Cause No. **327027**-III

COURT OF APPEALS
STATE OF WASHINGTON
(Div. III)

CRAIG S. CULBERTSON
Appellant,

v.

WELLS FARGO INSURANCE SERVICES USA, INC.; JOSHUA TYNDELL and JANE DOE; and RHONDA IDE and JOHN DOE;

Respondents.

Superior Court No. 14-2-01009-0
Spokane County
Honorable Judge Price

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This appeal challenges the trial court's rulings: (1) that as a matter of law that Respondent Wells Fargo Insurance Services USA, Inc. ("Wells Fargo") Employee Handbook does not contain promises of specific treatment in specific circumstances; (2) that judicial estoppel did not prevent Wells Fargo from asserting that Culbertson's compensation agreement could be unilaterally modified; (3) Wells Fargo does not owe Culbertson post-termination commissions because Wells Fargo unilaterally modified his compensation agreement; (4) denying Culbertson's CR 56(f) Motion to allow time for inspection of Culbertson's work computer at Wells Fargo to determine if Culbertson received reasonable notice of Wells Fargo's unilateral changes to his compensation agreement.

II. ASSIGNMENTS OF ERROR

Culbertson raises the following assignments of error.

1. The trial court erred when it ruled as a matter of law that the Wells Fargo Employee Handbook does not contain promises of specific treatment in specific circumstances.
2. The trial court erred when it failed to apply the doctrine of judicial estoppel to prevent Wells Fargo from asserting that Culbertson's compensation agreement could be unilaterally modified.

3. The trial court erred as a matter of law by failing to apply the procuring cause doctrine to Culbertson's claim for post-termination commissions owed under his bilateral compensation agreement with Wells Fargo.
4. The trial court abused its discretion by denying Culbertson's CR 56(f) Motion to allow inspection of his work computer at Wells Fargo before granting summary judgment to Wells Fargo because a genuine issue of material fact existed as to whether Wells Fargo provided Culbertson with "reasonable notice" of its unilateral changes to his compensation plan.

III. STATEMENT OF THE CASE & PROCEEDINGS

A. Trial Court Proceedings

On March 21, 2014, Culbertson filed a complaint against his former employer Wells Fargo alleging, among other things, wrongful discharge in violation of promises of specific treatment in specific circumstances contained in the Wells Fargo Employee Handbook (first cause of action). CP 7-12. Culbertson's complaint alleged wrongful/intentional withholding of his wages by Wells Fargo and its Spokane Branch Manager Josh Tyndell ("Tyndell") in violation of RCW 49.48.010, 49.52.050, and 49.52.070 (second cause of action). CP 7-14. Culbertson's complaint also alleged Wells Fargo breached its compensation agreement with Culbertson

by refusing to pay post-termination commissions (third cause of action). CP 7-15. Culbertson's complaint included additional causes of action against Well Fargo related to Wells Fargo's failure to pay him post-termination commissions: breach of covenant of good faith and fair dealing (fourth); promissory estoppel/detrimental reliance (fifth); quantum meruit/unjust enrichment (sixth); conversion (seventh); fraud/intentional misrepresentation (eighth); negligent misrepresentation (ninth); violation of the Consumer Protection Act, RCW 19.86 *et seq.* (tenth). CP 15-19. Culbertson's complaint also included the following tort causes of action claims against Wells Fargo, Tyndell, and Rhonda Ide, which were later voluntarily dismissed: tortious interference with business expectancies (eleventh); defamation (twelfth); invasion of privacy-false light (thirteenth); invasion of privacy-appropriation of name and likeness (fourteenth); negligent infliction of emotional distress (fifteenth); outrage (sixteenth). CP 19-23; 423-426.

On May 23, 2014, Culbertson filed a motion for partial summary judgment for an order of liability against Wells Fargo on Culbertson's breach of contract claim for failure to pay him post-termination commission as alleged in the third cause of action in his complaint. CP 43-45.

On May 23, 2014, Wells Fargo filed a motion for partial summary judgment for an order of dismissal of the following causes of action in Culbertson's complaint: wrongful discharge in violation of promises of specific treatment in specific circumstances contained in the Wells Fargo Employee Handbook (first); wrongful/intentional withholding of wages in violation of RCW 49.48.010, 49.52.050, and 49.52.070 (second); breach of contract by refusing to pay post-termination commissions (third); breach of covenant of good faith and fair dealing (fourth); promissory estoppel/detrimental reliance (fifth); quantum meruit/unjust enrichment (sixth); conversion (seventh); fraud/intentional misrepresentation (eighth); negligent misrepresentation (ninth); violation of the Consumer Protection Act, RCW 19.86 *et seq.* (tenth). CP 469-471.

On July 16, 2014, the trial court entered an order granting Wells Fargo's motion of partial summary judgment and denying Culbertson's motion for partial summary judgment. CP 218-226. In its order, the trial court held that Wells Fargo's Handbook does not provide a promise of specific treatment in specific circumstances. CP 223. The trial court further held that Wells Fargo unilaterally modified the terms of Mr. Culbertson's employment compensation by and through the 2013 Sales Incentive Plan, by providing Culbertson with reasonable notice of that Plan. CP 223.

On July 28, 2014, Culbertson filed a motion for reconsideration of the order entered by the trial court on July 16, 2014. CP 318-320.

On August 8, 2014, the trial court entered an order denying Culbertson's motion for reconsideration. CP 405-406.

On August 15, 2015, this timely appeal followed. CP 407-422.

B. Factual Background

Wrongful Discharge

On November 1, 2006, Culbertson accepted an offer of employment as an "Employee Benefits-Producer" from Acordia Northwest, Inc. ("Acordia," now publicly known as Wells Fargo Insurance Services USA, Inc.) at its Spokane Branch Office to serve as an employee benefits consultant/insurance broker. CP 9, 28, 47.

At some point following Culbertson's initial date of employment, Acordia merged and/or was assumed with/into Wells Fargo and all of the employees of Acordia, including Culbertson, became employees of Wells Fargo. CP 9, 28, 48.

When Acordia/Wells Fargo hired Culbertson on November 1, 2006, Culbertson signed a form acknowledging that he had received the *Handbook for Wells Fargo Team Members* (2006 Handbook) and understood its application to his employment at Wells Fargo. CP 140, 564.

During the course of his employment at Wells Fargo from November 1, 2006, until Wells Fargo fired him on February 3, 2014, Culbertson did not sign any other acknowledgment forms stating that he received, read, and understood any other handbooks published by Wells Fargo for its employees. CP 140.

On the morning of February 3, 2014, Wells Fargo's Spokane Branch Manager Tyndell summoned Culbertson into an unscheduled meeting at the Wells Fargo Spokane Branch Office conference room with a security guard posted outside to meet with a Wells Fargo investigator and Tyndell. CP 10, 16, 142.

Wells Fargo's investigator immediately accused Culbertson of falsifying records and began to question Culbertson about client expense reports he prepared in August and October 2013. CP 142.

Wells Fargo's investigator and Tyndell did not show Culbertson any documents during their meeting, much less any documents which they accused Culbertson of falsifying. CP 142.

The Wells Fargo investigator and Tyndell did not allow Culbertson to take any notes or ask questions of them during their meeting. CP 142.

During their meeting, Culbertson requested an opportunity to seek counsel, and the Wells Fargo investigator responded that Culbertson could not have any one present while being questioned. CP 142.

The Wells Fargo investigator and Tyndell did not remind Culbertson of the provisions in the Wells Fargo Handbook, which make Human Resources ("HR") Department "consultants" or "advisors" available to an employee during the dispute resolution and problem-solving process. CP 142.

The Wells Fargo investigator and Tyndell did not provide to Culbertson the opportunity to seek counsel with any "consultant" or "advisor" from Wells Fargo's HR Department when he asked for an opportunity to seek counsel. CP 143.

The Wells Fargo investigator told Culbertson to make a written statement regarding his travel expenses incurred in August and October 2013. CP 143. When Culbertson asked for an opportunity to review his travel records and calendar in his office, the Wells Fargo investigator denied his request and told Culberson to finish his written statement while the investigator and Tyndell stepped out of the conference room. CP 143.

A few minutes later, the investigator and Tyndell returned to the conference and told Culbertson the meeting was finished and that Culbertson's employment at Wells Fargo was terminated, effective immediately. CP 143. Tyndell handed Culbertson a pre-printed termination letter and told Culbertson that he was "no longer bondable." CP 143.

The pre-printed termination letter was dated February 3, 2014, signed by Tyndell and enclosed in it was a copy of a document "*Acordia Northwest, Inc. Agreement Regarding Trade Secrets, Confidential Information and Non-Solicitation,*" which Culbertson had signed when he was hired on November 1, 2006 ("2006 TSA"). CP 143, 149-154.

Nothing in the termination letter advised Culbertson of the portions in the Wells Fargo Team Member Handbook regarding internal problem solving resources available to Culbertson, or of the dispute resolution process, or that Culbertson may request to have the decision to terminate him reviewed "from an objective standpoint" by an Employee Relations consultant. CP 143, 149-154.

The Wells Fargo investigator and Tyndell did not give Culbertson any opportunity to effectively communicate with another manager in the Wells Fargo chain of reporting relationships regarding the allegations against him before they fired him. CP 144.

After Tyndell handed Culbertson the pre-printed termination letter, the Wells Fargo investigator provided Culbertson with the name, email address, and phone number of an employee in the Wells Fargo Human Resources ("HR") Department for Culbertson to contact if he had any questions "regarding his final paycheck." CP 144.

After Tyndell handed Culbertson the Termination Letter, Tyndell escorted Culbertson out of the Wells Fargo Spokane Branch Office and allowed Culbertson to retrieve only his coat, briefcase, and photos of Culbertson's children from his office. CP 144.

Tyndell did not allow Culbertson to review or retrieve any documents in Culbertson's office—including the Wells Fargo Handbook—as Tyndell escorted Culbertson out of the Wells Fargo Spokane Branch Office under the watchful eye of a security guard. CP 144.

Later on February 3, 2014, Culbertson sent a letter, via email, to the Wells Fargo HR Department representative identified by the Wells Fargo investigator during their meeting earlier that day, requesting a written statement as to the reasons for his discharge. CP 144, 156.

No representative from Wells Fargo's HR Department or other manager in the Wells Fargo reporting chain contacted Culbertson in response to his February 3, 2014, letter. CP 144-145. Instead, Culbertson's former supervisor who fired him mailed a letter to Culbertson dated February 14, 2014, repeating the same unspecified and unsubstantiated allegations made by the Wells Fargo investigator that Culbertson had falsified of records. CP 144-45, 158-59.

On February 27, 2014, Culbertson emailed a letter to Wells Fargo's HR Department requesting a review of the decision to terminate his

employment, and Culbertson sent a courtesy copy of the letter to Tyndell. CP 145, 161-62.

No one from Wells Fargo contacted Culbertson in response to his February 27, 2014, letter requesting a review of the decision to terminate his employment at Wells Fargo. CP 145.

Wells Fargo's 2006 Handbook Chapter 3 "Workplace Conduct" makes promises as follows:

> At Wells Fargo, *we're committed to* maintaining an environment that promotes professionalism and encourages each team member's professional development and achievement. *Consistency, fairness, respect and confidentiality are essential* to good relations between team members, their supervisors and Wells Fargo....

CP 608 (emphasis added).

Wells Fargo's 2006 Handbook Chapter 4 "Performance & Problem Solving" contains a Section 4.5 "Dispute Resolution" process which includes sections titled "Overview of the Dispute Resolution Process," "Wells Fargo Resources" "Termination Decision Review." CP 634-636.

Wells Fargo's 2006 Handbook Section 4.5 "Dispute Resolution" makes the following "guarantees" regarding its dispute resolution process:

> At Wells Fargo we feel *it's essential to provide team members with a prompt, fair review of any work-related problem. So, we've developed a process through which each team member has an opportunity to use internal problem-solving resources.*

> Although we can't *guarantee* that every team member will always be satisfied with the outcome, *we can make sure that all team members have dispute resolution methods available when they're needed.* In addition, we prohibit retaliation against any team member for using *the dispute resolution process*....
>
> If you need alternatives or to escalate your dispute further, *you can follow the process outlined below. It's strongly recommended you use these resources* in the order they're shown here—it's logical that those closest to your situation will be able to understand it best, so you'll want to go those resources first.
>
> *The process stops at any point you decide to discontinue it, or when you've exhausted all the resources described here.*

CP 634-635 (emphasis added).

Wells Fargo's 2006 Handbook Section 4.5 "Dispute Resolution" uses promissory language setting forth the dispute resolution process and the "Wells Fargo Resources" available to every team member which includes the opportunity to meet with "Your Supervisor," "Your Supervisor's Manager," "Your HR consultant," and "Your Employees Relations consultant."

> **Your Supervisor**-....If you prefer, *you can also contact your HR consultant and ask him or her to facilitate a meeting with your supervisor, or to help you prepare for the meeting.*
>
> **Your Supervisor's Manager**-...you can meet with your supervisor's manager (or another manager above your supervisor in the chain of reporting relationships) to discuss the issue. Again, if you prefer, *you can also contact your HR consultant and ask him or her to facilitate the meeting with your supervisor's manager, or to help you prepare for the meeting.*

> **Your HR Consultant**—After you've spoken with your supervisor's manager, if you feel you haven't been able to communicate effectively with him or her—or if you want someone else to review the situation or facilitate a meeting with either of them—*you can contact your HR consultant.*
>
> **Your Employee Relations Consultant**—*After you've spoken with your HR consultant*, if you still want your dispute reviewed further you can contact your Employee Relations consultant. *Employee Relations consultants review disputes from an objective position and act in a consultative role to help resolve work-related issues.* Your Employee Relations consultant will work with your HR Consultant to obtain related information in order to review the matter and make recommendations to you and your group's management, if appropriate. You may be asked to provide written information to help this process.

CP 635 (emphasis added).

Wells Fargo's 2006 Handbook Section 4.5 "Dispute Resolution" uses promissory language setting forth the end of the dispute resolution process titled "Termination Decision Review."

> *If your employment is terminated involuntarily (see "Involuntary Termination" on page 97) and you want to have that decision reviewed, contact your HR consultant as soon as possible following the termination. Once your HR consultant has reviewed the matter, if necessary it can be referred to Employee Relations. They'll determine whether a further review is warranted based on the circumstances—and if so, they'll conduct one.*

CP 636.

Wells Fargo's 2006 Handbook Chapter 9 "Leaving Wells Fargo" repeats the promissory language for "Review of Termination" in the dispute resolution process.

> If your employment is terminated involuntarily and you want to have that decision reviewed, *contact your HR consultant as soon as possible* following the termination. *Once your HR consultant has reviewed the matter, if necessary it can be escalated to Employee Relations.* They'll determine whether a further review is warranted based on the circumstances—and if so, they'll conduct one. (See "Dispute Resolution" on page 44.)

CP 688 (emphasis added).

The Wells Fargo 2006 Handbook contained Chapter 4 titled "Performance & Problem-Solving," which included a Section 4.6 titled "Third Party Representation," states, *inter alia*:

> *It is the intent of all Wells Fargo policies to provide a productive and fair work environment. We respect your right to communicate directly*, on an individual basis, *with your supervisor, manager or HR consultant about any of the terms or conditions of your employment. Within our work environment, we believe that those who are also Wells Fargo team members can be more responsive to your needs and concerns than anyone outside of the company such as an attorney, labor organization, association or group.*
>
> For that reason *we conduct team member communications and problem-solving*, as well as performance counseling, correction and internal investigations, *without participation by an individual or a "representative" who is not a Wells Fargo team member.* Confidential information relating to employment should be discussed only between the team member and his or her supervisor, or another authorized Wells Fargo team member....
>
> *If you encounter any problems on the job, bring your concerns to your supervisor, manager or HR consultant. They're willing to discuss any work-related problem with you on a direct, person-to-person basis.*

CP 636 (emphasis added).

Culbertson was aware of the promises in the Wells Fargo 2006 Handbook, and those statements induced him to remain on the job at Wells Fargo and not seek other employment. CP 140-41.

Post-Termination Commissions

On November 1, 2006, Culbertson signed an acceptance job offer letter from Acordia/Wells Fargo setting forth the terms of compensation in which Wells Fargo promised to pay Culbertson a draw "trued up" quarterly, based upon commission rates of thirty-five percent (35%) of the annual broker fees collected on new business and twenty-five percent (25%) of annual broker fees collected on renewed "billed" business. CP 47, 56-57, 429, 561-562.

The job offer letter, signed by Culbertson on November 1, 2006, was drafted entirely by Acordia without any input from Culbertson. CP 47, 56-57, 429, 561-562. Nothing in the job offer letter to Culbertson states that Culbertson will not be paid commissions on his sales after his employment at Wells Fargo terminates. CP 47, 56-57, 429, 561-562.

Upon his hire by Acordia/Wells Fargo, Culbertson signed a 2006 TSA, which included, *inter alia*, a provision prohibiting Culbertson from soliciting business from his former Wells Fargo customers for two (2) years after the termination of his employment. CP 47-48, 59-62, 575-578.

Nothing in the 2006 TSA restricted Culbertson from accepting business from former Wells Fargo clients after his employment ended so long as Culbertson did not solicit their business during the two (2) years after his employment at Wells Fargo terminated. CP 47-48, 59-62, 575-578.

On or about December 22, 2009, the Wells Fargo Spokane Branch Manager, Mark Neupert, presented Culbertson with a single-page document titled "*WFIS Producer Plan Appendix A Participant Draw and Commission Rates*" ("2010 Producer Plan"), and told Culbertson, "Here's your new comp plan." CP 9, 28, 48, 49, 64, 429, 565.

No other documents were attached to, enclosed with, or accompanied the 2010 Producer Plan when the Wells Fargo Spokane Branch Manager presented the 2010 Producer Plan to Culbertson for signature. CP 48, 64, 429, 565.

No Wells Fargo representative explained to Culbertson what was meant by the "the plan" referenced in the single-page 2010 Producer Plan handed to Culbertson by the Spokane Branch Manager before he signed it on December 22, 2009. CP 48-49, 64, 429, 565.

Culbertson understood his entire compensation "plan" to be the single-page document handed to him by the Wells Fargo Spokane Branch Manager, and no other documents. CP 49, 64, 429, 565.

No representatives of Wells Fargo provided Culbertson with any other documents to review before signing the single-page Producer Plan on December 22, 2009, or at any time. CP 48-49, 64, 429, 565.

On December 22, 2009, Culbertson signed a single-page document 2010 Producer Plan setting forth the terms of his compensation, which was the same commission rates as upon his hire. CP 9, 28, 48-49, 64, 429, 565.

The 2010 Producer Plan agreement further provides under "TSA Consideration" that for calendar year 2010 Culbertson "will receive the following consideration for signing a new TSA," an additional one percent (1%) commission on new revenue and an additional one percent (1%) commission on net new revenue. CP 48-49, 64, 429, 565.

Wells Fargo drafted the 2010 Producer Plan agreement without any input from Culbertson. CP 49, 64.

There is no provision in the 2010 Producer Plan signed by Culbertson on December 22, 2009, specifying how commissions will be paid after Culbertson's employment at Wells Fargo is terminated. CP 49, 64, 429, 565.

The 2010 Producer Plan agreement contains no language expressly defining the "WFIS Plan." CP 49, 64, 429, 565.

The 2010 Producer Plan agreement contains no language expressly incorporating contractual terms by reference from other documents. CP 49, 64, 429, 565.

Before and after Culbertson signed the 2010 Producer Plan on December 22, 2009, no Wells Fargo representative told Culbertson that Wells Fargo would not pay him any commissions on his sales after his employment at Wells Fargo ended. CP 49.

Wells Fargo's representatives signed the 2010 Producer Plan agreement on January 14, 2010. CP 48-49, 64, 429, 565.

On January 5, 2010, Wells Fargo District Managing Director, Northwest, Diane Dusseau from Seattle walked into Culbertson's Spokane office unscheduled and unexpectedly and presented Culbertson with a "*Wells Fargo Agreement Regarding Trade Secrets, Confidential Information, Non-Solicitation, and Assignment of Inventions*" ("2010 TSA"), and told Culbertson, "You need to sign it." CP 49-50, 66-68, 429, 566-568.

On January 5, 2010, Culbertson signed the 2010 TSA. CP 66-68, 429, 566-568. The 2010 TSA introduction states as follows, "In consideration of my continued employment by a Wells Fargo company..., the ability to participate in a new compensation plan containing new and additional benefits which include, but are not limited to, a guaranteed draw and an

increased commission percentage for new revenue and net new revenue generated in 2010, I agree as follows:... ." CP 66, 566.

The 2010 TSA was similar to the 2006 TSA signed by Culbertson, but the 2010 TSA included an additional provision which restricted Culbertson from *both soliciting and accepting* business from former Wells Fargo clients for two (2) years after his employment ended. CP 59-62, 66-68, 566-568, 575-578.

The 2010 TSA was drafted entirely by Wells Fargo without any input from Culbertson. CP 49-50, 66-68.

The 2010 TSA signed by Culbertson on January 5, 2010, contains no language expressly specifying how commissions will be paid after Culbertson's employment at Wells Fargo is terminated. CP 50, 66-68, 566-568.

The 2010 TSA contains no language expressly incorporating contractual terms by reference from other documents. CP 50, 66-68, 429, 566-568.

On November 22, 2011, Culbertson signed a single-page document titled "*WFIS Sales Incentive Plan Appendix A Participant Draw and Commission Rates*" ("2011 Incentive Plan"). CP 10, 28, 50-51, 70, 429, 569. No other document was attached to, enclosed with, or accompanied,

the single-page Incentive Plan when Wells Fargo's Spokane Branch Manager handed it to Culbertson for signature. CP 51.

On November 29, 2011, Wells Fargo's representative signed the 2011 Incentive Plan agreement. CP 50-51, 70, 429, 569.

The 2011 Incentive Plan was drafted entirely by Wells Fargo without any input from Culbertson. CP 51, 70.

There is no provision in the single-page 2011 Incentive Plan agreement signed by Culbertson on November 22, 2011, specifying how commissions will be paid after Culbertson's employment at Wells Fargo is terminated. CP 51-52, 70, 429, 569.

The 2011 Incentive Plan contains no language expressly incorporating contractual terms by reference from other documents. CP 51, 70, 429, 569.

The 2011 Incentive Plan agreement contains the following language at the bottom, in the left-hand corner: "Effective October 1, 2011." CP 51-52, 70, 429, 569.

The 2011 Incentive Plan agreement contains the same terms as the 2010 Producer Plan agreement, however, the 2011 Incentive Plan provides an additional compensation of a $1,956.60 payment by Wells Fargo to Culbertson for "grandfathered incidentals." CP 64, 70, 565, 569.

During the course of his entire employment at Wells Fargo Culbertson never received a printed copy of, nor read an electronic copy of any

document titled or represented to him as the "*Wells Fargo Insurance Services USA, Inc. Insurance Brokerage Sales Incentive Plan Effective April 1, 2013*" ("2013 Sales Incentive Plan"). CP 142.

Culbertson's efforts as a broker set into motion the events leading to the opening or renewal of several customers' annual accounts for Wells Fargo within twelve (12) months of the termination of his employment on February 3, 2014. CP 52, 106, 134-137.

After Wells Fargo fired Culbertson on February 3, 2014, Wells Fargo continued to receive broker fees from the sales of annual employee benefits accounts that Culbertson opened and/or renewed before Wells Fargo fired him. CP 12, 30.

Wells Fargo has not paid any commissions to Culbertson for broker fees received by Wells Fargo after Culbertson's termination on February 3, 2014, on annual accounts opened and/or renewed by Culbertson before his discharge date of February 3, 2014. CP 52, 53, 72, 518-519, 526-527, 529-531.

Wells Fargo's Inconsistent Assertions in Other Proceedings

On March 21, 2014, Wells Fargo has filed a separate lawsuit in this Court against Culbertson. CP 105, 109-131. Wells Fargo's complaint paragraph numbers 2.10, 2.11, and 2.12, assert that the restrictive covenants in the 2010 TSA, signed by Culbertson on January 5, 2010, are

supported by independent consideration—the promises exchanged by Culbertson and Wells Fargo in 2010 Producer Plan agreement signed by Culbertson on December 22, 2009. CP 112-113. In essence, Wells Fargo has filed a separate lawsuit against Culbertson asserting that the 2010 Producer plan agreement contained an exchange of promises—a bilateral contract—which supports the restrictive covenants in the 2010 TSA. CP 105, 109-131.

IV. ARGUMENT

A. MATERIAL ISSUES OF FACT EXISTS AS TO WHETHER WELLS FARGO BREACHED PROMISES OF SPECIFIC TREATMENT IN SPECIFIC SITUATIONS IN ITS HANDBOOK WHICH WERE RELIED UPON BY CULBERTSON.

Standard of Review. The appellate court reviews summary judgment granted in favor of the defendant by considering the facts in the light favorable to the plaintiff. *Swanson v. Liquid Air Cor*p., 118 Wn2d. 512, 515 (1992). Review of the trial court's grant of summary judgment in favor of the defendant is *de novo*, with the appellate court engaging in the same inquiry as the trial court. *Korslund v. DynCorp Tri-Cities Servs*., 156 Wn.2d 168, 177 (2005). "Facts and all reasonable inferences there from are considered in the light most favorable to the nonmoving party, and summary judgment should be granted only if, from all the evidence,

reasonable persons could reach but one conclusion." *Swanson,* 118 Wn.2d at 518.

Argument. In *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219 (1984), the Supreme Court of Washington recognized a cause of action for breach of promise of specific treatment in specific situations.

> [I]f an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship.

Korslund v. DynCorp Tri-cities Servs., 156 Wn.2d 168, 184 (2005) (citing *Thompson*, 102 Wn.2d at 230). "The employee must prove these elements of the cause of action: (1) that a statement (or statements) in an employee manual or handbook or similar document amounts to a promise of specific treatment in specific situations; (2) that the employee justifiably relied on the promise, and (3) that the promise was breached." *Id.* at 184-85 (citing *Bulman v. Safeway, Inc.* 144 Wn.2d 335, 340-41 (2001); *Thompson*, 102 Wn.2d at 233). "Each of these elements presents an issue of fact." Id. at 185 (citing *Swanson*, 118 Wn.2d at 525; *Thompson*, 102 Wn.2d at 233. "The *Thompson* specific treatment claim is not an implied or express contract claim but is independent of a contractual analysis and instead rests on a justifiable reliance theory." *Id.* (citations omitted).

1. Wells Fargo Violated The Promises Of Specific Treatment In Specific Situations In Its Handbooks.

Here, the promises of "consistency, fairness, respect, and confidentiality...essential to good relations..." (CP 608) and of "the free flow of questions, answers, ideas" for "successful communication" that "flows two ways" (CP 630) of the 2006 Handbook are more than just "general statements of company policy." These statements in Wells Fargo's 2006 Handbook created an atmosphere of job security and fair treatment which were *reinforced with specific promises in specific situations* when it comes to "use of internal resources" in "problem-solving" and a "dispute resolution process" which includes an opportunity to meet individually with managers in the reporting chain, and "your HR Consultant" and "your Employee Relations Consultant" to review the dispute "from an objective position." CP 429, 630, 634-636, 688.

a. *Wells Fargo Denied Culbertson The Use Of Internal Problem-Solving Resources And The Dispute Resolution Process.*

The Wells Fargo 2006 Handbook specifically promises *the opportunity to use* internal problem-solving resources, "*[W]e can make sure that all team members have dispute resolution methods available when they are needed.*" CP 634 (emphasis added). "It also outlines the *internal resources you can use to help you resolve any work-related disputes or problems* that may arise." CP 630 (emphasis added). In this case, Wells Fargo short-

circuited the entire "process" before Culbertson could start it, and thereby Wells Fargo breached its specific promise "*we can make sure that all team members have dispute resolution methods available when they're needed.*" CP 634 (emphasis added).

Here, Wells Fargo made no internal problem solving resources whatsoever available to Culbertson *when he needed it.* Furthermore, Wells Fargo never afforded Culbertson the opportunity to get the dispute resolution "process" started before and after it fired Culbertson. CP 142-143.

Wells Fargo should have kept its promise to allow Culbertson the opportunity to use the dispute resolution process, which included contacting his HR Consultant and his Employee Relations Consultant to help him gather information (i.e. copies of records he allegedly falsified) to prepare a response to the serious allegations leveled against him. Wells Fargo should have kept its promise to allow Culbertson the opportunity to meet managers individually in the chain of reporting relationships with his HR "consultant" to "solve the problem" and "resolve the dispute." None of that occurred here.

Instead, Wells Fargo summarily fired Culbertson after meeting with the investigator without a meaningful opportunity to prepare for and respond to the serious allegations of misconduct leveled against him. CP 142-143.

Wells Fargo fired Culbertson without the opportunity to review the reports he allegedly falsified. CP 142-143. Wells Fargo fired Culbertson without giving him time to verify his own travel records. CP 143. Wells Fargo fired Culbertson without the opportunity to seek counsel with his HR consultant, or his Employee Relations Consultant, or to meet individually with another manager to attempt to resolve the dispute. CP 142-143. Wells Fargo fired Culbertson without any opportunity to effectively communicate with another manager in the chain of reporting relationships. CP 142. The Wells Fargo investigator and Culbertson's supervisor accused Culbertson of serious misconduct, imposed discipline upon him, escorted him out the door within minutes, and denied him the dispute resolution "process" specifically promised in the 2006 Handbook. CP 142-143.

Wells Fargo denied Culbertson the promised dispute resolution process which included his "*right to communicate directly, on an individual basis with your supervisor, manager, or HR Consultant about any terms or conditions of your employment*" who "can be more responsive to your needs and concerns than anyone outside of the company such as an attorney, labor organization, association or group." CP 636 (emphasis added).

Wells Fargo's 2006 Handbook makes the following promises of specific treatment using mandatory language which were denied to Culbertson:

> After you've spoken with your HR consultant, if you still want your dispute reviewed further *you can contact our Employee Relations consultant. Employee Relations consultants review disputes from an objective position and act in a consultative role to help resolve work-related issues*. Your Employee Relations consultant <u>will</u> work with your HR Consultant *to obtain related information in order to review the matter* and make recommendations to you and your group's management, if appropriate."

CP 635 (emphasis added). Culbertson was denied the opportunity to contact "your" HR Consultant and "your" Employee Relations consultant to help solve his work-related issues and to obtain related information in order to review accusations against him "from an objective position" and to make recommendations to his group's management. CP 142-143, 635. Wells Fargo's investigator and Spokane Branch Manager Tyndell did not allow Culbertson to ask any questions or review any client expense reports which they accused him of falsifying. CP 142. They did not allow Culbertson to review his records and calendar in his office or to respond to the accusations against him. CP 142-143. Wells Fargo denied Culbertson any opportunity whatsoever to confer with his HR consultant or Employee Relations consultant to obtain information to review the accusations against him before his branch manager fired him and escorted him out the door. CP

142-143. Wells Fargo denied Culbertson any opportunity to meet with other managers in the reporting chain on an individual basis to discuss the accusations against him and implement the dispute resolution and problem solving basis. CP 142.

Page 44 of the 2006 Handbook makes the specific promise:

> At Wells Fargo we feel it's essential to provide team members with *prompt, fair review* of any work-related problem. So, we've developed a *process* through which *each team member has an opportunity to use the internal problem solving-resources*.
>
> Although we can't guarantee that every team member will always be satisfied with the outcome, *we can make sure that all team members have dispute resolution methods available when they're needed*.
>
> If you need alternatives or to escalate your dispute further, *you can follow the process* outlined below. *It's strongly recommended to use these resources in the order they're shown here....*
>
> *The process stops at any point you decide to discontinue it*, or when you've exhausted all the resources described here.

CP 634 (emphasis added).

Wells Fargo's 2006 Handbook makes the specific promise to follow the dispute resolution process *for all team members* when it is needed, which includes "an opportunity to use internal problem-solving resources." CP 634. Wells Fargo's 2006 Handbook repeated its promise to make the dispute resolution process available with mandatory language, "We respect *your right to communicate* directly, on an individual basis, with your

supervisor, manager or HR consultant *about any of the terms or conditions of your employment*." CP 636 (emphasis added).

Here Culbertson never had the opportunity to decide when to discontinue the dispute resolution process—because Wells Fargo denied Culbertson the opportunity to start the dispute resolution process. Wells Fargo denied Culbertson his "right" to communicate directly with any other managers or communicate with "his" HR Consultant and "his" Employee Relations Consultant. CP 142-143. The language in the 2006 Handbook promising the "opportunity to use" the dispute resolution process and internal resources is mandatory. CP 634. The 2006 Handbook does not provide Wells Fargo any discretion to deny team members the opportunity to use dispute resolution methods *when they're needed.* CP 634. The 2006 Handbook does not provide Wells Fargo any discretion to discontinue the dispute resolution *process* before the team member gets a fair opportunity to use it. CP 635. The 2006 Handbook does not provide Wells Fargo any discretion not follow the dispute resolution *process*. CP 634-635. The 2006 Handbook does not provide Wells Fargo any discretion to deny an employee his/her "*right*" to communicate in the dispute resolution process. CP 636.

The 2014 Handbook contains the nearly the exact same language as the 2006 Handbook in promising a dispute resolution process. CP 881-885.

"Although we can't guarantee that every team member will always be satisfied with the outcome, we can make sure that all team members have dispute resolution methods available when they're needed." CP 881, 634. "The process stops at any point you decide to discontinue it or when you've exhausted all the resources described on the Dispute Resolution Resources page." CP 881, 635. The Dispute Resolution Resources page in the 2014 Handbook describes the same dispute resolution process in the 2006 Handbook, which includes the opportunity to meet with "your manager's manager," "your HR Advisor team" and "Corporate Employee Relations to determine if further review is warranted based on the circumstances." CP 882, 635. Just as in the 2006 Handbook, the 2014 Handbook makes promises in the "Third-Party Representation" section, "We respect *your right to communicate* directly, on an individual basis, *with your manager's manager, or your HR Advisor team about any of the terms or conditions of your employment*." CP 885, 636 (emphasis added).

Here Wells Fargo created an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and Culbertson was induced thereby to remain on the job at Wells Fargo. CP 140-141. It is a question of fact whether Wells Fargo modified the employment relationship with Culbertson by issuing its 2006 Handbook

with promises of specific treatment in specific situations. See *Swanson*, 118 Wn.2d at 522-23; *Korslund*, 156 Wn.2d at 184-85, 188.

b. The Specific Promise To Have The Termination Decision Reviewed Internally "From An Objective Position."

Wells Fargo's 2006 Handbook makes the specific promise of an opportunity for the employee to request the assistance of an HR consultant to have his involuntary termination reviewed "as soon possible" by "Employee Relations." CP 636. The 2006 Handbook promises that "Employee Relations Consultants review disputes *from an objective position and act in a consultative role* to help resolve work-related issues." CP 635. The Wells Fargo 2006 Handbook *makes the specific promise* of review of termination decisions by "your HR consultant" and "if necessary it can be referred to Employees Relations." CP 636. The 2006 Handbook repeats the promise to review involuntary terminations by "your HR consultant, and "if necessary it can be escalated to Employee Relations." CP 688.

> **Review of Termination.** If your employment is terminated involuntarily and you want to have that decision reviewed, contact your HR consultant as soon as possible following the termination. *Once your HR consultant has reviewed the matter, if necessary it can be escalated to Employee Relations.* They'll determine whether a further review is warranted based on the circumstances—and if so, they'll conduct one. (See "Dispute Resolution" on page 44.)

CP 688 (emphasis added).

The 2014 Handbook twice makes the same promise to provide the opportunity for review of involuntary terminations by "your HR Advisor team" and Corporate Employee Relations. CP 884, 973. "After you've spoken with the HR Advisor team, if you still want your dispute reviewed further, you can contact Corporate Employee Relations to determine if further review is warranted based on the circumstances. A member of the Corporate Employee Relations team will inform of the determination." CP 884.

Culbertson was aware of the promises in Sections 4.5 and 9.3 of the 2006 Handbook providing him with an opportunity to have any decision to terminate his employment reviewed internally "from an objective position" and it induced him to remain on the job at Wells Fargo and not seek other employment. CP 140-141.

On February 3, 2014, Culbertson sent a letter, via email, to the Wells Fargo HR Department representative identified by the Wells Fargo investigator during their meeting earlier that day, requesting a written statement as to the reasons for his discharge. CP 144, 156. No representative from the Wells Fargo's HR Department or other manager in the Wells Fargo reporting chain contacted Culbertson in response to his February 3, 2014, letter. CP 144-145. Instead, the same branch manager who fired Culbertson mailed a response letter to Culbertson dated

February 14, 2014, repeating the same unspecified and unsubstantiated allegations made by the Wells Fargo investigator and the branch manager when they summarily fired Culbertson. CP 144-45, 158-59.

On February 27, 2014, Culbertson emailed a letter to Wells Fargo's HR Department requesting a review of the decision to terminate his employment, and Culbertson sent a courtesy copy of the letter to the branch manager who fired him. CP 145, 161-62. No one from Wells Fargo contacted Culbertson in response to his February 27, 2014, letter requesting a review of the decision to terminate his employment at Wells Fargo. CP 145.

There is sufficient evidence for a jury to conclude that Wells Fargo breached the specific promises of specific treatment in its 2006 Handbook to have his termination reviewed by "your HR consultant" and if necessary review by Employee Relations. CP 145, 161-162, 636, 688. The 2006 Handbook specifically promises that, "Employee Relations consultants review disputes from an objective position and act in a consultative role to resolve work-related disputes." CP 635. None of that occurred here as specifically promised by Wells Fargo in its 2006 Handbook.

> We agree that material issues of fact remain as to whether, in the absence of traditional contract analysis, defendant has made a promise of specific treatment in specific circumstances inducing plaintiff to stay on the job and not seek other employment, as

> described in Thompson. If so, the employer may not treat that promise as illusory. *Thompson*, at 230. Moreover, the questions whether statements in employee manuals, handbooks, or other documents amount to promises of specific treatment in specific situations, whether plaintiff justifiably relied upon any such promises, and whether any such promise was breached present material issues of fact. *Thompson*, at 233.

Swanson, 118 Wn.2d at 525. Here, Wells Fargo treated its promises of "internal resources" and a "right to communicate directly" in a "dispute resolution process" and to have termination decisions reviewed as illusory.

2. The Disclaimers In The Handbooks Are Not Conspicuous And Are Inconsistent With The Promises Of Specific Treatment In Specific Situations.

In *Thompson,* 102 Wn.2d at 230, the Supreme Court of Washington recognized that any disclaimers in an employee handbook "*at a minimum*" must be conspicuous to be effective. See *Swanson*, 118 Wn. at 526-27. None of the "at will" employment disclaimers in the 2006 Handbook are printed in a conspicuous manner with bold, italicized, underlined, or large print. CP 591, 600, 633, 686. Likewise, none of the "at will" employment disclaimers in Wells Fargo's 2014 Handbook are printed in a conspicuous manner. CP 737, 823, 879. The 2006 Handbook is 143 pages, not including the cover page. CP 585-733. The 2014 Handbook is 265 pages. CP 734-1004. None of the disclaimers in Wells Fargo's 2006 and 2014

Handbooks meet the minimum test to be effective, especially given the fact that they are both voluminous.

The effectiveness of a disclaimer in a handbook is a question of fact. *Swanson*, 118 Wn.2d at 528. "For several reasons, we conclude that here the effect of the disclaimer in the employee benefits manual is for the trier of fact." *Id.* at 529.

Additionally, the effectiveness of the disclaimers in the Wells Fargo Handbooks are negated by Wells Fargo's inconsistent promises of specific treatment in specific situations. The *Swanson* court held, "An employer's inconsistent representations can negate the effect of a disclaimer:"

> Other employer statements that contradict the disclaimer, however, may act to negate and override the disclaimer....*Examples of statements that have overrun disclaimers to the contrary are detailed grievance* or disciplinary *procedures* to be taken before discharge....

Id., at 532. "First, and importantly, an employer is not entitled to make extensive promises as to working conditions -- promises which directly benefit the employer in that employees are likely to carry out their jobs satisfactorily with promises of assured working conditions -- and then ignore those promises as illusory." *Id.* at 526. "[E]ven if a disclaimer appears in the same handbook as the relied upon policy, summary judgment may be inappropriate." *Id.* at 535 (citation omitted). "[A] disclaimer must be read by reference to the parties' norms of conduct and

expectations founded upon them." *Id.* (internal quotations and citations omitted).

> An employee handbook is only useful if the policies and procedures set forth in it are followed by the employer and its management personnel. Instead of looking for new ways to avoid liability when handbook provisions are not followed, employers should concentrate on setting forth reasonable policies and ensuring compliance with those policies.

Id. at 540 (citation omitted). Wells Fargo would benefit from the advice of the *Swanson* court.

Finally, Wells Fargo contends that Culbertson's signing an acceptance of job offer letter, an employment application, and a confidentiality/non-solicitation agreement stating that his employment was at will precludes his justifiable reliance on the promises in the Wells Fargo Handbooks as a matter of law. This argument flies in the face of Washington law.

"It would be inconsistent with *Thompson* and its progeny to conclude that once an application containing an at-will provision is signed, the employer is thereafter free to make whatever promises it wishes to make without any obligation to carry them out." *Korslund*, 156 Wn.2d at 188 (citing *Swanson*, 118 Wn.2d at 532-35). "[A] general disclaimer in an employment application form was negated by the listing of detailed procedures and specific grounds for discharge in an employment manual." *Swanson*, 118 Wn.2d at 533 (citing *Ferraro v. Koelsch*, 124 Wis. 2d 154,

368 N.W.2d 666 (1985)). "We reject the premise that this disclaimer can, as a matter of law, effectively serve as an eternal escape hatch for an employer who may then make whatever unenforceable promises of working conditions it is to its benefit to make." *Id.* at 532.

Whether Culbertson justifiably relied on promises of specific treatment in specific situations in Wells Fargo's 2006 Handbook is a genuine issue of material fact which precludes summary judgment

B. JUDICIAL ESTOPPEL PREVENTS WELLS FARGO FROM ASSERTING THAT CULBERTSON'S COMPENSATION AGREEMENT COULD BE UNILATERALLY MODIFIED.

Judicial estoppel prevents Wells Fargo from asserting that Culbertson's compensation agreement could be unilaterally modified. Three factors guide the court's determination whether to apply the doctrine: (1) whether a party's later position is clearly inconsistent; (2) whether accepting an inconsistent position creates a perception that either the first or the second court was misled; and (3) whether the party asserting an inconsistent position would gain an unfair advantage or impose an unfair detriment on the opposing party. *Arkison v. Ethan Allen, Inc.*, 160 Wn. 2d 535, 523-39 (2007).

Wells Fargo's contention that its agreement to pay commissions to Culbertson was a unilateral contract is utterly inconsistent with the position Wells Fargo took in the complaint it filed in Spokane County

Superior Court against Culbertson on March 21, 2014. CP 105, 109-131. Wells Fargo's complaint paragraphs 2.10, 2.11, and 2.12 assert that the restrictive covenants in the 2010 TSA, signed by Culbertson on January 5, 2010, are supported by the independent consideration of Wells Fargo's promises to pay Culbertson additional commissions in 2010 pursuant to the Producer Plan agreement Culbertson signed on December 22, 2009. CP 112-113.

Wells Fargo has taken legal action against Culbertson contending the 2010 Producer plan agreement contains an exchange of promises. That is the essence of a bilateral contract.

> Employment contracts are governed by the same rules as other contracts. The law recognizes, as a matter of classification, two kinds of contracts--bilateral and unilateral. A unilateral contract consists of a promise on the part of the offer or and performance of the requisite terms by the offeree. A bilateral contract is an exchange of promises. *The fundamental difference between a unilateral contract and a bilateral contract is the method of acceptance.* In a unilateral contract, the offer or promise of the one party does not become binding or enforceable [sic] until there is performance by the other party. However, *in a bilateral contract, it is not performance which makes the contract binding, but rather the giving of a promise by the one party for the promise of the other.*

Flower v. TRA Industries, Inc., 127 Wn. App. 12, 27-28 (2005), *review denied* 156 Wn.2d. 1030 (2006) (emphasis added) (internal quotes and citations omitted) (employment compensation agreement was bilateral

despite employee signing an acknowledgement that his employment was "at will").

The 2010 Producer Plan was a bilateral contract because it contained an exchange of promises and Culbertson accepted it by signing it. CP 49, 64, 429, 565. Wells Fargo has successfully argued in another department of the same trial court that the covenants in the 2010 TSA are binding upon Culbertson because of the promises exchanged by Wells Fargo and Culbertson in the 2010 Producer Plan. CP 4, 228-229, 292-296, 299-303.

The 2010 Producer Plan agreement signed by Culbertson on December 22, 2009, was subsequently modified in writing by the 2011 Incentive Plan agreement signed by Culbertson on November 22, 2011. CP 51, 70, 429, 569. Mutual assent is required to modify a bilateral contract; one party may not unilaterally modify a bilateral contact. *Flower*, 127 Wn. App. at 28 (citing *Jones v. Best,* 134 Wn.2d 232, 240 (1998)). Any modification of the 2011 Incentive Plan agreement by and between Culbertson and Wells Fargo required additional consideration and mutual assent by the parties. The 2011 Incentive Plan agreement signed by Culbertson on November 22, 2011, was the final expression of the terms of Culbertson's compensation agreement with Wells Fargo.

The complaint filed by Wells Fargo in Spokane County Superior Court against Culbertson to enforce the 2010 TSA alleged in paragraph 2.12

thereof, "In accepting the consideration offered by Wells Fargo as outlined in Appendix A [2010 Producer Plan], Culbertson then signed the 2010 TSA on January 5, 2010." CP 105, 113.

Wells Fargo made the below assertions in a separate lawsuit against Culbertson that the *exchange of promises* contained in the 2010 Compensation Plan between the parties was sufficient consideration to support the restrictive covenants in the 2010 TSA.

On May 9, 2014, Wells Fargo filed a memorandum in support of its motion for summary judgment seeking to enforce the restrictive covenants in the 2010 TSA against Culbertson. CP 228, 232-242. Wells Fargo asserted that the 2010 Producer Plan agreement signed by Culbertson and Wells Fargo contained the independent consideration to support the restrictive covenants in the 2010 TSA, arguing *inter alia*:

> Consideration is a bargained for exchange of promises; independent consideration involves new promises or obligations not previously required of the party. [*Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 834 (2004)].

CP 238.

> The TSA itself and the Appendix to the Wells Fargo Producer Plan provides an increase in commission, specifically in consideration for the non-acceptance/non-solicitation 2010 TSA. (Complaint Exs. 1 and 2) That increased 1% in commissions was not an existing obligation of Wells Fargo, nor an existing benefit for Culbertson prior to his agreement to enter into the 2010 TSA. *The bargained for exchange of promises was an increase in commission for entering into the new agreement.*

CP 239 (emphasis added).

On May 23, 2014, Wells Fargo filed a memorandum in opposition to Culbertson's summary judgment seeking dismissal of Wells Fargo's breach of contract claim for lack of consideration. CP 228, 244-259. Wells Fargo's opposition memorandum asserted *inter alia*:

> The express terms of Appendix A and the 2010 TSA establish that *consideration for the 2010 TSA was offered and accepted by Culbertson, in the form of increased commissions* of 1%, which he was in fact paid.

CP 245 (emphasis added). Wells Fargo's further asserted in its opposition memorandum *inter alia*:

> *[T]he 2010 TSA's consideration was the additional 1% commissions which was established in [2010 Producer Plan] Appendix A Culbertson signed....*

CP 250 (emphasis added). Wells Fargo's opposition memorandum further asserted *inter alia*:

> He received and signed [2010 Producer Plan] Appendix A, which despite his continued protestations, indeed contained the specific terms for "TSA Consideration," which increased his compensation by 1% on new revenue and 1% on net new revenue for a single year period if he signed the "new TSA." That consideration was again referenced in the 2010 TSA which Culbertson signed 14 days later. Culbertson accepted the additional 1% commissions when he signed the 2010 TSA, and thereafter received the additional 1% commissions. These facts establish the appropriate additional consideration independent of Wells Fargo's previous agreements with Culbertson, and satisfy Washington law rendering the 2010 enforceable....

CP 251.

> It is undisputed that Culbertson signed [2010 Producer Plan] Appendix A, and the 2010 TSA. He is bound by the unambiguous contract terms contained therein... *This is not some type of consumer adhesion contract; it is an employment agreement between sophisticated parties. There is no general duty for parties dealing at arm's length to explain to each other the terms of a written contract....*

CP 252. (emphasis added).

On June 2, 2014, Wells Fargo filed a reply memorandum in support of its summary judgment seeking to enforce the restrictive covenants in the 2010 TSA against Culbertson. CP 228, 261-27. Wells Fargo's reply memorandum asserts *inter alia*:

> Culbertson has made various claims, but has not presented any specific facts which rebut the fact that *he received [2010 Producer Plan] Appendix A which identified an offer of additional consideration for the "new TSA" in return for signing it,* and he indeed signed the new 2010 TSA, accepting that consideration, which he as paid... .
>
> The only issue of law before the court is whether independent consideration existed as a matter of law for the 2010 TSA...*Only Appendix A, which Culbertson signed, contained the offer of consideration under the heading "TSA Consideration." By its terms, the consideration offered was 1% on new revenue, and 1% on new net revenue, which "participant will receive...for signing the new TSA."*

CP 262-63 (emphasis added).

On June 6, 2014, Department 1 of the Superior Court for Spokane County, the Honorable Annette Plese, heard summary judgment arguments by

counsel for Culbertson and Wells Fargo. CP 228. At the June 6, 2014, hearing Well Fargo's counsel argued, as follows:

> Independent consideration involves new promises or obligations previously no required of the parties.
>
> The issue in *Labriola [v. Pollard Group, Inc.,* 152 Wn.2d 828 (2004)] involved an employee who, quote, remained at will and received no additional benefits. Employer incurred no additional obligations from the noncompete agreement. That's the exact opposite of this case.
>
> In fact, when you read the agreement that Wells Fargo put in front of Mr. Culbertson, it's as though they had *Labiola*, and they understood we can't just give them to him and have him sign it and not offer him anything else additionally on top of his continued employment.
>
> They said in addition to in consideration for signing this, we're going to give you in addition to your continuing employment, additional compensation of one percent new revenue and one percent net new revenue. *They promised that. That was an obligation if he signed this, which he did*, and then they paid it.
>
> Therefore, this Court on Summary Judgment can rule as a matter of law that this contract is enforceable. The 2010 TSA is supported by independent consideration, and, therefore it's enforceable.

CP 282. RP 10. (emphasis added). Wells Fargo's counsel also argued as follows:

> Again, [2010 Producer Plan] Appendix A is to the comp plan, and it says in there it's giving him notice that purchaser will receive the following consideration for signing the new TSA. One percent on net new revenue. He's not getting that for signing the comp plan or [2010 Producer Plan] Appendix A.

CP 283. RP 11.

> We have [2010 Producer Plan] Appendix A. An Appendix, by itself, is not, you, the term of art. Appendix would mean it's something attached to a comp plan. Then there's the TSA, the trade secrets agreement.
>
> The *appendix is merely saying we're offering, we're telling you if want to sign this, we are going to give you additional consideration, more money. Culbertson had that choice. He signed it. He got it.*

CP. 284. RP 12. (emphasis added). Wells Fargo's counsel also argued as follows before Judge Plese on June 6, 2014:

> They said hey, *we're going to offer you this. We're promising, obligating ourself. If you sign a new TSA, we'll give you one percent on your revenue, one percent on new net revenue. He signed it. He got paid it. He's obligated by the contract, and that's Washington law.* No Washington law says that's not valid and enforceable.

CP 287. PR 15. (emphasis added). Wells Fargo's counsel also argued as follows before Judge Please on June 6, 2014:

> Again, *Del Rosario vs. Del Rosario*, 116 Wn. App. 886, 2003, which was in Wells Fargo briefing, stands for their proposition there's no requirement that a party explain the terms of a contract that are arms-length transactions. There hasn't been, you know, any issue there.
>
> He signed a legally enforceable document, essentially a covenant not to compete. Washington enforces those. If they're signed midstream, they have to have independent consideration.
>
> There's no question before this Court *there was an obligation of promise and offer made that we'll pay you if you sign this. He signed it. They paid him. He's now under the terms he promises he'll abide by....*

CP 288-89. RP 16-17. (emphasis added). Wells Fargo's counsel essentially argued that the restrictive covenants in the 2010 TSA are enforceable because the exchange of promises in the 2010 Producer Plan—a bilateral contract.

On June 6, 2014, Department 1 of the Superior Court for Spokane County, the Honorable Annette Plese, ruled from the bench that a valid contract supported by independent consideration existed between Culbertson and Wells Fargo. CP 105, 228-229, 292-297, 299-303 On June 6, 2014, Judge Plese ruled from the bench as follows:

> Now we are in 2009, and December 22nd here's the producer plan. Here's what it is. It does say in here for TSA considerations if you sign this, you're going to get an additional one percent of revenue.
>
> Then 14 days later, he gets this TSA, and he signs that one saying, you know, sure. Great. No problem. I'll sign it, and Wells Fargo says he got the money. I don't think there's any dispute to all of that....

CP 293. Judge Plese further ruled from the bench on June 6, 2014:

> So at this time, the Court is going to deny the Summary Judgments. I think I could say there's a contract with equitable estoppel is the issue of going to court. So that's where the Court wanes is the whole issue is whether or not his equitable estoppel argument has merit enough to knock out that contract. That's where I'm going to stand at this point.
>
> I'm going to grant there is a contract and whether he breached that contract or whether his defense of equitable estoppel has that weight. You're going to trial on that issue.

CP 294-95.

On July 1, 2014, Judge Plese, entered an Order Granting In Part and Denying In Part Plaintiff's Motion for Partial Summary Judgment Re: Enforcement of 2010 TSA and Liability on Breach of Contract Claim; and Denying Defendant's Motion for Partial Summary Judgment. CP 229,299-303. Judge Plese's Order entered July 1, 2014, states, *inter alia:*

> The Court finds no genuine issue of material fact are in dispute that the...2010 TSA executed by Defendant Culbertson on January 5, 2010, was supported by the new and independent consideration of Additional 1% on New Revenue and Additional 1% on Net New Revenue for the 2010 year (January 1, 2010, through December 31, 2010), offered by Plaintiff Wells Fargo and accepted by Defendant Culbertson when he signed the Producer Plan agreement on December 22, 2009. Therefore, the Court finds as a matter of law that the 2010 TSA is valid and enforceable,...

CP 301. To allow Wells Fargo to assert that its compensation agreement with Culbertson was an unilateral agreement would be inconsistent with the assertions by Wells Fargo in its separate lawsuit against Culbertson. Wells Fargo asserted in that lawsuit that Culbertson's compensation plan was offer to pay him additional commissions in exchange for Culbertson's promise to sign a "new TSA." Wells Fargo successfully argued in another proceeding that this exchange of promises by Wells Fargo and Culbertson in the 2010 Sales Plan provided the consideration to support the restrictive covenants in the 2010 TSA. This allows Wells Fargo to gain an unfair

advantage or impose an unfair detriment on Culbertson. The trial court failed as a matter of law to apply the doctrine of judicial estoppel.

C. WELLS FARGO OWES CULBERTSON POST-TERMINATION COMMISSIONS BECAUSE THE PROCURING CAUSE DOCTRINE APPLIES TO CULBERTSON'S BILATERAL COMPENSATION AGREEMENT.

The Sales Plan signed by Culbertson on December 22, 2009, does not expressly provide how commissions will be paid when Culbertson is terminated. CP 9, 28, 48-49, 64, 429, 565. No other documents were attached to, enclosed with, or accompanied the 2010 Producer Plan when the Wells Fargo Spokane Branch Manager presented the 2010 Producer Plan to Culbertson for his signature. CP 48, 64, 429, 565. There is no provision in the 2010 Producer Plan signed by Culbertson on December 22, 2009, specifying how commissions will be paid after Culbertson's employment at Wells Fargo is terminated. CP 49, 64, 429, 565. Wells Fargo drafted the 2010 Producer Plan agreement without any input from Culbertson. CP 49, 64.

The 2010 Producer Plan agreement signed by Culbertson contains no language expressly defining the "WFIS Plan." CP 49, 64, 429, 565. The 2010 Producer Plan agreement signed by Culbertson contains no language expressly incorporating contractual terms by reference from other documents. CP 49, 64, 429, 565.

Culbertson's compensation agreement with Wells Fargo was modified when he signed the 2011 Incentive Plan agreement on November 22, 2011. CP 10, 28, 50-51, 70, 429, 569. No other documents were attached to, enclosed with, or accompanied, the single-page Incentive Plan when the Wells Fargo's Spokane Branch Manager handed it to Culbertson for signature. CP 51. Just like the 2010 Sales Incentive Plan signed by Culbertson on December 21, 2009, the single-page 2011 Incentive Plan agreement signed by Culbertson on November 22, 2011, does not contain any provision specifying how commissions will be paid after Culbertson's employment at Wells Fargo is terminated. CP 51-52, 70, 429, 569. The 2011 Incentive Plan agreement signed by Culbertson contains no language expressly incorporating contractual terms by reference from other documents. CP 51, 70, 429, 569. The 2011 Incentive Plan agreement contains the same terms as the 2010 Producer Plan agreement, however, the 2011 Incentive Plan provided additional compensation of a $1,956.60 payment by Wells Fargo to Culbertson for "grandfathered incidentals." CP 64, 70, 565, 569. The 2011 Incentive Plan was drafted entirely by Wells Fargo without any input from Culbertson. CP 51, 70.

The procuring cause doctrine acts as a gap filler. *Miller v. Paul M. Wolff Co.*, 178 Wn. App. 957, 964 (Div. 3, 2014). "The procuring cause rule states that when a party is employed to procure a purchaser ... to

whom a sale is eventually made, he is entitled to a commission ... if he was the procuring cause of the sale." *Id.* (quotations and citations omitted).

Here, Wells Fargo has admitted that Culbertson was the procuring cause for the sale of the annual customer accounts before Wells Fargo terminated him on February 3, 2014. CP 106, 134-137. Therefore, as a matter of law, Wells Fargo has breached the contract to pay Culbertson commissions when it has refused to pay him post-termination commissions.

During the course of his employment at Wells Fargo Culbertson never received a copy of the 2013 Sales Incentive Plan effective April 1, 2013. CP 142. There is no evidence in the record that Culbertson signed the 2013 Sales Incentive Plan agreement. CP 1021-1028. The fact that Wells Fargo is unable to show Culbertson signed the 2013 Sales Incentive Plan shows that Culbertson never received it; or if Culbertson did receive it, he did not agree to modify his written bilateral compensation agreement which he signed on December 21, 2009, (CP 48-49, 64, 429, 565) and modified by his signature on November 22, 2011. (CP 10, 28, 50-51, 70, 429, 569).

Culbertson never received or read the 2013 Sales Incentive Plan. CP 142. There is no evidence that Culbertson assented to incorporating the Wells Fargo 2013 Sales Incentive Plan into his compensation agreement

with Wells Fargo. The December 31, 2012, email exchange between Wells Fargo Spokane Branch Manager Tyndell and Culbertson does not show that Culbertson agreed to modify his bilateral compensation agreement with Wells Fargo. CP 1075-1076, 1072-1074. Culbertson's reply, "This sounds like it might be a significant hair-cut. I am sure all of us will be interested in what you find out in Dallas," shows that Culbertson actually objected to any changes to his bilateral compensation agreement with Wells Fargo. CP 1072.

The January 24, 2013, email exchange between Wells Fargo's Vicki Kitley and Culbertson does not show that Culbertson agreed to modify his bilateral compensation agreement with Wells Fargo. CP 1038, 1059-1061. The email discussed the need to ensure proper coding of production reports for the implementation of the new automated system Incentive Management Tracking ("IMT") for calculation of sales compensation and "true ups" on commissions outstanding receivables. CP 1038, 1059-1061. No where in this email does it show that Culbertson actually received, read, understood, and agreed to abide by the terms of the 2013 Sales Incentive Plan. CP 1038, 1059-1061. Moreover, *nothing in the January 24, 2013, email shows that Culbertson agreed to amend or modify his compensation agreement to include a provision prohibiting payment of post-termination commissions.* CP 1059-1061.

D. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING CULBERTSON'S CR 56(f) MOTION BEFORE GRANTING WELLS FARGO SUMMARY JUDGMENT.

"When a trial court has been shown a good reason why an affidavit of a material witness cannot be obtained in time for a summary judgment proceeding, the court has a duty to accord the parties a reasonable opportunity to make the record complete before ruling on a motion for summary judgment." *Lewis v. Bell*, 45 Wn. App. 192, 195 (1986) (citing *Cofer v. County of Pierce*, 8 Wn. App. 258 (1973)).

Arguendo Culbertson's compensation agreement with Wells Fargo is a unilateral contract, there exists a genuine issue of material fact as to whether Wells Fargo provided Culbertson with "reasonable notice" of its unilateral changes to Culbertson's compensation plan. Employees are not bound by an employer's unilateral revisions of company policy, unless the employer provides "reasonable" notice of the changes. *Govier v. North Sound Bank*, 91 Wn. App. 493, 495 (Div. 2, 1998)(citing *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 434 (1981)). "Actual notice is reasonable notice." *Id.* (citations omitted).

Wells Fargo contends that Culbertson is bound by the terms of the 2013 Sales Incentive Plan regardless if Culbertson ever actually read it. There is no evidence in the record that Culbertson signed an acknowledgement having received, read, and understood the 2013 Sales

Incentive Plan. Culbertson never received a printed copy of nor did he read the 2013 Sales Incentive Plan. CP 142.

By way of affidavit from his counsel, Culbertson had shown good reason why facts could not be obtained to oppose Wells Fargo's summary judgment motion and therefore a continuance pursuant to CR 56(f) was necessary and justified. CP 101-103, 163-166. Specifically, Culbertson needed a continuance of summary judgment to permit inspection of the hard drives to the Wells Fargo work computers used by Culbertson to determine if the electronic link to the Wells Fargo 2013 Incentive Plan was ever opened. CP 1029-1031.

Arguenedo, if Culbertson's compensation agreement with Wells Fargo was a unilateral contract, there exists a question of fact as to whether Wells Fargo provided Culbertson with "reasonable notice" of its unilateral changes to Culbertson's compensation agreement. "[A]n employer's unilateral changes in policy become effective only when the employee receives reasonable notice of the change." *Govier*, 91 Wn. App. at 498 (1998) (citing *Gaglidari,* at 117 Wn.2d at 434)).

In *Gaglidari,* the court held that the defendant employer failed to give plaintiff reasonable notice of a new handbook. Although the plaintiff knew different handbooks were given to new employees, she never actually received one or signed for one, despite the employer's assertion that the

new handbook was left in the employees' lounge. *Id.* at 435. "Whether the handbooks might actually be read in the employees' lounge would be wholly fortuitous; it would not be reasonable notice. Plaintiff is not bound by defendant's unilateral revisions of company policy unless defendant gave her reasonable notice of the changes." *Id.* at 435.

> it is unfair to place the burden of *discovering* policy changes on the employee. While the employee is bound by unilateral acts of the employer, it is incumbent upon the employer to *inform* employees of its actions.

Govier, 91 Wn. App. at 502 (citing *Gaglidari*, 117 Wn.2d at 435).

> In *Swanson,* the employer mailed a disclaimer provision to the employee in a packet containing some 200 pages; the employee did not acknowledge its receipt. 118 Wn.2d at 515, 529-30. The *Swanson* court held that "in order to be effective, a disclaimer . . . must be communicated to the employee." 118 Wn.2d at 529.

Id. 91 Wn. App. at 503 (citing *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512 (1992)). Whether reasonable notice has been given here is a question of fact." *Swanson*, 118 Wn.2d at 529.

It would be wholly fortuitous and unreasonable to place the burden on Culbertson to discover every policy change electronically linked to any and all emails sent to him by Wells Fargo—especially after Culbertson previously signed three written compensation agreements with Wells Fargo specifically setting out the terms of his commission payments. CP 47, 49, 50-51, 56-57, 64, 70.

At the very least, it is a question of fact for the jury whether Wells Fargo provided "reasonable notice" to Culbertson of the unilateral changes to his compensation plan agreements by an electronic link to the 2013 Sales Incentive Plan, which he never read. The trial court abused its discretion by denying Culbertson's CR 56(f) Motion to inspect his work computer at Wells Fargo to determine if Culbertson ever opened the electronic link to the 2013 Sales Incentive Plan.

E. CULBERTSON IS ENTITLED TO RECOVER HIS ATTORNEYS' FEES AND COSTS PURSUANT TO RCW 49.48.030 AND RAP 18.1.

Culbertson also respectfully requests the Court to award attorney fees and costs under RCW 49.48.030 which provides for the award of attorney fees and costs in "any action which any person is successful in recovering judgment for wages or salary owed to him." *McGinnity v. AutoNation Inc.*, 149 Wash. App. 277, 284 (Div. 3, 2009); *see also Mega v. Whitworth College,* 138, Wash. App. 661, 673 (Div. 3, 2007) (court awarded attorney fees and costs on appeal in favor of a professor who was granted wages as a matter of law and entitled to attorney fees and costs under RCW 49.48.030). Attorneys' fees under RCW 49.48.030 are recoverable for lost wages for breach of contract. *Flower*, 127 Wn. App. at 34. See also *Gaglidari*, 117 Wn.2d at 449-50.

V. CONCLUSION

For the reasons set forth above, Craig Culbertson, respectfully asks this Court to reverse the trial courts judgment in favor of Respondents Wells Fargo and grant summary judgment in favor of Appellant, Craig Culbertson.

DATED THIS 5th day of January, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of January, 2015, I caused to be served a true and correct copy of the foregoing document to the following:

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