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63623-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

KAREN SHANNON,

Appellant,

v.

THE PAIN CENTER OF WESTERN WASHINGTON, PLLC,

Respondent.

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT
AND MOTION TO DISMISS APPEAL

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I. INTRODUCTION

Plaintiff/Appellant Karen Shannon (“Shannon”) was employed by Defendant/Respondent, The Pain Center of Western Washington, PLLC (“Pain Center” or the “Clinic”) from November 13, 2006 until May 4, 2007. During these six and one half months, Shannon claims to have suffered from a hostile work environment on the basis of sex, in violation of RCW 49.60, *et seq.*, the Washington Law Against Discrimination (“WLAD”).

On November 4, 2008, Shannon filed suit in King County Superior Court. The Pain Center moved for dismissal and/or partial summary judgment on this claim on the grounds that the court lacked jurisdiction over this claim because the Clinic did not employ eight or more employees as required by RCW 49.60.040(11). Following briefing, oral argument and supplemental briefing by the parties, the trial court granted the Pain Center’s motion. Shannon appeals from the Amended Order Granting Defendant’s Motion for Dismissal or Partial Summary Judgment re Statutory Claims, entered on May 12, 2009.

RCW 49.60.040(11) defines the terms “employer” and “employee.” The WLAD does not use nor define the words “owner, sole proprietor, corporation, director, officer, partnership, company, or shareholder.” The Washington Human Rights Commission (“WHRC”) –

originally tasked with enforcement of the WLAD – has promulgated regulations to “carry out the provisions of this chapter. . . .” RCW 49.60.120(3). Further to that authority, the WHRC promulgated WAC 162-16-220 – titled “Jurisdiction – Counting the number of persons employed.” These regulations build on the statutory definition of “employer” by including and excluding various individuals from the jurisdictional count of “employees” based on the form of the business enterprise. If these regulatory strictures are applied as urged by Shannon, the intention of the legislature to exempt small employers from operation of the WLAD will be castigated.¹

Finally, this appeal is untimely. Although the trial court belatedly made findings that this matter was final and appealable pursuant to CR 54(b) and *Lindsay Credit Corp. v. Skarperud*, 33 Wn. App. 766, 773, 657 P.2d 804 (1983), those findings cannot displace the judgment of this Court as to the interlocutory nature of this appeal. Judicial economy will be best served by avoiding piecemeal appeals and the risk of inconsistent results,

¹ Respondent does not argue or imply that small businesses are not prohibited from engaging in acts of harassment or discrimination proscribed by RCW 49.60, *et seq.* This is obviously not the law in Washington State. *See, Roberts v. Dudley*, 140 Wn.2d 58 (1999). It is, however, the Pain Center’s position that no violations have occurred, and none have been established because Shannon’s claims have not yet been litigated to conclusion. Indeed, due to the interlocutory nature of this appeal, the substantive claims at issue here may be resolved adversely to her while this appeal is pending.

and this appeal should be dismissed, without prejudice to Shannon's right to appeal raise this issue following resolution of her admittedly identical substantive common law claims currently pending in the trial court.

II. COUNTERSTATEMENT OF ISSUES

1. Should this appeal from dismissal of a statutory claim be dismissed as untimely when a substantively identical common law claim remains pending in the trial court? Yes.
2. Is the sole member of a PLLC counted as an employee under RCW 49.60.040(10)-(11) when he does not receive "pay" as defined by WAC 162-16-220(10) and is not otherwise "employed" by the PLLC? No.
3. Is the spouse of the sole member of a PLLC counted as an "employee" for jurisdictional purposes under RCW 49.60.040(10) and/or WAC 162-16-220(12)? No.

III. STATEMENT OF THE CASE

David Velling, M.D. started his solo practice as the The Pain Center of Western Washington, PLLC, in 2004. CP 99. Dr. Velling is its sole member and the sole medical practitioner at the Clinic. At the time Shannon was employed by the Clinic, there were a total of seven employees, including Deanna Velling, Dr. Velling's wife. If Dr. Velling and Mrs. Velling are included in the count of employees, there were eight persons who worked at the Clinic. If Dr. Velling is excluded from the count on any basis, a maximum of seven people were "employed by" the Center. Alternatively, if Dr. Velling is included but Mrs. Velling is excluded from the count as the spouse of the owner, still only seven people were "employed by" the Clinic. If both Dr. Velling and Mrs. Velling are excluded from the count, then only six people were "employed by" the Clinic during this relevant time.

Shannon's Complaint asserted a claim that she was subjected to sexual harassment by the Pain Center in violation of the Washington Law Against Discrimination ("WLAD"), RCW 49.60, *et seq.* ("statutory claim"). CP 3-5. Shannon's Complaint also asserted various common law claims and, under liberal notice pleading standards, included a claim that she was subjected to sexual harassment in violation of public policy ("common law claims"). *Id.*

Following entry of an order granting dismissal of her statutory claim, Shannon filed a motion for reconsideration, arguing that the trial court had erred and that, if it did not reverse its ruling, reconsideration should be granted to provide that the court's order was final and appealable, and to more clearly identify those materials and pleadings the court relied upon in ruling on the motion. CP 132-33. Over the Pain Center's opposition (CP 138), the court granted Shannon's motion and entered an amended order (submitted by Shannon) that affirmed the dismissal, and recited that there was "no just reason for delay" and that the order was "final and appealable." CP 163. The Pain Center moves below for dismissal of this appeal because it is premature and not ripe for review.

The Revised Code of Washington, Chapter 49.60, *et seq.*, establishes all statutory rights and remedies for a plaintiff pursuing a private cause of action for an employer's violation of the WLAD. If an employer does not meet the statutory definition, it is exempt from private causes of action under the Act. The trial court found that it lacked subject matter jurisdiction over Shannon's statutory claim because the PLLC's sole member was excluded from the jurisdictional count of employees, and it dismissed Shannon's statutory claim for want of eight employees. CP 163.

Absent dismissal, this Court may decide whether to affirm the trial court's decision that counting sole member/owners of PLLCs and/or their spouses as "employees," is inconsistent with the legislature's intention to exclude small, unincorporated businesses from the operation of the WLAD. The plain language of RCW 49.60.040(11) does not require counting Dr. Velling as an employee, and the equally clear language of WAC 162-16-220 requires a finding that, as a sole member of a PLLC, he is not counted as an employee. This Court may also affirm the trial court on the grounds that the spouse of a sole member of a PLLC is not counted as an employee for purposes of establishing jurisdiction under RCW 49.60.040(10).

IV. MOTION TO DISMISS APPEAL

A. Shannon's Appeal Is Premature And Should Be Dismissed.

Motions may be made in the body of a brief when disposition of the motion will preclude consideration of the appeal on its merits. RAP 17.4(d). Granting this motion serves the interests of judicial economy and causes no prejudice to either party.

For an order disposing of fewer than all claims to be appealable as a matter of right, the underlying record must affirmatively show there is some present and articulable risk of hardship or some injustice that will be alleviated by an immediate appeal. *Doerflinger v. New York Life Ins. Co.*, 88 Wn.2d 878, 882, 567 P.2d 230 (1977). Shannon failed in all respects to identify any hardship she might suffer or some injustice that would be alleviated by an immediate appeal. Supplemental CP ____ (see Appendices A and B).

To determine if delay will cause injustice, the court examines these factors: (1) the relationship between the adjudicated and unadjudicated claims; (2) whether questions on review are before the trial court in the unadjudicated portion of the case; (3) the likelihood that the need for review may be mooted by developments in the trial court; (4) whether an appeal will delay the trial of the unadjudicated matters without simplifying or facilitating that trial; and (5) the practical effects of allowing an

immediate appeal. *Lindsay Credit Corp. v. Skarperud*, 33 Wn. App. 766, 773, 657 P.2d 804 (1983). No one factor is dispositive, but the court's discretion should be exercised in the interest of sound judicial administration. *Lindsay Credit Corp., supra*.

The primary focus of the court in *Lindsay Credit Corp.* was to determine whether the issue on which review is sought can await review until after final judgment is entered without prejudice to the parties and without harm to judicial economy. *Id.* Permitting this review to proceed poses a very real risk that this issue will be rendered moot by the trial of Shannon's remaining claims. Moreover, permitting an immediate appeal of this issue defeats the goals sought to be achieved in *Lindsay Credit Corp.* This is clear from an examination of the two possible trial outcomes: (1) a jury finds liability and awards Shannon damages on her common law harassment claim; or (2) a jury returns a defense verdict.

If a jury finds that the Pain Center is liable for the common law harassment alleged by Shannon, she would be entitled to appeal the dismissal of her statutory harassment claim (*i.e.*, her entitlement to attorney fees if the Clinic had the requisite number of employees). If Shannon prevails on that appeal, the matter can be remanded to the trial court for entry of an award of attorney's fees. This causes no prejudice and no added burden to either party.

If a defense verdict is returned on Shannon's common law harassment claim, Shannon would have the right to appeal the verdict – but only if there is an appealable error. If there is no error upon which to base an appeal at that time, the issue is rendered moot by virtue of the fact that the substantive claims will have been found to lack merit. In other words, it will not be necessary for this Court to reach the question at all.²

B. Shannon's Claim Is Not Justiciable

Before the jurisdiction of a court may be invoked, a justiciable controversy must exist. *See, Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814-15, 514 P.2d 137 (1973). A justiciable controversy is an “actual, present, and existing dispute, or the mature seeds of one, which is distinguishable from a possible, dormant, hypothetical, speculative, or moot disagreement.” *To- Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001). To be justiciable, a dispute must be between parties that have genuine and opposing interests, which are direct and substantial and not merely potential, theoretical, abstract, or academic; and a judicial determination of the dispute must be final and conclusive. *Id.* “Inherent in these four requirements are the traditional limiting doctrines of standing,

² Dismissal of this appeal would also reduce the risk that this case would be subject to repeated appeals (the present appeal, an appeal upon completion of this litigation, and a third appeal from a jury verdict if the statutory claims are reinstated and tried).

mootness, and ripeness, as well as the federal case-or-controversy requirement.” *Id.* The purpose of these requirements is to ensure the court will render a final decision on an actual dispute between opposing parties with a genuine stake in the court's decision. *Id.* Unless all these elements are present, the reviewing court steps into the prohibited area of advisory opinions. *Diversified Indus.*, 82 Wn.2d at 815, 514 P.2d 137.

There are two justiciability elements that are problematic to Shannon’s appeal. First, Shannon is unable to prove that an actual, present, or existing dispute (or the mature seeds of one) exists as a result of the dismissal of her statutory harassment claims. Second, she is unable to prove that the opposing interests she has with the Pain Center regarding the regulation relating to counting employees for jurisdictional purposes are direct and substantial rather than potential or theoretical. By her own admission, Shannon’s purpose in bringing this appeal was not to argue the merits of the harassment claims (which remain with the trial court), but to request the court to “establish the remedies available to plaintiff.”³ Shannon contends that resolution of this question will “allow both parties to better assess the risks and benefits of proceeding to trial.” Shannon also maintains that resolution of this question will have value to other litigants.

³ Shannon’s assertion is inherently inaccurate: the only remedy at issue is the availability of attorney’s fees.

Yet in 60 years since the WLAD went into effect, this question has not been presented to the appellate courts of Washington, so the value of a decision on this point may, in fact, have very little precedential value.

This is not an issue that will evade review in the proper case. This case may very well become the proper case to present the question, but it is not yet ripe for review. Whether the issue may arise in other cases, as Shannon has argued, is not a factor supporting interlocutory review, it is an argument that a party makes to support a request for discretionary review. In this case, Shannon has admitted that discretionary review was not appropriate (“...none of the criteria for discretionary review under RAP 2.3(b) apply”). Supplemental CP ____ (see Appendix B, p. 8). Accordingly, this appeal should be dismissed.

V. ARGUMENT ON APPEAL

A. Standard on Review

Statutory interpretation is a question of law that this court reviews *de novo*. *In re Pers. Restraint of Cruz*, 157 Wn.2d 83, 87, 134 P.3d 1166 (2006); see also *Port of Seattle v. Pollution Control Hearing Bd.*, 151 Wn.2d 568, 612, 90 P.3d 659 (2004) (citing *Pub. Util. Dist. No. 1 of Pend Oreille County v. Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002)).

A reviewing court may affirm the trial court's order on any basis that the record supports. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989); see also, *State v. Kelley*, 64 Wn.App. 755, 764, 828 P.2d 1106 (1992) (appellate court may affirm trial court on any basis the record and the law support); and *Niven v. E.J. Bartells Co.*, 97 Wn.App. 507, 513, 983 P.2d 1193 (1999) (reviewing court can affirm the trial court on any basis supported by the parties' pleadings and the proof.).

B. Background

The WLAD was first enacted in 1949 to discourage employment discrimination on the basis of race, creed, color, or national origin. LAWS of 1949, ch. 183. The 1949 enactment established the definition of "employer" as it exists today. *Id.* Enforcement of the Act was originally entrusted to a state agency. *Id.*

In 1973 that the legislature established a private statutory remedy for violation of the Act. LAWS of 1973, ch. 141. The legislative exemption of small employers from both state agency and private enforcement was considered as a matter of first impression in 1996. *Griffin v. Eller*, 130 Wn.2d 58, 61, 922 P.2d 788 (1996). In its decision, the Washington Supreme Court held that small employers, *i.e.*, those with fewer than eight or more employees, were statutorily exempt from the remedies afforded by the WLAD. *Griffin*, 130 Wn.2d at 61. The court expressly found that the original Act barred the WHRC from pursuing small employers for violation of the WLAD, and that there was no legislative history suggesting that the private statutory remedy created by the WLAD in 1973 was intended to rescind the legislative protection of subject “small, otherwise exempt, employers.” *Id.*, 130 Wn.2d at 63.

Since *Griffen* was decided in 1996, the Legislature has made no effort to amend the language of the statute so as to alter the outcome here. There is no statutory remedy for violation of the WLAD against anyone employing fewer than eight persons. By contrast, in 1999, the WHRC engaged in an extensive overhaul of its regulations in response to the court’s decision. In particular, the regulation which purported to subject “small, otherwise exempt” employers to private enforcement actions was

repealed. *See*, [former] WAC 162-16-160 (relied upon by the dissent in *Griffen*).

In an effort to clarify who should and should not be counted for jurisdictional purposes as “employees,” the Commission also promulgated WAC 162-16-220. Although this regulation was promulgated four years after enactment of the Limited Liability Company Act in 1994,⁴ WAC 162-16-220 fails to mention either Limited Liability Companies or Limited Liability Partnerships.

C. The Plain Language Of The WLAD Does Not Require Construction To Conclude That Sole Members Of PLLCs Are Not Counted As “Employees.”

The only conclusion one can reach from the plain language of the WLAD is that either (or both) Dr. Velling is not an “employee.” “Where statutory language is plain and unambiguous, the statute’s meaning must be derived from the wording of the statute itself. Each provision of the statute should be read in relation to the other provisions, and the statute should be construed as a whole. A literal reading of a statute is to be avoided if it would result in unlikely, absurd or strained consequences. The interpretation which is adopted should be the one that best advances the legislative purpose.” *Key Bank of Puget Sound v. City of Everett*, 67

⁴ *See*, RCW Chapter 25.15.800.

Wash.App. 914, 917-18, 841 P.2d 800 (1992), review denied, 121 Wn.2d 1025, 854 P.2d 1085 (1993) (internal citations omitted).

Absent ambiguity or a statutory definition, a court must give the words in a statute their common and ordinary meaning. *Garrison v. Wash. State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). Here, there are statutory definitions of “employee” and “employer.”

(11) “Employer” includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit.

RCW 49.60.404(11).

Ergo, an employer is one who “employs” others, also known as “employees.” The legislative definition of “employee” provides that:

(10) “Employee” does **not** include any individual employed by his or her parents, spouse, or child, or in the domestic service of any person.”

RCW 49.60.040(10) (emphasis added).

The statutory definition of “employer” – originally enacted in 1949 – is narrow and exclusive, including only those who employ “eight or more persons.” The statutory definition of “employee” is, by comparison, quite broad, presumably including anyone except “an[] individual employed by his or her parents, spouse, or child, or in the domestic service of any person.” RCW 49.60.040(10). The question, therefore, must turn on

what it is to “employ” or to be “employed by.” If this can be answered by giving plain meaning to these terms, no further construction of the statute is necessary.

There is no statutory or administrative definition of “employ.” To determine the plain meaning of an undefined term, we may look to the dictionary. *Id.* A cursory review of a number of dictionaries yields strikingly similar definitions of “employ:” (verb) “to hire or engage the services of (a person or persons); provide employment for; have or keep in one’s service: This factory employs thousands of people;” (noun) “employment; service: to be in someone’s employ;”⁵ “[t]o engage the services of; put to work: agreed to employ the job applicant; [t]o provide with gainful work: factories that employ thousands; n. The state of being employed: in the employ of the city.”⁶

Simply put, Dr. Velling “employs” people, and he is not “employed by” the Pain Center. He is the owner, *i.e.*, the employer. He does not take a salary, he is “compensated” (if at all) from the profits of the enterprise, and it is the vehicle by which he provides medical services to his patients. Dr. Velling *is* The Pain Center of Western Washington,

⁵ Random House Dictionary, © Random House, Inc. 2009.

⁶ The American Heritage® Dictionary of the English Language, Fourth Edition, Copyright © 2009 by Houghton Mifflin Company.

PLLC. He provides medical services *as* The Pain Center of Western Washington, PLLC. He is not a corporation, which would continue to exist as a separate legal entity if he left, but as the Operating Protocol for the PLLC provides, “withdrawal of the Member shall result in dissolution of the Company....” CP 113.

Under the plain language of the statute, Dr. Velling is a “person acting in the interest of an employer, directly or indirectly, who employs” fewer than eight persons – he acts in the interest of the PLLC, indirectly through the PLLC, to employ other persons, *i.e.*, the employees. This is a reasonable interpretation of the statute that does not require resorting to the administrative regulation to determine what the legislature meant. On this basis alone, the trial court’s decision should be affirmed.

D. WAC 162-16-220 Does Not, By Its Plain Language, Require That Sole Members Of PLLCs Be Counted As Employees For Jurisdictional Purposes.

As discussed above, legislative intent is paramount. “It has frequently been declared that, in the process of arriving at the intent of the legislative body, the first resort of the courts is to the context and subject matter of the legislation, because the intention of the lawmaker is to be deduced, if possible, *from what it said.*” *Graffell v. Honeysuckle*, 30 Wn.2d 390, 399, 191 P.2d 858 (1948) (citing *Lynch v. Department of Labor & Industries*, 19 Wn.2d 802, 145 P.2d 265 (1944) (emphasis

added)). Shannon’s entire argument with respect to *statutory* intent, which is entirely without supporting authority, is that WAC 162-16-220(15) and (17), which use the undefined term “private . . . artificial legal entities,” is intended to encompass PLLCs. Yet these provisions state:

(15) **Officers.** Officers of corporations, and officers of other private or public artificial legal entities, will be counted unless:

(a) They receive no pay from the corporation or other entity; and

(b) They do not participate in the management of the corporation or other entity beyond participation in formal meetings of the officers.

...

(17) **Members of a professional service corporation.** All persons who render professional services for a professional service corporation will be counted as employees of the corporation.

Id. (bold in original).

It is undisputed that the Pain Center is not incorporated, a “member” of a PLLC is not an “officer” and a PLLC is not a “professional service corporation.”⁷

⁷ RCW 25.15.045(1) makes PLLCs subject to the provisions of RCW 18.100 (the Chapter under which professional service corporations are formed). It is anticipated that, in reply, Shannon will argue that this expresses the legislature’s intent to transform PLLCs into the “functional equivalent” of professional service corporation, especially since RCW 25.15.045(3) states, “For purposes of applying the provisions of chapter 18.100 RCW to a professional limited liability company, the terms ‘director’ or ‘officer’ means manager....”

The purpose of forming a PLLC is to “afford LLC members with the same protection from the liabilities of the business conducted through the LLC as is afforded to *shareholders* of a corporation.”⁸ Notably, “shareholders” are not among those persons who are counted under WAC 162-16-220 as employees for jurisdictional purposes. Moreover, Shannon’s argument glosses over the regulatory exclusion of *directors* from the jurisdictional count. WAC 162-16-220(14) states:

(14) **Directors.** Directors of corporations, and similar officers of other private or public artificial legal entities, will *not* be counted simply because they serve in that capacity.

Id. Yet it is beyond cavil that “Directors . . . and similar officers” are engaged in setting corporate policy and making management decisions. Shareholders, by comparison, exert authority over a corporation only by exercise of their voting rights on limited questions put to them by the directors.

As discussed earlier, formation of a PLLC only limits a member’s personal liability for contractual obligations of the PLLC; personal liability for a member’s individual torts remains intact. As a practical

The subject provisions relate to licensing and insurance requirements, and the problem with this argument is that neither Chapter uses these definitions “for purposes of applying” RCW 49.60.

⁸ *Washington Lawyers Practice Manual*, Part Eight, p. 1, King County Bar Association (2005); see also, O’Neal, Hodge, *et. al.*, O’NEAL AND

matter, commentators have observed that the mere existence of a legal norm of limited liability does not mean that members will be able to enjoy it. Banks and other lending institutions routinely force the members to assume personal liability for the business' obligations as a condition to extending credit, among other things. O'Neal, *supra*, §2:4. Indeed, as will be discussed below, a sole member PLLC appears more like a sole proprietorship than a corporation.

E. If The Court Finds That The Statute Or Regulation Is Ambiguous, The Legislative Intent To Exclude Small Employers Must Be Given Effect.

Agency regulations are construed as if they were statutes, and a court must review a statute's plain language and statutory scheme to determine legislative intent. *State ex rel Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004). Here, the legislative intent was to exclude small, unincorporated employers from the operation of the WLAD. As the trial court properly gave effect to this intent, summary judgment dismissing Shannon's statutory claims should be affirmed.

Shannon argues that a sole member of a PLLC is the "functional equivalent" of a corporate officer. Brief of Appellant, p. 16-17 (citing to

THOMPSON'S CLOSE CORPORATIONS AND LLCs: LAW AND PRACTICE, §2:7 (2009).

CP 106).⁹ Then, bootstrapping the language of WAC 162-16-220(15), Shannon argues that the sole member of a PLLC must be counted as an employee for jurisdictional purposes. This argument ignores the larger statutory scheme, fails to read the regulation as a whole, and fails to give any meaning to the statutory definitions of employer and employee.

As discussed above, legislative intent is to be determined, first, from the legislature has said. *Graffell*, 30 Wn.2d. at 399-400. In enacting legislation upon a particular subject, the lawmaking body is presumed to be familiar with its own prior legislation relating to that subject. *Graffell*, *supra* (citing *In re Levy*, 23 Wn.2d 607, 161 P.2d 651 (1945)). Here, the legislature said “eight employees” and the WHRC said “officers” and “partners.” Both the legislature and the WHRC are presumed familiar with prior legislation and regulations. This is particularly true when the definitions of “employer” and “employee” were initially crafted in 1949, and the most recent amendments to WAC 162-16-220 were enacted in 1999 – fifty years later. In enacting regulations upon a particular subject, the rulemaking body is presumed to be familiar not only with its own prior

⁹ Shannon relies upon the legal opinion of an accountant. P. Curtis Stebbins, a Certified Public Accountant, is not qualified to render a legal opinion and this is not a subject upon which “expert testimony” will be helpful to the resolution of the issues before the Court. Respondent urges the Court to give no weight to Mr. Stebbins’ opinions in reaching its decision since there is no

regulations relating to that subject, but also with the court decisions construing such former legislation. *See generally, In re Levy*, 23 Wn.2d 607, 161 P.2d 651 (1945). This is particularly true when changes are made in response to court decisions as occurred when the WHRC repealed [former] WAC 162-16-160.

To measure the present law we must consider the old law, for a presumption carries in all changes in statute law that the legislature had in mind a mischief (a mischief of various rules, 40 Cyc. 1362), and a remedy, and we must attribute a motive for the striking out of the arbitrary provisions of the old law and a substitution of a discretionary power to award costs and attorney's fees unhampered by any restrictions within the realm of reasonable discretion.

In re Eichler's Estate, 102 Wash. 497, 173 Pac. 435 (1918). Accordingly, it must be presumed from the act of the WHRC and the inaction of the legislature in response to the court's decision in *Graffell* that the intention of the legislature was to exclude small, unincorporated employers from the operation of the WLAD. In that regard, an analysis of various forms of business enterprises, as explicated by the legislature, is instructive.

The Washington Secretary of State maintains an informational website titled "Choosing the Structure of Your Business or Organization,"

evidence that the trial court relied upon it in reaching its decision. To the contrary, the trial court apparently rejected the argument in its entirety.

which summarizes six possible business structures as defined by the legislature:

A Sole Proprietorship is one individual or married couple in business alone. Sole proprietorships are the most common form of business structure. This type of business is simple to form and operate, and may enjoy greater flexibility of management and fewer legal controls. However, the business owner is personally liable for all debts incurred by the business.

A General Partnership is composed of two or more persons (usually not a married couple) who agree to contribute money, labor, and/or skill to a business. Each partner shares the profits, losses, and management of the business, and each partner is personally and equally liable for debts of the partnership. Formal terms of the partnership are usually contained in a written partnership agreement.

A Limited Partnership* is composed of one or more general partners and one or more limited partners. The general partners manage the business and share full in its profits and losses. Limited partners share in the profits of the business, but their losses are limited to the extent of their investment. Limited partners are usually not involved in the day-to-day operations of the business.

A Limited Liability Partnership* is similar to a General Partnership except that normally a partner does not have personal liability for the negligence of another partner. This business structure is used most commonly by professionals such as accountants and lawyers.

A Corporation* is a more complex business structure. As a chartered legal entity, a corporation has certain rights, privileges, and liabilities beyond those of an individual. Doing business as a corporation may yield tax or financial benefits, but these can be offset by other considerations, such as increased licensing fees or decreased personal control. Corporations may be formed for profit or nonprofit purposes.

The Limited Liability Company (LLC)* and the Limited Liability Partnership (LLP)* are the newest forms of business structure in Washington. An LLC or LLP is formed by one or more individuals or entities through a special written agreement. The agreement details the organization of the LLC or LLP, including: provisions for management, assignability of interests, and distribution of profits or losses. Limited liability companies and limited liability partnerships are permitted to engage in any lawful, for profit business or activity other than banking or insurance.

http://www.secstate.wa.gov/corps/registration_structures.aspx. It is important to analyze these differences in the context of this case.

A sole proprietorship, defined as “one individual or married couple in business alone,” is, absent the formation of the PLLC, an apt description of Dr. Velling’s business structure. He is one individual in business alone. He is thus prevented from forming a partnership. Yet, without taking additional steps, Dr. Velling would remain personally liable for all contractual debts of the practice. And this point should be clearly made: The limitation on personal liability extends only as far as the contractual obligations of the practice. Dr. Velling remains personally liable for his professional negligence, wrongful acts, or misconduct he commits. RCW 18.100.070. As was discussed, *infra*, forming a PLLC provides him with the same legal protections as a shareholder, and shareholders are not included in the jurisdictional count under the WLAD.

A corporation, as the Secretary of State notes, “has certain rights, privileges, and liabilities beyond those of an individual,” including “tax or

financial benefits.” *Id.* It is undisputed that the Pain Center is not incorporated. Accordingly, he is not an “officer” or “director.” Shannon asserts that by virtue of the fact that Dr. Velling receives income from the practice and participates in its management he is an “officer” of a “private artificial legal entity.” As noted previously, using this definition, all sole proprietors, general partners, and limited liability partners would also be “officers” of “private artificial legal entities” and subject to a jurisdictional count. Yet the applicable regulation expressly exempts partners, sole proprietors and their family members, and directors. Hence, applying Shannon’s interpretation of the regulation results in an absurdity.

The two remaining business structures, the Limited Liability Company (LLC) and the Limited Liability Partnership (LLP), are formed under RCW Title 25 – “Partnerships.” Both LLCs and LLPs are required to register with the Secretary of State. Under Shannon’s definition of a “private artificial legal entity” this would require counting the partners of PLLPs as employees for jurisdictional purposes – but under WAC 162-16-220(16), “Partners will not be counted as employed by the partnership or by each other.” *Id.*

It is clear that the legislature intended to treat members of PLLPs and PLLCs the same. Both business structures are codified with other “Partnerships” in RCW Chapter 25. These two business forms are even

discussed in the same paragraph on the Secretary of State's website as having common formation requirements and common permitted business activities. As a further matter of legislative intent, why would "partners" be excluded from the count of employees while "members" are not? A partnership – general, limited, or a PLLP – may have dozens of partners. By contrast, Shannon argues that a sole practitioner who has not formed a corporation, but who has formed a legal business entity virtually identical to a PLLP, must be counted. It makes absolutely no sense. It unreasonably penalizes a sole practitioner – a small business owner who would otherwise be deemed a sole practitioner – for seeking to limit personal liability, while others who join with two or more practitioners can form PLLPs and not be so penalized.

A corporation is more likely to have the resources necessary to defend a claim under RCW 49.60.180, and sufficient resources to satisfy an award of attorney's fees to the "private attorney general." Conversely, small employers, sole proprietorships and partnerships tend to be small, closely held businesses. While protecting small businesses, the legislature and the courts have both recognized that a cause of action for sexual harassment in violation of public policy is available to provide a remedy to an aggrieved employee of a small business. This is yet more evidence that

the legislature intended to carefully balance both parties' interests. This balance has inured for sixty years and should not be upset here.

F. A Sole Member/Owner's Spouse Is Not Included In The Jurisdictional Count Of Employees Under The WLAD.

This Court can affirm the trial court's decision on any basis sustained by the record and the law. *LaMon*, 112 Wn.2d at 200-01. Shannon has not disputed that Deanna Velling is the spouse of David Velling, M.D. As discussed above, an "employer" is a person who acts "in the interest of" the employer to employ others. Therefore, whether the "employer" is Dr. Velling personally, or Dr. Velling "acting in the interest of an employer, directly or indirectly," it is clear that the legislature intended to exclude spouses from the jurisdictional count. This is consistent with the 1949 enactment of the WLAD, which provided the original definition of "employer" as one limited to employing eight or more persons. This was clearly understood by the WHRC which incorporated a verbatim exclusion of family members from those persons to be counted for jurisdiction. WAC 162-16-220(12) states: "Because of the definition of 'employee' in RCW 49.60.040, we will not count 'any individual employed by his or her parents, spouse, or child.'"

VI. CONCLUSION

For the reasons discussed above The Pain Center of Western Washington, PLLC requests dismissal of this appeal. If dismissal is not granted, The Pain Center of Western Washington, PLLC requests that the summary judgment entered by the trial court be affirmed.

DATED this 16th day of December, 2009.

LE GROS, BUCHANAN & PAUL

By: 
GAIL M. LUHN, WSBA #27104
Attorneys for Respondent, The Pain
Center of Western Washington, PLLC

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the following counsel of record:

Mr. Dan Albertson, Esq.
711 Court A Ste 200
Tacoma , WA 98402-5228
Tel: (253) 475-2000
Fax: (253) 627-2340

- Via Mail
- Via Facsimile
- Via Messenger

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 16th day of December.



Christie Benevich

Signed at Seattle, Washington

APPENDIX

A

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

KAREN SHANNON,)	
)	
Plaintiff,	)	NO. 08-2-38113-7KNT
)	
vs.	)	FINDINGS OF FACT
	)	PURSUANT TO CR 54(b)
THE PAIN CENTER OF WESTERN	)	RE: AMENDED ORDER GRANTING
WASHINGTON, PLLC,	)	DISMISSAL OR PARTIAL SUMMARY
	)	JUDGMENT
Defendant.)	
	)	(PROPOSED)

THIS MATTER having come before the Court upon Plaintiff's Notice of Presentation, following the issuance of the Commissioner of the Court of Appeals, Division I, Order directing the filing of Findings of Fact in support of a final judgment pursuant to CR 54(b) with respect to the Court's Amended Order Granting Dismissal or Partial Summary Judgment Re Statutory Claims and the Court having considered the Plaintiff's Proposed Findings of Fact, and the Defendant's objections thereto, and finding that the principal issue presented being:

1. The application of WAC 162-16-220 to RCW 49.60 and whether

FINDINGS OF FACT PURSUANT TO
CR 54(b) RE: AMENDED ORDER
GRANTING DISMISSAL OR PARTIAL
SUMMARY JUDGMENT-1

COPY

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1
2 the sole owner-member of a Professional Limited Liability Company,
3 formed pursuant to RCW 25.15, who receives pay from the company and
4 participates in the day-to-day management of said company,
5 constitutes an "employee" for purposes of counting the number of
6 employees necessary to apply RCW 49.60.

7 NOW, THEREFORE, in accordance with the factors to be
8 considered in *Lindsay Credit Corp. v. Skarperud*, 33 Wn. App. 766,
9 657 P.2d 804 (1983), the Court enters the following Findings of
10 Fact:

11 **1. This action arises upon Plaintiff's claim for**
12 **discrimination and wrongful termination in violation of RCW 49.60**
13 **and the parties did not dispute the following facts for purposes**
14 **of the motion for partial summary judgment brought by the Defen-**
15 **dant:**

16 1.1. That the Defendant is a Professional Limited Liability
17 Company which, during all times that the Plaintiff was employed by
18 Defendant, reported that it employed seven (7) employees to the
19 state of Washington Employment Security Department.

20 1.2. That the sole owner-member of the Professional Limited
21 Liability Company, Dr. David Velling, was not one of the seven (7)
22 employees reported by Defendant to the state of Washington
23 Employment Security Department.

24 1.3. That the Defendant, a Professional Limited Liability
25 Company, was formed by Dr. David Velling, who receives pay from the
26 company, participates in the day to day management of the company

1
2 and renders professional services on behalf of the company.

3 1.4. That the Defendant has never been a partnership.

4 **2. The Relationship Between the Adjudicated and the**
5 **Unadjudicated Claims:** The dismissal of the Plaintiff's statutory
6 claim for discrimination under RCW 49.60 leaves the Plaintiff with
7 a common-law claim for discrimination. Both claims rely upon the
8 same set of facts but the remedies for the dismissed claim under
9 RCW 49.60 include recovery for attorney's fees whereas the common-
10 law claim does not include recovery for attorney's fees.

11 **3. Whether Questions Which Would Be Reviewed On Appeal Are**
12 **Still Before The Trial Court For Determination In The Unadjudicated**
13 **Portion Of The Case:**

14 With respect to the Plaintiff's statutory claim under RCW
15 49.60, the Court finds that there are no remaining questions to be
16 reviewed on appeal which are still before the trial court. The
17 dismissal of the Plaintiff's statutory claim is final and the sole
18 issue is whether the sole owner-member of the Defendant profes-
19 sional limited liability company should be counted as an employee
20 for the purposes of applying RCW 49.60. If the sole owner-member
21 of the Defendant professional limited liability company is counted
22 as an employee, the Defendant has eight (8) employees and RCW 49.60
23 applies.

24 **4. Whether It Is Likely That The Need For Review May Be**
25 **Mooted By Future Developments In The Trial Court:**

26 The Court finds that it is not likely that the need for review

27 FINDINGS OF FACT PURSUANT TO
CR 54(b) RE: AMENDED ORDER
GRANTING DISMISSAL OR PARTIAL
SUMMARY JUDGMENT-3

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2 will be mooted if the Plaintiff prevails upon her common law claim
3 for discrimination at trial. In that event, it will be necessary
4 for the Court of Appeals to review this Court's ruling with respect
5 to the number of employees of the Defendant.

6 **5. Whether An Immediate Appeal Will Delay The Trial Of The**
7 **Unadjudicated Matters Without Gaining Any Offsetting Advantage In**
8 **Terms Of The Simplification And Facilitation Of That Trial:**

9 The Court finds that without an immediate appeal there will
10 be disadvantages to the parties in that a central question will
11 remain unanswered and likely preclude any resolution without trial.
12 Because the dismissal of the Plaintiff's claim eliminates a
13 significant remedy (i.e. an award of attorney's fees), it is
14 unlikely that the parties will be able to resolve the case without
15 proceeding to trial, whereas review of the Court's Order Granting
16 Partial Summary Judgment will eliminate a significant uncertainty
that will facilitate possible resolution of the case.

17 **6. The Practical Effects Of Allowing An Immediate Appeal:**

18 The Court finds that allowing an immediate appeal would increase
19 the likelihood of resolution of the case because it would establish
20 the remedies available to the Plaintiff and allow both parties to
21 better assess the risks and benefits of proceeding to trial.

22 The Court further finds the following unique circumstance that
23 favors immediate appeal:

24 **7. The Issue Presented Is One of First Impression:** Whether
25 the sole owner-member of a professional limited liability company

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2 falls within the definition of a "private artificial legal entity"
3 as set forth in WAC 162-16-220(15), and whether a sole owner-member
4 is an "employee" for purposes of RCW 49.60, appear to be issues of
5 first impression requiring resolution at the appellate level as the
6 same issues are potentially applicable in other cases involving
7 claims against professional limited liability companies under RCW
8 49.60.

9 Based upon the foregoing Findings, this Court reiterates its
10 previous findings that:

11 1. There is no just reason for delay of an appeal of the
12 Court's Amended Order Granting Dismissal or Partial Summary
13 Judgment Re Statutory Claims; and

14 2. The Court's Amended Order Granting Dismissal or Partial
15 Summary Judgment Re Statutory Claims is final for the purposes of
16 CR 54(b).

17 DONE IN OPEN COURT this ___ day of July, 2009.

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JUDGE RICHARD F. McDERMOTT

Presented by:


21
22 DAN M. ALBERTSON, WSBA#10962
23 Attorney for Plaintiff

24
25
26 FINDINGS OF FACT PURSUANT TO
27 CR 54(b) RE: AMENDED ORDER
GRANTING DISMISSAL OR PARTIAL
SUMMARY JUDGMENT-5

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APPENDIX

B

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

KAREN SHANNON,)	
)	
Plaintiff,	)	NO. 08-2-38113-7KNT
)	
vs.	)	PLAINTIFF'S REPLY TO
	)	DEFENDANT'S OBJECTIONS AND
THE PAIN CENTER OF WESTERN	)	RESPONSE TO DEFENDANT'S
WASHINGTON, PLLC,	)	MOTION TO STRIKE
)	
Defendant.	)	HEARING DATE: 07-31-09
)	

COMES NOW the Plaintiff, KAREN SHANNON, by and through the undersigned attorney, and submits the following Reply to Defendant's Objections and Response to Motion to Strike:

I. THE PRESENTATION OF FINDINGS IS NOT A MOTION TO RECONSIDER

The Plaintiff has submitted Findings of Fact to support appellate review after the Court of Appeals' Commissioner issued a ruling directing additional findings to support review:

The May 12, 2009 amended order on partial summary judgment does not include the necessary findings addressing the specific, tangible danger of hardship and the other factors required to satisfy CR 54(b) and RAP 2.2(d). Those findings must be entered by the trial court. Merely arguing the CR 54(b) factors to the appellate court without any findings is not adequate.

I will give Shannon a brief extension to seek the required findings to support the CR 54(b) certification,

Dan M. Albertson
Attorney at Law

PLAINTIFF'S REPLY TO DEFENDANT'S
OBJECTIONS TO FINDINGS AND RESPONSE
TO DEFENDANT'S MOTION TO STRIKE -1

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2 provided that the appeal will be dismissed as premature
3 unless adequate findings have been entered and filed
4 with this court by August 7, 2009.¹

5 Plaintiff's presentation of Findings of Fact is solely a
6 result of the Court of Appeals Commissioner's Ruling and is not a
7 motion for reconsideration of the Court's Order Granting Partial
8 Summary Judgment. RAP 2.2(d) specifically permits such findings
9 to be entered after the entry of a judgment.

10 **II. PLAINTIFF'S FINDINGS ARE ACCURATE**

11 Although Plaintiff seeks appellate review of the trial court's
12 decision on an issue of first impression which significantly
13 affects the remedies available to Plaintiff (but not affecting the
14 evidence to be submitted at trial), Counsel for Defendant objects
15 to appellate review and objects to the following Findings submitted
16 by Plaintiff:

- 17 1. That David Velling participates in the day-to-day
18 management of the Defendant; and
- 19 2. That the Defendant has never been a partnership.

20 With respect to the first finding of fact, the Plaintiff
21 submitted a Declaration in opposition to the Defendant's motion for
22 partial summary judgment, specifically stating that Dr. Velling,
23 the sole member-owner of THE PAIN CENTER OF WESTERN WASHINGTON,
24 PLLC, "was the Medical Director and was at the office every day,
25 except for scheduled periods out of the office, seeing patients and
26 providing medical services to patients. Thus, counting Dr. David
27 Velling, there were *eight* people working in the office each day."

1 'Clerk's letter of July 7, 2009.

1
2 Dr. Velling himself, at his deposition, conceded that "I work at
3 the office of The Pain Center of Western Washington" and that it
4 would be "fair" to say that, on a daily basis, he performed
5 professional services at The Pain Center.²

6 With respect to the issue of partnership, Defendant's
7 objection is that the finding "oversimplifies" the Defendant's
8 argument. Plaintiff submitted proposed Findings of Fact, not
9 summaries of the parties' argument. Regardless of Defendant's
10 argument, the Defendant is not a partnership. Dr. Velling
11 repeatedly testified at his deposition that The Pain Center is not
12 a partnership and he has never claimed it to be a partnership. The
13 Findings of Fact submitted by Plaintiff are accurate.

14 III. THE FACTORS FOR FINALITY

15 1. Relationship Between Adjudicated And Unadjudicated Claims.

16 Contrary to the Defendant's assertion, there is no possibility
17 of inconsistent verdicts if the Court of Appeals determines whether
18 or not the Defendant employed eight (8) persons during the
19 Plaintiff's employment with Defendant as no re-trial would be
20 necessary. However, not reaching that issue prior to trial will:

- 21 (1) Preclude any settlement between the parties; and
22 (2) Require an appeal after trial in the event of a verdict
23 favorable to the Plaintiff.

24 2. Likelihood That The Need For Review May Be Mooted.

25 The crux of this particular issue can be found in Defendant's

26 ²Uncontested Declaration of Karen Shannon at page 3 and
27 Declaration of Dan M. Albertson Re: Additional Briefing at pages 2-
3.

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2 statement "Even as the prevailing party, Shannon can seek review
3 of the trial court's order."³ That is precisely the point. Absent
4 review by the Court of Appeals now, even if Ms. Shannon obtains a
5 favorable jury verdict she will be forced to appeal - thereby
6 delaying further the relief she seeks.

7 It is correct that if Ms. Shannon does not obtain a favorable
8 jury verdict, and there is no error at trial, the issue of the
9 number of Defendant's employees is moot.

10 **3. Whether Review Will Delay Trial Of The Unadjudicated
Matters Without Simplifying Or Facilitating That Trial.**

11 Counsel for Defendant is correct that, absent a request for
12 a stay, appellate review will not delay trial. Contrary to the
13 Defendant's argument, however, any appellate opinion regarding the
14 number of employees would not be "advisory" as it would resolve the
15 issue, regardless of the outcome at trial.⁴

16 **4. The Practical Effects Of Allowing An Immediate Appeal.**

17 Ignoring the personal arguments advanced by counsel for
18 Defendant, the remaining arguments are:

- 19 1. A ruling by the Court of Appeals would deprive the trial
20 court of the ability to change its ruling before trial;
21 2. The Pain Center would have to defend an appeal; and
22 3. There is a possibility of inconsistent results and need to
re-litigate factual issues.

23 ³Defendant's Objections at page 7. (emphasis added).

24 ⁴Despite opposing counsel's suggestion, the timing of the
25 presentation of the Findings of Fact had nothing to do with
opposing counsel's schedule and was well within the time set by the
Court of Appeals for submission of findings by August 7, 2009.

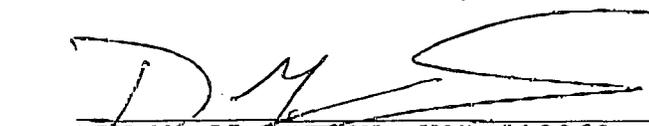
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3 None of the arguments made by Defendant have merit and the
4 Defendant cites no authority for any of them. First, no appeal
5 would ever be granted if depriving the trial court of the opportu-
6 nity to correct an erroneous ruling precluded review. Second, no
7 appeal would ever be granted if having to defend an appeal
8 precluded review. Third, there is no possibility of inconsistent
9 results or re-litigation of factual issues. The issue of the
10 number of employees was the sole basis for Defendant's motion for
11 partial summary judgment. The Defendant's motion could only have
12 been granted, as it was, if there were no genuine issues of
13 material fact as to that issue.

14 If, by "inconsistent results", counsel for Defendant means
15 that the Court of Appeals could reach a different result than the
16 trial court, that is true in every case of appellate review and is
17 not a basis to preclude review.

18 IV. CONCLUSION

19 The trial court ruled on an issue of first impression and it's
20 ruling materially affects the relief that can be afforded to the
21 Plaintiff at trial. For the reasons set forth in Plaintiff's
22 Proposed Findings of Fact, Plaintiff respectfully requests the
23 Court to enter the Findings in order to permit Plaintiff to seek
24 immediate review in the Court of Appeals.

25 DATED 30th day of July, 2009.

26 
27 DAN M. ALBERTSON, WSBA#10962
Attorney for Plaintiff

PLAINTIFF'S REPLY TO DEFENDANT'S
OBJECTIONS TO FINDINGS AND RESPONSE
TO DEFENDANT'S MOTION TO STRIKE -5

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