

JUN 19 2013

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DIVISION III
STATE OF WASHINGTON
By _____

Case No. 31445-6-III

COURT OF APPEALS, DIVISION THREE
STATE OF WASHINGTON

KEITH MILLER

Appellant,

vs.

PAUL M. WOLFF, et al.

Respondent.

BRIEF OF RESPONDENT

D. R. (ROB) CASE (WSBA #34313)
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A. INTRODUCTION.

Keith Miller (“plaintiff”, “Mr. Miller” and/or “Respondent”) was employed for multiple years by Paul M. Wolff Co. (“defendant”, “company”, “Appellant” and/or “PMW”). Mr. Miller worked as a commissioned salesman. His compensation was exclusively commission-based, without any guaranteed or regular salary. CP 477 (FF 2). As a result of the plaintiff’s brokerage efforts, the defendant secured contracts to sell goods and provide installation services. CP 482 (FF 10).

When the plaintiff’s employment ended on January 9, 2009, multiple projects that he had brokered were still in progress. Mr. Miller requested commissions on those projects. CP 480 (FF 6). Not only had he brokered them, but the terms of his employment contract did not his entitlement to commissions post-employment. CP 478 (FF 3). In these regards, the trial court found as follows: “Mr. Miller was the salesperson who located the at-issue jobs, submitted bids thereon, and secured binding contracts with the customers”, “[a]bsent the plaintiff’s efforts, PMW would not have secured these jobs” and “[t]he contract . . . does not specify whether commissions would be paid for projects that were still in-progress when the employment relation ends”. (Ellipsis added.) CP 481-482 (FF 10); 488 (CL 7); CP 478 (FF 3); *see also* CP 488 (CL 6). These findings and conclusions are unchallenged by the Appellant.

The plaintiff offered his continued assistance to PMW on the at-issue jobs. CP 480 (FF 8); Trial Exhibit 109 (email dated 01/09/09); Trial Exhibit 20 (letter dated 01/12/09). This negates the defendant's contention on appeal that Mr. Miller supposedly "abandoned" the projects. *See Brief of Appellant*, p.21. That contention is completely false.

The company rejected Mr. Miller's offer of continued assistance and refused to pay any commissions. CP 480 (FF 7, 8). Notably, the trial court concluded that the company "acted willfully and with intent to deprive the plaintiff of wages". CP 493 (CL 19). This negates the defendant's contention on appeal that equity supposedly tips in its favor. *See e.g., Brief of Appellant*, pp.20-21. That contention is also completely false.

Mr. Miller filed suit against PMW and its then-President, Curtis Beesley. He was awarded damages both via MAR arbitration and via trial de novo. CP 486 (FF 20); CP 491 (CL 15). By the time of trial, all of the at-issue jobs were fully complete. CP 481 (FF 8).

The arbitrator's damage award was reasonable. However, the arbitrator committed clear error in refusing to award fees. CP 145, 295. Unfortunately, the rules do not permit a partial trial de novo following MAR arbitration. *See* MAR 7.2(b)(2). Thus, the plaintiff had only two options: forgo fees even though he was clearly entitled to them, or de

novo the entire case even though the damage award was reasonable.

The trial de novo was a bench trial. Prior to trial, the defense violated MAR 7.2(b)(1). Via its briefing, the defense told the judge the exact amount of damages awarded by the arbitrator. CP 46-48, 145 (n.6).

In comparison to the arbitrator's award, the trial judge awarded \$1,173.87 less in damages. CP 486 (FF 20); CP 491 (CL 15). However, the trial judge also awarded attorneys' fees, whereas the arbitrator had not. CP 491-492 (CL 16-18).

The plaintiff's damages constitute "wages" under Washington law. CP 491 (CL 16-17). As such, an award of attorneys' fees to the plaintiff was mandatory under RCW 49.48.030.

Damages and fees were "comparables". Both issues were before the arbitrator and trial court, and each tribunal issued a decision on both issues (among others). CP 486 (FF 20); CP 493 (CL 21). Despite recovering slightly lesser damages via trial de novo, the plaintiff was nevertheless deemed the "prevailing party" via his combined recovery of damages and fees. CP 493-494 (CL 21). This is because fees were also a comparable.¹

¹ The defense contends that it was "solely through an award of attorney fees and cost on trial de novo" that Mr. Miller became the prevailing party. (Underscore emphasis added.) See *Brief of Appellant*, p.2. This contention is misleading. For clarity, the trial court specifically noted as follows: "The plaintiff's recovery of damages and fees via trial is larger than his award of damages without fees via arbitration. This is true even if

The instant case is not one of first impression, as the defense contends. *See Brief of Appellant*, p.2. Quite the contrary, there is precedential authority whereby a plaintiff who recovers lesser damages via trial de novo will nevertheless be deemed the prevailing party when other comparables are taken into account. The most on-point decision is *Cormar, Ltd. v. Sauro*, 60 Wn. App. 622, 806 P.2d 253 (1991) (Division Two), *review denied*, 117 Wn.2d 1004 (1991). Because Mr. Miller “emerged from Superior Court with a judgment for more money than the arbitrator awarded” (*Cormar v. Sauro*, 60 Wn. App. at 623), it follows that he was the prevailing party. It further follows that the fee-shifting provision of MAR 7.3 is not applicable because, quite simply, Mr. Miller did improve his position via the trial de novo. He improved his position by recovering fees and damages, which in combination are “more money than the arbitrator awarded.”²

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only the fees incurred through arbitration, but not those incurred thereafter, are used in making the comparison because the difference between the two actual damage awards is so small (*i.e.*, \$1,173.87).” (Underscore emphasis added.) CP 493-494 (CL 21). The defense is also incorrect in contending that “costs” were awarded to the plaintiff pursuant to RCW 49.48.030 and/or that the award of costs was used on the comparison of the total arbitration result to the total trial result. *See Brief of Appellant*, pp.2, 11. In fact, no costs were awarded under Chapter 49.48. Rather, only “statutory costs” were awarded, which occurred pursuant RCW 4.84.010 and .080. *See* CP 494 (CL 22). And those costs were not used in the comparison. *See* CP 493-494 (CL 21).

² The *Cormar* decision was repeatedly and extensively argued by the plaintiff before the trial court. *See e.g.*, CP 4, 143-144, 276-277. Sadly, the defense does not even mention *Cormar*, not even in an attempt to distinguish it. This is misleading by omission.

This court should affirm the Judgment in all respects. In addition, the plaintiff should be awarded fees incurred on appeal pursuant to RCW 49.48.030, RAP 18.1 and *McGinnity v. AutoNation, Inc.*, 149 Wn. App. 277, 286, 202 P.3d 1009 (2009) (Division Three), *review denied*, 166 Wn.2d 1022 (2009) (“a party that is awarded fees in arbitration under RCW 49.48.030 may also recover fees for all superior court and appellate court proceedings in the same matter”, internal quotation marks omitted.). The plaintiff should also be awarded costs pursuant to RCW 4.84.010 and .080, and RAP 14.1 through 14.6.

B. RESPONSE TO APPELLANT’S STATEMENT OF CASE, ASSIGNMENTS OF ERROR AND STATEMENT OF ISSUES

B.1. Introduction. In many regards, the Appellant’s presentation is self-serving, beyond the explicit scope of its appeal, and contrary to the unchallenged Findings of Fact and Conclusions of Law.

B.2. Because None of the Findings are Challenged, Each One is a Verity. The Appellant did not challenge any of the trial court’s Findings of Fact. Quite the contrary, the Appellant explicitly says that it “is challenging the legal standard adopted by the trial court rather than its findings of fact”. *Brief of Appellant*, p.12. Nevertheless, the Appellant repeatedly tries to “backdoor” factual issues into this appeal. This is

improper. It is well-established that when the findings are not challenged, they are verities on appeal. *See e.g., Smith v. Breen*, 26 Wn. App. 802, 803, 614 P.2d 671 (1980) (Division Three). The Appellant should not be permitted to contradict, nor add to, the findings.³

B.3. Because Only One Conclusion is Challenged, the Remainder are the Law of the Case. Also, the Underlying Facts are Not Subject to Review. Conclusion of Law 5 is the only conclusion that the Appellant explicitly challenges. *See Brief of Appellant*, p.13. The remaining Conclusions of Law are neither mentioned nor overtly challenged by the Appellant. As such, the other 21 conclusions are “the law of the case”. *See e.g., King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 716-717, 846 P.2d 550 (1993) (Division One) (“An unchallenged conclusion of law becomes the law of the case.”).

Furthermore, it is well-understood that “[a]n assignment of error as to a conclusion of law does not bring up for review the facts found upon

³ The Appellant also does not assign error to the trial court’s refusal to make any of its proposed findings. By failing to make such argument in its opening brief, the Appellant has waived the argument. It cannot be raised via reply. RAP 10.3(a)&(c); *Sacco v. Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990). Moreover, a general argument that different findings should have been made is not a proper assignment of error anyway; it is an improper request for the appellate court to search the record in hopes of discovering error. *See e.g., Koster v. Wingard*, 50 Wn.2d 855, 856, 314 P.2d 928 (1957); *Scroggin v. Worthy*, 51 Wn.2d 119, 124, 316 P.2d 480 (1957). “It is not the function or duty of [an appellate court] to search the record for errors, but only to rule on the errors specifically alleged.” (Bracketed change made.) *Smith v. Breen*, 26 Wn. App. 802, 803, 614 P.3d 671 (1980) (Division Three). Only the actual findings matter.

which the conclusion is based.” (Underscore emphasis added.) *West Coast Airlines, Inc. v. Miner’s Aircraft & Engine Service, Inc.*, 66 Wn.2d 513, 518, 403 P.2d 833 (1965). Thus, the Appellant cannot raise factual disputes via the backdoor.

The only issues on this appeal are whether Conclusion of Law 5 is correct and which side was the prevailing party. But the facts are not subject to dispute, contradiction and/or supplementation. “Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they just defer to the factual findings made by the trier-of-fact.” *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009) (Division Three), *review denied*, 168 Wn.2d 1041 (2010).

B.4. Mr. Miller Did Not Abandon the Projects. The Appellant repeatedly contends that Mr. Miller “abandoned” the at-issue projects. *See Brief of Appellant*, p.2, 21. To the contrary, the court found as follows: “Upon resigning, Mr. Miller offered his continued assistance to PMW in completing the jobs that he had brokered, which jobs were referred to as the ‘at-issue jobs’. The defendants denied that offer.” CP 480 (FF 8).

Mr. Miller made every effort to smoothly transition the projects. Via his email of January 9, 2009, he stated, “I will be spending the remainder of my day coordinating scheduled jobs, including maps, and

other closeout business.” Trial Exhibit 109. Via another email on January 11, 2009, he passed along additional details about the projects, as well as information about “an additional opportunity” for the company to secure further work. Trial Exhibit 9. Finally, on January 12, 2009, he wrote as follows: “I want to offer my full cooperation, availability and assistance to the company”. Trial Exhibit 20. This was three days after his resignation. Once again, his offer was rejected. CP 480 (FF 8).

Contrary to the Appellant’s presentation, it is a verity that Mr. Miller did not abandon anything. He conveyed all the pertinent details about the at-issue projects, he offered to keep working on those projects, and he even identified an additional opportunity for the company to get more business.⁴

B.5. Mr. Miller Found the At-Issue Jobs. The Appellant contends that Field Sale Representatives – such as Mr. Miller – are “assigned to a prospective project after the Company receives an invitation

⁴ Because Mr. Miller did not “abandon” the projects, the Appellant’s reliance on the ancient case of *Cole v. Carruthers* is misplaced. According to the Appellant’s own summary, the broker in *Cole v. Carruthers* “abandoned the project during negotiations, saying he was through and would spend no further time on it.” *See Brief of Appellant*, pp.18-19 (citing *Cole v. Carruthers*, 91 Wn. 500, 502, 158 P. 75 (1916)). This is entirely distinguishable from the instant case. Mr. Miller secured binding contracts with each customer prior to his resignation. CP 481-482 (FF 10). Thus, the jobs were far past the “negotiation” stage. Mr. Miller never said anything along the lines of “I am through and I will spend on further time on the projects”. Quite the contrary, he offered his continued assistance but the defendants rejected that offer. CP 480 (FF 8). Thus, *Cole v. Carruthers* is simply inapposite to the instant case.

to bid from a general contractor.” *Brief of Appellant*, p.4. The intended suggestion is that the at-issue jobs were handed to Mr. Miller; that he did not find them. This is not true.

The Appellant cites to CP 78, which is page 25 from the deposition of Curtis Beesley. Notably absent is any citation to the trial court’s actual Findings of Fact and/or Conclusion of Law. What the court actually found was that “Mr. Miller was the PMW salesperson who located the at-issue jobs, submitted bids thereon, and secured binding contracts with the customers.” CP 481-482 (FF 10); *see also* CP 478-479 (FF 4) (“Mr. Miller identified projects that were a good fit for PMW’s products and services.”). The court also concluded that “[a]bsent the plaintiff’s efforts, PMW would not have secured these jobs and, thus, would not have made any profit thereon.” CP 488 (CL 7).

Contrary to the Appellant’s presentation, it is a verity that Mr. Miller found the at-issue jobs. They were not pre-assigned to him by the company.

B.6. “Five Steps” is Just Motivational Jargon. The Appellant contends that Field Sale Representatives are “responsible for managing the Company’s performance under the contract **through completion.**” (Bold emphasis in original.) *Brief of Appellant*, p.4; *see also id.*, p.15. This contention is cited to CP 77 which is page 24 of Mr. Beesley’s deposition,

and to CP 479 which includes part of Finding of Fact 4 and the entirety of Finding of Fact 5.

The citation to Mr. Beesley's deposition is inapposite. Mr. Beesley was free to say whatever he wanted during his deposition and/or during his trial testimony, but that does not mean that the court (as the finder of fact) believed his testimony. The trial court "is free to believe or disbelieve any evidence presented at trial". *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 104-105, 267 P.3d 435 (2011) (Division Two). The trial court's actual findings are the established facts. Because the Appellant has not challenged any of the findings (nor the court's refusal to give different findings), the specifics of Mr. Beesley's testimony do not matter. All that matters are the actual findings.

Finding of Fact 4 does not support the defendant's contention that Mr. Miller had to manage the company's performance through completion. Quite the contrary, it actually states that "Mr. Miller was generally not involved in the on-site performance of PMW's obligations under these contracts." (Underscore emphasis added.) CP 478 (FF 4).

Likewise, Finding of Fact 5 does not support the defendant's contention. In full, it reads as follows:

The defendants testified that there are five distinct steps to any given job which a salesperson is expected to complete. The fifth step is seeing the job through to its completion.

The concept of five steps is not recited in the parties' written contract, nor within any other document bearing [*sic*, bearing] Mr. Miller's signature. Mr. Miller testified that the concept of five steps was occasionally mentioned verbally, but only a motivational jargon.

(Bracketed material added.) CP 479 (FF 5). Thus, at most, the court found that the testimony on this issue was conflicting. The Appellant cannot twist this to its favor. Quite the contrary, the inconsistency must be resolved in the plaintiff's favor.

“When a trial court has based its finding of fact on conflicting evidence and there is substantial evidence to support it, an appellate court will not substitute its judgment for that of the trial court even though it might have resolved the factual dispute differently.” *Beeson v. Atlantic-Richfield Co.*, 88 Wn.2d 499, 503, 563 P.2d 822 (1977). Appellate courts “review all reasonable inferences in the light most favorable to the prevailing party.” *Jensen v. Lake Jane Estates*, 165 Wn. App. at 104 (Division Two).

“Where the findings are not consistent with each other, if there is one or more which support the decree it will be upheld.” *Smith v. Breen*, 26 Wn. App. at 803 (Division Three) (quoting *Silverstone v. Hanley*, 55 Wn. 458, 459, 104 P. 767 (1909)). Finally, when a finding “is merely a resumé of the testimony submitted . . . unvouched for by the trial court”, it cannot serve as the basis for a reversal. (Ellipsis added.) *Bowman v.*

Webster, 42 Wn.2d 129, 132, 253 P.2d 934 (1953).

The court awarded damages to the plaintiff even though it concluded that the plaintiff did not complete the supposed “fifth step”. *See* CP 491 (CL 15). This result unmistakably indicates that the court did not find/conclude/believe that Mr. Miller was required to personally complete all five steps in order to earn his commissions (either in full or on a *pro rata* basis).

Contrary to the Appellant’s presentation, it is a verity that the concept of five steps was just motivational jargon. It was not an actual term of Mr. Miller’s contract.⁵

B.7. The Appellant’s Arguments about the Supposed Fifth “Step” are Contrary to the Findings. The Appellant contends that the supposed fifth “step” supposedly “constitutes the majority of the Field

⁵ Later, the Appellant argues that the passage in Conclusion of Law 15 to the effect that “the Court finds that 20% of the work on the at-issue jobs occurred after Mr. Miller’s resignation (i.e. – step 5)” supposedly means that “the trial court recognized the Mr. Miller was responsible for five steps of performance.” (Handwritten parenthetical in original.) *See Brief of Appellant*, p.16. To the contrary, Conclusion of Law 15 says no such thing. Moreover, the Appellant proposed its own Findings of Fact and Conclusions of Law, and those included the notion that “Mr. Miller’s performance as a salesperson required him to complete five steps” and that “[t]he fifth step is comprised of several duties”. *See* CP 430 (defendants’ proposed Finding #12). By not adopting these proposed findings, the trial court obviously rejected them. “The absence of a finding on a material issue is presumptively a negative finding entered against the party bearing the burden of proof on that issue.” *Batten v. Abrams*, 28 Wn. App. 737, 744, 626 P.2d 984 (1981) (Division Three), *review denied*, 95 Wn.2d 1033 (1981). The Appellant wanted the court to find/conclude/believe that all five of the supposed “steps” had to be personally completed for any commissions to be earned, but no such finding or conclusion was entered. The Appellant cannot obtain a reversal based on findings that were not made. *See supra*, p.5, n.3.

Sales Representative's work and is the most valuable to the Company". *Brief of Appellant*, p.5. As before, this contention is cited to CP 77 (which is page 24 of Mr. Beesley's deposition), and also to CP 479 (which includes part of Finding of Fact 4 and the entirety of Finding of Fact 5).

The citation to Mr. Beesley's deposition is inapposite for the reasons mentioned above. *See supra*, pp.10-11. Moreover, Finding of Fact 4 says nothing about any of the supposed "steps". *See* CP 478-479 (FF 4). Finally, Finding of Fact 5 – which recites the conflicting testimony about the supposed "steps" – merely says that "[t]he fifth step is seeing the job through to its completion." *See* CP 479 (FF 5). Notably absent is any finding as to when the majority of the work supposedly fell and/or what activities were supposedly the most valuable to the company. The Appellant is self-servingly trying to add to the findings.

Likewise, the Appellant offers a summary of what the fifth step supposed "includes". *Brief of Appellant*, p.5. The same citations are offered, specifically CP 77 (page 24 of Mr. Beesley's deposition) and CP 479 (FF 4 and/or FF 5). These citations fail for the same reasons. There is no finding about what is "included" in the fifth step, and the conflicting testimony about the supposed "steps" cannot warrant a dismissal. *Bowman v. Webster*, 42 Wn.2d at 132; *see also Beeson v. Atlantic-Richfield*, 88 Wn.2d at 503; *Jensen v. Lake Jane Estates*, 165 Wn. App. at

104 (Division Two); *Smith v. Breen*, 26 Wn. App. at 803 (Division Three).

Contrary to the Appellant's presentation, the court did not find that the fifth step was the most valuable to the company, nor did the court make any findings as to what the fifth step supposedly includes.⁶

B.8. The Appellant's Arguments About Final Concrete, LLC, and/or About Unclean Hands are Contrary to the Findings and Conclusions. The Appellant contends that "[o]n September 1, 2008, Mr. Miller created Final Concrete, LLC, a competitor to the Company." (Underscore emphasis added.) *See Brief of Appellant*, p.6. This contention is cited to CP 471 which is the first page of the trial exhibit list, and also to trial exhibit 103 which is a printout of Final Concrete's registration information from the Secretary of State's website. Of course, the exhibit list is not evidence. Also, the website printout gives no information as to whether Final Concrete was a "competitor" of the Appellant. The Appellant is trying to add facts.

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⁶ The Respondent contends that Mr. Beesley's deposition testimony should be entirely ignored. However, in the event that it is considered, the Respondent respectfully directs the court's attention to CP 84-85 which are pages 31-32 of the deposition. Therein, Mr. Beesley admits that the defendants paid commissions to Mr. Miller on past projects even though those projects were not yet fully complete. *See* CP 84-85. This testimony was the basis whereby the Respondent requested Finding of Fact 13. *See* CP 484 (FF 13). Admittedly, that finding was rejected by the court (for some unknown reason). Nevertheless, if Mr. Beesley's deposition testimony is considered on appeal (which, again, the Respondent submits that it should not be), then this excerpt is critically important and should not be overlooked.

Later, the Appellant argues that Mr. Miller should be denied any recovery due to his supposedly “unclean hands”. In this regard, the Appellant again contends that “Mr. Miller abandoned his projects prior to completion.” The Appellant also contends that “Mr. Miller had created Final Concrete, LLC to compete with the Company while he was still an employee of the Company.” *See Brief of Appellant*, p.21. Of course, the notion that Mr. Miller abandoned the at-issue jobs is squarely contradicted by the trial court’s findings, as explained above. *See supra*, pp.7-8. Likewise, the notion that Mr. Miller did something wrong by starting Final Concrete is also squarely contradicted by the findings and conclusions.

The Appellant conveniently fails to mention the Pierce County litigation. As recited in Finding of Fact 17, the company filed a separate lawsuit against both Mr. Miller and Final Concrete for, *inter alia*, supposed violations of non-competition restrictions. *See CP 485 (FF 17)*. However, all of the company’s claims were dismissed via summary judgment, and that result was upheld by Division Two on appeal. *See id.*; *see also Paul M. Wolff Co. v. Miller*, 165 Wn. App. 1020, 2011 WL 6916485 (2011).⁷

The company did not seek reconsideration by Division Two, nor review by the Supreme Court. Accordingly, via unchallenged Conclusion

of Law 4 under the heading of “Issue Preclusion and Claim Preclusion”, the trial court in the instant case ruled as follows:

. . . this Court rejects all arguments by the defendants that Mr. Miller’s claims should be bared and/or reduced on account of supposed breach of the duty of loyalty, supposed illegal competition, and/or supposed violation of the Uniform Trade Secrets Act. This includes the defendants’ arguments concerning “unclean hands”, because those arguments are premised on supposedly disloyal and/or illegal competitive actions by Mr. Miller.

(Ellipsis and underscore emphasis added.) CP 487 (CL 4).

This court should reject all arguments or suggestions that Mr. Miller somehow has unclean hands. That issue was previously decided in a separate case, the issue cannot be litigated anew, and the Appellant did not challenge Conclusion of Law 4.

B.9. This Case Does Arise in a Brokerage Context. The Appellant contends that this case supposedly did not arise in a brokerage context. *See Brief of Appellant*, p.13, 15. To the contrary, Finding of Fact 8 explicitly states that the at-issue jobs were “brokered” by Mr. Miller. *See* CP 480 (FF 8). In turn, Conclusion of Law 7 explicitly states that Mr. Miller “located the prospects, reviewed the relevant data, submitted bids, his bids were accepted by the customers, and he secured written contracts with the customers.” *See* CP 488 (CL 7). That is the essence of

⁷ As an unpublished decision, *Paul M. Wolff Co. v. Miller* does not carry the force of precedent. Rather, it serves as part of the factual backdrop of the instant case.

“brokering” or “brokerage”.

C. SUPPLEMENTAL STATEMENT OF THE CASE.

C.1. Introduction. In addition to the numerous corrections and clarifications set forth above, the Respondent wishes to emphasize the following facts.

C.2. Damages and Fees (in addition to other issues) Were Before Each Tribunal. At both arbitration and trial de novo, the plaintiff sought and argued for actual damages and attorneys’ fees. *See* CP 157-162 (plaintiff’s arbitration memorandum on recoverability of fees); CP 146 (declaration on trial de novo seeking recoverability of fees).⁸

Both tribunals issued decisions as to actual damages and as to fees. *See* CP 153-155 (arbitrator’s decision on actual damages); CP 164 (arbitrator’s decision on fees); CP 476-495 (Judgment). To be explained and argued below (*see infra*, pp.24-33) this makes actual damages and attorneys’ fees “comparables” because both issues were before each tribunal. By contrast, additional issues were not raised on trial de novo versus those that were raised via arbitration. The judge considered the same issues as the arbitrator had previously. Thus, each issue was a

⁸ In addition, the plaintiff also sought and argued for double damages under the Wage Rebate Act (RCW 49.52 *et seq.*) at both tribunals. *See* CP 145-147, 157. However, that issue is not germane to the instant appeal.

comparable.

C.3. The Trial De Novo Was Necessitated Exclusively Due to the Arbitrator's Erroneous Failure to Award Fees. As mentioned above, the arbitrator's damage award was reasonable. However, the arbitrator refused to award fees to the plaintiff. *See* CP 164 (arbitrator's decision on fees). That decision was clear error.⁹

The plaintiff asked the arbitrator to reconsider his decision as to the recoverability of fees. *See* CP 157-162. On that effort, the plaintiff argued as follows:

Absent recovery of all attorneys' fees, Mr. Miller will likely pursue a trial de novo, even though, as indicated above, Mr. Miller is currently willing to accept the arbitrator's calculation of damages (without any double-damage recovery). Specifically, it would be the denial of attorneys' fees that forces Mr. Miller to "appeal", rather than the damage award. That would be an unfortunate result.

CP 162.

The arbitrator refused to change his. *See* CP 164. As a result, the plaintiff had only two options. He either had to accept the erroneous legal decision as to fees which substantially eroded his financial recovery, or he had to de novo the entire case even though the damage award was reasonable. By rule, there is no option to de novo only one aspect of a

⁹ An award of fees is mandatory because the plaintiff's damages constitute "wages" under Washington law. This will be explained below. *See infra*, pp.20-21.

case following MAR arbitration. Quite the contrary, MAR 7.2(b)(2) explicitly provides that the trial de novo “shall be conducted as though no arbitration proceeding had occurred.” See MAR 7.2(b)(2); CP 145. The plaintiff chose trial de novo.¹⁰

C.4. The Equities Tip in Mr. Miller’s Favor. On this appeal, the Appellant argues that any recovery by the plaintiff would be inequitable and would constitute a windfall. See e.g., *Brief of Appellant*, pp.21-22. To the contrary, it is clear that the equities tip in Mr. Miller’s favor and that he earned the damages awarded.

The trial court concluded that “the defendants acted willfully and with intent to deprive the plaintiff of wages”. CP 492 (CL 19). The court also concluded that “[a]bsent the plaintiff’s efforts, PMW would not have secured these jobs and, thus, would not have made any profit thereon.” CP 488-489 (CL 7). Finally, the court found that Mr. Miller offered his continued assistance on the at-issue jobs, which offer was rejected by the defendants. CP 480 (FF 8).

Mr. Miller did not receive a windfall. He was awarded the 80% of his otherwise-applicable commissions based on the court’s determination

¹⁰ By contrast, a partial appeal can occur following contractual arbitration under RCW 7.04 *et seq.* Specifically, an aggrieved party can seek review of the arbitrator’s legal conclusions separate-and-distinct from the arbitrator’s factual decision on the merits. See e.g., *McGinnity v. AutoNation, Inc.*, 149 Wn. App. 277, 282, 202 P.3d 1009 (2009) (Division Three). But a partial appeal cannot occur following MAR arbitration.

that 20% of the work occurred after his resignation. CP 491 (CL 15).
That was a reasonable result.

D. APPLICABLE LAW, ANALYSIS AND ARGUMENT

D.1. Commissions are “Wages”. Under Washington law, the term “wage” or “wages” is given a very broad definition. The applicable definition is, quite simply, “compensation due to any employee by reason of employment.” See RCW 49.46.010(7). This definition originated from the Minimum Wage Act (RCW 49.46 *et seq.*), but it has been exported to other statutes and contexts, including RCW 49.48.030. See *e.g.*, *McGinnity v. AutoNation, Inc.*, 149 Wn. App. at 284 (Division Three), *review denied* (“Chapter 49.48 RCW does not define the term ‘wages.’ However, Washington courts have looked to the definition of this term in a related statute, RCW 49.46.010(2), which defines wages broadly as ‘compensation due to an employee by reason of employment.’”).

Division One has specifically ruled that “[c]ommissions are considered wages.” See *Dautel v. Heritage Home Center, Inc.*, 89 Wn. App. 148, 152, n.1, 948 P.2d 397 (1997) (Division One), *review denied*, 135 Wn.2d 1003 (1998). In addition to not being disturbed by the Supreme Court, this holding from *Dautel* has been recognized by both Division Two and Division Three. See *e.g.*, *Lietz v. Hanson Law Office*,

P.S.C., 166 Wn. App. 571, 595, n.38, 27 P.3d 899 (2012) (Division Two); *McGinnity v. AutoNation, Inc.*, 149 Wn. App. at 284 (Division Three). It follows that Mr. Miller did recover “wages”, because he was awarded damages for unpaid commissions and commissions constitute wages.¹¹

D.2. An Award of Fees is Mandatory Under RCW 49.48.030.

In full, RCW 49.48.030 provides as follows:

In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney’s fees, in an amount to be determined by the court, shall be assessed against said employer or former employer: PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.

RCW 49.48.030.¹²

By including the word “shall”, the statute is a mandatory rule. As recently written by Division Three,

. . . the language of RCW 49.48.030 is plain. The award of attorney fees is not discretionary. The court “shall” award reasonable fees to “any person” who prevails in an action for wages or salary owed.

Wise v. City of Chelan, 133 Wn. App. 167, 174, 135 P.3d 951 (2006) (Division Three).

¹¹ The Appellant fails to acknowledge the *Dautel* decision, even though it was specifically briefed and argued by Mr. Miller at the trial court. *See e.g.*, CP 135. Again, this is misleading by omission.

¹² The exception set forth in the final clause of RCW 49.48.030 is not applicable to the instant case. The court specifically found that “[v]ia their Answer and through the conclusion of trial, the defendants contended that no commissions were owed.” CP 441 (FF 7).

The claimant-plaintiff does not have to be a current employee for the statute to apply. In fact, the claimant-plaintiff does not have to actually perform and/or complete the work wherefrom the wages accrue, because, as happened here, the employer-defendant might inequitably try to deprive the plaintiff of his wages. Rather, the plaintiff must only be successful in recovering a judgment for wages or salary. In these regards, Division Three has written as follows: “There is no requirement that the plaintiff be a current employee.” *Bates v. City of Richland*, 112 Wn. App. 919, 940, 51 P.3d 816 (2002) (Division Three). “These cases demonstrate that awards for attorney fees under RCW 49.48.030 are not limited to judgments for wages or salary earned for work performed, but, rather, that attorney fees are recoverable under RCW 49.48.030 whenever a judgment is obtained for any type of compensation due by reason of employment.” *Bates v. City of Richland*, 112 Wn. App. at 940.¹³

D.3. The Statute Applies “In Any Action”. Thus, it Does Not Matter Whether the Claim is Legal or Equitable in Nature. Because RCW 49.48.030 applies “[i]n any action” (*see supra*, p.21), it does not matter whether the plaintiff’s claims were legal or equitable in nature.

¹³ Once again, the Appellant ignores this on-point precedent even though it was specifically briefed and argued before the trial court. *See* CP 136-137. This precedent directly negates the all of the Appellant’s arguments to the effect that Mr. Miller should be denied any recovery because of his supposed “failure to complete his performance”. *See e.g., Brief of Appellant*, pp.19-22.

Attorneys' fees have been awarded under the statute on both legal and equitable claims. *See e.g., Kloss v. Honeywell, Inc.*, 77 Wn. App. 294, 304, 890 P.3d 480 (1995) (Division One) (legal claim for breach of contract); *Corey v. Pierce County*, 154 Wn. App. 752, 760 & 774, 225 P.3d 367 (2010) (Division Two), *review denied*, 170 Wn.2d 1016 (2010) (equitable claim for promissory estoppel, among other claims).

Contrary to the Appellant's presentation and the arbitrator's ruling, there is zero authority to the effect that RCW 49.48.030 does not apply when a plaintiff recovers wages on a supposedly "equitable" claim. Again, by its very terms the statute applies "in any action".

Division Three has ruled that "if the employee gets the money on account of having been employed, then the money is wages in the sense of 'compensation by reason of employment.'" (Underscore emphasis added.) *McGinnity v. AutoNation*, 149 Wn. App. at 284, *review denied*. The type of claim and its label do not matter; what matters is the nature of the recovery. If the recovery is money because of current or past employment, then RCW 49.48.030 mandates an award of fees.

Regardless, the plaintiff's claim in the instant case was a legal claim. Specifically, the plaintiff prevailed via the procuring cause doctrine. In a decision that was not disturbed by the Supreme Court, Division One ruled that "the procuring cause doctrine provides relief at

law.” (Underscore emphasis added.) *Syputa v. Druck Incorporated*, 90 Wn. App. 638, 649, 952 P.2d 279 (1998) (Division One), *review denied*, 136 Wn.2d 1024 (1998). The Appellant stresses that the doctrine of procuring cause has equitable underpinnings (*see Brief of Appellant*, pp.20-21), but that does not change the fact that it is a legal claim that provides relief at law. Many legal claims have equitable underpinnings.

Finally, it is well-established that “RCW 49.48.030 is a remedial statute that must be liberally construed in favor of the employee.” *See e.g., McGinnity v. AutoNation*, 149 Wn. App. at 284 (Division Three), *review denied*. Applied to the instant case, it follows that any theoretical doubt must be resolved in Mr. Miller’s favor. He is the prevailing party, there is zero authority to the effect that a claim for procuring cause falls outside the scope of the statute, and Mr. Miller’s claim unquestionably qualifies as “an action” when the statute is liberally construed in his favor.¹⁴

D.4. The “Compare the Comparables” Approach. Division Three uses the “compare the comparables” approach for determining whether a litigant has improved his position via trial de novo. *See e.g.,*

¹⁴ Furthermore, the Washington Supreme Court has held that “once a court of equity has properly acquired jurisdiction over a controversy, such a court can and will grant whatever relief the facts warrant, including the granting of legal remedies.” *Zastrow v. W.G. Platts, Inc.*, 57 Wn.2d 347, 350, 357 P.2d 162 (1960). Thus, the Appellant’s urged distinction between legal and equitable claims falls flat.

Wilkerson v. United Inv., Inc., 62 Wn. App. 712, 717, 815 P.2d 293 (1991) (Division Three), *review denied*, 118 Wn.2d 1013 (1992); *see also Brief of Appellant*, p.25. Division One and Division Two use the approach also. *See e.g., Tran v. Yu*, 118 Wn. App. 607, 612, 75 P.3d 970 (2003) (Division One); *Cormar, Ltd. v. Sauro*, 60 Wn. App. 622, 623-624, 806 P.2d 253 (1991) (Division Two), *review denied*, 117 Wn.2d 1004 (1991).

Logically, the first step in the analysis must be to determine the number of comparables. If there was a single common issue before each tribunal (*e.g.*, actual damages), then the tribunal's respective decisions on that single issue are compared and any non-common issues are disregarded for purposes of MAR 7.3. However, if each tribunal ruled on multiple, common issues (*e.g.*, damages and fees), then the cumulative total on the common issues are compared. In this regard, Division Two's decision in *Cormar v. Sauro* is directly on-point.

In *Cormar*, the prevailing party won lesser damages via trial de novo (which, like the instant case, was a bench trial) versus what he had previously been awarded via MAR arbitration. Nevertheless, he was still deemed the "prevailing party" because the trial court also awarded prejudgment interest, whereas the arbitrator had rejected the plaintiff's argument and not awarded any interest. The net combination of damages and interest exceeded the total arbitration result. Based on this "simple

fact”, it was obvious that the plaintiff had improved his position in total dollars, even though his damages were slightly reduced via the trial de novo. In these regards, the decision reads as follows:

. . . The arbitrator made a lump sum damage award in favor of Tom Sauro and against Cormar, Ltd., but rejected Sauro’s claim for pre-award interest. Cormar requested a trial de novo.

The trial court ultimately awarded Sauro a principal amount less than the arbitration award, but also awarded prejudgment interest. Because the result was a net judgment greater than the arbitration award, the trial court awarded attorneys fees to Sauro pursuant to MAR 7.3. Cormar appeals only that award. We affirm.

. . .

We conclude that the rule [MAR 7.3] was meant to be understood by ordinary people who, if asked whether their position had been improved following a trial de novo, would certainly answer “no” in the face of a Superior Court judgment against them for more than the arbitrator awarded.

Cormar advances a sophisticated argument having to do with the use value of money and how it is affected by the time lag between arbitration award and a court hearing. We are not persuaded by the argument, which fails to refute the simple fact that Sauro emerged from Superior Court with a judgment for more money than the arbitrator awarded.

(Ellipses and underscore emphasis added.) *Cormar v. Sauro*, 60 Wn. App. at 623-624 (Division Two), *review denied*.

The instant case is akin to *Cormar*. Following MAR arbitration, a bench trial de novo occurred in both cases. In both cases, the plaintiff’s damages were slightly reduced at trial versus what the arbitrator had

awarded. However, in both cases the trial judge made an additional award to the plaintiff, which effectively corrected a mistake of law committed by the arbitrator. In both cases, the combination of such additional award together with the slightly-reduced damages exceeded the damage-only award by the arbitrator. The “simple fact” in both cases is that the plaintiff recovered more money via trial de novo versus arbitration, thereby making the plaintiff the “prevailing party”.

The Appellant contends that attorneys’ fees can never be used as a comparable. *See Brief of Appellant*, p.24. However, the Appellant fails to present any bright-line authority in support of this contention. At best, the Appellant cites three authorities that, properly understood, are inapposite to the instant case. *See Brief of Appellant*, pp.25-27 (citing *Niccum v. Enquist*, *Haley v. Highland* and *Tran v. Yu*).

The Appellant represents that *Niccum v. Enquist* supposedly holds that in all situations “compensatory damages should be compared to compensatory damages, not to compensatory damages plus costs.” *See Brief of Appellant*, p.25 (citing *Niccum v. Enquist*, 175 Wn.2d 441, 448-449, 286 P.3d 966 (2012)). Even assuming *arguendo* that this is correct, it is manifestly inapposite to the instant case. Specifically, it was not via recovery of costs that Mr. Miller improved his position on the trial de novo. Rather, it was Mr. Miller’s recovery of fees that made him the

prevailing party. Costs and fees are separate issues. *See e.g.*, RCW 49.48.030 (specifying that a successful plaintiff is entitled to fees, but making no mention of costs); *see also Niccum v. Enquist*, 175 Wn.2d at 445, n.2 (“Reasonable attorney’s fees . . . are not ‘costs’ under RCW 4.84.010”, ellipsis added.) Thus, *Niccum* does not settle the question in the instant case.

The instant case is not like *Niccum*. There, the issue was framed thusly: “The question before us is whether it is proper to subtract costs from an offer of compromise that purports to include them before comparing that offer to the jury’s award for purposes of MAR 7.3.” *Niccum v. Enquist*, 175 Wn.2d at 446. When a post-arbitration offer of compromise is presented and rejected, the amount of that offer effectively takes the place of the arbitrator’s award, such that the offer (rather than the arbitrator’s award) is used in the comparison. *See* RCW 7.06.050(1)(b). By contrast, there were no post-arbitration offers in the instant case. The instant case concerns a different situation.

Moreover, the trial de novo in *Niccum* was a jury trial. *See Niccum v. Enquist*, 175 Wn.2d at 444-445. By contrast, the instant case went through a bench trial. This is a major distinction, which Division Three’s decision in *Wilkerson v. United Inv., Inc.*, explains.

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Wilkerson, like *Niccum*, concerned a jury trial de novo. See *Wilkerson v. United Inv., Inc.*, 62 Wn. App. 712, 715-716, 815 P.2d 293 (1991) (Division Three), *review denied*, 118 Wn.2d 1013 (1992). The arbitrator had awarded \$10,965.12 of damages plus \$10,000 of fees and costs. By contrast, the jury's verdict was \$16,000. The jury did not award any fees or costs, or even consider those issues, because those issues are the province of the court not the jury. See *Wilkerson v. United Inv.*, 62 Wn. App. at 716 (Division Three). Under the compare the comparable approach, Division Three ruled that the two-component decision by the arbitrator could not be validly compared to the single-component decision by the jury. Instead, the proper comparison was to compare the common component that each tribunal had addressed, specifically compensatory damages. Attorneys' fees and costs were excluded from the comparison only because the second tribunal (*i.e.*, the jury) did not consider those issues. In this regard, the decision reads as follows:

It would be inequitable to compare the jury verdict for compensatory damages with an arbitrator's combined award of compensatory damages, attorney fees, and costs. The better approach to determine whether one's position has been improved, is to compare comparables. Here, the jury's compensatory damage award exceeded the arbitrator's compensatory damage award. We find Mr. Sloan [the defendant] did not improve his position; the judgment is affirmed. The Wilkersons [the plaintiffs] are entitled to attorneys fees on appeal.

(Bracketed material added.) *Wilkerson v. United Inv.*, 62 Wn. App. at 717

(Division Three).

Fees were excluded from the comparison in *Wilkerson* only because the trial de novo was a jury trial. By contrast, if the trial de novo had been a bench trial – as occurred in the instant case – then every common issue would have qualified as a comparable. *See e.g., Cormar v. Sauro*, 60 Wn. App. at 623-624 (Division Two), *review denied* (where multiple, common issues were compared, and the plaintiff was deemed the prevailing party even though he recovered lesser damages via the trial de novo because his overall financial recovery was greater).

The instant case is not like *Wilkerson*. The trial de novo here was a bench trial. Each issue that the arbitrator considered and ruled upon (most notably damages and fees) was also considered and ruled upon by the trial judge. Thus, it is a true apples-to-apples comparison to compare the arbitrator's award of damages without fees versus the trial judge's award of damages with fees. Fees are a common issue, so they must be used as a comparable. Comparing just the damage awards would illogically ignore the "simple fact" that Mr. Miller recovered more money via trial de novo versus what he was awarded via arbitration.

If the appellate courts truly intended that only actual damages could be used in the comparison, it stands to reason that the standard would be worded differently. Rather than referring to comparables, one

would expect that the standard would be worded thusly: “compare the ~~comparables~~ actual damage awards”. By using the generic and plural term “comparables”, the standard leaves room for other items (not just damages) to be used in the comparison. That is what the language means, which the undisturbed decision in *Cormar* illustrates.

The instant case is not like *Haley v. Highland*, and, even if it were the concurrence opinion cited by the Appellant is not binding precedent. As the author of the concurrence, then-Justice Talmadge expressed concern that “any party appealing the arbitrator’s award and recovering the identical award of compensatory damages would *always* improve its position because it would recover additional interest and more attorney fees would be incurred.” (Italic emphasis in original.) *Haley v. Highland*, 142 Wn.2d 135, 159, 12 P.3d 119 (2000) (concurrence by a single Justice).

As previously discussed, Mr. Miller did not improve his position by simply running up extra legal fees on the trial de novo and then arguing that his “extra” fees made him the prevailing party. Quite the contrary, the trial court specifically found as follows: “The plaintiff’s recovery of damages and fees via trial is larger than his award of damages without fees via arbitration. This is true even if only the fees incurred through arbitration, but not those incurred thereafter, are used in making the

comparison because the difference between the two actual damage awards is so small (*i.e.*, \$1,173.87).” (Underscore emphasis added.) CP 493-494 (CL 21). Thus, the hypothetical situation discussed in the concurrence from *Haley v. Highland* is not simply present in the instant case. The fees incurred post-arbitration were not used in the comparison.

Equally inapposite is Division One’s opinion of *Tran v. Yu*, which cites Justice Talmadge’s concurrence from *Haley v. Highland*. In *Tran v. Yu*, the court noted that “[a] trial is almost always more expensive than arbitration. If Tran’s interpretation was accepted, a party would invariably improve its position because additional costs, attorney fees and interest would be incurred.” *Tran v. Yu*, 118 Wn. App. 607, 612, 75 P.3d 970 (2003) (citing *Haley v. Highland*, 142 Wn.3d at 159 (Talmadge, J. concurring)). Again, Mr. Miller did not improve his position simply because additional fees were incurred on the trial de novo. Fees incurred post-arbitration were not used in the comparison.

Cormar is the most on-point precedent. By contrast, *Niccum*, *Wilkerson*, *Haley v. Highland* and *Tran v. Yu* are distinguishable and inapposite. Even though Mr. Miller’s damages were slightly reduced via the trial de novo, his recovery of fees more than makes up for the difference. He recovered more money via trial de novo than he was awarded via arbitration, and he corrected the arbitrator’s clear error of law

in the process. Thus, Mr. Miller is the prevailing party. The Appellant ignores the plain financial reality of what occurred.

Mr. Miller should not be penalized under MAR 7.3 when he was successful in recovering more money on the trial de novo. That is not what the rule is meant to address. Rather, the rule is only triggered if the total result via trial de novo fails to exceed the total arbitration result, which is not the situation here. MAR 7.3 is not applicable.

D.5. The Procuring Cause Doctrine. Division One’s *Syputa* decision aptly summarizes Washington’s procuring cause doctrine as it applies to employee commissions. The relevant excerpts are the following:

In the absence of a contractual provision specifying otherwise, the procuring cause doctrine acts as a gap-filler.

...

The standard for the procuring cause doctrine is activity that sets in motion the chain of events or negotiations culminating in a sale. Thus, an agent receives commissions on sales when the sales “resulted from the agent’s efforts.”

(Ellipsis added.) *Syputa v. Druck Incorporated*, 90 Wn. App. at 645-646

(Division One), *review denied*.

There is no dispute that Mr. Miller’s contract “d[id] not specify whether commissions would be paid for projects that were still in-progress when the employment relation ends.” (Bracketed change made.) CP 478 (FF 3); *see also Brief of Appellant*, p.5. Thus, the procuring cause

doctrine is applicable.

Simultaneously quoting and contradicting *Syputa*, the Appellant argues that “the procuring cause doctrine does not entitle an agent to payment of commissions simply because he or she performs ‘activity that sets in motion the chain of events or negotiations culminating in a sale.’” *See Brief of Appellant*, p.13. Rather, the Appellant contends that the agent “must also accomplish his or her bargained-for performance, unless the agency relationship is terminated by the principal in bad faith.” *Id.* Even if one assumes *arguendo* that this contention is accurate (which it is not), it only begs the question: specifically, what was Mr. Miller’s “bargained-for performance”?

Similarly, the Appellant argues that “[t]he broker must set in motion the series of events culminating in the sale and, in doing so, accomplishes [*sic*, accomplish] what he undertook under the agreement.” (Underscore emphasis in original; bracketed material added.) *Brief of Appellant*, p.14 (citing *Washington Professional Real Estate v. Young*, 163 Wn. App. 800, 810, 260 P.3d 991 (2011) (Division Three)). Again, this only begs the question: what did Mr. Miller undertake by the terms of his written employment contract?

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The Appellant contends that “Mr. Miller undertook securing a contract¹⁵] and managing the company’s performance of that contract.” (Bracketed material added.) *See Brief of Appellant*, p.17. To the contrary, there is no finding to the effect that Mr. Miller had to “manage the company’s performance” through completion. Quite the contrary, the customary situation was that “Mr. Miller was generally not involved in the on-site performance of PMW’s obligations under these contracts.” (Underscore emphasis added.) CP 478 (FF 3).

Once again, the Appellant is arguing what it wishes were true, not what the trial court actually found. This is just a repackaging of the Appellant’s “five step” argument. However, the trial court specifically found that “[t]he concept of five steps is not recited in the parties’ written contract, nor within any other written document baring [*sic*, bearing] Mr. Miller’s signature.” (Bracketed material added.) CP 479 (FF 5). It was just motivational jargon. *See id.* There is no finding or conclusion saying that Mr. Miller’s contract obligated him to manage the projects through completion and/or to personally complete all five supposed steps.

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¹⁵ There is no doubt that Mr. Miller secured contracts with the customers on the at-issue jobs. On this point, the court specifically found as follows: “Mr. Miller was the PMW salesperson who located the at-issue jobs, submitted bids thereon, and secured binding contracts with the customers.” CP 481-482 (FF 10).

The Appellant is trying to self-servingly import terms into Mr. Miller's contract in hopes of defeating his claim. That is precisely what *Syputa* says cannot be done. Because there is no on-point written contractual provision, the procuring cause doctrine governs. *See Syputa v. Druck Incorporated*, 90 Wn. App. at 645-646 (Division One), *review denied*. The unwritten, non-contractual notion of "five steps" cannot be used to negate the procuring cause doctrine. The doctrine applies in the absence of an on-point contractual provision.¹⁶

D.6. The Restatement. The Appellant cites two sections of the *Restatement (Second) of Agency*, specifically 445 and 454. *See Brief of Appellant*, pp.15-20. Properly understood, neither section applies to the instant case.

¹⁶ The Appellant's argument that "[m]ere commencement of performance is not sufficient" is inapposite to the instant case. *See Brief of Appellant*, p.17 (citing *Roger Crane & Associates, Inc. v. Felice*, 74 Wn. App. 769, 776, 875 P.2d 705 (1994) (Division Three)). As previously noted, the court specifically found as follows: "Mr. Miller was the PMW salesperson who located the at-issue jobs, submitted bids thereon, and secured binding contracts with the customers." CP 481-482 (FF 10). In addition, the court found that on most projects "PMW's on-site performance was substantially finished, with only minimal follow-up work left to be done" by the date of Mr. Miller's resignation. CP 480-481 (FF 8); *see also* CP 480 (FF 6). Finally, the court concluded that in the aggregate, just "20% of the work on the at-issue jobs occurred after Mr. Miller's resignation." CP 491 (CL 15). The Appellant's contention that CL 15 is actually a finding of fact (*see Brief of Appellant*, p.16, n.7) does not change the analysis. Because the Appellant has not challenged any of the findings, they are verities. *See e.g., Smith v. Breen*, 26 Wn. App. at 803 (Division Three). This includes the supposedly-mislabeled "finding". Finally, the Appellant's contention that "[t]he fifth step constituted the majority of the work" (*see Brief of Appellant*, p.16), which Mr. Miller has already rebutted above, is further rebutted by the trial court's conclusion/finding that just 20% of the work ("i.e. – step 5") occurred after Mr. Miller's resignation. CP 491 (CL 15). The court gave equal weight to each supposed "step"; it did not find/conclude that step 5 was more significant than the others.

In full, section 445 provides as follows:

Except where there is revocation in bad faith, an agent whose compensation is conditional upon the performance by him of specified services, or his accomplishment of a specified result, is not entitled to the agreed compensation unless he renders the specified services or achieves the result.

(Underscore emphasis added.) *Restatement (Second) of Agency*, §445.

The facts of the instant case are different. Mr. Miller's contract does not impose any such "conditions". Tellingly, the Appellant does not even address the language of Mr. Miller's contract. Instead, the Appellant – once again – asserts that Mr. Miller had to "manage the company's performance of th[e] contracts through completion." (Bracketed change made.) *See Brief of Appellant*, p.15. This is just another iteration of the Appellant's "five step" theory. The Appellant wanted the trial court to find/conclude/believe that Mr. Miller was contractually obligated to personally complete all five steps, but no such finding or conclusion was entered. "The absence of a finding on a material issue is presumptively a negative finding entered against the party bearing the burden of proof on that issue." *Batten v. Abrams*, 28 Wn. App. 737, 744, 626 P.2d 984 (1981) (Division Three), *review denied*, 95 Wn.2d 1033 (1981).

The Appellant cannot unilaterally and self-servingly proclaim, after the fact, that Mr. Miller's compensation was dependent on completing all five supposed steps. The actual terms of the contract are

what controls. Because the contract is silent as to the issue of post-termination commissions, the procuring cause doctrine is the applicable rule. *See Syputa v. Druck*, 90 Wn. App. at 645-646 (Division One), *review denied*.

The Appellant cites selected excerpts from the official comments to section 445, while totally ignoring other excerpts that run counter to its position. *See Brief of Appellant*, pp.15-16. For instance the Appellant ignores the following sentences from official comment “a”:

If the principal, in breach of contract, prevents the agent from accomplishing the result upon which the agreed compensation is conditioned, the agent is entitled to damages for such breach or, as an alternative, the fair value of his services in attempting to accomplish it.

...

If the accomplishment of the result is prevented by a termination of the employment, by operation of law, or by one of the parties without breach of contract, the agent is entitled, under some circumstances, to receive the value of the benefit he has conferred upon the principal. See Sections 452-453.^[17]

(Ellipsis and bracketed material added.) *Restatement (Second) of Agency*, §445 (comment “a”). These rules support the trial court’s damage award.

The court determined that roughly 20% of the work occurred after Mr. Miller’s separation from the company, so it awarded him the equivalent of 80% of his otherwise-applicable commissions. CP 491 (CL

¹⁷ Section 452 is discussed below. *See infra*, p.40.

15). That was a reasonable outcome; it was the “fair value” of the benefit that Mr. Miller conferred on the company.

Moreover, Mr. Miller tried to complete the projects, but the defendants refused to let him do so. CP 478-479 (FF 8). The defendant “acted willfully and with intent to deprive the plaintiff of wages”. CP 493 (CL 19). Accordingly, even assuming *arguendo* that Mr. Miller’s contract included a “condition” to the effect that he had to personally complete all five steps (which it did not), he would nevertheless be entitled to “fair value” because the defendants prevented him from accomplishing that result. *Restatement (Second) of Agency*, §445 (comment “a”).

Turning to section 454, in full it provides as follows:

An agent to whom the principal has made a revocable offer of compensation if he accomplishes a specified result is entitled to the promised amount if the principal, in order to avoid payment of it, revokes the offer and thereafter the result is accomplished as the result of agent’s prior efforts.

(Underscore emphasis added.) *Restatement (Second) of Agency*, §454.

Again, the facts of the instant case are different. Mr. Miller’s contract does not require any “specified result”, nor were his commissions “revocable” by the company. Moreover, the company cannot revoke Mr. Miller’s commissions simply because he resigned. As *Syputa* explains, in the absence of an on-point written contractual provision, the procuring cause rule acts as a gap-filler and governs the recoverability of

commissions post-termination. *See Syputa*, 90 Wn. App. at 645-646 (Division One), *review denied*. The Appellant just keeps trying to unilaterally add to Mr. Miller’s contract in an attempt to circumvent the holding of *Syputa*.¹⁸

Rather than the sections championed by the Appellant, Mr. Miller submits that section 452 is the applicable rule. In full, section 452 provides as follows:

Unless otherwise agreed, if the principal has contracted to pay the agent for his services and the relation terminates without breach of contract by either party, the principal is subject to liability to pay to the agent for services previously performed and which are part of the agreed exchange:

- (a) the agreed compensation for services for which compensation is apportioned in the contract; and
- (b) the value, not exceeding the agreed ratable compensation, of services for which the compensation is not apportioned.

Restatement (Second) of Agency, §452. Of critical import, the first sentence of official comment “a” begins as follows: “The rule in this Section applies where the principal or agent exercises a privilege of terminating the relation either because the employment was at will . . .”

¹⁸ Even if one assumes *arguendo* that Mr. Miller’s contract was somehow conditional, it is up to the trier of fact to decide whether any such condition(s) were sufficiently met. *See Restatement (Second) of Agency*, §448 (comment “c”, “Whether or not his efforts have had such a substantial effect that he should be compensated for them is a question for the triers of fact.”). By awarding 80% of the otherwise-applicable commissions, the trial court obviously concluded that any supposed conditions were satisfied to that percentage.

(Underscore emphasis and ellipsis added.) *Restatement (Second) of Agency*, §452 (comment “a”).

The facts of the instant case fit section 452. Mr. Miller was employed on an at-will basis. *See* CP 478 (FF 3) (“The contract does not specify any minimum or guaranteed term of employment.”); *see also* CP 2 (¶5 of the Complaint) and CP 15 (¶5 of the Answer). Mr. Miller resigned his employment, thereby “exercising his privilege of terminating the relation”. CP 477 (FF 2). Nevertheless, the defendant is liable for paying “the value” of the services “previously performed” by Mr. Miller on the at-issue projects. *Restatement (Second) of Agency*, §452. That is precisely the result reached by the trial court. The trial court awarded Mr. Miller 80% of the commissions because 80% of the work was finished by the date of his resignation. CP 491 (CL 15).

There is simply zero authority whereby the Appellant can avoid having to pay Mr. Miller. The Appellant’s contention that Mr. Miller’s contract was somehow “conditional” is not borne out by the language of the contract, nor by the trial court’s actual findings and conclusions. Mr. Miller conferred a benefit on the company. Because there is no written agreement as to what occurs post-termination, the procuring cause doctrine controls. Under *Syputa*, the only requirement is that the subject sales must have been “set in motion” by Mr. Miller’s efforts. Mr. Miller

did not have to complete all five supposed “steps” – as the Appellant repeatedly argues – because the contract does not say that. The Appellant cannot negate *Syputa* by twisting the language of the *Restatement*.

D.7. The Appellant’s Arguments about Intent and/or Reformation are Unsupported by the Findings and Conclusions. The Appellant argues that “[t]he trial court erred by failing to honor the parties’ intent”. *See Brief of Appellant*, p.22. In this regard, the Appellant cites CP 478-479 as supposedly establishing that the parties intended to “limit[] payment of commissions to projects completed by Field Sales Representatives.” (Bracketed change made.) *Id.* To the contrary, CP 478-479 say no such thing. At best, CP 479 states that typically “[c]ommissions were not paid until PMW fully finished its work on the project and received full payment from the customer.” *See* CP 479 (FF 4). However, this finding addresses the timing of when commissions are paid; it does not establish any performance requirements for the salesperson to earn the commissions. The court should not be misled: the Appellant is conflating two separate ideas. There are no findings as to “intent”.¹⁹

The Appellate also argues “[a] court of equity’s ability to reform the parties’ contract is limited.” *See Brief of Appellant*, p.22. This

¹⁹ As previously noted, Mr. Beesley admitted that the company did pay commissions to Mr. Miller on past project even though they were not complete. *See supra*, p.14, n.6. This further dispels the Appellant’s “intent” argument.

argument is inapposite to the instant case. The trial judge did not “reform” the parties’ contract. Quite the contrary, the trial judge awarded damages to Mr. Miller pursuant to the procuring cause doctrine because the contract, by its own terms, does not address the topic of post-termination commissions. The procuring cause doctrine “acts as a gap-filler.” *Syputa*, 90 Wn. App. at 645-646 (Division One), *review denied*. The doctrine does not reform the contract; it addresses an extra-contractual scenario.

D.8. There Must be an Effective Remedy when an MAR Arbitrator Makes a Clear Error of Law. Reduced to its core, this is a simple case. Mr. Miller found the at-issue jobs, secured binding contracts with the customers, and 80% of the work (in the aggregate) was completed prior to his resignation. He offered his continued assistance on the projects and made every effort to smoothly hand them off. In response, the Appellant prevented him from finishing the projects. The trial court concluded that the Appellant “acted willfully and with intent to deprive the plaintiff of wages”. CP 493 (CL 19).

The arbitrator got it right on the facts, but wrong on the law. His damage award was reasonable, but he committed clear error as to the recoverability of fees. He denied Mr. Miller’s request for reconsideration.

Under the Appellant’s view, Mr. Miller was in a “damned if you do, damned if you don’t” scenario. He could live with the erroneous

denial of fees, which would substantially erode his recovery in contradiction of RCW 49.48.030. Or he could go forward with a trial de novo that was, in the Appellant's view, destined to fail. Regardless of whether the erroneous decision on fees was reversed, the Appellant would still emerge as the prevailing party unless Mr. Miller somehow recovered extra damages. But that was highly unlikely, if not literally impossible, because the arbitrator's damage award was correct. Thus, even if the arbitrator's clear error of law was corrected, Mr. Miller would still "lose" the trial de novo because, quite perversely, the arbitrator was right on damages. Thus, the correct decision (*i.e.*, damages) would work against Mr. Miller even if he succeeded in getting the incorrect decision (*i.e.*, fees) reversed. There would be no method for Mr. Miller to achieve justice.

There must be a valid remedy when an MAR arbitrator gets it right on damages but wrong on the law. Particularly for case – like the instant case – which arise in the employment context. Washington is supposed to be a "pioneer" in protecting employees. *See e.g., Champagne v. Thurston County*, 163 Wn.2d 69, 76, 178 P.3d 936 (2008). There is a "strong public policy" in favor of employees. *Champagne v. Thurston County*, 163 Wn.2d at 76. Not only that, but the relevant statute – RCW 49.48.030 – is "liberally construed" in favor of the plaintiff. *See e.g., McGinnity v. AutoNation*, 149 Wn. App. at 284 (Division Three), *review denied*. Thus,

in the tug of war between RCW 49.48.030 and MAR 7.3, it follows that RCW 49.48.030 should be given primacy.

MAR 7.3 is only intended to discourage meritless appeals and reduce court congestion. *See Brief of Appellant*, p.24. It is not intended to penalize a plaintiff whose trial de novo is meritorious and successful. *Cormar* illustrates this. As occurred there, Mr. Miller received a greater combined recovery via trial de novo versus what he received via MAR arbitration. Trial de novo was necessary to correct the arbitrator's clear error of law. These circumstances simply do not warrant an award of fees to the defense.

E. CONCLUSION

This court should affirm the Judgment in all respects. Mr. Miller's damages constitute "wages". As such, an award of reasonable attorneys' fees was mandatory under RCW 49.48.030. Via his combined award of slightly-reduced damages and fees at trial de novo, Mr. Miller recovered more money than the arbitrator had awarded. That is the simple economic reality.

Mr. Miller was forced to de novo the entire case, even though the arbitrator's damage award was reasonable. The trial judge corrected the arbitrator's mistake of law. Mr. Miller's trial de novo was meritorious and

successful. MAR 7.3 is not triggered.

The procuring cause doctrine “acts as a gap filler”. It applies because Mr. Miller’s contract does not address the issue of post-termination commissions. Each of the at-issue projects was set in motion by Mr. Miller. He located them, submitted bids thereon, and secured contracts with each customer. Roughly 80% of the work (in the aggregate) was completed prior to Mr. Miller’s resignation. Accordingly, the trial court awarded Mr. Miller 80% of his otherwise-applicable commissions. That was a fair result.

The instant case is not one of first impression. Division Two’s decision in *Cormar* is a valid example wherein a plaintiff recovered slightly lesser damages at trial de novo but was nevertheless deemed the prevailing party when another “comparable” was taken into account. Damages and fees are both comparables in the instant case.

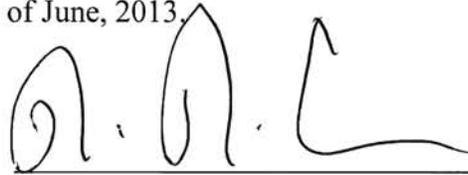
Finally, Mr. Miller is entitled to an award of fees and costs incurred on this appeal. *See* RCW 49.48.030, RAP 18.1; *McGinnity v. AutoNation, Inc.*, 149 Wn. App. at 286 (Division Three), *review denied*; RCW 4.84.010 and .080, and RAP 14.1 through 14.6.

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DATED this 18th day of June, 2013.

A handwritten signature in black ink, appearing to read 'D. R. CASE', written over a horizontal line.

D. R. (ROB) CASE (WSBA #34313)
Larson Berg & Perkins PLLC
Attorneys for Respondent

DECLARATION OF SERVICE

I, CHERYL I. BRICE, do hereby declare and state: On this day, in Yakima, Washington, I sent copies of this document via overnight U.S. Express mail, with postage prepaid, to the following:

Court of Appeals, Division One (original and one copy)
Clerk's Office
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Spokane, WA 99201-1905

Mr. Peter T. Petrich
Mr. Trevor D. Osborne
Ms. Ingrid McLeon
P.O. Box 1657
Tacoma, WA 98401

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Yakima, Washington, on June 18, 2013.



CHERYL I. BRICE, Legal Assistant

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