

67034-4

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Case No. 67034-4-I

COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON

SHAUN LaCOURSIERE,

Appellant,

vs.

CAMWEST DEVELOPMENT, INC.; and ERIC H. CAMPBELL,

Respondents.

BRIEF OF APPELLANT

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A. INTRODUCTION

A.1. Overview

This case arises under the Wage Rebate Act, RCW 49.52 *et seq.* The plaintiff was employed by the defendants. He received a base salary and commission-based bonuses. He was an ordinary employee. He didn't have any ownership interest in the business. All remunerations – both the salary and bonuses alike – were by reason of employment. The bonuses are the subject of this appeal. The plaintiff claims that upwards of \$107,000 was “rebated” from his bonuses by the defendants over a three-year span, thus violating RCW 49.52.050(1).

A.2. Rebate Scheme – Structure, Mechanics & Control

The plaintiff paid federal taxes and withholdings on each bonus. After those deductions, the “net” funds were not disbursed to the plaintiff. Instead, most of the funds – most of the net funds, after the plaintiff paid taxes on the entire gross –were diverted to an LLC. The money was sent directly to the LLC by the defendants, bypassing the plaintiff entirely. The LLC was controlled by the defendants. The LLC served as the middleman in the rebate scheme.

Without exception, the LLC immediately sent all of the funds back to the defendants. One day is all it took. The funds were re-deposited into the corporation's coffers and spent by the defendants. The money had

simply been shuffled between the defendants' bank accounts, yet the plaintiff had to pay taxes on it. Worse, he earned the money but he never got it.

When money was sent to the LLC, the plaintiff was credited with supposed "membership shares" in the LLC. The LLC then purported to "loan" the money to the defendants. This was smoke-and-mirrors to camouflage the rebate scheme.

These "loans" were the sole activity that the LLC ever conducted. The LLC owned no assets and it kept no cash. Thus, becoming a member of the LLC simply meant that the plaintiff had a once-removed stake in the loans. There was no other value to the LLC.

In effect, the plaintiff was an involuntary, unsecured lender to his employers. They kept part of his wages and gave him IOUs. That is an illegal rebate.

A.3. Freedom of Contract vs. Public Policy of the WRA

Below, the defendants' mantra was to argue that the rebate scheme (or, as they call it, "bonus program") was contained in two written contracts, and that the plaintiff signed both documents. However, under the Washington law, employers cannot circumvent the Wage Rebate Act by drafting a conflicting contract. *See infra*, pp.25-26 (Section "D.4."). If they could, the WRA would be meaningless.

The WRA prohibits any “device calculated to effect a rebate”. *See infra*, p.25 (citing *Champagne v. Thurston County*, 163 Wn.2d 69, 178 P.3d 936 (2008)). The question is whether this scheme effectuated rebates. If so, then it violates the WRA. No Washington appellate court has ever ruled that the WRA can be negated by an employer-drafted contract. The WRA is designed to protect workers, not to test the creativity of unscrupulous employers.

A.4. Lower Decision

Below, the plaintiff advanced claims under RCW 49.52.050 subparts (1), (2) and (3). *See* CP 8 (lns.16-23). On cross-motions for summary judgment, the superior court dismissed all claims. The judge did not explain the basis for her opinion. *See* CP 431-433. Regardless, the applicable standard of review is “de novo”.

A.5. Scope of Appeal & Relief Requested

On this appeal, the plaintiff proceeds exclusively on his claim that the defendants violated subpart (1) of RCW 49.52.050, which prohibits any “rebate” of wages. Notably, subpart (1) does not require any specific mental state. This substantially narrows the issues for appeal.

The material facts seem undisputed. Accordingly, the plaintiff requests (1) that the lower decision be reversed, and (2) that summary judgment be entered in the plaintiff’s favor (for damages, exemplary

damages, costs and attorneys' fees). As a fallback position, to the extent that any material issues are disputed, the plaintiff requests this court to remand the case for trial.

B. ASSIGNMENTS OF ERROR

B.1. The Defense Should Not have Received a Dismissal

The plaintiff's claim under RCW 49.52.050(1) should not have been dismissed via summary judgment. The established law does not warrant dismissal of that claim. The factual record, particularly when the construed in the plaintiff's favor, does not warrant dismissal.

B.2. Judgment Should've Been Entered in the Plaintiff's Favor

Summary judgment should have been entered in the plaintiff's favor. His claim under RCW 49.52.050(1) is conclusively proven by the undisputed facts and is consistent with established law.

C. STATEMENT OF THE CASE

C.1. Internship, Full-Time Employment, & Promotion

CamWest Development, Inc., is a construction business. CP 22 (lns.1-3). It buys land and builds residential developments. CP 22 (lns.1-3), 275 (lns.2-9), 345 (lns.4-8). During college, the plaintiff worked as an intern at the firm. CP 2, 264-265. He was recruited by Eric H. Campbell,

who was (and remains) the corporate President. CP 2, 4, 11, 266-267. Mr. Campbell is also the sole shareholder of the corporation. CP 302 (§3.2 of LLC Agreement).

After his graduation from college, the plaintiff was given a full-time position. CP 236, 268-269. During his deposition, the plaintiff said, “this is the first real job I had after graduating from college.” CP 274 (Ins.16-17).

The plaintiff’s initial position was “assistant project manager”. CP 236, 271. After approximately 2 years, he was promoted to the position of “project manager”. CP 4, 11, 236. The promotion became effective on January 1, 2005. CP 4, 11, 236.

C.2. “Employment Agreement” & Eligibility for Bonuses

As part of his promotion, plaintiff was required to sign an “Employment Agreement”. CP 236, 272. He had never signed an employment contract before. CP 274 (Ins.13-17). A complete copy of the Employment Agreement, including two Addenda, is found at CP 291-298. The defendants supplied the form of the agreement. *See* CP 24.

The plaintiff remained an at-will employee, but the defendants told him that he would now be eligible for profit-sharing bonuses. CP 236, 269, 273. Specifically, the plaintiff testified during his deposition, “I was told bonuses would be given off homes [that] I closed” and

“My understanding [was] I would receive a percentage of the profit on each home I closed”. CP 277 (ln.8), 276 (lns.16-17).

Consistent with that understanding, the agreement explicitly stated,

CamWest will credit Employee with a percentage of the net profit generated by the projects managed by Employee during the applicable period. Addendum(s) to this Agreement will define the percentage of profits to be credited to Employee for each project managed by the Employee.

CP 292 (¶2.2.3 of Employment Agreement). As contemplated, Addenda set the exact commission percentages for each housing development. *See* CP 297-298 (Addenda).

The plaintiff worked on at least 4 housing developments. *See id.* (referring to Silent Creek, Cascade Crest, Northpointe, and Village Walk). His commission rates were 2.50% and 3.75%, depending on the development. *Id.*¹

The agreement also listed some subjective, performance-based criteria, which could impact the bonuses. CP 291 (¶2.2.1 of Employment Agreement). The defendants decided how much weight to give to each criterion in any given year, but all employees had to be “evaluated by the

¹ The agreement refers to a “Project Managers’ pool”. *See* CP 292. The pool is not germane to this appeal. The plaintiff is not arguing that he should’ve received a greater stake in the pool. This case isn’t about how the gross bonuses were calculated. It’s about what happened after each gross bonus was declared. It’s about the defendants ending up with the majority of the “net” funds.

same standards and weighting”. CP 292 (§2.2.2 of Employment Agreement).²

Once calculated, each bonus was divided into two shares. The plaintiff did not receive the full bonus. Rather, the agreement (as prepared by the defendants) provided as follows:

- 2.2.5.1 Forty-four percent (44%) shall be distributed to Employee, less all applicable required withholding; and
- 2.2.5.2 Fifty-six percent (56%) shall be contributed to Employee’s capital account in CamWest Managers, L.L.C.

CP 238, 292.

The bonuses were remuneration for employment. *See* CP 251 (Ins.11-14), 291 (§2.2.1 of Employment Agreement). The only relationship between the plaintiff and the defendants was the employer-employee relation. The plaintiff didn’t have any ownership interest in the business. He wasn’t an officer or director. Prior to the at-issue transactions, he hadn’t loaned any money to the corporation. He was simply an employee. He was a salesman who earned commissions.

² These provisions are not germane to this appeal. This case is about the actual, past bonuses, and who ended up with the funds. The underlying criteria are beside the point. The plaintiff is not arguing that the defendants deviated from the list; nor that his gross bonuses should’ve been higher. This case is about the defendants ending up with the majority of the “net” funds.

Each bonus had to be earned. There is nothing to suggest that the bonuses were gifts or gratuities, unrelated to actual performance. For instance, the defendants didn't issue an across-the-board 10% bonus to all salesmen. Rather, each salesman's bonus was directly tied to the number of sales that he closed. CP 292, 298-299. There is no evidence to suggest that bonuses were given to salesmen who didn't close any sales, or that bonuses were given to the assistant project managers. Only the project managers received bonuses, based on their performance.³

C.3. The Plaintiff's Bonuses – Amounts, Taxes, & Allocation

The plaintiff earned 3 bonuses by his performance. The bonuses were based on his calendar-year performance, although they were actually paid on March 15th of the following year. *See* CP 317-319 (copies of checks). Specifically, the plaintiff's gross bonuses were as follows:

<u>Calendar year</u>	<u>Gross Bonus</u>
2005 (paid 03/15/06)	\$ 121,021.00
2006 (paid 03/15/07)	\$ 98,690.00
2007 (paid 03/15/08)	\$ 31,745.00
Total:	\$ 251,456.00 (gross)

³ Below, the defense conceded that the bonuses were “based upon employee performance”. *See* CP 22. Despite that concession, the defense argued that the bonuses were, somehow, “mere gratuities”. *See* CP 39-40. If the defense persists in that argument, a threshold issue will be presented, specifically: Do the bonus payments constitute “wages” under Washington law? To be explained and argued below, they undoubtedly do. *See infra*, pp.26-29 (sections “D.5.” and “D.6.”).

CP 239, 322-324 (*see* “Total Bonus” columns).⁴

The defendants required the plaintiff to pay federal taxes and withholdings against the full gross value of each bonus. *See* CP 322-324. After those deductions, the defendants divided the “net” funds into two shares. *See id.* This was the contemplated 44%-56% split.⁵

The defendants sent the majority of the net funds to the LLC, and the plaintiff only received whatever remainder was left. Specifically, the funds were allocated as follows:

<u>Year</u>	<u>Gross Bonus</u>	<u>Taxes paid by plaintiff</u>	<u>Funds sent to the LLC</u>	<u>Remaining funds sent to plaintiff</u>
2005	\$121,021.00	\$40,803.95	\$ 49,961.80	\$30,255.25
2006	\$ 98,690.00	\$33,668.54	\$ 40,348.96	\$24,672.50
2007	\$ 31,745.00	\$10,590.34	\$ 16,710.36	\$ 4,444.30
Totals:	\$251,456.00 (gross)	\$85,062.83 (taxes)	\$107,021.12 (to LLC)	\$59,372.05 (to plaintiff)

CP 239, 322-324, 317-319 (copies of checks).

The bold-face column is the subject of this lawsuit. Over the three-year span, upwards of \$107,000 was diverted to the LLC by the

⁴ The documents found at CP 322-324 were prepared, by the defendants, contemporaneously when each bonus was issued. *See* CP 398-399. The handwriting on the documents was added by defense counsel during this litigation. *See id.* Regardless, the typed terms accurately recite the gross value of each bonus, as well as the amount of taxes/withholdings that were deducted and how the net funds were allocated.

⁵ Below, the plaintiff argued that the split was miscalculated – that the actual figures weren’t 44% and 56%. *See e.g.*, CP 253-254. The plaintiff still has that belief, but the issue is not germane to this appeal. It is undisputed that upwards of \$107,000 was diverted to the LLC. That is the subject of this appeal. Whether the split was literally 44%-56% is beside the point.

defendants. The plaintiff earned those funds by his performance, but he never received them.

Each year, the corporation wrote a check directly to the LLC, followed by the LLC promptly writing a check back to the corporation. *See* CP 317-319 (copies of checks), 337, 344. The plaintiff had no input as to how much money was sent to the LLC each year. Nor did he have any power to compel a full disbursement of the “net” funds from his bonuses, without any money going to the LLC. The defendants controlled the allocation and wrote the checks without any input from the plaintiff. *See e.g.*, CP 242-243.

The taxes/withholdings paid by the plaintiff were more than he actually pocketed from his bonuses. Cumulatively over the three-year span, he was forced to pay taxes/withholdings of \$85,062.83. He pocketed only \$59,372.05 (net). *See* CP 322-324.

The LLC also received more than the plaintiff did. The LLC received \$107,021.12, nearly twice what the plaintiff actually pocketed. *See* CP 322-324. All money received by the LLC was immediately sent back to the defendants. CP 349-350. Thus, the defendants also kept/received more than the plaintiff actually pocketed.⁶

⁶ As time went by, the defendants allocated a larger share to the LLC, to later get returned to them. For years 2005 and 2006, the defendants sent roughly 41% (net) to the LLC. But for 2007, they sent the LLC 52% (net). *See* CP 240, 322-324.

Compared against his base salary, the plaintiff's bonuses were the primary component of his wages. His base salary was \$4,260 (gross) per month, which equates to just over \$51,000 (gross) per year. *See* CP 291 (¶2.1 of Employment Agreement). By contrast, his bonuses were \$121,021 for 2005, and \$98,690 for 2006. Even in 2007, after the housing market collapsed, he earned an additional \$31,745. *See* CP 239, 322-324, 317-319 (copies of checks). To be explained and argued below, the large size of the bonuses has significance under the applicable law. *See infra*, p.27 (citing *Powell v. Republic Creosoting Co.*, 172 Wn. 155, 19 P.2d 919 (1933)).

C.4. The LLC – Receipt of Funds & Supposed “Loans”

As previously addressed, the plaintiff's promotion (which entitled him to bonuses) became effective on January 1, 2005. CP 4, 11, 236. However, his initial bonus wasn't declared until March 15, 2006, approximately 14½ months later. *See* CP 317 (copies of checks). That was his 2005 calendar-year bonus.

March 15, 2006, was the date that the defendants first diverted a portion of the plaintiff's wages to the LLC. *See* CP 317 (copies of checks). Prior to that date, no relationship existed between the plaintiff and the LLC. In exchange for the money, the defendants credited the plaintiff with supposed “membership shares” in the LLC. *See* CP 160

(Ins.19-20), 162 (Ins.15-16).

The LLC was known by the name CamWest Managers, L.L.C. CP 4, 11, 237. Obviously, that is strikingly similar to the corporation's name (CamWest Development, Inc.).⁷

Not only did the LLC have a similar name, it also used the exact same office, telephone number, and bank as the corporation did. CP 237, 334, 319-321 (copies of checks). Eric Campbell simultaneously served as the President at the corporation, and as the Manager at the LLC. CP 237, 350, 4, 11. The LLC was effectively his alter ego.

As the Manager, Mr. Campbell had complete control of the LLC. He had "full and complete authority, power and discretion to manage and control" the LLC's affairs. CP 303 (§5.3 of LLC Agreement). He also earned a salary. CP 245, 303 (§5.1 of LLC Agreement). The salary was nominal, just \$120 per year. *Id.* However, during his deposition, Mr. Campbell conceded that this salary – regardless of its size and regardless of whether he actually took it – constituted an "economic benefit" for him. CP 245 (Ins.25-30), 350 (Ins.16-25), 351 (Ins.1-7). To be explained and argued below, this has significance under the applicable

⁷ The LLC is not a party to this litigation, because the LLC didn't employ the plaintiff. Only an "employer" can be held liable under the WRA. *See* RCW 49.52.050.

law. *See infra*, p.37.⁸

There was never a risk that Mr. Campbell might lose control of the LLC. To oust him as Manager required “the affirmative vote of the holders of one hundred percent (100%) of the Membership Interests”. CP 181 (¶5.8 of LLC Agreement). However, Mr. Campbell held a sizeable number of membership shares, so he effectively had veto power over any attempt to replace him as Manager. *See* CP 179 (¶4.2 of LLC Agreement).

By contrast, the plaintiff was always at risk of getting expelled from the LLC. The strict requirement for membership in the LLC was current employment at the corporation. CP 237 (Ins.14-16), 347 (Ins.16-19), 179 (¶4.1 of LLC Agreement). Thus, if the plaintiff quit his job or was fired by the corporation, he would be immediately expelled from the LLC. CP 194-195 (¶¶12.3.1.2-12.3.1.3 & 12.3.2.3 of LLC Agreement). Also, he could be expelled upon the affirmative vote of 66% of the other LLC members. CP 182 (¶6.6 of LLC Agreement); CP 5, 12.

The plaintiff was prohibited from trying to sell or assign his shares. CP 193 (¶12.1 of LLC Agreement). If he dissociated from the LLC, Mr. Campbell had a presumptive right to obtain his shares. CP 194 (¶12.2.1 of LLC Agreement); CP 5, 12. The plaintiff was effectively

⁸ Mr. Campbell further conceded that the “loans” from the LLC to the corporation constituted an economic benefit for the corporation. CP 246, 350. Again, this has significance under the applicable law. *See infra*, p.37.

stuck in the LLC. More to the point, his money was irretrievably tied up.

Throughout its existence, the sole business activity ever performed by the LLC has been “loaning” money to the corporation. CP 237, 346-347. By contrast, the LLC has never loaned money to any other entity or to any person, and it has never transacted any other business. *Id.* There is no evidence that the LLC owned any assets, or that it held any cash. The only value of the LLC was its lender position on the loans.

The LLC exclusively raised funds via member contributions. CP 237, 348. By contrast, the LLC never sought any lending of its own, nor did it generate any revenue by general commerce. CP 237, 347. Recalling that only current employees of the corporation were eligible to become “members” of the LLC (*see supra*, p.13), this means that all of the funds received by the LLC (and then purportedly “loaned” back to the corporation) came from the corporation’s own employees. *See* CP 237 (lns.22-28), 348.⁹

⁹ On this point, the relevant questions and answers from Mr. Campbell’s deposition were the following:

“Q. So the only way the LLC gets money is from member contributions, and the only way those member contributions occur is from bonuses from the corporation?”

A. At this time, yes.

Q. Okay. Today and prior to today, has it ever been different?

A. No, I don’t believe so.

Q. So that’s always been the case?

A. That is correct.”

CP 348 (transcript from Mr. Campbell’s deposition, p.58, lns.4-12).

As soon as the LLC received the funds, it immediately sent them back to the defendants. During his deposition, Mr. Campbell conceded that full-cycle, the shuffle took place “[m]ore or less” within a single business day. CP 242, 349-350. It was just a matter of letting the initial check (from the corporation to the LLC) clear, before the second check (from the LLC back to the corporation) was deposited. The checks were written directly from one entity to another, without any portion of the funds passing through the plaintiff. *See* CP 317-319 (copies of checks).

Despite being characterized as “loans”, the defense has not produced copies of any loan documents. There is no evidence of any collateral or meaningful security for the loans, other than Mr. Campbell’s personal guarantee. *See* CP 302 (¶3.3 of LLC Agreement). Of course, the plaintiff is not the direct lender, the LLC is, so it’s unlikely that he could enforce Mr. Campbell’s personal guarantee.

What is known is that the loans haven’t been repaid. *See* CP 246 (lns.5-7). During his deposition, Mr. Campbell conceded that upwards of \$12.2 million remains unpaid and outstanding. CP 354 (lns.18-22). That figure (\$12.2 million) constitutes principal only, without any accrued interest. *Id.* It spans several workers, because the plaintiff wasn’t the only employee against whom the rebate scheme was used. *See* CP 161 (lns.11-12).

C.5. The LLC Served as the Middleman

Below, Mr. Campbell signed a Declaration wherein he said, “I initiated the LLC Bonus Structure to provide [the corporation’s] employees the opportunity to share in the business’s successes.” CP 160 (Ins.11-12). If that were the true objective – allowing employees to share in the corporation’s hoped-for future success – an impartial observer might ask why Mr. Campbell even bothered with setting up an LLC at all. Why go through the rigmarole of establishing an LLC, splitting the bonuses into two shares, and shuffling money through the LLC?

Instead, why not simply give smaller immediate bonuses to the workers and then, if the hoped-for future successes actually materialized, issue additional bonuses at that point? A partial explanation is found at CP 365, where defense counsel wrote as follows:

The allocation regarding which Plaintiff now complains is exactly the reason why Plaintiff was able to receive such substantial bonuses in the first place. Because a percentage of each bonus was invested . . . as a membership interest in the LLC, which thereafter loaned money to CamWest and enabled it to purchase additional real estate for business, CamWest was financially capable of issuing generous bonuses to its Project Managers. Absent the LLC investment component of the bonuses, CamWest would not have issued direct payments in such sizeable amounts to its employees; instead, any . . . bonuses paid to the employees would have been markedly smaller.

(Internal citations omitted; ellipses added.) CP 365 (Ins.2-10). In other words, the defendants knew that most of the money would come back to

them, and they needed those funds to stay in business. The program was designed to “enable” the corporation to buy new land.

The defendants reaped substantial tax advantages by laundering money through the LLC. When each bonus was declared, the defendants took immediate deductions against their own tax liabilities for the full gross value of each bonus. CP 241 (Ins.16-25). On this point, the relevant questions and answers during Mr. Campbell’s deposition were as follows:

Q. Was that true for every bonus that your company decided to give to Shaun, meaning that your company would deduct the full 100 percent from its taxable base?

A. That is correct. . . .

Q. Your company would deduct the full 100 percent, even though not all that money was written directly to Shaun by check?

A. That is correct.

Q. And even though not all that money was otherwise temporarily given to Shaun, but rather was invested on Shaun’s behalf in the LLC?

A. That is correct.

CP 344 (Ins.6-10, 18-25). So, the defendants deducted the money as purportedly paid to the plaintiff (*i.e.*, “wages”), even though the money never left their control and was spent by them. See CP 242 (Ins.14-19), 345 (Ins.4-8), 403 (Ins.19-27).

Even with the relative tax considerations, an impartial observer might still ask why the LLC was used. Instead, why not simply give all of the net funds directly to the plaintiff, followed by the plaintiff actually

loaning a portion of the funds back to the defendants? To be explained and argued below, the answer is two-fold: (1) sending the money directly to the LLC eliminated what is commonly known as the risk of second performance, and (2) the LLC helped camouflage the rebate scheme. *See infra*, p.34.

C.6. Vesting Schedule & Termination

Not only was the plaintiff forced to be an involuntary lender to his employers, but the defendants also imposed a vesting schedule at the LLC. CP 243 (Ins.7-24). The vesting schedule had a four-year term. *Id.* If a member disassociated from the LLC (whether voluntarily or involuntarily) prior to his fourth anniversary at the LLC, he wouldn't get a full refund of his member contributions. *Id.* These provisions are contained at paragraph 12.4 (and its subparts) of the LLC Agreement. *See* CP 195-196.

The only way that the plaintiff could potentially get a full refund (of his forced "member contributions") was to pass his fourth anniversary. CP 243. However, there wasn't any guarantee that he would be given that chance. As previously addressed, the strict requirement for membership in the LLC was current employment at the corporation. CP 303 (§4.1 of LLC Agreement). But he remained an at-will employee at the corporation (*see* CP 269, Ins.16-20), so he was always at risk of having his employment terminated and, as a consequence, getting expelled from the

LLC. Also, he was always at risk that the other LLC members might vote at any time to expel. *See* CP 182 (§6.6 of LLC Agreement).

Effective March 6, 2009, the defendants fired the plaintiff. CP 244, 285-286, 341. This was just a few days shy of his next anniversary date at the LLC, which would've been his third. *See* CP 341 (lns.18-21). He was immediately expelled from the LLC. CP 342 (lns.10-12).¹⁰

When questioned about the suspicious timing of when the plaintiff fired, Mr. Campbell claimed, "In all sincerity, it's a coincidence." CP 244, 341 (lns.22-24). The defendants' proffered reason for firing the plaintiff, after years of continuous employment and at least 1 promotion, was "consistent tardiness". CP 244 (lns.22-26), 326-327. There is scant, if any, evidence to substantiate that explanation (particularly when the factual record is construed in the plaintiff's favor). Regardless, the reason for the termination is of little import, because this isn't a wrongful termination case. Rather, the critical points are (1) that the plaintiff was expelled from the LLC by the defendants, and (2) that the defendants profited as a result, which is further explained below.

¹⁰ Prior to fully terminating the plaintiff, the defendants demoted him to "senior laborer", which was a position lower than his original position of "assistant project manager". *See* CP 244 (lns.9-16). Actually he was given a choice. He could either accept the demotion, or he would be immediately fired. *Id.* By this point, the defendants had diverted upwards of \$107,000 to the LLC. The plaintiff reluctantly accepted the demotion, which temporarily saved him from being expelled from the LLC. *See* CP 284 (lns.16-22).

As a member of the LLC, Mr. Campbell profited when the plaintiff was expelled and denied a full refund. Expelling the plaintiff increased the value of each remaining member's stake in the loans. That included Mr. Campbell.

In effect, the defendants (as the borrowers under the supposed "loans") had the power to unilaterally "cram down" the principal of the loans. By firing the plaintiff, the defendants capped the reimbursement that he would receive. Even though his member contributions exceeded \$107,000, he wouldn't (and didn't) get a full reimbursement of that "principal" sum.¹¹

C.7. Partial Refund & Interest Payments

Eventually, the defendants gave a partial refund to the plaintiff, equivalent to 60% of his member contributions. CP 245 (Ins.13-19), 287 (In.25), 288 (Ins.1-4). Also, during the time that he was a member of the LLC, the plaintiff received 3 small "interest payments" on the loans. CP 246 (Ins.15-21), 318-321 (copies of checks).

The interest payments came from the LLC, not directly from the corporation. *See* CP 318-321. This further confirms that the plaintiff, despite effectively supplying the loan "principal", had only a once-

¹¹ The term "cram down" isn't used in its technical sense, which is when a bankruptcy court modifies a loan over the objection of the lender. Rather, it's used colloquially, to explain that the defendants could self-servingly modify the "loans".

removed stake in the loans. He had no direct rights under the loans, because the only parties to the loans were the LLC (as the supposed “lender”) and the defendants (as the supposed “borrowers”).¹²

To be explained and argued below, the partial refunds and interest payments have no bearing on liability or damages. Unlike other areas of the law, the WRA does not permit mitigation of liability. Damages are calculated based on the total wages that were rebated, without any offsets for funds that might’ve been returned to the worker. *See infra*, p.25 (citing *Morgan v. Kingen*, 141 Wn. App. 143, 169 P.3d 487 (2007) (Division One) and *Champagne*, 163 Wn.2d at 77).

D. LAW AND ARGUMENT

D.1. Standard of Review

When reviewing an order granting summary judgment, “de novo” is the applicable standard of review. The appellate court “engages in the same inquiry as the trial court.” *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998) (Division One). “All facts and reasonable inferences must be considered in the light most favorable to the nonmoving party.” *Kahn v. Salerno*, 90 Wn. App. At 117. The lower decision will be

¹² Checks from the LLC’s account are in the 2,000-number range, whereas checks from the corporation’s account are in the 11,000-range. *See and Compare*, CP 317-321.

affirmed only if “there are no genuine issues of material fact” and all reasonable persons would agree that “the moving party is entitled to judgment as a matter of law.” *Id.*

D.2. Public Policy of the Wage Rebate Act

In 1939, the Legislature passed what is now commonly referred to as the “Wage Rebate Act” or the “Anti-Kickback statute”, specifically RCW 49.52 *et seq.* See *e.g.*, *Champagne v. Thurston County*, 163 Wn.2d 69, 72, 178 P.3d 936 (2008) (using the name “wage rebate act”); *Dickens v. Alliance Analytical Laboratories, LLC*, 127 Wn. App. 443, 439, 111 P.3d 889 (2005) (using the name “Anti-Kickback statute”); RCW 49.52 (legislative history, including original code enactment via session law, 1939 c 195 §4).

Under the WRA, Washington is “a pioneer in assuring payment of wages due an employee.” (Internal quotation omitted.) *Champagne v. Thurston County*, 163 Wn.2d at 76. The WRA is construed “liberally, in light of the strong public policy to protect workers’ rights.” (Internal quotation omitted.) *Id.*

As far back as 1943, the Washington Supreme Court described the underlying purpose of the WRA as follows:

The act is . . . primarily a protective measure, rather than a strictly corrupt practices statute. In other words, the aim or purpose of the act is to see that the employee shall realize the full amount of the

wages which by statute, ordinance, or contract he is entitled to receive from his employer, and which the employer is obligated to pay, and, further, to see that the employee is not deprived of such right, nor the employer permitted to evade his obligation, by a withholding of a part of the wages, or by a device calculated to effect a rebate of part of them, or by having the employer's books purportedly show an overpayment of compensation.

(Ellipsis and underscores added.) *State v. Carter*, 18 Wn.2d 590, 621, 142 P.2d 403 (1943).

D.3. Relevant Provisions of the Wage Rebate Act

The WRA establishes five (somewhat overlapping) categories of unlawful conduct. *See* RCW 49.52.050(1)-(5). Violations constitute a misdemeanor, and an aggrieved worker is also entitled to a civil claim.

See e.g., RCW 49.52.070.

RCW 49.52.050 subpart (1) prohibits any "rebate" of wages. In relevant part, the statute provides as follows:

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

...

Shall be guilty of a misdemeanor.

(Underscores and ellipsis added.) RCW 49.52.050(1).

Notably, no specific mental state is required under subpart (1).

This distinguishes subpart (1) from the other subparts. *See and Compare*, RCW 49.52.050(1)-(5). Whether by accident or intentional design, an employer who collects or receives a rebate violates RCW 49.52.050(1).

The WRA applies to the literal employer, as well as any “officer” or “agent” of the employer. *See* RCW 49.52.050 (1st ¶), *see also* RCW 49.52.070. This explains the basis by which Mr. Campbell has been sued in his personal capacity – because he is the corporate President. As noted by the Washington Supreme Court, “The legislature intended, under RCW 49.52.070, to impose personal liability on the officers in cases like this because the officers control the financial decisions of the corporation.” *Morgan v. Kingen*, 166 Wn.2d 526, 536, 210 P.3d 995 (2009).

The WRA imposes exemplary damages, costs and attorneys’ fees for any violation of RCW 49.52.050 subpart (1). Specifically,

Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of RCW 49.52.050(1) . . . shall be liable in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and 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.

(Underscores and ellipsis added.) RCW 49.52.070.¹³

¹³ Below, the defense sought to invoke the “knowingly submitted” exception, on the basis that the plaintiff signed the Employment Agreement. *See e.g.*, CP 35-36. The plaintiff anticipates that the defense will make the same arguments on appeal.

Division One recently ruled, “the gross amount of wages, not the net after deductions for taxes, social security, or other matters” is used in calculating the exemplary damages. *Morgan v. Kingen*, 141 Wn. App. 143, 161, 169 P.3d 487 (2007) (Division One), *review granted, but this holding undisturbed*, 166 Wn.2d 526 (2009). “[T]he damages are exemplary damages, not merely compensatory.” *Morgan v. Kingen*, 141 Wn. App. at 161. “As exemplary damages, they are intended to punish and deter blameworthy conduct.” *Id.*, at 161-162.

As written by the Washington Supreme Court, “The WRA . . . does not provide for a lessening of liability based upon wages eventually paid but instead assigns exemplary damages based upon the employer’s willful withholding.” (Ellipsis added.) *Champagne*, 163 Wn.2d at 83, n.12. This distinguishes the WRA from the Minimum Wage Act. *Id.*

D.4. The Wage Rebate Act Cannot be Negated by an Employer-Drafted Contract

In the *Champagne* case, the Washington Supreme Court ruled that an employer cannot circumvent the WRA “by drafting a conflicting contract provision.” *Champagne*, 163 Wn.2d 69, 77, n.6 (2nd ¶). In other words, freedom of contract does not trump the WRA, just as the Minimum Wage Act cannot be negated by contract. If the Act were negatable by

However, as explained and argued below, no Washington appellate court has ever ruled

contract, it would be meaningless. The “strong public policy” of protecting workers against unscrupulous employers would be lost.

Champagne concerned a collective bargaining contract. *See Champagne*, 163 Wn.2d at 74. With respect to the “knowingly submitted” exception, the Court specifically noted, “no Washington court has found that a plaintiff knowingly submitted to a willful violation of the WRA based upon the existence of a collective bargaining agreement.” (Underscore added.) *See id.*, at 81, n.10. Likewise, after a diligent search, the plaintiff has not located a single decision wherein a non-union worker was deemed to have “knowingly submitted to . . . violations” because he signed a contract that his employers prepared.

D.5. Under Washington Law, Bonuses Constitute “Wages”

Below, the defense argued that bonuses are not “wages”. *See e.g.*, CP 411-412. To the contrary, wages are defined very broadly under Washington law, so as to include any monies due or paid “by reason of employment”. *See e.g., Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 13, 34-35, 111 P.3d 1192 (2005) (Division Three) (stating in relevant part, “There is no doubt that the bonus was to be paid ‘by reason of employment.’ It was therefore wages.”), *review denied*, 156 Wn.2d 1030 (2006).

that the WRA can be negated by an employer-drafted contract. *See infra*, p.33.

The plaintiff's bonuses were "by reason of employment". The Employment Agreement explicitly indicated that only current employees of the corporation were eligible for bonuses. *See* CP 179 (§4.1 of LLC Agreement). As a matter of fact, the plaintiff was an employee when each of his bonuses was issued. He earned the bonuses by his performance – by closing a large number of sales. There is no evidence to prove (or even suggest) that the bonuses were, somehow, not due to employment.

Echoing its arguments from below, defense counsel will likely argue that the bonuses were "mere gratuities". That is nothing but a contrived legal argument. As such, it should not permit the defendants to evade liability. *See e.g., Flower*, 127 Wn. App. at 36-37 (Division Three) (rejecting the employer's self-serving attempt to reclassify the bonuses as something other than wages), *review denied*, 156 Wn.2d 1030 (2006).

The notion that the defendants paid upwards of \$250,000 (gross) as "gratuities" to the plaintiff, when his base salary was only \$50,000 or so, is flatly absurd. Long ago, the Washington Supreme Court ruled that "substantial payments regularly made" to a worker are "something quite other than mere gifts". *Powell v. Republic Creosoting Co.*, 172 Wn. 155, 158, 19 P.2d 919 (1933).

D.6. Even Discretionary Bonuses Can Constitute “Wages”,

Which the *Byrne* Decision Explains

Below, the defense argued that the plaintiff’s bonuses were completely discretionary, and that there is supposedly a “discretionary bonus exception” to the WRA. *See* CP 39, 364. This court should not be misled. No such exception exists.

The only case the defense could muster in support of this argument was the Division Two decision of *Byrne v. Courtesy Ford, Inc.*, 108 Wn. App. 683, 32 P.3d 307 (2001). *See* CP 363-364. However, *Byrne* does not say what the defense suggests. In relevant part, the decision says,

. . . any compensation that actually is a wage should be protected from rebate . . .

We agree that “wages” should be defined broadly. . . . The anti-kickback statute is to be liberally construed to advance the legislature’s intent to protect employee wages and assure payment. . . .

A discretionary bonus can be compensation. . . .

. . . to be considered compensation, a discretionary bonus must be given regularly to create an implied contract and reliance, otherwise it is a mere gratuity. . . .

(Ellipses added.) *Byrne v. Courtesy Ford*, 108 Wn. App. at 688-698, 691.

Properly understood, *Byrne* informs that discretionary bonuses can qualify as wages. The critical inquiry is whether the bonus is an unexpected “gratuity” unrelated to performance, or, conversely, whether the bonus is given “consistently and repeatedly” and is based

upon performance. *See Byrne*, 108 Wn. App. at 690-691. When, as here, the bonuses are linked to performance and are consistently given, they constitute “wages”. *Id.*

Moreover, *Byrne* is easily distinguished from the instant case. *Byrne* concerned a one-time, unexpected gratuity, specifically a television won via a raffle. It was entirely unrelated to the quality of the worker’s performance. Winning the raffle was just dumb luck. Moreover, the raffle wasn’t even conducted the plaintiff’s employer, but, rather, by an outside third-party (Puget Sound Auto Auction). *See Byrne*, 108 Wn. App. at 309. On all accounts, *Byrne* is unlike the instant case.

Here, the bonuses were based on performance. The criteria were performance-based, and the Addenda set specific commission rates for each closing. *See CP 292, 297-298 (Addenda)*. It wasn’t dumb luck that warranted the bonuses. The plaintiff earned them by hard work and successful closings.

Byrne has no meaningful application to the instant case. Contrary to the defense’s arguments from below, *Byrne* does not establish a general “discretionary bonus exception” to the WRA.¹⁴

¹⁴ For clarity, the plaintiff does not concede that his bonuses were “completely discretionary”. Any extent of discretion ceased once each gross bonus was declared. The Employment Agreement did not (and could not) purport to give the defendants the “discretion” to rebate a portion of the bonuses. This case is not about how the gross bonuses were calculated. Rather, it is about what happened to the “net” funds. It’s about

D.7. The Plaintiff Did Not “Knowingly Submit to . . . Violations” of the WRA

Below, the defense argued that the statutory exception codified at RCW 49.52.070 should bar any recovery. *See e.g.*, CP 35-36. In the process, the defense twisted the language of the exception. As written, the exception reads: “PROVIDED HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.” *See* RCW 49.52.070 (last clause). But the defense repeatedly argued that “voluntary agreement” should be the standard. *See* CP 388-391. The court should not be misled. More generally, the exception is not applicable.

A significant difference exists between “voluntarily agreeing” to something, versus “knowingly submitting to . . . violations”. Voluntariness is a gauge of the actor’s volition. Knowingness, by contrast, is a gauge of the actor’s substantive understanding, which is a very different inquiry. It is entirely possible for an actor to agree to something without knowing that it’s a violation of the law, particularly when the other party gives no warning that violations might exist.

The Legislature understands the difference. In drafting subsection .070, the Legislature put the focus on what the employee knew, not simply

the fact that the majority of the net funds went back to the defendants. Whether some

on whether he acted voluntarily. If mere “agreement” was the standard, employers could impose all variety of wicked schemes on their unsuspecting workers. Long, opaque contracts – like those used here – could be used to disguise the rebate scheme. So long as the company got its workers to sign the documents, the workers would have no rights. The company would be free, conceivably, to take 100% of the workers’ wages. That cannot be what the Legislature intended.

Division One has recognized, “Exceptions from remedial legislation . . . are narrowly construed, and are applied only to situations that are plainly and unmistakably consistent with the terms and spirit of the legislation.” (Ellipsis added.) *Strain v. Travel West, Inc.*, 117 Wn. App. 251, 254, 70 P.3d 158 (2003) (Division One).

The WRA is remedial legislation. *See State v. Carter*, 18 Wn.2d at 621 (describing the WRA as a “protective measure”). The “aim or purpose” of the WRA, as described by the Washington Supreme Court, “is to see that the employee shall realize the full amount of the wages”, “to see that the employee is not deprived of such right”, and to prohibit the employer from using “a device calculated to effect a rebate”. *Id.*

The plaintiff never suspected that his employers were trying to steal his wages. He had no reason to think that the bonus program

degree of discretion existed earlier in the chain of events is beside the point.

violated the WRA. Specifically, the relevant questions and answers during the plaintiff's deposition were as follows:

Q. At the time that you signed the document that entitled "Employment Agreement," a copy of which is [an] exhibit to your deposition, did you have a belief as to whether or not any part of that contract constituted a violation of law?

A. No, I did not.

Q. No, you did not have a belief, or no, you did not believe it was [a violation]?

A. I did not believe it was any conflict in law.

...

A. I would not have signed an illegal contract.

Q. Why not?

A. Because I don't want to sign anything that's illegal and that could jeopardize and get myself in trouble for something.

CP 289 (lns.22-25), 290 (lns.1-2, 10-14).

The facts of this case do not "plainly and unmistakably" fit the exception codified at subsection .070, particularly when (1) the record is construed in the plaintiff's favor, and (2) the exception is narrowly construed. The defendants want freedom of contract to trump the WRA. However, no Washington appellate court has ever ruled that a worker loses his rights by signing an employer-drafted contract. *See Champagne*, 163 Wn.2d at 81, n.10.

This is not an appropriate case to break new ground. Washington is supposed to be a "pioneer" in protecting workers – both from their

employers and also from themselves.

D.8. This Court Should Consider the Reality of the Situation, and Should Not be Distracted with Technicalities

The plaintiff lost a substantial portion of his earned wages. He lost the money before he ever touched it. He lost it due to a scheme that his employers cooked up for their own benefit. His employers came out ahead, and he was left with worthless IOUs. If the WRA doesn't protect against that, it doesn't protect against much.

Mr. Campbell devised this scheme, controlled it and profited from it. He controlled the flow of money to-and-from the LLC. He required the plaintiff to pay taxes on all of the money, but the money was spent by Mr. Campbell. He took risks with the money. It wasn't invested in a CD or a money market account. Rather, he used it to buy more land for his corporation. Then, when the real estate market collapsed, he sent the plaintiff packing and refused to give him a full refund. All of the downside fell on the plaintiff. The plaintiff had no security or collateral. He was forced to be an involuntary, unsecured creditor to his own employers. If that's acceptable under the WRA, then what isn't?

The LLC was nothing but smoke-and-mirrors. Mr. Campbell is a savvy businessman. He must've known that if he simply kept the funds, without laundering them somehow, the transactions would've looked like

classic rebates. So, he devised the idea of setting up a captive LLC and characterizing the transactions as “loans”. This camouflaged things. But, at the end of the day, the reality was the same. The money flowed back to Mr. Campbell – that is the critical point.

Mr. Campbell claims that he was just trying to give his workers “the opportunity to share in the business’s successes.” CP 160 (lns.11-12). Common sense says otherwise. The workers didn’t have a choice. Mr. Campbell sent the money directly to the LLC. This eliminated what’s known as the risk of second performance. He was unwilling to relinquish all of the net funds to the plaintiff, because that would’ve let the plaintiff decide whether he wanted to be a part of these sham “loans” (or, conversely, whether he wanted to do something better with his money).

Below, the defense actually made the argument that relinquishing all of the net funds to the plaintiff would’ve been a “superfluous step”. See CP 419 (lns.23-27), 370 (lns.6-9). What nonsense! Long ago, the Washington Supreme Court explained that the worker must actually receive his wages “in full”, such that they are “in his pocket”, before any other transactions occur between the worker and his boss. Specifically,

Having once received his wages in full, the employees is at liberty to do what he will with his earnings, so long as he does not violate some positive rule or law governing his action. He may keep the money in his pocket, invest it, spend it, or give it away. . . . If the contribution be in fact a voluntary donation, it does not necessarily

constitute a rebate of wages merely because it moves to, or for the benefit of, the employer. (Ellipsis added.) *State v. Carter*, 18 Wn.2d at 622-623 (1943). These sham “loans” weren’t voluntary post-receipt transactions. They were involuntary pre-receipt transactions. The plaintiff didn’t write checks to the LLC. He didn’t even have any input as to how much money was sent to the LLC each year. Mr. Campbell controlled everything. The money bypassed the plaintiff entirely, yet he had to pay taxes on it.

The plaintiff had no idea that he was going to get burned. When he signed the Employment Agreement, his first bonus was still 14&1/2 months away. He wasn’t shown the LLC Agreement until the following year.

Together, the two contracts totaled 26 pages. *See* CP 290-316. They are not simple documents. For example, consider paragraphs 2.2.1 through 2.2.5.2 of the Employment Agreement. *See* CP 291-292. Those paragraphs aren’t easy to decipher. There is a list of criteria, but then the document also says that the worker is going to earn a percentage of each closing. The document refers to a “Project Managers’ pool”, but then it also talks about a 44%-56% split.

Nowhere on the documents was there a direct warning that the worker might lose all (or most) of the money that got “invested” in the LLC. There weren’t any warnings akin to truth-in-lending. There wasn’t

explanation that the worker wouldn't have any security or collateral, or that he wouldn't actually be a party to the loan transactions. *See* CP 290-316.

The documents didn't even mention the WRA, yet the defense wants this court to rule that the plaintiff "knowingly" gave up his rights under the Act. That's not consistent with Washington's status as a "pioneer" in protecting workers.

Employers are not supposed to be adversaries to their workers, at least not with respect to the workers' earned wages. Here, Mr. Campbell implemented a so-called "bonus plan" that, in reality, gave him a license to steal from his workers. He had a direct incentive to send as much money to the LLC as he could, because all of that money flowed back to his corporation. He reaped a personal economic benefit via his Manager's salary, and his corporation reaped economic benefits both by saving taxes and by having guaranteed access to capital. Then, Mr. Campbell fired the plaintiff and effectively "crammed down" the principal value of the loans. That was another economic benefit for Mr. Campbell.

In relevant part, RCW 49.52.060 explains that the employer is not supposed to derive any financial benefit by applying "deductions" against the workers' wages. Mr. Campbell clearly violated that standard. From

the outset, this scheme was designed to benefit Mr. Campbell and his corporation. The supposed benefits for the plaintiff proved to be fiction.

In hindsight, can this scheme be viewed as anything but an attempt to circumvent the WRA? Can it be viewed as anything but a “device calculated to effect a rebate”? Mr. Campbell tried to outsmart the law. If Washington truly has a “strong public policy” of protecting employees, this rebate scheme should not stand. The court should “punish” these defendants and “deter” other employers from following suit. *See Morgan v. Kingen*, 141 Wn. App. at 161.

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D.9. Calculation of Exemplary Damages

Under the WRA, “the damages are exemplary damages, not merely compensatory.” *Morgan v. Kingen*, 141 Wn. App. at 161. “As exemplary damages, they are intended to punish and deter blameworthy conduct.” *Id.*, at 161-162. The “gross amount of wages” is used in calculating the exemplary damages. *Id.* There are no offsets for any partial refunds that may have been paid to the worker. *Id.*; *see also*, *Champagne*, 163 Wn.2d at 83, n.12.

Applied to the instant case, the plaintiff should be awarded exemplary damages of \$214,042.24. That is twice the amount that was diverted to the LLC over the three-year span. *See supra*, p.9.

The plaintiff should also recover costs and attorneys’ fees. *See* RCW 49.52.070. Those items will be substantiated at a later date, assuming that the plaintiff prevails.

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E. CONCLUSION

This court should (1) reverse the lower court's dismissal of the plaintiff's claim under RCW 49.52.050 subpart (1), and (2) should direct entry of summary judgment in the plaintiff's favor on that claim. The plaintiff should recover damages, exemplary damages, costs and attorneys' fees. As a fallback position, to the extent that any material issues are disputed, this court should remand the case for trial.

DATED this 21ST day of July, 2011.



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

DECLARATION OF SERVICE

I, D. R. (ROB) CASE, do hereby declare and state: On this day,

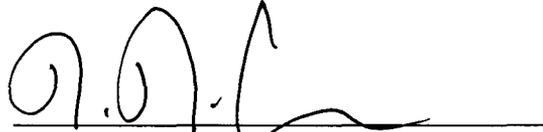
I hand-delivered copies of this document to the following:

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Clerk's Office
600 University Street
Seattle, WA 98101-4170

James M. Shore (one copy)
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101

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 July 21ST, 2011.



D. R. (ROB) CASE