

68336-5

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Court of Appeals No. 68336-5-I

**IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

TIMOTHY J. GODDARD,

Appellant,

v.

CSK AUTO, INC.

Respondents.

APPELLANT'S OPENING BRIEF

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STATE OF WASHINGTON
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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR.....	2
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	4
IV.	APPELLANT’S STATEMENT OF THE CASE.....	6
A.	CSK DRAFTED UNUSUAL EMPLOYMENT AGREEMENTS TO POSITION ITSELF MORE ATTRACTIVELY FOR ACQUISITION.....	6
1.	CSK Drafts and Presents Conflicting Severance and Rescission of Severance Agreements.....	6
2.	Goddard Terminates Employment Upon Satisfying the Stated Period of Retention.....	10
3.	CSK Claims Reimbursement of Relocation Debt in Disregard of Broad Mutual Release Contained in the Voluntary Rescission of Severance Agreement.....	12
V.	ARGUMENT.....	14
A.	Standard of Review.....	14
B.	Voluntary Rescission of Severance Agreement’s General Release Precludes CSK’s Claims.....	15
1.	Missouri Contract Law Upholds Release.....	16
2.	Washington Contract Law Upholds Release.....	19

3.	Release Relinquishes Obligations Pursuant to the Interim Promissory Note of February 2008.....	20
4.	Release Relinquishes Obligations Pursuant to the May 16, 2008 Letter Agreement.....	24
C.	May 16, 2008 Letter Agreement Precludes CSK’s Claims	25
D.	Goddard Did Not Breach the Interim Promissory Note....	26
E.	CSK Improperly Withheld Wages Due To Goddard.....	27
F.	Award of Attorneys’ Fees to CSK Was Improper.....	30
VI.	REQUEST FOR ATTORNEYS’ FEES.....	35
VII.	CONCLUSION.....	35

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Curators of University of Missouri</i> , 103 S.W.3d 394 (Mo. App. 2003).....	18
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, P.2d 222 (1990).....	20
<i>Boyce v. West</i> , 71 Wash. App. 657, P.2d 592 (1993).....	19
<i>Bowers v. Transamerica Title Ins. Co.</i> , 100 Wn.2d 581, P.2d 193 (1983).....	34, 35
<i>Estate of Givens v. U.S. Nat. Bank of Clayton</i> , 938 S.W.2d 679 (Mo. App. 1997).....	17, 18
<i>Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC</i> , 155 Wn. App. 643, P.3d 625 (2010).....	16
<i>Jones v. Allstate Ins. Co.</i> , 146 Wn.2d 291, 45 P.3d 1068 (2002).....	14
<i>Kaplan v. Northwestern Mut. Life Ins. Co.</i> , 115 Wn. App. 791, P.3d 16 (2003).....	15
<i>Kent Farms, Inc. v. Zurich Ins. Co.</i> , 93 Wn. App. 414, P.2d 109 (1998).....	20
<i>Liquidation of Professional Medical Ins. Co. v. Lakin</i> , 88 S.W.3d 471, (Mo. App. 2002).....	16
<i>Lybbert v. Grant County, State of Wash.</i> , 141 Wn.2d 29, 1 P.3d 1124 (2000).....	15
<i>Mayer v. City of Seattle</i> , 102 Wash. App. 66, P.3d 408 (2000).....	31
<i>McGill v. Hill</i> , 31 Wn. App. 542, P.2d 680 (1982).....	16
<i>Moore v. Blue Frog Mobile, Inc.</i> , 153 Wn. App. 1, P.3d 913 (2009).....	30

<i>Nationwide Mut. Fire Ins. Co. v. Watson</i> , 120 Wash. 2d 178, P.2d 851 (1992).....	20
<i>Schilling v. Radio Holdings, Inc.</i> , 136 Wn.2d 152, P.2d 371 (1998)....	28,29
<i>Scott By and Through Scott v. Pacific West Mountain Resort</i> , 119 Wn.2d 484, P.2d 6 (1992).....	19
<i>Slankard v. Thomas</i> , 912 S.W.2d 619 (Mo. App. 1995).....	17
<i>Vallandigham v. Clover Park School Dist. No. 400</i> , 154 Wn.2d 16, P.3d 805 (2005).....	15
<i>Veith v. Xterra Wetsuits, L.L.C.</i> , 144 Wash. App. 362, P.3d 334 (2008), review denied, 165 Wn.2d 1005, 198 P.3d 512 (2008)	19
<i>Wagner v. Wagner</i> , 95 Wn.2d 94, P.2d 1279 (1980).....	20

Other Authority

<i>Restatement (Second) of Contracts</i> § 284, comment a (1981).....	21, 23
---	--------

Rules

RAP 18.1.....	35
---------------	----

Statutes

RCW 49.52.050.....	29,35
RCW 49.52.050(2).....	29
RCW 49.52.070.....	29, 35

I. INTRODUCTION

This case involves a long-term employment relationship between the parties that resulted in a dispute when Mr. Goddard, an executive, decided to leave CSK Auto, Inc. (“CSK”) to work for its competitor, AutoZone.

During the latter course of Mr. Goddard’s employment, primarily due to CSK’s preparing itself to be acquired by another competitor, O’Reilly Automotive in 2008, Mr. Goddard was presented with several written agreements that were designed to secure his continued employment past the date of CSK’s acquisition. Mr. Goddard signed the agreements that were presented to him and continued to work in accordance with the terms those agreements. When Mr. Goddard satisfied the term of retention that CSK bargained for, he received a bonus. At that time, Mr. Goddard elected to terminate his employment with CSK.

In response, CSK withheld Mr. Goddard’s final paycheck in its entirety, which included a substantial amount of accrued leave, totaling almost \$29,000.00. CSK asserted that it was entitled to an *additional* \$209,697.89 for reimbursement of relocation expenses paid to assist Mr. Goddard with relocation of his family, including eight children, from Arizona to Washington State in early 2008. In asserting its position, CSK

ignored the fact that its last written agreement with Mr. Goddard contained a comprehensive release provision in which both parties released one another from all claims or rights that could be made against the other.

Goddard filed a complaint for wrongful withholding of wages against his former employer, CSK. Specifically, Goddard's claims were a) failure to pay wages, b) breach of contract and breach of promise of specific treatment, c) willful withholding of wages, and d) unjust enrichment.

CSK counterclaimed that it was due and owing for relocation expenses paid on behalf of Goddard. Specifically, CSK's counterclaims were a) breach of the interim promissory note and/or relocation policy, b) breach of the Severance and Rescission Agreements, and c) unjust enrichment.

Because this case involves basic principles of contract interpretation of the agreements between the parties, both parties filed motions for partial summary judgment so that the trial court could rule, as a matter of law, how the agreements should be interpreted. The trial court repeatedly amended its decision and eventually based its final ruling on a theory that neither party initially argued. Consequently, the procedural history of this case is convoluted and confusing at best. Mr. Goddard

appeals the granting of CSK's summary judgment motion, as well as the denial of his summary judgment motion.

II. ASSIGNMENTS OF ERROR

1. Mr. Goddard assigns error to the trial court's entry of the Order Granting Defendants' Motion for Partial Summary Judgment and Denying Plaintiff's Motion for Summary Judgment. (CP 418-420).
2. Mr. Goddard assigns error to the trial court's entry of Amended Order Granting Summary Judgment; Order Requesting Response to Motion to Reconsider. (CP 441-444).
3. Mr. Goddard assigns error to the trial court's entry of Order Granting in Part and Denying In Part Plaintiff's Motion for Reconsideration. (CP 610-613).
4. Mr. Goddard assigns error to the trial court's entry of Order Granting Defendant's Motion for Attorney Fees. (CP 688-689).
5. Mr. Goddard assigns error to the trial court's entry of Judgment. (CP 706-707).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Did the trial court err by concluding as a matter of law, that the Voluntary Rescission of Severance Agreement does not release Mr. Goddard from the obligations contained in the Interim Promissory Note? (Assignment of Error Nos. 1-3).

B. Did the trial court err by concluding as a matter of law, that the Voluntary Rescission of Severance Agreement covers only matters that occur after its signing, but not unmatured duties between the parties? (Assignment of Error Nos. 1-3).

C. Did the trial court err by concluding as a matter of law, that the obligation to repay relocation monies was triggered after Mr. Goddard terminated his employment with CSK Auto, Inc? (Assignment of Error Nos. 1-3).

D. Did the trial court err by concluding as a matter of law, that the release provision contained in the Voluntary Rescission of Severance Agreement was not intended to cover the Interim Promissory Note for reimbursement of certain relocation expenses should Mr. Goddard terminate his employment within two years after relocation? (Assignment of Error Nos. 1-3).

E. Did the trial court err by concluding as a matter of law, that

Mr. Goddard is obligated to reimburse CSK Auto, Inc. for amounts paid to Mr. Goddard that related to his relocation made prior to the “Change of Control” as defined by the letter dated May 16, 2008? (Assignment of Error Nos. 1-3).

F. Did the trial court err by concluding that future claims are not subject to the terms of a general release as a matter of law and that the release contained in the Voluntary Rescission of Severance Agreement does not apply to Mr. Goddard’s obligations under the Interim Promissory Note and/or Relocation Policy? (Assignment of Error Nos. 1-3).

G. Did the trial court err by holding, as a matter, of law, that Goddard breached the Promissory Note respecting expenses paid after the date of the merger with O-Reilly? (Assignment of Error Nos. 1-3).

H. Did the trial court err in denying Goddard’s motion to dismiss CSK’s claims for breach of the Interim Promissory Note and/or Relocation Policy? (Assignment of Error Nos. 1-3).

I. Did the trial court err in dismissing Goddard’s claim for payment of wages, exemplary damages, and attorneys’ fees? (Assignment of Error Nos. 1-3).

J. Did the trial court err by awarding attorneys’ fees to CSK in the amount of \$76,060.00? (Assignment of Error No. 4).

K. Did the trial court err by entering judgment against Mr.

Goddard in the amount of \$257,679.13? (Assignment of Error No. 5).

IV. APPELLANT'S STATEMENT OF THE CASE

A. CSK DRAFTED UNUSUAL EMPLOYMENT AGREEMENTS TO POSITION ITSELF MORE ATTRACTIVELY FOR ACQUISITION

1. CSK Drafts and Presents Conflicting Severance and Rescission of Severance Agreements

Goddard commenced work for CSK in 1984. CP 56. On or about March 31, 2008, CSK presented Goddard with a "Severance Agreement" for his review and approval. CP 57; CP 86. CSK was in the process of merging with its competitor, O'Reilly Automotive, Inc. CP 57. The purpose of the "Severance Agreement" was to ensure the continued employment of key management personnel. CP 86. The Agreement was drafted by CSK. CP 57. The Recitals of the Severance Agreement state:

The Company considers it essential and in the best interest of its stockholders to foster the continuous employment of key management personnel. The Company further recognizes that, as in the case of many publicly held corporations, the possibility of a change of control of the Company may exist and that such possibility, and the uncertainty and questions which it may raise among management, may create concerns for, and the distraction of, management personnel and may ever result in departures which might have otherwise not have taken place, all to the detriment of the Company and its stockholders. The Company now desires to take steps to reinforce and encourage the continued attention and dedication of members of the

Company's management, including the Executive, [Tim Goddard] to their assigned duties without distraction in the face of potentially disturbing circumstances arising from the possibility of a change of control of the Company. CP 86.

Consequently, Goddard understood the "Severance Agreement" to mean that if his employment was terminated by CSK without cause, or if Goddard voluntarily terminated his employment for good reason, as specifically defined by the "Severance Agreement," he would be entitled to severance benefits. CP 57. Severance benefits include payment of accrued vacation, base salary continuation in accordance with normal payroll practices for six months after termination, with continuation of benefits. CP 57; CP 88. Goddard's annual salary with CSK was \$177,000 at the time. CP 57.

Just prior to completion of the merger between CSK and O-Reilly Automotive, Inc., CSK presented Goddard with a letter agreement dated May 16, 2008, ensuring that Goddard would continue to receive his relocation benefits despite the occurrence of the merger. CP 597-98. The letter agreement provided, in pertinent part:

The Company agrees that if, prior to completion of your permanent relocation to the Seattle, Washington area, the Company enters into an agreement that, if consummated, would result in a Change in Control ... the Company ... will continue to reimburse you for relocation .. on terms no less favorable than the CSK Auto, Inc. Relocation Policy...

In fact, CSK merged with O'Reilly Automotive, Inc. in mid-2008. CP 180-181. Goddard continued his employment after the merger, remaining qualified to receive the severance package should his employment terminate at the behest of CSK, or for "Good Reason" as defined by the "Severance Agreement". CP 87.

In August 2008, Goddard traveled to Arizona to participate in a regional meeting with about seven CSK Regional Vice Presidents. CP 59. Just before the meeting, Goddard was informed that he was to prepare a comprehensive presentation of his region and that he was to treat the meeting more like an interview for his own job. CP 59. At the meeting, the original "Severance Agreement" was discussed. CP 59. The management of O'Reilly Automotive, Inc. acknowledged the fact that Goddard had entered into a "Severance Agreement" prior to the merger. CP 59. Goddard was given the option to leave employment with O'Reilly Automotive, Inc. at that point in time, and would be paid as if he were a continued employee for six months pursuant to the terms of the "Severance Agreement". CP 59.

Mr. Wise, the Co-President of O'Reilly Automotive, Inc. then offered Goddard a Regional Manager position, with a starting pay of \$145,000. CP 59. Goddard accepted the position as reflected in a written and signed "Offer of Employment" letter dated August 4, 2008. CP 100 –

101. The new position was a demotion not only in terms of salary, but from an officer-level position to a management-level position. CP 59. Mr. Wise stated that if Goddard decided to stay, he would have to sign a “Voluntary Rescission Agreement” and that, in consideration for signing that agreement, O’Reilly Automotive, Inc. would pay him a bonus which was equivalent of six months pay. CP 59.

The Voluntary Rescission of Severance Agreement was presented to Goddard approximately six months after the Interim Promissory Note was signed, and approximately five months after the Severance Agreement was signed. Its recitals provide, in pertinent part:

Whereas, rather than sever the employment relationship with CSK as a subsidiary of O’Reilly, the Executive has agreed, and O’Reilly desires, to retain the Executive’s employment relationship and in so doing rescind The [Severance] Agreement in favor of the consideration addressed herein infra... CP 103.

Goddard signed the Voluntary Rescission of Severance Agreement in August 2008. CP 60. He was giving up his officer / executive status, title, and a substantial amount of “base” salary, approximately, \$32,000 on an annual basis. CP 60. In exchange, Goddard would receive the same compensation as had been delineated in the “Severance Agreement” (payment of accrued vacation, six months base salary and benefits) “on July 1, 2009, only if the Executive is employed on that date, or if

separated from employment, has not voluntarily separated employment.”

CP 104.

Goddard remained employed with O’Reilly Automotive, Inc. through July 1, 2009, so that he would be entitled to the payment of \$88,500 of consideration for remaining employed through that date. CP 60. CSK remitted that payment to him a few weeks early, in June 2009. CP 60.

2. Goddard Terminates Employment Upon Satisfying the Stated Period of Retention

Thereafter, on or about July 2, 2009, Goddard voluntarily terminated his employment with CSK. CP 60. On or about July 8, 2009, Goddard received a letter from Jack Morefield, Director of Human Resources/Payroll that calculated his last paycheck, which included accrued vacation time, of \$23,957.75. CP 60; CP 111. However, CSK withheld all compensation from Goddard’s last paycheck, citing an “Interim Promissory Note” and demanding that Goddard pay CSK in excess of \$200,000 by August 2, 2009. CP 60; CP 111. In his letter, Mr. Morefield asserted:

On February 15, 2008 you signed an Interim Promissory Note for the estimated relocation expenses related to your move to the Seattle area. ... Due to your voluntary resignation before completing two years of employment after the effective date of your transfer, the note is now due

and payable. CP 111.

Thereafter, counsel for Goddard drafted a letter to dispute the withholding of the monies owed for his final paycheck, and noted the fact that the Voluntary Rescission of Severance Agreement contained an express release of any debt or liability that Goddard might owe to his former employer. CP 60 – 61, CP 113 – 116.

Notably, the Voluntary Rescission of Severance Agreement included a comprehensive mutual release:

5. Release

a) In consideration of the Company's entering into this Rescission Agreement and the payments and benefits set forth herein, the Executive, knowingly and voluntarily waives, releases and forever discharges the Company, ... from any claim, charge, action or cause of action any of them may have against any such released person, whether known or unknown... All such claims are forever barred by this Rescission Agreement.

...

b) The Company hereby agrees not to pursue or further any action, cause of action, right, suit, debt, compensation, expense, liability, contract, controversy, agreement, promise, damage judgment, demand or claim whatsoever at law or in equity whether known or unknown which the Company ever had, now has or hereafter can, shall or may have for, upon or by any reason of any matter, cause or thing, (collectively, "Company Claims") whatsoever occurring up to and including the date Executive signs this Rescission Agreement against Executive and hereby releases, acquits and forever absolutely discharges Executive of and from all of the foregoing, except with respect to the

obligations of Executive set forth in this Rescission Agreement. CP 104-105.

...

Instead of remitting the outstanding wages, CSK then issued a check for \$606.67, which was equivalent to payment of Washington's minimum wage for the hours Goddard had worked during his last pay period. CP 61; CP 118.

3. CSK Claims Reimbursement of Relocation Debt in Disregard of Broad Mutual Release Contained in the Voluntary Rescission of Severance Agreement

Despite the express release in the Voluntary Rescission of Severance Agreement, CSK filed counterclaims relating to expenses it advanced on behalf of Goddard in order for Goddard to relocate from Arizona to Washington State in early 2008. CP 9-25. In early 2008, CSK began eliminating jobs as part of downsizing. CP 56. Goddard's position was eliminated. CP 56. CSK provided Goddard with the option of moving to Washington State to fill an open Regional Vice President position, which was a demotion for Goddard. CP 56. Goddard agreed to move his family of eight children to Washington State in order to maintain his employment with CSK. CP 56.

CSK maintained a Relocation Policy in order "[t]o facilitate the relocation of associates and recruitment of personnel consistent with the

needs of the company and in a smooth and timely manner” and “[t]o provide for the equitable reimbursement of expenses...” CP 67. The Relocation Policy further states:

5. If a relocated associate voluntarily terminates his/her employment within twelve (12) calendar months following the acceptance of a relocation, he/she will be required to refund all or part of the monies extended to him/her by the company or its agents. CP 68.

In conjunction with Goddard’s acceptance of the relocation to Washington State, CSK presented Goddard with an “Interim Promissory Note” on February 15, 2008, for \$237,750.50, as an estimated relocation sum. CP 57; CP 84. The “Interim Promissory Note” states, in pertinent part:

FOR VALUE RECEIVED, the undersigned Maker promises to pay to the order of CSK Auto, Inc. The estimated relocation sum of Two Hundred Thirty Seven Thousand seven hundred fifty dollars and fifty cents, (\$237750.50 adjusted for actual relocation payment made to or for the Maker, without interest, on or before thirty days of the first to occur of the maker: 1) terminated employment with the company within two years from the effective date of transfer, or 2) failing to complete the relocation ... CP 84.

Goddard executed the Promissory Note and relocated from Arizona to Washington, placing his Arizona house on the market with an aggressive listing price in accordance with the Relocation Policy. CP 57;

CP 68. When Goddard's Arizona house did not sell within 30 days, the parties executed a Relocation Policy Exception Request on June 26, 2008, which reflected an extension to Goddard's interim living arrangements. CP 58 – 59.

Goddard's Arizona house sold shortly thereafter, but only after accepting a significant reduction in price. CP 58 – 59. The parties entered into a second Relocation Policy Exception Request on August 5, 2008, in order to compensate Goddard for the significant loss in equity. CP 58 – 59. CSK agreed to pay Goddard \$37,500 as a result. CP 59.

The relocation expenses promissory note was titled as "interim" because it was based upon an estimate prior to the Goddards' move. CP 84. However, after the move was complete CSK did not ever perform a final audit or obtain a final promissory note from Goddard. CSK never obtained any writing that was signed by Goddard as a promise to reimburse CSK for an amount in excess of \$237,750.50.

V. ARGUMENT

A. Standard of Review

The standard of review of an order of summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). When

considering a summary judgment motion, the court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Lybbert v. Grant County, State of Wash.*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The motion should solely be granted if, from all the evidence, reasonable persons could reach but one conclusion.” *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

On review of an order granting or denying summary judgment, the appellate court will only consider issues and evidence called to the attention of the trial court. A summary judgment denial cannot be appealed following a trial if the denial was based upon a determination that material facts are disputed and must be resolved by the factfinder. However, such an order is subject to review “if the parties dispute no issues of fact and the decision on summary judgment turned solely on a substantive issue of law.

Kaplan v. Northwestern Mut. Life Ins. Co., 115 Wn. App. 791, 799, 65 P.3d 16 (2003) (internal citations and quotations omitted). In this case, the trial court was presented with cross-motions for summary judgment that turned solely on substantive issues of law. Therefore, the trial court’s *denial* of Goddard’s Motion for Partial Summary Judgment is subject to review, as is the trial court’s order granting CSK’s Motion for Summary Judgment.

B. Voluntary Rescission of Severance Agreement’s General Release Precludes CSK’s Claims

The Voluntary Rescission of Severance Agreement contains a

choice of law provision that expressly states that Missouri law applies. “Washington courts will enforce an express choice of law clause in a contract so long as applying it does not violate the fundamental public policy of the forum state.” *Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 658-59, 230 P.3d 625 (2010) citing *McGill v. Hill*, 31 Wn. App. 542, 547, 644 P.2d 680 (1982). Not surprisingly, basic Missouri contract law does not differ from basic Washington contract law in interpreting the mutual general release.

1. Missouri Contract Law Upholds Release

The interpretation of settlement or release agreements, like all contracts, is a question of law. *Liquidation of Professional Medical Ins. Co. v. Lakin*, 88 S.W.3d 471, 476 (Mo. App. 2002). “The law presumes that a release is valid.” *Id.*

Interpretation of a settlement or release is governed by the same principles as any other contract. The cardinal rule in the interpretation of a contract is to ascertain the intention of the parties and to give effect to that intention. If there is no ambiguity, then the intention of the parties should be determined from the contract alone. A contract is ambiguous only if its terms are susceptible to more than one meaning so that reasonable persons may fairly and honestly differ in their construction of the terms. If there is no ambiguity, then the court need not resort to construction of the contract, and instead intent is determined from the four corners of the contract.

Id. (internal citations and quotations omitted). As much as CSK

would like to introduce testimony about what the contract language means, it cannot do so; matters external to the release cannot be considered.

In construing a release, as with any contract, the intention of the parties governs and any question concerning the scope and extent of the release is said to be determined by what may fairly be said to be in the parties' contemplation, which in turn is resolved in the light of all the surrounding facts and circumstances under which the parties acted. The intent of the parties, however, is governed by the language used in the release. Plain language forecloses speculation about intent of the parties. And the mere fact the parties disagree upon the interpretation of a document does not render it ambiguous.

Estate of Givens v. U.S. Nat. Bank of Clayton, 938 S.W.2d 679, 682 (Mo. App. 1997) quoting *Slankard v. Thomas*, 912 S.W.2d 619 (Mo. App. 1995).

In this case, the release language in paragraph 5(b) specifically provides:

The Company hereby agrees not to pursue or further any action, cause of action, right, suit, debt, compensation, expense, liability, contract, controversy, agreement, promise, damage judgment, demand or claim whatsoever at law or in equity whether known or unknown which the Company ever had, now has or hereafter can, shall or may have for, upon or by any reason of any matter, cause or thing...

Such broad language is typical in a general release, which disposes

of the entire subject matter involved. *Anderson v. Curators of University of Missouri*, 103 S.W.3d 394, 398–99 (Mo. App. 2003).

A general release uses language such as ‘from any and all claims, causes of action or liability of any sort whatsoever,’ ‘from any and all liability,’ ‘of whatever name or nature,’ and ‘any other matter whatsoever involving my relationship with the entity;

Id. citing Estate of Givens, supra. The broad language of the Release in this case, which includes such language, unambiguously and clearly terminated all existing and enforceable rights and obligations of the parties.

Notably, CSK did not include any language to preserve its right to pursue Mr. Goddard for relocation expenses, pursuant to its internal policies or the Interim Promissory Note. Absent such language, the release functions as a global release.

A party may limit or restrict a general release by expressing such intent in the general release. To retain legal rights relating to the dispute, the professors must have expressly reserved such rights in the settlement agreement. In the absence of words in the operative part of a general release which indicate an intention to limit or restrict its effect, it must be concluded that the instrument was contemplated and intended to be a complete settlement of all matters between the parties to the release.

Anderson at 399 (internal citations and quotations omitted).

Where the language used in the release is plain and

unambiguous, we will determine the parties' intent based on the release's language and not based on parol or extrinsic evidence. If, however, the release is ambiguous and we have to resort to parol evidence to determine that intent, a question of fact arises as to the intent of the parties. The determination of whether release is ambiguous is a question of law, and summary judgment is appropriate only when the release is unambiguous on its face.

Id. (internal citations omitted). Consequently, under Missouri law, CSK is precluded from asserting that the Voluntary Rescission of Severance Agreement is not a complete settlement of all matters that occurred prior to August 2008, which includes all obligations arising from Goddard's relocation to Washington State.

2. Washington Contract Law Upholds Release

A release is a contract whereby one party agrees to abandon or relinquish a claim, obligation, or cause of action against another party. *Boyce v. West*, 71 Wash. App. 657, 662, 862 P.2d 592 (1993). The validity or enforceability of a release or settlement agreement is determined by the substantive law of contracts. *Veith v. Xterra Wetsuits, L.L.C.*, 144 Wash. App. 362, 183 P.3d 334 (2008), review denied, 165 Wn.2d 1005, 198 P.3d 512 (2008). The sufficiency of the language to effect a release is generally a question of law. *Scott By and Through Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992).

As a contract, a release is to be construed according to the legal principles applicable to contracts. *Id.* A release is voidable if induced by fraud, overreaching, or if there is clear and convincing evidence of mutual mistake. *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wash. 2d 178, 187, 840 P.2d 851 (1992). Generally, courts uphold the validity of releases. *Id.*

The first rule in interpreting a contract is to ascertain the intent of the parties. *Berg v. Hudesman*, 115 Wash.2d 657, 663, 801 P.2d 222 (1990). “But if the language is clear and unambiguous, we must enforce the clause as written and cannot modify the contract or create ambiguity where none exists.” *Kent Farms, Inc. v. Zurich Ins. Co.*, 93 Wn. App. 414, 418, 969 P.2d 109 (1998). Contracts must be interpreted in a manner that does not render any portion of the contract meaningless or ineffective. *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980). Consequently, under Washington law as well, as there is no ambiguity in the written contract, CSK is precluded from asserting it released all obligations arising from Goddard’s relocation to Washington State.

3. Release Relinquishes Obligations Pursuant to the Interim Promissory Note of February 2008

Under either Missouri law or Washington law, the terms of the contract, and the release language of paragraph 5 of the Voluntary Rescission of Severance Agreement in particular, is plain, clear, and

unambiguous. The release could not be broader. No special words are required, although the language used is that which is used in a general release. The writing may merely state, for example, that it releases the obligor, that it releases the obligor's duties or that it releases the obligee's rights. Restatement (Second) of Contracts § 284, comment a (1981).

In this case, in August 2008, CSK specifically agreed not to pursue or further any debt, expense, liability, agreement, promise, or contract that CSK “ever had, now has or hereafter can, shall or may have” for anything “whatsoever occurring up to and including the date Executive signs this Rescission Agreement” and “releases, acquits, and forever absolutely discharges Executive of and from all of the foregoing, except with respect to the obligations of Executive set forth in this Rescission Agreement.”

In complete disregard of that express language, CSK attempts to resurrect Goddard’s debt regarding the expenses advanced pursuant to his relocation by asserting a claim for “Breach of Interim Promissory Note and/or Relocation Policy.” The Interim Promissory Note preceded the Voluntary Rescission of Severance Agreement by six months. Nothing in the Rescission Agreement permits CSK to enforce any obligations other than those specifically contained in the Voluntary Rescission of Severance Agreement, (other than those restrictive covenants from the Severance Agreement that were expressly incorporated by reference in paragraph 6.)

The trial court erred in holding that, as a matter of law, the release was not intended to cover the Interim Promissory Note for reimbursement of certain relocation expenses. CP 442. No language in the Voluntary Rescission of Severance Agreement refers to the Interim Promissory Note, directly or indirectly, other than the release itself: “debt, compensation, expense, liability, contract, controversy, agreement, promise...”

The trial court erred in holding that, as a matter of law, the August 2008 “Voluntary Rescission of Severance Agreement did not release Goddard from the obligations contained in the Interim Promissory Note dated and signed by the parties on February 15, 2008.” CP 442. The Voluntary Rescission of Severance Agreement is not ambiguous and contains a broad release of prior debts, expenses, and liabilities. It does not preserve CSK’s right to pursue debts, expenses, and liabilities arising from the Interim Promissory Note, rights which were not expressly reserved.

The trial court erred in holding that, as a matter of law, Goddard’s decision to terminate his employment with CSK in July 2009 resurrected an obligation to repay relocation monies. CP 442-43. Goddard resigned eleven months after the parties entered into the Voluntary Rescission of Severance Agreement, eleven months after being released of any and all prior debts. The trial court’s interpretation renders the language and

purpose of the release to be completely meaningless.

The trial court erred in holding that, as a matter of law, the Voluntary Rescission of Severance Agreement only cover matters that occur after its signing. CP 442. Of course the function of a contract is to cover matters that occur after its signing; the parties are exchanging promises. However, just because a duty has not yet matured at the time that a contract is signed does not mean that that an unmatured duty cannot be subject to the terms of a contract. In fact, this is precisely the function of a release, which results in a clean slate between the parties with any and all duties, whether matured or not. This proposition is further supported by the Restatement (Second) of Contracts § 284, comment a (1981) which provides, in pertinent part:

a. Nature of release. Although no particular form is required for an agreement to discharge a duty, the term “release” has traditionally been reserved for a formal written statement by an obligee that the obligor's duty is discharged. That usage is preserved in this Section. No special words are required and the writing may state, for example, that it releases the obligor, that it releases the obligor's duties or that it releases the obligee's rights. It must, however, take effect immediately or on the occurrence of a condition. A promise to discharge in the future an existing duty merely creates a new duty that can itself be discharged by the parties. Such a promise is not a release. **The duty that is released need not be matured. A purported release of a duty that does not yet exist, however, is not a release but a promise to**

discharge a duty in the future. See Illustration 3.
**A purported release of a duty that is revived on
the occurrence of a condition is not a release but
a contract not to sue.**

(emphasis added). In this case, CSK promised not to sue Goddard, even if he voluntarily terminated his employment within two years after the effective date of his transfer to Washington State, and/or within one year of his acceptance of that relocation. CSK's claims for reimbursement of relocation expenses from Goddard have been released and should be dismissed as a matter of law.

4. Release Relinquishes Obligations Pursuant to the
May 16, 2008 Letter Agreement

For the same reasons stated above, the release contained in the August 2008 Voluntary Rescission of Severance Agreement also releases Goddard of any debt, expense, or liability that had been altered or preserved in the earlier May 16, 2008 letter agreement with CSK. The Voluntary Rescission of Severance Agreement was presented and signed approximately three months after the May 16, 2008 letter agreement. No language in the Voluntary Rescission of Severance Agreement refers to the letter agreement, directly or indirectly, other than the release itself: “contract, controversy, agreement, promise...”

The trial court erred in holding that any obligations set forth in the May 16, 2008 agreement had been preserved despite the fact that CSK

released Goddard of all obligations when the parties entered the Voluntary Rescission of Severance Agreement in August 2008.

C. May 16, 2008 Letter Agreement Precludes CSK's Claims

Even if the terms of the May 16, 2008 could be held to have legally survived the release contained in the Voluntary Rescission of Severance Agreement, the letter agreement still precludes CSK's claims in their entirety.

Although the letter agreement does not refer to the Interim Promissory Note that Goddard had signed in February 2008, nor to the obligation set forth therein that Goddard must remain employed with CSK for two years after the effective date of his transfer, it does address the ongoing payment of relocation expenses. The May 16, 2008 letter agreement failed to account for the fact that the Interim Promissory Note prohibited Mr. Goddard from terminating employment for a period of *two years from the effective date of transfer*, while the Relocation Policy prohibited the termination of employment for *twelve calendar months following the acceptance of relocation*. The May 16, 2008 letter agreement altered the parties obligations significantly:

Interim Promissory Note

- Two years "after the effective date of your transfer"
- Effective date of transfer was February 2008

- End of two year period was February 2010

May 16, 2008 Letter Agreement

- Defers to CSK Relocation Policy language
- “[T]welve (12) calendar months following acceptance of a relocation”
- Acceptance of relocation was January 2008
- End of twelve month period was **January 2009**

Under the terms of the May 16, 2008 Letter Agreement, if it survives, Goddard’s voluntary termination in **July 2009** relieves him of any obligation to reimburse CSK for relocation expenses. Goddard satisfied the 12-month term of the relocation policy, which abrogated any obligation to “refund all or part of the monies extended to him/her by the company”. Consequently, the trial court erred in upholding the May 16, 2008 letter agreement, but then finding that Goddard was liable to CSK for reimbursement of relocation expenses that had been advanced prior to CSK’s merger with O’Reilly in mid-2008.

D. Goddard did Not Breach the Interim Promissory Note

Goddard did not breach the terms of the Interim Promissory Note by failing to reimburse CSK for relocation expenses that were advanced on his behalf in order to move his family from Arizona to Washington State. **First**, the May 16, 2008 letter agreement and relocation policy limited the time in which he had to remain employed to January 2009.

Since Goddard resigned in July 2009, he satisfied their terms. **Second**, the August 2008 Voluntary Rescission of Severance Agreement released Goddard of all debts, expenses, obligations, and contracts that CSK had as of the August 2008, which encompassed both the February 2008 Interim Promissory Note and the May 2008 Letter Agreement.

The trial court erred in denying Goddard's motion to dismiss CSK's claim that he breached the Interim Promissory Note; the trial court erred in granting CSK's motion that he did breach the Note.

E. CSK Improperly Withheld Wages Due to Goddard

After Goddard resigned his employment with CSK on July 2, 2009, Defendant calculated his final paycheck. Goddard had 343.67 hours of vacation that was awarded but unused. The gross value of the vacation time was \$23,957.75. CP 42. Plaintiff also had worked nine days during the final pay period and was entitled to pay for 72 hours of work. CP 111. The gross value of that time was \$5,019.23. Plaintiff was entitled to receive gross pay of \$28,976.98.

RCW 49.48.010 provides, "When any employee shall cease to work for an employer, whether by discharge or by voluntary withdrawal, the wages due him on account of his employment shall be paid to him at the end of the established pay period..."

The Legislature has evidenced a strong policy in favor of

payment of wages due employees by enacting a comprehensive scheme to ensure payment of wages, including the statutes at issue here which provide both criminal and civil penalties for the willful failure of an employer to pay wages. *See United Food & Commercial Workers Union Local 1001 v. Mutual Benefit Life Ins. Co.*, 84 Wash.App. 47, 51-52, 925 P.2d 212 (1996) (citing from RCW Chapters 49.46, 49.48, and noting RCW 49.52.050 in discussing the statutory scheme of state laws granting employees nonnegotiable, substantive rights regarding minimum standards for working conditions, wages, and the payment of wages).

Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 157, 961 P.2d 371

(1998). These statutes must be liberally construed to advance the Legislature's intent to protect employee wages and assure payment. *Id.* at 159.

CSK failed to remit that amount, issuing a final paycheck for \$0.00, making a demand reimbursement of relocation expenses. After receiving a demand from Goddard's counsel, citing the Washington Minimum Wage Act, CSK remitted payment of \$606.67.

Consequently, Goddard is still due wages in the amount of \$28,370.31, plus interest. CSK does not dispute the fact that it failed to remit payment for these wages. Goddard is entitled to his wages as a matter of law. The trial court erred in dismissing Goddard's claim for wrongful withholding of wages.

The Washington Legislature established a remedy of exemplary

damages when an employer willfully refuses to pay wages.

RCW 49.52.050 provides, in pertinent part, that “[a]ny employer or officer, vice principal or agent of any employer” is guilty of a misdemeanor if that entity “[w]ilfully and with intent to deprive the employee of any part of his wages, [pays] 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). The Washington Supreme Court’s test for “willful” is simple: “the employer's refusal to pay must be volitional. Willful means merely that the person knows what he is doing, intends to do what he is doing, and is a free agent.” *Schilling* at 159-160 (internal citations and quotation omitted).

Significantly, RCW 49.52.070 imposes double damages and attorney’s fees:

Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of subdivisions [RCW 49.52.050 (2)] shall be liable in a civil action by the aggrieved employee or his assignee to judgment for **twice the amount** of the wages unlawfully rebated or withheld by way of exemplary damages, **together with costs of suit and a reasonable sum for attorney's fees**: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

(emphasis added).

Despite Goddard's demand that CSK remit his final paycheck, and despite Goddard's counsel's explanation that CSK had released him of the debt secured by the Interim Promissory Note, CSK refused to remit payment (other than a subsequent payment for minimum wage.)

However, this is not the type of genuine "bona fide" dispute to shield CSK from exemplary damages for withholding wages for nearly four years and forcing Goddard to engage in litigation in order to recover those wages. "A bona fide dispute is one that is 'fairly debatable.'" Generally, the issue of whether an employer willfully withheld wages is a question of fact. But where reasonable minds could not differ, the court may decide the question as a matter of law." *Moore v. Blue Frog Mobile, Inc.*, 153 Wn. App. 1, 8, 221 P.3d 913 (2009) (internal citations and quotations omitted). In this case, there is no question, nor is there any dispute, that the parties entered into the Voluntary Rescission Agreement in August 2008, which agreement contained a broad general release. Consequently, the trial court erred in denying Goddard exemplary damages and attorneys' fees.

F. Award of Attorneys' Fees to CSK was Improper

Because CSK released Goddard of any obligation to reimburse it for relocation expenses under the terms of the Interim Promissory Note, CSK is not entitled to an award of attorneys fees for collection of that

debt. Additionally, because CSK withheld Goddard's final paycheck as a setoff to its claim for reimbursement of relocation expenses, Goddard is entitled to an award of attorneys fees against CSK. The trial court erred in awarding attorneys' fees to CSK.

The trial court also erred in awarding the *amount* of attorneys' fees to CSK, as the total amount awarded was unreasonable.

Trial courts must independently decide what represents a reasonable amount of attorney fees; they may not merely rely on the billing records of the prevailing party's attorney. Trial courts must also create an adequate record for review of fee award decisions. Failure to create an adequate record will result in a remand of the award to the trial court to develop such a record.

Mayer v. City of Seattle, 102 Wash. App. 66, 79, 10 P.3d 408 (2000)

(internal citations omitted). In this case, the trial court was presented with, and relied solely upon, the billing records of CSK's four attorneys. The trial court discounted time entries for just one attorney, and only by 16.3 hours. This did not account for the significant amount of duplicated effort expended, simply by having four attorneys on the case. "In awarding attorney fees, the trial court must limit the lodestar to hours reasonably expended, and should discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. *Id.* at 82.

CSK employed two Georgia attorneys to work on this case, which

necessitated their admission pro hac vice with the retention of local counsel to oversee the matter and to obtain advice regarding local rules and practices. Initially, Mr. Polly appeared to serve as lead counsel on the case as he conducted the deposition of Goddard very early in the case. Thereafter, Mr. Boyd appeared to take the lead role as he became the primary contact with Goddard's counsel, and argued CSK's Motion for Summary Judgment. Mr. Silk, local counsel, as stated above, performed more of a secondary role of advising the Georgia attorneys regarding local rules and practices.

Instead of resulting in more efficient and reasonable billing, these joint efforts resulted in a high degree of duplication. As one example, between December 3, 2009 and December 8, 2009, Mr. Polly billed 13.2 hours to prepare for and conduct Goddard's deposition. CP 641 -642. During that same time period, Mr. Boyd, billed 14.3 hours relating to preparation of Goddard's deposition. CP 641 - 642. Both Georgia counsel elected to personally attend Goddard's deposition in Washington; however, Goddard should not bear the financial burden of those duplicative efforts. As another example, between August 16, 2011 and August 19, 2011, Mr. Boyd billed 18 hours to prepare for the summary judgment hearing, which did not include any briefing and is excessive on its face. CP 649. During that same period of time, Mr. Polly billed 6.9 hours to prepare for and

attend the one hour hearing in person. CP 649. Again, the fact that they both elected to attend in person is fine, but the trial court erred in awarded attorneys' fees for both Georgia counsel to prepare and attend the motion.

In October 2011, the mediation session between the parties was attended only by Mr. Boyd. Between October 9, 2011 and October 12, 2011, Mr. Boyd billed 2.3 hours to draft the mediation statement, 12 hours to prepare for mediation (including travel across the country), 6 hours to attend the mediation, and 9 hours to "return from mediation" for a total of 29.3 hours. CP 652. Mr. Polly, who did not attend, billed 3.4 hours during that same time, for his preparation and assistance with mediation, bringing the total billing to 32.7 hours. CP 652. (In sharp contrast, Goddard's counsel spent a total of 5.5 hours relating to mediation, which included drafting the mediation memo and attending the mediation.) The billing associated with mediation can be described as nothing short of excessive.

The necessity of retaining local counsel arose because CSK elected to retain Georgia counsel. From the very first billing entry through the last billing entry, time was spent to retain and confer with local counsel as a result. (In the middle of the case, CSK elected to terminate the services of John Dalton and substitute John Silk as local counsel. On October 25, 2010, Mr. Silk provided consultation regarding the court's rules regarding

the additional possible witness deadline, and billed 1.2 hours for that service. CP 654. That same day, Mr. Boyd billed 4.3 hours for his work to revise the witness list and confer with local counsel. CP 643. CSK's motion also sought billing for Georgia counsel to become admitted, pro hac vice. Goddard should not bear the financial burden of CSK's duplicative efforts because it elected to retain out of state attorneys for its defense.

It can be highly appropriate to utilize the services of more than one attorney, but that should be done in order to ensure efficiency, not at its expense. Both Mr. Polly and Mr. Boyd appear to be fairly senior attorneys, although their application for fees omitted any explanation as to their background and years of experience. Because of their apparent seniority, this does not appear to be the type of situation in which there was a delegation of tasks from a senior attorney with greater litigation experience to a more junior attorney, as a hallmark of good professional practice. Instead, the two attorneys efforts appear wholly duplicitous and a hallmark of aggressive billing practices. Consequently, the amount of duplicative effort in this case was extraordinary, as reflected in the total number of hours and the total billing figures. 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, P.2d 193 (1983). The trial court erred in failing to make any discount despite the fact that four different attorneys billed for time in this case.

Given the excessive and duplicative billing records, the trial court abused its discretion in awarding \$76,060 in attorneys' fees to CSK.

VI. REQUEST FOR ATTORNEYS' FEES

Pursuant to RAP 18.1, RCW 49.52.070, and upon equitable principles, Goddard requests attorneys' fees on appeal. RAP 18.1 provides: "If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule..."

RCW 49.52.070 provides that the employer shall be liable for a violation of RCW 49.52.050 for amounts to include "costs of suit and a reasonable sum for attorney's fees." Should Mr. Goddard prevail on appeal, he will timely file his motion for attorneys' fees.

VII. CONCLUSION

In August 2008, Goddard was presented with an Offer of Employment from O'Reilly, which included a demotion and reduction in compensation. Goddard could have rejected that offer and he would have been immediately entitled to a) six months of salary pursuant to the

Severance Agreement, and b) the costs associated with reimbursement for his family's relocation to Washington State would not have been recoverable due to the involuntary termination without cause.

O'Reilly presented Goddard with the Voluntary Rescission of Severance Agreement for his consideration, which included a broad general mutual release. Significantly, the six months severance payment would no longer be dependent upon good cause for voluntary termination, but was guaranteed should Goddard remain employed through July 1, 2009. Goddard relied upon the language that CSK drafted – which language released him of any and all former obligations as of August 2008 – and he should be entitled to rely upon that language. Goddard should not be held to an unwritten, unspoken, completely subjective, self-serving, and “after the fact” exception to the terms of the release contained within the Voluntary Rescission of Severance Agreement.

Respectfully submitted this 14th day of May, 2012.

SINGLETON & JORGENSEN, INC. PS

By



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CERTIFICATE OF SERVICE

Jamie Brazier declares: I am a citizen of the United States and of the State of Washington; that I am over the age of 18 years and competent to be a witness in this cause. That on May 14, 2012, I caused to be delivered, one copy of the APPELLANT'S OPENING BRIEF, to the address(es) listed below by messenger service to local counsel and via email to all counsel:

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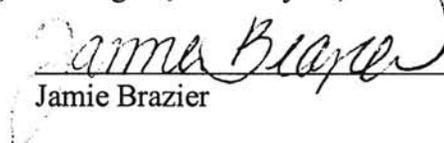
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Renton, Washington, on: May 14, 2012.



Jamie Brazier