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

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MEL T. ROMERO,

Appellant,

vs.

SECRET GARDENS OF WASHINGTON, LLC, WILLIAM DELANEY,  
and CHRISTY KLEIN

Appellant.

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**BRIEF OF APPELLANT**

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## **I. INTRODUCTION**

This case is a wage claim. Mr. Romero sued his former employers alleging that a signed contract entitled him to wages at the rate of 150,000.00 annually, to be paid bi-weekly, starting on October 1, 2014, the beginning of his employment and when he began performing his duties described therein, through June 2, 2015, when he resigned his employment after his employers refuse to honor the contract. Mr. Romero also claimed that, even if the contract was deemed unenforceable, he should be entitled to recover an undisputed amount of wages owed in the amount of \$3,000.00. The Respondents admitted to owing the \$3,000.00 in wages in response to requests for admission, and that the withholding was willful, in the Answer. The Trial Court dismissed the case pursuant to CR 41(b)(3) after the Plaintiff rested in a bench trial. Although the Judge stated at the hearing on the motion that she intended to restrict any review on appeal to an evaluation of substantial evidence by making findings of fact, she chose not to make findings of fact regarding the undisputed \$3,000 claim and regarding the severability clause in the contract, an issue that was raised in the Appellant's response to the motion to dismiss. The Appellant is asking the Court to find that the Trial Court's findings and conclusions of law as to the breach of contract-based wage claim are not supported by substantial evidence. As to the undisputed \$3,000, review should be based on whether the evidence presents a prima facie case in a light most favorable to the Appellant because no factual findings were made. The

same applies to the issue of whether the Court should have employed the severability clause to reform, or simply read the contract to say that Mr. Romero was supposed to be paid his salary from the time he was expected to and did start performing his employment duties for the Respondents. Appellant is asking the Court to make findings based on the record on two issues, 1) that the Appellant has successfully proven that the \$3,000 in wages were undisputed and willfully withheld by Respondents and 2) that the parties agreed to a severability clause which, when applied to the contract results in a binding contract obligating the Respondents to pay the Appellant the agreed upon salary starting at the commencement of his employment, October 1, 2014.

## **II. ASSIGNMENTS OF ERROR**

- 1. The Court erred in the fact-finding portion of the Order under appeal by making findings of fact that were not substantially supported by the evidence presented in the trial. In this appeal, the Appellant is specifically challenging the following paragraphs of the Order in which factual findings are made: Paragraphs, 10, 11, 16, 18, 20, 22, 26, 27, and 28.**
- 2. The Court erred in failing to make any factual findings as to one of the two claims that were before the Court for determination, specifically regarding \$3,000.00 which the Respondents admitted were undisputed wages they owed to Mr. Romero and had willfully chosen not to pay after receiving a written demand for payment of undisputed wages from Mr. Romero's attorney.**
- 3. The Court erred in failing to make any factual findings regarding the severability clause in the contract that the parties agreed to having entered into, and erred in failing to make any conclusions of law on the issue.**

4. **The Court erred in finding that the contract into which the parties entered was ambiguous and could not be read, by the Court, to produce a reasonable outcome.**
5. **The Court erred in considering extrinsic evidence to interpret a contract where the contract could be interpreted, in its face, to set the beginning of the compensation period to begin on the same date that the parties agreed was the beginning of the employment period under the contract.**
6. **The Court erred in determining that the Appellant was the sole drafter of the contract and determining that any ambiguity must, therefore be construed to his detriment.**
7. **The Court erred in ignoring judicial facts from admitted request for admission and admissions in the Answer, specifically that the Respondents owed an undisputed amount of wages (\$3,000) to the Plaintiff, which they intended to pay to him, but then willfully chose not to after receiving a written demand for payment of undisputed wages from Appellant's lawyer.**
8. **The Court erred in determining that, as a matter of law, in order to maintain a claim for unpaid and wrongfully withheld wages under RCW 49.48.010 and 49.52.070, a Plaintiff must make a claim for violation of the minimum wage statutes as well, where the amount of the undisputed wages owed has been admitted by the Defendant.**

### **III. APPELLANT'S STATEMENT OF THE ISSUES**

1. Where a Court issuing an Order granting a motion to dismiss under CR 41(b)(3) and does not provide any findings of fact regarding the claim dismissed, is the proper standard for Appellate review de novo with the question on appeal being whether the plaintiff presented a prima facie case, viewing the evidence in the light most favorable to the plaintiff?
2. Is there substantial evidence in the record to support the Judge's factual finding in Paragraph 10 "Mr. Delaney and Mr. Romero discussed that Mr. Romero would start his employment as of January 1, 2015?"
3. Is there substantial evidence in the record to support the Judge's factual finding in Paragraph 11 – "In September 2014,

Mr. Delaney provided Mr. Romero with a signed, hardcopy Employment Contract that he had found and downloaded from the internet?”

4. Is there substantial evidence in the record to support the Judge’s factual finding in Paragraph 16 – “These modifications resulted in internally inconsistent and ambiguous start dates for Mr. Romero’s annual compensation period. Paragraph 7 indicated Mr. Romero’s annual compensation period salary would begin either on the date the employment contract was signed, or on some unspecified date prior to January 1, 2015?”
5. Is there substantial evidence in the record to support the Judge’s factual finding in Paragraph 18 – “Mr. Romero filled in the date his employment would commence on October 1, 2014?”
6. Is there substantial evidence in the record to support the Judge’s factual finding in Paraph 20, in which the Court finds that Mr. Romero’s description of the events surrounding the review of the Employment Contract and its execution lack conflict with Mr. Delaney’s and lack credibility?
7. Is there substantial evidence in the record to support the Judge’s factual finding in Paragraph 22 – Between October 2014 and November 2014, Mr. Romero assisted Defendants with odd jobs and with setting up the facility and began to grow his plants. For this work, Defendants paid Mr. Romero separately by cash and check, since his annual compensation period had not yet commenced?
8. Is there substantial evidence in the record to support the Judge’s factual finding in Paragraphs 26, 27, and 28 – The Court finds that Mr. Romero attended a meeting where his contract was cancelled, that the contact was, in fact cancelled, and that Mr. Romero agreed to continue to work for minimum wage?
9. Where a contract contains a blank that is not filled in, but can be read, as a whole so that the date which the parties intended to be inserted in the blank is reasonably clear and would make the remainder of the contract make sense, should the Court interpret the contract in the manner which would make the clause with the blank in a manner that would make the entire contract consistent and reasonable?

10. If a contract can be read to be reasonable and consistent without considering extrinsic or parol evidence, should the Court do so?
11. Where one party presents another party with a proposed, unsigned contract that includes blanks or portions marked as “to be determined,” then the responding party presents a counter offer with changes and blanks to be filled in, and the first party fills in blanks and both then sign the final version of the contract , should the Court consider the contract to have bene drafted by both parties?
12. Does a modification of a contract occur after the contract is entered into?
13. When a contract is offered, rejected, and the offeree responds with a different contract, has there been a legal rejection and counter-offer?
14. If parties enter into a severability clause in a contract, agreeing to ask the Court to reform a contract should one clause be considered to be ambiguous or unenforceable, should the Court give a factual and/or legal reason for ignoring the severability clause after determining that a clause is unenforceable due to ambiguity?
15. Are admissions by a party to a CR 36 Request for Admission considered established facts at trial?
16. Are admissions in an Answer to factual assertions in a Complaint considered established facts at trial?
17. Where a Plaintiff makes a claim for unpaid wages, the Defendant admits to the fact that the wages were owed in a specific, undisputed amount, and that the decision not to pay them was willful, must the Plaintiff also allege and prove a violation of the minimum wage requirements under Washington Statutory y law in order to maintain his claim for wrongfully retained wages?

#### **IV. APPELLANT’S STATEMENT OF THE CASE**

Mr. Romero, the Appellant in this action, graduated high school in 1978, having gravitated towards classes in biology and zoology with

hopes of becoming a veterinarian. (VRP Vol. I, August 15, 2019, pp. 166-167) Well before that, as early as the age of nine, he had begun to learn about genetics, breeding guppies and hamsters. Id. After graduation, Mr. Romero worked in restaurant management and served on the nursing staff with Western State. (VRP Vol. 1, August 15, 2019, pp. 171-174). He never lost his interest in genetics and breeding. He studied Gregor Mendel's early work in plant and insect breeding experiments and eventually went on to open his own business, breeding and training dogs. Over 20 years, he produced over 300 title dogs, including breeding and training many police dogs. (VRP Vol. 1, pp. 169-174) Mr. Romero also began breeding marijuana plants. He worked under a medical marijuana license, focusing on genetics and producing seeds for new strains of the plant and became quite well known for this work. (VRP Vol. 1, August 15, 2019, pp. 175-176; VRP Vol. II pp. 277-278) Through this business he got to know Kyle Delaney, the son of the Respondent, William Delaney. (VRP August 14, 2019, p. 93, VRP Vol I, pp. 182-183)

When Washington was getting ready to legalize the production and sale of marijuana for recreational purposes Kyle Delaney, who had run a business growing medical marijuana, came to his father and step mother, William (Bill) Delaney and Christy Klein with a proposal. He convinced the couple, who had no experience running a business or in growing marijuana, to quit their jobs and put all their resources into creating Secret Gardens of Washington, LLC, a business that would grow and sell

marijuana to licensed retail dealers. (VRP August 14, 2019, pp. 93-97; Vol. I, August 15, 2019 pp. 101-103) There are various types of production in the marijuana business, including growing the flowering plants (the actual drug) for sale, making oil from the plants, producing cloned plants that can be sold to growers, and genetic research which produces seeds for new strains. (VRP Vol I, August 15, 2019, pp. 176-179) Secret Gardens was formed in 2013 by Ms. Klein and Mr. Delaney as a legal cannabis processor. Its facility is located in Bremerton WA. (CP 108, p. 1013) Kyle told his father that Secret Gardens would need a research and development breeding program to produce new strains of marijuana. He recommended that the business hire Mr. Romero for the position, which would require specialized knowledge. (VRP August 14, 2019, pp. 97, 99, 101, CP 108, p. 1013)

Kyle Delaney presented himself to Mr. Romero as an agent of Secret Gardens and offered him the job as the head of the breeding program. (VRP Vol. I, August 15, 201 pp. 183-184) Mr. Romero was excited about the prospect of using his knowledge about breeding marijuana in a legitimate business. Kyle Delaney then introduced Ms. Klein and Mr. Delaney to Mr. Romero as a potential candidate for the Research and Development position. (CP 108 p. 1013) William Delaney had been offering contracts to employees for Secret Gardens. He got the contracts from an internet website and made changes and additions to the

internet stock contract before offering them to potential employees. (VRP August 14, 2019, p.103)

On September 18, 2014, after having spoken to Mr. Romero about the job and deciding to offer him employment, William Delaney downloaded an employment contract he intended to offer to Mr. Romero. He made changes in the stock contract, including the addition of Mr. Romero's name, details regarding compensation, a clause regarding the commencement date of the contract, and the addition of a non-compete clause. (VRP August 14, 2019, p.103, p. 106) Mr. Romero and Mr. Delaney had agreed on the amount of compensation as \$150,000.00 annually. (VRP August 14, 2019, pp.107-108) However, as to when payments of the annual \$150,000 salary would begin and how it would be paid, Mr. Delaney wrote "TBD" for "To Be Determined" in a blank, inviting discussion from Mr. Romero on that issue. (VRP August 14, 2019 p. 105) That day, he emailed the contract that he had put together to Mr. Romero. (VRP August 14, 2019, p.102)

Mr. Romero looked at the contract. He was concerned because he had been told that he would be expected to start working immediately, but the contract said he would not be paid until January of 2015. Mr. Romero did not like the idea of working for three months without any compensation. He understood that, with the business deriving income from crop sales, there would not be income until the first harvest was sold, likely in January. He wanted to be sure that, even if he had to wait until

January to get paid, he would actually be paid for the work he would be doing in October, November and December, even if he had to wait on a retroactive payment for those months. Mr. Romero decided to take the contract to an attorney and seek advice for a counter-offer. (VRP Vol. I, August 15, 2019, pp. 187-188) Mr. Romero's attorney did make changes in the contract and gave it back to Mr. Romero, who took the counter-offer to William Delaney. (VRP Vol. I, August 15, 2019, pp. 189-190) The changes included the following language as to the commencement date and term of the contract: "The Employee will commence employment with the Employer on the \_\_\_\_ day of \_\_\_\_\_, 2014 (the "Commencement Date") for a term of one year. The parties shall renegotiate the terms of any future agreement." Section 7, "Employee Compensation" was rewritten to state: "Employee's annual compensation period will commence (on the date that this agreement is signed) (or January 1, 2015 with retroactive payments from the date of \_\_\_\_\_) Compensation will be paid to Employee every two weeks." (Exhibit 1)

Mr. Romero presented the counter offer to Mr. Delaney by handing him the rewritten contract with his signature on it and telling Mr. Delaney that he had made changes to the contract, but not going into any further detail as to the changes. (CP 108, p. 1014e, VRP August 14, 2019 pp. 112-113, VRP Vol. I, August 15, 2019, p. 189) Mr. Delaney was preoccupied with the business at the time, but admitted that there was no reason why he could not have had an attorney review the contract before accepting it. (CP

108 p. 1014; VRP August 14, 2019 pp. 112-113) Mr. Delaney, although he had been warned by Romero that there were changes in the contract offered to him, and had heard Mr. Romero tell him that he had gone to an attorney to have it re-written, was not concerned about what the changes might be as he was a self-styled “honest, trusting guy.” (VRP August 14, 2019, p. 106, p. 113) Mr. Delaney took the contract that Mr. Romero had offered him and signed it after writing “October 1” in the portion that indicated the commencement date of the contract. He did not fill in the blank after “retroactive payments,” however. Neither did he make any mark to indicate whether he was agreeing to pay Mr. Romero starting immediately upon the commencement of the contract, or retroactively from January 1, 2015. (VRP August 14, 2019 pp. 108-112, pp. 153-154; VRP Vol I. pp. 189-190; Exhibit 1) Mr. Delaney never looked at the terms of the contract he had signed until the night before his testimony at the trial of this case (some five years later), when he lamented “I was an honest, trusting guy. I didn’t know anyone would take a contract like that and bastardize it like that.” (VRP August 14, 2019, p. 113)

Per the commencement term of the contract, Mr. Romero began his breeding program at Secret Gardens on October 1, 2014. Mr. Delaney testified that Mr. Romero was working, but that he had no idea what Mr. Romero was doing from October 1, 2014, when he began working, through January 1, 2015. (VRP August 14, 2019, p. 114, p. 173) Mr. Romero found that, although some of the facility was still under

construction, the rooms he was assigned for the Research and Development program were sufficient to starting the early stages of the program. (VRP Vol I. p. 195) Typically, it would take about four years for create a new strain of marijuana if a breeding program was begun “from scratch.” However, part of Mr. Romero’s appeal was that he brought with him project seeds that he had been developing for years. With his seeds, the projected time period for him to produce strains for Secret Gardens was more like one year. When he had explained this, the owners seemed to be very happy with this news. (VRP Vol. I pp. 196-198) The first step of the breeding program was to germinate the seeds that Mr. Romero had brought with him. He was the only person in the breeding program, and began right away on October 1<sup>st</sup> by germinating a batch of seeds. (VRP Vol. I, pp. 212-213, p. 217) During the first month, the program progressed well. The seeds germinated and Mr. Romero had plants start to grow. (VRP Vol. I, p. 217) By November, Mr. Delaney admitted that by his own observation of the plants’ growth, Mr. Romero was well into his sixth week of the research and development program. (VRP August 14, 2019, pp. 266-267) Over the next several months, Mr. Romero kept detailed notes of his progress. During his testimony, the notes were presented to the Court with Mr. Romero explaining, step by step, the stages of the breeding program he had been through from “popping seeds” to providing the final product for testing by Secret Garden employees. (VRP Vol. I, pp. 238-244, Exhibits 44, 45) During the time he worked at

Secret Gardens, he successfully completed two full cycles of the program (from seeds to testing final product for two new batches of phenotypes) and was half way through a third cycle. (VRP Vol. II pp. 337-341, Exhibit 1)

In the meantime, however, things did not go so well for Secret Gardens, financially. Delaney and Klein found themselves unable to pay their employees for the work they had done. (VRP August 14, 2019, pp. 116-117) They failed to pay Washington Employment Security premiums for their employees, despite the fact that this was required in order to maintain their business license. (VRP August 14, 2019, pp. 116-117, pp. 120-121) In November of 2014, Delaney had a meeting with some of the members of the business and told them that Secret Gardens was not going to be able to fulfill its part of their employment contracts. (CP 108 p. 1015). Ms. Klein supplied a list of people who received notice on that day, a list that did not include Mr. Romero, Mr. Taylor, or Kyle Delaney. (VRP Vol. IV pp. 647-649, Exhibits 56, 57, 58) Mr. Romero continued to work thinking he would eventually be paid retroactively. He wasn't. By May of 2015, he had had enough and things came to a head over his not being paid. (VRP Vol. II pp. 327-328) On June 2, 2015, Ms. Klein told Mr. Romero that they would not be honoring his contract. This was the first time that Mr. Romero had heard this from the Respondents. (VRP Vol. II pp. 327-328) He resigned but continued to communicate with Ms. Klein who agreed that he was owed some wages. She and Mr. Delaney

insisted that they had cancelled the salary contract back in November of 2014, but did not dispute that Mr. Romero should be paid something for his work. Mr. Romero asked Ms. Klein to come up with some plan to pay him for the work he had done, writing in a text message “Okay, thanks. Also if you can draw up that salary plan, that would be great.” (VRP Vol. II p. 332) Mr. Delaney had no system for keeping track of hours that employees were working. (VRP August 14, 2019, pp. 117-118) Agreeing that they owed him some wages, Ms. Klein made two deposits into Mr. Romero’s account, totaling \$1,900. (VRP Vol. I p. 333) Mr. Delaney and Ms. Klein conceded that they could not dispute that they owed Mr. Romero another \$3,000 for the work he had done and they were prepared to pay Mr. Romero that last \$3,000.00. (VRP August 14, 2019, pp. 121-126, Exhibit 18) Romero exchanged text messages with Ms. Klein for weeks. Despite assurances that they would pay the last \$3,000.00, it never came. (VRP August 14, 2019 pp. 128-129) Eventually, he began to despair of ever receiving even the \$3,000.00 that they had admitted was undisputed and promised to pay him. He felt that he had exhausted his attempts to contact Ms. Klein after having contacted her by text almost every day for two weeks without any response. This was about seven months after Mr. Romero had resigned from Secret Gardens. (VRP Vol. II pp. 335-336) He finally sent a message warning that he would eventually resort to legal action to recover unpaid wages “I’m assuming since you haven’t gotten back to me about the monies as promised that working this

out outside the courts or state labor is not going to happen.” (VRP Vol. II p. 336)

Mr. Romero did hire an attorney, who sent Ms. Klein and Mr. Delaney a letter, asking them to pay any undisputed portion of the wages. After receiving the letter from the attorney, they made a willful decision not to pay Mr. Romero anything further, including the \$3,000.00 that was undisputed. (Exhibit 18, CP 14, VRP Vol. II pp. 128-131) This lawsuit ensued.

## **V. STANDARD OF REVIEW**

Civil Rule 41(b)(3) provides that in a bench trial, the Court may grant a motion to dismiss at the close of the plaintiff's case either as a matter of law or a matter of fact. Under CR 41(b)(3), generally, dismissal is proper "if there is no evidence, or reasonable inferences therefrom, that would support a verdict for the plaintiff." *Willis v. Simpson Inv. Co.*, 79 Wash.App. 405, 410, 902 P.2d 1263 (1995). This is akin to the CR56 summary judgment or directed verdict standard. If the Trial Court dismisses the case as a matter of law after the plaintiff rests, "review is de novo and the question on appeal is whether the plaintiff presented a prima facie case, viewing the evidence in the light most favorable to the plaintiff. But if the trial court acts as a fact-finder in its Order, appellate review is limited to whether substantial evidence supports the trial court's findings and whether the findings support its conclusions of law." *In re Dependency of Schermer*, 161 Wash.2d 927, 939-40, 169 P.3d 452 (2007).

*Commonwealth Real Estate Serv. V. Padilla*, 205 P.3d 937, 149 Wn. App. 757 (Wash. App. 2009)

In this case, prior to the Plaintiff's response to the motion, the Court stated, clearly, that she was intending to act as a fact finder, and intended for her Order to be reviewable under the latter, substantial evidence, standard. (VRP Vol. IV pp. 627-629) She also identified, clearly, two issues upon which the Court was going to rule. The first was whether Mr. Romero was owed any wages under the contract that the parties had signed. The second issue was whether, apart from the contract claim, the Defendants had wrongfully and willfully withheld wages. In the Answer and responses to request for admission, they had admitted that \$3,000.00 in wages were owed, undisputed and willfully withheld. The Court stated, definitively, "But those are the two contested issues, and I'm going to rule on both of them." (VRP Vol. II pp. 357-358) As the Appellant points out below (Section VI.A.\_\_\_\_), the Court issued no findings of fact whatsoever on the undisputed and wrongfully withheld \$3,000.00 wage claim. Therefore, as to that claim, the standard of review should be the standard set forth under *Willis v. Simpson Inv. Co.*, 79 Wash.App. 405, 410, 902 P.2d 1263 (1995), that is, dismissal is proper only "if there is no evidence, or reasonable inferences therefrom, that would support a verdict for the plaintiff."

As to the issue of whether Mr. Romero was due any wages under the Contract that the parties agreed was signed in this case (Exhibit 1) the

Court did make findings of fact. The dismissal of that claim, therefore, should be reviewed under the substantial evidence standard. Substantial evidence exists when there is a sufficient quantum to persuade a fair-minded person of the truth of the declared premise. *Ridgeview Props. v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982).

## **VI. ARGUMENT FOR REVERSAL**

### **A. Factual inaccuracies in the Court's Findings of fact**

The Appellant has identified and alleged error as to several factual findings in Order under appeal. The fact pattern set forth in this brief is supported by substantial evidence with citations directly from the record. The Appellant asserts that the following disputed factual findings from the Order are not substantially supported, and has provided for each, a cite to the evidence contradicting the Court's factual findings.

#### **1. Paragraph 10 "Mr. Delaney and Mr. Romero discussed that Mr. Romero would start his employment as of January 1, 2015."**

In his direct examination, Mr. Delaney testifies that, in discussing the date on which Mr. Romero was to start his employment with Secret Gardens, that the start date would have been October 1<sup>st</sup>. He was asked "Did you intend to offer Mr. Romero a job where he wasn't – where he'd be working from October to January but never get paid for that time period?" Mr. Delaney's response was "Not that he wouldn't get paid for it." (VRP August 14, 2019 pp. 106-107) The Court actually found that Mr. Romero did start working on October 1<sup>st</sup> (CP 108, p. 1014) It is

undisputed that Mr. Romero began his breeding program on that date. The Court finds that Mr. Romero helped with odd jobs “and began to grow his plants.” As of October, 2014. Id. Mr. Delaney testified that he was occupied with building the facility and had no idea what Mr. Romero was doing in October, but did admit that as of November, Mr. Romero was clearly six weeks into his research and development program, proving that he must have been working on the program since early October. (VRP August 14, 2019 p. 173, pp. 266-267) Mr. Romero produced records of his work in those first months and described it in detail to the Court. (VRP Vol. I p. 217, pp. 238-244, Exhibits 44, 45). Both Mr. Delaney’s testimony and the fact that Mr. Romero did, actually start on October 1<sup>st</sup> with his research and development program provide substantial evidence that Mr. Delaney discussed Mr. Romero beginning his employment on October 1<sup>st</sup>, not January 1<sup>st</sup>. The Court’s factual finding is in error.

**2. Paragraph 11 – “In September 2014, Mr. Delaney provided Mr. Romero with a signed, hardcopy Employment Contract that he had found and downloaded from the internet.”**

Mr. Delaney, in his direct testimony, explained that he had downloaded an internet contract and made several alterations to it before emailing it to Mr. Romero with a cc to his son, Kyle. He identified Exhibit 28 as an email he sent with the contract attached as an electronic exhibit and identified exhibit 38 as the contract that he had sent with the email. (VRP August 14, 2019 pp.102-105) There was no evidence to support a

finding that Mr. Delaney printed out a hard copy contract, signed it, and handed it to Mr. Romero. No such exhibit was ever offered for the record. The Judge's factual finding is in error. Mr. Delaney produced a contract which he had customized, but sent it as a word document attached to an email to Mr. Romero. This shows, of course, that he expected and intended for Mr. Romero to alter the document.

**3. Paragraph 16 – These modifications resulted in internally inconsistent and ambiguous start dates for Mr. Romero's annual compensation period. Paragraph 7 indicated Mr. Romero's annual compensation period salary would begin either on the date the employment contract was signed, or on some unspecified date prior to January 1, 2015.**

Insofar as the Court is finding, as a matter of fact, that this portion of the contract is ambiguous, that is simply not the case. There were blanks left in the sentence because, just as Mr. Delaney had done with the original contract, Mr. Romero's version left open to discussion whether the employer would start paying the bi-weekly salary at the time employment started (a blank for the employer to fill out and which Mr. Delaney did fill out), or defer payment of the salary from the commencement date of the employment to January 1, 2015, so that the first portion could be paid retroactively. This is not, on its face, ambiguous in any way. (Exhibit 1) In fact, it makes coincides perfectly with Mr. Delaney's testimony that, with a new business that depended on the sale of a crop, the initial income would not start until the sale of the first harvest.

**4. Paragraph 18 – Mr. Romero filled in the date his employment would commence on October 1, 2014.**

Mr. Delaney, in his direct examination testimony, went through the contract and identified the portions he filled in as his own handwriting. He pointed out a 7 and explained that it was his writing as he always used a “engineer’s” cross hatch on his 7’s. When directed to the start date written in on the contract, he testified that the October 1<sup>st</sup> commencement date looked like his handwriting too and that it could be his writing. As the examination continued, he continued to accept that he had written the start date in: ”You know, I don’t know why I put October 1<sup>st</sup>. I don’t.” and “I don’t know why the start date would have been put there, October 1<sup>st</sup>, 2014. I can’t remember why I put that there. I don’t.” (VRP August 14, 2019 pp. 109-112) As noted in subsection 1, above, the evidence shows that Mr. Delaney did intend for Mr. Romero to start his research and development program on October 1<sup>st</sup>, and that Mr. Romero did, in fact do so. The Court’s finding that, as a matter of fact, Mr. Romero was the one who wrote in the start date of October 1<sup>st</sup>, is not supported by substantial evidence.

**5. Paragraph 20 - The Court finds that Mr. Romero’s conflicting versions of events surrounding the review of the Employment Contract and its execution lack credibility.**

The Court’s finding that there were conflicting versions of the events surrounding the signing of the contract is not supported by the evidence. Mr. Romero and Mr. Delaney tell the same story about the day the contract was signed. Mr. Romero appeared with a contract and told

Mr. Delaney that he and his attorney had made some changes to it. Mr. Delaney was preoccupied with other business and did not take the time to review the changes. He filled in and signed portions of the contract. If we compare Mr. Delaney's description of Mr. Romero's presentation of the counter-offer/contract to him and his signing it with Mr. Romero's testimony in the record, we find that they are essentially identical. Mr. Romero testifies that after he had his attorney re-write the contract, he brought it to Mr. Delaney, presented it to him, and told him that there had been changes made to it. He testifies that he watched as Mr. Delaney thumbed through it "rather quickly" and signed it. (VRP Vol. I p. 190) Mr. Delaney says that Mr. Romero brought him the contract and explained to him that he had had his attorney make some changes to it. Mr. Delaney testified that although he was aware that Mr. Romero had taken it to a lawyer and made changes, although he had plenty of time to take it to his own lawyer, he "never really looked at [it]." Mr. Delaney admitted to writing the date on the top of the contract, and filling in the commencement date of October 1. (VRP August 14, 2019 pp. 110-112) Mr. Delaney explained that he was an "honest, trusting guy" and signed the contract without much concern over the fact that Mr. Romero had warned him that there were changes made to it. (VRP August 14, 2019 pp. 108-113, Exhibit 1)

**6. Paragraph 22 – Between October 2014 and November 2014, Mr. Romero assisted Defendants with odd jobs and with setting up the facility and began to grow his plants. For this work, Defendants paid Mr. Romero separately by**

**cash and check, since his annual compensation period had not yet commenced.**

Mr. Romero's contract shows that his annual compensation began either on the date of the signing of the contract (September 18<sup>th</sup>) or from the date the contract commenced (October 1, 2014). The evidence shows that Mr. Romero was paid some money in checks and cash, but not because his annual compensation period had not yet commenced. Mr. Delaney testified that the business was not able to pay its workers for the work they were doing and that he would hand out money to employees as he could. (VRP August 14, 2019 pp. 116-117) He had no timekeeping system and did not keep records as to hours worked. (VRP August 14, 2019 pp. 117-118) He had no idea what Mr. Romero was doing when he worked between October 1, 2014 and January of 2015. (VRP August 14, 2019 p. 114) On direct examination, he had to admit that, based on his own observations of the plant growth in Mr. Romero's work areas, he had been engaged in the research and development program for about 6 weeks by the month of November, 2014, indicating, of course, that Mr. Romero had actually started his program on the first of October. (VRP August 14, 2019 pp. 266-267)

**7. Paragraphs 26, 27, and 28 – The Court finds that Mr. Romero attended a meeting where his contract was cancelled, that the contract was, in fact cancelled, and that Mr. Romero agreed to continue to work for minimum wage.**

In November of 2014, Delaney did have a meeting with some of the members of the business and told them that Secret Gardens was not going to be able to fulfill its part of their employment contracts. However, there is substantial evidence to prove that Mr. Romero, Mr. Taylor, and Kyle Delaney, the three people who have sued for their wages under their contracts, were not at that meeting and did not receive notice that their contracts were being cancelled. Ms. Klein supplied a list of people who received notice on that day, a list that did not include Mr. Romero, Mr. Taylor, or Kyle Delaney. (VRP Vol. IV pp. 647-649, Exhibits 56, 57, 58) She was never able to explain why she had such detailed, comprehensive notes, showing that each and every contract was terminated and that written notice was given to each employee, for the rest of the employees, but not for Mr. Romero. This along with Mr. Romero's testimony that he continued to work, believing that eventually the business would make money is substantial evidence showing that it is more likely that Mr. Romero had not ever been told that his contract was terminated in November. The addition to this evidence of his testimony that it wasn't until June 2, 2015, when Mr. Klein told him, for the first time that his contract had been cancelled back in November of the previous year shows a lack of substantial evidence to support the Court's factual findings. (VRP Vol. II pp. 327-328)

- 8. The Court made no factual findings as to Plaintiff's claim for \$3,000.00 in unpaid wages that the Defendants admitted to owing and willfully choosing not to pay to Mr. Romero after his separation and written demand for payment.**

In the During discovery in this case, the Defendants admitted that they owed Mr. Romero an undisputed amount of wages in the amount of \$3,000.00 in response to Requests for Admission. (Exhibit 18) The Defendants' counsel also affirmed this to the Court in argument in May of 2019. (VRP May 17, 2019 p. 11-13) In the Answer, the Defendants admitted that the decision not to pay any amount of wages to Mr. Romero after having received a written demand for payment from his attorney was a willful decision. (CP 14) The Defendants sought, before trial, to amend the Answer to change the admission to a denial, but this was rejected by the Court. (VRP May 17, 2019 p. 44, CP 87) Thus the Amended Answer admits that the decision to withhold the undisputed \$3,000.00 was willful. At trial, the Court noted that she would be considering and rendering a decision on the breach of contract (salary wages) and the \$3,000.00 claim (the amount that was admitted not to have been in dispute) as the two issues in the trial. "But those are the two contested issues, and I'm going to rule on both of them." (VRP Vol. II pp. 357-358) Mr. Romero's counsel presented argument specifically laying out the factual and legal arguments on the \$3,000 issue in his response to the Defendants' motion to dismiss. (VRP Vol. IV pp. 663-666) The Appellant requests that the Appellate Court find that no findings of fact were made or offered by the Trial Court in its Order. The Respondent's Amended Answer and Responses to Requests for admission clearly establish and support, conclusively, by the

Respondents' own admissions, that there was an amount of \$3,000.00 in undisputed wages owed and that the Respondents willfully chose not to pay it. This evidence easily meets the *Willis v. Simpson Inv. Co.*, 79 Wash.App. 405, 410, 902 P.2d 1263 (1995) standard for reversal of the Trial Court's Order dismissing that claim. Certainly, with those clear judicial admissions of liability and the amount of damages, there is "evidence, or reasonable inferences therefrom, that would support a verdict for the plaintiff." *Id.*

**B. The Court erred in finding that the Contract was ambiguous as to the date on which Mr. Romero's compensation period was to begin. It was clearly meant to be on the "Commencement Date" which the parties filled in as October 1, 2014 in another section of the contract.**

"The goal of contract interpretation is to carry out the intent of the parties as manifested, if possible, by the parties' own contract language." *Dep't of Corrections v. Fluor Daniel, Inc.*, 160 Wn.2d 786, 795, 161 P.3d 372 (2007). When called upon to do so, the Court should interpret the contract as a whole and not read ambiguity into an unambiguous contract. *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990); *Syrov v. Alpine Res., Inc.*, 122 Wn.2d 544, 551, 859 P.2d 51 (1993) A written contract is ambiguous when its terms are uncertain or capable of being understood in more than one manner. *Universal/Land Const. Co. v. Spokane*, 49 Wash.App. 634, 636-37, 745 P.2d 53 (1987).

In this case, the Court, in its Order, found that one particular term of the contract was ambiguous not because the term itself was ambiguous,

but because the parties had left a blank in the contract un-filled. The ambiguity that the Court recognized focused particularly on the commencement date of the contract versus the commencement date of when the Plaintiff (the employee) was supposed to start getting paid for his work under the contract. Although the parties did agree, unambiguously, that “The ‘Commencement Date’ of the Employment contract, as a whole, was October 1, 2014,” (CP 108 p. 1016) The sentence that the Court found perplexing was under a separate section entitled “Employee Compensation” The Court found that the commencement of the salary period under the Employment Contract provided two options: “on the date this Agreement is signed” or “on January 1, 2015 with retroactive payments from the date of \_\_\_\_\_.” (Exhibit 1) Whereas the Court found that the parties did agree to the commencement date of the contract (October 1, 2014), the Judge was bound, as a matter of law, to give the sentence that she and Defendant identified as ambiguous a reasonable construction, if possible. *McIntyre v. Fort Vancouver Plywood Co.* 24 Wash.App. 120 124, 600P.2d 619 (1979) (A contract susceptible to a reasonable or unreasonable construction should be given a reasonable one.) The Washington Supreme Court, in *Grant Cy. Constructors v. E.V. Lane Corp.*, 77 Wash.2d 110, 121, 459 P.2d 947 (1969), stated “An ambiguity will not be read into a contract where it can reasonably be avoided by reading the contract as a whole. Even though some words may be said to be ambiguous, the meaning

should be deduced from the language alone without resort to parol evidence.” In *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (Wash. 1990), the Court wrote: “When a provision is subject to two possible constructions, one of which would make the contract unreasonable and imprudent and the other of which would make it reasonable and just, we will adopt the latter interpretation. *Dickson v. United States Fid. & Guar. Co.*, 77 Wn.2d 785, 790, 466 P.2d 515 (1970). *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wash.2d 826, 837, 726 P.2d 8 (1986); see Restatement (Second) of Contracts § 203(a) (1981).” In this case, the parties filled in the date of October 1, 2014 as the commencement date of the contract and signed the contract. Mr. Delaney admitted to having written the date into the contract. (VRP August 14, 2019 pp.110-112) But regardless of who wrote it in, the date was part of the agreement. The Court found that this was the actual commencement date of the contract as a whole and that Mr. Romero did, in fact start working on October 1, 2014, by “doing odd jobs and with setting up the facility and began to grow his plants” (CP 108 p. 1014, 1016) Setting up the facility and growing his plants was exactly what he was supposed to be doing under the terms of the contract as “Director of the R&D Breeding Program” for which they had agreed to pay him an annual salary of \$150,000. (CP 108 p. 1013) The agreement to start payment of the agreed upon wages ‘on the date this Agreement is signed’ or ‘on January 1, 2015 with retroactive payments from the date of \_\_\_\_\_” only makes sense if the blank was

supposed to be filled in with the same date that was filled in by the parties as to the commencement of the contract. The Court's determination that the contract actually meant that Mr. Romero would commence his duties on October 1<sup>st</sup>, but be paid some other amount besides the salary set forth in the agreement between October 1 and January 15<sup>th</sup> of the following year requires the Court to insert a lot of terms that simply don't exist at all in the contract. That interpretation is not reasonable in light of the actual written contract and is nonsensical, in general. The Appellant is asking this Court to find that, under the guidance from our Supreme Court in *Grant Cy. Constructors v. E.V. Lane Corp.*, the Superior Court Judge should have chosen to read the contract in a way that did not require her to insert terms that were not in the contract. Appellant's counsel, during closing argument, made this argument and preserved this issue in great detail. (VRP Vol. IV pp. 633-645)

The Court used this determination, that the particular sentence with the unfilled blank in it, was ambiguous as the basis for declaring that there was no meeting of the minds as Mr. Delaney claimed not to understand when the compensation period started per the contract he had chosen not to read (until the night before being examined by his attorney at trial). However, Mr. Delaney's own testimony before the Court belies this finding. At trial, Defense Counsel asked Mr. Delaney, pointing to the sentence at issue: "do you understand what that provision means?" He answered "Yeah. That he basically put us over a barrel, that, you know,

regardless of if I signed it, the contract became valid at that particular time and we'd have to pay him back --- again, we'd have to pay him those moving on.” (VRP August 14, 2019 p. 163) It seems clear that, at least at trial, under oath, before the Court, this self-stylized “honest trusting guy,” Mr. Delaney, did not find that sentence to be ambiguous at all. Despite all Defense attorneys’ protestations that there was no meeting of the minds in their motion to dismiss... it appears, pretty clearly, that Mr. Delaney and Mr. Romero both knew that clause intended to bind Secret Gardens to pay Mr. Romero his salary amount starting on the date that he began work, even if it had to be paid retroactively.

**C. The Court erred in considering extrinsic evidence to interpret the contract where the ambiguity was clearly and simply resolved within the four corners of the written agreement.**

The Court, in paragraph 12 of its Order (CP 108 p. 1016-1017), considered evidence extrinsic to the contract in order to interpret the portion which the Court found to be ambiguous. It considered the parties’ mutual subsequent performance, prior drafts of the contract which were part of negotiations, and parol evidence from Mr. Delaney as to his understanding of the terms.

“It is black letter law of contracts that the parties to a contract shall be bound by its terms.” *Adler v. Manor*, 153 Wn.2d 331, 344, 103 P.3d 773 (2004) (citing *Nat'l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 912-13, 506 P.2d 20 (1973)). The parole evidence rule prohibits

the 'use of parol evidence to add to, subtract from, modify, or contradict the terms of a fully integrated written contract, i.e., one which is intended as a final expression of the terms of the agreement.' *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 32, 959 P.2d 1104 (1998) (citing *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990); *In re Marriage of Schweitzer*, 132 Wn.2d 318, 327, 937 P.2d 1062 (1997)). In this case, as argued above, there was a reasonable interpretation of the contract based on the language of the contract itself. In its Order, the Court does give sufficient explanation or legal grounds to stray from the actual writing of the contract to which she found that both parties were bound. As pointed out above, the Court's interpretation of the contract inserts terms (as to how Mr. Romero was to be paid between the commencement of the contract and January 2015) that are not in the contract. Using parol evidence in order to insert terms into a contract that were not part of the written contract is counter to prevailing Washington law. "[P]arol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the intention of the parties and properly construing the writing. Such evidence, however, is admitted, not for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed." *Berg v. Hudesman*, 115 Wash.2d 657, 669-70, 801 P.2d 222 (1990) (quoting *Seavey Hop*

*Corp. v. Pollock*, 20 Wash.2d 337, 348-49, 147 P.2d 310 (1944)). It should be noted by the Appellate Court that Mr. Delaney did not assert that he had made a verbal offer to pay Mr. Romero at a different rate from what is in the written contract at the formation of the agreement. The Judge erred in considering Mr. Delaney's recanted (as mentioned above, his first response was that he did understand the term) assertion of his understanding of the agreement at trial when we have the signed agreement. The error is made even more obvious when the parol evidence requires us to insert a provision that does not exist in the written instrument.

The issue of how the Court determined Mr. Delaney's intent from parol evidence is undermined further by her assertion that "The Court finds that Romero's conflicting versions of events surrounding the review of the employment contract and its execution with Mr. Delaney lack credibility." (CP 108 p. 1014) If we compare Mr. Delaney's description of Mr. Romero's presentation of the counter-offer/contract to him and his signing it with Mr. Romero's testimony in the record... they are identical. Mr. Romero testifies that after he had his attorney re-write the contract, he brought it to Mr. Delaney, presented it to him, and told him that there had been changes made to it. He testifies that he watched as Mr. Delaney thumbed through it "rather quickly" and signed it. (VRP Vol. I p. 190) Mr. Delaney says that Mr. Romero brought him the contract and explained to him that he had had his

attorney make some changes to it. Mr. Delaney testified that although he was aware that Mr. Romero had taken it to a lawyer and made changes, although he had plenty of time to take it to his own lawyer, he “never really looked at [it].” Although the Judge stated, in her finding of fact, that Romero filled in the October 1, commencement date, it was Mr. Delaney who admitted to writing the date on the top of the contract, and filling in the commencement date of October 1. (VRP August 14, 2019 pp. 110-112) Mr. Delaney explained that he was an “honest, trusting guy” and signed the contract without much concern over the fact that Mr. Romero had warned him that there were changes made to it. (VRP August 14, 2019 pp. 108-113, Exhibit 1) The Judge’s finding of fact on this issue is not only factually incorrect, but it evidences some prejudice against Romero, or perhaps a factually incorrect understanding of the record on her part, as she questions his credibility when his version of the signing of the contract was not even marginally different from Mr. Delaney’s.

The Court’s assertion regarding subsequent mutual performance, in which she states “Between October and December 2014, the Parties acted as if Mr. Romero’s employment as Secret Gardens’ Director of R&D had not yet commenced” (CP 108 p. 1017) directly contradicts the portion of the contract that the Judge finds was the commencement date “The ‘Commencement date’ of the Employment Contract, as a whole, was October 1, 2014.” (CP 108 p. 1016) “[t]o interpret the

meaning of a contract's terms, Washington courts employ the context rule, which permits trial courts to consider extrinsic evidence for the limited purpose of determining the parties' intent so long as the extrinsic evidence is not used to contradict the written terms.” *Berg*, 115 Wn.2d at 669. It also contradicts Mr. Delaney’s testimony, mentioned above, in which he admits that Mr. Romero began working on October 1, 2014, and that, per Mr. Delaney’s observations, by November, it appeared that Mr. Romero had been engaged in his research and development work for about six weeks.

**D. The Court erred in determining that Mr. Romero was the drafter of the contract and construing the term it found to be ambiguous against him.**

The Court, in this case, determined that one sentence in the contract was ambiguous because one blank was not filled in. In her order, the Judge asserted, as a basis for determining that the Contract should be interpreted in favor of the employer, that Mr. Romero drafted the sentence at issue. She went on to state, as a matter of law, that “Mr. Romero drafted this provision and therefore the Court must strictly construe this provision against Mr. Romero an [sic] in favor of Secret Gardens. See *Jones Associates, Inc. v. Eastside Properties, Inc.*, 41 Wn. App. 462, 468, 704 P.2d 681, 1985).” (CP 108 p. 1016) Appellant’s attorney addressed this issue in his responsive argument to the Court. (VRP Vol. IV pp. 631-633) It is true that, in contract interpretation cases the Court’s generally construe ambiguities against the contract's drafter. *Pierce County v. State*,

144 Wash.App. 783, 813, 185 P.3d 594 (2008); *see also Johnny's Seafood Co. v. City of Tacoma*, 73 Wash.App. 415, 420, 869 P.2d 1097 (1994) (noting that ambiguities in lease drafted by a lessor are resolved in favor of the lessee). However, if the parties drafted the contract together, the Court does not go line by line deciding who drafted what in order to construe line item portions of the contract against one party or the other. Where there was a collaborative effort or negotiation and both parties were drafters, the Court does not strictly construe the contract or portions of it against either party. Instead, in cases where both parties were drafters, the Court is instructed to adopt the interpretation that is the most reasonable and just. *Viking Bank v. Fir grove Commons 3, LLC*, 183 Wn. App. 706, 713, 334 P.3d at 116,120 (2014) (if the drafter is unknown or if the parties drafted the contract together, we will adopt the interpretation that is the most reasonable and just.) In the Findings of Fact and Conclusions of Law, the Court found that Mr. Delaney, the employer, produced a written contract, which he gave to Mr. Romero. Mr. Romero then took it to his lawyer and returned with a counter-offer, having made some alterations to the terms in contract that Delaney had offered. The Judge found that Mr. Romero returned to Mr. Delaney with the version of the contract that he and his attorney had altered and notified Mr. Delaney that he had made changes to the contract. The Judge failed to include the fact that Mr. Delaney signed the contract that Mr. Romero had given him. This was a fact established beyond any doubt in in this case. (VRP August

14, 2019 pp. 108-110, pp. 153-154, Exhibit 1) It seems clear that the final contract, that Mr. Delaney signed was the product of an arm's length negotiation. Mr. Delaney's testimony about the contract he offered in the first place indicates that he intended for it to be an opening offer and invited a mutual discussion as to its terms. For example, he testified that he included the acronym "TBD" in the portion of the contract he offered which discussed how compensation was to be paid to the employee. This is obviously an important term of any employment agreement. Mr. Delaney explained that TBD stood for "to be determined" and guessed that this meant that the line would be filled in once he started negotiating with Mr. Romero. (VRP August 14, 2019 p. 105) Even the Court noted, as a finding of fact, that the contract Mr. Delaney offered to Mr. Romero left an open blank as to when the employment contract was to commence. (CP 108 p. 1014) Mr. Delaney produced the first offer, which he expected to produce a response and negotiation to fill in the TBD and blank portions, and accepted and signed the counter-offer that Mr. Romero brought him, knowing that Mr. Romero had included changes to the terms in the counter-offer. This is a far cry from the type of adhesion contracts, like insurance agreements or leases that are typically construed strictly against the drafter of the entire contract.

It may be important for the Appellate Court to read part of the trial transcript pertinent to this issue. Begging the Court's pardon for, as an attorney, suggesting that a Judge may not have had a good grasp on the

difference between the concepts of modification of an existing contract and the offer, counter-offer concept of negotiation, the Appellant would ask the Court to review pages 638 through 640 of Volume IV of the trial transcript in this case. (VRP Vol. IV pp.638-640) During the response argument to the motion to dismiss, the Appellant's counsel and the Judge engage in a discussion, which, the undersigned strongly suggests, indicates that the Court was confused about this basic concept. The evidence was absolutely conclusory that Trial Exhibit 1 (CP\_\_\_\_) was and is the and the only contract that the parties signed. There was no modification of an existing contract. There was an exchange of counter-offers where both parties were involved in a process of negotiation. In this case, the Court erred in finding that, under these facts, that Mr. Romero was the drafter of the contract and in determining that the contract, or any part of it, should be construed strictly against him.

**E. The Court did not mention or address Plaintiff's assertion that the severability clause included in the contract at issue required the Court to change the scope of the provision at issue.**

Mr. Romero's attorney, in his closing argument, presented the Court with the Severability clause in the contract at issue. (VRP Vol. 4, p. 633-646, Exhibit 1) As with the undisputed \$3,000.00 wage claim, the Court made neither factual findings nor offered any legal conclusions regarding the severability clause and the arguments present to her by Mr. Romero's attorney on the issue. As a result, this issue should be

determined under the *Willis v. Simpson Inv. Co.*, 79 Wash.App. 405, 410, 902 P.2d 1263 (1995) standard of review. That is, dismissal is proper "if there is no evidence, or reasonable inferences therefrom, that would support a verdict for the plaintiff." In a light most favorable to the Plaintiff, the contract should have been reformed to indicate that Mr. Romero's \$150,000.00 annual salary was to begin on the same date that his employment as director of research and development and his work in that position began, October 1, 2014.

A severability clause states what will happen to an agreement if part of the agreement is declared unenforceable by a Court. Some alternatives stipulate that the potentially unenforceable clause may be rewritten to be enforceable. This is often referred to as the "rule of reasonableness." Severability clauses are to be found in just about every contract written by attorneys and most laws passed by our legislators. Severability clauses generally contain two parts, a) savings language to preserve the remaining agreement in the event a Court finds a part to be unenforceable, and b) reformation language that describes how the parties intend the unenforceable parts to be modified to be enforceable, or simply deleted if doing so will support the purpose of the agreement. The severability clause that Mr. Delaney proposed, and both parties ultimately accepted states:

**\* Severability**

24. The Employer and Employee acknowledge that this Agreement is reasonable, valid and enforceable. However, if any term,

covenant, condition or provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, it is the parties' intent that such provision be changed in scope by the court only to the extent deemed necessary by that court to render the provision reasonable and enforceable and the remainder of the provisions of this Agreement will in no way be affected, impaired or invalidated as a result.

(Exhibit 1 contract between parties)

Considering the facts that a) the severability clause was in no way ambiguous, b) it was proposed by Delaney initially and accepted, verbatim, by Romero, and c) it was included on each and every one of the other employment contracts Delaney signed with other employees, the Court should find that the parties intended for it to apply in this situation. Counsel went on to show that, if the Court simply removed the one sentence that she found to be ambiguous, the contract would reflect that the employee would commence his duties on the date that the contract was supposed to commence (October 1, 2014) and that he would also start getting paid the agreed upon salary at the same time he started doing the job that as to be compensated with the salary. Counsel presented the contract and simply crossed out the one sentence, showing how the contract would be consistent with the simple reformation:

IN CONSIDERATION OF the matters described above and of the mutual benefits and obligations set forth in this Agreement, the receipt and sufficiency of which consideration is hereby acknowledged, the parties to this Agreement agree as follows:

Commencement Date and Term

1. The Employee will commence employment with the Employer on the   /   day of ~~October~~   /   2014 (the "Commencement Date") for a term of one year. The parties shall renegotiate the terms of any future agreement.

Employee Compensation

7. ~~Employee's annual compensation period will commence (on the date that this agreement is signed) (or January 1, 2015 with retroactive payments from the date of \_\_\_\_\_)~~  
Compensation will be paid to Employee every two weeks.

Compensation paid to the Employee for the services rendered by the Employee as required by this Agreement (the "Compensation") will consist of a salary of \$150,000.00 (USD) per year plus a commission according to the following commission formula:

\* A 10% commission will be earned/paid on sales of 'new strain(s)' clone and/or seed for sales that exceed the first \$150,000.00 base sales of 'new strain(s)' clone and seeds. Employer will provide Employee with sales accounting to demonstrate the commission on a quarterly basis.

(VRP Vol. IV p. 633-646)

This logical outcome is reinforced when one recognizes that the "offending" sentence is, by its plain English construction, giving the employer a choice of when the employee is supposed to begin getting paid, not when the contact begins or when employment begins. That is determined in another portion which even the Trial Court could not find to be ambiguous. Employment began on October 1, 2014. That is clear from the contract. The compensation would begin either 1) on the date the contract is signed, which was in September, OR 2) on January 1, 2015 WITH retroactive payments to an agreed upon date (represented by a blank). The only thing that makes any sense in interpreting this sentence is to acknowledge that it is designed to give the employer the option of deferring the actual payment of the biweekly salary to January 1<sup>st</sup>, but that

the employee, who is doing the job starting before that, would end up getting paid for his work retroactively instead of just not getting paid at all for his work (which would be a violation of Washington law and State public policy). This matches up, logically, with the testimony from all parties about how Secret Gardens was expected to make income. It produces crops of marijuana for sale. Nobody could do it legally before September of 2014. Therefore, no marijuana growing business was going to have anything to sell until the first crop was harvested, which was expected to be several months from the start date (December of 2014).

The Judge, in her Findings of Fact and Conclusions of Law made no mention, whatsoever, of the severability clause or counsel's argument. Simply ignoring the severability clause does not make it go away. The parties agreed to ask the Court to reform any portion of the contract that was found to be unenforceable. With no answer or even acknowledgement from the Court as to this issue, Mr. Romero and the Appellate Panel are left with nothing but error. With no record as to why the severability clause was ignored, it seems impossible that the Appellate Court could find that there was substantial evidence to support the Courts decision to ignore it. Typically, where the Court has failed to create an adequate record explaining its reasons for a decision, the Appellate Court may remand the case so that the Judge can amend her Order. This has been done in cases where a Court ordered sanction is appealed, as in *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wash.App. 409, 416, 157 P. 3d

431 ( 2007) However, an appellate court "may" independently review written documents and make findings instead of remanding to the trial court when the trial court failed to enter them. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992). In this case, it is unequivocal that the parties signed the contract, that Delaney proposed the severability clause, it was accepted by Romero, and has become part of the written contract. No argument or reason has ever been asserted, by anyone, as to why it should be ignored. It should not have been. It was error for the Superior Court Judge to decline to even try to reform the contract as requested by the parties when she determined one portion was ambiguous. She had two choices which would have made the contract fully consistent. She could have inserted the commencement date that the parties wrote into the contract in the blank for commencement of pay, or she could have simply removed the sentence with the blank. In either case, we would have a contract for employment which calls for the employee to start getting paid the agreed upon salary for his work when he begins his work, which is utterly reasonable. Determining that the parties really intended for duties and the contract to commence on October 1, 2014, but for salary to begin some three and a half months later, with an agreement on pay for the interim three months to be worked out between the parties outside of the terms of the contract is not. The Appellant is asking the Court to remand this case with a determination that the contract called for the annual salary to start on October 1, 2014. It does not matter, to the resolution of this

case, whether the payments for that period were to be made on or before January of 2015, as it is undisputed that they were not.

**F. As to the claim for wrongful retention of wages, the Court's decision to dismiss was not supported by any finding of fact and could only be reached by ignoring Defendant's admission in the Answer and facts which were admitted in response to requests for admission.**

In this case, Mr. Romero alleged that he was not paid wages which were owed to him and that the decision by Secret Gardens not to pay his wages was willful. He sued under Washington's wage payment act and specifically plead a wrongful retention of wages under two statutes, one (RCW 49.48.010) that requires an employer to pay all wages due after separation, and the other (RCW 49.52.050) which makes it a misdemeanor for an employer, including individual officers, to wrongfully withhold wages. Its civil enforcement statute, RCW 49.52.070 authorizes exemplary damages if an undisputed wage amount is withheld willfully. (CP 2, pp. 2-9 )

At trial, the Court was presented with Defendant's responses to requests for admission in which the employer admitted that there were at least \$3,000.00 in wages that it owed to Mr. Romero, that it could not prove that he had not earned those wages, and that it had chosen not to pay the \$3,000.00 to Mr. Romero.(Exhibit 18) Here are the requests and answers:

3. The Defendants were planning to pay the Plaintiff \$3,000.00 in wages because they felt they did not have evidence upon which to dispute that amount of wages being owed to the Plaintiff.

X   ADMIT  
       DENY Reason for denial: \_\_\_\_\_  
(Exhibit 18 – Responses to Requests for Admission)

The responses to Requests for Admission were signed by Defendants’ trial counsel who never brought a motion for leave to amend the responses. This should have established, conclusively, that the Respondents came into trial owing Mr. Romero an undisputed \$3,000.00 in unpaid wages. Another request for admission and an admission from the Answer, together, established that the Respondents were planning to pay Mr. Romero this \$3,000.00 in undisputed wages before they received a demand letter from Mr. Romero’s attorney for the unpaid wages, and then they willfully refused to pay the wages to Mr. Romero.

1.. Prior to receiving a letter from Plaintiff’s attorney, Defendants were preparing to pay Plaintiff \$3,000.00 in wages.  
  X   ADMIT  
       DENY Reason for denial: \_\_\_\_\_  
(Exhibit 18 – Responses to Requests for Admission)

In the Complaint, the Plaintiff had alleged:

3.15.. After receiving Plaintiff’s written calculation of his unpaid wages and demand for payment, Defendants willfully refused to unconditionally pay the Plaintiff any of the sum demanded.  
(Complaint – Exhibit 72)

In their Amended Answer, Defendants admitted this allegation. (Exhibit 74 3.14; CP 87). Civil Rule 36 (Requests for Admission), states:

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.

(CR 36(b))

The Defendants had, prior to trial, sought to amend the Answer from “admit” to “deny” as to paragraph 3.15. The Defendants’ counsel admitted that the Defendants were actually planning to pay the \$3,000 and then chose not to after receiving a letter from Plaintiff’s counsel. (VRP August 14, 2019 p. 126, pp. 128-129) The Court refused to allow Defendant to amend its answer on that particular issue. (VRP May 17, 2019, pp. 11-13, p. 44; CP 87) A statement of fact made by a party in a pleading (like and answer) is an admission that the fact exists as such and is admissible against him in favor of his adversary. *Neilson v. Vashon Island School Dist. No. 402*, 558 P.2d 167, 87 Wn.2d 955 (Wash. 1976) citing *Anderson v. Pettridge*, 45 Wash.2d 299, 274 P.2d 352 (1954), See Annot., 63 A.L.R.2d 412 (1959). An admission of a fact in an Answer is considered a judicial admission. A judicial admission is “[a] formal admission[] in [a] pleading which [has] the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.” *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (quoting *In re Fordson Eng’g Corp.*, 25 B.R. 506, 509 (Bankr. E.D. Mich. 1982)).

Mr. Romero’s counsel presented the responses to requests for admission and the Amended answer in his response to the employers’ motion to dismiss. He argued that even if the Court found that the salary claimed under the contract was not recoverable, at the very least, the admissions proved that the Defendants owed Mr. Romero \$3,000.00 in

undisputed, unpaid wages and that the wages had been willfully withheld, a violation leading to an award of the wages under RCW 49.48.010 and 49.52.050 and up to double that amount again under RCW 49.52.070, as well as attorney's fees and costs under both RCW 49.48.030 and 49.52.070. The Court did not address this evidence or the argument in any detail at all in its final order. The Judge only gave a legal conclusion, unsupported by any finding of fact that "Defendants have not committed any wage violations under Chapter 49.48 RCW for failing to pay any salary owed." (CP 108 p. 1017) She never addressed the \$3,000.00 claim and did not provide any factual basis for determining, generally that "Defendants are not liable to Mr. Romero under RCW 49.52.070 because they have not committed any wage violations under Chapter 49.48 RCW." Based on the evidence provided, and especially considering the relative strength of that evidence as judicial admissions, the Trial Court's dismissal of the wage claim was in error. The Plaintiff respectfully suggests that the Judge's decision should be reversed on this issue and the case should be remanded with instructions to award the \$3,000.000 in wages and for a determination of exemplary damages, attorney's fees and costs under the RCW 49.48.030 and 49.52.070.

Under these statutory claims, exemplary damages, fees, and costs are non-discretionary where willfulness is found. In this case, of course, willfulness was admitted both in the Answer and in response to requests for admission.

RCW 49.48.030

**Attorney's fee in action on wages—Exception.**

In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, ***reasonable attorney's fees***, in an amount to be determined by the court, ***shall be assessed*** against said employer or former employer: PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.

(emphasis added)

RCW 49.52.070

*Civil liability for double damages.*

Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of RCW 49.52.050 (1) and (2) ***shall be liable*** in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, ***together with costs of suit and a reasonable sum for attorney's fees***

(emphasis added)

The dual admissions of willfulness should trigger an award under RCW 49.52.070 for exemplary damages and under both statutes for fees and costs (of course the fees and costs would only be awarded once for both claims).

**G. The Court erred if it found, as a matter of law, that, where wages owed are undisputed, a Plaintiff must also allege and prove a violation of the minimum wage act in order to recover the undisputed and unpaid wages.**

The Court does not explain how or why she included in her Order the assertion that “Plaintiff has not alleged any facts or cause of action for violation of Washington’s Minimum Wage Act, RCW 49.46 et seq.” (CP 108 p. 1018) Inferring, however, from its placement in the Order, that the

Court is making a legal conclusion that one cannot sue for disputed wages unless one also sues for a violation of the minimum Wage Act, this is in error. The purpose of the WRA (Wage Rebate Act) is clear “it is ‘primarily a protective measure ... [with] the aim or purpose ... to see that the employee shall realize the full amount of the wages ... he is entitled to receive from his employer, and which the employer is obligated to pay, and, further, to see that the employee is not deprived of such right, nor the employer permitted to evade his obligation, by a withholding of a part of the wages.’” *Schilling v. Radio Holdings, Inc.*, 136 Wash.2d 152, 159, 961 P.2d 371 (1998) (quoting *State v. Carter*, 18 W.2d 590, 621, 140 P.2d 298, 142 P.2d 403 (1943)). In simpler terms, the WRA "must be liberally construed to advance the Legislature's intent to protect employee wages and assure payment." *Allen v. Dameron*, 187 Wash.2d 692,705, 389 P.3d 487 (Wash., 2017)

Washington’s wage payment acts are meant to be applied, as the name overtly implies, to “wages,” a term which is defined, specifically, in the act:

(7) "Wage" means compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value  
RCW 49.46.010(7)

Under normal circumstances, an employee is paid his or her wages earned during a specified pay period on a payday date established by the employer. WAC 296-126-023. Where a pay date is

established, the Court's only other inquiry to determine whether an employer or agent has failed to pay the employee his or her wages after the payday date ended. *Allen v. Dameron*, 187 Wash.2d 692, 389 P.3d 487 (Wash., 2017). Where the employee is separated from the employer, for any reason, all wages earned become due, regardless of when they were originally due.

**RCW 49.48.010**

**Payment of wages due to employee ceasing work to be at end of pay period — Exceptions — Authorized deductions or withholdings.**

When any employee shall cease to work for an employer, whether by discharge or by voluntary withdrawal, the wages due him or her on account of his or her employment shall be paid to him or her at the end of the established pay period.

In this case, the evidence and the record establishes, through incontrovertible evidence (as set forth above, via responses to request for admission and admission in the answer) that the Defendants owed Mr. Romero, by their own admission, \$3,000.00 at the time of his separation. They admitted that they were planning on paying him the \$3,000.00, and then willfully chose not to after learning that he was demanding payment of his wages through an attorney. A claim under RCW 49.48.010 requires that the Plaintiff show that he has not been paid "the wages due him or her on account of his or her employment." A claim under 49.52.050 makes it unlawful for any officer or agent of an employer to "Willfully and with intent to deprive the employee of any part of his or her wages" RCW 49.52.050(2) If a Plaintiff shows that undisputed wages were wrongfully

withheld beyond the payday after his separation he may recover them pursuant to 49.48.010 and recover attorney's fees and costs. If the Plaintiff then also proves that an officer or agent willfully withheld them (proving a violation of RCW 49.52.050), then RCW 49.52.070 gives the Plaintiff a right to recover an amount in exemplary damages up to two times the amount of wages recovered, plus attorney's fees and costs. As "wages" are defined as "compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value," in action for unpaid wages where the amount of undisputed wages is an incontrovertible and established fact, as it is in this case, the Plaintiff need not also prove or even allege a violation of the minimum wage portion of the act. The Plaintiff respectfully requests that the Court remand this case to the Superior Court with instructions to find that the Defendants did wrongfully, and willfully withhold \$3,000.00 in wages from the Plaintiff, and for the Court to proceed to determine the appropriate amount of exemplary damages, attorney's fees and costs to be awarded to the Plaintiff.

## **VII. CONCLUSION**

The Trial Court was presented with two wage claims in this case. Mr. Romero claims he was owed wages under a signed contract, from October 1, 2014 through June 2, 2015, at a rate of \$150,000.00 annually, minus the amounts that the Defendants had already paid him. His second

claim was that the Defendant owed him \$3,000.00 and that this amount was willfully withheld, based on the Defendants' own admissions in the Answer and in response to requests for admission. The Court erred in setting aside the written contract that both parties had signed. On this part of the claim, she made findings of fact, so the Appellant has shown that there is not substantial evidence to support her findings of fact. The Court erred in failing to address the severability clause which obligated both parties to ask the Court to reform the contract or preserve it should a term be considered unenforceable. As the Court chose not to issue any findings of fact as to the severability clause or even address it in the Order, the Appellate Court should find that the Plaintiff presented sufficient evidence to support a prima facie case for severability, resulting in the contract being interpreted to require payment of annual compensation starting on October 1, 2014. Finally, the Trial Court failed to make any factual findings as to the Respondents' willful decision not to pay the amount of wages that they did not dispute, \$3,000.00, to Mr. Romero. As a result, the Court should find that the Plaintiff has presented sufficient evidence to prove a prima facie case under the wage payment statutes and reverse the Courts Order. In addition, the Appellate Court should exercise its authority independently review written documents and make findings instead of remanding to the trial court when the trial court failed to enter factual findings. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992). Appellant requests that the Appellate Court make findings that the

Respondents did willfully and wrongfully withhold \$3,000.00 in undisputed wages from Mr. Romero, and remand the case to the Trial Court to determine the amount of exemplary damages to be awarded in addition to the wages, as well as to make a determination as to the amount of attorney's fees and costs to be awarded pursuant to the applicable statutory law.

Respectfully submitted,

  
CHALMERS C. JOHNSON, WSBA # 40180  
Attorney for the Appellant

#### **CERTIFICATE OF MAILING**

SIGNED at Port Orchard, Washington

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on April 28, 2020, the document to which this certificate is attached, Initial Brief of Appellant, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

Rochelle Y. Nelson  
Alan D. Schuchman  
524 Second Avenue  
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And was concurrently emailed to counsel at [rnelson@cairncross.com](mailto:rnelson@cairncross.com) and [aschuchman@cairncross.com](mailto:aschuchman@cairncross.com)

  
Chalmers C. Johnson, WSBA # 40180

**GSJONES LAW GROUP, PS**

**April 28, 2020 - 11:12 AM**

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