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DIVISION II

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

MICHAEL DURAND,
PLAINTIFF/APPELLEE,

VS.

HIMC CORPORATION; ITI
INTERNET SERVICES, INC. JUDY
JOHNSTON; and JERRY
CORNWELL, and THE MARITAL
COMMUNITY OF JERRY
CORNWELL AND JANE DOE
CORNWELL;
DEFENDANTS/APPELLANTS.

CASE NO. 37088-3-II

- RESPONDENT'S OPENING BRIEF -

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III. COUNTER-STATEMENT OF THE ISSUES

1. Should the Trial Court's Findings of Fact Be Deemed Verities on Appeal Given the Defendants' Failure to Assign Error to Such Findings of Fact?

2. Did the Trial Court Abuse its Discretion in Denying Defendants' Motion for a Trial Continuance And/or for Cr 56 (f) Relief When the Defendants Did Not Provide the Trial Court a Good Reason for the Delay in Obtaining Discovery, and When the Defendants Did Not Articulate What Would Be Established by Way of Further Discovery or How Such Evidence Could Establish the Existence of a Genuine Issue of Material Fact?

3. Whether the Trial Court Abused its Discretion in Denying Defendants' Motion for a Continuance And/or for Cr 56 (f) Relief When the Defendants Conducted Absolutely No Discovery During the Discovery Period Set Forth Within the Trial Court's Case Schedule, and Instead Engaged in Substantial Motion Practice That Had a Low Likelihood of Success, and When the Plaintiff Was Able to Complete Necessary Discovery While at the Same Time Responding to Defendants' Efforts to Have this Case Resolved Through Motion Practice?

4. Whether the Trial Court Correctly Applied Existing Case Law When Rejecting the Defendants' Contention That "The Inability to Pay a Wage Claim" Is a Defense to the Claim of a Wrongful Withholding of Wages Brought Pursuant to RCW 49.52.050 and RCW 49.52.070?

5. Whether the Trail Court Appropriately Found That the Individual Defendants Johnston and Cornwell, Who Were "Officers" of the Corporation(s) Are Personally Liable for the Amount of Plaintiff Wages Which Were Wilfully Withheld by the Absence of a "Bona Fide" Dispute, When the Terms of the Applicable Statute RCW 49.52.050 and RCW 49.52.070 Specifically Imposes Liability on "Officers?"

6. Whether Substantial Evidence Supports the Trial Court's Conclusions That Defendants Breached Michael Durand's Contract of Employment by Prematurely Terminating His Services Before the Expiration of the Five-year Term Set Forth Within the Contract, and Whether the Trial Court Correctly Calculated the Amounts Due and Owing under the Contract?

7. Whether the Trial Court Correctly Determined That under RCW 49.52.070 That \$150,000.00 Was Wilfully Withheld from Plaintiff, Michael Durand, When under the Defendants' Own Theory

of the Case He Was Entitled to Severance Pay and Bonuses Roughly Equivalent to That Amount?

8. Whether or Not the Trial Court Correctly Interpreted the Plaintiff's Contracts of Employment, Which Were Drafted by Agents of the Defendants and to the Extent That They Were Ambiguous, Had to Be Construed Against the Appellant's Position?

9. Whether the Trial Court Erred in Awarding Attorney's Fees under RCW 49.48.030 and RCW 49.52.070 When the Award of Such Fees Was Fully Supported by the Evidence Presented Before the Trial Court, and by Plaintiff's Counsel's Fee-related Submissions?

10. Whether or Not the Trial Court Acted Within its Discretion to Award Attorney's Fees at a Multiplier of .5, When the Case Presented a Substantial Amount of Risk Due to the Nature of the Events Presented, I.e. an Inability to Pay?

11. Whether the Trial Court Correctly Imposed Joint and Several Liability for Payment of Attorney's Fees upon the Individual Defendants, Who Were Liable for a Portion of the Award That Was Made under RCW 49.52.070 When the Same Work Would Have Had to Have Been Performed in Order to Prove Plaintiff's Claim Pursuant

to RCW 49.48 Et Seq as Would Have Been Required to Prove the Claim under RCW 49.52 Et Seq?

12. Whether the Trial Court Correctly Calculated Damages under RCW 49.52.070 Against the Individual Defendant Officers When the Amount Awarded (\$150,000.00) Was Roughly Equivalent to the Amount Due and Owing under Plaintiff's "First Contract," Which the Defendants Were Attempting to Enforce Without Consideration of the Terms Set Forth Within the "Second Contract?"

13. Whether or Not the Trial Court Erred in Imposing Liability upon Individual Defendants Cornwell Marital Community, When There Was No Indication That He Was Operating in a Manner That Would Not Ultimately Benefit His Marital Community When Operating as a Corporate Officer in a Company in Which He Owned a Substantial Amount of Stock?

IV. COUNTER-STATEMENT OF THE FACTS

A. Introduction/Overview.

After being heavily recruited by Ron Ehli, who was the principle on both HIMC Corporation and ITI Internet Services at the time, Plaintiff Michael Durand moved his young family from the Vancouver area to the Tacoma, Pierce County area in order to accept employment with both

HIMC Corporation and ITI Internet Services. On March 24, 2005, Mr. Durand was tendered a job offer that had preliminary compensation terms set forth therein, including a severance provision. Mr. Durand viewed the initial offer as simply being an incentive for him to make a commitment to work for HIMC and ITI Internet Services, which would require him to move his family from Vancouver to the Tacoma area. (Exhibit 2). On or about April 18, 2005, he was approached by the HIMC president, Virgil Llapitan and was told that his employment contract, in order to be consistent with that of the other officers of the corporation had to contain additional and more lucrative terms. *Id.* (Exhibit 3A). The contract provided:

A. 3. **Term.** The term of this agreement shall begin on April 18, 2005 and shall continue for a period of five years until April 18, 2010. This agreement shall be renewed automatically thereafter for up to one (1) successive term of five (5) years each unless either the company or Durand shall issue written notice on or before the 60th day prior to the anniversary date of this agreement on an intent not to renew this agreement for the next succession of additional term:

4. **Compensation.** For all services rendered by Durand under this agreement, the company shall provide compensation to Durand as follows:

4.1 **Salary.** Salary at the rate of \$12,500.00 per month or more payable semi-monthly, payable in cash.

4.2 **Annual Bonus.** 10% minimum guaranteed for 2005. Maximum 25% yearly bonus shall be determined in the discretion of the Board of Directors.

4.3 **Other Benefits.** The company shall pay the monthly premium cost for medical, dental, disability insurance, and parking and monthly auto allowance.

4.4 **Acceptance Bonus.** For acceptance of this agreement, Durand shall be paid 25,000 shares of HIMC restricted stock issued on the 6 month of employment. (October 18, 2005).

4.5 **Relocation Assistance.** Durand shall receive \$20,000 as relocation expenses for relocation to the Tacoma area.

Under the express terms of the employment contract, it was provided:

In the event that the company or any of its successors shall terminate this agreement early, Durand shall receive compensation from the remaining contract term upon termination. Any and all stock or options not

vested will be fully vested at the time of early termination.

Mr. Durand understood that the purpose of his employment at HIMC and ITI Internet Services was to develop a sales department and long-term strategies, and it was not necessarily to generate sales. Such tasks were to be performed by two subordinate employees, who, over a short period of time, were laid off by the company. As such he did engage in sales and account maintenance activities simply as a matter of necessity.

Relying on the promises within the terms of the contract, Mr. Durand did in fact move from Vancouver and relocated his home to University Place, Washington. Initially the express terms of Mr. Durand's contract were honored, save for the fact that Mr. Ehli deferred the promised \$20,000 in relocation expenses. However this change in September 2005, when Mr. Ehli approached Mr. Durand, and other management staff, and requested that they half their salaries, due to the financial condition of the company, and apparently the need to fight off what was characterized as a "hostile takeover" by the investors int the various corporations.

Mr. Durand, in reliance of his written employment contract for a term of years, agreed to the deferral of wages and continued to work for the corporations, believing the fortune of the companies would shortly turn around.

At the time Mr. Durand took the employment, he was unfortunately unaware that there were concerns about Mr. Ehli's stewardship of the companies and litigation soon followed in the case of *Johnston vs HIMC Corporation*, Pierce County Cause number 05-2-10424-0. In addition, apparently Mr. Ehli was having an affair with a substantially younger employee which resulted in the disintegration of his marriage with a Pam Elhi, who had involvement in the management of the various corporations.

By February 21, 2006, Mr. Elhi was no longer actively involved in the management of the corporation and such roles had been assumed by Pam Elhi and the Elhi's daughter, Melissa Duthie. While Mr. Durand had made substantial efforts to stay out of the Elhi's affairs, on February 21, 2006, he was terminated without warning from his employment with ITI Internet Services and HIMC Corporation by Melissa Duthie. Such termination was memorialized by Mr. Durand in an email which clarified his termination but also indicated that he expected to be paid his "back

wages" for "the amount he had deferred in compensation due to the financial well being of the company". (Exhibit 4).

Further, in March 2006, the "hostile takeover" as Mr. Elhi perceived it did in fact occur with the defendants Johnston and Cornwell (and perhaps others) taking over control of the two corporations and the ousting of the Ehlis. When such an event occurred, Mr. Durand approached defendant Judy Johnston about future employment, and he was told to speak to Mr. Cornwell. Mr. Durand and Mr. Cornwell had a telephone conversation shortly thereafter, and he expressly told Mr. Durand that the new Board of Directors had no intentions of honoring the employment contracts that had previously been entered into by the former Board and Officers of the corporation.

Within a short time, Mr. Durand was seeking legal counsel, who attempted to negotiate a resolution of Mr. Durand's outstanding claims under the terms of his contract for the amount of remuneration due under the contract.

Unfortunately, despite the fact that the company acknowledged at least \$125,000 debt to Mr. Durand reflective of the severance provision in the initial employment offer, no agreement could be reached and the defendant companies have made no effort to pay Mr. Durand even the

amount admittedly owed save for an offer of ephemeral unsecured promissory note. This lawsuit followed.¹

Under the terms of Mr. Durand's employment contract which was prematurely terminated and, which by its terms, has an acceleration clause should it be prematurely terminated, Mr. Durand is owed the following from his former employers:

1. Base salary per contract at \$12,500 per month equals \$618,750.00;
2. Deferred salary ("back wages") equals \$38,958.26; annual bonus for the year 2005, \$15,000; relocation assistance, \$20,000. Total owed under the terms of the contract: \$692,708.26.²

1

When there are two agreements, or prior or contemporaneous agreements, they merge into the final written contract. See, *Flowers v. TRA Industries* 127 Wn app 113, 29, 111 P3rd 1192 (2005). Further more a second contract dealing with the same subject matter as did the first contract made by the same parties, but does not expressly state whether or not or to what extent it intends to act as a substitution for the previous contract, the two contracts must be interpreted together, and insofar as they may have inconsistent terms, the contract entered into later in time prevails, but the consistent remainder of the first contract may still be enforced. Id. In the instant matter, counsel for the defense which acknowledging the debt due under the severance portion of the first contract, which was the job offer, has attempted to ignore and all provisions of the second contract which comprises Mr. Durand's fully integrated employment agreement.

2

The figure does not include the \$125,000 under the severance provision.

As discussed below, given the operation of RCW 49.52.050 and RCW 49.52.070, the above-referenced amount should be doubled. There is simply not a bona fide dispute existing with respect to the amounts due and owing under the terms of the contract, and it is very clear that these companies, and these individual defendants, have made the deliberate choice not to pay Mr. Durand the remainder of the amounts due and owing under the terms of the contract, due to an alleged financial inability to pay, which under the *Schilling* case is not only not a defense, but is an admission of willfulness for RCW 49.52.070 purposes.

In any event, as discussed below, clearly this is a case where Mr. Durand's wages have been largely withheld as a result of the actions of the individual named defendants. Under the terms of statutory language set forth within RCW 49.52 such actions exposes them to personal liability without regard to whether or not the Court decides to "pierce the corporate veil". The applicable statutes are RCW 49.52.050 and RCW 49.52.070 which provide the following:

RCW 49.52.050. Rebates of wages -- False records -- Penalty

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

(1) Shall collect or receive from any employee a rebate of any part of wages theretofore paid by such employer to such employee; or

(2) Willfully and with intent to deprive the employee of any part of his wages, shall pay any employee a lower wage that the wage such employer is obligated to pay such employee by any statute, ordinance, or contract; or

(3) Shall willfully make or cause another to make any false entry in any employer's books or records purporting to show the payment of more wages to an employee than such employee received; or

(4) Being an employer or a person charged with the duty of keeping any employer's books or records shall wilfully fail or cause another to fail to show openly and clearly in due course such employer's books and records any rebate of or deduction from any employee's wages; or

(5) Shall willfully receive or accept from any employee any false receipt for wages;

Shall be guilty of a misdemeanor.

[Emphasis original and added]

RCW 49.52.070. Civil liability for double damages.

Any employer and **any officer**, vice principal or agent of any employer who shall violate any of the provision of subdivisions (1) and (2) of RCW 49.52.050 shall be liable in a civil action by the aggrieved employee or his assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees; PROVIDED HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

The violations by an employer or any officer, vice principal, or agent of any employer of any of the provisions of subdivisions (3), (4), and (5) of RCW 49.52.050 shall raise a presumption that any deduction from or underpayment of any employee's wages connected with such violation was wilful.

(Emphasis added).

B. Pretrial Proceedings.

On or about November 29, 2006, the operative pleading in this case, Plaintiff Durand's "Amended" Complaint was filed. Within the Complaint, Plaintiff brought claims for (1) breach of express employment contract; (2) promissory estoppel/reliance; (3) wrongful withholding of wages pursuant to RCW 49.48 et seq and RCW 49.52 et seq. Attached to the Amended Complaint was a copy of the April 18, 2005 Employment Agreement and the March 24, 2005 Employment Offer. (CP 13 - 27). The case scheduling order set discovery cut-off on April 11, 2007, and the deadline for adjusting the trial date at April 4, 2007. (CP 1).

Following service of the subject Complaint, the defendant corporations HIMC and ITI filed an Answer on December 13, 2006. (CP 28-32). However, instead of filing an Answer, the individual defendants Cornwell and Johnston sought dismissal pursuant to CR 12 (b)(6). (CP 33-86). Plaintiff's counsel objected to the CR 12 (b)(6) motion, and by

agreement the matter was set over until the Plaintiff had an opportunity to conduct discovery, including the issuance and receiving answers to interrogatories, which were issued to the defendants therein, and the opportunity to depose Defendant Judy Johnston and ITI/HIMC employee, Virgil Llapitan, who had been the signatory on the above-referenced employment agreements.

Following an opportunity for discovery, Plaintiff on February 21, 2007, filed a detailed response to Defendants' "CR 12 (b)(6) motion" and in part objected to the stylization of Defendants' motion being a "12 (b)(6) motion when substantial materials were attached to the pleading ,and as such it should have been treated as a motion for summary judgment.

Within Plaintiff's reply memorandum, it was noted that the entire approach taken by the Defendants in bringing the motion flied in the face of CR 8 (c), which allows for notice of pleading. In addition, the position taken by the Defendants, that "an inability to pay" was a complete defense because they could not be required to issue a "hot check" was frivolous and contrary to the Supreme Court's opinion in the case of *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 961 P.2d 371 (1998).

It was also further argued that under the *Ellerman v. Center Point Pre-press, Inc.*, 143 Wn.2d 514, 22 P.3d 795 (2001), that the individual

defendants could be liable under RCW 49.52.070 because they are “officers” of the corporation who held authority over the “check book”, i.e. whether or not funds could be paid. (CP 89-06).

In addition, Plaintiff also resisted the notion that the Defendants would be entitled to some kind of good faith immunity pursuant to RCW 23 (B).08.30 under what is known as the “business judgment immunity” rule.

On or about March 2, 2006, the Honorable Rosanne Buckner heard Defendants’ motion to dismiss. (See, RP Vol. 1, pp. 1-30). After hearing full argument, the Court ultimately rejected Defendants’ 12 (b)(6) finding that “successor director or officers” could be liable for the withholding of wages pursuant to RCW 49.52.070. (*Id.*p 29).

On or about March 30, 2007, the Court entered an Order which in most part denied Defendants’ motion for dismissal pursuant to CR 12 (b)(6) and/or motion for summary judgment. (CP 271-73).

Apparently unsatisfied, and trying to create an additional basis for delay, on March 30, 2007, the Court heard Defendants’ motion to have the denial of the Defendants’ 12 (b)(6) motion to dismiss certified to the Court of Appeals. (CP 261-66). Judge Buckner denied the motion, indicating that it was her understanding that she had correctly followed the case law.

(See, RP Vol. II, p. 11 and 12). (CP 274-75). A notice of discretionary review of the Court of Appeals with respect to the March 30, 2007 Order, which in most part denied its motion to dismiss pursuant to CR 12 (b)(6), and the Order denying Defendants' petition to certify appeal. (Supp. CP).

On April 26, 2007, Plaintiff filed a motion for summary judgment and sought to shorten time so that the summary judgment motion could be heard before the then currently set trial date of May 23, 2007. (CP 290-309).

Within two days of Plaintiff filing his motion for summary judgment, the Defendants filed a motion to change trial date, which attempted to justify a need for continuance based on the existence of its notice of discretionary review to the Court of Appeals, the unavailability of counsel, and the fact that the Defendants had been focused on filing motions as opposed to doing discovery before the discovery cut-off that had otherwise elapsed. Notably, within Defendants' motion for continuance there was no explanation as to why, other than engaging in pleading practice, while the Defendants (unlike Plaintiff) could not complete their discovery in a timely manner, or what discovery would be likely to reveal. (CP 324-357).

Also significant, on that date, the parties filed a joint statement of the evidence. Within the joint statement of the evidence, amongst the Defendants' exhibits and listed as defense exhibits 1 through 13, were correspondence between Plaintiff's counsel and defense counsel regarding efforts to resolve the claim pre-filing. These are the same letters which now the Defendants object to their admissions on the grounds that their admissions were violative of ER 408. It is noted that the joint statement of the evidence is duly signed by defense counsel by way of a facsimile signature. (Supp. CP).

On May 4, 2007, the parties met before Judge Buckner on the various procedural motions which were then pending. During the course of oral argument on Defendants' motion for a continuance, Plaintiff's counsel objected to the re-opening of discovery, noting that Plaintiff had been reliant on the closing of discovery, which occurred on April 11, 2007, it filed a motion for summary judgment and the Plaintiff had been able to conduct depositions and do written discovery in the case, while the defense had wholly failed to do so. (RP Vol. III, p. 7-15).

While defense counsel indicated that he had a desire to take two depositions, during the course of his recitation he never provided an

explanation as to why the discovery could not have been done earlier. (RP Vol. III, p. 10-14).

In sorting through the various motions, the trial court based on its own calendar, determined to set the case over for approximately a four-week period of time. The Court determined that it would not issue a new discovery cut-off date and noted that the focus of the defense had been its pretrial motions and not the conducting of appropriate discovery under the circumstances, and no “good cause” existed for a continuance. (*Id.*, p. 14-15).

At that time, the Court entered orders denying Defendants’ motion, requesting supplemental discovery, but did grant an order changing trial date from May 23, 2007 to June 15, 2007. In addition, the Court set June 8, 2007 as the date for hearing of Plaintiffs motion for summary judgment. (CP 418-19). In the meantime, the Court of Appeals Commissioner was able to accommodate Defendants’ notice of discretionary review, and on June 11, 2007, issued a “ruling denying review.” (Supp. CP). Within the ruling denying review, the Court of Appeals Commissioner (Court Commissioner Skerlec) indicated that it was neither obvious nor probable error for the trial court to apply the terms of RCW 49.52.050 and RCW 49.52.070 to a “officer” of a company of an employer who fails to pay

wages. In addition, the Court indicated that it was its opinion that the *Ellerman* and *Schilling* cases had been appropriately applied by the Superior Court, and should the Defendants be inclined to seek relief the remedy was to seek legislative amendment and that neither the Court of Appeals, nor the trial court had the prerogative of overruling either the *Ellerman* or *Schilling* opinions, which were issued by the Washington State Supreme Court.

Having efforts at delay through appellate proceeding disposed of, on June 15, 2007, the trial court called the case for trial. Initially, the trial court heard Plaintiff's motion for summary judgment. After full argument, the Court determined that it needed to hear evidence with respect to the "intent of the parties and the formulation of the two employment agreements that we have here" and that such questions were sufficient to deny the matter summary judgment and require the need for a full hearing. (RP Vol. IV, p.1-19).

On June 21, 2007, trial on the matter commenced. At that time, the Court heard Plaintiff's motions in limine, motion to strike untimely disclosed witnesses and exhibits, and heard arguments with respect to Plaintiff's ER 904 submissions. (RP Vol. V, p. 1-69).

C. Testimony of Plaintiff, Michael Durand.

Testimony in the instant case commenced on June 21, 2007. Prior to testimony, Plaintiff's counsel provided to the Court an opening statement. The defense counsel declined to do so. (See, RP Vol. V, p. 69-84). Mr. Durand, the Plaintiff herein, was the first witness called. During the course of his testimony, Mr. Durand explained how he had met Mr. Ehli at Lake Mayfield in Lewis County, where they had both owned lake front property. He indicated that he developed a social friendship with Mr. Ehli and ultimately their discussions turned to the idea that Mr. Durand would come and work for Mr. Ehli's companies HIMC and ITI Internet Services, Inc. (RP Vol V, p.88-94). At that time of these discussions, which occurred in approximately 2004, Mr. Durand was working at Brach's Confection Company in Vancouver, Washington, where he also resided. He was a Regional Sales Manager for Brach's and had 13 western states within his territory. He also had 10 direct reports and indirectly had 70 individuals under his supervision. (*Id.*). He was making approximately \$110,000.00 per year during the last three to four years of his employment with Brach's. (*Id.*). He also had a substantial amount of Brach's assets directly under his supervision.

As these conversations between Mr. Ehli and Mr. Durand grew more serious, Mr. Durand emphasized that he was not in a position to leave a national company where he had reached the highest level of recognition and growth over an eight and one-half year span to go to a small company without having a substantial safety net for his family. (*Id.*, p. 95). Ultimately, Mr. Ehli directed Mr. Durand to speak to Virgil Llapitan, who was an officer within the subject companies, in order to put together an appropriate job offer that provided Mr. Durand with sufficient security to feel comfortable to be able to give his notice to Brach's, which had otherwise been lucrative and steady employment. On or about March 24, 2005, Mr. Durand traveled to Tacoma, Washington and met with Mr. Llapitan to hammer out a deal. The terms were negotiated for the initial job offer, set forth within Exhibit 2, and was before the trial court.

Under the terms of the job offer, Mr. Durand was to commence with his employment on April 18, 2005. (Exhibit 2).

On April 18, 2005, Mr. Durand presented himself to the location of ITI Internet Services, which was located in Tacoma, Washington. Part of the initial offering was an initial \$25,000.00 "signing bonus," which was never received by Mr. Durand. The purpose of the signing bonus was, among other things, to help offset realtor fees and moving expenses,

which would be incurred by Mr. Durand having to move from Vancouver, Washington to the Tacoma area in order to be employed by ITI Internet Services. (RP Vol. V, p. 99). (See also, Exhibit 68).

At the time of hire, Mr. Durand was told that the company was in the middle of receiving funding as a by-product of “going public” and it was expected that the company would soon be infused with as much as \$20 million in capital. (*Id.*, p. 100). It was understood that Exhibit 2 was to be an offer letter that was to provide Mr. Durand a sufficient comfort level for his family’s security that he could give notice to Brach’s Confection and that a later formalized document would be drawn up.

On Mr. Durand’s first day of employment at ITI Internet Services, he was approached by Virgil Llapitan, who under the directions of Mr. Ehli was to enter into a more “formal employment agreement” than the one that had initially been drawn up between the parties. Mr. Durand understood that Mr. Llapitan was the President of HIMC and the Chief Operating Officer of ITI Internet Services, Inc. (*Id.*, p. 102).

Ultimately, as a result of these discussions, Exhibit 3A was entered into between Mr. Durand and his employer. During the course of discussing the development of Exhibit 3, Mr. Durand discussed the fact that the contract had a structural difference than the prior agreement, and

that it now included a five-year term. The five-year term was a new provision, but Mr. Durand understood that he was making a five-year commitment to his new employer and was willing to do so. With respect to the termination provision set forth within the contract, Mr. Durand specifically discussed this with Mr. Llapitan and said: "Look, if I am terminated before the end of this agreement before April 18, 2010, this means that this contract is paid and due to me? He said 'yes.'" (*Id.*, p. 104).

It was further explained by Mr. Llapitan that with respect to the annual bonus provision within the contract, that Mr. Durand was being guaranteed a \$15,000.00 bonus at the end of the year. However, it was understood that after the 2005 bonus was paid out, that in subsequent years the level of any bonus payout would be left to the discretion of the Board. (*Id.*, p. 105).

Initially, Mr. Durand received his promised salary of \$12,500.00 per month. (*Id.*, p. 106). (Exhibit 5).

Unfortunately, the funding that was anticipated never materialized. Ultimately, Mr. Durand had to lay off his two sales staff and by September of 2005, he was being approached by Mr. Ehli, who indicated that due to the financial circumstances of the company there was a need to take a

temporary pay cut in order to ensure the continued survivability of the enterprise. (*Id.*, p. 113-114).

At that time, Mr. Durand agreed to take a pay cut, but it was promised that such a pay cut would only be temporary.

Ultimately, despite the pay cut, Mr. Durand stayed with the company because he believed in the company and decided to stay and try to help the company become successful. According to Mr. Durand, the fact that he had a “five-year term” was a substantial factor in his decision to continue to maintain his employment with the company, “Ron Ehli’s promised that this was temporary and will get back on our feet – will make the adjustments. The five-year term was actually key. The contract was key. I had a contract in writing with the President of the organization. And I just felt, that together with everybody making sacrifices for a short term, we can turn this around.”

Unfortunately, the company ultimately was not able to turn it around and Mr. Ehli found himself in an ugly divorce situation and a shareholder revolt that ultimately resulted in his demise at the companies which he had founded. (*Id.*, p. 116).

According to Mr. Durand, the company was suffering from “mayhem.” (*Id.*, p. 117).

Apparently, through the divorce proceedings, Mrs. Ehli and the Ehli's daughter had temporary control over the corporation. On February 21, 2006, Mrs. Ehli and Mr. Ehli's daughter, Melissa Duthy, approached Mr. Durand and indicated that he was terminated.³

After being notified of his termination, Mr. Durand immediately sent an email making inquiry as to the payment of his deferred salary and promised bonuses. (Exhibit 4). Ultimately, Mr. Durand received his final paycheck on or about February 28, 2006, but his re-location, annual bonus and back wages were not paid. (*Id.*, p. 120-121).

Within a matter of weeks, a shareholders' meeting was conducted where the Ehli's were completely ousted from control of the subject corporations. Mr. Durand attended a meeting on or about March 7, 2006, where it was made clear that the Ehli's and Mr. Llapitan were out and that a new Board comprised of Jay Gurley, Defendant Cornwell and Defendant Johnston had taken over the companies. (*Id.*, p. 122-123). Mr. Durand at that time spoke to an individual named Mitch Wiggins, who was involved in the staffing of ITI Internet Services, and indicated that Mr. Durand had

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Ultimately it was learned that Mr. Durand was terminated because it was viewed that he was too close to Mr. Ehli, who was in the throes of a messy divorce with his wife, Pam. (RP Vol. VIII, p. 800).

an interest in continuing employment with the company, and was told that he needed to sit down with Defendant Cornwell.

As a result of this conversation, Mr. Durand went to the headquarters of ITI Internet Services, and tried to speak to Jerry Cornwell and Judy Johnston. Unfortunately, they were having a difficult time getting into the building and Ms. Johnston asked Mr. Durand to come back another day and to contact Jerry.

On March 23, 2006, Mr. Durand was finally able to get ahold of Defendant Cornwell on the telephone, and indicated to him that he had an interest in employment with ITI Internet Services. At that time, Mr. Cornwell told Mr. Durand that he was not interested in hiring him, and in response Mr. Durand let Mr. Cornwell know that Mr. Durand in fact had an employment contract with the company that needed to be honored. In response:

He basically said that they will not honor contracts from the prior Board. And that was that. So I couldn't get my job, and I couldn't get my contract.

(*Id.*, p. 124).

At that point in time, Mr. Durand began looking for counsel.

At time of trial, Mr. Durand prepared a damage summary that was before the Court as Exhibit 8. Within Mr. Durand's damage summary, he indicated that as a by-product of the new Board's failure to honor his employment contract he had received substantial damages, inclusive of \$38,956.98 in deferred back pay, a loss of a \$15,000.00 guaranteed annual bonus for the year 2005, a failure to pay a \$20,000.00 re-location/signing bonus and the early termination of a five-year contract for a term at a loss of \$618,750.00.

In addition, it is noted that during the testimony of Mr. Durand, the defense counsel, Mr. Adler himself, admitted documents that he now contends were protected by ER 408 as settlement negotiation documents. As discussed below, the defense counsel simply cannot have it both ways and to the extent that Defendants are now complaining that ER 408 was violated, and if such a violation has occurred, it has been subject to waiver and/or would fall within the invited error doctrine. (See, RP Vol. VII, p. 70-95). Although the defense counsel withdrew the offered Exhibits, which were defense exhibits within the joint statement of the evidence, ultimately, the Court determined that the defense could not have its cake and eat it too with respect to settlement documents the defense desired to submit piece-meal in order to establish the existence of a "bona fide

dispute” in defense to Plaintiff’s wrongful withholding of wages claim.
(Id, p. 122-133)

D. Testimony of Ronald W. Ehli.

On June 26, 2007, the former founder and Chief Executive Officer of HIMC and ITI Internet Services was called to testify. During the course of Mr. Ehli’s testimony he confirmed that contracts similar to those entered into with the Plaintiff were also entered into other members of the ITI Internet Services management team, including himself and A. J. McCann. (See, Exhibits 12 and 14). (RP Vol VII, p. 140-142). He also acknowledged that A. J. McCann was provided a signing bonus in the amount of \$55,000.00 as part of his contract. (*Id.*, p. 141). In addition, Mr. Ehli’s contract at the time provided that should he be terminated by the company, that he was entitled to a lump sum payment of \$5 million. (*Id.*, p. 142).

Mr. Ehli also acknowledged that at or around the time that Mr. Durand was hired, it was understood that the company, which had just gone public, would have a substantial influx of capital (cash) coming its way in order to finance and fund expansion and further operations.

Mr. Ehli acknowledged that he had met Mr. Durand socially, and sometime in the end of 2004 and the beginning of 2005 began in earnest

discussing with Mr. Durand the idea that he would come and work with the defendant companies. Mr. Ehli acknowledged that Mr. Durand was a high-ranking sales executive with another company, but that he did not have any experience in the area of internet or banking, which frankly, Mr. Ehli viewed as being primarily an advantage. (*Id.*, p. 148-149).

Mr. Ehli also confirmed that Exhibit 2, the initial contract, was a document that was for the purpose of trying to “bring some of these ideas together in writing so we could make sure that we were all talking about the same thing.” He indicated that Exhibit 2, the initial contract, was not intended to be a full and final employment contract with Mr. Durand, but that there “was standard employment contracts that were used in the company.

Mr. Ehli testified that the bonus for the year 2005, was a 10% minimum guarantee, and was intended that Mr. Durand, as a bonus for the year 2005, would receive 10% of his annual salary. (*Id.*, p. 150). There was not intention that the bonus be pro-rated to the amount actually earned in the year 2005. (*Id.*).

Mr. Ehli also confirmed that the provision of the five-year term of employment within Mr. Durand’s contract was purposeful in order to “lock in the top people in the company.” According to Mr. Ehli, it is very

expensive to bring someone in, train them, and then lose them to a competitor within two or three years after you had done so. The purpose of the five-year term was to ensure that people will be “around for awhile.” (*Id.*, p. 153).

According to Mr. Ehli, under the termination provision, paragraph 4.6 of Exhibit 3A, should Mr. Durand be prematurely terminated short of his five-year term of employment, he was entitled to be paid “the remaining balance of the contract and all stock that he had that was not fully invested would be invested [sic].” (*Id.*, p. 154).

The purpose of such a provision was to provide the employee with job security so they could be more comfortable and better able to perform their job. (*Id.*, p. 155).

Under the terms of the contract, there were no specific performance standards, goals or targets, and according to Mr. Ehli this was purposeful given the fact that the company had no track record with a concentrated sales department engaging in marketing and given the absence of such a prior track record in the area, any performance goals merely would have been speculative. It was also noted by Mr. Ehli that it was intended that Mr. Durand be an employee of both HIMC and ITI Internet Services. It was acknowledged that HIMC had no paid employees and all the

employees were to be paid through ITI Internet Services, which was the only company with any kind of an income stream.

Mr. Ehli acknowledged that Mr. Durand's ability to perform in the area of sales while employed at ITI Internet Services was impacted by the lack of funding, which did not allow for the sales and marketing department to be appropriately put together. He acknowledged that Mr. Durand's ability to perform was further impacted by the fact that his two employee sales force was removed from him due to lack of funding.

According to Mr. Ehli, the September 2005 pay reduction was intended to be only temporary and was an effort save the company from harm due to lack of financing. Mr. Ehli represented that the pay cut would only be temporary until funding came through, and he promised the employees that the back wages would accrue on the books and be owed to them. (*Id.*, p. 158).

Mr. Ehli also testified that the \$20,000.00 "re-location bonus" was intended to be a lump sum bonus, and was not dependent on actual receipts from moving locations. (*Id.*, p. 159).

According to Mr. Ehli, ultimately he was informed by his wife, Pam Ehli, that the reason Mr. Durand was terminated from his

employment had nothing to do with job performance reasons, but had to do with the finances of the company.

E. Testimony of Virgil Llapitan.

On June 27, 2007, Plaintiff called Virgil Llapitan, the signatory of both contracts, as a witness. Mr. Llapitan, like Mr. Durand, was hired by ITI Internet Services even though he had no background in the area of internet banking and/or internet services. Mr. Llapitan was hired in May of 2004 after working years in the insurance industry. (RP Vol. VIII, p. 149).

Mr. Llapitan was hired at a rate of \$120,000.00 per year. (*Id.*, p. 162).

Further, Mr. Llapitan very clearly testified that he was delegated the task by Mr. Ehli to enter into the contracts which were at issue herein. (*Id.*, p. 776-77, 797). There is simply no question that Mr. Llapitan had the authority to enter into a contract with Michael Durand. Mr. Llapitan also acknowledged that the second contract was in part for the purposes of making Mr. Durand's contract consistent with the other contracts in the company and that the five-year term within the contract (which he also had) was in order to provide the employee with job security. The recruitment of Mr. Durand was part of a business plan, which included

bringing in professional staff which would make the companies more inviting to investors. (*Id.*, p. 789). In addition, speaking of investors, it was understood that additional funding was coming and for a period of time, almost on a daily basis, they would be waiting for additional funds to arrive. (*Id.*, p. 192).

In any event, Mr. Llapitan acknowledged that he intended to sign the subject contracts, and that there was no intent to defraud or mislead Mr. Durand, and no purposeful ambiguities were set forth within the contracts which he had drafted.

Additionally, Mr. Llapitan acknowledged that Mr. McCann had received a “signing bonus” and acknowledged receiving contemporaneous emails from Mr. Durand wherein the re-location assistance provision within his contract was in fact referenced as a “signing bonus.” (See, Exhibit 68). (RP Vol. IX, p. 40-42).

F. Testimony of Judy Johnston.

Ms. Johnston acknowledged that following the removal of Mr. Ehli, she and Mr. Cornwell had all check writing authority for ITI Internet Services. (Exhibit 7). (RP Vol IX, p. 79-80).

She also acknowledged that the company had enough money to pay other bills of the company, including such things as the rent, telephone, and legal fees. (Exhibit 30).

She also acknowledged that she personally owned in excess of 380,000 shares in HIMC. She acknowledged that Mr. Durand had not been paid under the terms of his contract. (*Id.*, p. 85). She acknowledged that she was part of the decision making process not to pay Mr. Durand on his contract. (*Id.*, p. 86-87).

It was found during the course of trial that Ms. Johnston, despite the fact that she was aware that Mr. Durand was demanding payment under the terms of his contract, made no effort to find any information with respect to the genesis of such contract and what the two contracts were intended to mean. At that time, Mr. Llapitan, who had maintained his employment with ITI Internet Services, was available to her and was the signatory on Mr. Durand's two contracts, yet she never spoke with Mr. Llapitan about Mr. Durand's contract. Nor had she made any attempt to speak with Ronald Ehli, nor Pam Ehli, in making the determination not to pay under the terms of Mr. Durand's contract. (*Id.*, p. 87-88). In other words, despite Plaintiff's demand for substantial payment under the terms of the contract, Ms. Johnston, prior to making the decision not to pay Mr.

Durand on his contract, made no effort to investigate the surrounding circumstances regarding the entry of such contracts. (*Id.*, p. 88-92).

According to Ms. Johnston, the company simply took the position that they were not going to pay Mr. Durand anything until the Court told them what they had to pay. (RP Vol. XI, p. 5). In other words, even though the Defendants acknowledged that Mr. Durand had some monies due and owing, at no point in time did they even tender the undisputed amounts.

In any event, on or about August 17, 2007 (following a protracted recess due to the Court's calendar), the parties engaged in closing arguments. Following closing arguments, the trial court took the matter under advisement. On or about August 27, 2007, the Court issued its written opinion with respect to Plaintiff's claims. Within the Court's written opinion, which is attached hereto as Appendix #1, the Court indicated that Plaintiff had primarily prevailed on all claims, save for the fact that he was now provided a doubling of damages to the entirety of amounts which were not paid under the terms of his contract.

G. Post-trial Proceedings.

On or about September 27, 2007, Plaintiff moved for a supplemental award of pre-judgment interest, and the following day filed

a motion for an award of attorney's fees pursuant to RCW 49.48.030 and RCW 49.52.070. The Defendant replied to Plaintiff's motion for attorney's fees by arguing that Plaintiff should not receive fees for work done prior to filing the Complaint in the instant matter, and that fees should be excluded for Plaintiff's unsuccessful effort at summary judgment, apparently, under the theory that the Plaintiff's motion for summary judgment should be treated as an unsuccessful and segregable claim of some form.

On October 17, 2007, Plaintiff responded and provided citation to appropriate case law indicating that when attorney's fees are being shifted, a party is entitled to an award of fees for the attorney's fees incurred even during the unsuccessful stages within the litigation so long as the party ultimately prevails.

On October 19, 2007, the trial court heard Plaintiff's motion for attorney's fees and for pre-trial interest (as well as Defendant's motion for reconsideration and/or vacate, or whatever it was).

In awarding Plaintiff's counsel attorney's fees, the Court deducted 21.5 hours for efforts that were taken prior to the action being filed, and rejected the notion that time spent on summary judgment was a duplicative or wasted effort. (RP Vol. XII, p. 33-34). Also, the Court awarded a

multiplier of .5 and noted “we do have a high-risk situation in this case. We sort of have a little David going up against the big corporate Goliath in this situation. Clearly, a lot of effort was made in this situation to note that there just was never going to be any payment made of these types of sums or money. I believe that created a high-risk situation for Mr. Lindenmuth to handle.” (*Id.*).

On November 16, 2007, the parties met for entry of Findings of Fact and Conclusions of Law and to address whether or not post-judgment interest would be appropriate on the claims filed herein. The Court entered Findings of Fact and Conclusions of Law and entered an granted pre-judgment interest. (RP Vol. XIII, p. 2-48). (CP 730-42). (Appendix 2). Curiously, once again Defendants raised the ER 408 issue, which forms a partial predicate for their appeal. It is noted that according to defense counsel Adler, he wanted the settlement negotiation materials submitted into evidence because: “We had to show there was a bona fide dispute. That was shown by the nature of the dispute pre-litigation. So it was sort of, if you will pardon my expression, damned if we do and damned if we don’t. However, he did specifically object to any consideration of the documents to establish liability because that is what

Rule 408 prescribes, although it does say it may be admitted for some other purpose.”⁴ (RP Vol. XIII, p. 48-50).

Finally, on December 7, 2007, the parties met for the Court’s determination as to the appropriate size of the supersedeas bond. At that time, the Court ordered the Defendants to file a supersedeas bond in the amount of \$1,504,441.00 with respect to the corporate defendant and the amount of \$652,755.00 with respect to the bond regarding the individual defendants. (CP 793-94). To this date no bond has ever been filed.

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It is noted that Defendants’ position with respect to the admission of pre-trial settlement negotiation materials is at best schizophrenic. It is suggested that if the Defendants’ purposes in submitting these documents was to establish the absence of a bona fide dispute, or to establish the existence of a bona fide dispute, the Defendants also ran the risk that such documentation would be utilized by the trial court for the purposes of establishing the **absence of a bona fide dispute** with respect to the amounts due and owing under the first contract, which according to the Defendants is the only operative document at issue herein. (See CP 499-506, Defendant’s Trial Brief). If that is the case, there was simply never any excuse for not paying the amounts due under what the Defendants’ themselves viewed as to being the contract of employment with Mr. Durand. Ultimately, the Court found that they were wrong, and the second contract was in fact the operative document. However, under the law, it is the obligation of the employer to pay all amounts due and owing within a reasonably short time after the cessation of employment. See, RCW 49.48.010.

V. ARGUMENT

A. Preliminary Considerations and Standards of Review.

It is noted that in the instant case the Defendants herein have filed a brief that is extremely disjointed and difficult to respond to. Weaved into the Defendants' alleged statement of facts are arguments that are clearly inappropriately set forth in the state of facts, which with RAP 10.3 (a)(5) requires that the statement of the case (a fair statement of the facts) be presented "without argument." In addition, it is noted that the Defendant failed to cite to the existing authority under either RCW 49.48.030 and RCW 49.52 eq seq, but instead utilized some rather fanciful and novel arguments in their stead. It is suggested that to the extent that the Defendant is seeking to overrule clear authority contrary to their position, they have an obligation to set forth the authority and argue that it should be overruled or otherwise distinguished away.

In any event, it is noted that Defendants herein fail to assign error to any of the trial court's Findings of Facts and Conclusions of Law. As such, such Findings of Fact and Conclusions of Law must be deemed verities on appeal. See, *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42-43,

59 P.3d 611(2002) (unchallenged findings are verities on appeal). As such, in the instant case, the Appellate Court is obligated to view the factual findings of the trial court as being true and supported by substantial evidence. In other words, in the instant case, it is simply unnecessary now for the Plaintiff to establish that the Findings of Fact are otherwise supported by substantial evidence.

Further, given the facts of the Finding of Facts in the instant matter fully support the Conclusions of Law, the Defendants' waiver of appropriately challenging such Finding of Facts should be fatal to their appellate efforts.

In any event, as indicated in the above-cited *Robel* opinion, the Court reviews Conclusions of Law de novo. Further, even if we assume arguendo that the Defendants have properly preserved any challenges to the Finding of Facts (which are otherwise verities), it is noted that such Finding of Facts will be upheld if they are supported by "substantial evidence." This is because the trial court is in the best position to evaluate such evidence through the evaluation of the live witnesses who are before it. See, *Thorndyke v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth

of the declared premise. See, *Bearing v. Share*, 106 Wn.2d 212, 721 P.2d 918 (1986).

Substantial evidence is sometimes defined as a quantity of evidence needed to satisfy the burden of production. In other words, once the plaintiff produced enough evidence to satisfy the burden of production, then thus survive a defense motion for judgment as a matter of law, the trier of fact alone determines the facts of the case, and the Appellate Court will not substitute its judgment. See, *In Re Dependency of C B*, 61 Wn.App 280, 810 P.2d 518 (1991).

Under such circumstances it is the obligation of the reviewing court to defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Circumstantial evidence and direct evidence are equally reliable. *State v. Inslie*, 103 Wn.App 81, 11 P.3d 318 (2000). Similarly, even in circumstances where error is appropriate assigned to Findings of Fact, generally Findings of Fact supported by substantial evidence are considered verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992).

In addition, it is noted that to the extent that the Defendant is arguing about what was set forth in the Complaint, Answer and pre-trial

dispositive motion proceedings, typically such issues are not appropriately before an Appellate Court following a full trial that has reached a conclusion with, among other things, an entry of Findings of Fact and Conclusions of Law. See, *Adcox v. Children's Orthopedic Hospital*, 123 Wn.2d 15, 864 P.2d 921 (1993); *Caulfield v. Kitsap County*, 108 Wn.App 242, 29 P.3d 738 (2001) (a denial of a motion for summary judgment is not reviewable even after entry of a final judgment and a losing party must appeal from the sufficiency of the evidence presented at time of trial).

The instant case went through a full trial before Judge Buckner with the entry of Findings of Fact and Conclusions of Law. Thus, at this juncture, the only issues that should appropriately be determined by the Appellate Court is whether or not, based on the evidence presented at time of trial, Judge Buckner appropriately applied the laws to the facts, which must now be construed in a manner most favorable to the Plaintiff herein.

Finally, sprinkled throughout Defendant's Opening Brief are arguments not supported by citation to pertinent authority or adequate analysis which should be disregarded. *Cowiche Canyon Conservancey v. Bosley*, 118 Wn.2d at 80. Such omissions cannot be corrected in Defendant's Reply Brief. *Id.*

**B. Defendants Wrongfully Withheld the Plaintiff's Wages
and Are Liable Under RCW 49.48.030.**

RCW 49.48.010 provides:

When any employee shall cease to work for an employer, whether by discharge or by voluntary withdrawal, the wages due him on account of his employment shall be paid to him at the end of the established pay period.

Under RCW 49.48.030, an employee who is not timely paid wages as required by RCW 49.48.010, is entitled to bring a cause of action and should recover an amount greater than the amount admittedly owed, is entitled to an award of his costs and attorney's fees. RCW 49.48.030 has been repeatedly applied in actions where an employee has recovered lost wages due to the breach of an employment contract, and such provisions apply even if there is a bona fide dispute between the employer and employee. See, *Flowers v. TRA Industries*, 127 Wn.App 113, 111 P.3d 1192 (2005). See also, *Kloss v. Honeywell, Inc.*, 77 Wn.App 294, 89 P.2d 480 (1995).

Further, recovery under such statutory scheme is not limited to recovery of wages or salary earned for work actually performed, but rather attorney's fees and recovery is permitted whenever a judgment is obtained for any type of compensation due by reason of employment. *Bates v. City*

of Richland, 112 Wn.App 919, 51 P.3d 816 (2002). Further, there is no requirement that the plaintiff be a current employee in order to recover statutory attorney's fees in its successful action against the employer for a recovery of wages or salary owed. *Id.* In addition, the term "wages and salary owed" is not limited or measured solely by hourly, daily or a monthly predetermined pay scale. See, *Brown v. Suburban Obstetrics and Gynecology*, 35 Wn.App 880, 670 P.2d 1077 (1983). Further, by its terms, RCW 49.48.030 is applicable to "former employers."

Further, to the extent that Defendants are trying to contend that the definition of "employee" applicable under RCW 49.12.005 (the minimum wage act), is somehow controlling in claims brought pursuant to RCW 49 et seq and/or RCW 49.52 et seq is patently frivolous. Obviously, the definition of an employee who is entitled to minimum wage would be an employee who is currently employed. Should the employer fail to pay minimum wages, or pay wages that are lawfully due and owing, are different issues.

There is a wealth of case law indicating that the statutory terms of RCW 49.48. are not limited to payment for work that has actually been performed, but literally involves any form of compensation that is a by-product of the employment relationship. For example, in *McIntyre v.*

State, 135 Wn.App 594, 141 P.3d 755 (2006) the Court of Appeals reversed a trial court's denial of an award of attorney's fees pursuant to RCW 49.48.030, which were claimed by a State Patrol employee, who after termination was successful in being reinstated to her former position and was reimbursed for her back wages. See also, *Hanson v. City of Tacoma*, 105 Wn.2d 854, 719 P.2d 104 (1986).

In addition, in *Gaglidari v. Denny's Restaurant*, 117 Wn.2d 42, 451, 815 P.2d 1362 (1991), the Washington Supreme Court upheld an award of attorney's fees under RCW 49.48 on behalf of an employee who successfully sued his employer for breach of an implied contract. Naturally, this case involved recovery by a former employee and the Court interpreted the phrase "wages or salary owed" to be broad enough to include those awards of back pay, as well as front pay (future economic damages). See also, *Dice v. City of Montesano*, 131 Wn.App 675, 128 P.3d 1253 (2006), wherein the Court upheld the award of double damages pursuant to RCW 49.52 et seq, when the employer failed to pay a former employee three months of severance pay he was entitled to under the terms of his express contract. See also, *Bates v. City of Richland, supra*, upholding an award of attorney's fees under RCW 49.48 in an action

brought by a former employee who sued due to the miscalculation of pension benefits.

Significantly, also in the case of *Flowers v. TRA, supra*, the Court found that a former employee brought an action against an employer for breach of an employment contract, promissory estoppel and negligent misrepresentation, was entitled to double damages under RCW 49.52.070 and an award of attorney's fee pursuant to RCW 49.48.030 (as well as RCW 49.52.070). In that case, the issue was a \$10,000.00 signing bonus, plus promises relating to re-location allowances and other benefits of employment.

In addition, in *Kloss v. Honeywell, Inc.*, the Court of Appeals had little difficulty in awarding attorney's fees under RCW 49.48.030 on a claim that wages were wrongfully withheld by an unlawful breach of an employment contract. Naturally, when dealing with a contract of employment that has been breached, more often than not the plaintiff will be "a former employee." See also, *Walsiuki v. Whirlpool Corp.*, 76 Wn.App 250, 884 P.2d 113 (1994); *Naches Valley School Dist. v. Cruzen*, 54 Wn.App 388, 775 P.2d 960 (1989) (attorney's fees awarded for recovery of unlawfully withheld reimbursement for sick leave); *Hayes v. Truelock*, 51 Wn.App 795, 755 P.2d 830 (1988) (former employee

awarded attorney's fees for wrongful discharge and received back pay and front pay awards).

Given the substantial amount of authority awarding attorney's fees or doubling damages under RCW 49.48 et seq or RCW 49.52 et seq, the Defendants' fanciful efforts to constrict the meaning of employee to mean only current employees is patently frivolous. It is also inconsistent with the term "wages," which means "compensation due to an employee by reason of employment..." *Cruzen*, at 398. Such a narrow interpretation would fail to recognize that both RCW 49.48 and RCW 49.52 are remedial statutes that must be liberally construed. *Id.*; see also, *Dice v. City of Montesano*, 131 Wn.App 689-90 (liberally construed wages, includes not only monies earned, but any type of compensation due by reason of employment). RCW 49.52.070 is also a remedial statute. *Ellerman v. Center Point Pre-press*, 143 Wn.2d at 520.

Additionally, such a narrow construction would be contrary to the language of RCW 49.48.010, which commands that employees be paid in a reasonable amount of time **after leaving employment.**⁵

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In the instant case, RCW 49.48 and RCW 49.52 are both criminal statutes which provide for a civil remedy. In this instance, both statutes are being utilized as an effort to acquire a civil remedy and not for the purpose of criminal prosecution. As such, the statutes must be liberally construed. While one can argue that they must be narrowly construed if being utilized

In the instant case, it cannot be meaningfully challenged that Defendants violated RCW 49.48.030, and subjected themselves to substantial damages. In this instance, the Defendants breached a written contract of employment that provided for specific remunerations and benefits. Generally, employment contracts are governed by the same rules

for a criminal prosecution, that is simply not what is at issue in the instant case. It is noted that to the extent that Defendant is trying to interpret these subject statutes as “criminal statutes,” they are simply ignoring that they are not being utilized in a criminal context in the instant case. Bizarrely, it appears that despite the fact that this case has gone through a full trial, the Defendants are concerned with the method and manner in which the Complaint was drafted. See, footnote 10, p. 38, of Appellant’s Opening Brief. Defendants in this case go so far as to say that the Court must construe the Plaintiff’s Complaint in this case in the same manner as a criminal charging document. Such an assertion is made without citation to authority and is obviously frivolous. In addition, the Defendants are citing to case law dating back to 1939, i.e. *Standard Finance Co. v. Townsend*, 1 Wn.2d 274 (1939) for the proposition that “a pleading is to be construed most strongly against the pleader.” Obviously, the *Townsend* case is no longer good law given the adoption of the modern Rules of Civil Procedure.

Under modern practices, pleadings must be liberally construed and the Complaint will be upheld so long as it states facts entitling plaintiff to some form of relief. See, *Simpson v. State*, 26 Wn.App 687, 615 P.2d 1297 (1980). Clearly, it is unnecessary that a Complaint set forth detailed facts supporting the plaintiff’s cause of action. *Schoening v. Grays Harbor Community Hospital*, 40 Wn.App 331, 698 P.2d 593 (1985). All that is necessary, is that the Complaint generally put the defendant on notice as to what he is being sued for. See, *Champagne v. Thurston County*, 163 Wn.2d 69, 84, 178 P.3d 936 (2008).

In this instance, the Defendants’ ramblings with respect to the scope and content of Plaintiff’s Complaint (which has occurred following a jury trial) are frivolous and should be disregarded.

applicable to any other contract. See, *Kloss v. Honeywell, Inc.*, 77 Wn.App 294, 298, 890 P.2d 480 (1995). When the terms of the contract are plain and unambiguous, the intentions of the parties must be ascertained from the language employed. See, *Schauerman v. Haag*, 68 Wn. 863, 873, 416 P.2d 88 (1966). Generally, the words of the contract should be given their ordinary meaning, unless context or definition requires otherwise. The main function of the Court is to find out what the parties intended and give force to their intentions. *Id.*

Generally, a bilateral contract is one in which there are reciprocal promises. The promise by one party is the consideration for the promise by the other party. Each party is bound by its promise to the other. See, *Edling v. Gobes, Inc.*, 34 Wn.App 495, 663 P.2d 123 (1983).

When considering a written contract, basic principles that require that (1) the intent of the parties controls; (2) and the Court must ascertain the intent from reading the contract as a whole; and (3) the Court will not read ambiguity into a contract that is otherwise clear and unambiguous. See, *Dice v. City of Montesano*, 131 Wn.App 675, 683-84, 128 P.3d 1253 (2006). Generally, prior and contemporaneous agreements merge into the final written contract, and any of these are rendered immaterial by operation of the parol evidence rule. See, *Flowers v. TRA Industries*, 127

Wn.App at 29. It is noted in the *Flowers* opinion at page 29, quoting *Lynch v. Higley*, 8 Wn.App 903, 911, 510 P.2d 63 (1973):

When a second contract deals with the same subject matter as did the first contract made by the parties, but does not state whether or not or whether or to what extent it intends to operate in discharge or substitution...the two contracts must be interpreted together. In so far as they are inconsistent, the latter one prevails; the remainder of the first contract, being quite consistent with the second in substance and purpose may be enforced. See also, Beroth v. Apollo College, Inc., 135 Wn.App 551, 562, 145 P.3d 386 (2006). As similarly stated in Beroth at 562, when two contracts are interpreted together, the later one prevails on the terms that are inconsistent; all consistent terms of the first contract remain in force.

In the instant matter, and as indicated within the Findings of Fact which are verities herein, Mr. Durand entered into two plain and unambiguous contracts with the employer corporation. Under the initial contract, he was entitled to severance pay for “one month of severance for every month employed to a maximum of 12 months, minimum guaranteed is for six months of severance.” In this case, it is certainly an undisputed fact that Mr. Durand worked for the defendant corporation for 10 months, thus at a minimum (even under the Defendants’ theory of the case, which ignores the second contract), he would be entitled to judgment as a matter

of law for the amount of \$125,000.00, and his 2005 annual bonus, plus relocation assistance of \$20,000.00.

In addition, Mr. Durand's second contract with ITI Internet Services and HIMC provides for other benefits and protections that were otherwise unafforded by the initial contract. With respect to the early termination benefit, it is noted that it was supported by consideration because it was only in the second contract that Mr. Durand committed himself to work for the defendant employer for a five-year term.

Further, as indicated above, the testimony before the trial court from Mr. Durand, Mr. Ehli and Mr. Llapitan, who were the only persons involved in the formation of the contracts, fully support the trial court's determination as to what the contracts meant. There was simply no countervailing evidence other than argument and speculative assertions on the part of the individuals who had no personal knowledge with respect to what was discussed during the formation of the contracts and what were its intended purposes.

Further, it cannot be said, even if the Defendants had properly assigned error to the Findings of Fact of the trial court, that such Findings of Fact are not be supported by substantial evidence.

While one could argue that there was some level of ambiguity with respect to the \$15,000.00 annual bonus for the year 2005, because one could argue that it had to be calculated on actual earnings vs. the \$150,000.00 annual salary, such ambiguity was cleared up by the testimony of Mr. Ehli, who indicated it was the intention that there be a \$15,000.00 bonus at the end of the year 2005.

Further, to the extent that the Defendants are contending that Plaintiff voluntarily agreed to a permanent wage reduction, that is simply contrary to the evidence presented at time of trial, which came in the form of Mr. Durand and Mr. Ehli's testimony. Further, the position taken by the Defendants is contrary to the holding in the case of *Chelius v. Questar Microsystems, Inc.*, 107 Wn.App 678, 27 P.3d 681 (2001), wherein the Court of Appeals indicated that an employee does not "knowingly submit" to the unlawful withholding of wages simply by staying on the job when an employer fails to pay wages that are otherwise owed. In that case, the employees, despite agreeing to defer payment of their wages for a period of time, only received wages sporadically, but nonetheless continued on with their employment hoping the company would become successful and that the stock options that they were provided as part of their

compensation package would bring them wealth. They did so for a period in excess of two years.

The payment of back wages was not forthcoming and the employees filed suit pursuant to RCW 49.52.050 and 070.

In *Chelius*, the employers contended that the employees who stayed on the job despite not being paid their wages “knowingly submitted” to the unlawful withholding of wages, thus under RCW 49.52.070 were not entitled to the benefit of double damages and/or attorney’s fees.

However, using the substantial evidence standard applicable to Findings of Fact and Conclusions of Law, the Appellate Court rejected such a position and affirmed the trial court’s determination that there was not a knowing submission to the wrongful withholding.

Similarly, in the instant case, the trial court found substantial evidence that Mr. Durand did not “knowingly submit” or waive his entitlement to his deferred wages following Mr. Ehli’s efforts to cut his pay due to the financial instability of the company. Certainly, it would be an inequitable and absurd result to find that Mr. Durand, who was acting in the best interests of the company, waived away his entitled to

compensation when he was otherwise terminated in breach of his employment contract without a scintilla of reasonable cause.

In any event, substantial evidence supports the trial court's conclusion that the Defendants breached Plaintiff's contract of employment and under RCW 49.48.030 the employer defendants, HIMC and ITI Internet Services clearly subjected themselves to liability.

Further, under RCW 49.48.010, all compensation due to Mr. Durand should have been paid to him in his next regular paycheck, including the deferred salary which he demanded at the time of his termination.

C. All Defendants Are Liable for the Wrongful Withholding of Plaintiff's Wages of the Undisputed Amounts Which Were Due and Owing.

In the instant matter, the Defendants have throughout been inconsistent as to what their position is with respect to what amounts were due and owing to the Plaintiff. As indicated in Defendants' Opening Brief at page 7, the Defendants appear to be arguing that they should only be bound by the first contract, which contained a severance position that provided severance pay of one month's salary for each month worked up to a maximum severance package of 12 months with pay. (See, Exhibit

2). Having conceded that Plaintiff was at least owed something under the terms of the first contract, the Defendants had the obligation to tender such payment at the next pay period following the cessation of Plaintiff's employment. Whether the amount was \$125,000.00 or \$54,166.80 is simply a matter of factual dispute that was resolved against the Defendants herein based on substantial evidence. The fact of the matter is that the Defendants paid nothing, and in order for Plaintiff to receive any payment, he had to sue his former employer because they did not intend to pay him until a judge told them what they had to pay. That is not an appropriate and lawful way to conduct business under RCW 49.48.010 and constitutes a willful withholding of wages.

Further, it is very clear that in order to avoid the obligation to pay Mr. Durand on his contract, the Defendants simply ignored the existence of Mr. Durand's second contract of employment, dated April 18, 2005, and conducted no investigation as to its validity even though the signature for the company on the contract, Virgil Llapitan, was and continues to be employed by the defendant corporations.

The bottom line is that the Court could reasonably have concluded that the Defendants did not want to pay Mr. Durand anything under the

terms of either contract, because as stated to Mr. Durand they did not want to honor the contracts of the former Board.

Frankly, it is the Plaintiff's position that there was really no factual dispute with respect to Plaintiff's entitlement under the second contract and he should have been awarded liquidated damages under RCW 49.52.070 with respect to **all amounts due and owing**. The trial court came to a different conclusion based on substantial evidence, and the Plaintiff herein will simply will have to live with such conclusions – so should the Defendants.

In the instant case, RCW 49.52.050 (2) was implicated because the employer paid Mr. Durand “a lower wage than the wage such employer is obligated to pay such employee by any...contract...” Pursuant to RCW 49.52.050 and RCW 49.52.070, double damages may be awarded to an employee for an employer's willful withholding of an employee's wages. The critical determination in a case for double damages under RCW 49.52.070 is whether the employer's failure to pay wages was “willful.” *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159, 961 P.2d 371 (1998). “Willful” means that the person knows what he is doing, intends to do what he is doing, and is a free agent. *Id.* at 159-60. Non-payment of wages is willful when it is a result of a knowing and intentional action

and not the result of a bona fide dispute as to the obligation to pay. *Id.* See also, *Chelan County Deputy Sheriff's Assoc. v. Chelan County*, 109 Wn.2d 282, 300-03,745 P.2d 81 (1987). The question of whether the determination as to whether a bona fide dispute is one that is “fairly debatable” as to whether all or a portion of the wages must be paid. See, *Schilling*, 136 Wn.2d at 161. The determination of whether a bona fide dispute exists is a question of fact. *Chelan County*, 109 Wn.2d at 300-01.

Under RCW 49.52.070 there are only two defenses, i.e. carelessness or the existence of a bona fide dispute. See, *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d at 160. A failure to pay wages for financial reasons is not recognized as a basis to show a lack of willfulness under RCW 49.52.070. See, *Schilling* at 163-65.

With respect to this claim, the recent case of *Morgan v. Kingen*, 141 Wn.App 143, 169 P.3d 487 (2007) (rev. granted 164 Wn.2d 1002, 190 P.3d 54 (2008)) is extremely instructive. In that case, the Court found that the officers of a company that had filed for Chapter 11 bankruptcy protection were subject to liability as “officers” under the express terms of RCW 49.52.070. In that case, the defendant corporate officers tried to contend that they should not be held personally responsible under the wage claim statute for double damages because the company had experienced

financial difficulties and had filed a Chapter 11 bankruptcy, which had been converted into a Chapter 7 liquidation. Following *Schilling*, the court in *Morgan* rejected the notion that an “inability to pay” was any form of a defense to a claim pursuant to RCW 49.52.070. The Court noted that the liability of the officers was well warranted because they continued to operate the company before and after the bankruptcy proceedings and they did so despite its financial difficulties. In addition, they made the decision as to payroll, controlling payments to employees and other creditors based on their decisions about which of the company’s creditors would be paid.

Similarly, in the instant case, the individual Defendants have continued to operate the subject companies, and have made decisions as to which creditors would or would not be paid. They continue to have an income stream, and continue to pay employees other than Mr. Durand, other creditors and have paid a substantial amount for attorney’s fees in defending this and other claims.

In other words, instead of retiring their debt to Mr. Durand, they have simply made a willful decision to pay other debts instead. Because of the nature of the claim made by Mr. Durand and the applicable statutes, they simply do not have that prerogative. As in *Morgan*, there is no proof

that there has been any carelessness and that a bona fide existed at least to the severance provision to the original contract signed by Mr. Durand. While the Court had to engage in a factual determination as to the interplay of the two contracts, thus implicitly finding that there was a bona fide dispute (which was ultimately resolved against the defendants) as to what was due and owing, that does not change the fact that, even under the Defendants' own theory of the case, Mr. Durand was due money under the severance provision of his original contract. There is no defense to such claim, and it is certainly not predicated on carelessness.

To the extent that the Defendants are trying to contend that they are not required to write "a hot check" in order to Mr. Durand's wage claim, such a position is specious when fully analyzed. The Defendants obviously had a number of options in which to avail themselves, other than writing "a hot check." First and foremost, Mr. Durand afforded them an opportunity in March of 2006, to honor his contract. They declined to do so. Additionally, they could have sought to acknowledge their debt to Mr. Durand and to reach an agreement with him with respect to retiring the debt based on monthly or otherwise scheduled payments. They could have sought protection within the bankruptcy court, where Mr. Durand would have been treated like any other creditor of the company. They

could have permitted that a judgment be entered against them and allowed for the retirement of the debt through appropriate liquidation proceedings. What they could not do was simply ignore their obligation and cry the poorhouse when refusing to pay what was promised to Mr. Durand.

Further, with respect to the individual Defendants, a construction proposed by the Defendants would simply read the word “officer” out of RCW 49.52.050 and RCW 49.52.070. Such efforts defy all rules of statutory construction.

The beginning point when interpreting a statute or regulation is it’s “plain language.” *Lacey Nursing Center, Inc. v. DOR*, 128 Wn. 2d 40, 53, 905 P.2d 338 (1995). When a statute or regulation is unambiguous, courts determine legislative intent from the statutory or regulatory language alone. *Id.* See, also, *Waste Management v. WUTC*, 123 Wn. 2d 621, 629, 869 P.2d 1034 (1994).

Generally, statutes and regulations should be construed to effect their purposes and unlikely, absurd or strained consequences should be avoided. See, *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987). Any interpretation of a statute which would render it unreasonable or result in an illogical consequence should be avoided. See, *City of Puyallup v. Pac Bell*, 98 Wn. 2d 443, 450, 656 P.2d 1035 (1982). All provisions of

statutes and regulations should be harmonized whenever possible, and all terms should be given effect whenever possible. Emwright v. King County, 96 Wn. 2d 538, 543, 637 P.2d 656 (1981). Further, whenever possible, a statute should be construed in a manner which does not nullify, void or render meaningless or superfluous any section or words. Truly v. Heuft, 138 Wn. App. 913, 921, 158 P.3d 1276 (2007). When the language of a statute is plain and free from ambiguity there is no room for construction, the plain meaning must be given its effect without resort to the rules of statutory construction. State v. Theilken, 102 Wn. 2d 271, 273, 684 P. 2d 709 (1984).

Generally, if a statute is ambiguous, it must be interpreted in a manner which is most consistent with legislative intent as derived from the language of the act as a whole. See, Stewart Carpenter Services v. Contractor Bonding and Insurance, 105 Wn. 2d 353, 358, 715 P.2d 1115 (1986).

In the instant case, Mr. Durand is not contending that Johnston and Cornwell were “the employer.” They were **officers** of Plaintiff’s employer, and under the terms of the statute are subject to personal liability for the willful withholding of wages. Further, Defendants strained and absurd arguments are foreclosed by the *Morgan, Chelius* and the

opinion in *Ellerman*. Even if the Defendants were not “officers,” they would fall under the heading of “vice principals” within the meaning of the *Ellerman* opinion and RCW 49.52.070. In *Ellerman*, the Supreme Court found that a business manager, who had no authority to sign checks or direct a payment to be made on behalf of the corporation, was not subject to liability under the authority of RCW 49.52.070. In reaching such decision, the Supreme Court set forth as a test whether an individual is a vice principal for the purposes of statutory liability. Under such circumstances the Court found that a “vice principal” cannot be said to have wilfully withheld wages unless he or she exercised control over the direct payment of funds and acted pursuant to that authority. *Ellerman v. Center Point Pre-press, Inc.*, 143 Wn.2d at 521. In other words, in order to be personally liable under RCW 49.52 et seq, it must be established that the manager or supervisor had control over how and when the company paid its employees.

In the instant case, it is beyond dispute that after the ousting of the Ehli’s from the corporation, that Defendants Johnston and Cornwell assumed the authority over company funds. It is also undisputed that they made a conscious decision not to pay on Mr. Durand’s contract until a judgment was entered against the corporations. They made such a

decision, despite the fact that their own counsel made representations that the first contract should be applicable, and Mr. Durand was entitled to \$125,000.00 plus other benefits under the terms of the first agreement.

This is not a wrongful termination case. Plaintiff did not bring a claim against the individual Defendants for wrongful termination. He did bring a claim against them for wrongfully withholding his wages, because it was they who made the determination not to pay his wages, which were otherwise due and owing. It is noted that it was only a short time after his termination that the Ehli's were ousted from the control of the corporations. Ultimately, it was the decision of the Defendants herein to not pay the Plaintiff what was due and owing under the terms of his contract and they continued to uphold that decision on behalf of these two corporations. As previously discussed, they refused to pay Mr. Durand in preference of paying other creditors who had other forms of claims other than wage claims.

They were clearly subject to liability under the terms of the statute whether they are characterized as "officers" and/or "vice principals." Defendants' arguments to the contrary, while novel, are specious and defy common sense and statutory language.

Defendants' contention that it is a pre-requisite to liability for the corporate officers that there must be a "piercing of the corporate veil" simply ignores the terms of the subject statutes. ⁶

The case of *Dickens v. Alliance Analytical Laboratories*, 127 Wn.App 433, 111 P.3d 889 (2005), relied upon by the Defendants for the proposition that under RCW 49.52 et seq the Plaintiff must "pierce the corporate veil" to impose individual liability, is highly distinguishable. In that case, the question was whether or not the owner of an LLC was liable for the decision to withhold wages, which was otherwise made by other individuals involved in the day-to-day operations of the limited liability corporation. In such an instance, when an owner is not a direct decision maker, the Court found that liability could nevertheless be imposed under the equitable principles relating to piercing of the corporate veil.

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Obviously, there was clearly a reason why the individual Defendants were not subject to liability under RCW 49.48 et seq due to the difference in statutory language. RCW 49.48 et seq does not provide for individual liability of corporate officers. RCW 49.52 et seq does. While one can speculate as to the difference, the bottom line is that the legislature made a determination that when there is a willful withholding of wages that it would expand liability to cover the responsible individuals.

In the instant case, the two individually named Defendants had direct control over the determination as to whether or not Mr. Durand should be paid under the terms of his contract, thus this matter is clearly distinguishable and they fall within the hardcore language of RCW 49.52.050 and 070.

Given the statutory language, it is unnecessary for the Plaintiff to have to prove that the corporate form was abused by the Defendants herein. They are liable because the statute says so.

D. The Trial Court Did Not Violate ER 408 and Even If it Did, it Was an Invited Error, an Issue That Was Subject to Waiver by the Defendants, and/or a Harmless Error.

As noted by the Defendants, under ER 408 evidence regarding settlement can be utilized for “other purposes.” See, *Bulaich v. AT & T*, 133 Wn.2d 254, 778 P.2d 103 (1989) (Admitted to prove employer’s mental state); see also *Sharbono v. Universal Underwriters*, 139 Wn.App 383, 161 P.3d 406 (2007).

In the instant case, it was the Defendants that urged the trial court to consider settlement correspondence for the purposes of establishing the existence of a bona fide dispute, in an attempt to avoid liability under

RCW 49.52.070. In addition, the Defendants asserted a claim that because Mr. Durand had demanded full payment on his contract, that somehow this was an excessive and unreasonable demand, and as a result Mr. Durand had engaged in some kind of bad faith, thus warranting a full forfeiture of all amounts due and owing under the terms of the contract. In order to rebut such a specious argument, obviously, the settlement correspondence became relevant for “other purposes.”

In any event, as it was the Defendants who initially sought submission of such documentation for the purposes of establishing the existence of a “bona fide dispute” and the Court ultimately did admit such documents for such a limited purpose, it is hard to imagine how the Defendants herein are in a position to complain.

What the Defendants failed to grasp is the fact that in the most part their ploy, i.e. interjecting settlement discussions into the case in order to establish the existence of a “bona fide dispute” ultimately was in the most part successful. In the instant case, the trial court failed to double damages under RCW 49.52 et seq with respect to a substantial portion of Plaintiff’s economic damages despite the Plaintiff’s position that the entirety of the amount due and owing to him should have been doubled under the statute. Based on the information provided to the Court, ultimately at

the Defendants' urging, was that the evidence did not establish the existence of a bona fide dispute, as did the \$150,000.00 which was owing under the terms of the first contract, which the Defendants indicated was the only enforceable agreement between the parties.

The Defendants cannot have it both ways. They cannot utilize settlement discussion negotiations to establish the existence of a bona fide dispute, when such negotiations also serve to establish that in fact there was not a bona fide dispute as to some of the amounts claimed. The effort to interject such correspondence was equally, if not most part of the fault, of the Defendants and having engaged in such a strategy they must take the good with the bad.

A waiver occurs when a party takes inconsistent positions within a litigation. See, *Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000). In the instant case, the Defendants' position throughout the litigation with respect to settlement negotiations and what they could be utilized for is surely inconsistent. Having tried to interject such settlement negotiations into the case, the Defendants are certainly in no position to complain. Further, the doctrine of invited error precludes the Defendants from now arguing that it was somehow inappropriate for the Court to consider settlement discussion documents, generally protected by

ER 408, when they included such documents within their joint statement of evidence submitted to the trial court prior to trial, and when they utilized the documents during the course of trial for their own purposes. See, *Hudson v. Hapner*, ___ Wn.App ___, 187 P.3d 311 (2008).

Finally, having submitted such documents within the Defendants' portion of the joint statement of the evidence, the Plaintiff was entitled to rely and use such information. See, generally, *Henrickson v. King County*, 101 Wn. App 258, 2 P.3d 1006 (2000) (Both parties can benefit from ER 904 submission).

In any event, with respect to this issue, the Defendants simply cannot have it both ways. Additionally, it is noted that to the extent that the Court may have abused ER 408, such actions on the part of the trial court was a harmless error. See, *Hoskins v. Reich*, 142 Wn.App 557, 570-71, 174 P.3d 1250 (2008). Defendants throughout the course of this litigation and on appeal are indicating that it is their position that the only operative contract was the offer of employment, which was entered into on March 24, 2005. (Exhibit 2). If that is the case, such a position in and of itself indicates that Mr. Durand was entitled to a minimum of \$125,000.00 in severance pay, plus the other benefits that were not paid under the terms of that agreement. (Roughly, \$150,000.00).

On this basis alone, the trial court certainly had the prerogative of finding a willful and wrongful withholding of wages, particularly once it was determined that there was no factual basis for the assertion that the severance pay should be calculated based on some reduced amount predicated on the temporarily reduced salary, which Mr. Durand agreed to with a promise that it would ultimately be paid in full under the terms of his contract. To the extent that the Court may have misused the settlement documents (which she did not), such an error was harmless because the finding of willfulness as to the \$150,000.00 amount is otherwise substantially supported by the evidence.

E. The Defendants Are Not Entitled to a Good Faith Business Judgment Immunity.

As all of the above-cited cases indicate, an employer who fails to pay contractually due wages and other remunerations of employment, is liable for damages under RCW 49.48 et seq and potentially under RCW 49.52 et seq. It is noted that although they are not being utilized in the criminal context in this instance, both of the above-referenced statutes also provide for criminal penalties and the withholding of wages actually constitutes a misdemeanor under the laws of the State of Washington. It is respectfully suggested that the commission of a crime in the form of

wrongful withholding of wages can never be deemed a “good faith” action on the part of any responsible employer or officer of a corporation, nor would a reasonable person believe that such criminal conduct could be justified, particularly under the circumstances of this case. The touchstone of RCW 23B.08.300 Immunity is a standard of reasonableness. Further, it is certainly unreasonable for the individual Appellant to wrongfully withhold Mr. Durand’s wages given the fact that the trial court in this instance determined that at least \$150,000.00 was really undisputed.

As previously discussed above, the failure to pay Mr. Durand’s wages while continuing to pay the other debts of the corporation is certainly unfair and is frankly unconscionable. See, *Scott v. Trans System*, 110 Wn.App 44, 38 P.3d 379 (2002) (Refusing to apply rule in a case in part involving a wage claim).

In Washington, there is very little case law interpreting the business judgment immunity afforded by RCW 23B.08.300 and 420. However, in the case of *Senn v. Northwest Underwriters*, 74 Wn.App 408, 875 P.2d 637 (1994), the Appellate Court found that the business judgment rule did not protect the officers and directors of a corporation who knew or reasonably should have known that the corporation’s employees were engaging in fraudulent activities. It is hard to distinguish

the same case from the instant case. What is at issue here is not a fraud perpetrated by subordinate employees, but rather an affirmative decision on the part of corporate officers to commit what is essentially a misdemeanor crime. It would be counterintuitive to say that such action could ever be performed in a good faith manner given the fact that they violate very express and specific statutory duties.

In addition, it is clear that the public policies which animate RCW 49.48 et seq and RCW 49.52 et seq, trump the more general principles and justifications for the business judgment rule. It has long been recognized that RCW 49.52 must be liberally construed to advance its legislative purposes of protecting employee's wages and ensuring payment. See, *Schilling*, 136 Wn.2d at 519.

In sum, it would be hard to imagine that officers and directors of a corporation would be fulfilling their fiduciary duties to the corporation by exposing it to substantial liabilities, including double damages and by engaging in misdemeanors. It is suggested as set forth in the *Senn* case, that to meet fiduciary duties the directors in this case should have made a reasonable effort to retire the debts it owed to Mr. Durand, or stipulated to an appropriate judgment, or file bankruptcy and/or address their ability to pay at the collection stage of a litigation. Having not done so, they

exposed themselves to personal liability, which unfortunately was the by-product of their extremely risky and analytically unsound legal advice they may have been provided.

F. The Trial Court Did Not Abuse Its Discretion By Denying A Motion for Continuance And/Or Defendant's Motion for CR 56 (f) Relief.

The decision to grant or deny a continuance generally is a matter within the trial court's discretion and a court abuses its discretion only when it exercises such discretion in a manifestly unreasonable manner or based on untenable grounds or reasons. See generally, *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 106, 864 P.2d 937 (1994).

The decision to waive or strictly enforce local rules is also a matter within the trial court's discretion. Compare, *Lancaster v. Perry*, 127Wn.App 826, 113 P.3d 1 (2005) to *Mercier v. GEICO*, 139 Wn.App 891, 902-03, 165 P.3d 375 (2007).

Generally, when considering a motion under CR 56 (f) to continue a motion for summary judgment, the trial court may deny the motion for continuance when (1) the requesting party does not have a good reason for the delay in obtaining the evidence; (2) the requesting party does not indicate what evidence would be established by further discovery; or (3)

the new evidence would not raise a genuine issue of fact. See, *Tellevik v. 131641 West Rutherford Street*, 120 Wn.2d 68, 90, 838 P.2d 111, 845 P.2d 1325 (1992).

In the instant case, the Defendants failed to meet the first element within the *Tellevik* opinion, in that the Appellants failed to articulate “ a good reason for the delay in obtaining the evidence.” It is noted in the instant case, although the Plaintiff was able to fully conduct necessary discovery prior to the expiration of the case schedule discovery cut-off date, the defense counsel did not issue a single interrogatory in this case, nor take a single timely deposition. There is no excuse, other than the fact that defense counsel was filing motions that were largely denied, for not engaging in such discovery.

In addition, defense counsel never truly articulated what evidence could be established by way of further discovery, though he did mention the names of a couple of individuals that he desired to depose. In addition, there was no indication that any evidence gathered during the discovery process would have served to raise an issue of material fact that would have resulted in the defeat of the motion for summary judgment.

In the instant case, as is self-evident from the record, the Defendants were fully provided an opportunity to be heard on whatever

issue they desired. There is no indication that a grant of a continuance either generally, or under CR 56 (f), would have in any way changed the outcome of the instant case.

Clearly, the trial court had a tenable basis for exercising its discretion in denying a motion for continuance, and as such Defendants cannot establish a reversible error based on such a decision.

With respect to the Defendants' complaints regarding the application of Pierce County Local Rules regarding the case schedule, the Defendants do not articulate in any reasonable manner how they were prejudiced by the case schedule imposed herein. As the Defendants recognize, they had "20 weeks after the initial filing date" to engage in discovery. During the course of that 20 week period they did nothing. They also failed to seek adjustment of the trial date in a timely manner. Further, while the Defendants complain that according to defense counsel that somehow PCLR 1(h)(1) was somehow implicated because of the number of the defendants listed in the caption of the Complaint (which included two corporations) somehow created a situation where one could automatically predict that there would be (apparently) too many witnesses to fall under the expedited case schedule, is clearly predicated on rank speculation.

In addition, although Defendants indicate that they were somehow burned by the case schedule because they could not depose “out of state witness A.J. McCann,” there is no indication that Mr. McCann (who was terminated months before Plaintiff) ultimately had anything relevant to say with respect to any matter at issue herein. The fact that Mr. McCann was at some point listed as a trial witness is irrelevant given the fact that neither party called him as a witness at time of trial.

The bottom line is that the defense counsel in this case failed to act diligently. The Court was well within its case management authority and discretion to maintain the case schedule in the manner in which it did. It is noted that the Court did continue the case on the defense motion for approximately one month. It is thankful (given the current congestion within the Pierce County Superior Court) that the trial court was willing to accommodate the parties so that they could have a timely and full trial.

G. The Trial Court Did Not Abuse Its Discretion In Awarding Attorney’s Fees for the Work Performed Which Was Necessary To Reach a Successful Result in the Instant Case.

In the instant case, the Plaintiff was able to acquire a Judgment against the Defendants in excess of \$1 million. It is hard to imagine that

the Defendants are seriously contending that the Plaintiff lacked success in this matter.

It is also interesting to note that most of the Defendants' argument with respect to fees is made without a single citation to any matter within the record.

If one actually reviews the record in the instant case, it is very clear that little if any time was spent on "unsuccessful claims." While it is true that in response to Defendants' 12 (b)(6)/summary judgment motion, efforts were made to clarify the Complaint with respect to which claims were brought against which entities, such efforts did not require much in the way of labor. In addition, the fact that the Complaint named Judy Johnston's deceased husband as a named party is at best an issue that involves housekeeping, and is not something that would be worthy of a fee reduction in the manner suggested by the Defendants.

As is self-evident, the gravamen of the instant case was the wrongful withholding of wages, which was predicated on a breach of contract. Plaintiff prevailed on those claims, and it would simply be impossible to segregate out the work performed with respect to those claims and work performed on what the Defendants have characterized as "unsuccessful claims," which at best would have occupied a de minimus

amount of time. For the Defendants to contend in any way, shape or form that they “partially prevailed” as they suggest at page 61 of their Opening Brief is simply laughable.

Further, the work performed in order to acquire a Judgment against the corporate defendant under RCW 49.48.030 and the individual defendants under RCW 49.52.070, would have been the exact same. In other words, even if the corporate defendants had not been sued in the instant case, the same work would have had to have been performed in order to acquire the Judgment against the individual defendants. In other words, in the instant case, such work was indivisible and could not be subject to segregation. Under both claims the Plaintiff is entitled to fees, and since the work had to be performed irrespective to which statute the Plaintiff was operating under, the Court was well within reason to find that the entirety of the attorney’s fees should be subject to a joint and several liability judgment.

Further, the Defendants’ argument in this instance is obviously argument without a scintilla of authority and simply must be disregarded.

It is noted that there was a substantial difference between the award of pre-judgment interest in the instant case, and the award of attorney’s fees. The trial court, in the wise exercise of its discretion, correctly

assumed that the attorney's fees would have been accrued irrespective of which claim was being brought, while at the same time, the pre-judgment interest could only accrue to the damages awarded against the respective parties. Thus, it was reasonable to allocate the pre-judgment interest on a pro-rata basis based on the individual judgment, while it would not be reasonable to do so with respect to the attorney's fees award, for work which would have accrued even in the absence of either the corporate and/or individual parties.

A trial court **may** require a plaintiff to segregate its attorney's fees between successful and unsuccessful claims. See, *Bloor v. Fritz*, 143 Wn.App 718, 821-22, 180 P.3d 805 (2008). However, this only occurs when the claims are "unrelated," and when claims are unrelated, the court should award only the fees attributable to the recovery on that claim. **"But where the attorney's fees for successful and unsuccessful claims are inseparable, the trial court may award the plaintiff all its fees."** *Id.*, citing to *Blair v. WSU*, 108 Wn.2d 558, 572, 740 P.2d 1379 (1987).

In the instant case, the Plaintiff's claims were simply inseparable. The wrongful withholding of wages claim and the breach of contract claim were wholly inseparable and dependent upon one another. The only claim that was not fully adjudicated was Plaintiff's claim of promissory

estoppel, which was only a contingent claim brought in the event the court determined there was no valid contract at issue herein. As such, the trial court was well within its prerogative of awarding the fees as it did.

In addition, the trial court was well within its discretion of awarding a 0.5 multiplier in the instant case (not 1.5 as exaggerated by Appellant's herein). Typically the "lodestar" calculation is deemed to be a reasonable fee in a fee shifting case. However, in rare instances, the "lode star" may be adjusted up or down to reflect other factors that are not already considered within the calculation of the "lodestar" fee. See, *Carlson v. Lake Chelan Community Hospital*, 116 Wn.App 718, 743, 75 P.3d 533 (2003) (upholding the trial court's award of a multiplier of 0.5); see also, *Pham v. City of Seattle*, 159 Wn.2d 527, 151 P.3d 976 (2007) (discussing in detail contingency risk as a basis for a fee multiplier and/or enhancement). See also, *Bloor v. Fritz*, 143 Wn.App at 822-23.

As noted in *Pham* at 541, adjustment of the "lode star" upward can be based on two broad considerations; (1) the contingent nature of the case; and (2) the quality of the work performed. As suggested by *Pham*, the determination as to whether or not to award a contingent risk multiplier is a matter that is solely up to the discretion of the trial court.

In the *Carlson* case, the court upheld a 0.5 multiplier based on risk because the case itself involved considerable risk, the defense counsel granted no concessions, and there was never any assurance of recovery.

Such observations were equally applicable in the instant case. Here, there was and continues to be a substantial risk despite success at the trial level. Any Judgment entered herein may be uncollectable or only partially collectable. The defense has taken this matter on appeal and has pursued an appeal despite the failure to file a supersedeas bond, thus not providing Plaintiff's counsel any assurance of payment should this appeal be unsuccessful. It is reminded that the Defendant's in this case base their defense on "an inability to pay theory," thus this case presents a substantially greater risk than one where an insurance company, or a municipal entity, or other "deep pockets" will ultimately be able to pay. In addition, defense counsel has clearly granted no concessions, has engaged in sometimes obnoxious tactics and has consistently been tenacious in his approach towards this litigation. Beyond that, Plaintiff's counsel has had to face a tenacious defense that has in many instances been extremely novel, expensive and certainly in some instances disconcerting.

In any event, given the above, it is respectfully suggested that the trial court was well within the wise exercise of her discretion to provide

a multiplier at 0.5, particularly given the incredible amount of risk Plaintiff's counsel faced in the prosecution of the instant case and continues to face during the court of this appeal.

H. Plaintiff Should Be Awarded Fees on Appeal and At the Multiplied 0.5 Rate.

Pursuant to RAP 18.1, Plaintiff requests an award of attorney's fees on appeal pursuant to RCW 49.48.030 and RCW 49.52.070. Clearly, such fees are authorized under the terms of the above-referenced statutes for appellate proceedings. See, *Brandt v. Impero*, 1 Wn.App 678, 463 P.2d 197 (1969) (attorney's fees under RCW 49.52.070 include attorney's fees on appeal). See also, *Chelius v. Questar Microsystems*, 107 Wn.App at 685-86. See also, *Kohn v. Georgia Pacific*, 69 Wn.App 709, 850 P.2d 517 (1993) (awarding fees on appeal pursuant to RCW 49.48.030).

In the instant case, Plaintiff should be awarded fees on appeal at the multiplier rate because the contingent risk which existed at the time of trial has simply not ceased. In the instant case, the Defendants were ordered to file a supersedeas bond to assure payment to Plaintiff on appeal. The Defendants have not done so, and as such the Plaintiff continues to have the same risk as before the trial court that he (and his attorney) will

never be paid. Under such “rare circumstances,” even an appellate multiplier is in fact warranted.

Finally, in the instant case, the Defendants in their conclusion request that the trial court award them fees on appeal pursuant to RCW 49.48.030 and RCW 49.52.070. Obviously, this request is frivolous in that the text of the statute does not provide for the award of attorney’s fees to a prevailing “employer.” As such, the Defendants’ request for attorney’s fees must be denied because there is no statutory basis for such an award.

Finally, with respect to the imposition of joint and several liability, generally, there can be joint and several liability where there is an indivisible harm. See, *Seattle First National Bank v. Shoreline Concrete, Inc.*, 91 Wn.2d 230, 588 P.2d 1308 (1978). There can be joint and several liability for the debts of a corporation if there is also a basis for individual liability. See, *Roderick Timber Co. v. Willapa Harbor Cedar Products, Inc.*, 29 Wn.App 311, 627 P.2d 1352 (1981).

In the instant case, there is clearly a reasonable basis for the trial court to impose joint and several liability with respect to attorney’s fees. The claims are and were inseparable, and there is an individual basis for liability in this case. Nothing more needs to be shown. Further, with

respect to this issue, the Defendants failed to provide pertinent authority, and as such their arguments in that regard must be disregarded.

I. The Judgment Was Appropriately Awarded Against Mr. Cornwell's Marital Community.

In the instant case, Mr. Cornwell was intimately involved in the management of the subject corporations following the ousting of the Ehlis and personally holds substantial stock in the corporation. As a general proposition, community property can be subject to execution, even for separate debt, if separate property and a party's portion of the community's property is inadequate to satisfy a judgment. See, *Keene v. Edie*, 131 Wn.2d 822, 935 P.2d 588 (1997). As such, many of the Defendants' concerns with regard to the liability against Mr. Cornwell's community may be somewhat academic. However, a spouse can be liable for a community debt if the debt was accrued during the course of actions taken for the benefit of the marital community or done with respect to the management of community property. See, *Farmer v. Farmer*, 25 Wn.App 896, 611 P.2d 1314 (1980).

As such, the trial court was well within its prerogative to find the marital community of Mr. Cornwell liable for his actions, which obviously

were done for the benefit of his marital community, and during the course of the management of his community property.

In any event, the Defendants fail to cite to any relevant authority, so their arguments with regard to Mr. Cornwell's liability must be disregarded.

VI. CONCLUSION

For the reasons stated above, Defendants' efforts at upsetting the Judgments entered herein by way of this appeal, should be denied. The trial court should be affirmed with respect to all matters which were before it and all matters which are currently addressed within Appellants' Opening Brief.

Having failed to assign error to the trial court's Findings of Fact in this matter, the Court can take as verities on appeal that Mr. Durand entered into the contract with these Defendants, and that contract was breached causing substantial damages.

The trial court's other actions were well within its vested discretion, which was in no way abused.

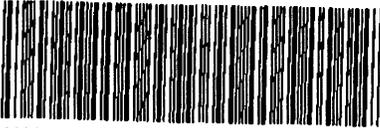
The judgment of the trial court should be unequivocally affirmed
herein.

Dated this 9 day of October, 2008, at Tacoma, Washington.

A handwritten signature in black ink, appearing to read "Paul A. Lindenmuth", written over a horizontal line.

Paul A. Lindenmuth, WSBA# 15817
Attorney for Plaintiffs/Respondents

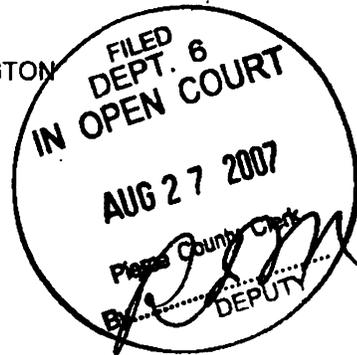
Appendix No. 1



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SUPERIOR COURT OF WASHINGTON
COUNTY OF PIERCE



MICHAEL DURAND AND NATASHA DURAND,
Plaintiffs,

Vs.

NO. 06-2-13326-4

MEMORANDUM DECISION

HIMC CORP., et al:

Defendants

This matter having come on regularly for trial, the Court now makes the following DECISION:

The Plaintiffs shall be awarded the following sums under the terms of Michael Durand's employment contracts with the defendants: \$618,750 base salary for the remaining 4 years and 2 months after termination in February 2006; \$38,958.26 for deferred salary; \$15,000 annual bonus for 2005; and \$20,000 relocation assistance.

1 This Court finds that a bona fide dispute existed with respect to an amount owing over \$150,000 under
2 the terms of the contracts which were not negotiated by the individual defendants. However, the
3 defendants withheld the undisputed amount of \$150,000 and this amount should be doubled as an award
4 to plaintiff in addition to an award of reasonable attorney fees and costs by later order of the Court.

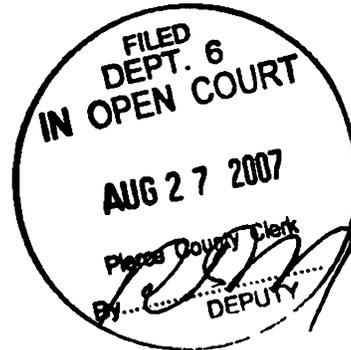
5 Plaintiffs' counsel is directed to prepare findings of fact, conclusions of law and a judgment to
6 conform to this decision and supplemented as appropriate. Presentation shall be made on the Court's
7 motion docket for argument if necessary.

8 Dated this 27 day of August, 2007

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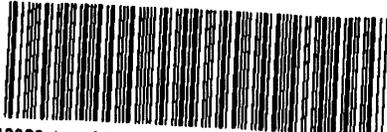
11 Judge Rosanne Buckner

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13 Memorandum Decision faxed to the parties' attorneys on Aug 27, 2007 by
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Appendix No. 2

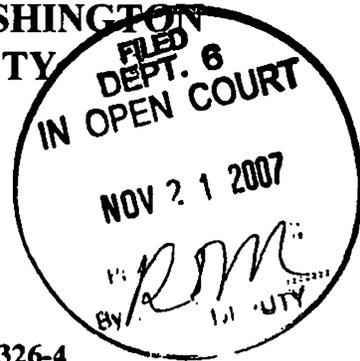


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THE HONORABLE ROSANNE BUCKNER

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**SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**



MICHAEL DURAND and NATASHA
DURAND, individually, and marital
community comprised thereof,

Plaintiff,

NO. 06-2-13326-4

vs.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

HIMC CORPORATION, et al;

Defendants.

THE COURT having called this case on June 15, 2007, and having heard evidence from June 21st through June 29th, 2007, and having concluded the testimony and argument in the case on August 17, 2007, and the Court having heard the evidence and argument in the above-entitled cause, and having examined the exhibits submitted by the parties, makes the following Findings of Fact and Conclusions of Law based upon a preponderance of the evidence presented at time of trial.

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I. FINDINGS OF FACT

A. Introduction.

1. In early 2005, Ron Ehli, who then was a principal and in control of both Defendant HIMC Corporation and Defendant ITI Internet Services, Inc., recruited Plaintiff Michael Durand to leave his job with Brachs Confection Company in Vancouver, Washington, for the purposes of coming to work for Mr. Ehli at HIMC, Corporation and ITI Internet Services, Inc. as their Vice President of Sales.

2. At the time Mr. Durand was being recruited by Mr. Ehli, the companies had recently received a substantial amount through a first round of funding, and it was anticipated that additional capital would be forthcoming. In anticipation of additional funding, during the course of negotiations between Mr. Durand, Mr. Ehli and Virgil Llapitan (who was President of HIMC, Corporation, and who had a management role in ITI Internet Services, Inc.), offered Mr. Durand a position as Vice President of Sales at a rate of compensation of \$150,000.00 per year.

2, On or about March 24, 2005, Mr. Durand met with Mr. Llapitan and Mr. Ehli and formulated a written job offer, which was before the Court as Plaintiff's Exhibit #2. The job offer was signed on March 24, 2005 by both Mr. Durand and Virgil Llapitan, as President of HIMC Corporation.

3. Based on the terms of the job offer/ contract signed by Mr. Llapitan and which is before the Court as Exhibit #2, Mr. Durand tendered his resignation from his employer in Vancouver, Washington and took steps to move his family from the Vancouver, Washington area to the Tacoma, Pierce County area, which is the location of the Defendant corporations.

4. On April 18, 2005, Mr. Durand presented himself for his first day of employment at HIMC and ITI Internet Services. At that time, he was approached by HIMC President, Virgil Llapitan, who told

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2 him that his employment contract, in order to be consistent with that of other officers within the corporation
3 had to contain additional terms than those originally set forth in the job offer. At that time, Mr. Durand
4 and Mr. Llapitan entered into a "Employment Agreement" which was before the Court as Plaintiff's
5 Exhibit #3A. The Employment Agreement, which is incorporated by this referenced, by its terms purports
6 that the agreement is between ITI Internet Services, Inc., a Washington corporation, and Michael R.
7 Durand. It is also noted that the Employment Agreement is signed by Virgil Llapitan as President of HIMC
8 Corporation. The Court finds that it was the intent of the parties that Mr. Durand be an employee of ITI
9 Internet Services, Inc., and not HIMC Corporation. The basis for this finding is the fact that HIMC
10 Corporation is solely a holding company that has no paid employees. In addition, it is clear from the
11 records presented at time of trial that Mr. Durand was paid by checks issued from an ITI Internet Services
12 account and was kept on ITI Internet Services books as an employee in the position of Vice President of
13 Sales. See, Plaintiff's Exhibit #5.

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15 5. At the time the April 18, 2005 contract was entered into, Mr. Llapitan had either direct, or
16 authority delegated by Ron Ehli, to enter into a contract of employment with Mr. Durand, which the Court
17 finds to be the full and final agreement between the parties, and which was intended to be a fully integrated
18 agreement.

19
20 6. Following entry into the April 18, 2005 agreement, Mr. Durand fully performed under the
21 terms of his employment agreement and began trying to develop a sales department for the services
22 provided by ITI Internet Services, which is an internet check processing company. Unfortunately, the
23 second round of investor funding that was anticipated at the time of Mr. Durand's hire never materialized.
24 As a result, Mr. Durand was not provided the resources that were initially anticipated for the development
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2 of the sales department, and was losing the resources he initially had because he had to lay off sales staff
3 due to the financial condition of the company.

4 7. In approximately September of 2005, Mr. Ehli, who was still in control of the companies,
5 as well as other management personnel, including Virgil Llapitan, were approached by Mr. Ehli who
6 indicated that they would all have to take temporary salary reductions due to the financial condition of the
7 companies. It was understood at this time that the salary reductions would only be temporary and the
8 amount deferred ultimately would be paid. Mr. Durand continued his employment with ITI Internet
9 Services at the reduced salary rate until he was terminated on February 21, 2006.
10

11 8. In the interim ,and prior to Mr. Durand's termination on February 21, 2006, Mr. Ehli and
12 his wife Pam Ehli were in divorce proceedings which resulted in Mrs. Ehli and their daughter Melissa
13 Duthie acquiring day-to-day control of the corporations. In addition, a stockholders' lawsuit was filed
14 under the name of Johnston v. HIMC Corporation, under Pierce County Superior Court Cause No. 05-2-
15 01424-0. As a result of this lawsuit, by March of 2006 a stockholders' meeting was held pursuant to court
16 order and a new board of directors for HIMC Corporation was installed. The new board of directors
17 included Henry Gurley, Judy Morton Johnston and Dean Kalivas. The newly elected board of directors
18 for HIMC Corporation appointed themselves as the directors of ITI Internet Services, Inc. and installed
19 Defendant Jerry Cornwell as the CEO of ITI Internet Services, Inc. Under a resolution dated March 8,
20 2006, all check writing and bill paying authority was removed from Virgil Llapitan, Ronald Ehli, Pamela
21 Ehli, Melissa Duthie and Anne White, and placed into the hands of Judy Morton Johnston and Jerry
22 Cornwell, collectively and indiuidally. See, Plaintiff's Exhibit #7.
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24 9. As previously mentioned, on February 21, 2006 Michael Durand's employment with HIMC
25 Corporation and ITI Internet Services, Inc. was terminated by Pamela Ehli and Melissa Duthie, who then

1
2 had control of the corporations. The grounds for Mr. Durand's termination is that Pam Ehli and Melissa
3 Duthie believed that Mr. Durand was too close to Mr. Ehli. At that time, Mr. and Mrs. Ehli were in the
4 middle of contentious divorce proceedings. Almost immediately upon his termination, Mr. Durand
5 demanded payment of "back pay," which was inclusive of a relocation/signing bonus, 2005 annual bonus
6 of 10%, and his deferred salary. Under the terms of the April 18, 2005 Employment Agreement, Mr.
7 Durand was entitled to a minimum annual bonus of 10% of his annual salary for the year 2005, i.e.
8 \$15,000.00. In addition, he was promised a relocation assistance/signing bonus of \$20,000.00 for his
9 agreement to relocate from the Vancouver to Tacoma area. Neither the \$15,000.00 annual bonus for the
10 year 2005, nor the relocation assistance had been paid to Mr. Durand prior to his February 21, 2006
11 termination. Despite Mr. Durand's immediate demand for payment upon his termination of his contracted
12 for bonus, relocation assistance and deferred salary, no payment was forthcoming.
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14 10. Shortly after the March 8, 2006 meeting, which installed a new board of directors for HIMC
15 Corporation and ITI Internet Services, Inc., Mr. Durand met Ms. Johnston at the company offices and
16 discussed with her the possibility of employment with the company and explained to her that he had a
17 contract of employment with the company which had been terminated by Mrs. Ehli. Ms. Johnston
18 referred Mr. Durand to Mr. Cornwell, who Mr. Durand called within the next few days. At that time, Mr.
19 Cornwell told Mr. Durand that the new board of directors would not honor any of the contracts approved
20 by the old board of directors.
21

22 11. Over the course of the next few months, Mr. Durand sought out and retained legal counsel
23 for the purposes of enforcing his contract of employment, which had been breached by his February 21,
24 2006 termination. Under the terms of Mr. Durand's employment contract, which was for a term of five
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2 years and subject to renewal thereafter, if it was prematurely terminated short of the five-year term, all
3 amounts due and owing under the terms of the contract became immediately due.

4 12. On or about July 7, 2006, counsel for Mr. Durand, Paul A. Lindenmuth, sent to David B.
5 Adler, counsel for HIMC and ITI Internet Services, a letter demanding payment under the terms of Mr.
6 Durand's April 18, 2005 employment contract and inviting negotiation.

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8 13. After the initial July 7, 2006 correspondence from counsel for Durand to David Adler, Mr.
9 Adler through correspondence engaged in substantial pre-trial negotiation on behalf of HIMC and ITI
10 Internet Services. Such correspondence was offered by the Defendant in this case and although potentially
11 covered by ER 408 as settlement discussions, such correspondence were admitted for other purposes
12 including establishment of whether or not there was a "bona fide dispute" or a partial bona fide dispute as
13 to the amounts due and owing under the terms of Mr. Durand's employment contract. See Exhibit #15-20,
14 22, 23, 25-27.

15 14. During the course of settlement negotiations, ITI Internet Services and HIMC Corporation
16 through Mr. Adler acknowledged at a minimum that Mr. Durand was owed roughly \$150,000.00 based on
17 the initial employment offer document, which was before this Court as Plaintiff's Exhibit #2. Despite such
18 acknowledgment, no payment was forthcoming to Mr. Durand save for a offer of a promissory note with
19 indefinite terms and schedule for repayment. Ultimately, the negotiations between the parties, despite such
20 acknowledgment, broke down, no payment was forthcoming to Mr. Durand and this lawsuit was filed.

21
22 15. The Court finds credible Mr. Durand's position that the purpose of the April 18, 2005
23 contract was to finalize the terms of his employment and to make the terms of his employment agreement
24 more or less consistent with the employment agreements held by other upper management members of the
25 defendant corporations, specifically, Ron Ehli and Virgil Llapitan.

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2 16. The Court finds that to the extent that the April 18, 2005 agreement may contain some
3 ambiguity, such ambiguity must be construed against its drafter, which was Virgil Llapitan acting as an
4 agent for both HIMC Corporation and ITI Internet Services, Inc. It is clear from the face of the contract
5 that the term of the contract was for a five year time period, commencing April 18, 2005 and concluding
6 April 18, 2010, with potential for an automatic renewal for an additional five-year term. In addition, under
7 paragraph 4.6 of the employment agreement between the parties, upon early termination of the agreement,
8 Mr. Durand is entitled to receive all compensation remaining from the terms of the contract, including
9 payment of his salary at a rate of \$12,500.00 per month payable in cash.
10

11 17. Further, the Court finds that under the terms of the employment agreement, it was the intent
12 of the parties that Mr. Durand was to receive compensation at a rate of \$12,500.00 per month, or
13 \$150,000.00 per year and from that base \$150,000.00 per year figure, he was being promised a 10%
14 minimum guaranteed bonus for the year 2005, or an annual bonus for the year 2005 of \$15,000.00. In
15 addition, he was promised a relocation assistance/signing bonus in the amount of \$20,000.00. The payment
16 of this \$20,000.00 was not contingent on actual moving expenses, but was to be a flat bonus of \$20,000.00.
17 The Court also finds that the \$15,000.00 annual bonus was not paid, nor was the relocation
18 assistance/signing bonus paid due to the financial stresses suffered by these companies due to failed efforts
19 to receive the additional promised financing. However, at no time did Mr. Durand waive an entitlement
20 to his annual bonus, nor the \$20,000.00 relocation expenses. There is simply no evidence presented by
21 either party that would indicate that such a waiver occurred. It is noted that upon his termination, Mr.
22 Durand immediately requested payment of the deferred bonuses and salary.
23

24 18. The Court also finds that Mr. Durand did not intend to take a permanent wage reduction
25 and that in good faith he agreed to defer half of his salary for the benefit of the company. The amount of

1
2 money deferred by Mr. Durand totaled \$38,958.26, which reflects a deferral period from September 16,
3 2005 until the payment of his final paycheck on February 28, 2006.

4 19. The Court finds that pursuant to RCW 49.48 et seq, Mr. Durand should have been paid all
5 amounts due and owing under the terms of his contract of employment, including, the termination pay
6 under paragraph 4.6 of the employment agreement, his deferred salary, his annual bonus for 2005, and his
7 promised \$20,000.00 relocation assistant/signing bonus, at the next regular pay period, or at least a
8 reasonable time thereafter. The undisputed evidence established that no such payments were made.

9
10 20. In addition, the undisputed evidence established that the individuals who made the
11 determination not to pay Mr. Durand once the demand for payment under the terms of the contract were
12 made were Judy Johnston and Jerry Cornwell, who were acting in their capacities as officers and directors
13 of HIMC and ITI Internet Services, Inc. It is undisputed that at the operative times in question, i.e. after
14 demand was made and during the pendency of this case, Mr. Cornwell and Mr. Johnston held all check
15 writing authority and payment decision making within the subject defendant corporations. The Court
16 further finds that pursuant to RCW 49.52.050 and RCW 49.52.070, both Ms. Johnston and Mr. Cornwell
17 are individuals who can be subject to liability for the willful and wrongful withholding of Mr. Durand's
18 wages because they were operating as "officers," "principles" or "agents," of the employer when they
19 made the decision not to pay Mr. Durand the amounts due and owing.

20
21 21. The Court specifically finds that under the terms of Mr. Durand's contract of employment
22 with ITI Internet Services, Inc., he is entitled to payment of \$618,750.00 in base salary for the remaining
23 four years, two months of his contract, which was prematurely terminated in February, 2006. In addition,
24 he is entitled to \$38,958.26 for deferred salary, \$15,000.00 annual bonus for the year 2005, and \$20,000.00
25 in relocation assistance.

1
2 22. In addition, the Court specifically finds that a bona fide dispute existed with respect to any
3 amounts owing over \$150,000.00 under the terms of the contract which were not negotiated by the
4 individual Defendants. However, the Defendants withheld an undisputed amount of \$150,000.00 and this
5 amount should be doubled as an award to Plaintiff under the terms of RCW 49.52 et seq because such an
6 amount was willfully and wrongfully withheld.

7
8 23. In addition, under the terms of both RCW 49.48.030 and RCW 49.52.070, Plaintiff is
9 entitled to an award of reasonable costs and attorney's fees. In considering Plaintiff's request for an award
10 of attorney's fees, the Court must first arrive at the "lodestar amount", which is a reasonable hourly rate
11 multiplied by the amount of work reasonably performed on the claims allowing for fee shifting. In this
12 case, the Court finds that all claims either were subject to the fee shifting statute, or are so intertwined as
13 to not be subject to any form of meaningful segregation.

14 24. It is undisputed that the reasonable hourly rate for Mr. Lindenmuth's time is at a rate of
15 \$300.00 per hour. In addition, in reviewing the declarations on file herein and the factors set forth in the
16 opinion of Bowers v. TransAmerican Title Insurance Co., 100 Wn. 2d 581, 595-96, 675 P.2d 193 (1983),
17 the Court finds that the rate of \$300.00 per hour for Mr. Lindenmuth's time is reasonable and consistent
18 with the market for similar skills and services within our local community.

19
20 25. As of September 28, 2007, Mr. Lindenmuth is requesting compensation for 274.7 hours.
21 Having considered the argument of counsel and the guidance provided by the Court of Appeals in the case
22 of Dice v. City of Montesano, 431 Wn. App. 675, 691-92, 528 P. 3d 1253 (2006), the Court 21 hours for
23 pre-filing negotiations should be excluded from the lodestar amount. It is noted that Plaintiffs also seek
24 a supplemental award of attorney's fees for post-trial motions. Plaintiff's counsel should be awarded an
25 additional amount of compensation than those initially requested for work performed on post-trial motions

1
2 and the accrual of attorney's fees on this matter may be ongoing.

3 26. In addition, Plaintiff's counsel requests that his fees be awarded at a multiplier of 2.0, due
4 to the high-risk nature of this litigation where the Defendants have formally defended on a contention that
5 they have an inability to pay Mr. Durand the amounts due and owing under the terms of his contract. The
6 Court finds that this case indeed presents an enormous amount of contingent risk given the position taken
7 by the Defendants and their efforts to defend based on an inability to pay defense. As such, the Court finds
8 it reasonable to award attorney's fees with a multiplier of .5, because this is a rare case where due to the
9 high and exceptional degree of contingent risk, such a multiplier is warranted.
10

11 *AB 21.* Finally, Plaintiff's request an award of prejudgment interest on all amounts with the
12 exception of the \$150,000.00 awarded as liquidated damages under RCW 49.52.070. The Court finds that
13 this is a case where an award of prejudgment interest is appropriate, in that once the Court determined the
14 duties and liabilities of the parties, the amount of damages could be ascertained with mathematical
15 precision. It is also clear that such prejudgment interest should be awarded at a rate of 12%.

16 To the extent that the above Findings of Fact should be more properly treated as Conclusions of
17 Law, and the below Conclusions of Law should be treated as Findings of Fact, it is the intent of the Court
18 that they be treated as if appropriately designated within the pleading.
19

20 **II. CONCLUSIONS OF LAW**

21 1. Mr. Durand had a binding contract of employment with ITI Internet Services, Inc. and
22 HIMC Corporation. The contract of employment is inclusive of both what at time of trial was
23 characterized as the job offer (Exhibit #2) and the employment agreement (Exhibit #3A), which was
24 intended to be the full and final integrated agreement among the parties. These two contracts must be
25

1
2 interpreted together and to the extent that they may contain inconsistent terms, the later contract in time
3 will prevail, but the consistent remaining terms of the first contract are still subject to enforcement.

4 2. The amounts due and owing under the terms of Mr. Durand's contracts of employment with
5 the Defendant corporations, constitute "wages due him on account of his employment" within the meaning
6 of RCW 49.48.010. Under the terms of RCW 49.48.010, the amounts due and owing under the terms of
7 Mr. Durand's contract were due to him at the end of the established pay period, which would have been
8 February 28, 2006. It is undisputed that no such payments were made, and as a result the Defendants
9 unlawfully withheld Mr. Durand's wages in violation of RCW 49.48.010. AB HMC Corp
AND ITI
Internet
Services Inc

10 3. Pursuant to RCW 49.48.030, the Plaintiff has been successful in recovering a judgment for
11 "wages or salary owed to him" and as such is entitled to an award of a reasonable attorney fee. The
12 exception set forth in RCW 49.48.030 relating to a recovery of an amount less or equal to the amount
13 admitted by the employer, does not apply because the Defendants in this case do not admit that the amount
14 awarded by the Court was the amount due and owing.

15 4. Defendants ITI Internet Services, Inc. and HIMC Corporation were the employer of Michael
16 Durand within the meaning of both RCW 49.48.010 and RCW 49.52.050. In addition, Defendants Judy
17 Johnston and Jerry Cornwell were both "officers, vice principles or agents" of the employer. Under RCW
18 49.52.050 (2), both the corporate employers as well as the individual defendants are liable because they
19 willfully and with intent to deprive Mr. Durand of any part of his wages paid him at a lower wage than the
20 wage they were obligated to pay under the terms of any contract. Here, it is undisputed that Mr. Durand
21 was not paid all the amount of wages which were due and owing under the terms of his contract, and in fact
22 his final paycheck on February 28, 2006 paid him substantially less wages than his employer was obligated
23 to pay under the terms of his contract.
24
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2 5. Clearly, under the terms of RCW 49.48.010 and RCW 49.52 et seq, the amounts due and
3 owing under the terms of Mr. Durand's contract constitute wages for the purposes of statutory coverage.

4 6. Pursuant to RCW 49.52.070, the employer, and Judy Johnston and Jerry Cornwell,
5 individually, as officers, vice-principles or agents of the employer are liable for the amount of wages which
6 were wrongfully withheld without proper justification or excuse. In addition, they are liable for double the
7 amount which was willfully and wrongfully withheld without lawful justification and excuse. As
8 previously mentioned, the Court finds that amount to be \$150,000.00, and under RCW 49.52.070 and an
9 additional amount of \$150,000.00 as liquidated damages pursuant to RCW 49.52.070 is awarded. The
10 Court specifically finds that beyond the \$150,000.00 amount, there is a bona fide dispute as to what was
11 owing. However, as to the \$150,000.00 willfully withheld, the Defendants clearly knew what they were
12 doing and that they had no lawful justification for doing it. In addition, the Court finds that Mr. Durand
13 at no time knowingly submitted to the violation of RCW 49.52 et seq.

14
15 7. Having prevailed on claims pursuant to RCW 49.48 et seq ^{against defendant's corporation B} and RCW 49.52 et seq, the
16 Plaintiff is entitled to an award of costs and attorney's fees. In addition, under the circumstance of this case ^{against the defendant's}
17 and as discussed as above, Plaintiff's counsel is entitled to an award of attorney's fees with a multiplier
18 of 0.5 reflective of the exceptionally high degree of contingent risk involved in this case. The Court finds
19 that a full and final award of attorney's fees in the amount of \$ 130,815 is reasonable and
20 appropriate.

21
22 8. The Court finds that an award of costs pursuant to RCW 4.84 et seq is appropriate in the
23 amount of \$ 1780.75. In addition, the Court concludes that an award of prejudgment interest on
24 all liquidated amounts is appropriate ^{against the corporate defendants B}. As of the date of entry of these Findings of Fact and Conclusions
25 of Law, the amount of prejudgment interest at 12% is \$ 143,475.95

1
2 9. All Defendants, including Judy Johnston and Jerry Cornwell and his marital community, are
3 jointly and severally liable for wrongfully withheld wages of \$150,000.00 pursuant to RCW 49.52.070 and
4 the \$150,000.00 in liquidated damages award under RCW 49.52.070. In addition, all Defendants are jointly
5 and severally liable for Plaintiff's attorney fees of \$130,815 and costs of \$1780.75 and
6 \$31,062.55 of prejudgment interest (21.65% of \$143,475.99).

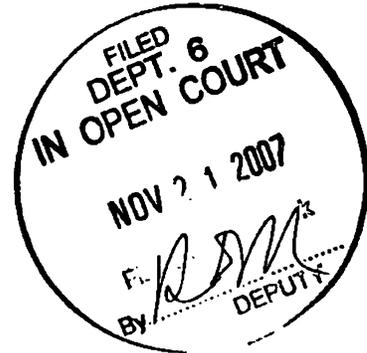
7
8 10. Defendants HPMC and ITI Internet Services are jointly and severally liable on all amounts
9 awarded to the Plaintiffs.

10 DONE IN OPEN COURT this 21 day of November, 2007.

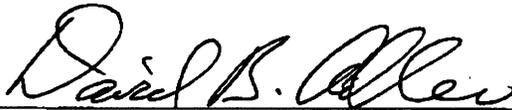
11
12 
13 Judge Rosanne Buckner

14 Presented by:

15
16 
17 Paul Lindenmuth, WSBA #15817
18 Attorney for Plaintiffs



19 ~~Notice of Presentation waived~~ AB

20
21 
22 David Adler, WSBA #16585
23 Attorney for Defendants
24
25

FILED
COURT OF APPEALS
DIVISION II

03 OCT 10 AM 10:53

STATE OF WASHINGTON

BY _____
DEPUTY

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

MICHAEL DURAND, et al,

Plaintiffs/Respondents,

vs.

JOHNSTON and CORNWELL, et
al,

Defendants/Petitioners.

37088-3
No: ~~33956~~-I-II

DECLARATION OF MAILING

I, Mary Dye, certify and declare under penalty of perjury under the laws of the State of Washington, that the following is true and correct.

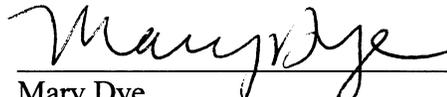
1. I am an employee of The Law Offices of Ben F. Barcus & Associates, P.L.L.C., over the age of 18, and competent to testify concerning the matter herein.

2. On October 10, 2008, I mailed a true and correct copy of Respondents' Motion for Late Filing, to File Overlength Brief and Waiver of

Sanctions, Respondent's Opening Brief, and this Declaration of Mailing, via
legal messenger, to:

David B. Adler, Esq.
520 Pike Street, Suite 1440
Seattle, WA 98101

Dated this 10th day of October, 2008, at Tacoma, Washington



Mary Dye