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No. 72604-8-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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PROJECT CORPS, LLC; and  
MICHELLE D. GADDIE,

Appellants,

v.

ROBERT RUHL; and  
PATRICIA PETERSON,

Respondents.

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STATE OF WASHINGTON  
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BRIEF OF APPELLANTS

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**ORIGINAL**

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## **I. IDENTITY OF APPELLANTS**

Appellants, ProjectCorps, LLC and Michelle D. Gaddie, defendants in the underlying action in King County Superior Court Cause No. 13-2-25459-0 SEA, respectfully submit this brief for the Court's consideration.

## **II. INTRODUCTION**

The facts of this case tell a story of broken promises and bookkeeping errors. Like many small businesses, ProjectCorps LLC ("ProjectCorps") hit tough times and was having difficulty paying the extremely high salaries (including commissions) of two of its most important and highest paid employees, Respondents Patricia Peterson ("Peterson") and Robert Ruhl ("Ruhl"). The owner of ProjectCorps, Michelle D. Gaddie ("Gaddie"), explored many avenues to keep the company afloat, including, not taking a salary or distribution herself, borrowing money from family, taking out loans on behalf of the company, taking out personal loans, and obtaining a line of credit on her personal home. However, these measures were not enough and more needed to be done to reduce the company's expenses, including the reduction of employee salaries.

Initially, rather than cut their salaries, Peterson and Ruhl agreed that they would defer their wages, in the event they were offered an opportunity to be owners (to which the deferred wages would be used as a buy-in) or

until ProjectCorps was in a better financial position. At the heart of the agreement was the desire to make ProjectCorps successful, and as such, the parties worked together in good faith to help the company prosper.

However, the parties' efforts to cut expenses were not enough. When ProjectCorps could no longer pay the extremely high salaries of Peterson and Ruhl, the owner of the company, Gaddie, made the decision to cut their salaries in 2013. At this point, the narrative changed. Peterson and Ruhl became disgruntled and their discontent would ultimately lead to their termination. Following their termination, a simple accounting was performed in an effort to determine the amount of Peterson and Ruhl's deferred wages so that a payment plan could be set; however, significant bookkeeping errors were discovered, which had resulted in overpayment to Peterson and Ruhl. While ProjectCorps was attempting to fully evaluate the overpayment and the parties began trying to negotiate resolution, the underlying lawsuit was filed.

On summary judgment, Peterson and Ruhl sought recovery of all wages and commissions that were deferred in 2012, the wages that were cut in 2013, exemplary damages on both the wages from 2012 and 2013, attorney fees, and interest.

In the face of declaration testimony and documentation submitted by Gaddie, the trial court improperly applied the summary judgment

standard and granted summary judgment on Peterson and Ruhl's 2013 wage claims. In addition, the trial court awarded exemplary damages, attorney fees, and interest related to the 2013 wage claims.

In the face of declaration testimony and documentation detailing the bookkeeping and accounting errors that resulted in the overpayment of commissions and the clear bona fide dispute over wages owed, the trial court granted Peterson and Ruhl's claims for commission payments from 2012, as well as the exemplary damages, attorney fees, and interest related to the 2012 commissions.

Appellants are requesting that the trial court's order on summary judgment be reversed and this matter be remanded.

### **III. ISSUES PRESENTED FOR REVIEW**

- 1) Whether the trial court erred when it awarded Respondents Patricia Peterson and Robert Ruhl each \$7,083.31 in withheld wages in 2013, when evidence was offered to demonstrate that Respondents Patricia Peterson and Robert Ruhl's wages were decreased?

**ANSWER: YES**

- 2) Whether the trial court erred when it struck and excluded the declaration testimony of Kimberly Valenzano, when Ms. Valenzano's testimony was proper pursuant to ER 701?

**ANSWER: YES**

- 3) Whether the trial court erred when it awarded Respondents Patricia Peterson \$54,198.24 and Robert Ruhl \$31,400.03 in exemplary damages pursuant to RCW 49.52.070, when there was not a willful withholding of wages?

**ANSWER: YES**

- 4) Whether the trial court erred when it awarded Respondents Patricia Peterson \$54,198.24 and Robert Ruhl \$31,400.03 in exemplary damages pursuant to RCW 49.52.070, when Respondents knowingly submitted to the deferment of their wages?

**ANSWER: YES**

- 5) Whether the trial court erred when it awarded Respondents Patricia Peterson and Robert Ruhl attorney fees pursuant to RCW 49.52, when summary judgment was not proper and the trial court failed to adequately review the amounts awarded?

**ANSWER: YES**

- 6) Whether the trial court erred when it awarded Respondents Patricia Peterson and Robert Ruhl 12% interest on the damages awarded, when prejudgment interest was improperly awarded on wages that were knowingly deferred and on amounts that were disputed?

**ANSWER: YES**

#### **IV. STATEMENT OF THE CASE**

##### **A. Substantive Facts**

###### *1. ProjectCorps' Decision to Hire Peterson and Ruhl*

ProjectCorps is a small strategic consulting and professional services company that helps businesses identify and solve problems in an individualized and market-driven way. CP 269-270. ProjectCorps does a significant amount of its work with local and state agencies. *Id.*

Peterson was initially an independent contractor hired by ProjectCorps as a Sr. Consultant where she worked as a full-time billable consultant on-site at the Port of Tacoma. CP 270. This work began in September 2007 and was completed in Q1 2010. *Id.* On March 14, 2011,

Peterson was hired as Vice President of Client Services, a W-2 employee because ProjectCorps needed to drive revenue and manage clients and consultants. *Id.* Peterson made it clear that she knew consulting and could increase new business and extend the work ProjectCorps already had. *Id.* Gaddie relied on the representations made by Peterson when ProjectCorps hired her with yearly base salary of \$170,000.00 plus commission. *Id.*

On September 15, 2011, Peterson's husband, Ruhl, was hired as a W-2 employee in the position of Principal Consultant. CP 270. Ruhl was hired because he promised that he would build a new practice area for ProjectCorps and develop an entirely new line of business. *Id.* Gaddie relied on the representations made by Ruhl when ProjectCorps hired him with a yearly base salary of \$170,000.00 plus commission. *Id.*

## 2. *The Commission Program and Its Modifications*

The first iteration of the commission program was created May 18, 2011. CP 271, 281. Peterson was primarily responsible for developing the commission program. *Id.* When the commission program was originally implemented in 2011, Gaddie did not participate in the allocation of commission payments, even though she was an essential and material team member and involved in every transaction triggering commission payments. *Id.*

In calculating commissions under the plan, ProjectCorps utilized a Gross Margin calculation to determine commissions. CP 271, 281. Gross Margin was intended to reflect a calculation of billable work minus the overhead attributable to the project. *Id.* It was essentially a cost of goods sold calculation. *Id.* The program was modified slightly on November 1, 2011. CP 271, 283.

In 2011, ProjectCorps needed to take out a Small Business Loan to cover salaries, including Peterson and Ruhl's extremely high wages. CP 271. In addition, in 2012, Gaddie personally took out a line of credit in the amount of \$50,000.00 to cover payroll and support irregularities in cash flow based on slow-paying customers. *Id.* After that, Gaddie personally had to borrow money from her partner's family in the amount of \$48,000.00 and had to borrow from her personal residence's line of credit, HELOC, of approximately \$125,000. *Id.*

Starting 2012, the commission program was **significantly modified** because ProjectCorps was having financial problems and could not pay its expenses. CP 271, 285. The commission program required that commissions be shared by "[E]ach team member that materially participates in the sale will be compensated." *Id.* This portion was added not only because ProjectCorps wanted to make sure **all** team members were incentivized, but because Gaddie wanted to start receiving a portion of the

commission. *Id.* Gaddie decided to take part in the commission program, not because she wanted a check, but because she wanted her commission payment to remain in the company to cover payroll, expenses, and to repay its loans. *Id.* at 271-272. **Gaddie never received a paycheck, let alone a commission payment.** *Id.*

In addition, the 2012 modification resulted in the reduction of the commission rate from 25% of Gross Margin to 18% of Gross Margin. CP 271, 285.

### 3. *Peterson and Ruhl Agree to Defer their Wages*

Peterson and Ruhl expressly agreed to defer their wages until ProjectCorps was in a better financial position. CP 272.

In Q1 of 2012, Gaddie told Peterson and Ruhl that as a result of the precarious financial position of the company, she was going to cut salaries. CP 272. Gaddie intended to cut Ruhl's salary by 40%, but Peterson said her husband would not stand for that. *Id.* The parties discussed a scenario where both Peterson and Ruhl each would take a cut of 20% and they would work only 80% time. *Id.* However, Peterson and Ruhl were interested in becoming owners of the company and believed they needed to work 100% of the time. *Id.* The parties agreed to "defer" Peterson and Ruhl's salary so that those funds could be used as their buy-in, if it was agreed that they should become owners of the company. *Id.* This discussion took place in

March 2012, and Peterson and Ruhl understood that there was either going to be pay-cuts or they could use their “deferment” as a buy-in. *Id.* Had Peterson and Ruhl not pursued the buy-in option, Gaddie would have simply cut Ruhl’s salary or the salaries of both employees. *Id.* The parties continued to call it “deferment” while they worked towards making the company profitable. *Id.*

By July 2012, Gaddie decided to end the salary deferment and return Peterson and Ruhl to their full salary. CP 272. There were a number of reasons for this, including the fact that bringing Peterson and Ruhl on as partners was not something Gaddie wanted to do. *Id.* Peterson and Gaddie met on a weekly basis and Peterson was well aware of Gaddie’s decision, as well as the company’s financial difficulties. *Id.* Peterson was made aware that the company was not in a financial position to pay back the deferments, but Gaddie did not want to continue to increase the amount of deferred funds since they were not going to be used as a buy-in and Gaddie was not sure how ProjectCorps would be able to pay Peterson and Ruhl the money. *Id.* at 272-273. Even more, ProjectCorps needed Peterson and Ruhl to work hard so the company could generate profits. *Id.* Yet, the decrease in Peterson and Ruhl’s wages negatively impacted their performance. *Id.* As such, with the little bit of money ProjectCorps had available, Peterson and Ruhl’s salaries were returned to the full amount. *Id.*

However, by January 2013, it was clear that the company was facing nearly insurmountable financial difficulties. CP 273. As was standard, Gaddie was meeting with Peterson every week, and beginning in January 2013, Gaddie told Peterson that the company needed to cut salaries, and specifically her and her husband's salaries. *Id.* ProjectCorps was waiting to hear whether it had won a large project, so there was minimal billable work being done (i.e., there was little opportunity for Peterson and Ruhl to generate much revenue). *Id.* By March 2013, nothing more could be done. *Id.* Gaddie informed Peterson that effective March 16, 2013, her salary and her husband's salary would be cut by 20%. *Id.* Gaddie instructed Karen Chenkovich, ProjectCorps' bookkeeper, to make the changes in payroll. *Id.* Peterson and Ruhl were not happy, but they continued to work for the company even though their salaries were reduced. *Id.* ProjectCorps was still waiting on the outcome of the large project, so there was hope that better times were ahead. *Id.*

In an effort to demonstrate ProjectCorps' commitment to Peterson and Ruhl, Gaddie sent two emails on April 8, 2013 identifying the amount of wages that had been deferred. CP 273, 287-288, 290. Even though Gaddie had to borrow money from her partner's family and take out loans to make payroll, ProjectCorps wanted to stand by its promises, which resulted in the April 2013 emails being prepared. *Id.* The emails clearly

illustrate the time-period for the deferment and do not mention 2013 at all. *Id.* Pay reductions that were effective in 2013 were not referenced in the emails because they were not part of the deferment. *Id.*

4. *Peterson and Ruhl are Terminated*

On June 6, 2013, because of the sustained and difficult financial situation of ProjectCorps, Ruhl was transitioned to a W-2 hourly employee. CP 273. On June 10, 2013, because of the sustained and difficult financial situation of ProjectCorps, Peterson was transitioned to a W-2 hourly employee. *Id.* Peterson and Ruhl were not happy with this turn of events and that discontent would lead to their termination. *Id.* Both Peterson and Ruhl were terminated for willfully and knowingly violating a company policy when they attended a client meeting without prior approval on June 20, 2013. *Id.*

5. *Overpayment is Discovered*

When Peterson and Ruhl's employment was terminated, ProjectCorps began taking steps to determine the amount of deferred wages so that the company could work out a payment plan. CP 531, 233. In light of the agreement that was made and the company's financial peril, Peterson and Ruhl should have had no expectation of being paid; however ProjectCorps still wanted to stand by the agreement to pay Peterson and Ruhl when financial times were better.

Kimberly Valenzano (“Valenzano”) helped Gaddie start ProjectCorps in 2000 and worked as an employee until she accepted a management position at a pharmaceutical company as an analytical chemist. CP 233.

Valenzano returned to ProjectCorps immediately after Karen Chenkovich’s resignation on June 25, 2013, just five days after Peterson and Ruhl were terminated. CP 233-234. Chenkovich had been running the office and accounting (Accounts Receivable, Accounts Payable, etc.), and Valenzano took over all of her responsibilities. CP 234. Valenzano hired a bookkeeper (Linda Julien) to help her. *Id.*

Valenzano and Ms. Julien undertook an extensive auditing project where they reviewed the expense data and invoice/payment records for vendors and staff. CP 234.

Valenzano is not a forensic accountant, but even based on her review, she discovered a number of discrepancies with the amounts Peterson and Ruhl were demanding, and more specifically the accounting practices of Chenkovich related to those discrepancies. CP 234. A number of issues arose that made Valenzano review the company’s records. *Id.* At first glance, Valenzano could not make sense of the data; however, after finding spreadsheets and commissions schedules that Chenkovich prepared,

Valenzano was able to reconstruct the faulty process that Chenkovich was employing, which resulted in overpayment to Peterson and Ruhl. *Id.*

Specifically, upon attempting to verify Chenkovich's data, Valenzano discovered that Chenkovich had arbitrarily and without justification used a 50% of COGs ("Cost of Goods") calculation on a particular project and calculated a commission payment allocation to Ruhl and Peterson based only on that arbitrary calculation. CP 234. This was concrete evidence that the commission program was not being properly implemented. *Id.* Arbitrarily determining the COGS or expenses did not make any sense to either Valenzano or Ms. Julien. *Id.* This was a clear indication that additional review of the company records was necessary. *Id.*

It was reasoned that if the commissions were supposed to be based on Gross Margin, it would be impossible to properly calculate the commission amount if you do not know the amount of expenses or were simply making the amount of expenses up, which is what occurred here. CP 234. Bookkeeping errors impacted the implementation of the commission program and the overpayment of wages to Peterson and Ruhl. *Id.*

In addition, commission calculations could not be supported when considering the fact that ProjectCorps was not profitable. CP 234. Each project was running at a loss. *Id.* Yet, ProjectCorps was giving Peterson and Ruhl thousands of dollars in Gross Margin profits based on faulty

bookkeeping calculations by Chenkovich. *Id.* Overhead remained the same or even lower, so that was not the issue. *Id.* It became apparent that consulting costs were killing the company's bottom-line (salaries/vendors and consulting expenses). *Id.* Valenzano started reviewing timesheet records and whatever else she could find on the server. *Id.*

After Valenzano reviewed ProjectCorps' company records, it soon became evident that Peterson and Ruhl had been significantly overpaid during the implementation of the commissions program. CP 235-239.

With regard to Peterson's commission payments paid out in 2011, Valenzano reviewed the company's payroll records and discovered that Peterson was overpaid for Q3 Tax Portal 2011 commissions. CP 235. Peterson was allocated \$4,991.79 per the commission schedule prepared by Chenkovich; however, accounting records indicate that Chenkovich paid Peterson \$3,725.71 on 10/21/11 (50%) and \$3,725.21 on 11/4/2011 (50%) for a total of \$7,450.42. This was an overpayment of \$2,458.63. *Id.*

As stated above, in 2011, ProjectCorps' commission program was significantly modified to require that commissions be shared by "[E]ach team member that materially participates in the sale will be compensated." CP 235, 271, 285. This portion was added because ProjectCorps wanted to make sure all team members were incentivized, as well as the fact that Gaddie wanted any commission money to remain in the company to cover

payroll and expenses. *Id.* A review of the commission records reveal that all team members were **not** compensated under the commission program, and as a result, Peterson and Ruhl were overcompensated. *Id.* In all cases, Gaddie was not included in any commission schedules. *Id.* There are multiple instances where commission schedules included both Ruhl and Peterson, without justification of percent allocation, but no other staff members were included in the allocation. *Id.* This was bookkeeping error that was inconsistent with the commission program. *Id.*

In addition, starting in 2012, the commission rate was changed from 25% of Gross margin to 18% of Gross Margin. CP 236, 271, 285. However, Chenkovich continued to pay commissions on the higher percentage. As such, Peterson and Ruhl were overcompensated. *Id.*

Finally, in addition to miscalculating the commission percentage, Chenkovich failed to properly calculate Gross Margin. CP 236, 271, 285. It was the company's policy that Gross Margin meant subtracting the expenses from the gross profits. *Id.* The records demonstrate that Chenkovich made bookkeeping errors when calculating the overall expenses related to the projects, which significantly affected Gross Margin when calculating commission. *Id.* Valenzano discovered that the commission schedules prepared by Chenkovich were elevated and not accurate. *Id.* As such, Peterson and Ruhl were overcompensated because

the Gross Margin was not properly calculated. *Id.* Below is a review and recalculation of Gross Margin for some of the specific projects that Ruhl and Peterson worked. *Id.*

With regard to the Five Cities Q2 2011 project, Valenzano reviewed the original timesheet records, accounting records, and expense data/reports. Valenzano discovered the following:

- Expenses that were not included in original calculation.
- Vendor costs were much higher based on paid invoices.
- Staff hours were not properly accounted for during the duration of project work.
- Staff administrative hours were added to COGs, assuming 6% of effort for Kaufman (1.5 hrs) and 10% of 1 week duration for Peterson (4 hrs).
- Chenkovich incorrectly determined the gross margin at \$2,432.50 and prepared commission payments totaling \$608.13.
- The actual gross margin should have been \$147.57, and based on a commission of 25% of gross margin, the commission payment should have been \$36.89.

CP 236-237, 243.

With regard to the Five Cities Q3 2011 project, Valenzano reviewed the original timesheet records, accounting records, and expense data/reports. Valenzano discovered the following:

- Expenses that were not included in original calculation.
- Staff effort was under reported.

- Administrative hours were added based on the assumption that 6% of Kaufman's effort spent on admin (18.5 hrs) and Peterson spent 10% of duration (20 weeks project) managing project/client/staff/vendors (80 hrs).
- Chenkovich incorrectly determined the gross margin at \$59,603.41 and prepared commission payments totaling \$14,900.85.
- The actual gross margin should have been \$42,493.54, and based on a commission of 25% of gross margin, the commission payment should have been \$10,623.39.

CP 237, 247-248.

With regard to the CTS Q4 2011 project, Valenzano reviewed the original timesheet records, accounting records, and expense data/reports.

Valenzano discovered the following:

- Added management/administrative hours should have been calculated based on the fact that one exempt, full-time staff 6% of effort on project assigned as administrative hours.
- VP client services, exempt, full-time staff 12% of project duration assigned as administrative hours for management of client/staff/vendors.
- Expenses were significantly higher than originally reported.
- Vendor costs were higher (based on invoices from independent contractors working on project).
- Significant staff hours were not assigned to project work based on review of timesheet records, this includes travel time which was reimbursed in mileage expenses.
- The actual gross margin should have been \$25,027.46, and based on a commission of 25% of gross margin, the commission payment should have been \$6,256.87 (a reduction of \$7,380.39).

CP 237-238, 250-252.

With regard to the CTS Q1-Q2 2012 records, Valenzano reviewed the original timesheet records, accounting records and expense data/reports.

Valenzano discovered the following:

- Commissions were paid out based on 25% of gross margin, but should have been paid out at 18%.
- Chenkovich improperly calculated the Q1 2012 Gross Margin as \$114,853.23, then she estimated COGs at 50%, and reduced Gross Margin based on an arbitrary 50% of gross revenues without justification for this calculation error.
- Similarly, Chenkovich improperly calculated the Q2 2012 Gross Margin as \$6,625 based on 50% of CTS revenue received in that quarter. It appears the report prepared by Chenkovich did not review any timesheet, vendor or expense data because she did not populate any of the data fields in her Gross Margin calculation. This was another gross error in the commission calculation.
- The correct calculation for Q1-Q2 2012 Adjusted Gross Margin should have been no more than \$61,973.91.
- The correct report results in a commission cut of \$10,319.70.

CP 238, 254-256.

With regard to the Tax Portal Phase 2 (Q2/Q3 2012), Valenzano reviewed the original timesheet records, accounting records, and expense data/reports. Valenzano discovered that no payments were made, but the amount being requested by Respondents was 33% too high based on the following:

- Commissions are requested on 25% of gross margin, but should only be calculated at 18%.
- There were no expenses reported in Chenkovich's data.
- Several vendor payments were not included in Chenkovich's data.
- Staff hours were significantly under-reported in Chenkovich's data.
- Administrative hours were added for staff and management of project team based on the assumption that 6% administrative hours for effort during 34 week project - Kaufman (12 hrs) and Ruhl (33.5 hrs).
- Chenkovich incorrectly determined the gross margin for Q2 2012 at \$26,811.66 and prepared commission payments totaling \$6,702.92 (includes error based on 25% instead of 18%).
- Chenkovich incorrectly determined the gross margin for Q3 2012 at \$96,662.75 and prepared commission payments totaling \$24,165.69 (includes error based on 25% instead of 18%).
- The actual gross margin for Q2 and Q3 2012 should have been \$96,737.39, and based on a commission of 18% of gross margin, the commission payment should have been \$17,052.73 - meaning that there was an overpayment of \$13,815.88.

CP 238-239, 258-259.

With regard to the University of Washington CPOE project (Q2/Q3/Q4 2011 and Q1/Q2/Q3 2012), SCCA (Q1/Q2 2012) and Avista project (Q3/Q4 2011), Valenzano reviewed the original timesheet records, accounting records, and expense data/reports. Valenzano discovered that the commission reports were not correctly calculated and appear grossly inflated based on the fact that:

- There were **no** expenses reported in Chenkovich's data.
- Chenkovich did not assign any administrative/client oversight/management hours for work on this effort, which would result in 6-12% in hours for the duration of effort for staff and Peterson as VP Client Services.
- It appeared that all commissions paid in 2011 and allocated in 2012 were incorrectly calculated and inflated for Ruhl and Peterson.

CP 239, 261-268.

The above facts are detailed, but only required the comparison of records and simple arithmetic. CP 233-268. Based on Peterson and Ruhl's promises to defer their wages until ProjectCorps was in a better financial position and the discovery of significant bookkeeping errors, ProjectCorps had a bona fide dispute with the amounts Peterson and Ruhl were claiming. However, prior to ProjectCorps being able to work something out with Peterson and Ruhl, the underlying lawsuit was filed. CP 427-428.

The facts detailed in Valenzano's declaration revealed genuine issues of material fact related to Respondents' claim for commission payments; however, the trial court did not consider any of the above information and improperly excluded Valenzano's declaration.

## **B. Procedural History**

The Complaint was filed on July 9, 2013, and then an Amended Complaint was filed on July 15, 2013. CP 1-20, 21-35. On August 14, 2013, Appellants filed their Answer to the Complaint. CP 52-62.

Respondents issued discovery on August 1, 2013 and Appellants provided responses on September 16, 2013. CP 192. No other discovery was conducted. *Id.*

On March 17, 2014, Respondents filed a Motion for Summary Judgment without oral argument. CP 64-77.

On April 3, 2013, Appellants filed their Opposition to the Motion for Summary Judgment, as well as a Motion for a Continuance Pursuant to CR 56(f). CP 164-188, 415-426. In the CR 56(f) Motion, Appellants were essentially arguing that the Motion for Partial Summary Judgment was premature because it was based on facts that required additional investigation. *Id.* In addition to the fact that for several months prior to the motion, the parties chose to focus on mediation prior to engaging in extensive and costly discovery; however, the mediation was unexpectedly cancelled by Respondents. *Id.*

On April 4, 2014, the trial court entered a Stipulated Order to Allow for the filing of an Amended Answer with Counterclaims. CP 430-449. The Amended Answer alleged Counterclaims against Respondents for violation of the Consumer Protection Act and Unfair Competition. *Id.* These claims involved Peterson and Ruhl's decision to start a competing business through utilization of ProjectCorps' assets and by making representations about ProjectCorps' employees. *Id.*

Appellants' Motion to Continue pursuant to CR 56(f) was denied by the trial court on April 14, 2014. CP 517.

Respondents' Motion for Summary Judgment was subsequently noted for oral argument on May 9, 2014, and on April 28, 2014, seven days after the Motion to Continue was denied, Appellants' submitted their Supplemental Opposition to Respondents' Motion for Summary Judgment. CP 525-551.

On May 9, 2014, following oral argument, the trial court entered an Order Granting Partial Summary Judgment in favor of Respondents. RP 1-50, CP 593, 594-596.

On May 15, 2014, the trial court entered a Stipulation allowing Respondents to file a Second Amended Complaint for the sole purpose of removing Kimberly Valenzano, a recognized non-interested party, from the lawsuit. CP 597-599, 617-632.

On June 3, 2014, Respondents filed a Motion and Declaration to fix the amount of attorney fees, costs, and expenses. CP 633. On June 13, 2014, Appellants opposed the Respondents' motion. CP 661-675. On July 7, 2014, the trial court entered Findings of Fact, Conclusions of Law, and Order Fixing Attorney Fees, Costs, and Expenses. CP 701-705.

On September 12, 2014, the parties entered a Stipulation and Order for (1) Entry of CR 54(b) Judgment on Fewer than All Claims; (2) Entry of

a Stay of Remaining Claims; and (3) Setting Supersedeas Bond Amount (“Stipulation”). CP 707-715. The Stipulation provided for the entry of a judgment, as well as the process for moving forward with an appeal. *Id.*

On September 16, 2014, the trial court entered Findings of Fact and CR 54(b) Final Judgment on Fewer than All Claims (“Judgment”). CP 716-719.

On October 15, 2014, a Notice of Appeal was filed. CP 720-736.

On November 3, 2014, counsel for Appellants tendered two cashier’s checks to counsel for Respondents in partial satisfaction of the September 16, 2014 Judgment. CP 737-741. Specifically, the funds were directed to Respondents in satisfaction of the \$11,333.36 award of 2012 salary wages due and owing to each of the Respondents. *Id.*

On November 12, 2014, counsel for Appellants tendered a cashier’s check made payable to “Cable Langenbach Kinerk & Bauer LLP in Trust for Patricia Peterson and Robert Ruhl” in the amount of \$22,666.72. CP 737-741. The \$22,666.72 payment was tendered in partial satisfaction of the September 16, 2014 Judgment as a result of the trial court’s determination of the amount of exemplary damages (pursuant to RCW 49.52) awarded to Respondents arising out of the 2012 salary wages. *Id.*

A Partial Satisfaction of Judgment was entered with the trial court on December 2, 2014. CP 737-741.

On December 19, 2014, counsel for Appellants tendered a check in the amount of \$22,744.79 made payable to “Cable Langenbach Kinerk & Bauer LLP in Trust for Patricia Peterson and Robert Ruhl.” CP 756-758. The check was paid in partial satisfaction of the September 16, 2014 Judgment, and specifically reflected a payment of \$18,029.36 for the attorney fee award, as well as the interest that had accumulated on the attorney fee award, 2012 wage claims, and the exemplary damage award related to the 2012 wage claims. *Id.*

A Partial Satisfaction of Judgment was entered with the trial court on January 20, 2015. CP 756-758.

## V. ARGUMENT

### A. Standard of Review

On appeal from summary judgment, the appellate court decides the case on a *de novo* basis, engaging in the same analysis as the trial court. *See, e.g., Roger Crane & Associates, Inc. v. Felice*, 74 Wn. App. 769, 875 P.2d 705 (1994). Both the law and the facts should be reconsidered by the appellate court. Along these lines, the trial court’s rulings on the admissibility of evidence are also reviewed *de novo*, even though the same rulings might be reviewed only for abuse of discretion in an appeal following a trial. *Momah v. Bharti*, 144 Wn. App. 731, 182 P.3d 455 (2008) (admissibility of hearsay); *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d

267 (2008) (qualifications of expert).

Any findings of fact entered by the trial court should be considered superfluous and should be disregarded by the appellate court. *Redding v. Virginia Mason Medical Center*, 75 Wn. App. 424, 878 P.2d 483 (1994); *Thongchoom v. Graco Children's Products, Inc.*, 117 Wn. App. 299, 71 P.3d 214 (2003) (Where case on appeal was decided on summary judgment, any findings of fact are superfluous and subject to the de novo standard of review).

As such, this Court should consider all of the facts and reasonable inferences in the light most favorable to Appellants ProjectCorps and Gaddie. *Mason v. Kenyon Zero Storage*, 71 Wn. App. 5, 8-9, 856 P.2d 410 (1993). A finding of a genuine issue of any material fact would warrant reversal of the trial court's determination on summary judgment. *Condor Enters., Inc. v. Boise Cascade Corp.*, 71 Wn. App. 48, 54, 856 P.2d 713 (1993). Equally, a finding that the trial court improperly excluded evidence would also warrant reversal of the trial court's determination on summary judgment. *Momah*, 144 Wn. App. 731, 182 P.3d 455; *Montgomery*, 163 Wn.2d 577, 183 P.3d 267.

**B. Evidence Creating a Genuine Issue of Material Fact was Presented in Opposition to the Respondents' 2013 Wage Claims**

ProjectCorps and Gaddie offered admissible evidence that Ruhl and

Peterson's wages were cut in March 2013. However, contrary to this evidence, the trial court granted Ruhl and Peterson's motion for summary judgment related to their 2013 wage claims, as well as exemplary damages, attorney fees, and interest related to the 2013 wage claims. The trial court's decision is a reversible error.

A summary judgment motion can be granted only when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990); CR 56. The court must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Id.* The burden of showing there is no issue of material fact falls upon the party moving for summary judgment. *Hash v. Children's Orthopedic Hosp.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988). It has often been said that any doubts as to the existence of a genuine issue of material fact should be resolved against the moving party, and in favor of allowing the case to go to trial. *See, e.g., Ventures Nw. Ltd. P'ship v. State*, 81 Wn. App. 353, 361, 914 P.2d 1180 (1996); *Westlake View Condo. Ass'n v. Sixth Ave. View Partners, LLC*, 146 Wn. App. 760, 766, 193 P.3d 161 (2008).

Gaddie offered declaration testimony in direct conflict with a material element of the Respondents' 2013 wage claims. CP 272-273.

Gaddie offered evidence that she decided to reduce the Respondents' wages in March 2013, not merely defer them as was agreed to by the parties in 2012. As provided in Gaddie's declaration, by January 2013, it was clear that ProjectCorps was facing nearly insurmountable financial difficulties. As was standard, Gaddie met with Peterson every week, and beginning in January 2013, Gaddie told Peterson that the company needed to cut salaries, and specifically her and her husband's salaries.

ProjectCorps was waiting to hear whether it had won a large contract, so there was minimal billable work (i.e., revenue) being done by Peterson and Ruhl. By March 2013, nothing more could be done. Gaddie informed Peterson that effective March 16, 2013, her salary and her husband's salary would be cut by 20%. Gaddie instructed the bookkeeper at the time, Chenkovich, to make the changes in payroll. Peterson and Ruhl were not happy, but they continued to work for the company even though their salaries were reduced. It should not be lost on the Court that at no time in 2012 or 2013 did Gaddie receive a salary or take a distribution.

On April 8, 2013, multiple pay-periods **after** Gaddie had reduced the Respondents' wages, she sent emails to Peterson and Ruhl in an effort to demonstrate ProjectCorps' commitment to the agreement made by the parties. CP 273, 287-288, 290. It is important to note that the April 8, 2013 emails **did not reference 2013 wages in any way**. Even still, the emails

were the sole evidence that the Respondents relied upon to support their claims and what the trial court utilized to grant summary judgment. The emails clearly illustrate the time-period for the agreed upon deferment and do not mention wages in 2013 at all. *Id.* Gaddie did not confirm via the April 8, 2013 emails that the parties had agreed to a deferment of the 2013 wages because Gaddie had in fact reduced Peterson and Ruhl's wages. *Id.*

However, in the face of declaration testimony from the owner of ProjectCorps confirming that the company had reduced the Respondents' wages in 2013, the trial court improperly determined that there were no genuine issues of material fact and that the Respondents were entitled to damages related to the 2013 wages. The trial court concluded,

I agree with the plaintiff that there's no evidence that there was a reduction of salary as opposed to a continuing financial straits that the -- that the defense found itself in and that just as it did before, it simply started paying them less than their salary. There's no evidence of a salary change. There is evidence of a continuing or a return to shorting them on their payment. And I find that the amounts that the -- that there's not a genuine issue of material facts as to the salary that was withheld for 2013.

RP 42:15-23. The trial court ignored conflicting testimony and the genuine issue of material fact.

The trial court improperly ignored admissible evidence that raised a material issue of fact that should have been resolved by the jury. The trial court failed to adhere to the standard on summary judgment. As such, the

trial court's summary judgment decision with respect to Respondents' 2013 wage claim should be reversed and remanded.

**C. Valenzano's Declaration was Improperly Excluded**

*1. Valenzano's Declaration was Based on Personal Knowledge*

After returning to ProjectCorps to help run the business, Valenzano was responsible for running the office and **all** accounting functions (Accounts Receivable, Accounts Payable, Payroll, etc.). To assist her, Valenzano hired a bookkeeper, Linda Julien. Valenzano and Ms. Julien undertook an extensive auditing project where they reviewed expense data and invoice/payment records for vendors and staff.

Valenzano submitted a declaration based on her personal knowledge in support of Appellants' Opposition to Respondents' Motion for Partial Summary Judgment that detailed her observations. Valenzano's declaration was based entirely on her personal observations of ProjectCorps' records. Valenzano reviewed payroll records, commission schedules, timesheet records, accounting records, and expense data/reports, and then articulated her observations in the declaration.

However, the trial court expressly excluded Valenzano's declaration testimony and did not consider the evidence. Specifically, the trial court held:

“The Court does find that we -- Valenzano's testimony in offering a layperson's opinion about the commission amounts and calculations is simply not admissible evidence. It is an area that is exempted from 701 because it is based on technical or other specialized knowledge that is rightfully within 702. And she was frank in indicating she's not an expert in this area.”

RP 39:17-24.

Valenzano was not offering opinion testimony. Rather, she was providing statements based on her personal observations of records and a process (the commission plan) she was familiar with. Even more, she completed basic mathematics to calculate the bookkeeping errors. The mathematics performed by Valenzano does not require the testimony of an expert and could easily have been performed by an elementary school student. The trial court's analysis under ER 701 and 702 was **not** necessary and amounts to a clear reversible error. Valenzano's declaration should have been admitted pursuant to ER 602.

2. *Valenzano's Declaration Complies with ER 701*

ER 701 provides that if a witness is not an expert:

[T]he witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

ER 701 is a rule of discretion and is intended to emphasize what a witness knows rather than how the witness expresses his or her knowledge. *Ashley*

v. *Hall*, 138 Wn.2d 151, 156, 978 P.2d 1055 (1999); citing Comment 701, Washington Court Rules at 131 (1999). The rule assumes a witness will testify to observations but permits the witness to resort to inferences and opinions when such testimony will be helpful to the jury. *Id.*

Washington case law predating ER 701 has held lay opinion testimony admissible in a variety of cases, including opinions regarding the value of property, and identification of a person. *See, e.g., Port of Seattle v. Equitable Capital Group, Inc.*, 127 Wn.2d 202, 898 P.2d 275 (1995) (lay opinion regarding property's value admissible); *State v. Hardy*, 76 Wn. App. 188, 884 P.2d 8 (1994) (lay opinion regarding identity of person in surveillance video was admissible).

The admission of lay opinion testimony should only be excluded where the sort of opinion expressed calls for that of an expert. *Ashley*, 138 Wn.2d at 156, 978 P.2d 1055. Whether an opinion is a lay or expert opinion depends upon the source of the knowledge. An expert opinion is opinion based in whole or in part on scientific, technical or specialized knowledge, whereas a lay opinion is based on personal knowledge (*i.e.*, on knowledge derived from the witness's own perceptions, and from which a reasonable lay person could rationally infer the subject matter of the offered opinion). *State v. Kunze*, 97 Wn. App. 832, 988 P.2d 977 (1999).

In determining whether such statements are impermissible opinion testimony, the court will consider the circumstances of the case, including the following factors: “(1) ‘the type of witness involved,’ (2) ‘the specific nature of the testimony,’ (3) ‘the nature of the charges,’ (4) ‘the type of defense, and’ (5) ‘the other evidence before the trier of fact.’” *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); quoting *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993).

Here, Valenzano offered lay testimony that was based on her personal observations. Valenzano’s observations were of documents and a process (the commission program) that she was very familiar with. As stated above, Valenzano helped Gaddie start ProjectCorps, was extremely familiar with the business, and replaced ProjectCorps’ bookkeeper. Valenzano was fully capable of reviewing documents, completing simple mathematics, and then articulating her conclusions. There can be little doubt that testimony related to the calculation of commission payments would be useful to the jury that is tasked with resolving the question of whether wages are owing, willfully withheld, or not owing. Yet, the trial court excluded and ignored evidence that would have raised a genuine issue of material fact. The trial court made a determination of liability when presented with evidence that challenged the amounts claimed by Respondents. Resolution of liability on summary judgment was not proper

and the jury should be provided with an opportunity to evaluate ProjectCorps' defenses.

3. *Federal Law Supports Appellants' Position*

ER 701 is virtually identical to its federal counterpart, Fed. R. Evid. 701, and Federal Court decisions are consistent with those in Washington permitting lay opinion testimony. *See U.S. v. Darland*, 659 F.2d 70 (5th Cir. 1981) (no error in permitting sheriff to state why, in his opinion, no fingerprints were found on a car allegedly used in bank robbery; "It is true that the sheriff was not shown to be an expert in fingerprinting, but he was an experienced law enforcement officer and his answers required no particular expertise," citing Rule 701); *Farner v. Paccar, Inc.*, 562 F.2d 518 (8th Cir. 1977) (trucker allowed to express lay opinion on the proper design of suspension systems for trucks; court noted witness had 30 years' experience in trucking and owned several trucks with the system in question).

Fed. R. Evid. 701 permits lay opinion testimony that is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701's requirement that opinion testimony be based on a witness's perception derives from Fed. R. Evid.

602. That rule states in pertinent part that “[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony.” Fed. R. Evid. 602.

In fact, the advisory committee note regarding Fed. R. Evid. 701 subsection (c) provides that a lay witness may testify to the value of property or **expected profits without the necessity of qualifying the witness as an accountant, appraiser, or similar expert.** Fed. R. Evid. 701 Advisory Committee Notes to 2000 Amendment. Valenzano was simply completing basic mathematics, which is a far cry from the outermost limits of what the rule permits. The drafters of Rule 701 rejected the concern that lay opinion testimony would mislead juries. Rule 701 assumes instead that “the natural characteristics of the adversary system will generally lead to an acceptable result,” and weaknesses in the lay witness's testimony can be emphasized through “cross-examination and argument.” Fed. R. Evid. 701 advisory committee's notes; *see also United States v. Beck*, 418 F.3d 1008, 1015 (9th Cir.2005) (noting that “direct and cross-examination of a lay witness testifying as to his or her opinion is relied upon to verify the accuracy of the testimony”).

Courts routinely permit witnesses to offer lay opinion testimony concerning matters they learn or experience they gain as a result of their

employment. See *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1175–76 (3d Cir.1993); *Minority Television Project, Inc. v. FCC*, 649 F. Supp. 2d 1025, 1032 (N.D. Cal. 2009) (Most, if not all, of Mr. Ozier's testimony was based upon his particularized knowledge that he had by virtue of his or her position in a business, as opposed to training or specialized knowledge within the realm of an expert, and was therefore lay opinion); see also *United States v. Munoz–Franco*, 487 F.3d 25, 35 (1st Cir. 2007) (“Under Rule 701, courts have allowed lay witnesses to express opinions about a business based on the witness's own perceptions and knowledge and participation in the day-to-day affairs of [the] business”).

In *Vasserman v. Henry Mayo Newhall Mem'l Hosp.*, CV 14-06245 MMM PLAX, 2014 WL 6896033, at \*7-9 (C.D. Cal. Dec. 5, 2014), the court reasoned that statements by the Vice President and Chief Human Resources Officer at Newhall Memorial, Mark Puleo, were based on personal knowledge; and were not the product of “scientific, technical, or other specialized knowledge.” The court concluded that the fact that Puleo knew the information as a result of his work for Newhall Memorial did not convert his factual observations into expert testimony. *Id.*

Puleo provided calculations concerning the number of putative class members, the approximate number of paychecks they received, and their average hourly rate of pay; however, the court determined that none of this

information concerned subject matter “beyond the common knowledge of the average layman,” such that Puleo would have to qualify as an expert. The court noted that the appellant did not explain why simple mathematical calculations constituted expert testimony. The court ultimately concluded that Puleo did not offer expert testimony and overruled the appellant’s objections under Fed. R. Evid. 701, 702, and 704.

The above federal law is consistent with and supports the laws in Washington allowing a lay witness to testify when such testimony is based on the witness’s observations and would be helpful to the jury. Valenzano offered her observations of records and the commission program, both of which she had personal knowledge of and were developed as a result of her employment.

4. *Valenzano Possessed Enough Expertise to State a Helpful Opinion*

Courts have also noted that testimony from a lay witness, while not an expert in the traditional sense, possessed enough expertise to state a helpful opinion on a specific issue.

In *Teen-Ed, Inc. v. Kimball Intern., Inc.*, 620 F.2d 399 (3d Cir. 1980), an action for breach of contract, the plaintiff’s accountant was permitted to state an opinion on how lost profits could be calculated even though he had not been qualified as an expert. The court noted that as a lay

witness, the accountant was required to testify from firsthand knowledge, which the court said he possessed. See also *First Annapolis Bancorp, Inc. v. United States*, 72 Fed.Cl. 204 (2006) (“Lay opinion testimony by an accountant concerning lost profits or value of a business has been held admissible under Federal Rule of Evidence 701.”).

It is well-settled that “[t]he modern trend favors the admission of [lay] opinion testimony, provided that it is well founded on personal knowledge and susceptible to specific cross-examination.” *Ghee v. Marten Transp., Ltd.*, 570 Fed. Appx. 228, 231 (3d Cir. 2014). In *Ghee*, the court determined that a lay witness's opinion testimony that “is based on sufficient experience or specialized knowledge” and “a sufficient connection” exists between “such knowledge and experience and the lay opinion,” that opinion should be admitted because it “may be fairly considered to be ‘rationally based on the perception of the witness and truly ‘helpful’ to the jury.” *Id.*

Here, Valenzano helped Gaddie start ProjectCorps and was aware of all aspects of the business’ operations. Valenzano offered testimony based on her observations of records and processes she had personal knowledge and was familiar. She took over the previous office manager’s position and was responsible for all accounting functions from that point forward. Completing basic math that an elementary school student is capable of performing does not require the testimony of an expert.

Valenzano was capable of completing simple mathematics and then articulating her conclusions. Valenzano's declaration should not have been excluded because it was based on her personal observations, would be helpful to the jury, and she possessed sufficient knowledge and expertise of the subject matter she offered testimony.

5. *Obtaining the Truth Should be the Ultimate Goal*

In the face of the detailed information offered by Valenzano in her declaration, the trial court improperly struck Valenzano's declaration and improperly awarded withheld commissions for 2012 to Patricia Peterson in the amount of \$45,114.93 and Robert Ruhl in the amount of \$24,316.72, as well as exemplary damages, attorney fees, and interest related to the 2012 commissions. The trial court's decision on summary judgment not only was contrary to the law, but was also contrary to basic principles of fairness.

Where there is difficulty in making a distinction between fact and opinion, a statement of opinion, if it is such, will often be necessary or at least desirable in order for the witness to place the subject matter before the jury. Thus, as one Washington opinion states, it is more important to get at the truth and permit statements involving some inference than to quibble over distinctions between fact and opinion. *See State v. Riggs*, 32 Wn.2d 281, 201 P.2d 219 (1949) (A non-expert witness is permitted to state a fact known to or observed by him even though his statement involves a certain

element of inference, and may testify to facts coming within his observation although facts are such as are ordinarily provable by experts, and questions calling for statements of fact which are susceptible of categorical denial are not objectionable as calling for conclusions.)

Here, the trial court abandoned the pursuit of truth when it excluded Valenzano's declaration and summarily resolved this case in favor of the Respondents. The trial court's decision on summary judgment should be reversed and remanded.

**D. No Willful Withholding Occurred**

ProjectCorps did not willingly and with intent deprive its employees of wages, and as such the trial court improperly awarded Peterson exemplary damages pursuant to RCW 49.52.070 in the amount of \$54,198.24 and Ruhl in the amount of \$31,400.03.

RCW 49.52.050 provides for liability where “[a]ny employer or officer, vice principal or agent of any employer...2) **wilfully 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.”

In *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 136, 159-60, 961 P.2d 371 (1998) the court held willfulness is found where “the employer's refusal to pay [is] volitional... Willful means that the person knows what he

is doing, intends to do what he is doing, and is a free agent.”; *Ebling v. Gove's Cove, Inc.*, 34 Wn. App. 495, 500, 663 P.2d 132 (1983) (A failure to pay is willful when it is the result of knowing and intentional action rather than mere carelessness).

Where an employer fails to pay wages owed, case law has established two instances that negate a finding of willfulness: “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.” *Schilling*, 136 Wn.2d at 160, 961 P.2d 371; see also *Pope v. Univ. of Washington*, 121 Wn.2d 479, 490, 852 P.2d 1055 (1993).

The issue of whether an employer acts willfully for purposes of RCW 49.52.070 is a **question of fact**. *Schilling*, 136 Wn.2d at 160, 961 P.2d 371; *Moore v. Blue Frog Mobile, Inc.*, 153 Wn. App. 1, 7-8, 221 P.3d 913 (2009).

1. *Bookkeeping Errors Impacted ProjectCorps Ability to Calculate Wages*

In *Schilling*, 136 Wn.2d at 161, 961 P.2d 371, the court held that the concept of carelessness or inadvertence suggests errors in bookkeeping or other conduct of an accidental character. Carelessness or inadvertence negates the willfulness necessary to invoke double damages under RCW

49.52.070 when the employer's failure to pay wages involves a legitimate error or inadvertence. *Id.*

Here, ProjectCorps submitted evidence demonstrating that there were bookkeeping errors and discrepancies related to Peterson and Ruhl's wages. Valenzano identified a number of accounting issues after reviewing ProjectCorps' records, including the commission records, timesheet records, accounting records, and expense data/reports. Valenzano was brought in to replace ProjectCorps' former bookkeeper and was fully capable to review company records. Upon doing so, Valenzano, via simple mathematics, was able to identify and reconstruct the faulty process that former bookkeeper was employing. No one is arguing that the faulty process was intentional, rather, that it was careless and/or inadvertent bookkeeping errors.

At a bare minimum, the declaration offered by Valenzano created an issue of material fact as to why Peterson and Ruhl were not paid the amounts they were claiming. However, ProjectCorps was not permitted to even advance this defense because the trial court improperly excluded the entirety of Valenzano's declaration. The trial court did not attempt to segregate testimony it believed was subject to ER 702. Instead, all of Valenzano's testimony was excluded and evidence supporting the bookkeeping errors was not considered.

2. *A Bona Fide Dispute Existed*

A “bona fide” dispute between the employer and employee regarding wages can negate a finding of willfulness. *Moore*, 153 Wn. App. at 7-8, 221 P.3d 913. “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). A bona fide dispute is one that is “fairly debatable.” *Schilling*, 136 Wn.2d at 161, 961 P.2d 371.

When presented with argument on ProjectCorps’ assertion that a bona fide dispute existed over the payment of wages, the trial court improperly reasoned that there was no bona fide dispute as follows:

“Willful is really intentional and knowing. The exception is a bona fide dispute. And the *Chelius* uses the terms in the past tense “existed,” unless -- and I read that to mean unless a bona fide dispute existed at the time of the willful act of withholding. And it is clear that the bona fide dispute came up and gives rise to the counterclaims, which I’m not ruling on today.”

RP 40:19-25. The trial court’s reasoning is not supported in the *Chelius* opinion. Rather, the trial court’s analysis highlights the error warranting reversal.

First and foremost, the issue of whether an employer willfully withheld wages is a **question of fact**. *Moore*, 153 Wn. App. at 8, 221 P.3d 913; *Ebling*, 34 Wn. App. at 500-01, 663 P.2d 132. The trial court’s

conclusion that there was no question of fact on this issue is a reversible error.

Next, an employer's **genuine belief** that it is not obligated to pay certain wages precludes the withholding of wages from falling within the operation of RCW 49.52.050(2) and 49.52.070. *Ebling*, 34 Wn. App. at 500-501, 663 P.2d 132. “An employer does not willfully withhold wages within the meaning of RCW 49.52.070 where it has a bona fide belief that it is not obligated to pay them.” *Id.*; see also *McAnulty v. Snohomish Sch. Dist.* 201, 9 Wn. App. 834, 838, 515 P.2d 523 (1973).

In *Ebling*, the employer, Gove, admitted it knowingly and intentionally refused to pay Ebling under the commission rate for which Ebling had originally agreed to render his services. 34 Wn. App. at 500, 663 P.2d 132. However, the reviewing court agreed that Gove had properly set forth a material question of fact when it stated that it had a genuine belief that it was obligated to pay only the amounts it determined were due, and importantly, that a bona fide dispute existed over the amount Ebling was entitled (which rendered the statutory sanctions inapplicable), and as such, the trial court was required to resolve the question of fact. *Id.*

In *Cameron v. Neon Sky*, 41 Wn. App. 219, 221, 703 P.2d 315 (1985), the court found no violation of RCW 49.52.050 and 070 where the employer freely acknowledged the full amount of wages and severance pay

due the employee, but deducted from the employee's final paycheck the overpayment of wages. The court found that the defendants “did not try to pay him a wage that was lower than the wage they were obligated by law to pay. There was no ‘intent to deprive the employee of any part of his wages,’ the act proscribed by the statute.” *Id.*

Contrary to the trial court’s conclusion that focused on the tense of the word “existed,” the question here is whether Peterson and Ruhl’s entitlement to the payments was “fairly debatable” when considering the agreement to defer wages, bookkeeping errors, and discovery of discrepancies related to the implementation of the commission program. *Schilling*, 136 Wn.2d at 161, 961 P.2d 371.

Here, Gaddie’s declaration presented evidence supporting the deferment agreement and Valenzano’s declaration presented genuine issues of material fact related to Peterson and Ruhl’s claims for commission payments. Valenzano’s review of commission records, timesheet records, accounting records, and expense data/reports revealed the following:

- Expenses that were not included in the original calculation.
- Vendor costs were much higher based on paid invoices.
- Staff hours were not properly accounted for during the duration of project work.
- Staff administrative hours were added to COGs.
- Chenkovich incorrectly determined the gross margin.

- A commission rate of 25% of gross margin was used when the commission rate should have been 18%.

All of the above factors contributed to ProjectCorps genuine belief that it was not obligated to pay Peterson and Ruhl. However, this argument was not considered by the trial court because Valenzano's declaration was stricken.

In addition, even if the trial court did not consider Valenzano's declaration, it failed to consider the deferment agreement and Ms. Gaddie's reliance on Valenzano's findings to support the genuine belief that ProjectCorps did not have an obligation to pay Peterson and Ruhl. Again, summary judgment was not proper and this matter and should be remanded so this dispute can be tried before a jury.

**E. Respondents Knowingly Submitted to the Deferment of Wages**

Respondents knowingly submitted to the deferment of their wages, and as such, the trial court improperly awarded Peterson exemplary damages pursuant to RCW 49.52.070 in the amount of \$54,198.24 and Ruhl in the amount of \$31,400.03.

RCW 49.52.070 provides civil liability for double damages for the failure to pay wages. However, the benefits of RCW 49.52.070 are not available "to any employee who has knowingly submitted" to the withholding of wages. "Knowingly submitted" requires that Peterson and

Ruhl intentionally deferred to ProjectCorps the decision of whether they would be paid. *Chelius v. Questar Microsystems, Inc.*, 107 Wn. App. 678, 681–82, 27 P.3d 681 (2001). Any question as to whether Peterson and Ruhl are permitted by law to defer their wages is answered by the statute. RCW 49.52.070 anticipates and confirms that Peterson and Ruhl are more than capable of agreeing to defer their wages: “the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.”

Here, ProjectCorps and Gaddie submitted evidence that Peterson and Ruhl expressly and knowingly agreed to defer their wages until ProjectCorps was in a better financial position. Gaddie offered testimony that she discussed the deferment with Respondents and they agreed to the deferment. Peterson and Ruhl are sophisticated parties that knew exactly what they were doing. Gaddie was in constant communication with Peterson and Peterson knew that ProjectCorps could not repay the deferment until the company’s financial position improved. Peterson and Ruhl’s termination did not alter the agreement of the parties. ProjectCorps’ financial position did not change for the better when Peterson and Ruhl were terminated; however, ProjectCorps still tried to work with Peterson and Ruhl to create a payment plan. ProjectCorps was operating well within the

agreement of the parties, but Peterson and Ruhl initiated the underlying lawsuit contrary to their agreement to defer.

Based on the evidence submitted, Respondents are not entitled to the exemplary relief provided under RCW 49.52.070. The trial court erred when it awarded exemplary damages on summary judgment when evidence was offered that supported the conclusion that Peterson and Ruhl intentionally and expressly agreed to defer their wages until ProjectCorps was in a better financial position. ProjectCorps should have had an opportunity to present its defense before the jury.

**F. Plaintiffs are Not Entitled to an Award of Attorney Fees**

*1. There was No Willful Withholding*

Per the Orders entered, the trial court expressly awarded Peterson and Ruhl attorney fees pursuant to RCW 49.52 in the amount of \$18,029.36. RCW 49.52.070 only provides attorney fees when an employee's wages are withheld willfully and with an intent to deprive.<sup>1</sup>

Attorney fees would **not** be available in the event this Court finds that ProjectCorps did not willfully and with intent to deprive Peterson and Ruhl wages because of bookkeeping errors and/or bona fide dispute.

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<sup>1</sup> Appellant recognizes that Respondents sought and summary judgment was granted on claims pursuant to RCW 49.52 and 49.48; however, the Orders entered by the trial court only state that attorney fees were awarded under RCW 49.52.070.

Equally, attorney fees would **not** be available to Peterson or Ruhl if this Court finds that they knowingly submitted to the wage deferment.

2. *The Fees Awarded were Improper*

A review of the billing entries supporting the attorney fees awarded reveal that a significant amount of the award was **not directly related to the two claims** that the trial court entered on summary judgment. Specifically, the claims filed pursuant to RCW 49.48 and RCW 49.52. In short, the trial court awarded attorney fees for work performed on other claims that were not resolved by the motion for summary judgment, as well as billing entries unrelated to the Complaint.

Respondents filed a Complaint that sought damages for six different claims: (1) breach of a written contract; (2) breach of an implied contract; (3) promissory estoppel; (4) violations of RCW 49.52.050 and 49.52.070; (5) violation of RCW 49.48.010; and (6) wrongful discharge in violation of public policy. The majority of these claims **do not** provide for an award of attorney fees and were not part of the summary judgment. In light of the fact that only two claims warrant the recovery of attorney fees, ProjectCorps requested that **specific** billing entries be reduced by one-third. CP 661-666. ProjectCorps specifically identified the entries that tended to reflect work on claims other than those related to the summary judgment order. However, the trial court rejected ProjectCorps' request.

In addition, Respondents sought the recovery of fees that were not in any way related to the claims supporting attorney fees. CP 666-667. Again, ProjectCorps specifically identified the billing entries that tended to reflect work on matters that were not related to the summary judgment order. However, the trial court rejected ProjectCorps' request.

The calculation of reasonable attorney fees begins with the "lodestar," "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Washington State Commc'n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 219-20, 293 P.3d 413 (2013).

If the prevailing party's attorney fees include time spent both on issues as to which the prevailing party was successful, as well as issues as to which the party was unsuccessful, the trial court will need to segregate the fees accordingly. *See Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Equally, the trial court should segregate the hours spent on claims as to which there is a basis for a fee award from those for which there is no basis. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 224 P.3d 795 (2009) (Segregation of attorney time between contract claims and negligence claims was necessary); *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Development, Inc.*, 143 Wn. App. 345,

177 P.3d 755 (2008) (Trial judge erroneously failed to segregate time spent prior to the tender of defense to defendant).

Here, there was no dispute that Respondents asserted multiple claims in the Complaint and were only successful on one-third (1/3) of those claims on summary judgment. Appellants did not dispute the billing entries that were directly related to the two successful claims, and were merely requesting that the entries that did not specifically involve the claims be reduced by one-third (1/3). In addition, ProjectCorps requested that billing entries unrelated to the Complaint and the summary judgment be reduced. In total, ProjectCorps requested that the Respondents' fee award be reduced by \$4,539.50. This reflected a one-third (1/3) reduction of the fees totaling \$6,685.50 and a reduction of \$82.50 for unrelated work. The trial court only reduced Respondents' attorney fee request by 3.3 hours or \$907.50. The trial court's reduction was contrary to law and fact. Respondents' attorney fee award should be reduced and remanded as a result of the errors associated with the granting of summary judgment and the trial court's failure to adequately review the amounts awarded.

**G. Respondents are Not Entitled to an Award of Prejudgment Interest**

The trial court improperly awarded prejudgment interest on wages that Peterson and Ruhl knowingly deferred and on amounts that were

disputed. In fact, the trial court allowed prejudgment interest from the time in which the wages were deferred (*i.e.*, each pay-period). Even in the face of evidence submitted by ProjectCorps that Respondents had agreed to the deferment and Respondents continued to work for ProjectCorps during and after the deferments, the trial court still permitted prejudgment interest from the time in which each of the deferments occurred. This does not make sense.

Peterson and Ruhl expressly and knowingly agreed to defer their wages until ProjectCorps was in a better financial position, yet the trial court awarded interest on the amounts they agreed to defer and from the date of deferment. ProjectCorps submitted declarations in support of Peterson and Ruhl's knowing agreement to defer their wages. Prejudgment interest should not be awarded because of the RCW 49.52.070 exclusion; however, there are no set of circumstances that would support looking back to the time the wages were deferred to set the prejudgment interest.

Even more, Peterson and Ruhl are not entitled to prejudgment interest for claims that are disputed, including the overpayment of commissions and disputed wage amounts.

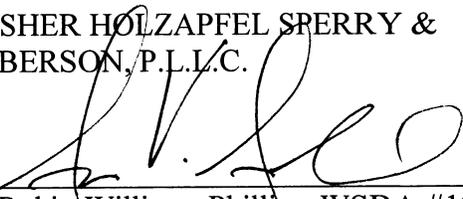
## VI. CONCLUSION

Appellants respectfully request that this Court reverse and remand the trial court's order on summary judgment.

Respectfully submitted this 23 day of April, 2015.

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CERTIFICATE OF SERVICE

I certify that on April 23, 2015, I caused a copy of the foregoing document to be served via legal messenger to the following counsel of record for respondent:

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