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DIVISION II

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STATE OF WASHINGTON

Case No. 405318

BY  DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

John H. Wright, a married man,
Appellant,

v.

Dave Johnson Insurance, Inc., a Washington corporation, David L.
Johnson and Beverly M. Johnson, husband and wife, *Respondents.*

BRIEF OF APPELLANT

Jeffrey A. Damasiewicz
WSBA # 30036
Attorney for Appellant

Phillips, Krause & Brown
101 E. Market Street, Suite 525
Aberdeen, WA 98520
(360) 532-8380

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR	4
	<u>Assignments of Error</u>	4
	<u>Issues Pertaining to Assignments of Error</u>	6
III.	STATEMENT OF THE CASE	7
	A. <u>Factual Background</u>	7
	B. <u>Procedural Background.</u>	15
IV.	SUMMARY OF ARGUMENT	23
V.	ARGUMENT	25
	A. <u>The trial court did not have the authority to write into the parties' agreement a requirement that the defendant transfer ownership of the life insurance policies at issue to the plaintiff upon termination of the defendant's employment.</u>	25
	B. <u>The trial court, in setting the amount of interest to be paid by the plaintiffs to the defendant for the premiums that had been paid on the insurance policies by the defendant, did not have the authority to ignore the interest rate set forth in RCW 19.52.010 and apply an unspecified "blended" rate with no identification as to the amount of the interest rate or the manner of calculating the interest.</u>	32
	C. <u>The trial court did not have the authority to award costs to the plaintiffs as prevailing parties.</u>	34

D. The trial court did not have the authority to award costs and fees to the plaintiffs under RCW 4.84.185. 35

E. The Findings of Fact and Conclusions of Law to which the defendant objected were not supported by sufficient evidence. 37

F. The trial court erred in compelling the defendant to answer numerous “contention interrogatories” and other interrogatories and to provide documents pertaining to those interrogatories. 44

VI. CONCLUSION 49

APPENDICES

Appendix 1: “Buy and Sell” agreement	A-1
Appendix 2: Findings of Fact and Conclusions of Law	A-7
Appendix 3: Statutes	A-15
RCW 4.56.110	A-16
RCW 4.84.185	A-17
RCW 19.52.010	A-18
Appendix 4: April 1, 2010, hearing transcript	A-19
Appendix 5: Satisfaction of Judgment documents	A-20

TABLE OF AUTHORITIES

Cases

<u>Biggs v. Vail</u> , 119 Wn.2d. 129, 830 P.2d. 350 (1992)	35
<u>Bill of Rights Legal Foundation v. Evergreen State College</u> , 44 Wn.App. 690, 723 P.2d. 483 (1986)	35-36
<u>Building Industry Association of Washington v. McCarthy</u> , 152 Wn.App. 720, 218 P.3d. 196 (2009)	35
<u>Goad v. Hambridge</u> , 85 Wn.App. 98, 931 P.2d. 200 (1997)	36
<u>Hearst Communications, Inc. v. Seattle Times Co.</u> , 154 Wn.2d. 493, 115 P.2d. 262 (2005)	23, 29, 30, 31, 32
<u>Labriola v. Pollard Group, Inc.</u> , 152 Wn.2d. 828, 100 P.3d. 791 (2004)	39
<u>Marine Enterprises v. Security Trading</u> , 50 Wn.App. 768, 750 P.2d. 1290 (1988)	34
<u>Oliver v. Flow Int'l Corp.</u> , 137 Wn.App. 655, 155 P.3d. 140 (2006)	23, 31, 32
<u>Phillips Building Co. v. An</u> , 81 Wn.App. 696, 915 P.2d. 1146 (1996)	34
<u>Schrom v. Bd. For Volunteer Fire Fighters</u> , 153 Wn.2d. 19, 100 P.3d. 814 (2004)	33
<u>Tiger Oil Corp. v. Dep't. of Licensing</u> , 88 Wn.App. 925, 946 P.2d. 1235 (1997)	35
<u>Truong v. Allstate</u> , 151 Wn.App. 430, 211 P.3d. 430 (2009)	35
<u>Weber v. Biddle</u> , 72 Wn.2d. 22, 431 P.2d. 705 (1967)	18, 45

	<u>Statutes</u>	
RCW 4.56.110(4)		33
RCW 4.84.185		2, 5, 6, 21, 24, 35, 38
RCW 19.52.010		6, 21, 33
	<u>Rules</u>	
RAP 8.1(h)		22

I. INTRODUCTION

This litigation revolved around two key issues raised in the plaintiffs' complaint and in the defendant's counterclaim: (1) whether Defendant John H. Wright (hereinafter referred to as "Defendant Wright") was required to transfer to Plaintiff David L. Johnson's corporation, without any compensation, ownership of two life insurance policies (for which Defendant Wright had been paying the premiums for years) under the terms of a written "Employment Agreement" and/or a "Buy and Sell" agreement when Plaintiff David L. Johnson himself (hereinafter referred to as "Plaintiff Johnson") admitted that neither of these agreements required any such transfer and that the parties in entering into the agreements never even discussed such a transfer and (2) whether Defendant Wright was owed any additional compensation under the terms of his oral employment agreement with the plaintiffs.

Other claims were asserted by the plaintiffs in their complaint and pre-trial arguments but abandoned during the course of the trial. These included claims that Defendant Wright had improperly taken artwork, foreign language study materials, and other unidentified property, and that Defendant Wright had improperly used "points" in a vacation program.

The trial court, after a three day bench trial, ruled that Defendant Wright did not have to transfer ownership of the life insurance policies to

Plaintiff Johnson's corporation but did have to transfer ownership of the policies to Plaintiff Johnson personally. The court rejected the plaintiffs' argument that this transfer should be made without any compensation and instead ruled, consistent with the alternative relief requested by Defendant Wright, that Plaintiff Johnson would have to reimburse Defendant Wright the full amount of the premiums he had paid with interest. The court assessed as interest an arbitrary amount without specifying the interest rate or even how the amount of interest was calculated rather than assessing an amount calculated in accordance with the interest rate provided by statute.

The court did not find in favor of the plaintiffs on their other claims.

The court also ruled against Defendant Wright on his counterclaim.

Despite the fact that the plaintiffs did not prevail on all their claims and did not obtain all the relief they requested and the fact that the court awarded alternative relief requested by the defendant, the court not only awarded the plaintiffs costs as the "prevailing party" but also awarded all their costs and attorney fees under RCW 4.84.185.

Although the parties agreed that enforcement of the judgment could be stayed pending appeal with Defendant Wright delivering to the court executed forms transferring ownership of the life insurance policies to Plaintiff Johnson and making the court the beneficiary of the policies

pending appeal, the court rejected this approach and refused to sign an agreed order to that effect. The trial court then demanded that Defendant Wright transfer ownership of the policies to Plaintiff Johnson within one week or post cash or bond in the amount of the full face value of the policies or be thrown in jail. The trial court refused to allow any longer period of time to allow for this court to review the decision. Given these circumstances, Defendant Wright had no feasible alternative but to transfer the policies, which he did. This aspect of the judgment, along with some of the monetary portions of the judgment, were then satisfied.

Defendant Wright now asks this court to reverse the trial court's order requiring transfer of the life insurance policies to Plaintiff Johnson. In the alternative, Defendant Wright asks this court to reverse the decision as to the amount of interest and direct the trial court to assess interest at the statutory rate of 12% per annum.

Defendant Wright also asks this court to reverse the decisions awarding costs and attorney fees to the plaintiffs.

Since the policies were already transferred to Plaintiff Johnson and some of the monetary aspects of the judgment have already been satisfied, granting the requested relief will also require direction to the trial court to enter a supplemental order or judgment to reverse the effects of the earlier judgment to the extent it has already been satisfied. That would include an

order or judgment requiring Plaintiff Johnson to transfer the policies back to Defendant Wright and/or an order requiring reimbursement of money paid under the judgment to the extent inconsistent with this court's final determination.

Defendant Wright also asks this court to direct the trial court to vacate the findings of fact and conclusions of law to which Defendant Wright objects.

Defendant Wright also asks this court to reverse an order compelling discovery.

II. ASSIGNMENTS OF ERROR

Assignments of Error

No. 1: The trial court erred in entering its Judgment of March 10, 2010.

No. 2: The trial court erred in entering its March 2, 2010, Findings of Fact and Conclusions of Law.

No. 3: The trial court erred in entering Finding of Fact Number 4 in its March 2, 2010, Findings of Fact and Conclusions of Law.

No. 4: The trial court erred in entering Finding of Fact Number 5 in its March 2, 2010, Findings of Fact and Conclusions of Law.

No. 5: The trial court erred in entering Finding of Fact Number 6 in its March 2, 2010, Findings of Fact and Conclusions of Law.

No. 6: The trial court erred in entering Finding of Fact Number 7 in its March 2, 2010, Findings of Fact and Conclusions of Law.

No. 7: The trial court erred in entering Finding of Fact Number 8

in its March 2, 2010, Findings of Fact and Conclusions of Law.

No. 8: The trial court erred in entering Finding of Fact Number 11 in its March 2, 2010, Findings of Fact and Conclusions of Law.

No. 9: The trial court erred in entering Finding of Fact Number 12 in its March 2, 2010, Findings of Fact and Conclusions of Law.

No. 10: The trial court erred in entering Conclusion of Law Number 2 in its March 2, 2010, Findings of Fact and Conclusions of Law.

No. 11: The trial court erred in entering Conclusion of Law Number 3 in its March 2, 2010, Findings of Fact and Conclusions of Law.

No. 12: The trial court erred in entering Conclusion of Law Number 4 in its March 2, 2010, Findings of Fact and Conclusions of Law.

No. 13: The trial court erred in entering Conclusion of Law Number 5 in its March 2, 2010, Findings of Fact and Conclusions of Law.

No. 14: The trial court erred in entering Conclusion of Law Number 6 in its March 2, 2010, Findings of Fact and Conclusions of Law.

No. 15: The trial court erred in entering Conclusion of Law Number 7 in its March 2, 2010, Findings of Fact and Conclusions of Law.

No. 16: The trial court erred in entering Conclusion of Law Number 8 in its March 2, 2010, Findings of Fact and Conclusions of Law.

No. 17: The trial court erred in entering its March 29, 2010, Order Pursuant to RCW 4.84.185.

No. 18: The trial court erred in entering its October 22, 2009, Order Compelling Discovery Responses.

Issues Pertaining to Assignments of Error

No. 1: Did the trial court have the authority to write into the parties' agreement a requirement that the defendant transfer ownership of the life insurance policies at issue to the plaintiff upon termination of the defendant's employment when the plaintiff himself admitted that the agreement on its face did not require such a transfer and that the parties never discussed such a requirement? (Assignments of Error No. 1, 2, 12, and 16.)

No. 2: Did the trial court, in setting the amount of interest to be paid by the plaintiffs to the defendant for the premiums that had been paid on the insurance policies by the defendant, have the authority to ignore the interest rate set forth in RCW 19.52.010 and apply an unspecified "blended" rate with no identification as to the amount of the interest rate or the manner of calculating the interest? (Assignments of Error No. 1, 2, and 13.)

No. 3: Did the trial court have the authority to award costs to the plaintiffs as prevailing parties when the plaintiffs abandoned most of their claims during the course of the trial and did not prevail on all their demands and when the court awarded the defendant alternative relief that the defendant had requested in his answer to the complaint, i.e., repayment of premiums the defendant had paid on the policies in the event that the policies were ordered transferred to the plaintiffs? (Assignments of Error No. 1, 2, and 15.)

No. 4: Did the trial court have the authority to award costs and fees to the plaintiffs under RCW 4.84.185 when (a) the defendant prevailed in most respects in his defense against the plaintiffs' claims and (b) there was a rational basis under the law for the defendant's counterclaim with the plaintiffs acknowledging the existence of a dispute between the parties about compensation allegedly owed to the defendant but simply disagreeing about the underlying facts as to how that compensation was meant to be calculated and whether it had in fact been paid in full? (Assignment of Error No. 17.)

No. 5: Were the Findings of Fact and Conclusions of Law to

which the defendant objected supported by sufficient evidence? (Assignment of Error No. 3 through Assignment of Error No. 16.)

No. 6: Did the trial court err in compelling the defendant to answer numerous “contention interrogatories” and other interrogatories and to provide documents pertaining to those interrogatories? (Assignment of Error No. 19)

III. STATEMENT OF THE CASE

A. **Factual Background.** In early 1998, Defendant Wright was living and working in Louisiana when he received a telephone call from his father-in-law, Plaintiff Johnson. RP (Johnston 11/3/09) 62:3-63:4; RP (Prante 11/4/09) 146:20-151:9.¹ Plaintiff Johnson asked Defendant Wright to leave his job and home in Louisiana and move to Washington to help Plaintiff Johnson establish and run a new insurance agency. Id. Plaintiff Johnson indicated that, in addition to needing help from Defendant Wright in certain areas in which Plaintiff Johnson lacked skills, he also wanted Defendant Wright to be his “perpetuation,” which in the insurance industry is crucial and is the person who is designated to take over an insurance agency in the event something happens to the owner. Id.; RP (Johnston 11/3/09) 64:20-66:7, 102:23-103:11; RP (Prante 11/4/09) 146:20-151:9.

¹ Verbatim reports were prepared by two different court reporters: Brenda Johnston and Carman Prante. Each started the numbering of their respective transcripts at page 1. To signify which court reporter’s transcripts are referenced, Appellant has added a designation of the reporter and the date of the applicable hearing to the record reference throughout the brief.

Plaintiff Johnson had created a corporation as the form for the new insurance agency. RP (Johnston 11/3/09) 56:8-11. That corporation is Plaintiff Dave Johnson Insurance, Inc. (hereinafter referred to as “the Corporate Plaintiff.”) Id.

Defendant Wright and Plaintiff Johnson then had a series of telephone calls discussing Plaintiff Johnson’s request. RP (Prante 11/4/09) 63:1-13, 146:20-151:9. According to Defendant Wright, prior to Defendant Wright accepting the employment offer Plaintiff Johnson had promised that Defendant Wright would be paid a salary as the manager of the insurance agency equal to what he would have been paid by his employer in Louisiana (between \$50,000 and \$65,000 per year); would be paid half of the profits of the insurance agency; would be paid half of the commissions earned on any policies he sold; would receive medical, dental, and vision coverage; and would be sold the insurance agency in seven years. Id. Plaintiff Johnson also offered to pay the expenses for Defendant Wright to move himself and his family to Washington. Id.

These terms were acceptable to Defendant Wright. Id. He asked Defendant Johnson to put the terms of the agreement into writing. Id.; RP (Prante 11/4/09) 79:12-80:24. Plaintiff Johnson promised that he would do so as soon as Defendant Wright arrived in Washington. Id.

According to Plaintiff Johnson, in the pre-acceptance telephone

discussions, he offered to pay Defendant Wright only \$36,000 per year (with the possibility of later increases, including an increase to \$45,000 as soon as possible) and made no further promises at that time other than the offer to pay Defendant Wright's moving expenses. RP (Johnston 11/3/09) 64:4-19, 68:1-3; RP (Prante 11/5/09) 236:22-237:11, 282:2-10, 270:9-23. Plaintiff Johnson did, however, testify, "I, in fact, suppose used my skills as a salesman to sell him on the fact that here is an opportunity that you just can't afford to pass up." RP (Prante 11/5/09) 246:25-247:3.

Defendant Wright then sold his house and left his job in Louisiana. RP (Prante 11/4/09) 151:10-152:12. He moved to Washington in late March of 1998 to help Plaintiff Johnson establish and run the new insurance agency, with his employment with the Corporate Plaintiff starting around April 1, 1998. Id. Plaintiff Johnson did pay Defendant Wright's moving expenses as promised. RP (Prante 11/4/09) 152:13-15.

Plaintiff Johnson acknowledges that he did at some point agree to pay Defendant Wright half of the profits of the Corporate Plaintiff insurance agency. RP (Johnston 11/3/09) 126:1-127:21, 139:7-16. Plaintiff Johnson claims that this promise was made some time after Defendant Wright began working for the Corporate Plaintiff insurance agency and not prior to Defendant Wright accepting the offer. Id. Plaintiff Johnson claimed that the profit sharing promise was required by

and originated in a later “Buy and Sell” agreement but ultimately admitted that the “Buy and Sell” agreement contained no such provision. RP (Johnston 11/3/09) 143:24-144:8; Ex. 14. Plaintiff Johnson also claims that the “50/50” split of the profits was not to be based on gross income of the Corporate Plaintiff less normal business expenses but instead was to be based on only part of the Corporate Plaintiff’s gross income less not only business expenses of the Corporate Plaintiff but also some of Plaintiff Johnson’s personal expenses that he paid from the Corporate Plaintiff’s separate corporate bank accounts and with some of the income to be subjected to a different percentage split. RP (Johnston 11/3/09) 130:6-131:5, 133:2-9, 141:20-142:1; RP (Prante 11/5/09) 211:4-222:22.

Plaintiff Johnson never put the parties’ initial agreement into writing despite repeated requests from Defendant Wright asking him to do so. RP (Johnston 11/3/09) 67:23-25; RP (Prante 11/4/09) 154:19-155:11. Similarly, Plaintiff Johnson and the Corporate Plaintiff, despite repeated requests from Defendant Wright, never provided medical, dental, and vision coverage to Defendant Wright or paid him all of the compensation that was initially promised. RP (Prante 11/4/09) 155:12-156:5; RP (Prante 11/5/09) 222:23-224:4. Defendant Wright consistently and persistently throughout the time he worked for the Corporate Plaintiff disputed the amount of compensation that he was receiving from the Corporate

Plaintiff in discussions with Plaintiff Johnson. RP (Johnston 11/3/09) 88:10-18; RP (Prante 11/4/09) 133:22-134:8; RP (Prante 11/5/09) 238:15-24.

In August of 2001, approximately three years into the business relationship, Plaintiff Johnson transferred to Defendant Wright ownership of two life insurance policies insuring the life of Plaintiff Johnson. Ex. 26; Ex. 27; RP (Johnston 11/3/09) 108:10-109:12; RP (Prante 11/4/09) 161:4-162:3. At that time, Plaintiff Johnson personally and individually was the owner of the insurance policies, and he had owned those policies for years before he ever established and formed the Corporate Plaintiff insurance agency. RP (Johnston 11/3/09) 111:10-112:7. Plaintiff Johnson signed forms provided by the life insurance company transferring ownership of the policies to Defendant Wright and making Defendant Wright the new beneficiary of the policies. Ex. 26; Ex. 27; RP (Johnston 11/3/09) 108:10-109:22. On the forms, Plaintiff Johnson noted that he was transferring the policies to Defendant Wright as his “son-in-law.” Id. There were no restrictions on the transfer of ownership or change of beneficiary noted on the form, and the transfer was to Defendant Wright individually and not into any type of trust or to Defendant Wright in trust. Id. Defendant Wright understood that the transfer of the life insurance policies was to make up for some of the shortfall in his compensation resulting from

Plaintiff Johnson's failure to live up to his original promises regarding the amount of Defendant Wright's compensation. RP (Prante 11/4/09) 161:4-162:3; RP (Prante 11/5/09) 167:17-168:6. Plaintiff Johnson testified that he often gratuitously provided financial benefits to Defendant Wright as a "kiss" because he was Plaintiff Johnson's son-in-law. RP (Johnston 11/3/09) 79:8-14, 97:4-24, 106:10-13.

After the transfer of ownership of the life insurance policies to him, Defendant Wright paid the premiums with his own funds from his own personal checking account, with the exception of the first premium that was due. Ex. 23; Ex. 33; Ex. 37; RP (Johnston 11/3/09) 115:7-12; RP (Prante 11/5/09) 169:14-175:6.

Around the same time, Plaintiff Johnson had a "Buy and Sell" agreement drafted that granted Defendant Wright an option to purchase the insurance agency in the event that Plaintiff Johnson became incapacitated or died. Ex. 14; RP (Johnston 11/3/09) 112:8-114:5; RP (Prante 11/4/09) 159:25-160:5; RP (Prante 11/5/09) 177:20-178:8.² The "Buy and Sell" agreement did not require Plaintiff Johnson to sell the agency to Defendant Wright at the seven-year mark as originally promised. Ex. 14; RP (Prante 11/5/09) 177:20-178:8. The "Buy and Sell" agreement mentioned that Defendant Wright could purchase insurance on

² A copy of the "Buy and Sell" agreement is attached as Appendix 1.

the life of Plaintiff Johnson and, if he elected to exercise his option to purchase the agency, could use the proceeds of life insurance policies to pay a portion of the purchase price. Ex. 14. However, it did not require Defendant Wright to purchase life insurance or to use proceeds of life insurance policies for any portion of the purchase price if Defendant Wright chose to exercise his option and purchase the agency. Ex. 14; RP (Johnston 11/3/09) 114:9-15; RP (Prante 11/5/09) 178:9-16. Furthermore, the “Buy and Sell” agreement did not mention the two life insurance policies that had been transferred to Defendant Wright specifically. Ex. 14; RP(Johnston 11/3/09) 114:6-8. **Most importantly, as Plaintiff Johnson himself admits, the “Buy and Sell” agreement did not require the life insurance policies to be transferred to Plaintiff Johnson or any of the other plaintiffs on the termination of Defendant Wright’s employment or under any other circumstances.** Ex. 14; RP (Johnston 11/3/09) 114:16-25; RP (Prante 11/5/09) 178:17-179:13.

In March of 2005, tension between Plaintiff Johnson and Defendant Wright resulting from the disputes about the amount of compensation Defendant Wright was receiving reached a boiling point. RP (Johnston 11/3/09) 88:19-90:20; RP (Prante 11/5/09) 179:14-183:2. Defendant Wright then left Washington on a trip during which some difficult family issues arose, including the sudden death of his father. Id.

When Defendant Wright returned from the trip, Plaintiff Johnson insisted that Defendant Wright sign an “Employment Agreement.” Ex. 39; RP (Johnston 11/3/09) 88:19-90:20; RP (Prante 11/5/09) 183:3-18. At that time on or around March 29, 2005, the parties were seven years into their employment relationship. Ex. 39; RP (Johnston 11/3/09) 119:9-25. According to Plaintiff Johnson, the “Employment Agreement” was a take-it-or-leave-it agreement that was not open to negotiation and was designed solely to benefit the plaintiffs and to provide absolutely no benefit whatsoever to Defendant Wright and was imposed upon Defendant Wright because Plaintiff Johnson was mad at him. RP (Johnston 11/3/09) 88:19-90:20, 120:1-122:2. According to Plaintiff Johnson, the entire purpose of the “Employment Agreement” was to impose non-compete terms on Defendant Wright in the event the employment relationship terminated. Id.

On June 17, 2005, Defendant Wright and Plaintiff Johnson had another meeting. RP (Prante 11/5/09) 183:19-186:13. According to Defendant Wright, at this meeting, Plaintiff Johnson stated that he was no longer going to pay Defendant Wright any share of the agency’s profits, and Plaintiff Johnson’s written notes from the meeting confirm this. RP (Johnston 11/3/09) 133:16-134:2; RP (Prante 11/5/09) 183:19-186:13. Plaintiff Johnson also told Defendant Wright at this meeting that Plaintiff

Johnson had never intended to actually sell Defendant Wright the insurance agency. RP (Prante 11/5/09) 183:19-186:13.

On June 20, 2005, Defendant Wright resigned his employment with Plaintiff Johnson's insurance agency. RP (Johnston 11/3/09) 87:7, 88:3-9; RP (Prante 11/4/09) 48:10-18; RP (Prante 11/5/09) 188:4-12.

Thereafter, Plaintiff Johnson demanded that Defendant Wright transfer ownership of the life insurance policies back to Plaintiff Johnson without any compensation despite the fact that Defendant Wright had been paying the premiums for years. RP (Johnston 11/3/09) 98:18-23.

When Defendant Wright refused to do so, Plaintiff Johnson sent a form to the life insurance company requesting that the owner and beneficiary of the life insurance policies be changed from Defendant Wright. Ex. 28; RP (Johnston 11/3/09) 99:3-16, 106:14-108:7. On that form, Plaintiff Johnson falsely and fraudulently listed himself and signed as the "present owner" of the policies knowing full well that Defendant Wright was the owner of the policies. Ex. 28; RP (Johnston 11/3/09) 106:14-108:7. The life insurance company did not fall for this deception. CP 53.

This lawsuit followed.

B. Procedural Background. In the Complaint, Plaintiff Johnson alleged that Defendant Wright was required under the

“Employment Agreement” to “return” the life insurance policies to the Corporate Plaintiff despite the fact that the Corporate Plaintiff never owned the life insurance policies. CP 1-4.

The Complaint also included several new claims that had never been previously asserted by Plaintiff Johnson. Id.

One of those new claims was for the return of “valuable artwork” to the Corporate Plaintiff. Id. However, Plaintiff Johnson later admitted that there was absolutely no factual basis for this claim. CP 85. Evidently, Plaintiff Johnson found in his own home the “valuable artwork” that he falsely accused Defendant Wright of taking. Id.

Another of the new claims advanced for the first time in the Complaint was for Defendant Wright to return “foreign language programs” to the Corporate Plaintiff. CP 1-4. However, Plaintiff Johnson admitted that he did not know whether the Corporate Plaintiff or Defendant Wright himself had paid for the program. CP 85-86.

The final claim asserted in the Complaint was for damages allegedly caused to the Corporate Plaintiff by Defendant Wright allegedly using “corporate ‘points’” to vacation under a vacation program sometime after resigning his employment. CP 1-4. However, the membership in the vacation program was purchased by Plaintiff Johnson personally and individually over a decade before the Corporate Plaintiff was ever formed

and was always owned by Plaintiff Johnson personally and individually and was never owned by the Corporate Plaintiff. CP 75-76. Furthermore, this personal and individual membership in the vacation program was used only by Plaintiff Johnson and his family members and never by any employee of Plaintiff Johnson or the Corporate Plaintiff until sometime after Defendant Wright resigned his employment. Id. Defendant Wright explained that although before he resigned he booked a vacation under this family vacation program, along with his wife, who is Plaintiff Johnson's daughter, after he resigned they did not take the vacation. CP 53-54. Defendant Johnson claimed he had proof that the vacation was taken, but he never provided that alleged proof. CP 87-88. In any event, Plaintiff Johnson, who is the owner of the membership, admitted that he would have received written notice from the vacation company when the vacation was booked, and as the member he could have then cancelled the vacation himself. CP 87.

Defendant Wright answered the Complaint and also asserted counterclaims based upon Plaintiff Johnson's failure to live up to his word and honor the promises he made to induce Defendant Wright to leave his home and employment in Louisiana and move to Washington to help Plaintiff Johnson establish and run the Corporate Plaintiff insurance agency. CP 5-8.

On April 6, 2009, Defendant Wright filed a motion for partial summary judgment. CP 16-92. The motion sought dismissal of all four of the claims the plaintiffs asserted against Defendant Wright. *Id.* In the written materials submitted by the plaintiffs in opposition to the motion, they presented absolutely no evidence regarding the claims of theft of the “valuable artwork” and the “foreign language program” or regarding the claim of use of “corporate points” in the vacation program owned by Plaintiff Johnson individually. CP 93-124; CP 125-151. This deficiency was brought to the court’s attention in a reply brief and at the hearing on the motion. CP 125-151; RP (Prante 9/28/09) 4-32.³ That notwithstanding, the trial court completely denied the motion in all respects. CP 223-225.

On October 5, 2009, the plaintiffs filed a motion to compel discovery. CP 152-202. The bulk of the requests involved in the motion were “contention interrogatories.” *Id.* The plaintiff objected to these interrogatories under the holding of Weber v. Biddle, 72 Wn.2d. 22, 29, 431 P.2d. 705 (1967), among other reasons. CP 203-221. Other

³ At the hearing, the plaintiffs’ counsel asserted that these other claims should not be dismissed and that he had presented no evidence in his opposing materials because these claims were lesser in significance and because he felt that the defense had not established a right to summary judgment as to those claims in the moving papers. RP (Prante 9/28/09) 4-32. In other words, although presenting no evidence in response to the motion for partial summary judgment, the plaintiffs indicated that they nevertheless were not at that time abandoning those claims.

interrogatories were objected to as beyond the scope of discovery seeking information that was neither admissible nor reasonably calculated to lead to the discovery of admissible evidence. Id. Another interrogatory asked for any witness statements obtained by the defense and was objected to as seeking privileged attorney work product material. Id. Another interrogatory that was objected to asked for detailed information concerning any “information, facts, writings or evidence relating to this litigation that has not been fully and completely disclosed during your prior answers to these interrogatories” that might be possessed by any of the defendant’s “agents, attorneys, friends, relatives, employees, former agents or former employees.” Id. The court granted the motion to compel. CP 226-228; RP (Johnston 10/15/09) 23-34.

A three day bench trial of the case took place from November 3, 2009, through November 5, 2009.

During the course of the trial, Plaintiff Johnson admitted that neither the “Employment Agreement” nor the “Buy and Sell Agreement” required Defendant Wright to transfer ownership of the policies on the termination of his employment and that the parties had never even discussed the issue prior to signing the agreements. RP (Johnston 11/3/09) 83:12-18, 114:16-25, 124:14-21.

At the close of the trial, the trial judge made oral rulings. RP

(Prante 11/5/09) 308-317. The trial judge stated that ownership of the life insurance policies was to be transferred from Defendant Wright to Plaintiff Johnson. Id. The trial judge specifically noted that the policies had been individual property and were never corporate property. Id. The trial judge also ruled that Plaintiff Johnson would be required to repay Defendant Wright the amount of all premiums that Defendant Wright had paid on the policies with interest. Id. (The plaintiffs had argued that they should be given ownership of the policies without having to repay any amount for the premiums Defendant Wright had paid over the years.) The trial judge also ruled against Defendant Wright on his counterclaims. Id.

Defendant Wright filed written objections to the plaintiffs' proposed findings of fact and conclusions of law. CP 265-273.

At the March 1, 2010, hearing set for the presentation of the plaintiffs' proposed findings of fact, conclusions of law, and judgment, Defendant Wright reiterated his objections. RP (Prante 3/1/10) 318-323. At the hearing, the trial judge accepted as "fair" and "reasonable" the "blended rate" of interest proposed by the plaintiffs in setting the amount of interest to be paid by the plaintiffs on the premiums that Defendant Wright had paid on the policies over the years. RP (Prante 3/1/10) 318-323. Neither the plaintiffs nor the court identified the amount of the "blended rate" or how the "blended rate" was applied. Id. They simply

announced a figure for “interest” without any identification of the specific rate, how it was applied, or even what calculation was used to arrive at the figure. Id. The plaintiffs claimed that their “blended rate” was a compromise between the “federal funds rate” and the “prime rate.” Id. Defendant pointed out at the hearing that the proper rate was the rate mandated by RCW 19.52.010. Id. Defendant also pointed out that the “prime rate” already includes as a component the “federal funds rate” and “blending” those rates further is not appropriate. Id.

The court entered Findings of Fact and Conclusions of Law and a Judgment on March 2, 2010. CP 274-284.

On March 19, 2010, the plaintiffs moved for an award of costs and attorney fees under RCW 4.84.185, claiming that Defendant Wright’s defenses to the complaint and his counterclaims were frivolous. CP 285-324. Defendant Wright opposed the motion. CP 325-340. The trial court granted the motion. CP 347-350. This was despite the fact that the plaintiffs did not prevail on three of their four claims and were ordered to repay the premiums as Defendant Wright had requested as alternative relief in his answer to the complaint. CP 325-340. It is also despite the fact that even Plaintiff Johnson acknowledged that there had been a long-standing dispute about whether Defendant Wright had been paid all the compensation he was promised and the court simply decided that factual

issue after trial in favor of the plaintiffs. CP 325-340. At the hearing on this motion, the trial judge stated, “I personally don’t care whether they rule whether I’m right or wrong, because you know what, I know I’m right. And the only thing that would prove to me at a higher court if they happen to say that I’m wrong, it proves to me that they are not infallible, because I know I’m right.” RP (Prante 3/19/10) 336:25-337:5.

At an April 19, 2010, hearing regarding the posting of security for a stay of enforcement of the judgment pending appeal, counsel presented an agreed order to the trial court under which Defendant Wright would deliver to the court forms transferring the ownership of the life insurance policies to Plaintiff Johnson and making the court the beneficiary of the policies to be held by the court pending appeal. Appendix 4. Counsel for the plaintiffs signed the order and stated on the record to the court that they felt this was a fair way to proceed. Id. The trial judge then refused to enter the order and threatened to throw Defendant Wright in jail if he did not transfer ownership of the policies to Plaintiff Johnson within a week or pay the full face value of the policies into the court by cash or bond. Id. When it was suggested that a slightly longer time might be appropriate so that a motion could be made pursuant to RAP 8.1(h) allowing this court to review the decision, the trial court simply reiterated that Defendant Wright had one week to post cash or bond or transfer ownership of the policies or

be thrown in jail. Id. Given the time constraints, the amount of cash or bond that would be required, and the threat of being jailed in this civil case, Defendant Wright had no feasible alternative but to transfer ownership of the policies to Plaintiff Johnson. Since then, the judgment has been largely satisfied by both sides as a result of the trial judge's strong-arm tactics. Appendix 5.

IV. SUMMARY OF ARGUMENT

The trial court did not have the authority to write into the parties' "Buy and Sell" agreement a requirement that on the termination of Defendant Wright's employment he was required to transfer the life insurance policies to Plaintiff Johnson. Even Plaintiff Johnson admitted that the "Buy and Sell" agreement did not require Defendant Wright to do so. Plaintiff Johnson also admitted that the parties had never even discussed such a term. The court's decision on this issue violates the standards set forth in Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d. 493, 115 P.2d. 262 (2005) and Oliver v. Flow Int'l Corp., 137 Wn.App. 655, 155 P.3d. 140 (2006).

The court also erred by assessing "interest" on the amount of premiums Defendant Wright had paid on the policies in an amount less

than the statutory rate of 12%.⁴ The court not only ignored the statute, it did not even state what interest rate it was applying or how the “interest” figure was calculated. It simply set a figure and announced that the non-specific “blended rate” proposed by the plaintiffs was appropriate.

The court also erred in awarding costs to the plaintiffs as a “prevailing party” and costs and fees to them under RCW 4.84.185. The plaintiffs did not prevail at all on three of their four claims – the ones involving alleged conversion of property and misuse of “points” in a vacation program. In fact, they completely abandoned those claims during the course of the trial. As to their fourth claim – the one regarding the life insurance policies – they did not completely prevail. The court rejected the claim that the policies were corporate property. The court also rejected their claim that they were entitled to the policies for free. Instead, the court ordered the plaintiffs to reimburse Defendant Wright the premiums he had paid on the policies as he had requested as alternative relief and to do so with interest. As to the counterclaim, it was not “frivolous” within the meaning of the statute because construing the evidence in the light most favorable to Defendant Wright there was an admitted long-standing dispute as to whether he had received all the compensation he was due and the court simply accepted the plaintiffs’

⁴ This issue will be moot if the court reverses the decision requiring the transfer of the insurance policies to Plaintiff Johnson.

position on the factual issues of what was promised, how the compensation was to be calculated, and whether the promises were fulfilled.

The court also erred in compelling certain discovery responses.

V. ARGUMENT

A. The trial court did not have the authority to write into the parties' agreement a requirement that the defendant transfer ownership of the life insurance policies at issue to the plaintiff upon termination of the defendant's employment.

In their Complaint, the plaintiffs demanded that Defendant Wright “return” the policies to the corporate plaintiff, Dave Johnson Insurance, Inc., under the “Employment Agreement” and/or the “Buy and Sell” agreement.

However, the plaintiffs admitted that the policies had initially been purchased many years before the corporation was even formed, had only ever been owned by Plaintiff Johnson personally and individually before being transferred to Defendant Wright, and had never been owned by the corporation. In other words, the life insurance policies could not possibly be “returned” to the corporation because the corporation had never owned them.

Plaintiff Johnson also admitted during the trial that the “Employment Agreement” did not require the return of the life insurance

policies and that he was not claiming that it did.⁵

This state of the proceedings leaves the only properly advanced theory regarding the life insurance policies that was not abandoned by the plaintiffs before the end of the trial their argument that the “Buy and Sell” agreement required the life insurance policies to be transferred to Plaintiff Johnson on the termination of Defendant Wright’s employment.⁶

However, Plaintiff Johnson has admitted that the terms of the “Buy and Sell” agreement do *not* require Defendant Wright to transfer the life insurance policies to any of the plaintiffs on the termination of Defendant John’s employment or under any other

⁵ It appears that the plaintiffs were attempting in their Complaint to manufacture a claim to the policies on behalf of the corporation under the “Employment Agreement” because that agreement, to which Plaintiff Johnson individually was not a party, had an attorney fee clause (as noted in the Complaint), whereas the “Buy and Sell” agreement, to which Plaintiff Johnson individually was a party, did not have an attorney fee clause. In other words, it appears the plaintiffs were attempting to trump up a claim under the “Employment Agreement” on behalf of the corporation in an effort to manufacture a right to attorney fees.

⁶ On the second day of the trial (which was over three years from when the plaintiffs filed their lawsuit), the plaintiffs’ attorney announced for the first time that he had been “doing a little legal research **last night**” and now felt “that this case has more elements of a constructive trust than it does of contract.” RP (Prante 11/4/09) 33:10-34:2. (Emphasis Added.) Plaintiffs’ counsel did not at that time provide any briefing on the point, any citation to any pertinent legal authority, or even any explanation of the details or specifics of this new theory. *Id.* In closing argument, Plaintiffs’ counsel did not mention any constructive trust theory initially, but tried to sneak it in during his reply to the defense’s closing argument. RP (Prante 11/5/09) 276:12-288:21, 306:17-307:4. Accordingly, the court allowed the defense to address this new theory for the first time. RP (Prante 11/5/09 307:5-9). Defense counsel objected to the addition of any such claim, pointing out that the case had been filed over three years earlier, the complaint only mentioned contract theories, the plaintiffs never moved to amend, the constructive trust theory was not even mentioned until the second day of the trial, and that the defense had not been given an opportunity to research or fully address the issue. RP (Prante 11/5/09) 307:10-308:18).

circumstances. This is clearly correct as there is nothing anywhere in the “Buy and Sell” agreement that even addresses any such term. **Indeed, as Plaintiff Johnson himself testified, the parties never even discussed such a term or such a possibility.**

The language of the “Buy and Sell” agreement is not even consistent with the idea that Defendant Wright had to use the life insurance policies at issue, or even any life insurance policies at all, to purchase the insurance agency. The agreement did not even absolutely require Defendant Wright to purchase the insurance agency; it merely gave him an option to do so. Furthermore, the “Buy and Sell” Agreement provided that Defendant Wright could purchase under certain conditions during Plaintiff Johnson’s lifetime, which obviously would not require or even allow for the use of the proceeds of life insurance policies to purchase the agency. Moreover, the “Buy and Sell” agreement did not require Defendant Wright to use proceeds from the life insurance policies to purchase the agency if he elected to exercise the option; it simply allowed him to if he so desired to use that source of funding. In addition, the “Buy and Sell” agreement did not specifically mention the specific policies at issue. **Most importantly, the “Buy and Sell” agreement did not require Defendant Wright to transfer ownership of the policies to any of the plaintiffs if Defendant Wright terminated his employment,**

if he elected not to purchase the agency, if he elected to use other sources of revenue to purchase the agency, or for any other reason whatsoever.

Notwithstanding the language of the agreement and the undisputed testimony of the parties that the agreement does not require the transfer of the policies and that the parties had never even discussed that issue prior to entering into their agreement, the trial court in effect wrote just such a provision into the agreement and ordered Defendant Wright to transfer ownership of the life insurance policies to Plaintiff Johnson. The trial judge at a later hearing regarding entry of findings of fact and conclusions of law stated, “my whole purpose in this thing was to be fair...and you know what, if the Court of Appeals wants to turn this back and tell me that being fair isn’t my job, that’s fine with me.” RP (Prante 3/1/10) 322:18-23. While Defendant Wright certainly believes a trial court must be “fair” to litigants, he does not believe “fairness” occurs with, or could possibly encompass, a trial court ignoring the facts and disregarding the law to arrive at a result that one individual judge personally deems “fair” that involves rewriting parties’ contracts after the fact.⁷

⁷ Defendant Wright also questions the “fairness” of the judge since the judge followed up his comments with an implicit threat of economic doom if Defendant Wright dared to appeal, stating, “And on the other side of it, we appeal this. Let’s not forget the appeal bond part. So I would like to have some numbers presented to me and then projected out for like about three years so we make sure we get the right appeal bond set into it.” RP

Such action by a trial court is prohibited under Washington law.

In Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d. 493, 115 P.2d. 262 (2005), the Washington Supreme Court set out to clear up the confusion that had been engendered by some older cases as to the proper method of interpreting contracts. The court stated that one of those cases had been “viewed by some as authorizing unrestricted use of extrinsic evidence in contract analysis, thus creating unpredictability in contract interpretation.” Id. at 503. The court explained that “surrounding circumstances and other extrinsic evidence are to be used ‘to determine the meaning of *specific words and terms used*’ and not to ‘show an intention independent of the instrument’ or to ‘vary, contradict or modify the written word.’” Id. The court then set forth the following framework for the analysis of contracts under Washington law:

We take this opportunity to acknowledge that Washington continues to follow the objective manifestation theory of contracts. Under this approach, we attempt to determine the parties’ intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties....We impute an intention corresponding to the reasonable meaning of the words used....Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used....We

(Prante 11/5/09) 322:23-323:3. As noted above, the trial judge also refused to enter an agreed order for a stay pending appeal and then threatened to throw Defendant Wright in jail unless he either transferred ownership of the policies within one week or posted hundreds of thousands of dollars, specifically rejecting a request to allow a little more time so that this court could address the matter.

generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent....We do not interpret what was intended to be written but what was written.

Id. at 503-04. (Internal citations omitted.)

The trial court in this case did exactly what the Washington State Supreme Court expressly prohibited in Hearst. The court delved into alleged subjective intent and then “interpreted” the written agreement to include an intention independent of what is actually included in the language of the agreement and to vary, contradict, and modify the actual terms of the agreement by adding in a requirement that Defendant Wright give the life insurance policies at issue in this case, that are not even specifically mentioned in the “Buy and Sell” agreement, to Plaintiff Johnson even though there is no such existing requirement within the language or express terms of the agreement.⁸ In doing so, the court

⁸ The trial court seemed to base its decision largely on the fact that the “Buy and Sell” agreement makes a reference to life insurance policies and its conclusion that the transfer of the life insurance policies was connected to the “Buy and Sell” agreement as a possible funding source in the event that Defendant Wright elected to exercise his option to purchase the insurance agency. However, the “Buy and Sell” agreement does not mention the specific policies at issue and only allows, not requires, the use of life insurance proceeds as a funding source in the event Defendant Wright elected to exercise his option. In any event, even if the transfer was connected to the “Buy and Sell” agreement, that does not change the fact that the agreement itself does not require transfer of the policies under any circumstances or the fact that Plaintiff Johnson himself admitted that the parties never even discussed the idea of Defendant Wright transferring the policies to any of the plaintiffs in the event that his employment terminated. Even if the transfer of the policies and the agreement were connected as the court believed, that still does not give the court the right to change the parties written agreement by writing into it a term that was never even discussed.

ignored the “objective manifestations” of the actual language of the contract and focused on the alleged “unexpressed subjective intent” of the plaintiffs contrary to the Supreme Court decision in Hearst. The court thus elected to “interpret what was [allegedly] intended to be written [rather than] what was written” as also prohibited under the Hearst decision.

The present case is also similar to Oliver v. Flow Int’l Corp., 137 Wn.App. 655, 155 P.3d. 140 (2006), which cites the Washington State Supreme Court’s decision in Hearst. The plaintiff in Oliver entered into a contract in which he, Oliver, gave the defendant, Flow International Corporation, all rights to one of his inventions in exchange for a guaranteed minimum payment and the possibility of royalties. When Flow International Corporation did not patent, manufacture, or market the invention, Oliver sued due to the resulting failure to generate royalties for him. However, the contract did not explicitly require Flow International Corporation to patent, manufacture, or market the invention, even though it did make references to patent applications and marketing and manufacturing. Although Oliver pointed to language of the agreement and other extrinsic circumstances that indicated Flow International Corporation had intended to patent, manufacture, and/or market the invention, the court found that it was not bound to do so. The court stated,

“This is an improper use of extrinsic evidence because the result Oliver seeks is to insert new obligations into the contract. The express terms of the contract do not create the obligation Oliver now attempts to impose, even in light of the context in which the agreement arose.” Id. at 143.

The trial court here did exactly what the Oliver court prohibited: it “inserted new obligations” into the agreement, here, the obligation to gift the life insurance policies to Plaintiff Johnson. This is simply contrary to Washington law as set forth in Hearst and Oliver.

B. The trial court, in setting the amount of interest to be paid by the plaintiffs to the defendant for the premiums that had been paid on the insurance policies by the defendant, did not have the authority to ignore the interest rate set forth in RCW 19.52.010 and apply an unspecified “blended” rate with no identification as to the amount of the interest rate or the manner of calculating the interest.

The court ordered the plaintiffs to repay the premiums that Defendant Wright had paid on the life insurance policies with interest. The parties agreed that the amount of the premiums to be repaid was \$27,293.63 as established by the evidence at trial.

In their proposed findings of fact, conclusions of law, and judgment, the plaintiffs proposed interest to be paid on the premiums in the amount of \$3,946.46. The plaintiffs did not identify what specific rate was used or how the interest was calculated. They simply stated that this was a “blended rate” somehow supposedly combining the “prime rate”

and the “federal funds rate.”

Defendant Wright objected, noting that the proper interest rate was 12% by statute and resulted in interest in the amount of \$14,176.94. Defendant Wright also advised the court that the “prime rate” already includes as a component the “federal funds rate” and “blending” those rates further is not appropriate.

The court adopted the amount proposed by the plaintiffs, also without noting the specific interest rate or how the interest was calculated.

Prejudgment interest on a “loan or forbearance of money” where there is no written agreement as to the rate is 12% under RCW 19.52.010.⁹ See Also, Schrom v. Bd. For Volunteer Fire Fighters, 153 Wn.2d. 19, 100 P.3d. 814 (2004)(holding that parties who had paid annual fees for a pension plan but were later determined to be ineligible for the pension had to be reimbursed the amount of the payments plus interest at the statutory rate under RCW 19.52.010). Post-judgment interest under RCW 4.56.110(4) is also 12%.¹⁰

The trial court erred in disregarding the statute and in assessing interest at an unspecified and inappropriate rate. Interest at the rate of 12% per annum was required by statute.

⁹ A copy of this statute is attached in Appendix 3.

¹⁰ A copy of this statute is attached in Appendix 3.

C. The trial court did not have the authority to award costs to the plaintiffs as prevailing parties.

In Phillips Building Co. v. An, 81 Wn.App. 696, 702, 915 P.2d. 1146 (1996), the court stated: “If both parties prevail on major issues, however, there may be no prevailing party. [Citations Omitted.] In such situations, neither party is entitled to an attorney fee award.” See Also, Marine Enterprises v. Security Trading, 50 Wn.App. 768, 773, 750 P.2d. 1290 (1988), with the court stating: “When both parties to an action are afforded some measure of relief and there is no singularly prevailing party, neither party is entitled to attorney’s fees under RCW 4.84.330.”

The plaintiffs did not prevail at all on three of their four claims, namely, the claims of theft of artwork, theft of foreign language programs, and conversion of “points” in a vacation program. Moreover, the plaintiffs did not even completely prevail on their claim regarding the insurance policies. While the court did order Defendant Wright to transfer ownership of the policies to Plaintiff Johnson, it rejected the argument that they be transferred to Plaintiff Corporation and the argument that they be transferred for free. The court ordered the plaintiffs to repay all the premiums Defendant Wright had paid as he had requested as alternative relief and to do so with interest.

Therefore, the plaintiffs cannot be considered a “prevailing party”

under the statute, and it was error to award costs to them as a “prevailing party.”¹¹

D. The trial court did not have the authority to award costs and fees to the plaintiffs under RCW 4.84.185.

In order to be considered “frivolous” under RCW 4.84.185, a claim or defense must be frivolous in its entirety. See, Biggs v. Vail, 119 Wn.2d. 129, 830 P.2d. 350 (1992); Tiger Oil Corp. v. Dep’t. of Licensing, 88 Wn.App. 925, 946 P.2d. 1235 (1997); Building Industry Association of Washington v. McCarthy, 152 Wn.App. 720, 218 P.3d. 196 (2009); Truong v. Allstate, 151 Wn.App. 430, 211 P.3d. 430 (2009). If a party prevails on any aspect of its claim or defense, it is not “frivolous” within the meaning of the statute and costs and attorney fees cannot be awarded. Id. “A frivolous action has been defined as one that cannot be supported by any rational argument on the law or facts.” Bill of Rights Legal Foundation v. Evergreen State College, 44 Wn.App. 690, 696-97, 723 P.2d. 483 (1986). See Also, Tiger Oil Corp. v. Dep’t. of Licensing, supra.; Truong v. Allstate, supra. “However, allegations that, upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, frivolous.” Bill of Rights Legal Foundation v. Evergreen

¹¹ If the court affirms the award of costs and attorney fees under RCW 4.84.185, this issue would be moot as that award would cover anything that would have been awarded under the “prevailing party” statute. However, if that award is reversed, this issue is pertinent.

State College, 44 Wn.App. 690, 696-97, 723 P.2d. 483 (1986). A claim is not “frivolous” simply because it does not prevail, and all doubts are to be resolved in favor of the non-moving party. See, Goad v. Hambridge, 85 Wn.App. 98, 931 P.2d. 200 (1997).

Defendant Wright’s defense to the plaintiffs’ claims was not frivolous because he prevailed on almost all counts. Specifically, the plaintiffs were forced to abandon as completely baseless all of their claims of theft and conversion.¹² The court also ruled against the plaintiffs in their assertion that the life insurance policies were corporate property rather than individual property of Plaintiff Johnson. This was significant because of the inclusion of the attorney fee provision in the Employment Agreement with the corporate plaintiff and the lack of an attorney fee provision in the Buy and Sell Agreement with the individual plaintiff. Moreover, the plaintiffs ultimately abandoned their claim under the Employment Agreement during the course of the trial. Most importantly, the court ruled that Defendant Wright was entitled to restitution or reimbursement of the premiums he had paid on the policies just as

¹² The plaintiffs have often asserted that these claims were *de minimis* and ultimately abandoned them during the course of the trial. However, the plaintiffs successfully resisted dismissal of these claims on summary judgment and even in their Trial Memorandum filed a week before trial continued to insist that “Defendant Wright took other property of the Corporation.” CP 229-239 (at 238). Defendant Wright had no choice but to defend against these claims or be labeled, by default, an art thief and a thief of other property from an employer.

Defendant Wright requested as alternative relief in his answer to the complaint.

In short, Defendant Wright prevailed on significant aspects of his defense. Therefore, the defense cannot be considered “frivolous” and costs and attorney fees cannot be awarded under the statute.

Furthermore, as to the counterclaims, construing the facts in the light most favorable to Defendant Wright, there was a legitimate and long-standing dispute over whether he had been paid all the compensation that he had been promised. Indeed, the plaintiffs do not deny that promises were made regarding the compensation and that there was a dispute regarding whether those promises had been fulfilled. There were, however, factual issues concerning what exactly was promised, how “profits” were to be calculated, and whether the promises were fulfilled. The fact that the court ultimately accepted the plaintiffs’ assertions does not make an attempt to resolve the acknowledged dispute in a lawsuit that was already initiated by the plaintiffs “frivolous.” There was clearly a rational argument for seeking the compensation that Defendant Wright believed he was promised but did not receive.

E. The Findings of Fact and Conclusions of Law to which the defendant objected were not supported by sufficient evidence.

Finding of Fact Number 4 states that Defendant Wright’s

counterclaims are “without factual basis.”¹³ To the extent that the court is implying in this finding that Defendant Wright’s counterclaim was “frivolous” within the meaning of RCW 4.84.185, sufficient evidence does not support such a finding. The undisputed evidence was that the parties had a long-standing dispute about the amount of compensation Defendant Wright received. Defendant Wright testified that he was promised a starting salary between \$50,000 to \$65,000. Plaintiff Johnson testified that he initially offered only \$36,000, but he also testified that he had used his great skills as a salesman to induce Defendant Wright to leave his home and job to come and work with him. Plaintiff Johnson also testified at one point that he had promised to get the salary to \$45,000 as soon as possible. Defendant Wright also testified that he was promised half of the profits from the start. Plaintiff Johnson admitted that he had promised half of the profits at some point. He claimed that it was not until the “Buy and Sell” agreement was executed, but later had to recant his oft-repeated testimony that the “Buy and Sell” agreement contained this promise as it actually provided no such thing. The evidence also showed that the profit sharing was not in fact an equal split. Plaintiff Johnson did not include all the income in the calculation, subjected some of the income to a different split, and included many of his personal expenses in the calculation.

¹³ A copy of the court’s “Findings of Fact and Conclusions of Law” is attached as Appendix 2.

Finding of Fact Number 5 states, in part, that the “Buy and Sell” agreement provided for “rights of succession” to ownership of the insurance agency. The “Buy and Sell” agreement simply provides an option for Defendant Wright to purchase the insurance agency under certain conditions.

Finding of Fact Number 6 states, among other things, that the “Employment Agreement” “required the Defendant Wright to return all property owned by the Plaintiff Corporation after termination of employment.” The “Employment Agreement” does not contain any such provision. Moreover, Plaintiff Johnson admitted during the trial that the “Employment Agreement” did not require the “return” of the life insurance policies, and the plaintiffs abandoned during the course of the trial their claims to the “return” of any other property. Any finding regarding the “Employment Agreement” is irrelevant and improper. This is especially true since the “Employment Agreement” was completely unenforceable due to a lack of consideration as addressed in Defendant Wright’s motion for partial summary judgment and Trial Brief. CP 26, 130-131, and 250-251. See, Labriola v. Pollard Group, Inc., 152 Wn.2d. 828, 100 P.3d. 791 (2004).

Finding of Fact Number 7 states various assertions regarding the alleged purpose and intent of the transfer of the life insurance policies.

The finding ignores the undisputed fact that the “Buy and Sell” agreement was only an option and did not even on its face require Defendant Wright to use any life insurance policies, let alone the specific life insurance policies at issue in this case (that were not even referenced in the agreement), to fund the purchase if he did chose to exercise his option. Moreover, the finding distorts Defendant Wright’s testimony regarding the purpose of the transfer from his perspective, as did the Plaintiffs’ counsel and the court during the course of the trial. Defendant Wright did not testify that the policy was an outright gift given for absolutely no reason whatsoever as the plaintiffs’ counsel suggested and the court attempted to lead Defendant Wright into stating. Defendant Wright testified that the life insurance policies were given to him to make up for some of the shortfall in his compensation resulting from Plaintiff Johnson’s failure to live up to his original promises regarding the amount of Defendant Wright’s compensation. Defendant Wright testified that Plaintiff Johnson told him when he was transferring the life insurance polices to Defendant Wright, “I want to give these two policies to you because I feel grateful, appreciative for your having stuck it out with me since the beginning of the agency, all the sacrifice that you’ve made and all the work that you have put into this.” RP (Prante 11/4/09) 161:18-22. He also testified that he understood that “sacrifice” to include that “at this point in time I’m still

not making the salary that David promised so there was the cumulative total of that accruing up to that point in time.” RP (Prante 11/5/09) 167:23-168:1.

Finding of Fact Number 8 makes various assertions regarding Defendant Wright’s position regarding the purpose of the transfer of the life insurance policies. Again, as noted in the preceding paragraph, this finding is based upon a distortion of Defendant Wright’s position regarding the purpose of the transfer. Moreover, the idea that the transfer was some sort of “gift” is certainly not “totally illogical” or “totally contradictory to the clear facts” given Plaintiff Johnson’s testimony claiming he often granted unsolicited perks and special financial benefits to Defendant Wright as a “kiss” because he was his son-in-law. Indeed, the transfer forms specifically state as the reason for the transfer, “son-in-law.”

Finding of Fact Number 11 states that Plaintiff Johnson’s “claims for the return of certain property owned by the Plaintiff Corporation to the Plaintiff Corporation, including valuable artwork and foreign language programs have been resolved outside this lawsuit, and those claims are not before this Court.” There is absolutely no evidence from the trial whatsoever to support this finding. Moreover, there is absolutely nothing in the record anywhere to support this finding. That is because it is simply

untrue. The parties did not resolve these claims; the plaintiffs simply abandoned them during the course of the trial and failed to present any evidence regarding them. This is likely because they were totally baseless and completely unsupportable from a factual and legal perspective. CP 28-29, 127, and 248.

Finding of Fact Number 12 states, “The use by Defendant Wright, without permission or authorization from any of the plaintiffs, to use corporate ‘points’ after his resignation have been resolved outside this lawsuit, and those claims are not before this Court.” There is absolutely no evidence from the trial whatsoever to support this finding. Moreover, there is absolutely nothing in the record anywhere to support this finding. That is because it is simply untrue. The parties did not resolve these claims; the plaintiffs simply abandoned them during the course of the trial and failed to present any evidence regarding them. This is likely because they were totally baseless and completely unsupportable from a factual and legal perspective. CP 28, 127, and 248-249. This finding is particularly onerous because it also implies that Defendant Wright did in fact misuse “corporate points” in a vacation program when he did not do so and the plaintiffs utterly failed to present any evidence regarding the claim at trial or at any other stage of this litigation.

Conclusion of Law Number 2 states that the purpose of the transfer

of the life insurance policies was to provide a way for Defendant Wright “to buy the insurance agency in the future, in the event of the death of the Plaintiff Mr. Johnson.” This appears to be a finding of fact rather than a conclusion of law. Defendant Wright objects to this conclusion for the same reasons that he objects to Findings of Fact numbered 7 and 8 as stated above.

Conclusion of Law Number 3 states that Defendant Wright’s “claim” that the transfer of the life insurance policies was a “gift” is “without merit” and “not credible.” This appears to be a finding of fact rather than a conclusion of law. Defendant Wright objects to this conclusion for the same reasons that he objects to Findings of Fact numbered 7 and 8 as stated above.

Conclusion of Law Number 4 requires Defendant Wright to deliver to Plaintiff Johnson any documents relating to the life insurance policies and to sign documents to transfer ownership of the policies to Plaintiff Johnson. Defendant Wright submits that this was error for the reasons stated in section IV.A. above.

Conclusion of Law Number 5 requires Plaintiff Johnson to reimburse the premiums Defendant Wright had paid on the policies with “interest” in an unspecified amount at the unspecified “‘blended’ interest rate...proposed by the Plaintiffs.” Defendant Wright submits that this was

error for the reasons stated in section IV.B. above.

Conclusion of Law Number 6 states that the counterclaim is “without merit” and “without basis” and that “[t]here is no claim.” Defendant Wright objects to this conclusion for the same reasons that he objects to Finding of Fact Number 4 and for the reasons stated in section IV. D. above.

Conclusion of Law Number 7 awards taxable costs to the plaintiffs. Defendant Wright submits that this was error for the reasons stated in section IV.C. above.

Conclusion of Law Number 8 states that the court will enter a judgment consistent with the terms of the findings of fact and conclusions of law. Defendant Wright submits that entry of the judgment was error for the reasons stated in this brief as to the other specific assignments of error.

F. The trial court erred in compelling the defendant to answer numerous “contention interrogatories” and other interrogatories and to provide documents pertaining to those interrogatories.

In an order compelling discovery, the trial court ordered the defendant to provide further responses to, among other interrogatories, interrogatories numbered 7 through 14, 18, and 27.¹⁴ The general pattern

¹⁴ The trial court also stated in its order, “The terms to be awarded to Plaintiffs arising out of these discovery issues, shall abide the final result in this case.” If this court does not reverse the award of all costs and attorney fees that were awarded below, the issue may be moot since that award includes the costs and attorney fees that were connected to the motion to compel. On the other hand, if the court on this appeal does reverse the award

in these interrogatories was to state an allegation from the Answer and Counterclaim and then request that the defendant “state in detail the material facts you base this contention on” and “identify each and every document...which supports your answer to the previous question.” In some of these interrogatories, the plaintiffs also asked the defendant to speculate as to what third-party witnesses knew.

In Weber v. Biddle, 72 Wn.2d. 22, 29, 431 P.2d. 705 (1967), our Washington State Supreme Court stated: “Appellants were warranted in asking for the identity of persons who had information on material issues in this case. However, the opposing party cannot be required to put on a dress rehearsal of the trial. While it is proper to elicit information as to evidentiary facts as contrasted with ultimate facts, nevertheless it is improper to ask a party to state evidence upon which it intends to rely to prove any fact or facts.”

This rule by the Washington State Supreme Court is good and binding law. It prohibits as “improper” exactly what the plaintiffs demanded and the court ordered provided: a “dress rehearsal” of the trial. This included a listing of trial witnesses, what those third-party witnesses would say, what exhibits would be used at trial, as well as a listing of what “facts” support the ultimate facts or other facts. The interrogatories asked

by the trial court of all costs and attorney fees, what if any terms are appropriate could be an issue.

for the evidence that would be used to prove certain facts. It was “improper” for the plaintiffs to ask for such information and error for the court to compel it. Furthermore, it was improper to demand and order that the defendant speculate as to what exactly third-parties would say as there was no foundation or competence for the defendant to speak for others. Plaintiffs should have attempted to discover what others might say by interviewing or deposing them personally.

The trial court in its order also compelled the defendant to provide further response to interrogatory number 31. This interrogatory asked for information regarding “the loan that has been taken out against the insurance policies in question.” This was completely irrelevant. The only issue as to the insurance policies was whether Defendant Wright should have been required to gift them to one or more of the plaintiffs. It was error to compel further response to this interrogatory.

The trial court in its order also compelled the defendant to provide further response to interrogatory number 24. This interrogatory requested Defendant Wright’s “earnings and source of earnings for the past five years.” Since the interrogatory was propounded in October of 2007, it presumably was requesting information from 2003 through 2007, which would be five years. To the extent the interrogatory sought information regarding income after June of 2005 when Defendant Wright ceased his

employment with Plaintiff Corporation, it was completely irrelevant. The only issue as to Defendant Wright's income was how much he had been promised by Plaintiff Johnson compared to how much he was actually paid by Plaintiff Corporation. Information about income from other employers was likewise irrelevant. It was error to compel further response to this interrogatory.

The trial court in its order also compelled the defendant to provide further response to interrogatory number 28. That interrogatory stated:

Do any of your agents, attorneys, friends, relatives, employees, former agents or former employees possess any information, facts, writings or evidence relating to this litigation that has not been fully and completely disclosed during your prior answers to these interrogatories? If your answer to this question is anything other than an unequivocal "No," please identify each and every such item of information, fact, writing or evidence specifically and in detail, and in addition, identify the person or persons possessing such information by name, address and relationship to the parties herein."

Defendant responded in part, "Defendant objects to this request to the extent it seeks information that is protected by the attorney-client privilege." This is because the interrogatory asked for the defendant's "attorney" to reveal to the plaintiffs "any information, facts, writings or evidence relating to this litigation" that the defendant's attorney possesses. Furthermore, this interrogatory is overly broad and calls for speculation as to what third parties know and/or would say as witnesses and what

documents they may possess. The interrogatory goes far beyond what is required by the Civil Rules, which merely require a party to identify persons who may possess relevant information. It was error to compel further response to this interrogatory.

The trial court in its order also compelled the defendant to provide further response to interrogatory number 31. That interrogatory stated, “Identify any written statements from any person that you have in your possession, or that you have knowledge of, regarding any fact or issue in this case.” Defendant’s responded, “Defendant objects to this request to the extent it seeks information that is protected by the attorney-client and/or work product privileges and to the extent it is vague and ambiguous. Subject to and without waiving the foregoing objections, Defendant responds: ‘If you are referring to signed affidavits, declarations, or other signed statements of potential witnesses, Defendant has none at this time.’” The attorney-client privilege was asserted because, for example, if the defendant had written a statement for his attorney, that would be privileged but conceivably covered by this boundlessly broad interrogatory. As to the work-product privilege, if defense counsel were to have interviewed a witness and then obtained a written and signed statement from that witness, that would clearly have constituted attorney work-product. In any event, no such witness

statements had been obtained by counsel and the plaintiffs and the court were so advised. It was error to compel further response to this interrogatory.

It was also error to compel production of documents relating to the above-referenced interrogatories. The plaintiffs did not even serve a request for production of documents on the defendant.

VI. CONCLUSION

Based on the foregoing and the record herein, Appellant respectfully requests that this Court:

(1) reverse the trial court's decision ordering the transfer of the life insurance policies from Defendant Wright to Plaintiff Johnson;

(2) if request number 1 above is not granted, reverse the trial court's decision regarding the amount of interest assessed on the premiums paid by Defendant Wright and order the court to assess interest at the statutory rate of 12% per annum;

(3) reverse the trial court's decision awarding costs and attorney fees to the plaintiffs;

(4) direct the trial court to enter a supplemental order or judgment to reverse the effects of the earlier judgment to the extent it has already been satisfied, including an order or judgment requiring Plaintiff Johnson to transfer the policies back to Defendant Wright and/or an order

requiring reimbursement of money paid under the judgment to the extent inconsistent with this court's final determination;

(5) direct the trial court to vacate the findings of fact and conclusions of law to which Defendant Wright objects; and

(6) reverse the trial court's decision compelling discovery.

Dated: September 2, 2010

Respectfully Submitted,



Jeffrey A. Damasiewicz
WSBA #30036
Attorney for Appellant

APPENDIX 1

A000001

**BUY AND SELL AGREEMENT OF
DAVE JOHNSON INSURANCE, INC.**

This agreement by and between Dave Johnson Insurance, Inc., a Washington corporation, whose principal office is located at 324 W Heron St, Aberdeen, Washington and David L. Johnson and Beverly M. Johnson, principal share holders of Dave Johnson Insurance, Inc. of 704 N Glenn St, Montesano, Washington and Purchaser, John H. Wright, of 3204 Wishkah Rd, Aberdeen, Washington, Witnesseth that:

Whereas the principal shareholders, David L. Johnson and Beverly M. Johnson desire to provide for the orderly transfer of the assets and shares of the corporation to John H. Wright and desiring to promote their mutual interest and the interest of the corporation by imposing certain restrictions and obligations on themselves and on their stock in the corporation; and

Whereas it is further desired that the principal shareholders make provision that the purchaser should have the option to purchase all or any of the interest of the principal shareholders or as any of them may wish to dispose of by sale during their respective lives; and

Whereas it is desired by John H. Wright to purchase the interest owned by the principal shareholders, David L. Johnson and Beverly M. Johnson, subject to the conditions provided herein during their lifetime or from their estate; and

Whereas the purchaser may insure the life of the principal shareholder, David L. Johnson, with the purchaser as beneficiary; and

Whereas it is desired that John H. Wright should have the first option to purchase, subject to the conditions herein provided, all or any of the shares of stock owned by the

principal shareholders, David L. Johnson and Beverly M. Johnson, in consideration of the mutual promises and covenants hereinafter contained,

It is mutually agreed as follows:

1. Restriction on stock sales during life: No shareholder shall dispose of or encumber any part of his stock in the corporation, except to another shareholder.
2. Purchase of stock on death or incompetency. In the event of death or incompetency of David L. Johnson, the share owned by him and his spouse are subject to the terms of this agreement providing for transfer of shares on the death or incompetency of David L. Johnson. Upon the death or incompetency of David L. Johnson, John H. Wright shall have the option to purchase and the decedent's estate shall sell the stock to the purchaser. David L. Johnson shall be considered incompetent if the incompetency is attested to by two licensed physicians and continues for a period of 3 years or if the incompetency is determined in court. If the two physicians are unable to agree on the competency of the affected shareholder, then the two physicians shall appoint a third physician whose decision shall be final. The purchase price of such interest shall be computed in accordance with the provision of paragraph 3 of this agreement.
3. Purchase price: The purchase price of the business is to be the value of the stock owned by the selling shareholder. The value of the stock owned by the selling shareholder shall be determined as follows: \$380,000.00 plus one-half the gross annual income in excess of \$380,000 x 1.5, less any shares owned by the purchaser, e.g. $(\$380,000.00 + \frac{1}{2} \text{ the increase in gross annual income over } \$380,000.00) \times 1.5 - \text{ the value of shares already owned by purchaser.}$ The

remaining shares extracted from the previous formula [$\frac{1}{2}$ the increase in gross annual income over \$380,000.00] are to be gifted to the purchaser at the time paragraph 2. above is exercised.

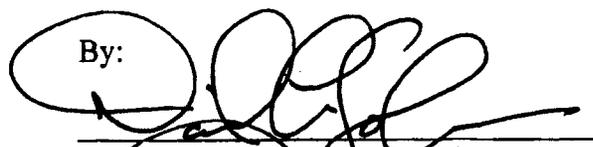
4. Limitation: During the lifetime of the principal shareholder, David L. Johnson, the purchaser, John H. Wright shall not purchase and David L. Johnson shall not be required to sell more than 49% of the outstanding shares of the corporation. This restriction shall not apply after the death of David L. Johnson or the incompetency of David L. Johnson as provided for in paragraph 2.
5. Payment of purchase price: Payment of the purchase price of the shares of stock by purchaser during the lifetime of David L. Johnson shall be in cash. The purchaser may purchase life insurance on the life of David L. Johnson. That upon the death of David L. Johnson the proceeds from said insurance policy(ies) may be used to pay the balance of the purchase price of the outstanding shares of the corporation. The balance, if any, of the purchase price shall be paid in cash or at the option of the purchaser, the purchase price shall be amortized on a monthly basis for a ten year period. The purchase price shall be paid in monthly installments with interest calculated in the declining balance thereof at the rate of Bank of America prime plus 2% interest per annum.
6. Endorsement of stock certificates: Upon the execution of this agreement, each of the certificates of stock subject thereto shall be surrendered to the corporation and endorsed as follows: "Transferability of this certificate is restricted by a stock holder agreement on file in corporate records."

7. Buy back agreement: The parties further agree that should they cease their employment that the corporation may request, and the shareholder shall sell his stock to the corporation at the price as provided under paragraph 3 hereof. That if purchaser shall cease employment with the corporation, this agreement shall become null and void.
8. Continuity, Authority of Business, and Assets: Upon the death or incompetency of David L Johnson as defined in paragraph 2, and prior to the buyer delivering written declaration to the remaining stockholders declaring either his intention to exercise or not exercise his first option to buy the remaining stock, it is agreed that the remaining stockholders may not make structural, financial, contractual, or organizational acts of any kind, nor may there be any distribution of profits to any remaining stockholder or any other party. It is the sellers' intent to leave the business in a financially stable and secure mode of operation, under existing day-to-day management until the buyer has declared his intentions and completed the purchase. The buyer shall have 25 business days after the death or incompetency of David L Johnson to declare his intentions. If the buyer exercises his option to purchase the business, then this restriction shall remain in effect in its entirety until the close of the sale; the remaining stockholders making every effort to cooperate with the buyer and expediting the sale. All non-stock assets belonging to the corporation transfer to the buyer at the close of the sale.
9. Nonassignability or transferable: This agreement is personal to the parties herein and shall not be assigned, transferred or in any way alienated by any of the parties herein.

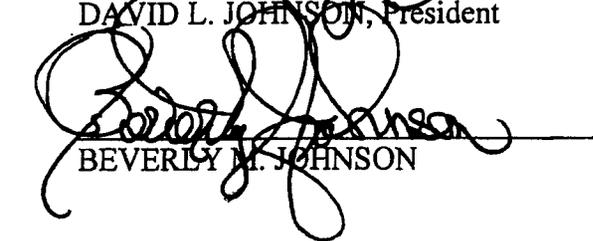
10. Law applicable: This agreement shall be subject to and governed by the laws of the State of Washington irrespective of the fact that one or more of the parties now is or may become a resident of a different state.

IN WITNESS WHEREOF the parties have executed this agreement on August 20, 2001

DAVE JOHNSON INSURANCE, INC.

By: 

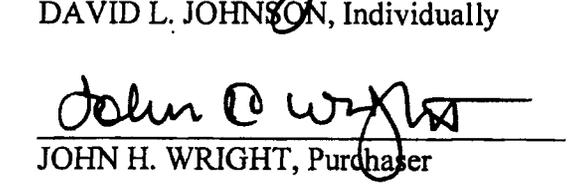
DAVID L. JOHNSON, President



BEVERLY M. JOHNSON



DAVID L. JOHNSON, Individually



JOHN H. WRIGHT, Purchaser



DEBI M. MARTIN
NOTARY PUBLIC
STATE OF WASHINGTON
My Commission Expires Dec. 1, 2002

APPENDIX 2

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SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

DAVE JOHNSON INSURANCE, INC., a
Washington Corporation; DAVID L.
JOHNSON and BEVERLY M.
JOHNSON, husband and wife,

No.: 06-2-01073-2

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Plaintiffs,

vs.

JOHN W. WRIGHT, a married man,

Defendant.

THIS MATTER was scheduled for, and heard as a bench trial before the undersigned Judge on November 3 - 5, 2009 for adjudication of the COMPLAINT FOR DECLARATORY JUDGMENT, REPLEVIN, DAMAGES AND ATTORNEY FEES filed herein by the plaintiffs and the ANSWER TO COMPLAINT AND COUNTERCLAIM filed herein by the defendant; and the PLAINTIFFS' REPLY AND AFFIRMATIVE DEFENSES TO COUNTERCLAIM OF DEFENDANT.

The plaintiffs appeared personally and by their attorney, Thomas A. Brown. The defendant appeared personally by his attorney, Jeffrey A. Damasiewicz.

COPY

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**
Page 1 of 7

BROWN LEWIS JANHUNEN & SPENCER
A PROFESSIONAL SERVICE CORPORATION
ATTORNEYS AT LAW
BANK OF AMERICA BUILDING
SUITE 501
101 EAST MARKET STREET
POST OFFICE BOX 1806
ABERDEEN, WASHINGTON 98520
(360) 533-1600 OR 532-1960

A 000008

1 The Court heard testimony, and received and admitted certain documents and
2 deposition testimony into evidence both as offered and pursuant to the stipulations of the
3 parties.
4

5
6 Now, therefore, the Court enters the following **FINDINGS OF FACT AND**
7
8 **CONCLUSIONS OF LAW.**
9

10
11
12 **FINDINGS OF FACT**
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- 14
15 1. The Plaintiff, Dave Johnson Insurance, Inc., is a Washington
16 Corporation in good standing, which does business in Grays
17 Harbor County, State of Washington. The Plaintiff Corporation
18 has paid all fees and secured all licenses required by law. The
19 Plaintiffs David L. Johnson and Beverly M. Johnson are husband
20 and wife, residing in Grays Harbor County, State of Washington.
21
22 2. The Defendant, John H. Wright, is a married man, residing in
23 Grays Harbor County, State of Washington.
24
25 3. The individual Plaintiff David L. Johnson is a principal and sole
26 owner of the Plaintiff Corporation. In April of 1998, the
27 Defendant Wright was hired by the Plaintiff Corporation as an
28 employee.
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**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**
Page 2 of 7

BROWN LEWIS JANHUNEN & SPENCER
A PROFESSIONAL SERVICE CORPORATION
ATTORNEYS AT LAW
BANK OF AMERICA BUILDING
SUITE 501
101 EAST MARKET STREET
POST OFFICE BOX 1808
ABERDEEN WASHINGTON 98520
360) 533-1800 OR 532-1980

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4. Defendant John Wright's claims that he was tricked and defrauded and induced to come to Washington to work for Plaintiffs, by fraudulent promises of the Plaintiff David L. Johnson are without factual basis. Defendant John Wright's claims that he did not receive what he was promised by the Plaintiff David L. Johnson are without factual basis.

5. On August 20, 2001, all of the parties entered into an agreement entitled "BUY AND SELL AGREEMENT OF DAVE JOHNSON INSURANCE, INC." This agreement provided for certain rights of succession for the Defendant Wright in the event of the death or incompetence of the individual Plaintiff David L. Johnson. This agreement provided that it could be funded by life insurance. This agreement also provided that the agreement would become null and void if the Defendant Wright ceased employment with the Plaintiff Corporation.

6. On March 29, 2005, the Plaintiff Corporation and the Defendant Wright entered into an agreement entitled "EMPLOYMENT AGREEMENT." This agreement provided for certain duties of the Defendant Wright as an employee and agent of the Plaintiff Corporation. This agreement provided that the agreement could be terminated by either party. This agreement required the Defendant Wright to return all property owned by the Plaintiff Corporation after termination of employment.

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7. The Plaintiff David L. Johnson transferred certain Life Insurance Policies to the Defendant John Wright, to fund the Buy-Sell buyout in the event of the death of the Plaintiff David L. Johnson. The purpose of the parties in transferring the life insurance policies from Mr. Johnson to Mr. Wright was to provide a vehicle to be utilized by the Defendant Mr. Wright to enable him to buy the insurance agency in the future, in the event of the death of the Plaintiff Mr. Johnson. The purpose of the parties in transferring the life insurance policies from the Plaintiff Mr. Johnson to the Defendant Mr. Wright was not to make a gift of the policies from the Plaintiff Mr. Johnson to the Defendant Mr. Wright.
8. The position of the Defendant that the policies were a gift is totally illogical and totally contradictory to the clear facts established at trial. The arguments to the contrary are an insult to the Court's intelligence and no rational, logical person could accept those arguments.
9. On June 20, 2005, the Defendant Wright resigned as an employee of Plaintiff Corporation. His resignation was accepted by the Plaintiff Corporation.
10. Despite repeated demands by the Plaintiffs, the Defendant Wright has failed and refused to return the policies of life insurance on the life of individual Plaintiff David L. Johnson to the Plaintiff and has refused to sign the necessary documents to transfer record ownership of those policies to the Plaintiff David L. Johnson

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11. The claims for return of certain property owned by the Plaintiff Corporation to the Plaintiff Corporation, including valuable artwork and foreign language programs have been resolved outside this lawsuit, and those claims are not before the Court

12. The use by the Defendant Wright, without permission or authorization from any of the plaintiffs, to use corporate "points" after his resignation have been resolved outside this lawsuit, and those claims are not before the Court.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and the subject matter.

2. The purpose of the parties in transferring the life insurance policies from Mr. Johnson to Mr. Wright was to provide a vehicle to be utilized by the Defendant Mr. Wright to enable him to buy the insurance agency in the future, in the event of the death of the Plaintiff Mr. Johnson.

3. The purpose of the parties in transferring the life insurance policies from the Plaintiff Mr. Johnson to the Defendant Mr. Wright was not to make a gift from the Plaintiff Mr. Johnson to the Defendant Mr. Wright. The claim that the transfer was a gift is without merit. Mr. Wright's testimony to the contrary is not credible.

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4. If Mr. Wright is in possession of the insurance policies, they should be returned by the Defendant Mr. Wright to the Plaintiff Mr. Johnson forthwith, along with any materials in the possession of Defendant, relating in any way to those policies. The Defendant Mr. Wright should be required to execute any and all documents necessary to transfer record ownership of the insurance policies back to the Plaintiff Mr. Johnson. The obligation imposed by this paragraph should be stayed for thirty days from the entry hereof to allow for an appeal.

5. The Plaintiff Mr. Johnson should be required to reimburse the Defendant Mr. Wright for the premiums paid by Mr. Wright (\$27,293.63), plus interest at a reasonable rate from the dates that the premium payments were made to the date of re-delivery of the policies. The "blended" interest rate, proposed by the Plaintiffs is a reasonable amount to be used as interest.

6. The claims made in the COUNTERCLAIM of the Defendant Mr. Wright are without merit. There is no claim. The claims of loss are without basis. The COUNTERCLAIM of the Defendant should be dismissed with prejudice.

7. Taxable costs should be awarded to the Plaintiffs.

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8. The Court will sign a Judgment in accordance with the terms of these FINDINGS OF FACT AND CONCLUSIONS OF LAW.

DATED this 2ND day of MARCH, 2010.

/s/ Gordon L. Godfrey

Gordon L. Godfrey
SUPERIOR COURT JUDGE

Presented by:
Brown Lewis Janhunnen & Spencer
Attorneys for Plaintiffs

By: *Thomas A. Brown*
Thomas A. Brown WSBA #4160

3/1/10

Approved^{*} for entry by:

Phillips, Krause & Brown
Attorneys for Defendant

By: *Jeffrey A. Damasiewicz*
Jeffrey A. Damasiewicz, WSBA No. 30036

*APPROVED AS TO FORM ONLY,
SUBJECT TO THE DEFENDANT'S
OBJECTIONS OF RECORD

APPENDIX 3

A000015

RCW 4.56.110
Interest on judgments.

Interest on judgments shall accrue as follows:

(1) Judgments founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in the contracts: PROVIDED, That said interest rate is set forth in the judgment.

(2) All judgments for unpaid child support that have accrued under a superior court order or an order entered under the administrative procedure act shall bear interest at the rate of twelve percent.

(3)(a) Judgments founded on the tortious conduct of a "public agency" as defined in RCW 42.30.020 shall bear interest from the date of entry at two percentage points above the equivalent coupon issue yield, as published by the board of governors of the federal reserve system, of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the date of entry. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

(b) Except as provided in (a) of this subsection, judgments founded on the tortious conduct of individuals or other entities, whether acting in their personal or representative capacities, shall bear interest from the date of entry at two percentage points above the prime rate, as published by the board of governors of the federal reserve system on the first business day of the calendar month immediately preceding the date of entry. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

(4) Except as provided under subsections (1), (2), and (3) of this section, judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered. The method for determining an interest rate prescribed by this subsection is also the method for determining the "rate applicable to civil judgments" for purposes of RCW 10.82.090.

[2010 c 149 § 1; 2004 c 185 § 2; 1989 c 360 § 19; 1983 c 147 § 1; 1982 c 198 § 1; 1980 c 94 § 5; 1969 c 46 § 1; 1899 c 80 § 6; 1895 c 136 § 4; RRS § 457.]

Notes:

Application -- Interest accrual -- 2004 c 185: See note following RCW 4.56.115.

Application -- 1983 c 147: "The 1983 amendments of RCW 4.56.110 and 4.56.115 apply only to judgments entered after July 24, 1983." [1983 c 147 § 3.]

Effective date -- 1980 c 94: See note following RCW 4.84.250.

A000016

RCW 4.84.185

Prevailing party to receive expenses for opposing frivolous action or defense.

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

[1991 c 70 § 1; 1987 c 212 § 201; 1983 c 127 § 1.]

Notes:

Administrative law, frivolous petitions for judicial review: RCW 34.05.598.

A 000017

RCW 19.52.010

Rate in absence of agreement — Application to consumer leases.

(1) Every loan or forbearance of money, goods, or thing in action shall bear interest at the rate of twelve percent per annum where no different rate is agreed to in writing between the parties: PROVIDED, That with regard to any transaction heretofore or hereafter entered into subject to this section, if an agreement in writing between the parties evidencing such transaction provides for the payment of money at the end of an agreed period of time or in installments over an agreed period of time, then such agreement shall constitute a writing for purposes of this section and satisfy the requirements thereof. The discounting of commercial paper, where the borrower makes himself liable as maker, guarantor, or indorser, shall be considered as a loan for the purposes of this chapter.

(2) A lease shall not be considered a loan or forbearance for the purposes of this chapter if:

- (a) It constitutes a "consumer lease" as defined in RCW 63.10.020;
- (b) It constitutes a lease-purchase agreement under chapter 63.19 RCW; or
- (c) It would constitute such "consumer lease" but for the fact that:
 - (i) The lessee was not a natural person;
 - (ii) The lease was not primarily for personal, family, or household purposes; or
 - (iii) The total contractual obligation exceeded twenty-five thousand dollars.

[1992 c 134 § 13. Prior: 1983 c 309 § 1; 1983 c 158 § 6; 1981 c 80 § 1; 1899 c 80 § 1; RRS § 7299; prior: 1895 c 136 § 1; 1893 c 20 § 1; Code 1881 § 2368; 1863 p 433 § 1; 1854 p 380 § 1.]

Notes:

Short title -- Severability -- 1992 c 134: See RCW 63.19.900 and 63.19.901.

Severability -- 1983 c 158: See RCW 63.10.900.

A 000018

APPENDIX 4

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF GRAYS HARBOR

DAVE JOHNSON INSURANCE, INC., a)	
Washington Corporation; DAVID L.)	
JOHNSON and BEVERLY M. JOHNSON,)	
husband and wife,)	
)	
Plaintiffs,)	
)	
vs.)	NO. 06-2-01073-2
)	COA NO. 40531-8-II
JOHN W. WRIGHT, a married man,)	
)	
Defendant.)	



VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE JUDGE GORDON GODFREY

- April 19, 2010 -

Grays Harbor County Courthouse
Department 1
Montesano, Washington

A P P E A R A N C E S

FOR THE PLAINTIFF:	MR. THOMAS BROWN ATTORNEY AT LAW
FOR THE DEFENDANT:	MR. JEFFREY DAMASIEWICZ ATTORNEY AT LAW
REPORTED BY:	CARMAN PRANTE, CCR (#2513) OFFICIAL COURT REPORTER GRAYS HARBOR SUPERIOR COURT 102 W. BROADWAY, #203 MONTESANO, WA 98563

P R O C E E D I N G S

- April 19, 2010 -

THE COURT: Wright and Johnson Insurance.

MR. DAMASIEWICZ: Good afternoon, Your Honor. On my motion on the security, Mr. Brown and I have agreed and we have an agreed order. Should I hand that to the clerk?

MR. BROWN: Just to remind the Court that - provides that the documents relating to the transfer of the shares be held in the registry of the court during the appeal. We thought that was a fair way to proceed.

THE COURT: But you've got a problem. This is on appeal.

MR. DAMASIEWICZ: Yes.

THE COURT: RAP 7.2, after review has been accepted, as soon as documentation under Rule 7 of the RAP's is sent to the Court of Appeals, appeal is accepted. So what can I do after review has been accepted in a case?

MR. DAMASIEWICZ: My --

THE COURT: Excuse me.

MR. DAMASIEWICZ: Sorry.

THE COURT: Under that, I refer to RAP 8.1. I realistically can only under intangible property require

1 what the original order of the Court was, but that's on
2 appeal, so I am stayed from that.

3 My only other alternative is to require the value
4 the super - of the property from a supersedeas bond for
5 cash. And so therefore I will believe about the only
6 thing I can do would be to require Mr. Wright to file the
7 amount of cash necessary for the value of the policies
8 that he's holding. I don't know what the value of the
9 policies are, but I'm limited on what I can do.

10 MR. DAMASIEWICZ: Your Honor, I guess I read the rule
11 differently; that, you know, property can be used to - to
12 secure the judgment upon appeal. That's the way I read
13 the rule.

14 THE COURT: It refers to intangible property. There's
15 property and then there's intangible property. It refers
16 to intangible property regarding the Court's authority is
17 to file a supersedeas bond or cash in the amount.

18 And basically what you gentlemen have done is come
19 up with a third resolution and I'm - my problem is, this
20 matter is on appeal. And I - you know, I'm not going to
21 make any commentary on the merits of the appeal, that's
22 up to you people. But obviously this matter has been
23 very strictly adhered to and so therefore my authority -
24 and I want to be clear on the rules and you can I guess
25 appeal this as to that, but at this point in time I don't

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1 know what the value of these insurance policies are, but
2 obviously if something were to happen to Mr. Johnson then
3 we're - we've got a problem, Houston.

4 And so therefore I would believe that the - the face
5 value of the intangible property, either a cash amount
6 has to be filed with the clerk, that would be my ruling,
7 or they are to be turned over to Mr. Johnson. And I
8 don't believe I have any alternative. So you can either
9 turn them over to Mr. Johnson pursuant to the Court's
10 original ruling and you can pursue your appeal or you can
11 file, with the registry of the Court of the Clerk, cash
12 in the amount of the face value of the policies. And I
13 believe that's the rules, this allows me my discretion
14 and I believe it's under RAP 8.1 and RAP 7.2.

15 And the only question I have, the next step I guess
16 is making sure it's done. Because until I researched it
17 I was prepared to have Mr. Wright brought in here and I
18 would make certain that the county sheriff would allow
19 him to use his cell phone to call from the jail cell to
20 tell them where the policies could be found. And I guess
21 that would still be my intent if he doesn't turn them
22 over to the opposing party during the appeal.

23 So I guess by this time next week I'll hear your
24 resolution that Mr. Brown on behalf of his client has
25 received the matters and he's got them or the cash amount

1 has been deposited with the Clerk of the Court. Or the
2 alternative, I will request that you have your client
3 here so that I can have a deputy escort him over and he
4 can use his cell phone, Mr. Damasiewicz.

5 MR. DAMASIEWICZ: The only thing about that, Your
6 Honor, is I think one week in my view may be hasty.
7 Because under the rules of appellate procedure we're also
8 entitled to a file a motion with the appellate court
9 regarding any decision on what the posted security would
10 be. And I would think we ought to have time to be able
11 to file that motion before Mr. Wright is thrown in jail.

12 THE COURT: You have an alternative, and that's to turn
13 the matters over to Mr. Brown. I'll have him here next
14 week. Maybe you can probably get your stay filed between
15 now and then.

16 Thank you. Have a nice day, gentlemen.

17 MR. DAMASIEWICZ: Your Honor, there was also
18 Mr. Brown's motion.

19 THE COURT: Go ahead, Mr. Brown.

20 MR. BROWN: Your Honor, as you know, we filed a motion
21 based on the provisions of the statute and you've already
22 ruled on the applicability of it. And what's before you
23 today is the setting of the amount. And, first of all, I
24 would point out that we did a little bit of research on
25 whether or not what your authority was on - with respect

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1 to this. And I think it's clear that you do have
2 authority --

3 THE COURT: To set attorney's fees, yes.

4 MR. BROWN: So yeah. So I included that language and I
5 think the Court has had an opportunity to see it. We
6 prepared an affidavit setting forth the amount of money
7 involved and I would suggest to the Court that our
8 affidavit was reasonable in the sense that we knocked off
9 everything that occurred before the lawsuit was started
10 and also the Court probably saw that we did not increase
11 the hourly rate when our hourly rate increased in the
12 office and that made a \$5,000 difference in the - in the
13 amount. And I haven't heard - I haven't heard any
14 objection since we filed that - those materials to the
15 amount we proposed, which was \$45,189.02.

16 THE COURT: Response?

17 MR. DAMASIEWICZ: Your Honor, I did have a chance to
18 look at it and I believe that Mr. Brown's rate and the
19 hours and the total on his fees was definitely
20 reasonable. He's an experienced trial lawyer. He
21 obviously did a good job. I looked over the costs, the
22 expenditures, they all seem very reasonable and
23 appropriate and I was able to kind of figure out what
24 they were.

25 There was - the only other aspect was there was

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1 paralegal time. There was quite a bit of it and I think
2 for the most part that's a good thing because that's the
3 way to keep bills down. There was just a very few
4 entries by the paralegal for things like copying
5 documents, delivering documents, things of that nature.
6 It added up to about \$200. It wasn't even substantial
7 enough that I wanted to even brief it or take a lot of
8 time with it. But, you know, bottom line I feel like the
9 amount that they've documented is reasonable other than
10 possibly a little bit of the paralegal time.

11 THE COURT: Present your order. I agree with your sum,
12 Mr. Brown.

13 MR. BROWN: Okay. Your Honor, I have an order and a
14 proposed judgment which I provided to the Court and to
15 Mr. Damasiewicz. Here's the . . .

16 MR. DAMASIEWICZ: And, Your Honor, I did have a chance
17 to review both of those and the form is perfectly
18 acceptable and I am signing them.

19 THE COURT: Okay. Thank you. Signed. Thank you.

20 MR. BROWN: Thank you, Your Honor.

21 MR. DAMASIEWICZ: Thank you, Your Honor.

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(End of Proceedings.)

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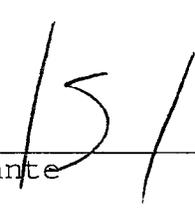
C E R T I F I C A T E

I, CARMAN PRANTE, a duly authorized Notary Public in and for the State of Washington, residing at Grays Harbor, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I, DO FURTHER CERTIFY that the foregoing transcript constitutes a full, true, and accurate transcript of that portion of my stenograph notes so taken and so ordered.

I, DO FURTHER CERTIFY that I am not related to any of the parties to this lawsuit, nor am I interested in the outcome thereof.

Dated this 22nd day of April, 2010.



Carman Prante
CCR #2513

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APPENDIX 5

A000028

FILED
IN THE OFFICE
OF COUNTY CLERK
GRAYS HARBOR, WA

'10 MAY 12 AIO:11

CHEERYL BROWN
COUNTY CLERK

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SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

DAVE JOHNSON INSURANCE, INC., a
Washington Corporation; DAVID L.
JOHNSON and BEVERLY M.
JOHNSON, husband and wife,

Plaintiffs,

vs.

JOHN H. WRJGHT, a married man,

Defendant.

No.: 06-2-01073-2

PARTIAL SATISFACTION OF
SUPPLEMENTAL JUDGMENT

CLERK'S SUMMARY:

- | | | |
|----|-----------------------|--|
| 1. | Judgment Creditors: | Dave Johnson Insurance, Inc., David L. Johnson and Beverly M. Johnson, |
| 2. | Creditor's Attorney: | Thomas A. Brown |
| 3. | Judgment Debtor: | John H. Wright |
| 4. | Judgment Amount: | \$45,189.02 |
| 5. | Prejudgment Interest: | |
| 6. | Taxable Costs: | |
| 7. | Attorney Fees: | |
| 8. | Judgment Interest: | |
| 9. | Type of Satisfaction: | Partial Satisfaction |

WHEREAS plaintiffs obtained a Supplemental Judgment against defendant, and said Supplemental Judgment was signed by Judge Godfrey on April 19, 2010 and entered into the

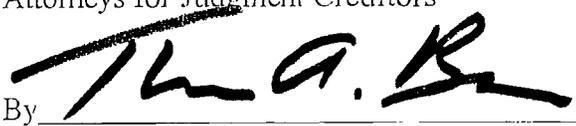
1 docket on April 20, 2010, and the Supplemental Judgment has been partially satisfied by the
2 payment of \$31,305.09;

4 NOW THEREFORE, partial satisfaction of this Supplemental Judgment is hereby
5 acknowledged and the clerk of the court is hereby authorized and directed to partially cancel,
6 satisfy and discharge the Supplemental Judgment in the indicated amount.
7

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9 The unsatisfied portion of the Supplemental Judgment as of April 19, 2010 remains in full force
10 and effect.

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13 DATED: May 10, 2010

BROWN LEWIS JANHUNEN & SPENCER
Attorneys for Judgment Creditors

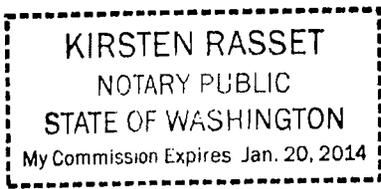
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17 By 

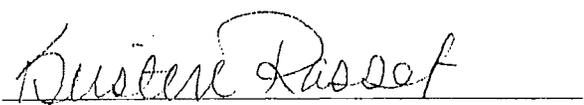
18 Thomas A. Brown, WSBA #4160

19
20 STATE OF WASHINGTON)
21)ss.
22 GRAYS HARBOR COUNTY)

23 On this day personally appeared before me **THOMAS A. BROWN**, to me known to be
24 the individual described in and who executed the within and foregoing instrument, and
25 acknowledged that he signed the same as his free and voluntary act and deed, for the uses and
26 purposes therein mentioned.

27 GIVEN under my hand and official seal on May 10, 2010.

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NOTARY PUBLIC in and for the State
of Washington residing at Hoquiam

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FILED
IN THE OFFICE
OF COUNTY CLERK
GRAYS HARBOR, WASH.

10 MAY 12 A10 :11

CHERYL BROWN
COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

DAVE JOHNSON INSURANCE, INC., a
Washington Corporation; DAVID L.
JOHNSON and BEVERLY M.
JOHNSON, husband and wife,

No. 06-2-01073-2

SATISFACTION OF JUDGMENT

Plaintiffs,

vs.

JOHN H. WRIGHT, a married man,

Defendant.

CLERK'S SUMMARY:

- 1. Name of Judgment Creditor: Dave Johnson Insurance, Inc., David L. Johnson, and Beverly M. Johnson
- 2. Creditor's Attorney: Thomas A. Brown
- 3. Name of Judgment Debtor: John H. Wright
- 4. Type of Satisfaction: Full
- 5. Cause No.: 06-2-01073-2
- 6. Date of Entry of Judgment: March 2, 2010

COME NOW the Judgment Creditors, Dave Johnson Insurance Inc., David L. Johnson, and Beverly M. Johnson, by and through their attorney, Thomas A. Brown, of the firm Brown Lewis Janhunen & Spencer, and declare that the judgment previously entered herein on March 2,

A000031

1 2010, to the extent that it affects the Defendant has been satisfied in full by Defendant's delivery
2 of pertinent documents under the first numbered paragraph of the Judgment and by Defendant's
3 delivery of executed forms directing the life insurance company to change ownership of the life
4 insurance policies from John H. Wright to David L. Johnson under the second numbered
5 paragraph of the Judgment.

6 This Satisfaction of Judgment does not affect the Supplemental Judgment signed on April
7 19, 2010, and entered into the docket on April 20, 2010.

8 DATED: May 10, 2010

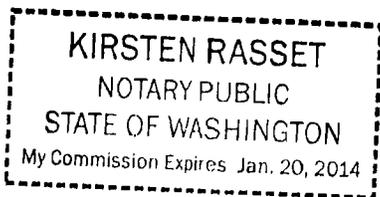
10 Brown Lewis Janhunnen & Spencer
11 Attorneys for Judgment Creditors

12 By Thomas A. Brown
13 Thomas A. Brown, WSBA #4160

14 STATE OF WASHINGTON)
15 GRAYS HARBOR COUNTY)ss.
16)

17 On this day personally appeared before me **THOMAS A. BROWN**, to me known to be
18 the individual described in and who executed the within and foregoing instrument, and
19 acknowledged that he signed the same as his free and voluntary act and deed, for the uses and
20 purposes therein mentioned.

21 GIVEN under my hand and official seal on May 10, 2010



26 Kirsten Rasset
27 NOTARY PUBLIC in and for the State
of Washington residing at Hogewam

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SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

DAVE JOHNSON INSURANCE, INC., a
Washington Corporation; DAVID L.
JOHNSON and BEVERLY M.
JOHNSON, husband and wife,

No.: 06-2-01073-2

SATISFACTION OF JUDGMENT

Plaintiffs,

vs.

JOHN H. WRIGHT, a married man,

Defendant.

CLERK'S SUMMARY:

- | | | |
|----|----------------------------|---|
| 1. | Name of Judgment Creditor: | John H. Wright |
| 2. | Creditor's Attorney: | Jeffrey A. Damasiewicz |
| 3. | Name of Judgment Debtor: | Dave Johnson Insurance, Inc., David L. Johnson and Beverly M. Johnson |
| 4. | Type of Satisfaction: | Full |
| 5. | Cause No.: | 06-2-01073-2 |
| 6. | Date of Entry of Judgment: | March 2, 2010 |

COMES NOW the Judgment Creditor, John H. Wright, by and through his attorney, Jeffrey A. Damasiewicz, of the firm Phillips Krause & Brown, and declares that the judgment previously entered herein on March 2, 2010, to the extent that it affects the Plaintiffs has been

1 satisfied in full by payment of the amount set forth in the Judgment. The clerk is directed to
2 enter satisfaction of said judgment as a matter of record.
3

4 This Satisfaction of Judgment does not affect the Supplemental Judgment signed on
5 April 19, 2010, and entered into the docket on April 20, 2010.
6

7 DATED: May 10, 2010
8

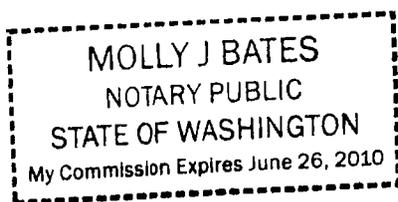
9 PHILLIPS KRAUSE & BROWN
10 Attorneys for Judgment Creditor John H. Wright

11 By *Jeffrey A. Damasiewicz*
12 Jeffrey A. Damasiewicz, WSBA #30036
13

14 STATE OF WASHINGTON)
15)ss.
16 GRAYS HARBOR COUNTY)

17 On this day personally appeared before me **JEFFREY A. DAMASIEWICZ**, to me
18 known to be the individual described in and who executed the within and foregoing instrument,
19 and acknowledged that he signed the same as his free and voluntary act and deed, for the uses
20 and purposes therein mentioned.

21 GIVEN under my hand and official seal on May 10, 2010.
22



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Molly Bates
NOTARY PUBLIC in and for the State
of Washington residing at Montesano

CERTIFICATE OF SERVICE

I certify that on September 2, 2010, I caused a true and correct copy of this Brief of Appellant to be served on Thomas A. Brown, attorney for Respondents, by hand-delivering said copy to Thomas A. Brown, Esq., Brown, Lewis, Janhunen & Spencer, 101 East Market Street, Suite 501, Aberdeen, Washington.

DATED: September 2, 2010

Molly Bates
Molly Bates

FILED
COURT OF APPEALS
DIVISION II
10 SEP - 3 PM 1:00
STATE OF WASHINGTON
BY _____
DEPUTY