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DIVISION II

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STATE OF WASHINGTON

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No. 45407-6-II

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 REPLY BRIEF

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1. Overview

Respondents do not even feign an answer to the Catch-22 they created. Either they were correct, methadone creates physical conditions incompatible with driving a commercial vehicle, in which case they failed to accommodate Mr. Clipse by firing him on the spot with no attempt at accommodation or they were wrong, there was no disability, no DOT prohibition, but they fired him because of their perception of it. Instead, they contradict themselves arguing there was no failure of accommodation as it was impossible, while arguing there was no *disability*. A plaintiff with a less than candid employer may argue in the alternative. An employer must be able to explain why it did what it did. That respondents still cannot consistently explain their actions says all that need be said.

2. Response Facts

As respondents appeal denial of a CR 50 motion, Mr. Clipse need not respond to their spin of facts. He is entitled to all inferences. Grove v. PeaceHealth St. Joseph Hosp., 177 Wn.App. 370, 381 (2013). Mr. Clipse relies on his original facts; CDS does not materially dispute them.

At page 4, CDS asserts Mr. Clipse claimed the perceived disability was he is a "recovered drug addict," using quotes as though that was Mr. Clipe's language. That is false; he pled no such facts. He pled facts providing notice he was terminated because of a perception of disability or

he had a disability and was not accommodated. CP 3-4. Linking methadone, drug addiction, and a perception he was a drug addict and that was the disability is a story CDS created to minimize Mr. Clipse's claim.

At page 6 CDS asserts Mr. Brunk "testified that CDS's policy is to provide a drug-free workplace" to argue Mr. Clipse was fired because even if he met the CFR, respondents' intention is to make their fleet "safer." He said exactly the opposite. Conceding CDS has no requirements stricter than what DOT requires:

> Q: Isn't it true that there are no rules or procedures at CDS that are any more strict in terms of the physicality or the health issues of drivers than what the DOT has itself to pass the DOT exam?
>
> A: No, there isn't.

(8/20, 21). But even if Brunk testified as asserted, that makes respondents' situation worse as it would be the 4th different reason offered for the adverse decision. Never, not to Employment Security despite multiple encounters, to the EEOC, nor at deposition did they offer as their reason they wanted their fleet to be "safer" than the CFRs require.

Regarding the argument CDS's policy was to only accept two-years DOT cards, that admits discrimination based on physical condition as Mr. Brunk admitted the length of cards is contingent on physical conditions which, while present, disqualify no driver under DOT

regulations; what matters is a driver have a card. Id. at 13-14. Despite that, when asked repeatedly to explain why discriminating based on the length of card was not therefore discriminating based on physical conditions, he could not answer much less explain why it was necessary.[1] (8/21, 46-51). They thus admit they make hiring decision based on physical conditions neither DOT nor necessity require.

At page 7 respondents argue reliance on "FMCSA publications" is industry standard. They were never offered. Only the public FAQ web site was offered. Further, Brunk admitted the DOT regulations govern, not a web site. (8/21, 41-42). At page 8 respondents reference "FMCSA publications," asking their own doctor (McKendry) if "FMCSA advisory criteria recommend disqualifying any driver who takes methadone, whether they get a certificate from the treating doctor or not." She agreed some commentators do but that the CFRs defer to the doctor making the exam. CP 289 and McKendry, p. 63-64. Dr. McKendry explained regardless of what a commentator may say, certifying Mr. Clipse under the DOT rules was appropriate.

At page 9 respondents assert Mr. Brunk "testified he never saw the required follow-up (paperwork requested by McKendry) from Mr. Clipse's physicians. Mr. Clipse testified he showed it to Mr. Brunk when

[1] More fundamentally, he also never explained why making the distinction was necessary from a business standpoint much less had any relation to safety.

he returned to work the day Brunk fired him. (8/21, 83-84) As a question of fact, that is resolved in favor of Mr. Clipse despite Mr. Brunk's denial.

At page 10, respondents assert relating to estoppel they only made a "conditional offer" of employment. Mr. Clipse testified it was definitive with a start date. (8/21, 71-74) (8/20, 10-11). He testified he was asked to take a physical only after hired. He agreed, not because DOT required it, but to make his employer happy. (Id. and 8/21, 75-76).

At page 12 respondents assert "the record reflects detailed consideration by the Trial Court of the law and Clipse's counsel's arguments with respect to showing excusable neglect." It does not.

3. Reply In Support Of Mr. Clipse's Assignments Of Error

A. RCW 49.52.050

Although Allstot sidestepped, this Court is asked whether the majority or dissent in Hemmings v. Tidyman's, Inc., 285 F.3d 1174 (9th Cir. 2002) was correct. Hemmings was wrong as explained by the dissent and Mr. Clipse. The majority would not apply RCW 49.52.050 to WLAD claims saying it would if there was language the obligation to pay wages arises out of "any statue." Yet, that is precisely what the statute says.

Before addressing respondents' arguments, it is important to consider their motion. As cited in the opening brief, in one paragraph and oral argument no more detailed, they argued only there was no evidence of

"willfulness" and only wages earned are subject to the statute. On appeal, they range far beyond that. Mr. Clipse is put to address all argument but this Court should not consider arguments not made below. See Scriviner v. Clark College, ___ Wn.2d ___, fn. 1 (2014), and RAP 2.5(a).

i. It Was Error To Dismiss Over "Willfulness"

Respondents concede error by arguing at page 32 the Trial Court dismissed because Mr. Clipse proved no willful failure to pay. Respondents admit this was "the element focused on by Judge Serko in granting CDS's motion..."(Id. at 34)

Cited by Mr. Clipse and ignored by respondents, Nurses Ass'n v. Sacred Heart Medical Center, 175 Wn.2d 822 (2012) held willfulness (lack of mistake or bona fide dispute) is the employer's affirmative burden to prove, not the employee's to disprove. Id. at 834. Extended discussion is not required: a claim cannot be dismissed on directed verdict for plaintiff's alleged failure to disprove a defendant's affirmative defense.

Further, as briefed originally, Mr. Brunk admitted willfulness in Mr. Clipse's case in-chief. Respondents asserted no clerical mistake. They asserted failing to pay was a bona fide dispute. Overnite demonstrates it was not bona fide. Here as below, they assert they relied

on a web site, with no date,[2] arguing it said Methadone was an exclusion.

Respondents ignore Mr. Brunk's admission he understood the CFR governs, not a so-called guidance web site. (8/21, 41-42). The Exception in 49 CFR 391.41 (b)(12) is not subject to dispute: methadone is not an exclusion if prescribed by a physician familiar with the driver's duties. Respondents' assertion the CFR per se precludes any such prescription, in the face of the Exception, is not only not bona fide it is frivolous. Mr. Clipse presented to Mr. Brunk two DOT Driver's Certificates by doctors aware of the prescription and when he returned on April 19 showed Mr. Brunk his letter from Dr. Pang (who prescribed the Methadone originally) articulating the exception in greater detail. (8/12, 71-72, 83-85).

Assertion of a personal interpretation of a statute that cannot be reconciled with its plain language is, as a matter of law, not bona fide. L&I v. Overnite Transp. Co., 67 Wn.App. 24, 34-36 (1992). Respondents ignore Overnite. Their myopic assertion they relied on a web site in light

[2] At trial Respondents' never understood the significance of their inability to produce a copy of the web site with a date concurrent with the original employment decision. (8/21, 27-33) As the jury apparently understood, despite respondents keeping concurrent copies of all of their other materials, (which were produced in discovery) and presented at trial, they could never produce a print out from an alleged website, up and running at the time of the events in question, stating Methadone was a disqualifier. Instead, they only produced a copy from a web site they mailed to the EEOC in July 2011, 3 months later The only thing that shows is Mr. Brunk, after having his first two pretexts debunked by Employment Security and then being confronted by an EEOC complaint, looked at the web site in July, in response to the EEOC complaint and offered *that* new pretext (that Methadone was a disqualifier) never offered before. (July 22, 2011, Tr Ex. #11). If he looked at the web site already, and if it was actually a basis of his decision, he would have sent it to Employment Security and identified it then no differently than to the EEOC.

of Mr. Brunk's admissions is without merit. Finally, given their shifting pretexts, alleged reliance on a web site is unworthy of credence.

Assuming the applicability of RCW 49.52.050, this is no question of fact. The clarity of the "Exception" is dispositive. Respondents' denials in their briefing aside, by their testimony they concede a willful failure to pay with no bona fide excuse. There is no question of fact to reverse on, remand with an instruction to enter judgment is appropriate.

ii. The Statute Is Not Limited To Wages Actually Earned For Work Actually Done

At pages 32 respondents argue the statute only reaches wages for work done. ("It is undisputed... he (Clipse) did not perform any services or labor... and therefore did earn a wage that was due." That was also their argument to the Trial Court the Court agreed with.

Respondents concede that is error. At page 36 they admit in Allstot v. Edwards, 114 Wn.App. 625 (2002) wages from the officer's termination to his order of reinstatement, e.g., for work he never performed, were subject to the statute. Allstot explicitly rejected respondents' argument; Allstot, 114 Wn.App. at 632-633:

> In this case, the trial court ruled that double damages are not applicable to a suit for back wages as a matter of law. 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.

Id. at 632-633.

The only limiting factor is the employer is "obligated to pay" the wage "by any statute." Allstot. Respondents cite neither authority, logic, or public policy why broadly interpreting RCW 49.52.050 is served by limiting it to only obligations imposed for wages for work already done. That limited view contradicts the interlocking framework of statutes designed to protect wages: the WLAD is only one of them.

iii. The Obligation To Pay Exists Before A Jury Verdict And Is Not Limited To Fixed Wages

Respondents argue "there (was) no obligation to pay any damages based on lost wages prior to the jury verdict." (Respondents' brief, p. 32)[3] That is true only if an employer is not obligated to follow the WLAD until a jury tells it to. Respondents' obligation to not deprive Mr. Clipse his wage protected by the WLAD existed when they fired him and would have been no less violated if Mr. Clipse never sued. That it required a verdict to determine compensation does not mean neither the obligation or violation existed until verdict. Juries judge facts, they do not create them.

In support of the argument, Respondents assert because the

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[3] Although the grammar is challenging, it is assumed they meant there was no obligation to pay a wage prior to the jury verdict. RCW 49.52.050 does not require both an obligation to pay a wage and to "pay any damage based on lost wages."

obligation to pay in Allstot only arose after the city was ordered to reinstate the officer, that means a duty to pay can only be fixed by a verdict. (Respondent's brief, p. 36-38). Respondents can argue that only by ignoring the other half of the facts in Allstot.

Respondents ignore **the reason the officer in Allstot was fired for presented a bona fide dispute.** Allstot, 114 Wn.App. at 629. The officer was fired for-cause over "misconduct" albeit we are not told what. Id. But, it was sufficiently strong both a Civil Service Commission and Superior Court upheld the town's for-cause dismissal. Ultimately, Division Three reversed, ordering reinstatement. Id. But, being later adjudged wrong did not mean the City did not have a bona fide dispute at the time. Thus, under those specific facts the original failure to pay did not violate RCW 49.52.050 because it was for a bona fide reason. But, after the order of reinstatement, the City still failed to pay the back wages. Finding no violation of RCW 49.52.050 before the order of reinstatement but only after did not create a per se rule the duty to pay can only be fixed by jury verdict. It is simply true that before the order in that case, the employer had a bona fide dispute but after it did not.

The only way Allstot could apply to this case on this point is if respondents convinced the trier of fact (or the Court as a matter of law) they had a bona fide dispute not to pay Mr. Clipse. But if so, that would

not, as respondents argue, demonstrate their duty to pay could have only be fixed by a verdict. It would merely be the fulfillment of the defense that although they did not pay, they had a bona fide reason not to do so.

Respondents made that argument below, as they do here, by exploiting an overbroad sentence. Explaining why it did not apply the statute to the failure to pay before the order of reinstatement:

> According to Hemmings, RCW 49.52.050 applies only when an employer has a pre-existing duty under contract or statute to pay a specific compensation. When the employer's obligation to pay a specific amount does not legally accrue until a jury verdict, the employer cannot be said to have consciously withheld a quantifiable and undisputed amount of accrued pay.

Allstot, 114 Wn.App. at 634 (underline added). Based on the underlined portion, respondents argued below and in error the Trial Court agreed, Allstot held the obligation to pay only arises after a verdict. That is not what the case held; respondents ignore the grammar of the sentence.

Allstot did not say a verdict is required for the "obligation to pay" to "legally accrue" in every case of a dispute. It merely said "***when***" a verdict is required to give rise to the duty to pay (for example, when there existed a bona fide dispute before verdict) the failure to pay is no violation. That is exactly what Allstot said by the word "when." "When" the obligation to pay does not "accrue" until a verdict, for instance, with a bond fide dispute, there is no violation by not paying before the verdict.

Mr. Clipse asks this Court to clarify that sentence. It is clear but here, the Trial Court was persuaded in error by respondents' misinterpretation.

The merits of why there was no bona fide dispute are addressed above. The failure to pay was "willful" when originally consummated.

Finally, at page 37 they argue RCW 49.52.050 does not apply because the WLAD "offers a variety of remedies for damages flowing from a finding of discrimination; it does not authorize payment of back wages via RCW 41.12.090." It is assumed they meant RCW 49.52.050.

First, it is folly to argue because the WLAD does not identify RCW 49.52.050 means it does not apply. No statues identify RCW 49.52.050; do they contend it does not apply to minimum wage or over time claims. Resort to such logic reveals the lack of meritorious argument.

Second, RCW 49.60.020 indicates nothing in the WLAD limits seeking relief under another statute or claim. It is not novel the same course of misconduct may give rise to multiple remedies.

RCW 49.52.050 is clear and not subject to interpretation. WLAD is "any statute." Even if there was no reason to apply it, that it applies is sufficient. But, there is an added policy reason to not ignore its application. The WLAD does not provide exemplary damage. RCW 49.52.050 with its double damages in a sense does. That is complimentary to the WLAD. In some cases, and while this is not one, an employer could

violate the WLAD but do so without willfulness. In that event, no recovery under RCW 49.52.050 would be available. Perhaps an employer fails to accommodate leading to an employee's discharge but it was not for lack of extraordinary effort trying; perhaps the employer had a bona fide dispute over the accommodation despite being later adjudged incorrect. An employee could recover under RCW 49.60 but not 49.52.050. But, perhaps an employer – such as here – makes no accommodation attempt at all. Or perhaps the employer, with no bona fide excuse – as here – fires the employee on the spot upon merely perceiving disability. That employer violates the WLAD and willfully deprived an employee of his wage in violation of a statute. The employee could recover under both the WLAD and RCW 49.52.050. There is no duplicative recovery. The employee would not recover wages twice, once under each statute. But, they would recover wages plus exemplary damages under RCW 49.52.050 when the WLAD violation if "willful." That is the implementation of every policy reason behind both the WLAD and RCW 49.52.050.

B. Fee Motion

First, at page 39 they argue the motion was properly struck because this case "is indistinguishable" from Corey v. Pierce County, 154 Wn.App. 752 (2010) which they call "controlling." Mr. Clipse does not ask this Court to ignore Corey but respondents ignore (and expect this

Court to ignore) that in Corey the judgment explicitly ordered Corey to file her fee motion in 10 days and once a motion to strike was filed she did not ask the Court to extend time under CR 6 for excusable neglect. CP 649, 676 – 683. Those are material facts not present here. Worse, respondents misrepresent facts arguing their lack of prejudice is of no weight because Corey held the motion properly struck absent prejudice. That falsely implies prejudice was discussed and found unnecessary. Corey did not ask invoke excusable neglect; that is why prejudice was not discussed. The only question was whether the motion was late.

Related, at 41-42 respondents argue the Trial Court did not err not considering the fee motion because "Clipse did not even request additional time..." This is another misstatement. Mr. Clipse's reply brief was captioned: "Plaintiff's response to defendants' motion to strike. In the alternative, cross-motion under CR 6(b)(2) to enlarge time." CP 619. Also, Mr. Clipse indicated at CP 619-620:

> ...even if this Court disagrees that the language in the order of judgment "reserving" this issue does not address the 10 day issue, the authorities cited below indicates it is an appropriate use of discretion to enlarge time by the two days at issue. CR 54 explicitly allows that and CR 6 explicitly allows such enlargement even after a deadline has passed. To be clear: plaintiff so moves.

(underline in original) Mr. Clipse offered substantial briefing as well.

At page 40 respondents argue the Order's use of the word

"reserved" did not enlarge time but offer no argument or authority why. Instead, they cite cases to the effect that if a party fails to cite authority that means there is none and because Mr. Clipse could not cite a case directly on point means his argument is without authority. If an appellate opinion must be found precisely matching the facts of the case there would be little need for the Courts of Appeal as that would mean every scenario had already been decided. Mr. Clipse cited authority.

At page 41 respondents complain if the language "reserved" enlarged time to file, that means Mr. Clipse had an "indefinite period of time in which to do so." Not be flip, however, Mr. Clipse never contended the order addressed every contingency – only that it extended time to file. Saying nothing, the time to file was 10 days. To say anything, must mean something different. If not, why say it. If with the imperfection of the lack of a deadline Mr. Clipse unreasonably delayed, respondents' remedy would have been to move to set a date. But that there was no deadline does not mean the Order did not do, exactly as it said: reserved the issue for later. Mr. Clipse did not delay. Respondents do not dispute he filed the motion in 12 days, to be heard the exact same day as if filed in 10.

At page 42 respondents argue Mr. Clipse filed no motion to extend time before the Order therefore it cannot be read to have done so. Respondents assigned no error to the Order. They accepted it and may not

argue its lack of support, whatever that argument may be. Robel v. Roundup Corp., 148 Wn.2d 35, 37 (2002). The Order's language controls. See Ferree v. Doric, Co., 62 Wn.2d 561, 567 (1963). Respondents also ignore the colloquy regarding when the motion should be heard. It was noted for one of the days identified by the Court. (8/28, 12-14)

At page 41 respondents argue because Mr. Clipse could have requested more time under CR 6(b)(1) before the deadline means he failed "to exercise diligence" under CR 6(b)(2). If true, that would swallow CR 6(b)(2) as that must be said of every CR 6(b)(2) request.

At page 42 respondents cite Davies v. Holy Family Hospital, 144 Wn.App. 483 (2008) as being "instructive," straining to bootstrap the fact the Court was upheld for not extending time. It is of no weight. In Davies, the party responding to summary judgment did not timely respond to the motion, did not move under CR 56(f) for more time, and the Trial Court declined to consider a late filed declaration. Id. at 499. With no analysis, the Court identified the standard as excusable neglect, conclusorily stated the late party "failed to establish any basis for failing to comply with the time period," and upheld the Trial Court. Other than identifying the standard, Davies sheds no light nor "instruction." Counting results, divorced from facts, is not how cases are decided on appeal. If it were, Mr. Clipse cited in his brief many more reserving for not extending time.

Respondents do not get around to addressing the standard of excusable neglect until page 44, 6 pages into the argument.

At page 45 respondents offer, for the first time, an argument delay could (not did) prejudice them because without the calculation of fees they would not know how much to post for the appeal bond. First, respondents raised no argument of prejudice below; they ignored the elements and argued only that late is late. They cannot be heard to argue prejudice for the first time here. RAP 2.5(a). Second, it takes only cursory reading to see this is not an argument of actual prejudice but instead hypothetical; that an open-ended fee motion could delay a supersedes calculation, not that it did so here. Third, the terms of the Order caused no delay. Judgment was entered August 28 (CP 474) and the fee motion ordered stricken September 20. (CP 781) Yet still, respondents deposited no supersedes until October 4. (App. 1). That delay had nothing to do with a pending fee motion.

At page 45 respondents argue "several cases… have focused on the parties' knowledge of the triggering event" and cite Cohen v. Stingl, 51 Wn.2d 866 (1958), Pybas v. Paolino, 73 Wn.App. 393 (1994), and State v. Cline, 21 Wn.App. 720 (1978) arguing through page 47 based on them.

Cohen and Cline involved parties seeking to enlarge time to file a notice of appeal. Pybas involved trying to do the same on a MAR de novo

request. Those are deadlines explicitly precluded from extensions of time by the RAPs and MARs. It requires no argument to point out the inapplicability of such cases to a requests under CR 6(b)(2). They are apples and oranges. That the Trial Court explicitly adopted here, respondents' analogy to late notices of appeal well demonstrates the error.

At page 78 respondents argue CR 78 and the Clerk's failure to enter costs is of no weight because although CR 78 says the Clerk "shall" enter statutory costs if no fee award is made within 10 days unless an order extending time to file a fee motion is entered, "the Clerk is under no specific time constraints" to do so. Or said another way, they argue although the Rule provides the Clerk shall do something, that there is no deadline in the Rule to do so does not mean the rule is not effective on the subject. The irony. That is <u>precisely</u> the argument Mr. Clipse made that respondents contend is wrong of why the Court "reserving" fees and costs to a later date but not explicitly setting a deadline in the order does not mean the time was not extended: it only means there was no deadline set in which to do it. Respondents and the Court cannot have it both ways.[4]

Once this Court separates the chaff, the only response on point to the actual standard is one paragraph at page 47. They make only two

[4] Actually, factually respondents' entire argument on this point is wrong, CR 78 does provide a deadline: ten days

arguments; no excusable neglect lays because: (1) Mr. Clipse knew the deadline ahead of time and (2) because he "failed to file a motion pursuant to CR 6(b)(1) prior to the expiration" he failed to demonstrate excusable neglect. The fallacy of pointing to not filing a CR 6(b)(1) motion for neglect on a CR 6(b)(2) motion is addressed above. On the circular conclusion that because Mr. Clipse knew the deadline in advance means there was no excusable neglect, Mr. Clipse, in great detail and with meaningful citation to authority directly on point walked through, separately, each of the elements of excusable neglect.[5] If his arguments are so lacking no response by respondents is necessary, their lack of response in their brief is of no matter. However, that is not the case. If the only instance relief under CR 6(b)(2) may be granted is if the moving party does not know of the deadline, the rule would say that. The case law cited by Mr. Clipse demonstrates that is not the rule.

Finally as to the standard of review, respondents argue it is an abuse of discretion. The facts are not disputed; this presents the

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[5] It is not well taken for respondents to argue Mr. Clipse's discussion of diligence is flawed being (allegedly) only outward looking, attempting to blame the Court Apparently, respondents believe the standard of excusable neglect carries with it an element of personal apology. Mr. Clipse is not numb to the visceral need to offer a *mea culpa* *Counsel did.* And the Trial Court was never "blamed." But, why the motion was filed when it was, was explained. As the overused phrase goes, it is what it is. At a point, the elements are the elements and respondents, not even here, never specifically address them. They only make broad and sweeping attacks asserting the neglect was not "excusable" as a conclusion, while ignoring excusable neglect is the output of elements. Reducing the question to a visceral reaction makes the standard ad hoc; that urges a rule of man (or woman), not law

application of fact to a court rule and that review is de novo. However, even if an abuse of discretion, as Mr. Clipse cited in his opening brief it is an abuse of discretion for a Trial Court to either apply the wrong standard or no standard, or to not extend time from Tuesday at 4:30 pm to Thursday at 3:14 when the motion was filed – to be heard on the same day as if filed on Tuesday. (CP 746). All three lay here. Although respondents give lip service to excusable neglect, saying the phrase several times, they concede and the transcript demonstrates the Trial Court did not consider it; instead, the Trial Court adopted precisely respondents' argument: late is late and that because the time to file a notice of appeal cannot be extended, this is no different. That is not the application of the excusable neglect standard.

4. Response To Cross Appeal

A. The CR 50 Motion On WLAD Was Properly Denied

i. RESPONDENTS' ARGUMENT RELIES ON A FALSE CONSTRUCT OF THE CLAIM

Despite the complaint, now at least four briefs (summary judgment, trial brief, CR 50 brief, and opening brief here) and extended colloquy to the contrary, respondents continue to insist Mr. Clipse's position is they perceived him to be a "recovered drug addict" (respondents' brief, 16) and that is his disability claim. Therefore, they reason Mr. Clipse must prove being a former drug addict is a disability. It

is frivolous for respondents to perpetually misrepresent the claim.

Mr. Clipse has commented drug use may have been one animus Brunk had given he told Mr. Clipse to get "cleaned-up." However, that has never been what this case is about. Regardless of why Mr. Clipse was on methadone. Mr. Brunk admits he had an animus against it. (VRP 8/20, 25, 29, 31, 32) Disability law does not ask "why" an employee had the disability, it is only concerned with whether he had it and how the employer acted in response.[6] For respondents to argue that "why" Mr. Clipse was on methadone is the determining fact would be like an employer saying he did not discriminate firing an employee for being wheelchair bound because the employee became a paraplegic while surfing and surfing is not a disability. It did not matter why/how the employee was in a wheelchair. He was in it. That, and what the employer did in response, is what matter.

Mr. Clipse has been consistent throughout that (1) respondents knew he took methadone,[7] (2) they perceived it[8] to directly alter Mr. Clipse's physicality by (allegedly) making him physically unfit to drive

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[6] Obviously, if the "why" Mr. Clipse was on methadone was he was stealing pills, that would matter because it could not be said that would meet the exception of the CFR. It is undisputed that was not respondents' concern.

[7] Albeit, it was undisputed under prescription, never at work, and at times his doctor determined would not influence his safe driving

[8] Or so they told the EEOC and the jury.

(drowsy, prone to addiction, etc) or in the alternative had an erroneous belief the CFRs per se prohibited it, and (3) they fired him for it.

That is not assertion: it is respondents' own evidence and case theory. They cannot have it both ways. Firing someone because of a physical condition the employer believes constitutes a limitation is quintessentially an employment action taken because of an actual or perceived disability. It even meets respondents' own, incorrect, disability definition. Given that, it wastes time to argue Mr. Clipse demonstrated no disability, real or merely perceived. Respondents' argument must be an accommodation was available but not "reasonable" or a BFOQ prevented employment at all. Those will be addressed below.

ii. RESPONDENTS' ARGUMENT OF DISABILITY IS BASED ON OUTDATED LAW

The whole of respondents' argument, same as to the Trial Court on directed verdict, relies on abrogated case law decided under a since amended definition of "disability." Respondents argue at 16, that even in a perception case "the condition the employer is alleged to perceive must meet the definition of disability." In other words, what the employer perceived as a disability, if true, would be a disability in fact.

That was the definition used in McClarty v. Totem Elec., 157 Wn.2d 214 (2006), rejecting what it called the HRC's "circular"

definition, adopting the ADA's definition, requiring proof of a disability in fact. Id. at 228. The Court used the same definition in Hill v. BCTI Income Fund, 144 Wn.2d 172 (2001) and Davis v. Microsoft, 109 Wn.App. 884 (2002), both relied on by respondents.

However, in 2007 the Legislature redefined disability by RCW 49.60.040(26)(a), abrogating McClarty and the "in-fact" line of cases respondents rely on. Hale v. Wellpinit School Dist. No. 49, 165 Wn.2d 494, 498 (2009) ("...the legislature rejected the McClarty definition and amended the WLAD to provide a new statutory definition of "disability.""). That line of cases, on that point, is no longer good law. Frisino v. Seattle School Dist. No. 1, 160 Wn.App. 765, fn. 6 (2011) (The validity of Hill v. BCTI Income Fund–I, 144 Wn.2d 172, (2001), Riehl v. Foodmaker, Inc., 152 Wn.2d, 138, 145, 94 P.3d 930 (2004); and Davis v. Microsoft, 109 Wn.App. 884 (2002), has been questioned after the passage of the 2007 amendments to the definition of disability.")[9]

Worse than ignoring Davis and its entire line being abrogated, respondents cite Davis and then cite Fey v. State, 174 Wn.App. 435 (2013), telling this Court Fey "cited with approval" Davis's in-fact proof requirement to create the appearance it remains good law. That is false.

Fey did not cite Davis "with approval" on that point as respondents

[9] This Court, Division Two, in an unpublished case has even more unequivocally reached the same conclusion.

represent. It cited Davis for two reasons only: (1) "Washington decisions have relied on the federal regulations as illustrative criteria to determine whether a particular function is essential," Fey, 174 Wn.App. at 453 and (2) the standard on directed verdict. Id. at 455.

Fey was an accommodation case having little to do with whether plaintiff was "disabled" or what was required to prove that. Disability was assumed given plaintiff's poor vision. Fey revolved around "qualification," and is the only thing Fey might be cited for. Id. at 453.

iii. MR. CLIPSE PRESENTED EVIDENCE OF A PERCEPTION OF DISABILITY WHICH DOES NOT REQUIRE EVIDENCE OF DISABILITY IN FACT

The 2007 amended definition of disability is simple. Although cited by respondents, they ignore the material word "or."

> "Disability" means the presence of a sensory, mental, or physical impairment that:
>
> (i) Is medically cognizable or diagnosable; or (ii) Exists as a record or history; or (iii) Is perceived to exist whether or not it exists in fact.

RCW 49.60.040(26)(a). In light of the conjunction "or," the definition provides disability "means the presence of sensory, mental, or physical impairment that is perceived to exist whether or not it exists in fact."

Thus, the presence of an impairment in fact is not required. What is required is the perception of an impairment "whether or not it exists."

The statute defines what an impairment is:

> (c) For purposes of this definition, "impairment" includes, but is not limited to:
>
> (i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or
>
> (ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

RCW 49.60.040(7)(c).

Impairments need not be permanent or life altering:

> (b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.

Id. at (7)(b).

The definitions are intended to be very broad, much broader than the ADA or previous law. Comparing and contrasting the ADA and previous Washington definition with the newer amendment, Townsend v. Walla Walla School Dist., 147 Wn.App. 620 (2008) explained the amendment is "a substantially broader definition of disability." Id.

The standard is so low, in Townsend, a hearing loss nearly

corrected by hearing aides was found to be a disability requiring accommodation because, even if only minimally, it made plaintiff's job more difficult to do. Id. Because it was minimal, the required accommodation was merely asking plaintiff's co-workers to look at her when they spoke so she could supplement her hearing aide with reading their lips. Because the disability was accommodated there was no violation - not because there no disability.[10]

A condition that impairs a person's ability to do their job is per se a disability. Under even the more restrictive, per-amendment definition of disability a work restricting condition is sufficient. The pre-amendment case of Pulcino v. Federal Express Corp., 141 Wn.2d 629 (2000) held:

> By requiring that such abnormality must have a substantially limiting effect upon the individual's ability to perform his or her job, we have ruled out the trivial.

Id. at 642. See also the pre-amendment case of Roeber v. Dowty Areospace Yakima, 116 Wn.App. 127, 137 (2003) (holding a condition that "substantially limited his ability to perform his job" is a disability).

If under the pre-amendment, limited definition of disability a work

[10] Respondents cite Townsend but overlook how minimal the disability was; instead, asserting at page 17-18 the case held "it is always the burden of the employee to offer evidence that the complained condition amounts to a disability through testimony or evidence of the condition of the plaintiff." That is quote from respondents' brief, not the case. As far as that goes, Mr. Clipse does not disagree however it ignores Townsend was not a perception case; it was an assertion of actual disability. In a perception case, an employee must present evidence of the perception of disability. Respondents err by suggesting otherwise.

restricting condition qualifies, a fortiori that is true under the liberal amendment:

> Under the new statute, the question is not whether the accommodation was "medically necessary" in order for Johnson to do his job, such as hearing enhancements or a wheelchair might be. Instead, it is whether Johnson's impairment had a substantially limiting effect upon his ability to perform the job such that the accommodation was reasonably necessary, or doing the job without accommodation was likely to aggravate the impairment such that it became substantially limiting.

Johnson v. Chevron U.S.A., Inc. , 159 Wn.App. 18, 30-31 (2010) (quotes in original).

Mr. Clipse presented substantial evidence respondents perceived him "impaired." Mr. Brunk testified he perceived taking Methadone completely physically precluded driving a commercial vehicle.

Mr. Brunk admits he told Mr. Clipse when he was being fired because he was taking Methadone. (VRP 8/20, 25, 29, 31, 32). He admitted that was not only what he told Mr. Clipse, but it was, according to him, the truth of the matter. Id. He told the EEOC he believes Methadone constituted/created physical impairments sufficient to make Mr. Clipse unable to drive a Commercial Vehicle, citing what he called a "leaflet" supporting that supposition (Trial Ex. #28). He testified to his perception Methaone causes "memory lapses, fatigue," (VRP 8/21, 36), he said Mr. Clipse was not "clean" with his prescription, (VRP 8/21, 49). He testified

taking Methadone, in his perception, completely precluded driving a commercial vehicle. (VRP 8/21, 23-24 and Trial Exhibit #14).

Given their testimony, it is frivolous to assert Mr. Clipse did not establish their perception of disability. That is their entire defense: taking Methadone physically impaired Mr. Clipse to the point of total physical restriction from driving a commercial vehicle.

Respondents cite no authority that, in a perception case, the employee must also present medical evidence what the employer perceived constituted a physical impairment <u>when the employer's own testimony admits that was his perception</u>. If true, it would negate perception cases because they would cease to be perception of disability 'whether or not true' cases and be disability in-fact cases.

Respondents cite <u>Rhodes v. URM Stores, Inc.</u>, 95 Wn.App. 794 (1999) for the proposition a plaintiff must be "handicapped" to be disabled and establish that "upon expert medical documentation." (Respondents' memo, p. 16). They argue Mr. Clipse presented "no evidence" regarding "recovered drug addiction as an impairment," that Mr. Clipse elicited no evidence of how Mr. Brunk perceived that as an impairment, and most notably that such evidence "could only have been offered by a physician."

First, as debunked above, this argument relies on the false construct that Mr. Clipse alleged his disability (real of perceived) was

former drug addiction. That was not his claim. That alone demonstrates the lack of merit of all of respondents' arguments on those points.

But ignoring that second, again respondents rely on abrogated case law to make the arguments. Rhodes is a pre-amendment case. Citation to it for the quantum of impairment is improper.

Third, the concept of "handicap" was rejected in 1993, even before the abrogation of McClarty. ("The term 'disability' was substituted for the word 'handicap' under the WLAD in 1993. Hale, 165 Wn.App. at fn. 1).

Fourth, there has never been a requirement of medical testimony to prove discharge because of a disability – particularly when the employer admits it. Medical testimony was formerly required to establish what a needed accommodation would require if it was not otherwise obvious from the disability itself. Kimbro v. Atlantic Richfield Co., 889 F.2d 869, 874 (9th Cir. 1989) (discussing Washington law). Now, the only time medical testimony is required is if the claim asserts a need for accommodation if, without one, it would aggravate a medical condition. Id.

Respondents cite Brady v. Daily World, 105 Wn.2d 770 (1986). This is another pre-amendment case cited for the meaning of disability, arguing "isolated incidents involving alcohol use were not sufficient to show that the employee had alcoholism or that the employee was discharged for that perceived condition." (Respondents' brief, p. 18).

Citing pre-amendment cases for what constitutes disability is fatally flawed. But, for completeness, the case's discussion of disability law is one paragraph. It says nothing other than there was no evidence at all the employer perceived a disability – it perceived plaintiff was drunk at work. Id. at 777. Given that, firing plaintiff because he showed up for work drunk several times, was not sufficient to show a perception of alcoholism. Id. That has nothing to do with the case at bar in light of respondents' admissions of their perceptions of Mr. Clipse.

Finally, respondents cite at p. 18 Rhodes, arguing the Court's rejection of "cocaine and marijuana use" was a disability even with "testimony from (plaintiff's) physician." What that has to do with the case at bar, even taking that at face value, is not understood. Rhodes, decided in 1999, is of no weight on the quantum of disability required. The opinion was centered on defining what a disability was and that is how the case was decided. Id. at 799-800. But, that definition is no longer good law.

iv. MR. CLIPSE PRESENTED A PRIMA FACIE CASE

Between pages 20 and 24 respondents argue Mr. Clipse presented no prima facie case, arguing he was not "qualified" because he allegedly failed essential job functions because (1) the DOT prohibits the use of Methadone per se, and (2) it may have standards higher than the DOT and

its would not allow methadone.

Mr. Clipse made two claims: failure of accommodation and direct discrimination, referred to in the disability context as disparate treatment.[11]

Prima facie **disparate treatment** requires evidence plaintiff was:

> [1] disabled, [2] subject to an adverse employment action, [3] doing satisfactory work, and [4] discharged under circumstances that raise a reasonable inference of unlawful discrimination.

Brownfield v. City of Yakmia, 178 Wn.App. 850, 876 (2014). Brownfield was a disability in-fact case. The grammar of those element must be tweaked for a perception allegation. Also, in a never-worked case the "satisfactory work" element has less relevance. It is relied this Court can see those grammatical issues without Mr. Clipse pointing out each one.

Mr. Clipse presented a prima facie case. He presented evidence of (1) respondents' perception of disability,[12] (2) termination is an adverse action, (3) respondents admit he was otherwise qualified, (4) Mr. Brunk's statements explicitly concede "inference," the reason for termination was disability, e.g., "discrimination" by his admission the termination was for

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[11] Mr. Clipse did not utter the magic term "disparate treatment" in his complaint However, he pled those facts ("they refused to let him work, therefore treating him adversely because of disability") and the jury was instructed without objection on the pattern, disparate treatment instruction, WPI 330.31.01, Instruction #8

[12] Although Mr Clipse does not believe he was disabled per se light of the CFR Exception, he is entitled to the inferences of respondents' own argument and evidence that methadone causes drowsiness, inattention, etc. Thus, he presented evidence of disability in fact as well – certainly, respondents asserted one

the methadone prescription and its alleged effects.

Prima facie **failure of accommodation** requires plaintiff:

> (1) had a sensory, mental, or physical abnormality that substantially limited her ability to do the job; (2) was discharged by the defendant; (3) was qualified to perform the essential functions of the job; and (4) was replaced by someone whose ability to do the job was not similarly limited.

Hill, 144 Wn.2d at fn.20.

Mr. Clipse presented a prima facie case. Again, the elements inhere in the facts. He presented evidence of (1) respondents' perception of disability or alternately actual disability, (2) he was discharged, (3) he was qualified with both a CDL and DOT card; and (4) he was replaced by someone not "disabled" in this context.[13]

Washington applies the McDonnell Douglas shifting analysis in disability claims. Hill, 144 Wn.2d at 180 [14] (overruled on other grounds, McClarty, supra.); see also Scrivener v. Clark College, __ Wn.2d __ , 3 (2014); Hines v. Todd Shipyards, 127 Wn.App. 356, 370-371 (2005).

Once plaintiff presents a prima facie case, the burden shifts to the employer to present evidence of nondiscriminatory reasons for the

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[13] Mr Brunk told Employment Security when confronted with Mr. Clipse's 1-year DOT card that he would have been hired but someone else had been hired in the meantime. VRP 8/20 Supplemental, p. 17 and Trial Exhibit #10.

[14] Before respondents pounce; yes, Mr. Clipse acknowledges he has strongly criticized them for relying on pre-2007 amendment cases. However, the abrogation of those cases' disability analysis does not disturb other, established rules.

employment action. Brownfield, 178 Wn.App. at 873. Assuming that is done, the burden shifts to the employee to dispute them or show they are a pretext for discrimination even if otherwise true. Id.

To pick up the thread of respondents' appellate argument, they assert DOT regulations prohibit per se methadone and they had even stronger standards prohibiting any medication as their non-discriminatory reasons. Those fail the burden shift.

First, the CFR does not prohibit methadone in light of the Exception. Mr. Clipse had a CDL and passed respondents' own DOT physical. His prescription met the Exception in the CFR. He was qualified under DOT. Respondents original "mistake" (even assuming it was made) ignoring the CFR Exception is bad enough: to continue to assert it in briefing is frivolous.

Second, despite the argument in their brief, respondents offered no evidence before directed verdict – none is cited – they had standards higher than the DOT. They conceded the opposite by Mr. Brunk's admission CDS had no physical standards stronger than DOT's. (8/20, 21) Respondents make several VRP citations and sharp argument to create the impression there is evidence in the record CDS had higher standards. However, if those VRP citations are actually read they have nothing to do with this issue. For example, at page 21 they cite VRP 08/29, 60-61 as

saying "employers are permitted to enforce their own, stricter guidelines." However, there is no such citation. The jury returned a verdict on August 28. Also, the only transcripts going to page 60 are August 21 and 22. On both, the testimony at ranges 60-61 are of Mr. Clipse. The argument CDS had higher standards is plainly a lawyer manufactured argument, trying to connect the dots between vague statements in CDS's employee handbook regarding a "drug free workplace." (Trial Ex. #18, p. 2). That argument ignores the "drugs" referenced are "controlled substances," e.g., illegal drugs. There was no testimony offered by Mr. Brunk that CDS has standards even higher than DOT – he admitted the opposite.

Respondents' failure to present evidence on their burden shift required the case to be submitted to the jury. McDonnell Douglas, inter alia. Respondents' incorrect legal argument regarding DOT and nonexistent higher standard evidence did not rebut the prima facie case.

Ignoring respondents did not meet their burden shift, assuming they did, Mr. Clipse's satisfied his. An employer's shifting reasons create an inference none are true but are a pretext for discrimination:

> ...inconsistent reasons for terminat(ion)... suggesting that none of the reasons given was the real reason for his termination. Evidence indicating that the employer offered multiple, incompatible reasons or inconsistent reasons for the adverse action and rebutting the accuracy or believability of the employer's reasons is sufficient to create competing inferences.

Rice v. Offshore Systems, Inc., 167 Wn.App. 77, 91 (2012). See also Hill, 144 Wn.2d at 184:

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.

Respondents' shifting reasons offered to Employment Security, EEOC, deposition, and trial are well briefed and require no further discussion. Respondents offered at least two prextexts in the Employment Security setting alone. First saying he failed the DOT physical, then admitting he passed but he needed a one year-card. (8/20 Supp. Trans. 4-18).

Further, Mr. Clipse directly rebutted the two reasons offered by respondents on appeal. He presented substantial evidence through the admissions of Mr. Brunk and testimony of Drrs. McKendry and Pang that the DOT regulations did not disqualify him. (McKendry, p. 10-16, Pang, 9-12). As to the proffered reason of higher CDS standards, not only was there no evidence of them for Mr. Clipse to rebut and Mr. Brunk conceded that was not true (8/20, 21), the examination of Mr. Brunk shows any attempt to create physical barriers to employment over those DOT indicates are required for safe driving are discriminatory practices themselves. (VRP 8/20, 13-14; 8/21, 46-51). Here, not even on appeal do

respondents argue why their allegedly higher standards, which they never presented evidence on, were required or even facilitated safety.

The forgoing is sufficient. However, respondents also err by paying no weight to the difference between Mr. Clipse's failure of accommodation and disparate treatment claims. Respondents' BFOQ arguments are cognizable only as to Mr. Clipse's disparate treatment claim. Fey, 174 Wn.App. at 445.

Respondents offer a variety of add-on arguments offered to prop up the two primary ones discussed above. The above addresses the core adequately but for completeness the following is offered.

Respondents argue their own doctor, McKendry, erred giving Mr. Clipse either a 30 day or 1 year card. They assert she ignored DOT guidance that Methadone prescription is a disqualifier per se. That fails for a variety of reasons.

First, respondents never offered those alleged "guidelines." There is no evidence of them. The only thing offered was a public FAQ web site, not the published doctors' guidelines. As to their web site, Mr. Brunk admitted the CFRs are determinative, not a web site.

Second, although McKendry acknowledged guidance suggested a doctor should not pass a driver with such a prescription, respondents sharply stop their citation short of where she explained that guidance is

only guidance and the regulations defer to the opinion of the doctor. (McKendry, 73) She explained there is a "medical examiner's handbook" that provides guidance but is not binding, id. at 45-47, and she decided based on the actual regulations: "In 2011 I made the decision regarding Mr. Clipse's situation based on the regulations in the Federal Motor Carrier's Web site." Id. at 48. The web site respondents rely so heavily on says that was appropriate. Trial exhibit 28 offered by respondents, page 8 of the web page, point 58 states:

> The Medical Examiner must follow the standards found in 49 CFR 391.41. In the case of vision, hearing, epilepsy, and diabetes requiring any use of insulin, the FMCSRs are absolute and allow no discretion by the Medical Examiner.
>
> FMCSA also provides medical advisory criteria and medical guidelines to assist the Medical Examiner determine if a person is physically qualified to operate a commercial bus or truck. The Medical Examiner may or may not choose to use these guidelines. These guidelines are based on expert review and considered practice standards. The examiner should document the reason(s) for not following the guidelines.

(underline added). The underlined portions are notable. The only CFR medical standards not subject to discretion involve vision, hearing, epilepsy and diabetes. Prescription is not one. Second, even respondents' web site states a doctor "may or may not choose" to use the guidance. Dr. McKendry used the regulations and documented it by the letter she requested from Pang which is not disputed she ultimately had.

The lack of factual support for respondents' argument of their own higher standards is discussed above. However, for completeness Mr. Clipse will also discuss the authority they cite; it is equally inapplicable.

They cite Rhodes. That is a sharp citation to create the appearance of authority but the facts reveal it provides none. The employee was a "marijuana abuser" "using marijuana and cocaine" and "lost the ability to control" it. Rhodes, 95 Wn.App. at 800. He was fired for repeatedly using illegal drugs at work. That has nothing to do with an employer having stronger drug policies than required by DOT because DOT prohibits illegal drug use. Rhodes does not support adopting rules, under the pretext of safety, that deny employment over physical issues the DOT has determined pose no safety threat.

Next, respondents cite Hines. However, it is essentially the same case as Rhodes. Again, plaintiff had a "cocaine" dependency but the other dependency was alcohol. Hines, 127 at 362. As in Rhodes, plaintiff was allowed to enter treatment but failed to follow through and ordered the doctor to stop communicating to the employer his lack of compliance. Id. at 364. That is why he was fired. Id. The termination was proper for plaintiff's failing to follow through on the treatment of the disability, not the disability itself. Id. Like Rhodes, that provides no support for respondents' argument that having drug rules (never proven) more

stringent than DOT is permissible. Adverse to respondents, Rhodes accepted using a drug effecting physical ability constitutes a disability.

Respondents cite Brady. Its facts are discussed above. Brady was fired because he repeatedly showed up drunk at an industrial press. That has nothing to do with this case. That employers can have "drug" and "safety" rules is not denied. But, they may not be discriminatory.

Last, respondents city Fey. Fey was not promoted because the job he wanted required him to drive a commercial vehicle yet he could not obtain a CDL because of poor eye sight. 174 Wn.App. at 445. Fey claimed only a lack of accommodation; he did not assert "disparate treatment." Id. at 447. Fey's holding is limited to accommodation claims but even still it is of no support to respondents.

First, Fey is notable as it explained a BFOQ defense is not available in failure of accommodation claims. Id. Respondents' BFOQ arguments are of no weight on Mr. Clipse's disparate treatment claim.

Second, Fey had no CDL but driving commercial vehicles was a large part of the job. Respondents use Fey to argue accommodation may not so alter the job as to create one at the employee's demand. Mr. Clipse agrees; but, he did not ask that. He had a CDL and respondents admit he was otherwise qualified. VRP 8/20, 8-10. He did not ask respondents to allow him to violate the CFRs; he did not violate them.

v. MR. CLIPSE STATED AN ACCOMODATION CLAIM

Between pages 24 and 27 respondents argue Mr. Clipse sought no accommodation and could not be accommodated even if he did. Acknowledging, finally, some understanding of the alternate theories of the case, respondents argue there can be no failure of accommodation where Mr. Clipse asserts he was not disabled.

On the one hand, that is true. If Mr. Clipse's methadone was not a disability it was disparate treatment to fire him over respondents' perception it was, but that is not a failure of accommodation. However, if respondents are correct that methadone causes the physical conditions they assert preclude him from driving, it was a disability giving rise to the duty to accommodate. In that regard, they elicited substantial evidence in Mr. Clipse's case-in-chief from their own doctor (McKendry) that Methadone can cause jitteriness, hyperthesia, fatigue/sleepiness, nausea, and a lack of concentration. (McKendry, 64-70).

Respondents cannot use their own shifting and incompatible pretexts as a sword; hiding behind the confusion caused by their shifting reasons is exactly that. It is not an employee's burden to act as a lie detector for an employer, sift the shifting pretexts, decide which was the "real" one, and prove that pretext was discriminatory. Respondents'

multiple, shifting pretexts have created their own Catch-22. Either they discriminated by firing Mr. Clipse for what they perceived to be a disability that in fact was not. Or, Mr. Clipse had a disability and they discriminated by failing to accommodate it.

Moving past that, as to respondents' argument no accommodation was possible, Mr. Clipse presented evidence of an easy accommodation: let him change his prescription. Dr. Pang testified she could and would have found a different prescription if Mr. Clipse was given the opportunity to return with a need for a different prescription. (Pang, p. 12: "Q: Would you have been willing to do that? A: Yes.")

It is well settled if the needed accommodation is time to "return to work unimpaired," the employer must provide it. Kimbro v. Atlantic Richfield Co., 889 F.2d 869, 874 (9th Cir. 1989), affirmed by Michelson v. Boeing Co., 63 Wn.App. 917, 920 (1991).[15] That is clear without Kimbro given the duty to accommodate "unless (it) can be shown to impose an undue hardship on the employer's business," Snyder v. Medical Service Corp. of Eastern Washington, 145 Wn.2d 233. 239 (2001).

The record is devoid of evidence allowing Mr. Clipse to return to

15 In candidness to the Court, Michelson upheld summary judgment in favor of defendant because plaintiff did not rebut the reasons proffered for termination or medical evidence of a "continuing handicap." As briefed above, that abrogated standard of "handicap," not disability, is no longer controlling. But, nothing has been done to obviate the holding on time as an accommodation

Dr. Pang for a different prescription would have caused an unreasonable hardship. Given the time CDS took to hire Mr. Clipse, to give notice to his then current employer, etc., waiting a few more days (if not possibly only one) would not have been unreasonable.[16] If there was a concern over lingering effects (which respondents never asserted or presented evidence on), a few days more for the medication to clear his system would be reasonable. Respondents never asserted any of that minor delay, for a teaching position, would have been a hardship. Being unable to assert that, they stubbornly asserted continued methadone could not have been accommodated. They ignored the easy accommodation of time.

Regarding respondents' argument no obligation to accommodate arose because they were not aware of its need is frivolous. They concede they knew of the methadone, their perception of disability/condition it caused (e.g., the alleged physical effects), and decided on the spot to fire Mr. Clipse. VRP 8/20, 22 and 25. Their knowledge triggered an affirmative obligation to inquire and accommodate if reasonably possible. Mr. Brunk admits he made no call; he made no inquiry nor started the

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[16] There is nothing in the CFR that says "ever" having a prescription is a life time disqualifier and respondents cite no authority for that proposition. Such would be a non-sensical interpretation. What is at issue is having an active prescription albeit even that ignores the Exception makes the permissible under those conditions.

interactive process. VRP 8/20, 25-26.[17] His decision was unilateral. Id.

The employee's duty is "giving the employer notice of the disability." Goodman v. Boeing Company, 127 Wn.2d 401, 408 (1995). Once done, that "triggers the employer's burden to take positive steps to accommodate the employee's limitations." Id. Goodman rejected Boeing's argument the employee's notice must "include informing the employer of the full nature and extent of the disability." Id. It is the employer's obligation to "determine the extent of the disability," to do something as basic as "call (the employee) into the office to assist" to determine how to reach an accommodation, etc." Id. It violates that duty to "leave the initiative" to the employee to do those things. Id. Those duties are counterbalanced by the employee's "duty to cooperate with the employer's efforts." Id. The employer's duties are "affirmative." Snyder v. Medical Service Corp. of Eastern Wash, 145 Wn.2d 233, 239 (2001).

Respondents' "affirmative duty," Snyder, was "triggered," Goodman, the moment Brunk read McKendry's fax identifying the

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[17] Respondents will likely respond by complaining Mr. Clipse had an obligation to tell Mr. Brunk all of his various prescriptions and medical conditions. That was Mr. Brunk's contention at trial VRP 8/20, 26 At trial they never presented authority nor explained the basis for that. It is not believed to be true The medical gate keeper is the DOT physician, not Mr. Brunk. Arguably, if after qualified a driver is diagnosed with a condition or has some other issue that calls into question his DOT qualification, the driver has an affirmative obligation to take himself out of service and follow up for clearance But, for respondents to assert (as they did at trial), a driver applicant already cleared to drive, holding a valid DOT certificate, must disclose all manner of physical conditions not requiring accommodation to the employer is itself a discriminatory practice.

Methadone prescription and his stated belief its use was/would cause physical conditions interfering with employment. That duty could have been met by simply "call(ing) (Mr. Clipse) into the office" to explore what could be done. Id. Instead of doing that, they fired him.[18] Mr. Clipse has never contended the accommodation was allowing him to violate the CFRs; that is a false construct of respondents.' Assuming the truth of their incorrect CFR argument and even their baseless "higher standards" argument, all that was required was Mr. Brunk giving Mr. Clipse time to return to Pang for a different prescription.

Respondents' argument at 27 that Mr. Clipse "never engaged in the accommodation process" is frivolous given Mr. Brunk's admission he decided the moment he read Dr. McKendry's fax he would fire Mr. Clipse before discussing anything with him.

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[18] In anticipation of the response that Mr. Brunk's telling Mr. Clipse to go get "cleaned up" was the invitation for Mr. Clipse to get a different prescription, that is easily seen to be. like the argument of higher CDS standards, a post-hoc legal argument. (1) That is not what Brunk said. He did not say, go get cleaned up and come back. He said, you are not employed here. <u>An employer does not accommodate by firing the employee and inviting them to reapply once they have no disability</u>. (2) Respondents admit they immediately hired someone else. <u>Supra</u>. If the comment was, 'get cleaned up and come back,' they would have given Mr. Clipse time to get a different prescription and hold the job for the day or two that required <u>Rhodes</u> and <u>Hines</u> cited by respondents compel exactly that In <u>Hines</u>, the employee was accommodated by giving him time to go to treatment The employee was later properly fired not because the disability of their drug used made him not qualified or violated a BFOQ, but because he did not follow through on the accommodated treatment plan

vi. RESPONDENTS FAILED TO PRESERVE ERROR

Respondents assign error to the denial of directed verdict although they requested neither a new trial or JNOV nor assigned error to the verdict. Under Washburn v. City of Federal Way, 168 Wn.App. 588 (2013) failing to do those things fails to preserve the record to review directed verdict. The Supreme Court in the same case, 178 Wn.2d 732 (2013) reversed that decision. But, the manner in which it did does not preclude applying that rule to this or any WLAD case.

Noting Division One's ruling was the Federal Rule, and FRCP 50 and CR 50 are identical, it declined to apply it on the facts before it:

> Washburn offers only one argument for disregarding our practice and following the federal rule, namely, that it requires the parties to be focused on legal issues by fixing factual matters through the jury verdict, preserving judicial resources. Washburn's argument is unpersuasive.

Id. at 752.

Washburn was a personal injury case where the plaintiff's evidence must be complete on resting. However, the WLAD explicitly acknowledges the intertwined nature of the plaintiff's and defendant's cases. The McDonnell Douglas shifting burdens test, require consideration of defendant's evidence:

> Because the McDonnell Douglas burden-shifting framework was designed to provide the trier of fact with

> *both* sides' conflicting explanations for the employment action at issue, once a trial court concludes that an employment discrimination claim cannot be resolved as a matter of law short of a trial, no directed verdict should issue before *both* parties' witnesses have been duly examined and cross-examined and *both* parties have set forth their evidence...
>
> ...it is a wise exercise in judicial economy to let the jury decide the matter and then to grant a judgment n.o.v., rather than court the prospect of trying the entire matter again as to that defendant, with resulting prejudice to all parties. Appellate courts have repeatedly said that it usually is desirable to take a verdict, and then pass on the sufficiency of the evidence on a post-verdict motion.

Hill, 144 Wn.2d at fn. 9 (italics in original, internal citations omitted).

Washburn indicated the argument for requiring a post-trial motion to preserve directed verdict error in a personal injury case was unpersuasive. But, the WLAD presents unique challenges to Trial Courts. Not only is it incongruous with Federal law to not require the so-simple task to renew the motion posttrial, it puts Trial Courts in an impossible Catch-22 in WLAD cases. McDonnell Douglas, Hill, etc., instruct Trial Courts to not grant directed verdict in evidence shifting cases based on inferences that exist upon a prima facie case and to let the jury decide based on all the evidence. Not requiring defendants to preserve the record by a post-trial JNOV or new trial motion undercuts the Trial Court's obligation to let the matter go the jury on the complete evidence and deprives the Trial Court the opportunity to grant that relief post trial as

Hill directly instructed them to do. It also asks appellate courts to ignore the complete record developed through cross-examination and shifting evidence offered by the employer in its defense case-in-chief.

Thus, not only is it a fiction to ignore the complete evidence once submitted to the jury, in a WLAD case it contradicts Hill, McDonnell Douglas, inter. alia., to review an interlocutory CR 50 denial when the employer accepts the jury verdict was correct by not moving for post trial relief and fails to assign error to the verdict itself. That is particularly true where, as here, defendant assigns no error to instructions.

With no post-trial motion for relief, and no assignment of error to the verdict or instructions, the employer effectively admits the verdict based on all of the evidence was correct and asks the Court of Appeals to abrogate that final, correct verdict based on all the evidence over an interlocutory decision based on half the evidence. Not only does that defy logic, it tramples the concept of judicial economy.

A CR 50 motion in a WLAD case is much like a denied CR 56 motion when the issue is a question of fact lays. Even if the Trial Court might have granted the motion, if the trier of fact based on all of the evidence and after considering the employer's case justifying the employment decision (perhaps because of constantly shifting rationalizations) is persuaded the real reason was discriminatory based on

proper instructions, it would be unfair and anomalous to review a prior interlocutory order to "deprive" a party a "jury verdict" because "on less evidence" a motion for directed verdict could have been granted when "after the evidence was more completely presented, where cross-examination played its part and where witnesses were seen and appraised" the party prevailed. See Johnson, 52 Wn.App. at 307.

B. Summary Judgment Provides No Basis For Review

Respondents assign error to the denial of summary judgment but offer no argument or authority; instead, they assert the issues are similar to its CR 50 motion. Error assigned but not argued is "deemed abandoned." Pappas v. Hershberger, 85 Wn.2d 152. 153 (1975); Holder v. City of Vancouver, 136 Wn.App. 104, 107 (2006); Bercier v. Kiga, 127 Wn.App. 809, 824 (2004) ("We need not consider arguments that are not developed in the briefs and for which a party has not cited authority."); RAP 10.3.

Further, that denial is not subject to review because respondents moved there was no dispute of material facts, not that there was a pure question of law. CP 11-24. 819-858, 886-927, 859-870. Mr. Clipse presented evidence demonstrating a question of fact. CP 25-50, CP 172-175, CP 51-158. Summary judgment was denied because of a question of fact, not of law. CP 76-77, VRP 44-46. Denial because of a question of

fact is not reviewable once the case is submitted to the jury. Johnson v. Rothstein, 52 Wn.App. 303, 305 (1988); Adcox v. Childrens' Othropedic Hospital, 123 Wn.2d 15, fn 9. (1993).

On the merits, given the lack of briefing here by respondents, Mr. Clipse presented a question of fact. The Trial Court understood the issues. (6/17/13 summary judgment transcript) There was no error.

C. The CR 50 Motion On Estoppel Was Properly Denied

To avoid respondents' making Mr. Clipse's claim something it is not, he admits he understood he was hired as an at-will employee.

This case presents the unique circumstance in Havens v. C & D Plastics, Inc., 124 Wn.2d 158 (1994) to sustain estoppel in an at-will hire. Havens recognized this claim when there is a "clear and definite promise" of employment. Id. at 171-172. Respondents' argue there was no "clear promise" of employment, asserting there was only a conditional offer.[19] Mr. Clipse unequivocally testified he was hired. That question of fact goes to him. With that, it should be a matter of proving the elements: at id.:

> (1) a promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise.

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[19] At trial respondents only argued the claim should be dismissed because the offer of employment was "conditional." They never argued there is a per se rule estoppel may never be raised in at-will settings. To the extent that is a new argument, if offered, it should not be considered. RAP 2.5(a).

In Havens the Court upheld dismissal because plaintiff asserted he was promised termination only for cause but offered no compelling evidence of that. Id. at 174-175. Nothing in Havens explicitly says the doctrine shall be limited to only cases asserting for-cause termination for cause. It is simply true that in Havens, that was plaintiff's claim.

If the elements are proven, there is no reason to not apply the cause in employment at-will. It may be for at-will employment damage is slight. For instance, if a plaintiff promised employment at-will "changed his position" by leaving a job but the plant at his new job shuts down, there is no doubt the employee changed position to his detriment in reliance of the promise. However, damages are limited by the fact he was at-will meant he could be fired any day.

Simply because damages are slight does not mean there are none. Simply because an employee could be fired at-will does not mean they would have been. Damage and liability are separate questions.

Korslund v. DynCorp Tri-Cities Services, Inc., 156 Wn.2d 168 (2005) recognized estoppel arising out of promises made in a handbook despite plaintiff's acknowledgment he was an employee at-will, saying it was inconsistent to allow "...the employer...to make whatever promises it wishes to make without any obligation to carry them out." Id. at 187.

Flower v. TRA Industries, Inc., 127 Wn.App. 13 (2005) held in employment, "if a promise is made for the purpose of deceiving and with no intention of performing, it may be actionable." Id. at 32.

Neither Korslund or Flower are precise fits. However, they hold employers to their promises where it does not unreasonably erode the at-will doctrine. Respondents' cases address situations where the employees left one job for another, but were at least allowed to work to some extent.[20] In doing so, they took their at-will chances and no claim laid. See Bakotich v. Swanson, 91 Wn.App. 311 (1998).

There is a qualitative difference between an employee already working and taking their chances under the at-will doctrine asserting estoppel, versus an employee induced to quit one job and is then fired from his new one before he can even start. If this court deems that a request for an extension of case law, so be it. However, if the elements are proven they are proven. The jury determined Mr. Clipse proved the elements. Mr. Clipse's at-will status could have acted as an argument against damages. It might have been a good one. It was not made.

DATED this 3rd day of October, 2014.

McGAUGHEY BRIDGES DUNLAP, PLLC

By: ______________________

Dan[illegible] W. Bridges, WSB[illegible] 24[illegible]79

Attorney for appellant

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[20] This is an argument they did not raise below See fn. 19, supra

CERTIFICATE OF DELIVERY

A copy of this brief was provided by next day legal messenger to attorneys for respondents at the below address:

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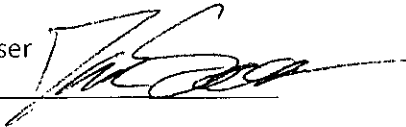
DATED this 3rd day of October, 2014 in Seattle, Washington.

/s/ David Loeser 

David Loeser

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DIVISION II

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STATE OF WASHINGTON

BY_______________
DEPUTY

No. 45407-6-II

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.

APPENDIX TO APPELLANT RONALD CLIPSE'S REPLY BRIEF

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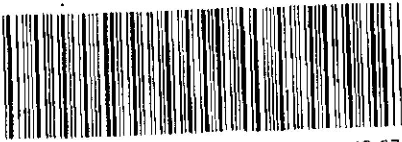
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HONORABLE SUSAN SERKO

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A.M. OCT 04 2013 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY ________ DEPUTY

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

RONALD CLIPSE, Plaintiff, v. COMMERCIAL DRIVER SERVICES, INC., a Washington corporation, and LEE BRUNK and JANE DOE BRUNK, and the marital community comprised thereof, Defendants.	NO. 12-2-05566-7 NOTICE OF CASH SUPERSEDEAS **[CLERK'S ACTION REQUIRED]**

COME NOW the above-named Defendants by and through their attorney of record, Lori M. Bemis of McGavick Graves, P.S., and pursuant to RAP 8.1(d)(1) hereby direct the clerk to invest the funds in the amount of $107,458.76, subject to any clerk's investment fee, as provided in RCW 36.48.090 and RAP 8.1(d)(1).

DATED this 4th day of October, 2013.

McGAVICK GRAVES, P.S.

By: ______________________
LORI M. BEMIS, WSBA #32921
Attorney for Defendants

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