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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

NO. 40077-4-II

Pierce County Superior Court No. 08-2-08338-~~7~~

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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JAMES B. ZIMMERMAN,

Plaintiff/Respondent,

v.

W8LESS PRODUCTS, LLC, a Washington  
limited liability company; JOHN ARBEENY,  
and his marital community; and CHARLES RAU,  
and his marital community,

Defendants/Appellants.

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**REPLY BRIEF OF APPELLANTS**

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## I. DISCUSSION

### 1. Respondent's Statement of the Case Contains

#### Incomplete and Inaccurate Statements.

Respondent's statement of the case on page 9 states:

"Pursuant to motion and unanimous approval by the Board, respondent Zimmerman was then accepted as the Vice-President of Marketing/Business Development." (CP 45)

In fact:

"The acceptance was based upon his apparent qualifications as stated by Mr. Jolley and subject to getting a formal resume, vetting him with previous employers, obtaining additional funding for the company, and upon execution of a written employment agreement specifying duties and compensation. Mr. Zimmerman and Mr. Jolley fully understood that the acceptance was subject to the execution of a formal employment contract." (CP 85)

At a previous Board meeting on December 28, 2007, the minutes of that meeting, which were mailed to Mr. Jolley on December 29, 2007, contained the following:

"Employment Contracts. The current lack of employment contracts is inefficient and opens up a host of accountability issues. All management employees must have employment contracts that clearly explain their duties and responsibilities and were (sic) possible lay out milestones for accomplishing goals. Compensation must also be addressed and initially may require different compensation in the form of stock options or other incentives in order to preserve capitalization with the company. Such contracts may require a specialized attorney since it is not within the realm of Barry Davidson's expertise." (CP 84)

The need for the requirement of written employment agreement was further confirmed by the fact that Zimmerman and Jolley forwarded a form of employment contract on February 1, 2008 which clearly acknowledged that the contract needed Board approval. This contract was objected to and never executed. (CP 35).

The above allegations clearly indicate that there was a clearly debatable question of fact as to whether or not Zimmerman was in fact an employee of the limited liability company.

There was also evidence before the court in the Declaration of John Arbeeny that Zimmerman had been hired initially by Jolley to assist Jolley in marketing his law practice rather than assisting W8Less Products, LLC (CP 87).

**2. Arbeeny and Rau did not terminate Jolley.**

On page 11 of Respondent's statement of the facts, it is alleged that:

“On February 6, 2008, appellant Arbeeny and appellant Rau took action to terminate Mr. Jolley's position as “CEO” and for appellant Arbeeny to take over in that capacity.”

As a matter of fact, Mr. Jolley's termination was not done by Arbeeny and Rau, but was an action taken by BenMaxx, LLC, which was a principal member of W8Less Products, LLC. (CP 97)

3. **Durand v. HIMC Corp. cited by Respondent is clearly distinguishable in the facts.**

In his argument, respondent cites **Durand v. HIMC Corp.**, 151 Wn. App. 818, 835, 214 P.3d 189 (2009) and specifically says:

“The facts in **Durand v. HIMC Corp.**, *supra*, are strikingly similar to the facts in our case.”

Appellant respectfully submits that the cases are not similar at all, specifically because in **Durand**, the plaintiff was an “employee” who signed a “Formal Job Offer Agreement (Contract 1)” and also signed a second written employment contract, the purpose of which “was to formalize the original terms of Contract 1.” **Durand**, 151 Wn. App. at 823. There was no question that Mr. Durand was an employee of HIMC/ITI, a corporation and its wholly owned subsidiary. In our case, there is a debatable issue of fact as to whether or not respondent Zimmerman was ever an employee of W8Less Products, LLC. The employment contract he proposed was never executed, nor was there ever an agreement to pay him any particular compensation. Because of that difference, the **Durand** case, *supra*, is clearly distinguishable from the case at bar. Also, in **Durand**, there never was a question as to what Durand’s compensation was, and, Durand agreed to take 56% pay cut on the condition that he would receive full

compensation, including back pay, once ITI's financial condition improved. **Durand**, 151 Wn. App. at 824. A few months later, Durand was terminated and the individual officers of the employer corporation, who were authorized to write checks, refused to issue him a check. That case is clearly distinguishable because there is in the immediate case an issue of fact as to whether Zimmerman was an employee.

In the case at bar, Arbeeny and Rau did not refuse to issue or sign a check for Zimmerman, but they simply voted "no" when a motion was made to pay Zimmerman an unspecified amount for work allegedly done prior to the first time the members of the LLC considered Zimmerman for employment (CP 86).

**4. Even though you don't need to pierce the corporate veil to hold a member of an LLC liable as an employer, the member of the LLC so charged has to have the authority to pay or withhold wages and willfully refuses to do so.**

In **Dickens v. Alliance Analytical Laboratories, LLC**, 127 Wn. App. 433, 111 P.3d 889 (2005), the Supreme Court affirmed the trial court's denial of a summary judgment motion because, in that case, there had to be a piercing of the corporate veil in order to show

that the individual named as a defendant was in fact a manager who had authority to pay or withhold wages. Taken together, **Durand** and **Dickens** indicate that an individual member of an LLC may be found personally liable for withholding wages where there are no factual questions that the individual was an employer who had the authority to pay or withhold wages and “willfully” refused to pay an employee his/her wages. If there are no factual questions regarding the existence of an employer/employee relationship, and the individual member had authority to pay wages to an employee but refused to do so, then it is not necessary to pierce the corporate veil in order to find the member individually liable on a wage claim. However, in this case, there are obviously factual issues about whether or not Arbeeny and Rau are employers without piercing the corporate veil. This is not a case where there was no question of an amount being owed to Zimmerman which Arbeeny and Rau refused to pay. The motion that was made was to pay Zimmerman an unspecified amount for some work done in January of that year without specifying the amount (CP 86). Arbeeny and Rau voted no on the motion, but that does not constitute proof that they had the

authority to pay or withhold wages, and “willfully refused to pay an employee his or her wage.”

**5. You cannot be said to withhold payment of wages where there is no agreement as to the amount of those wages.**

As was argued in Appellants’ Brief at pages 19-21, not only were there factual issues regarding the existence of an employer/employee relationship (including Mr. Jolley’s authority to hire Zimmerman), but there is also an obvious issue of fact as to the amount of wages which were allegedly due to Zimmerman. The order granting plaintiff’s motion and denying defendants’ motion for summary judgment does not specifically state that the trial court found that there was an employer/employee relationship between W8Less Products, LLC and Zimmerman. However, it does state that the court granted summary judgment in favor of Mr. Zimmerman against all defendants “for wages in an amount to be determined at trial ....performed on behalf of W8Less Products, LLC in January and February, 2008.” (CP170). A finding that Mr. Zimmerman was an employee of W8Less is assumed in that ruling, so it appears the court has made a factual determination as to employment even though there was contradictory evidence issued on that subject.

Also to be noted is that in the order granting plaintiff's motion for summary judgment, it was clear that the court did not make a finding that there was a certain amount of wages due to Zimmerman. The court acknowledged that the amount of wages was to be determined at trial or in this case, mandatory arbitration (CP 120).

6. **Appellant argued that there were questions of fact as to whether Zimmerman was an employee and a clear question of fact as to the amount allegedly owed to him as wages.**

The respondent did not address those issues in the brief. Where a party fails to respond to an argument on an issue, that party concedes the issue. See **State v. Ward**, 125 Wn. App. 138, 144 (2005).

## II. ATTORNEYS' FEES ON APPEAL

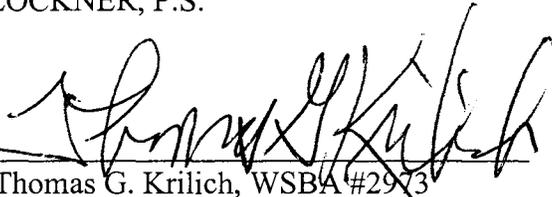
Pursuant to RAP 18.1, appellants Arbeeny and Rau request attorneys' fees on appeal. RAP 18.1 provides:

“If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule....”

The court should award Arbeeny and Rau attorneys' fees on appeal.

Respectfully submitted this 24<sup>th</sup> day of May, 2010.

KRILICH, LA PORTE, WEST  
& LOCKNER, P.S.

By   
Thomas G. Krilich, WSBA #2973  
Attorney for Appellants

CERTIFICATE OF SERVICE

I, DAWNE SHOTSMAN, hereby certify under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

On May 24<sup>th</sup>, 2010, I delivered a true and accurate copy of the foregoing Reply Brief of Appellants, via first class mail, to:

Jean Jorgensen  
Singleton & Jorgensen, Inc., PS  
337 Park Avenue North  
Renton WA 98057

DATED: May 24<sup>th</sup>, 2010, at Tacoma, Washington.

  
Dawne Shotsman

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