

72604-8

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No. 72604-8

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

ROBERT RUHL AND PATRICIA PETERSON,

Plaintiffs/Respondents,

v.

PROJECTCORPS, LLC AND MICHELLE D. GADDIE,

Defendants/Appellants.

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUE STATEMENTS.....	1
III.	STATEMENT OF THE CASE.....	3
	A. ProjectCorps and Michelle Gaddie admitted that they withheld salary from Robert Ruhl and Patricia Peterson in 2012.	3
	B. ProjectCorps and Gaddie admitted that they withheld commissions from Ruhl and Peterson in 2012.	4
	C. ProjectCorps and Gaddie describe the four April 2013 emails as admissions.....	5
	D. ProjectCorps and Gaddie withheld wages again in 2013. ...	5
	E. Gaddie fired Ruhl and Peterson two days after they served this lawsuit.	6
	F. When litigation began, Gaddie denied owing anything.....	6
	G. ProjectCorps did not produce, and denied the existence of, documents calculating profits per project.....	7
	H. Ruhl and Peterson moved for summary judgment; Gaddie brought administrative proceedings and counterclaims.	8
	I. Gaddie also responded to the motion for summary judgment with new denials and excuses.....	9
	J. Gaddie and ProjectCorps seek to delay the summary judgment hearing so they can conduct a forensic accounting.....	10
	K. In her second opposition to summary judgment, Gaddie did not present a forensic accounting, she went on the attack. 11	
	L. ProjectCorps and Gaddie admitted again that Valenzano is not an accountant or an expert.	12

M. The trial court awarded unpaid wages under RCW 49.48 and 49.52, exemplary damages, attorney fees and prejudgment interest.	13
N. ProjectCorps and Gaddie declined to request reconsideration of the interest calculation.	13
O. The trial court awarded \$17,572.50 in attorney fees.	14
P. ProjectCorps and Gaddie did not appeal the award of unpaid wages or exemplary damages related to 2012 salary.	15
IV. ARGUMENT	15
A. Washington’s comprehensive, protective wage statutes assure the payment of wages to employees.	15
1. Through the Wage Rebate Act and Wage Payment Act, the legislature intended to assure payment of wages, costs, and attorney fees.	15
2. Washington courts vigorously enforce RCW 49.48 and RCW 49.52’s protections.	18
3. Courts narrowly construe RCW 49.52’s affirmative defense.	18
4. Courts reject “financial inability” excuses.	19
5. Courts frequently grant and affirm summary judgment for employees.	20
B. The superior court properly declined to consider the Valenzano declaration and appropriately awarded respondents 2012 commissions as a matter of law.	22
1. Valenzano’s declaration does not satisfy ER 701(a).	22
2. ER 701(c) precludes forensic accounting testimony by a lay witness.	24
3. Valenzano’s testimony is inadmissible under ER 1001-1002.	26
4. Valenzano’s testimony is inadmissible under ER 402/403.	28

5.	ProjectCorps' commission withholding was willful.....	31
C.	No evidence establishes the affirmative defense of knowing submission to unlawful withholding of wages.	33
D.	The Superior Court properly granted summary judgment awarding unpaid 2013 salary and exemplary damages.	34
1.	No ProjectCorps record supports the pay cut story.	36
2.	ProjectCorps' documents establish the 2013 withholding.	36
3.	ProjectCorps and Gaddie admitted the 2013 withholding.	37
4.	Gaddie's hearsay testimony does not create an issue of material fact.	38
5.	PC and Gaddie misstate the timing of the withholding.	39
E.	The trial court properly awarded prejudgment interest.	40
1.	ProjectCorps waived its challenge to the interest award and has not challenged \$3,374.52 of the prejudgment interest award.....	40
2.	Standard of Review.....	41
3.	The Court did not abuse its discretion by awarding prejudgment interest beginning with the date of withholding.	41
4.	The Court did not abuse its discretion by awarding prejudgment interest on commissions and 2013 salary.	42
F.	The trial court's award of attorney fees should be affirmed.....	44
1.	The fee award can be affirmed under RCW 49.48 or 49.52.	44
2.	The trial court did not manifestly abuse its discretion by awarding fees.	45

3. The trial court did not manifestly abuse its discretion in its use of the Lodestar method to set the amount of the award.46

G. Ruhl and Peterson are entitled to fees on appeal.48

H. The Court should allow immediate execution of any award of wages and exemplary damages.48

V. CONCLUSION 49

APPENDICES

TABLE OF AUTHORITIES

Cases

<i>Aubin v. Barton</i> 123 Wn. App. 592, 609-610, 98 P.3d 126 (2004)	25
<i>Bailie Commcn's, Ltd. V. Trend Bus. Sys.</i> 53 Wn.App. 77, 81, 765 P.2d 339 (1988).....	42
<i>Bailie Communications v. Trend Business Sys.</i> 61 Wn.App. 151, 162, 810 P.2d 12 (1991).....	43
<i>Bostain v. Food Express, Inc.</i> 159 Wn.2d 700, 723, 153 P.3d 846 (2007).....	43
<i>Brandt v. Impero</i> , 1 Wn. App. 678, 681, 463 P.2d 197 (1969).	21, 31, 48
<i>Cameron v. Neon Sky</i> 41 Wn. App. 219, 220, 703 P.2d 315 (1985).....	31
<i>Cf. Guile v. Ballard Comm. Hosp.</i> 70 Wn. App. 18, 26-27, 851 P.2d 689 (1993)	26
<i>Chelius v. Questar Microsystems</i> 107 Wn. App. 678, 683, 27 P.3d 681 (2001).....	33, 34
<i>Chuong Van Pham v. City of Seattle</i> 159 Wn.2d 527, 538, 151 P.3d 976 (2007).....	44
<i>City of Seattle v. Heatley</i> 70 Wn. App. 573, 579, 854 P.2d 658 (1993).....	26, 31, 44
<i>Collins v. Clark County Fire Dist. No. 5</i> 155 Wn. App. 48, 98, 231 P.3d 1211 (Div. 2, 2010).....	48
<i>Cowiche Canyon Conservancy v. Bosley</i> 118 Wn.2d 801, 808, 828 P.2d 549 (1992).....	51

<i>Cowie v. Ahrenstedt</i> 1 Wash. 416, 420, 25 P. 458 (1890)	29
<i>Dep't of Labor & Indus. V. Kaiser Aluminum & Chem. Corp.</i> 111 Wn.App. 771, 48 P.3d 324 (2002).....	41
<i>Diamond v. R&R Elecs., Inc. (In re Am. Computer & Digital Components, Inc.)</i> 2005 Bankr. LEXIS 1465, *6 (Bankr. C.D. Cal. Aug. 1, 2005).....	27
<i>Durand v. HIMC Corp.</i> 151 Wn. App. 818, 834, 214 P.3d 189 (2009).....	21, 22
<i>Durand v. HIMC Corp.</i> 151 Wn.App. 818, 837, 214 P.3d 189 (2009).....	36
E. Imwinkelreid, Evidentiary Foundations (The Mitchie Company 2nd ed. 1980), p. 191; ER 1001-1002	29
<i>Failla v. FixtureOne Corp</i> 181 Wn.2d 642, 656, 336 P.3d 1112 (2014).....	23
<i>Gaglidari v. Denny's Rest</i> 117 Wn.2d 426, 449, 815 P.2d 1362 (1991).....	19
<i>Graves v. Toyota Motor Corp.</i> 2011 U.S. Dist. LEXIS 113841, *25 (S.D. Miss. Sept. 30, 2011).....	26
<i>Hansen v. Rothaus</i> 107 Wn.2d 468, 472, 730 P.2d 662 (1986).....	47
<i>Hiskey v. City of Seattle</i> 44 Wn. App. 110, 113, 720 P.2d 867 (1986).....	34
<i>Humphrey Indus. Ltd. V. Clay St. Assocs.</i> 176 Wn.2d 662, 672, 295 P.3d 231 (2012).....	45
<i>In re Marriage of Rideout</i> 150 Wn.2d 337, 358, 77 P.3d 1174 (2003).....	44

<i>Jacks v. Blazer</i> 39 Wn.2d 277, 286, 235 P.2d 187 (1951).....	42
<i>James River Ins. Co. v. Rapid Funding, LL</i> 2011 U.S App. LEXIS 21740, *15 (10 th CIR. 20011)	25
<i>Jones v. State</i> 170 Wn.2d 338, 370, 242 P.3d 825 (2010).....	38
<i>Jumamil v. Lakeside Casino, LLC</i> 179. Wn.App. 665, 319 P.3d 868 (2014).....	18, 21, 48
<i>Landberg v. Carlson</i> 108 Wn.App. 749, 758, 33 P.3d 406 (2001).....	48
<i>Leon v. Kelly</i> 2009 U.S. Dist. LEXIS 39010, *44-45 (D.N.M. 2009).....	25
<i>Mahler v. Szucs</i> 135 Wn.2d 398, 433-34, 957 P.2d 632 (1998)	46
<i>Melville v. State of Washington</i> 115 Wn.2d 34, 36, 793 P.2d 952 (1990).....	27
<i>Moore v. Blue Frog Mobile, Inc</i> 153 Wn. App. 1, 4-5, 221 P.3d 913 (2009)	32
<i>Moore v. Hagge</i> 158 Wn. App. 137, 157, 241 P.3d 787 (2010).....	22
<i>Morgan v. Kingen</i> 166 Wn.2d 526, 538, 210 P.3d 995 (2009).....	16, 20, 21
<i>Pacific County v. Comcast of Wash. IV, Inc.</i> 184 Wn.App. 24, 75, 336 P.3d 65 (2014).....	41
<i>Polygon Nw. Co., v. Am. Nat’l Fire Ins. Co.</i> 143 Wn. App. 753, 793, 189 P.3d 777 (2008).....	42
<i>Robinson v. Avis Rent a Car Sys.</i> 106 Wn.App. 104, 121, 22 P.3d 818 (2001).....	38

<i>Rosen v. Ascentry Techs., Inc.</i> 143 Wn.App. 364, 369, 177 P.3d 765 (2008).....	42
<i>Schilling v. Radio Holdings, Inc.</i> 136 Wn.2d 152, 157, 961 P.2d 371 (1998).....	<i>Passim</i>
<i>Schmunk v. State</i> 714 P.2d 724, 735 (Wyo. 1986).....	22
<i>Smith v. Shannon</i> 100 Wn.2d 26, 37-38, 666 P.2d 351 (1983)	22, 23, 41
<i>Staff Builders v. Whitlock</i> 108 Wn.App. 928, 934, 33 P.3d 424 (2001).....	48
<i>State ex rel. A.N.C. v. Grenley</i> 91 Wn. App. 919, 927-28, 959 P.2d 1130	44
<i>State v. Fricks,</i> 91 Wn.2d 391, 397, 588 P.2d 1328 (1979).....	27
<i>State v. Maule</i> 35 Wn. App. 287, 295-96, 667 P.2d 96 (1983)	26
<i>State v. Russell</i> 125 Wn.2d 24, 70-71, 882 P.2d 747, 777 (1994)	22
<i>State v. Smith</i> 87 Wn. App. 345, 348, 941 P.2d 725 (1997).....	22, 23
<i>State v. Sua</i> 115 Wn.App. 29, 40-41	39
<i>Stevens v. Brink's Home Sec.</i> 162 Wn.2d 42, 50, 169 P.3d 473 (2007).....	43
<i>Terrell C. v. Dept. of Social and Health Services</i> 120 Wn. App. 20, 28, 84 P.3d 899 (2004).....	31

<i>Truck Ins. Exch. v. VanPort Homes, Inc.</i> 147 Wn.2d 751, 766, 58 P.3d 276 (2002).....	44
<i>Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.</i> 160 Wn. App. 912, 925, 250 P.3d 121 (2011).....	41
<i>United States v. Novaton</i> 271 F.3d 968, 1009 n.9 (11th Cir. 2001).....	25
Rules	
Fed.R.Evid. 701, 2000	24
RCW 49.48.010	17, 32, 33
RCW 49.48.030	passim
RCW 49.52	passim
RCW 49.52.050	passim
RCW 49.52.050(1) and (2)	passim
RCW 49.52.050(1)-(2).....	passim
RCW 49.52.070	passim
Other	
McCormick, Damages (Hornbook Series) § 54 (1935).....	46

I. INTRODUCTION

This case is about admissions, retaliation, denials, and delay.

II. ISSUE STATEMENTS

A willful violation of RCW 49.52 triggers a right to recover double damages and attorney fees. Willfulness only requires that the person knows what she is doing, intends what she is doing, and is a free agent. In this case, ProjectCorps' President emailed Ms. Peterson and Mr. Ruhl, admitting that ProjectCorps owed each employee commissions. But when Peterson and Ruhl sued to recover their wages, ProjectCorps terminated their employment. Did the superior court correctly conclude that the failure to pay wages was willful?

When attempting to prove the failure to pay wages was not willful, ProjectCorps submitted Ms. Valenzano's declaration, in which she purported to undertake a forensic accounting. The evidentiary rules focus on reliability of evidence and require witnesses to have personal knowledge. If a source document is available, the rules generally require the document be introduced. And of course a lay witness cannot offer an opinion that evades the reliability requirements of evidence rule 702. Did the superior court properly decline to consider Valenzano's opinions after Valenzano admitted she was not a forensic accountant, her review was "limited," she partially relied on another person, made mathematical errors and

unsupported assumptions, and failed to identify or submit the source documents she allegedly reviewed?

RCW 49.52.070 establishes one affirmative defense: if an employee knowingly submits to the unlawful withholding of wages, the employee cannot recover double damages. Knowing submission requires a finding that the employee deliberately and intentionally deferred to the employer the decision of whether they would ever be paid. Here, there is no evidence or allegation that Peterson and Ruhl agreed that ProjectCorps could choose to never pay them. Did the superior court correctly determine that the affirmative defense does not apply?

Prejudgment interest is owed when the amount is liquidated or readily calculated without the use of opinion or discretion. Here, the amounts owed were calculated by ProjectCorps and admitted in writing. Did the court correctly award prejudgment interest?

A superior court's attorney fee award is reviewed for manifest abuse of discretion. Ruhl and Peterson sought an award for 67.2 of the 111.4 hours worked by their attorney, and the court awarded less than the amount requested. The court's findings and conclusions include handwritten interlineations reflecting the court's reasoning. The ultimate attorney fee award was \$18,029.36 on a principal judgment that exceeded \$216,000. Did the superior manifestly abuse its discretion?

Both RCW 49.48 and RCW 49.52 award attorney fees to wage earners who partially or completely succeed in defending a wage judgment on appeal. Assuming Ruhl and Peterson are partially or completely successful on appeal, should this Court award them appellate attorney fees?

III. STATEMENT OF THE CASE

A. **ProjectCorps and Michelle Gaddie admitted that they withheld salary from Robert Ruhl and Patricia Peterson in 2012.**

ProjectCorps is a Washington state limited liability company. Michelle Gaddie is its sole member and president.¹ Robert Ruhl and Patricia Peterson both became employees of ProjectCorps before 2012.² Ruhl and Peterson both received salaries, payable twice per month.³

From April through July 2012, ProjectCorps withheld \$1,416.66 from each of Ruhl and Peterson's salary paychecks.⁴ In total, ProjectCorps withheld \$11,333.36 in 2012 salary from both Ruhl and Peterson.⁵

ProjectCorps admitted the withholding in writing. On April 8, 2013, Gaddie wrote to Ruhl:

As you know, Karen [Chenkovich] has done a nice job of keeping track of and we have maintained visibility of your

¹ Compare CP 21 (¶¶ 1.3 and 1.4) to CP 53; see also CP 83.

² CP 78 ¶3; CP 121 ¶3; Appellants' Brief (AB) at 4-5.

³ CP 78-79 ¶4-6; CP 121-122 ¶ 4-6; and see e.g. CP 84-89 and 126-131.

⁴ CP 119; CP 162-163; and compare CP 84-89 and 126-131 to CP 90-97 and 132-139.

⁵ *Id.* and CP 119 and 163.

2012 salary deferral since March 2012. This is itemized below.

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 will then turn my attention to 2012 commissions.

March 2012:	\$1,416.67
April 2012:	\$2,833.34
May 2012:	\$2,833.34
June 2012:	\$2,833.34
July 2012:	<u>\$1,416.67</u>
Total	\$11,333.36

Thank you,
Shelley

Gaddie sent an identical email to Peterson that same day.⁶

B. ProjectCorps and Gaddie admitted that they withheld commissions from Ruhl and Peterson in 2012.

In addition to salary, Ruhl and Peterson received commissions.⁷ As with Ruhl and Peterson's salary, ProjectCorps withheld commissions in 2012. On April 12, 2013, four days after committing in writing to pay the withheld 2012 salary, Gaddie sent an email to Ruhl, telling him:

As a follow up to a conversation I had with Patricia this week, I promised to send along a second communication confirming the deferred commission total owed to you. As

⁶ CP 119 and 162-163.

⁷ CP 79 ¶9; CP 122 ¶ 9; AB 5; and see e.g. CP 85, 86, 88, 127, 128, 130.

you know, Karen does a great job of keeping track of and maintaining visibility of this. The total amount is \$24,316.72 for commissions earned on the following projects: CTS and Tax Portal.

I have reviewed this with Karen and we believe that the numbers are accurate. If there is a discrepancy with this total, please let me know.

Thank you,
Shelley⁸

The same day, Gaddie sent a nearly identical email to Peterson admitting ProjectCorps had withheld at total of \$45,114.93 in commissions from her on five different projects. Gaddie repeated: “I have reviewed this with Karen and we believe that the numbers are accurate.”⁹

C. ProjectCorps and Gaddie describe the four April 2013 emails as admissions.

About the emails on April 8 and April 12, 2013, ProjectCorps says:

“Yes, they’re an admission;”

“There’s been no, you know, objection to the fact that the emails for 2012 articulate monies that were deferred and owing.”¹⁰

D. ProjectCorps and Gaddie withheld wages again in 2013.

After the April 8 and 12, 2013 emails, ProjectCorps delivered salary checks to Ruhl and Peterson on April 19, 2013. Those paychecks withheld

⁸ CP 119-120.

⁹ CP 162.

¹⁰ VRP 19:17; 28:24-29:1.

\$1,416.66 each.¹¹ This was the same amount ProjectCorps withheld from Ruhl and Peterson's salary checks in the middle of 2012.¹² ProjectCorps withheld \$1,416.66 for four more pay periods, for a total 2013 salary withholding from Ruhl and Peterson of \$7,833.31 each.¹³

E. Gaddie fired Ruhl and Peterson two days after they served this lawsuit.

After the 2013 withholdings, Ruhl and Peterson prepared this lawsuit seeking their unpaid wages. They served it on Gaddie on June 18, 2013.¹⁴ Gaddie fired them roughly forty hours later.¹⁵

At the time of the termination, ProjectCorps had never denied that it owed the amounts listed in the April 8 and 12, 2013 emails or the amounts withheld in 2013. Rather, ProjectCorps claims "a bona fide dispute arose following Peterson and Ruhl's termination."¹⁶

F. When litigation began, Gaddie denied owing anything.

The original complaint stated causes of action under the Wage Rebate Act (RCW 49.52), and for breach of express and implied contract, and

¹¹ Compare CP 114 and 157 (\$5,666.67) to CP 112, 113, 155, and 156 (\$7,083.33).

¹² CP 90-97 and 132-139.

¹³ CP 574 and CP 575. The end-of April salary payment was split into two checks of \$2,833.33 on April 30 and May 6, 2013 (for a total payment of \$5,666.66, and a total withholding of \$1,416.67).

¹⁴ CP 1-11; CP 763.

¹⁵ CP 49-51; CP 56 ¶ 2.63.

¹⁶ CP 165, line 2.

promissory estoppel.¹⁷ All of the causes of action sought payment of unpaid wages and an award of associated interest. The claim under RCW 49.52 also sought exemplary damages and attorney fees.¹⁸

Ruhl and Peterson amended their Complaint on July 15, 2013, to add claims for violation of the Wage Payment Act (RCW 49.48) for failure to pay all amounts owing on the next regularly scheduled payday following termination, and for wrongful termination.¹⁹

Following a motion for default, Gaddie and ProjectCorps filed their Answer on August 14, 2013, disputing, for the first time, “whether any amount is owed and if so the calculation of that amount.”²⁰

G. ProjectCorps did not produce, and denied the existence of, documents calculating profits per project.

Ruhl and Peterson’s commissions were based on the profitability of projects.²¹ Ruhl and Peterson did not understand how ProjectCorps and Gaddie could dispute the amount of commissions owed, so they asked in discovery for “all records related to revenue and profitability for all projects worked on by plaintiffs.”²² Gaddie and ProjectCorps responded, in part:

¹⁷ CP 7-10.

¹⁸ CP 7-11.

¹⁹ CP 21, 33-34.

²⁰ CP 62 ¶ 4.4. The motion for default will be included in supplemental clerk’s papers.

²¹ CP 281, sales commissions are percentage of “Gross Margin of contract.”

²² CP 485.

“There exist no records which reflect the revenue and profitability per project. To the extent that there may be any documents which are responsive and non-privileged, they will be produced upon the entry for (sic) protective order.”²³ On September 30, 2013, the Court entered a protective order to which Gaddie and ProjectCorps stipulated.²⁴

H. Ruhl and Peterson moved for summary judgment; Gaddie brought administrative proceedings and counterclaims.

Over five months passed after entry of the protective order and ProjectCorps still had not produced any documents pertaining to the revenues or profitability of projects or evidencing a basis to dispute the amounts owed.²⁵ Ruhl and Peterson moved for summary judgment on their claims under RCW 49.52 and RCW 49.48.²⁶

While the summary judgment motion was pending, Ruhl and Peterson learned that Gaddie initiated two proceedings to have them disqualified from bidding on contracts for the State of Washington and for the University of Washington.²⁷ While the summary judgment motion was on file, Gaddie

²³ CP 485.

²⁴ CP 742.

²⁵ CP 468, lines 17-20.

²⁶ CP 750.

²⁷ CP 565-569; CP 567; CP 635 ¶6; see also RCW 39.26 and WAC 200-305.

and ProjectCorps also prepared an amended answer that added counterclaims unrelated to Ruhl and Peterson's wage claims.²⁸

I. Gaddie also responded to the motion for summary judgment with new denials and excuses.

On April 3, 2014, the day their response to the motion for summary judgment was due, Gaddie and ProjectCorps filed an opposition brief with declarations from Gaddie, their attorney, and Kimberly Valenzano.²⁹ The opposition said that nothing was owed to Ruhl and Peterson.³⁰ ProjectCorps and Gaddie claimed, for the first time, that ProjectCorps had actually cut Ruhl and Peterson's pay in 2013, rather than withholding part of it.³¹ The opposition also claimed, for the first time, that after Ruhl and Peterson were terminated, ProjectCorps began to believe that it had overpaid Ruhl and Peterson's commissions.³² That claim was based solely on the declaration of Valenzano, who admitted: "I am not a forensic accountant."³³

Valenzano said her testimony was based on her review of the "original timesheet records, accounting records, and expense data/reports" for projects on which Ruhl and Peterson worked—the very records

²⁸ CP 430, 444-447.

²⁹ CP 164, 192, 233, and 269.

³⁰ CP 164 ("Defendants...request that the Court deny Plaintiffs' Motion in full.")

³¹ CP 181, lines 24-26.

³² CP 170, section 5.

³³ CP 234.

ProjectCorps and Gaddie had not produced to Ruhl and Peterson on the ground that they did not exist.³⁴ Valenzano said she had reviewed “spreadsheets;” “commission schedules;” “timesheet records;” “payroll records;” and “accounting records” showing payments to Peterson on October 21, 2011 and November 4, 2011.³⁵

Valenzano’s declaration did not attach a single “spreadsheet,” “timesheet record,” or “payroll record.” It did not attach any record of payments to Peterson on October 21, 2011 or November 4, 2011. It attached nothing but five documents Valenzano herself created for purposes of opposing summary judgment;³⁶ an email purporting to transmit the commission plan in 2011; and documents Valenzano calls “commission schedules,” which are based on revenue and hours-worked figures from other sources that Valenzano did not provide to the Court.³⁷

J. Gaddie and ProjectCorps seek to delay the summary judgment hearing so they can conduct a forensic accounting.

The day they opposed the motion for summary judgment, ProjectCorps and Gaddie filed a motion for more time to respond, stating:

“Defendants are presently undertaking a forensic accounting of their records to determine whether in fact there was an underpayment of wages and/or commissions

³⁴ CP 236 at 20-21; CP 237 at 5-6, 16-17; CP 238 at 4-5, 17-18; CP 239 at 11-12.

³⁵ CP 234 at 8, 9, 24; CP 235 at 1-2, 17, 19-20.

³⁶ CP 245, 248, 250, 254, 258 (all dated “2014”).

³⁷ E.g. CP 243, 244, 247.

to Plaintiffs. The proposed continuance would provide Defendants the chance to complete their forensic accounting.”³⁸

ProjectCorps and Gaddie requested a continuance of three months.³⁹

Ruhl and Peterson voluntarily re-noted the motion for summary judgment an additional 25 days out, to a date when the assigned judge had an open calendar spot.⁴⁰ The motion for continuance was denied.⁴¹

K. In her second opposition to summary judgment, Gaddie did not present a forensic accounting, she went on the attack.

On April 28, 2014, ProjectCorps and Gaddie filed their supplemental opposition to the motion for summary judgment.⁴² The supplemental opposition repeated the claim “Defendants are presently undertaking a forensic accounting of their records.”⁴³ But it made no mention of any forensic accountant or any progress since April 3. The only new elements of the supplemental opposition were several sentences alleging pre- and post-employment misconduct by Ruhl and Peterson. Otherwise, the supplemental opposition was a verbatim copy of the April 3, 2014,

³⁸ CP 422 at 3-6. See also CP 415 at 22-23; CP 428 ¶5.

³⁹ CP 750 (April 14, 2014 noting date); CP 422 (requesting a July 15, 2014 noting date).

⁴⁰ CP 752; CP 466, lines 19-22.

⁴¹ CP 517.

⁴² CP 525, et seq.

⁴³ CP 542, lines 15-16.

opposition.⁴⁴ ProjectCorps did not submit any new evidence aside from Ruhl and Peterson’s Reply to Gaddie and ProjectCorps’s counterclaims.⁴⁵

L. ProjectCorps and Gaddie admitted again that Valenzano is not an accountant or an expert.

On May 9, 2014, the trial court heard oral arguments on the motion for summary judgment. At oral argument, ProjectCorps and Gaddie admitted:

“[Valenzano is] not testifying as an expert...She is not a forensic accountant.”

“There’s no specific scientific or technical requirement that is necessary for her to identify a spreadsheet that was created by the former bookkeeper and comparing that with the records that the company has that relate to that project.”⁴⁶

Despite this description of what Valenzano did, ProjectCorps and Gaddie never produced a single spreadsheet purportedly reviewed by Valenzano, or any project-related records to which she compared a spreadsheet (other than the summary commission schedules).

ProjectCorps and Gaddie admitted that challenging the commission calculation in ProjectCorps’s business records for a particular project would require “going to that file and looking to see what was accounted for.”⁴⁷ But they never produced any records from any project files.

⁴⁴ Compare CP 164 *et seq.* to CP 525 *et seq.* (specifically CP 546-548).

⁴⁵ CP 552.

⁴⁶ VRP 22:12, 14; 22:22-23:1.

⁴⁷ VRP 24:5-6.

M. The trial court awarded unpaid wages under RCW 49.48 and 49.52, exemplary damages, attorney fees and prejudgment interest.

At the conclusion of the May 9 hearing on the motion for summary judgment, the trial court ruled in favor of Ruhl and Peterson and signed the Order Granting Partial Summary Judgment.⁴⁸ The trial court ruled that ProjectCorps and Gaddie were jointly and severally liable to Ruhl and Peterson under RCW 49.48 and 49.52 for unpaid wages in amounts equal to their withheld 2012 salary, their withheld 2012 commissions, and their withheld 2013 salary: \$42,733.39 for Ruhl and \$65,531.60 for Peterson.⁴⁹ The court awarded exemplary damages under RCW 49.52 in amounts equal to the withheld wages. The court awarded interest on all of those amounts and awarded attorneys' fees to Ruhl and Peterson in amounts to be determined separately.⁵⁰

N. ProjectCorps and Gaddie declined to request reconsideration of the interest calculation.

After the Court had ruled that it would sign the Partial Summary Judgment Order, ProjectCorps and Gaddie mentioned that it opposed the

⁴⁸ VRP 49:6-25.

⁴⁹ CP 595: \$11,333.36 (2012 salary) + \$24,316.72 (2012 commissions) + \$7083.31 (2013 salary) for Ruhl and \$11,333.36 (2012 salary) + \$45,114.93 (2012 commissions) + \$7083.31 (2013 salary) for Peterson.

⁵⁰ CP 595: \$8,788.74 in interest for Ruhl and \$13,151.57 in interest for Peterson.

“manner in which interest is calculated.”⁵¹ The Court suggested that “having fully argued the case, your remedy might be to make a motion to reconsider some portion of the Court’s ruling.”⁵² ProjectCorps and Gaddie did not move for reconsideration or otherwise address the interest calculation.

O. The trial court awarded \$17,572.50 in attorney fees.

After the summary judgment order, “Plaintiffs provided reasonable documentation of [111.4] hours expended by their attorney.”⁵³ In order not to request fees that weren’t directly related to the summary judgment victory, Ruhl and Peterson only asked for an award of fees for 63.2 of the 111.4 hours worked, plus four more hours they expected to spend completing tasks related to the fee petition.⁵⁴ The trial court only awarded fees for 63.9 of the 67.2 total hours requested.⁵⁵ The total award was \$17,572.50 in attorney fees, \$18,029.36 with costs. This amounts to roughly 8.3% of the wages and exemplary damages awarded.

⁵¹ VRP 50:5.

⁵² VRP 50:10-14.

⁵³ CP 703, Finding 13 reads “11.4.” But this appears to be a typographical error. The number of hours documented by plaintiffs was 111.4. See CP 650.

⁵⁴ CP 636-7 ¶ 9.

⁵⁵ CP 704 ¶ 6.

P. ProjectCorps and Gaddie did not appeal the award of unpaid wages or exemplary damages related to 2012 salary.

On September 19, 2014, the trial court entered a judgment consistent with its summary judgment order and award of attorney fees.⁵⁶ On October 15, 2014, ProjectCorps and Gaddie filed their notice of appeal. They did not appeal the award of unpaid 2012 salary. They did not appeal the award of exemplary damages on that unpaid 2012 salary, or the award of fees incurred in prevailing on the claim for 2012 unpaid salary and related exemplary damages. They did not appeal the trial court’s decision to hold Gaddie jointly and severally liable with ProjectCorps.⁵⁷

IV. ARGUMENT

A. Washington’s comprehensive, protective wage statutes assure the payment of wages to employees.

1. Through the Wage Rebate Act and Wage Payment Act, the legislature intended to assure payment of wages, costs, and attorney fees.

Washington State is “a pioneer in assuring payment of wages due an employee.”⁵⁸ Washington’s wage statutes grant employees “nonnegotiable, substantive rights” regarding the payment of wages.⁵⁹ “The Legislature has evidenced a strong policy in favor of payment of

⁵⁶ CP 716.

⁵⁷ CP 720.

⁵⁸ *Champagne v. Thurston County*, 163 Wn.2d 69, 76, 178 P.3d 936 (2008).

⁵⁹ *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157, 961 P.2d 371 (1998).

wages due employees by enacting a comprehensive scheme to ensure payment of wages, including the statutes at issue here which provide both criminal and civil penalties for the willful failure of an employer to pay wages.”⁶⁰ The “preferential” statutes enacted by the Washington legislature include the Wage Rebate Act (RCW 49.52) and the Wage Payment Act (RCW 49.48).⁶¹

RCW 49.42 reflects a “strong legislative intent to assure payment to employees of wages they have earned.”⁶² “The act is thus primarily a protective measure...”⁶³ RCW 49.52 prohibits paying an employee “a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract.”⁶⁴ RCW 49.52 then imposes personal liability on any employer, officer, vice principal, or agent who underpays an employee “willfully and with intent to deprive the employee of any part of his or her wages.”⁶⁵ In addition to personal liability, the RCW 49.52 provides for double damages, costs and attorney fees:

RCW 49.52.070. Civil liability for double damages.

⁶⁰ *Id.*

⁶¹ *Morgan v. Kingen*, 166 Wn.2d 526, 538, 210 P.3d 995 (2009).

⁶² *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159.

⁶³ *Id.*

⁶⁴ RCW 49.52.070(2).

⁶⁵ RCW 49.52.070(1).

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) and (2) shall be liable in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

Similar to RCW 49.52, the Wage Payment Act (RCW 49.48) contains both criminal and civil liability for employers. RCW 49.48 makes it unlawful for an employer to “withhold or divert any portion of an employee’s wages unless the deduction is specifically agreed upon orally or in writing by the employee and employer.”⁶⁶ RCW 49.48 allows an employee to recover “wages due to him or her.” Further, it provides for the recovery of attorney fees “in any action in which any person is successful in recovering judgment for wages or salary owed to him or her.”⁶⁷ In one important respect, RCW 49.48 strengthens RCW 49.52. RCW 49.48 applies at the moment an employee’s employment terminates. By doing so, RCW 49.48 “mandated that employers pay employees all wages due upon the conclusion of the employment relationship.”⁶⁸

⁶⁶ RCW 49.48.010(2).

⁶⁷ RCW 49.48.030.

⁶⁸ *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d at 157.

2. Washington courts vigorously enforce RCW 49.48 and RCW 49.52's protections.

Washington courts vigorously enforce these comprehensive legislative enactments by interpreting the protective language in RCW 49.48 and RCW 49.52 expansively. “The statute must be liberally construed to advance the Legislature’s intent to protect employee wages and assure payment.”⁶⁹ Applying this principle in *Gaglidari v. Denny’s Rests*, 117 Wn.2d 426, 449, 815 P.2d 1362 (1991)., for example, Washington’s Supreme Court construed RCW 49.48 “broadly to include both back pay and front pay awards.”⁷⁰ Similarly, Washington courts routinely award recovery of attorney fees under RCW 49.48 and RCW 49.52 even when a plaintiff only partially succeeds at the superior court level or on appeal.⁷¹

3. Courts narrowly construe RCW 49.52's affirmative defense.

At the same time, Washington courts narrowly construe RCW 49.52’s affirmative defense. The last clause of RCW 49.52.070 allows an employer to avoid paying double damages if it establishes that an employee “knowingly submitted” to a violation of RCW 49.52.050(1)-(2).

⁶⁹ *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159, 961 P.2d 371 (1998).

⁷⁰ 117 Wn.2d 426, 449, 815 P.2d 1362 (1991).

⁷¹ See *Jumamil v. Lakeside Casino, LLC*, 179 Wn.App. 665, 319 P.3d 868 (2014) (partial appellate attorney fees awarded for prevailing on RCW 49.52 claim), and *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159, 961 P.2d 371 (1998) (“by providing for costs and attorney fees, the Legislature has provided an effective mechanism for recovery even where wage amounts wrongfully withheld may be small.”).

But as the court in *Chelius v. Questar Microsystems* explained, an employee does not “knowingly submit to unlawful withholding of wages by simply staying on the job after the employer fails to pay.”⁷² “[T]o have ‘knowingly submitted’ to the unlawful withholding of wages, the employees must have deliberately and intentionally deferred to [the employer] the decision of whether they would ever be paid.” Other judicial opinions similarly restrict the affirmative defense.⁷³

4. Courts reject “financial inability” excuses.

A second manner in which Washington courts vigorously enforce statutory protections of wage earners is by refusing to create judicial exceptions to liability. Put differently, courts have rebuffed employer’s excuses for failing to pay wages. The most prominent example is an employer who attempts to evade liability by asserting financial inability. Every single opinion rejects the excuse. The Washington Supreme Court first addressed the issue in *Schilling v. Radio Holdings, Inc.*⁷⁴ The employer’s President tried to avoid personal liability for double damages, costs, and attorney fees by asserting that he believed an acquirer would pay the wages owed to employees. The person seeking wages submitted a

⁷² 107 Wn. App. 678, 683, 27 P.3d 681 (2001).

⁷³ *Durand v. HIMC Corp.*, 151 Wn.App. 818, 837, 214 P.3d 189 (2009).

⁷⁴ 136 Wn.2d 152, 961 P.2d 371 (1998).

declaration in which she acknowledged that the President “had a concern for our back pay” and that he “honestly believed that we were covered.” The court declined “to engraft a financial inability defense onto RCW 49.52.070.”⁷⁵ Subsequent opinions have been even more forceful. In *Morgan v. Kingen*, the court rejected the corporation’s bankruptcy as an excuse to personal liability: “We decline to expand the defenses to negate a finding of willfulness to include financial status, specifically chapter 7 liquidation.”⁷⁶ This court should ignore the appellant’s lengthy, repeated assertions of financial hardship; financial inability is irrelevant. As numerous opinions recognize, employers and their officers have decision-making power to continue operating in light of financial reversals or cease doing business, and employers and officers decide who goes unpaid.⁷⁷

5. Courts frequently grant and affirm summary judgment for employees.

A third way in which superior and appellate courts vigorously enforce the protections of RCW 49.52 and RCW 49.48 is by granting (and affirming) summary judgment in favor of employees seeking recovery of their wages. In many cases, as in this case, the appellant argues that the

⁷⁵ 136 Wn.2d 152, 154.

⁷⁶ 166 Wn.2d 526, 538, 210 P.3d 995 (2009); *see also Durand v. HIMC Corp.*, 151 Wn. App. 818, 834, 214 P.3d 189 (2009).

⁷⁷ *Morgan v. Kingen*, 166 Wn.2d 526, 536-37.

element of “willfulness” raises an issue of material fact. But the interpretation of a “willful failure to pay has not been stringent: the employer’s refusal to pay must be volitional.”⁷⁸ Proving willfulness only requires that the person knew what she was doing, intends what she was doing, and is a free agent.⁷⁹ Applying this standard, courts affirmed summary judgment in *Schilling v. Radio Holdings, Inc.*,⁸⁰ *Morgan v. Kingen*,⁸¹ and six months ago, in *Failla v. FixtureOne Corp* ,181 Wn.2d 642, 656, 336 P.3d 1112 (2014).⁸² In *Jumamil v. Lakeside Casino, LLC*, the court found that the superior court erred by *not* granting summary judgment to the employee seeking wages. *Jumamil* even held that the employer’s absentee owner who was unaware that the employee had not been paid at the time wages were withheld was personally liable for willfully withholding the wages because he did not promptly pay her after learning of the withholding. And although the employee had been paid the wages in the interim, the court remanded for an award of attorney fees and costs related to the wage claim.⁸³

⁷⁸ *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159.

⁷⁹ *Brandt v. Impero*, 1 Wn. App. 678, 681, 463 P.2d 197 (1969).

⁸⁰ 136 Wn.2d at 160.

⁸¹ 166 Wn.2d at 533.

⁸² 181 Wn.2d 642, 656, 336 P.3d 1112 (2014).

⁸³ 179 Wn.App. 665, 686, 319 P.3d 868 (2014).

B. The superior court properly declined to consider the Valenzano declaration and appropriately awarded respondents 2012 commissions as a matter of law.

1. Valenzano’s declaration does not satisfy ER 701(a).

ER 701 substantially limits opinion testimony of non-experts by establishing three hurdles: (i) the testimony must be “rationally based on the perception of the witness,” (ii) it must be helpful, and (iii) it cannot be based on technical or other specialized knowledge that is within the scope of ER 702. The first hurdle incorporates the “personal knowledge” requirement of ER 602: “Under Rule 701, the witness must have perceived firsthand the pertinent events or matters, and his inferences or opinion must be rationally based on his perception; his testimony must be rejected if his firsthand observation was inadequate to support an opinion.”⁸⁴ “Under Rule 701 and Rule 602, the witness must have personal knowledge of matter that forms the basis of opinion testimony; the testimony must be based rationally upon the perception of the witness; and of course, the opinion must be helpful to the jury (the principal test).”⁸⁵ The proponent has the burden of establishing the foundation.⁸⁶

⁸⁴ *Schmunk v. State*, 714 P.2d 724, 735 (Wyo. 1986).

⁸⁵ *State v. Russell*, 125 Wn.2d 24, 70-71, 882 P.2d 747, 777 (1994); see also *Moore v. Hagge*, 158 Wn. App. 137, 157, 241 P.3d 787 (2010) (plaintiff’s opinion testimony inadmissible under ER 701 because plaintiff admitted he had no recollection of events).

⁸⁶ CR 56(e); *State v. Smith*, 87 Wn. App. 345, 348, 941 P.2d 725 (1997).

Valenzano testified that she partially relied on information created or evaluated by Linda Julien, who did not testify: “I hired a bookkeeper (Linda Julien) to help me. Linda also assisted with the project audit of expense data and invoice/payment records for vendors and staff.”⁸⁷ Reliance on a report from someone else is not personal knowledge.⁸⁸

Valenzano was not employed at ProjectCorps in 2011-2012; she became employed on June 25, 2013, *after* ProjectCorps terminated Peterson and Ruhl.⁸⁹ Valenzano is not an owner of ProjectCorps.⁹⁰ Valenzano provided no information about her education or qualifications; she only identified work experience as a chemist.⁹¹ Valenzano acknowledges that she is “not a forensic accountant.”⁹² Due to her lack of personal knowledge, her reliance on Julien, and because she only undertook a “limited review,” Valenzano couched her opinion as a “belief”: “I believe from my review of the data...”⁹³ Because Valenzano relied on Linda Julien, and Valenzano

⁸⁷ CP 234 (lines 3-4).

⁸⁸ *State v. Smith*, 87 Wn. App. 345, 352, 941 P.2d 725 (1997) (pilot testimony about Aerial Traffic Surveillance Marks painted by WSDOT inadmissible because not based on personal knowledge).

⁸⁹ CP 234 (line 1); CP 49-51; CP 56 ¶ 2.63.

⁹⁰ CP 233 (line 22)

⁹¹ CP 233 (line 26).

⁹² CP 234 (line 5).

⁹³ CP 235 (line 10). A belief is not personal knowledge. *State v. Smith*, 87 Wn. App. 345, 351, 941 P.2d 725 (1997) (ER 602 “bars testimony purportedly relating facts, when they are based only on the reports of others. Personal knowledge of a fact cannot be based on the statement of another.”).

acknowledges she did not create any of the documents she reviewed, her testimony does not satisfy ER 701(a) and ER 602 and the superior court properly disregarded it.

2. ER 701(c) precludes forensic accounting testimony by a lay witness.

The United States Supreme Court amended FRE 701 in 2000 and the Washington Supreme Court followed suit in 2004. The amendments added subsection (c):

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702. [ER 701].

“Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”⁹⁴ “The stated purpose behind the 2000 amendments was "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering

⁹⁴ Fed.R.Evid. 701, 2000 Advisory Committee Notes; see also *Graves v. Toyota Motor Corp.*, 2011 U.S. Dist. LEXIS 113841, *25 (S.D. Miss. Sept. 30, 2011) (by the 2000 amendment to Rule 701, opinion testimony by a lay witness is properly excluded under the Rule if the opinion is more appropriately within the province of an expert witness).

an expert in lay witness clothing."⁹⁵ For example, in *James River Ins. Co. v. Rapid Funding, LLC* 2011 U.S App. LEXIS 21740, *15 (10th CIR. 20011), the court affirmed the exclusion of testimony in which a lay witness attempted to calculate a post-fire estimate of the pre-fire value of a dilapidated, condemned, 39-year old building.⁹⁶

In this case, ProjectCorps asked the court for more time to complete a “forensic accounting;” ProjectCorps understood the necessity of expert witness testimony.⁹⁷ Forensic accountants are regularly admitted to give expert witness testimony.⁹⁸ And crucial parts of Valenzano’s testimony require specialized knowledge within the ambit of an expert. For example, Valenzano analyzed the 2011 commissions paid on the Five Cities Project.⁹⁹ The project used two consultants (Kaufman and Peterson). Valenzano made an “assumption” that Kaufman spent 6% or 18.5 hours on administrative matters and that Peterson “spent 10% of the twenty week project managing

⁹⁵ *United States v. Novaton*, 271 F.3d 968, 1009 n.9 (11th Cir. 2001).

⁹⁶ 2011 U.S. App. LEXIS 21740, *15 (10th Cir. 2011).

⁹⁷ CP 422 at 3-6. See also CP 415 at 22-23; CP 428 ¶ 5.

⁹⁸ See, e.g., *Leon v. Kelly*, 2009 U.S. Dist. LEXIS 39010, *44-45 (D.N.M. 2009) (forensic accountant admitted as expert to testify about damages); *Diamond v. R&R Elecs., Inc. (In re Am. Computer & Digital Components, Inc.)*, 2005 Bankr. LEXIS 1465, *6 (Bankr. C.D. Cal. Aug. 1, 2005) (witness who lacked formal title of “forensic accountant” had sufficient knowledge and experience to qualify to testify on “forensic accounting” matters); and *Aubin v. Barton*, 123 Wn. App. 592, 609-610, 98 P.3d 126 (2004) (CPA qualified to give stock option grant opinion).

⁹⁹ CP 237.

project/staff/vendors (80 hours).”¹⁰⁰ Based on her arbitrary “assumption,” she then reduced the project’s “gross margin.” CF. CP 245 with CP 243. For another project, Valenzano inconsistently assumed a 12% administrative burden for Peterson.¹⁰¹ Qualified experts must support “assumptions” with underlying facts or data of a type reasonably relied upon by experts in the field.¹⁰² Without explanation, Valenzano also changed the hourly rate applied to Peters from \$95.00 to \$102.70. CP 243, 243. Here, ProjectCorps tried to evade the reliability requirements of ER 702.¹⁰³ Because forensic accounting is “specialized knowledge within the scope of Rule 702,” a lay witness cannot offer a forensic accounting opinion.¹⁰⁴

3. Valenzano’s testimony is inadmissible under ER 1001-1002.

Testimony that does not violate ER 701 may be inadmissible due to other evidentiary principles.¹⁰⁵ “The best evidence rule excludes secondary evidence of a writing’s contents; the rule expresses a preference for the

¹⁰⁰ CP 237 (lines 9-10). Valenzano’s Five Cities Project calculations include mathematical errors. Chenkovich recorded Kaufman with 363 hours. Adding 18.5, the Valenzano total should be 381.5. But Valenzano’s new calculation records 426 hours. Peterson’s original hours were recorded as 61; Valenzano added 80. But her new calculation says 142.5, not 141. *Id.*

¹⁰¹ CP 238 (line 26).

¹⁰² *State v. Maule*, 35 Wn. App. 287, 295-96, 667 P.2d 96 (1983) (reversible error to admit expert testimony unsupported by adequate foundation).

¹⁰³ *Cf. Guile v. Ballard Comm. Hosp.*, 70 Wn. App. 18, 26-27, 851 P.2d 689 (1993) (physician’s declaration did not create issue of material fact because it was merely a summarization of post-surgical complications, coupled with unsupported conclusion).

¹⁰⁴ ER 701(c).

¹⁰⁵ *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993).

more reliable evidence, the writing itself.”¹⁰⁶ Washington courts routinely refuse to admit testimony that attempts to reprise available documents. In *Cowie v. Ahrenstedt*,¹⁰⁷ the court excluded testimony about ownership of property and a lease because the written lease was available. In *State v. Fricks*,¹⁰⁸ the Washington Supreme Court reversed the superior court for admitting a store manager’s testimony about the amount of money stolen: testimony about the contents of a “tally sheet” was inadmissible because the tally sheet was available and perhaps not even admissible as a business record. When testimony purports to recap documents but is not accompanied by the source documents, the testimony violates the best evidence rule and fails to satisfy Civil Rule 56(e).¹⁰⁹ Valenzano made sweeping assertions such as “significant staff hours were not assigned” and “staff effort was under reported.” CP 237 (line 24), 237 (line 8). But because Valenzano failed to introduce available source records, the superior court properly refused to consider her arbitrary records recap.

¹⁰⁶ E. Imwinkelreid, *Evidentiary Foundations* (The Mitchie Company 2nd ed. 1980), p. 191; ER 1001-1002.

¹⁰⁷ *Cowie v. Ahrenstedt*, 1 Wash. 416, 420, 25 P. 458 (1890).

¹⁰⁸ *State v. Fricks*, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979).

¹⁰⁹ *Melville v. State of Washington*, 115 Wn.2d 34, 36, 793 P.2d 952 (1990) (court properly refused to consider attorney declaration reciting information from various records, files, and reports).

4. Valenzano's testimony is inadmissible under ER 402/403.¹¹⁰

Distilling her declaration, Valenzano has two opinions. First, ProjectCorps overpaid Ruhl and Peterson for commissions in 2011.¹¹¹ This opinion is irrelevant to the motion for summary judgment. ER 402. The motion sought commissions owed for 2012, the amounts admitted by Gaddie.¹¹² Valenzano's opinion about 2011 commission might support a counterclaim for overpayment, but it does not create an issue of material fact about 2012 commissions owed.

Valenzano's second opinion is that ProjectCorps owes Ruhl and Peterson 2012 commissions, but the amount owed is less than Chenkovich calculated and Gaddie previously admitted.¹¹³ This opinion is misleading and irrelevant because (i) it applies the wrong commission plan and (ii) Valenzano failed to use the commission plan's definition of "Gross Margin."

The record contains three Referral & Sales Commission Compensation plans: May 18, 2011, November 1, 2011, and January 26, 2012. CP 281, 283, 285. For purposes of this appeal, there is no substantive difference

¹¹⁰ A reviewing court may affirm on any ground when the record is sufficiently developed. RAP 2.5(a).

¹¹¹ CP 235 (¶¶ 4-6), 236-237.

¹¹² CP 74; Brief of Appellants at p. 2.

¹¹³ CP 238-239 & CP 236 (¶ 7).

between the May and November 2011 plans; the commission rate under the 2011 plans was 25%. The January 26, 2012 plan reduced the commission rate to 18%. But the January 26, 2012 grandfathered the 2011 25% commission rate for projects started before January 26, 2012: “Commission plan in effect when contract is endorsed will remain in effect.”¹¹⁴

Valenzano was unaware of or ignored the grandfather clause. She testified “starting in 2012, the commission rate was changed from 25% of Gross margin to 18% of Gross Margin.”¹¹⁵ Thus, Valenzano applied 18% to work performed in 2012 on the Tax Portal project and other projects for which commissions were earned in 2012.¹¹⁶ But the Tax Portal project (as well as the other projects referenced by Valenzano) were endorsed in 2011, they are subject to the 2011 Commission Plan, and 25% is the applicable commission rate.¹¹⁷ Valenzano’s testimony is misleading and irrelevant because she applied the wrong commission plan. Put differently, Gaddie correctly complimented the calculations done by ProjectCorps’ bookkeeper, Karen Chenkovich: “As you know, Karen does a great job of keeping track of and maintaining visibility of this [commissions].”¹¹⁸

¹¹⁴ CP 285 (“Guidelines”).

¹¹⁵ CP 236 (¶ 7).

¹¹⁶ CP 258, CP 238 (line 6), 239 (lines 4-5 and lines 15-16).

¹¹⁷ CP 250; CP 261-263; CP 267; CP 235 at 17; CP 277 at 11; CP 568.

¹¹⁸ CP 162, 119.

Valenzano also refused to use the commission plan's definition of Gross Margin. The 2011 Commission Plan defined Gross Margin "as the result of gross revenue minus cost of consultant. Commission percentages are calculated upon Gross Margin of contract."¹¹⁹ Valenzano disregarded the definition of Gross Margin when she deducted "expenses," "vendor costs," and "staff administrative hours" in addition to the cost of consultants.¹²⁰

Every calculation of Valenzano's deducted unidentified, unsupported "expenses."¹²¹ Valenzano deducted unverified "vendor payments."¹²² Valenzano also deducted amounts for "administrative hours" "for staff and management of project team based on the assumption that 6% administrative hours for effort..."¹²³ Finally, Valenzano inflated the number on consultant hours in her calculations.¹²⁴

¹¹⁹ CP 281, 283.

¹²⁰ CP 236-237 (see bullet points explaining deductions made by Valenzano).

¹²¹ CP 245 (\$131.98), 248 (\$2,491.93), 250 (\$2,786.23), 254 (\$4,004.80), and 258 (\$1,286.49).

¹²² CP 245 (\$1,575 for "paid invoices"), 248 (\$41,027.50 for "paid invoices"), 250 (\$30,883.75 for "paid invoices"), 254 (\$38,180.80 in "paid invoices"), and 258 (\$59,326.50 for "paid invoices").

¹²³ CP 238 (line 24), see also 237 (line 9 – "assumption that 6% of Kaufman's effort spent on admin"), and CP 237 (line 20 – "staff 12% of project duration assigned as administrative hours").

¹²⁴ For each of the following quarters, the calculation performed by Ms. Chenkovich will be listed first, followed by the hours listed by Ms. Valenzano. Five Cities (2nd Qtr. 2011): Cf. CP 243 (Kaufman hours = 20 and Peterson Hours = 3) with CP 245 (Kaufman hours = 28.5 and Peterson hours = 8.5). Five Cities (3rd Qtr. 2011): Cf. CP 247 (Kaufman hours = 363 and Peterson hours = 61) with CP 248 (Kaufman hours = 426 and Peterson hours = 142.5). CTS (4th Qtr. 2011): Cf. CP 250 (Kaufman hours = 0, Ruhl hours = 145, and Peterson hours = 85.5) with CP 251 (Kaufman hours = 97, Ruhl hours = 202.5, and

Valenzano's disregard of the Gross Margin definition was deliberate: she testified that ProjectCorps had a "policy that Gross Margin meant subtracting the expense from the gross profits."¹²⁵ Valenzano did not provide this supposed "policy." Valenzano was not employed by ProjectCorps when the "policy" was in effect; hence, she lacked personal knowledge. Valenzano's deliberate disregard of the commission plan's definition of Gross Margin renders her opinion misleading and irrelevant.¹²⁶

5. ProjectCorps' commission withholding was willful.

A failure to pay wages is willful if it is volitional.¹²⁷ Proving willfulness only requires that the person knew what she was doing, intends what she was doing, and is a free agent.¹²⁸ The failure to pay 2012 commissions was willful. Even if the court considers the Valenzano April 2014 declaration, it does not create a "bona fide dispute" about wages owed for 2012. A "bona fide dispute" must be contemporaneous with the obligation to pay wages. *Cameron v. Neon Sky* involved a part-owner who managed a business.

Peterson hours = 162.5). UW Medicine (1st Qtr. 2012): Cf. CP 265 (Thorpe hours = 260.5 and Peterson hours = 40.5) with CP 264 (Thorpe hours = 332.5 and Peterson hours = 47).

¹²⁵ CP 236 (line 12).

¹²⁶ ER 402, 403; cf. *Hiskey v. City of Seattle*, 44 Wn. App. 110, 113, 720 P.2d 867 (1986) (expert's opinion applying standard for use of a chattel inadmissible because the cable was not a "chattel"); *Terrell C. v. Dept. of Social and Health Services*, 120 Wn. App. 20, 28, 84 P.3d 899 (2004) (expert opinion on legal duty inadmissible because it conflicted with applicable legal standard and because legal opinions are generally inadmissible).

¹²⁷ *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159.

¹²⁸ *Brandt v. Impero*, 1 Wn. App. 678, 681, 463 P.2d 197 (1969).

Without telling the other owners, the manager increased his salary.¹²⁹ The other owners terminated him. From his final paycheck, they deducted the salary increases the manager paid himself, but acknowledged the full amount of the manager's wages and severance. Because the deduction was not "a mere ruse to deprive him of wages," the court held the deduction was not willful.¹³⁰ Similarly, in *Moore v. Blue Frog Mobile, Inc.*, the employer ceased severance payments on August 31, 2007 after learning of an August 8, 2007 declaration that the employer contended breached a non-disparagement clause in the severance agreement.¹³¹

In this case, willfulness exists as a matter of law.¹³² First, Valenzano admits that ProjectCorps has failed to pay Peterson and Ruhl 2012 commission; she only asserts that the amount owed is less than Gaddie admitted.¹³³ Yet ProjectCorps has refused to pay any portion of the 2012 commissions. Second, an employer's April 2014 attempt at a forensic accounting is not evidence of a bona fide dispute on June 20, 2013, the date on which ProjectCorps was obligated to pay Peterson and Ruhl their wages. RCW 49.48.010. ProjectCorps willfully failed to pay 2012 commissions to

¹²⁹ 41 Wn. App. 219, 220, 703 P.2d 315 (1985).

¹³⁰ 41 Wn. App. 219, 222. Nevertheless, the court held the employer violated RCW 49.48.

¹³¹ 153 Wn. App. 1, 4-5, 221 P.3d 913 (2009).

¹³² See Section IV(A)(5) above.

¹³³ CP 238 (lines 16 and 19).

Peterson and Ruhl, entitling them to their commissions, double damages, and attorney fees.¹³⁴

C. No evidence establishes the affirmative defense of knowing submission to unlawful withholding of wages.

The narrow affirmative defense to an award of exemplary damages and attorney fees under RCW 49.52.070 is only available to an employer where the employee “knowingly submits” to a violation of RCW 49.52.050. An employee only knowingly submits to unlawful withholding of wages if she deliberately and intentionally defers to the employer the decision of whether to ever pay the employee.¹³⁵ There is no evidence, or even an allegation, of any such agreement by Ruhl and Peterson. Instead, ProjectCorps and Gaddie claim only “Peterson and Ruhl expressly agreed to defer their wages until ProjectCorps was in a better financial position.”¹³⁶ This allegation does not come close to satisfying the elements of the affirmative defense—there is no claim of a deliberate and intentional ceding to ProjectCorps of the power to choose to never pay.

The evidence ProjectCorps cites is even weaker. It is a single paragraph of Gaddie’s declaration, claims there was an agreement to defer salary (not

¹³⁴ RCW 49.48.010, 49.48.030, 49.52.050(2), 49.52.070.

¹³⁵ *Chelius v. Questar Microsystems* 107 Wn. App. 678, 683, 27 P.3d 681 (2001); *Durand v. HIMC Corp.*, 151 Wn.App. 818, 837, 214 P.3d 189 (2009).

¹³⁶ AB 7, citing CP 272.

commissions) for the purpose of funding Ruhl and Peterson buying in to the company.¹³⁷ Under *Chelius*, any such agreement would have ended on termination at the latest.¹³⁸ But Gaddie herself says the alleged agreement to defer wages didn't even last that long. The next paragraph of Gaddie's declaration says she nixed the buy-in deal and "decided to end the salary deferment."¹³⁹ Hence, Gaddie admits that if there was a deferment deal, it was a temporary deal and she cancelled it. In other words, Ruhl and Peterson never gave Gaddie the option to simply not pay—they never knowingly submitted to a violation of RCW 49.52.

D. The Superior Court properly granted summary judgment awarding unpaid 2013 salary and exemplary damages.

When Ruhl and Peterson demanded their unpaid wages, ProjectCorps sued them. When Ruhl and Peterson requested the documents supposedly supporting ProjectCorps's continued withholding of wages, ProjectCorps denied the documents existed. When Ruhl and Peterson moved for summary judgment, ProjectCorps and Gaddie retaliated with counterclaims and attempts to have them debarred from competing for contracts with the State and the University of Washington, and set about trying to come up with ways to deny they owed any wages.

¹³⁷ CP 272 ¶13.

¹³⁸ *Chelius v. Questar Microsystems* 107 Wn. App. at 683.

¹³⁹ CP 272 ¶14.

There was no way to hide from the unpaid 2012 salary. The withholding was recorded in paychecks and admitted in the April 8, 2013 emails. ProjectCorps has finally abandoned all attempts to defend that particular nonpayment. ProjectCorps and Gaddie admitted the 2012 commission withholdings too, but they tasked Valenzano with trying to rescue them from those admissions. The one tranche of unpaid wages that ProjectCorps had not discussed in their April 8 and 12, 2013, emails was the money withheld from five 2013 salary checks. The non-payment was a fact (not even Valenzano's "forensic accounting" tried to deny it). So ProjectCorps had Gaddie introduce "the pay cut story" in a declaration opposing summary judgment. Gaddie's testimony was:

I informed Peterson that effective March 16, 2013, her salary and her husband's salary would be cut by 20%. I instructed Karen Chenkovich to make the changes in payroll.¹⁴⁰

The trial court correctly found that this testimony did not create a genuine issue of material fact.

¹⁴⁰ CP 273, lines 10-11.

1. No ProjectCorps record supports the pay cut story.

Gaddie’s declaration in opposition to the motion for summary judgment is the first and only source for the pay cut story—Ruhl and Peterson had never heard it before.¹⁴¹ The trial court commented:

there’s no evidence that there was a reduction of salary as opposed to a continuing financial straits that the – that the defense found itself in and that just as it did before, it simply started paying them less than their salary. There’s no evidence of a salary change. There is evidence of a continuing or a return to shorting them on their payment.¹⁴²

The trial court was right. In discovery, plaintiffs asked for “all payroll records for December 2011 to present pertaining to either plaintiff” and for “the entire employee, human resources, or personnel file maintained by you for each of the plaintiffs.”¹⁴³ But the record contains no contract, letter, memo, email or any scrap of paper about a salary change.

2. ProjectCorps’ documents establish the 2013 withholding.

The records that do shed light on Ruhl and Peterson’s 2013 rate of pay are records ProjectCorps did not produce in this lawsuit. In the course of ProjectCorps’s attempt to blackball Ruhl and Peterson from State contracts, it sent the State’s Department of Enterprise Services an “Employee

¹⁴¹ CP 584, lines 21-22.

¹⁴² VRP 42, lines 15-21.

¹⁴³ CP 485 and 486, RFP 3 and 8.

Earnings Record” for Ruhl, for Peterson, and for two other ProjectCorps employees.¹⁴⁴ The Employee Earnings Record for one of the other employees shows that for most of 2013, the employee was paid a salary equal to \$81.60 per hour, referred to at the bottom of the Employee Earnings Record as “Rate 1.” But starting with the August 15 check, ProjectCorps began paying some of the employee’s hours at “Rate 2,” only \$30.00 per hour.¹⁴⁵

The Employee Earnings Records for Ruhl and Peterson cover “Check Dates 1/15/2013-09/30/2013,” a date range that extends well before and after the April to June drop in payments. But the reports do not record any change in salary. They read:

Pay Frequency	Semi-monthly
Standard Hrs.	86.67
Salary	7,083.33/Pay period ¹⁴⁶

There is no “Rate 1” and “Rate 2.” There was no pay cut.

3. ProjectCorps and Gaddie admitted the 2013 withholding.

The pay cut story contradicts the admission in ProjectCorps’ Amended Answer that salary was deferred in 2013. The Amended Complaint reads:

¹⁴⁴ CP 572-577.

¹⁴⁵ CP 572.

¹⁴⁶ CP 574 and 575.

2.31 Portions of Ruhl's 2013 salary payments were also deferred. Gaddie's email does not account for those deferred salary payments.¹⁴⁷

ProjectCorps' amended answer admits there was a deferment:

2.31 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 2.13 to plaintiffs' amended complaint are specifically denied.¹⁴⁸

ProjectCorps's amended answer says nothing about a pay cut.¹⁴⁹

4. Gaddie's hearsay testimony does not create an issue of material fact.

ProjectCorps argues that Gaddie's pay cut story should have prevented summary judgment. But a party cannot create a genuine issue of material fact by submitting a declaration that contradicts previous admissions.¹⁵⁰ And Gaddie's testimony is part hearsay, part irrelevant.

Gaddie offered testimony about her alleged out of court statement to Peterson ("I informed Peterson that effective March 16, 2013, her salary and her husband's salary would be cut by 20%") to prove the truth of the

¹⁴⁷ CP 24.

¹⁴⁸ CP 453.

¹⁴⁹ CP 461.

¹⁵⁰ *Jones v. State*, 170 Wn.2d 338, 370, 242 P.3d 825 (2010)("Self-serving affidavits contradicting prior sworn testimony cannot be used to create an issue of material fact."); *Dep't of Labor & Indus. V. Kaiser Aluminum & Chem. Corp.*, 111 Wn.App. 771, 48 P.3d 324 (2002)(a party cannot create an issue of fact by contradicting prior admissions in interrogatory responses); *Robinson v. Avis Rent a Car Sys.*, 106 Wn.App. 104, 121, 22 P.3d 818 (2001)(a party cannot create an issue of fact by contradicting prior admissions in deposition).

matter asserted in that statement. Hence, Gaddie’s testimony is inadmissible hearsay.¹⁵¹

Gaddie’s testimony that she instructed Chenkovich, the ProjectCorps bookkeeper, to make changes to payroll is irrelevant. It is obvious changes were made to the payroll system to withhold money from Ruhl and Peterson. The fact that Gaddie instructed Chenkovich to make those changes says nothing about whether they were legal. Gaddie’s testimony about instructing Chenkovich is only relevant as an admission that Gaddie voluntarily caused wages not to be paid. Gaddie’s voluntary act justifies the trial court’s ruling that the 2013 withholding was willful and requires an award of exemplary damages.¹⁵²

5. PC and Gaddie misstate the timing of the withholding.

ProjectCorps and Gaddie argue that because the April 8, 2013, emails do not admit to withholding salary in 2013, they affirmatively suggest no salary was withheld. This argument is based on the following misstated chronology:

¹⁵¹ ER 801 and 802; *State v. Sua*, 115 Wn.App. 29, 40-41 (it was error to admit testifying witnesses’ prior out-of-court statements—hearsay includes “any out-of-court statement offered to prove its truth, even if made by a witness at the present trial or hearing.”).

¹⁵² *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152 at 159.

On April 8, 2013, multiple pay-periods **after** Gaddie reduced the Respondents' wages, she sent emails to Peterson and Ruhl....¹⁵³

In fact, the 2013 withholding of Ruhl and Peterson's salaries began with their April 19, 2013 paychecks, after the April 8 and 12 emails.¹⁵⁴ The emails don't mention the withholdings on April 19 to June 18 because the withholdings had not happened yet.

There is no genuine issue of fact as to how much Ruhl and Peterson were supposed to be paid in 2013: \$7,083.33 in salary per pay period. There is also no issue of fact as to how much they were paid for five pay periods: \$5,666.66. The trial court was right to award \$7,083.31 in withheld 2013 salary to each plaintiff, along with exemplary damages in an equal amount.

E. The trial court properly awarded prejudgment interest.

1. ProjectCorps waived its challenge to the interest award and has not challenged \$3,374.52 of the prejudgment interest award.

ProjectCorps and Gaddie failed to discuss how to calculate prejudgment interest at the summary judgment hearing, so the trial court invited them to

¹⁵³ AB 26-27 (bold and underlining in original).

¹⁵⁴ CP 114 and 157.

move for reconsideration on that issue. They declined, thereby waiving their objections to the trial court's interest award.¹⁵⁵

ProjectCorps makes no argument against the award of prejudgment interest on the withheld 2012 salary (\$11,333.36 each) for the period from the date Ruhl and Peterson were terminated (June 20, 2013) through the date of judgment (September 16, 2014). Hence, \$3,374.52 in prejudgment interest (\$1,687.26 for each plaintiff) is unchallenged on appeal.¹⁵⁶

2. Standard of Review.

An award of prejudgment interest is reviewed for abuse of discretion.¹⁵⁷ ProjectCorps and Gaddie do not argue that the trial court abused its discretion, so the trial court should be affirmed.

3. The Court did not abuse its discretion by awarding prejudgment interest beginning with the date of withholding.

ProjectCorps and Gaddie argue that it “does not make sense” to award prejudgment interest from the dates of the withholdings (which range from April 2012 to June 2013), rather than the date Ruhl and Peterson were

¹⁵⁵ RAP 2.5; *Smith v. Shannon*, 100 Wn.2d 26, 37-38, 666 P.2d 351 (1983)(refusing to address for the first time on appeal an argument that could have been raised by way of a motion for new trial).

¹⁵⁶ 12% interest on the amount \$11,333.36 for the one year, two months, and 27 days between the June 20, 2013 termination and September 16, 2014 judgment.

¹⁵⁷ *Pub. Util. Dist. No. 2 of Pacific County v. Comcast of Wash. IV, Inc.*, 184 Wn.App. 24, 75, 336 P.3d 65 (2014), quoting *Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wn. App. 912, 925, 250 P.3d 121 (2011).

terminated (June 20, 2013).¹⁵⁸ The award made perfect sense. “Prejudgment interest compensates a plaintiff for the ‘use value’ of damages incurred from the time of the loss until the date of judgment.”¹⁵⁹ Each time a dollar of wages was withheld, Ruhl and Peterson lost, and ProjectCorps gained, the use value of that dollar. That loss and gain took place at the moment of withholding, not at termination.

ProjectCorps and Gaddie’s position is based on their allegation that Ruhl and Peterson agreed to allow ProjectCorps to defer their wages. But they have never even alleged that Ruhl and Peterson agreed wages could be withheld interest-free until termination. And if there had been such a deal, ProjectCorps could not enforce it, having failed to pay at termination.¹⁶⁰

4. The Court did not abuse its discretion by awarding prejudgment interest on commissions and 2013 salary.

“The allowance of prejudgment interest, being well established in case law, is not in a substantially different position from the statutory provision

¹⁵⁸ AB 50.

¹⁵⁹ *Humphrey Indus. Ltd. V. Clay St. Assocs.*, 176 Wn.2d 662, 672, 295 P.3d 231 (2012); *Polygon Nw. Co., v. Am. Nat’l Fire Ins. Co.*, 143 Wn. App. 753, 793, 189 P.3d 777 (2008)(“[A]n award of prejudgment interest is in the nature of preventing the unjust enrichment of the defendant who has wrongfully delayed payment.”).

¹⁶⁰ *Rosen v. Ascentry Techs., Inc.*, 143 Wn.App. 364, 369, 177 P.3d 765 (2008)(“A party is barred from enforcing a contract that it has materially breached” and failure to pay is a material breach.), citing *Bailie Commcn’s, Ltd. V. Trend Bus. Sys.*, 53 Wn.App. 77, 81, 765 P.2d 339 (1988) and *Jacks v. Blazer*, 39 Wn.2d 277, 286, 235 P.2d 187 (1951).

for post-judgment interest.”¹⁶¹ “Prejudgment interest in a case involving a liquidated claim, or one that is ascertainable with certainty, will be awarded as a matter of public policy.”¹⁶² A liquidated claim is “one where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion.”¹⁶³

In the case of the 2012 commissions, the amount of the claim, down to the dollar, is ascertainable from Gaddie’s April 12, 2013 admissions. In the case of the unpaid 2013 salary, the withheld amounts are ascertainable by subtracting the amounts paid in the relevant paychecks from the amount normally paid. Hence, the trial court did not abuse its discretion in determining that the claims for commissions and 2013 salary were liquidated and eligible for prejudgment interest.

ProjectCorps and Gaddie argue that Peterson and Ruhl are not entitled to prejudgment interest on amounts that were “disputed.”¹⁶⁴ That argument is contrary to case law. “A dispute over the claim, in whole or in part, does not change the character of a liquidated claim to unliquidated.”¹⁶⁵

¹⁶¹ *Bailie Communications v. Trend Business Sys.*, 61 Wn.App. 151, 162, 810 P.2d 12 (1991)(reversing trial court’s failure to award prejudgment interest.)

¹⁶² *Id.*

¹⁶³ *Id.*, citing McCormick, Damages (Hornbook Series) § 54 (1935).

¹⁶⁴ AB 49-50.

¹⁶⁵ *Stevens v. Brink’s Home Sec.*, 162 Wn.2d 42, 50, 169 P.3d 473 (2007), citing *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 723, 153 P.3d 846 (2007); *Hansen v. Rothaus*, 107 Wn.2d 468, 472, 730 P.2d 662 (1986).

The trial court did not err in awarding interest on all wages and exemplary damages. If the Court believes there was any error in the mathematical calculations underlying the prejudgment interest award, it should instruct the Commissioner to perform the appropriate calculations and include in the appropriate amount of interest in the mandate.

F. The trial court’s award of attorney fees should be affirmed.

“We review a trial court's attorney fee award for a manifest abuse of discretion.”¹⁶⁶ ProjectCorps does not argue that the trial court manifestly abused its discretion, so the attorney fee award should be affirmed.

1. The fee award can be affirmed under RCW 49.48 or 49.52.

ProjectCorps argues the “Orders entered by the trial court only state that attorney fees were awarded under RCW 49.52.070.”¹⁶⁷ But the Order Fixing Attorney Fees refers to both RCW 49.48 and RCW 49.52 four times.¹⁶⁸ Additionally, “a reviewing court can sustain a grant of attorney fees under a different statute than the one relied upon by the lower court.”¹⁶⁹ Because

¹⁶⁶ *Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 98, 231 P.3d 1211 (Div. 2, 2010), citing *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007).

¹⁶⁷ AB 46, n. 1.

¹⁶⁸ CP 702 at FOF 1, 3, 4; CP 703 at FOF 17 and COL 2.

¹⁶⁹ *In re Marriage of Rideout*, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003), citing *State ex rel. A.N.C. v. Grenley*, 91 Wn. App. 919, 927-28, 959 P.2d 1130, review denied, 136 Wn.2d 1031, 972 P.2d 467 (1998), see also *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002)(“we may affirm the [lower] court on any grounds established by the pleadings and supported by the record.”); RAP 2.5(a)(“A party may

attorney fees are triggered under RCW 49.48 by the recovery of wages, not be a finding of willfulness, the trial court's award of fees should be affirmed, regardless of the outcome of the claims for exemplary damages under RCW 49.52.

2. The trial court did not manifestly abuse its discretion by awarding fees.

RCW 49.48.030 mandates an award of fees to a prevailing plaintiff:

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.

RCW 49.52.070 also contains mandatory language:

Any employer and any...agent of any employer who shall violate...RCW 49.52.050(1) and (2) shall be liable in a civil action by the aggrieved employee...to judgment for twice the amount of wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees.

No matter the outcome of the appeal, Ruhl and Peterson succeeded in recovering the withheld 2012 salary and exemplary damages. That by itself mandates an award of attorney fees under RCW 49.48.030 and RCW 49.52.070. ProjectCorps and Gaddie do not argue that the attorney fee award should be reversed. They argue that it should be "reduced and

present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.").

remanded,” admitting that an award of fees was appropriate.¹⁷⁰ Gaddie and ProjectCorps also never objected to the award of \$456.86 in costs.

3. The trial court did not manifestly abuse its discretion in its use of the Lodestar method to set the amount of the award.

In Washington, fee awards are calculated using the Lodestar method.¹⁷¹ Under Lodestar, a court determines the number of hours reasonably expended by counsel in securing a successful recovery and the reasonable rate for that work. Then the court multiplies those two figures.

ProjectCorps never challenged the rate charged by counsel for Ruhl and Peterson. ProjectCorps and Gaddie argue that the summary judgment award left four claims unresolved and the trial court failed to segregate out the hours spent on those claims. This argument fails for at least two reasons.

First, ProjectCorps and Gaddie contradict the position they took at the trial court level. In a motion to continue the trial date, ProjectCorps and Gaddie argued that “the partial summary judgment Order completely resolved the Plaintiffs’ claims for willful wage withholding, and leaves only Plaintiffs’ claims for wrongful discharge.”¹⁷² This is consistent with the trial court’s finding that “the Complaint contained other causes of action also

¹⁷⁰ AB 49.

¹⁷¹ *Mahler v. Szucs*, 135 Wn.2d 398, 433-34, 957 P.2d 632 (1998).

¹⁷² CP 684 at 16-17; supplemental Clerks Papers will include ProjectCorps’s motion.

seeking recovery of the withheld wages.”¹⁷³ This finding is unchallenged so it is a verity that is binding on appeal.¹⁷⁴

Second, the trial court did segregate hours. The trial court found that counsel had submitted reasonable documentation of 111.4 hours expended on this matter (another verity on appeal). Ruhl and Peterson requested fees for 67.2 hours (60% of the total) to eliminate hours not spent on the successful claims. The trial court cut an additional 3.3 hours. There is no basis to find a manifest abuse of discretion in the trial court’s segregation of counsel’s hours.

ProjectCorps and Gaddie also argue that certain time entries from Ruhl and Peterson’s counsel should have been reduced by “one third.” As a matter of fact, the reduction ProjectCorps and Gaddie proposed amounts to “two thirds.”¹⁷⁵ ProjectCorps and Gaddie claim that the time entries they targeted do not relate to the successful claims. But Ruhl and Peterson explained why they are related to the successful claims.¹⁷⁶ The trial court, in its discretion, agreed with Ruhl and Peterson and ProjectCorps provides no basis to find that the trial court abused its discretion.

¹⁷³ CP 702, Finding 2.

¹⁷⁴ *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

¹⁷⁵ CP 684 at 2-5.

¹⁷⁶ CP 685.

G. Ruhl and Peterson are entitled to fees on appeal.

A party may recover fees on appeal if the party was entitled to recover fees in the trial court.¹⁷⁷ The claims at issue both fall under statutes that expressly allow for the recovery of attorney fees by Ruhl and Peterson.¹⁷⁸ Even if the trial court judgment is only partially affirmed, the Court should, under RCW 49.48.030 and RCW 49.52.070, award appellate fees incurred in connection with Ruhl and Peterson's successful theories and claims on appeal.¹⁷⁹

H. The Court should allow immediate execution of any award of wages and exemplary damages.

If this Court determines that any adjustment to the trial court's fee award is necessary or that any additional proceeding before a Commissioner or the trial court is necessary to fix the amount of appellate fees, the Court should take care to ensure that such procedure does not further delay Ruhl and Peterson's recovery. ProjectCorps and Gaddie have posted a supersedeas bond, which has prevented Ruhl and Peterson from collecting the wages and exemplary damages owed to them. It would be consistent with the

¹⁷⁷ *Landberg v. Carlson*, 108 Wn.App. 749, 758, 33 P.3d 406 (2001), *review denied*, 146 Wn.2d 1008, 51 P.3d 86 (2002).

¹⁷⁸ RCW 49.48.030; RCW 49.52.070; *Brandt v. Impero*, 1 Wn.App. 678, 682-83, 463 P.2d 197 (1969)(awarding appellate fees under RCW 49.52).

¹⁷⁹ *Jumamil*, 179 Wn.App. at 692-693 (partial appellate attorney fees awarded for prevailing on RCW 49.52 claim); *Staff Builders v. Whitlock*, 108 Wn.App. 928, 934, 33 P.3d 424 (2001)(plaintiffs were entitled to fees on appeal despite reversal of a substantial amount of the trial court judgment).

Legislative goal of prompt and full payment to employees to order that Ruhl and Peterson may execute any affirmed award of wages, exemplary damages, interest, costs, and fees against the bond even during proceedings to finalize the award of attorney fees.

V. CONCLUSION

Before this lawsuit began, ProjectCorps and Gaddie admitted that they had withheld and they owed Ruhl and Peterson every single dollar of 2012 wages Ruhl and Peterson are asking for. And ProjectCorps's own documents show they withheld every dollar of wages Ruhl and Peterson are asking for from 2013. But when Ruhl and Peterson asked for their wages, ProjectCorps and Gaddie didn't pay, they retaliated. They fired them, sued them, and tried to torpedo their attempts to earn a living. And they began investing their time and money into denying that they owed anything to Ruhl and Peterson. ProjectCorps and Gaddie's denials, including this appeal, have succeeded in delaying payment for over three years. The delay needs to end. This Court should affirm the trial court in all respects, award appellate attorney fees, and order that execution on the bond can take place while the trial court or Commissioner calculates the amount of appellate fees.

Dated this 19th day of June, 2015.

CABLE LANGENBACH KINERK & BAUER, LLP

By 

Jack M. Lovejoy, WSBA 36962
Lawrence R. Cock, WSBA 20326
Attorneys for Plaintiffs/Respondents

CERTIFICATE OF SERVICE

On said day below I emailed a courtesy copy and deposited with the U.S. Postal Service for service a true and accurate copy of the RESPONDENTS' BRIEF in Court of Appeals Case No. 72604-8-I to the following parties:

Sean V. Small
Robin Williams Phillips
Lasher Holzapfel Speery & Ebberson, PLLC
2600 Two Union Square
601 Union Street
Seattle, WA 98101
phillips@lasher.com
small@lasher.com

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

Dated this 19th day of June, 2015 at Seattle, Washington.



Katy Albritton, Legal Assistant
Cable, Langenbach, Kinerk & Bauer

APPENDIX 1

RCW 49.48.010. Payment of wages due to employee ceasing work to be at end of pay period — Exceptions — Authorized deductions or withholdings. When any employee shall cease to work for an employer, whether by discharge or by voluntary withdrawal, the wages due him or her on account of his or her employment shall be paid to him or her at the end of the established pay period:

...

It shall be unlawful for any employer to withhold or divert any portion of an employee's wages unless the deduction is:

- (1) Required by state or federal law; or
- (2) Specifically agreed upon orally or in writing by the employee and employer; or ...

RCW 49.48.030. Attorney's fee in action on wages — Exception. 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.

APPENDIX 2

RCW 49.52.050. Rebates of wages — False records — Penalty. Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected 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; or

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

Shall be guilty of a misdemeanor.

RCW 49.52.070. Civil liability for double damages. Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of RCW 49.52.050 (1) and (2) shall be liable in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

APPENDIX 3

From: [Shelley Gaddie](#)
To: [Patricia Peterson](#)
Cc: [Karen Chenkovich](#)
Subject: Deferred Commissions
Date: Friday, April 12, 2013 4:56:37 PM
Attachments: [image001.png](#)

Hi Patricia,

As a follow up to our conversation this week, I promised to send along a second communication confirming the deferred commission total owed to you. As you know, Karen does a great job of keeping track of and maintaining visibility of this. The total amount is \$45,114.93 for commissions earned on the following projects; CTS, SCCA, UWM, Avista and the Tax Portal.

I have reviewed this with Karen and we believe that the numbers are accurate. If there is a discrepancy with this total, please let me know.

Thank you,
Shelley

Shelley Gaddie

President & Founder



PROJECTCORPS

Direct: 206-518-6101

Cell: 206-714-6008

www.projectcorps.com

From: Shelley Gaddie
Sent: Monday, April 08, 2013 11:34 AM
To: Patricia Peterson
Cc: Karen Chenkovich
Subject: Total for 2012 Salary Deferral

Hi Patricia,

As you know, Karen has done a nice job of keeping track of and we have maintained visibility of your 2012 salary deferral since March 2012. This is itemized below.

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 will then turn my attention to 2012 commissions.

March 2012:	\$1,416.67
April 2012:	\$2,833.34
May 2012:	\$2,833.34

APPENDIX 3

June 2012:	\$2,833.34
July 2012:	<u>\$1,416.67</u>
Total	\$11,333.36

Thank you,
Shelley

Shelley Gaddie

President & Founder



PROJECTCORPS

Direct: 206-518-6101

Cell: 206-714-6008

www.projectcorps.com

APPENDIX 3

Deferred Commissions

Shelley Gaddie

Sent: Friday, April 12, 2013 4:56 PM

To: Robert Ruhl

Cc: Karen Chenkovich

Hi Robert,

As a follow up to a conversation I had with Patricia this week, I promised to send along a second communication confirming the deferred commission total owed to you. As you know, Karen does a great job of keeping track of and maintaining visibility of this. The total amount is \$24,316.72 for commissions earned on the following projects; CTS and Tax Portal.

I have reviewed this with Karen and we believe that the numbers are accurate. If there is a discrepancy with this total, please let me know.

Thank you,
Shelley

Shelley Gaddie

President & Founder



PROJECTCORPS

Direct: 206-518-6101

Cell: 206-714-6008

www.projectcorps.com

From: Shelley Gaddie

Sent: Monday, April 08, 2013 11:34 AM

To: Robert Ruhl

Cc: Karen Chenkovich

Subject: Total for 2012 Salary Deferral

Hi Robert,

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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 will then turn my attention to 2012 commissions.

March 2012:	\$1,416.67
April 2012:	\$2,833.34
May 2012:	\$2,833.34
June 2012:	\$2,833.34
July 2012:	<u>\$1,416.67</u>
Total	\$11,333.36

Thank you,
Shelley

APPENDIX 3

Shelley Gaddie
President & Founder



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APPENDIX 4

ER 402

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

ER 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 701

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

ER 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 1001

For purposes of this article the following definitions are applicable:

(a) Writings and recordings. "Writings" and "recordings" consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

...

(c) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

...

APPENDIX 4

ER 1002

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by rules adopted by the Supreme Court of this state or by statute.