

NO. 65453-5-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

ISAIAS RAMIREZ and MARIO HERNANDEZ, on behalf of themselves
and all others similarly situated,

Plaintiffs,

v.

PRECISION DRYWALL, INC., a Washington corporation; JAMES LEA, individually
and the marital community of James Lea and Jane Doe Lea; DENNIS LEA, individually
and the marital community of Dennis Lea and Jane Doe Lea; KELLY WASKIEWICZ,
individually and the marital community of Kelly Waskiewicz and John Doe Waskiewicz,

Defendants,

BRIEF OF APPELLANTS

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DIVISION I

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I. INTRODUCTION

Defendants Jim Lea, Dennis Lea, and Kelly Waskiewicz (the “Individual Defendants”) were deprived of a fair trial through erroneous conclusions and instructions by the trial court that they could be liable as “employers” in addition to the corporate entity that employed the crew members at issue here, Precision Drywall, Inc. They were further deprived of a fair trial and neutral jury by the misconduct of Plaintiffs’ counsel in closing by referring to matters unsupported by the record, and alleging in violation a pre-trial order his own clients’ poverty and Defendants’ wealth, and asking the jury to make an award because Defendants did well “on the backs of these employees” who are “living week to week.”

The jury deliberated for less than one court day despite a five week trial and dozens of issues, which demonstrates the prejudicial effect of the trial court’s instructions and counsel’s misconduct.

II. ASSIGNMENTS OF ERROR

The trial court erred in the following respects:

A. Concluding at summary judgment the Individual Defendants are liable employers under the IWA, and as a closely held company, when the IWA, but both statute and WAC, limits the responsible employer to only the employing entity, and there is no basis in law to hold those in a closely held corporation more liable than any other corporation.

B. Including in its jury instructions its erroneous conclusions at summary judgment, thus misleading the jury and *de facto* directing the jury to find the Individual Defendants are “employers” for all other claims.

C. Instructing the jury that the Individual Defendants could be liable as the “employer” for overtime and rest break claims and that liability could even attach even if they had no control of the employment relationship, and in not instructing that they could be liable only if RCW 49.52.070 was met.

D. Failing to instruct the jury that for exemplary damages under RCW 49.52.070, the jury needed to find that any non-payment of wages due was done “willfully *and* with the intent to deprive” as the statute states.

E. Submitting to the jury the question of whether deductions made for the crew members’ purchase of personal tools of the trade violated RCW 49.52.070, and not granting Defendants’ CR 50 Motion.

F. Not granting a new trial when at the very end of rebuttal summation, in line with “the principal of last heard, longest remembered,” and in violation of the trial court’s order, alleged a financial disparity between Plaintiffs and Defendants, that such disparity occurred because Defendants violated the law and made money “on the backs of these employees,” and asked the jury to make an award as a result, when such reference is presumptively prejudicial and the trial court concluded it “was in error” and not “proper” for which it otherwise sanctioned counsel.

III. STATEMENT OF THE CASE¹

A. STATEMENT OF FACTS

1. PRECISION DRYWALL, INC.

The seeds of Precision Drywall, Inc. were planted in the 1960's after Jim Lea and Dennis Lea moved to Washington. RP 1765:11-1768:19 and 1688:21-169:25. For a number of years, the two of them performed all of the work themselves. *Id.*, and RP 1688:21-24, 1689:2, 1766:1-18. The company "grew a little at a time" but always remained a small, family company. RP 1768:4-1769:25, 1690:12-25. Jim and Dennis are the sole owners and two primary officers (RP 1575:19-1576:1 and 1680:3-8), and were the only two responsible for operation and management of the company, the finances, the compensation to employees, and all of the "bidding" to obtain work. RP 1576:2-16 and 1680:8-24.

Precision's office is essentially a small box with an open area containing four desks, two separate offices, and a bathroom. RP 1510:10-24 and 833:9-15. Three secretaries worked in the open area, all part-time: Kelly Waskiewicz (Jim's daughter), Cyndie Sapp (Jim's niece and Dennis's cousin; RP 832:5) and Sheena Learned (Jim's granddaughter). RP 812:23-814:13; 1523:11-14 ; 844:16-19; and 1134:16-1135:1.

¹ "RP" refers to the "Report of Proceedings; "CP" refers to the "Clerk's Papers."

Ms. Waskiewicz's primary duty was to process payroll. RP 816:13-16 and 822:1-8. Ms. Waskiewicz testified that she did not "do the timecards" (RP 835:13) and didn't "know what the foremans (*sic*) did" (RP 1501:10). She inputted the gross dollar amount from the timecards the foremen prepared into the computer to calculate payroll deductions. RP 825: 13, 850:19-852:3, and 860:8-25. While Ms. Waskiewicz signs the paychecks (RP 7, 864:3-5), she had no direct involvement or communication with the employees. RP 850:19; RP 12, 1495:11-1498:24; 1501:10; and 1516:8-9 ("I don't deal with employees").

Although Ms. Waskiewicz worked only part time processing payroll, Jim and Dennis appointed her as a corporate officer, Secretary, solely for convenience to them. RP 1517:6-1519:7 and 1775:18-1777:15. Whenever Jim and Dennis were unavailable, she could sign a release of lien rights so that the company could receive its final payment. *Id.*

Ms. Waskiewicz had no ownership in Precision, did not manage the company in any regard, did not communicate with or supervise the crews, and Jim did not discuss with her any decisions he made. RP 1518:24-15197; and 1500:19-22 (Jim "wouldn't discuss that with us"), 1501:10 ("I don't know what the foremans did"). Moreover, only Jim and Dennis attended the annual corporate meetings. RP 1774:22-1775:17, 1685:13-22, and 1518:24-1519-7.

2. DRYWALL WORK AND CREWS

In approximately the mid-1980s, the drywall industry shifted from individuals to pre-formed crews typically comprised of family members or friends. RP 1770-1772:19, 493:9-23 Crews would solicit Precision for work, offering their size and experience. *Id.* The crews were close-knit, often relatives or friends, or both. *See, e.g.,* RP 31:6-32:10 (two brothers, one cousin, and one friend), and 239:2 (taping crew of husband and wife).

The crews align into the two discrete steps of drywall, ones that hang (or install) the drywall onto the wood members of the framing, and ones that finish the drywall by applying tape and joint compound, or “mud.” *See, e.g.,* CP 29-31, CP 44-46, CP 64-65, and 82-85. Precision used two foreman for the hanging crews, Ray Sapp and Carl Muckelrath, and one foreman for the tapers/finishers, Tom Hauck. RP1031:14-24, 1254:1-20, 446:21-448-23, and 1254:1-6. An illustrative video of hanging was played for the jury, and Mr. Sapp provided a detailed description of the process to hang drywall. RP 1865:9-1877:18. An illustrative video and photographs were shown to the jury, along with a detailed description by Mr. Hauck, of the steps and process to finish. RP 2268:9-2287:17.

All crews enjoy a freedom and independence seldom found in any other employment, setting their schedule, taking as many or as few breaks, and in however duration, as they choose, working at a pace of their

choosing, etc. *See, e.g.,* CP 44 (§4), 50 (§26), 66 (§9-10), and 83 (§5); RP 577:20-579:11, 2185:5-8. Precision paid more than other companies (RP 1725:1-4). One crew member testified in working for Precision, his crew “entered glory.” RP 2449:17-21. For this reason, some crews left Precision only to return. *See, e.g.,* RP 32:11-33:5, 1931:19-1932:2,

The drywall industry has always paid the crew members by the square footage involved. RP 1581:23-24, 1682:15-19. However, the amount of hours always “did have something to do with the drywall business” (RP 1585:25-1586:3), and Precision “kept [hours] at some point” (RP 1583:13). In the mid-1990s, Washington state changed its policy and practice such that the drywall companies were required to keep track of and report the square footage involved; hours were no longer important or necessary in reporting to the state. RP 869:19-870:10, 910:20-912:16, 1432:1-1433:23, 1484:4-6, 1578:7-1584:5.

While Precision unfortunately was therefore not recording the hours the crews worked, it was aware that the overtime premium was required to be paid if the crew members worked more than 40 hours in a given week. RP 1605:10-22 and 1610:19-22. Precision clearly had a policy that no crew member was to work more than 40 hours per week. RPC 1606:18-19 and 1587:21-1588:4. It never asked or encouraged any crew to work overtime. RP 1586:5-7 and 1704:19-21.

For reasons substantiated at trial, Precision, and Jim and Dennis, had every reason to believe that crew members were not working overtime.

RP 1813:13-1816:10, 1704:7-1706:2, and 1315:23-25. These included:

- *The work was very simple, easy, and straightforward, such that it could be and was accomplished in less than 40 hours (RP 317:19-319:4, 1093:2, 1096:10-21, 559:17-25, 1390:15-1396:10, 1802:14-1805:7, 1813:13-1815:5, 2094:16-18).*
- *The crews were both experienced and efficient, and by having worked for Precision for so long, the crews were quite familiar with the work, making it more efficient (RP 319:5-321:19, 493:9-23, 1004:4-1009:23, 1051:10-21, 1065:17-20, 1093:7-1094:24, 1101:8-10, 1112:3-5, 1324:3-1329:20, and 1815:6-21).*
- *Both Jim and Dennis, as well as all three foremen, all worked in the past and knew from their own experience the work can and was accomplished without overtime (RP 446:15-448:23, 554:8-21, 1092:13-1093:2, 1117:16-22, 1254:1-25 and 1330:14-1331:22).*
- *Precision limited the amount of work to each crew. i.e. the number and size of houses in relation to size and experience of crew (RP 1035:18-1038:22, 1051:10-1052:10, 509-14:24, 1382:1-1386:13).*
- *Many times, the hanging crews would finish a house by early afternoon, e.g. 1:00pm (RP 1035:8-11 and 7-25, 1066:22-23, 1953:15-1954:12, 2057:16-19, 2095:9-10, 2230:20-23).*
- *The number of hours a crew could work were limited, including no Sundays at any time and Saturdays only with permission (RP 499:18-501:5, 503:14-23, 943:16-18, 967:13-968:4, 979:6-980:4, 1038:18-22, 1089:3-14, 1073:12-14, 1091:3-24, 1258:14-23, and 1312:21-1313:6 and 1336:19-25).*

- *If Precision was ever busier, they simply added crews or used subcontractors, not assign more work to an existing crew (RP 1257:17-21, 1330:6-13, and 1787:6-1788:4).*
- *The foremen constantly communicated and visited often with the crews, and thus aware of the hours being worked, saw that breaks were taken and that the crews were relaxed (not pressured or stressed), and the like (RP 441:5-16, 454:7-16, 455:10-456:1, 463:21-464:25, 469:21-470:20, 499:18-501:5, 537:5-17, 1033:3-7, 1043:17-23, 1051:10-21, 1065:17-20, 1087:8-20, 1268:4-7, 1330:14-1331:25).*
- *No crew member ever complained or raised an issue at any time (RP 41:4-10, 1087:23-25; 1783:12-1785:25).*

In addition, Defendants presented as witnesses nine hangers (RP 1927-29, 2051, 2092, 2104, 2144, 2172, 2226, 2250, 2594) and seven tapers/finishers (RP 2326, 2399, 2421, 2497, 2509, 2564, 2640-42).

Virtually all testified to the hours they worked and at a production rate that demonstrated very little overtime. RP 3155:5-3159:6, 3164:13-3170:8.

However, the jury awarded overtime damages in the full amount sought by Plaintiffs, thereby applying an assumed production rate offered by the Plaintiffs (CP 580 and 585), despite several deficiencies. First, as applied, the assumed rate yielded some crews working implausible hours, e.g. 126 in seven days. RP 739:25-743:6. Second, Plaintiff Ramirez testified that his crew worked hard, physical labor at least roughly 67 hours per week, every week, with little or no breaks. RP 207:25-208:17,

223:1-227:3. This was impeached by members of his own crew, among others. RP 1965:2-1966:17, 1972:14-1975:16, 1979:12-1981:12; 2236:20-2239:20. Third, Plaintiffs did not solicit from the crew members it presented any production rate, but rather one hanger they presented testified to a rate 480% greater than the rate Plaintiffs used. RP 317:19-321:19 (15-18 sheets per hour, or 720-864 sf per hour, vs. 150 sf per hour at RP 684:4-10).

The jury also awarded Plaintiffs one-half the amount sought for deductions related to the tools purchased by the crews. CP 578-575. Like virtually every aspect of the construction industry (and others), the worker supplies his personal tools of his or her trade. *See, e.g.*, RP 479:7-485:25, 1790:1-1794:9, 1730:1-1732:3, and 41:11-43:1. As a matter of convenience to the crews, Precision allowed crews to purchase their tools on the company's credit account at a supply house. *Id.* The crew members typically asked first, and either the crew picks up the tool or the foreman will and deliver it to the crew. The tools are the property of the crews, and the crew keeps the tool. *Id.* The exact amount of the tool, with no mark-up or interest, is then deducted from the crew's earnings. *Id.* and 854:3-859:21. The deduction is reflected and demonstrated in Precision's records by the supplier invoice and on the timecards. *Id.*

B. STATEMENT OF PROCEDURE

In August 2008, Plaintiffs commenced the instant action, and filed their Amended Class Action Complaint asserting six causes of action against Precision and three individual, Jim, Dennis, and Ms. Waskiewicz (the latter as “Individual Defendants”). CP 1-15. The trial court certified Plaintiffs’ lawsuit as a class action in April 2009. CP 598 and *see* CP 16-192 (Defendants’ declarations re class cert. submitted March 23, 2009).

The parties filed various motions for summary judgment; one is relevant to this appeal. Plaintiffs moved for partial summary judgment to establish all Defendants failed to maintain certain records, that the deductions regarding the crew members’ tool purchases violated the WAC, and that the Individual Defendants were jointly and severally liable for the same. CP 193-415 and CP 455-458. The basis for liability regarding deductions for tool purchases was WAC 296-126-028. CP 205-206. The basis for personal liability of the Individual Defendants was that they qualified as the “employer,” where the Plaintiffs analogized to, and sought to import, the expansive definition of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (“FLSA”). CP 201-202.

The trial court initially granted the motion in part as to the failure to keep records (CP 455-458). After a continuance for further depositions (CP 453-454 and CP 451-452), the trial court granted the motion on

December 17, 2009 (CP 455-458), hereafter as the “Dec. 17 SJ Order re Deductions,” attached hereto as Appendix A. The findings and conclusions of the trial court were then incorporated into the jury instructions. CP 603.

Prior to trial, Plaintiffs moved *in limine* to exclude all evidence and argument referring to financial status, which the trial court granted. CP 482-489. Yet, during trial, Plaintiffs solicited testimony as to the profit for each house and the hundreds of houses completed each year. RP 1596:6-11, 1599:8-1601:1, 1612:19-1613:14, 942:22-944:25.

In summation, Plaintiffs’ counsel referred to his own clients as being unable to spell their name. RP 3116:21-23. Then, at the very end of the rebuttal summation, Plaintiffs’ counsel alleged his clients were “likely living week to week,” and that all Plaintiffs were asking for was approximately \$3,000 to \$4,000 for each crew member, “which wasn’t much.” RP 3185:4-3186:2. In juxtaposition, counsel alleged “[t]hese folks did very well I’m sure between 2005 and 2009 doing 1500...,” to which an objection was sustained. *Id.* Counsel nonetheless continued, stating, “1500 houses they were doing per year on the backs of these employees.” *Id.*

In addition, Plaintiffs’ counsel previously asserted in summation that Defendants had “an expert on productivity rates” (Mr. Cowin), who “must have had something to say about productivity rates.” RP 3181:7-25. Counsel continued, alleging Mr. Cowin provided a number (i.e. a

production rate) and that Defendants “didn’t like the number.” *Id.* From this purported dislike, counsel alleged: (1) that the number was unfavorable to Defendants (“it wasn’t good for them” and “they didn’t like the number”), and (2) Defendants told its damages expert, Peter Malishka, “don’t read” Mr. Cowin’s testimony (“they told him don’t read it because they didn’t like the number. They didn’t like the truth.”). *Id.* The jury deliberated for less than one court day. RP 3186, RP 3231.

Defendants moved for a new trial, which was heard and decided on May 7, 2010. CP 538-563, and May Hearing at 3:13. The trial court concluded Plaintiffs violated its order *in limine* (May 7 Hearing at 6:13-16), that reference to financial status and disparity “was in error” and not “proper” (*id.* at 7:5, 13:3-4). The court refused to award fees for the rebuttal portion of summation (*id.* at 12:21-13:6), but did not grant Defendants’ motion for a new trial under CR 59 and/or 60.

IV. AUTHORITY AND ARGUMENT

A. DEC 17 SJ ORDER MISCONSTRUED THE IWA

1. STANDARD OF REVIEW

Review of summary judgment is *de novo*, with the appellate court performing the same inquiry as the trial court. *See, e.g., Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). In addition, *de novo* review is also appropriate because on summary judgment the trial court

interpreted a statute, specifically RCW 49.12.005. *Philippides v. Bernard*, 151 Wn.2d 376, 383, 88 P.3d 939 (2004).

All facts and reasonable inferences therefrom are viewed most favorably toward the nonmoving party. *Id.* Since the function of summary judgment is not to resolve factual disputes, the trial court is not to make factual findings and any such findings "are superfluous and may not be considered to the prejudice of the [non-moving party]." *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978).

2. INDIVIDUALS ARE NOT "EMPLOYERS" UNDER THE IWA

The trial court should have determined that the Individual Defendants were not, as a matter of law, an "employer" under the Industrial Welfare Act, Chapter 42.12 RCW (the "IWA"). CP 575 (appendix A). While the Order does not specifically cite the IWA, all "wage and hour violations" identified in the Order are of WAC Chapter 296-126. CP 575:5-10. The trial court identified WAC 296-126-040 for the first violation (CP 575:5-6), and the other violations it found related to the deductions for the crews' purchase of their personal tools (CP 575:7-10). Further, Plaintiffs relied upon only WAC 296-126. CP 11 and 205:1-21.

Chapter 296-126 of the WAC is part of the IWA--the title states it sets the "standards...for all occupations subject to Chapter 49.12 RCW," and WAC 296-126-001(1), entitled "applicability," states that "[t]hese rules

apply to employers and employees in the state as defined in RCW 49.12.005(3) and (4).”

Thus, by concluding that the Individual Defendants violated WAC Chapter 296-126, the trial court determined the Individual Defendants are “employers” under the IWA. This was error because the IWA by definition limits the responsible employer to the employing business entity:

(b) On and after May 20, 2003, 'employer' means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees...

RCW 49.12.005(3)(b) (bold added), and WAC 296-126-002.

Of course, it is the business entity that is “engaging in business”; the officers and employees are merely agents and as agents are distinct from the corporate entity and will not be liable for the corporate debts except in extraordinary circumstances. *See, e.g., Truckweld Equip. Co. v. Olson*, 26 Wn.App. 638, 644, 618 P.2d 1017 (1980). Likewise, under agency law, the principal-employer is liable for the acts of its agents and employees; the agents and employees are not personally liable. *See, e.g., Houser v. City of Redmond*, 16 Wn.App. 743, 747, 559 P.2d 577 (1977).

Thus, the IWA by definition limits the responsible “employer” to the business entity. Two Divisions of this Court interpreted the

substantively identical definition in WISHA, RCW 49.17.020(4), and held that only the business entity is the “employer.” *Smith v. Myers*, 90 Wn.App. 89, 93-94, 950 P.2d 1018 (1998), citing *Rodgers v. Irving*, 85 Wn.App. 455, 462-463, 933 P.2d 1060 (1997).

Therefore, by definition, the Individual Defendants were not “employers” and could not be liable for any violations of the IWA. Further error lies in the trial court disregarding the corporate form because the court found Precision Drywall to be a closely held corporation. CP 575. This was error for four reasons.

First, Plaintiffs never asserted a cause of action for corporate disregard [CP 1-15 (Am. Cmplnt.)], and the doctrine was never raised in Plaintiffs’ Mtn. for SJ [CP 193-210]. Second, no facts were presented or found to meet the two requisite elements. *Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 410, 645 P.2d 689, 692 (1982). Third, as noted above, officers, directors, and employees agents are separate and distinct from the corporate entity, and will not be liable for the corporate debts and obligations except in extraordinary circumstances. *See, e.g., Truckweld Equip., supra*, 26 Wn.App. at 644.

Fourth, the law treats large and small corporations equally, just as it treats equally the officers, directors, and shareholders of a closely held company the same as those in a corporation with publically traded stock.

See, e.g., RCW 25.15.060 (piercing veil of LLC same as for corporation); *Olympic Fish Products, Inc. v. Lloyd*, 93 Wash.2d 596, 599-600. 611 P.2d 737 (1980) (officers and directors of closely held corporation not treated differently under law and held to same standard in managing corporate affairs); and *Eagle Pacific Ins. Co. v. Christensen Motor Yacht Corp.*, 85 Wn.App. 695, 708, 934 P.2d 715 (1997).

The trial court's error was then exacerbated when the trial court then included its errors in its instructions to the jury. CP 603 (inst. 14). In instruction 14, the court included its ruling that the Individuals are "employers...because each acted directly or indirectly in the interest of" the business entity (CP 603), then defined "employer" for *all* of Plaintiffs' claims as one who "acts directly or indirectly in the interest of the employer." (CP 601, inst. 12). This was a *de facto* direction to the jury that the Individual Defendants were the "employer" for all claims.

B. ERRONEOUS JURY INSTRUCTION DEFINING EMPLOYER

1. STANDARD OF REVIEW

The sufficiency of a jury instruction is reviewed *de novo*, and a sufficient instruction is one that: (1) allows the parties to argue their theory of the case, (2) is not misleading, and (3) when read with the instructions as a whole, properly informs the jury of the applicable law. *See, e.g., Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000). In addition,

because the instructions being challenged involve statutory interpretation, *de novo* is the standard of review. *State v. Becklin*, 163 Wn.2d 519, 525, 182 P.3d 944 (2008). Where an error of law in a jury instruction prejudices a party, the trial court's decision is to be reversed. *See, e.g., Hue v. Farmboy*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

2. AGENTS OF THE EMPLOYING ENTITY ARE NOT LIABLE

Instruction 12 was proposed by the Plaintiffs and given by the trial court without change. CP 601 (copy at Appendix B). Defendants do not challenge the first sentence. The remaining sentences are an inaccurate statement of the law, mislead the jury, and deprived Defendants from arguing their theory. The second sentence was derived from the MWA, 49.46.010(4), and although it correctly quotes the statute it is misleading because it allowed the jury to infer and conclude that individuals can also be the employer, in addition to the business entity. The jury was instructed in the first sentence that the employer is the business entity, then in the second sentence instructed that the employer "also includes" certain individuals beyond the business entity itself.

a. The MWA Description of "Employer" is Ambiguous

The MWA describes the "employer" in RCW 49.46.010(4). The corresponding Administrative Code for the MWA, WAC 296-128, *et. seq.*, provides neither a description nor any guidance. The statute is ambiguous

because it is open to more than one interpretation. *State v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002).

On one hand, “[t]aken literally this language would support liability against any agent or employee with supervisory power over other employees.” *Donovan v. Agnew*, 712 F.2d 1509, 1513 (1st Cir. 1983). Construing the MWA so broadly leads to an absurd or strained result, which courts will not do. *See, e.g., McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004).

On another hand, the statute could be construed to impose liability upon the actual employing entity as in the IWA and WISHA. *See, e.g., Smith, supra*, 90 Wn.App. 89, 93-94. A third possible construction is what Plaintiffs implied to the trial court at summary judgment, that Washington adopt the “economic realities” test ascribed by federal courts applying the Fair Labor Standards Act, 29 U.S.C. 201, *et. seq.* (“FLSA”), e.g. those with “operational control of significant aspects of the corporation’s day-to-day functions; the power to hire and fire employees; the power to determine salaries...” are also the “employer.” *Lambert v. Ackerley*, 180 F.3d 997, 1012 (9th Cir. 1999); CP 201-202 (Plaintiffs’ Mtn. for SJ), and Plaintiffs relied on *Lambert* in supporting their proposed instruction.

Appellants could locate no Washington decision interpreting the MWA's description of "employer." Since the MWA was based upon the

FLSA, this Court may look to federal cases, however because the FLSA and MWA are not identical, federal decisions are merely persuasive and this Court is not bound by them. *Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 897, 639 P.2d 732 (1982); and *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 298, 996 P.2d 582 (2000).

The Legislature's intent of the MWA was to simply include those who inculcate the employer's responsibility to pay wages, identifying in RCW 49.52.070 when and which individuals may be personally liable.

b. An Employer Under the MWA Should not Include Individuals Beyond the Business Entity

By its language, the MWA's description of "employer" does not encompass individual, personal liability when the employer is a corporate entity. The statute first lists potential business entities ("individual, partnership, association, corporation"), then after the disjunctive "or" identifies "any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee." The conjunction "or" is disjunctive, signifying an alternative. *See, e.g., Caven v. Caven*, 136 Wn.2d 800, 807-808 and 810, 966 P.2d 1247 (1998); and *State v. Johnson*, 35 Wn.App. 380, 387-88, 666 P.2d 950 (1983).

With the disjunctive "or," the Legislature intended that regardless of form of the business, either the employing business entity or employing

person is the “employer” under the MWA. If the Legislature intended that both the business entity and individuals be the responsible “employer,” it would have used the conjunction “and.” Both the disjunctive and presentment of alternatives makes sense because an employer cannot be both a “partnership” *and* a “corporation.” Likewise, the “employer” cannot be both a “corporation” *and* individual persons .

To interpret the statute as describing an employer as both a corporation *and* “persons acting in the interest of the employer” would rewrite the statute. It is “imperative that [courts] not rewrite statutes,” *State v. Groom*, 133 Wn.2d 679, 689, 947 P.2d 240 (1997) (citation omitted), nor “add words or clauses to an unambiguous statute when the legislature has chosen not to include that language,” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Rather, “Courts should assume the Legislature means exactly what it says.” *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

As this Division once held and affirmed by the Supreme Court:

it would be incongruous to hold that any possible agency relationship between an employer and an employee can make that employee personally liable for the wages of other employees.

Ellerman v. Centerpoint Press, 142 Wn.2d 514, 522, 22 P.3d 795 (2001) (where trial court determined that the manager was not the “employer.”).

Further, by use of the word “included” in the statute, the Legislature intended that the employing entity be liable for the acts of its agents “acting directly or indirectly in the interest of [the] employer.” For example, the corporate employer is liable for the supervisor who fails to account for or pay overtime, it does impose liability on the supervisor.

Inculcating the corporate entity is also consistent with both the contractual nature of the employment relationship and the stated purpose of the MWA. Even when at-will, the employment relationship is still contractual. *Lake Land Employment Group, LLC v. Columber*, 804 N.E.2d 27, 32 (Ohio 2004) (“at-will employment is contractual in nature”); and *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 838, 991 P.2d 1126 (2000). It is the business entity that creates the employment relationship and is the party to the “contract.”

Likewise, the stated purpose of the MWA is to set “minimum standards of employment...to establish a minimum wage for employees of this state to encourage employment opportunities within the state.” RCW 49.46.005. Encouraging and ensuring “employment opportunities within the state” is not furthered by making individual supervisors personally liable, but holding the business entity liable for the acts of its supervisors does.

c. The Legislature Expressly Identified What Individuals Will be Liable and When in RCW 49.52.070

As our state's Supreme Court just recently expressed:

The legislature intended, under RCW 49.52.070, to impose personal liability on the officers...because the officers control the financial decisions of the corporation. There are many examples that highlight the need for such risk of personal liability...

Morgan v. Kingen, 166 Wn.2d 526, 536, 210 P.3d 995 (2009) (bold added); and see *Ellerman, supra*, 142 Wn.2d at 520-523.

RCW 49.52.070 contains the Legislature's expression of intent as to when and why an individual may be liable—RCW 49.52.070 identifies which individuals (officer, vice principal, or agent) and in what circumstances (when s/he violates either RCW 49.52.050(1) or (2)). RCW 49.52.070 must be read and harmonized with RCW 49.46.010. *In re Detention of Boynton, supra*, 152 Wn.App. 442, 452, 216 P.3d 1089 (2009) (citations omitted); and *Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) .

By identifying specific individuals, the Legislature identified which individuals may be personally liable for the non-payment (or rebates) of wages. The Legislature then demarcated the individuals from the employing entity by including “employer” in the statute and using the conjunction “and.” In *Morgan, supra*, 166 Wn.2d at 536, the Court

highlighted the conjunction “and” and noted the distinction and demarcation between the “employer” (i.e. the employing entity) and the individuals who control the company and employment relationship.

Likewise, in *Ellerman, supra*, 143 Wn.2d at 518 and 521-522, the trial court found that the manager of the employing entity was not the “employer” and further rejected the employee’s assertion that the manager was automatically liable under RCW 49.52.070 as a manager. By its holding, *Ellerman* recognized that individual liability is limited, and properly circumscribed by RCW 49.52.070 and to only those agents and vice-principals who exercise control of the direct payment of wages and act pursuant to that authority. *See also Morgan*, 166 Wn.2d at 536.

If the Legislature intended RCW 49.46.010(4) to include individuals, then there would have been no need to list which individuals have liability in RCW 49.52.070 *in addition to* the employing entity. Likewise, if RCW 49.46.010(4) already defined individuals as the “employer,” then identifying which individuals may be personally liable in RCW 49.52.070 would be superfluous. If Legislature intended to make individuals the “employer” under RCW 49.46.010(4), then it would have simply stated in RCW 49.52.070 that the “employer” is liable for double damages if the non-payment is done “willfully and with the intent to deprive...” RCW 49.52.070 is not simply a statute that allows for

exemplary damages and criminal sanction; it evinces the Legislature's intent to *not* impose general blanket liability upon individuals through RCW 49.46.010(4). The specific statute controls over the more general.

Further, it is an absurd construction that anyone "acting directly or indirectly in the interest of the employer in relation to an employee" would be personally liable, but only "officers, vice-principals and agents" who withhold wages "willfully and with the intent to deprive" may be liable for exemplary (double) damages. Statutes will not be construed to render them meaningless or superfluous. *Boynton, supra*, 152 Wn.App. at 452.

Moreover, to construe RCW 49.46.010(4) as including individuals as the liable employer would make individuals unwitting sureties or guarantors of wages. Those who merely "act directly or indirectly...in relation to an employee" are strictly liable as personal guarantors or sureties of wages, a punitive measure that would disturbingly chill one's desire to either take or advance to a position that had some measure of management or control over employees, however slight.

Washington's decisional authority also demonstrates that individual liability is based and premised upon the Anti-Kickback statute, not whether the individual is also the responsible "employer" under the MWA (RCW 49.46.010(4)). *See, e.g., Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 158-164, 961 P.2d 371 (1998), (analyzing individual liability under RCW

49.52.070 and whether financially unable to pay wages a defense); *Morgan, supra*, 166 Wn.2d at 536-538 (same); and see additional examples *infra*, at Section IV.C, pgs. 35-41.

It is because of the Anti-Kickback statute that Washington need not rely on the FLSA or its cases. The FLSA contains a conspicuous deficiency Washington does not—the scheme provides no definition “as to the limits of the employer-employee relationship.” *Andrews v. Kowa Printing Corp.*, 838 N.E.2d 894, 901 (Ill. 2005), citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728-29, 67 S.Ct. 1473, 1475-76, 91 L.Ed. 1772 (1947). Because of this deficiency in the FLSA, “federal courts crafted the economic realities test.” *Donovan, supra*, 712 F.2d at 1513.

Since Washington’s employment statutes do not suffer from that deficiency, we need not to resort to the FLSA’s “economic realities” test.

d. States with Similar Statutes Concluded Individuals are Not the Employer

Three other states with wage statutes substantially similar to Washington previously addressed this issue squarely, and all three held that individuals are neither personally liable nor personal guarantors of wages.

First, in *Andrews, supra*, the Illinois Supreme Court addressed the meaning of “employer” as defined in that state’s Wage Payment and

Collection Act. 838 N.E.2d at 886 and 898, referring to 820 ILCS 115/2.² That Act defines “employer” similar to that in RCW 49.46.010(4), as it includes “any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee...” (section 115/2), and further contains a provision of what individuals may be held liable—those “who knowingly permit such employer to violate the provisions...” (section 115/13). *Andrews*, 838 N.E.2d at 898. The Illinois Supreme Court harmonized the two provisions and held individuals are not the “employer” unless the latter section (those who “knowingly permit...”) was established. *Andrews*, 838 N.E.2d at 899-900. The court also held if section 2 included individuals, then section 13 would be “wholly superfluous” since “these people would already be classified as “employers.” 838 N.E.2d at 899-900.

Second, on the question from the 10th Circuit Court of Appeals of “[w]hether officers of a corporation are individually liable for the wages of the corporation's former employees under the Colorado Wage Claim Act, Colo.Rev.Stat. § 8-4-101 *et seq.* (2001),” the Colorado Supreme Court analyzed its wage statute and answered:

² In addition to its “Wage Payment and Collection Act,” Illinois also has a Minimum Wage Law that describes “employer” identical to that in the FLSA and WA’s MWA. 820 ILCS 105/3(c). While the Illinois Supreme Court does not appear to have construed “employer” under its Minimum Wage Laws (820 ILCS 105/3), its analysis in *Andrews* would apply equally since (i) the definition of “employer” in the both laws are virtually identical, and (ii) the key phrase—“any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee”—is exactly identical.

No, under Colorado's Wage Claim Act, the officers and agents of a corporation are not jointly and severally liable for payment of employee wages and other compensation the corporation owes to its employees

Leonard v. McMorris, 63 P.3d 323, 326-327 (Co. 2003).

Colorado likewise has a definition of employer substantially similar to that of Washington, except that the its Wage Act explicitly states the employer is the business entity “and any agent or officer thereof.” The Supreme Court nonetheless found this ambiguous, but since its Wage Claim Act, like Washington’s MWA, “focuses on the liability of the entity who created and maintained the employment relationship,” the statute only inculpated the entity for the acts of its agents. 63 P.3d at 328-329.

Third, Nevada defines “employer” for its wage statutes thus: “[e]mployer includes every person having control or custody of any employment, place of employment or any employee.” NRS § 608.11, *Boucher v. Shaw*, 196 P.3d 959, 961 (Nev. 2008). In *Boucher*, the Nevada Supreme Court answered in the negative the question from the Ninth Circuit Court of Appeal whether individual managers could be liable:

The definition of “employer” under NRS 608.011 is ambiguous. Interpreting this provision, we conclude that NRS 608.011 was not designed to extend personal liability to individual managers of corporations in derogation of existing Nevada corporate law.

Boucher, 196 P.2d at 963-964.

3. EVEN IF PROPER TO APPLY THE FLSA “ECONOMIC REALITY” TEST, THE COURT MISSTATED THE TEST

If it proper for the trial court here to instruct the jury on the “economic reality” test from the FLSA, the trial court did not properly inform the jury of that legal test. Because the FLSA definition provides no limit of “employer,” federal courts crafted the “economic reality” test. *See, e.g., Donovan, supra*, 712 F.2d at 1513. Only if an one “exercises ‘control over the nature and structure of the employment relationship,’ or ‘economic control’ over the relationship,” is that individual an employer within the meaning of the FLSA. *See, e.g., Lambert, supra*, 180 F.3d at 1012 (citation omitted); and *Donovan, supra*, 712 F.2d at 1511-1513.

Here, the trial court’s instruction no. 12 fails to set this forth. Rather, the trial court simply provided the jury with examples of certain activities, then through the disjunctive conjunction “or” prior to the last example, allowed any *one* example to suffice. This was error because liability is determined not by “isolated factors but rather upon the circumstances of the whole activity.” *Boucher v. Shaw*, 572 F.3d 1087, 1090-1091 (9th Cir. 2009). Further, the various factors enunciated by courts are but a “useful framework for analysis...they are not etched in stone and will not be blindly applied. The ultimate determination must be based “upon the circumstances of the whole activity.” *Bonnette v.*

California Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir.1983), abrogated on other grounds by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 539, 105 S.Ct. 1005 (1985).

Moreover, being an officer alone does not subject that officer to liability under the FLSA. Rather, only the officer who has “a significant ownership interest in it, controls significant functions of the business, and determines salaries and makes hiring decisions has operational control and qualifies as an ‘employer’ for the purposes of FLSA.” *US Dep’t of Labor v. Cole*, 62 F.3d 775, 778 (6th Cir. 1995); and *Lambert*, 180 F.3d at 1012.³

Therefore, even if it permissible to analogize to and instruct the jury on the FLSA “economic reality” test, the trial court did not provide the correct test, thereby misleading the jury and denying Ms. Waskiewicz from arguing her theory of the case—she had no control over the employment relationship; she was but a part-time employee.

C. ERROR IN INSTRUCTION FOR EXEMPLARLY DAMAGES

The trial court erred in two respects regarding Plaintiffs’ claim for exemplary (double) damages under RCW 49.52.070: (1) instructing the

³ *Cf.* A minority of cases have stated that an officer may be liable even without any ownership, however in those instances the court found—and premised its finding on the fact—that the particular officer had “pervasive control over the business and financial affairs.” *Donovan v. Sabine Irrigation*, 695 F.2d 190, 194-195 (6th Cir. 1983); and see *Reich v. Circle C Investments*, 998 F.2d 324, 326 and 329 (5th Cir. 1998) (officer in question was “the driving force behind” the company, listing acts that showed complete control over business and employment relationship).

jury incorrectly on the law, failing to give the instructions offered by the Defendants; and (2) denying the Defendants' Motion for a New Trial under CR 59(a) for the giving of an erroneous instructions.

The standard for review regarding jury instructions is set forth above, Section IV. B.1, *supra*. Review of a motion for a new trial is for abuse of discretion, however the question on review is whether "has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial?" *Aluminum Co. of Am. v. Aetna Cas. & Surety Co.*, 140 Wn.2d 517, 537, 988 P.2d 856 (2000).

Any doubts as to whether to grant a new trial or not are to be resolved in favor of granting a new trial. *See, e.g., Arthur v. Iron Works*, 22 Wn.App. 61, 66, 587 P.2d 626 (1978), citing *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973). Further, "greater weight is owed a decision to grant a new trial than a decision not to grant a new trial." *See, e.g., Richards v. Overlake Hosp. Medical Center*, 59 Wn.App. 266, 271, 796 P.2d 737 (1990).

1. FAILURE TO INSTRUCT ON ALL OF THE STATUTORY ELEMENTS

Jury Instruction 33 (CP 613, Appendix C), and the corresponding instructions (nos. 24 and 30, CP 613 and 619), did not properly state the law. RCW 49.52.070 provides for an award of double damages for a

violation of RCW 49.52.050(1) or (2). Plaintiffs sought double damages under subsection (2):

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

RCW 49.52.050(2).

These statutes set forth three elements: (1) an employer must be obligated to pay some compensation “by any statute, ordinance, or contract”; (2) the employer pays a lower wage; and (3) the failure to pay was done *both* [i] “willfully and [ii]with intent to deprive the employee of any part of his wages.” *See also Allstot v. Edwards*, 114 Wn.App. 625, 633, 60 P.3d 601 (2002), and *Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wn.2d 282, 300, 745 P.2d 1 (1987).

Defendants only challenge the third element. By the unambiguous words of the statute, the nonpayment of wages must be both “willfully **and** with intent to deprive the employee of any part of his wages...” The conjunction “and” demonstrates the two distinct elements.

Further, courts have consistently recognized that for RCW 49.52.070 to apply, paying the lower wage must be both willful and done with the intent to deprive. In *Yates v. College Education Bd.*, 54 Wn.App. 170, 176, 773 P.2d 89 (1989), the court described the two as “elements,”

plural, and in *Pope v. University of Washington*, 121 Wn.2d 479, 490-91 (fn 4), 852 P.2d 1055 (1994), the Supreme Court held, “[a]ffirmative evidence of intent to deprive an employee of wages, however, is necessary to establish liability under RCW 49.52.050.” *See also Morgan, supra*, 166 Wn.2d at 533 (“it must be determined whether the failure to pay was willful and done with the intent to deprive...”).

Likewise, in *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 849, 50 P.3d 256 (2002), the Supreme Court stated, “the statute’s requirement that the employer act willfully **and** with intent... would require **substantial evidence** that [the employer] acted willfully **and** with the intent to deprive its employees of their wages” (emphasis added). *See also Flower v. T.R.A. Industries, Inc.*, 127 Wn.App. 13, 37, 111 P.3d 1192 (2005) (liability requires substantial evidence of both elements).

The distinction of the two elements makes sense because an employer may act willfully in that s/he knows what he or she is doing, and intends the act. *See, e.g., Schilling, supra*, 136 Wn.2d at 159-160. However, just because one intends the act—issues a payroll check for less than that owed—does not necessarily mean that one acted “with intent to deprive the employee any part of his wages.”

In both *Pope, supra, and Cameron v. Neon Sky*⁴, the respective employers knew what they were doing, intended to make the disputed deductions, and acted as “a free agent.” However, both courts concluded at summary judgment that even though the deduction was wrongful, since neither acted with the requisite “intent to deprive the employee of any part of his wages,” double damages could not be awarded as a matter of law.

Moreover, without the second element of “intent to deprive,” the good faith dispute defense is rendered moot. When an employer has a legitimate factual or legal basis to not pay what otherwise may be owed, there is no violation of RCW 49.52.070. *Ebling v. Gove’s Cove*, 34 Wn.App. 495, 500-501, 663 P.2d 132 (1983) (“An employer’s genuine belief that he is not obligated to pay certain wages precludes” an award); *Dept. of Labor & Indus. v. Overnite Trans. Co.*, 67 Wn.App. 24, 34-36, 834 P.2d 638 (1992) (good faith legal dispute constituted defense); *Hisle v. Todd Pacific*, 113 Wn.App. 401, 428-29, 54 P.3d 687 (2002) (same); and *Champagne v. Thurston County*, 163 Wn.2d 69, 82, 178 P.3d 936 (2008) (noting that plaintiff did “not allege that bad faith or animus”).

Since instruction 33 only included the first element (willfulness), it failed to set forth the applicable law, which constitutes reversible error. Further, by failing to accurately instruct the jury as to RCW 49.52.050(2),

⁴ *Cameron v. Neon Sky*, 41 Wn.App. 219, 703 P.2d at 315 (1985).

as Defendants proposed (CP 518-520), the trial court deprived Defendants of asserting one of their theories to defend Plaintiffs' claim for double damages. Jury instructions are to be given such that each party is allowed to argue its theory of the case, and where there is substantial evidence to support a party's theory of the case, the party is entitled to have the trial court instruct the jury on that theory. *See, e.g., Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996), and *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 135, 606 P.2d 1214 (1980).

Here, Precision admitted that it had not paid overtime during the class period (e.g. CP 605), thus the jury would almost certainly find any nonpayment was done knowingly and as "a free agent." However, Defendants' theory, consistently asserted both before and during trial, was that its actions were not done with the requisite "intent to deprive the [crew members] of any part of [their] wages."

The consequence of the inaccurate jury instruction is that the jury determined both Precision and its two owners violated RCW 49.52.070. The jury was never instructed that they needed to find, separately for each Defendant (CP 597), each not only acted willfully, but also "with intent to deprive the [crew members] of any part of [their] wages." Without the jury instructions Defendants proposed, they could not argue their theory to defend the claim for double damages.

2. FAILURE TO DETERMINE AS A MATTER OF LAW THAT THE DEDUCTIONS FOR CREW MEMBERS PURCHASING PERSONAL TOOLS OF THE TRADE DID NOT VIOLATE RCW 49.52.070

The trial court erred as to two additional defenses Defendants asserted against RCW 49.52.070 regarding the deductions for the purchase of personal tools: (a) failing to determine as a matter of law that the deductions were not a violation of RCW 49.52.070, and (b) even if there was a factual question, failing to properly instruct the jury on the statutory defense of “knowing submission.”

a. Deductions for Crew Member Purchases of Tools

Both *Cameron, supra*, and *Pope, supra*, hold that deductions from wages to reimburse an employer do not, as a matter of law, violate RCW 49.52.070. As such, the trial court erred in denying the Defendants’ CR 50 Motion and submitting the issue to the jury.

In *Cameron*, a manager increased his salary, allegedly unilaterally; the employer fired the manager and deducted the amount increase. 41 Wn.App. at 220-221. Though the employee was entitled to the increase, the deduction did not violate RCW 49.52.070:

the issue is whether deduction for an alleged debt from wages due upon termination of employment is, as a matter of law, a willful withholding of wages in violation of RCW 49.52.050. We hold that it is not.

41 Wn.App. at 222. The *Cameron* court reasoned that the employer

“freely acknowledged the full amount of wages” due, and did not try to pay him a lower wage, but rather “the deduction was made because of the disputed ‘overpayment’.” 41 Wn.App. at 222. Accordingly, there was no “intent to deprive the employee of any part of his wages.” *Id.*

The Supreme Court then approved the holding and rationale in *Cameron*, addressing a mistaken belief by the University that it was required to make deductions for social security taxes. 121 Wn.2d at 482-485. *Pope* concluded that the University did not dispute the amount of the wage, but was “actually paying the wage to the employee.” 121 Wn.2d at 490. Thus, while ultimately wrongful, the deduction was not as a matter of law a violation of RCW 49.52.070:

Consequently, the University was deducting the amount of a disputed employee debt from wages admittedly owed. This does not deprive the employee of wages under RCW 49.52.050.

121 Wn.2d at 490.

Likewise, Precision did not dispute the amount of the wage and actually paid the wage that was owed. There was no intent to deprive. As such, the question of whether the deductions regarding tool purchases violated RCW 49.52.070 should not have been submitted to the jury.

b. Erroneous Instruction on “Knowing Submission”

RCW 49.52.070 provides a “statutory disqualification” to the either personal liability or double damages, or both:

the benefits of this section shall not be available to any employee who has knowingly submitted to such violations

The statute is conspicuously absent of any other language or standard; it is simply that the employee “knowingly submitted” to a violation. Yet, the trial court included in its instructions additional language:

To meet this exception, an employer must prove that employees deliberately and intentionally deferred to the employer the decision of whether they would ever be paid the wages owed.

Instructions 24 (CP 613), 30 (CP 619), and 33 (CP 622),

Adding the language was error--courts are to apply the statute as written, and may not add language or re-write the statute. *Delgado, supra*, 148 Wn.2d at 727; and *Keller, supra*, 143 Wn.2d at 276. Further, it imposed a higher burden on Defendants (“deliberate and intentional” instead of “knowing”) and confused and misled the jury (deferring a decision the crew members never had).

The trial court appears to have copied its additional language from *Chelius v. Questar Microsystems*, 107 Wn.App. 678, 27 P.3d 681 (2001) and/or *Durand v. HIMC Corp.*, 151 Wash.App. 818, 214 P.3d 189 (2009).

However, in both those decisions, there was a critical distinguishing issue: both employers claimed the employee agreed to defer unpaid wages, which the employees disputed. It was because of the dispute that the courts stated the employers need demonstrate “the employees must have deliberately and intentionally deferred to [the employer] the decision of whether they would ever be paid...” 107 Wn.App. at 682.

Thus, the language was used because of an alleged agreement to defer wages, and because of the dispute whether there was an agreement. In contrast, in this action there was no decision to make about deferral, nor any issue of any agreement to defer. Rather, it was but whether the crew members employees “knowingly submitted” to the deduction from their paycheck, i.e. buying their own personal tools of the trade from future earnings rather than with their own cash or credit.

Since the Defendants submitted evidence that the crew members were aware of and consented to the deductions, but for the erroneous instruction, the jury could have concluded that the crew members “knowingly submitted” to the deductions under the statute.

D. FAILURE TO GRANT NEW TRIAL

1. INTRODUCTION AND STANDARD OF REVIEW

Plaintiffs’ counsel engaged in misconduct by not only referring in closing argument to financial status, but imploring the jury to punish

Defendants because “these folks did very well I’m sure...on the backs of these employees.” RP 3185:18-3186:2. The trial court concluded Plaintiffs violated its pre-trial order (May 7 Hearing at 6:13-16), that reference to financial status and disparity “was in error” and not “proper” (*id.* at 7:5 and 13:3-4). Therefore, the court refused to award fees for the rebuttal portion of summation (*id.* at 12:21-13:6), but erred in failing to grant the Defendants’ motion for a new trial under CR 59 and/or 60.

The standard of review under CR 59 and CR 60 is abuse of discretion. Under CR 60 this means whether the exercise of discretion was manifestly unreasonable or untenable. *Aluminum Co. of Am., supra*, 140 Wn.2d at 537. However, under CR 59, review of the discretion asks “has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial?” *Id.* (citations omitted). Any doubts as to whether to grant a new trial or not are to be resolved in favor of granting a new trial. *See, e.g., Arthur v. Iron Works*, 22 Wn.App. 61, 66, 587 P.2d 626 (1978), citing *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973). Further, “greater weight is owed a decision to grant a new trial than a decision not to grant a new trial.” *See, e.g., Richards v. Overlake Hosp. Medical Center*, 59 Wn.App. 266, 271, 796 P.2d 737 (1990).

Under CR 60(b)(4), a party may be relieved from a final judgment or order for “misconduct of an adverse party.” Relief “is aimed at judgments which were unfairly obtained, not those that are factually incorrect.” *People’s State Bank v. Hickey*, 55 Wn.App. 367, 371, 777 P.2d 1056 (1989). What if any effect of the misconduct is immaterial, as “a litigant who has engaged in misconduct is not entitled to the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.” *Mitchell v. State Institute of Public Policy*, 153 Wn.App. 803, 825, 225 P.3d 280 (2009) quoting *Taylor v. Cessna Aircraft Co.*, 39 Wn.App. 828, 696 P.2d 28 (1985).

It is further immaterial whether the misconduct “was innocent or willful. The effect is the same whether the [misconduct] was innocent, the result of carelessness, or deliberate.” *Hickey, supra*, 50 Wn.App. at 371. Thus, if the misconduct prevents the fair presentation of a case, relief is to be given. *Id.*; and *Taylor*, 39 Wn.App. at 836-837.

Under CR 60(b), the moving party need demonstrate misconduct by clear and convincing evidence, and that such misconduct prevented it from fully and fairly presenting its case. *See, e.g., Hickey, supra*, 55 Wn.App. at 371-72; and *Dalton v. State*, 130 Wn.App. 653, 665-666, 124 P.3d 305 (2005). CR 60 is to be liberally construed. *Gustafson v. Gustafson*, 54 Wn.App. 66, 70-71, 772 P.2d 1031 (1989).

On the other hand, under CR 59(a)(2), the misconduct need not be established by clear and convincing evidence; rather, a new trial “is required” where there was (1) misconduct which (2) was prejudicial; it is prejudicial “if it affects, or presumptively affects, the outcome of the trial.” *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 142, 750 P.2d 1257 (1988) (bold added); and *see King v. Starr*, 43 Wn.2d 115, 121-123, 260 P.2d 351 (1953) (where counsel refers to immaterial evidence having prejudicial effect, “the verdict must be set aside”).

In addition, to invoke CR 59(a) the moving party typically must object unless the misconduct is so flagrant and prejudicial that an objection would have been ineffective. *See, e.g., Riley, supra*, 51 Wn.2d at 443-444 (failure to make objection not waive request for new trial because objection would not have been effective); and *Carabba v. Anacortes School Dist.*, 72 Wn.2d 939, 952-954, 435 P.2d 936 (1967). Defendants did object, which the trial court sustained. RP 3185:21-24.

2. REFERENCE AND PLEA TO FINANCIAL DISPARITY AND MATTERS NOT IN RECORD WAS MISCONDUCT

“[A] cardinal principal of our jurisprudence that the rich and poor stand alike,” and “neither the wealth of one nor the poverty of the other shall be permitted to affect the administration of law.” *City of Cleveland v. Peter Kiewit Sons’ Co.*, 624 F.2d 749, 757 (6th Cir. 1980) (new trial for

injecting into trial idea that defendant was a “big company” and had the ability to pay a judgment). Arguments relating to wealth or poverty “are improper, as tending to induce either excessive or inadequate verdicts as a result of such appeal to the passion or prejudice of the jury.” *Eisenhauer v. Burger*, 431 F.2d 833, 837 (6th Cir. 1970). Pleas to one’s poverty, or the other party’s wealth, are “clearly a transparent attempt to appeal to the sympathies of the jury,” and are “clearly misconduct.” *Hoffman v. Brandt*, 421 P.2d 425, 428 (Cal. 1967).

The parties’ relative financial conditions, whether alone or in comparison to each other, is forbidden, and even suggesting to the jury one’s financial position is misconduct and prejudicial (although prejudice need not be shown under CR 60). *See, e.g., Miller v. Staton*, 64 Wn.2d 837, 840, 394 P.2d 799 (1964) (new trial granted in part because defense counsel’s misconduct in asserting in closing that any money awarded would come out of his client’s pockets); *Miller v. Mohr*, 198 Wash. 619, 637-638, 89 P.2d 807 (1939) (evidence regarding property and assets is “highly prejudicial,” and admission was “likely to distract the attention of the jury from the real issues in the case” such that a new trial granted).

Plaintiffs’ counsel committed misconduct by first alleging his own clients’ poverty and Defendants’ alleged wealth, then again when he asked the jury to make an award because of the disparity by stating Defendants

did well “on the backs of these employees” who are “living week to week.” RP 3185:4-3186:2. In addition, counsel insinuated (without support) that the Plaintiffs were poor because of the alleged wage violations: counsel alleged his clients “were living week to week” and that the meager “\$3,000 to \$4,000” being requested is not “that much,” and that this amount be “given back” to the employees as if the Defendants stole that amount from the crews by violating the law “on the backs of these employees”). *Id.*

This was a plea for the jury to exact punitive damages from the Defendants. Punitive damages are unavailable in Washington. *See, e.g., Dempere v. Nelson*, 76 Wn.App. 403, 410, 886 P.2d 219 (1994). It was a deliberate attempt to “appeal to social or economic prejudices of the jury” and have the jury punish presumably wealthy Defendants. *Carson v. Fine*, 123 Wn.2d 206, 223, 867 P.2d 610 (1994) (“appeals to the jury’s sympathies..., [or] provokes its instinct to punish” is prejudicial).

Additional misconduct is that Plaintiffs referred to matters not supported by the record. There was no evidence of financial status at trial. Further, Plaintiffs asserted in closing that Defendants’ had an expert as to productivity (Mr. Cowin), that Mr. Cowin had a productivity rate Defendants “did not like,” and because Defendants did not like Mr. Cowin’s rate allegedly instructed its damages expert (Peter Malishka) to

not read Mr. Cowin's deposition. RP 3181:7-25. Plaintiffs concluded by alleging Defendants "didn't like the truth." RP 3181:25.

A party may not make assertions in closing argument that are not supported by the record. *See, e.g., State v. Rose*, 62 Wn.2d 309, 312, 382 P.2d 513 (1963); and *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) ("references to evidence outside of the record and bald appeals to passion and prejudice constitute misconduct."). Misconduct in closing argument by referring to matters that are neither in nor supported by the record further justifies setting aside a verdict for a new trial. *See, e.g., Discargar v. City of Seattle*, 30 Wn.2d 461, 469-470, 191 P.2d 870 (1948); and *Riley v. Dept. of Labor & Industries*, 51 Wn.2d 438, 442-444, 319 P.2d 549 (1957) (injection of unsupported assertion that plaintiffs better off with verdict for defendant so prejudicial that curative instruction could not have eradicated).

Similar to that in *Discargar*, there was some evidence in the record of Defendants working with Mr. Cowin as to production rates (RP 2805:4-2807:6), but nothing was adduced at trial as to what he testified (or did not testify), whether he had a number and if so whether Defendants liked it or not, nor an affirmative instruction to Mr. Malishka to not read the deposition testimony, and if so any reason therefore. RP 2806:21-23 (not being asked to read is not the same as being directed to not read).

Through Plaintiffs' counsel's improper insinuation, the jury was left with the indelible impression that Defendants had a single number, an assumed production rate, that it did not like. The jury could very well have understood that this number was consistent with Plaintiffs' proffered production rate. The jury then ignored all other evidence and awarded all overtime damages sought after but scant deliberations despite substantial evidence to the contrary.

3. WILLFUL VIOLATION OF COURT ORDER

Plaintiffs' counsel's misconduct was in direct and deliberate violation of the Court's order *in limine* precluding any mention or argument regarding the financial status of any of the parties. Where a party violates a Court's pretrial ruling, a new trial may be warranted even if the aggrieved party did not object and seek a curative instruction. *Osborne v. Lake Washington Sch. Dist.*, 1 Wn.App. 534, 538-539, 462 P.2d 966 (1969).

Notably, Plaintiffs cited *Osborne* in their Motion to exclude financial status. RP 486. In *Osborne*, in violation of the court's ruling, the defendant elicited testimony as to the plaintiff student's poor character. 1 Wn.App. at 537-538. The trial court "was shocked by an obvious violation of a pretrial order designed to prevent the very problem caused,"

and granted a new trial even though the plaintiff had not objected. 1
Wn.App. at 538-539.

Likewise, in *King v. Starr*, 43 Wn.2d 115, 117, 121-122, 260 P.2d 351 (1953), defense counsel violated a pretrial ruling excluding all references to insurance by stating in his opening that his clients “have no insurance.” *King* quoted with approval a New Hampshire decision that held where insurance is referenced, “the verdict must be set aside.” 43 Wn.2d at 121-122. *King* ordered a new trial and held the reference “was improper, and the prejudicial effect was not eradicated by the prompt action of the trial judge, who instructed the jury to disregard it.” *Id.*

Just as in *Osborne* and *King*, Plaintiffs’ counsel here deliberately violated the trial court’s pretrial Order by alleging poverty of his own clients and Defendants’ presumed wealth, further impassioning the jury to make an award because of the disparity. However, the trial court here did not give a curative instruction as was in *King*, but even had a curative instruction, the bell had been rung and a curative instruction would not have undone the pernicious effect.

4. THE MISCONDUCT WAS PRESUMPTIVELY PREJUDICIAL

Although prejudice is immaterial under CR 60, references to wealth or poverty, or one’s financial status at all, are presumed prejudicial. Karl B. Tegland, 14A *Wash. Prac., Civil Procedure* § 30:40 (“[p]rejudice

is presumed from improper introduction of ...wealth of, or insurance held by the defendant...”). Introduction of a defendant’s assets is “highly prejudicial” for which a new trial is the remedy because such “evidence peculiarly likely to distract the attention of the jury from the real issues in the case.” *Miller v. Mohr, supra*, 198 Wash. at 637-638; *and see Carson*, 123 Wn.2d at 223 (reference to economics was prejudicial), and *Riley*, 51 Wn.2d at 442-44 (insinuation that plaintiff better off without verdict so prejudicial that no instruction could have cured). Likewise, in *Miller v. Staton, supra*, a new trial was the remedy for defense counsel merely asserting in closing that any money awarded “comes out of these peoples’ pockets.” 64 Wn.2d at 840.

The presumption of prejudice, and deprivation of an unimpassioned jury, are demonstrated by the plethora of authorities cited thus far, and countless others. *See, e.g., Enriquez v. Cochran*, 967 P.2d 1136, 1169-1170 (N.M. Ct. App. 1998) (new trial because defense counsel rhetorically asked in closing if his client “[has] the resources?” and referring to him as “a working man”, where curative instruction did not remove the presumed prejudice); *De Rousseau v. Chicago, St. P., M&O Ry. Co.*, 39 N.W.2d 764, 767 (Wis. 1964) (new trial because plaintiff referred to wealth of defendant and curative instruction did not remove the prejudice.; and *Allison v. Acton-Etheridge Coal Co.*, 268 So.2d 725, 728-

730 (Ala. 1972) (referral in closing to wealth of plaintiff was invidious and had “poisonous effect” that could not have been cured by instruction and therefore new trial granted).

If the misconduct at issue “affects, or presumptively affects, the outcome of the trial, a new trial under CR 59 is to be granted.” *Adkins, supra*, 110 Wn.2d at 142. Any doubts as to whether to grant a new trial or not are to be resolved in favor of a new trial. *Arthur*, 22 Wn.App. at 66.

The trial court certainly recognized the prejudice of even a hint of financial situation in three rulings: (1) granting the Motion *in limine* to exclude mention of financial status; (2) removed a juror after deliberations started because the juror recalled hearing from her ex-husband 10 years prior that Jim & Dennis Lea were part of an investment group (RP 3198:1-3199:11, 3207:17-3209:20); and (3) the Court sustained Defendants’ objection (RP 3185:18-3186:2). A statement that “appeals to the jury’s sympathies..., provokes its instinct to punish” is prejudicial. *See Carson, supra*, 123 Wn.2d at 223.

5. NO INSTRUCTION WOULD HAVE CURED THE PRESUMPTIVE PREJUDICE

Because of the presumptive prejudice and forbidden nature of financial status, an instruction to disregard would not have been a satisfactory cure. *See, e.g., King*, 43 Wn.2d at 122 (prejudicial effect

cannot be eradicated by prompt action of trial judge's instruction to disregard); *Hoffman*, 421 P.2d at 429-430 (curative instruction to disregard could only reduce but did not eliminate presumed prejudice); and *Alison*, 268 So.2d at 729-730 (curative instruction could not eradicate presumed prejudice). *Riley*, 51 Wn.2d at 443-444 ("the insidious effect on the jury" could not have been cured, and therefore irrelevant that no objection made or curative instruction sought); and *Miller v. Mohr*, 198 Wash. at 637-638 (new trial granted even though no curative instruction given).

Thus, even when no curative instruction is given courts consistently hold that even had an instruction to disregard been given, the prejudice was so pernicious that it could only have been cured through a new trial. *See, e.g., Osborne*, 1 Wn.App. at 538-539 (new trial granted even though Plaintiff had not objected and sought a curative instruction); *Riley*, 51 Wn.2d at 443-444 ("the insidious effect on the jury" could not have been cured, and therefore irrelevant that no objection made or curative instruction sought); and *Miller v. Mohr*, 198 Wash. at 637-638 (new trial granted even though no curative instruction given).

Notably, Plaintiffs' counsel's misconduct occurred at the end of rebuttal, taking advantage of "the principal last heard, longest remembered." *Adkins*, 110 Wn.2d at 141.

E. REQUEST FOR COSTS AND ATTORNEY FEES

If this Court determines that Defendants have prevailed in this appeal, they respectfully request pursuant to and in accordance with RAP 18.1(b) an award of costs, expenses, and statutory attorney's fees. They would be entitled to an award of statutory attorney's fees pursuant to RCW 4.84.010(6) and RCW 4.84.080.

V. CONCLUSION

Accordingly, pursuant to the above authorities, argument, and reasons, the Individual Defendants respectfully request the Court vacate the judgment as against them and remand with the following conclusions and instructions: (1) the Individual Defendants are not employers under the IWA or MWA, and therefore cannot be liable for any of Plaintiffs' claims unless all elements of RCW 49.52.070 are met, and (2) for any liability under RCW 49.52.070, the non-payment must be done both "willfully and with the intent to deprive" the crew members their wages.

Dated this 25th day of October 2010.

GALLETCH & FULLINGTON, PLLC



Michael B. Galletch, WSBA #29612
Attorneys for Appellants

**APPENDIX A
TO APPELLANTS' BRIEF**

**CP 573-577 -- December 17, 2009 "Order Granting Plaintiffs'
Motion for Partial Summary Judgment Regarding
Failure to Keep Records and Unlawful Wage
Deductions"**

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HONORABLE MICHAEL J. TRICKEY
Department 34
Noted for Hearing: Friday, December 11, 2009, 10:00 a.m.
With Oral Argument

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

ISAIAS RAMIREZ, MARIO HERNANDEZ,
GILBERTO MENDOZA on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

PRECISION DRYWALL, INC., a
Washington corporation; JAMES LEA,
individually, and the marital community of
JAMES LEA and JANE DOE LEA; DENNIS
LEA, individually, and the marital community
of DENNIS LEA and JANE DOE LEA; and
KELLY WASKIEWICZ, individually, and
the marital community of KELLY
WASKIEWICZ and JOHN DOE
WASKIEWICZ,

Defendants.

NO. 08-2-26023-2 SEA

**ORDER GRANTING PLAINTIFFS'
MOTION FOR PARTIAL
SUMMARY JUDGMENT
REGARDING FAILURE TO KEEP
RECORDS AND UNLAWFUL
WAGE DEDUCTIONS**

THIS MATTER came before the court on November 20, 2009 and December 11, 2009
on Plaintiffs' Motion for Partial Summary Judgment Regarding Failure to Keep Records and
Unlawful Wage Deductions. The Court heard oral argument from counsel for both parties and
considered the following documents and evidence:

ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT REGARDING FAILURE TO KEEP
RECORDS AND UNLAWFUL WAGE DEDUCTIONS - I
CASE No. 08-2-26023-2 SEA

TERNELL MARSHALL & DAUDT PLLC
3600 Fremont Avenue North
Seattle, Washington 98103
TEL. 206.816.6603 • FAX 206.350.3528

- 1 1. Plaintiffs' Motion for Partial Summary Judgment Regarding Failure to Keep
- 2 Records and Unlawful Wage Deductions;
- 3 2. The Declaration of Toby J. Marshall and exhibits attached thereto, with the
- 4 exception of Exhibit 2;
- 5 3. Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment;
- 6 4. Plaintiffs' Reply in Support of Plaintiffs' Motion for Partial Summary Judgment
- 7 Regarding Failure to Keep Records and Unlawful Wage Deductions;
- 8 5. The Supplemental Declaration of Toby J. Marshall in Support of Plaintiffs'
- 9 Motion for Partial Summary Judgment Regarding Failure to Keep Records and Unlawful Wage
- 10 Deductions, and exhibits attached thereto;
- 11 6. Declaration of Isaias Ramirez in Support of Plaintiffs' Motion for Partial
- 12 Summary Judgment;
- 13 7. Declaration of Mario Hernandez in Support of Plaintiffs' Motion for Partial
- 14 Summary Judgment;
- 15 8. Plaintiffs' Supplemental Brief in Support of Plaintiffs' Motion for Partial
- 16 Summary Judgment Regarding Failure to Keep Records and Unlawful Wage Deductions;
- 17 9. The Second Supplemental Declaration of Toby J. Marshall in Support of
- 18 Plaintiffs' Motion for Partial Summary Judgment, and exhibits attached thereto; and
- 19 10. Defendants' Supplementation Re: Plaintiffs' MSJ for Tool Deductions, the
- 20 Subjoined Declaration of Counsel, and the exhibits attached thereto.

21 The Court did not consider any declarations or deposition testimony referred to in
22 Defendants' papers that was not directly submitted in support of Defendants' opposition to
23 summary judgment.

24 The court finds no material facts in dispute as to the following issues and concludes as a
25 matter of law the following:

- 26 1. Plaintiffs' Motion for Partial Summary Judgment is GRANTED;

ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT REGARDING FAILURE TO KEEP
RECORDS AND UNLAWFUL WAGE DEDUCTIONS - 2
CASE No. 08-2-26023-2 SEA

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ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT REGARDING FAILURE TO KEEP
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King County Superior Court
Judicial Electronic Signature Page

Case Number: 08-2-26023-2
Case Title: RAMIREZ ET AL VS PRECISION DRYWALL INC
Document Title: ORDER GRANTING PTLs MOT FOR SJ
Signed by Judge: Michael Trickey
Date: 12/17/2009 2:13:06 PM



Judge Michael Trickey

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APPENDIX B
TO APPELLANTS' BRIEF

CP 601 -- Jury Instruction No. 12

Instruction 12

When used in these instructions, the term "employer" means any person, corporation, partnership, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees. The term "employer" includes any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee. For example, the owners and corporate officers of a company (including officers who lack an ownership interest) will fall within the definition of "employer" if they are engaged in running the company's business, are engaged in managing the company's finances, are responsible for maintaining the company's employment records, are authorized to issue payroll checks on behalf of the company, determine the company's employment practices, or exercise control over how the company's employees are paid. In these instances, the owners and corporate officers are acting directly or indirectly in the interest of the company in relation to the company's employees. Thus, like the company, they are also considered to be employers of the employees.

When used in these instructions, the term "employee" means any individual employed by an employer.

**APPENDIX C
TO APPELLANTS' BRIEF**

CP 613 -- Jury Instruction No. 33

Instruction 33

When an employer or officer, vice principal, or agent of an employer willfully fails to pay wages owed to employees, the employees are entitled to recover twice the amount of wages owed. The term "willfully" means that the person knows what he or she is doing, intends to do what he or she is doing, and is a free agent.

The failure to pay wages is not willful if it is due to a legitimate error or if a bona fide dispute existed between the employer and employee regarding the payment of wages. The term "legitimate error" means an error that is accidental or the result of carelessness. The term "bona fide dispute" means a fairly debatable dispute over whether an employment relationship exists or whether all or a portion of the wages must be paid. An employer's failure to keep adequate and proper records of wages owed does not create a bona fide dispute.

Deductions are not "willful" if an employee knowingly submitted to any withholding of wages. To meet this exception, an employer must prove that employees deliberately and intentionally deferred to the employer the decision of whether they would ever be paid the wages owed.

DECLARATION OF SERVICE

I, Kelly L. Baker, certify that on October 29, 2010 I caused to be delivered via US Mail a true and correct copy of the following document:

Brief of Appellants (with revised Table of Contents)

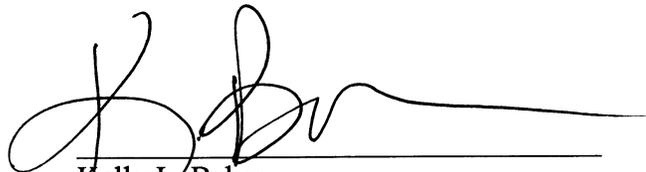
upon the following parties to the above entitled action:

State of WA, Court of Appeals
Division I
One Union Square
600 University St
Seattle, WA 98101-1176

Toby J. Marshall and
Terrell Marshall & Daudt
3600 Fremont Ave. N
Seattle, WA 98107

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

Signed at Seattle, Washington this 29th day of October 2010.



Kelly L. Baker
Paralegal, Galletch & Fullington