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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2016 MAR 29 PM 4:30

No. 73559-4-I

COURT OF APPEALS FOR DIVISION 1

STATE OF WASHINGTON

AVA LEVINE
Respondent-Plaintiff,

v.

CREATIVE CHANGE COUNSELING, INC.,
Appellant-Defendant.

RESPONDENT-PLAINTIFF'S RESPONSE BRIEF

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I. INTRODUCTON

This is an appeal of a decision by the Honorable Theresa Doyle of the King County Superior Court. A bench trial was conducted on May 4 through 7 and May 12 to 13, 2015. Judge Doyle issued the trial court's Memorandum Decision on June 1, 2015. In that Memorandum Decision, Judge Doyle found Appellant-Defendants discriminated against Respondent – Plaintiff Levine (“Levine”) in contravention of the Washington Law Against Discrimination. As a result of that discrimination and violations of the Washington Law Against Discrimination, Judge Doyle awarded Levine lost back pay and emotional distress damages. Judge Doyle signed the Findings of Fact and Conclusion of Law on August 17, 2015.

On June 6, 2012, Plaintiff filed suit against Defendants alleging whistleblower retaliation, discrimination based on sexual orientation, disability, and religious preference, and failure to accommodate her disabilities. Plaintiff sued Creative Change Counseling, Inc., (“CCCC”), officers Forest Woodley and Silvia Bell-Woodley and board members Dan Owens and Janet White. The trial court found CCCC and Sylvia Bell-Woodley and Forest Woodley discriminated against Plaintiff Levine due to her creed and sexual orientation in violation of the Washington Law

Against Discrimination (“WLAD”).

Plaintiff and others testified that the emotional and psychological effects of her treatment by Defendants caused her termination from her subsequent employment and inability to hold a job and work through the date of trial. Testimony was presented that Plaintiff was unable to focus on her work due to her ongoing anxiety, insomnia and stress. She began to experience psychotic symptoms and was committed to hospital at least twice because of suicidal ideation or attempts and became homeless. Plaintiff had not worked since September of 2012 and was then receiving social security disability benefits. The trial court found that Plaintiff’s termination from CCCC caused her deteriorating mental health which, in turn, resulted in her termination from subsequent employment and inability to work thereafter.

Defendants erroneously assert that the trial court erred in its findings in several respects: (1) that its factual determinations were erroneous; (2) the emotional distress damages were not established based on the testimony in the case, and; (3) Levine did not properly plead for special and general damages and so should not be awarded either.

II. COUNTERSTATEMENT OF ISSUES ON APPEAL

Should the court consider Appellant-Defendants’ argument regarding the trial court’s findings of fact when no record of proceedings

was provided?

Should the court consider Appellant-Defendant's argument that the evidence did not support the award of emotional distress damages when the report of proceedings was not produced by them.

Should the trial court's award of special, emotional distress, damages be affirmed where Plaintiff plead for "all statutory damages allowed by stature" and special damages in her complaints and plaintiff thoroughly briefed that she was seeking emotional distress damages before the trial?

Should the Respondent – Plaintiff be awarded attorney fees for responding to this appeal?

III. COUNTERSTATEMENT OF THE CASE

Following a bench trial, Judge Theresa Doyle issued a Memorandum Decision in King County Superior Court on June 1, 2015. CP 168. In that Memorandum Decision Judge Doyle found Appellant-Defendants discriminated against Levine in contravention of the WLAD. As a result of that discrimination, Judge Doyle awarded Levine lost back pay and emotional distress damages. *Id.* at 7-8. Plaintiff's subsequent Findings of Fact and Conclusions of Law, signed by Judge Doyle on August 17, 2015, mirror the memorandum decision. CP 198.

Levine is both a lesbian and Jewish. It was well known in the work

place that she was a lesbian. CP 168:4; CP 196:4. The Court found that there was “substantial evidence in this case of Mr. Woodley’s animus towards gays.” CP 168:4; CP 196:4.

Levine informed the Woodley’s at the start of her employment that she was converting from Christianity to Judaism. The trial court found that “[t]here is substantial evidence here of Mr. Woodley’s negative attitude toward non-Christians in the workplace.” CP 168:4.

The trial court applied the burden shifting analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). First, the court found that Levine established a prima facie case of discrimination based on Woodley’s hostility to gay people and non-Christians in the work place. *Id.* The court found “two adverse employment actions. On July 16, 2011, she was demoted from supervisor to staff worker, and was no longer allowed to serve minor clients. On August 8, 2011, her employment was terminated.” *Id.*; see also CP 196:4. The court found that Levine’s sexual orientation and religion were a “substantial factor” in her demotion from supervisor.

The burden then “shifts to defendants to provide a legitimate, non-discriminatory reason for the demotion.” *Id.* at 5. The court found that Appellant-Defendants provided a “legitimate reason for some disciplinary action.” *Id.* at 5 (emphasis added).

The burden then shifted back to Levine to show that the reason provided by the employer was, in fact, pretextual. Judge Doyle found that the reasons provided for the employment termination were pretextual: “The defendant’s testimony lacks credibility because: 1) the reason for the decision had shifted over time; 2) her job performance was satisfactory; 3) no other employees were laid off at the time; and 4) any shortage of work for Levine to perform was due to the Woodley’s own decision to continue barring her from serving minor clients and/or refusal to reinstate her as a supervisor. There was plenty of work. The NAVOS audit was ongoing and the agency was scrambling to get its files in proper order to meet the quality of care concerns that NAVOS had raised to the defendants in the July 20 meeting.” *Id*; *see also* CP 196:6.

Judge Doyle placed particular emphasis on the shifting reasons for Levine’s termination. “The Woodley’s maintained that Levine was laid off, not terminated, and that Levine consented to the lay off. But in his September 26, 2011 letter to the DOH, Mr. Woodley gave as reasons that Levine’s work was poor, that she lacked an understanding of privacy laws, lacked supervisory ability, and was absent for excessive periods perhaps due to her physical frailty and constant stomach illness. In a 2014 declaration, Mr. Woodley stated that she was terminated because she refused to do any work after her demotion from supervisor. Ms. Bell-

Woodley testified that she was laid off because the agency ‘didn’t have any clients for her’, and that the HPPA incident was a contributing factor to the layoff.” *Id.* at 5. In conclusion, Judge Doyle correctly followed the law.

IV. STANDARD OF REVIEW

On appeal, a trial court’s conclusions of law are reviewed de novo. *City of Seattle v. Megrey*, 968 P.2d 900, 93 Wn. App. 391, 393-04 (Div. 1 1998)(citing *State v. McCormack*, 117 Wn.2d 141, 143, 812 P.2d 483(1991)(cert. denied, 502, 502 U.S. 1111, 112 S.Ct. 1215, 117 L.Ed.2d 453 (1992)). In reviewing questions of fact, the appellate court’s role is limited to determining whether substantial evidence exists to support the trial court’s findings. *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). “Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978).

The appellant must provide a record on review sufficient to support the issues they raised on appeal. The appellant has the burden of providing an adequate record on appeal. *Story v. Shelter Bay Co.*, 52 Wn. App. 334, 335, 760 P.2d 368 (Div. 11988); *Sime Constr. Co. v. WPPSS*, 28 Wn. App. 10, 18, 621 P.2d 1299 (Div. 3 1980), review denied, 95

Wn.2d 1012 (1981). Generally, the “record on review” may consist of (1) a “report of proceedings”, (2) “clerk’s papers”, (3) exhibits, and (4) a certified record of administrative adjudicative proceedings. RAP 9.1(a). The report of an oral proceeding may take one of three forms, as outlined in RAP 9.2-9.4. Although RAP 9.1(a) does not require a report of proceedings, “RAP 9.2 requires the party seeking review to provide an appeal record containing all evidence necessary and relevant to the issues to be reviewed.” *Favors v. Matzke*, 53 Wn. App. 789, 794, 770 P.2d 686 (Div. 1 1986).

When an appellant fails to satisfy its burden to produce the report of proceedings necessary to review the issues on appeal, the decision of the trial court as it relates to the matters of fact must stand. RAP 9.2; *Story v. Shelter Bay Co.*, 52 Wn. App. at 335; *see also Chace v. Kelsall*, 72 Wn.2d 984, 435 P.2d 643 (1967); *Gaupholm v. Aurora Office Bldgs., Inc.*, 2 Wn. App. 256, 467 P.2d 628 (Div. 1 1970); *In re Estate of Rynning*, 1 Wn. App. 565, 462 P.2d 952 (Div. 2 1969). Without an adequate trial record to review, a court of appeals cannot review the challenged evidence in the context of the rest of the evidence presented. *Allemeier v. Univ. of Wash.*, 42 Wn. App. 465, 473, 712 P.2d 306 (Div. 1 1985). Those findings of fact are verities on appeal. *Matter of Estate of Watlack*, 88 Wn. App. at 609 (Without the report of proceedings, the Appellant cannot argue

matters of fact). The appellate court's review is thereafter limited to determining whether the conclusions of law are supported by findings of fact. *Id.*, citing with approval *Holland v. Boeing Co.*, 90 Wn.2d at 390.

V. ARGUMENT

1. The Evidence Does Support The Cause of Action of Discrimination.

Appellants-Defendants (collectively hereinafter "Woodley") argues that Levine "did not prove her case for discrimination." Woodley Brief at 7. Woodley asserts that the facts found by the trial court are insufficient to support the cause of action because, "without that evidence [a change in circumstances from Levine's demotion to her termination], the trial Court cannot point to that (*sic*) would change a legitimate demotion into a discriminatory act. Thus, the trial Court erred and therefore the verdict finding discrimination should be overturned." Woodley Brief at 9.

Woodley's argument rests on a misapprehension of the burden shifting scheme and the findings of fact. Woodley acknowledges that the scheme used to analyze a discrimination claim outlined by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). Woodley, however, appears to assert that when a defendant provides a nondiscriminatory reason under that scheme - as is required at the second phase - a trial court may not

subsequently find that reason pretextual: “The trial Court in this case held that the plaintiff’s initial demotion was not a pretext but a legitimate interpretation of the HIPAA and therefore the court found that the demotion was appropriate.” Woodley Brief at 7-8.

Woodley also appears to argue that the trial court erred in its factual findings regarding whether Levine satisfied the criteria in the July 26, 2011 letter of demotion: “However, there was no proof offered that Ms. Ava Levine ever fulfilled the other conditions of her demotion as set forth in the disciplinary letter dated July 16, 2011.” Woodley Brief at 5. In particular, Woodley asserts that Levine did not address all of the issues involved in her demotion:

The letter does not state that she reviewed and understood the King County Managed Care Policy and Procedure as she was directed. Nor does the July 26, 2011 letter demonstrate that she understood the law as set forth under HIPAA. There is nothing noted in the record that occurred from July 26, 2011 to the date of her termination that turned what the court viewed as a legitimate employment decision to one that was later determined to be pretextual. Without that evidence, the trial Court cannot point to that would change a legitimate demotion into an discriminatory act. Thus, the trial court erred and therefor the verdict finding discrimination should be overturned.

Woodley Brief at 8-9.

Woodley’s argument fails for three reasons: first, Woodley impermissibly argue facts not supported by the record they provided; secondly, Woodley offers a gross misinterpretation of Judge Dolye’s

factual findings, and; third, Woodley misinterprets the burden shifting scheme adopted by courts in Washington.

a. The Appellant Cannot Challenge The Trial Court's Findings of Fact.

Woodley impermissibly challenges the findings of fact. Woodley argues that

[t]he Court erred in finding that the defendants continued the demotion after the July 26, 2011 letter but she was terminated because she did not see a role for her in the organization. First, she only states that she read and understood the release of information laws under HIPAA. The letter does not state that she reviewed and understood the King County Managed Care Policy as she was directed. Nor does the July 26, 2011 letter demonstrate that she understood the law as set forth under HIPAA. There is nothing noted in the record that occurred from the July 26, 2011 to the date of her termination that turned what the Court viewed as a legitimate decision to one that was later determined to be pretextual.

Woodley Brief at 8-9. Those are the trial court's findings of fact.

Woodley is prohibited from re-arguing the facts of the case because they did not meet their burden of providing an adequate record on appeal.

Woodley asserts that the trial court's findings of fact are erroneous.

Woodley failed to provide a report of oral proceedings as required by RAP

9.1. Woodley thus failed to provide the evidentiary basis for the court of appeals to assess Woodley's arguments raised on appeal. Woodley relies

entirely upon the trial court's memorandum decision, and not upon any

report of the actual proceedings. As this court does not have the record of

proceedings before it, it cannot consider Woodley's argument. *Matter of Estate of Watlack*, 88 Wn.App. at 609; *see also Story v. Shelter Bay Co.*, 52 Wn. App. at 335; *Sime Constr. Co. v. WPPSS*, 28 Wn. App. at 18.

b. Appellant Woodley Misinterprets The Factual Findings.

Woodley seems to assert that the trial court erred in applying the facts to the law. Woodley argues that Levine failed to rebut its "legitimate, non-discriminatory explanation" for its action and thus did not meet its burden under the burden shifting scheme in *McDonnell Douglas*. Woodley Brief at 7, *citing Hill v. BCTI Income Fund – I*, 144 Wn.2d 172, 181, 23 P.3d 440 (2001). Woodley argues that the trial court found that its decision to demote Levine was "legitimate," and that nothing occurred after the date of demotion to turn a "legitimate demotion into a discriminatory act." Woodley Brief at 9.

Woodley's assertions are without merit. Woodley's challenge is misplaced as it ignores the fact that the trial court found **two** adverse employment actions: a demotion and a termination. The trial court found that Woodley's proffered explanations were pretextual for both. With regards to the demotion, the court held that "some disciplinary action" might have been warranted. However, once Levine addressed the issues that caused her to be demoted, the trial court found that she should have been reinstated in her supervisory role. CP 168:5. The trial court held that

the failure to reinstate Levine to supervisor demonstrated the pretextual nature of Woodley's explanation. *Id.* Woodley has offered no reason – other than an impermissible re-arguing of the facts (with no transcript of the proceeding) - to overturn that finding.

Second, the trial court found that the Woodley's acted in a discriminatory fashion when Woodley terminated Levine. CP 168:4-5; CP 196:6. Woodley does not challenge that finding on appeal. The wrongful termination in itself is sufficient to sustain the decision, as the trial court found a prima facie case, a rebuttal, and then that the rebuttal was pretextual. As a result, Judge Dolye's decision was proper and should be upheld.

c. The Court Correctly Applied The Facts To The Law.

When analyzing discrimination claims under the WLAD, Washington courts apply the burden-shifting scheme as set out by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). As adopted by Washington courts, that scheme requires that, under the first prong, a plaintiff bears the initial burden of establishing a prima facie case of discrimination, which creates a presumption of discrimination. *Hill v. BCTI Income Fund – I*, 144 Wn.2d 172, 185-87, 23 P.3d 440 (1991); *Scrivener v. Clark College*, 181 Wn.2d 439, 446, 334 P.3d 541 (2014)

(citing with approval *Kastanis v. Educ. Emps. Credit Union*, 122 Wn.2d 483, 490, 859 P.2d 26 (1993)). Significantly, this is merely a burden of production and not a burden of persuasion. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 363-64, 753 P.2d 517 (1988)).

Once the plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Scrivener v. Clark College*, 181 Wn.2d at 446 (citing with approval *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d at 363-64). If the employer produces some evidence of a nondiscriminatory reason for the discharge, the temporary presumption of discrimination is rebutted. The third prong requires the Plaintiff to produce sufficient evidence that the defendant's alleged nondiscriminatory reason for the employment action was a pretext. *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 667, 880 P.2d 988 (1994).

The trial court followed the burden shifting test and appropriately applied the facts to the law. First, the court found that Levine had established a prima facie case of discrimination based on her sexual orientation and creed. CP 168:4-5. The court found that Levine was subject to "two adverse employment actions. On July 16, 2011, she was demoted from supervisor to staff worker, and was no longer allowed to serve minor clients. On August 8, 2011, her employment was

terminated.” *Id.* The court found that Levine’s sexual orientation and religion were a “substantial factor” in her demotion from supervisor. *Id.*

The burden then shifted to defendants to provide a legitimate, non-discriminatory reason for the adverse action(s). The court found that Appellant-Defendants provided a “legitimate reason for some disciplinary action.” *Id.* at 5 (emphasis added).

At trial, the burden then shifted back to Levine to show that the reason was in fact pretextual, and Levine met that challenge. The trial court found that the reasons the Woodley provided for the adverse employment action was pretextual: “The defendant’s testimony lacks credibility because: 1) the reason for the decision had shifted over time; 2) her job performance was satisfactory; 3) no other employees were laid off at the time; and 4) any shortage of work for Ms. Levine to perform was due to the Woodley’s own decision to continue barring her from serving minor clients and/or refusal to reinstate her as a supervisor. There was plenty of work. The NAVOS audit was ongoing and the agency was scrambling to get its files in proper order to meet the quality of care concerns that NAVOS had raised to the defendants in the July 20 meeting.” *Id.*

The trial court appropriately followed the burden shifting scheme. Levine put forward a prima facie case, Woodley seemingly rebutted it, and

then Levine showed that the proffered reasons were pretextual.

Accordingly, this court should affirm and uphold Judge Doyle's decision.

2. The Evidence Does Support the Emotional Damages Award Given By The Trial Court.

Woodley wrongly argues that Levine failed to provide sufficient evidence to support an award of emotional damages. Woodley asserts, without having produced a record of the proceedings necessary to review the issue, that Levine failed to offer proof of "actual anguish or emotional distress" in order to receive damages under RCW 49.60. Woodley then asserts that Levine and her spouse, Shauna Levine, "scant offered testimony regarding the symptoms the Plaintiff was suffering from..." Woodley Brief at 9. Woodley further argues that Levine's subsequent termination from Valley Cities would have caused her emotional distress. *Id.* at 10. Woodley also notes that, "[a]lso, a year later she was required to be involuntarily committed to Harborview for her mental distress and anguish. This was not true after her employment ended with CCCC and it cannot be said that her employment at CCCC caused her mental anguish and thus the verdict should be overturned." *Id.* At no time does Woodley cite to the record regarding the testimony. In fact, there is no record to cite to as Woodley failed to submit a record of the proceedings in any form. Due to Woodley's failure to submit the record necessary to review the

issues Woodley raises on appeal, its argument fails by rule.¹

Woodley has provided an insufficient record to contest the emotional distress damages on appeal. Although RAP 9.1(a) does not require a report of proceedings, “RAP 9.2 requires the party seeking review to provide an appeal record containing all evidence necessary and relevant to the issues to be reviewed.” *Favors v. Matzke*, 53 Wn. App. at 794. The appellant has the burden of providing an adequate record on appeal. *Story v. Shelter Bay Co.*, 52 Wn. App. at 335; *Sime Constr. Co. v. WPPSS*, 28 Wn. App. at 18; *see also* RAP 10.3(a)(6) (The appellant is required to submit an argument in support of the issues presented for review, “together with citations to legal authority and references to the relevant parts of the record.”). When an appellant fails to satisfy its burden to produce the report of proceedings necessary for the review on appeal, the decision of the trial court as it relates to the matters of fact must stand. *Sime Constr. Co. v. WPPSS*, 28 Wn. App. at 18; *see also Chace v. Kelsall*, 72 Wn.2d 984; *Gaupholm v. Aurora Office Bldgs., Inc.*, 2 Wn. App. 256; *In re Estate of Rynning*, 1 Wn. App. 565. Without the trial record, a court of appeals cannot review the challenged evidence in the context of the rest

¹ Indeed, Levine asserts that Woodley’s failure to present a trial transcript is strategic because Woodley and Appellant’s counsel know that the testimony at trial fully supports the emotional distress findings and damages.

of the evidence presented. *Allemeier v. Univ. of Wash*, 42 Wn. App. 465, 473, 712 P.2d 306 (Div. 1 1985). Those unchallenged findings of fact are verities on appeal. *Matter of Estate of Watlack*, 88 Wn. App. at 609 (Without the report of proceedings, the Appellant cannot argue matters of fact). The appellate court's review is thereafter limited to determining whether the conclusions of law are supported by findings of fact. *Id*, citing with approval *Holland v. Boeing Co.*, 90 Wn.2d at 390.

Woodley failed to provide a report of oral proceedings as required by RAP 9.1. It was Woodley's responsibility to provide a sufficient record containing all relevant evidence necessary to review the issues raised on appeal. RAP 9.2. Woodley's failure to do so precludes any discussion of the trial court's findings of fact. Woodley failed to cite to the record once in his argument concerning emotional distress damages, as he is required to. Nor could he, as he failed to produce that record. This court has nothing to consider, as Woodley's entire argument regarding emotional distress damages is based on the inadequacy of testimony contained in the very record that he failed to produce. This court should affirm the trial court and uphold its decisions as Woodley has failed to provide a sufficient record, pursuant to RAP 9.10.

3. The Trial Court Did Not Err by Admitting Evidence of Plaintiff's Special Damages

Woodley erroneously complains for the first time on appeal that the trial court should have excluded evidence of special damages because Levine failed to plead or special damages.

In *Ellingson v. Spokane Mortg. Co.*, 19 Wn. App. 48, 56-57, 573 P.2d 389 (1978), the Court held that RCW 49.60.030(2)'s reference to "actual damages" allows for the recovery of damages for mental anguish or emotional distress. The *Ellingson* Court explained:

In reference to the type of harm suffered, the term "actual damages" has a generally accepted legal meaning. Although it declined to define "actual injury," the United States Supreme Court recently noted the variety of harm which may result when damage is actually sustained.

Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, *the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.* Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

(Italics ours.) *Gertz v. Robert Welch, Inc.* [418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974)], *supra* at 350. Accord, *Weaver v. Bank of America Nat'l Trust & Sav. Ass'n* [59 Cal. 2d 428, 380 P.2d 644, 30 Cal. Rptr. 4 (1963)], *supra*; *Anderson v. Pantages Theatre Co.*, 114 Wash. 24, 31, 194 P. 813 (1921). It is important to note that although *Gertz* was a defamation action, it is clear that the court's language is not limited to such cases.

(Italics ours.) Therefore, we hold that the recovery of "actual damages" under the law against discrimination, RCW 49.60, is not limited to merely pecuniary or out-of-pocket losses or, as the case

here, to the wage compensation differential. Rather, the remedy and the recovery authorized by the statute encompasses all claims for compensatory damages for injury in fact, as distinguished from exemplary, nominal or punitive damages. This conclusion is consistent with the mandate of liberal construction of this remedial legislation to effectuate its purposes. RCW 49.60.010-.020.

Ellingson v. Spokane Mortg 19 Wn. App. at 57-58.

Levine put Woodley on notice that she was seeking damages for all of her “actual damages,” which included a claim for special, emotional distress, damages. In her original Complaint, Levine expressly cited RCW 49.60.030(2), which allows a party to recover the “actual damages sustained by the person.” CP 1: ¶ 44. Levine included that same citation and quote in her First Amended Complaint. CP 8: ¶ 48. And, in her original Complaint and her First Amended Complaint, Levine indicated that she was seeking “all available statutory remedies” for the alleged violations of the WLAD in the Prayer for Relief. CP 1 and CP 8. Woodley was thus on notice as Levine cited RCW 49.60.030(2) and stated in her prayer for relieve that she was seeking “**all available statutory remedies**” for the alleged violations of the WLAD. (emphasis added).

The issue of emotional distress injury was also briefed at length in Levine’s December 9, 2014 Trial Brief. CP 110; 15; 27-32. Levine also raised this in her April 27, 2014 Trial Brief. CP 152; 15-16; 32-38. Further, the fact that Levine was seeking damages at trial for emotional

distress was also thoroughly briefed in Plaintiff's December 11, 2014, Opposition to Defendants' Motion in Limine. CP 115;3-6; 9-10.

Levine briefed and fully addressed these issues in Plaintiff's Opposition to Woodley's Motion in Limine. CP 115; 9-10. *See also* CP 116. The trial court denied the defense motion and allowed evidence of special damages at trial. This court should affirm this issue on appeal.

Appellants also cannot claim error on a failure to plead special damages. While Levine abandoned the False Claim Act cause of action prior to trial, she quoted 31 U.S.C. § 3730(h) in paragraph 66 of her Original Complaint which expressly refers to "special damages" (CP 1; Complaint, ¶ 66). Then, in her Second Amended Complaint, Levine plead: "Then, on August 15, 2011, CCCC fired Levine and this caused her to suffer emotional distress." (CP 145: ¶ 46). Therefore, it cannot be stated that Levine failed to alert Woodley that she was seeking special damages in this litigation.

Levine clearly plead and put Woodely on notice of her claim for special, emotional distress, injury claim, and Woodley's argument and appeal on this issue should be rejected.

4. This Court Should Affirm the Trial Court on the Proximate Cause Issue

The trial court found that Levine's "termination from CCCC

caused [her] deteriorating mental health which, in turn, resulted in her poor performance and at and termination from Valley Cities.” CP 168:8. On this evidence, and following the trial court’s review of Plaintiff’s Brief Re: Superseding Intervening Cause Doctrine Under the WLAD CP 164, the trial court awarded Levine lost back pay “until her employment at Valley Cities” and “from the September 2012 termination from Value Cities to the date of trial.” CP 168.9. Plaintiff’s Brief Re: Superseding Intervening Cause Doctrine Under the WLAD discussed at length the superseding intervening cause doctrine, and the issue of foreseeability. CP 164.

Woodley did not object or file a response to Plaintiff’s Brief Re: Superseding Intervening Cause Doctrine Under the WLAD. CP 164. Therefore, Woodley waived the right to appeal on this issue. In order to properly preserve an issue for appeal, the evidence must be objected to at trial. RAP 2.5(a); *see City of Seattle v. McCoy*, 101 Wn. App. 815, 844, 4 P.3d 159 (2000) (citing *State v. Brush*, 32 Wn. App. 445, 456, 648 P.2d 897 (1982), review denied, 98 Wn.2d 1017 (1983)). Therefore, this court can deny the appeal on this issue because it was not preserved for appeal. In addition, this court can deny Woodley’s appeal on this issue because Woodley has not presented this court with an adequate record necessary to

review this issue on appeal.²

5.Plaintiff Should Be Awarded Fees For Responding To This Appeal.

When, as here, the underlying statute authorized an award of attorneys fees to the employee/respondent, a party may seek attorney fees as a prevailing party in an appeal pursuant to RAP 18.1. Levine is entitled to attorney fees on review pursuant to RCW 49.60.030(2) and RAP 18.1. While RCW 49.60 does not expressly authorize attorney fees on review, it has been interpreted as allowing such an award. RCW 49.60.030(2). *Goodman v. Boeing Co.*, 75 Wn. App. 60, 877 P.2d 703 (1994), *aff'd*, 127 Wn.2d 401, 899 P.2d 1265 (1995); (employee, as the prevailing party on review of her discrimination claim, was entitled to attorneys' fees pursuant to this rule and RCW 49.60.030(2)); *Xieng v. Peoples Nat. Bank of Washington*, 120 Wn.2d 512, 844 P.2d 389, 400 (En Banc 1993)(*citing with approval Allison v. Housing Auth.*, 118 Wn.2d 79, 98, 821 P.2d 34 (1991)). Prevailing parties in actions under the Washington Law Against Discrimination are entitled to an award of attorney fees and costs. *Blair v. Washington State University*, 108 Wn.2d 558, 572-73, 740 P.2d 1379 (1987). Levine was awarded attorney fees under 49.60 by the trial court. Levine seeks an award of her attorney fees and costs in answering this

² See cases cited and argument at *infra*, Section IV.

appeal, should she prevail.

Levine also seeks sanctions under Court Rule 11. That rule requires an attorney to sign and date all pleadings, motions and legal memoranda. Such signature constitutes the attorney's certification that:

To the best of the...attorney's knowledge, information and belief, formed after reasonable inquiry it [the pleading, motion, or memoranda] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

CR 11. When it appears that CR 11 has been violated, the court, "upon motion or upon its own initiative, shall impose upon the person ... an appropriate sanction," which may include reasonable attorney fees and expenses. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (en banc 1994).

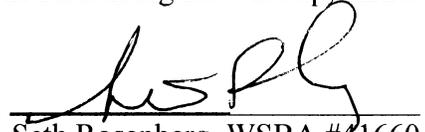
Woodley's attorney should be held liable for any attorney fees imposed by the court. First, the attorney filed a brief that argued the law without providing a report of proceedings. Even a cursory review of the court rules should have led that attorney to realize that was impermissible. Further, Woodley is insolvent. Woodley's attorney has taken on this appeal without compensation. Decl. Rosenberg. Awarding attorney fees against Woodley will have no meaning and will not impose them on the party that caused Levine to incur more costs.

VI. CONCLUSION

For the foregoing reasons the appeal should be denied.

RESPECTFULLY SUBMITTED this March 29, 2016.

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DECLARATION OF SERVICE

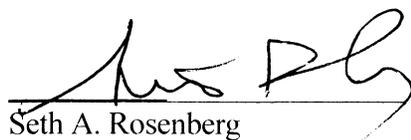
I hereby declare, under penalty of perjury under the laws of the State of Washington, that on March 29, 2016, I mailed a copy of the foregoing motion via regular U.S. Mail to the following parties:

Harrold Franklin 459 Seneca Ave NW Renton, WA 98057

Richard D. Johnson, Clerk Washington State Court of Appeals, Division I 600 University Street Seattle, WA 98101-4170

The motion and exhibits was also hand delivered to the court on March 29, 2016 and e-mailed to Harrold Franklin on that date.

DATED: March 29, 2016


Seth A. Rosenberg