying any amount of pay or any other benefits (CP 63). The motion was seconded by Jolley, but failed to pass by a vote of 2-2 (CP 86), with Arbeeney and Rau voting against it. The proposed employment contract for Zimmerman was not approved by the members at that meeting (CP 63) or at any later date (CP 87).

Arbeeney subsequently learned that Jolley had been acting as attorney for Zimmerman because of alleged financial problems which Zimmerman was having. Arbeeney believed that the attorney-client relationship between Jolley and Zimmerman started in at least December, 2007. Jolley, as his attorney, did file a bankruptcy proceeding on behalf of Zimmerman in April, 2008 (CP 87).

On February 15, 2008, Jolley sent defendants a letter demanding payment retroactive to January for Zimmerman plus benefits (CP 68-69).

III. SUMMARY OF PROCEEDINGS

Zimmerman filed a complaint against W8Less Products, LLC, as well as John Arbeeny and his marital community, and Charles Rau and his marital community, on May 16, 2008. The complaint alleged that W8Less Products, LLC failed to pay Zimmerman his agreed upon wages, benefits and other compensation in violation of RCW 49.48.010 and RCW 49.52.070. The second cause of action alleged that Zimmerman was damaged because W8Less Products, LLC failed to grant him his salary, stock options, and other benefits. The third cause of action alleged that Zimmerman was entitled to double wages and attorneys' fees and cost pursuant to RCW 49.48.030 and RCW 49.52.070. The fourth cause of action alleged unjust enrichment to W8Less Products, LLC due to the services of Zimmerman.

Zimmerman sought judgment against Arbeeny and Rau personally because they were the two Board members who voted against the motion that was made to pay Zimmerman retroactively (CP 1-6).

W8Less Products, Arbeeny and Rau filed an answer denying any obligation to pay wages or any willful refusal to pay wages, and alleged as affirmative defenses that Zimmerman had failed to state a

cause of action, and that Zimmerman's claim against the named individuals (not the LLC) was without basis in law or fact and constituted a violation of CR 11 (CP 7-9).

Zimmerman made a motion for partial summary judgment on September 5, 2008. W8Less Products, Arbeeny and Rau replied to that motion and pointed out Zimmerman's status in bankruptcy. The matter was stayed because of the filing of a "Notice of Stay Regarding Bankruptcy" on October 30, 2008 (CP 116-118).

After the stay was lifted, W8Less Products, Arbeeny and Rau filed a motion for partial summary judgment on March 16, 2009 asking for dismissal of the complaint as to the individual defendants, Arbeeny and Rau, and their marital communities (CP 114-115).

On April 17, 2009, the trial court entered an "Order Granting Plaintiff's Motion for Partial Summary Judgment and Denying Defendants' Motion for Partial Summary Judgment" against all defendants (CP 168-172). The court could not make a finding as to the amount of wages allegedly due, so provided that the amount of the wages would have to be determined at time of trial (CP 170). The court ruled that Arbeeny and Rau had been willful in refusing to pay Zimmerman his wages and were therefore personally liable under RCW

49.52.070. The trial court also summarily dismissed appellants' affirmative defenses of failure to state a claim and violation of CR 11 (CP 171).

W8Less Products, Arbeeny and Rau filed a timely "Motion for Reconsideration" on April 21, 2009 (CP 173), which motion was denied by an "Order Denying Defendants' Motion for Reconsideration" entered on May 1, 2009 (CP 184-185).

The matter proceeded to mandatory arbitration, after which a "Judgment on Arbitration" in favor of Zimmerman, against W8Less Products, LLC, and the individual defendants, Arbeeny and Rau and their marital communities, was entered on November 13, 2009 in the amount of \$3,000 for wages, which was doubled to \$6,000, plus significant reasonable attorneys' fees and costs (CP 186-188).

On December 11, 2009, W8Less Products, Arbeeny and Rau filed a Notice of Appeal from the "Judgment Summary and Judgment" entered on November 13, 2009 and, more specifically, the "Order Granting Plaintiff's Motion for Partial Summary Judgment and Denying Defendants' Motion for Partial Summary Judgment" entered on April 17, 2009 (CP 192-201).

IV. ARGUMENT

A. Standard of Review. The standard of review when an appeal is taken from an order of summary judgment was succinctly stated in **Post v. City of Tacoma**, 167 Wn.2d 300 (2009) wherein, at page 308, the court stated:

“When reviewing an order of summary judgment, this court engages in the same inquiry as the trial court. *Morin v. Harrell*, 161 Wn.2d 226, 230, 164 P.3d 495 (2007). Summary judgment is rendered where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). All facts and reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 693, 169 P.3d 14 (2007). Statutory interpretation is a question of law that this court reviews de novo. *In re Pers. Restraint of Cruz*, 157 Wn.2d 83, 87, 134 P.3d 1166 (2006). The applicability of the constitutional due process guaranty is a question of law subject to de novo review. *Wash. Indep. Tel. Ass’n v. Wash. Utils. & Transp. Comm’n*, 149 Wn.2d 17, 24, 65 P.3d 319 (2003).”

B. Individual members of a limited liability company are not generally liable for the company’s obligations.

The essence of Zimmerman’s complaint is that he, as an employee of W8Less Products, LLC, is owed money by W8Less Products, LLC, a Washington limited liability company. His complaint went on to name John Arbeeny and Charles Rau, who are two members of the LLC, which is a member managed LLC, and specifically alleged,

in paragraphs 1.3 and 1.4, that Arbeeny and Rau personally were an “employer” for the purposes of RCW 49.48.010. The complaint went on to ask for judgment against those individual defendants and their marital communities.

RCW 49.48.010 does not contain any definition of “employer.”

RCW 49.48.115 is titled “Employer defined.” It states:

“For the purposes of RCW 49.48.120, the word “employer” shall include every person, firm, partnership, corporation and the state of Washington, and all municipal corporations.”

That statute clearly provides that an employer could be a person, firm, partnership or corporation, but there is nothing in that definition which would lead you to conclude that where the actual employer is a limited liability company, or a corporation, that the individual members or managers of that limited liability company or directors of that corporation are also to be considered as an “employer” personally.

Generally speaking, the members of a limited liability company are not liable for the debts and obligations of the LLC unless plaintiff is successful in “piercing the veil.” RCW 25.15.060 which is entitled “Piercing the veil” states:

“Members of a limited liability company shall be personally liable for any act, debt, obligation, or liability of the limited liability company to the extent that shareholders of a Washington business corporation would be liable in analogous

circumstances. In this regard, the court may consider the factors and policies set forth in established case law with regard to piercing the corporate veil, except that the failure to hold meetings of members or managers or the failure to observe formalities pertaining to the calling or conduct of meetings shall not be considered a factor tending to establish that the members have personal liability for any act, debt, obligation, or liability of the limited liability company if the certificate of formation and limited liability company agreement do not expressly require the holding of meetings of members or managers.”

The immunity of officers and directors from personal liability for the obligations of the corporation are general hornbook law. A general statement of the very limited circumstances under which the corporate veil can be pierced is found in Washington Practice 1B, Ch. 66, “*The Corporation*,” in §66.91 which is entitled “Disregard of the Corporate Entity.” That subsection states:

“In rare instances, the court may look beyond the corporate form and impose personal liability upon shareholders, officers or directors. This is known as disregard of, or piercing, the corporate veil. Piercing the veil is appropriate when the corporation has been intentionally used to violate or evade a duty owed to another. There are two essential factors to disregarding the corporate entity: (1) the corporate form must be intentionally used to violate or evade a duty; and (2) disregard must be “necessary and required to prevent unjustified loss to the injured party.” Courts have been extremely reluctant to pierce the corporate veil in Washington.

In addition to piercing the corporate veil, the “alter ego” doctrine can be applied to disregard the corporate entity. It is usually invoked to impose liability upon corporate officers for fraud committed by the corporation. However it has also been invoked to impose liability on the corporation for the acts or

knowledge of its shareholders where the corporation and the shareholders are one and the same.”

In **Norhawk Invs. v. Subway Sandwich**, 61 Wn. App. 395, 811

P.2d 221 (1991), the court stated, beginning at page 398:

“The doctrine of corporate disregard was set forth in *Morgan v. Burks*, 93 Wn.2d 580, 585, 611 P.2d 751(1980). “The corporate entity is disregarded and liability assessed against shareholders in the corporation when the corporation has been intentionally used to violate or evade a duty owed to another.” The court’s statement of the doctrine identifies two essential factors: (1) the corporate form must be intentionally used to violate or evade a duty and (2) disregard must be “necessary and required to prevent unjustified loss to the injured party.” *Meisel v. M&N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 410, 645 P.2d 689 (1982) (quoting *Morgan*, at 587).”

“With regard to the first element, the court must find an abuse of the corporate form.” *Meisel* at 410. The court in *Truckweld Equip. Co. v. Olson*, 26 Wn. App. at 644-45, stated that such an abuse generally involves “fraud, misrepresentation, or some form of manipulation of the corporation to the stockholder’s benefit and creditor’s detriment.” With respect to the second element, “wrongful corporate activities must actually harm the party seeking relief so that disregard is necessary. Intentional misconduct must be the cause of the harm that is avoided by disregard.” *Meisel*, 97, Wn.2d at 410.”

“...Norhawk concedes that no fraud was committed; however, it contends, citing cases outside our jurisdiction , that deliberate undercapitalization of SSS is an abuse of the corporate form. Norhawk’s argument is contrary to Washington case law which holds that the separate existence of a corporation should not be disregarded solely because its assets are not sufficient to discharge its obligations. *Meisel*, at 411.”

“It is also well established that “[t]he purpose of a corporation is to limit liability.” *Meisel*, 97 Wn.2d at 411.”

“Separate corporate entities should not be disregarded solely because one cannot meet its obligations. *Meisel*, 97 Wn.2d at 411.”

Applying the above law to the facts of this case leads to the conclusion that there is no personal liability on the part of John Arbeeny, Charles Rau, or their marital communities.

A brief summary of the facts involved in this case is that Dallas Jolley, who admittedly was a managing member of the LLC, had apparently, without first disclosing it, hired plaintiff Zimmerman to assist Jolley in marketing his law practice, which he had allegedly neglected and which he was considering was moving from Pierce County to King County. He then purported to hire Zimmerman to work for W8Less Products, LLC, without the consent of the other managers. While the members of the LLC considered Jolley’s requested hiring of Zimmerman, no employment agreement was ever executed.

Arbeeny and Rau, as members of the LLC, did not hire Zimmerman, and they specifically voted against a motion to pay him “retroactively.” There is no evidence of any acts by Arbeeny or Rau which suggests an intentional use of the corporate form (limited liability company form) to violate or evade a duty owed to Zimmerman, and there is certainly no evidence that the disregard of the corporate veil is

somehow “necessary and required to prevent unjustified loss to the injured party.”

C. The question of whether the corporate veil should be pierced is a question of fact that would preclude a summary judgment against members of a limited liability company or dismissal of defenses based on the corporate shield.

In **Truckweld Equipment Co. v. Olson**, 26 Wn. App. 638, 643, 618 P.2d 1017 (1980), the court stated:

“The question whether the corporate form should be disregarded is a question of fact.”

Arbeeny and Rau, on behalf of themselves and their marital communities, have alleged that Zimmerman has failed to state a claim against them personally, and have further alleged that filing the complaint against them is a violation of Civil Rule 11. Personal liability cannot be assessed against those individuals without a piercing of the corporate veil and that is a question of fact.

The trial court could not summarily dismiss Arbeeny and Rau’s affirmative defenses, which are essentially based on the shield of liability that was intended from the formation of the limited liability company, because of that question of fact.

D. Individual members of a limited liability company employer cannot be held personally liable under RCW 49.52.050 unless they act “willfully with intent to deprive the employee” of his wages.

Zimmerman argued in his brief in support of his motion for partial summary judgment that RCW 49.52.070 creates a civil liability upon not only a corporate type employer, but also any officer who shall violate any of the provisions of subdivisions (1) and (2) of RCW 49.52.050. RCW 49.52.050 is entitled “Rebates of wages-false records-penalty.” The pertinent portion is as follows:

“Any employer or officer, vice principal or agent of any employer, whether said employer be in the private business or an elected public official, who:

(1) Shall collect or receive from any employee a rebate of any part of wages theretofore paid by such employer to such employee; or

(2) Wilfully and with intent to deprive the employee of any part of his wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract...”

Section .050 goes on to say that the specific acts set out in Section .050 are criminal acts (misdemeanors).

In this case, there is no question but that W8Less Products, LLC is a potential employer. However, the fact that Arbeeny and Rau, as members of that LLC, voted against paying any money to someone

whom they contend was never an employee of the limited liability company, certainly does not even suggest that there was any willful intent to deprive Zimmerman of any part of his wages. Zimmerman was trying to become an employee, and he was being supported in that effort by the former manager, but his efforts never resulted in his becoming an “employee.”

Unless Zimmerman is able to prove that Arbeeny and/or Rau committed one of the criminal acts prohibited under RCW 49.52.050, then there is no civil liability on them personally under RCW 49.52.070, because that only arises if there has been a criminal act as prohibited by RCW 49.52.050.

CR 11 requires that pleadings (the complaint) have to be based on the best “knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if

specifically so identified, are reasonably based on a lack of information or belief.”

The rule goes on to specifically state:

“If a pleading, motion or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorneys fee.”

In this particular case, Arbeeny and Rau have asserted CR 11 as a defense to the bringing of them personally into the lawsuit where they should be, at first glance, protected from personal liability by the proper creation of the limited liability company. The court will have to hear all of the evidence in the case before determining that a violation of Civil Rule 11 has or has not occurred, and therefore, the court should not summarily dismiss this affirmative defense.

E. RCW 49.52.050(2) only applies when the employer has an obligation to pay a specific compensation.

The court entered its “Order Granting Plaintiff’s Motion for Partial Summary Judgment and Denying Defendants’ Motion for Partial Summary Judgment” on the theory that Arbeeny and Rau, as member managers of W8Less Products, LLC, had “willfully” refused

to pay any compensation to Zimmerman, and were therefore guilty of a violation of RCW 49.52.050(2), and therefore personally liable to Zimmerman under RCW 49.52.070. The court at the hearing on summary judgment found that Zimmerman had done some work for the LLC at the request of the then manager, and was therefore entitled to some compensation, although the amount of that compensation had yet to be determined.

Arbeeny and Rau respectfully allege that, under the case law hereinafter cited, they cannot be said to have acted “willfully,” and therefore they cannot be personally liable to Zimmerman for any wages.

In the recent case of **Allstot v. Edwards**, 114 Wn. App. 625, 60 P.3d 601 (2002), the court was considering the applicability of RCW 49.52.050. At page 633, the court stated:

“The basic requirements in RCW 49.52.050 are that the employer is obligated to pay a certain wage and intentionally pays a lower wage. Accordingly, protection of wrongfully withheld back wages is within the ambit of 49.52.050.”

More importantly, the court in **Allstot v. Edwards, supra**, went on to cite a recent federal case applying Washington law, **Hemmings v. Tidy Man’s, Inc.**, 285 F.3d, 1174, 1203 (9th Cir. 202), which stated that:

“RCW 49.52.050 applies only when an employer has a preexisting duty under contract or statute to pay a specific compensation. When the employer’s obligation to pay a specific amount does not legally accrue until jury verdict, the employer cannot be said to have consciously withheld a quantifiable and undisputed amount of accrued pay.”

Hemmings, 285 F.3d at 1203, cited in **Allstot v. Edwards**, 114 Wn.

App. 625 at 634. The court in **Allstot** also went on to say:

“We will not find willful intent to deprive if the employer has a bona fide dispute as to the obligation to pay. *Pope v. Univ. of Wash.*, 121 Wn.2d 479, 490, 852 P.2d 1055, 871 P.2d 590 (1993). A bona fide dispute is one that is fairly debatable over whether all or a portion of the wages must be paid.”

F. There cannot be a “willful withholding of wages” under RCW 49.52.052(2) where there is a bona fide dispute as to whether an employment relationship exists.

The principles set out in the **Allstot** case were later confirmed in **Champagne v. Thurston County**, 163 Wn.2d 69 (2008), which said on page 81:

“A willful withholding under RCW 49.52.050(2) is a basis for exemplary damages in a civil action of “twice the amount of the wages unlawfully rebated or withheld...together with costs of suit and a reasonable sum for attorney’s fees.” RCW 49.52.070. This court defines a willful withholding as “the result of knowing and intentional action and not the result of a bona fide dispute as to the obligation of payment.” *Wingert*, 146 Wn.2d at 849 (quoting *Chelan County Deputy Sheriff’s Ass’n v. County of Chelan*, 109 Wn.2d 282, 300, 745 P.2d 1 (1987)). A bona fide dispute is a “fairly debatable” dispute over whether an employment relationship exists, or whether all or a portion of

the wages must be paid.” *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 161-62, 961 P.2d 371 (1998) (citing *Cannon v. City of Moses Lake*, 35 Wn.App. 120, 125, 663 P.2d 865 (1983); *Moran v. Stowell*, 45 Wn. App. 70, 81, 724 P.2d 396 (1986); *Chelan County Deputy Sheriff’s Ass’n*, 109 Wn.2d at 301).”

The idea that there has to be a definite liability to pay a definite amount was repeated by the Court of Appeals in **Durand v. HIMC Corp.**, 151 Wn. App. 818, 214 P.3d 189 (2009), where, at page 833, the court said:

“A plaintiff can file a claim under RCW 49.52.070 when he can show a violation of RCW 49.52.050(2)...Furthermore, the court cannot find a willful failure to pay if (1) the failure is the result of carelessness or error or (2) when a bona fide dispute exists as to the amount of wages owed or whether there was an employer/employee relationship. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 160, 961 P.2d 371 (1998).

In the case at bar, the trial court on summary judgment found that while the court believed Zimmerman was entitled to some compensation for work that he had done for the LLC, the amount of compensation was not agreed upon and would have to await determination at time of trial. Therefore, because there was no specific amount due to Zimmerman, and because there was a fairly debatable dispute over whether an employment relationship existed, W8Less Products, LLC, and the individual members of the LLC who voted not to enter into the contract with Zimmerman or make any payment to

Zimmerman, cannot be said to have acted “willfully” as required by RCW 49.52.010 and 49.52.070.

G. Merely voting “no” on a motion cannot be considered a willful withholding of wages.

Arbeeny and Rau took no personal action to deprive Zimmerman of any wages. Their only involvement was to vote “no” when a motion was made to pay Zimmerman an unspecified amount for work he had allegedly done for the benefit of the LLC prior to the time he was first officially considered for employment. They did not take any action for their own personal benefit, but merely voted on a motion that was presented to them as members of the management board of the limited liability company. If the motion had passed, and then Arbeeny or Rau had personally refused to turn over a payment that had been approved by the limited liability company, then they could be considered to have acted willfully in withholding wages or compensation.

As noted previously, RCW 49.52.050(2) concerns a willful withholding that would amount to a misdemeanor. Merely voting no on the motion was a legitimate exercise of their discretion as manager

members, and cannot be said to be the type of “willful withholding” which would make them personally liable under RCW 49.52.050(2).

V. CONCLUSION

When Arbeeny and Rau, as members of W8Less Products, LLC, voted “no” on a motion that was made to pay an unspecified amount to Zimmerman for work allegedly done prior to the time he was first officially considered for employment, they were merely exercising their judgment as to what was in the best interest of the limited liability company. They did not act for their own personal benefit, nor did they willfully withhold any specific amount that was due from the limited liability company to Zimmerman.

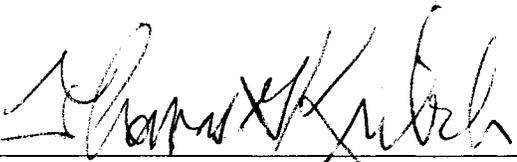
In this case, there was a fairly debatable issue as to whether or not Zimmerman had become an employee of the limited liability company and there was also a fairly debatable issue as to what, if anything, he might be entitled to in the way of compensation. While the limited liability company might have some liability to Zimmerman, there is no justification or grounds for “piercing the corporate veil” to make any of the individual members of the limited liability company personally liable for whatever obligation the limited liability company might have to Zimmerman. Furthermore, by the mere act of voting

“no” when a motion was made to pay Zimmerman an unspecified amount, the members voting “no” did not act to “willfully withhold wages” in the manner prohibited by RCW 49.52.050(2).

The judgment as to Arbeeney and Rau and their marital communities should be reversed and Zimmerman’s complaint as to those individuals should be dismissed.

Respectfully submitted this 22nd day of February, 2010.

KRILICH, LA PORTE, WEST
& LOCKNER, P.S.

By 
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Attorney for Appellants

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CERTIFICATE OF SERVICE

BY 
DEPUTY

I, DAWNE SHOTSMAN, hereby certify under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

On February 22nd, 2010, I delivered a true and accurate copy of the foregoing Statement of Arrangements, via first class mail, to:

Jean Jorgensen
Singleton & Jorgensen, Inc., PS
337 Park Avenue North
Renton WA 98057

DATED: February 22nd, 2010, at Tacoma, Washington.



Dawne Shotsman