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No. 72604-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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PROJECT CORPS, LLC; and
MICHELLE D. GADDIE,

Appellants,

v.

ROBERT RUHL; and
PATRICIA PETERSON,

Respondents.

REPLY BRIEF OF APPELLANTS

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I. REPLY

A. Introduction

Appellants, ProjectCorps, LLC (“ProjectCorps”) and Michelle D. Gaddie, are requesting that the trial court’s order on summary judgment be reversed and this matter be remanded.

ProjectCorps, did not willfully withhold the wages of Respondents Patricia Peterson (“Peterson”) and Robert Ruhl (“Ruhl”). Pursuant to the agreement between the parties, Peterson and Ruhl expressly agreed to defer their wages, until the company was in a financial position to repay the deferred money. The parties expressly agreed that once ProjectCorps “returned to a level of profitability that could support repayment,” Gaddie would “put a repayment plan in place. . . .” CP 287-288, 290-291.

When Peterson and Ruhl’s employment was terminated, ProjectCorps began taking steps to determine the amount of deferred wages. However, it soon became evident that (1) Peterson and Ruhl had been significantly overpaid during the implementation of the commissions program; and (2) Peterson and Ruhl were requesting salary in excess of what they were entitled. A bona fide dispute arose at this point.

Peterson and Ruhl were demanding all of the wages they had knowingly and willfully agreed to defer, and were unwilling to work with ProjectCorps to create a payment plan. Litigation then ensued. In

opposition to Summary Judgment, facts were presented by both Gaddie and Valenzano demonstrating that Respondents were not entitled to the amounts demanded and that a bona fide dispute arose following Peterson and Ruhl's termination. The trial court disregarded the material issues of fact raised in Gaddie's declaration and struck Valenzano's declaration in full. The trial court's decision on summary judgment was in error, and as such, this matter must be remanded.

B It Was an Error to Award the Respondents' 2013 Wages

ProjectCorps and Gaddie offered admissible evidence that Ruhl and Peterson's wages were cut in March 2013. However, contrary to this evidence, the trial court granted Ruhl and Peterson's motion for summary judgment related to their 2013 wage claims, as well as exemplary damages, attorney fees, and interest related to the 2013 wage claims. The trial court's decision is a reversible error.

The Respondents attempt to justify the trial court's decision to ignore admissible evidence by arguing that (1) there is no documentary support of the 2013 wage cut; and (2) Gaddie's testimony is contradictory and/or hearsay. Both of Respondents' arguments fail.

1. The Documents Support Appellants' Position

Gaddie offered declaration testimony in direct conflict with a material element of the Respondents' 2013 wage claims. CP 272-273.

Gaddie offered evidence that she decided to reduce the Respondents' wages in March 2013, not merely defer them as was agreed to by the parties in 2012. Respondents appear to ignore the fact that Gaddie's declaration is documentary evidence depicting her actions and the result of her action, which in turn was presented to the trial court. These facts alone presented an issue of material fact that should have resulted in the denial of summary judgment.

In addition, Gaddie's declaration included documentary evidence that was presented to the trial court. Gaddie met with Peterson every week and beginning in January 2013 Gaddie told her that the company needed to cut salaries, and specifically her and her husband's salaries. CP 272-273. By March 2013, Gaddie informed Peterson that effective March 16, 2013, her salary and her husband's salary would be cut by 20%. *Id.* Gaddie instructed Karen Chenkovich to make the changes in payroll. *Id.* On April 8, 2013, Gaddie sent emails to Peterson and Ruhl in an effort to demonstrate ProjectCorps' commitment to the agreement made by the parties. CP 273, 287-288, 290-291. It is important to note that the April 8, 2013 emails **did not reference 2013 wages in any way.** *Id.*

As discussed in more detail below, Peterson and Ruhl are ignoring the plain language of the emails, as well as the fact that they **never** objected or disagreed with Gaddie's emails. Even still, the emails were the sole

evidence that the Respondents relied upon to support their claims, and in turn is what the trial court utilized to grant summary judgment. The emails clearly illustrate the time period for the agreed upon deferment and do not mention wages in 2013 at all. Payroll records confirm that Peterson and Ruhl continued to work for the company after their salaries were reduced. CP 273. Similar to the above, Peterson and Ruhl never objected or disagreed with Gaddie's reduction of their pay.

2. Appellants Did Not Offer Contradictory Evidence

While it is true that as a general rule, a party cannot create an issue of fact and prevent summary judgment simply by offering two different versions of a story by the same person, ProjectCorps and Gaddie did not offer contradictory evidence. *See McCormick v. Lake Washington School Dist.*, 99 Wn. App. 107, 992 P.2d 511 (1999).¹ Even more, this stated rule must be tempered by the usual rule that all doubts should be resolved in favor of allowing the case to go to trial, and the court should scrutinize the two versions and reject the second one only if there is a clear and material contradiction. *Sun Mountain Productions, Inc. v. Pierre*, 84 Wn. App. 608, 929 P.2d 494 (1997) (trial court erred in rejecting affidavit; appellate

¹ While it is unclear whether the trial court relied on Respondents' proffered case law on this issue, Respondents' citation in its Reply on Summary Judgment to the dissenting opinion in *Jones v. State*, 170 Wn.2d 338, 370, 242 P.3d 825 (2010), without noting the same is improper and is not of presidential value.

court said contradiction between deposition and affidavit was not significant enough to warrant rejection of affidavit). No such contradiction exists here.

During the briefing on summary judgment, Gaddie offered a declaration testifying that she reduced the Respondents' wages in 2013. CP 272-273. In response (and now here), the Respondents argued that (1) Appellants' Answer to the Complaint was contradictory to the declaration and (2) wage records submitted in a debarment proceeding were contradictory to the declaration.

First, the Appellants' Answer is not contradictory to Gaddie's declaration. Respondents' Amended Complaint made the following assertion at paragraph 2.31:

Portions of Ruhl's 2013 salary payments were also deferred. Gaddie's email does not account for those deferred salary payments.

CP 24. Appellants' Amended Answer to paragraph 2.31 stated as follows:

Admitted in part, denied in part. It is admitted only that Ruhl agreed to deferment of portions of his wages. The remaining allegations contained in paragraph 2.31 to plaintiffs' amended complaint are specifically denied.

CP 453. Appellants **did not** admit that 2013 wages were deferred. On the contrary, it was expressly denied that Ruhl's 2013 wages were deferred. Appellants are not required to argue in their Answer that Ruhl's wages were cut in 2013. That allegation was denied in the Answer and then during the

litigation, and specifically in Opposition to Summary Judgment, Gaddie offered a declaration detailing the 2013 wage cut. Respondents' argument otherwise is not supported.

Second, the Employment Security employee earning records speak for themselves and do not contain contradictory information. It is worth noting that the employee earning records are prepared and maintained by Employment Security, not ProjectCorps. Appellants cannot be held to have offered contradictory testimony when they did not create or offer the Employment Security documents. Respondents started the 2013 year earning \$7,083.33 per pay period, and as a result, the earning statement recorded this amount. CP 574-575. However, a simple review of the earning statements demonstrates the **actual** wages that were paid to Respondents for each pay period from January 2013 through September 2013, including the pay periods reflecting the reduction in Respondents' wages.

Respondents' reliance on the employee earning records highlights the weakness of their position. The employee earnings records are nothing more than a computer generated form with limited fields of data. However, the more relevant data confirms the actual wages that were paid to Peterson and Ruhl over the course of their employment in 2013 and specifically reflects the reduction in their 2013 wages and their continued employment

after the reduction.

3. Peterson and Ruhl's Post-Employment Actions Reflect Their Ability to Manipulate

Appellants are compelled to respond to Peterson and Ruhl's baseless comment that ProjectCorps retaliated against them following their termination. As a result of Peterson and Ruhl's actions, ProjectCorps filed Counterclaims for violation of the Consumer Protection Act and Unfair Competition. CP 460-463. Peterson and Ruhl appear to actively ignore the decisions they have made and their role in this dispute. Whether their knowing decision to defer their wages or the manner in which they have attempted to start a new business following termination, Peterson and Ruhl have made decisions that have consequences. Yet in the face of those decisions, Peterson and Ruhl want this Court to believe that they are victims; however, such a conclusion is very far from the truth. Peterson and Ruhl's post-employment actions reflects their willingness to bend the rules when it suits their needs.

At the time ProjectCorps hired Peterson and Ruhl, Gaddie was aware that they previously owned and operated a consulting business. CP 274. Based upon their assertions, it was Gaddie's understanding that the business was inactive. *Id.* Even more, Peterson and Ruhl's employment with ProjectCorps was contingent on them just working for ProjectCorps

and no longer engaging and seeking work as independent contractors. *Id.* Peterson and Ruhl were required to give 100% of their energies and services to ProjectCorps. *Id.* Gaddie relied on the promise and representations made by Peterson and Ruhl, when ProjectCorps hired Peterson and Ruhl with a yearly base salary of \$170,000.00 plus commission. CP 270. However, following their termination, a search on the State of Washington Department of Revenue database revealed that Ruhl and Peterson had reactivated C3G, their company, in **January 1, 2013, six months before they were terminated from ProjectCorps.** CP 276. This reactivation reflects that Peterson and Ruhl were planning to compete, or in fact, were competing. *Id.*

After their employment ended, Gaddie became aware that Peterson and Ruhl's company, C3G, was actively competing with ProjectCorps. CP 275. Gaddie discovered that C3G was identified as a pre-qualified vendor with the State of Washington Department of Enterprise Services for IT Business Analysis; however, in C3G's submittal to be a pre-qualified vendor, Peterson and Ruhl had included clients of ProjectCorps and represented that they had worked with those clients as C3G. *Id.*, CP 293-300. Peterson and Ruhl also had included resumes from ProjectCorps' employees, thereby representing ProjectCorps' employees as C3G employees. CP 302-305. In addition, they stated that they had been in

business since 1997. *Id.* All of this information was misleading.

Peterson and Ruhl were not done. With regard to the University of Washington Consulting Alliance, Peterson and Ruhl contacted the Alliance to become an Alliance member, which allows a company to work directly with anyone at the University of Washington without going through a competitive procurement process. CP 275. In C3G's submittal and consultant profile, Peterson and Ruhl (1) had included clients of ProjectCorps and represented that C3G had worked with those clients; (2) they also included a resume of one of ProjectCorps' employees in their submittal calling him a Principal Consultant; and (3) included as consultants resumes for individuals who worked for other companies. *Id.*, CP 311-339.

The above facts are not exhaustive, but illustrate the basis for why Counterclaims were brought against Peterson and Ruhl. While Peterson and Ruhl would like this Court to believe that they are victims, the facts in this case tell a far different story. Peterson and Ruhl should be required to comply with the promises they made and held accountable for their actions.

4. Reversal Is Required

Gaddie offered declaration testimony and documentary evidence directly in conflict with a material element of the Respondents' 2013 wage claims. CP 272-273. Gaddie offered evidence that in the face of financial ruin, she cut the Respondents' wages in March 2013.

The trial court improperly ignored admissible evidence that raised a material issue of fact that should have been resolved by the trier of fact. The trial court failed to adhere to the standard on summary judgment. As such, the trial court's summary judgment decision with respect to Respondents' 2013 wage claim should be reversed and remanded.

C. Valenzano's Declaration Was Improperly Excluded

Valenzano's declaration was an important piece of evidence that was not considered by the trial court. Valenzano should have been permitted to testify to information she personally observed, was capable of understanding, and that would have assisted the trier of fact in making a determination of the evidence presented.

1. Valenzano Possessed Personal Knowledge of the Facts Testified

ER 602, which is incorporated into ER 702, restates the time-honored rule that a witness who testifies to a fact that can be perceived by the senses must have actually observed the fact. The proponent's burden under ER 602 is to produce evidence "sufficient to support a finding" of personal knowledge -- a nominal burden in most situations. *See* 5D Wash. Prac. Handbook Wash. Evid. ER 602 (2014-15 ed.). The role of the trial court is limited to determining whether under the circumstances presented, reasonable persons could differ as to whether the witness had an adequate

opportunity to observe the events in question. If reasonable minds could differ, the testimony should be admitted. The testimony should be excluded **only if**, as a matter of law, no trier of fact could reasonably find that the witness had personal knowledge of the events in question. *State v. Vaughn*, 36 Wn. App. 171, 672 P.2d 771 (1983), *aff'd*, 101 Wn.2d 604 (1984).

Here, Valenzano submitted a declaration based on her personal knowledge in support of Appellants' Opposition to Respondents' Motion for Partial Summary Judgment that detailed her observations. CP 233-240. Valenzano's declaration was based entirely on her personal observations of ProjectCorps' records. Valenzano reviewed payroll records, commission schedules, timesheet records, accounting records, and expense data/reports, and then articulated her observations in the declaration.

The fact that Valenzano testified that she hired a bookkeeper to assist her in reviewing the records does not change the character of her observations. She testified to matters that she personally observed and was capable of understanding, Valenzano did not testify on behalf of bookkeeper.

In addition, Valenzano offered a detailed recitation of the information she reviewed and her observations of that information. Testifying to her beliefs following her observations does not bring into question whether she had personal knowledge. It is not unusual for a

witnesses to testify as to what they believe, and Washington courts have a long history of admitting such testimony, even when the qualifier “thinks” or “believes” is used. *See State v. Murphy*, 15 Wn. 98, 45 P. 729 (1896). However, here, Valenzano did not qualify her observations. The Respondents are trying to take **one word from seven page declaration** to challenge Valenzano’s personal knowledge without regard to the entire declaration.

After returning to ProjectCorps to help run the business, Valenzano was responsible for running the office and **all** accounting functions (Accounts Receivable, Accounts Payable, Payroll, etc.). She submitted a declaration based on her personal knowledge that detailed her observations of ProjectCorps’ records. Valenzano possessed sufficient personal knowledge of the facts presented in her declaration.

2. Valenzano did Not Offer Expert Testimony

Valenzano offered lay testimony that was based on her personal observations. As confirmed in her declaration, Valenzano’s observations were of documents and a process (the commission program) that she was very familiar with. Valenzano helped Gaddie start ProjectCorps, was extremely familiar with the business, and replaced ProjectCorps’ bookkeeper. Valenzano was fully capable of reviewing documents, completing simple mathematics, and then articulating her conclusions.

The fact that Appellants requested a continuance of the summary judgment hearing to obtain a forensic accounting, a request that was denied by the trial court, does not impact Valenzano's ability to provide lay witness testimony. Specialized knowledge of a scientific nature was **not** required for Valenzano to testify to her observations. Completing basic math that an elementary school student is capable of performing does not require the testimony of an expert. Respondents are couching their attack on Valenzano's credibility under the guise that she required specialized scientific expertise to complete simple math. Valenzano's observations were of documents and a process (the commission program) that she was very familiar with. Valenzano helped start ProjectCorps and returned to the company when it needed someone to take over running the office and accounting. Relying on her personal knowledge of the company, reviewing documents, and then completing basic math does not require an expert.

The Respondents' attempt to raise specific objections to Valenzano's observations on a project-by-project basis is fodder for cross-examination and illustrates yet another reason why summary judgment was not appropriate. The facts offered by Valenzano created significant material questions of fact related to Respondents' claim for commission payments. The Respondents confirm the existence of material issues of fact by challenging Valenzano's observations. Based on Valenzano's knowledge

of the company's operations and her simple review of the records, it was evident that the timesheet data did not reflect true effort, billable and non-billable time spent, on project work. Keep in mind, the data points that were being used by ProjectCorps' former bookkeeper to determine commission payments were completely fabricated. Because the time reporting data was poorly recorded there was an underestimate of overall effort spent on project work, which significantly affects Gross Margin calculations for consultant costs. Valenzano discovered that the schedules prepared by the former accountant were elevated and not accurate. In all cases, commissions were awarded to staff without any justification of how percent allocation was determined. As such, Peterson and Ruhl were overcompensated because the Gross Margin was not properly calculated. This is evidence that the trier of fact should have an opportunity to consider. Instead, the trial court struck Valenzano's declaration in full, thereby eliminating material issues of fact related to the amount of commissions owing.

Valenzano's declaration should **not** have been excluded because it was based on her personal observations, would be helpful to the jury, and she possessed sufficient knowledge and expertise of the subject matter she offered testimony.

3. ER 1001 and ER 1002 Are Not Applicable Here

By its terms, ER 1002 applies only when a party seeks to prove the

content of a writing, recording, or photograph. The rule **does not apply**, and **does not require** production of an original, when a party seeks to prove an act, condition, or event, even though the act, condition, or event may have been memorialized in some form of record.

It is important to note that Valenzano's review of ProjectCorps' records occurred because she discovered a number of discrepancies with the amounts Peterson and Ruhl were claiming they were owed. At first glance, she could not make sense of the data; however, after finding spreadsheets and commissions schedules that the former bookkeeper prepared she was able to reconstruct the faulty process that was being employed, which resulted in overpayment to Peterson and Ruhl. In addition to discovering the discrepancies, the other obvious issue with the commission calculations had to do with the fact that ProjectCorps was not generating a profit. Yet, ProjectCorps was paying Peterson and Ruhl thousands of dollars in commissions.

Based on Valenzano's initial observations, her declaration reflects her personal knowledge of an act, condition, or event that was memorialized in some form of record. Valenzano's personal observations were offered to describe the discrepancies and recalculations, as such, ER 1002 did not apply. Even more, Respondents' challenge to the underlying data relied upon by Valenzano should have been explored on cross-examination, not

by having the declaration struck in its entirety.

Further, pursuant to ER 1006, the contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. Valenzano testified that she reviewed the company's payroll records, the original timesheet records, accounting records, and expense data/reports. After testifying to her observations, she produced a Revised Commission Report for each of the projects she reviewed. Valenzano's declaration complies with the evidence rules and should have been considered by the trial court.

4. Respondents' ER 402 and ER 403 Objections Further Support Overturning the Trial Court's Decision to Strike Valenzano's Declaration

The Respondents are raising questions of material fact through their challenge of Valenzano's declaration. Valenzano offered her personal observation of the ProjectCorps records she reviewed. The weighing of credibility is not proper on summary judgment, but the Respondents are requesting that this Court find Valenzano not credible. In total, Valenzano reviewed six (6) projects that had multiple phases. Three (3) of the projects where she found discrepancies were conducted in 2011 and the 25% commission was paid. However, the Respondents do not mention this. They are seeking to generalize the facts and ignore the data. Of the remaining three (3) projects, Valenzano utilized her knowledge of the

operation of the company and the documents she had at hand to calculate the commission amount. Respondents' challenge to whether or not Valenzano utilized the correct commission percentage does not justify fully excluding her declaration.

As stated above, the Respondents' challenge to Valenzano's declaration should have been raised on cross-examination and go to the weight of her testimony, not completely stuck by the trial court. The trial court erred when she failed to consider Valenzano's declaration and awarded damages to Respondents in the face of material issues of fact.

5. The Evidence Offered Demonstrates a Bona Fide Dispute

First and foremost, the issue of whether an employer willfully withheld wages is a **question of fact**. *Moore v. Blue Frog Mobile, Inc.*, 153 Wn. App. 1, 8, 221 P.3d 913 (2009); *Ebling v. Gove's Cove, Inc.*, 34 Wn. App. 495, 500-501, 663 P.2d 132 (1983). "An employer does not willfully withhold wages within the meaning of RCW 49.52.070 where he has a bona fide belief that he is not obligated to pay them." *McAnulty v. Snohomish Sch. Dist. 201*, 9 Wn. App. 834, 838, 515 P.2d 523 (1973). A bona fide dispute is one that is "fairly debatable." *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 136, 161, 961 P.2d 371 (1998).

The Respondents argue that there was no bona fide dispute because the dispute was not "contemporaneous" with the obligation to pay wages.

The Respondents' argument misstates the standard and issue at hand. The Respondents are seeking to focus on when the bona fide dispute was presented to the trial court, not whether it existed at the time of the overpayment.

ProjectCorps offered evidence demonstrating an overpayment and its genuine belief that it was not obligated to pay certain wages. Gaddie's declaration presented evidence supporting the deferment agreement and Valenzano's declaration presented genuine issues of material fact related to Peterson and Ruhl's claims for commission payments. CP 271-273, 287-288, 290-291, 233-268. These factors resulted in ProjectCorps' genuine belief that it was not obligated to pay certain wages to Peterson and Ruhl.

Given that the facts are to be viewed in the light most favorable to the non-moving party, the trial court should have determined that a bona fide dispute existed at the time the dispute between the parties arose because of the deferment agreement and the overpayment of wages. In other words, the event triggering of the bona fide dispute was when Peterson and Ruhl demanded an amount that was not in accord with what ProjectCorps genuinely believed was owed, not the date the issues were presented to the trial court. Now on appeal, the Respondents are following in the same footsteps of the trial court, which improperly focused on the tense of the word "existed," rather than whether Peterson and Ruhl's entitlement to the

payments was “fairly debatable” when considering the agreement to defer wages, bookkeeping errors, and discovery of discrepancies related to the implementation of the commission program. *Schilling*, 136 Wn.2d at 161, 961 P.2d 371. The factors contributing to the bona fide dispute “existed” at the time Peterson and Ruhl were terminated and demanded payments of funds ProjectCorps genuinely believed were not owed. The fact that the issues were articulated in Opposition to Summary Judgment does not change when the bona fide dispute arose. Summary judgment on the issue of willfulness was not proper.

D. A Material Issue of Fact Exists as to Whether the Respondents Knowingly Submitted to the Deferment of Wages

Liability under RCW 49.52.070 is **not** available “to any employee who has knowingly submitted” to the withholding of wages. “Knowingly submitted” requires that Peterson and Ruhl intentionally deferred to ProjectCorps the decision of whether they would be paid. *Chelius v. Questar Microsystems, Inc.*, 107 Wn. App. 678, 681-82, 27 P.3d 681 (2001).

In many ways, Respondents have based their entire case on the correspondences sent by Gaddie in April 2013; however, when it comes to actually reviewing the language in the emails, Peterson and Ruhl fail to accurately articulate the terms of the agreement. The key language stated

as follows:

“Please know that repayment of this money is very important to ProjectCorps and will be paid just as soon as we are able to. Once we return to a level of profitability that can support repayment, I will put a repayment plan in place for this amount and then turn my attention to 2012 commissions.”

CP 287-288, 290-291. Respondents argue that there “is no evidence, or even an allegation” that Peterson and Ruhl deliberately and intentionally deferred to ProjectCorps the decision of **whether to ever pay** the employees;” however, Appellants are not arguing as such and to suggest otherwise would be a **misstatement** of the issue. The issue here is whether the trial court erred when it awarded exemplary damages on summary judgment when evidence was offered supporting the conclusion that Peterson and Ruhl **intentionally and expressly agreed to defer their wages until ProjectCorps was in a better financial position**. Once in a financial position that could support the repayment, Peterson and Ruhl agreed that ProjectCorps could utilize a repayment plan. The Respondents should be bound to the terms of the agreement.

Peterson and Ruhl have cited to and relied upon the emails sent by Gaddie throughout this case, and equally, Peterson and Ruhl have **never** provided any evidence that they disagreed with or objected to the statements made in the emails. In fact, Peterson and Ruhl have argued the truth of the facts in the emails to support their claims. However, now Respondents want

to disavow the terms stated in the emails because ProjectCorps and Gaddie are relying on the language to demonstrate that Peterson and Ruhl expressly and knowingly agreed to defer their wages until ProjectCorps was in a better financial position. Respondents' contradicting positions should not be sustained.

Peterson and Ruhl's termination **did not** alter the agreement of the parties. Peterson and Ruhl's wages would have been cut if they did not agree to the different plan. CP 272. There is **no case law** that supports the conclusion that an employee should not be bound by an agreement to defer wages because the employee is terminated. A valid contract was formed and all parties received a benefit from the agreement. The Respondents only cite to and rely upon *Chelius*, 107 Wn. App. at 683, to argue that any agreement between the parties was cancelled when Peterson and Ruhl were terminated; however, *Chelius* does not apply in the manner suggested by Respondents. In *Chelius*, the evidence was straightforward. The employer, Questar, signed a compensation agreement with Chelius, which stated that if the company terminated his employment, it would pay all wages due and owing within 30 days of his separation date. *Id.* In fact, Questar did terminate Chelius' employment, but it never paid his wages. *Id.* The owner of Questar, Helenius and Tilley, pointed to evidence that the parties' contract was modified by an oral agreement that any payment of wages due

was conditioned on the company having sufficient funds at the time to pay, but Chelius testified to the contrary and Helenius admitted during trial that he signed the contract because he knew Chelius would resign unless he obtained a written assurance of payment. *Id.*

Not only are the facts disguisable, but *Chelius* was resolved at trial, not summary judgment. Appellants did not have the opportunity to present the RCW 49.52.070 exception to the trier of fact because the trial court granted summary judgment. ProjectCorps' financial position did not change for the better when Peterson and Ruhl were terminated; however, ProjectCorps still tried to work with Peterson and Ruhl to create a payment plan. ProjectCorps was operating well within the agreement of the parties, but Peterson and Ruhl initiated the underlying lawsuit contrary to their agreement to defer.

Based on the evidence submitted, Respondents are not entitled to the exemplary relief provided under RCW 49.52.070. The trial court erred when it awarded exemplary damages on summary judgment when evidence was offered that supported the conclusion that Peterson and Ruhl intentionally and expressly agreed to defer their wages until ProjectCorps was in a better financial position. ProjectCorps should have had an opportunity to present its defense before the jury.

E. Prejudgment Interest Should Not Have Been Awarded

The Respondents first assert that ProjectCorps and Gaddie somehow waived their right to challenge the award of prejudgment interest because they did not file a motion for reconsideration. This position is not supported.

First, ProjectCorps and Gaddie properly preserved their objection to the award of prejudgment interest in their Opposition to the Motion for Summary Judgment (CP 183) and during the hearing on the motion (RP 50). In addition, this issue was identified in the Notice of Appeal filed with this Court. CP 721. Appellants are not required to file a motion for reconsideration to preserve their objection or to challenge a trial court's decision on appeal.

Further the Respondents' reliance on *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983), is misplaced. In *Smith*, the court stated that the appellant argued that the trial court erred in applying the incorrect standard of care; however, the reviewing court determined that at no time did the appellant suggest to the trial court the one that should been used. *Id.* The facts and holding in *Smith* are inapposite.

Next, Respondents attempt to justify the trial court's miscalculation of prejudgment interest by ignoring the facts of the case. The Respondents are relying on contradictory positions that cannot coexist. To avoid the

creation of a material question of fact, Peterson and Ruhl did not dispute ProjectCorps' position that the Respondents expressly and knowingly agreed to defer their wages. While disputed here, Respondents argued that all wages were due at termination because any such agreement could not survive termination. While ignoring the plain language of the agreement of the parties, the trial court agreed and determined that wages were owing; however, the trial court proceeded to award interest on the amounts Respondents agreed to defer from dates of the deferments and not from the date of termination. This was an error.

Respondents seek to absolve the trial court's flaw in calculating interest by arguing that Peterson and Ruhl never agreed that the deferred wages would be interest free. However, now that it does not suit their interest, the Respondents ignore the two emails on April 8, 2013 identifying the amount of wages that had been deferred. CP 273, 287-288, 290-291. These emails, which form the basis of the Respondents' entire claim, detail the terms of the deferment and do not include interest.

F. The Award of Attorney Fees Was Not Supported

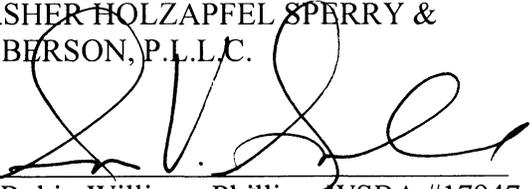
Respondents should not be awarded attorney fees on billing entries that were **not directly related to the two claims** that the trial court entered summary judgment. CP 67. ProjectCorps requested that **specific** billing entries be reduced. CP 661-666. ProjectCorps specifically identified the

entries that tended to reflect work on claims other than those related to the summary judgment order. Respondents' continued reliance on what the trial court found does not change the requirement that the only attorney fees that should be awarded are those associated with the claims filed under RCW 49.48 and RCW 49.52.

The trial court erred when it failed to segregate the hours spent on claims as to which there is a basis for a fee award from those for which there is no basis.²

Respectfully submitted this 17th day of July, 2015.

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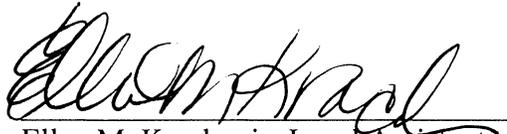
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² Appellants reserve the right to object to any award of attorney fees on appeal.

CERTIFICATE OF SERVICE

I certify that on July 17, 2015, I caused a copy of the foregoing document to be served via legal messenger to the following counsel of record for respondent:

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