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NO.66468-9-I

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

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ITMSOURCE, INC.,

Appellant,

vs.

AUDLEY BECKER,

Respondent.

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APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Gregory Canova, Judge

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**BRIEF OF APPELLANT**

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Address: FRANK J. PROHASKA & ASSOC., PLLC  
1001 4<sup>th</sup> Avenue, Suite 3200 By Frank J. Prohaska  
Seattle, WA 98154 Attorney for Appellants  
(206) 284-9698

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SUPERIOR COURT CIVIL RULES

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## **I. NATURE OF CASE**

This case arises from an alleged employment contract between Appellants ITMSource, Inc. and Darren Varnado with Respondent Audley Becker. Respondent brought a motion for summary judgment which was granted by the King County Superior Court without allowing Appellants an adequate defense as they were represented pro se at the time and were not permitted to provide evidence of disputed facts. This Court should overturn and remand to the Trial Court.

## **II. STATEMENT OF ISSUES**

1. Did the trial court properly grant Mr. Becker's motion for summary judgment when Defendant Darren Varnado, acting pro se on his own behalf and for ITMSource, was not afforded additional time to respond to the motion for summary judgment pursuant to CR 56(f)?
2. When Defendant Darren Varnado missed deadlines for responses to Requests for Admission and Plaintiff's motion for summary judgment

due to illness and extreme personal stress from multiple lawsuits and dissolution of his company, was there excusable neglect sufficient to warrant Defendant vacation of the order granting summary judgment, especially when matters should be decided on the merits and not technicalities?

### **III. STATEMENT OF THE CASE**

The following facts are not disputed. Plaintiff Audley Becker claimed he was not paid wages and commissions in breach of his employment contract with ITMSource. (CP 40-41). Plaintiff filed his lawsuit on November 18, 2009 and served Defendants ITMSource and Darren Varnado with the summons and complaint on or about December 17, 2009. (CP 59). Defendants filed their answer to the complaint on or about January 8, 2010 denying all of Plaintiff's allegations. (CP 38-39).

Plaintiff then served Defendants on or about April 25, 2010 with Requests for Admissions that improperly asked Defendants to admit essentially each allegation of the Complaint. (CP 40-44). At the time of the

service of the Requests for Admission, Darren Varnado was bedridden with a flare up of gout—a medical condition that started in March 2010 and continued through April 2010 and was severe enough that he was bedridden for approximately one month. (CP 59-60). In addition to Mr. Varnado’s health situation, he was also dealing on a pro se basis with six additional lawsuits filed by creditors due to the dissolution of his nine year old company, ITMSource. (CP 59-60). The extreme stress of multiple lawsuits and poor health, as well as attempting to deal with his legal and financial issues pro se, resulted in Mr. Varnado missing the deadline for responding to the Requests for Admission.

Plaintiff filed a motion for summary judgment relying upon the requests for admission, notwithstanding the fact that Defendants had filed an Answer essentially denying the allegations restated in the requests for admission. (CP 59-60 and CP 38-39). Mr. Varnado, again due to the myriad issues he was dealing with legally, financially and healthwise, did not file a response to the summary judgment motion. (CP 59-60). Mr. Varnado did appear at the scheduled hearing in an attempt to defend his position, but the

trial court did not consider any evidence brought to the hearing by Mr. Varnado and granted summary judgment in favor of Plaintiff. (CP 59-60). Defendants subsequently filed a motion for reconsideration which contained a written contract that disputed Plaintiff's assertion of facts regarding the nature of his employment contract with Defendants. (CP 56-57). The motion for reconsideration was denied by the trial court thus leading to this appeal.

#### IV. ARGUMENT

- A. The order granting summary judgment should be vacated as Defendants had evidence of genuine issues of disputed material facts that were not considered by the Trial Court.**

CR 56(f) permits a continuance of a summary judgment motion in order to allow a party additional time to obtain necessary evidence to respond to the motion. The Washington Courts recognize that "the trial court has a duty to give the party a reasonable opportunity to complete the record before ruling on the motion." *Lewis v. Bell*, 45 Wn. App. 192, 196, 724 P. 2d 425 (1986). While there is sparse case law in Washington addressing CR 56(f), the court in *Turner v. Koehler*, 54 Wn. App. 688, 775 P. 2d 474 (1989)

applied decisions pertaining to the comparable federal rule. In *Turner*, the court dealt with a matter wherein the non-moving party asserted an expert affidavit was still needed in order to respond to the motion for summary judgment. The responding party did not specifically request a continuance under CR 56(f) and the trial court granted the motion. The Appellate Court, Division 1, noted that “In limited situations, the federal courts have shown leniency to parties who have not formally complied with Fed. R. Civ. P. 56(f). These include situations in which the party opposing the summary judgment . . . appeared pro se . . .” *Turner* at 694.

In our case, Appellant appeared pro se and was present at the summary judgment motion. He advised the court that he had evidence to respond, however the court denied him an opportunity to present that evidence, instead relying solely on what was already in the record. Appellant’s evidence raised a genuine issue of material fact, was already in his possession and was not presented earlier due to Appellant’s health condition and extreme personal financial and legal issues occurring at the time of the motion for summary judgment. The trial court should have

permitted Appellants to present their evidence, specifically a written employment contract that refuted Plaintiff's factual assertions. Appellant, in his status as a pro se litigant, clearly falls within the exception to formal compliance with CR 56(f) and it was error to not grant him additional time to respond.

**B. The order granting summary judgment and subsequent entry of judgment should be vacated as there is no reasonable inference to justify the decision and the judgment was obtained resulting from Appellant's excusable neglect.**

Appellant moved for reconsideration following the summary judgment motion based upon CR 59(a)(7) and (9) as well as CR 60 (b)(1) and (9). These civil rules permit vacation of a judgment where there is no reasonable inference from the evidence to justify the decision, where there is inadvertence and excusable neglect , or where a judgment or order resulted from unavoidable casualty or misfortune preventing a party from defending. In addition to the foregoing, the Washington Courts have been generally

unwilling to allow a judgment to stand on solely procedural grounds. The Washington Court noted in *Rinke v. Johns-Manville Corp.*, 47 Wash. App. 222, 734 P. 2d 533(1987), the "**modern rules of procedure are intended to allow the court to reach the merits, not dispose of cases on technical niceties.**"(emphasis added).

In this matter, the Court granted Plaintiff's motion for summary judgment without permitting Defendants from producing evidence disputing Plaintiff's assertions of genuine issues of fact. Furthermore, Plaintiff relied primarily on unanswered Requests for Admission in support of the motion for summary judgment, even though Defendants had denied the same by way of their answer and affirmative defenses. Defendant Varnado failed to file a response to the Requests for Admission due to his health and personal issues. Regardless, his answer denied the allegations in the complaint which were essentially simply restated by Plaintiff as his Requests for Admission.

The Washington Courts have long held that Requests for Admission are intended to eliminate undisputed facts, not central issues to the dispute. *Santos v. Dean*, 96 Wn.App.849, 982 P.2d 632 (1999). Plaintiff's

Requests for Admission were not proper as they called for Defendants to admit or deny facts central to the questions of liability and damages which are questions for the jury and/or fact finder and therefore are improper. *Brust v. Newton*, 70 Wn.App. 286,852 P.2d 1092 (1993). Additionally, reasonable inference from the scant documents on file with the Court show that Defendants denied these same allegations in their complaint and therefore, the Requests for Admission were essentially already answered.

Admittedly, Defendants did not file a response to the summary judgment motion. However, Plaintiff's only support for the motion was reliance on Defendants' failure to specifically respond to requests for admissions. Plaintiff's case alleges breach of an employment contract. Plaintiff did not provide the court with any such document even though it is referenced multiple times in Plaintiff's motion for summary judgment. Defendant Varnado had the written employment contract in his possession at the summary judgment hearing but was not permitted to include it in the record. In this case, Defendants are being penalized due to procedural shortcomings which, as this Court has consistently held, is not the proper

means to obtain a judgment.

Defendant Varnado, prior to this appeal, handled this matter along with six other lawsuits pertaining to his company ITMSource on a pro se basis. He was additionally forced to deal with all of his legal matters, this case included, while also dealing with a significant health problem, foreclosure of his home and problems with creditors who have not yet filed suit against him. He filed a timely Answer and did not miss appearing on his own behalf at the summary judgment hearing. However, due to the overwhelming health problems and legal issues he was being forced to handle and the fact that he was pro se, his failure to file responses to Requests for Admission and the summary judgment motion were unreasonably held against him as if he were subject to a default judgment.

His failure to respond to the requests and Plaintiff's motion was due primarily to inadvertence resulting from an outbreak of a longstanding health condition that rendered him bedridden for a month. Defendant Varnado's failure to respond was also due to excusable neglect. Defendant Varnado's company ITMSource was a nine year old business that

dissolved due to insufficient revenue resulting from the economy, amongst other issues. As a result, he and his company were named as defendants to this lawsuit as well as six other lawsuits from vendors and creditors. At the time of Plaintiff's summary judgment motion in this case, Defendant Varnado handled all of these matters pro se. The sheer number of lawsuits and issues related thereto overwhelmed Defendant Varnado and resulted in him miss deadlines due to confusion between each of these lawsuits and complicated by being bedridden with gout. Clearly his initial filing of an Answer coupled with his appearance at the summary judgment hearing demonstrated his attempt to mount a defense. However, he was penalized for excusable neglect in missing response deadlines by losing out on technical niceties and not the merits of the case—which clearly exist as demonstrated by the written contract he attempted to produce at the summary judgment and which was produced to the trial court in Defendants' motion for reconsideration.

As previously noted, the Washington Court stated in *Rinke v. Johns-Manville Corp.*, 47 Wash. App. 222, 734 P. 2d 533(1987), the

**"modern rules of procedure are intended to allow the court to reach the merits, not dispose of cases on technical niceties."**(emphasis added). It is also well recognized in Washington that **" The burden is on the party moving for summary judgment to demonstrate there is no genuine dispute as to any material fact** and reasonable inferences from the evidence **must be resolved against the moving party."** *Folsom v. Burger King*, 135 Wn. 2d 658, 663, 958 P. 2d 301 (1998) (emphasis added). **"The motion should be granted only if, from all the evidence, a reasonable person could reach only one conclusion."** *Id.* at 663. **"The moving party bears the burden of showing there are no material facts in dispute ."** *Malnar v. Carson*, 128 Wn. 2d 521, 535, 910 P. 2d 455 (1996) (emphasis added). Furthermore, it is established in Washington that, **"The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party ."** *Wilson v. Steinbach*, 98 Wn. 2d 434, 437, 656 P. 2d 1030 (1982) (emphasis added).

In this present case, Darren Varnado timely filed an Answer to Plaintiff's complaint denying all allegations therein. He also was in

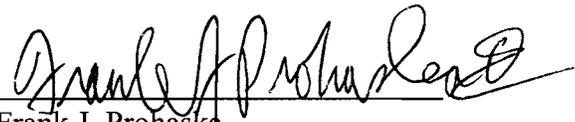
possession of a written contract made with Plaintiff that specifically rebutted Plaintiff's allegations as to the nature of the employment contract. This evidence was never considered by the trial court, nor did the trial court allow Defendants a continuance to have time to present this evidence into the record. The written employment contract was silent as to commissions other than to note that "Commission package to be **mutually agreed upon and documented** on or before your employment start date." (Emphasis added). This is the only employment contract at issue and specifically disputed Plaintiff's unsupported allegations of unpaid commissions and of a purported contract setting forth a 2.5% commission rate. The essential material facts in this case are clearly in dispute and sufficient to warrant denial of summary judgment. However, the trial court refused to grant Defendants an opportunity to present this evidence.

## V. CONCLUSION

The trial court in this case granted an order of summary judgment in favor of Plaintiff without granting Defendants additional time to present

essential evidence into the record. Washington case law clearly does not support a judgment based on technical niceties, especially when the merits of the case clearly do not support the judgment. Case law also clearly supports an exception to CR 56(f) for pro se litigants, yet the trial court refused any continuance to Defendants even though Defendant Varnado stated he had evidence to dispute Plaintiff's claims. Appellant respectfully requests this Court overturn the trial court's order on summary judgment and subsequent entry of judgment and remand this matter to the trial court for adjudication on the merits.

SUBSCRIBED and DATED this 2nd day of June, 2011 in Seattle, Washington.



Frank J. Prohaska  
Washington State Bar Association # 27589  
Attorney for Appellants  
1001 4<sup>th</sup> Avenue, Suite 3200  
Seattle, WA 98154