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COURT OF APPEALS  
DIVISION II

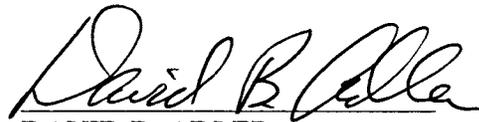
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STATE OF WASHINGTON  
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DEPUTY

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

MICHAEL DURAND	)	
et.al.	)	
Respondents,	)	CASE #37088-3-II
	)	
vs.	)	APPELLANTS' REPLY
	)	BRIEF ON APPEAL
HIMC CORPORATION; ITI	)	
INTERNET SERVICES, INC.	)	
JUDY MORTON JOHNSTON;	)	
and JERRY CORNWELL;	)	
Appellants	)	
_____	)	

Respectfully Submitted this 18<sup>th</sup> day of November, 2008.



DAVID B. ADLER.  
Attorney for Appellants

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FINDINGS OF FACT WERE IDENTIFIED AS ERRONEOUS BY APPELLANTS

Appellants take exception to the Respondent's incorrect characterization of the appeal as having conceded as "verities" the Trial Court's Findings of Fact. Appellants also take exception to the use of this ploy to support dismissing the appeal as somehow frivolous because, according to Respondent, no exceptions were taken to the Findings of Fact. Au contraire. The Opening Brief on Appeal identifies several areas in which the Findings of Fact were erroneous, deficient, biased, and lacking in the essential findings needed to support the conclusions of law reached by the Trial Court.

The Appeal is based as much on affirmative errors in those Findings entered by the Court as well as the failure to the Court to make findings that it was compelled to make by the nature of the claims themselves and the Affirmative Defenses. Error is ascribed to Findings that were not supported by Substantial Evidence. Thus the Opening Brief's Table of Contents and Argument No. 3, pp. 25-46, identify the Findings of Fact as deficient. The errors in the Findings of Fact are referenced and critiqued at several places. See Opening Brief, pp. 1, 6-7, 8, 20, 23, 26 and fn. 4, 27 and fn. 5, 28-29, 29 and fn. 4, fn. 5, 30, 36, 38, 39, 40, 44, 47, 48, 49, 50, 51, 52, 65, 67, 68, and

69. In addition to disputing the Findings as being sufficient to support the Conclusions of Law, the Appeal also identifies specific findings that are erroneous, contrary to law, or inconsistent with other Findings or the Conclusions of Law.

B: THE ENTRY OF JUDGMENT UNDER RCW 49.48.030 WAS UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS A PRODUCT OF AN ERRONEOUS INTERPRETATION OF THE CONTRACT OF EMPLOYMENT

The enforcement of the April 18, 2005 contract and consequent, imposition of damages totaling \$1,118,780.00 is based on an erroneous application of contract law and trial errors in the admission and exclusion of evidence. The interpretation of the two contracts presents a question of law that may be reviewed **de novo**.

Respondent confuses two distinct claims by disregarding the wording of the statute(s) that he relies upon for his wage payment demand. The Response asserts that the definition of employee in RCW 49.12.005 cited by Appellants, see Opening Brief, pp 38-42, is “patently frivolous”. This use of diatribe to replace statutory analysis is regrettable. As Appellants’ Opening brief makes clear, the reference to the employee definition in RCW 49.12.005 is asserted as to issues arising under RCW 49.52.050. However, the Response also ignores the plain wording of the statute, RCW 49.48.082, which begins

with the words: “The definitions in this section apply **throughout this section** and RCW 49.48.083 through 49.48.086”. (emphasis added). RCW 49.48.082(5) then provides that as to wage claims **arising under RCW 49.48.010 and 49.52.050** the definition of employee set forth in **RCW 49.12.005** shall apply.<sup>1</sup> The statutory definition of an employee was passed in about 2006 and set forth definitions to be applied in any wage complaint brought under RCW 49.48 in addition to those brought under RCW 49.52.

Respondent also misses the point when he dismisses Appellants’ claim that a violation of RCW 49.52.050 must be pled and be proven. See Response, p. 47. The rule of liberal construction is not a rule of statutory reconstruction. Champagne v Thurston County, 163 Wn.2d 69 (2008), cited by Respondent, does uphold the practice of notice pleading. It also clearly requires that the Complaint must include a statement of the claim. 163 Wn.2d at 84. There is no RCW 49.52.070 claim absent an underlying violation of RCW 49.52.050(2). An allegation of that criminal violation is missing from

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The Appendix to the Opening Brief of Appellants’, page 2, contains a typographical error in the citation of the statute, RCW 49.48.082(5). The statute commands that the definition in RCW 49.12.005 of employee shall be used in wage payment requirements set forth in “RCW 49.48.010, **49.52.050**, and 49.52.060. The Appendix erroneously transposed the citation from 49.52.050 to *49.48.050*. Moreover, the Washington legislature made this statutory change in HR 3185, a Bill first read on **February 3, 2006**. Case law prior to House Bill 3185 that applied a more expansive definition of “employee” to include former employees became no longer binding.

the Complaint, and it was missing from the proof at trial. It is still the unseen “elephant in the living room”

Respondent’s recitation of the rules for contract interpretation is a simple recitation of general rules. It does not establish that any substantial evidence existed upon which the Trial Court correctly applied those rules. There were not two clear and independently unambiguous contracts of employment. Even Michael Durand testified that the two contracts had to be interpreted together to understand the latter agreement. The termination clause of the April 18, 2005 Contract moreover does not represent any commitment by Michael Durand to work for HIMC/ITI for a five year term. Response, p. 50. The contract does not include any penalty upon Plaintiff if he decided to quit. There is no non-compete clause, and no non-disclosure of confidential information imposed upon Mr. Durand after he quits employment with HIMC. The termination provision means only what Plaintiff insisted upon as a condition for agreeing to work for HIMC, to wit: That he have the same termination benefit that he had in his prior employment. See Testimony of Virgil Llapitan, TR 810-814.

It also is not accurate to claim that the testimony of Michael Durand, Ronald Ehli and Virgil Llapitan fully supported the trial court’s determination

of the meaning of the contracts, thus creating the necessary substantial evidence to support the Conclusions of Law. Response, pp. 51-52. Virgil Llapitan testified that the Bonus of \$15,000.00 was discretionary under the Contract(s), not mandatory as the Court found. Mr. Llapitan testified that the relocation assistance was not a bonus and had to be requested and documented, which it was not. The Court disregarded the language of the Contract(s) and treated the money as a bonus if not a gift. See TR 810-814, 840, 845-851. If the second contract was intended to formalize that which had been previously agreed to on March 24, 2005, then the intent of the parties on that earlier date should predominate. As Mr. Llapitan testified, the severance package that was “formalized” on April 18, 2005 was the language demanded by Mr. Durand on March 24, 2005, to wit: a Guarantee of a monthly severance payment that increased for each month of employment, up to a maximum of twelve months. See TR 810-814, 845-851.

It is argumentative and incorrect to allege that the Defendants did not want to pay “anything” to Mr. Durand under either contract. The testimony of Judy Johnston that HIMC did not know how much it owed to Mr. Durand and therefore needed a Court ruling confuses what she and HIMC were willing to pay Mr Durand, but for his pre-litigation insistence that he was entitled to

payments that ran contrary to the wording and intent of the first Agreement. Exhibit 2. HIMC offered Mr, Durand a Promissory Note of \$125,000.00 based on his ten months of employment calculated at \$12,500.00 per month. That pre-litigation offer is not a refusal to pay. It is a distortion of the testimony to claim that Jerry Cornwell ever told Plaintiff that his wage contract would not be honored because nothing was being honored. That history was disputed by Jerry Cornwell. The Court had only a “he said vs. he said” dispute that it could not resolve by substantial evidence standard or even a preponderance standard. See Cornwell testimony, TR 976-978.

By creating a false scenario of an outright refusal to pay, Respondent seeks to implicate the Schilling definition of “willful. See Response, pp. 56-57. However, in citing to Schilling, Respondent fails to answer the question on appeal, to wit: what does it mean to say that the Defendant is a “free agent” such that the inability to pay was “willful”. Again, an employer with no money, or an employer whose payment duties include the payment of taxes, or the payment of other employees, or the distribution to customers whose funds are held in a quasi-trust relationship, is not a “free agent”. An employer who has net revenue before tax of minus <\$19,042> is not a free agent when

presented with a wage claim of \$692,708.00 and a criminal statute like RCW 9A.56.060.

Respondent is wrong and the Trial Court erred as a matter of law when it found that the individual Defendants were liable as corporate officers because they exercised control over the direct payment of funds that were non-existent. See Response, pp. 60-62, on the theory that an inability to pay imposed a presumption of a willful refusal to pay. See infra.

C: THE INDIVIDUAL DEFENDANTS ARE NOT LIABLE FOR ANY WRONGFUL WITHHOLDING OF WAGES

Respondent's argument that the appeal should be disregarded because, in Respondent's eyes, it does not cite supporting case law is another effort to trivialize that which Respondent cannot rebut. Respondent abstains from analyzing the legislative history presented by Appellants. He does not challenge the Appellants deconstruction of the decision in Schilling v Radio Holdings, 136 Wn.2d 152 (1998) to its core factual background. This Appeal asks this Court to examine the Schilling decision in detail in conjunction with the statutory history and framework that Schilling interpreted. The mere citation to other appellate cases which dutifully if not by rote repeat and intone various statements from the Schilling decision is not an argument to dismiss this appeal. Schilling is a decision that must be limited to the specific facts that

generated that opinion, and made unnecessary a further examination by the Supreme Court of the effects of its ruling in other fact-specific situation. The failure to do so creates the absurd results now evident in the decision of Morgan v Kingen, 141 Wn. App. 143 (2007), rev. granted 164 Wn.2d 1002 (2008). Morgan does not examine the legislative history of RCW 49.52.050. Contrary to Respondent's argument, Response, fn. 5, the elements of a criminal violation do not change merely because a civil penalty may arise from the violation. The only alteration if any is in a reduction of the burden of proof from Beyond a reasonable doubt to either clear and convincing or a preponderance of the evidence. However, a crime, **as defined by the statute**, must still be alleged and proven. In Morgan Division One cited the decision in Schilling for its limited fact specific ruling that inability to pay is not a defense. It then drew the incorrect presumption otherwise barred by statute, RCW 49.52.080, that because the employer could not pay, it is presumed that he "withheld" the payment it could not otherwise have made. Morgan then eviscerated the test of liability for Officers and Directors by holding that control over the ability to pay is irrelevant once "there was insufficient funds to pay the wages", thus making RCW 49.52.070 a strict liability statute against corporations and officers of corporations in financial difficulties.

Morgan is that ultimate contradiction of the very tenants of statutory interpretation cited by Respondent, p. 60-61. Because of a rote and superficial citation of the Schilling decision, the Morgan court ignored the plain language of RCW 49.52.050 and 49.52.070. The decision produced “absurd and strained consequences”, that do not give effect to all terms of the statute, much as did the decision by the Hon. Judge Buckner. The “absurd and strained consequence” now produced is that any new Director or Officer of a struggling Washington company will become personally liable for pre-existing or ongoing wage debts should his or her efforts to revive a company be unsuccessful, or even delayed.

Under decisions like Morgan v Kingen, and other appellate rulings that have misinterpreted Schilling and avoided an examination of the statutory background to that limited decision, the making of various mandatory payments that leave an employer with insufficient funds to fully pay a wage claim has now become a sufficient basis upon which to expose any officer to double damages. Thus the payment of federal withholding taxes in advance of paying a past-due wage claim is grounds for double damages upon an Officer/Treasurer under RCW 49.52.070. The payment of mandatory L&I payments to the State in advance of a past-due wage claim is sufficient to

establish an intent to violate RCW 49.52.050, and hence 49.52.070. The payment in accordance with RCW 49.48.010 of other employees currently employed by an employer in advance of a disputed wage/contract claim by a former employee is now proof of an intent to violate RCW 49.52.070. The payment of mandatory attorney's fees made necessary by the legal requirement that a corporation cannot represent itself is now grounds for finding an intent to violate RCW 49.52.070.<sup>2</sup> A specific intent to deprive must also be proven because inability to pay, per se, is not made punishable by RCW 49.52.050. However, it now is by Judge Buckner's decision.

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The claim that the Trial Court's decision was supported by evidence that other claims were paid ignores the magnitude of the Durand wage claim—**\$692,708.00**. Defendants' **Exhibit 30** was an income and expense report prepared by Judy Johnston as treasurer and based on her experience in handling corporate accounts. Throughout 2006 neither HIMC nor ITI Internet Services, Inc ever had sufficient money to pay Michael Durand's claim, even if in **July 2006**, when Mr. Durand first made his written demand upon the new Board, all available income had been diverted to Mr. Durand. See **Exhibit 30**, attached hereto.

In July, 2006 HIMC had gross income of only **\$80,591.00**. Its gross profit after payment of mandatory expenses for the goods it sold was **\$59,498.00**. Wages for other current employees which **by law had to be paid** and if not paid would have subjected the companies to further claims under RCW 49.48.030 and RCW 49.52.0070 totaled **\$13,384.00**. Payroll and Revenue taxes which **by law had to be paid** totaled **\$6,355.00**. The attorney's fees of **\$7,000.00** would not have satisfied Mr. Durand, and Court rules on attorney representation of corporations meant that if attorneys were not paid, that HIMC would have been unable to challenge and reverse an arbitration award of \$2,200,000.00 entered when HIMC was unrepresented by counsel, and which was later replaced with a new award for former employee A. J. McCann of about \$165,000.00. See Johnston TR 1075-1076, 1208. Mr. Durand's lawsuit helped insure that HIMC would continue to incur legal fees. For all of 2006 after Mr. Durand started his demands and litigation, HIMC was losing money. At no point did HIMC go on a splurge and waste its limited operating capital. No officer or director received any money. No money was "diverted" to pleasure any non-business interest of HIMC or its Board or Officers. HIMC offered Mr. Durand \$125,000.00. He turned it down. See Testimony of Judy Johnston, TR 955-960, 1150, 1207.

The Complaint, the proof at trial and the Trial Court's Findings of Fact have never established the various elements needed to establish a criminal violation of RCW 49.52.050. Even the post-Schilling Supreme Court seems to have accepted this rule of statutory construction and proof of a violation. See Appellants' Opening Brief, pp. 35-39, citing Pope v Univ of Washington, 121 Wn.2d 479 (1993).

The Respondent argues incorrectly that there was substantial evidence of a violation of RCW 49.48.030 with regard to the scope of the contract benefits that were at issue. Respondent was offered payment of his severance package of \$125,000.00 via a Promissory Note. This was rejected by Respondent because it was too small a payment vis-a-vis his demands, and because the payment would not be in cash. See Judy Johnston, TR 1150-1151, 1207-1208, 1082-1083; and Jerry Cornwell, TR 1031-1032 Defendants' Third (2<sup>nd</sup> Supplemental) Trial Memorandum re: Reasons for Rejecting Payment Via Promissory Note,. C.P. pp. 535-540, and **Exhibit Nos. 18-21; 25-26**. Therefore, just as the Court incorrectly elevated an inability to pay to a conclusive presumption of "proof" of a willful violation of the statute, so too did it convert an inability to pay in cash into evidence of a refusal to pay anything.

E. RCW 23B.08.300 and .08.420 AFFORD A VALID AND NECESSARY DEFENSE TO CLAIMS UNDER RCW 49.52.070

Respondent argues that because RCW 49.52.070 extends potential liability to officers and directors [who have willfully violated subsection RCW 49.52.050(2)] the protection offered to Officers and Directors by RCW 23B.08.300 is negated. Respondent again argues from a presumption that the inability of a corporate officer to factually or lawfully pay a wage claim means **ipso facto** that any decision taken in a fiduciary capacity must be rendered nugatory by the presumption of willfulness and criminal liability that Respondent believes flows inexorably from the Schilling decision. See Response, pp. 69-71.<sup>3</sup> This creates a tortured and absurd application of several of the laws of the State of Washington.

The individual Defendants were elected and appointed after the **March 6, 2006** shareholder meeting held pursuant to Court Order. They had no prior experience with Michael Durand. They were not responsible for the sorry financial condition of HIMC and ITI Internet Services, Inc. which confronted them upon their assuming their duties. They did not know Michael Durand,

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Respondent uses circular reasoning to argue that the good faith defense under RCW 23B.08.300 and .420 is unavailable where someone has committed a crime. Presumably the inability to pay under RCW 49.52.070 proves the willfulness needed to create a crime under RCW 49.52.050. This thus defeats evidence of the good faith that is a defense against the element of criminal willfulness itself. Response, pp 69-70.

and had never seen his two contracts of employment. Exhibits 2 and 3A. They even found themselves locked out and unable to enter the business premises or have immediate access to its financial records following the election. This was the factual situation in about March 22-24, 2006 when Plaintiff first announced himself to Jerry Cornwell for purposes of employment, not wage compensation. TR. 402-403. No contract(s) was produced until **July 7, 2006** when Plaintiff's attorney wrote his demand letter to counsel for Appellants itemizing the \$692,708.26 demand, but including only the later version of the employment agreement dated April 18, 2005. **CP 133**. See Judy Johnston, TR 962 (didn't know he had a contract until receipt of his attorney's letter), TR 1088-1091; Jerry Cornwell, TR 976-977. Respondent gave HIMC two weeks to make full payment. This claim arrived at a time when HIMC had accumulated negative earnings for the month of June, 2006 of <\$19,042>. See **Exhibit 30**.

Any agreement by Jerry Cornwell to buy the proverbial "pig in a poke" and divert money to the uninvestigated and unproven Durand claim would have been a breach of fiduciary duties as defined at RCW 23B.08.420 See Senn v N.W. Underwriters, 74 Wn. App. 408 (1994)(Officers have affirmative duty to know the affairs of the corporation prior to acting). The

individual defendant officers thus faced two contradictory duties: 1) Exercise the caution of a reasonable person in paying an unproven debt out of the available corporate funds subject to the overriding duty to not violate Washington criminal law, RCW 9A.56.060 by issuing a worthless check; and 2) Acknowledging the Durand wage claim to the extent it was verified and could factually be paid whether in cash or via Promissory Note. If the individual defendants complied with their duties under RCW 23B.08.420, the failure to pay is not evidence of a violation of RCW 49.52.070; neither is their good faith decision to contest the validity of the second contract, Exhibit 3A, evidence of a criminal violation of RCW 49.52.050(2). The Conclusions of Law and entry of Judgments under RCW 49.52.070 should be vacated because the Court's dismissal as irrelevant under Schilling of what respondent calls the "Business Judgment" affirmative defenses of good faith and exercise of fiduciary duties under RCW 23B.08.420(4) prevented entry of any Findings of Fact as per RCW 23B.08.420(1)(Officers) or RCW 23B.08.300(1)(Directors).

Defendants examined the two contracts and concluded that, consistent with their fiduciary duties as well as the corporation's duty to pay wages under RCW 49.48.030, Durand was owed \$125,000.00 as per the **March 24, 2005**

contract. **Exhibit 2.**<sup>4</sup> The remainder of the Durand claim was disputed based on the inconsistencies between Exhibit 2 and 3A.

The individual defendants and the corporation agreed that Durand was owed money under his first contract, but he could not immediately be paid that amount because of insufficient funds. The Corporation offered him a Promissory Note for \$125,000.00. This offer **qua** admission, when coupled with the Court's erroneous interpretation of Schilling, led the Court to erroneously conclude as a matter of law that, **by default**, the individual Defendants must have acted with a willful intent to deprive Mr. Durand of that portion of his wages that was not being disputed, and which would have been paid if HIMC/ITI had had the money. This reasoning violates RCW 49.52.080 which limits the use of a presumption of willfulness to claims arising under RCW 49.52.050(3), (4) and (5). The clear import of the statute is that a presumption of willfulness is directly prohibited as to claims arising under RCW 49.52.050(2). More significantly, the Trial Court's application of Schilling to create a presumption now penalizes with double damages those

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The **July 7, 2008** demand letter from counsel for Respondent included only **the second contract of April 13, 2005**. The original contract of employment was not mentioned in the demand letter and had been effectively "buried". Once that was located, the contradictions between the two were apparent, and doubts as to the credibility of Mr. Durand's enormous claim and the credibility of his contract interpretation became even greater.

officers who do an honest job of responding to pre-existing wage claims from former employees, and abstain from using pretextual disputes to fall within the borders of Schilling's "bona fide dispute" defense criteria.

The defenses of RCW 23B.08.420 are harmonious with the bona fide dispute defense recognized in Schilling (a case where there was proof of an alter ego identity between the corporation and the Officer/Director). See Appellants' Opening Brief, p. 13 at fn. 2, and p. 26. RCW 23B.08.420 allows the courts to negate any presumption of willfulness in situations where the corporate employer has insufficient funds to pay the wage claim by making relevant the factual determination of whether the officer performed his duties in accordance with the standards set forth in that section, i.e. RCW 23B.08.420(1). See Scott v Trans-System, Inc. 148 Wn.2d 701 (2003)(when decisions are made 1) in good faith and 2) are within the authority of the officer/director to make, "corporate management is immunized from liability"

The Court erred in its Findings of Fact and consequent conclusions of Law by refusing to consider the facts and make any Findings that showed that Jerry and Judy Johnston acted consistent or inconsistent with their fiduciary duties by demanding from Durand proof of a contract, proof of his claims under the contract, and then demurring from submission because of the

inconsistencies in the severance provisions of the two contracts. Under the Trial Court's conclusions of law, conduct in accordance with RCW 23B.06.420 may now be used as justification to impose [presumptive] civil liability under RCW 49.52.070.

F. RESPONDENT'S DEFENSE OF THE COURT SCHEDULING ORDER IS FACTUALLY AND LEGALLY DEFICIENT

Respondent attempts to create an argument that any prejudice deriving from the truncated discovery schedule improperly imposed by the Trial Scheduling Order was either self-induced or resolved by the Court's determination that no "good cause" was shown to reopen discovery. See Response, pp. 16-17., 72-75. The good cause standard advocated by Respondent does not factor in the harm caused by the lack of sufficient time to conduct discovery worthy of a case that sought \$1.3 million or more. It assumes that the time limitations are valid **ab initio**, and therefore any requests for additional time must first show that the limited time available to Defendants was used in a manner that the Court in retrospect considers wise, or utilitarian given the limited time allowed by the Court's rules. That is circular reasoning.

Good cause is shown by the unconstitutional nature of the truncated discovery period imposed upon the unilateral and ex parte request by Plaintiff

for such a schedule. Good Cause is shown by the absence of due process that led to Defendants being weighed down by a litigation plan that rewards the pre-litigation preparation of the Plaintiff, while penalizing the Defendants who are forced to contest the issues on an “un-equal time” basis. The Defendants were faced with a Complaint that named two types of Defendant. 1) The employer corporations: HIMC and ITI Internet Services, Inc., and 2) The individual Officers of HIMC and ITI Internet Services, Inc. who were accused of criminal activity because they adhered to the fiduciary standards of management imposed by Washington law See RCW 23B.06.300; 23B.06.420, by the positive criminal laws of Washington that prohibit the issuance of “hot checks”, RCW 9A.56.060, and common law rules that enable the recipient of a check knowingly issued on insufficient funds to then sue both the officers and again the corporation for fraud based on what would then be affirmative acts of deception. See Judy Johnston, TR 1071-1073. The Court rules are defective if they are imposed to block a defendant from challenging the legal validity of such a Complaint. If the Trial Scheduling rules result in an Order which negates the availability of a Rule 12(b) Motion , then it is defective and unlawful.

The denial of Appellants' CR Rule 56(f) Motion only compounded the error. The Court had a second chance to both give a technical nod of approval to the Scheduling Order while also showing flexibility to enable the Defendants to conduct some discovery. While Respondent argues that denying a Rule 56(f) request is within the Trial Court's discretion, Response p. 72, that discretion can be abused. In this case it was abused by the Court's disdain for or disregard for the due process rights of the Defendants to conduct discovery in a complex case involving a claim for more than \$1,300,000.00.

Respondent again repeats a tautology. He cites Tellevik v 131641 West Rutherford St., 120 Wn. 2d 68 at 90 (1992) for the general standards, i.e. that there must be a good reason to need the additional discovery. Respondent argues that invoking one's rights under CR Rule 12(b)(6) to challenge the lawfulness of the claims is **ipso facto** not a good reason to account for a loss of time. Ergo, if that motion is denied, then the time lost in pursuing the Rule 12(b)(6) claim must be of no weight in determining the existence of good cause.

G. THE TRIAL COURT ERRED IN FAILING TO SEGREGATE THE UNSUCCESSFUL WORK FROM THE THAT WHICH WAS SUCCESSFUL. COURT RULES FOR FEE AWARDS DEMAND NOTHING LESS.

Plaintiff was successful in obtaining a verdict for unpaid wages under RCW 49.48.030. Appellants contend he obtained a larger wage payment than that to which he was entitled.. Thus the appeal. However, Plaintiff also obtained an award of double damages under RCW 49.52.70 which was substantially smaller than he had sought, to wit: \$150,000.00 vs. \$692,708.00. The Trial Court dismissed various portions of the claims as against the individual Defendants vs. the Corporate Defendants. The Court dismissed the claims against the wife of Defendant Jerry Cornwell. The parsing of the Complaint is a sufficient basis upon which to require the Trial Court to dismiss from the petition for Attorney's' fees that portion of work that is properly allocable to the unsuccessful efforts of Plaintiff's counsel. Further, given the overstated claims lodged in this case, the Trial Court should also have exercised its discretion to limit the fee claim to that which was reasonable in terms of the hours needlessly expended.

Respondent's claim on the totality of the fees awarded to him rests on the circular reasoning that because he obtained a verdict, all that he did must have been necessary to the result obtained; and because he won on one claim, all the claims were interrelated. That is nothing but a restatement of the old adage that victory has a thousand fathers, while defeat is an orphan. The

standard for awarding fees demands that even an orphan is entitled to recognition when fees are sought in a case resulting in less than a 100% victory for the Plaintiff. See Bowers v TransAmerica title Inc., 100 Wn.2d 483 (1983); Kastanis v Educ. Employees Credit Union, 122 Wn.2d 483 (1993). That some additional work may have been required of Plaintiff's counsel in his fee request or of the Trial Court in its evaluation of the hours spent is not a reason to excuse the trial court for not doing that which is necessary to a proper fee award.

Just at the total hours accepted as a basis for determining the lodestar amount was excessive, so too was the Court's approval of a 1.5 fee multiplier.<sup>5</sup> Pham v Seattle City Light, 159 Wn.2d 527 (2007), cited by Respondent, does not support his argument. Pham was a civil rights case. The Supreme Court repeated the long-standing rule, cited by Appellants, that "The Court should discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time." 159 Wn.2d at 538. The Supreme Court approved the Trial Court's denial of a multiplier where the

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Plaintiff mis-describes the amount of the multiplier. See Response, p. 79. He claimed his hourly rate was \$300.00 per hour. His fee motion requested a multiplier of 2x his hourly rate. The Court awarded him/Plaintiff a multiplier that increased his hourly rate to \$450.00 per hour. That is a multiplier of 1.5. If the multiplier had been 0.5, then the allowed fee would have been \$175.00 per hour. A multiplier of simply "1.0" leaves the hourly rate unchanged.

normal hourly rate was deemed adequate. The Supreme Court also noted that the Trial Court made an extensive and serious examination of the fee request and the hours expended. It had entered 35 findings of fact justifying its reasonable fee calculation. That is the polar opposite from the dearth of explanation or findings entered in this case by the Trial Court.

Pham v Seattle City Light marks a firm expression against the casual awarding of fee multipliers. The Washington Supreme Court appears to have approved the reasoning in City of Burlington v Dague, 505 U.S. 557 (1992)

that: “the lodestar calculation is presumptively reasonable and that a contingency multiplier would likely duplicate in substantial part factors already subsumed in the lodestar.” id at 541

The Pham Court directed the issue to the risk of loss at the start of litigation, not, as Respondent now seeks to interpret, to any speculative future inability to obtain satisfaction of a judgment. The Court described the risk of loss, i.e. in establishing the merits of the case, as already being reflected in the lodestar calculation based on the number of hours of time reasonably spent. However, “A contingency enhancement would result in double payment...Applying contingency or risk multipliers results in a social cost of indiscriminately encouraging non-meritorious claims to be brought as well as meritorious ones” id 541. The Pham court did not approve a contingency multiplier based

on some speculative difficulty in collecting on a judgment. It did not approve the risk of collection as a relevant factor in determining either the lodestar or the reasonableness of a fee multiplier.<sup>6</sup> Plaintiff complains that Defendants actually mounted a vigorous defense against the unnecessary RCW 49.52.070 claim that acted as the **in terrorem** claim designed to coerce a settlement but which backfired and served only to block any settlement that would personally implicate the Officers of HIMC Corp.

The Trial Court abused its discretion and awarded an undeserved payment enhancement.

H. NO MULTIPLIER SHOULD BE APPLIED TO ATTORNEY'S FEES ON APPEAL.

Respondent continues to argue for a multiplier based on the likelihood of collection of the underlying judgment. That theory of increased recovery for attorney's fees was adequately addressed in Appellants' Opening Brief.

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Both this case and the decision in Morgan v Kingen, 141 Wn. App. 143 (2007), rev. granted 164 Wn.2d 1002 (2008), exemplify a social cost in allowing claims to be made directly against Officers and Directors of corporate employers that are not alter-ego entities and are truly in bad financial condition. At this stage in the Plaintiff's bar's application of the Schilling decision, no prudent or experienced person would agree to act as an officer or CEO of a troubled Washington corporate employer because he or she would then be making his personal and community assets subject to civil liability just because the troubled corporate employer is unable to pay a specific wage claim. It makes any new officer into an involuntary guarantor of the debts of an employer for a financial condition that the now liable officer did not personally create, and is even trying to improve. In the case of Plaintiff Michael Durand, he gave a pass to the past Directors and Officers who had involuntarily terminated him and pursued the new officers **within four months** of the change in management.

Appellant's contend that the likelihood of collection in a hourly fee case is not a relevant factor in creating or evaluating a "contingent risk". Response, p. 81. Every Judgment carries some risk of non-collection. If this factor is given relevance then the prior rulings of numerous Supreme Court decisions on when a multiplier is appropriate will be made meaningless. Further, the risk factor will no longer be subject to objective evaluation by the Trial Court, but will now be an expression of the subjective or speculative fears of the prevailing party-Plaintiff.

The imposition of Joint and several liability for attorney's fees was error because the claims are severable, and the Trial Court severed the liability of the individual defendants on the RCW 49.48.030 claim. The harm was not indivisible, since the failure to pay a wage is a factual issue of what was the wage and was it paid **by the employer**. The imposition of double damages against an Officer involves additional issues of whether the related criminal statute, RCW 49.521.050, was violated and whether the officer knowingly and willfully, given the financial status of the corporate employer, intended to deny a wage payment.

#### I. THE MARITAL COMMUNITY ISSUE

The Trial Court dismissed Mrs. Jane Doe Cornwell as a Defendant. There was no judgment entered against her or her estate. For the reasons stated in the Opening Brief, the Court erred in imposing a judgment against Jerry Cornwell's portion of his marital Estate. The Court also erred in not imposing attorney's fees against the Plaintiff for having also filed claims against Mrs. Jane Doe Cornwell simply because she is the spouse of Jerry Cornwell.

The decision in Keene v Edie, 131 Wn.2d 822 (1997) relied upon by Respondent is not dispositive of the issue herein. In Keene the Supreme Court extended to community real property its holding in deElche v Jacobsen, 95 Wn.2d 237 (1980) to make the responsible spouse's one-half community interest in real property subject to payment of a judgment. It did not give a license to Plaintiffs to intimidate an Officer or Director by suing his or her spouse if an unwarranted wage claim was not paid.

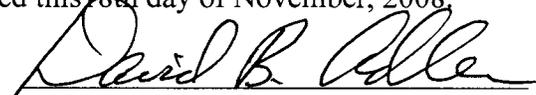
#### CONCLUSION

The decision below is a product of a mis-interpretation of Schilling that affects the liability of the individual defendants as officers and directors. The bias of the Court (a/k/a liberal int interpretation) is evident in its legal interpretation of the two contracts and its disregard of evidence from Virgil Llapitan regarding the formative intent of Michael Durand. The Court over-

extended itself to benefit the Plaintiff by awarding a multiplier on the hourly fee in a case under RCW 49.48.030 that began with an assurance that some amount of money was owed by HIMC/ITI to Plaintiff. There was no “risk” of losing that legal claim. The Trial Court made legal conclusions that were not supported by its own Findings of Fact, and entered Findings that were inconsistent with other Findings.

The Court’s Judgments should be vacated, and this Complaint remanded for a new trial, before a new judge, with instructions to reopen discovery for a sufficient period of time to afford the Defendants the Due Process ability to prepare a Defense. However, on Remand, the claims against Judy Johnston and Jerry Cornwell, qua Officers, should be Dismissed. The individual Defendants should be awarded their attorney’s fees incurred in having to defend against a spurious claim under RCW 49.52.070 that was unsupported by the evidence.

Respectfully submitted this 18<sup>th</sup> day of November, 2008.

  
DAVID B. ADLER, Attorney for Appellants.

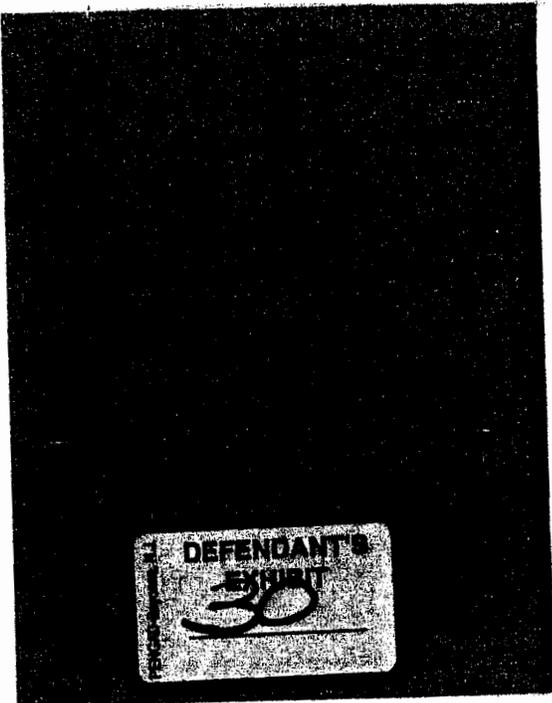


EXHIBIT NO. 30

**CONFIDENTIAL****HIMC & SUBSIDIARIES  
INCOME & EXPENSE REPORT**

	June 2006	July 2006	Aug 2006	Sept 2006	Oct 2006	Nov 2006
<b>INCOME</b>						
Fees and commissions	70,156	81,753	76,820	73,141	78,955	72,522
Returns and allowances	(1,163)	(1,162)	(100)	(808)	(1,965)	(3,004)
<b>Total Income</b>	<b>68,993</b>	<b>80,591</b>	<b>76,720</b>	<b>72,333</b>	<b>76,990</b>	<b>69,518</b>
<b>COST OF GOODS SOLD</b>						
ACH bank fees	1,531	1,459	1,358	1,537	1,659	1,524
Postage	12,723	12,365	24,682	14,102	15,923	14,213
Supplies	2,500	4,580	4,600	4,691	607	0
Verification costs	5,104	2,689	7,707	969	3,058	4,521
<b>Total Cost of Goods Sold</b>	<b>21,858</b>	<b>21,093</b>	<b>38,347</b>	<b>21,299</b>	<b>21,247</b>	<b>20,258</b>
<b>GROSS PROFIT</b>	<b>47,135</b>	<b>59,498</b>	<b>38,373</b>	<b>51,034</b>	<b>55,743</b>	<b>49,260</b>
<b>GENERAL EXPENSES</b>						
Accounting	1,625	0	0	0	0	0
Advertising	908	92	92	1,192	592	592
Bank charges	6	6	6	6	6	6
Consulting & tech support	8,215	8,200	7,780	5,000	1,394	2,044
Directors fees (Note 1)	0	0	0	0	0	0
Insurance - empl med (Note 2)	0	0	0	0	0	0
Insurance - liability & property	0	0	227	177	0	418
Investor/public relations	559	0	112	0	165	400
Legal & professional	21,245	7,000	12,970	12,671	6,357	19,500
Licenses, permits & trademarks	506	0	0	84	500	50
Meals & entertainment	0	0	0	0	0	0
Miscellaneous	122	0	0	152	0	963
Office expense	386	44	89	327	171	484
Parking	846	846	846	846	847	846
Rent - equipment	2,737	2,486	2,486	2,710	2,301	2,767
Rent - premises	4,307	4,307	4,307	4,307	4,307	4,307
Repairs & maintenance	865	443	0	0	0	0
Salaries - officers (Note 3)	0	0	0	0	0	0
Security	263	263	263	281	281	281
Tax - payroll	1,206	2,868	1,068	1,616	2,483	1,508
Tax - revenue	3,994	3,487	0	0	3,368	0
Telephone and Internet	2,619	3,464	4,335	1,038	4,308	3,277
Travel	0	872	1,332	782	1,422	1,576
Wages (Note 4)	15,770	13,384	13,958	21,129	17,736	19,688
<b>Total General Expenses</b>	<b>66,177</b>	<b>47,762</b>	<b>49,871</b>	<b>52,318</b>	<b>46,238</b>	<b>58,705</b>
<b>EARNINGS BEFORE INCOME TAX</b>	<b>(19,042)</b> (Note 5)	<b>11,736</b>	<b>(11,498)</b>	<b>(1,284)</b>	<b>9,505</b>	<b>(9,445)</b>
<b>ACCUMULATED EARNINGS</b>	<b>(19,042)</b>	<b>(7,306)</b>	<b>(18,804)</b>	<b>(20,088)</b>	<b>(10,583)</b>	<b>(20,028)</b>

**CONFIDENTIAL**EXHIBIT NO. 3  
D-4

**HIMC & SUBSIDIARIES**  
**NOTES TO INCOME & EXPENSE REPORT**

- Note 1) Directors: Henry F. Gurley III, Dean S. Kalivas, Judy Morton Johnston  
No compensation paid.
- Note 2) No employee medical insurance has been provided during 2006 due to budget constraints.  
Beginning January 2007, insurance will be provided with partial employer contribution.
- Note 3) Officers: Jerry Cornwell (President), Judy Morton Johnston (Sec/Treas)  
No compensation paid.
- Note 4) Employees: Melanie Downing, Deon Gorman, Mike Gorman, Virgil Liapitan, Cory  
Nowacky and Miles Raymond  
Operations Manager: Tami McMullin (wages paid by Western Clearing Corp. LLC  
from March 9, 2006 to March 8, 2007 under terms of debt settlement)
- Note 5) This deficit was covered by obtaining \$20,000 in loans from shareholders.

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY   
DEPUTY

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

MICHAEL DURAND, et al

Respondent,

vs.

HIMC CORPORATION,  
ITI INTERNET SERVICES, INC.,  
JUDY MORTON JOHNSTON,  
JERRY CORNWELL; AND  
JOHN DOES 1-10,

Appellants.

No. 37088-3-II

CERTIFICATE OF SERVICE

I hereby certify that on this 18<sup>th</sup> Day of November, 2008, I served the foregoing  
Appellants' Reply Brief on Appeal upon counsel by causing copies to be delivered by ABC  
Messenger to:

Paul Lindenmuth  
4303 Ruston Way  
Tacoma, Washington 98402

Dated this 18<sup>th</sup> day of November, 2008.

  
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Seattle, Washington 98101