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NO. 67226-6
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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December 14, 2012
Court of Appeals
Division I
State of Washington

PICO COMPUTING, INC. AND DR. H.R.G. TROUT

APPELLANTS,

v.

JASON (GABRIEL) FELIX,

RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT OF

KING COUNTY

THE HONORABLE JEAN REITCHEL

BRIEF OF APPELLANTS PICO COMPUTING AND DR. H.R.G.
TROUT

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I. ASSIGNMENTS OF ERROR

- A. The trial court erred in finding the loan agreement “wages.”
- B. The trial court erred in finding the withholding willful as a *bona fide* dispute existed and defendants attempted to define the loan amount due starting one week following termination through trial.
- C. The trial court erred in admitting and relying upon Exhibit 2.
- D. The trial court erred in awarding attorneys’ fees.
- E. The trial court erred in the computation of the loan.
- F. The trial court erred in holding evidence surrounding the calculations of the loan due were not relevant to the issue of *bona fide* dispute.

II. ISSUES

- A. Wages are a defined term, including money payable in legal tender. Stock options that are converted to a loan to the corporation are not wages. Here, Felix granted Pico an interest free loan until Pico had the financial resources necessary to pay him back. This agreement would be unenforceable under Washington wage law if it was for wages. Felix now seeks to enforce the loan agreement under the guise of “wages” and

recover double damages and attorneys' fees. Did the trial court err in finding the Felix loan to Pico constituted wages?

- B. Under Washington law, double damages are not awardable where a bona fide dispute existed over whether the wages were due. Here, there was a bona fide dispute over (1) whether the amount in question is a "wage" as defined by the statutes, (2) the amount due under the loan agreement, and (3) whether the loan had matured. Did the trial court err in finding the withholding willful?
- C. ER 408 precludes the admission of information and documents contained in settlement discussions. Here, Exhibit 2 was an e-mail chain attempting to calculate and settle Felix's claims. The Court relied exclusively on this exhibit in finding that Felix had met his burden of proof with respect to the total amount of wages due at the close of his case. Did the trial court err in admitting Exhibit 2?
- D. Reasonable attorneys' fees are awardable under Washington law for wage and hour violations. Here, the Plaintiff made representations about his hourly rate not supported by prior submission to the Court. Further, the Plaintiff sought recover for attorneys' fees incurred in unsuccessful, improper, and/or

denied motions and other filings. Did the trial court err in not discounting the awarded attorneys' fees by the number of hours spent on fruitless tasks?

E. The computation of disputed amount was incorrect and relied upon a date that neither party claimed was the start date of the loan started. Computation completely consistent with the admitted and documented facts of the case were presented to the court. Did the Court err in finding the start date of the loan to be February?

F. Court erred in ruling that the offer to pay plaintiff \$39,000 in December 2007 was irrelevant to the issue of bona fide dispute. By ignoring relevant testimony the court denied defendant a right to assert the bona fide dispute defense. Defendants' offers showed a continuing dialogue attempting to define the actual loan amount. Did the Court err in holding the evidence associated with calculating the amount due irrelevant to the bona fide dispute defense?

III. STATEMENT OF THE CASE

General Facts

Jason (Gabriel) Felix was a shareholder and employee of Pico Computing from its formation in 2004 until he quit in 2007. During that

time, Jason's titles ranged from Vice President to Chief Hardware Engineer to engineer. CP 1 (*Complaint*).

When joining Pico, Felix signed a shareholder's agreement which provided for a "nominal" salary of \$90,000.00. *Id.* It was understood that the actual salary would be \$45,000, with the balance in stock. *Id.*

As Felix became dissatisfied with Pico, he opted to exchange the \$45,000 in stock for a loan of up to \$45,000 payable at a time that Pico could afford to pay him. RP P. 126 li. 4-7. Felix knew Pico had insufficient resources to pay him the full \$90,000 he demanded. RP P. 126 li. 4-7

Felix resigned in December 2007. RP P. 92, li. 22-25, P. 93, li. 1. Immediately following his resignation, Trout sent an offer of \$39,000 to cover all outstanding financial issues Between Jason and Pico Computing (RP P. 447, li. 8 –12) .. Felix declined the loan settlement and demanded that the company be appraised Pico then initiated an appraisal and sent the letter of Jan 29, 2008 to establish the amount of the loan agreement

Exhibit 14, and Appendix A.

11 Q. (By Mr. McKay) All right. You have No. 14 in front of you?

12 A. I do.

13 Q. And have you seen that document before?

14 A. Oh, yeah.

15 Q. And what is it?

16 A. It is an email communication between me and Dr. Trout trying

17 to figure out the amount owed.
RP P. 143, li. 11-17, *See Also* RP P. 147, li. 14-17.

Exhibit 14 demonstrates that a bona fide dispute existed regarding the amount due and whether or not it was a loan or a wage. Not even Plaintiff's complaint can identify the specific amount that was claimed to be owing. CP 1-6.

The Agreement was a Loan and Not Wages

Felix's testimony regarding his loan establishes he did not consider it "wages":

4 But in 2007, you decided to change your compensation to
5 just strictly wages as opposed to any stock; is that right?
6 A. I don't know if you call it wages, but yeah, I didn't want
7 any stock any more.
8 Q. Okay. You -- instead of wages, you used the firm salary.
9 A. I usually call it deferred -- well, wages in deferred
10 compensation. RP P. 119, li. 4-10.

Felix admitted he thought the agreement was a loan and not wages. RP P.127, li. 16-18. "It was like an interest-free loan type of thing." RP P. 127, li. 24-25. The agreement, drafted by Felix expressly states "This is not an authorization to trade salary for stock." RP P. 321, li. 16-17. Felix explains his thought process:

4 So to keep that from happening, instead of
5 getting a \$90,000 check or having, you know, added up that
6 year, I just said, "Let's defer it until the company has
7 sufficient financial resources to pay it."
RP P. 126 li. 4-7

Felix acknowledged that the difference between the right to purchase stock was a different amount than wages:

8 Well, the deferred salary, there is a correct amount. And
9 that correct amount has to be paid. As far as I'm
10 concerned, that's not negotiable. What's owed is owed.
11 Stock, on the other hand, is kind of nebulous. It's hard
12 to assign a value to it. So that's something that's -- it's
13 harder to figure out what the correct value of the stock is.
RP P. 147, li. 8-13.

The trial court, however, concluded that the loan constituted
“Wages” CP 424-425, *Conclusions of Law Nos. 1-4*.

A Bona Fide Dispute Existed

Plaintiff requested to increase his salary to \$90,000; the request was modified by Felix to be an interest free loan agreement, which was approved by Trout in March 2007. The agreement was intended to become effective April 1, 2007. The March 16th, 2007 agreement clearly establishes that this was a loan and not wages. Pico never considered Felix’s loan as wages; it would not have accepted his request to cash out his stock options in exchange for the interest free loan had Pico understood Felix considered this “wages”:

24 Had you known that Mr. Felix thought this was about wages,
25 would you have approved?
1 A. No, I would not. I would have said, "Jason, I can't afford
2 it, the company can't afford it. You know, I think you have
3 no choice but to get another job."
4 And, you know, I mean, I -- my belief was that Jason was
5 happy with that lump sum payment, or whatever it is, you

6 know, under whatever terms we agreed, and that he was
7 prepared to move forward. And, therefore, I was prepared
to
8 pay him for another, in this case, nine months or close to
9 nine months of employment in the hopes that he could come
to
10 some reasonable accommodation or deal with whatever
problems
11 he was struggling with.
12 I mean, had that not happened, there is no question I
13 would have had no choice but to say, "Well, Jason, I can't
14 afford it and you must leave."
RP P. 335, li. 24-25, P. 336. li. 1-14.

The loan agreement was proposed by Felix. RP P. 126 li. 4-7

The understanding between Pico and Felix was that the loan would be repaid at a point when Pico could afford it. RP P. 127, li. 24-25.

Further, attempts were made to define exactly how much was due and owing:

20 A. If I remember rightly, this one was -- you know, Jason and
I
21 would regularly lock horns on, you know, what one plus
one
22 would be -- not -- I mean, not in an insulting way, but, you
23 know, we'd do a spreadsheet and come up with one answer,
and
24 then he would do it and come up with a different answer,
and
25 we'd either decide that I was all wet or he was all wet.
1 And so this was an ongoing process trying to get to the
2 bottom of it, in my opinion. RP P. 318, li. 20-25, P. 319, li.
1-2. *See also* RP P. 143, LI. 15-17, *citing Exh. 13 & 14.*

Felix contended the loan period should begin in January. RP P. 318, li. 9-

18. This assertion is not supported by any written documentation. Pico

contends the loan period should begin in March as supported testimony of defendant and by exhibits 10 and 11. March 16 is when Pico and Felix agreed to exchange stock options for a cash payment:

17 Ah, I think we differ on that. Jason claims the January
18 1st. And I entertained that number, and you can see that
19 there is some emails that are concerned with, you know,
20 some
21 settlement issues there, try to figure this out. And I
22 looked at the documentation that I had, and I said, "Jason,
23 you know, I don't remember anything in January. I do
24 remember something in" -- "March 16th when we agreed to
25 this. And therefore" -- "And I have documentation to that
1 effect. I have, you know, documentation that you requested
2 it, I have documentation that I accepted it. Seems to me
3 that's a pretty good contract and that's" -- "we can peg
4 that, we can put dates on that."
5 And so I always took the position that it was April 1st
6 that this thing kicked in. And all of my calculations were
7 based on that, and that comes out to a number that's in the
neighborhood of \$27,000. RP P. 336, li. 17-25, P. 337, li.
1-7.

The trial court concluded, however, that the loan period should begin in February. RP P. 421 (*Finding of Fact No. 30*). Further, the trial court expressly stated that it did not consider any offers of settlement as "relevant" to the issue of bona fide dispute. RP P. 330 li. 12-17.

No Evidence was Presented that February Was the Election

Date

The e-mail Felix presented to the court states that Felix is making a request to change his compensation; not the confirmation of an agreement

already in effect. Felix testified that he made the election to stop receiving stock and, instead, loan the company \$45,000 in lieu of a cash salary:

19 Q. Now, did you have a conversation with Dr. -- hold on one
20 second. I'm going to get this off the screen.
21 Oh, damn. Excuse me.
22 Okay. We'll refer to that in a second. Now, I guess
23 we'll refer to it now. I've handed you -- I'll hand you
24 what's been marked as Exhibit No. 11.
25 And just tell me what that is. We'll describe the reasons
1 for it and things for a second. But just what is that?
2 A. It's a letter that describes what Trout and I agreed to on
3 early January.
RP P. 143, li. 19-25, P.144, li. 1-3

Dr. Trout, however, testified that the request was made in February, was approved March 16, 2007, and effective April 1, 2007. Both the February and March dates are fully corroborated by written documentation:

13 Q. Okay. And when do you believe you came to an
agreement with
14 Mr. Felix about the deferral?
15 A. I've said that I can't remember dates and times. I do
16 actually remember this one. It was a Monday, and it was
the
17 16th, I believe, of April.
18 Q. That's April or March?
19 A. Of March. Excuse me.
RP P. 320, li. 13-19.
...
22 Q. Was that the date going forward that you assumed Mr.
Felix
23 had agreed to defer?
24 A. I took the position there was a -- it was -- at the
25 beginning of the next pay period, which I believe was April
322
1 1st. And I based my calculations on that. It's a little
2 bit arbitrary, but, you know, the pay period I think had

3 already swung into action. Right. So it was the next
4 available time.
RP P. 321, li. 22-25, P. 322, li. 1-4.

Despite only two dates being the election date (January and March), the trial court found that the written request for election was effective in February. CP 420. *Findings of Fact 25, 29, 30, See also Conclusions of Law No. 3.* Exhibit 25 expressly showed the dispute regarding the start date of the loan:

| | |
|-------------------------------------|-------------|
| Nominal Salary | \$90,000 |
| Actual Salary | \$48,750 |
| Social Security | \$3,139 |
| Balance (for whole year) | 38,811 |
| Months of accumulation | 8.5 |
| Prorated amount $8.5/12 * 38,861 =$ | \$26,996.00 |

Numbers taken from Exhibit 25 (RP P. 429, li. 18)

The Settlement E-Mail Was Inadmissible

Exhibit 2 was an e-mail chain between Felix and Pico Computing discussing the total amount allegedly due for the loan and for the shares Felix held in Pico Computing.

Exhibit 2 was admitted over objection:

6 MR. KING: We object to this particular exhibit. This is
7 an exhibit prohibited under ER 408.
8 MR. MCKAY: What rule is that, Counsel?
9 MR. KING: It says --
10 THE COURT: Insurance liability?
11 MR. KING: Offers to compromise:
RP 40, li. 6-11.

Felix argued that the document showed Pico's admission of a \$90,000 salary. RP P. 40, li. 17-23. In response, Pico argued that the document contained numerous statements indicating a discussion over settlement:

20 So you see here, he says, "Could you help me
21 understand the numbers we're getting, the number of pay
22 periods? In the fiscal year of 2007 the 26th, half of my
23 salary was 45,000, salary deferred was 45,000, the amount
of
24 the outstanding loan is 43-."

25 And then you see another email where he says that, "The
1 salary deferred was 45,000, the amount of the outstanding
2 loan is 39,807." And then you see Dr. Trout responding in
3 essentially a settlement communication as to what the
amount
4 of the supposed loan is.

5 And I would argue that this is, in fact, a settlement
6 communication or an offer to settle as opposed to any
7 admission by Dr. Trout as to the basis of liability or the
8 amount.

9 MR. MCKAY: Counsel's arguments goes to the weight. It
10 has to be supported by evidence. This is a clearly
11 admissible document.

12 THE COURT: The Court will admit it. There is nothing
on
13 the face of the document itself that says: There is my
14 settlement offer, this is in -- for settlement. There is
15 nothing on the face of the document that says that this is
16 for settlement. So I will allow its admission.

17 Clearly counsel can introduce other evidence that the
18 Court could reconsider. But on the face of the document
19 itself, it's admissible.

RP P. 41, li. 20-25, P. 42, li. 1-19.

After holding that the document was admissible, the Court denied the directed verdict using Exhibit 2 as the sole basis for the amount of wages due.

The Attorneys' Fees Awarded were Untimely Sought and Excessive

The Court orally ruled that Felix was to file his motion for attorneys' fees within 14 days following trial:

4 MR. MCKAY: In terms of a noting date, I would just
5 like to have everything noted for the two weeks from
6 today, if that's appropriate, if that's available.
7 THE COURT: How are we two weeks from today?
8 THE CLERK: Is he asking for a presentation hearing?
9 I'm not sure what --
10 THE COURT: You want a presentation hearing or --
11 MR. MCKAY: I'll waive a presentation hearing.
12 MR. KING: I don't see any reason to come and have
13 oral argument.
14 THE COURT: Do you want just to have a date where
15 there is due so you'll make sure you do it?
16 MR. MCKAY: Yes. I just want a presentation date of
17 two weeks --
18 THE COURT: Let's give him a presentation date.
19 MR. MCKAY: -- from today, and then everything will
20 be
21 timely submitted.
22 THE CLERK: Okay. So we're looking on the --
23 MR. MCKAY: March 28, I think.
24 THE CLERK: I think it's around March 25th, if today
is the 11th.
RP P. 537, li. 4-24

Several months later, however, neither a judgment had been presented nor a motion for attorneys' fees sought. *Docket*. As a result, the Defendants moved for judgment on July 6, 2011. *Docket*. The Court entered judgment on July 19, 2011. *Docket*. On July 29, 2011, Felix moved for attorneys' fees, with a hearing date of August 12, 2011. CP 430.

However, this hearing was stricken and re-noted on August 18, 2011 for hearing on August 26, 2001. CP. 463.

Felix sought \$81,576.25 in hourly attorneys' fees in his motion, along with a 1.5 multiplier. CP 431. The motion contended that Felix counsel's hourly rate was \$350.00. CP 441, but this is inconsistent with a prior assertion of the hourly rate, where counsel sought \$350 for 2.8 hours of work. CP 464.

Aside from an inconsistent hourly rate, counsel also sought fees for unsuccessful motions, unfiled matters, and incomplete tasks. CP 464. *See Appendix B.*

IV. SUMMARY OF ARGUMENT

Defendants argue that the disputed amount was not wages as the loan agreement proposed by Plaintiff is unenforceable under Washington law, and the loan in lieu of stock does not fall under the statutory definition of wages.

Defendants next argue that Plaintiff failed to establish willful withholding as a bona fide dispute arose regarding whether the amount due was wages and, more importantly, the calculation of the amount due.

Defendants thirdly argue that the Court's findings of fact regarding the February effective date is not supported by substantial evidence.

Defendants fourthly argue that the Court's should not have dismissed as irrelevant the evidence of a bona fide dispute consisting of back and forth negotiations about the amount of the actual loan and, specifically, the offer, by Dr. Trout, in the amount of \$39,020 made one week after Felix's resignation.

Finally, if the Court does hold this loan agreement constituted wages, the request for attorneys' fees was untimely and the fees awarded were excessive and not supported by evidence.

V. ARGUMENT

A Loan is not a Wage

Questions of law are reviewed de novo by the Court of Appeals. *Pacesetter Real Estate, Inc. v. Fasules*, 53 Wn.App. 463, 471, 767 P.2d 961 (1989). This permits the Court of Appeals to substitute its judgment for that of the trial Court. *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001). The proper construction of a statute is a question of law reviewed de novo. *Welch v. Southland Corp.*, 134 Wn.2d 629, 632, 952 P.2d 162 (1998).

There is no Washington authority that addresses whether or not stock compensation constitutes "wages" for purposes of statutory wage claims under Washington law. RCW § 49.46.010(2) defines "wage" as "compensation due an employee by reason of employment, payable in

legal tender of the United States on banks convertible into cash on demand at full face value, subject to such deductions, charges or allowances as may be permitted by rules of the director[.]”

In the simplest terms, a stock option is the right to purchase a specified number of shares of a designated stock for a particular price during a stated period of time. *In re Marriage of Harrington*, 85 Wn.App. 613, 624, 935 P.2d 1357 (1997).

Legal tender is defined as “[t]he money (bills and coins) approved in a country for the payment of debts, the purchase of goods, and other exchanges for value.” LEGAL TENDER, Black's Law Dictionary (9th ed. 2009).

Stock and “wages” are diametrically opposed to one another in that “wages” are compensation for services already provided, not an incentive or reward for enhancing the market value of the company. Granting employees the opportunity to acquire an ownership interest is simply not the same as paying wages, or even paying bonuses on salaries.

Courts throughout the country support this analysis. *See, e.g., Tischmann v. ITT/Sheraton Corp.*, 882 F. Supp. 1358, 1370 (S.D.N.Y. 1995) (holding that “incentive compensation based on factors falling outside the scope of the employee's actual work” does not constitute wages); *Dean Ritter Reynolds, Inc. v. Ross*, 429 N.Y.S.2d 653, 658 (N.Y.

App. 1980) (holding that “the term ‘wages’ ... does not encompass an incentive stock plan”); *see also Canet v. Gooch Ware Travelstead*, 917 F. Supp. 969,995 (E.D.N.Y (1996) (“incentive compensation does not constitute ‘wages’”); *In re Larson*, 147 B.R. 39 (Bankr. D.N.D. 1992) (same).

California's wage claim statute is similar to Washington's. The relevant statute defines “wages” as “all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.” *See* Cal. Lab. Code § 200(a) (2006). Like Washington, the case law construes the statute broadly and the term “wages” includes all compensation for services rendered, including money paid or other value given.

In *IBM Corp. v. Bajorek*, 191 F.3d 1033 (9th Cir. 1999), however, the Ninth Circuit ruled that “stock options are not ‘wages.’” *Id.* at 1039. Bajorek was employed by IBM and received stock options during his employment. 191 F.3d at 1036. His stock option agreement provided that if he left IBM and went to work for a competitor within six months of exercising options, he would be required to pay back to IBM his gains from the exercise. *Id.* Bajorek exercised certain options, obtained just under a million dollars and left IBM to work for a competitor. *Id.* When

IBM brought suit, Bajorek argued that if IBM were to recover damages, it would violate California's anti-kickback statute. *Id.* at 1038-39.

The Ninth Circuit held that “wages” does not include stock options. Accordingly, the Ninth Circuit reversed the trial court and held that stock options are not “wages” under the applicable California statutes:

Stock options are not “amounts.” They are not money at all. They are a contractual right to buy shares of stock. The purposes of avoiding secret kickbacks enabling an employer to avoid minimum wage laws or collective bargaining agreement obligations, and of protecting employees' reliance interests in their expected wages, do not apply to stock options.... Even where stock options may be awarded pursuant to plans giving rise to expectations of stock awards, and are not awarded according to such plans, they ordinarily do not give rise to an expectation of a calculable sum of money.

191 F.3d at 1039; *see also Falkowski v. Imation Corp.*, 309 F.3d 1123, 1132 (9th Cir. 2002) (Affirming Rule 12 dismissal of claims that stock options are “wages” under California Labor Code - [r]esolution of this question is easy: “options are not ‘wages’” under the statute's definition of the term “wages.”).

Essentially, stock is not something “paid” to an employee. A stock has no monetary value apart from a potential future value tied to the performance of a particular stock. *Id.* Furthermore, the value of a stock often has much to do with “the fortuities of stock market behavior,” *id.*

which further emphasizes that stock profits are not “paid” by the employer to the employee as wages.

Other states consistently reject the argument that stock is to be considered wages. New York holds that stock options are not “wages” under the applicable New York statute - but, rather, “incentive compensation based on factors falling outside the scope of the employee's actual work.” *Guiry v. Goldman, Sachs & Co.*, 814 N.Y.S. 2d 617 (N.Y.App., 2006). In affirming the trial court's dismissal of plaintiff's statutory wage claims, the Appellate Division ruled that “the equity based compensation at issue here lacks the ‘direct relationship between an employee's own performance and the compensation to which that employee is entitled[.]’ ” *Id.* (citation omitted); see also *IBM v. Martson*, 37 F. Supp. 2d 613, 618 (S.D.N.Y. 1999) (exercised stock options not “wages” under NY statute); *Rosenberg v. Salomon Inc.*, 992 F. Supp. 513, 517-18 (D. Conn. 1997) (applying New York law and dismissing plaintiff's statutory wage claim; stock award is incentive compensation and not “wages” under NY Labor Law); *Tischmann v. ITT/Sheraton Corp.*, 882 F. Supp. 1358, 1370 (S.D.N.Y. 1995) (incentive compensation based on factors falling outside the scope of employee's actual work is precluded from statutory coverage under New York law).

Numerous have likewise held that stock options are not “wages.” *See, e.g., Hmelyar v. Phoenix Controls*, 339 Ill. App. 3d 700, 706 (Ill. App. Ct. 2003) (under Illinois law, unvested and unexercised stock options are not “wages” for purposes of statutory unemployment insurance act); *DeNadai v. Preferred Capital Markets, Inc.*, 272 B.R. 21 (D. Mass. 2001) (under federal bankruptcy code, stock options are not post-petition earnings or compensation and, thus, are not excluded from bankruptcy estate); *In re Lawton*, 261 B.R. 774 (Bankr. M.D. Fla. 2001) (stock options are not “wages” exempt from bankruptcy under Florida law); *Harrison v. NetCentric Corp.*, 744 N.E.2d 622 (Mass. 2001) (affirming summary judgment against plaintiff; under Massachusetts common law doctrine, employer-defendant not accountable to discharged employee for unpaid compensation because unvested stock options were not “clearly connected to work already performed”). *See also Paolini v. Albertson's Inc.*, 149 P.3d 822 (Idaho,2006)(holding stock options not wages).

Here, Felix traded stock (his right to spend up to half of his salary to purchase Pico Computing shares) for a loan obligation to him. At no point did Felix actually want to change his compensation to 100% “salary.” Felix proposed the loan, and expressly wrote that it was not an agreement to “trade salary for stock.” RP P. 321, li. 16-17. Felix knew when he made the loan he was trading stock options (which were not

certain as to value) for a loan, which had a discrete value. *See RP. P. 171, li. 24-25*, “...So it was difficult to determine what the value of the stock really was.” Felix also knew the agreement was for repayment when Pico could afford it. RP P. 193, li. 16-19. As a result, Felix’s agreement to defer was a transfer of non-wages for consideration. In other words, the “deferred salary” constituted a payment for his surrender of his Pico Stock options – he chose to exchange his right to purchase up to \$45,000 in stock for a loan to Pico Computing. As a result, the loan agreement was not “wages,” but rather a loan. The trial court erred in holding Felix was due wages; if anything, he was due payment on the loan, under the terms of the loan agreement he drafted. As the stock options are not wages, he is not entitled to double damages or attorneys’ fees. The Court should reverse the trial court’s finding and enter an order identifying the loan transaction as that, a loan, thus Felix’s damages are mere the face value of the loan.

**FELIX FAILED TO ESTABLISH THE WITHHOLDING WAS
WILLFUL**

Under RCW 49.52.050 and .070, employees have a claim for double damages for willful violations of WAC 296-126-092. *Wingert et al. v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002), *affirming* 104 Wn.App. at 588-91. “Willful means merely that the person

knows what he is doing, intends to do what he is doing, and is a free agent.” *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159-60, 961 P.2d 371 (1998)(internal quotations omitted); *accord Morgan v. Kingen*, 141 Wn.App. 143, 155, 169 P.3d 487 (2007).

There is an exception; double damages are not available if there is a bona fide dispute as to the employer's obligation. *DLI v. Overnite Transportation Co.*, 67 Wn.App. 24, 34, 834 P.2d 638 (1992).

The liability under RCW 49.52.070 is premised upon violation of another statute, RCW 49.52.050(2) which defines a misdemeanor in the circumstances where an employer, officer, vice principal or agent of any employer, “willfully and with intent to deprive the employee of any part of his wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance or contract...” *Id.*

The Washington Supreme Court extensively discussed the liability created by RCW 49.52 in *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152,961 P.2d 371 (1998). The Court there noted, “the critical determination in a case under RCW 49.52.070 for double damages is whether the employer's failure to pay wages was ‘willful.’” 136 Wn.2d at 159.

There are only two instances when an employer's failure to pay wages is not willful, "the employer was careless or erred in failing to pay, or a bona fide dispute existed between the employer and employee regarding the payment of wages." *Id.* at 136 Wn.2d 160.

The bona fide dispute exception to liability under RCW 49.52.070 is more developed in Washington case law. For example, there is no bona fide dispute where an employer failed to pay a lawyer wages because of supposed economic reverses and falsified tax records. *See, e.g., Brandt v. Impero*, 1 Wn. App. 678, 680-81, 463 P.2d 197 (1969).

In its conclusion, the Court in Schilling stated:

An employer or agent of an employer who fails to pay an employee's wages withholds such wages "willfully and with intent to deprive" if the employer volitionally fails to pay the employee....In the absence of an express legislative exception to the double damages provision of RCW 49.52.070 for an employer who alleges a financial inability to pay wages due, we decline to create such an exception judicially. 136 Wn.2d at 165-66.

"Lack of intent may be established either by a finding of carelessness or by the existence of a bona fide dispute." *Id.* (quoting *Pope v. Univ. of Wn.*, 121 Wn.2d 479, 491 n. 4, 852 P.2d 1055, 871 P.2d 590 (1993)). *See also Flower v. T.R.A. Industries, Inc.*, 127 Wn.App. 13, 36, 111 P.3d 1192, 1203 (2005). "An employer's nonpayment of wages is willful and made with intent 'when it is the result of knowing and

intentional action and not the result of a bona fide dispute as to the obligation of payment.’ ” *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 849, 50 P.3d 256 (2002) (quoting *Chelan County Deputy Sheriffs' Ass'n v. County of Chelan*, 109 Wn.2d 282, 300, 745 P.2d 1 (1987)). In other words, the dispute over whether Pico owed wages to Mr. Felix must be “fairly debatable.” *Schilling*, 136 Wn.2d at 161, 961 P.2d 371.

A “bona fide” dispute between the employer and employee regarding the wages negates a finding of willfulness. *Morgan v. Kingen*, 166 Wn.2d 526, 210 P.3d 995 (2009). “An employer does not willfully withhold wages within the meaning of RCW 49.52.070 where he has a bona fide belief that he is not obligated to pay them.” *McAnulty v. Snohomish Sch. Dist. 201*, 9 Wn.App. 834, 838, 515 P.2d 523 (1973). See *Moore v. Blue Frog Mobile, Inc.*, 153 Wn.App. 1, 8, 221 P.3d 913, 916 (2009). The dispute must be “bona fide,” i.e., a “fairly debatable” dispute over whether an employment relationship exists, or whether all or a portion of the wages must be paid. See *Brandt v. Impero*, 1 Wn.App. 678, 680-81, 463 P.2d 197 (1969)(no bona fide dispute where employer failed to pay wages because of economic reverses and falsified tax records); *Simon v. Riblet Tramway Co.*, 8 Wn.App. 289, 293, 505 P.2d 1291 (dispute over bonus-no double damages), *review denied*, 82 Wn.2d 1004 (1973), *cert. denied*, 414 U.S. 975, 94 S.Ct. 289, 38 L.Ed.2d 218 (1973);

Ebling v Gove's Cove, Inc., 34 Wn.App. 495, 500-02, 663 P.2d 132 (1983)(no bona fide dispute regarding commission amounts actually owed sailboat salesman-double damages upheld); *Cannon v. City of Moses Lake*, 35 Wn.App. 120, 663 P.2d 865 (dispute over accumulated sick/vacation leave fairly debatable-no double damages), *review denied*, 100 Wn.2d 1010 (1983); *Cameron v. Neon Sky, Inc.*, 41 Wn.App. 219, 703 P.2d 315 (deduction by employer of a disputed debt from wages owed-no double damages), *review denied*, 104 Wn.2d 1026 (1985); *Moran v. Stowell*, 45 Wn.App. 70, 81, 724 P.2d 396 (sick leave dispute-no double damages), *review denied*, 107 Wn.2d 1014 (1986); *Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 659, 717 P.2d 1371 (1986) (conflict over incentive bonuses, dispute over actual amount owing-no double damages); *Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wn.2d 282, 300-303, 745 P.2d 1 (1987) (dispute over deputy on-call time payments-no double damages); *Yates v. State Bd. for Community College Educ.*, 54 Wn.App. 170, 176-77, 773 P.2d 89 (dispute over professional improvement credits-no double damages), *review denied*, 113 Wn.2d 1005, 777 P.2d 1050 (1989); *Pope*, 121 Wn.2d at 489-91, 852 P.2d 1055 (University withheld disputed social security taxes from wages of student employees ineligible for retirement system-no double damages).

In *Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 660, 717 P.2d 1371, 1375 (1986), an employee who worked as a salesman was asked to resign. He agreed, provided that he would still receive his bonus for the year, which the employer's sales manager promised to him in writing. The employee resigned but did not receive his expected bonus. He filed suit for breach of contract and defamation. The Court explored the bona fide dispute issue:

Plaintiff argues this court cannot refuse the statutory remedy of RCW 49.52.070 if an employer refuses to pay money it admittedly owes to an employee. The question of whether the employer willfully withheld money owed, however, is a question of fact; our review is limited to whether there was substantial evidence to uphold the court's decision. We find the evidence sufficient to uphold the decision... While the trial court did not enter written findings with regard to the plaintiff's request for exemplary damages, its oral observations offer some insight. *State v. Eppens*, 30 Wn.App. 119, 126, 633 P.2d 92 (1981). The trial court found RCW 49.52.070 to be inapplicable because there had been a bona fide dispute prior to the summary judgment as to whether Krachenfels' [Plaintiff] written assurance constituted an enforceable contract. The court also noted that the amount of bonus due under the plan was subject to some discretion and *the final amount owing to plaintiff remained subject to considerable dispute at trial*. There is sufficient evidence in the record to show a bona fide dispute as to the actual amount owed. Our review is limited to this determination. *Id. Emphasis Added*.

Similarly, *Champagne v. Thurston County*, 163 Wn.2d 69, 178 P.3d 936 (2008), involved an employer's claim that it had no legal obligation to pay the plaintiffs the wages requested. In *Champagne*, the plaintiffs were paid certain additional amounts a month after the wages were earned. 163

Wn.2d at 72-73. A change to a WAC section rendered such payments lawful, but under the old rule, such delayed payments were not allowed. *Id.*, at 77-78. Moreover, the CBA involved in the matter allowed for the delayed payments before the change to the WAC, and CBA provisions pertaining to pay periods were expressly allowed by another WAC to supersede the old WAC provision. *Id.* Ultimately, the court determined that a bona fide dispute “more than likely” existed regarding whether the wages were due by a certain time under the old WAC, and denied double damages to the plaintiffs. *Id.*, at 82. *Champagne v. Thurston County* is particularly relevant to the current case because it establishes that a bona fide dispute can arise over the delay of payment. In this case, the delay arose due to a dispute over the amount owed. Felix did not even know how much he was due when he resigned from Pico. RP P. 302, li. 19-25.

Another analogous case, *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1203 (9th Cir.2002), held that the double damages provision of RCW 49.52.070 does not apply when employees are paid unlawfully low wages in violation of federal and state anti-discrimination laws. According to *Hemmings*, RCW 49.52.050 applies only when an employer has a pre-existing duty under contract or statute to pay a specific compensation. When the employer's obligation to pay a specific amount does not legally accrue until a verdict, the employer cannot be said to have consciously

withheld a quantifiable and undisputed amount of accrued pay. *Hemmings*, 285 F.3d at 1203.

First, as discussed above, there is a dispute over whether the amount Felix claimed is, in fact, wages. There is ample evidence in the record, combined with the uncertainty of the legal status of the loan, for a bona fide dispute as to whether *wages* were due.

Similar to *Hemmings*, the actual amount due was in dispute; Mr. Felix testified he would not take less than the \$37,788 he had demanded. RP P. 42, li. 13-15. But this number was not agreed to by the parties. In fact, the Despite making efforts to settle both of Mr. Felix's claims, no settlement was reached. The start date of the wages was also in dispute, which is a fairly debatable issue.

In short, on the evidentiary record before this Court and in light of the applicable Washington authority, there was a bona fide dispute as to the total amount due to Felix, even up to the date of trial; Felix contended the loan was for "wages" from January 1, 2007, while Pico contended the loan amount was to be calculated from the March 16, 2007 acceptance of the loan agreement. As a result, the Court should not have found wilfulness or awarded double damages and attorneys' fees; a bona fide dispute existed.

There has been substantial evidence in this case that attempts were made to pay Mr. Felix a portion of these wages, both within weeks of the December 15, 2007 end date as well as throughout this litigation. It was Mr. Felix who insisted on payment as if the election date was January 1, 2007.

FINDINGS OF FACT HOLDING FEBRUARY 2007 IS THE EFFECTIVE DATE ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

This Court reviews the trial court's findings of fact for substantial evidence in the record and conclusions of law de novo. *Estate of Jones*, 152 Wn.2d 1, 8-9, 93 P.3d 147 (2004). While findings of fact which are supported by substantial evidence will not be disturbed on appeal, unsupported findings cannot stand. *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993).

The Court reviews the record to see if there is substantial evidence to support challenged findings of fact; if there is, then those findings are also binding upon the appellate court. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Credibility determinations are for the trier

of fact and are not subject to appellate review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Here, the trial court concluded the election was effective in February when Felix sent Exhibit 11, which requests election from shares to the loan agreement. Felix, however, testified that the loan agreement was entered into on January 1, 2007. Pico testified that the loan agreement was effective April 1, 2007. Neither party contended that the February e-mail was the date of the election. As a result, the trial court's Finding of Fact is not supported by any evidence and, therefore, the trial court's finding should be reversed.

THE SETTLEMENT E-MAIL WAS INADMISSIBLE PER ER408

In reviewing the admission of evidence over objection, the Court of Appeals reviews the trial court's rulings for an abuse of discretion. *Jenkins v. Snohomish County PUD No. 1*, 105 Wn.2d 99, 713 P.2d 79 (1986).

ER 408 provides:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount... This rule also does not require exclusion when the evidence is offered for

another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

“[T]he rule bars the use of all offers as evidence, whether the offers were successful or unsuccessful. If the rule were otherwise, Rule 408 would not achieve its intended purpose of barring evidence of settlement negotiations in the event that negotiations fail and the case proceeds to trial.” *Footnote omitted*, 5A Wn. Prac., Evidence Law and Practice § 408.4 (5th ed.)

The official comment to ER 408 states that the rule:

makes the evidence inadmissible and is based on the policy of promoting complete freedom of communication in compromise negotiations. Parties are encouraged to make whatever admissions may lead to a successful compromise without sacrificing portions of their case in the event such efforts fail. The rule avoids the generation of controversy over whether a statement was within or without the area of compromise negotiations.

The rule is based on a policy “favoring compromise and settlements” (ER 408 *cmt.*) and “was enacted to protect parties and witnesses from the potentially corrosive effect settlement evidence may have on a jury.” *Northington v. Sivo*, 102 Wn. App. 545, 550, 8 P.3d 1067 (2000). *See, e.g. Duckworth v. Langland*, 95 Wn.App. 1, 5-6, 988 P.2d 967 (1998) (trial court properly struck references to compromise negotiations filed in opposition to a summary judgment motion); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 675, 15

P.3d 115 (2000) (“confidential settlement communications are inadmissible for purposes of establishing [defendant's] liabilities.”)

For example, in an action arising out of the parties' operation of a used car dealership, the plaintiff sought to recover damages for defendant's alleged failure to repay a loan and failure to pay for consigned motor vehicles. The Defendant moved for summary judgment. In response, Plaintiff filed, among other things, a letter he and his attorney had received from the defendant's attorney. Plaintiff claimed the letter substantiated his claims by admitting the existence of the transactions and agreements Plaintiff claimed to have had with Defendant.

The letter, which had been written in response to a demand letter by Plaintiff's attorney, did not deny each and every one of Plaintiff's allegations, but the letter disputed Plaintiff's version of the facts and offered the possibility of a settlement in which Defendant would purchase Plaintiff's interest in the partnership, or vice versa. The trial court properly refused to consider the letter in the summary judgment proceeding because it was inadmissible under Rule 408. *Laue v. Estate of Elder*, 106 Wn.App. 699, 25 P.3d 1032 (2001).

As Tegland explains:

(4) What evidence is barred. Rule 408 is concerned only with offers and other statements that relate to

compromising a claim. Statements made before the plaintiff asserts a claim remain admissible.

(a) The point at which a claim is asserted, thus triggering the rule, is normally the filing of the action, but the point may vary according to the facts and circumstances of the individual case. Prefiling statements may be barred if made after an actual dispute has arisen and when litigation is imminent. The court has a measure of discretion in administering this aspect of the rule.

Example—Inadmissible.

In *Duckworth v. Langland*, 95 Wn.App. 1, 988 P.2d 967 (1998), a dispute arising out of the development of real estate, the trial court properly excluded a pre-lawsuit letter written by one of the defendants to the plaintiff, offering to pay the plaintiff \$35,000.

Example—Inadmissible.

In *Finley v. Curley*, 54 Wn.App. 548, 774 P.2d 542 (1989), a corporate officer's offer to exchange his stock in a joint venture for a consultant's shares in a corporation was an inadmissible settlement offer. The court said that at the time the offer was made, a dispute had already arisen and "The court could believe ... that the offer was made to buy peace." 5D Wn. Prac., Handbook Wn. Evid. ER 408 (2010-11 ed.)

The only exception to the ER 408 bar arises if the evidence is offered from some other reason than establishing liability or damages. *Matteson v. Ziebarth*, 40 Wn.2d 286, 242 P.2d 1025 (1952) (evidence of compromise and offers of compromise admissible when offered for some purpose other than liability, such as to prove lack of good faith where good faith in issue) (cited in *Comment 408 to ER 408*).

Plaintiff contended that the communications are “admissions” as an exception to the ER 408 bar. Again, Tegland clarifies that these so-called admissions, are inadmissible:

(c) Documents and other statements that are an integral part of settlement negotiations or the settlement itself—including admissions by party opponent—are barred by ER 408. When adopted, ER 408 changed Washington law in this respect. The official Judicial Council Comment to ER 408 states, “[T]he conduct or statements have been allowed in evidence as admissions of party opponent By contrast, Rule 408 makes the evidence inadmissible and is based on the policy of promoting complete freedom of communication in compromise negotiations.”5D Wn. Prac., Handbook Wn. Evid. ER 408 (2010-11 ed.)

Similarly, in *Doe v. Gonzaga University*, 99 Wn. App. 338, 992 P.2d 545 (2000), affirmed 143 Wn. 2d 687 (2001), the Court held:

According to ER 408, evidence of a settlement agreement is not admissible to prove whether a party is liable on a particular claim. But the rule ‘does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness.’ ER 408. The purpose of the rule is to encourage parties to make whatever admissions may lead to a successful compromise without sacrificing portions of their case in the event these efforts fail. Comment ER 408.” *Id.*

“The rule is designed to exclude the offer of compromise only when it is tendered as an admission of the weakness of the offering party's claim or defense” 2 Kenneth S. Broun, *McCormick on Evidence*, § 266, at 234 (6th ed. 2006) (emphasis added).

Evidence of settlement offers are largely irrelevant because such offers do not necessarily reflect the belief that the adversary's claim has merit. *Buliach v. AT&T Info. Sys.*, 113 Wn.2d 254, 263-64, 778 P.2d 1031 (1998). The inappropriate reference to settlement negotiations during trial is grounds for an order for new trial. *Discargar v. Seattle*, 30 Wn.2d 461, 468, 191 P.2d 870 (1948).

As a result, all of the exhibits pertaining to settlement, regardless whether such settlement is expressly stated or not, are inadmissible. It would be reversible error to allow Plaintiff to use these settlement communications to prove "admissions" regarding liability and/or damages.

Here, Exhibit 2 was admitted over objection. The Court held it was admissible, but does not identify the rationale for why the ER 408 bar does not apply, other than the fact that the term "settlement" does not appear on the face of the document:

THE COURT: The Court will admit it. There is nothing on
13 the face of the document itself that says: There is my
14 settlement offer, this is in -- for settlement. There is
15 nothing on the face of the document that says that this is
16 for settlement. So I will allow its admission. RP P. 42, li. 12-16

But, the Court uses Exhibit 2 in denying the Defendants' motion for a directed verdict to establish the amount due to Felix.

7 MR. KING: And one final motion. This is again a motion
8 to dismiss the -- well, actually, we'll do the wage claim.
9 In order to establish the wages due, Mr. Felix has to

10 testify as to damages and the period of time that he is due
11 those damages. He hasn't established his dollar figure, he
12 hasn't asked the Court for really anything. He said, "This
13 is what I sent a letter for," but he never actually said,
14 "This is how much I'm due in wages." And, as a result,
15 again, that's kind of a critical element of their claim. He
16 said that, you know, it's up to half of his compensation.
17 That's what the agreement says. But we haven't had a
dollar
18 figure. And, as a result, they have failed to produce
19 sufficient evidence to meet their burden of proof.
20 MR. MCKAY: Your Honor, there is more than sufficient
21 evidence based upon Dr. Trout's explicit admission that the
22 amount of wages that is owed is 37,788.
23 As I told the Court at the beginning of the proceedings,
24 there is some question as to what the price -- precise
25 amount will be. I will be addressing that during
1 Defendant's case, and also I'll address it in argument. But
2 at the very least, there is sufficient evidence, there is
3 all the inferences in our favor that the proper amount is
4 \$37,788.

5 THE COURT: Exhibit 2 does establish 37,788 as the
amount.

6 In terms of a calculation, I think that's sufficient at this
7 point in time.

RP P. 271, li. 7-25, P. 272, li. 1-7

As discussed below, absent this exhibit, Felix never testified regarding the actual amount of wages he claims he was due during Plaintiff's case. Plaintiff's Counsel admitted the "precise" calculation had not been testified to. It was only during the defense case that he presented any evidence attempting to define his wages due.

It is axiomatic that a Plaintiff has the burden of proof on damages. In the Fair Labor Standards Act context, the United States Supreme Court

held the appropriate burden of proof for a claim of uncompensated work under the FLSA is “sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.” *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946). Here, Felix never specifically identified the amount of wages he claimed were due; instead he testified as to the start date of the “deferred wage agreement” and the last day he worked. This is insufficient to show what wages were due. Therefore, the trial court erred in denying the Defendants’ Motion for a directed verdict; the sole evidence came from the ER 408 protected e-mail where Felix makes a demand and Defendants respond.

THE MOTION FOR ATTORNEYS’ FEES WAS UNTIMELY

Pursuant to CR 54(d)(2) a motion for attorneys’ fees and costs must be filed no more than 10 days after entry of judgment. Judgment was entered on July 19, 2011. *Docket*. The Plaintiff’s motion was originally filed on July 29, 2011, but it was then stricken. *Docket*. The motion was then re-noted it for hearing on August 26, 2011. *Docket*. In *Corey v. Pierce County*, 154 Wn.App. 752, 774, 225 P.3d 367, 379 (2010), the Court addressed an untimely petition for attorneys’ fees:

We do not believe the mandate of liberal construction of the statutory attorney fees claim precludes the application of a temporal limitation, such as that in CR 54(d). The

timeliness requirement of CR 54(d) applies only after the underlying claim is reduced to judgment in court. Corey has not shown excusable neglect or reason for delay in making her request for fees. The trial court properly denied the fees as untimely under CR 54(d).

Further, in its oral ruling, the Court ordered the Plaintiff to present his motion for attorneys' fees that As a result, under CR 54(d)(2), Felix's motion for attorneys' fees is untimely and should be denied.

**THE ATTORNEYS FEES AWARDED WERE EXCESSIVE
AND NOT REASONABLE**

The burden of demonstrating that a requested fee is reasonable “always remains on the fee applicant;” *Absher Const. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 847, 917 P.2d 1086 (1995). As the requesting party, Felix has the burden of establishing that the requested number of hours is a reasonable number. In calculating an award of attorney fees, the trial court is required to “independently determine what are reasonable attorneys' fees, beginning first by calculating a lodestar figure.” *Pham v. City of Seattle*, 124 Wn. App. 716, 721, 203 P.3d 827 (2004). “The lodestar method is grounded in the market value of the lawyer's services, and is determined by multiplying the hours reasonably expended in the litigation by each attorney's reasonable hourly rate of compensation.” *Id.* (citing *Steele v. Lundgren*, 96 Wn. App. 773, 780, 982 P.2d 619 (1999)). “[T]he trial court, instead of merely relying on the

billing records of the... attorney, should make an independent decision as to what represents a reasonable amount of attorney fees.” *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993).

“[T]he determination of what constitutes reasonable attorney fees should not be accomplished solely by reference to the number of hours which the law firm representing the successful [party] can bill.”

Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 744, 733 P.2d 208 (1987). When calculating the number of hours reasonably expended in the litigation, “the court must discount any duplicated or wasted effort by the attorneys.” *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 599-600, 675 P.2d 193 (1983).

An award of fees is not a penalty, but rather a cost of litigation. *Absher Const.*, 79 Wn. App. at 847. To that end, the trial court should consider the relationship between the amount in dispute and the fee requested, and the circumstances of the individual case. *Id.*

However, even if the lodestar method is used, the court should still determine whether the fee is reasonable. In *Allard v. First Interstate Bank of Washington*, 112 Wn.2d 145, 149, 768 P.2d 998 (1989) the court considered the eight relevant factors in determining the amount of a reasonable attorney fee. These are:

- (1) The time and labor required, novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) The fee customarily charged and the locality of similar legal services;
 - (4) The amount involved and the results obtained;
 - (5) The time limitations imposed by the client or by the circumstances;
 - (6) The nature and length of the professional relationship with the client;
 - (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and,
 - (8) Whether the fee is fixed or contingent.
- Allard*, supra at 149.

The Washington Supreme Court has advised trial courts that they cannot simply accept the billing statements of a party petitioning for a fee award, but must make an independent judgment of a reasonable fee amount. In *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 733 P.2d 208 (1987), the Washington Supreme Court reviewed a trial court's award of attorney's fees under the Consumer Protection Act. The court felt that Nordstrom's counsel had greatly exaggerated its fees and remanded the matter back to the trial court with the following directions:

[T]he determination of what constitutes reasonable attorney fees should not be accomplished solely by reference to the number of hours which the law firm representing the successful plaintiff can bill.... Therefore, the trial court, instead of merely relying on the billing records of the plaintiff's attorney, should make an independent decision as to what represents a reasonable amount of attorney's fees.

The amount actually spent by the plaintiff's attorney may be relevant, but is in no way dispositive. Nordstrom, supra at 744.

Those who seek fees under [fee shifting statutes] have an obligation "to maintain billing time records that are sufficiently detailed to enable courts to review the reasonableness of the hours expended." *Woolridge v. Marlene Industries Corp.*, 898 F.2d 1169, 1177 (6th Cir. 1990). Vague time entries that do not sufficiently document how time was spent are improper and such time should be discarded. As stated in *In re Donovan*, 877 F.2d 982, 995 (D.C.Cir. 1989):

The description of services rendered is confined to "legal issues," "conference re all aspects" or "call re status." Such description fails to provide the court with any basis "to determine with a high degree of certainty" that the hours billed were reasonable. The vague description does not allow the court to evaluate whether the time billed was spent on issues [for which fees are recoverable] and this compels the court to exclude such hours. *Id. See also, e.g., Lewis v. Coughlin*, 801 F.2d 570, 577 (2nd Cir. 1986).

In this case, Felix made no efforts or provided the trial court with any basis to determine that the number of requested hours is reasonable. Indeed, he simply provides this Court with billing records, each with certain amounts redacted. CP 448-453. This is improper. Further, the

Defendants challenged the fees spent in preparing a variety of documents and pleadings which were either not used or unsuccessful. The Defendants also challenged the legal fees claimed for motions to compel where sanctions were awarded on the basis of the legal fees incurred in drafting and filing those motions. Finally, the Defendants challenged the entirety of the fees submitted as being sufficiently vague as to render any analysis as to the reasonableness impossible.

To assist the Court, Defendants provided a chart to the trial court addressing each of the billing deficiencies. RP 468-471. *See Appendix B (reproduced for the Court of Appeal's Convenience)*. The issues with the various entries are as follows:

- The Motion for Default was never filed with the Court as the answers were filed.
- The other matter was dismissed on summary judgment; Plaintiff cannot recover time associated with the appraisal matter.
- The Plaintiff was awarded sanctions to compensate for the attorneys' fees associated with the motion to compel.
- Again, the Plaintiff was awarded sanctions to compensate for the attorneys' fees associated with the motion to compel.

- The Deposition of Mary Edenshaw did not occur; Plaintiff voluntarily struck his request for her deposition. As a result, this work was not reasonable or necessary to prosecute this matter.
- The Plaintiff's Motion for Summary Judgment was denied. The Plaintiff's Motion for CR 11 Sanctions was also denied.
- As a result, neither of these actions were reasonable or necessary for the prosecution of this matter; Plaintiff's fees should be reduced by the hours worked on this motion for summary judgment.
- Further, the Plaintiff submitted a variety of certified statements in response to the Defendants' summary judgment and in support of Plaintiff's motion. As a result, it is impossible to determine whether the claimed time was for the response to the Defendants' Motion or in support of the Plaintiff's motion. Therefore, all time should be discounted.
- Finally, several entries contain administrative tasks, such as assembly, inputting, and filing of the motions. As a result, the Court cannot determine whether such time was

reasonable and/or necessary, and the time should be reduced accordingly.

- The Plaintiff's motion to reconsider was denied.

Therefore, this time was not reasonable or necessary to the prosecution of this matter. Further, the time requested also includes administrative tasks. The court should reduce the requested hours accordingly.

Not only has Plaintiff sought fees for tasks which he was unsuccessful and served no purpose in the prosecution of this matter, Plaintiff has failed to establish that an hourly rate of \$350 is reasonable and/or customary; his self-serving declaration is insufficient to prove his hourly rate is reasonable and/or customary in the Seattle market.

The hourly rate requested by Plaintiff's counsel (\$350), however, is not supported by his request for fees in response to the motion to compel. In the first motion to compel, Plaintiff sought \$350 for "Plaintiff counsel's time in having to bring this motion." *Plaintiff's Motion to Compel; Plaintiff's Reply*. However, the billing submitted to the Court seeks compensation for a total of 2.8 hours. RP 448.

Based on the fees addressed above, the trial court should have, at a minimum reduce the total hours in this matter from 233.075 hours to

156.775 hours (reducing the fees by 76.3 hours for the unnecessary and unsuccessful work).

Plaintiff failed to provide clear billing descriptions sufficient to allow the trial court to determine whether the claimed work was reasonable and necessary, thus the Court should deny attorneys' fees to the Plaintiff.

Finally, the Defendants note that the Plaintiff's time spent on this matter is inordinately large in light of the fact that the Plaintiff's wage claim at trial was for approximately \$35,000. It does not make economic sense to reward the legal spend of over twice the amount in legal fees. The fees as presented are not reasonable and the trial court erred in failing to discount the fees accordingly.

V. Conclusion

The Court's conclusion that Felix's loan agreement constitutes wages is in error. Aside from the fact that an agreement to pay when the company can afford it is unenforceable under Washington wage and hour law. As a result, Felix cannot have intended the agreement to constitute a deferral of wages; it must be a loan to Pico Computing. Therefore, the trial court erred in finding that the loan arrangement constituted "wages" and should be reversed.

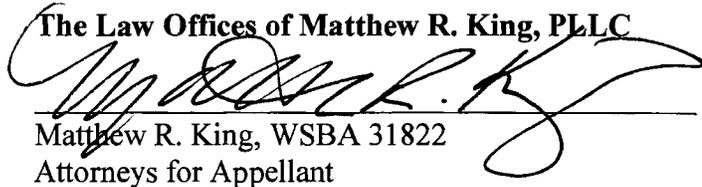
Not only is the loan not wages, the decision not to pay Felix arose from a bona fide dispute over the amount due him; Felix testified that his loan was to start as of January 1, 2007. Pico testified that his loan was accepted on March 16, 2007, and went into effect on April 1, 2007. Not even Felix could identify the amount due him when he resigned. This bona fide dispute is further identified in the offer to settle extended two weeks after Felix resigned. Without such a dispute, no such communications would have occurred. The offer for the wages, based on Pico's calculation remained open throughout the litigation process and throughout the trial. As a result, the trial court erred in doubling damages and awarding attorneys' fees and this Court should reverse the trial courts rulings.

Further, the Court's findings of fact and conclusions of law regarding the effective date of the loan agreement are not supported by the evidence in this case. No party testified that they intended the loan agreement to be effective on February 16, 2007. Felix testified the agreement was to be effective January 1, 2007. Pico testified the agreement was accepted on March 16, 2007. As a result, the Court's finding of facts and conclusions of law regarding the start date of Felix's election is not supported by any evidence and should be reversed.

Finally, as the loan agreement was not wages, any award of attorneys' fees was erroneous. The trial court's award of attorneys' fees was also in error as the fee request was untimely, the fees sought were excessive and not supported by evidence. The trial court's award of attorneys' fees should be reversed.

RESPECTFULLY SUBMITTED this 14th day of December, 2011.

The Law Offices of Matthew R. King, PLLC

A handwritten signature in black ink, appearing to read 'Matthew R. King', is written over a horizontal line. The signature is stylized and cursive.

Matthew R. King, WSBA 31822
Attorneys for Appellant

APPENDIX A – EXHIBIT 14

Subject: Re: New appraiser
From: "Robert Trout" <rtrout@picocomputing.com>
Date: Sun, 27 Jan 2008 10:55:31 -0800
To: "Gabriel Felix" <vashongabriel@gmail.com>

Jason:

This email makes no sense to me whatsoever. I cannot attach a meaning to vague terms like 'fiscally responsible'. But worse than that, the email makes me think that you still have not grasped some fundamental facts. At the hazard of insulting your intelligence let me reiterate:

1. the book value of the stock will probably be less than \$1.
2. the phrase 'when the company can afford it' means that it is the lowest priority obligation of the company.
3. as the lowest priority obligation it is behind full salaries, loans, new employees -- possibly ten years away.
4. the Agreement regulates what we can do, and imposes a tight schedule.

Assuming the \$1, my proposal is:

1. to give you \$20,000 to settle **all financial obligations** between Pico Computing and yourself.
2. to structure it as a stock transaction so that it is covered by the strict payout schedule of the Agreement, namely \$20,000 + 7% for 60 days = \$20,233.
3. to pay it all out now.

Your modifications which split the stock and your deferred claim is very bad for you. It means:

1. you receive \$2000+7% = \$2023 +/- for your stock now.
2. you get a bill for the Altium Designer now !

3. your deferred compensation (\$18,500 + #2(altium) – see spread sheet) is on the never-never plan.

The necessities of closing the books for 2007 and preparing tax statements must be met **this Wednesday**. The Agreement poses its own deadline. Please try to understand my proposal and why it is structured **the** way it is. Don't screw around again and lose the opportunity to close this issue on reasonable terms. **If** you do not understand please call.

rt

ps. I am attaching the note that i was about to send when you called. We covered more than is in this **doc** and some of it has been overtaken by events.

----- Original Message -----

From: Gabriel Felix
To: Robert Trout
Sent: Saturday, January 26, 2008 4:18 PM
Subject: Re: New appraiser

Hi Trout,

I never had a problem with the share price offers, but rather that you were changing the deferred salary into stock. It doesn't seem fiscally responsible to convert right now. If you would be willing to leave the differed salary for 2007 out of the deal, then we could proceed.

Thanks,

Jason

On Jan 25, 2008 12:10 PM, Robert Trout <rtrout@picocomputing.com> wrote:

Jason:

Attached is what i think we agreed to with a little more detail.

Just last night when i was mulling over with Barbara a very tough response, it occurred to me that i should give you enough space to adjust to the situation and change your conduct - something i have seen you do before and for which i have great admiration.

This is not the agreement that i proposed, and perhaps i was being to generous (a failing that you well know) but i do think it is fair.

Look over these points and respond when you have had the time to consider it. I will presume it is a go, and hold off all the other actions that i should be pushing along until i hear from you.

rt

----- Original Message -----

From: [Gabriel Felix](#)

To: [Robert Trout](#)

Sent: Friday, January 25, 2008 11:02 AM

Subject: New appraiser

Hi Trout,

My new appraiser is Dennis Fogh, hopefully his expertise will not be necessary.

Thanks,

Jason

| | |
|-----------------------|----------------------------------------------------------------------------|
| Jason_0125.doc | Content-Type: application/msword Content-Encoding: base64 |
|-----------------------|----------------------------------------------------------------------------|

Pico Computing, Inc.,
Suite 311,
150 Nickerson St.,
Seattle, WA, 98109-1642.
206 283 2178
206 283 0436 (fax)
picocomputing.com



Jan 31st, 2008.

Mr. Jason Felix
29229 Manzanita Bch Rd
Washington, Is, WA, 98070-8911
(206) 463-4056

Last day of employment.

Your last day of employment at Pico Computing was Friday Dec 14th, 2007. The remaining staff universally regard this as your final day no doubt because it was memorialized by lunch at Ponti's. You were paid up through Dec 15th as recorded in Quick Books. You did not come into work on the following Monday, Tuesday, or Wednesday. Your appearance on Thursday (Dec 20th) was for three hours and was *after* you had begun your employment at Phillips. There are therefore no possible grounds for regarding your last day as anything but Dec 14th.

Appointment of an appraiser.

You have failed to elect an appraiser by the 40th day (Jan 23rd) after your termination. You have therefore forfeited your rights under section 5.1.3.2 of the Stockholders Agreement. The Corporation has named Hanlin Moss as an appraiser. Under section 5.1.3.3 their valuation will prevail.

The Hanlin Moss Group, P.S.
Certified Public Accountants and Certified Valuation Analysts
1411 Fourth Avenue, Suite 410, Seattle, WA 98101
Tel: 206-623-3200 Fax: 206-623-3222

There is an ample email trail dating back to Dec 20th, 2007 indicating that the Corporation would appoint Hanlin Moss. They are well qualified and know the financial status of the Corporation. As CPA's and CVA's there is no reason to believe they will not make a fair and impartial appraisal. The remaining staff are universally opposed to making a special exception in your case by letting the schedule slip to accommodate your belated request to appoint your own appraiser.

Back salary.

Under section 7.3 of the Agreement any modification to the Agreement requires the written consent of *all* stockholders. Your election to discontinue accumulating stock in lieu of salary is not supported by any such written consent, and is therefore null and void.

Nothing herein shall be construed as compromising the Corporation's rights under 7.3. The following discussion aims to establish fair recompense in the light of your request to suspend accumulation of stock.

Your request was received by the Corporation in Feb, 2007. This decision would have become effective at the beginning of the next pay period namely March 1st, 2007. Documents in my possession confirm this date. One of the signed documents in our possession is dated March 16th which would make the date of discontinuance Apr 1st. We reserve judgment on which of these dates is fair. On Jan 19th, all stockholders were sent an Excel spreadsheet in which stock distribution and the amount of back salary was calculated based upon the date of Apr 1st.

We have made the deduction for the Altium Designer against the salary claim rather than the stock. The value of Altium Designer was estimated at \$5000 – this may be a trifle high.

Assuming an effective date of 4/1 the amount is \$18,550. However, we may at our absolute discretion use 3/1 as the effective date (which would increase the amount to \$21,391). Your claim of a discontinuance date of Jan 1st, 2007 do not appear to be supported by the documentation and is rejected.

You implicitly acknowledged receipt of the Jan 19th email in your email reply of Jan 24th.

The document dated Apr 16th over your signature qualifies the payments with the phrase 'until sufficient financial resources are available to make full payment'. Neither document cites interest. Although it is the intention of the Corporation to pay you out entirely, we reserve all rights implicit in these two qualifications.

Payment of stock.

Once an appraisal is complete, it is the intention of the Corporation to buy your stock in its entirety. Interest at approximately 6.5% (current prime rate as specified in section 5.1.3.7) from Dec 14th, 2007 until the payment day will be added to the proceeds from the stock redemption. Under section 6.2 of the Agreement you are obliged to endorse and return the stock certificates. If you decline to do this, the stock certificates will be de-registered and the certificates will thenceforth be null and void.

Negotiated Settlement.

The second appraiser is frivolous and an unnecessary expense. It will cost you more than you recoup. Given the financial performance of the Corporation in 2007 we believe a formal valuation will not exceed \$1 per share. However, under section 5.1.2 an acceptable valuation can be determined by consent. The Corporation is open to a negotiated settlement in the range of \$20,000.

Robert Trout
President

APPENDIX B – TABLES FROM ATTORNEYS’ FEES BRIEFING

| |
|---------------------------------------------------------------------------------------------------------------------|
| 11-Sep-09 Draft, finalize and file Mot for Default – No Anwar 0.6 |
| 14-Sep-09 Rec’d and reviewed answers in both cases; def attorney 0.25 |
| 3-Nov-09 Draft and finalize Motion to Compel Disc Answers 1.1 |
| 6-Nov-09 Review Defendant’s response to Motion to Compel 0.2 |
| 9-Nov-09 Reply Brief for Motion to Compel and Request Sanctions 1.5 |
| 20-Nov-09 Reviewed and recd Order to Compel with sanctions against Def 0.3 |
| 20-Nov-09 Draft, finalize and file SECOND Mot to Compel 0.6 |
| Legal Research of Response |
| 29-Nov-09 Draft Reply re Mot to Compel and Sanctions 0.6 |
| 30-Nov-09 Finalize Reply and early morning filing 0.4 |
| 5-Dec-09 review and Email to Def atty re latest mot compel ORDER 0.3 |
| 14-Sep-10 Prep Edenshaw dep notice; email to def atty re dep and missing discovery in wage case 0.3 |
| 16-Sep-10 review case law for possible ex parte contact with witness Edenshaw, review Group Health v. Wright 0.4 |
| 23-Sep-10 rev email from def atty re missing wage info, summary judgment scheduling; edenshaw dep. 0.15 |
| 23-Sep-10 First Draft and research our mot sj, wage case 3.8 |
| 24-Sep-10 Cont first draft brief and motion 1.7 |
| 25-Sep-10 First draft Consolidated Stmt facts – email for client review 1.7 |
| Cont draft brief 1.4 |
| 26-Sep-10 Cont draft Cons/ Stmt Facts; rev & input docs from client 2.2 |
| Rev brief; research on deferred wage agreement 2.4 |
| 27-Sep-10 Cont revise brief and cons staement [sic] facts 3.2 |

28-Sep-10 More doc and rev re SJ from client
0.8
Continue drafting brief and Cos statement [sic] facts
3.1

30-Sep-10 Final Cons Stmt; email to client for review and input
0.8
Finalize Cert Stmts
1.2
Con draft SJ and Cons stmt
4.1

1-Oct-10 email and rev with client staement [sic] facts and cert stmts
0.2
Finalize SJ Motion and all support docs/stmts
5.2

4-Oct-10 First draft, response to SJ, supp cons stmt, cert staement [sic] facts
3.1
Research on wage issues, conf interest, deferred wage consent
3

10-Oct-10 Cont draft supp staement facts for new info; begin draft motion for sanctions
1.2
for fraud; review rule ethics
0.3

14-Oct-10 First read Def Response
0.6

16-Oct-10 Finalize supp cons stmt; email to client for approval
0.8

17-Oct-10 Cert Stmt for client; draft and email for approval
0.9

18-Oct-10 Finalize and assemble all exhibits and pleadings; email to def
3.1

20-Oct-10 Cont draft motion for CR 11 – FRAUD!!
2.1

21-Oct-10 Finalize mot for fraud sancts and email to defense atty
1.8

22-Oct-10 Second Read def response; begin reply
2.2

23-Oct-10 Cont response briefs and cert stmt
4.1

25-Oct-10 Finalize, assemble serve response materials
2.7

26-Oct-10 Corrected brief and email to def atty re sanctions
0.2

27-Oct-10 Rev response of King re sanctions
0.4
Draft reply
1.4
email to court re hearing procedures
0.1

| | | | |
|-----------|--------------------------------------------------------------------|----|------|
| 28-Oct-10 | Finalize reply and e-mail to def atty re CR 11 motion | | |
| | 0.75 | | |
| 7-Nov-10 | Mot for Reconsideration, wage case | | 2.2 |
| 8-Nov-10 | Finalize and serve mot for reconsider; email to Court | | 1.8 |
| 30-Nov-10 | review Order of Court re mot reconsider; email def atty and client | | 0.2 |
| 9-Dec-10 | review Def's response for mot reconsider and legal research | | 0.9 |
| | Begin Drafting reply | | 2.1 |
| 13-Dec-10 | Cont draft reply | NO | TIME |
| | LISTED | | |
| 14-Dec-10 | Finalize and serve reply bf | | 1.6 |
| 21-Dec-10 | email re status of mot recon | | 0.05 |
| 22-Dec-10 | review and discuss client order DENYING mot recon | | 0.2 |