

67034-4

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Case No. 67034-4-I

COURT OF APPEALS, DIVISION ONE  
STATE OF WASHINGTON

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SHAUN LaCOURSIERE,

Appellant,

vs.

CAMWEST DEVELOPMENT, INC.; and ERIC H. CAMPBELL,

Respondents.

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**REPLY BRIEF OF APPELLANT**

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D. R. (ROB) CASE (WSBA #34313)  
Larson Berg & Perkins PLLC  
Attorneys for Appellant

105 North 3<sup>rd</sup> Street  
Yakima, WA 98901  
Phone: (509) 457-1515  
Fax: (509) 457-1027

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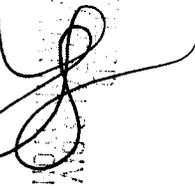


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## **A. INTRODUCTION**

The plaintiff persists in his position that “this court should consider the reality of the situation and should not be distracted with technicalities.” *See e.g., Brief of Appellant*, pp.33-37. The defendants engage in creative double-speak, intentionally misconstrue the plaintiff’s arguments, and promote semantics over substance (in addition to many, many other transgressions).

The defendants claim that funds paid to the plaintiff due to his employment are somehow not “wages”. They claim that “knowing submission to such violations” somehow doesn’t require the employee to actually know that he’s submitting to violations. They so completely twist and contort the WRA that they claim it somehow works to protect employers, rather than workers.

None of this changes the underlying reality of what happened: (1) the defendants devised a scheme for their own benefit, (2) the plaintiff fell victim to that scheme, and (3) the defendants profited as a result. They reaped substantial kickbacks. If the WRA doesn’t protect against that, it doesn’t protect against much.

The essential question is whether employers can prospectively negate the WRA by drafting a conflicting contract provision long before the rebates actually start, and even longer before the worker actually

suffers an economic loss (*i.e.*, gets fired and denied a full refund). This is a question of first impression. Based on established precedent, it should be decided in the plaintiff's favor. Alternatively, if the court is unwilling to go that far, the case should be remanded for trial. Under no circumstance should the plaintiff lose without even getting the benefit of a trial before a jury of his peers.

## **B. ARGUMENT AND ANALYSIS**

### **B.1. The Defense Should be Sanctioned for Improperly Mentioning Settlement Discussions.**

Showing blatant disrespect to this court and the plaintiff alike, the defense commits an intentional wrong at page 16 of its *Brief of Respondents*. Specifically, within footnote 1, the defense improperly mentions a settlement offer. The defense recites the exact monetary figure that they "offered" (*i.e.*, an 80% refund) and says "LaCoursiere rejected that offer." *See Brief of Respondents*, p.16, n.1. This violates ER 408, and defense counsel knows it!

The defense offers zero justification for interjecting settlement discussions into this appeal. Quite the contrary, the defense simply "rings the bell" and moves on. What purpose does this serve? Or, more accurately, what legitimate purpose does this serve? The answer is "none." It is just a transparent attempt to bias the court.

The defense hopes that Mr. LaCoursiere will be seen as unreasonable for rejecting their offer, and, by contrast, that they will be seen as reasonable for making the offer. This is entirely illegitimate.

Worse yet, this marks the third time that the defense has violated ER 408 during this litigation. The defense first mentioned this settlement offer within its “Defendants’ Motion for Summary Judgment.” *See* CP 30 (lns.21-24). In response, Mr. LaCoursiere objected and asked the trial court to strike the offending sentences. *See* CP 403-404. Undeterred, defense counsel actually re-raised the topic during oral argument, saying “Camwest [*sic*] offered to pay him out at 80 percent.” RP 52. That was the second violation. When defense counsel made that statement, the judge interrupted and said, “Well yeah. But I mean, you know, they wanted something in return.” *Id.* Defense counsel agreed with the judge’s point, which effectively conceded the obvious -- *i.e.*, the defense was trying to interject settlement discussions into the summary judgment hearing. *See* RP 53. By this exchange, it was clear to everyone in the courtroom the topic was not appropriate.

By violating the rule anew within their *Brief of Respondents*, defense counsel clearly fears no reprisals from this court. Is there ever any consequence for repeated, blatant violations of the rule? At this point,

simply striking the offending sentences will not be a sufficient remedy. The defense should be sanctioned. The “offer” is proof of guilt.

**B.2. The WRA Protects Workers, *Not* Employers.**

At page 40, the defense writes a very revealing sentence: “The employer does not automatically lose the protections under the Act simply because the parties memorialized their agreement in writing.” (Underscore added.) *Brief of Respondents*, p.40. That is how the defense views the WRA -- as though it is intended to protect employers, rather than workers. This completely distorts the actual language of the WRA. It also stands Washington’s status as a “pioneer in assuring payment of wages due and employee” and the “strong public policy to protect workers’ rights” (*see Champagne*, 163 Wn.2d at 76) on its head.

Exactly what employer-oriented “protection” is the defense talking about? The answer, presumably, is the “knowing submission” exception within RCW 49.52.070. *See Brief of Respondents*, pp.39-41 (addressing that exception). That section is actually an employee-oriented grant of exemplary damages, but the defense twists and contorts it into an opportunity to be exploited by employers. This confirms many of the sentences within Mr. LaCoursiere’s opening brief, including:

From the outset, this scheme was designed to benefit Mr. Campbell and his corporation. . . .

In hindsight, can this scheme be viewed as anything but an attempt to circumvent the WRA? Can it be viewed as anything but a “device calculated to effect a rebate”? Mr. Campbell tried to outsmart the law.

*Brief of Appellant*, pp.36-37. This crystallizes the debate in this case.

Under the defendants’ rationale, the WRA’s prohibitions and restrictions (*e.g.*, RCW 49.52.050) are merely default rules that an employer can negate in advance. That cannot be what the Legislature intended. Such a construction would be entirely inconsistent with the underlying rationale for the Act. *See e.g.*, *State v. Carter*, 18 Wn.2d at 621 (explaining that the Act is a “protective measure” for workers, and that employers cannot use any “device calculated to effect a rebate”).

**B.3. The Defendants Concede that they Played Accounting Gimmicks, and they Actually Offer those Gimmicks as a Reason that they Should be Absolved of Liability.**

Equally telling is that the defendants come right out and say that they inflated the bonuses because they knew that a large portion of the money would flow right back to them. *See e.g.*, *Brief of Respondents*, pp.6, 25-26. In this regard, they write that “[t]he only way CamWest could afford to give its employees the extremely generous bonuses at issue was by allocating a percentage of the sums as capital contributions to the LLC” and “[a]bsent the LLC investment component of the bonuses,

CamWest would not have issued direct payments in such sizeable amounts to its employees”. *Id.*

So, the defendants admit that they played accounting gimmicks, and they somehow think that this is a good thing? That it should garner this court’s approval, rather than censure? That it’s somehow a defense under the WRA, rather than a concession of liability, for employers to argue “well, we only rebated the funds that we intentionally baked-in for that purpose”? Actually, the WRA is “liberally construed” in favor of workers (*see Champagne*, 163 Wn.2d at 76), so these accounting gimmicks certainly don’t absolve the defendants.

**B.4. The Plaintiff was *Never* Paid in Excess of 44%.**

At pages 9-11, the defendants repeat their double-speak from below as to how the bonuses were allocated. Specifically, the defendants contend that they supposedly “paid [Mr.] LaCoursiere directly” in excess of 44% on each of his three bonuses. *See Brief of Respondents*, pp.9-11. They argue that he received 58.72% of the 2005-year bonus, 59.12% of the 2006-year bonus, and 52.64% of the 2007-year bonus. *Id.* To the contrary, the defendants’ own records prove otherwise:

- The 2005-year bonus was \$121,021. Of that sum, the defendants allocated just \$45,645.17 (gross) to Mr. LaCoursiere, which is clearly recited on CP 322 under the “Cash Bonus” column. This equates only 37.72%. Then, in “net” term, Mr. LaCoursiere actually received just \$30,255.25, which equates to roughly 25%. *See* CP 322.

- Similarly, the 2006-year bonus was \$98,690. Of that sum, the defendants allocated just \$37,448.08 or 37.95% (gross) to Mr. LaCoursiere. On a “net” basis, he pocketed just \$24,672.50 or 25%. *See* CP 323.
- And, the 2007-year bonus was \$31,745. Only \$6,669.18 or 21% (gross) was allocated to Mr. LaCoursiere. And he pocketed a “net” of \$4,444.30 or 14%. *See* CP 324.

So, how does the defense claim that Mr. LaCoursiere was “directly . . . paid” more than 52% each year? The answer is that the defense counts all taxes – including those applied against the funds that were sent directly to the LLC – as supposedly having been “directly paid” to Mr. LaCoursiere. This makes no sense. Mr. LaCoursiere did not receive the tax withholdings, the government did. More generally, he did not receive the funds that were sent to the LLC.

Whether viewed in gross or net terms, Mr. LaCoursiere never got 44%. The defendants’ contention that “Mr. Campbell has often directed . . . that a percentage of the total bonus amount greater than 44% be paid directly to the Project Manager in order to provide the employee with a larger cash payment” (*see Brief of Respondents*, pp.4-5) is fiction.

**B.5. Mr. LaCoursiere Did Not Send the Funds to the LLC, the Defendants Did So Directly.**

In at least two places, the defense argues (or at least suggests) that Mr. LaCoursiere supposedly sent the funds to the LLC himself, personally. Specifically, at page 5, the defense offers the following

generic explanation of the mechanics of its scheme: “Once the Project Manager makes his first capital contribution to the LLC . . . .” *See Brief of Respondents*, p.5. Likewise, at page 6, the defense writes, “a percentage of each bonus was invested by the participating employee as a membership interest in the LLC . . . .” *See id.*, p.6. These passages are completely misleading.

The truth is that Mr. LaCoursiere did not play any active role with regard to the funds that were sent to the LLC. The defendants controlled everything. They decided how much money would be sent to the LLC each year, versus how much would be allocated to the plaintiff. As shown above, the plaintiff’s allocation never topped 38% (gross). Moreover, the funds that were diverted to the LLC were sent directly to the LLC by the defendants. The defendants wrote two checks: one from the corporation to the LLC, and the other from the LLC back to the corporation. It was as simple as that. Mr. LaCoursiere never possessed those funds. *See Brief of Appellant*, pp.9-10; CP 317-319 (copies of checks), 337, 344.

**B.6. This Case is Not About the “Other Project Managers”.**

The defendants claim that the “other Project Managers” did not “raise any complaints regarding the Bonus Structure, including LaCoursiere’s own roommate.” *See Brief of Respondents*, p.17. In response, the plaintiff asks the following: So what? Whether other

workers lodged any complaints is entirely beside the point. This case is about Mr. LaCousiere's wages, and that's it. As an aggrieved worker, Mr. LaCousiere has rights under the WRA. His rights are in no way affected by what might have happened with the other workers. The defense is offering "red herring" arguments.

The defendants also claim that "some CamWest employees opt[ed] out of the LLC Bonus Structure, choosing to instead receive a pure percentage-of-salary bonus." *See Brief of Respondents*, p.5. Notably, however, the defendants fail to provide any details or specific names of the workers who supposedly did so. This is just another "red herring" argument. The defendants want the court (and, presumably, the plaintiff) to just take their word for this proposition, even though they self-servingly misrepresent so many other facts about this case (*e.g.*, that the WRA supposedly protects employers, that Mr. LaCousiere supposedly received more than 44% each year, that Mr. LaCousiere supposedly sent the funds to the LLC, etc.).

**B.7. This Rebate Scheme Bares No Similarity to the Other Contracts that the Plaintiff Had Experience With.**

At pages 12-14, the defense attempts to paint Mr. LaCousiere as supposedly having a special background. Specifically, they argue that he had "significant experience in the construction industry", that he was

“familiar with contracts”, that one of his responsibilities in this job was to “review ‘many contracts’”, and that he “owns a rental property and prepared the lease himself.” *See Brief of Respondents*, pp.12-14.

The defendants want the court to believe that Mr. LaCoursiere’s background somehow should’ve made him particularly capable of detecting, deciphering and sidestepping the defendants’ rebate scheme. But this scheme was totally unlike anything that he had encountered before, and the defendants cannot rationally argue otherwise. A few years of experience in the construction trades hardly prepares someone to parse 20+ pages of complex employment contracts, particularly when the documents are confusing by design. There is no similarity between the contracts that Mr. LaCoursiere worked with during his job selling houses and the documents that embody this rebate scheme. The defense doesn’t even try to argue the point.

These documents were anything but simple. The defendants intentionally crafted a complex, two-part scheme, with a delayed effect, all in an attempt to obscure that kickbacks were happening. There is no other explanation for the structure of this scheme. *See Brief of Appellant*, p.35.

**B.8. The Defendants are *Not* as Generous as they Claim to be.**

At pages 16-17, the defendants recite that they “chose to pay [Mr.] LaCoursiere according to the more expedited schedule” when then

summarily fired (which, coincidentally, they did just prior to his next anniversary date). *See Brief of Respondents*, pp.16-17. This argument falls flat. The reality of the situation is that no “schedule” should’ve been used because all of the money was his in the first place. He earned it by his labor, he paid taxes on it, and the proffered reason for his termination – supposed “consistent tardiness” after many continuous years of employment and at least one promotion – was nothing but pretext. More generally, employers who’ve taken upwards of \$107,000 in rebates from a worker shouldn’t so proudly thump their chest about eventually disgorging a portion of funds, no matter how “expedited” they do so.

Without any hesitation, the defendants claim that there was nothing “nefarious” about their scheme. *See Brief of Respondents*, p.22. They make that argument (1) despite the fact that they diverted upwards of \$107,000 away from the plaintiff and back to themselves, and (2) despite the fact that they still possess 40% of that sum and refuse to disgorge it. Maybe from their perspective there’s nothing “nefarious” about this, but the WRA should be viewed from the worker’s perspective.

The principle reason that the defendants contend that their scheme was not “nefarious” was that it was embodied in two, complex written documents. This argument misses the mark. The defendants conveniently ignore that this rebate scheme lasted for several years. The plaintiff

wasn't shown the second document (the LLC contract) until more than a year had passed after he'd signed the first document (the Employment Agreement). *See and Compare*, CP 291, 208; *Brief of Respondents*, p.6-7, 9.

To get induce the plaintiff to sign the documents, the defendants dangled huge promises in front of him, namely the \$121,000+ gross bonus for the 2005 calendar year. At this date, the housing market showed no hints of its future collapse. The plaintiff had just been promoted. Everything was designed to engender false faith.

The plaintiff continued even harder and closed a large number of sales. The "Addenda" specified commission rates for each housing project. *See* CP 297-298. Small "interest payments" were trickled out to the plaintiff (similar to what happens in a Ponzi scheme), but those payments were a pittance in comparison to the size of the rebates, and they were effectively just a partial refund of the money that had already been taken from him (also similar to a Ponzi scheme). *See e.g., Brief of Appellant*, pp.20-21.

The defendants used the "vesting schedule" to compel loyalty, because if the plaintiff resigned it was unlikely that he'd get a full refund. *See e.g., Brief of Appellant*, pp.18-19. All the while, the defendants gained tax advantages for their own benefit, and the tax liabilities were

shifted to the plaintiff. *See id.*, p.17. Then, just before his next anniversary date, they summarily fired him. *See id.*, p.19.

In effect, the defendants set a trap, baited it, and then sprung it at just the right moment. The notion that they were merely providing “an opportunity” for Mr. LaCoursiere “to share in hoped-for financial successes” (*see Brief of Respondents*, p.6) is lawyerly nonsense. If that were the true objective, then when why did the defendants go through this entire rigmarole? Instead, why didn’t they simply give smaller immediate bonuses to the workers and then, if the hoped-for future successes actually materialized, issue additional bonuses at that point, as questioned at page 16 of the *Brief of Appellant*? The defense offers no answer.

The true objective was quite different from Mr. Campbell’s self-serving claim that this scheme was supposedly set up to benefit the workers. It wasn’t. It was set up for his own benefit, which the *Brief of Respondents* unwittingly concedes. *See e.g., Brief of Respondents*, p.40 (suggesting that the WRA is designed to protect employers), pp.6, 25-26 (suggesting that the bonuses were inflated in to permit kickbacks).

When this long-term, six-figure, complex scheme is compared against a more traditional, one-time, small-scale rebate situation, which is the more “nefarious”? All successful scams are seductive. This scheme was very seductive, and by design. As the defense emphasizes, the

plaintiff “had no reason to object to receiving my bonus” and was happy with seemingly earning “a nice bonus.” *See Brief of Respondents*, p.11. He didn’t suspect that the defendants were going to take advantage of him, and that’s exactly what the defendants wanted. The defendants profited at his expense. They did so by shuffling a portion of his bonuses between bank accounts and then right back to themselves. That is a “rebate” however one looks at it.

**B.9. The Defense Purposefully Misconstrues the Plaintiff’s “Smoke-and-Mirrors” Reference.**

At pages 22-23, the defense attempts to respond to the plaintiff’s characterization of the individual components of this rebate scheme as “smoke-and-mirrors”. *See Brief of Respondents*, pp.22-23. However, the defense either hasn’t actually read the plaintiff’s opening brief or has decided to intentionally misconstrue what the plaintiff said.

The plaintiff is not arguing that the defendants were attempting to disguise the loans themselves, as the defense claims. Rather, the plaintiff’s argument is that the defendants attempted to disguise the broader, underlying economic reality of the situation, namely that rebates were occurring. The supposed “loans” were one component, but in-and-of-themselves the loans were not what the defendants were trying to hide. As the defense acknowledges, the stated purpose of the LLC was to “loan”

money to the defendants. Rather, the defendants were trying to hide the fact that they were reaping huge kickbacks. The argument is explicitly stated at pages 33-34 of the *Brief of Appellant* as follows:

The LLC was nothing but smoke-and-mirrors. Mr. Campbell is a savvy businessman. He must've known that if he simply kept the funds, without laundering them somehow, the transactions would've looked like classic rebates. So, he devised the idea of setting up a captive LLC and characterizing the transactions as "loans". This camouflaged things. But, at the end of the day, the reality was the same. The money flowed back to Mr. Campbell – that is the critical point.

*See Brief of Appellant*, pp.33-34. The defendants cannot deny this reality.

**B.10. The Bonuses Were Paid “By Reason of Employment”, and that Makes them “Wages”.**

At page 27, the defense accuses the plaintiff of “attempt[ing] to circumvent” the issue of whether the subject bonuses constitute “wages” under Washington law. *See Brief of Respondents*, p.27. This is manifestly false. In truth, the plaintiff devotes three pages of his opening brief to the subject. *See Brief of Appellant*, pp.26-29.

Then, at page 28, the defense argues that the plaintiff “places undue emphasis on the fact that he bonuses he received were ‘paid by reason of employment’”, which the defense claims “is not the critical inquiry”. *See Brief of Respondent*, p.28, n.3. Both contentions are false.

The *Flower* decision, which was a WRA case about bonuses, directly informs that Washington law defines “wages” as any monies due

or paid “by reason of employment”. See *Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 13, 34-35, 111 P.3d 1192 (2005) (“There is no doubt that the bonus was paid ‘by reason of employment.’ It was therefore wages.”). The defense obviously wishes that *Flower* didn’t say this, but it does. The *Flower* decision is conspicuously not cited within the *Brief of Respondents*, as though that might make it disappear. The plaintiff trusts that this court will give *Flower* its due weight.

Rather than *Flower*, the defense holds up the *Byrne* decision as the supposedly end-all-be-all as to what constitutes “wages”. See *Brief of Respondents*, pp.27-28. Admittedly, *Byrne* was rendered by this court, whereas *Flower* was rendered by Division Three. Nevertheless, a cursory review of *Byrne* readily shows that it has little, if any, application to the instant case. First, *Byrne* is so factually distinguishable as to be inapposite. This was explained within the plaintiff’s opening brief. See *Brief of Appellant*, pp.28-29. The defense makes no effort to show that this case is somehow factually similar to *Byrne*.

Second, the defense grossly misstates a key factual aspect of *Byrne*. The defense suggests that the bonus at issue in *Byrne* came from the employer, by writing the following: “*Byrne* appropriately stands for the proposition that an employer is not subject to civil liability under the Wage Rebate Act when it withholds or retakes gratuities it was never

obligated to pay the employee in the first place”. See *Brief of Respondents*, p.31. Of course, the bonus in *Byrne* (a television won via a raffle) actually came from an outside third party, rather than from the employer directly. See *Byrne v. Courtesy Ford*, 108 Wn. App. 683, 685, 32 P.3d 307 (2001); *Brief of Appellant*, p.29.

Most notably, the defense’s suggestion that *Byrne* says that an “implied contract” is always necessary is both a self-serving overread of the case, and an illogical one to boot. The instant case concerns an actual “contract” (or, more accurately, two of them, although they violate the WRA). By what rationale would it make sense to permit a worker to sue under the WRA based on an implied contract, but not based on an actual one? The defense offers no explanation.

The defense desperately wants this court to focus on the limited “discretion” that existed as to Mr. LaCoursiere’s bonuses. They want the court to ignore the economic reality of what happened to the money, and instead to rule based upon what could’ve happened but didn’t. In this regard, the defense stresses that they could’ve decided to not issue any bonuses for 2005-2007. See *Brief of Respondents*, pp.28-29. Sure, that could’ve happened, but it didn’t. Just the same, the defense could’ve decided to fire the plaintiff without ever promoting him, such that he never would’ve been subjected to this rebate scheme. But that didn’t happen.

Surely this case should be decided based upon what actually transpired, rather than based upon hypothetical possibilities that didn't transpire.

Once each bonus was declared, all discretion ceased. The contracts don't grant any discretion to claim "rebates". Nor does chapter 49.52 purport to give that "discretion".

This case isn't about a potential, fourth bonus for 2008. The plaintiff is not trying to compel the defendants to pay a bonus that they don't want to pay. Quite the contrary, this case is about past bonuses, which the defendants willingly declared.

The defense, yet again, misconstrues the plaintiff's argument by writing, "Under [Mr.] LaCoursiere's reasoning, a sum would be transformed from a gratuity to compensation subject to the Act [at] the moment that the employer made the discretionary decision to give the gratuity to the employee." (Underscore added.) *See Brief of Respondents*, p.30. Not quite. This case isn't about the moments in time when the defendants decided to issue the bonuses – it's about the actual issuance. It's about the fact that the defendants reaped substantial kickbacks. It's a question of where the money went, not the "decision" as to whether or not to declare the bonuses in the first place. This court should follow the money, because that shows that rebates occurred.

If the case-specific *Byrne* decision about a one-time, dumb luck raffle prize of limited value is somehow extrapolated to bar the plaintiff's claim in this case, that will be an unfortunate and unexpected result.

When these bonuses were declared and paid, they were in all ways treated as wages. They were treated as wages for tax purposes. They were labeled as "compensation" under the contract, and specific commission percentages were established for each housing project. *See* CP 291, 297-298. It wasn't until after the lawsuit was filed that the defendants suddenly shifted course and tried to argue that the bonuses were somehow not "wages". That effort falls flat under *Flower* and *Byrne* alike.

**B.11. The Plaintiff Did Not "Knowingly Submit to Violations".**

The defendants' first argument as to the "knowing submission" exception is based on the *Coulumbe* decision. *See Brief of Respondents*, pp.32-33 (citing and arguing *Coulumbe v. Total Rental Care Holdings, Inc.*, 298 F. App'x. 617, 619 (9<sup>th</sup> Cir. 2008)). Of course, *Coulumbe* is not binding precedent on this court because it is federal decision. Moreover, *Coulumbe* is readily distinguishable. As the decision explicitly recites, the plaintiff in *Coulumbe* directly "testified that he knowingly and voluntarily relinquished" the at-issue compensation, namely stock options. *See Coulumbe v. Total Rental*, 298 F. App'x at 618. He received the stock

options and thereafter decided to return them to his employer. This two-step process is totally unlike what happened in the instant case, and the defense knows it. *See e.g., Brief of Respondents*, p.40.

The defense also relies on the *Chelius* and *Durand* decisions. *See Brief of Respondents*, p.38 (citing *Chelius v. Questar Microsys., Inc.*, 107 Wn. App. 678, 682, 27 P.3d 681 (2001); *Durand v. HIMC Corp.*, 151 Wn. App. 818, 836-837, 214 P.3d 189 (2009)). What the defense conveniently fails to mention, however, is that the worker prevailed in both of the cases. “Knowing submission” was not found in either case. The defense cannot point to any decision wherein a worker was found to have “knowingly submitted to violations”, and certainly none wherein this sort of convoluted, delayed-effect scheme was upheld via summary judgment.

Equally curious is the defendants’ contention that “knowing submission involves a lower threshold than voluntary agreement.” *See Brief of Respondents*, p.37, n.8. No argument is advanced on the point; the defense just makes the assertion and moves on. However, “knowledge” or “knowingness” is a gauge of the actor’s substantive understanding, whereas “voluntariness” is only a gauge of volition. *See Brief of Appellant*, p.30. These are very distinct inquiries, and the Legislature understands the difference. RCW 49.52.070 poses an inquiry of what the employee knew, namely whether he “knowingly submitted to

such violations.” See RCW 49.52.070. It does not, by contrast, pose the lesser inquiry of whether the he acted voluntarily.

The defense argues that “[Mr.] LaCoursiere has failed to cite any legal authority requiring this additional level of knowledge”, specifically that he employment must know that he’s submitting to violations. See *Brief of Respondent*, p.37. To the contrary, the authority is RCW 49.52.070 itself. The statute says “knowingly” and then modifies that mental state by the passage “submitted to such violations.” Thus, to lose his rights under the WRA, the employee must know that he’s submitting to violations. By contrast, the defense argues that the worker only has to know that he’s submitting to something, but he supposedly does not have to know “that the rebate to which he submitted was unlawful”. See *Brief of Respondents*, p.37. Such a construction would certainly better serve employers’ interests, at least the unscrupulous ones. But it would contradict Washington’s status as “a pioneer in assuring payment of wages due an employee” (see *Champagne*, 163 Wn.2d at 76) as well as the prohibition against letting employers use a “device calculated to effect a rebate” (see *State v Carter*, 18 Wn.2d at 621).

“Exceptions for remedial legislation . . . are narrowly construed, and are applied only to situations that are plainly and unmistakably consistent with the terms and spirit of the legislation.” *Strain v. Travel*

*West*, 117 Wn. App. at 254. The instant case does not “unmistakably” fit the “knowingly submitted to such violations” exception of RCW 49.52.070. If it did, the defense wouldn’t need 50 pages to make its case, and the defense wouldn’t resort to violating ER 408.

**B.12. The Defense Continues to Argue Semantics.**

At page 41, the defense argues that it’s supposedly irrelevant whether the worker actually receives his wages in full. Building from there, the defense plays words games by arguing that if Mr. LaCoursiere didn’t actually receive all of the funds, then no “rebate” could have occurred. *See Brief of Respondent*, p.41, n.9. This is just semantics. Washington law plainly informs that the technicalities don’t really matter. What matters is the underlying purpose of the WRA. It’s a “protective measure”, not a strict corrupt practices act, it’s “liberally construed” in the worker’s favor, and employers are not allowed to use a “device calculated to effect a rebate”. *State v. Carter*, 18 Wn.2d at 621. This court should examine the reality of what happened, setting aside mere semantics.

**B.13. Champagne is the Most On-Point Precedent.**

The defense suggests that the *Champagne* decision, by the Washington Supreme Court, has no relevance whatsoever because it concerned a collective bargaining contract. In this regard, the defense

argues that “a collective bargaining agreement does not reflect an individual employee’s personal choices.” *See Brief of Respondents*, p.39.

To the contrary, an individual who chooses to join a union, and/or who chooses to remain part of the union, most certainly has made a “personal choice”. It may be true that each union worker does not individually negotiate his contract, but once the worker joins the union, the contract undoubtedly “directly involves the employee” and the employee undoubtedly has “individually accept[ed] – or reject[ed] – the terms of the agreement”, which are the supposed distinctions that the defense proffers. *See Brief of Respondents*, pp.39-40.

More generally, *Champagne* is informative because it’s the most on-point decision to the operative question in this case, namely whether employers can prospectively circumvent the WRA “by drafting a conflicting contract provision”. *See Brief of Appellant*, p.26 (citing and arguing *Champagne*, 163 Wn.2d at 74). If Washington truly is a “pioneer in assuring payment of wages due an employee” and there truly is a “strong public policy to protect workers’ rights” (as stated within *Champagne*, 163 Wn.2d at 76), the same conclusion ought to apply to all settings. The WRA was designed to protect workers, not to test the creative of unscrupulous employers. Non-union employers shouldn’t have any easier time circumventing the law.

**B.14. At Worst, this Case should be Remanded for Trial.**

The plaintiff persists that he, not the defense, was entitled to summary judgment. However, in the event that this court might be reluctant to decide this case as a matter of law, the plaintiff submits that this case should be remanded for trial. This case presents an issue of first impression, namely whether an employer can prospectively negate the WRA by drafting a conflicting contract provision. This contract does not include any express waivers of the WRA. At most, the waiver would presumably arise by how the contract was carried out, years after it was put in place. As summarized above and throughout, this entire scheme was designed to be obscure and to engender false faith. Against that backdrop, the plaintiff shouldn't be denied of a trial.

**B.15. Employers Are Never Entitled to Fees under the WRA.**

Finally, the defendants' spends 8 pages trying to convert the one-way, employee-oriented attorneys' fees standard of the WRA into a two-way, employer-oriented rule. *See Brief of Respondents*, pp.42-50. But they don't offer any actual WRA authority on the issue, which is telling. The plaintiff's only claim is for violation of the WRA; he did not sue for breach of contract. The Legislature contemplated that there might be an underlying contract between the parties. *See* RCW 49.52.050(2) (referring to "any statute, ordinance, or contract", underscore added). Yet, as to

attorneys' fees, the Legislature enacted a one-way rule. *See* RCW 49.52.070. It's as simple as that. The WRA is a remedial statute for workers, and there has never been a WRA case wherein the employers recovered attorneys' fees.

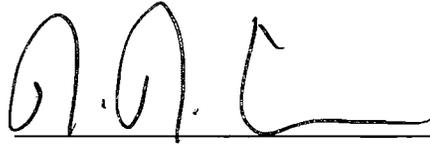
### **C. CONCLUSION**

Either this scheme will be rejected as a misguided attempt to circumvent the WRA, or it's going to serve as a blueprint for other employers to take advantage of their workers, if they choose. It's already been used to effectuate \$12.2 million of rebates. If this court judicially ratifies the scheme, there's no telling how many millions (or, conceivably, billions) will be taken from workers by unscrupulous employers.

These defendants tried to outsmart the law. They want the WRA to be twisted into somehow providing protections for employers, rather than workers. This scheme is nothing but a sophisticated "device calculated to effect a rebate". Employers aren't supposed to mess around with their workers' wages; they aren't supposed to play accounting gimmicks. "Public policy" is supposed to protect workers. Employers are supposed to be "punished" when they impose rebate/kickback schemes.

This court should (1) reverse the lower decision, and (2) should direct entry of summary judgment in the plaintiff's favor.

DATED this 23<sup>rd</sup> day of September, 2011.

A handwritten signature in black ink, appearing to read 'D. R. CASE', written over a horizontal line.

D. R. (ROB) CASE (WSBA #34313)  
Larson Berg & Perkins PLLC  
Attorneys for Appellant

DECLARATION OF SERVICE

I, D. R. (ROB) CASE, do hereby declare and state: On this day,

I have hand-delivered copies of this document to the following:

Court of Appeals, Division One (original and one copy)  
Clerk's Office  
600 University Street  
Seattle, WA 98101-4170

James M. Shore (one copy)  
Stoel Rives LLP  
600 University Street, Suite 3600  
Seattle, WA 98101

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

SIGNED at Yakima, Washington, on September 23<sup>rd</sup>, 2011.



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D. R. (ROB) CASE