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

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**PICO COMPUTING INC. & DR. ROBERT TROUT, Appellants**

**vs.**

**JASON ("GABRIEL") FELIX, Respondent**

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**BRIEF OF RESPONDENT**

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FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 JUN 25 PM 2:14

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## INTRODUCTION

### A. Background of Case

Respondent Gabriel Felix wants nothing more than what any reasonable person would want: he wants to be paid \$32,000 in back salary and \$200,000 in stock that he earned while working for former employer, Appellant Pico Computing inc. Inc.

Although Respondent's entitlement to such compensation is clear, the founder and president of the company, Appellant Dr. Robert Trout, steadfastly refuses to pay anything. As a result, Respondent has been forced to bring two separate lawsuits, each of which are currently pending before this Court:

- **Cause No. 66303-8-I**. Dr. Trout refused to provide any compensation for nearly \$200,000 of company stock that Respondent purchased while working for the company. Dr. Trout refused to provide compensation based upon his representation that a highly esteemed appraiser, William Hanlin, CPA, had conducted an "independent appraisal" of the stock and determined that it was worthless (value of "\$0.00" per share). These representations were later proven to be outright falsehoods. As Mr. Hanlin testified under oath, no such appraisal had ever been conducted.

- **Present Case (No. 67226-6)**. Although Dr. Trout has repeatedly admitted that Respondent is owed least \$30,105 in unpaid wages, he steadfastly refuses pay the wages based upon denials and litigation conduct which, as shown below, can be fairly characterized as both baffling and bizarre.

#### **B. Baffling Resistance to Pay Undisputed Wages**

The following is a short summary of the facts which, as shown elsewhere in this brief, are fully supported by citations to the record. See Statement of the Case, *infra*, p. 8.

Respondent worked as an electrical engineer for Appellants from 2004 to 2007, and was paid a salary of \$90,000 per year.

When Respondent terminated his employment, Dr. Trout unambiguously agreed in writing that Respondent was owed \$37,778 for unpaid portions of his salary. Dr. Trout also promised to pay this amount when the company had “sufficient financial resources.”

After it became clear that the company was enjoying handsome profits and was doing so well as to be featured in Forbes Magazine, Dr. Trout abruptly reversed himself and denied that any back salary was owed. As a result, Respondent was forced to file suit.

Thereafter, Dr. Trout continued to assert that nothing was owed. His steadfast denial that anything was owed persisted from the time the lawsuit was initiated until the late stages of trial.

However, at the late stages of trial, Dr. Trout once again suddenly reversed himself by testifying that there never had been “any question” that Respondent was entitled to receive at least **\$30,105** in unpaid salary.

Dr. Trout also testified that the only reason he had not paid the \$30,105 was that he and Respondent had never reached agreement as to additional salary or stock payments that were in question.

To emphasize to the trial court that he was acting in “good faith,” Dr. Trout voluntarily deposited cash of \$31,760 into the registry of the clerk for payment to Respondent.

Thereafter, Dr. Trout again completely reversed himself.

Not only did he deny that anything was owed, he also moved (unsuccessfully) to have the registry funds returned to him, stating that Respondent “has no right to the funds deposited in the registry of the Court.”

### **C. Summary of Why Trial Court Decision Must Be Affirmed**

As shown herein, the current appeal has no merit whatsoever. The decision of the trial court must be affirmed. Pursuant to RAP 18.1, this Court should award additional attorney fees to Respondent for the time spent in responding to this appeal.

## II.

### STATEMENT OF THE CASE

#### A. Statement of Facts and Procedure

It is well established that any unchallenged findings of fact of a trial court will become verities upon appeal. *Contested Election of Schlosser*, 140 Wn.2d 368, 385, 998 P.2d 818 (2000).

None of the following findings of fact have challenged by Appellants, and therefore are conclusively established for purposes of this appeal:

##### 1. Parties

Appellant Pico Computing Inc. is a company that designs, manufactures and sells computer hardware and code breaking systems. FOF at p. 2, lines 9-12 (CP 416). The company was founded in 2004 by Dr. Robert Trout, who has always been the company's president. Id at lines 14-18 (CP 416).

Respondent Gabriel Felix is an electrical engineer. In 2004, he contracted with Dr. Trout to work as a full time employee for Pico Computing, at the salary rate of \$90,000 per year. FOF at p. 2, lines 1-3 (CP 417); p. 5 lines 3-4 (CP 419).

**2. Respondent's Right to Choose Form of Salary (Cash or Stock)**

When he joined Pico Computing, Respondent was verbally told by Dr. Trout that he could choose to receive any portion of his salary in the form of stock, cash wages, or any combination thereof. FOF at p. 5 lines 8-20 (CP 419).

This was later confirmed by a written Shareholder Agreement that Respondent and other employees were required to sign. Id at CP 419. The Shareholder Agreement is set forth in Trial Exhibit 8. It provides:

*2.1.1. Option of an Employee to Purchase Shares. Any employee of the Corporation with at least one year of service or whose first day of employment was before Nov 5<sup>th</sup>, 2005, shall be eligible to purchase shares of the Corporation . . . .*

*2.1.2. An employee may choose to defer all or part of his salary in expectation of purchasing stock in the Corporation upon meeting the one year requirement.*

FOF at p. 5, lines 15-21 (CP 419); Trial Exhibit 8.

**3. Respondent's Initial Decision to Take Most of Salary in the Form of Stock**

When Respondent first started working for Pico Computing, he elected to take all his salary in the form of stock. FOF at p. 6, lines 8-9 (CP 420).

Later, in 2006, Plaintiff elected to take approximately one half of his salary in stock, and the other half in wages. FOF at p. 6, lines 11-13 (CP 420). All cash salary payments that were ever made to Respondent were

reported to the IRS as “wages” via IRS form W-2. FOF at p. 6, lines 11-13 (CP 420).

4. **Decision in January, 2007, to Take All Salary in Form of Cash Wages**

In early January, 2007, Respondent orally advised Dr. Trout that henceforth, all of his compensation should be paid in the form of wages, and nothing in stock. FOF at p. 6, lines 15-19 (CP 420).

On February 7, 2007, Respondent gave Dr. Trout formal written notice of this decision. FOF at p. 6, lines 16-19 (420). The notice stated:

This letter is to certify that I have requested the following adjustments to my compensation:

Stock: 0%  
Salary: 100%

The salary is to stay the same: 90K/Year

Thank you  
Jason

Trial Exhibit 10.

5. **Agreement to Defer Portion of Wages**

A few weeks after providing Dr. Trout with his written notice of election, Respondent provided Dr. Trout a written letter that gave the company permission to delay payment of up to one-half of the \$90,000 salary, with the understanding that the deferred portion would be paid when

the company had “sufficient financial resources.” FOF at p. 6, lines 21-30

(CP 420). The letter stated:

To Whom It May Concern:

This letter gives you permission to defer up to half of my bi-monthly salary until sufficient financial resources are available to make full payment. This is not an authorization to trade salary for stock.

Signed  
Jason Felix

Trial Exhibit 11.

When giving such permission, Respondent **did not** intend to relinquish or waive his right to payment of his full salary. FOF at p. 6, lines 27-30 (CP 420). Instead, his only intent was to accommodate the cash flow needs of the company by temporarily agreeing to delay payment until the company's financial situation improved. *Id.*<sup>1</sup>

**6. Email Admission By Dr. Trout that Respondent was Owed Gross Wages of \$37,778**

Respondent terminated his employment in December, 2007. FOF at p. 3, lines 3-4 (CP 417). Subsequently, Respondent and Dr. Trout exchanged emails in an effort to ascertain the exact amount of the deferred salary that was owed. Trial Exhibit 2.

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<sup>1</sup> Appellants have abandoned their earlier efforts to use the financial status of Pico Computing as a defense to double damages liability under RCW 49.52.070. Since Appellants do not contest the trial court’s rejection of this defenses, it will not be discussed further.

Dr. Trout's emails and calculations are set forth in Trial Exhibit 2.

As will be noted, Dr. Trout calculated that since Respondent had worked 25 out of the 26 scheduled pay periods in 2007, at the salary rate of \$90,000 per year, Respondent's gross salary should have been \$86,538. Id.

However, since Respondent had only been paid \$48,750, the company owed him **\$37,778**. Id.

**7. Ample Financial Resources to Pay**

Dr. Trout admitted at trial there were ample financial resources to pay the back salary in full. RP 338, lines 5-13. The company was doing so well as to be featured in a Forbes Magazine article. Trial Exhibit 12.

**8. Intentional Failure to Pay Wages**

At no time did Dr. Trout ever pay the wages that he admitted were due. This failure was deliberate, and not due to accident or inadvertence. FOF p. 9, lines 1-4 (CP 423).

**9. Respondent Forced to Bring Suit**

On September 3, 2009, Respondent filed suit to recover the unpaid wages. See Complaint, CP 1-6. The lawsuit contained three separate causes of action: 1) common law breach of contract; 2) Violation of Washington's Wage Payment Act, RCW 49.48, and 3) Violation of Washington's Wage Rebate Act, RCW 49.52. Id.

**10. Reversal of Position By Dr. Trout and Denial that Anything Was Owed**

After suit was filed, Dr. Trout reversed his position and denied that **anything** was owed. Answer, CP 7-12. Dr. Trout also moved dismiss Respondent's entire claim, with prejudice. Def. Motion For Sum. Judgment, CP 13-30. The primary theory that Dr. Trout relied upon was that by demanding payment of his salary, Respondent had "breached his fiduciary duty" to the company and created an impermissible "conflict of interest." Id at CP 20-25. Dr. Trout raised this same defense at trial. Trial Brief of Defendants, p. 4-11 (CP 309-310).

**11. Another Reversal by Dr. Trout: Trial Admission that Undisputed Wages Were Owed of at Least \$30,105.**

During his case in chief, Dr. Trout once again suddenly reversed himself by testifying that Respondent **was owed** at least **\$30,105** in gross unpaid salary, and that there never had been "any question" about this. RP 323, lines 4-7; RP 337, lines 4-17; RP 430, lines 5-21.

Dr. Trout also testified that he had always known that at the minimum, Respondent was entitled to compensation for the eight and one-half month interval between March 15, 2007 and the end of the calendar year. RP3, 323, lines 4-7; RP 337, lines 4-17; RP 430, lines 5-21.

Further, he testified that there never had been “any argument” about the formula for computing this amount, nor had there ever been any argument about the “basis on which it was paid.” RP 337, lines 8-10.

**12. Calculation On Court’s Easel Board By Dr. Trout: \$30,105**

To illustrate his testimony, Dr. Trout stepped up to the court’s easel board and provided handwritten calculations to show how he arrived at his figure. RP 388, line 2 to 389, line 23. The calculations are set forth in Trial Exhibit 25.

Based upon his assertion that a “start date” of March 16, 2007 should be used, Dr. Trout calculated that since the unpaid salary was subject to social security withholding of \$3,139, Respondent’s net wages, after deduction for social security, should have been \$26,966. Trial Exhibit 25; RP 337, lines 4-7; RP 430, lines 4-21; Brief of Appellant, p. 16. This translates to gross wages (before social security withholding) of **\$30,105**. FOF at p. 8, 10-11 (CP 422).

**13. Reason Given For Non-Payment**

Dr. Trout testified that although he initially failed to pay due the wages due to a lack of financial resources, this later became irrelevant because the company **did** develop sufficient financial resources to pay in full. RP 338, 5-12. Accordingly, Dr. Trout testified that the **only reason** such payment had not been made was that he and Respondent had been

unable to reach agreement on whether the “start date” for computing the wages should have been March 16, 2007, or an earlier date. RP 337 lines 14-17; RP 338, lines 1-4; RP 390, lines 3-12.

According to Dr. Trout, had an agreement been reached as to the proper “start date,” he would have been “happy” to pay in full. RP 338, lines 10-12.

**14. Deposit of Undisputed Wages Into Registry of the Court for Payment to Respondent**

In an effort to demonstrate to the trial court that he had acted in good faith when withholding the wages, Dr. Trout deposited cash of \$31,760 into the registry of the court for disbursement to Respondent. According to pleadings filed by Dr. Trout’s lawyer, the purpose of this deposit was to show the court that “a bona fide dispute existed regarding the wages due.” Defendant’s Motion to Release Funds, p. 1, lines 17, 18 (CP xx).

**15. Another Reversal: Subsequent Denial that Anything Was Owed**

After trial concluded, Dr. Trout once again reversed himself and denied that anything was owed. Not only did he file the present appeal, but he also moved (unsuccessfully) to have the registry funds returned to him. See: Motion to Disburse Funds From Registry of Court, (CP x). According to the pleadings filed by his lawyer, Respondent had “no right to the funds deposited in the registry of the Court.” Id at line 9 (CP x).

**16. Express and Unchallenged Findings By Trial Court That Dr. Trout's Testimony Was False.**

The trial court **did not** believe that the explanations given by Dr. Trout concerning his reasons for non-payment were truthful. It therefore entered written findings that found, as a matter of fact, that Dr. Trout **did not** withhold the wages for the reason that he claimed, i.e., that there was “uncertainty” as to the correct start date or the total amount owed. As stated in Finding of Fact 37 and 38:

- a. *[T]he Court does not find that Dr. Trout's testimony in this area was factually credible. Stated differently, the Court declines to find, as a matter of fact, that Dr. Trout refused to pay the salary on the grounds that he claimed at trial. The Court's conclusion in this regard is based upon the pleadings and oral motions submitted in this case, and based upon the demeanor and testimony that was observed at trial.*
- b. *While the Court declines to make factual findings concerning Defendants' true reasons for non-payment, the reasons given by Dr. Trout were not credible. Accordingly, it declines to find, as a matter of fact, that Dr. Trout failed to make payment for the reasons he cited at trial*

FOF at p. 9-10 (CP 423-424).

**B. False Statements Of Fact In Appellants' Brief**

Appellants' brief contain a number of false and unsupported allegations of fact:

**1. “Respondent Never Wanted to Change His Compensation to 100% Salary”**

Appellants’ brief contains the absurdly false statement that “[a]t no point did Felix actually want to change his compensation to 100% salary.” Brief of Appellants, p. 25. Appellants claim that when Respondent agreed to defer his salary, he **did not** want the unpaid portion of the salary to be paid in the form of cash. Instead, he wanted the payment to be made in the form of a “loan” for “stock options.” *Id* at 25-26.

There is not an iota of evidence – documentary or testimonial – to even remotely support this assertion.

To the contrary, the record shows without contradiction that the **only** form of compensation ever considered by the parties was cash. “Stock options” were **NEVER** considered as a form of compensation. This is established not only by the documentary evidence, but also by the testimony of Dr. Trout. See Statement of Facts, *supra*.

**2. “There Was a Dispute As to Whether the Compensation Qualified as ‘Wages’”**

Appellants also falsely claim that Dr. Trout withheld the compensation because there was a “bona fide” dispute as to whether the compensation qualified as “wages.” See Brief of Appellant, p. 33.

There is absolutely no documentary evidence or testimony in the record to support this assertion. To the contrary, Dr. Trout testified that there were only **two** reasons why he withheld the wages:

1. Initially, the company did not have “sufficient financial resources” to pay; and
2. Later, he withheld the amount due to uncertainty as to the correct “start date” and/or total amount due.

See Statement of Facts, supra. p. 18.

Moreover, the undisputed evidence shows that the parties always assumed without question that the unpaid salary **was** wages, and **never** questioned otherwise. This is shown not only by Dr. Trout’s testimony that the unpaid salary was subject to social security withholding of \$3,139,<sup>2</sup> but also by the uncontested finding of fact that all cash salary payments were reported to the IRS via Wage Form W-2.<sup>3</sup>

**3. “The Election to Receive the Salary in Cash Wages Had to Be ‘Approved’ by Dr. Trout”**

Appellants also falsely claim that Respondent’s choice to receive all his salary in cash payments could not be effective until it was “approved” by Dr. Trout, which they claim did not occur until March 16, 2007. Brief of Appellant, RP 12; 15. This is also a fiction.

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<sup>2</sup> See Trial Exhibit 25; RP 389, lines 4-6.

<sup>3</sup> FOF at p. 6, lines 11-13 (CP 420).

There is no evidence to support the claim that “approval” was required. To the contrary, the record shows the opposite. The record shows that the choice of whether to be paid in the form of cash or stock was **left entirely to the employee**. The Shareholder Agreement (Trial Exhibit 8) plainly states:

*2.1.3. An employee may choose to defer all or part of his salary in expectation of purchasing stock in the Corporation upon meeting the one year requirement.*

Nowhere does the Shareholder Agreement state or imply that “approval” was required. *Id.*

Although Dr. Trout claimed at trial that the Shareholder Agreement **did** require company approval, he was unable on cross examination to point to **any** provision of the Shareholder Agreement to support this claim. RP 355, line 24 to RP 364, line 10. Indeed, during cross-examination he was repeatedly asked to reveal which provisions contained such a requirement. Dr. Trout’s only response was to provide long and rambling answers that were incomprehensible and clearly designed to avoid the questions. *Id.*

#### ***4. “Trial Exhibit 2 Was Generated During “Settlement” Negotiations”***

Appellants also falsely claim that the string of emails set forth in Trial Exhibit 2 were generated in the context of settlement negotiations.

Brief of Appellants, p.p. 40-41. There is not an iota of evidence in the record to support this assertion.

There was no testimony to support this assertion. Neither party ever testified that Trial Exhibit 2 was generated as part of compromise or settlement negotiations.

Likewise, there is no documentary evidence to support this assertion. To the contrary, the facial language of the emails in Trial Exhibit 2 indicate that the parties were doing nothing more than trying to ascertain how much was owed under the deferred wage agreement. As the trial court correctly pointed out, there is nothing in the exhibit which even remotely states or implies that settlement discussions were occurring. RP 42, lines 1-19.

Clearly, a person does not engage in “settlement discussions” by merely contacting a debtor/creditor for the purpose of ascertaining the amount due under a contract. This is exactly the situation with Trial Exhibit 2. The parties were ascertaining the amount that was owed. They were not engaging in “settlement” negotiations. The trial court was correct in admitting the document.

It should also be noted that Appellant’s claim that Trial Exhibit 2 was generated during settlement discussions is internally contradicted by their own briefing. As Appellants’ brief correctly recognizes, at no time did Respondent ever consider accepting anything less than the full amount of

wages that he believed he was entitled to. He **was not** willing to negotiate on this. See Brief of Appellants (and quoted testimony therein) pp. 12, 33.

**5. “Dr. Trout Offered to Settle the Wage Claim for \$39,000”**

Appellants mislead the court by stating that commencing as early as one week after Respondent terminated his employment, Dr. Trout made a made a good faith effort to ascertain and settle the company’s wage obligations. According to Appellants, he offered “\$39,020” for this purpose. Brief of Appellants, pp. 1, 20, 34, 51.

These assertions are downright falsehoods.

As the record shows, Dr. Trout **NEVER** tendered an any offer to settle the wages that he knew were due.

To the contrary, the **only attempt** ever made by Dr. Trout to “settle” the case was an extraordinarily greedy and stingy attempt to leverage a settlement of **BOTH** the wage claim **AND** the stock claim for the miserly sum of \$39,000 --- for both cases. RP 443, lines 7-13. Later, Dr. Trout lowered this same “offer” to a paltry \$20,000, which was far below what Dr. Trout knew was owed for the wage claim alone. See: Trial Exhibit 14; Trial Exhibit 2.

**C. RULINGS BY COURT**

At the conclusion of trial, the court ruled as follows:

**1. Ruling As to Goss Salary Due: \$32,884.42**

The trial court ruled that the amount of gross unpaid salary was **\$32,884.42.**<sup>4</sup> FOF 29-30 (CP 421-422). This figure is only \$2,779.42 more than the figure that Dr. Trout testified was owed (\$30,105). See Statement of Facts, supra, p. 13.

In making its calculations, the trial court used the same method that Dr. Trout used when testifying at trial. FOF 30-32 (CP 421-422). There were only three minor differences between the trial court's calculations and Dr. Trout's calculations:

- a. "Start" Date. The "start date" for Dr. Trout's calculations was the date that he claimed the notice of election was "approved" (March 16, 2007). In contrast, the trial court used the date that Respondent's written notice of election was delivered and received by Dr. Trout (February 7, 2007);
- b. Deduction of Social Security Taxes. Dr. Trout's calculation was based upon Respondent's **net** entitlement, after deduction of social security taxes of \$3,139. The trial court's calculation was based upon Respondent's **gross** entitlement, before social security withholding;
- c. Computation of Interval. Dr. Trout's computation was based upon the number of months that had elapsed during the relevant interval. The trial court's calculations were based upon the actual number of pay periods that had existed during the interval.

FOF at CP 422.

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<sup>4</sup> The measure of damages in wage cases is the **gross** amount of compensation that is due before deduction for social security taxes. *Morgan v. Kingen*, 141 Wn. Ap. 143, 161, 169 P.3d 487 (2007).

## **2. Ruling As to Liability of Pico Computing**

The trial court entered judgment against Pico Computing for the amount of the unpaid wages that it found was due, which as previously shown, was **\$32,884.42**. COL p. 10 (CP 424-425).

The judgment against Pico Computing was entered under two different theories of liability:

1. Common law breach of contract. By failing to pay the wages, Pico Computing had breached the terms of its oral and written contract of employment with Respondent, and
2. Violation of RCW 49.48.010. By failing to pay the wages by the next scheduled pay period after termination, Pico Computing had violated Washington's Wage Payment Act, RCW 49.48.

COL pp. 10-12 (CP 424-425).

## **3. Ruling of "Double Damages" Liability Against Both Pico Computing and Dr. Trout**

RCW 49.52.050 and RCW 49.52.070 provide for the mandatory assessment of "double damages" against any employer, or any agent or officer of an employer, who intentionally withholds any part of an employee's wages without a bona fide reason for doing so.

Since Dr. Trout admitted at trial that he had intentionally withheld \$30,105 worth of wages that were not in dispute, the trial court imposed double damages of twice this amount, which was **\$60,210**. (Calculation:  $\$30,105 \times 2 = \$60,210$ ). COL, pp. 12-13 (CP 424-425). This assessment was imposed against both Dr. Trout and Pico Computing.

**4. Award of Attorney Fees**

Pursuant to RCW 49.52.070 and RCW 49.48.030, the Court ruled that Respondent was entitled to recover reasonable attorney fees of **\$77,525**. Order on Motion for Attorney Fees, p. 3, lines 12-16 (**CP 598**).

In moving for attorney fees, Respondent requested compensation for 228.75 hours, at the rate of \$350 per hour. The trial court granted this request, but reduced the hours awarded to 221.5 hours. Order and Findings for Attorney Fees, p. 3, lines 12-16, (**CP 598**). Thus, the total hourly award for fees was \$77,525. Id.

**III.**

**ARGUMENT**

**A. Appellant’s Argument that the Unpaid Compensation Was not “Wages” is Clearly Without Merit**

Appellants’ argument that the unpaid salary amount was not “wages” is utterly bereft of legal and factual merit.

Under Washington law, “wage” is broadly defined to mean any “compensation due to an employee by reason of employment.” *McGinnity v. Auto Nation*, 149 Wn.App. 277, 284, 202 P.3d 1009 (2009); *Dice v. City of Montesano*, 131 Wn. App. 675, 689, 128 P.3d 1253 (2006). See Also: RCW 49.46.010(2); RCW 49.48.082(8).

Consistent with this definition, if there is an agreement that an employee will receive any particular item of compensation in exchange for

work, then such item will constitute a “wage.” *Byrne v. Courtesy Ford*, 108 Wn. App. 683, 689, 32 P.3d (2001). The item does not have to be in monetary form. Under the right circumstances, even a television set can qualify as a “wage.” *Byrne*, supra, 108 Wn. App. at 689.<sup>5</sup>

Here, Dr. Trout unequivocally admitted that Respondent was entitled to receive at least \$30,105 for his work with Pico Computing. See Statement of Facts, supra, p. 13. He also admitted that the compensation was subject to social security withholding. *Id* at p. 14. There was no dispute that all cash payments to employees were reported to the IRS via Wage Form W-2. *Id* at p. 9. Under these facts, there can be no question that the unpaid salary was “wages.”

Although Appellants argue that the compensation should be characterized as a “loan” instead of wages, this argument is irrelevant. As previously shown, “wage” refers to any compensation that is earned as a result of employment. Thus, it **does not** matter whether the amount owed to Respondent is characterized as a “salary, “loan” or “kitchen sink.” In all circumstances, the result is the same: since the amount was earned by virtue of Respondent’s employment, it was a “wage.” Appellants’ argument to the contrary must be summarily dismissed.

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<sup>5</sup> “Wages” do not just include present or future payments, but also back wages. *Allstot v. Edwards*, 114 Wn. App. 625, 628, 60 P.3d 601 (2002).

**B. Appellants' Argument That There Was a "Bona Fide Dispute" Has No Merit**

Appellants do not dispute that Dr. Trout intentionally withheld the undisputed sum of \$30,105. Nonetheless, they claim that the trial court erred in imposing "double damages" under RCW 49.52.070 because there was a "bona fide dispute" as to whether Pico Computing was obligated to make such payment. Brief of Appellants, p. 33.

As shown herein, this argument must be summarily stricken because it is utterly without factual or legal merit.

**1. Statement of Law & Standard of Review**

RCW 49.52.050 and RCW 49.52.070 make it unlawful for any employer or officer or agent of an employer to "willfully" withhold "any part" of wages that are due. Where willful withholding has occurred, the law imposes a mandatory civil penalty of "double damages" of "twice" the amount of wages that were withheld. RCW 49.52.070.

The test for "willfulness" is not stringent. "*Willful*" simply means that the failure to pay wages was intentional, and not due to oversight or inadvertence:

[O]ur test for "willful" failure to pay has not been stringent: the employer's refusal to pay must be volitional. Willful means "merely that the person knows what he is doing, intends to do what he is doing, and is a free agent." *Brandt*, 1 Wn. App. at 681. *Ebling v. Gove's Cove, Inc.*, 34 Wn. App. 495, 500, 663 P.2d 132 (1983) ("Under RCW 49.52.050(2), a non-payment of wages is willful when it is not a matter of mere carelessness, but

the result of knowing and intentional action." The nonpayment of wages is willful "when it is the result of a knowing and intentional action[.]" *Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 659, 717 P.2d 1371 (1986).

*Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159-160, 961 P.2d 371 (1998).

Although intentional withholding of wages will normally in the mandatory assessment of double damages, an exception exists where the employer had a "bona fide dispute" as to whether payment was due.

*Schilling*, supra, 136 Wn. 2d at 160-161. A "bona fide dispute" is a 'fairly debatable' dispute over whether an employment relationship exists, or whether all or a portion of the wages must be paid." *Schilling*, supra, 136 Wn. 2d at 161.<sup>6</sup>

The determination of whether a bona fide dispute existed is a question of fact. *Lillig v. Becton-Dickinson*, 105 Wn. 2d 653, 660, 717 P.2d 1371 (1986). Thus, a trial court's findings of fact concerning the existence or non-existence of a bona fide dispute will be upheld if any reasonable view is substantiated by the evidence, even if there may be other reasonable findings. *Id. Ebling v. Gove's Cove, Inc.*, 34 Wn. App. 495, 501, 663 P.2d 132 (1983).

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<sup>6</sup> The bankruptcy or financial inability of the employer to pay wages DOES NOT provide a "bona fide" reason for failing to make wages payments, and may not be raised as a defense to double damages liability. *Durand v. HIMC Corp.*, 151 Wn. App. 818, 834, 214 P.3d 189 (2009) (2009).

2. **The “Bona Fide Dispute” Argument Must Be Stricken**

Appellants’ argument that there was a “bona fide dispute” is precluded by the factual record in this case. The argument must be stricken.

Although Appellants claim that Dr. Trout withheld the unpaid salary because of a “dispute” as to whether it qualified as “wages,”<sup>7</sup> there is **no evidence** in the record to support this claim. There was no testimony that Dr. Trout ever withheld wages for this reason. Likewise, there is no documentary evidence to support such an assertion. This argument has no factual support in the record. It therefore must be summarily dismissed.

The same thing is true for Appellants’ other factual assertion, namely, that Dr. Trout withheld the amount due to his uncertainty as to the total amount that was due.<sup>8</sup> **This argument is also precluded by the record, and therefore must also be summarily dismissed.**

As previously shown, the trial the court entered findings of fact that explicitly found that the reasons Dr. Trout gave for failing to pay the wages false and not believable. Statement of Facts, supra, p. 16. Appellants **have not challenged this finding – indeed, they ignore it.**

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<sup>7</sup> See Brief of Appellants, p. 33.

<sup>8</sup> Brief of Appellants, p. 33.

Since unchallenged findings of fact become verities on appeal,<sup>9</sup> it is **conclusively established that Dr. Trout did not have a bona fide excuse for failing to make the wage payments.** Thus, Appellants have no ability to make an argument concerning the existence of a “bona fide” dispute. The argument is closed to them.

In addition, a trial court’s finding concerning the credibility of testimony is not reviewable. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (Holding that “[c]redibility determinations are for the trier of fact and cannot be reviewed on appeal.”). This constitutes an additional reason why Appellants’ arguments concerning the bona fide dispute defense is not reviewable.

**3. The Trial Court’s Factual Rejection of a “Bona Fide Dispute” Defense is Also Supported by Substantial Evidence**

Even if Appellants were allowed to challenge the trial court’s finding that Dr Trout’s excuses for non-payment were false, the trial court’s findings must nonetheless be sustained. This is because they were amply supported by substantial evidence:

- Dr. Trout’s claim at trial that there was uncertainty as to the amount of wages that were owed was **directly contradicted** by emails that he sent shortly after Respondent terminated his employment. In point of fact, Dr. Trout knew exactly how much was owed. See Trial Exhibit 2;

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<sup>9</sup> *Contested Election of Schlosser*, *supra*, 140 Wn.2d at 385.

- Until suit was filed, the **ONLY** reason ever raised by Dr. Trout for non-payment was that the company “could not afford” to pay. At no time did he ever claim that payment was being withheld due to uncertainty as the appropriate start date for computing the wages. See Statement of Case, supra, p. 14;
- The same was true after suit was filed. While Dr. Trout attempted to have the case dismissed on various grounds, the record shows that at no time did he ever claim that a reason for his non-payment was uncertainty as the amount due.
- The **first and ONLY time** that Dr. Trout made such an assertion was during the late stages of trial, after it had become obvious that he would not only lose the case, but was also likely to be assessed double damages for failing to make payment.

These are not the actions of an employer who, as Dr. Trout asked the trial court to believe, had a longstanding and good faith intent to pay what was owed, subject only to an uncertainty of the total amount due.

Instead, they were the actions of an employer who was willing to use any artifice to avoid his obligations. Clearly, the trial court’s factual finding that Dr. Trout testimony was not credible is supported by substantial evidence.

#### **4. The Bona Fide Dispute Defense Has No Legal Merit**

As a final matter, it should also be noted that Appellants’ argument concerning the “bona fide dispute” defense lack legal merit.

If an employer knows that **any part** of an employee’s wages is due and payable, then it **must** pay such wages. It **is not** “bona fide” for an employer to intentionally withhold undisputed wages for any reason,

including for the purpose of “strong arming” the employee into accepting discounted settlements on other claims. If an employer fails to pay any portion of an employee’s wages that that it knows are due, then the double damages provisions of RCW 49.52.050 and RCW 49.52.070 apply as a matter of law.

These conclusions are mandated by the plain language of RCW 49.52.050. As the statute makes clear, the prohibitions against wrongful withholding applies to “any part” of the employee’s wages:

Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who

(2) Willfully and with intent to deprive the employee of any part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay . . . .

Shall be guilty of a misdemeanor.

Washington Courts have consistently agreed that an employer has an absolute duty to pay any part of the employee’s wages that are not in dispute, and will be held liable for double damages if the undisputed wages are not paid. E.g., see *Durand v. HIMC Corp.*, supra, 151 Wn. App. at 818, 214 P.3d 189 (2009) (upholding double damage award for undisputed portions of wages that defendants admitted were due but did not pay).

Directly on point is *Allstot v. Edwards*, 114 Wn. App. 625, 60 P.3d 601 (2002). In that case, although the employer never disputed that it owed

at least partial wages, it made no effort to calculate or pay them. In holding that the employer could properly be assessed double damages for withholding payment of the partial wages, the Court explained:

While the amount of the [disputed portion of wages] is debatable and therefore not subject to double damages, the fact that the Town owed Mr. Allstot some portion of his back wages was never debatable. The crucial question is when the Town could have and should have determined how much it figured it owed. And that is a question of fact . . . . If the Town could have determined . . . . that it owed him at least \$30,783, then delaying payment of that amount for four years might indicate willful withholding of wages.

Id at 634-635.

The same result applies here. Although Dr. Trout knew that there was no dispute as to Respondent's entitlement to at least \$30,105 in back salary, he intentionally refused to pay this amount. This constitutes willful withholding as a matter of law. The trial court did not err in imposing double damages of twice this amount, as required by RCW 49.52.070.

**C. The Trial Court DID NOT Err in Refusing to Granting Appellant's Motion to Dismiss Based Upon ER 408**

Appellants assign error to the failure of the trial court to grant a motion to dismiss which they brought at the close of Respondent's case in chief. Brief of Appellant, pp. 34-42.

Appellants' theory is that the trial court improperly relied upon Trial Exhibit 2, which contained Dr. Trout's explicit admission that Respondent was owed back wages of \$37,778. Appellants claim that the emails were

generated during “compromise and settlement” negotiations, and therefore should have been excluded under ER 408. Appellants also claim that since Respondent failed to present any other evidence concerning the amount of wages that were due, the court should have granted their motion due to the failure of Respondent to meet his prima facie burden of proof.

This argument is without merit for three separate reasons:

1. **The Argument Has Been Waived**

After Appellants motion to dismiss was denied, they proceeded to present evidence of their own via their case in chief. This constitutes an **absolute waiver** of the right to challenge the sufficiency of Respondent’s prima facie case.

As the Supreme Court has explained:

The Defendants contend that the trial court erred when it denied their motion for dismissal at the close of Taylor's case. By presenting evidence in their own behalf, however, the Defendants waived any error regarding that motion. See *Carle v. McChord Credit Union*, 65 Wn. App. 93, 97 n.3, 827 P.2d 1070 (1992); *Goodman v. Bethel Sch. Dist.* 403, 84 Wn.2d 120, 123, 524 P.2d 918 (1974); *Jones v. Bard*, 40 Wn.2d 877, 880, 246 P.2d 831 (1952).

*Hume v. American Disposal*, 124 Wn. 2d 656, 666, 880 P.2d 988 (1994).

3. **Settlement Discussions NEVER Occurred**

While Appellants assert that Trial Exhibit 2 was generated for the purposes of “compromise” and “settlement,” this claim has no basis in reality.

As is facially obvious from Trial Exhibit 2, there is **nothing** contained in that exhibit that even remotely suggests that the emails were generated for the purpose of compromise and settlement. Likewise, there is no testimony in the record to support the claim that settlement discussions were occurring at the time the emails were generated.

Moreover, the testimony at trial shows the opposite – settlement discussions concerning the unpaid wages **did not** occur. As Appellants concede in their brief, Respondent was **NEVER** willing to accept anything less than the full amount of wages that he was entitled to, was not willing to negotiate. See Brief of Appellants (and quoted testimony therein) pp. 12, 33.

**4. Respondent Amly Met his Prima Facie Burden**

Even if Trial Exhibit 2 had been excluded, there was still ample evidence to support Respondent's prima facie burden of proof.

As the record shows, Respondent testified that he had contracted to work for Pico Computing at an agreed salary of \$90,000 per year. RP 118, lines 3-7, RP 119, lines 19-20. He worked on a full time basis until his last day of employment, which was December 15, 2007. RP 93, lines 2-9. He further testified that his salary was paid every two weeks during the year. (RP 230, line 12) and that he was only paid \$48,750 in 2007. RP 224, lines 17-18.

Based upon this data, there was an ample basis for the Court to precisely measure Respondent's wage entitlement. Appellants' argument to the contrary is nonsense.

**D. The Trial Court Properly Calculated Wages Based Upon a "Start Date" of February 7, 2007**

Appellants challenge the trial court's finding that the appropriate "start date" for computing Respondent's wages should be February 7, 2007, which was the date that Respondent formally served his written notice of election upon Dr. Trout. FOF p. 6, (CP 420). According to Appellants, there was no substantial evidence to support this finding. Brief of Appellants, p. 34. This assertion is without merit.

In point of fact, the evidence at trial overwhelmingly proved without contradiction that a start date of February 7, 2007 was appropriate.

As previously shown, the Shareholder Agreement gave employees the option to receive any portion of their salaries in the form of stock, cash wages, or any combination thereof. See Statement of Facts, supra, p. 9. The decision of whether or not to exercise this option was left to the discretion of the employees. Id. There was nothing in the Shareholder Agreement which required company "approval" before the election could become effective. See Trial Exhibit 8.

The testimony at trial indicated that there was uncertainty as to the precise date on which Respondent orally notified Dr. Trout of his election to

receive all of his salary in cash. RP 121, lines 14-19. However, there never was any uncertainty as to the date the written notice of election was given. As the undisputed findings of fact show, the notice was written and delivered on February 7, 2007, receipt of which was acknowledged by Dr. Trout by placing his initials on the document.

Given these facts, and given the wording of the shareholder agreement, the trial court's finding that the wages should be computed using a "start date" of February 7, 2007 was a fair and sensible reading of the contract, and a fair and sensible application of the facts.

Clearly, there was substantial evidence to support this finding.

**E. The Motion for Attorney Fees Was Timely**

Appellants assert that Respondent's motion for attorney fees was not timely filed, as required by CR 54. This argument is without merit.

The time limits of CR 54(e) do not begin to run until after a judgment is filed. CR 54(e); As this Court has stated:

The timeliness requirement of CR 54(d) applies only after the underlying claim is reduced to judgment in court.

(Underlines added) *Corey v. Pierce County*, 154 Wn. App. 752, 774, 225 P.2d 367 (2010).

Once a judgment is filed, any motion for attorney fees must be filed within 10 days after the judgment was entered. As explicitly stated in the rule:

Claims for attorney's fees and expenses, other than costs and disbursements, shall be made by motion . . . Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days *after* entry of judgment.

(italics and underlines added) CR 54(e).

Here, Appellant's own brief makes clear that the rule **was** fully complied with. In this connection, Appellant's concede that the judgment was entered on July 19, 2011, and that Respondent's motion for attorney fees was filed **nine days** after the judgment was entered, on July 29, 2011. Brief of Appellants, p. 18. Clearly, since the motion for attorney fees was filed within the 10 day limit specified by CR 54(e), it was timely. *Corey v Pierce County*, supra, 154 Wn. App. at 774.

As a final matter, it should be noted that Appellants correctly state that the motion was originally noted for hearing on for August 12, 2011, but later delayed until August 26, 2007. Brief of Appellants pp. 18-19. However, Appellant's have failed to advise this Court that this delay was not the fault of Respondent's attorney. To the contrary, the matter had to be moved to another date due to the unavailability of the judge. See: Reply Brief of Plaintiff Re Motion for Attorney Fees, pp. 2-3. (CP 497). Thus, the matter was re-noted the motion for the first available date after the judge returned, which was August 26, 2011. Id.

It is emphasized, however, that the delay in noting the motion in no way violated CR 54. As previously shown, the rule requires the motion to be filed within 10 days after the judgment was entered, but does not specify a deadline for noting the motion. Since the requirements of CR 54 were complied with, Appellant's arguments have no merit.

**F. The Attorney Fee Award WAS Reasonable**

***1. Statement of Law and Standard of Review***

Where an employee has prevailed in recovering unpaid wages, the trial court must assess hourly attorney fees using a "Lodestar" analysis. *Morgan v. Kingen*, 166 Wn.2d 526, 539, 210 P.2d 995 (2009).

The Lodestar analysis requires the court to first determine the number of hours that were reasonably spent in the representation. After it has done so, it then must multiply such hours by a reasonable hourly rate. The resulting product is the amount of wages which should be awarded. *Morgan v. Kingen*, supra, 166 Wn.2d at 539.

Fee awards are reviewed under a "manifest abuse of discretion" standard. *Morgan v. Kingen*, supra, 166 Wn.2d at 539. Under this standard, the trial court's decision will not be disturbed unless the exercise of its discretion is found to have been manifestly unreasonable or based upon untenable grounds or reasons." *Rettkowski v. Dept. of Ecology*, 128 Wn.2d 508, 519, 910 P.2d 462 (1996), (citing *Progressive Animal*

*Welfare Soc'y v. University of Wash.*, 114 Wn.2d 677, 688-89, 790 P.2d 604 (1990).

**2. Appellant's Challenges Have No Factual or Legal Merit**

None of the arguments raised by Appellants have any merit. Taking each argument in the order they appear in Appellant's opening brief:

- “*Felix made no efforts or provided the trial court with any basis to determine that the number of requested hours is reasonable. Indeed, he simply provides this Court with billing record.*” (Brief of Appellants at p.46).

This is nonsense. As the record shows, Respondent's attorney presented the court not only with highly detailed billing records (see **CP 448-453**), but also with highly detailed affidavits which carefully discussed every aspect of his billing. See Cert. Stmt. Scott McKay in Support of Motion for Attorney Fees (CP 441-462); Second Certified Statement of Scott McKay in Support of Fees (CP 507-508).

These submissions far exceeded what was required to establish reasonable attorney fees. As the Supreme Court has stated:

[A]ttorneys must provide reasonable documentation of the work performed. This documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (i.e., senior partner, associate, etc.).

*Bowers v. Transamerica Title Ins.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983).

Moreover, Appellants are dead wrong insofar as they suggest that the trial court's award was based merely based upon the affidavits and billing records that had been submitted to it. As the trial court expressly indicated, its decision was also based upon a multiplicity of other independent factors, including the quality of representation observed at trial, the conduct of litigation, and trial court's assessment of the credibility of Respondent's attorney. Order on Attorney Fees, Findings 2, 5-6 (CP 596-597).

- *“Plaintiff cannot recover time associated with the appraisal matter.” (Brief of Appellant, p. 47).*

The affidavits of Respondent's attorney make clear that he carefully segregated all time he spent on wage and appraisal cases. None of the billings presented to the trial court were for the appraisal case. Cert. Stmt. Scott McKay in Support of Motion for Attorney Fees at paragraph 12 (CP 443).

- *“The fees [were] spent in preparing a variety of documents and pleadings which were either not used or unsuccessful.” (Brief of Appellants, p. 47).*

This argument demonstrates that Appellants do not understand the law.

The critical question for an award of attorney fees **is not** whether the attorney's efforts in any particular task led to fruitful results. Rather, the critical question is whether the time was reasonably spent as part of the

overall representation, and was not wasteful or unnecessary. *Bowers*, supra, 100 Wn.2d at 597.

The fact that any particular motion or argument was not accepted by the court is not, by itself, grounds for discounting such hours. Indeed, if a party prevails on any significant claim or issue that is inseparable from other issues on which the party did not prevail, the court must award attorney for time spent in pursuing the unsuccessful issues. *Brand v. Dept. of Labor & Indust.*, 139 Wn.2d 659, 672, 989 P.2d 1111. (1999). As the Court of Appeals has explained:

[W]here the plaintiff's claims involve a common core of facts and related legal theories, "a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised."

*Martinez v. City of Tacoma*, 81 Wn. App. 228, 243, 914 P.2d 86 (1996).

Consistent with the above, time spent on an unsuccessful motion or argument will only be excluded if it involves facts, legal theories or work that is distinct and unrelated to the successful claims. *Brand*, supra, 139 Wn.2d at 672.

Appellants' brief list several items which they claim should have been excluded from consideration because they were either not used or were unsuccessful. Each of these contentions were specifically addressed in the materials which Respondent presented to the trial court. As shown therein, none of these challenges have merit:

- a. Motion for Default. The motion for default was prepared and noted because Appellants had delayed in filing an answer. It was stricken only after Appellants finally provided their answer. See Second Certified Statement of Scott McKay, paragraph 2(d) at **CP 507** (certifying facts set forth in Reply Brief of Plaintiff Re Motion for Attorney Fees, pp. 8-9) (**CP 497- 498**). This clearly was a reasonable expenditure of time.
- b. Mary Edenshaw Deposition. During the course of litigation, it had become readily apparent to Respondent's attorney that there was a significant likelihood that Dr. Trout would be evasive in providing answers to discovery requests. For this reason, Respondent's attorney spent time in preparing to independently obtain discovery from the company's bookkeeper Mary Edenshaw, on either an ex parte basis, or by noting her deposition. For tactical reasons, however, counsel later decided that it would be best not to proceed in this manner unless the required information could not be obtained any other way. See Second Certified Statement of Scott McKay, paragraph 2(d) at **CP 507** (certifying facts set forth in Reply Brief of Plaintiff Re Motion for Attorney Fees, pp. 8-9) (**CP 497- 498**).
- c. Motion for Summary Judgment. The motion was brought for a variety of different reasons which were clearly explained to the trial court and clearly were reasonable. The claims and legal theories that Respondent relied upon were identical to the claims and theories that he prevailed upon at trial. See Second Certified Statement of Scott McKay, paragraph 2(d) at **CP 507** (certifying facts set forth in Reply Brief of Plaintiff Re Motion for Attorney Fees, pp. 9-10) (**CP 498-500**).
- d. Motion for Reconsideration. The judge that was assigned to hear the summary judgment motion (Judge Middaugh) denied the motion on the same frivolous ground that Appellants raise in this appeal, namely, that there was a factual dispute as to whether Plaintiff's \$90,000 salary was a "wage." Since Judge Middaugh's decision was poorly conceived and clearly contrary to law, the motion for reconsideration was entirely reasonable. See Second Certified Statement of Scott McKay, paragraph 2(d) at **CP 507** (certifying facts set forth in Reply Brief of Plaintiff Re Motion for Attorney Fees, pp. 11) (**CP 500**).

- “[The Court’s Fee Award Included “legal fees claimed for motions to compel where sanctions were awarded on the basis of the legal fees incurred in drafting and filing those motions.” (Brief of Appellants, p. 47).

This is false. Hours spent in obtaining successful sanction awards were specifically excluded from the fee petition. See: Second Certified Statement of Scott McKay, paragraph 2 (CP 507) (certifying facts set forth in Reply Brief of Plaintiff Re Motion for Attorney Fees, p 6, lines 114-23 (CP 495).

- ‘Plaintiff has failed to establish that an hourly rate of \$350 is reasonable and/or customary.’ (Brief of Appellants, p. 49).

This argument is without merit.

In determining a reasonable hourly billing rate, the attorney’s regular and customary hourly billing rate will generally be accepted. *Bowers v. Transamerica*, supra, 100 Wn.2d at 597.

Likewise, the rates charged by other attorneys in the same geographic area will also generally be accepted. *Broyles v. Thurston County*, 147 Wn. App. 409, 452, 195 P.2d 985 (2008). Moreover, the trial court is given broad discretion to rely upon other factors, including:

[T]he level of skill required by the litigation, the amount of potential recovery, time limitations imposed by the litigation, the attorney’s reputation, and the undesirability of the case.

*Brand v. Dept. of Labor & Industries*, 139 Wn.2d 659, 666, 989 P.2d 1111 (1999).

Here, Respondent's affidavit contained detailed statements of both opinion and fact which showed that the requested hourly billing rate of \$350 per hour was entirely reasonable and customary. Cert. Stmt. Scott McKay in Support of Attorney Fees, paragraphs 2-9 (CP 441-442). The trial court clearly acted reasonably in adopting this hourly rate.

- *“Plaintiff's time spent on this matter is inordinately large in light of the fact that the Plaintiff's wage claim at trial was for approximately \$35,000.”* (Brief of Appellants, p. 50).

This argument has no merit. The fact that a fee award dramatically exceeds the amount of the overall judgment is generally irrelevant. As the Washington Supreme Court has stated:

We will not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small. Instead, courts should be guided in calculating fee awards by the lodestar method in determining an award of attorney fees as costs. *Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109, 786 P2d 265 (1990). The lodestar methodology affords trial courts a clear and simple formula for deciding the reasonableness of attorney fees in civil cases and gives appellate courts a clear record upon which to decide if a fee decision was appropriately made.

*Mahler v. Szucs*, 135 Wn.2d 398, 433, 135 Wn.2d 398 (1998).

- *Several entries contain administrative tasks, such as assembly, inputting, and filing of the motions.* (Brief of Appellants, p. 48).

This argument is without merit. The Second affidavit of Scott McKay makes clear that time spent in administrative tasks were not included in the requested fee award. See Second Certified Statement of

Scott McKay, paragraph 2(c) (CP 507) (certifying facts set forth in Reply Brief of Plaintiff Re Motion for Attorney Fees, p. 6 (CP 495).

**IV.**

**REQUEST FOR ATTORNEY FEES PURSUANT TO RAP 18.1**

RCW 49.48. and RCW 49.52.070 provide that an employee who prevails in any wage action under those statutes is entitled to collect reasonable fees and costs of suit. Obviously, if the decision of the trial court is affirmed in whole or part, this Court should award fees for the time spent in responding to this appeal, as provided by RAP 18.1.

**V.**

**CONCLUSION**

This appeal has no merit. Accordingly, the decision of the trial court must be affirmed. Pursuant to RAP 18.1, the Court should allow for an additional award of fees for this appeal, as authorized by RCW 49.48.030 and RCW 49.52.070.

Respectfully Submitted this 25<sup>th</sup> day of July, 2012



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Scott McKay, WSBA No. 12746  
Attorney for Respondent