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

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MEL T. ROMERO,

Appellant,

v.

SECRET GARDENS OF WASHINGTON, LLC, et al.,

Respondents.

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APPEAL FROM THE SUPERIOR COURT  
OF KITSAP COUNTY, CASE NO. 16-2-00810-2

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REVISED BRIEF OF RESPONDENTS

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## I. INTRODUCTION

This case involves the brief employment of Appellant Mel Romero by Secret Gardens of Washington LLC, a small I502 production business owned by husband and wife, William Delaney and Christy Klein (collectively, “Secret Gardens” or “Respondents”). Mr. Romero sued Respondents for wages based entirely upon an ambiguous term that Mr. Romero himself had drafted into his employment agreement.

At the heart of this appeal is Paragraph 7 of the agreement, which purportedly provides the date that Mr. Romero’s annual salary would commence. However, Mr. Romero inserted two options into this provision, with one of those options containing a blank space for the start-date to be later filled in. Mr. Romero returned this re-drafted agreement to Mr. Delaney, and without discussing or negotiating its terms, both parties signed the agreement. Critically, neither party filled in the blank space for *when* Mr. Romero’s \$150,000 salary would begin. Within a couple months, Secret Gardens faced financial difficulties and held a meeting on November 14, 2014 to cancel all their employment agreements.

Yet Mr. Romero argues his \$150,000 salary period should have commenced on October 1, 2014 (despite there being no term in his contract indicating as much) and that the cancellation meeting never took place. Mr. Romero also asserted a second, alternative claim that he was

owed at least \$3,000 in “undisputed” wages, based on his apparent misunderstanding of an early settlement offer from Secret Gardens.

In a trial to the bench, the Appellant presented testimony from several witnesses regarding the creation of this agreement, the parties’ mutual understandings of its terms, their subsequent performance thereunder, and the circumstances under which it was cancelled. Appellant’s witnesses provided vastly differing accounts, and at the end of Appellant’s case in chief—and after Mr. Romero’s credibility was impeached dozens of times—the trial court weighed the evidence and credibility of the witnesses and found in favor of Secret Gardens.

On appeal, Appellant seeks to undo the trial court’s determinations of fact and credibility and supplant the court’s findings with his own distorted and self-serving version of events. But that is not the proper standard on appeal. By misstating the record, and inverting the standard of review, Appellant contrives errors in the record that simply do not exist. For the foregoing reasons, the trial court’s decision to dismiss Appellant’s claims should be affirmed.

## **II. RESTATEMENT OF ISSUES**

- A. Should the Court of Appeals affirm the trial court’s findings of fact that Mr. Romero’s Employment Agreement was validly cancelled before the Salary Period had commenced, where there is substantial evidence in the record to support her decision?

- B. Did the trial court properly dismiss Mr. Romero’s remaining \$3,000 claim, when the court explicitly found that Mr. Romero had been paid for all his hours worked with Secret Gardens and Appellant’s claim is based on his misunderstanding of an early settlement offer?

### III. RESTATEMENT OF THE CASE

#### A. Restatement of Facts

Secret Gardens is owned by husband and wife, William Delaney and Christy Klein. They first started this company in 2013, shortly after Washington State passed the I502 law, which legalized recreational cannabis production and sales within the State.<sup>1</sup> Neither Mr. Delaney nor Ms. Klein had any prior experience in this industry, but Mr. Delaney’s son, Kyle Delaney, encouraged Mr. Delaney and Ms. Klein to capitalize on this opportunity.<sup>2</sup> Despite being on the verge of retirement, Mr. Delaney and Ms. Klein quit their jobs, liquidated their 401(k) accounts and poured the last of their savings into this fledgling business to help get it off the ground.<sup>3</sup>

In September 2014 or so, Secret Gardens’ I502 production license was approved, and they began bringing plants into their partially-finished Bremerton facility.<sup>4</sup> Even though Secret Gardens was just beginning to set up their operations, Kyle Delaney recommended that Secret Gardens hire Appellant Mel Romero to conduct research and development

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<sup>1</sup> See generally, Verbatim Report of the Proceedings (VRP) Vol. II (8/14/19) at 93-95. Note: the trial court appears to have sent the VRPs up in two batches, and as a result, there are two sets of VRP Vol. I and Vol. II in the record. For clarity, Respondents will refer to both the volume number and date of testimony when citing to the VRPs.

<sup>2</sup> See *id.*

<sup>3</sup> *Id.* at 94, 143.

<sup>4</sup> *Id.* at 145-46.

(“R&D”) to develop exclusive cannabis strains for Secret Gardens.<sup>5</sup> Mr. Romero had been involved in growing and selling marijuana for years, long before it was legal anywhere.<sup>6</sup> Heeding the advice, Mr. William Delaney met with Mr. Romero in person in mid-September 2014.<sup>7</sup> After interviewing Mr. Romero, Mr. Delaney decided to hire him as the Director of R&D at an annual salary of \$150,000.<sup>8</sup>

During his interview, Mr. Delaney and Mr. Romero specifically discussed that Mr. Romero’s position and his salary would not begin until January 1, 2015, once the facility was properly set up for Mr. Romero’s work.<sup>9</sup> As Mr. Delaney explained at trial, he chose this date because “we figured our first harvest was going to be sometime in January” and “[w]e had no revenue streams coming in prior to selling anything.”<sup>10</sup>

On September 13, 2014, Mr. Delaney emailed Mr. Romero with a copy of the Employment Agreement that he had found and modified from the internet (the “Agreement”).<sup>11</sup> Consistent with their prior conversations, this Agreement indicated that Mr. Romero’s salary would begin to accrue on January 1, 2015.<sup>12</sup> A separate provision, at Paragraph 1, indicated the start-date for Mr. Romero’s employment, which was left blank. The Agreement also contained robust protections for Secret

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<sup>5</sup> VRP Vol. II (8/14/19) at 97-98, 146.

<sup>6</sup> VRP Vol. I (8/15/19) at 174.

<sup>7</sup> VRP Vol. II (8/14/19) at 146-47.

<sup>8</sup> *Id.* at 148.

<sup>9</sup> *Id.* at 150-51.

<sup>10</sup> *Id.* at 151:14-20.

<sup>11</sup> *Id.* at 103 and CP 1238-1248.

<sup>12</sup> *See* CP 1238-1248.

Gardens' intellectual property and confidential information, and it guaranteed Secret Gardens an exclusive interest in the new strains that Mr. Romero would develop.<sup>13</sup> It also limited Mr. Romero from using this information to unfairly compete with Secret Gardens.<sup>14</sup>

Mr. Romero took this Agreement to his own attorney, and together they effectively re-drafted the entire document.<sup>15</sup> The changes Mr. Romero made to this Agreement are staggering; a review of a redlined copy of the Agreement reveals that Mr. Romero and his attorney removed several pages of critical intellectual property provisions and significantly altered his employment terms, effectively depriving Secret Gardens any of the proprietary benefit of Mr. Romero's R&D work.<sup>16</sup> Mr. Romero also attempted to transmute the "at-will" Employment Agreement into a contract for a full year of guaranteed salary by (unsuccessfully) attempting to strike all the "at-will" provisions of the Agreement, removing Secret Gardens' ability to terminate him even for material breaches of the Agreement, *and* adding a one-year term to the Agreement.<sup>17</sup> Mr. Romero also deleted the requirement that his employment would be on a "full time" basis and added to the Agreement that he could "determine his own

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<sup>13</sup> *See id.*

<sup>14</sup> *Id.*

<sup>15</sup> *See* VRP Vol. II (8/14/19) at 157-170 and CP 1392-1404.

<sup>16</sup> *Id.*

<sup>17</sup> VRP Vol. II (8/14/19) at 158-59, 163 and CP 1392-1404. As stated above, Mr. Romero's effort was unsuccessful. The agreement still contained an at-will provision, allowing Secret Gardens to terminate it with or without cause or notice to Mr. Romero. *See* CP 1097-1105.

work schedule.”<sup>18</sup> Mr. Romero does not deny that his attorney made these changes on his behalf.<sup>19</sup>

Mr. Delaney provided lengthy testimony at trial that he never discussed these changes with Mr. Romero.<sup>20</sup> Had he been aware that Mr. Romero materially changed the contract, Mr. Delaney would have never signed this agreement, particularly as it effectively negated any benefit Secret Gardens might receive from Mr. Romero’s work.<sup>21</sup>

Critical to this appeal, Mr. Romero re-drafted Paragraph 7, related to the start date of his salary payments. In Paragraph 7, Mr. Romero wrote that his Salary Period would begin either on: (1) the date the Employment Agreement was signed, or (2) on “\_\_\_\_\_ with retroactive payments to begin on January 1, 2015.”<sup>22</sup> Mr. Romero did not select either of these options, nor fill in the blank space prior to providing the Agreement to Mr. Delaney. Notably, Paragraph 7 *does not* indicate that retroactive payments would begin on the “Commencement Date” of Mr. Romero’s fulltime employment, which was defined separately in Paragraph 1.

Mr. Romero printed this modified version of the Agreement and in Paragraph 1 handwrote in his start-date for fulltime employment as October 1, 2014.<sup>23</sup> Mr. Romero then presented it to Mr. Delaney, although at trial, Mr. Romero offered several materially different versions

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<sup>18</sup> *Id.* at 160, 166; CP 1392-1404.

<sup>19</sup> VRP Vol. I (8/15/19) at 187-188.

<sup>20</sup> *See* VRP Vol. II (8/14/19) at 157-170.

<sup>21</sup> *See id.*

<sup>22</sup> *See* CP 1097-1105.

<sup>23</sup> *See* Finding of Fact No. 18 (CP 1014) and VRP Vol. II (8/20/19) at 467.

of how this occurred.<sup>24</sup> Mr. Delaney admits that Mr. Romero told him that some changes had been made but did not describe the extent or nature of the changes and certainly did not tell Mr. Delaney that his lawyer had fundamentally altered the entire agreement.<sup>25</sup> Unfortunately, the facility was in the midst of construction and Mr. Delaney was busy dealing with contractors and electricians in the facility.<sup>26</sup> As a result, Mr. Delaney explains he signed the Agreement without reviewing it and neither party wrote in the start date for Mr. Romero's salary under Paragraph 7.

Mr. Delaney and Ms. Klein testified that Secret Gardens also executed employment contracts with several other employees, including Peter Wilson, William Hughes, Brandon Mitchell, and Ryan Taylor (except these contracts had *not* been significantly modified by these employees), all of whom would also begin receiving their salary on January 1, 2015.<sup>27</sup>

Between October 1, 2014 and November 14, 2014, Mr. Romero came to the facility only *seven* times and assisted Defendants with setting up the grow operations.<sup>28</sup> For this work, Secret Gardens paid Mr. Romero separately and in cash or checks.<sup>29</sup> The evidence shows that Mr. Romero did not start his substantive work as an R&D Director during this early

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<sup>24</sup> See *infra* at Finding of Fact No. 19 (CP 1014).

<sup>25</sup> VRP Vol. II (8/14/19) at 112-13, 156.

<sup>26</sup> *Id.*

<sup>27</sup> See VRP Vol. II (8/14/19) at 173-183.

<sup>28</sup> *Id.* at 107, 113, 118-19, 173; see also CP 1273-1301 (exhibits showing Mr. Romero's sign in log between September and November 2014. This record shows that Mr. Romero came to the facility only seven times between October 1 and November 14, 2014).

<sup>29</sup> See *id.*; CP 1308-1311 (photocopies of the check receipts).

period.<sup>30</sup> Mr. Romero admits as much, and testified on the stand that between October and November 2014, he would only occasionally come by the facility to start popping seeds in preparation for his substantive R&D research, but that his R&D rooms were unfinished and did not yet have lights or other equipment.<sup>31</sup>

This testimony is confirmed by Secret Gardens' Visitor Logs, which reveal Mr. Romero came to the facility for only a total of 12 hours (or *about 1.5 full workdays*) between October 1, 2014 and November 14, 2014.<sup>32</sup> Tellingly, Mr. Romero was also the only "employee" who continued signing in as a "Visitor" to the facility and did not receive an employee badge until January 2015, the date that Mr. Delaney understood Mr. Romero's salaried position was to begin.<sup>33</sup>

The Secret Gardens facility took much longer than expected to get set up and running.<sup>34</sup> By November 2014, it was clear to Mr. Delaney and Ms. Klein that the business was behind schedule in its build-out and was still several months away from generating any revenue.<sup>35</sup> At that point in time, Mr. Delaney and Ms. Klein had emptied their savings accounts just

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<sup>30</sup> See VRP Vol. II (8/14/19) at 152:3-13 (Mr. Delaney describing his conversation with Mr. Romero that Mr. Romero wanted to come in and start early, before his January 1<sup>st</sup> date, to help with some of the set up for the production side of the business, but that he would not yet be starting his substantive R&D work.)

<sup>31</sup> VRP Vol. I (8/15/19) at 194:22-195:12 and 214:12-215:1 (Mr. Romero explaining the initial seed popping stage takes 3-6 weeks before the plant even needs food or light). Mr. Romero, of course, insists that popping seeds *does* constitute substantive R&D work, but Respondents dispute this fact.

<sup>32</sup> VRP Vol. II (8/14/19) at 183-197 and CP 1273-1301.

<sup>33</sup> VRP Vol. II (8/14/19) at 183:14-20, 187:25-188:6; VRP Vol. II (8/20/19) at 511:11-13; VRP Vol. I (8/15/19) at 107:11-16.

<sup>34</sup> VRP Vol. II (8/14/19) at 201:4-202:25.

<sup>35</sup> See *id.* and VRP Vol. I (8/15/19) at 119:25-121:9.

to get the business running; it was evident that it would be impossible for Secret Gardens to pay their employees the salaries that they had hoped.<sup>36</sup>

On November 14, 2014, Mr. Delaney called a meeting with the entire Secret Gardens team. At trial, Mr. Delaney provided extensive, detailed testimony about this meeting.<sup>37</sup> As he explained at trial, Mr. Delaney informed the employees that Secret Gardens was cancelling all its employment agreements and that any employees who wished to continue working with them would be working on a minimum wage basis.<sup>38</sup> Mr. Delaney explained they were hopeful that they would be able to raise wages once the business began making money, but given the current state of affairs, Secret Gardens could not fulfill the employment agreements.<sup>39</sup> Mr. Delaney provided each of the employees with a memorandum explaining that the contracts were cancelled effective immediately, which were then placed in the employees' personnel files.<sup>40</sup> A copy of that memorandum was admitted as Trial Exhibit 36. Mr. Delaney sent Mr. Romero an email the following day, thanking him for attendance and input at the meeting.<sup>41</sup> Mr. Romero responded, "[G]lad to help."<sup>42</sup>

Ms. Klein was also present during this November 2014 meeting, and she similarly provided detailed testimony about this meeting at trial.<sup>43</sup>

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<sup>36</sup> *See id.*

<sup>37</sup> *See* VRP Vol. II (8/14/19) at 203-223 and CP 1302-1305.

<sup>38</sup> *See id.* at 205:10-207:3.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 205:19-25.

<sup>41</sup> *Id.* at 224:9-18 and CP 1306-1307.

<sup>42</sup> *Id.*

<sup>43</sup> *See* VRP Vol. I (8/15/19) at 110-132.

Respondents introduced as Exhibit 37 Ms. Klein's meeting minutes, which she took during that meeting. Even Mr. Romero admitted at trial that he attended a meeting on November 2014.<sup>44</sup>

After the meeting, Mr. Romero continued to work for Secret Gardens on an hourly, minimum wage basis.<sup>45</sup> Secret Gardens continued to struggle financially during this period of time. With very little revenue coming in the door, Mr. Delaney and Ms. Klein did their best to ensure that employees were paid first as money came in. They paid employees based on surveillance video that Mr. Delaney reviewed to calculate hours worked.<sup>46</sup> Mr. Delaney testified that, based on his records, Secret Gardens had paid Mr. Romero for all his hours worked.<sup>47</sup>

Mr. Romero continued to work at Secret Gardens until June 2, 2015, when he quit.<sup>48</sup> At or near the end of his employment, Mr. Romero informed Ms. Klein that he believed he was entitled to his salary under his Agreement.<sup>49</sup> Mr. Romero evidently either forgot about the November 2014 termination meeting or was willing to lie in order to recover this salary. When Ms. Klein reminded Mr. Romero they cancelled the contracts, he nonetheless maintained he was entitled to additional wages

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<sup>44</sup> *Id.* at 223:20-224:21.

<sup>45</sup> *See* VRP Vol. II (8/14/19) at 231:2-233:25.

<sup>46</sup> *Id.* at 244:3-25 and CP 1384-1388.

<sup>47</sup> *See id.*

<sup>48</sup> VRP Vol. I (8/15/19) at 147:15-23; VRP Vol. II (8/20/19) at 327:22-25.

<sup>49</sup> *See* VRP Vol. II (8/20/19) at 327:17-328:22.

for his work at Secret Gardens.<sup>50</sup> Ms. Klein offered to pay Mr. Romero \$3,000 to resolve this issue, feeling at the time she could not disprove his claim for additional wages.<sup>51</sup> Mr. Romero later served Respondents with a Demand Letter, demanding over \$100,000 in damages.<sup>52</sup> When Secret Gardens refused to respond to his demand letter, Appellant filed this subject lawsuit.

## **B. Procedural History**

Appellant filed suit against Secret Gardens (and Mr. Delaney and Ms. Klein personally) on May 3, 2016, alleging that he was owed compensation under his Employment Agreement. Appellant argued that his compensation period under the Agreement began on October 1, 2014, and that the Employment Agreement had never been properly cancelled, thus entitling him to a full year's salary under the Agreement.<sup>53</sup> Based on these allegations, his Complaint alleges two claims: (1) breach of contract and (2) violation of RCW 49.48.010 (Washington's wage withholding statute), both of which arise from Secret Gardens' failure to pay the salary described in the Employment Agreement.<sup>54</sup> Appellant's Complaint did

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<sup>50</sup> *See id.*

<sup>51</sup> CP 1106-1113 (Request for Admission No. 1) and VRP Vol. I (8/15/19) at 147-152 and CP 1389-1391.

<sup>52</sup> *See* Tr. Ex. 2.

<sup>53</sup> *See* CP 1-9.

<sup>54</sup> *Id.* Appellant's Complaint also stated claims for replevin and unjust enrichment related to seeds that Mr. Romero brought with him at the beginning of his employment. Those claims were resolved and withdrawn early in the case.

not allege any violation of Washington's minimum wage statute, nor did Appellant identify in his Complaint any legal basis for recovering any additional hourly wages from Secret Gardens outside his contract claim.

In response to this Complaint, Respondents brought counterclaims against Mr. Romero for misrepresentation, fraudulent inducement, negligence, and breach of contract in order to recoup some of the extensive damage Mr. Romero caused due to his negligent care of Secret Gardens' plants and property while an employee.<sup>55</sup>

This case was tried to the bench. As part of his case in chief, Appellant called Mr. Delaney, Ms. Klein, Mr. Bradley Ecklund (a local pot grower and breeder, who testified as an expert witness on behalf of Appellant and in defense of Defendants' counterclaims), and Mr. Ryan Taylor (a former Secret Gardens employee), who appeared by video preservation deposition.

Appellant, Mr. Romero, also took the stand, wherein he attempted to spin an unlikely and demonstrably bloviated version of his work and time with Secret Gardens. Throughout trial, Mr. Romero was impeached on matters that ranged from the trivial to the crucial: he admitted to falsely asserting damages for \$70,000 worth of seeds against Secret Gardens (a

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<sup>55</sup> CP 285-296. However, Respondents voluntarily withdrew these counterclaims without prejudice after trial, following the trial court's Order dismissing Appellant's claims, but reserved the right to reinstate them if this matter is remanded to trial.

claim he later dropped), even though he knew his seeds were worth only \$35,000-\$40,000;<sup>56</sup> he lied about the fact that he was currently working and selling seeds;<sup>57</sup> he preached the importance of keeping dogs out of grow facilities moments before being confronted with a recent picture he took of his own dog wandering amongst his plants;<sup>58</sup> he told a ludicrous story of a vicious dog bite inside the Secret Gardens facility that should have required 30 stitches but that healed so miraculously he was left without any scar or marking;<sup>59</sup> he spun a Fantasia-style story of how he carried buckets of water up *two* flights of stairs, despite photo and video evidence proving the facility has only *one* flight of stairs;<sup>60</sup> he provided evasive and unconvincing testimony about his sources of money for the last several years;<sup>61</sup> and he testified about nightly parties that his fellow-employees threw in the facility, which directly conflicted with his earlier

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<sup>56</sup> VRP Vol. II (8/20/19) at 371:20-378:3.

<sup>57</sup> *Id.* at 378:15-379:17.

<sup>58</sup> *Id.* at 381:22-383:7 (explaining that he did not “catch” his dog in time, even though he had time to take a picture of her for a nice size comparison).

<sup>59</sup> *See id.* at 323:13-325:6 (Mr. Romero’s direct testimony, wherein he explained how he was afraid to return to the facility because the dog “grabbed my arm and ripped me wide open...I probably needed 30 stitches at that time.”) and 383:22-385:13 (Mr. Romero’s cross-examination testimony, attempting to justify why his ripped open arm had no scars or markings with the explanation the dog’s bite was a “clean cut.”).

<sup>60</sup> *Id.* at 402:10-407:24 and CP 1405-1406 (impeached on the fact that the main stairs are only one flight, so changing his testimony that the *back* stairs were two flights, requiring him to be impeached *again* with a video of the back stairs showing that there is only one flight of stairs).

<sup>61</sup> *See id.* at 424:22-426:3.

sworn testimony that he *rarely* ever saw anyone in the facility.<sup>62</sup> In total, Mr. Romero’s testimony was impeached through prior deposition testimony, other documents, or his own sworn declarations over *25 times* during his testimony. The trial court bore witness to Mr. Romero’s testimony and was well-suited to evaluate his credibility and the veracity of his claims.

Following the Appellant’s case in chief, Respondents brought a motion for CR 41(b)(3), requesting that the trial court, in its capacity as the fact finder, make a determination as to whether Appellant carried his burden of proof in establishing his claims. Following oral argument, the trial court entered an order dismissing all of Appellant’s claims based on her findings of fact and conclusions of law drawn from the evidence presented.<sup>63</sup> In light of the dismissal, Respondents voluntarily withdrew their counterclaims against Appellant, and Appellant timely appealed.

#### **IV. ARGUMENT**

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

In a bench trial, where the trial court sits as both judge and jury, the defendant may move the trial court to make findings as to the

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<sup>62</sup> *See id.* at 307:19-308:6 (testifying that he saw the other Secret Gardens employees throw parties at the facility “Almost every night that I worked”) and *id.* at 431:3-433:1 (testifying that he rarely saw any of the other employees throughout his time at Secret Gardens).

<sup>63</sup> CP 1012-1019.

sufficiency of plaintiff's claims based solely on the evidence presented in the plaintiff's case in chief. Under CR 41(b)(3):

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant ... may move for a dismissal on the ground that upon the fact and the law the plaintiff has not shown a right to relief. The court as trier of the facts may then determine them and render judgment against the Plaintiff or decline to render any judgment until the close of all evidence.

In granting a CR 41(b)(3) motion, the trial court may either (1) weigh the evidence and make a factual determination as to the plaintiff's prima facie case, or (2) it may view the evidence in the light most favorable to the plaintiff and rule, as a matter of law, that the plaintiff has failed to establish a prima facie case.<sup>64</sup> If the trial court dismisses the case as a matter of law, the decision is reviewed de novo. "But if the trial court acts as a fact-finder, appellate review is limited to whether substantial evidence supports the trial court's findings and whether the findings support its conclusions of law."<sup>65</sup>

As Appellant concedes, the trial court's findings of fact in this case are reviewed only for substantial evidence in support thereof.<sup>66</sup>

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<sup>64</sup> See *In re Dependency of Schermer*, 161 Wn.2d 927, 939-940 (2007).

<sup>65</sup> *Id.* at 940.

<sup>66</sup> *Casterline v. Roberts*, 168 Wn. App. 376, 381 (2012) (explaining that the appellate court will review a trial court's decision following a bench trial by asking whether substantial evidence supports the trial court's findings of fact and whether those findings support the trial court's conclusions of law).

Specifically, the inquiry on appeal is whether the trial court's findings were based on substantial evidence in the record.<sup>67</sup> Substantial evidence is the quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true.<sup>68</sup> **“If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it might have resolved a factual dispute differently.”**<sup>69</sup>

The standard of review is not, as Appellant falsely claims, whether substantial evidence exists in the record to support a *different* theory of events.<sup>70</sup> In fact, Appellant's inversion of this rule would undermine the trial court's role as the fact finder and arbiter of credibility—a role particularly important here given the credibility issues with Appellant's trial testimony. The Court of Appeals' role is not to review all the evidence in the record *de novo* and question the trial court's evidentiary determination. On appeal, the determination is limited to whether the trial court's findings have some evidentiary support. Here, there can be no dispute that all the trial court's findings of fact, including those identified by Appellant, were supported by substantial evidence.

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<sup>67</sup> *Id.*

<sup>68</sup> *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879 (2003).

<sup>69</sup> *Id.* at 879-880 (emphasis added) (citing *Croton Chem. Corp. v. Birkenwald, Inc.*, 50 Wn.2d 684 (1957)).

<sup>70</sup> *See id.*

**B. All the Trial Court’s Findings of Fact were Well-Supported by Substantial Evidence in the Record.**

**1. The trial court’s findings of fact at paragraphs 10, 11, 18, 20, 22, and 26-28 are all supported by credible witness testimony and exhibits.**

Each and every one of the trial court’s findings of fact are supported by substantial evidence in the record. Appellant’s challenges to the trial court’s substantiated findings of fact appear to be based on his confusion surrounding: (1) the trial court’s order; (2) the record and evidence introduced; and (3) the “substantial evidence” standard of review itself. Each of these findings are taken in turn below.

**Paragraph (Finding of Fact) 10: “Mr. Delaney and Mr. Romero discussed that Mr. Romero would start his employment as the R&D Director on January 1, 2015.”**

This finding is irrefutably based on substantial evidence. Mr. Delaney testified to this fact explicitly, explaining that they specifically discussed this date because Secret Gardens would not be generating any revenue until January 2015.<sup>71</sup> Additionally, all the other Secret Gardens salaried employees had start dates of January 1, 2015 in their employment contracts. Appellant assigns error, arguing that the evidence shows Mr. Romero actually started working on October 1, 2014.<sup>72</sup> In this regard, Appellant appears to have misread the trial court’s order: the trial court

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<sup>71</sup> VRP Vol. II (8/14/19) at 151:6-20.

<sup>72</sup> App’t Br. at 16-17.

found that the Parties had *discussed* that Mr. Romero's start date would be January 1, 2015. This Finding of Fact does not speak to when Mr. Romero actually started performing work, which is an entirely different factual issue that was disputed at trial.

**Paragraph (Finding of Fact) 11: “In September 2014, Mr. Delaney provided Mr. Romero with a signed, hardcopy Employment Contract that he had found and downloaded from the internet.”**

This Finding of Fact is based on the testimony from Mr. Romero, who testified that he received an original hard copy contract from Mr. Kyle Delaney, Mr. William Delaney's son.<sup>73</sup> Peculiarly, Appellant argues that this finding was in error because Mr. William Delaney instead testified that he *emailed* this contract to Mr. Romero, which is consistent with the trial court's very next finding of fact: “Mr. Delaney also emailed Mr. Romero a Microsoft Word version copy of this Contract.”<sup>74</sup> This assignment of error is apparently based on Appellant's incomplete reading of the Court's Order and the record.

**Paragraph (Finding of Fact) 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 would begin either on the date the**

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<sup>73</sup> See VRP Vol. I (8/15/19) at 186:11-187:2 (explaining that Kyle Delaney set down a hardcopy of the contract for him to review); VRP Vol. II (8/20/19) at 445:17-23, 447:7-12 (describing that Kyle Delaney had handed him a written contract); VRP Vol. II (8/20/19) at 452:16-24. (when asked, “[Kyle Delaney] gave you a hand -- hand copy, a physical piece of paper contract, right?” Mr. Romero responded, “Yes, ma'am.” He went on to explain that Mr. Delaney later emailed a version so that his attorney could make changes.)

<sup>74</sup> See Finding of Fact No. 12 (CP 1013).

**employment contract was signed, or on some unspecified date prior to January 1, 2015.”**

This Finding of Fact is supported by the language of the Agreement itself, which the trial court set forth almost verbatim within this Finding.<sup>75</sup> Appellant responds that the contract is not ambiguous because the trial court could have just taken the “Commencement Date” set forth in Paragraph 1 and inserted this date into Paragraph 7, since that is the term that Mr. Romero wanted, but failed to fill in. Of course, this argument ignores that the Agreement specifically sets forth two different dates for when Mr. Romero’s employment would begin (under Paragraph 1), and when Mr. Romero’s generous salary package would begin to kick in (under Paragraph 7). Had the Parties intended that these be the same date, Mr. Romero could have just as easily written this term in himself or drafted this provision to indicate that the salary period would begin to accrue on the “Commencement Date” of his employment. Mr. Romero did neither and instead left this Paragraph regarding the start date of his Salary Period blank.

A more complete discussion of the legal merits of the trial court’s interpretation of Paragraph 7 is provided below. However, it should suffice to say that Finding of Fact No. 16 is supported by the exact text of

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<sup>75</sup> See CP 1097-1105.

the Agreement itself. Moreover, both Mr. Delaney *and* Mr. Romero testified that in reviewing the plain text of Paragraph 7, they could not ascertain which start-date was intended by the Agreement.<sup>76</sup> This Finding is plainly supported by actual, substantial evidence.

**Paragraph (Finding of Fact) 18: “Mr. Romero filled in the date his employment would commence as October 1, 2014.”**

This Finding is supported by Mr. Romero’s original deposition testimony, which was introduced at trial to impeach Mr. Romero’s later, inconsistent testimony. Mr. Romero testified during his deposition that he specifically recalled that *he* wrote that October 1, 2014 date in the contract himself.<sup>77</sup> Mr. Delaney did *not* testify that he wrote in this October 1, 2014, Commencement Date for his employment. When asked whether the October 1, 2014 date was written by him, Mr. Delaney merely responded, “It could be. It looks like my writing. It could be.”<sup>78</sup> When asked about this date again on cross-examination, Mr. Delaney responded again, “Like

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<sup>76</sup> See VRP Vol. II (8/14/19) at 171:19-172:7 (Mr. Delaney explaining that he intended the salary to begin January 1, 2015, but reviewing the final agreement, he could not ascertain when the retroactive payments for Mr. Romero’s salary would begin); and **VRP Vol. II (8/20/19) at 469-473** (Mr. Romero’s testimony about what he intended Paragraph 7 to say, what he “believed this part of the provision covered,” but explicitly conceding that he himself, as the drafter of this document, was unable to point to where the contract specifically indicates his salary would begin October 1, 2014.).

<sup>77</sup> See VRP Vol. II (8/20/19) at 467 (Mr. Romero’s testimony: “Question: ‘Okay. Additionally, it looks like you wrote into that commencement start date the 1<sup>st</sup> of October 2014 where it had previously been blank.’ Answer: ‘Yes.’”). Mr. Romero responded at trial with an unconvincing explanation that he must not have understood the question during his deposition.

<sup>78</sup> VRP Vol. II (8/14/19) at 112:6-9.

I mentioned before, it could be or could not be. It's messy like mine. I'm not too sure."<sup>79</sup>

Moreover, given Mr. Delaney's repeated, emphatic testimony that he did not expect Mr. Romero to begin working at the facility on a fulltime basis until January 1, 2015, whereas Mr. Romero *insisted* that he expected to begin work on October 1, 2014, it would make little sense that Mr. Delaney would write this date in himself.<sup>80</sup> Based on this substantial evidence, the trial court found that it was more probable that Mr. Romero, not Mr. Delaney, wrote in this October 1, 2014 date.

**Paragraph (Finding of Fact) 20: "The Court finds that Mr. Romero's conflicting versions of events surrounding the review of the Employment Contract and its execution with Mr. Delaney lack credibility."**

Unfortunately, this assignment of error is another example of Appellant simply misreading the trial court's order. This Finding refers to the multiple contradictory versions Mr. Romero *himself* told about what occurred.<sup>81</sup> As elicited by Respondents' counsel during Mr. Romero's cross-examination, Mr. Romero initially testified on the stand his attorney modified an electronic copy of the Agreement that Mr. William (Bill) Delaney had emailed to him. During his deposition, however, Mr.

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<sup>79</sup> *Id.* at 155:5-6.

<sup>80</sup> *See e.g.*, VRP Vol. II (8/20/19) at 479:4-15 (describing his work as beginning October 1, 2014).

<sup>81</sup> *See generally id.* at 478.

Romero explained that his attorney modified the paper copy of the Agreement that Mr. Kyle Delaney had provided to him, and he likely used white-out on the paper to make his revisions.<sup>82</sup> Then, Mr. Romero testified at trial that he did *not* discuss these changes with Kyle Delaney, despite his earlier deposition testimony that he “did discuss the changes with Kyle, and I told him to observe the changes.”<sup>83</sup>

Mr. Romero also testified at trial that Mr. Delaney only thumbed through the Agreement quickly without discussion.<sup>84</sup> But this conflicts with the version of events Mr. Romero told during his sworn deposition, wherein he stated they had discussed the changes at length.<sup>85</sup> In fact, Mr. Romero previously testified that he watched Mr. Delaney review the entire contract in front of him, and that they had a *thirty-minute* conversation about the changes that Mr. Romero made.<sup>86</sup> Mr. Romero testified that Mr. Delaney was not only fine with some of these modifications, “As a matter of fact, he welcomed it.”<sup>87</sup> Mr. Romero was forced to concede at trial that they did not discuss any of these terms, including his salary start-date.

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<sup>82</sup> See VRP Vol. II (8/20/19) at 452:1-455:17.

<sup>83</sup> *Id.* at 455:18-456:11.

<sup>84</sup> See VRP Vol. I (8/15/19) at 190:13-16.

<sup>85</sup> VRP Vol. II (8/20/19) at 457:14-460:16.

<sup>86</sup> See *id.*

<sup>87</sup> *Id.* at 459:7-13; 460:11-13 (explaining that Mr. Delaney did not express any concern with Mr. Romero changing the start date of his employment to October 1, 2014, and in fact, Mr. Delaney welcomed it.)

Mr. Romero's utter inability to tell a consistent, straightforward version of how he prepared and presented this Agreement to Mr. Delaney undermined much of his testimony at trial. Quite understandably, the trial court had ample reason to find Mr. Romero's conflicting versions of events not credible.

**Paragraph (Finding of Fact) 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."**

This Finding of Fact is supported by exhibits reflecting cash payments and testimony from Mr. Delaney, Ms. Klein, *and* Mr. Romero himself, all of whom testified that Mr. Romero was paid sporadically during this period for his work.<sup>88</sup> During trial, Mr. Delaney was specifically asked how employees were paid before their work prior to January 1, and Mr. Delaney explained, "We kind of kept track of hours when people were there at the particular time. We tried to give them money as best as possible when the work was done and completed."<sup>89</sup> Appellant nonetheless takes issue with this Finding because Appellant disputes that the purpose of these payments were made for "hours

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<sup>88</sup> VRP Vol. II (8/14/19) at 107, 113, 118-19, 173, and CP 1308-1311 (Mr. Delaney's testimony); VRP Vol. I (8/15/19) at 149-152 (Ms. Klein's testimony); VRP Vol. I (8/15/19) at 209:9-24, 225:6-15, 305 (Mr. Romero's testimony describing his payments for work between October 2014 and January 2015).

<sup>89</sup> VRP Vol. II (8/14/19) at 107:3-7.

worked.” Appellant then offers several pieces of evidence that he alleges supports his argument that these payments were *not* for hours worked.<sup>90</sup>

Appellant’s challenge to this Finding is based on a fundamental misunderstanding of the “substantial evidence” standard of review. Regardless of whether the Appellant disagrees with the trial court’s ultimate fact findings in this case or wishes that the trial court would have believed his evidence, there was irrefutably evidence in the record to support the trial court’s determination that these payments were provided for hours worked. Mr. Delaney explicitly testified that he paid workers as much as he was able, when he was able, for the hours they worked because their salaries had not yet commenced. This Finding of Fact was not made in error.

**Paragraphs (Findings of Fact) 26-28:**

- **“On November 14, 2014, Mr. Delaney held a meeting during which he verbally cancelled all employment contracts with all Secret Gardens employees. Mr. Romero, along with John William Hughes, Peter Wilson, Brandon Mitchell, Ryan Taylor, and Mr. Delaney’s son, Kyle Delaney, were all present at this meeting. Ms. Klein took notes and in pertinent part, noted that ‘A. All employees contracts have been cancelled effective immediately. He will put out notice to all today. B. Employees will be paid on an hourly basis at minimum wage level...”**
- **“Thus, the Employment Agreement with Mr. Romero was cancelled on November 14, 2014, before the annual compensation period salary commenced.”**

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<sup>90</sup> See Br. of App’t at 20-21.

- **“Mr. Romero agreed to stay on and continued to work on a minimum wage basis.”**

These Findings are amply supported by the record. Both Ms. Klein and Mr. Delaney offered lengthy, emotional testimony about the November 2014 meeting, detailing for the trial court all the topics that were discussed at that meeting and the attendees’ reactions.<sup>91</sup> Both witnesses testified that Mr. Romero attended the meeting and described his reaction to the news that his Employment Agreement would be cancelled.<sup>92</sup>

Moreover, written documents and exhibits supported Mr. Delaney’s and Ms. Klein’s as well. Respondents introduced Ms. Klein’s contemporaneous meeting minutes from this November 14, 2014 meeting, which indicated Mr. Romero was present among the other employees and confirmed that Mr. Delaney discussed the termination of these employee contracts.<sup>93</sup> Ms. Klein’s notes also indicated that Mr. Romero and all the other employees received a copy of the memo regarding the termination of their contracts and that another copy of this memo would be placed in their employee file. A copy of that termination memo was also provided as an exhibit at trial.<sup>94</sup>

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<sup>91</sup> VRP Vol. II (8/14/19) at 203-223 and CP 1302-1307 (Mr. Delaney’s testimony); VRP Vol. I (8/15/19) at 110-132 (Ms. Klein’s testimony).

<sup>92</sup> *See id.*

<sup>93</sup> *See* CP 1304-1305.

<sup>94</sup> CP 1302-1303.

Even so, Appellant assigns error to this Finding of Fact arguing, again, that Mr. Romero's own evidence should have been given more weight and that substantial evidence supported *his* version of events.<sup>95</sup> As with above, this argument misunderstands this Court's standard of review on appeal. All of these Findings were supported by substantial evidence in the record and cannot be overturned on appeal merely because Appellant disagrees with the ultimate outcome.<sup>96</sup> Whether Appellant offered his own, contradictory, evidence is simply immaterial and ultimately reflects the Court's credibility determinations.

Moreover, Appellant's "proof" that Mr. Romero did not attend the cancellation meeting is based largely on a confusing and inconsistent segment of testimony from Ms. Klein, wherein which she attempted to explain the significance of sticky-notes that she had added to Trial Exhibits 56-58. Appellant argues these exhibits are proof that the November 14, 2014 cancellation memorandum was not provided to several other employees, but not Mr. Romero.<sup>97</sup> This misstates the record: Ms. Klein testified she could not recall the significance of these sticky-notes and did not know when or why she wrote them. Regardless, she

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<sup>95</sup> Br. of App't at 21-22.

<sup>96</sup> See *Sunnyside Valley*, 161 Wn.2d at 940.

<sup>97</sup> App't Br. at 22.

confirmed that *all* employees attended the meeting and received copies of the termination memorandum.<sup>98</sup>

Appellant also relies on the testimony from himself and Mr. Taylor (who also sued Secret Gardens for wages) as conclusive evidence that this meeting did not take place. However, both of these witnesses were thoroughly impeached on cross-examination at trial, particularly Mr. Romero. Unable to keep his story straight, Mr. Romero could hardly get through five minutes of cross-examination questions before being impeached with his prior inconsistent deposition testimony, or sworn declarations.<sup>99</sup> Thus, the trial court had ample reason to question the credibility of Mr. Romero's testimony and find that this cancellation meeting had taken place consistent with Mr. Delaney's and Ms. Klein's testimony.

**2. Moreover, with respect to most of these assignments of the trial court's "factual inaccuracies," Appellant fails to establish reversible error.**

Finally, Appellant fails to identify how any of these alleged erroneous Findings of Fact constitute reversible error. Of course, some of these Findings of Fact would logically impact the outcome of this case if reversed on appeal (such as the trial court's finding that the Employment

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<sup>98</sup> See VRP Vol. I (8/15/19) at 162:6-164:7.

<sup>99</sup> See *supra* at 13-14, fn. 56-62.

Agreements were validly cancelled in November 2014). However, most of these other assignments of error are simply immaterial and Appellant fails to explain how these “errors” constitute a basis for reversal. For example, Appellant challenges the trial court’s finding that Mr. Delaney provided Mr. Romero with a hard copy of the Agreement.<sup>100</sup> Like all the other assignments of error, Appellant fails to establish how this finding, or any of the other allegedly erroneous finding, constitutes reversible error, or how it would otherwise impact the outcome of the trial court’s decision. In this regard, Appellant has not carried his burden on appeal.

**C. The Trial Court’s Interpretation of the “Commencement Date” of the Employment Agreement’s Salary-Period was Legally Accurate and Supported by the Evidence.**

“When a court relies on inferences drawn from extrinsic evidence, interpretation of a contract is a **question of fact.**”<sup>101</sup> Thus, the appellate court reviews “a trial court’s decision following a bench trial by asking whether substantial evidence supports the trial court’s findings of fact and whether those findings support the trial court’s conclusions of law.”<sup>102</sup>

In interpreting contract provisions, Washington courts follow the context rule, wherein “extrinsic evidence relating to the context in which a contract is made may be examined to determine the meaning of specific

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<sup>100</sup> App’t Br. at 17.

<sup>101</sup> *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 711 (2014) (emphasis added) (citing *Berg v. Hudesman*, 115 Wn.2d 657, 667–68 (1990)).

<sup>102</sup> *Id.* at 712 (citing *Casterline v. Roberts*, 168 Wn. App. 376, 381 (2012)).

words and terms “ used in the contract.”<sup>103</sup> Extrinsic evidence includes both the contract’s subject matter and objective, the circumstances surrounding contract formation, both the parties’ conduct and subsequent acts, and the reasonableness of the parties’ respective interpretations.<sup>104</sup>

**1. The trial court properly found that the commencement period of the salary under the Agreement was ambiguous, since there were *several* different reasonable interpretations that could be drawn from the writing.**

Paragraph 7 of Mr. Romero’s Agreement was irrefutably ambiguous. The trial court found, based on the evidence presented, that the Parties had discussed that Mr. Romero would begin his employment as the Director of R&D on January 1, 2015.<sup>105</sup> The trial court also found, based on the evidence presented, that Mr. Romero revised the Agreement in a manner that resulted in “internally inconsistent and ambiguous start dates for Mr. Romero’s annual compensation period.”<sup>106</sup> As revised by Mr. Romero, Paragraph 7 indicates that the Salary Period would *either* begin “on the date the employment contract was signed, *or* on some unspecified date prior to January 1, 2015.”<sup>107</sup> As the trial court expressly noted: “The Employment Contract did not indicate which of the two

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<sup>103</sup> *William G. Hulbert, Jr. & Clare Mumford Hulbert Revocable Living Trust v. Port of Everett*, 159 Wn. App. 389, 399–400 (2011).

<sup>104</sup> *Hulbert*, 159 Wn. App. at 400.

<sup>105</sup> Finding of Fact No. 10 (CP 1013).

<sup>106</sup> Finding of Fact No. 16 (CP 1014).

<sup>107</sup> *Id.* (emphasis added).

options the parties intended to apply. **There is nothing in the Compensation clause of the Contract to indicate that the salary would begin on October 1, 2014.**<sup>108</sup> This means the provision is ambiguous.<sup>109</sup>

While true that an ambiguity cannot be read into a contract where it can be avoided by reading the contract as a whole,<sup>110</sup> this contract cannot be resolved by reviewing other portions of the Agreement. Regardless of Paragraph 1 provides an October 1, 2014 “Commencement Date” for Mr. Romero’s fulltime employment, the agreement explicitly provides for a *different* period of time for the Salary Period to begin. Had the Parties intended that this Salary Period would begin on the same date as the Commencement Date of employment, it would have been drafted as such. Instead, this Agreement does not provide *any* clear commencement date for this specific Salary Period provision. As Appellant acknowledges in his own brief, “Mr. Romero’s version left open to discussion” as to when the payments would begin.<sup>111</sup> The Parties never re-visited this issue or negotiated this start date term. And reading the plain text of this

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<sup>108</sup> Conclusion of Law No. 9 (CP 1016).

<sup>109</sup> See *Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wn.2d 911, 918 (1970) (“A contract is not ambiguous when a reading of the contract as a whole **leads to only one meaning.**” (emphasis added)).

<sup>110</sup> App’t Br. at 25 (citing *Grant Cnty. Consts. v. E. V. Lane Corp.*, 77 Wn.2d 110, 121 (1969)).

<sup>111</sup> See App’t Br. at 18.

provision, it is impossible to know when the Salary Period would commence under this Agreement.

Appellant's briefing seems to imply that the Salary Period *must* begin as of the first date of Mr. Romero's employment because the provision itself is otherwise unlawful, since employees cannot work for free. However even this reasoning is flawed. As the trial court correctly concluded, "There is nothing invalid about an employment contract that contains a period of employment in which the compensation will be salary and a period in which it will be minimum wage or hourly."<sup>112</sup> State and federal minimum wage laws merely require that employers pay their employees no less than minimum wage for any hours worked. This does not preclude employers from offering a different rate of pay prior to the commencement of their salary. Nor is this Agreement illegal merely because it is silent as to how Mr. Romero will be paid for the work he performs prior to the commencement of his Salary Period. And here, the trial court specifically found that Mr. Romero had in fact been paid for his hours worked prior to the commencement of this Salary Period.<sup>113</sup>

Moreover, even if Secret Gardens *had* failed to pay Mr. Romero for his work prior to his Salary Period commencing, his remedy for that

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<sup>112</sup> Conclusion of Law No. 11 (CP 1016).

<sup>113</sup> Finding of Fact No. 22 (CP 1014).

unpaid work would be recovery under the minimum wage statute, not a claim for breach of contract. As explained by the Court of Appeals in *Evans*, courts do not void an illegal contract term when “the statute or ordinance contains an adequate remedy for its violation.”<sup>114</sup> “This exception developed from the rule that courts should examine a statute’s purpose and apply the statutory penalty before voiding a contract for a statutory violation.”<sup>115</sup> Thus, even under those circumstances, Washington minimum wage law supplies the remedy and Mr. Romero would be allowed to recover minimum wages for any hours worked for which he was not compensated. But the remedy cannot be, as Appellant seems to imply here, that the contract must be modified by the court to extend the Salary Period for an exceedingly generous \$150,000 salary package to cover three additional months’ salary for Appellant’s 1.5 days of work during that time, which Respondents had not agreed to pay.<sup>116</sup>

Appellant fails to identify any cogent reason for why this Agreement “unambiguously” provides that Mr. Romero’s salary began to

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<sup>114</sup> *Evans v. Luster*, 84 Wn. App. 447, 450 (1996) (citing *Sienkiewicz v. Smith*, 97 Wn.2d 711, 716 (1982)).

<sup>115</sup> *Id.* at 450, fn. 5.

<sup>116</sup> Moreover, by this logic, even Mr. Romero’s construction of the Agreement would fail. Washington regulation require payment intervals of no less than once a month. WAC 296-128-035. Mr. Romero’s argument that his salary would begin to accrue in October, but not be paid until January 1, 2015 would result in an unlawful deferment of his salary for three months. Thus, even under Appellant’s own argument, Appellant’s interpretation of the Agreement is flawed.

accrue on October 1, 2014. The trial court correctly identified that this portion of the contract was ambiguous and required interpretation.

**2. The trial court properly found that this ambiguity was created by Plaintiff and his attorney, who drafted this provision and created multiple options for commencement that the Parties never actually selected.**

The trial court also properly held that ambiguity regarding Mr. Romero’s Salary Period should be construed against Mr. Romero, as the drafter of this provision. Washington courts have made clear that a party cannot benefit from the very ambiguity that he creates.<sup>117</sup> “[A]mbiguous contract language is strictly construed against the drafter.”<sup>118</sup> Courts consistently apply this rule and rationalize its use on the basis that “the party formulating the language is to blame for the difficulty in interpreting it, and that he [or she] could have avoided the problem by more careful draftsmanship.”<sup>119</sup> “[W]e construe written contracts against their drafters such that they cannot later benefit from ‘mistakes’ that they were in a position to prevent.”<sup>120</sup> Courts embrace this notion because the drafter

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<sup>117</sup> See *Jones Assoc., Inc. v. Eastside Props., Inc.*, 41 Wn. App. 462, 468 (1985).

<sup>118</sup> *Id.* (emphasis added) (citing *Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wn.2d 911, 918 (1970); *Taylor-Edwards Warehouse v. Burlington Northern*, 715 F.2d 1330, 1334 (9th Cir. 1983)).

<sup>119</sup> *Jacoby*, 77 Wn.2d at 918.

<sup>120</sup> *McKasson v. Johnson*, 178 Wn. App. 422, 429 (2013).

“should not be allowed to take advantage of the very ambiguities that it could have prevented with greater diligence.”<sup>121</sup>

Here, Mr. Romero should not be permitted to benefit from the ambiguity he created. There was no dispute at trial that Appellant and his attorney prepared this heavily modified and effectively re-drafted Employment Agreement. Appellant admitted that he prepared Paragraph 7 and inserted this blank space for the start date of his Salary Period. Moreover, if Mr. Romero he intended that his salary period begin on October 1, 2014, he was perfectly capable of drafting that provision to include that date. By omitting it, and leaving this date blank, Mr. Romero instead drafted a provision that implied to his employers that his salary-period had not yet been determined, and that it would be determined at some later date. Appellant cannot benefit from the ambiguity he created. The trial court properly followed the controlling precedent that instructs that this provision must be strictly construed against the drafter and in Secret Gardens’ favor.

The case cited by Appellant regarding the interpretation of a “negotiated” contract is inapposite.<sup>122</sup> Appellant argues this contract was

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<sup>121</sup> *Emter v. Columbia Health Servs.*, 63 Wn. App. 378, 384 (1991) (citing *Kunin v. Benefit Trust Life Insurance Co.*, 910 F.2d 534, 540 (9th Cir. 1990), *cert. denied*, 498 U.S. 1013 (1990), *review denied*, 498 U.S. 1074 (1991)).

<sup>122</sup> See Br. of App’t at 33 (citing *Viking Bank v. Fir Grove Commons 3, LLC*, 183 Wn. App. 706, 713 (2014)).

negotiated, and therefore, the trial court must resolve the ambiguity in a manner that is reasonable and just.<sup>123</sup> This is false: the trial court made fact findings that Appellant drafted this provision without input, negotiation, or discussion with Mr. Delaney, and thus found: “Mr. Romero’s attorney **entirely rewrote the operative clause at issue here**, Paragraph 7, and consequently must be considered the drafter of that clause.”<sup>124</sup> The trial court also found Mr. Romero’s testimony of conflicting versions of his “negotiations” over this agreement lacked credibility.<sup>125</sup> The trial court’s finding that this was *not* a negotiated provision was supported by substantial evidence. Thus, her decision to construe this provision against Mr. Romero was proper and supported by her findings.

**3. The trial court provided several reasons for her interpretation, so any “error” regarding her decision to construe this Agreement against the drafter is harmless.**

Finally, even if the trial court’s decision to construe this Agreement against its drafter were in error, this error would nonetheless be harmless. The trial court provided *several* reasons for her interpretation of the Employment Agreement, which were unchallenged by Appellant in

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<sup>123</sup> *Id.*

<sup>124</sup> Conclusion of Law No. 5 (CP 1016) (emphasis added).

<sup>125</sup> Finding of Fact Nos. 19-20 (CP 1014).

his appeal. Any one of these reasons would support a far more “just and reasonable” interpretation in Secret Gardens’ favor.

First and foremost, the trial court found, “There was no meeting of the minds on when the salary period would commence.”<sup>126</sup> Appellant does not assign error to this portion of the trial court’s ruling. The legal impact of this ruling is significant: without a meeting of the minds, there can be no contract in the first place.<sup>127</sup> For example, in the case *Shuck v. Everett Sports Cars, Inc.*, the parties had entered into an agreement for the purchase and trade of the owner’s Jaguar car with the dealer for a new MG automobile. The parties entered into a purported agreement based upon a nebulous understanding on the part of the dealer that either the balance due on the car was approximately \$1,500 or, if the balance was a greater amount, that the owner would accept the arrangement in any event. The owner did not share this understanding and believed the arrangement would only go through if the balance was approximately this amount. Neither party ascertained the true amount due on the Jaguar, but both signed a document which set the balance due at \$1,500.

The Court of Appeals held, “Under these circumstances, there was not a meeting of the minds of the parties on a material part of the contract

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<sup>126</sup> Conclusion of Law No. 10 (CP 1016).

<sup>127</sup> *Shuck v. Everett Sports Cars, Inc.*, 12 Wn. App. 28, 31-32 (1974).

...”<sup>128</sup> As the court explained, “Each party had in mind an unexpressed intent which differed from that objectively manifested to the other. **The document signed by the parties did not reflect a common understanding of the essential terms of a contract and therefore, no contract existed between them.**”<sup>129</sup>

The same circumstances are presented here. Mr. Delaney testified he understood the Salary Period to commence on January 1, 2015, which was the date on the version of the Agreement originally given to Mr. Romero, is at least partially support by the actual language in Paragraph 7 (which identifies salary payments beginning on January 1, 2015) and consistent with all the other employment agreements Mr. Delany executed. Mr. Romero testified that he subjectively believed the Salary Period commenced on October 1, 2014 (even October 1, 2014 is not written anywhere in Paragraph 7). While it may be true that this Paragraph 7 left this issue “open to discussion” (as Appellant asserts in his brief),<sup>130</sup> the Parties never discussed or agreed when this Salary Period would actually begin. Thus, the Parties maintained differing, unexpressed understandings as to this essential term, and the Agreement itself does “not reflect a common understanding” of this essential term. Therefore, as

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<sup>128</sup> *Id.* at 31.

<sup>129</sup> *Id.* (emphasis added).

<sup>130</sup> App’t Br. at 18.

held by the Court of Appeal in *Shuck* “no contract existed between them.”<sup>131</sup> The trial court’s finding that there was no meeting of the minds provides a *per se* sufficient basis for the trial court to dismiss Appellant’s breach of contract claims.

Second, the trial court also found, in the alternative, that this Paragraph 7 is properly construed as commencing the Salary Period on January 1, 2015 for a host of reasons besides it being properly construed against the drafter: (1) “The Parties’ subsequent mutual performance support[ed] Secret Gardens’ interpretation that the Parties intended that Mr. Romero begin January 1, 2015.”<sup>132</sup>; (2) “Mr. Romero testified...the contract was not intended to have his salary start on the date it was signed on September 17, 2014, as one option in Paragraph 7 provides.”;<sup>133</sup> and, therefore, (3) “Given that the original proposed contract called for the annual compensation period salary to begin on January 1, 2015 and that was the understanding Mr. Delaney and Secret Gardens had, and under the Contract’s Paragraph 7, one of the options is to have the annual compensation period begin on January 1, 2015, the Court interprets the

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<sup>131</sup> *Shuck*, 12 Wn. App. at 31.

<sup>132</sup> Conclusion of Law No. 12.b (CP 1017).

<sup>133</sup> Conclusion of Law No. 12.c (CP 1017).

Contract’s annual compensation period as beginning January 1, 2015, with no retroactive application.”<sup>134</sup>

These unchallenged conclusions of law are correct and supported by the evidence. Mr. Delaney and Mr. Romero specifically discussed a January 1, 2015 start date *and* the Parties mutually acted as if Mr. Romero’s substantive work had not yet begun, as demonstrated by the fact that (1) Mr. Romero only came in sporadically between October and December 2014, (2) he continued to sign in as a “Visitor” and not an “employee” of Secret Gardens, and (3) he did not receive his employee badge until January 1, 2015.<sup>135</sup> All this evidence aided the court in interpreting the Employment Agreement and supported the trial court’s decision that the Salary Period was intended to begin on January 1, 2015.<sup>136</sup> The trial court did not need to even “strictly construe” this provision against Mr. Romero to reach this interpretive conclusion.

**4. The trial court heard argument on, considered, and properly rejected Plaintiff’s severability argument.**

Finally, Appellant argues that the trial court’s reasoned decision and determinations of fact should be reversed because her order does not

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<sup>134</sup> Conclusion of Law No. 12.d (CP 1017).

<sup>135</sup> VRP Vol. II (8/14/19) at 150-151; Vol. II (8/14/19) at 152:3-13; 183-197, with Tr. Exs. 34, 35, and 77 and unchallenged Finding of Fact Nos. 23-24 (CP 1015) (indicating that Mr. Romero continued to come to the facility as a “Visitor” until January 2015).

<sup>136</sup> See *Berg v. Hudesman*, 115 Wn.2d 657, 667 (1990) (when interpreting the proper meaning of a contractual term, courts should consider, *inter alia* “the subsequent acts and conduct of the parties to the contract.”)

expressly evaluate the merits of Appellant’s “severability” argument. This is incorrect. The record plainly shows that the trial court considered this severability argument, as it was presented at length to the trial court during the Parties’ argument on Defendants’ closing CR 41(b)(3) motion.<sup>137</sup> And for several reasons, the trial court was justified in not giving this argument much credence.

First, the trial court expressly held that there was no meeting of the minds,<sup>138</sup> and therefore, no contract existed between them. Thus, the trial court had no reason to entertain the use of a severability clause contained in an Agreement that was never properly executed.

Second, severability clauses exist to allow the courts to extricate or narrow contract provisions that might be unenforceable because they are unlawful (*e.g.* overbroad non-competition provisions or unenforceable arbitrability clauses).<sup>139</sup> Parties utilize such clauses so that a court can remove or blue-pencil the offending provision to bring it within the bounds of the law, as a means of saving the rest of the agreement.<sup>140</sup>

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<sup>137</sup> See VRP Vol. IV (8/22/19) at 663-666.

<sup>138</sup> See *supra* at 37 and Conclusion of Law No. 10 (CP 1016).

<sup>139</sup> See *e.g.*, *Zuver v. Airtouch Commc’ns, Inc.*, 153 Wn.2d 293, 320 (2004) (“Courts are generally loath to upset the terms of an agreement and strive to give effect to the intent of the parties.”); *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316, 329 (Div. 1 2009); *Czerwinski v. Pinnacle Prop. Mgmt. Svcs., LLC*, 9 Wn.App.2d 1047, 2019 WL 2750183 (unpublished) (Jul. 1, 2019).

<sup>140</sup> See *id.*

By contrast, here, Appellant attempts to use the severability clause as a cudgel, insisting that it actually compels the trial court to remove an *ambiguous* term and effectively impose upon the Parties a new Salary Period that the Parties neither negotiated nor agreed to be bound by. This is an impermissible use of the severability clause.<sup>141</sup> Washington courts have made clear that they will not give effect to severability clauses where excising the problematic provision would result in essentially rewriting the contract.<sup>142</sup> Here, the Agreement specifically provides for two different start dates, one for Mr. Romero’s employment and one for his Salary-Period. The trial court cannot just remove one of these provisions without upending the Parties’ original intent to provide for two different commencement periods.

Moreover, Respondents can find no case where a severability clause was used as Appellant proposes here: to remove an entire, critical provision of the contract simply because the provision was *ambiguous*. Nor does it make any sense that a severability clause effectively requires the trial court to foist upon the Parties a different, unbargained-for substantive salary term than the options provided for in the Agreement.

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<sup>141</sup> *McKee v. AT&T Corp.*, 164 Wn.2d 372, 403 (2008).

<sup>142</sup> *Id.* (citing *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003) (“Any earnest attempt to ameliorate the unconscionable aspects of . . . [the] agreement would require this court to assume the role of contract author rather than interpreter.”); *see also Zuver v. Airtouch Comms., Inc.*, 153 Wn.2d 293, 320 (2004).

The trial court properly decided to *interpret* the meaning of this ambiguous salary provision, rather than remove it completely.

Even more to the point, the severability clause at issue in this case explicitly **does not** apply here. By its plain text, it applies only:

...[I]f 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...<sup>143</sup>

The trial court did *not* find that Paragraph 7 was “invalid, void, or unenforceable” as is required to trigger the court’s use of this provision. To the contrary, the trial court specifically held, “There is nothing invalid about an employment contract that contains a period of employment in which the compensation will be salary and a period in which it will be minimum wage or hourly.”<sup>144</sup> Thus, the trial court properly declined to invoke the severability clause. Nor did she need to make any explicit reference to this argument in her written decision, as she made an explicit finding that Paragraph 7 itself was *not* void, unlawful, or otherwise legally unenforceable. The provision was merely ambiguous, requiring the trial court’s interpretation. Accordingly, the trial court correctly rejected this argument to sever the provision and instead interpreted its meaning

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<sup>143</sup> CP 1097-1105, Paragraph 24 (emphasis added).

<sup>144</sup> Finding of Fact No. 11 (CP 1016).

according to the Parties' original intention, discussions, and subsequent performance thereunder.

**D. The Trial Court Expressly Observed, on the Record, that Defendants' Offer to Pay \$3,000 to Mr. Romero Did Not Constitute an Admission of "Undisputed Wages."**

Appellant's second claim is based on a wholly disingenuous characterization of Secret Gardens' offer to pay Mr. Romero \$3,000 as an "undisputed" wage claim. Secret Gardens never admitted to owing Mr. Romero *any* amount of wages and has insisted at every stage of this litigation (including at trial) that this claim for \$3,000 was very much disputed.<sup>145</sup>

Appellant makes this misleading assertion of "undisputed" wages based almost entirely on Secret Gardens' response to Request for Admission (RFA) No. 1, in which Secret Gardens admitted that they were, at one point, preparing to pay Mr. Romero \$3,000.<sup>146</sup> This argument ignores that, in RFA No. 2, Appellant asked Secret Gardens to further admit: "Defendants decided not to pay plaintiff the \$3,000 in wages once they received the letter from Plaintiff's lawyer."<sup>147</sup> This is where Secret Gardens answered and clarified: "**Deny. Defendants were preparing to**

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<sup>145</sup> See e.g. VRP Vol. I (5/17/19) at 13:2-18 (Respondents' counsel explaining explicitly that the \$3,000 was offered *because* Defendants lacked records at that time to refute the claim, and clarifying unequivocally, "**It is [Defendants'] position that [Mr. Romero] has been paid all the wages he is owed.**").

<sup>146</sup> CP 1106-1113.

<sup>147</sup> *Id.*

**pay Mr. Romero \$3,000 because Mr. Romero had stated that that was how much he believed he was owed to him from his employment with Secret Gardens; lacking sufficient records to refute that claim at that time, the Defendants were preparing to pay the requested amount.”<sup>148</sup>**

This response reflects classic settlement discussion. To avoid the risk of defending against a future wage claim, Ms. Klein offered to pay Mr. Romero \$3,000 to essentially go away, fearing she lacked sufficient evidence at that time to defeat such a claim. This does *not* mean that the claim is undisputed. However, before payment could be made, Mr. Romero sent a Demand Letter, demanding over \$100,000 in damages.<sup>149</sup>

Secret Gardens’ response to this RFA constitutes the sole evidentiary basis for Appellant’s allegation that Secret Gardens “admitted” that it owed \$3,000 of “undisputed” wages to Mr. Romero.<sup>150</sup> Appellant failed to elicit any testimony at trial to support his errant interpretation of Secret Gardens’ RFA response. In fact, at trial, when Appellant’s counsel attempted to question Ms. Klein further about the nature of this \$3,000 offer, Respondents’ counsel objected, pointing out that this offer clearly

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<sup>148</sup> *Id.* (emphasis added).

<sup>149</sup> See Tr. Ex. 2.

<sup>150</sup> Appellant also bases this claim the Demand Letter that his attorney prepared, which references undisputed wages, and Appellant’s own Complaint. See Br. of App’t at 42. Neither of these documents prove that Secret Gardens believed that these wages were undisputed, only that Appellant continued to erroneously characterize them as such.

constituted confidential settlement discussions, protected under ER 408.<sup>151</sup> The trial court agreed that Respondents' answer to the RFA "does appear to be talking about settlement ... this looks like they're trying to settle the case."<sup>152</sup> Ultimately, however, the trial court overruled Respondents' objection, reasoning that it being a bench trial she would simply allow Appellant's counsel additional questioning. Despite this invitation to proceed with his line of questioning, Appellant's counsel declined and stated, "I'd like to move on to a different topic."<sup>153</sup> Appellant did not ask Mrs. Klein any further questions on this issue.

These alleged "undisputed" wages arose a second time during Appellant's direct examination of Mr. Romero. Appellant's counsel began questioning Mr. Romero about how many hours he worked during his employment, and Respondents objected as to relevance of such testimony. Appellant's counsel insisted that such testimony was relevant to Mr. Romero's claim that Respondents admitted to \$3,000 of "undisputed wages."<sup>154</sup> The trial court asked Appellant's counsel, "All right. Now that I'm there, go to the next step **and tell me where they admit to undisputed wages.**"<sup>155</sup> Again, Appellant's counsel referred the

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<sup>151</sup> See VRP Vol. I (8/15/19) at 61:22-68:11.

<sup>152</sup> *Id.* at 68:6-11.

<sup>153</sup> *Id.* at 69:23.

<sup>154</sup> VRP Vol. II (8/20/19) at 349:20.

<sup>155</sup> *Id.* at 355:1-3.

court to Secret Gardens' Response to RFA No. 1. The trial court disagreed with Appellant's characterization of the RFA response, and explained again, on the record:

**The way I am reading this is it was in terms of settlement.** If I read Request for Admissions I and II [sic], they're going to pay him \$3,000 in wages to settle it. They felt like they didn't have records to refute the claim, and they were preparing to pay it. It doesn't say anything that they believe the \$3,000 represented how many hours he worked.<sup>156</sup>

Appellant's counsel asked no further questions about this issue and concluded his direct examination of Mr. Romero. No other testimony or evidence was ever elicited to support Appellant's claim for \$3,000.

Thus, Appellant's argument that the trial court failed to address the alleged \$3,000 of "undisputed" wages owed to Mr. Romero is a farce. The trial court squarely addressed this issue in her oral ruling. Moreover, the *only* party to characterize the \$3,000 offer as an "undisputed wage claim" at any point in this litigation was Mr. Romero and his own attorney. Appellant's misreading of Secret Gardens' RFA responses, and his inability to distinguish between an undisputed claim for wages and an offer of settlement, does *not* create any legal right for additional wages. The trial court properly concluded, explicitly and on the record, that the

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<sup>156</sup> *Id.* at 356:8-15.

\$3,000 described in the RFA response was not undisputed and appeared to constitute a settlement offer.

## V. CONCLUSION

The trial court rendered its decision based on detailed findings of fact and conclusions of law that were abundantly supported by the evidence presented at trial. Appellant is misguided in his insistence that the Court of Appeals should step into the shoes of the trial court and reweigh this evidence. The trial court made a thorough and reasoned decision as to Appellant's claims and found Mr. Romero simply was not credible. Given that all the trial court's findings were more than adequately supported by the record, this decision should not be upset on appeal. The trial court's order should be affirmed.

Dated this 19th day of August, 2020.

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