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**Court of Appeals No. 68336-5-I**

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

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TIMOTHY J. GODDARD,

Appellant,

v.

CSK AUTO, INC.

Respondents.

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**APPELLANT'S REPLY BRIEF**

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FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 AUG 15 PM 2:24

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**I. REPLY IN SUPPORT OF APPELLANT'S OPENING BRIEF**

CSK proffers a number of excuses in response to Mr. Goddard's request that this Court reverse the trial court's dismissal of his claims on summary judgment. However, these post-litigation, self-serving explanations merely call attention to what CSK is now asserting as deficiencies in the manner in which it drafted written agreements that govern the relationship between the parties. CSK should not be permitted to use the Court system as a substitute for taking the time to draft written agreements to address all of its primary concerns. If the issues CSK now complains of were, in fact, concerns at the time the agreements were drafted, they most surely would have been incorporated into the written text. Since they were not, CSK should be foreclosed from attempting to re-write them now.

**II. MISSOURI LAW DEEMS RELEASE LANGUAGE PLAIN AND UNAMBIGUOUS ON ITS FACE**

As anticipated, CSK invites the Court to disregard the plain and unambiguous language of the release in order to support its position that the release is not really a release at all. CSK cites *Andes v. Albano*, 853 S.W.2d 936 (Mo. 1993) to support its assertion that "*context* is key and must be considered by the Court in construing the scope of the release

here.”<sup>1</sup> However, the Supreme Court of Missouri’s holding in *Andes* supports Mr. Goddard’s position. “There is a presumption of validity of an executed release. This presumption is founded in the policy of law to encourage freedom of contract and the peaceful settlement of disputes.” *Id.* at 940 (internal citations omitted). CSK omitted the operative part of the opinion, which holds, “However, language that is plain and unambiguous on its face will be given full effect within the context of the agreement as a whole unless the release is based on fraud, accident, misrepresentation, mistake, or unfair dealings.” *Id.* at 941. In *Andes*, the pertinent language of the agreement stated, “...each party releases the other from all claims and marital rights arising by reason of common law or the statutes pertaining to marriage.... Each party further releases the other from any claims, known or unknown...” *Id.* The Supreme Court held, “There is no ambiguity, however, in the clause ‘any claims, known and unknown.’ These words are unqualified and unrestricted and would, therefore, include any allegations of wiretapping.” *Id.* Similarly, the language in the agreement at issue in this case, also includes similar language, although even more comprehensive than that in *Andes*, which is:

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<sup>1</sup> Brief of CSK Auto, Inc., pg 18.

b) The Company hereby agrees not to pursue or further any action, cause of action, right, suit, debt, compensation, expense, liability, contract, controversy, agreement, promise, damage judgment, demand or **claim** whatsoever at law or in equity **whether known or unknown** which the Company ever had, now has or hereafter can, shall or may have for, upon or by any reason of any matter, cause or thing, (collectively, “Company Claims”) whatsoever occurring up to and including the date Executive signs this Rescission Agreement against Executive and hereby **releases**, acquits and forever absolutely discharges Executive of and from all of the foregoing, except with respect to the obligations of Executive set forth in this Rescission Agreement.

CP 104-105 (emphasis added).

Consequently, as in *Andes*, this Court should hold that the unqualified and unrestricted language in this release agreement forecloses any possibility of going outside the four corners of the agreement in order to evaluate the *context* that CSK proffers.

**III. MISSOURI LAW DEEMS SCOPE OF LANGUAGE TO BE BROAD AND ALL ENCOMPASSING UNLESS SPECIFIC EXCLUSION IS CARVED OUT IN OPERATIVE PART OF RELEASE**

CSK next argues that when the door is open to consider the *context* of the parties’ agreements, that the Court must limit the release as applicable only to a specific *subject matter*. CSK cites *Goldring v. Franklin Equity Leasing Co.*, 195 S.W.3d 453, 456-457, (Mo. App. 2006)

in support of this proposition. Again, CSK omitted the operative part of the opinion, which holds:

A general release disposes of the entire subject matter involved. A party may limit or restrict a general release by expressing such intent in the general release and must have expressly reserved such rights in the settlement agreement. If a party fails to do so, the agreement will be interpreted to be a complete and final settlement of all the matters between the parties to the release.

*Id.* Significantly, the facts in our case are similar to the facts in *Goldring*, where an employer and employee entered into an agreement regarding the payment of life insurance premiums for the benefit of the employee.

Upon death of the employee, the original agreement provided that the employer would be entitled to reimbursement of the total premiums paid.

However, at the point of termination of employment, the parties entered into a separation agreement. The release language stated:

17. [Employer] ... releases and forever discharges [Employee] from any and all actions, charges, causes of action or claims of any kind ..., known or of which [Employer] should have known about prior to the effective date of this [Release], which [Employer] ... may have against [Employee] arising out of any matter, omission, occurrence or event existing or occurring prior to ... this [Release], including, without limitation: any claims relating to or arising out of [Employee]'s employment with and/or termination of employment with [Employer] and/or any common law claims, now existing or hereafter recognized, such as breach of contract, libel, slander, fraud, promissory estoppel, breach of implied covenant of good faith and fair

dealing, misrepresentation or wrongful discharge; provided, however, that the foregoing release of claims shall expressly not apply to any promises and obligations of [Employee] set forth in this [Release], including but not limited to those set forth in Section 5.

The parties then had a dispute regarding the continued payment of insurance premiums. The employer ultimately discontinued payment of the premiums. The Court held that this language of the separation agreement released the employee's obligation to reimburse the employer for the insurance premiums:

We find the broad language of the Release unambiguously and clearly terminated all existing and enforceable rights and obligations under the parties' Agreement and Assignment. Specifically, the Release discharged Employer from "any and all ... claims ... including, without limitation: any claims relating to or arising out of his employment with and/or termination of employment with Employer." Employer's right to reimbursement of insurance premiums it paid while Employee was its employee falls squarely within this express Release language. **Had Employer's intent been otherwise, it could have carved out an exception to the Release, i.e., for the effectiveness or obligations of the parties' Agreement and Assignment, as it had done for Section 5 thereof.** Therefore, because we find the Release terminated all the rights and obligations between the parties, Employer's remaining points on appeal are denied.

(emphasis added). Just as in *Goldring*, CSK could easily have restricted the general release to include only the duties and obligations that fell outside of the Interim Promissory Note and/or Relocation Policy and/or

May 16, 2008 letter agreement. It constructed the language of the Voluntary Rescission of Severance Agreement and it could have included a reservation of their right to make claims for reimbursement of relocation expenses. One simple sentence would have preserved CSK's rights: "Notwithstanding the foregoing release, the parties agree that nothing herein shall affect or release any rights to reimbursement of relocation expenses in the event that Goddard terminates his employment within two years of his relocation to Washington State." However, CSK did not draft such a sentence and did not limit the scope of its release, which limitations must be contained within the operative part of the general release.

The facts in our case to support the contention that the language operates as a general release are even more compelling than the facts in *Estate of Givens v. U.S. National Bank of Clayton*, 938 S.W.2d 679 (Mo.App. E.D. 1997). In *Givens*, a bank President's acts were being investigated for violation of federal laws. On October 31, 1990, the bank's Board of Directors passed a resolution agreeing to indemnify Givens, the bank President for legal fees he incurred in defense. A few days later, on November 6, 1990, the Board offered Givens the opportunity to resign in lieu of termination. In return for a severance package from the bank, Givens signed a release on November 8, 1990, which stated:

### *Release*

In consideration of the agreement of U.S. National Bank of Clayton to pay me a severance benefit equal to my last base salary with the Bank pro rated from the date of my termination, November 8, 1990, through January 9, 1991, which I understand and acknowledge that the Bank is not required to pay, I hereby release and agree to hold harmless U.S. National Bank of Clayton, its officers, directors and shareholders, and their respective successors, heirs and assigns, from any and all liability, actions, causes of action, claims, demands and damages, whether or not now known or contemplated, of whatever name or nature, in any manner arisen, arising or to arise from [sic] or in connection with, directly or indirectly, my hiring, employment and dismissal by U.S. National Bank of Clayton and any other matter whatsoever involving my relationship with U.S. National Bank of Clayton, its officers, directors or shareholders.

As the course of litigation continued after the release had been signed, Givens' incurred over \$120,000 of attorneys' fees. His Estate demanded reimbursement of those fees in accordance with the indemnity agreement. The bank refused, citing the subsequent release agreement. Finding that the language of the release was unambiguous, the Missouri Court of Appeals held that the general release relieved the Bank of the obligation to pay for Given's attorneys fees:

The release uses phrases which have been recognized by this court to be general in nature: "from any and all liability," "of whatever name or nature" and "and any other matter whatsoever involving my relationship with [the Bank]." These are phrases which have been recognized by this court to release all claims a party may have.

Even more broadly than the release language in *Goldring* and *Givens*, CSK's release stated it would not pursue "any action, cause of action, right, suit, debt, compensation, expense, liability, contract, controversy, agreement, promise, damage judgment, demand or claim," "whatsoever at law or in equity whether known or unknown" and then emphasized that it was releasing everything except the obligations in the actual Rescission Agreement. CP 105. Just as in *Goldring* and *Givens*, CSK cannot resurrect an agreement for indemnification / reimbursement in flagrant disregard of the fact that it entered into a subsequent agreement, which released Mr. Goddard of any and all liability.

Nothing in the agreement's title or recitals refer to obligations regarding the relocation expenses, which are not dispositive of the issue; only the general release language is dispositive.

A party may limit or restrict a general release by **expressing such intent in the general release**. To retain legal rights relating to the dispute, the professors must have expressly reserved such rights in the settlement agreement. In the absence of words **in the operative part of a general release** which indicate an intention to limit or restrict its effect, it must be concluded that the instrument was contemplated and intended to be a complete settlement of all matters between the parties to the release.

*Anderson v. Curators of University of Missouri*, 103 S.W.3d 394, 399

(Mo. App. 2003) (internal citations and quotations omitted, emphasis added.) CSK drafted the broad release agreement, failed to include any limitation or exclusion to protect its rights with respect to relocation expenses, and elected its governance by Missouri law. Now, it complains about its own deficiencies and asks this Court to revive a claim it allegedly “unintentionally” released.

Missouri courts have afforded little sympathy to a party who did not understand the consequences of an act. Where the mistake has resulted solely from the negligence or inattention of the party seeking relief, and the other party is without fault, relief should not be granted absent unusual circumstances which would make enforcement of the agreement unjust. Absent fraud, misrepresentation or other unfair dealing a release is not invalid because of a unilateral mistake.

*Parks v. MBNA America Bank*, 204 S.W.3d 305, 314 (Mo. Ct. App. 2006).

Just as in *Parks*, this Court should hold that there is no evidence (or even allegation) of fraud or deception and that “that even a brief skim of the agreement ... clearly reveal[s] the breadth of the release.” *Id.*

There can be no legitimate dispute that the Voluntary Rescission of Severance Agreement fails to refer to, much less explicitly exclude, obligations regarding relocation expenses. The Court does not reconstruct the terms of the contract because CSK failed to sufficiently protect itself.

**IV. MISSOURI LAW HOLDS THAT RELEASE COVERS CLAIMS THAT MAY ARISE IN THE FUTURE**

CSK cites two Missouri cases for the proposition that a release will not include claims that have not yet matured at the time of signing. The first is *Daniels v. Tip Top Plumbing and Heating, Inc.*, 409 S.W.2d 741 (Mo. 1966). However, this case does not support CSK's position at all. In *Daniels*, two parties entered into a release and settlement after an automobile collision. The releasing parties sustained both personal injury and property damages. Payment was made for damages associated with personal injuries before the settlement and release were signed. After the settlement and release were signed, the releasing parties then sought to recover property damages. The Missouri Court of Appeals cited 76 C.J.S. Release s 51, pp. 696, 697:

A general release, not restricted by its terms to particular claims or demands, ordinarily covers all claims and demands due at the time of its execution and within the contemplation of the parties, and it has been said that **any existing liabilities intended to be excepted from such a release should be expressly set forth therein**. On the other hand, a release which is confined or which is construed as being confined to claims or demands arising from, or relating to, a specified matter operates to release all the particular claims or demands properly embraced in the specifications, **but it does not release other claims or demands, particularly those expressly excepted from the operation of the release.** (emphasis added).

The Missouri Court held that summary judgment dismissal of the claim for property damage was appropriate because the only controversy between the parties related to an automobile accident, and absent any specified exception to the language of the release, the general release encompassed the property claims as well as the personal injury claims. Just as in *Daniels*, this Court should find that CSK's release language operated as a general release that does not permit CSK to seek reimbursement for monies after it released Mr. Goddard from the debt.

The second Missouri case cited by CSK is *Williams v. Riley*, 243 S.W.2d 122 (Mo. App. 1951). In that case, a judgment had been previously obtained against the defendant. The defendant admitted that the subsequent release language did not contemplate that judgment because neither the defendant nor his counsel was aware of the judgment at the time of the agreement containing the release. The Missouri Court held that a motion to quash the judgment was properly overruled despite a subsequent release that was then presented. In our case, there is no secondary litigation or judgment between the parties, nor is there any evidence that Mr. Goddard did not contemplate a release of obligations regarding relocation expenses; he was certainly aware of the written agreements that pre-dated the release by only a few months.

CSK's citation of Florida, Pennsylvania, and Arizona law in order to support its claims is misplaced. CSK elected a choice of law in its contract with Plaintiff – Missouri law. Absent any legal support from Missouri, its claim must fail. CSK cites cases that have dramatically different fact patterns, such as *Sottile v. Gaines Construction Company*, 281 So. 2d 558 (Fla. App. 1973). *Sottile* related to a prior default judgment to a release agreement; the Florida Court held that the release, as an affirmative defense, had not been raised in prior litigation and that res judicata applied to bar that claim. No such waiver of an affirmative defense or res judicata applies between Mr. Goddard and CSK.

CSK's cited Pennsylvania case, *Restifo v. McDonald*, 230 A.2d 199 (Pa. 1967), involved the scope of release, signed nine days after an automobile collision. Although the Court upheld the release between the parties to the release, the Court found that a lack of meeting of the minds precluded a release pertaining to a right of contribution of a third-party lawsuit. No such tangential claim exists between Mr. Goddard and CSK.

CSK's cited Arizona case, *Western Chance #2, Inc. v. KFC Corporation*, 957 F.2d 1538 (9th Cir. 1992), involved a franchise dispute. The Arizona Court held that the release language was limited in scope to create an issue of material fact as to whether the terms of a separate oral

agreement had been released. No limitation in the scope of the release exists here.

None of these foreign law cases support CSK's claim that it is entitled to repayment of relocation expenses remitted after the release, because they had not "matured". Again, it would have required little effort for CSK to have included a reference to the relocation benefits and the purported ongoing obligation in the Voluntary Rescission of Severance Agreement, and/or to have prepared a Final Promissory Note for Mr. Goddard's signature had it truly considered the relocation expenses a continued obligation. It is truly difficult to comprehend this huge company's defense that Mr. Goddard somehow took unfair advantage of it -- by signing the agreements it elected to prepare and present to Mr. Goddard to encourage his continued employment after the merger.

CSK drafted the language that released Mr. Goddard of any obligation "...which the Company ever had, now has or **hereafter can, shall or may have...** (emphasis added). CP 105. Now, CSK seeks to disregard its own language that encompasses future obligations that may arise. However, that is inconsistent with Missouri law, where "[Courts] construe each term to avoid rendering other terms meaningless. A construction which attributes a reasonable meaning to all the provisions of the agreement is preferred to one which leaves some of the provisions

without function or sense.” *City of Harrisonville v. Pub. Water Supply Dist No. 9*, 49 S.W.3d 225, 231 (Mo. App. 2001). CSK released Mr. Goddard of obligations that it a) ever had, b) now has, or c) may have. Its arguments that it did not waive its rights to pursue future claims, because they had not yet matured at the time of the contract, fly in direct contradiction with its own contract language. No Missouri law supports such a proposition.

***V. COURSE OF CONDUCT DOES NOT SUPPORT INTERPRETING A LIMITED SCOPE OF RELEASE***

Although CSK argues that the parties “course of conduct” demonstrates that the release was not a general release, citing no authority in support of its argument, that argument directly contradicts the facts in this case. Significantly, “a course of dealing does not override express terms in a contract or add additional obligations. Rather, it is a tool for interpreting the provisions of a contract.” *Badgett v. Security State Bank*, 116 Wn. 2d 563, 572, 807 P.2d 356 (1991). Consequently, the express release language should not be undermined even if a contrary course of conduct could be found. However, none can be found in this case because CSK does not even assert that Mr. Goddard took any action; CSK relies solely upon its own unilateral conduct in attempt to establish a reciprocal “course of conduct”.

Even if CSK was unclear as to whether or not it had a legal duty to continue to pay Mr. Goddard's relocation expenses after the release was executed (similar to Goldring's employer who was uncertain as to its legal duty to continue to pay insurance premiums), that does not establish a course of conduct to defeat the express terms of the contract. In fact, the O'Reilly "Offer of Employment" that CSK relies upon, dated August 4, 2008, delineates salary, severance pay, medical and dental insurance, vacation, and sick pay, and states, "Since this offer has been **tailored to your individual** work history, please keep the contents confidential." CP 100-101. This offer letter was executed by the parties within days of executing the Voluntary Rescission of Severance Agreement. If CSK, the employer, had a different intent, it could have a) carved out an exception to the release in the Voluntary Rescission of Severance Agreement, b) included a reference to the relocation benefits and the ongoing obligation in the offer letter that was simultaneously presented, or c) prepared a Final Promissory Note for Mr. Goddard's signature. Since it did none of these things, its arguments that it truly considered the relocation expenses a continued obligation are not legitimate. No course of conduct exists; and nothing overrides the express terms of the agreement CSK itself drafted.

**VI. MAY 16, 2008 LETTER AGREEMENT IS OF NO LEGAL CONSEQUENCE GIVEN SUBSEQUENT RELEASE**

Despite CSK's assertion to the contrary, Mr. Goddard never argued that the obligations in the May 16, 2008 letter was not wholly superseded by the subsequent Voluntary Rescission of Severance Agreement, due to the same general release. However, when the trial court did not uphold that general release, the May 16, 2008 letter agreement became crucial to the analysis. Because the letter agreement refers only to the terms of the Relocation Policy, it altered the parties' obligations regarding the relocation expenses significantly. CP 81. Instead of being subject to reimbursement of relocation expenses for a period of *two years* under the Interim Promissory Note, the parties agreed that Mr. Goddard was only subject to a claim for reimbursement for a period of *one year* under the Relocation Policy. Since Mr. Goddard satisfied the term of the relocation policy by departing more than one year after accepting relocation, pursuant to the express terms of the policy, he has no obligation to reimburse CSK under the terms of the May 16, 2008 letter agreement. CP 68.

CSK again attempts to re-construct the express terms of its own contract by asserting that the May 16, 2008 letter agreement implicitly included the (conflicting) two-year obligation that was set forth in the

prior Interim Promissory Note. Missouri law does not permit such self-serving parol evidence to deviate the unambiguous language of a contract. In sharp contrast, Mr. Goddard is not trying to convert and contort the language of the agreements he signed, he is willing to abide by those terms; the only party that is trying to “have its cake and eat it too” is CSK.

***VII. CSK’S STRAIN TO IMPOSE NEW AND UNWRITTEN CONDITIONS ON RELOCATION POLICY IS A SHAM***

CSK now claims that it has a legal basis for recovering relocation expenses pursuant to the Relocation Policy, based upon the self-serving testimony of Jack Morefield who asserts a) that the express language of the Relocation Policy should be ignored, b) that his interpretation governs, c) that the operative time period is not 12 months after the acceptance of a relocation, but that d) the operative time period is actually 12 months prior to the termination of employment. CP 177. If that truly were the case, then Mr. Morefield’s letter dated July 8, 2009, would certainly have cited the Relocation Policy as a second basis for recovery of expenses. It did not. CP 111. Mr. Morefield’s declaration is offered as a transparent attempt to impose liability where none exists. Consequently, the declaration only creates a genuine issue of material fact to defeat CSK’s Motion for Summary Judgment if the language of the Relocation Policy is

legally relevant (given the subsequent general release); his credibility is put squarely at issue.

**VIII. CSK IMPROPERLY WITHHELD WAGES FROM GODDARD'S FINAL PAYCHECK**

CSK acknowledges that Mr. Goddard was entitled to gross pay of \$28,976.98 at the time his last paycheck was due. CP 182. CSK did not pay Mr. Goddard anything (other than what it calculated at a minimum wage rate). CP 118. CSK released Mr. Goddard from liability when it entered into the Voluntary Rescission of Severance Agreement. Yet, CSK disregarded that release, and still disregards that release to this day.

The language releasing Mr. Goddard from the obligations of the prior promissory note is so clear that CSK should not be permitted to avoid exemplary damages by asserting arguments with validity - where none exists. This is not a true "bona fide" dispute, but a mechanism by which to delay, deny, and defend the payment of wages to Mr. Goddard in retaliation for moving to a competitor. The employer-employee dispute in *Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 13, 111 P.3d 1192 (2005) is strikingly similar to that in our case. In *Flower*, the employer failed to remit a \$10,000 signing bonus at the termination of Flower's employment. The employer asserted that it was permitted to reduce the bonus amount due to relocation moving expenses. The Washington Court of Appeals

awarded exemplary damages despite the employer's attempt to rationalize an explanation for withholding wages:

Review of these provisions does not require the use of extrinsic evidence. The \$10,000 signing bonus was only to be reduced by those moving expenses that exceeded \$10,000. Moving expenses were under \$8,200. The contract collectively refers to the moving expenses and signing bonus as a "moving allowance." But expenses were distinguished from the bonus. The signing bonus was not an expense that required repayment. Whether Mr. Flower quit or was fired is not then relevant to this issue. Mr. Flower was entitled, as a matter of law, to the \$10,000 signing bonus. He sought attorney fees and exemplary damages under RCW 49.48.030 and RCW 49.52.070. He is entitled, as a matter of law, to both.

...

[The employer] Huntwood contends there was a bona fide legal dispute, first, over whether the "bonus" was an "expense" under the contract and, second, whether Mr. Flower left the company that would require Mr. Flower to repay the bonus. The terms of the contract clearly state that the bonus is to compensate Mr. Flower for signing on with the company. His act of taking the job entitled him to the bonus. The fact that Huntwood contrived a legal argument that the bonus was actually an "expense" does not make it a bona fide dispute. That is especially true since Mr. Hunt drafted the agreement and chose the terms that he now claims are debatable. Any ambiguity is construed against Huntwood. See *Guy Stickney, Inc. v. Underwood*, 67 Wash.2d 824, 827, 410 P.2d 7 (1966).

...

We do not apply a particularly stringent test to determine whether there was willful failure to pay wages; it means that the failure to pay was volitional or that the employer " 'knows what he is doing, intends to do what he is doing, and is a free agent.' " *Schilling*, 136 Wash.2d at 160, 961 P.2d 371 (quoting

*Brandt v. Impero*, 1 Wash.App. 678, 681, 463 P.2d 197 (1969)). Huntwood's implausible rationale for its failure to pay Mr. Flower's signing bonus supports a finding that there is substantial evidence of its willful and intentional deprivation of this payment. The facts show Huntwood's withholding of these wages to be deliberate.

Id. at 33-37. Just as in *Flower*, this Court should find that CSK's conduct in attempting to collect relocation expenses upon Mr. Goddard's termination of employment, despite the fact that it released Mr. Goddard of the obligations set forth in the promissory note, was deliberate and justifies exemplary damages.

Should this Court reverse the trial court by upholding the full scope of the release agreement, Mr. Goddard should also be permitted to pursue his claim for wrongful withholding of wages, based solely on the delay of payment. *Champagne v. Thurston County*, 163 Wn.2d 69, 80-85, 178 P.3d 936 (2008).

Although the undisputed facts in this case support a finding that the violation of RCW 49.52.050 was nothing but willful, if the Court finds that a bona fide dispute might exist, then that is a material issue of fact that precludes summary judgment dismissal of Mr. Goddard's claim.

***IX. CSK ALSO ATTEMPTS TO RECRAFT ITS LANGUAGE REGARDING NON-SOLITICATION***

**1. No Non-Compete Period Existed According to CSK's Own Contract**

Section 5 of the Severance Agreement, which is incorporated into the Voluntary Rescission of Severance Agreement, provides:

**5.2 Agreement Not to Compete/Non-Solicitation**

(a) While employed by the Company and during the Severance Period following the Executive's termination of employment under circumstances entitling the Executive to the Standard Severance Benefits (the "Non-Compete Period"), the Executive shall not become engaged in a managerial or executive capacity for, or consultant to, Auto Zone, Inc., The Pep Boys – Manny, Moe & Jack, O'Reilly Automotive, Inc., Advance Stores Company, Incorporated, or Discount Auto Parts, Inc.

(b) During the Non-Compete Period, the Executive shall not, directly or indirectly, hire or attempt to hire any employee of the Company.

CP 90. The Severance Agreement was designed to deal with the fact that CSK was subject to a potential merger with O'Reilly. Thereafter, if CSK terminated the Executive's employment, or if the Executive's terms of employment were materially adversely affected, then the Executive would become eligible to receive continued salary and benefits for a period of six months. Logically and prudently, CSK did not want to pay an Executive continued salary and benefits if the Executive subsequently became employed by a competitor during that severance period. Nor did CSK

want the Executive to hire away its remaining employees during that severance period, while simultaneously receiving compensation from CSK.

The operative time period, referred to as the “Non-Compete Period,” did not exist once Mr. Goddard resigned from employment in July 2009. CP 90. He was not entitled to any severance benefits in July 2009 or thereafter. Notably, there were no prohibitions asserted upon his employment by AutoZone, CSK’s competitor. Consequently, there is no Non-Compete Period by which Mr. Goddard was prohibited from hiring or attempting to hire any employee of CSK.<sup>2</sup>

**2. CSK Did Not Suffer Damages Pertaining to any Asserted Violation of Non-Solicitation**

CSK asserted that Mr. Goddard solicited three of its employees shortly after he began working for AutoZone. Those employees are 1) Brian Rasmussen, 2) Hoyt Tonnon, and 3) Derek Reid. However, neither Mr. Rasmussen nor Mr. Tonnon left CSK as a result of any act or omission on the part of Mr. Goddard; and CSK now seeks no damages as a result. CSK also ignores the massive internal turmoil it created due to the merger with O’Reilly. “A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately

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<sup>2</sup> CSK cites Missouri law in support of its analysis of restrictive covenants; however, the restrictive covenants from the Severance Agreement are governed by Arizona law, pursuant to the terms of the Severance Agreement.

causes damage to the claimant.” *Northwest Independent Forest Mfrs. v. Dept. of Labor and Industries*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995).

Instead, CSK only seeks damages attributed to Derek Reid, relying upon Mr. Morefield’s self-serving statement that CSK was “forced” to increase Mr. Reid’s salary by \$5,000 in order to retain him. CP 183. Mr. Reid’s declaration of October 26, 2009 did not state that he was going to leave CSK if they did not give him a raise: “Mr. Steuk offered me an annual pay increase of \$5,000, and ultimately convinced me to stay with CSK Auto.” CP 393. Mr. Reid’s declaration submitted in opposition to CSK’s motion reveals a) Mr. Morefield has no personal knowledge of Mr. Reid’s discussions with Mr. Steuk regarding his consideration of alternative employment, b) that Mr. Reid had never decided to leave CSK Auto, c) CSK’s agent was the one who raised the issue of compensation and elected to offer Mr. Reid a raise, and d) Mr. Reid stayed with CSK even though Auto Zone offered him a better compensation plan. CP 321-323. Additionally, Mr. Reid, who normally enjoyed a decent pay raise every year, did not receive a raise in early 2010, indicating that CSK’s raise was just given early. CP 323.

This court has held that, where the action is one for damages only, there being involved no property or personal rights having value in themselves, a failure to prove substantial damages is a failure to prove the substance of the issue, and warrants a judgment of

dismissal. This view is sound for another reason; that is, the law ‘does not concern itself with trifles.

*Ketchum v. Albertson Bulb Gardens*, 142 Wn. 134, 139, 252 P. 523

(1927) (internal citations and quotations omitted).

Consequently, CSK claim that it was damaged fails. At the very least, a disputed material issue of fact exists as to whether CSK truly was damaged as a result of Mr. Reid’s raise in salary, and whether CSK mitigated its damages by electing to offer Mr. Reid a raise of \$5,000.

**X. UNJUST ENRICHMENT CLAIMS WERE PLED AS ALTERNATIVE THEORIES**

Today, CSK appeals the dismissal of its unjust enrichment claim. However, at summary judgment, CSK admitted that this claim was made in the alternative and would only come into play if the Court determined that no contract existed between the parties. CP 450. The parties do not dispute the existence of the contracts; they dispute the legal significance of the contracts. Therefore, the trial court properly dismissed both parties’ claims for unjust enrichment.

First and foremost, CSK was not unjustly enriched. Equity demands that the CSK be foreclosed from accepting the benefit it specifically bargained for – continued employment of Mr. Goddard through July 1, 2009 at a reduction in salary – while simultaneously

claiming that Mr. Goddard must reimburse it for relocation amounts for termination of employment after July 1, 2009.

Mr. Goddard would have been far better off to permit CSK to terminate his employment in August 2008. In that case, he would have immediately received six months of severance benefits and would not have had to defend any claim of reimbursement of relocation expenses. In order to protect himself from that dichotomy, Mr. Goddard needed to obtain a release of the prior obligation. Significantly, **he did obtain that release** by signing CSK's Voluntary Rescission agreement. CP 140.

Secondly, in its Answer and Affirmative Defenses, CSK asserted five affirmative defenses, one pertaining directly to unjust enrichment:

3. Plaintiff's claim for unjust enrichment is barred by the existence of valid agreements between Plaintiff and Defendant that specify the rights and obligations of the parties.

CP 13. Additionally, CSK submitted the Declaration of Jack Morefield that established the parties entered into certain written contracts. CP 181.

Now, CSK asks this court to grant an equitable remedy, while simultaneously ignoring its prior position that valid contracts exist that bar a claim for unjust enrichment.

CSK asserted this affirmative defense because unjust enrichment is not actionable when a contract exists between the parties; the Court will not

use its equitable power to re-write a contractual relationship that the parties freely entered into of their own accord. “Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it.” *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008).

CSK is bound by its pleadings and cannot now assert a claim for unjust enrichment, which it itself formerly claimed was “barred by the existence of valid agreements.”

Where a party in his pleadings relies solely upon an alleged written contract between himself and the other party, he is bound by his pleading and cannot object to treatment of the writing as the whole contract of the parties, and hence he cannot introduce parol evidence to vary such contract.

*City of Seattle v. Northern Pac. Ry. Co.*, 12 Wn.2d 247, 259, 121 P.2d 382 (1942) (internal quotations and citation omitted).

Usually, the complaining party is NOT the one that drafted the contract. However, that is the case here; CSK drafted ALL of the contracts it now complains of, and seeks the equitable powers of this Court to rewrite them. “We have consistently held that we cannot, upon general considerations of abstract justice, make a contract for the parties that they did not make for themselves.” *Merlin v. Rodine*, 32 Wn.2d 757, 759, 203 P.2d 683 (1949). CSK’s claim of unjust enrichment fails absent

the Court's completely redrafting the terms of all of the applicable written contracts between the parties.

CSK bargained for the continued employment of Mr. Goddard through June 2009, and CSK received those services. CP 61. If the parties would not have entered into the Voluntary Rescission of Severance Agreement, Mr. Goddard would have been entitled to remain on the payroll between August 2008 and January 2009, without having to work another day. Mr. Goddard would not have had to repay any relocation expenses to CSK. Notably, Mr. Goddard was willing to take a reduction in position and salary in order to assist O'Reilly in maintaining its management team. It is far too late for CSK to complain that it now expects more of Mr. Goddard.

***XI. CSK'S ATTORNEY FEE AWARD IS EXCESSIVE  
GIVEN THE FACT THAT LIMITED DISCOVERY  
WAS CONDUCTED PRIOR TO CROSS-MOTIONS  
FOR SUMMARY JUDGMENT***

Mr. Goddard appeals the award of attorneys' fees in any amount, because Mr. Goddard should prevail given the express language of the release agreement.

Mr. Goddard also appeals the *amount* of attorneys' fees awarded, because the basis for the award is the language contained in the Interim

Promissory Note which permits “...such sums as the court may adjudge **reasonable** as attorney’s fees therein...” (emphasis added).

Significantly, in this case, a very limited amount of discovery was conducted (one deposition of Mr. Goddard, the parties exchanged written interrogatories and requests for production, and a one set of requests for admission was propounded by counsel for Mr. Goddard). Thereafter, the parties filed cross-motions for summary judgment, regarding the identical legal issue that is presently on appeal. Additional briefing regarding the cross-motions was ordered by the Court. When CSK prevailed at the trial court level, it filed its Motion for Attorney’s Fees. The Court awarded over \$76,000.00 of attorneys’ fees to CSK based upon this limited scope of work.

Reasonable is defined as acceptable and according to common sense and normal practice; not expecting more than is possible or achievable; and not exorbitant. Reasonableness is synonymous with the words “sensible,” “rational,” “practical,” “levelheaded,” and “equitable.” A determination of whether attorneys’ fees are reasonable must be determined in light of the circumstances of each case. *Singleton v. Frost*, 108 Wn.2d 723, 731, 742 P.2d 1224, 1228 (1987). This is a contract case, ultimately decided on summary judgment, but hardly necessitating the huge amount of time defense time spent among four different attorneys,

and the large amount of billable hours expended. The facts do not require special expertise of attorneys; the case is not novel, nor does it pose especially difficult questions of either fact or law. CSK is free to employ as many resources as it elects to employ, but Mr. Goddard should not be subject to paying for excessive resources.

The court may discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. It is appropriate to discount work which could be useful in ancillary or parallel litigation. Fees are not penalties, but rather a cost of litigation. The reasonableness of a request depends on the circumstances of each individual case

*Absher Const. Co. v. Kent Sch. Dist. No. 415*, 79 Wash. App. 841, 847, 917 P.2d 1086, 1090 (1995) (internal citations omitted).

In opposition to CSK's motion for attorneys' fees, and again in his Opening Brief, Mr. Goddard cited several examples to demonstrate that the fee award was not reasonable. The burden of demonstrating that a fee is reasonable always remains on the fee applicant. *Id.* at 847. CSK failed to meet its burden to show that its fee request was reasonable in any respect.

## ***XII. CONCLUSION***

CSK is requesting that this Court disregard the plain and ambiguous language of the documents and agreements that it drafted, and

to consider parol evidence in the form of post-litigation explanations.

CSK is not willing to be bound by any of its written materials, which it seeks to have redrafted in order to support its present legal position:

- a) Voluntary Rescission of Severance Agreement: “The Company hereby agrees not to pursue ... any liability, contract, controversy ... and hereby releases, acquits and absolutely discharges Executive of and from all of the foregoing, except with respect to the obligations of Executive set forth in this Rescission Agreement.”; (NOT “...except for the obligations pursuant to the February 15, 2008 Interim Promissory Note).
- b) May 16, 2008 Letter Agreement: “on terms ... in any event, no less favorable than the CSK Auto, Inc. Relocation Policy”; (NOT “on terms ... in any event, no less favorable to CSK than those of the Interim Promissory Note).
- c) Relocation Policy: “...twelve calendar months following relocation”; (NOT: twelve rolling calendar months after each CSK relocation expense payment).

- d) Severance Agreement: “While employed by the Company and during the Severance Period... the “Non-Compete Period”;  
(NOT “... and also for X Months after termination of employment).

Mr. Goddard did not, and could not, take advantage CSK, a giant publically-traded company, who was solely focused on its acquisition by another giant publically-traded company in 2008. Mr. Goddard fully performed his end of the bargain; CSK should be required to do the same.

Respectfully submitted this 15th day of August, 2012.

SINGLETON & JORGENSEN, INC. PS

By

  
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Jean Jorgensen  
WSBA No. 34964

Attorneys for Appellant Goddard

CERTIFICATE OF SERVICE

Jamie Brazier declares: I am a citizen of the United States and of the State of Washington; that I am over the age of 18 years and competent to be a witness in this cause. That on August 15, 2012, I caused to be delivered, one copy of the APPELLANT'S REPLY BRIEF, to the address(es) listed below by messenger service to local counsel and via email to all counsel:

John M. Silk  
Sally Metteer  
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Renton, Washington, on: August 15, 2012.

  
Jamie Brazier, Assistant