

No. 45407-6-II

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COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

RONALD CLIPSE,

Appellant/Cross-Respondent,

vs.

COMMERCIAL DRIVER SERVICES, INC., a Washington Corporation,
and LEE BRUNK and Jane Doe BRUNK, and the marital community
comprised thereof,

Respondents/Cross-Appellants.

APPELLANT RONALD CLIPSE'S BRIEF

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ORIGINAL

TABLE OF CONTENTS

A. Assignments of Error.....1

B. Issues Related To Assignments Of Error.....1

C. Overview.....2

D. Facts.....3

 1. FACTS RELATING TO THE TRIAL COURT GRANTING RESPONDENTS' MOTION FOR DIRECTED VERDICT ON RCW 49.52.050.....3

 2. FACTS RELATING TO THE TRIAL COURT STRIKING MR. CLIPSE'S POST VERDICT MOTION FOR FEES AND COSTS UNDER RCW 49.60.....13

E. Standards Of Review.....15

F. The Trial Court Erred.....16

 1. An Employer's Obligation To Pay Back Wages Under The Law Against Discrimination Constitutes A Statutory Obligation To Pay Wages Under RCW 49.52.050.....16

 a. AUTHORITY.....16

 b. ARGUMENT.....21

 c. RELIEF REQUESTED.....27

 2. The Trial Court Erred By Striking Mr. Clipse's Motion For Fees And Costs Under RCW 49.60.....29

 a. FACTS.....29

 b. AUTHORITY.....30

c.	ARGUMENT.....	36
1.	<u>Mr. Clipse’s Motion Was Not Late</u>	36
2.	<u>If Late, The Trial Court Erred By Not Extending Time</u>	39
G.	<u>Relief Requested</u>	43

Cases

Washington State Court of Appeals

Allstot v. Edwards, 114 Wn.App. 625 (2002) 17, 18, 19, 20, 23

Bay v. Jensen, 147 Wn.App. 641, 651 (2008) 16

Corey v. Pierce County, 154 Wn.App. 752 (2010)..... 15, 36

Hartman v. United Bank Card, Inc., 2013 WL 1442310, 3 (Wash 2013) 34

Mitchell v. Washington State Institute of Public Policy, 153 Wn.App. 803
(2009) 42

Pybas v. Paolino, 73 Wn.App. 393, 402 (1994) 43

Rabanco v. King County, 125 Wn.App. 794 (2005) 37

Sorenson v. Dahlen, 136 Wash.App. 844, 850 (2006) 16

State v. Smith, 174 Wn.App. 359, 367 (2013)..... 32

Washburn v. City of Federal Way, 169 Wn.App. 588, 615 (2012)..... 33

Washington State Supreme Court

Chaney v. Providence Health Care, 176 Wn.2d 727, 732 (2013).....16

Ferree v. Doric Co., 62 Wn.2d 561, 567 (1963) 37

Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 159-160 (1998).. 20, 24

Washington State Nurses Ass'n v. Sacred Heart Medical Center, 175
Wn.2d 822, 834 (2012) 24

Federal Cases

Certain Underwriters at Lloyds, London, Subscribing to Certificate of Insurance OP01 0025 ex rel. Puget Sound Underwriters, Inc. v. Inlet Fisheries, Inc., 232 F.R.D. 609, 610-611 (2005)..... 33

Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 113 S.Ct. 1489 (1993)..... 33, 34, 35, 41

Pryor v. Aerotek Scientific, LLC, 278 F.R.D. 516, 522 (2011) 35, 41

Washburn v. Gymboree, 2012 WL 5360978, 8 (W.D.Wash.2012)..... 21

United States Court of Appeals

Hemmings v. Tidyman’s, Inc., 285 F.3d 1174 (9th Cir. 2002) 19, 20, 21

Foreign Authority

Caudill v. Judicial Ethics Comm., 986 S.W.2d 435, 438 (Ky.1998)..... 32

Statutes

RCW 41.12.080 17, 18, 22

RCW 49.48.030 18

RCW 49.52.050 1, 8, 9, 16, 18, 19, 20, 21, 22, 23, 25, 27, 28

RCW 49.52.050(2)..... 16, 17, 20

RCW 49.52.070 1, 8, 9, 20, 27, 28, 44

RCW 49.60 1, 2, 3, 9, 13, 28, 29, 30, 42, 45

Other Authorities

4 WAPRAC 54 42

21 CFR 1308.11 25

49 CFR 382.301(a)..... 4

49 CFR 382.301(b) 4

49 CFR 391.41 (b)(12)..... 6, 26

49 CFR 391.45 4

49 CFR 391.45(b) 4

Black’s Law Dictionary 31, 37, 38

Rules

CR 6 16, 29, 30, 32, 36, 42

CR 6(b)..... 1, 14, 29, 32

CR 6(b)(2)..... 14

CR 50 8, 21, 27

CR 54 30, 31, 32, 36, 38, 42

CR 54(d)..... 3, 31, 32, 36, 38, 42

CR 54(d)(1)..... 31, 32, 38

CR 54(d)(2)..... 1, 31, 32, 38

CR 57 41, 43

CR 78(e)..... 31

RAP 14.1..... 45

RAP 14.2.....	45
FRCP 6.....	32
FRCP 36-3	21

A. Assignments Of Error

1. Whether the Trial Court erred by granting respondents' motion for directed verdict, dismissing appellant's claim for double damages under RCW 49.52.050 and 49.52.070.
2. Whether the Trial Court erred by granting respondents' motion to strike appellant's motion for fees and costs under RCW 49.60.
3. Whether the Trial Court erred by denying appellant's motion for reconsideration, granting respondents' motion to strike appellant's motion for fees and costs under RCW 49.60.
4. Implicit in assignments of error 2 and 3 is whether the Trial court erred in (a) denying Appellant's motion for fees and costs under RCW 49.60 and (b) denying Appellant's motion to extend time to file his cost and fee motion.

B. Issues Related To Assignments Of Error

1. Whether an employer's statutory obligation to pay back wages under the law against discrimination (RCW 49.60) constitutes a statutory obligation to pay wages within the meaning of RCW 49.52.050.
2. Whether the Order of Judgment "Reserving" for a later date the determination of fees and costs under RCW 49.60 enlarged the time to file appellant's fee motion under CR 54(d)(2).
3. Whether, assuming the Order of Judgment "Reserving" for a later date the determination of fees and costs under RCW 49.60 did not enlarge the time to file a motion under CR 54(d)(2), the Trial Court erred by refusing to enlarge the time to file that motion under CR 6(b) when the enlargement was at most only two days, would make no difference in the hearing date, no prejudice to either the Respondents or the judicial process was present, and

appellant articulated a reasonable and good faith reason for the extension.

C. Overview

Respondents operated a commercial driving school. Appellant Mr. Clipse had over 30 years of commercial driving experience. He was recruited, hired as an instructor, and given a start date by Respondents. (8/21, 71-74).¹ After he quit his previous job as induced by Respondents and reported to them for his first day of work, they fired him. (8/21, 75, 84-85) The Jury determined the reason for the termination was disability discrimination.

This case presents an issue of first impression applying RCW 49.52.050, to RCW 49.60. RCW 49.50.050 makes it illegal, providing the remedy of double damages, attorney's fees, and costs for an employer's willful failure to pay a wage protected by statute. RCW 49.52.050 applies equally to back wages; wages not yet earned but would have been but for the employer's violation of statute protecting the employee's right to earn them. RCW 49.60 is a statute protecting against failing to pay a wage for reasons proscribed by the WLAD.

The Trial Court dismissed on directed verdict Mr. Clipse's 49.52.050 claim because he had not earned the back wages subject to the

¹ Because the Court Reporter provided the transcript starting each day with a new page number, herein Mr. Clipse will use the citation convention of identifying the date of the transcript, followed by the page number.

claim. The Supreme Court has held back wages are subject to the statute.

Mr. Clipse moved for his fees and costs for proving the RCW 49.60 violation. The Court granted Respondents' motion to strike Mr. Clipse's motion as untimely. It was not untimely; the Order of Judgment "Reserved" the motion, as provided by CR 54(d), for a later date. But even if late, the Trial Court erred denying Mr. Clipse's motion to extend time. Respondents' asserted the motion had to be filed on Tuesday; it was filed on Thursday, to be heard the same day as if filed on Tuesday.

D. Facts

1. FACTS RELATING TO THE TRIAL COURT GRANTING RESPONDENTS' MOTION FOR DIRECTED VERDICT ON RCW 49.52.050

Mr. Ronald Clipse sued Respondents Lee Brunk and Commercial Driver Services for discriminating against him based on a disability. (CP 1-7) Specifically, that Mr. Clipse either (1) had no disability but respondents perceived he did and would not let him work because of it or (2) he had a disability and respondents failed to accommodate it. (CP 3, para. 2.5)

It was not disputed Mr. Clipse was a Commercial Driver's License holder (CDL) and actively employed as a commercial driver when Respondents recruited and hired him (8/20, 5-8) as an instructor at their commercial drivers school. (8/21, 66-67)

According to Mr. Clipse, when he interviewed with Respondent Mr. Brunk (the school's owner) he was hired on the spot. (8/21, 71-74) Mr. Clipse had over 30 years experience as a commercial driver (8/21, 58). Brunk admitted Mr. Clipse was well-qualified. (8/20, 8-9) Because Mr. Clipse already had a Driver's Certificate² with nearly a full year on it (Mr. Brunk admitted seeing both the CDL and Mr. Clipse's valid DOT Medical Driver's Certificate during the interview, 8/21, 71-72, 8/20, 9). Mr. Clipse was not required by DOT regulations to take a new physical examination³ (8/21, 74-75) and Brunk did not ask for one. Id.

Thus, Mr. Clipse was hired without restriction; Brunk admitted he asked Mr. Clipse to give notice to his employer and gave Mr. Clipse a start

² DOT regulations call a driver's medical clearance card to drive a "Driver's Certificate."

³ It is a misconception of Respondents that DOT regulations require a DOT physical upon every new hire. That is incorrect. What is required is a person has a current DOT certification. See 49 CFR 391.45(b) only requiring a DOT exam every "24 months," not on new hire. The only pre-hire DOT testing requirement is a "controlled substance" drug screen. See 49 CFR 382.301(a) However, even that is not required provided the driver was already a "participant" in a "controlled substances testing program" meeting DOT standards and was either actually tested in the preceding 6 months or subject to a "random controlled substance program for the preceding 12 months" and no positive results were obtained. See 49 CFR 382.301(b). As an active CDL driver for an interstate trucking company when hired, Mr. Clipse had a current DOT certification under 49 CFR 391.45 and was in a random drug testing pool under 49 CFR 382.301(b). Brunk conceded at trial he was aware¹ of both and that he knew all of these applicable DOT regulations. 8/21, 34-45, 71-72; 8/20, 9. Thus, his hiring Mr. Clipse as Mr. Clipse testified⁴, after the interview and unconditionally, conforms completely with DOT requirements and the evidence at trial.

date at CDS of April 18. (8/21, 71-74) (8/20, 10-11)

A little more than a week later, Brunk phoned Mr. Clipse asking him to take a DOT physical. (8/21, 75-76) Mr. Clipse testified that struck him as odd because one was not required by the DOT and was not already requested, but not wanting to say “no” to his new employer he agreed to do so. Id.

During the exam, Mr. Clipse dutifully identified a prescription for Methadone by his primary care physician for chronic pain related to a torn rotator cuff. (8/21, 79) The respondents’ medical doctor (McKendry) asked Mr. Clipse to obtain documentation from his primary care doctor regarding the prescription and in the meantime gave Mr. Clipse a new DOT Driver’s Certification for 1 month, pending Mr. Clipse’s return with a letter from his doctor regarding that prescription and a letter from his cardiologist regarding his history of one heart attack.⁴ (8/21, 80-82)

⁴ Notably, and suggested to be error, Mr. Brunk never testified Mr. Clipse’s heart issue nor any other medical issue had anything to do with firing Mr. Clipse. Despite that, over Mr. Clipse’s objection, the Trial Court allowed defense counsel to spend hours digressing into the entirety of Mr. Clipse’s medical history ranging from a prescription for cough syrup, to his allergies, to ERD. Such evidence could possibly be relevant as “after acquired evidence” provided Respondents testified they learned of those issues later and it would have resulted in Mr. Clipse’s termination. They never did. Albeit if they did, that simply would have been more evidence of discrimination¹ as none of them were DOT disqualifiers. Despite that, defense counsel was permitted to spend essentially half her case arguing issues of Mr. Clipse’s medical history that had nothing to do with the Respondents’ employment decisions. Given his scope of assignment of

Because Mr. Clipse's cardiologist was not available until the day Mr. Clipse was to first report to work, (8/21, 82) he called Mr. Brunk to advise he could not come to work that first day. Id. Mr. Brunk said that was fine and told Mr. Clipse to report for work April 19. (8/21, 83)

However, according to Mr. Brunk the previous week he received a report from Dr. McKendry (Trial Ex. #6), received on April 14, identifying Mr. Clipse's prescription for Methadone and decided when he read the report he would not employ Mr. Clipse. (8/20, 22-25). Respondents offered at least four different reasons for that decision and a new one at trial. To not distract from this time line, their perpetually changing story will be set forth separately below.

DOT Regulations provide a general rule that a driver may not drive while on any narcotic (See 49 CFR 391.41 (b)(12)). However, that rule provides an "exception" that it is permissible if prescribed by a doctor familiar with the patient's duties and concludes it will not interfere with the ability to safely operate a commercial vehicle. Id. Mr. Clipse's doctor (Pang) testified consistent with that requirement. (Pang transcript, 7:10-9:1 and 10:10-12:5).

Mr. Clipse obtained the doctors' letters requested by Respondents'

error, there is no need for Mr. Clipse to assign as error those erroneous evidence decisions but this may be raised in response to Respondents' assignments of error.

physician, identified in her report she faxed to Respondents. (8/21, 83) CDS was on the way to McKendry's office from Mr. Clipse's cardiologist so he stopped by CDS to show Brunk the doctors' letters and confirm he would be at work the next day after reporting back to McKendry for his one-year Driver's Medical Certification. Id. and 84.

When Mr. Clipse arrived, Brunk told him he would not be allowed to work. (8/21, 84) What was said is not disputed. Mr. Clipse pleaded for his job, telling Mr. Brunk he had given notice and quit his job as he and Brunk discussed at the time Brunk hired him, giving him a start date. Mr. Brunk would not let Mr. Clipse work. (8/21, 84-85) (8/20, 28-29). Mr. Clipse testified Brunk told him they could not afford Clipse to have "a relapse" (8/21, 84) as a reference to Mr. Clipse's prescription for methadone – a well known heroin weaning medication. Even Brunk admitted he told Mr. Clipse to get "cleaned up." (8/20, 29).

In the Complaint, not allowing Mr. Clipse to work after hiring him was characterized as a termination. (CP 3, para. 2.5) Respondents' Answer alleged Mr. Clipse was never hired.

The difference is of no import. Either Mr. Clipse was hired but fired before he could work a shift, or not hired. The reason was permissible or discriminatory. Respondents admitted their reason

(ignoring their shifting reasons) was a physical condition.⁵ (8/21, 25)

The Jury found in favor of Mr. Clipse on the question of disability discrimination. (CP 472-473) At this juncture, nothing more need be said on that issue: the jury found Respondents either fired, or did not hire, Mr. Clipse because of a disability. Whether the jury internally decided it was real or perceived is of no import for Mr. Clipse's assignments of error. Respondents were caught in a Catch 22; either: (1) Mr. Clipse's taking Methadone (or belief he was subject to a "relapse" and need to get "cleaned up" from heroin) was a disabling condition as Respondents claimed in which case the duty to accommodate simply required them to allow Mr. Clipse to return to his doctor to change his prescription⁶ or (2) taking Methadone was not a disabling condition but Respondents perceived it was.

Respondents made a CR 50 motion for directed verdict at the close of Mr. Clipse's evidence to dismiss Mr. Clipse's RCW 49.52.050 (and remedy under 49.52.070) claim. The gist of the motion was Mr. Clipse did not work and earned no wage for RCW 49.52.050 to apply.

Mr. Clipse responded that: (1) RCW 49.52.050 applies to "back

⁵ Respondent's reasons varied wildly but at their core, they all revolved around their perception of Mr. Clipse's physical condition.

⁶ Mr. Clipse's physician, Dr. Pang, testified that if given the opportunity she could and would have given Mr. Clipse a different prescription. (Pang, 12:1-13)

wages” that would have been earned had the employer not violated a statutory obligation to allow the employee to earn them and (2) RCW 49.60 constitutes a statutory obligation in employers to not deny employees the right to earn a wage based on a discriminatory practice. (CP 429-436) Mr. Clipse conceded a finding of liability under RCW 49.52.050 was contingent on the jury finding Respondents violated RCW 49.60 in the first place. Id.

The Trial Court granted respondents’ motion, finding there must be wages earned before an employer may be held liable under RCW 49.52.050 and .070 adopting Respondents’ argument. (8/26, 15-18) The Trial Court also indicated there must be an actual agreement or concession by the employer regarding the wages owed, before failing to pay them establishes a violation. Id.

The jury verdict determined Respondents failed to pay Mr. Clipse \$79,300 in back wages because they discriminated against him in violation of RCW 49.60, et. seq. (CP 472) That is a finding Respondents deprived Mr. Clipse a wage, in violation of a statute.

The Court did not find there was no evidence of a “willful” violation of RCW 49.52.050. As discussed below, “willfulness” is a term of art and does not require malice aforethought to deny wages. If raised, it is the employer’s burden to prove.

Given Mr. Clipse's assignment of error and both the basis of Respondents' CR 50 motion and the Court's granting of it, it is arguably unnecessary to delve into the no less than 4 shifting pretexts Respondents provided to justify their conduct. However, to ensure completeness Mr. Clipse will digress to set them forth. It is well established offering shifting, differing reasons for the action is evidence none were the actual reason but instead a pretext for discrimination.

The **first pretext** was offered in response to Mr. Clipse's unemployment claim. On April 27, 2011 Respondents certified they did not hire Mr. Clipse only because he "failed his DOT exam." (Trial Ex. #8, 8/20 Supp, 8-13). Later, they admitted that was false; he passed. (8/20, 21-22, 27). They knew Mr. Clipse had a valid medical card when he was interviewed and hired and that their own doctor (McKendry) had given Mr. Clipse an additional 30-day card; the provision of the 30 day card was included in the fax from Respondents' Dr. McKendry (Trial Ex #6) Brunk admitted he read. (8/21, 22-25) A doctor may not issue even a 30 day Driver's Certificate unless the candidate passes all of the DOT requirements. 49 CFR 391.41. Mr, Brunk admitted he was aware of these DOT regulations. (8/21, 34) To know Mr. Clipse had even a 30-day card is to know he passed the DOT physical. Respondents knew this pretext was false when originally offered. 8/20, 13-14, 21-22.

The second pretext was also offered to Employment Security. Employment Security asked Mr. Clipse to respond to the assertion he failed the DOT physical. (8/20 Supp., 15) He said he passed and provided his card to prove it. Id. at 16. Employment Security asked Respondents to explain. Their response on May 9, was telling; after being flummoxed by the agency finding out Mr. Clipse passed (referencing the card, Mr. Brunk asked: “where did you get that?”), they continued the false statement that Mr. Clipse failed his DOT exam but added the new pretext that they required a 1-year card, saying “we cannot hire him without assurance that he can have a Certificate for a year.” Id. at 13, Trial Ex. #9.

Not a new pretext but important foundation for the next one and confirmation Respondents knew their original statements to Employment Security were false when made, Employment Security followed up again with Mr. Clipse. Mr. Clipse provided a copy of the 1-year card provided by Respondents’ own doctor (McKendry) once he returned with the paperwork she requested, id. at 15. It was that same paperwork Mr. Clipse showed Respondents on April 18 on his way to McKendry and that McKendry told Respondents in her fax on April 14 she was waiting on. When Employment Security confronted Respondents with the 1-year card, Respondents told Employment Security on May 12 that the 1-year card would have been sufficient and they would have let him work with it but

the position had since been filed. Id. at 15-17, Trial Ex. #10. Respondents thus implied to Employment Security they did not know Mr. Clipse had the 1-year card at the time; however, as demonstrated above, on April 19 Mr. Clipse showed Respondents the doctors' letters Brunk understood Clipse was taking to McKendry for a longer card (8/20, 24) telling Respondents he was on his way to McKendry's office that same day.

The **third pretext** was offered to the EEOC in response to Mr. Clipse's EEOC complaint. By then, Respondents knew they could not continue the story a 1-year Driver's Certificate was required (sufficient) after being caught by Employment Security with Mr. Clipse's 1-year card. Also, they apparently realized continuing to assert Mr. Clipse failed the DOT physical was too obviously false to continue asserting. Thus, as an entirely new pretext, on July 22, 2011 Respondents dropped the assertion that Mr. Clipse failed the physical and told EEOC the new pretext that CDS required a "two year card." (Trial Ex. #11) Also for the first time, Respondents asserted Mr. Clipse's prescription for Methadone was "strictly prohibited" by the DOT and that was why he was not allowed to work. Id., and 8/20, 36-37. Respondents' assertion to the EEOC about the DOT regulation relating to Methadone will be discussed below.

Every time their pretext was rebutted, Respondents shifted to a new story.

It appears depositions, motions, and trial briefing finally got the message through to Respondents. Given that, Respondents manufactured an entirely new pretext. As the **fourth pretext** at trial, Respondents' attorney argued Mr. Clipse was not hired because it was Respondents' intention to have even "higher" or stronger safety regulations than required by the DOT. Notably, Mr. Brunk never asserted that himself.⁷

2. FACTS RELATING TO THE TRIAL COURT STRIKING MR. CLIPSE'S POST VERDICT MOTION FOR FEES AND COSTS UNDER RCW 49.60

Following the verdict, Mr. Clipse presented a proposed Order of Judgment. (CP 474) Because of the time limitation of CR 54, the proposed Order included language that moving to prove up fees and costs under RCW 49.60 was "Reserved" for a later date. Id. That order was entered following the verdict on August 28 without objection by Respondents. (8/23, 12)

When considering the proposed Order of Judgment, the Trial Court entertained a colloquy when the motion might be heard. The Trial Court suggested not noting it to be heard for at least two weeks because of court

⁷ This was plainly only an attorney argument. Mr. Brunk never said it was his reasoning; it is contrary to all his certifications to State and Federal government and his testimony. Counsel offered the school manuals, testimony of employees about a no-tolerance drug policy, and tried to connect the disjointed dots herself.

scheduling. (8/23, 12) Dates as late as September 27 were discussed: The Court: “13th, don’t set it for the 13th. The 13th is going to be a crazy busy docket as well. So I would suggest that it be the 20th or 27th.” Id.

Mr. Clipse filed his motion for fees and costs on September 11, for one of the dates the Court told him she wanted it heard on. (CP 498-603, 475, 476-497)

Respondents moved to strike asserting the fee motion was late. (CP 604-607, 608-618) Mr. Clipse replied that explicitly “Reserving” fees and costs in the Judgment extended the time under CR 54 to file the motion. (CP 619-643, 644-695) In the alternative, Mr. Clipse moved the Trial Court to extend time under CR 6(b)(2) and the standard of “excusable neglect,” he articulated evidence and argument on it. Id.

Respondents articulated not a single aspect of prejudice to either them or the judicial process by an extension, nor did they allege or make any showing of bad faith by Mr. Clipse in the timing of his motion. (CP 696-706) They only argued that late is late, asserting that because the time to file a notice of appeal, and MAR de novo request, etc., cannot be extended due to “excusable neglect,” that the Trial Court was compelled to similarly deny Mr. Clipse’s motion to extend time. Id. Respondents argued Corey v. Pierce County, 154 Wn.App. 752 (2010) was directly on point and compelled granting their motion.

Mr. Clipse replied, agreeing Corey should not be ignored but was not on point because (1) Corey did not ask the Trial Court to extend time under CR 6, (2) the Order of Judgment in Corey did not “Reserve” the motion for fees and costs but instead (3) included language explicitly ordering the motion needed to be filed in 10 days. (CP 619-643)

The Trial Court granted Respondents’ motion to strike. (CP 781-782) The transcript demonstrates The Court made no consideration of the elements of “excusable neglect.” (9/20, 21-24) Instead, it echoed the analysis of Respondents: because the timeline for filing notices of appeal, etc., cannot be extended, this was no different. Id. at 23, 26-27. The Court found no prejudice to the Respondents or the process by extending time nor bad faith by Mr. Clipse. Id. There was no evidence, adverse to Mr. Clipse, on the elements of excusable neglect. Id.

Mr. Clipse moved for reconsideration (CP 789-801) that the Trial Court denied without argument. (CP 813)

E. Standards Of Review

The Trial Court’s CR 50 dismissal is reviewed de novo. Chaney v. Providence Health Care, 176 Wn.2d 727, 732 (2013).

The Trial Court’s refusal to extend time under CR 6 is also de novo as it constitutes applying fact to a court rule:

We address the application of the court rules to the

particular set of facts in this case, which is a question of law that we review de novo on appeal.

Sorenson v. Dahlen, 136 Wash.App. 844, 850 (2006). If this Court finds the standard of review on the CR 6 issue is an abuse of discretion, that standard is well established:

Abuse of discretion occurs when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons.

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Bay v. Jensen, 147 Wn.App. 641, 651 (2008) (internal citations omitted).

F. The Trial Court Erred

1. An Employer's Obligation To Pay Back Wages Under The Law Against Discrimination Constitutes A Statutory Obligation To Pay Wages Under RCW 49.52.050

a. AUTHORITY

This is an issue of first impression. No Washington court has decided whether Washington's Law Against Discrimination (WLAD) constitutes a statutory obligation to pay wages under RCW 49.52.050. Authority compels answering the question in the affirmative.

RCW 49.52.050 requires no interpretation. An employer is liable

for double damages if it:

Willfully 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.

RCW 49.52.050(2).

Two points illustrate the Trial Court's error. First, RCW 49.52.050(2) does not limit the scope of statutory wage obligations. It says the opposite by saying "any statute." Second, the statute does not limit the obligation to only wages already earned. Although not a discrimination case, Allstot v. Edwards, 114 Wn.App. 625 (2002) is directly on point to both propositions.

In Allstot, a plaintiff police officer sued for wrongful termination alleging the City fired him in violation of RCW 41.12.080, setting forth the limited "reasons" an officer "may be discharged." Id. at 633.

Allstot sued for unpaid back wages for work he did not do; wages he would have been paid if not wrongly discharged in violation of a statute. Id. and 631. A civil service commission upheld his discharge but the Appellate Court (in a previous opinion) reversed and "ordered him reinstated." Id. at 633. The Court held plaintiff was owed "pay from the time of dismissal" to the time of his reinstatement for work Allstot did not do, but would have done if not denied work in violation of statute. Id.

On remand, the Trial Court in Allstot held back wages for work not done are not within the scope of RCW 49.52.050. That was error:

The court's reasoning was that back wages did not constitute pay for work actually done and therefore were not within the scope of RCW 49.52.050. Nothing in the statute indicates such a limited reading. Moreover, we are directed to liberally construe the statute to advance the *legislative intent to protect employee wages and assure payment*. In the context of another statute, RCW 49.48.030 (attorney fees for successful recovery of wages or salary), “wages” has been construed to include back pay.

Id. at 633. (internal citations omitted) (underline added).

Allstot explained the trigger of the statute is not whether wages were already earned, but whether the employer deprived the plaintiff a wage when the right to the wage arose from “any statute, ordinance, or contract.” Id. at 605. In Allstot, the plaintiff relied on the city’s violation of RCW 41.12.080 (the grounds for terminating a police officer) as constituting a “violation of statute” that deprived him of wages that, although he performed no work to earn them, he was deprived of the statutory right to earn them. The Court agreed. Id.

RCW 49.52.050 makes no limitation on the statutes that may support a violation; not only did Allstot not identify any limitation it held there was none. Allstot indicated that because RCW 49.52.050 must be “liberally construed” in a manner to “assure payment” as required by law – any law – the Legislature’s not including a limitation on the statutory

obligations within its scope means there is no limitation.

There is only one reported case discussing applying RCW 49.52.050 to the WLAD, 2-1 it refused to do so: Hemmings v. Tidyman's, Inc., 285 F.3d 1174 (9th Cir. 2002). The dissent harshly criticized the opinion for ignoring the plain language of the statute, giving no regard to the statute's plain language or intention to be read broadly.

Allstot cited Hemmings and commented the dissent was "strenuous," 114 Wn.App. at 634, but never squarely agreed or disagreed with the result. Allstot side stepped saying "both arguments, we believe, go to the critical element" that a right of action under RCW 49.52.050 rises on the "willful intent to deprive an employee" of his wages. Id. According to Allstot, the defendant's "willful failure to pay" is the issue, not whether the person already worked to earn the wages.

The majority in Hemmings does not withstand even cursory scrutiny – something the dissent said as well. As it will no doubt be cited by Respondents, Mr. Clipse will address it now.

According to the Hemmings majority, "if the Washington legislature intended for the provision (RCW 49.52.050) to apply to (discrimination claims) it could have stated that any employer who violates any statute is subject to double damages." Id. at 1203. (underline added) Yet, that is what the statute says as confirmed by Allstot:

The plain language of RCW 49.52.050(2) provides that the employer's obligation to pay must arise from "any statute, ordinance, or contract."

Allstot, 114 Wn.App. at 633. (underline added).

It is not understood why the Judges in Hemmings gave no weight to the words clearly there. The dissent was equally perplexed:

Applying the state's double damages statute in cases like Lamphicar's, where wages are withheld because of employment discrimination, is consistent with the Supreme Court of Washington's interpretation of § 49.52.050, the state's willful deprivation of wages statute. In interpreting §49.52.050, the Supreme Court of Washington held that the "*statute must be liberally construed* to advance the Legislature's intent to protect employee wages and assure payment." *Schilling*, 961 P.2d at 375 (emphasis supplied). Indeed, the Supreme Court of Washington has held that the "critical determination" in a double damages case under this section is "whether the employer's failure to pay wages was 'willful.'" *Schilling*, 961 P.2d at 375. Because the failure to pay employees on an equal basis is clearly willful, double damages are appropriate in this case.

The case for applying § 49.52.070 to discrimination cases is further strengthened by Washington's anti-discrimination law. RCW § 49.60.020 provides that "the provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof." Contrary to the defendant's argument, nothing in either the Washington statutes or case law describes RCW § 49.60, the anti-discrimination statute, as an exclusive remedy. The failure to pay equal wages in violation of state and federal anti-discrimination laws may, therefore, fall within the type of conduct prohibited by RCW § 49.52.050.

Hemmings, 285 F.2d at 1205 (emphasis in original).

Hemmings refused to apply RCW 49.52.050 to WLAD claims

because, according to it, “Washington Courts have not extended (the statute) to situations where employers violate anti-discrimination statutes.” Hemmings, 285 F.3d at 1203. It deftly failed to mention that was simply because the issue had not come up yet. That is not a reason to not apply the statute once it did.

Albeit not a detailed discussion, Washburn v. Gymboree, 2012 WL 5360978, 8 (W.D.Wash.2012),⁸ considered applying RCW 49.52.050 to a WLAD claim, finding no relief only because the plaintiff did not prove the discrimination claim; the court did not cite Hemmings to indicate the claim is not cognizable. If Hemmings may be relied on for a per se rule that RCW 49.52.050 does not apply to WLAD claims, one would anticipate Washburn would have said that.

b. ARGUMENT

Respondents’ CR 50 motion provided no meaningful authority or argument; it was one paragraph, CP 952, denying they acted “willfully” and asserting a RCW 49.52 claim cannot be “predicated on a claim of discrimination.” Ignoring the lack of authority, evidence, or argument by Respondents below, Mr. Clipse will illustrate the claim from square one.

There can be no dispute the WLAD is a “statute.”

⁸ Under Rule 36-3, Ninth Circuit, unpublished cases issued after January 1, 2007 may be cited.

There can be no dispute the WLAD creates a statutory right to wages by its intention to create a right to have and to hold employment:

The WLAD also declared the right to be free from discrimination in employment to be a civil right: The right to be free from discrimination because of race ... is recognized as and declared to be a civil right. This right shall include, but not be limited to: (a) The right to obtain and hold employment without discrimination.

International Union of Operating Engineers, Local 286 v. Port of Seattle,

164 Wn.App. 307, 316 (2011)⁹ (citing RCW 49.60.030).

The *raison d'être* of having and holding employment is to earn a wage. That is one of the core reasons WLAD exists: to protect the payment of wages against loss from discriminatory practices.

Thus, the denial or failure to pay a wage, back and future, rights statutorily protected by the WLAD, is quintessentially a failure to pay a wage an employer is “obligated” to pay “by statute.” See RCW 49.52.050.

The *obligation* to not deny an employee a wage because of a discriminatory reason is no different than the obligation to not deny a wage under any other statutory right including but not limited to the minimum wage or RCW 41.12.080 as at issue in Allstot.

Turning to the Trial Court’s granting respondents’ motion for

⁹ Overruled on other grounds, see 176 Wn.2d 712 (2013).

directed verdict, this court's review is de novo.

At the close of Mr. Clipse's case, he demonstrated a discharge (or as the Respondents wish to characterize it, a failure to hire) in violation of RCW 49.60. The jury verdict in his favor sufficiently demonstrates the point for this assignment of error.

Mr. Clipse presented evidence of a willful violation of RCW 49.52.050; he presented evidence the act depriving him a wage was volitional and not the product of a "mistake" or bona fide dispute. Respondents' shifting pretexts for discharge well established that.

RCW 49.52.050 does not impose strict liability any time wages are not paid. However, it is critical to remember the words "willful" and with "intent" are terms of art. Their purpose is only to not penalize good faith clerical mistakes or bona fide disputes – they do not create a requirement of proof of malice aforethought to withhold a wage. Washington State Nurses Ass'n v. Sacred Heart Medical Center, 175 Wn.2d 822, 834 (2012). The Court explained the statute

makes it illegal for an employer to act wilfully and with intent to deprive the employee of any part of his or her wages. Where an employer fails to pay wages owed, only two instances negate a finding of willfulness: (1) the employer was careless or erred in failing to pay or (2) a "bona fide" dispute existed between the employer and employee regarding the payment of wages.

Id. at 834 (internal citations omitted) (underline added).

The burden of proving “carelessness” or a “bona fide” dispute is the employer’s:

A bona fide dispute is a “fairly debatable” dispute over whether all or a portion of wages must be paid. The burden falls on the employer to show the bona fide dispute exception applies.

Id. at 834. (internal citations omitted). By design, that is a heavy burden:

In the past, our test for “willful” failure to pay has not been stringent: the employer’s refusal to pay must be volitional. Willful means merely that the person knows what he is doing, intends to do what he is doing, and is a free agent.

Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 159-160 (1998)

(internal citations omitted).

The Supreme Court’s decisions in Sacred Heart and Schilling yield a clear rule. Equating “willful” as “merely” meaning “volitional”: it means only that the conduct was not an accident – the employer knew “what he was doing” and did it. Id. Because this is the employer’s burden, dismissal for a lack of willfulness (term of art) is impossible on directed verdict. A plaintiff need not prove the absence of a defendant’s burden of proof albeit the admissions of Respondents in Mr. Clipse’s case-in-chief were dispositive: Respondents’ admitted the termination was volitional and any hope of a bona fide dispute was lost by their admissions regarding what DOT required.

When an employer’s interpretation of statute as a bona fide dispute

is its reason not to pay is not “fairly debatable,” the employer violates RCW 49.52.050 and acts “willfully” as a matter of law. *Id.* citing L&I v. Overnite Transp. Co., 67 Wn.App. 24, 34-36 (1992).

In Overnite Transportation, the employer asserted a bona fide dispute to pay and argued case law finding an overtime obligation was “wrongly decided,” *id.* at 36, urging a different interpretation. *Id.* However, the employer’s interpretation was wrong and the Court held an employer’s base adamancy its interpretation is correct in the face of the law being something else, “does not amount to a bona fide dispute.” *Id.*

The Respondents’ assertion DOT regulations prohibited taking Methadone per se (their third excuse in a long line of shifting pretexts) does not constitute a bona fide dispute in the face of the clear language of the very DOT regulation respondents asserted they were relying on. The DOT regulation in effect in April 2011 provided:

A person is physically qualified to drive a commercial vehicle if that person --

(12)(i) Does not use a controlled substance identified in 21 CFR 1308.11 Schedule I, an amphetamine, a narcotic, or any other habit-forming drug.

(ii) **Exception.** A driver may use such a substance or drug, if the substance or drug is prescribed by a licensed medical practitioner who:

- (A) Is familiar with the driver's medical history and assigned duties; and
- (B) Has advised the driver that the prescribed substance or drug will not adversely affect the driver's ability to safely operate a commercial motor vehicle;

49 CFR 391.41 (b)(12) (emphasis added). Mr. Clipse's prescription met the exception. His Methadone was prescribed by his Doctor (Pang) who was familiar with his history, duties, and concluded he could safely operate a commercial vehicle. (Pang Transcript, 7:10-9:9) Her letter (Tr. Ex. #5) Mr. Clipse showed to Mr. Brunk on April 19 said that.

Respondents' own doctor (McKendry) agreed. (McKendry Transcript, 14:16-15:15) She could not have issued even a 30 day card unless Mr. Clipse met all of DOT requirements. (Trial Ex. #6). Respondents own doctor (McKendry) told Respondents that by the language on her report, faxing them the 1 month DOT Driver's Certificate she issued. (Trial Ex. #6) Respondents admitted that having a valid card is all that DOT requires. (8/20, 13-14)

Thus, there was no bona fide dispute to assert either (1) 49 CFR 391.41 constitutes a per se disqualification or (2) that it disqualified Mr. Clipse. Ignoring the Exception is not a bona fide dispute. Respondents' insistence their reading of the statute is superior when the language says something else is not bona fide as a matter of law. See Overnite

Transportation. Respondents testified, as in Overnite, that they were relying on “other authority,” asserting they relied on a “guidance” “web site” that conceded a driver could not drive while on Methadone. (8/21, 19-20) However, they had to concede, and it is clear without the concession, that a “guidance” web site is not the law and their obligation was to follow the law articulated in the actual regulations. (8/21, 39:11-42:12)

In the event this Court finds the word “employee” in RCW 49.52.050 is significant, to distinguish its application between a person already employed versus a perspective employee denied employment in violation of statute, which was not raised by Respondents, the evidence was Mr. Clipse was an employee. Mr. Clipse testified he was hired, given a first shift to report for, reported for it, but was fired before he could do any tasks. Respondents deny that; but, that was Mr. Clipse’s evidence and he is entitled to that inference: he was an “employee.”

RCW 49.52.050 was violated by respondents. It cannot be said discriminating against Mr. Clipse because of a disability constituted a “bona fide dispute” to not pay a wage protected by statute.

c. RELIEF REQUESTED

The Trial Court’s CR 50 dismissal of Mr. Clipse’s RCW 49.52.050 and .070 claim should be reversed.

Given Respondents' admissions and the jury verdict, there is no question of fact but the Respondents' firing Mr. Clipse because of disability discrimination does not constitute a bona fide dispute which is the only defense available to this employer under RCW 49.52.050; his termination was not a "mistake. Firing or not hiring someone because of a disability, in violation of RCW 49.60, is not a bona fide reason to deprive an employee of their statutorily protected wage. As in Overnite Transp., the respondents' dogged adamancy the regulation prohibited a Methadone prescription per se, in contradiction to the regulation's plain language Exception, is not a bona fide dispute.

Therefore, this court should remand for entry of judgment for double damages under RCW 49.52.050 and .070 consistent with the jury verdict already extant of discrimination. Mr. Clipse is also entitled to fees and costs, both at trial and on appeal, if he prevails on this claim. See RCW 49.52.050 and Overnite Transp. Supra.

A fee award should not arbitrarily carve out a sliver of fees relating only to RCW 49.52 briefing. Mr. Clipse had to prove the violation of RCW 49.60 to prove the violation of RCW 49.52.050. Any fee award must account for the work to prove the underlying RCW 49.60 violation.

2. The Trial Court Erred By Striking Mr. Clipse's Motion For Fees And Costs Under RCW 49.60

A. FACTS

The core facts are set forth above. To frame the issue, Judgment was entered following the verdict on August 28, 2013. (CP 474) The Judgment indicated fees and costs were "Reserved" for later determination. Id.

On September 11, 2013 Mr. Clipse moved for fees and costs under RCW 49.60, noting it for one of the days the Trial Court directed. (CP 498-603, 475-497). Respondents moved to strike, arguing the motion was untimely and should have been filed on September 9. (CP 609-618) Mr. Clipse disputed the motion was late, because the Judgment "Reserved" fees and costs, but moved under CR 6(b) to extend time just the same. The Court struck the fee motion, refusing to award fees or costs. (CP 781-782) Mr. Clipse moved for reconsideration which the Trial Court denied without argument. (CP 813)

Mr. Clipse's motion was not untimely as the Order of Judgment explicitly "Reserved" fees and costs for a later date. But even if late, the Trial Court erred by not enlarging time under the excusable neglect standard. Mr. Clipse made both arguments to the Trial Court.

The Trial Court evaluated none of the elements or standards of

excusable neglect. Instead, in a circular fashion it concluded there was no excusable neglect because in her mind the neglect was not excusable. (9/20, 22) The Court also stated its belief that time under CR 59 was absolute such as a notice of appeal and could not be extended. (9/20, 26-28). The Court erred by not considering the factors of excusable neglect.

The elements of excusable neglect were met. Respondents provided no opposition to them. They argued myopically that the motion was allegedly late and that was all there was to it, no different than not filing an appeal in a timely manner. That was the Trial Court's analysis – it echoed the time to file an appeal rationale. (9/20, 23, 26) (The Court: “I find 54(d) – I agree this is a harsh result with a modest missed date, but it seems to me it is analogous to notices of appeal, statutes of limitation, it is absolute...”) However, a CR 54 motion is not “analogous to a notice of appeal or a statute of limitation.” Neither have any grace to extend time yet CR 54 by way of CR 6 does. For Respondents to argue and the Trial Court to find ‘late is late’ abrogates the excusable neglect standard.

B. AUTHORITY

Mr. Clipse's entitlement to his actual fees and cost under RCW 49.60 upon prevailing on his disability claim was not disputed below and is clear on the face of the statute. The issue is one of timing.

Post judgment motions for fees are regulated by CR 54, providing:

(d)(1) If the party to whom costs are awarded does not file a cost bill or an affidavit detailing disbursements within 10 days after the entry of the judgment, the clerk shall tax costs and disbursements pursuant to CR 78(e).

(d)(2)...Unless otherwise provided by statute or order of the Court, the motion must be filed no later than 10 days after entry of judgment.

(underline added).

CR 54 creates an either – or situation. Under CR 54(d)(2) either a motion is filed moving for costs or an order is entered deferring the date for a motion for costs, or under CR 54(d)(1) the Clerk of the Court “shall” administratively enter an order taxing statutory costs which in a civil case such as at bar under CR 78(e) is the “statutory attorney fee.”

The meaning of the word “shall” is clear and not subject to dispute. It is a word of mandatory command. It is distinct from words such as should or may.

Should, while definitely strongly encouraging a particular course of action, is permissive. Shall requires a particular course of action and accordingly, is mandatory.

State v. Smith, 174 Wn.App. 359, 367 (2013). Citing Caudill v. Judicial Ethics Comm., 986 S.W.2d 435, 438 (Ky.1998). See also Black’s Law Dictionary: “**Shall**. As used in statutes, contracts, or the like, this word is generally imperative and mandatory... Shall is a word of command, and one which has always or which must be given a compulsory meaning; as

denoting an obligation.”

The Clerk entered no order of statutory costs. This demonstrates the Clerk understood the Order of Judgment “Reserving” fees and costs as extending time under CR 54(d)(2). If not, the Clerk was bound to have taxed statutory costs and disbursements unilaterally.

If a party violates CR 54(d)(1) by failing to note its motion within 10 days, CR 6(b) comes into play. CR 6(b) provides a Trial Court may extend a deadline either before or after the deadline passes:

(1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or. (2) upon motion made after the expiration of the specified period, permit the act to be done *where the failure to act was the result of excusable neglect.*

CR 6 identifies five deadlines that may not be enlarged: CR 54 is not one.

A request for an extension after a deadline has passed should be granted if “excusable neglect” lays. There is little to no Washington authority defining excusable neglect in this context. However, ample Federal authority exists. See Washburn v. City of Federal Way, 169 Wn.App. 588, 615 (2012). That is true as FRCP 6 and CR 6 are essentially identical.

There are well settled, national consensus factors on what constitutes excusable neglect; as explained by Pioneer Inv. Services Co. v.

Brunswick Associates Ltd. Partnership, 507 U.S. 380, 113 S.Ct. 1489 (1993).

Rule 6 provides that where an enlargement of time has been requested after the time for performing the act has expired, the party seeking the enlargement must show “excusable neglect.” The Ninth Circuit recently addressed the concept of “excusable neglect” in an en banc opinion. Although the context was different, the teaching of the case is clear: **A trial court should assess circumstances that may show excusable neglect using the four Pioneer factors, which it must carefully weigh** in the exercise of its discretion.

Certain Underwriters at Lloyds, London, Subscribing to Certificate of Insurance OP01 0025 ex rel. Puget Sound Underwriters, Inc. v. Inlet Fisheries, Inc., 232 F.R.D. 609, 610-611 (2005) (internal citations omitted) (emphasis added).

The question of excusable neglect is not left arbitrarily to the viscera of the Judge. It does not present the classic issue of pornography as framed by US Supreme Court Justice Potter Stewart that he cannot explain it, “but he knows what it is when he sees it.” Excusable neglect is a frame work of elements the output of which color excusable neglect or not; in the one Washington case on point that could be found:

The court considers four factors: (1) the danger of prejudice to the non-moving party, (2) the length of delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the moving party's conduct was in good faith.

Hartman v. United Bank Card, Inc., 2013 WL 1442310. 3 (Wash 2013)
citing Pioneer.

Here, the Trial Court found excusable neglect can and should only include circumstances out of the control of the party or counsel. (9/20, 22) (By the Court: "My child was sick; I was in the hospital...") That is not the rule. First, it abrogates the elements. Hartman. Second, if that was the rule, it would not be one of "excusable neglect," it would be one of "unavoidable circumstance." As explained in more detail by Pioneer:

...[T]he Rule grants a reprieve to out-of-time filings that were delayed by "neglect." The ordinary meaning of "neglect" is "to give little attention or respect" to a matter, or, closer to the point for our purposes, "to leave undone or unattended *to especially] through carelessness* " Webster's Ninth New Collegiate Dictionary 791 (1983) (emphasis added by opinion). The word therefore encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness... [B]y empowering the courts to accept late filings "where the failure to act was the result of excusable neglect," Rule 9006(b)(1), Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control.

Pioneer, *supra*. at 388. (italics and quotes in original). To say "as well as by intervening circumstances beyond the party's control," at the conclusion of a list of neglectful acts demonstrates that an event "beyond the party's control" is merely one example of excusable neglect. To say

“Faultless omissions to act and more commonly, omissions caused by carelessness” and base “neglect” expresses an intent to include even careless mistakes if the elements are met. Here, the Trial Court held only events beyond the party’s control qualify; that abrogates the rule.

Further demonstrating, contrary to the logic of the Trial Court that only unavoidable emergency circumstances may constitute excusable neglect, Pryor v. Aerotek Scientific, LLC, 278 F.R.D. 516, 522 (2011) explains even plain and simple attorney mistakes and oversights may constitute excusable neglect:

As Pioneer Investment made clear, the word ‘neglect’ encompasses simple, faultless omissions to act and, more commonly, omissions caused by carelessness. The Ninth Circuit has held that “intentional” or culpable omissions to act are only those that are “willful, deliberate, or evidence of bad faith.” while neglectful failure to answer as to which the defendant offers a credible, good faith explanation negating any intention to take advantage of the opposing party, interfere with judicial decision making, or otherwise manipulate the legal process is not ‘intentional’ and is therefore not necessarily culpable or inexcusable.

Id. at 121 (internal citations omitted) (underline added). Ultimately, what the rule is looking for is a reasonable mea culpa for the delay accompanied by a lack of prejudice to the process and the adverse party. Id.

Thus, the question is: when does excusable attorney error become inexcusable attorney error. As a general rule: when the error does not arise out of an attempt to disadvantage the adverse party, when there is an

absence of bad faith, and when there is no substantial prejudice; then, error/neglect is excusable. Id.

The case of Corey v. Pierce County, 154 Wn.App. 752 (2010) may appear on point. It deals with a late fee motion but its general rule is not in dispute and other than the fee motion in the case being late, the facts are entirely different that the case at bar. (CP 676 – 683)

First, in Corey the Order of Judgment explicitly said the fee and cost motion shall be filed within 10 days. (CP 649 Corey Judgment)

Second, the plaintiff in Corey stubbornly insisted her motion was not late and did not even ask the Court to apply CR 6 (as Mr. Clipse did here) to extend time under CR 54(d) assuming her motion was late.

Thus, Corey addressed only whether the motion was late with an Order of Judgment explicitly directing that the motion be filed in 10 days. On that, the answer was clear. However, that is not the case at bar.

C. ARGUMENT

1. Mr. Clipse's Motion Was Not Late

An Order of Judgment need say nothing as to when a post Judgment fee and cost motion is to be filed. Most do not. To say anything about timing says something about timing. A Court's written ruling must be given force over any oral statement or alleged intent of the Court. Ferree v. Dorie Co., 62 Wn.2d 561, 567 (1963).

The Order of Judgment explicitly “Reserved” the motion for fees and costs for a later date. That must mean something. It cannot simply mean the motion may be brought later. Nothing may be said and that is already the case. To say anything, says something else. That is consistent with Rabanco v. King County, 125 Wn.App. 794 (2005) holding language saying something a given way evidences an intent that it actually mean what it says. Id. at 806.

Below, Respondents argued that reserving the motion for a later date without imposing a deadline was the equivalent of a blank check. That is disputed but even if true, their complaint is that the Reservation needed a deadline – not that no Reservation was made. Respondents did not take exception to the form of the Judgment; the record indicates they reviewed it before execution and entry. (9/20, 5, 12)

Mr. Clipse proposed his Order with a “Reservation” for exactly that purpose: to extend the time to file the motion. (CP 644-645) Counsel used the same language before, for the same reason. Id., (CP 673-674)

The Trial Court indicated that reservation was not of its mind when it signed the Order. However, the Trial Court’s unexpressed thoughts do not trump the plain language of the Order itself. Ferree. Ultimately, the parties and the Clerk must and do rely on what the Order says. Here again, Black’s Law Dictionary is instructive:

Reserve. To keep back, to retain, to keep in store for future or special use, and to retain or hold over to a future time.

Mr. Clipse included the language “Reserved” to enlarge the time to file the motion: it was reserved to a later, future date. That is precisely what the term means. Black’s Law Dictionary. That was consistent with CR 54(d)(2) that requires no specific date be set, but only that that an Order be entered extending the time.

The Order “Reserved” the time to file the motion as required by CR 59(d)(2) to extend time past 10 days because Appellants already had those ten days with the order saying nothing.

Mr. Clipse does not live and die on the following; but for context, this is also supported by the lack of action by the Clerk. Here the Clerk did not issue statutory costs or fees as mandated by the command “shall” under CR 54(d)(1) which is permissible only if the order extended the time to file the motion.

Likely, Respondents will argue the Clerk in Pierce County never does that, so its failure to do so here is of no weight. Mr. Clipse does not know what the Clerk does in other cases. He knows what the Rule says. It is respectfully suggested the Superior Court cannot have it both ways.

The motion was not late. The time to file it was reserved by Order.

Mr. Clipse did not wait months. He did not wait at all. If he drug

his feet with no pending date certain, Respondents' remedy would have been to move to set a date certain. But, it does not lay on Respondents, seeing the language of the Order and not objecting or asking for clarification, to argue the word "Reserved" did not mean precisely what the word plainly means.

2. **If Late, The Trial Court Erred By Not Extending Time**

It is believed review is de novo. But even if not, applying the wrong standard or not applying a standard at all, is an abuse of discretion. Here, the record demonstrates the Trial Court leapt to the circular conclusion that the delay did not seem "excusable" therefore it was not excusable. Also, that the Trial Court adopted the Respondents' argument that because a party cannot extend the deadline to file a notice of appeal, this is no different, demonstrates the Trial Court abused its discretion.

Ultimately, while perhaps not "easy," Respondents made the Trial Court's, and now this Court's, task simple by not disputing that the elements of excusable neglect were met. **On each element:**

(1) There was **no prejudice to the Respondents**. By their argument, the motion would have been timely if filed on Tuesday, September 9 at 4:30. It was filed on Thursday, September 11, for the same hearing date as if it was filed on Tuesday when Respondents argue was timely. That is, in essence, a day and a half, if not one day in filing.

To assert prejudice, dilatory conduct, or bad faith for filing the motion on a Thursday instead of Tuesday for the same hearing date strains credulity. That is why not even Respondents asserted prejudice; there was none.

(2) The length of the delay was de minimis and **did not affect or prejudice the proceedings** because even if filed a day earlier, it still would have been noted for the same day. This is not an issue of filing the motion 10 days late for a hearing six months later. This is an issue of filing the motion on a Thursday instead of a Tuesday for the same hearing day. Filing it a day or two earlier would have made no difference when it was heard.

(3) The **reason for the delay** is sufficiently set forth above. Mr. Clipse did not believe he was delaying. He believed he was being timely but even if this Court agrees with the Trial Court that the word “Reserved” did not extend time, the Trial Court did not find and there is no evidence to support that was not Mr. Clipse’s belief, nor is there any basis in the record to find bad faith in that belief or a plan or motive to prejudice Respondents. At worst, this was an incomplete communication and perhaps an ambiguously prepared order. What it is not, is bad faith or evidence of a dilatory plan to prejudice Respondents.

(4) Directly related to the “reason” for the delay, there **was no bad faith** by Mr. Clipse on this issue. Counsel for Mr. Clipse has used the

same form of Order in at least one other case with no issue raised. (CP 644-645)

In Pryor, supra., what was at issue was a day delay. In Pryor, the plaintiff failed to move to certify a class action by the 5:00 p.m. court deadline. Id. at 520-521. The excuse offered was, despite the clarity of the Court's Order setting that deadline, the attorney "did not realize" the order modified the general rule that filings by midnight were acceptable. Id. There was nothing unclear about the Court's order. Id. Plainly, the excuse boiled down to a mistake by the attorney. The Court worked through each of the four Pioneer factors (in too much space to set forth here but are found at 520 - 521) and concluded a day delay per se constitutes excusable neglect when there is no prejudice.

Pryor's delay was one legal day. Here the delay was two legal days, if not possibly one. Granted, at a point too many days will be too many days. However, that break point is not between one and two days.

Furthermore, the result here was not the intention of the drafters in amending CR 57 to create the 10 day rule. The intention was to prevent parties from failing to raise Trial Court attorney's fees issues for the first time until well into the appellate process, which was apparently happening with regularity. The purpose was not to erect a narrow door for proof, it was to limit interruptions to the appellate process:

By imposing a ten-day deadline on the filing of motions for attorneys' fees, costs, and the like, the amendment to CR 54(d) is intended to prevent parties from raising trial-level attorney fee issues very late in the appellate process, sometimes after one or all appellate briefs have been submitted.

4 WAPRAC 54. The Drafter's Commentary continued by noting what was sought to be avoided was "delay at the appellate level when an aggrieved party seeks to obtain appellate review of a subsequently entered attorney fee award." *Id.* "Delay" at the Trial Court level was not an issue.

Addressing essentially the same procedural issue but under CR 78, which like CR 54 provides a deadline for the taxation of costs and any objection to them, Mitchell v. Washington State Institute of Public Policy, 153 Wn.App. 803 (2009) said Trial Courts should not "mechanically" apply a Civil Rule deadline regarding entry of an order of costs "to deprive a litigant of costs to which he is justly entitled or to enrich a litigant with costs that he has unjustly secured." *Id.* at 823.

To refuse to extend time a day and half (or two days, if the Court will) is the epitome of "mechanically" applying a Civil Rule deadline to "deprive a litigant" of their "justly earned" costs.

Furthermore, to strictly construe a CR 54 motion for fees and costs to the extent of construing CR 6 out of existence is contrary to the additional public policy goal of RCW 49.60 requiring complete relief on

not simply the underlying claim but also the “cost of suit” that the “liberal construction (the) WLAD requires.” Blaney v. Int’l Assoc. of Machine and Aerospace Workers, 151 Wn.2d 203, 214 (2004).

Mr. Clipse is not deaf to the argument that the Rule is clear and endorsing extensions will erode it to the point of meaninglessness. To be clear, Respondents did not make that argument nor did the Trial Court articulate it. But, to anticipate such a question by this Court, such an argument is one of a slippery slope.

Slippery slope arguments may have traction in freedom of speech cases, but it is suggested the Courts are not so unwise as to be unable tell the difference between a one or two day extension under circumstances such as this, from a party trying to take dilatory advantage by undue delay. Ultimately, “each case of excusable neglect must rest on its own facts,” Pybas v. Paolino, 73 Wn.App. 393, 402 (1994), and finding it here will not open the flood gates to render CR 57 meaningless.

G. Relief Requested

The Trial Court’s CR 50 dismissal of Mr. Clipse’s RCW 49.52.050 claim should be reversed. However, more than reversed, given the admissions of Respondents in Mr. Clipse’s case-in-chief and the jury verdict finding Mr. Clipse was denied employment for a discriminatory reason, Mr. Clipse asks this Court to remand with a directive that RCW

49.52.050 was violated and direction to the Trial Court to award Mr. Clipse his attorney's fees, costs, and double damages for the violation under RCW 49.52.070.

The Respondents admit Mr. Clipse was not paid his wage by "mistake" – they intended to fire him. Further, (1) given the clarity of the word "exception" in the CFR the Respondents purport to have relied on demonstrating their pretext was false, (2) the penultimate reason for the discharge was discriminatory, and (3) the perpetually shifting and changing pretexts offered by Respondents for the discharge that caused the wage loss demonstrate as a matter of law there was no bona fide dispute.

Mr. Clipse is entitled to his fees and costs on appeal on his RCW 49.52 claim. See RAP 14.1 and 14.2.

The Trial Court's order striking Mr. Clipse's motion for fees and costs under RCW 49.60 should be reversed and the matter remanded with a directive that the Trial Court award fees and costs to Mr. Clipse in accord with his original fee and cost motion.

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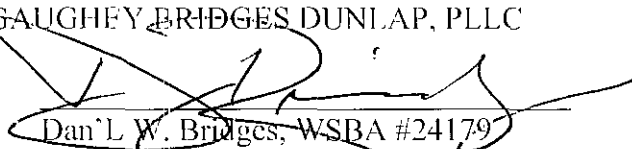
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Mr. Clipse is entitled to his fees and costs on appeal on his RCW
49.60 claim. See RAP 14.1 and 14.2.

DATED this 3rd day of July, 2014.

McGAUGHEY BRIDGES DUNLAP, PLLC

By:


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CERTIFICATE OF DELIVERY

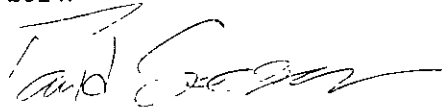
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DATED this 3rd day of July, 2014.

/s/ David Loeser



David Loeser