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Court of Appeals No. 68336-5-I

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

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Timothy J. Goddard,  
Appellant/Cross-Appellee,

v.

CSK Auto, Inc.,  
Appellee/Cross-Appellant.

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REPLY BRIEF OF APPELLEE/CROSS-APPELLANT  
CSK AUTO, INC.

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## INTRODUCTION

Plaintiff/Appellant Timothy Goddard (“Goddard”) commenced this appeal after the Superior Court for King County, Washington (the “Trial Court”) entered a judgment for CSK Auto, Inc. (“CSK Auto”) against Goddard for breach of contract, interest, and attorney’s fees in the amount of \$257,226.64.

CSK Auto filed a response brief (“Response”) to Goddard’s appeal, and in its Response cross-appealed certain other rulings of the Trial Court, as more fully described below (and in the Response). Goddard then filed his Reply (“Goddard’s Reply”) in support of his original appeal. This reply brief (“CSK Auto’s Reply”) is in support of CSK Auto’s cross-appeal, and responds also to Goddard’s Reply with respect to the issues raised by CSK Auto’s cross-appeal.

As the Court knows from its review of the parties’ prior briefs, the principal issue in this case is whether Goddard was obligated to repay to CSK Auto certain relocation expenses it advanced to him when Goddard moved from Arizona to Washington. While the Trial Court correctly found that Goddard’s contractual obligation to repay CSK Auto remained intact following the O’Reilly merger, it incorrectly determined that a May 16, 2008, “Letter Agreement” prevented CSK Auto from recovering relocation expenses totaling \$191,084 that were paid on Goddard’s behalf after July 11, 2008. The Trial Court also erred when it dismissed CSK

Auto's claims for \$5,000 in damages associated with Goddard's admitted breach of an employee non-recruitment covenant. Finally, to the extent the Trial Court was correct that post-July 11, 2008 expenses were not recoverable under any contract, CSK Auto alternatively appeals the Trial Court's dismissal of its unjust enrichment claim. CSK Auto's Reply addresses each of the issues outlined above.

### **ARGUMENT**

**I. The May 16 Letter Agreement did not affect Goddard's obligations under the Promissory Note.**

**A. Factual background.**

The underlying facts are discussed in detail in CSK Auto's Response Brief, and for the most part are not revisited here. For a brief overview, however, during 2008, CSK Auto paid approximately \$360,982.10 to Goddard or on his behalf to relocate Goddard and his family from Arizona to Washington.<sup>1</sup> CSK Auto covered virtually all expenses incurred by Goddard associated with the move – including the extremely generous benefit of paying Goddard for certain losses associated with the sale of his Arizona home.

Before agreeing to incur these expenses, CSK Auto secured two commitments from Goddard. First, Goddard signed a Promissory Note,

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<sup>1</sup> CP-178, at ¶5; *see also* CP 509. When it filed its summary judgment motion, CSK Auto believed that the amount advanced was in excess of \$407,000.00. Subsequent review revealed, however, that certain expenditures had inadvertently been counted twice, resulting in the revised amount described above.

which obligated Goddard to repay relocation expenses paid to him or incurred on his behalf by CSK Auto if his employment terminated within two (2) years from the effective date of the transfer.<sup>2</sup> Second, as Goddard concedes, his relocation was also subject to CSK Auto's then-existing Relocation Policy.<sup>3</sup> The Relocation Policy required Goddard to repay CSK Auto for relocation expenses if Goddard resigned employment "within twelve (12) calendar months following the acceptance of a relocation[.]"<sup>4</sup> These obligations ran concurrently, and were not mutually exclusive.

Goddard's relocation occurred in the midst of merger negotiations between CSK Auto and O'Reilly Automotive, Inc. ("O'Reilly").<sup>5</sup> Related to the merger, the pre-merger management of CSK Auto assured Goddard in a letter dated May 16, 2008 (the "Letter Agreement"), that he would continue to receive relocation benefits notwithstanding any merger. Goddard also entered into a "Severance Agreement" and a "Voluntary Rescission of Severance Agreement" ("Rescission Agreement") with CSK Auto related to the merger; Goddard unsuccessfully (and incorrectly) argued below that the Rescission Agreement operated to release him from

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<sup>2</sup> See CP 487, 511-512.

<sup>3</sup> See CP 576-593 ("Relocation Policy"), and CP 514.

<sup>4</sup> CP 581, #5.

<sup>5</sup> CSK Auto remained a separate company following the merger, but became an indirect, wholly owned subsidiary of O'Reilly.

his obligations to repay relocation expenses to CSK Auto upon termination of employment.

The Trial Court properly found that the Promissory Note remained applicable at the time of Goddard's resignation from employment, and required him to repay to CSK Auto a portion of the \$360,982.10 it had paid to him or on his behalf to relocate him to the Seattle metro area (where Goddard continues to reside). The Trial Court incorrectly found, however, that the Letter Agreement required Goddard to reimburse CSK Auto for *only* those relocation expenses paid by CSK Auto on his behalf that were incurred before O'Reilly acquired CSK Auto on July 11, 2008 – that is the portion of the Trial Court's ruling appealed by CSK Auto.

**B. Plaintiff's construction of the Letter Agreement is contradicted by its language.**

Goddard attempts to stretch the language of the Letter Agreement beyond its logical meaning. The Letter Agreement provides that CSK Auto would *continue to provide* Goddard relocation benefits on terms “no less favorable” than those that existed prior to the O'Reilly merger, including pursuant to the Relocation Policy – in other words, not *worse* than the deal Goddard struck with CSK Auto previously.<sup>6</sup>

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<sup>6</sup> CP 598. The Letter agreement states expressly CSK Auto's commitment to “*continue to reimburse* you for relocation, home sale, and purchase, and temporary living expenses on terms no less favorable to those provided to you prior to the consummation of the [merger], and in any event no less favorable than the CSK Auto Relocation Policy as in effect . . . prior to the [merger].”

Importantly, *nothing* in the Letter Agreement addresses the conditions under which Goddard might be required to *repay* the relocation expenses advanced to him. Rather, the Letter Agreement was limited to assuring Goddard that the company would continue to provide relocation benefits and that the *scope of the reimbursement* Goddard was eligible to receive (which was substantial and generous) would not be cut off or reduced after the O'Reilly acquisition. The Letter Agreement merely maintained the *status quo*; it did *not* provide Goddard with *better* relocation terms than he was already getting.

Goddard testified in his deposition that under the Letter Agreement, CSK Auto was obligated to provide him with relocation benefits both “before and after the [O'Reilly] acquisition.”<sup>7</sup> That candid admission demonstrates Goddard understood that his right to receive relocation benefits under CSK Auto's Promissory Note and the Relocation Policy survived the O'Reilly acquisition (and all associated agreements). Logically, then, so did Goddard's dual repayment obligations under those agreements.

Goddard's attempts to distinguish the Promissory Note from the Relocation Policy in this respect does not work. The relocation agreements between Goddard and CSK Auto included his obligations under the both the Promissory Note *and* the Relocation Policy. The

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<sup>7</sup> CP 519.



record is clear that the Promissory Note was part-and-parcel of the reimbursement rights governed by the Relocation Policy: Goddard warranted in the Promissory Note that “my signature is an acknowledgement that I have read and understand the agreement and Relocation Benefits Information, and agree to the terms and conditions.”<sup>8</sup> Thus, Goddard’s inaccurate supposition that the repayment obligations under the Relocation Policy and Promissory Note are mutually exclusive and CSK Auto’s promise to provide him with *benefits* “no less favorable” than under the Relocation Policy negates his obligations under the Promissory Note is a non-starter.

The Letter Agreement is not a factor in the analysis. It did not, as Goddard contends, change the existing contractual relationship between the parties – it merely confirmed it. It maintained the *status quo* as to the parties’ rights and obligations before and after the O’Reilly acquisition. As Goddard’s testimony emphasizes, Goddard’s obligations under both the Promissory Note and the Relocation Policy were unaffected by either the Letter Agreement (or the Rescission Agreement, for that matter). Goddard owes CSK Auto the full amount it advanced to him for relocation – the \$257,226.64 awarded by the Trial Court plus the additional principal amount of \$191,084, interest on that amount, and attorney’s fees, not just the truncated amount awarded by the Trial Court.

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<sup>8</sup> CP 556 (Promissory Note), fifth paragraph, second sentence.

**II. The Trial Court incorrectly dismissed CSK Auto’s claim that it had an independent right of recovery against Goddard under its Relocation Policy.**

CSK Auto argued in the Trial Court that CSK Auto could recover expenses advanced to Goddard under both the Promissory Note and under its Relocation Policy. The Trial Court agreed that the Relocation Policy applied, but found that Goddard’s relocation obligations under the Relocation Policy (but not the Promissory Note) had expired by the time he left for AutoZone on July 2, 2009.<sup>9</sup>

The Relocation Policy provided that if Goddard voluntarily terminated his 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.”<sup>10</sup> Goddard argued below that this language is unambiguous, and the 12-month period began to run on the “effective date” of his transfer to Seattle on January 28, 2008.<sup>11</sup>

Goddard’s Reply fails to address, or even recognize that the Relocation Policy expressly provides that CSK Auto’s interpretation of its

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<sup>9</sup> As discussed in CSK Auto’s prior brief, this issue is moot should this Court find that the Promissory Note requires reimbursement for all expenses previously advanced to Goddard. The obligations are concurrent, and therefore any claim for reimbursement under the Relocation Policy is subsumed by a fully-applicable Promissory Note.

<sup>10</sup> CP 581.

<sup>11</sup> CP 234-235.

terms prevails in any dispute over its meaning.<sup>12</sup> The *only* declarant with knowledge of the meaning of that language is Jack Morefield, who explains that the Relocation Policy creates a rolling 12-month obligation period requiring Goddard to repay to CSK Auto any relocation payments accepted by him while the relocation was in process, if paid within the 12-month period prior to his termination of employment.<sup>13</sup> Goddard chose not to depose Mr. Morefield, and his testimony has not been impeached in any way whatsoever. Importantly, Goddard admits he never spoke to anyone at CSK Auto as to what this language in the Relocation Policy meant, and thus has no personal knowledge regarding the operation of this language in the Relocation Policy.<sup>14</sup>

Rather than address these issues, Goddard's Reply brief attacks Mr. Morefield's "credibility" and contends that a fact dispute would exist if the Court considered Mr. Morefield's testimony as to the meaning of the Relocation Policy's language. That argument is wrong – zero credibility determinations need to be made. A credibility assessment is necessary only where there is a *bona fide* dispute as to the meaning of contractual language, and here there is absolutely none.<sup>15</sup>

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<sup>12</sup> CP 581, #8 "In all cases where there is a question of interpretation of policy, the decision of [the] Relocation Services Senior Travel Manager shall prevail."

<sup>13</sup> CP 179, ¶ 8.

<sup>14</sup> CP 516.

<sup>15</sup> See *Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor County*, 164 Wn. App. 641 (Wash. Ct. App. 2011) (affirming summary judgment

The only testimony in the record as to the meaning of the Relocation Policy is Mr. Morefield's, and Goddard did not (and cannot) offer any countervailing testimony which created any fact dispute over the meaning of the applicable language. This is especially true because, as noted above, the policy itself expressly reserves to CSK Auto the right to construe that language. More to the point, Goddard never offered any contrasting interpretation of the policy language in the factual record reviewed by the Trial Court.

As described above, Goddard admitted that the Relocation Policy applied both before and after he signed the Rescission Agreement.<sup>16</sup> Thus, even if the Rescission Agreement operated to release any prior claims for repayment held by CSK Auto (which it did not), any relocation expenses paid for Goddard on or after the Rescission Agreement was signed on or about August 22, 2008, remain recoverable by CSK Auto under the Relocation Policy. To the extent this Court finds that those amounts are not recoverable under the Promissory Note, it should remand to the Trial Court for further proof on CSK Auto's damages related to relocation expenses paid by CSK Auto to Goddard or on his behalf pursuant to the Relocation policy.

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and enforcing an oral contract where there was no disputed testimony regarding the terms of the agreement).

<sup>16</sup> CP 519.

**III. CSK Auto is entitled to summary judgment on its claim that Goddard breached his non-recruitment covenant.**

CSK Auto also cross-appealed the Trial Court's ruling that it could not recover \$5,000 in damages based upon CSK Auto's counterclaim that Goddard's breached a non-recruitment covenant he had with CSK Auto.

**A. Goddard's argument that no restrictive covenant applied to him is illogical.**

Goddard's sole argument, summed up on page 22 of Goddard's Reply Brief, is that "there was no Non-Compete Period by which Mr. Goddard was prohibited from hiring or attempting to hire any employee of CSK."<sup>17</sup> This argument is illogical based upon the agreements Goddard signed and the context in which they were executed.

The Rescission Agreement expressly retained certain restrictive covenants, including an employee non-recruitment covenant, that were contained in Goddard's earlier "Severance Agreement" with CSK Auto. The Severance Agreement defined the duration of Goddard's *post-termination non-compete* as the "Severance Period," which here was indisputably six (6) months.

As pointed out in CSK Auto's Response, the term "Severance Period" as used in the Severance Agreement is definitional only. The "Severance Period" establishes both (1) the amount of severance potentially due Goddard; and, more importantly (2) the timeframe for the

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<sup>17</sup> Appellant's Reply Brief, p. 22.

restrictive covenants tied to Goddard's receipt of "severance" compensation.

The Severance Agreement, which was entered into prior to the O'Reilly acquisition, contemplated periodic post-termination payments. The Rescission Agreement, however, changed the severance obligation so that the putative "severance benefits" became payable to Goddard (1) in a lump sum and (2) while he was still employed with CSK Auto. Thus, the Court's task is to square the Rescission Agreement's express retention of Goddard's *post*-employment restrictive covenants with the Rescission Agreement's contemplation of paying Goddard a *pre*-termination, lump sum payment of money (now anachronistically referred to as a "severance payment").

That task, in reality, is not hard at all. It is clear from the Rescission Agreement that the post-termination non-recruitment covenants were to remain in effect, despite the change in how and when the putative "severance" payment was to be made. Section 5.2(a) of the Severance Agreement prohibits Goddard from engaging in certain activities "[w]hile employed by the Company and during the Severance Period *following the Executive's termination of employment.*"<sup>18</sup> The "Severance Period" is the period for which Goddard was to receive compensation – six months of salary – and is not dependent upon *when* those payments were made.

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<sup>18</sup> CP 537, §5.2(a).

Thus, in accepting the lump-sum “severance” benefit, Goddard agreed not to compete with CSK Auto while employed, *and* “during the [6-month] Severance Period *following the Executive’s termination of employment . . .*” There is no other reasonable way to construe this language. The obligation not to solicit employees did not change simply because under the Rescission Agreement the payment was made before rather than after termination of employment.

**B. CSK Auto was damaged by Goddard’s unlawful solicitation of Derek Reid.**

No reasonable argument exists against the propositions that (1) Goddard breached his non-recruitment covenant, and (2) CSK Auto suffered damages as a result. Goddard’s Reply effectively concedes he unlawfully solicited former CSK Auto Derek Reid to leave CSK Auto for AutoZone.<sup>19</sup> Reid signed a declaration, under oath, clearly stating, among other things: (1) that Goddard solicited Reid to leave CSK Auto for AutoZone; and (2) that Reid decided to stay with CSK Auto due, in part, to his annual pay being increased by \$5,000.<sup>20</sup> Reid’s sham second declaration does not bar judgment for CSK Auto because Goddard *admits* he solicited Reid. The Trial Court erred in dismissing these claims; at the very least, CSK Auto should be permitted to prove its damages below.

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<sup>19</sup> See Appellant’s Reply Brief, p. 22-24. Goddard argues only that the non-recruitment covenant was inapplicable, or that CSK Auto was not damaged by his breach. He does not argue that no breach occurred. Similarly, Goddard candidly admitted in deposition that he breached the covenant. See CP 499-500.

<sup>20</sup> See CP 529-531, ¶¶ 6 and 8.

**IV. CSK Auto should be granted summary judgment on its unjust enrichment claim.**

As stated in CSK Auto's Response, CSK Auto's claim for unjust enrichment is made in the alternative. Plaintiff's argument that the existence of contractual remedies bars this claim is incorrect, in light of the rulings of the Trial Court as they currently exist.<sup>21</sup> As described above, CSK Auto is entitled to full recovery under the contracts it has with Goddard. If, however, this Court determines – as did the Trial Court – that a portion of the relocation expenses advanced by CSK Auto to Goddard were not covered by contract, CSK Auto's unjust enrichment claim applies, and it is entitled to recovery in equity an amount equal to the relocation expenses advanced to Goddard after July 11, 2008.

“Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it.”<sup>22</sup> The elements of the claim are: (1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment.<sup>23</sup>

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<sup>21</sup> As CSK Auto has explained, however, its unjust enrichment claim *is* moot if it is correct as to its principal argument that the Promissory Note entitles it to a full recovery of all relocation expenses previously advanced to Goddard (along with interest and attorney's fees).

<sup>22</sup> *Young v. Young*, 164 Wn.2d 477, 483; 191 P.3d 1258 (Wash. 2008).

<sup>23</sup> *Id.* at 484-485

All of those elements are present here. CSK Auto provided Goddard with substantial relocation benefits that, in fairness, he should not be permitted to keep. The Trial Court found that some of those relocation benefits were not subject to contractual repayment obligations. Regardless of whether the Trial Court was correct in its analysis, the fact remains that Goddard promised CSK Auto he would repay the relocation expenses advanced to him if he resigned within a certain time, and then reneged on that promise.

Plaintiff misses the mark (or hopes to obfuscate the issue), by arguing he would have been better off if he had resigned immediately following the merger. Plaintiff's resignation upon the closing of the merger would have immediately triggered his substantial repayment obligations under the Promissory Note and Relocation Policy.<sup>24</sup> By not immediately resigning, Plaintiff received the sum of \$88,500 in *extra* pay while remaining employed and continuing to receive his normal salary and benefits. Importantly for this claim, by remaining employed, Goddard *continued* to receive relocation benefits.

Thus, in the last few months of Goddard's employment, CSK Auto paid Goddard – an employee whose normal annual salary was less than

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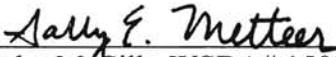
<sup>24</sup> This is true even if Goddard is correct about the scope of the release in the Rescission Agreement (although he is not): if Goddard had resigned immediately, no Rescission Agreement would have been available to him, and he would have had no argument whatsoever to contest his obligation to repay CSK Auto for the relocation benefits provided.

\$200,000 – nearly a half-million dollars (\$88,500 plus \$360,982.10 in relocation payments) in excess of his normal pay. Allowing Goddard to keep the hundreds of thousands of relocation expenses he received would be an unjust windfall – *particularly because Goddard continued to accept relocation benefits from CSK while preparing to argue he had no obligation to repay them.* That is the very definition of unjust enrichment – accepting substantial benefits under a repayment obligation while at the same time preparing to disavow that obligation altogether.

### **CONCLUSION**

As stated in CSK Auto’s Response Brief, the Trial Court got it mostly right – it erred only in (1) not awarding CSK Auto the full measure of its damages under the Promissory Note, the Relocation Policy, or in equity; and (2) in dismissing CSK Auto’s claim for damages resulting from Goddard’s admitted breach of his non-recruitment covenant. Goddard’s arguments to the contrary are belied by the record and are internally inconsistent. This Court should award CSK Auto additional damages for all relocation expenses advanced to Goddard after July 11, 2008 (\$191,084), plus \$5,000 for his unlawful recruitment of Derek Reid, plus all associated interest and attorney’s fees.

Dated this 14<sup>th</sup> day of September, 2012.

  
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**CERTIFICATE OF SERVICE**

Traci Jay 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 September 14<sup>th</sup>, 2012, I caused to be served, one copy of the RESPONDENT'S REPLY BRIEF to the address listed below by via e-mail and U.S. Mail to all counsel:

Jean Jorgensen  
Singleton & Jorgensen, Inc., PS  
337 Park Avenue North  
Renton, WA 98057

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

Executed at Seattle, Washington on September 14, 2012.

  
Traci Jay