THE HONORABLE RICHARD MCDERMOTT
Notice for Hearing: August 21, 2015 at 9:30 a.m.
Moving Party

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

RAMON ANEL,

Plaintiff,

v.

FRANCISCAN MEDICAL GROUP, a Washington Corporation; FRANCISCAN HEALTH SYSTEM, a Washington Corporation; and CATHOLIC HEALTH INITIATIVES, a Colorado Corporation,

Defendants.

No. 14-2-10378-6 KNT

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

THE BLANKENSHIP LAW FIRM, P.S.
1000 Second Avenue, Suite 3250
Seattle, Washington 98104
(206) 343-2700

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1000 Second Avenue, Suite 3250
Seattle, Washington 98104
(206) 343-2700

I. INTRODUCTION AND RELIEF REQUESTED

Dr. Ramon Anel served as a highly respected nephrologist (kidney doctor) and medical director for Defendants Franciscan Medical Group ("FMG"), Franciscan Health System ("FHS"), and Catholic Health Initiatives ("CHI").[1] Through hard effort, he created a nephrology department for Defendant FMG that operated throughout Pierce County. Given his outstanding work, Defendants asked him to serve in three medical directorships, overseeing and ensuring kidney patients received the highest quality of care. Defendants promised to pay Dr. Anel hourly wages for all three of these directorships, but when Dr. Anel submitted timesheets listing the hours he had worked, Defendants refused to pay him for many of his hours. Dr. Anel protested this wrongful withholding of wages, and though Defendants told him to keep doing all his work, they continued cutting his pay. Soon, Dr. Anel learned that Defendants were likewise cutting the pay of his colleagues and began complaining on their behalf as well. In response, Defendants threatened Dr. Anel's job, continued cutting his pay, and fired him. Defendants' executives—the same ones who fired him—admitted during their depositions that they fired Anel because he wouldn't "let go" of the unpaid wages, and kept insisting that Defendants pay him and his colleagues the wrongly withheld pay.

As such, Defendants have admitted liability for the tort of wrongful discharge in violation of public policy. All four elements of this tort are established against Defendant FMG[2] as a matter of law. First, Dr. Anel fought for unpaid wages—an important public policy according to binding rulings from the Washington Supreme Court. Second, firing Anel for protesting the withholding of wages jeopardizes this important public policy of obtaining unpaid wages. Third, according to deposition testimony of Defendants' own witnesses,

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[1] Defendants are all closely related companies. Defendant CHI owns FHS, which in turn owns FMG. CHI pays the wages for employees of FHS/FMG, and they are represented by the same attorneys in this lawsuit. *Blankenship Decl.*; *Exhs. F-G.* Note that all exhibits, which are referenced solely by their Exhibit Number, are attached to the *Declaration of Scott Blankenship*.

[2] Defendants do not dispute that FMG employed and terminated Dr. Anel. *Blankenship Decl.* Anel asserts that all three Defendants employed him, but given that Defendants appear to dispute his employment status with FHS and CHI, at this time Anel only seeks summary judgment on his wrongful discharge claim against FMG.

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Defendant FMG fired Anel because of his wage complaints, proving causation. And finally, Defendant FMG has no overriding justification for its actions—instead, it flatly admitting liability. Thus, the Court should hold Defendant FMG liable as a matter of law for the tort of wrongful discharge.

Given the admissions from Defendants' decision-makers, this Court should also rule Defendants willfully withheld Dr. Anel's wages in violation of RCW 49.52. Based on binding law, this Court should also rule that Dr. Anel's duty to mitigate his damages does **not** require him to seek or accept employment more than 50 miles from his residence in Gig Harbor, Washington. Finally, Defendants raised numerous affirmative defenses in their Answer to the Complaint, which lack any evidence or support. Given that no evidence supports these affirmative defenses, they should be dismissed with prejudice at summary judgment.

II. STATEMENT OF FACTS

A. Defendants refused to pay Dr. Anel all the wages he earned as Medical Director

Dr. Anel was the first nephrologist employed by Defendants FMG and FHS, and through hard work and long hours, he succeeded in building a previously-nonexistent Nephrology Department for FMG. *Exh. A* (Anel 47:23-48:2); *Anel Decl.* As part of this process, Defendants asked Dr. Anel to take on three medical directorships. In 2009, Jim Good (a Vice President at FHS) asked Anel to become Medical Director at the St. Joseph Dialysis Center in Puyallup (one of FHS' dialysis units)—a position in which Dr. Anel provided medical oversight for the delivery of dialysis therapy to patients with end-stage kidney disease, ensuring dialysis treatments were safe and met the required quality of care. *Exh. A* (Anel 48:16-49:9); *Anel Decl.* FHS gave Anel a written contract for this position (the "Puyallup Directorship"), which stated he would be paid an hourly rate of $140.00 for his work as Medical Director, up to a limit of $43,600.00 per year (or 311.4 hours—an average of roughly 26 hours per month) for this specific directorship. *Exh. H.*

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Some two months later, VP Good asked Dr. Anel to take on a second directorship for FHS, serving as Quality Medical Director for FHS' entire nephrology service line (the "Quality Directorship"). *Exh. A* (Anel 49:14-22); *Anel Decl.* In this role, Dr. Anel oversaw the quality of the services provided by FHS' nephrology service line and, more importantly, the standardization of a number of treatment protocols, which are implemented in all of FHS' dialysis units. *Exh. A* (Anel 215:23- 218:19); *Anel Decl.* Dr. Anel and VP Good agreed on the work Anel would perform for this directorship and agreed he would be paid hourly for this work, at the same rate as his directorship for the Puyallup Directorship. *Exh. A* (Anel 49:14-50:19); *Anel Decl.* They did not mention any limit on the number of hours Anel could bill for this directorship, and they did not discuss the duration of this directorship. *Anel Decl.* Anel and VP Good verbally agreed on the terms of this directorship—a binding verbal contract[3]—and VP Good promised to eventually put this contract in writing, though Defendants never did so. *Exh. A* (Anel 49:14-50:25); *Anel Decl.*

Around this time, Dr. Anel also became Medical Director for Northwest Nephrology—a group of nephrologists practicing at FMG. *Exh. I.* In this role, he had general oversight over the operations at an FMG-owned nephrology clinic (and specifically over medical providers in the clinic). *Anel Decl.* He received a written contract to perform this directorship at a rate of $110.00 per hour, plus $800.00 annually per full time employed provider he supervised. *Exh. I.* Throughout this time, Anel was also working as a nephrologist for FMG, and performing dialysis on patients at FHS facilities. *Anel Decl.* In this capacity, he received a salary that varied depending on his productivity. *Id.*

Anel submitted a timesheet at the end of each month, listing the hours he worked in his two FHS directorships—which was clearly labeled as listing hours worked for both

[3] An oral contract is valid when, as here, it identifies the parties, subject matter (the directorship), promise (Anel will work for hourly pay), terms/conditions and price (rate of pay). *Becker v. WSU*, 165 Wn. App. 235, 246 (2011). Notably, contracts of indefinite duration, which do not specifically state they must last longer than one year, are not subject to the statute of frauds. *Davis v. Alexander*, 25 Wn.2d 458, 466 (1946).

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directorships. *Anel Decl.*; *Exh. A* (Anel 60:4-16) (Defense Counsel admitted seeing timesheets listing both directorships). All his pay for the FHS directorships, the FMG directorship, and his work as a nephrologist was paid by CHI, in a single check each pay period. *Exh. A* (Anel 62:13-16); *Anel Decl.*

At first Dr. Anel assumed he was being paid for all the hours he billed on his medical director timesheets. As he testified, it was difficult to tell what hourly director work was being paid, because each paycheck varied based on his changing productivity as a nephrologist. *Anel Decl.* But roughly one year after he began the Quality Directorship, Anel looked closely at his past payments and realized Defendants had never paid him anything for the Quality Directorship. *Anel Decl.*; *Exh. A* (Anel 51:23-52:21). Instead, Defendants refused to pay him more than $43,600 per year for his combined FHS directorships—the annual cap for his work on the Puyallup Directorship. When he realized this, Dr. Anel immediately protested to Defendants' executives—first to FHS' VP Jim Good, who assured Anel he would be paid. *Id.* Soon after, however, Good retired, and Defendants still failed to pay Anel any Quality Directorship pay. *Anel Decl.* Dr. Anel then complained to numerous FHS/FMG executives about the withheld pay, including Greg Semerdjian (Senior VP/Chief Medical Officer for FHS), Carole Peet (President of FHS' St. Anthony Hospital, and Executive in charge of FHS Nephrology Services), Nancy Gallagher (Regional Director for Nephrology for FHS), Kevin Jenkins (Ms. Gallagher's successor), Dr. Mark Adams (Chief Medical Officer of FHS, succeeding Dr. Semerdjian), and Dennis Popp (Interim Executive-in-charge, succeeding Ms. Peet). *Anel Decl.*; *Exh. A* (Anel 54:13-59:14). Ms. Peet told Anel to keep performing the Quality Directorship work because it was helpful for Defendants, but told him that he would need to cap his combined hours for the FHS directorships (Quality Directorship and Puyallup Directorship) at 43 combined hours per month. *Anel Decl.*; *Exh. A* (Anel 56:12-57:6). Given these assurances, Dr. Anel continued performing both directorships and kept track of the time he worked on the two FHS directorships, thereafter limiting the hours he billed for his FHS

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directorships to 43 combined hours per month. *Anel Decl.* But Defendants still did not pay him more than 311.4 hours per year for the combined FHS directorships (an average of 26 hours per month), thus breaking their contract and wrongly denying Dr. Anel wages he earned. *Anel Decl.*; *Exh. A* (Anel 59:25-61:7).

B. Defendants continued withholding wages, then fired Dr. Anel because he repeatedly protested the withholding of wages

Dr. Anel continued protesting the withholding of his wages. He told Defendants' management that, since they were not paying him anyway, he would withhold any medical director timesheets as a form of protest until they agreed to pay him what he called "backpay," meaning the unpaid wages he had earned to date for his Quality Directorship. *Exh. A* (Anel 64:22-66:2). Then, when Defendants still refused to pay his "backpay"/unpaid wages, he resigned from his two FHS directorships in 2012 as a form of protest for not being paid. *Anel Decl.*; *Exh. A* (Anel 66:10-24; 128:6-129:9). During this time, Dr. Anel learned that his colleague Dr. Rajnikanth Narayanan—another nephrologist/medical director—was also not being paid for all the hours he billed as medical director. *Exh. A* (Anel 128:24-129:9); Exh. *Exh. J (Narayanan Decl.)*

Dr. Dean Field (then-President of FMG and current Vice President of FHS) asked Dr. Anel to resume performing his FHS directorships after listening to Anel's concerns over nonpayment. *Exh. A* (Anel 131:8-132:3). Field assured Anel that his concerns over non-payment of wages were valid. *Id.* [redacted] *Exh. K.* Anel agreed to return to the Puyallup Directorship, but refused to return to the Quality Directorship, since he had *never* been paid for any of that work. *Anel Decl.* Dr. Anel also submitted the timesheets he had been withholding as a form of protest, expecting to now be paid. *Id.* But by October 2012, Defendants had *still* not paid Anel anything for his previous

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work as Quality Director, and Anel complained to Dr. Field (then a VP for FHS) and to Dr. Steven Spare (Field's successor as President of FMG) about the ongoing nonpayment of wages. *Anel Decl.*; *Exh. A* (Anel 146:14-148:24). In a meeting with President Spare, Anel said he would again resign from his Puyallup Directorship as a form of protest, but President Spare threatened to fire him altogether (including firing him as a nephrologist) if he did so. *Anel Decl.* Out of fear for his job, Dr. Anel continued performing his two remaining directorships, though he continued protesting the withholding of previously-earned Quality Director pay. *Id.*

Defendants' executives readily admitted in depositions that Dr. Anal protested the withholding of these wages. For example, Dr. Field admitted that Dr. Anel regularly expressed frustration that Defendants had not paid him wages for 22 months' worth of work he had already performed as a medical director. *Exh. B* (Field 73:13-20; 75:25-76:5). Dr. Field admitted he and Dr. Anel frequently had disputes about "why [Anel] couldn't be compensated in the way that he believed he should be...." *Exh. B* (Field 150:14-151:8).

Following Anel's repeated complaints, Defendants retaliated against Anel and began crossing off hours he listed on his directorship timesheets throughout 2013, and paying him reduced wages for his remaining FHS directorship. *Anel Decl.* Defendants flatly admitted to this practice under oath during depositions. Kurt Schley (President of St. Anthony Hospital and Executive-in-charge of FHS Nephrology throughout 2013) testified that Defendants frequently refused to pay Anel for all the time he billed on his FHS directorship timesheets, and that Dr. Anel repeatedly fought to be paid for this unpaid time. *Exh. C* (Schley 68:1-25; 74:7-75:17). Schley admitted that he personally decided to reduce the amount of pay Dr. Anel received, below the hours Anel had submitted on timesheets, even though Schley could not recall the exact reason he did so during his deposition. *Exh. C* (Schley 127:1-128:8). Likewise, Marla Fredericks (FHS' Regional Director of Nephrology in 2013) admitted in her deposition that she reduced the hours listed on Anel's directorship timesheets in the summer of 2013, without informing Anel that she was reducing his pay and without giving him a

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chance to justify the time listed on his timesheets. *Exh. D* (Fredericks 76:24-80:16). Thus, Defendants continued to withhold even more wages from Anel in 2013.

Again, Anel did not back down and continued to demand these wages. During this time, Defendants had also been withholding wages from Dr. Narayanan—a fact that Narayanan discussed with Anel. *Anel Decl.*; *Exh. J* at 4-5 (*Narayanan Decl.*). Dr. Anel began openly protesting the withholding of both his and his colleague's wages in meetings with Dean Field and other executives during the summer of 2013, as witnessed by both Dr. Narayanan and fellow nephrologist Aman Gill (a Defense witness).[4] *Exh. J* at 4-5 (*Narayanan Decl.*); *Exh. E* (Gill 119:22-125:1). Dr. Gill further testified that Anel warned him during this timeframe to watch out for Defendants cutting Gill's time and withholding Gill's wages—a practice that Anel said was "illegal." *Exh. E* (Gill 132:20-133:12). Even Defendants' executive, Kurt Schley, admitted that Anel fought back when Defendants cut his directorship pay in 2013, testifying that Anel would explain all the work he had done and insist on receiving pay for all the hours he billed. *Exh. C* (Schley 106:20-107:3).

In response, during the summer of 2013, executives from FMG and FHS met to discuss firing Dr. Anel. The decision-makers from this meeting admit that they decided to fire Anel because of his ongoing protests and "unhappiness" over the withheld wages. For example, Dean Field testified that he was the executive who suggested firing Dr. Anel, and that he did so because he and Anel "struggled interacting." *Exh. B* (Field 148:10-151:8). When asked what specific issues he had interacting with Anel, Field admitted that it was about how Anel didn't "seem to [have] an understanding why he couldn't be compensated in the way that he believed he should be," tying everything back to the wage disputes. *Exh. B* (Field 150:19-151:8). Likewise, Kurt Schley testified in his deposition that Defendants' leadership discussed firing Dr. Anel because he kept fighting to be paid for all the time listed

[4] Beyond the fact that Dr. Gill is still employed by Defendants, at his deposition Gill testified that Defendants' attorneys were representing him, and that Defense attorney Gillian Bidgood had met with him to prepare him for his deposition. *Exh. E* (Gill 5:22-23; 7:8-11; 8:1-13).

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in his medical director timesheets. *Exh. C* (Schley 138:22-140:2). Schley even testified that, based on Dr. Anel's "personality," Schley considered Dr. Anel to be someone who would likely engage in whistle-blower activity against Defendants. *Exh. C* (Schley 90:7-91:3).

Dr. Anel—who was not aware this meeting had occurred—continued protesting when Defendants cut his pay, until finally, on October 14, 2013, Dean Field went to Dr. Anel's office and, without any notice, fired him. *Anel Decl.*; *Exh. B* (Field 182:16-185:6). Dr. Anel asked why he was being fired, and Field told him it had nothing to do with Anel's skills as a physician, but rather said Defendants were firing Anel because of his inability to be part of Defendants' "team." *Anel Decl.* Anel asked what that meant, and Field—the man who suggested firing Anel because of his disputes over wages—flatly admitted that it was about Anel not being able to "let go" of the unpaid wage issues. *Id.* When asked about this in his deposition, Field testified that he remembered telling Anel the termination was because Anel "struggled in letting go past history," and he did not deny telling Anel that this specifically included his disputes over nonpayment of wages. *Exh. B* (Field 182:16-185:6). Moreover, Kurt Schley—an executive who participated in the decision to fire Anel—testified that he believes Defendants fired Dr. Anel because of his disputes "with time sheets," again tying the termination to Anel's wage disputes. *Exh. C* (Schley 154:13-25).

It appears that Defendants achieved their desired goal by firing Dr. Anel: beyond ridding themselves of a whistleblower (as Schley characterized Anel, *see supra*), Defendants made an example of Anel, such that other medical directors who felt they had been wrongfully denied wages were too afraid to protest. Indeed, at his deposition Dr. Gill testified that, two months after Anel's termination, Defendants refused to pay Gill for all the hours he billed as a medical director. Gill testified that he believed this was wrong, but he did not fight for his wages because he was afraid Defendants would fire him, just like they had fired Dr. Anel. *Exh. E* (Gill 121:2-125:1). Gill testified that there was an "atmosphere of fear" among Dr. Anel's former colleagues when he was fired, and that everybody was "walking on

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eggshells" out of fear that they would be fired if they stood up to Defendants. *Id.* Thus, by firing Anel, Defendants have been able to continue illegally withholding wages from their employees, in violation of Washington law. *See, e.g.*, RCW 49.46, RCW 49.48, RCW 49.52.

C. Defendants asserted numerous affirmative defenses in this case that are completely baseless and unsupported by any evidence

In their Answer to the Second Amended Complaint, Defendants asserted fifteen affirmative defenses, yet to date Defendants have failed to provide any evidence in support of affirmative defenses 1, 3, 5, 6, 7, 8, 9, and 15. *Dkt. 45* at 5-6. Indeed, affirmative defenses 5 and 8 are mere denials of liability, which are thus not affirmative defenses at all. *Id.* Defendants should not be allowed to bring these baseless defenses at trial. Given the lack of evidence, these affirmative defenses should be dismissed at summary judgment.

III. STATEMENT OF ISSUES

A. Should this Court rule that Defendant FMG is liable for the tort of wrongful discharge in violation of public policy when, as a matter of law, all four elements of this claim are established based on binding rulings from the Washington Supreme Court and based on the testimony of Defendant FMG's decision-makers—who admit they fired Dr. Anel because he protested when Defendants withheld his wages?

B. Given that Defendants' decision-makers admit they withheld pay from Dr. Anel, should this Court rule that Defendants[5] are liable as a matter of law for willful withholding of wages under RCW 49.52?

C. Should this Court follow governing law and rule that, as a matter of law, Dr. Anel was not required to seek or accept employment more than 50 miles from his residence in Gig Harbor, Washington in order to mitigate damages?

D. Should this Court dismiss affirmative defenses 1, 3, 5, 6, 7, 8, 9, and 15 with prejudice, when Defendants produced no evidence in support of these affirmative defenses?

[5] All three Defendants were Dr. Anel's employers as defined under RCW 49.52.

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IV. EVIDENCE RELIED UPON

Plaintiff relies upon the Declaration of Ramon Anel and the Declaration of Scott C. G. Blankenship with attached exhibits, and the pleadings and papers already on file in this case.

V. AUTHORITY

"Summary judgment is properly granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Ballard Square Condo. Owners Ass'n v. Dynasty Const. Co.*, 158 Wn.2d 603, 608-09 (2006); CR 56(c). "Summary judgment is appropriate if reasonable minds could reach only one conclusion from the evidence presented." *Ballard*, 158 Wn.2d at 609. Thus, the question is whether a reasonable jury could only find in favor of the moving party. *Herron v. KING Broadcasting Co.*, 112 Wn.2d 762, 767-68 (1989). "A material fact is one upon which the outcome of the litigation depends, in whole or in part." *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 861 (2004). "The burden is on the moving party to show that there is no genuine issue as to any material fact. If the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that material facts are in dispute. If the nonmoving party fails to do so, then summary judgment is proper." *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 26 (2005). Notably, the non-moving party cannot create an issue of material fact by submitting declarations that contradict the prior deposition testimony of its witnesses, because "an affidavit cannot be used to create an issue of material fact by contradicting prior deposition testimony." *Davis v. Fred's Appliance, Inc.*, 171 Wn. App. 348, 357 (2012); *McCormick v. Lake Wash. Sch. Dist.*, 99 Wn. App. 107, 111 (1999).

As explained below, there are no disputed material facts regarding the elements of liability for Dr. Anel's wrongful discharge claim against Defendant FMG. Rather, given the admissions of Defendants' decision-makers during depositions, and given binding case law from Washington's Supreme Court, this Court should rule as a matter of law that Dr. Anel has established all elements of liability in his wrongful discharge claim. Given those admissions,

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this Court should also rule Defendants willfully withheld wages due to Dr. Anel in violation of RCW 49.52. This Court should also apply controlling law and rule that Anel's duty to mitigate does **not** require him to seek or accept employment farther than 50 from his residence in Gig Harbor, Washington. Finally, Defendants failed to produce any evidence supporting affirmative defenses 1, 3, 5, 6, 7, 8, 9, and 15, which must be dismissed at summary judgment.

A. As a matter of law, Dr. Anel was wrongfully terminated in violation of Washington public policy for requesting wages

While employment in Washington is generally at-will, the tort of wrongful discharge "operates to vindicate the public interest in prohibiting employers from acting in a manner contrary to fundamental public policy." *Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 801 (2000); *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 936 (1996). The tort has long been applied to employees who, like Dr. Anel, were fired in retaliation for exercising a legal right or privilege, such as seeking unpaid wages. *Hume v. Am. Disposal Co.*, 124 Wn.2d 656 (1994) (discharging employee for demanding unpaid wages violates Washington public policy). A defendant is liable under this tort if a plaintiff proves: (1) the existence of a clear public policy (clarity); (2) discouraging the employee's conduct would jeopardize the public policy (jeopardy); (3) the public policy related conduct caused the discharge (causation); and (4) defendant cannot offer an overriding justification for the termination (absence of justification). *Gardner*, 128 Wn.2d at 941. Based on undisputed facts and admissions from Defendants' own decision-makers during depositions, all four elements are established as a matter of law. Thus, under controlling law, this Court should rule that Defendant FMG is liable for committing the tort of wrongful discharge as a matter of law. The only remaining issue for trial on this claim is the amount of damages Defendant FMG owes for wrongfully firing Dr. Anel.

1. Firing an employee for requesting wages violates Washington public policy (Clarity Element) as a matter of law

The clarity element is established when "the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Prior judicial

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decisions may also establish the relevant public policy." *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232 (1984). The clarity element "does not require us to evaluate the employer's conduct at all; the element simply identifies the public policy at stake." *Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 219 (2008); *Gardner*, 128 Wn.2d at 945 (clarity element "merely requires that plaintiff establish a clear statement of public policy," not that the public policy was violated).

Here, as evidenced in the enactment of RCW 49.46 *et al,* RCW 49.48 *et al,* and RCW 49.52 *et al,* as well as case law, it is well-established that firing an employee for seeking earned wages is contrary to Washington public policy. *See e.g. Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157 (1998) ("[t]he Legislature has evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive scheme to ensure payments of wages"); *Young v. Ferrellgas, L.P.*, 106 Wn. App. 524, 531(2001) (holding that an employee's claim for violating Washington's wage statutes was based on "broad public policy principles"); *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 830 (2000) (referencing chapters 49.46, 49.48 and 49.52 RCW). This is a part of Washington State's "long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000). Thus, in *Hume*, the Washington Supreme Court flatly stated that these statutes "prohibit[] employer retaliation against employees who assert wage claims, and we have held employers who engage in such retaliation liable in tort for violation of public policy...." *Hume*, 124 Wn.2d at 662 (recognizing clear mandate of public policy to pay wages due as evidenced by the Legislature's enactment of RCW 49.46, and holding that retaliation against employees who assert wage claims is illegal under the wrongful discharge tort). Given these binding holdings from the Washington Supreme Court, this Court must hold that, as a matter of law, firing an employee for seeking earned wages violates a clear mandate of Washington public policy.

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2. Dr. Anel satisfies the jeopardy element as a matter of law

To establish the jeopardy element, a plaintiff must establish two prongs. For the first prong, he must show he "engaged in particular conduct, and the conduct directly relates to the public policy, ***or*** was necessary for the effective enforcement of the public policy," and that permitting employers to discharge employees in such circumstances would discourage others from engaging in the desirable conduct. *Gardner*, 128 Wn.2d at 945. Critically, the Washington Supreme Court has clarified that this prong is established if an employee protests against activity that he reasonably believes is illegal, **even if he is mistaken and the employer is not violating the law**. *See, e.g.*, *Ellis v. City of Seattle*, 142 Wn.2d 450, 461 (2000); *Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 223 (2008).

For the second prong, plaintiffs must establish "that other means for promoting the policy…are inadequate." *Gardner*, 128 Wn.2d at 945. Dr. Anel easily establishes both these prongs. Indeed, the testimony of Defendants' own witnesses during depositions proves the first prong, and the second "adequacy" prong is established because the Washington Supreme Court has already ruled that wrongful discharge claims predicated on wage complaints are viable. Dr. Anel thus establishes the jeopardy element as a matter of law.

a. Dr. Anel engaged in conduct directly relating to Washington public policy, by protesting Defendants' withholding of earned wages

Under the first prong of the jeopardy element, Dr. Anel's conduct either needs to directly relate to the public policy, *or* be necessary for the effective enforcement of the public policy. The first prong is established because Dr. Anel protested against Defendants' illegal withholding of wages, and he thus engaged in conduct that "directly relates to the public policy" in this case. *See id.*

Critically, even if Defendants' actions were not illegal (which they were), Dr. Anel still establishes the first prong because he protested against what he reasonably believed was an illegal withholding of wages. As noted above, actual violations of the law are ***not*** required to establish jeopardy. In *Ellis v. City of Seattle*, the question presented was whether a plaintiff

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had to prove that the employer's conduct would actually violate public policy or whether the plaintiff merely had to have a reasonable belief that the employer's actions violated the law. Washington's Supreme Court held that "the jeopardy prong of the *Gardner* test may be established if an employee has an **objectively reasonable belief** the law may be violated in the absence of his or her action." *Ellis*, 142 Wn.2d at 461 (emphasis added). This holding has been repeatedly upheld and applied in wrongful discharge cases based on numerous different public policies. *See id.* (reasonable belief standard applied when employee fired for protesting when he believed fire alarms had been disabled); *Danny*, 165 Wn.2d at 223 (reasonable belief standard applied when employee fired for leaving work to prevent domestic violence); *Little v. Windermere*, 301 F.3d 958, 971-72 (9th Cir. 2001) (reasonable belief standard applied when employee fired for opposing what she reasonably believed was sexual harassment).

Here, a reasonably jury must find that Dr. Anel reasonably believed Defendants' refusal to pay him violated the law. No one disputes that Dr. Anel performed hourly work in his medical directorships, or that he submitted timesheets listing the hours worked. And no one disputes that Defendants refused to pay Anel for all these wages, or that Anel repeatedly fought for his unpaid wages. Indeed, Kurt Schley flatly admitted in his deposition that Defendants refused to pay Anel for time he had billed, and that Anel fought to be paid for these unpaid wages. *Exh. C* (Schley 68:1-25; 74:7-75:17). Schley admitted he personally reduced Anel's pay. *Exh. C* (Schley 127:1-128:8). Marla Fredericks also admitted she wrote down Dr. Anel's time on his timesheets without informing Anel. *Exh. D* (Fredericks 76:24-80:16). Meanwhile, both Defense witnesses and Anel's former colleagues witnessed him fighting for the wages that Defendants had withheld from both Anel and from other medical directors. *Exh. B* (Field 73:13-20; 75:25-76:5); *Exh. E* (Gill 119:22-125:1); *Exh. J.*

Moreover, Defendants cannot dispute that Dr. Anel truly believed he was owed for the hours he billed on his timesheets. Dean Field—the decision-maker who suggested firing Anel and then personally fired him [redacted]

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[redacted]. *Exh. K.* President Schley (who thought Anel had the personality of a "whistleblower") also admitted that Anel fought back when Defendants questioned the hours he had billed—that Anel would explain how he had actually performed all the work listed on his timesheets and would insist on being paid for that work. *Exh. C* (Schley 106:20-107:3. Plus, Dr. Gill testified that he and Dr. Anel discussed the unpaid wages, and that Anel clearly said he believed it was illegal for Defendants to withhold those wages. *Exh. E* (Gill 132:20-133:12). Thus, the facts cannot be disputed. Dr. Anel repeatedly fought to be paid for hours he billed as a medical director, and when Defendants refused to pay him, he kept fighting for the wages be believed he was owed.

By complaining that Defendants were improperly withholding wages from Anel and his colleagues, Dr. Anel's conduct directly related to the public policies at issue, and at the very least, he had an objectively reasonable belief that he was fighting against illegal conduct. Defendants cannot dispute this, especially since Defendants' executives admitted in their depositions that Anel fought for wages "he believed" were owed to him. *Exh. B* (Field 150:14-151:8). Thus, Defendants' admissions and Anel's uncontroverted testimony, he engaged in conduct directly related to the public policy at issue in this case by repeatedly complaining that Defendants were illegally withholding wages he and his colleagues had earned.

Moreover, it is clear that firing Dr. Anel for fighting for wages has in fact discouraged others from likewise fighting for all the wages they were owed. Dr. Gill testified under oath that he was too afraid to challenge Defendants when they illegally underpaid him two months after Dr. Anel, after seeing Defendants fire Anel. *Exh. E* (Gill 121:2-125:1). Dr. Gill further testified that there was an "atmosphere of fear" among Dr. Anel's former colleagues when he was fired, and that everybody was "walking on eggshells" out of fear that they would be fired if they stood up to Defendants. *Exh. E* (Gill 121:2-125:1). Given Gill's testimony, any reasonable jury must find that firing Dr. Anel discouraged others from fighting for their

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1000 Second Avenue, Suite 3250
Seattle, Washington 98104
(206) 343-2700

unpaid wages. Thus, based on admissions from Defendants' own witnesses, there is no doubt that Dr. Anel engaged in conduct related to the policy at issue (seeking wages) and that, by firing Dr. Anel, Defendants discouraged others from fighting for their wages—fulfilling the first jeopardy prong as a matter of law under *Gardner*. *See* 128 Wn.2d at 945.

b. As a matter of law other enforcement mechanisms are inadequate

In Dr. Anel's case, the second prong of the jeopardy element (that other mechanisms for enforcing the public policy are inadequate) is established as a matter of law. Indeed, the Washington Supreme Court has already ruled that employees may bring viable wrongful discharge claims when they allege they are fired for asserting wage claims. *See Hume*, 124 Wn.2d at 662. Therefore, there can be no doubt that Dr. Anel's wrongful discharge claim—based on his assertion of wage claims to Defendants—is viable and is not precluded based on other mechanisms of enforcing payment of wages.

Indeed, although it is clear that Washington has embraced a "strong policy in favor of payment of wages due employees" there are no effective measures to fully promote this policy. None of Washington's wage statutes provide for back pay, front pay, injunctive relief, emotional distress, or compensatory damages. RCW 49.48 *et. seq.*; RCW 49.52 *et. seq.*; RCW 49.46 *et. seq.*[6] For the most part, the statutes merely allow employees to collect the wages they rightfully earned and recover attorney's fees.

Most notably, however, the statutes fail to protect employees who seek to enforce the wage statutes from retaliation. Indeed, Chapters RCW 49.48 and RCW 49.52 do not include *any* anti-retaliation provisions. While Washington's Minimum Wage Act (WMWA) does prohibit retaliation, even that statute fails to afford the employee with any relief. Rather, it

[6] RCW 49.48 requires employers to pay employee all wages due upon the conclusion of the employment relationship. RCW 49.48.010. However, the remedies for an employer's violations are limited to attorney's fees. RCW 49.48.030. RCW 49.52 only provides for double damages against employers who "willfully and with the intent to deprive the employee of any part of his wages," along with attorney's fees. RCW 49.52.070. RCW 49.46 permits employers to recover wages owed and attorney's fees, but the only penalty provided for violations of the WMWA is misdemeanor sanctions for the employer. None of these statutes grant employees a private cause of action for retaliatory terminations. Moreover, the WMWA fails to protect a large class of workers, including Dr. Anel (a doctor/medical director exempt from the WMWA).

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1000 Second Avenue, Suite 3250
Seattle, Washington 98104
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merely sanctions the employer. RCW 49.46.100(2) ("Any employer who discharges or in any other manner discriminates against any employee because such employee has made any complaint to his employer…shall be deemed in violation of this chapter and shall, upon conviction therefore, be guilty of a gross misdemeanor."). And because the WMWA only applies to certain workers, higher-level employees like Dr. Anel (a doctor/medical director) are left without any protection—a significant hurdle for the public policy as managers are in an ideal position to report wage violations and advocate for less powerful employees.[7]

The U.S. Supreme Court recognizes that anti-retaliation provisions are critical to enforce public policies:

> Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends.

Burlington Northern & Santa Fe Ry. v. White, 126 S. Ct. 2405, 2413 (2006). This same logic applies to any statutory scheme. Certainly, employees will not risk losing their jobs if they are left with no recourse. Simply put, collecting unpaid wages after expensive and drawn-out litigation pales in comparison to continued job security and benefits.

Indeed, Washington courts have found statutes which are indisputably more protective than the statutes at issue here to be inadequate to promote a public interest. Thus, in *Roberts v. Dudley*, the Washington Supreme Court found that the plaintiff properly stated a cause of action for the tort of wrongful discharge for reporting sexual harassment and subsequently suffering retaliation, despite the fact that the Washington Law Against Discrimination, RCW 49.60 ("WLAD"), "is significantly broader than the tort of wrongful discharge," providing for injunctive relief, back pay, front pay, emotional distress, costs, and attorney's fees. *Roberts*,

[7] Moreover, it is irrational to expect low level employees to further the public policy and report wage abuses if their managers are terminated for asserting the same right. Clearly, allowing employers to terminate employees like Dr. Anel in retaliation for complaining about withheld wages jeopardizes Washington's public policy.

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1000 Second Avenue, Suite 3250
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140 Wn.2d at 76. Moreover, unlike the relevant statutes here, the WLAD also contains an anti-retaliation provision. Such remedies have been described as "a full panoply of compensatory damages." *Dailey v. North Coast Life Insur. Co.*, 129 Wn.2d 572 (1996). No such relief was provided to Dr. Anel. *See also Smith v. Bates Technical College*, 139 Wn.2d 793 (2000) (in wrongful discharge claim, the court indicated that it saw "no justified reason" to deny plaintiff "the opportunity to recover damages for emotional distress—thereby immunizing the alleged tortuous conduct of her employer—simply because her administrative and contractual remedies may partially compensate her wrongful discharge.").

Most importantly, given the inadequate protection afforded by RCW 49.48, RCW 49.52, and RCW 49.46, Washington's Supreme Court has already ruled that employers violate the tort wrongful discharge when they fire employers for asserting wage claims. *See Hume*, 124 Wn.2d at 662. Thus, this issue has already been settled—Washington's wage statutes **do not** preclude claims for wrongful discharge that are predicated on an employee seeking wages from his employer. *Id.* The other mechanisms for ensuring payment of wages simply are not adequate, which is why the Supreme Court has already ruled that wrongful discharge claims which are predicated on employees seeking wages earned (like Dr. Anel's) are viable. *Id.*

The Washington Supreme Court case, *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 531-536 (2011), does not alter this analysis. In *Cudney*, an employee claimed he had been fired in violation of public policy for reporting workplace safety violations; namely that a manager was driving intoxicated. The Court held that the employee had adequate remedies under Washington Industrial Safety and Health Act (WISHA) and DUI laws. However, WISHA, unlike Washington's wage statutes, has an anti-retaliation provision that includes significant remedies. Not only does the statute *require* the Department of Labor and Industries (L&I) to investigate any appropriate claim, but if the investigator finds retaliation, the L&I is *required* to bring suit against the employer. RCW 49.17.160(2). The employee can also independently bring suit. If retaliation is found, the statute requires superior courts to order *all* appropriate

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1000 Second Avenue, Suite 3250
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relief for cause shown, including reinstatement with back pay. Thus, unlike the statutes at issue here, by actually prohibiting retaliation and providing comprehensive remedies, WISHA permits employees to report violations freely, without fear of losing their jobs.

Moreover, the Washington Supreme Court recently clarified that *Cudney* did **not** alter or overrule any prior Supreme Court holdings regarding the viability of wrongful discharge claims based on particular public policies. *Piel v. City of Federal Way*, 177 Wn.2d 604, 614-16 (2013) (stating *Cudney* is not inconsistent with past Supreme Court wrongful discharge holdings, and it is improper to view *Cudney* as "overrul[ing] anything"). Thus, the Supreme Court's holding in *Hume* remains controlling law, and wrongful discharge claims predicated on complaints about unpaid wages are viable. *See Hume*, 124 Wn.2d at 662. This Court must follow the binding holding from *Hume* and rule that Dr. Anel's wrongful discharge claim based on his wage complaints is viable, and alternate enforcement mechanisms are thus inadequate. This fulfills the second prong of the jeopardy element as a matter of law.

3. Causation exists as a matter of law based on Dr. Anel's undisputed testimony and admissions from Defendants' decision-makers

In order to establish causation, a fact-finder need only find the protected activities were a "substantial factor" in the termination or constructive discharge—they need not be the only factor or even the main factor. *Mackay v. Acorn Custom Cabinetry*, 127 Wn.2d 302, 309 (1995). Here, as discussed above, testimony from both Dr. Anel and from Defendants' own decision-makers prove Defendant FMG fired Dr. Anel because he fought for wages he believed Defendants owed him, and no reasonable jury could find otherwise. First, when Anel protested the nonpayment of wages by trying to resign his directorships, Dr. Spare threatened to fire him. *Exh. A* (Anel 146:14-148:21). Then, when Anel refused to stop fighting for his wages, Dean Field suggested firing Anel because he wasn't "understanding why he couldn't be compensated in the way that he believed he should be," tying everything back to the dispute over wages/compensation. *Exh. B* (Field 150:14-151:8). Kurt Schley then testified that

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Defendants' executives discussed firing Anel because he kept fighting to be paid for all the time listed in his timesheets. *Exh. C* (Schley 138:22-140:2). Ultimately, Schley testified that he believes Defendants did in fact fire Dr. Anel because of his disputes "with time sheets"—flatly admitting causation. *Exh. C* (Schley 154:13-25). Likewise, when Dean Field fired Dr. Anel, he told Anel that he was being fired because Defendants' executives were upset that Anel couldn't "let go" of the wage dispute. *Anel Decl.*; *Exh. B* (Field 182:16-185:6).

Thus, Defendants' decision-makers admit they fired Dr. Anel because he fought for wages he believed Defendants had wrongly failed to pay him. Critically, Defendants cannot create a factual dispute by submitting after-the-fact declarations to contradict this testimony. *Davis*, 171 Wn. App. at 357. Defendants thus admit Dr. Anel's protected activity (asserting wage claims) was a substantial reason (if not in fact the only reason) they fired him, proving causation under *Mackay*. 127 Wn.2d at 309. There is no dispute of fact, and this Court should rule that Dr. Anel has established causation against Defendant FMG as a matter of law.

4. Defendants fail to offer an overriding justification for firing Dr. Anel

It is Defendant FMG's burden to raise an overriding justification for firing Anel. *Gardner*, 128 Wn.2d at 941. Because Dr. Anel establishes the first three elements of his claim (*see supra*) Defendant FMG is liable if it cannot provide a legal, overriding justification for firing Anel. *Id.* But as discussed above, Defendants' decision-makers actually told Anel he was being fired for asserting wage claims, and admitted under oath that they decided to fire him because of his wage disputes. Thus, rather than justifying its actions, Defendant FMG has admitted liability. As a matter of law then, Defendant FMG cannot meet its burden of providing a legal, overriding justification for firing Dr. Anel. All four elements of Dr. Anel's wrongful discharge case are established as a matter of law, and this Court should therefore rule that Defendant FMG is liable for the tort of wrongful discharge. The only remaining issue for trial on this claim is the amount of damages FMG owes for wrongfully firing Dr. Anel.

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B. As a matter of law Defendants willfully withheld wages in violation of RCW 49.52

Employers who willfully withhold wages owed to workers are liable for double the withheld wages under RCW 49.52. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 160 (1998). "Willfulness" means the employer intended to withhold pay, and does *not* require that the employer knew its actions were illegal. *Id.* Employers who willfully withheld pay can only avoid liability if they meet their high burden of proving they had a bona fide dispute over the amount of wages owed. *Id.* at 165. An employer's incorrect interpretation of the law does not create a bona fide dispute. *Dep't of Labor & Indus. v. Overnite Transp. Co.*, 67 Wn. App. 24, 35–36, 834 P.2d 638 (1992). "Employers" include any corporation for which the worker performs services he had been hired to perform, as well as any party responsible for non-payment of wages. *Jumamil v. Lakeside Casino, LLC*, 179 Wn. App. 665 (2014). Here, a reasonable jury must find that Defendants intentionally withheld wages Dr. Anel had earned, given that decision-makers like Schley and Fredericks admit they intentionally withheld Dr. Anel's pay. Defendants even signed off on Anel's timesheets, yet then crossed off his time without telling him and paid him reduced wages. *Exh. L.* Plus, all three Defendants are "employers" under RCW 49.52, since Anel performed work for FMG and FHS, and since CHI (which paid Anel's paychecks) failed to pay him all his wages. Thus, this Court should rule that Defendants are liable as a matter of law for violating RCW 49.52. The only remaining issue is the amount of damages owed.

C. As a matter of law, plaintiffs (like Dr. Anel) have no duty to seek or accept employment located more than 50 miles from their residence

Defendants bear the burden of proving Dr. Anel failed to mitigate his damages under Washington law. *See, e.g., Burnside v. Simpson Paper Co.*, 66 Wn. App. 510 (1995); *Sias v. City Demonstration Agency*, 588 F.2d 692, 696 (9th Cir. 1978).[8] To prove Dr. Anel failed to mitigate, Defendants must prove (1) there were jobs available that were "substantially equivalent" to Anel's job with Defendants, and (2) Anel failed to use reasonable care and

[8] Washington adopted and follows federal law governing mitigation of damages. *Burnside*, 66 Wn. App. at 529.

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diligence in seeking such jobs. *Burnside*, 66 Wn. App. at 529; *Henningsen v. Worldcom, Inc.*, 102 Wn. App. 828, 846 (2000). Plaintiffs need not succeed in their efforts to find "substantially equivalent" employment, and in fact, if a defendant fails to prove "substantially equivalent" employment was available, then as a matter of law the "mitigation" defense fails—even if a plaintiff did not look for work at all. *Burnside*, 66 Wn. App. at 529-30.

To be "substantially equivalent," a job must afford "virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status" as Dr. Anel's nephrology position with Defendants. *Donlin v. Philips Lighting North America Corp.*, 581 F.3d 73, 85 (3d Cir. 2009); *Rasimas v. Mich. Dep't of Mental Health,* 714 F.2d 614, 624 (6th Cir.1983). In addition, a "substantially equivalent" job must be located near Dr. Anel's residence in Gig Harbor, Washington, because he need not accept a job "that is an unreasonable distance from [his] residence." *Donlin*, 581 F.3d at 89. Thus, in *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828 (2004), the Washington Supreme Court held that a discharged employee was not required to seek or accept employment more than 75 miles away from his former jobsite. *Id.* at 840-41. Likewise, courts routinely hold that plaintiffs in employment lawsuits need not seek or accept employment more than 50 miles from their residence, and need not relocate to obtain employment. *See, e.g., NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1314 (D.C.Cir. 1972) (no failure to mitigate when plaintiffs refused to accept employment 50 miles from their residences); *Rasimas,* 714 F.2d at 625 (no failure to mitigate when plaintiff refused to interview for a job 223 miles from his residence); *Oil, Chem. & Atomic Workers Int'l Union v. NLRB,* 547 F.2d 598, 604 n.8 (D.C.Cir. 1976) (plaintiff in employment lawsuit may reject offer of employment that would require him to move to a new town). Given these prior case holdings, this Court should rule that, as a matter of law, Dr. Anel had no duty to mitigate damages by seeking or accepting employment located more than 50 miles from his residence in Gig Harbor, Washington.[9]

[9] *See Anel Decl.* (stating Anel's residence is in Gig Harbor).

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1000 Second Avenue, Suite 3250
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D. Defendants have failed to produce any evidence supporting eight affirmative defenses, which must therefore be dismissed at summary judgment

"Defendant has the burden of proof on the issues of his affirmative defense…" *Olpinski v. Clement*, 73 Wn.2d 944, 950 (1968); *see also Locke v. City of Seattle*, 133 Wn. App. 696, 713 (2006) (party asserting affirmative defenses has burden of proof). "A party is entitled to summary judgment if the party can show that there is an absence of evidence supporting the nonmoving party's case." *Stansfield v. Douglas County*, 107 Wn. App. 1, 10 (2001), *citing Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-25 (1989). Thus, a moving plaintiff satisfies his burden at summary judgment by merely challenging the sufficiency of the evidence supporting a defendant's affirmative defense. *Las v. Yellow Front stores, Inc.*, 66 Wn. App. 196, 198 (1992) (in context of defendant as moving party). In responding to summary judgment, the defendant "may not rest upon the mere allegations or denials of his pleading, but…must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." *Reed v. Davis*, 65 Wn.2d 700, 706-07 (1965) (in context of plaintiff as moving party). The defendant must set forth facts "by affidavit or otherwise…based on personal knowledge admissible at trial and not merely on conclusory allegations, speculative statements or argumentative assertions." *Las*, 66 Wn. App. at 198. Indeed, "[t]he whole purpose of summary judgment procedure would be defeated if a case could be forced to trial by a mere assertion that an issue exists without any showing of evidence." *Reed*, 65 Wn.2d at 707.

Defendants failed to meet their burden of producing competent evidence to support their first, third, sixth, seventh, ninth, and fifteenth affirmative defenses: (1) failure to state a claim, (3) failure to mitigate damages, (6) Dr. Anel's injuries were caused by third parties, (7) Dr. Anel's claims are barred by waiver, laches, or estoppel, (9) Dr. Anel's claims are barred by unclean hands, and (15) Defendants may assert any other defense including "after-acquired evidence." *See Dkt. 45* at 5. Defendants have not identified any facts in support of these defenses. For example, they have not identified any would-be third party that could have

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1000 Second Avenue, Suite 3250
Seattle, Washington 98104
(206) 343-2700

caused Dr. Anel's damages (sixth affirmative defense). Nor have Defendants provided any basis for their "waiver, laches and/or estoppel" defense, or their "unclean hands" and "after-acquired evidence" defenses (seventh, ninth, and fifteenth affirmative defenses).

Additionally, as noted above, to prove their "mitigation" defense Defendants must prove that (1) there were available jobs within 50 miles of Dr. Anel's residence, which were "substantially equivalent" in pay/duties/working conditions to his job as a nephrologist, and (2) Anel failed to use reasonable care to obtain such jobs. *Henningsen*, 102 Wn. App. at 846. But Defendants have not shown that any "substantially equivalent" positions were available within 50 miles or even 100 miles of Anel's residence, and they failed to provide evidence that Anel failed to diligently seek any such hypothetical jobs. To the contrary, Anel testified in his deposition that since being fired, he has sought work as a nephrologist with numerous employers located in King and Pierce Counties, and as far away as Seattle and Olympia (located 45 and 38 miles from Gig Harbor by car, respectively). *Exh. A* (Anel 277:1-278:14; 280:14-281:10). Unfortunately, no such employers have been hiring nephrologists. *Id.* There is simply no evidence that Anel failed to seek "substantially equivalent" jobs, and in fact no evidence that such jobs were even available. Given the lack of evidence, no reasonable jury could rule in favor of Defendants on these affirmative defenses, which must be dismissed with prejudice. *See Vallandigham, Las, Reed, supra*. Plus, Defendants' fifth and eighth affirmative defenses merely deny that Defendants engaged in unlawful acts. These general denials of liability are not affirmative defenses at all and should therefore be dismissed with prejudice.

VI. CONCLUSION

This Court should rule Dr. Anel has established all elements of his wrongful discharge claim against FMG, and has established that all Defendants violated RCW 49.52. This Court should follow governing law and rule Dr. Anel has no duty to seek or accept employment more than 50 miles from his residence. Finally, given Defendants' complete lack of evidence, this Court must dismiss affirmative defenses 1, 3, 5, 6, 7, 8, 9, and 15 with prejudice.

THE BLANKENSHIP LAW FIRM, P.S.
1000 Second Avenue, Suite 3250
Seattle, Washington 98104
(206) 343-2700

DATED this 24th day of July, 2015.

THE BLANKENSHIP LAW FIRM, P.S.

By: s/ Scott C. G. Blankenship

Scott C. G. Blankenship, WSBA No. 21431
Paul S. Woods, WSBA No. 42976
The Blankenship Law Firm, P.S.
1000 Second Avenue, Suite 3250
Seattle, WA 98104
Telephone: (206) 343-2700
Facsimile: (206) 343-2704
Email: sblankenship@blankenshiplawfirm.com
pwoods@blankenshiplawfirm.com
Attorneys for Plaintiff

DECLARATION OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the date listed below I caused to be served a copy of the attached document to the following attorneys for Defendants in the manner indicated below at the following addresses:

Michael Madden, WSBA No. 8747
Bennett Bigelow & Leedom, P.S.
601 Union Street, Suite 1500
Seattle, WA 98101-1363
Telephone: (206) 622-5511
Facsimile: (206) 622-8986
Email: mmadden@bbllaw.com

- ☒ by Electronic Mail
- ☐ by Facsimile Transmission
- ☐ by First Class Mail
- ☒ by Hand Delivery
- ☐ by Overnight Delivery
- ☐ by Notification via E-filing System

Sean Robert Gallagher, Admitted *Pro Hac Vice*
Megan-Elise Harry, Admitted *Pro Hac Vice*
Richard M. Murray, Admitted *Pro Hac Vice*
Polsinelli PC
1515 Wyncoop Street, Suite 600
Denver, CO 80202
Telephone: (303) 572-9300
Facsimile: (303) 572-7883
Email: sgallagher@polsinelli.com
mharry@polsinelli.com
rmurray@polsinelli.com

- ☒ by Electronic Mail
- ☐ by Facsimile Transmission
- ☐ by First Class Mail
- ☐ by Hand Delivery
- ☐ by Overnight Delivery
- ☐ by Notification via E-filing System

DATED this 24th day of July, 2015, at Seattle, Washington.

ERICA BRUNETTE
Paralegal

THE BLANKENSHIP LAW FIRM, P.S.
1000 Second Avenue, Suite 3250
Seattle, Washington 98104
(206) 343-2700