No. 45407-6-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

RONALD CLIPSE

Appellant/Cross-Respondent,

v.

COMMERCIAL DRIVER SERVICES, INC. AND LEE BRUNK

Respondents/Cross-Appellants

OPENING BRIEF OF RESPONDENTS/CROSS-APPELLANTS AND RESPONSE TO CLIPSE'S OPENING BRIEF

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I. INTRODUCTION

Plaintiff below, Ronald Clipse ("Clipse") interviewed for a job with Commercial Driver Services ("CDS") as a commercial truck driver instructor; the job required him to drive a commercial motor vehicle. Following the interview, Lee Brunk ("Brunk"), the owner of CDS at the time, conditionally offered Clipse a job, conditioned on him taking a Department of Transportation ("DOT") physical and, based on the physical, obtaining a two-year Commercial Driver's License ("CDL"). Clipse quit his existing job within a day or two of his initial interview, but before submitting to a DOT physical and knowing the results of the physical. From the information provided through the DOT physical process, CDS learned that Clipse was regularly taking a narcotic pain killer, Methadone. Brunk believed that use of the narcotic Methadone was a violation of CDS's policies and of the commercial driver permitting requirements of the Federal Motor Carrier Safety Administration ("FMCSA") and refused to hire Clipse.[1] Clipse sued Brunk and CDS in the Superior Court of the State of Washington for Pierce County.[2] Among other claims, Clipse alleged that CDS's refusal to hire him amounted to

[1] For clarity Ronald Clipse will be referred to as "Clipse" and Lee Brunk will be referred to as "Brunk". Cross-appellant intends no disrespect by utilizing last names in its briefing and does so merely as a convenience as such designations are consistent with briefing submitted to the trial court and assist in following the posture of the case.

[2] Defendants Brunk and CDS will henceforth be referred to jointly as "CDS."

disability discrimination under Washington's Law Against Discrimination ("WLAD") and the federal Americans With Disabilities Act ("ADA").

CDS operates a school that teaches students to drive commercial motor vehicles such as double and quadruple axle trucks, which Clipse, as an instructor, would have been required to drive and control. CDS took the position that no discrimination occurred for several reasons: that CDS's own policies prohibited operating a commercial vehicle while under the influence of a narcotic drug, such as Methadone; that the FMCSA regulations prohibited the operation of a commercial vehicle while under the influence of Methadone: that CDS's management, Brunk, did not perceive Clipse as disabled and was not motived by such perception when refusing to hire Clipse; and that Clipse failed to establish that he was disabled. Additionally, CDS claimed that since the position Clipse sought was "at-will" and conditional, as a matter of law, Clipse could not prevail on a claim of promissory estoppel.

The jury returned a verdict in favor of Clipse in the amount of $85,000. (CP 472-474). After trial, an untimely request for attorneys' fees and costs was filed by Clipse and dismissed pursuant to CR 54(d)(2). (CP 781-782). Clipse subsequently filed for appeal and CDS filed a timely cross appeal. (CP 783-787; 986-990).

II. ASSIGNMENTS OF ERROR OF CROSS-APPELLANT BRUNK

A. *Assignments of Error.*

1. The trial court erred by failing to dismiss, as a matter of law under CR 50 and pursuant to CR 56 prior to trial, Clipse's claims of promissory estoppel and discrimination claim under the WLAD.[3]

B. *Issues Pertaining to Assignments of Error.*

1. Did Clipse present substantial evidence, as required by CR 50, supporting his claim of discrimination where he presented no evidence establishing recovered drug addiction as a disability?

2. Did Clipse present substantial evidence, as required by CR 50, supporting his claim for promissory estoppel where the job offer was conditioned upon a DOT physical and for an at-will job?

3. In support of Clipse's claim of discrimination pursuant to the WLAD, did Clipse present substantial evidence, as required by CR 50, establishing that he was perceived as disabled when he denied being disabled and failed to present evidence that recovered drug addiction is a disability?

4. Did Clipse, in asserting discrimination in violation of the WLAD, present substantial evidence, as required by CR 50, establishing he was perceived as having a disability when the only evidence offered by him in support of this contention was his current use of the narcotic Methadone?

5. Did Clipse, in asserting discrimination in violation of the WLAD, present substantial evidence, as required by CR 50, that CDS failed to accommodate him when he denied being

[3] Before the trial court, Defendants' sought dismissal pursuant to CR 56, although the focus of this brief is on Clipse's failure at trial to remedy the evidentiary shortcomings identified at summary judgment, dismissal in this case pursuant to CR 50 and/or CR 56 was required.

disabled, failed to establish disability or that he was perceived as disabled, and failed to communicate to CDS any modes of accommodation for CDS to consider?

III. STATEMENT OF THE CASE

A. Procedural History.

Clipse commenced suit against CDS alleging that he was a victim of disability discrimination and claimed he was entitled to employment with CDS because promissory estoppel prevented CDS from not hiring him. (CP 1-7). Clipse claimed that CDS discriminated against him by refusing to hire him, despite CDS's prior conditional offer, characterized by Clipse as a guarantee of employment. (CP 5-6). Clipse's claims of discrimination were based on his assertion that CDS perceived Clipse as disabled, with the disability being "recovered drug-addict." (CP 4). Clipse also claimed that CDS failed to accommodate him. (CP 4). In addition, Clipse asserted claims for termination in violation of public policy, equitable estoppel, promissory estoppel, and violation of RCW 49.52.050 and 070. (CP 1-7). At trial, Clipse dismissed his ADA claim under federal Law and his claim for wrongful termination in violation of public policy. (RP August 22, 2013 p. 90:10-25; CP 421-22). On CDS's motion, Clipse's claim for wrongful withholding of wages was dismissed on the basis that the willful element could not be established in a case where the obligation to pay was contingent upon the jury's determination

of discrimination holding, "I read the cases absolutely to be that you do not have a 49.52 case unless there is something pre-jury verdict that shows that the employer believes they might have been liable and therefore they are willfully withholding those wages." (CP 421-22, CP 952; RP August 26, 2013 pp. 17-18). Prior to trial, CDS moved for summary judgment as to all claims asserted by Clipse; this motion was denied and the case proceeded to trial. At trial, the case proceeded on the theory that Clipse was actually disabled by certain medications he took, or was regarded as disabled, and on a theory of promissory estoppel. At trial, Clipse's counsel requested "no relief [. . .] over and beyond what is afforded by RCW 49.60." (CP 421-422). As a result, the jury was instructed only on Clipse's discrimination claim under the WLAD and promissory estoppel. (CP 952).

B. Statement of Facts Relevant to Clipse's Discrimination Claim.

Clipse applied for a job as a commercial truck driving instructor with CDS in April of 2011, which position required a CDL. (RP August 20, 2013 p 9:1-17; August 22, 2013 pp. 66-68). Clipse was interviewed by then-owner of CDS, Brunk. (RP August 22, 2013 pp. 67-68).

The interview went well and Clipse was asked by Brunk to submit to a DOT physical. Clipse submitted to the DOT physical without objection

admitting such physicals were "fairly standard" in the industry. (RP August 22, 2013 pp. 6:11-13, 7:21-25, 8:1-3). A DOT physical is a component of receiving and maintaining a CDL. Before taking the physical and receiving the results, Clipse quit his job with his then employer, Alliance. (RP August 22, 2013 p. 10:1-19). Although, notably, Clipse was sick on the day he asserts he gave notice, April 7, and on the following day, April 8. Id. During the DOT physical, Clipse disclosed that he was "regularly" taking a narcotic pain killer, Methadone. (Trial Ex. 6). The results of the DOT physical were faxed to CDS, which is how CDS learned that Clipse was "regularly" taking Methadone. (RP August 20, 2013 pp. 22, 30). Brunk testified that CDS's policy is to provide a drug-free work place. (RP August 20, 2013 p. 42: 17-25, Trial Ex. 12). As a result of Clipse's DOT physical, Clipse initially received a 30-day card permitting him to drive for thirty days. (Trial Exs. 3, 6). CDS declined to hire Clipse believing that use of Methadone was inconsistent with CDS's company policy regarding use of narcotics while driving and believing that the FMCSA prohibited operating a vehicle while taking Methadone; Brunk also testified that CDS has never accepted a driver with a 30-day card. (RP August 21, 2013 pp. 24-26; August 20, 2013 p. 31:3-23; Trial Ex. 14A). Brunk testified that while CDS generally required a two-year DOT card, it had occasionally accepted a one-year card, but never a 30-day card. (August 20, 2013 pp. 31:3-23, 43:13-21).

Brunk also produced evidence of the FMCSA publications, reliance upon which is standard in the trucking industry, and which he relied upon in reaching the conclusion that Clipse was not a qualified candidate. (RP August 21, 2013 pp. 24-26; CP 857; Trial Ex. 14A). The portion of FMCSA's website Brunk reviewed is set up in question and answer form and provides, in part:

> Q: Can a driver be qualified if he is taking Methadone?
> A: No. CMV driver taking Methadone cannot be qualified.

(Trial Ex. 14A; RP August 21, 2013 pp. 24:8-25, 25-27:1-12). Clipse asserted that when Brunk advised Clipse that he was not hired, Brunk stated that he feared Clipse would relapse. (RP August 21, 2013 p. 84). Clipse is unclear what accommodation Brunk should have extended at this point.

Clipse is unequivocal that he is not disabled and has no personal experience or knowledge of drug addiction, let alone recovered drug addiction. (RP August 22, 2013 pp. 59, 23-25, 60-61:1-5). Consequently, there is no testimony regarding the alleged disability of recovered drug addiction in the record. Id. Moreover, there is no testimony from Clipse or any physician regarding what major life functions addiction or recovered addiction effected. The entire medical testimony presented at trial was from the DOT physician, Dr. McKendry, and Clipse's primary care physician at the time, Dr. Pang. Neither physician testified at all as to

the physical impairments attributable to recovered drug addiction. (See generally testimony of Drs. McKendry and Pang).

Dr. McKendry only opined as to what FMCSA's guidelines required, which, tellingly, she avers, "I am aware that the Federal Motor Carrier Safety Administration (FMCSA) advisory criteria recommend disqualifying any driver who takes Methadone, whether they get a certificate from their treating doctor or not." (CP 277-78). Dr. McKendry further testified that approval of Clipse to drive while on Methadone was in contravention of the FMCSA's guidelines. Id. CDS ultimately faced legal action for a course of action which the FMCSA and physicians tasked with applying its guidelines actually recommends.

Clipse does not dispute that a CDL was required for the position at CDS. (CP 277-78). Clipse also testified that it was not uncommon to take a DOT physical when starting a new job. (RP August 22, 2013 p. 7). In conjunction with his DOT physical, Clipse disclosed medications he was taking certifying that failure to disclose or providing false, inaccurate, or misleading information may invalidate his DOT certification. (RP August 22, 2013 p. 11). Through Clipse's testimony it was established that he failed to disclose a number of medications that he was on at the time of his DOT physical. (RP August 22, 2013 p. 34). Significant evidence was presented at trial regarding the fact that Methadone was a narcotic and an opiate. (RP

August 22, 2013 p. 49). Moreover, Clipse stated he understood that narcotics can present issues with operating a motor vehicle. (RP August 22, 2013 p. 49).

At trial, Brunk reiterated that he believed hiring an instructor who was taking Methadone was inconsistent with CDS's policies and the FMCSA's regulations. (RP August 20, 2013 pp. 25:7-11, 29:6-11; August 21, 2013 pp. 24-26). Brunk testified that CDS's own policies required compliance with federal law and prohibited an employee from driving while under the influence of a controlled substance. (RP August 20, 2013 pp. 42:22-25, 43:1-9; Trial Ex. 12). Brunk also indicated that CDS generally required a two-year DOT card; clarifying that while, from time-to-time, a one-year card had been accepted, he had never accepted a 30-day card, which is what Brunk obtained from his DOT physical. (RP August 20, 2013 pp. 14:22-25, 15:1-2, 31:1-23, 43:18-21). For Clipse to obtain a DOT card permitting him to drive for more than thirty days, Clipse was required to bring additional information to the DOT physical clinic, which Clipse did do. (Trial Ex. 22). Notably, Dr. McKendry issued the 30-day card *prior* to receiving any of the requested information from Clipse's physicians in violation of the FMCSA regulations in contravention of her own paperwork. (Trial Exs. 3, 22). However, Brunk testified he never saw the required follow up from any of Clipse's physicians. (RP August 20, 2013 p. 46:8-

10). Clipse also testified that he did not provide the one-year card to CDS after he obtained the card. (RP August 21, 2013 p. 86: 9-19; RP August 22, 2013 pp. 61:8-25, 62:1-5). Brunk testified he never saw the one-year card Clipse later received. (RP August 20, 2013 p. 44:6-9).

C. *Statement of Facts Relevant to Clipse's Claim of Promissory Estoppel.*

Clipse was made a conditional offer of employment for an at-will job. Clipse testified that he knew the job was at-will and understood what the term "at-will" meant with respect to a job. (RP August 20, 2013 pp. 11-12, 19:18-23; August 22, 2013 pp. 70:20-23, 71:1-2, 72:20-25, 73:1-7). Clipse also testified he never knew the specific start time on the day he believed he was to start work. (RP August 22, 2013 p. 76:10-14). Clipse admits that he was asked and agreed to take a DOT physical. (RP August 22 pp. 6:11-13, 7:21-25, 8:1-3). Clipse's claim relies on nothing more than his self-serving assertion that he did not believe that the physical bore at all on his fate as a possible employee, yet he submitted to it. (Id.) Clipse also asserts that in reliance upon Brunk's conditional offer he quit his job at Alliance, yet Clipse was not at work on his purported quit date, April 7, or the following day April 8. (RP August 22, 2013 pp. 70:20-23, 71:1-2). Regardless, these facts are of little importance in light of the most significant fact – the position Clipse sought was an at-will job, Clipse conceded that he

knew it was "at-will", and that he could be terminated at any time. (RP August 20. 2013 pp. 11-12, 19:18-23; August 22. 2013 pp. 70:20-23, 71:1-2, 72: 20-25, 73:1-7).

D. Statement of Additional Facts Relevant to Dismissal as a Matter of Law of Clipse's Double Damage Claim Pursuant to Ch. 49.52 RCW.

At the close of Clipse's case in chief. the trial court granted CDS's motion for judgment as a matter of law, under CR 50 regarding Clipse's Ch. 49.52 RCW claims. (RP August 26, 2013 pp. 18, 30). After hearing argument, the Court found that the record lacked sufficient evidence that CDS had acted willfully to deprive Clipse of a wage. (RP August 26, 2013 pp. 17-18). It is uncontroverted that Clipse did not perform any services or labor for CDS because he never worked at CDS at all. (RP August 21, 2013 pp. 24-26; 82:20-84:9). Additionally, it is clear that there was a bona fide dispute regarding Clipse's ability to drive as a commercial truck driver given his use of Methadone and federal regulation that appeared to Brunk to bar him from driving while taking Methadone. (RP August 20, 2013 p. 31:3-23; August 21, 2013 pp. 24-26; Trial Ex. 14A).

E. Statement of Additional Facts Relevant to the Trial Court's Striking, as untimely, of Clipse's Post-Trial Motion for Costs and Attorney's Fees Brought under CR 54.

Judgment was entered in the trial court on August 28, 2013 and filed the same day, this was the same day as the jury verdict was announced. (CP

474). The first section of the Judgment is titled, Judgment Summary, and identifies the judgment creditor, judgment debtors, principal judgment amount, and the rate of post judgment interest. Id. There is also a line that reads: "Statutory and RCW 49.60 Costs and Fees: Reserved." Clipse did not file his motion for costs and fees under CR 54 until September 11, 2013. (CP 476). The trial court struck Clipse's motion as being untimely and found that Clipse had not shown excusable neglect established for the late filing. (RP September 20, 2013 pp. 19-22, 26). The record reflects detailed consideration by the trial court of the law and Clipse's counsel's arguments with respect to a showing of excusable neglect. (RP September 20, 2013 pp. 19-22).

IV. ARGUMENT

A. Standard of Review

1. Denial of a Motion Pursuant to CR 50 is Reviewed De Novo.

At the conclusion of Clipse's case, CDS moved for judgment as a matter of law pursuant to CR 50. (CP 941-952). CDS argued that Clipse had not established that recovered drug addiction was a disability, that he was qualified for the position as a commercial truck driver, or that Clipse could perform the job. (CP 945-949). In addition, CDS argued that Clipse had failed to establish promissory estoppel.

Judgment as a matter of law is appropriate when, during a trial by jury, "a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary bases for a reasonable jury to find or have found for that party with respect to that issue . . . ." CR 50(a)(1). On appeal, denial of a motion for judgment as a matter of law is reviewed de novo, utilizing the same standard as the trial court. Fey v. State, 174 Wn. App. 435, 454-55, 300 P.3d 435 (2013). A motion for judgment as a matter of law brought under CR 50, "must be granted 'when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.'" Davis v. Microsoft Corp., 149 Wash. 2d 521, 531, 70 P.3d 126 (2003) (quoting Sing v. John L. Scott, Inc., 134 Wn.2d 24, 29, 948 P.2d 816 (1997)).

2. Striking of a Motion for Attorneys' Fees and Finding an Absence of Excusable Neglect is Reviewed for Abuse of Discretion.

The decision of the trial court to accept or decline untimely filing is vested in the sole discretion of the trial court and the decision of the trial court is reviewed for abuse of discretion. Colorado Structures, Inc. v. Blue Mountain Plaza, LLC, 159 Wash.App. 654, 660, 246 P.3d 835 (2011). A court abuses its discretion when it is exercised on untenable grounds or for untenable reasons. Id.

3. *Clipse Cannot Resurrect on Appeal Claims Voluntarily Dismissed at Trial.*

At trial, Clipse proceeded to the jury on his state claim under the WLAD and his claim for promissory estoppel. (CP 472-473). Clipse's claim under RCW 49.52.050 and 070 were dismissed over Clipse's objection on CDS's CR 50 motion. Clipse voluntarily dismissed his claims for wrongful termination in violation of public policy (which was not briefed by Clipse at all in his response to summary judgment), discrimination under the federal ADA, and equitable estoppel (versus promissory estoppel). (CP 25-50). Washington law holds that a party, having sought voluntary dismissal, has waived the jurisdiction of both the trial and appellate courts with respect to the merits of the claim. Cork Insulation Sales Co., Inc. v. Torgeson, 54 Wn. App. 702, 707, 775 P.2d 970 (1989). Consequently, CDS will not address the failure of the trial court to dismiss the later dismissed federal ADA claim and wrongful termination in violation of public policy claim argued at summary judgment. Although, as is evident from the record, CR 56 warranted dismissal of these claims at summary judgment.

4. *Clipse Failed to Present Any Evidence Establishing that Recovered Drug Addiction Is a Disability.*

In Washington, to articulate a prima facie case for disability discrimination, an employee must establish:

1) The employee had a sensory, mental, or physical abnormality that substantially limited his or her ability to perform the job;
2) The employee was qualified to perform the essential functions of the job with or without reasonable accommodation [. . .];
3) The employee gave the employer notice of the disability and its accompanying substantial limitations; and
4) Upon notice, the employer failed to reasonably accommodate the employee.

Davis v. Microsoft Corp., 109 Wn. App. 884, 889-90, 37 P.3d 333 (2002) aff'd, 149 Wn.2d 521, 70 P.3d 126 (2003) (internal citations omitted) (cited with approval in Fey v. State, 174 Wn. App. 435, 300 P.3d 435 (2013)).

It is anticipated that Clipse will argue that it is immaterial whether recovered drug addiction qualifies as a disability because Brunk perceived Clipse as disabled and that the perception of disability is sufficient to establish the first element of a claim for disability: that the employee had a sensory, mental, or physical abnormality that substantially limited his or her ability to perform the job. (CP 425). This is not the law; RCW 49.60.040(7)(a) provides:

> "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.

Pursuant to Washington law, the alleged disabling condition must still be shown to be an impairment of a sensory, mental, or physical state.

RCW 49.60.040(7)(a). Although the employer in a "regarded as" case perceives a disability that does not exist, the condition the employer is alleged to perceive must still be shown to meet the definition of disability to entitle an employee to relief under the WLAD. RCW 49.60.040(7). In the case at hand, Clipse would be correct that he need not prove he suffers from a disability to proceed to a jury on a "regarded as" claim; however, he is incorrect that he is not required to show that the condition he is perceived to have meets the definition of disability. Clipse must show that the condition he was perceived to have, recovered drug addiction, is a disability because it is perceived that recovered drug addiction created a mental, sensory, or physical impairment. The fallacy of Clipse's reasoning is obvious. Under Clipse's analysis, a person who has no disability is afforded greater protection under the WLAD by way of a lesser burden of proof than an individual with an actual disability. Such a litigant would merely have to show that they are perceived to have some medical condition, whether or not the condition meets the definition of disability. RCW 49.60.040(7)(a). This is not the law. Id.

"[W]hether a person is handicapped is an issue of fact, depending upon expert medical documentation and state of mind . . . ." Rhodes v.

URM Stores, Inc., 95 Wn. App. 794, 977 P.2d 651 (1999).[4] In the instant case, no evidence was presented regarding *recovered* drug addiction as an impairment. Similarly, there was no testimony from Brunk regarding how he perceived recovered drug addiction would affect one's sensory, mental, or physical abilities. RCW 49.60.040(7)(a). Speculation and conclusion are insufficient to carry the burden of a plaintiff. Moreover, such testimony, in this case, could only have been offered by a physician. This is because Clipse averred that he was not an addict (and had never been one), as a result, he could not testify from personal knowledge as to how being a recovered drug addict impairs one's sensory, mental, or physical state. (RP August 22, 2013 pp. 59, 23-25, 60-61:1-5). At trial, Drs. Pang and McKendry focused on Clipse's medication and medical record; neither opined as to whether recovered drug addiction was a disability or what aspects of one's physical state would be impacted as a recovered drug addict. (CP 218-343).

Contrastingly, in Townsend v. Walla Walla Sch. Dist., 147 Wn. App. 620, 196 P.3d 748 (2008), the plaintiff presented evidence of having a hearing problem and presented evidence of her physical limitations and the impact on her. Townsend, 147 Wn. App. at 626. It is always the

[4] Although the definition of disability has changed since Rhodes, the case is still relevant insofar as it opines that the evidence presented of disability must be sufficient to satisfy that the condition upon which the claim rests is a disability.

burden of the plaintiff to offer evidence that the complained of condition amounts to a disability through testimony or evidence of the condition's effect on the plaintiff. Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 145, 94 P.3d 930 (2004). A complete failure of proof on this element requires dismissal.

For example, in Brady v. Daily World, 105 Wn.2d 770, 718 P.2d 785 (1986), the Supreme Court noted that 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." Brady, 105 Wn.2d at 789. It also declined to consider whether alcoholism was a disability, finding that freedom from intoxication was a bona fide occupational qualification. Id. This underscores the fact that the first inquiry, even in a perceived disability case, is whether the complained of condition meets the definition of disability, and that alcoholism's status as a disability was not a foregone conclusion. Id. Similar to Rhodes, a truck driver who was terminated for cocaine and marijuana use presented testimony from his physician regarding the nature of addiction abuse and the patient's history involving marijuana and cocaine use. Id. at 799-800. The Rhodes court held, relying in part upon the Supreme Court's refusal in Brady to hold that alcoholism was a disability as a matter of law, that

such testimony was insufficient to establish a disability. Rhodes, 95 Wn. App. at 799-800 (analyzing Brady, 105 Wn.2d at 777).

These cases show that a failure of proof as to the element of disability warrants dismissal. In the instant case, no evidence was offered by Clipse at trial establishing that recovered drug addiction (or drug addiction) was a disability. Clipse also failed to offer any testimony regarding how, if at all, his usage of Methadone affected him. Brunk testified that at the time he was considering Clipse for a position at CDS, he was unaware that Methadone is given to some individuals who used heroin. (RP August 20, 2103 pp. 29:25, 30:1-9). Magnifying the lack of evidence presented on the issue of disability by Clipse, there is no testimony from Brunk to the effect that he believed that a present or former drug addict necessarily suffered from sensory, mental, or physical impairments. However, notably an employee suffering from active drug addiction is frequently not qualified for employment in a position where operating machinery is required. There is a complete dearth of evidence as to the element of disability in this claim at trial. Accordingly, Clipse failed to present substantial evidence establishing that he was regarded as disabled. CDS's motion for judgment as a matter of law should have been granted. CR 50.

5. ***Clipse Failed to Provide Substantial Evidence that He was a Qualified Candidate for a Position at CDS.***

To prevail on a claim under the WLAD, in addition to showing disability or that one was perceived as disabled, one must show that he is able to perform the essential functions of the job in question, with or without reasonable accommodation. Davis, 109 Wn. App. at 889-90. Washington law affords considerable deference to an employer's description of the essential functions of a job. Fey, 174 Wn. App. at 452; Snyder v. Med. Serv. Corp. of E. Wash., 98 Wn. App. 315, 328, 988 P.2d 1023 (1999) aff'd sub nom. 145 Wn.2d 233, 35 P.3d 1158 (2001). Clipse was not qualified for the job due to his Methadone use and his possession of only a 30-day card. A person is not permitted to drive a commercial motor vehicle in Washington State unless they hold a CDL. Ch. 46.25 RCW. The position at CDS required Clipse to drive a commercial vehicle and hold a CDL to do so. (RP August 22, 2013 pp. 5:17-25, 6:1-5); 49 C.F.R. § 391.11(a).

An employer of commercial drivers is tasked with ensuring candidates meet the necessary commercial driver requirements. RCW 46.25.040; 49 C.F.R. § 391.11(a). An employer is prohibited from employing a commercial driver who is disqualified from driving a commercial motor vehicle. RCW 46.25.040(a). An employer of

commercial drivers is required to comply with both federal and state requirements. 49 C.F.R. § 391.11(a). Federal law provides, "[a] person shall not drive a commercial motor vehicle unless he/she is qualified to drive a commercial motor vehicle." 49 C.F.R. § 391.11(a). This posture of state and federal law dictates certain requirements that an employer of commercial drivers must adhere to. To the extent state law may be inconsistent with federal regulations, state law is specifically preempted. 49 C.F.R. § 382.109 and 49 C.F.R. § 382.103(a).

The regulations go on to require that a driver be physically qualified in accord with subpart E. 49 C.F.R. § 391.11(b)(4). Subpart E indicates that a person is physically qualified to drive a motor vehicle if he/she, "[d]oes not use any drug or substance identified in 21 C.F.R. 1308 Schedule I, an amphetamine, a narcotic, or other habit-forming drug." 49 C.F.R. § 391.41(12)(i) (emphasis added). Schedule I specifically identifies opiates as an excluded drug or substance. 21 C.F.R. § 1308.11 Schedule I. Methadone is a narcotic, an opiate, and habit forming and is, therefore, prohibited by 49 C.F.R. § 391.41(12)(i). Consequently, a driver who utilizes Methadone and is qualified pursuant to a physician's exception, such as the one Dr. McKendry executed in this case, employers are permitted to enforce their own, stricter employment guidelines. (RP August 29, 2013 pp. 60:9-25, 61:1-7).

In addition to the plain language of 49 C.F.R. § 391.41, the federal government offers "interpretation" guidelines to assist employers in complying with the FMCSA. The federal government's guidance for employers seeking to comply with 49 C.F.R. § 391.41 is as follows:

> Question 4: Is a driver who is taking prescription Methadone qualified to drive a CMV [Commercial Motor Vehicle] in interstate commerce?
>
> Guidance: Methadone is a habit-forming narcotic which can produce drug dependence and is not an allowable drug for operators of CMVs.

49 C.F.R. § 391.41 U.S. Dept. of Transportation Guidelines (www.fmcsa.dot.gov; Trial Ex. 14A). Brunk's interpretation of these regulations was that Methadone was a prohibited substance pursuant to 49 C.F.R. § 391.41 because it is a narcotic, an opiate, and habit forming. (RP August 20, 2013 pp. 25:7-11, 29:6-11; August 21, 2013 pp. 24-26). CDS regarded strict compliance with these regulations to be an essential function of the job. Id. Dr. McKendry further testified that the FMCSA's guidelines for physicians recommend not approving a truck driver using Methadone, even with a doctor's note. (CP 277-278; Trial Ex. 14A). CDS's job policies follow the recommendations for an employer *even as described by a DOT physician.* (Trial Exs. 12, 14A).

Here, Clipse argued that CDS erroneously interpreted the federal regulations and that Methadone use was permitted where approved by a

doctor. This argument fails to address Washington's long standing history of permitting employers to establish and enforce policies prohibiting drug use in the work place or imposing stricter standards than the law. Consequently even if true, the WLAD cannot be interpreted to *require* CDS to employ an individual to drive a commercial truck who is taking Methadone daily or face charges of discrimination. Put differently, must an employer hire every employee who completes his/her DOT physical even if they perceive the employee to represent a safety hazard due to use of a narcotic? Even if CDS interpreted the C.F.R.s more strictly, CDS was entitled to do so. Further, how can CDS's interpretation be legally actionable as disability discrimination where it is reflected by Dr. McKendry and the FMCSA's own guidelines? (CP 277-278).

Washington courts have repeatedly found, as a matter of law, that employer's drug policies are reasonable and enforceable safety precautions in the workplace. Rhodes, 95 Wn. App. at 801; Hines v. Todd Pac. Shipyards Corp., 127 Wn. App. 356, 371, 112 P.3d 522 (2005); Brady, 105 Wn.2d at 789.

Recently in Fey, Division III held that a case of disability discrimination should have been dismissed pursuant to CR 50. Fey, 174 Wn. App. at 459-60. Division III held, "[t]he jury's function does not extend to second-guessing . . . management's judgment about the makeup

of its fleet." Fey, 174 Wn. App. at 447. The Fey court went on to hold, "[w]here there is no material dispute as to the evidence, the court may determine as a matter of law that a function claimed to be essential by the employer is in fact essential." Id. Here, as in Fey, CDS established that possession of a commercial driver's license, and compliance with the regulations establishing eligible holders of a commercial driver's license were essential functions of the job. Fey, 174 Wn. App. at 451.

Further, the Fey court notes that its decision is hardly the first time Washington courts have endorsed an employer's reliance upon federal regulations for establishing employment functions. Fey, 174 Wn. App. at 453 (quoting Dedman v. Pers. Appeals Bd., 98 Wn. App. 471, 479, 989 P.2d 1214 (1999) (citing 29 C.F.R. § 1630.2(n)(3))); Davis, 109 Wn. App. at 891.

6. ***Clipse Cannot Maintain his Claim for Failure to Accommodate Where he Never Sought Accommodation or Disclosed the Condition he Believed Should be Accommodated; Nor Could Clipse Be Accommodated Where the Accommodation Proposed is Acceptance of Narcotic Use.***

A failure to accommodate claim requires a showing that 1) the employee is disabled, 2) the employee is qualified to fill the position and, 3) the employer failed to reasonably accommodate the employee's disability. Fischer-McReynolds v. Quasim, 101 Wn. App. 801, 808, 6 P.3d 30 (2000). "[A]n employer's duty to reasonably accommodate an

employee's handicap does not arise until the employee gives notice of the disability." Fey, 95 Wn. App. at 801 (citing Goodman v. Boeing Co., 127 Wn.2d 401, 408, 899 P.2d 1265 (1995)). "A failure to engage in the interactive process does not form the basis of a disability discrimination claim in the absence of evidence that accommodation was possible." Fey, 174 Wn. App. at 445.

Here, there can be no failure to accommodate claim in the context of a perceived disability because Clipse cannot show that he was entitled to accommodation where he was not disabled. Clipse asserts that he was entitled to accommodation, yet based on his own theory of the case, there is no disability to accommodate in a case where he was only regarded as having a disability. Even assuming that there was an obligation to accommodate in this case, Clipse presented no evidence that he triggered the obligation to accommodate or that accommodation was possible.

Even presuming these basic threshold inquiries can be met, accommodation is not possible; CDS cannot be expected to hire an individual taking Methadone. While CDS could have given Clipse time to get off Methadone; CDS is only obligated to do so where the obligation to accommodate even arises. Snyder v. Med. Serv. Corp. of E. Wash., 145 Wn.2d 233, 240, 35 P.3d 1158 (2001).

Washington courts have repeatedly dismissed failure to accommodate claims where the obligation to accommodate never arises because the employer is not made aware of the disability. Snyder, 145 Wn.2d at 240. The obligation to accommodate Clipse never arose because Clipse never established that recovered drug addiction is a disability which requires accommodation. Further, Clipse never established that he was otherwise qualified, as he admitted that he never even provided CDS proof of his one-year card. (RP August 21, 2013 p. 86:9-19; RP August 22, 2013 pp. 61:8-25, 62:1-5). Finally, Clipse cannot show that CDS is required to accommodate him by tolerating drug use that CDS regards as forbidden by the FMCSA and its own policies. (Trial Ex. 12). As Fey explicitly held, an employer is not required to, "revamp the essential functions of a job to fit the employee." Fey, 174 Wn. App. at 452. Potential employers may hold a number of opinions about certain disclosures made by an employer, the possibility that such disclosures are viewed negatively does not automatically give rise to a claim for discrimination on the basis of disability. The perception still has to relate to an actual physical condition which qualifies as a disability under the law (whether the person actually has it is immaterial), and requires accommodation. Snyder, 145 Wn.2d at 240.

Clipse also never engaged in the accommodation process. The sole accommodation Clipse seemed to suggest is for CDS to have tolerated drivers who were taking Methadone (or another narcotic). The law does not require an employer to engage in accommodation on the facts presented in this case. Nor is an employer required to change job functions under the WLAD or FMCSA in response to an assertion of disability. Fey, 174 Wn. App. at 452.

7. The Court Erred by Failing to Dismiss Clipse's Claims Pursuant to CR 50 Where Clipse Failed to Present Evidence that he was 1) Perceived as Disabled 2) Otherwise Qualified and 3) Entitled to Accommodation.

As addressed throughout this brief, the analysis of Clipse's claims at the summary judgment level and at trial both reflect an absence of key elements. The absence of evidence establishing a disability was not remedied at trial. As such, the obligation to accommodate never arose. Moreover, the evidence Clipse offered does not speak to the posture of the law which permits an employee to establish his own qualifications for any position. Fey, 174 Wn. App. at 452; Davis, 149 Wn.2d at 536.

Clipse's only evidence that he was qualified for the job was that he was given a 30-day card after his DOT physical. However, this argument does not address the fact that CDS still interpreted the FMCSA's guidelines to prohibit Methadone use among commercial drivers. Put

simply, CDS did not have to accept the 30-day card or any other card; nor did CDS have to tolerate Methadone use among its truck drivers. Further, even if CDS's interpretation of the guidelines was more strict than federal law, the law irrefutably establishes that an employer is entitled to utilize stricter standards when deciding what the qualifications are for a particular job. There is ample evidence that CDS's desire to put only sober, non-narcotic influenced drivers behind the wheel was a long-standing and appropriate standard at CDS. (Trial Ex. 12). One which Dr. McKendry herself testified was supported by the FMCSA's own guidelines for interpreting its regulations. (CP 277-278).

8. No Claim for Promissory Estoppel or Equitable Estoppel can be Had Where an Employee Was Hired for an At-Will Position and Such Employment Offer Was Conditional.

Clipse claims that he relied upon the promise of a job offer from CDS and quit his job with his former employer, Alliance, as a result of Brunk's promise.[5] Dismissal of this claim was sought following the close of Clipse's case in chief under CR 50. Although Clipse's complaint avers both equitable estoppel and promissory estoppel, on Clipse's request, only the claim of promissory estoppel went to the jury. (CP 473).

To prevail on a claim of promissory estoppel, Clipse must prove the following five elements:

[5] Although equitable estoppel was pleaded, only promissory estoppel went to the jury. (CP 472-473).

> (1) a promise (2) which the promisor should reasonably expect will cause the promisee to change position and (3) which actually causes the promisee to change position (4) in justifiable reliance on the promise, so that (5) injustice can be avoided only by enforcement of the promise . . . .

Shaw v. Hous. Auth. of City of Walla Walla, 75 Wn. App. 755, 761, 880 P.2d 1006 (1994). Brunk testified that only a conditional offer of employment was made for an at-will job. (RP August 20, 2013 pp. 11-12. 19:18-23; August 22, 2013 pp. 70:20-23, 71:1-2, 72: 20-25, 73:1-7). Although Clipse claimed that he received a firm offer of employment, he also submitted to a DOT physical and admitted that he understood the position was at-will. Id. The at-will nature of the job was an undisputed fact.

Clipse failed to show that he was justified in relying on a conditional promise for a job where he would be employed "at-will." At-will means that, an employer may terminate an employee with or without cause. Bulman v. Safeway, Inc., 144 Wn.2d 335, 340, 27 P.3d 1172 (2001). No reliance can be shown where the position was at-will and where Clipse concedes that he understood the position was "at-will." Similarly, Clipse offered no evidence that CDS should have reasonably expected that Clipse was going to give notice before he was given a firm offer or before he completed the DOT physical.

Washington courts have repeatedly dismissed estoppel claims where they are predicated on an at-will offer of employment. In the case of Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 174, 876 P.2d 435 (1994), the Supreme Court rejected a claim of promissory estoppel, because "there is no clear and definite promise of *permanent employment subject only to dismissal for just cause.*" Havens, 124 Wn.2d at 174 (emphasis added). "Plaintiff's own expectations do not constitute a promise by the employer . . . ." Havens, 124 Wn.2d at 175 (quoted with approval Bakotich v. Swanson, 91 Wn. App. 311, 319, 957 P.2d 275 (1998)). That is precisely what occurred in the case at hand where only an at-will job was offered. Washington law is unequivocal: a promise of an at-will job, even when coupled with the expectations of the plaintiff for long-term employment, does not support a claim of promissory estoppel. Id. Nothing more than these facts were offered in this suit, and this meager showing does not rise to the level of "substantial evidence." This claim should be dismissed as a matter of law.

9. The Trial Court Properly Dismissed, as a Matter of Law Under CR 50, Clipse's Claim for Double Damages Pursuant to RCW 49.52.050 and RCW 49.52.070 Because the Record Lacked Substantial Evidence to Support Such a Claim.

At the close of Plaintiff's case in chief, CDS moved for judgment as a matter of law under CR 50 of all claims asserted by Clipse, the trial

court granted CDS's motion to dismiss Mr. Clipse's claim for double damages brought under RCW 49.52.050(2) and RCW 49.52.070

Judgment as a matter of law is appropriate when, during a trial by jury, "a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue ...." CR 50(a)(1). The appellate court may affirm a trial court's disposition of a motion for summary judgment or judgment as a matter of law on any ground supported by the record. Mountain Park Homeowners Ass'n v. Tydings, 125 Wash.2d 337, 344, 883 P.2d 1383 (1994).

Clipse claims he is entitled to double damages under RCW 49.52.050(2) and RCW 49.52.070. In Washington, an employee is entitled to double damages against his employer when the employer, "willfully and with intent to deprive the employee of any part of his wages, pays the 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); Schilling v. Radio Holdings, Inc., 136 Wash.2d 152, 158, 961 P.2d 371 (1998); Allstot v. Edwards, 114 Wash.App. 625, 632, 60 P.3d 601 (2002). The employer's withholding of wages is willful when it is, "the result of knowing and intentional action and not the result of a bona fide dispute as to the obligation of payment." Yakima County v.

Yakima County Law Enforcement Officers Guild, 157 Wash.App. 304, 341, 237 P.3d 316 (quoting Chelan County Deputy Sheriffs' Ass'n v. County of Chelan, 109 Wash.2d 282, 300, 745 P.2d 1 (1987)). When it is fairly debatable whether all or a portion of the wages must be paid, a bona fide dispute is presented. Schilling, 136 Wash.2d at 159-60.

The court below granted CDS's motion for judgment as a matter of law regarding Clipse's claim for double damages. (RP August 26, 2013 pp. 15, 17-18, 30). Accordingly, the trial court found there was no legally sufficient evidentiary basis for Clipse's claim for double damages where no willful element could be shown. Id. It is undisputed from Clipse's own testimony that he did not perform any services or labor as an employee for CDS and, therefore, did not earn a wage that was due. (RP August 22, 2013 p. 76:2-6). While the jury apparently found Clipse disabled and, therefore, damaged because he was not hired due to a disability, Clipse did not establish a right to any wage from CDS that existed before the jury rendered its verdict. Aside from the fact that Clipse never worked for CDS, there was also a bona fide dispute regarding CDS's ability to hire Clipse given his Methadone use or his qualifications for the job sought. Fey, 174 Wn. App. at 452. There is no obligation to pay any damages based on lost wages prior to the jury verdict. Consequently, the failure to pay wages cannot be willful as a matter of

law. The discussion of double damages arising under a discrimination claim, such as the case at hand, in Hemmings v. Tidyman's Inc., 285 F.3d 1174 (9th Cir. 2002) is instructive.

In Hemmings, two long time employees of the employer-defendant, Tidyman's Inc., sued claiming they had been discriminated against on the basis of their gender, both plaintiffs were women. In addition, they claimed they were entitled to double damages under RCW 49.52.050 and RCW 49.52.070. After trial, the jury found in favor of Hemmings and her co-plaintiff on their claim of discrimination and also found in favor of plaintiff regarding the claim for double damages. Tidyman's Inc. appealed, among other issues, the award of double damages under RCW 49.52.050(2) and RCW 49.52.070 arguing that RCW 49.52.050(2) and RCW 49.52.070 do not apply in discrimination cases. The United States Court of Appeals for the Ninth Circuit agreed and found that Hemmings and her co-plaintiff were not entitled to a doubling of damages under RCW 49.52.050 and RCW 49.52.070. In analyzing Washington cases and statutory history, the Hemmings court focused on the word "obligated" in the phrase "obligated to pay" contained in RCW 49.52.050(2), as follows:

> The key word in the statute is "obligated." ... The insertion of the word "obligated" indicates a preexisting duty imposed by contract or statue to pay specific compensation.

> Thus, a willful and intentional withholding of accrued pay legally owed the employee would subject the employer to double damages. Here, the Defendant's "obligation" to pay Plaintiffs the specific amount at issue had not legally accrued prior to the jury verdict. [The obligation to pay] did not stem from a "statute, ordinance, or contract;" rather, it resulted from a retrospective jury verdict.

Hemmings, 285 F.3d at 1203. The Hemmings court went on to say that the Washington Supreme Court had not extended the reach of RCW 49.52.050 to circumstances where a bona fide dispute existed regarding an employer's obligation to pay the amounts in question. Id. at 1203-04. The circumstance in Hemmings is precisely the circumstance in the case at hand.

CDS's obligation to pay did not arise until the jury rendered its verdict following trial stemming from a bona fide dispute. Under such circumstances, it cannot be said that CDS's failure to pay previous to the verdict was willful, which is the element focused on by Judge Serko in granting CDS's motion for judgment as a matter of law. (August 26, 2013 pp. 17:22-18:21). The holding and reasoning in Allstot, a case heavily relied on by Clipse, is consistent with Hemmings.

Clipse's reading of Allstot is strained at best. Rather, the holding and reasoning in Allstot supports the conclusion of the trial court and the dismissal of Clipse's double damages claim as a matter of law.

In Allstot, a Coulee Dam police officer, Cameron Allstot, was fired for misconduct in 1991. His termination was upheld by both the Coulee Dam Civil Service Board and the superior court. However, the Court of Appeals reversed and ordered the town to reinstate Allstot as a police officer with back pay from the time of his termination; he returned to work in June, 1994. Allstot, 114 Wn. App. at 629. In September. 1994, Allstot served a claim on the Town to collect back wages, benefits, prejudgment interest. and attorney's fees. Later in September, 1994, Allstot filed new suits in state and federal courts alleging civil rights violations and wrongful termination; the state court action was stayed pending the outcome of the federal action. Id. The federal action was dismissed by the district court, which dismissal was upheld by the United States Court of Appeals for the Ninth Circuit in 1997. Id. at 630. The stay of Allstot's state court action was lifted in May, 1998. Id. A month earlier, in April, 1998, the Town paid Allstot a total of $30,783 for back wages minus offsets, retirement contributions, and interest. Id. In January, 2001, Allstot and the Town stipulated to entry of an order of partial summary judgment holding the Town liable for back wages and also a stipulation of facts supporting summary judgment, which document stipulated that Allstot was entitled to prejudgment interest on his back wages. Id. at 631. The parties failed to resolve their differences and the case regarding back

wages went to trial. Allstot claiming that the Town willfully refused to pay his back wages for four years, between 1994 and 1998, the Town claiming it delayed payment during the pendency of the state and federal claims. Id. The trial court refused to instruct the jury regarding double damages as requested by Allstot and the Allstot court reversed finding the trial court abused its discretion in failing to instruct the jury regarding double damages because there was substantial evidence supporting the idea that the Town willfully withheld wages due until 1998. Id. Therefore, the Allstot court reversed and remanded the case for a new trial. Id. at 635.

The Allstot case supports the trial courts dismissal of Clipse's double damages claim. First, Clipse was not owed any wage by CDS, Clipse never worked for CDS. (RP of August 22, 2013 p. 76:2-6). A wage is compensation for labor or services rendered to an employer. Black's Law Dictionary (9th ed. 2009). It is uncontroverted that Clipse did not perform any services or labor for CDS. Because no wage was due, it is impossible for CDS to willfully withhold a wage it never owed. On the other hand, the Allstot court found a wage was due because RCW 41.12.090 dictates that a civil service employee who is terminated without good cause may be reinstated with "pay" from the time of dismissal, which is what the Allstot court ordered in 1994. Id. at 630. Clipse, in the case at hand, cannot rely on similar statutory protection where he, unlike

Allstot, never worked a single minute for CDS. Contrary to Clipse's assertions, 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. The Allstot court focused on the element of willfulness when commenting on the Hemmings majority decision and dissent: "[b]oth arguments, we believe, go to the critical element of RCW 49.52.050(2) that requires a finding of willful intent 'to deprive the employee of any part of his wages.'" Allstot, 114 Wash.App. at 634. In the case at hand, there is no evidence of willful intent to deprive Clipse of a wage where he never worked a minute for CDS. (RP August 22, 2013 p. 76:2-6). On the other hand, the Allstot court found the record contained substantial evidence presenting a question of fact for the jury on the question of willful withholding of wages due to the Town's withholding of back wages directed to be paid by the Court of Appeals in 1994, but not paid until 1998. Id. at 631. This result is explained by the Allstot court as follows:

> The crucial question is when the Town could have and should have determined how much it figured it owed. And that is a question of fact relevant to the Town's willfulness in withholding payment until 1998. (citation omitted). If the Town could have determined soon after Mr. Allstot was reinstated that it owed him at least $30,783, then delaying payment of that amount for four years might indicate willful withholding of wages.

Allstot, 114 Wash.App. at 635. It is noteworthy that the Allstot court did find the pertinent time period did not start in 1991, the year in which Allstot was terminated. This must be, although not discussed by the court, because between 1991 and 1994 when the case was pending, there was a bona fide dispute whether Allstot was terminated for cause. It is only after the Court of Appeals ordered Allstot reinstated with back pay in 1994 that the issue of willfulness arose. Id. at 631. This circumstance is analogous to the case at hand and also the holding in Hemmings in that there can be no willfulness without a prior obligation to pay the employee's wages. Dismissal of this claim was proper. CR 50. There is no evidence whatsoever speaking to the element of willfulness and dismissal of this claim is in accord with Allstot and Hemming.

10. The Trial Court Properly Struck Clipse's Motion for Costs and Fees Brought Under CR 54(d)(2) because the Motion was not Timely Filed and Clipse did not Establish Excusable Neglect for the Untimely Filing.

The trial court struck Clipse's motion for attorney's fees and expenses because the motion was not timely filed within the ten days following the entry of judgment as required by CR 54(d)(2). Attorney's fees and expenses may be requested under CR 54(d)(2) which provides:

> Claims for attorneys' fees and expenses, other than costs and disbursement, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of

> damages to be proved at trial. Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.

CR 54(d)(2). Judgment in the case at hand was entered on August 28, 2013. (CP 474). Accordingly, under CR 54(d)(2), a motion for attorney's fees and expenses was timely filed only if it was filed on or before September 9, 2013 (the tenth day following entry of judgment fell on a Saturday, therefore, Clipse had until the following Monday to timely file the motion); the motion was not filed until September 11, 2013. (CP 474).

The case of Corey v. Pierce County, 154 Wn.App 752, 225 P.3d 367 (2010) is controlling. In Corey, counsel failed to file a fee motion after a verdict in favor of plaintiff within the ten days required by CR 54(d)(2). Id. at 760. In Corey, as in the case at hand, the authority for attorneys' fees and expenses was based on separate statute. Id. at 773. However, as in Corey, the underlying statute did not provide for a contrary time period to file a request for fees and expenses and the ten days provided for under CR 54(d)(2) controlled. The trial court struck the motion as untimely pursuant to CR 54(d)(2) thereby denying the plaintiff's fee request Id. The Corey case is indistinguishable from the instant case.

Here, as in Corey, Clipse filed a motion for fees based on the assertion that they recovered on at least some of the claims presented at trial pursuant to Ch. 40.60 RCW. Id. Also, as in Corey, a request for

attorneys' fees must be filed in accord with CR 54(d)(2) unless Ch. 49.60 RCW dictates that another time period shall apply. Again, as in Corey, no separate time for filing a motion for attorneys' fees and expenses is provided for in Ch. 40.60 RCW. Consequently, Clipse was bound to comply with CR 54(d)(2) in filing a motion for attorneys' fees and expenses and failed to comply with CR 54(d)(2) filing an untimely application for fees and expenses.

On appeal, Clipse again attempts to justify the late filing by focusing on the insertion of the word "reserved" in the Judgment entered August 28, 2013. He contends that his recitation in the judgment of the right to file a motion pursuant to Ch. 49.60 RCW amounted to a reservation of the right to file such a motion without regard to the time constraints of CR 54(d)(2). Therefore, according to Clipse, the motion was timely filed. This argument is without merit. Notably, no authority is cited for this proposition where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search has found none. DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). Further, the acceptance of the late filing is vested in the discretion of the trial court. Colorado Structures, Inc. v. Blue Mountain Plaza, LLC, 159 Wash.App. at 660. The right to bring a motion for fees would exist

regardless of whether it is "reserved" in the judgment. RCW 49.60.030. Under Clipse's analysis. he preserved not just the right to file a fee motion, but an indefinite period of time in which to do so by his insertion of "reserved" in the judgment. This is not the law. Clipse was required to file in accord with CR 54(d)(2) or request additional time per CR 6(b).

CR 54(d)(2) also indicates more time will only be provided upon the order of the Court. Tellingly, no order exists, nor was a motion brought to request more time. The colloquy at the time the judgment was discussed in detail by the trial court when evaluating the motion to strike is devoid of any discussion regarding extension of time to file a fee motion. (RP September 20, 2013 pp. 8:9-19; 9:4-11; 19-22). Essentially, Clipse's argument is that CDS (and the Court) acquiesced to some indeterminate timeline for filing the motion for fees as a result of the amount of costs and attorney's fees being "reserved" in the judgment. (CP 474).

Further, a specific procedural rule is applicable to such a situation. CR 6(b) permits a party to request an expansion of the time to file. Plaintiff also had the ability to request additional time pursuant to CR 6(b)(1) prior to the expiration of the ten days. His failure to do so is a failure to exercise diligence. Pybas v. Paolino, 73 Wn.App. 393, 403, 869 P.2d 427 (1994). Ultimately Clipse did not even request additional time

pursuant to CR 6(b)(1) *after* CDS filed the motion to strike, yet such a motion is a prerequisite to invoking the trial court's discretion to find excusable neglect. (CP 619-632); CR 6(b)(1).

Clipse contends that his "reservation" in the Judgment was intended to be a modification of the time limits of CR 54(d)(2). This cannot be the case. Had counsel actually possessed the intention to file beyond the time limits of CR 54(d) at the time judgment was entered as he contends, such an intention would necessarily require, and be demonstrated by, 1) a request as to the time needed and 2) a showing of cause. CR 6(b). The complete absence of a request for more time or a mention of cause belies the present assertion that Plaintiff's counsel intended to expand the time limits of CR 54(d)(2) on August 28, 2013. (September 20, 2013 pp. 19-22). Further, based on the colloquy examined by the Court, the trial court's decision was well within the trial court's discretion. (RP of September 20, 2013 pp. 20-21). Had that been the intention of counsel per the Court rule, any indicia of such an intention relative to the time for filing is absent. CR 6(b). Again, counsel also had ten days to remedy any issue regarding time before the time to file expired. CR 6(b).

The case of Davies v. Holy Family Hospital, 144 Wn.App. 483, 183 P.3d 283 (2008) is instructive. In that case, the litigant mentioned in

court filings an excuse for failing to file timely documents in defense of a motion for summary judgment. Id. at 499. A permutation of counsel's argument in this case was presented, but under more specific circumstances. In Davies, the court found that the litigant provided a reason for the late filing (albeit a reason ultimately rejected by the court), but faulted the plaintiff for failing to make a motion for a continuance pursuant to CR 56(f), a fact also considered when the court refused to accept the late filing. Id. at 499. Contrastingly here, Clipse not only did not make a motion for a continuance under CR 6(b), but also failed to offer a factual basis that would establish excusable neglect. Id. at 144 at 499; CR 6(b)(2).

Finally, the reservation itself would not signal to the Court or to CDS's counsel that the motion would be filed beyond the ten day time limit. Such a reservation could both be included in the Judgment and yet also filed within the time constraints of CR 54(d)(2). Further, under Clipse's analysis, there would be no limit to filing a motion for fees any time a litigant included "reserved" in a judgment. Note that in Corey counsel failed to include the reservation; under Plaintiff's analysis, this would have provided an additional basis for rejecting the fee petition. However, in Corey, the court solely focused on the late filing pursuant to CR 54(d)(2). Corey, 154 Wn.App. at 772. Absent Plaintiff's request for

expanded time pursuant to CR 6(b), there is no basis whatsoever to assume that Plaintiff intended to preserve a right to file such a motion at some undetermined future time without regard to CR 54(b)(2). Also telling is that under Plaintiff's analysis, defense counsel and the Court would be acquiescing to an indefinite period to file a CR 54(d)(2) request. There can be no agreement to, or consideration of, a request for a continuance where the terms of the request are not disclosed, proposed, or discussed.

As the absence of prejudice to CDS, which is repeatedly argued by Clipse, it is significant that there was no showing of prejudice in the Corey case on the part of the defendant. Id. Where excusable neglect has not been shown and the time constraints of CR 54(d)(2) have not been met, dismissal is proper and in accord with the authority established by Corey regardless of the existence or absence of prejudice.

Clipse asserts that the late filing should be accepted pursuant to CR 6(b)(2). The trial court, in its discretion, could accept a late filing based upon a showing of excusable neglect. Cohen v. Stingl, 51 Wn.2d 866, 868, 322 P.2d 873 (1958); CR 6(b)(2). In the case at hand, Clipse seems to argue that the judgment reflects an intention to file the motion outside of the constraints of CR 54(d)(2) and that he should be excused for his mistaken and misguided belief that he had leave to file beyond the ten

days required by CR 54(d)(2). The onus is on Clipse to request to expand the time for filing under CR 54(d)(2) and make the appropriate motion under CR 6(b); this was not done.

Here, as in Pybas, "the responding party [to an assertion of excusable neglect] can rarely show actual prejudice because the prejudice is to the system and an extension of time undermines the finality of the judgment." Pybas, 73 Wn.App. at 403. Despite the fact that this was the primary aspect of CDS's prejudice, the trial court nonetheless did not find excusable neglect. Id. Also, there is prejudice to Defendants in such an instance relating to the possibility of an appeal. Should a litigant appeal, frequently a stay is sought which must be secured by cash on deposit with the Court or a bond. RAP 8.1. The amount of such a bond takes into account the principal of the judgment. Anticipated fees on appeal are also part of the analysis, which will also be informed by a party's fee petition. RAP 8.1(c). Meaningful arrangements for a bond necessarily depend upon the amount of money involved. RAP 8.1(c). Thus, the delay does prejudice CDS and its ability to make such arrangements to the satisfaction of the Court. Regardless, a showing of prejudice is not the touchstone of the Court's analysis.

Several cases evaluating allegations of excusable neglect have focused on the parties' knowledge of the triggering event. In Cohen, the

court found significant that the judgment (which triggered commencement of the time period at issue) was submitted in open court. Cohen, 51 Wn.2d at 868. The case of Pybas is also on point. In Pybas, a party failed to timely file a request for a trial do novo following arbitration. Pybas, 73 Wn.App. at 394. Unlike in this case, opposing counsel was timely served with the request for a trial de novo, but it was filed with the Court shortly after the deadline for filing a trial de novo had passed. Id. at 395. Despite this, and despite the noted absence of prejudice to the defendant, the court found that there was no excusable reason for the failure to timely file. Id. at 404. The same result is proper here. Clipse's counsel admits that he was aware of the rule at the time he entered the motion and offered no excusable reason for not addressing the issue in Court on August 28, 2013 or before the expiration of the ten day time period. CR 6(b)(1); (RP September 20, 2013 pp. 19:18-25, 20:1-24, 22:12-22). Plaintiff's assertion that he thought he had reserved an indeterminate time period to file such motion based upon the entry of his judgment is illogical and not excusable neglect. There is simply no mention of the possibility of a late filing whatsoever, let alone a discussion of CR 54(d)(2) and CR 6(b). For such discussion to be meaningful, a hearing date would also have been agreed upon, which also did not occur. (RP September 20, 2013 pp. 19:18-25,

20:1-24, 22:12-22). Counsel's undisclosed intentions are not excusable neglect.

The case of State v. Cline, 21 Wn.App. 720, 586 P.2d 545 (1978) is also instructive. In Cline, the defense inadvertently "forgot" to note the time for appeal after trial and filed the notice of appeal late. As a result, the appeal (which was filed one date late) was dismissed. Id. at 721. Counsel's failure to follow the procedures available pursuant to CR 54(d)(2) or CR 6(b) is an omission similar to the failure in Cline and is not excusable neglect. Id.

CDS asserts that Clipse has not shown excusable neglect where he was aware of the judgment, aware of the ten-day time limit, failed to address a need for more time while in open court, and failed to file a motion pursuant to CR 6(b)(1) prior the expiration of the ten-day time limit, all without excusable explanation. Further, the arguments presented focus primarily on defense counsel's and the Court's actions, namely their failure to comprehend Plaintiff's counsel's intentions, excusable neglect in an inquiry of Clipse's conduct. (RP September 20, 2013 pp. 19:18-25, 20:1-24, 22:12-22). Where excusable neglect has been found, it focuses not on the omissions of the Court or the opposing counsel, but primarily on the attorney asserting excusable neglect. This is a further basis for denying the fee motion. Pybas, 73 Wn.App. at 394.

Plaintiff attempts to bootstrap the failure of the clerk's office to enter a cost bill pursuant to CR 78 as an implicit endorsement of his argument that an indeterminate period of time was reserved to file pursuant to CR 54(d)(2). Under the plain language of CR 78, the Clerk does not have the authority to enter the cost bill until ten days have passed. Once ten days have passed, the Clerk is under no specific time constraints pursuant to CR 78 as to when to enter a cost bill. There is no reason to conclude the failure to enter a cost bill on the part of the Clerk is linked to the time to file requirements of CR 54(d). CR 78 also provides that the cost bill contemplated under CR 78 shall not delay entry of a judgment. Implicit in the rule is that the cost bill may amend or be an adjunct to a judgment already entered. CR 78(e). Consequently, no conclusions can be drawn from the failure of the clerk to yet enter a cost bill.

The trial court clearly did not abuse its discretion in striking Clipse's motion for costs and fees based on its review of the hearing, counsel's arguments, and the trial court's repeated invitation to explore the parameters of Clipse's alleged showing of excusable neglect. (RP September 20, 2013 pp. 19:18-25, 20:1-24, 22:12-22). The trial court was also not persuaded by the argument regarding the use of the word "reserved" in the judgment and did not find anything in the record amounting to excusable neglect. Such decision was proper and rested in

the sound discretion of the trial court and was based upon a familiarity with the record and a detailed review of Clipse's arguments relative to his failure to timely file. The trial court's decision show no abuse and should be upheld.

V. CROSS APPELLANT REQUESTS AN AWARD OF COSTS AND ATTORNEY'S FEES AS PERMISSIBLE PURUSANT TO RAP 14.1, 14.2 AND 18.1.

As permitted under RAP 18.1, 14.1 and 14.2, Cross-Appellant requests and award of attorneys' fees and costs should it ultimately be the prevailing party in this instant appeal. To the extent an award of fees are awardable to a prevailing party who was the defendant before the trial court under Ch. 49.60 RCW, Ch. 46.25 RCW and/or equitable ground such an award is hereby requested by Cross-Appellant in the event it is the prevailing party. Hwang v. McMahill, 103 Wn. App. 945, 954, 15 P.3d 172 (2000).

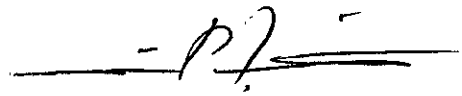
VI. CONCLUSION

The paucity of proof as to the element of disability is singularly fatal to Clipse's claim. As a result, Clipse failed to present substantial evidence that he was, or that he was perceived, as disabled. All Clipse proved is that he was taking a strong narcotic, Methadone, which CDS refused to accept among its commercial drivers. Further, since Clipse claim is predicated on a perceived disability, there was never any

obligation to accommodate him. Even if there were an obligation to accommodate, Clipse never engaged in an interactive process and no accommodation was possible where Clipse essentially requests an accommodation, which requires the employer to alter its job requirements. Clipse understood and agreed that the position with CDS was at-will. As a result, there is no claim of promissory estoppel. Consequently, CDS requests that this Court dismiss all claims remaining at the time the case was submitted to the jury pursuant to CR 50. Should the Court conclude that a claim survives this appeal, the court should remand for proceedings consistent with this Court's instructions. Should CDS's request for dismissal not be granted, the trial court's rulings with respect to Ch. 49.72 RCW and Clipse's failure to timely file his motion for attorneys' fees and costs should not be modified as they were properly decided.

DATED this 5th day of August 2014.

MCGAVICK GRAVES, P.S.

By: 

Lori M. Bemis, WSBA #32921
Of Attorneys for Respondents/
Cross-Appellants

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DECLARATION OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served via hand-delivery by ABC Legal Messenger by August 6, 2014, a copy of the **OPENING BRIEF OF RESPONDENTS/CROSS-APPELLANTS AND RESPONSE TO CLIPSE'S OPENING BRIEF** to:

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(Counsel for Ronald Clipse)

Signed at Tacoma, Washington this 5th day of August 2014.

McGAVICK GRAVES, P.S.

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