

Court of Appeals No. 40077-4-II

**IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

JAMES B. ZIMMERMAN,

Respondent,

v.

W8LESS PRODUCTS, LLC, a Washington limited liability company;
JOHN ARBEENY, and his marital community;
and CHARLES RAU, and his marital community,

Appellants.

BRIEF OF RESPONDENT

FILED
COURT OF APPEALS
10 APR 22 PM 2:49
STATE OF WASHINGTON
BY *WJ*

Jean Jorgensen, WSBA #34964
Attorneys for Respondent
Singleton & Jorgensen, Inc., PS
337 Park Avenue North
Renton, WA 98057
Telephone: (425) 235-4800

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION..... 6

II. RESPONDENT’S RESTATEMENT OF ISSUES PRESENTED 6

III. RESPONDENT’S RESTATEMENT OF THE CASE 7

IV. ARGUMENT..... 12

A. Standard of Review for Summary Judgment is De Novo 12

B. Given the strong legislative policy to protect workers’ rights, the express language of RCW 49.52.070, and the explicit prior holding of this Court, the trial court did not err in holding Appellants John Arbeeny and Charles Rau personally liable..... 13

C. Given the express language of RCW 49.52.050, the strong legislative policy to protect workers’ rights, and the explicit holding of this Court, the trial court did not err in holding Appellants John Arbeeny and Charles Rau willfully deprived Respondent of his wages..... 17

D. Given the express language of RCW 49.52.070, strong legislative policy to protect workers’ rights, and the holdings of Washington Courts, the trial court did not err in permitting a civil suit to be brought for willful withholding of wages..... 20

E. Given the strong legislative policy to protect workers’ rights, and the holdings of Washington Courts, the trial court did not err in holding that failure to make *any* payment of wages constituted payment of a “lower wage” than Respondent was entitled to receive.21

F. Given the express statutory language, strong legislative policy to protect workers’ rights, and the holdings of Washington Courts, the trial court did not err in striking the Appellants’ affirmative defense for CR 11 sanctions..... 27

1. Standard of Review for Denial of CR 11 Sanctions is Abuse of Discretion27

2. Appellant Cites Nothing in the Record to Support its Contention that the trial court Abused its Discretion in denying CR 11 sanctions28

G. Appellants Fail to Submit Argument Regarding the Trial Court’s Denial of Appellants’ Motion for Reconsideration 29

1. Standard of Review for Denial of Motion for Reconsideration is Abuse of Discretion29

2. Appellants Fail to Submit Arguments to Support its Assignment of Error that the Trial Court Erred in Denying Appellants’ Motion for Reconsideration29

V. RESPONDENT REQUESTS ATTORNEYS FEES ON APPEAL30

VI. CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Allstot v. Edwards, 114 Wn. App. 625, 60 P.3d 601 (2002).....	22, 23
Atherton Condominium Apartment Owners Ass'n Bd. Of Dirs. v. Blume Dev.Co., 115 Wn.2d 506, 799 P.2d 250 (1990).....	13
Brin v. Stutzman, 89 Wn. App. 809, 827, 951 P.2d 291 (1998).....	28
Champagne v. Thurston County, 163 Wn.2d 69, 178 P.3d 936 (2008)....	18
Chelius v. Questar Microsystems, Inc., 107 Wn. App. 678, 27 P.3d 681 (2001).....	18
Collins v. Clark County Fire Dist. No. 5, ___ P.3d ___, 2010 WL 820029 (March 15, 2010)	30
DePhillips v. Zolt Constr. Co., 136 Wn.2d 26, 959 P.2d 1104 (1998)....	13
Dickens v. Alliance Analytical Laboratories, LLC, 127 Wn. App. 433, 111 P.3d 889 (2005).....	15
Drinkwitz v. Alliant Techsystems, Inc., 140 Wash.2d 291, 996 P.2d 582 (2000).....	18
Durand v. HIMC Corp., 151 Wn. App. 818, 214 P.3d 189 (2009).....	16
Ellerman v. Centerpoint Prepress, Inc., 143 Wash.2d 514, 22 P.3d 795 (2001).....	18
Emright v. King County, 96 Wn.2d 538, 637 P.2d 656 (1981).....	21
Hemmings v. Tidy Man's, Inc., 285 F.3d 1174 (9th Cir. 2002).....	24
Holiday v. Merceri, 49 Wash.App. 321, 742 P.2d 127 (1987)	29
Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett, 146 Wash.2d 29, 42 P.3d 1265 (2002).....	18
Jones v. Allstate Ins. Co., 146 Wn.2d 291, 45 P.3d 1068 (2002).	12

Keenan v. Allan, 889 F.Supp. 1320 (E.D.Wash. 1995) <i>aff'd</i> 91 F.3d 1275 (9th Cir. 1996).....	21
Pope v. University of Washington, 121 Wash.2d 479, 852 P.2d 1055 (1993).....	21
Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 157, 961 P.2d 371 (1998).....	14, 15, 18
State ex rel. Beffa v. Superior Court for Whatcom County, 3 Wn.2d 184, 100 P.2d 6 (1940).....	28
United Food & Commercial Workers Union Local 1001 v. Mutual Benefit Life Ins. Co., 84 Wash.App. 47, 925 P.2d 212 (1996)	14

Statutes

RCW 49.46	14
RCW 49.48	14
RCW 49.48.010	13
RCW 49.48.115	15
RCW 49.52.050	14, 15, 17, 20, 21, 22, 24, 26
RCW 49.52.070	13, 14, 15, 16, 20, 21, 22, 23, 24, 27

Court Rules

CR 11	7, 28, 29, 31
CR 56(c).....	12
CR 59	29
MAR 6.3	6, 31

I. INTRODUCTION

Appellants seek to undermine a Judgment obtained against the individual parties by appealing an order granting Respondent's motion for partial summary judgment, and a Judgment obtained after arbitration. Appellants failed to timely request a trial de novo and are now barred from attacking or setting aside the Judgment on appeal, pursuant to MAR 6.3. See accompanying Motion to Modify Commissioner's Ruling.

The corporate employer, W8Less Products, LLC is virtually insolvent and the corporate officers attempt to avoid personal liability would leave Zimmerman without any viable recourse for recovering wages due, in direct conflict with the language, spirit and purpose of the strong mandate of the legislature to protect Washington employees by permitting an employee to hold corporate officers personally responsible for their decision not to remit wages due.

II. RESPONDENT'S RESTATEMENT OF ISSUES PRESENTED

1. Did the trial court err in holding that Appellants John Arbeeny and Charles Rau, members of W8Less Products, LLC, are personally liable for refusal to pay wages based upon their a) high level positions within the company in which they exercised control over payment of funds, and b) votes to prohibit payment of wages to

Zimmerman, given the express statutory language to hold such officers personally liable, the strong legislative policy to protect workers' rights, and prior rulings by this Court to hold such officers personally liable?

[The trial court committed NO error.]

2. Did the trial court err in denying Appellant's Motion for Reconsideration, where, as here, Appellant failed to submit any argument that the trial court abused its discretion? [The trial court committed NO error.]

3. Did the trial court err in dismissing Appellants' CR 11 defense, where, as here, a) Appellant failed to submit any argument that the trial court abused its discretion, b) Washington statutes expressly provide for personal liability of an employer's officers / agents for wrongful withholding of wages, and c) Washington Courts liberally construe the wrongful withholding statute and hold an employer's officer / agents personally liable? [The trial court committed NO error.]

III. RESPONDENT'S RESTATEMENT OF THE CASE

W8Less Products, LLC develops and manufactures low cost, low weight ceramic brake rotors for motorcycles, commercial trucks, and automobiles (hereinafter "W8Less"). CP 11. In or about December 2007, W8Less completed its development phase and commenced marketing and

selling of its product. CP 11. W8Less planned to attend the V-Twin Expo trade show in January 2008, which focuses exclusively on the V-twin motorcycle market. CP 37, 39.

Mr. Dallas Jolley served as the CEO/Managing Member of W8Less in December 2007 and January 2008. CP 42, 49. Appellant John Arbeeney served as a member during December 2007 and January 2008. CP 11. Appellant Charles Rau III served as W8Less' Chief Technology Officer. CP 11.

In December 2007, Mr. Jolley determined that W8Less required marketing expertise to assist in an effective and professional presentation at the upcoming trade show to be held at the end of January 2008. CP 39. Mr. Jolley selected Respondent Zimmerman to perform those functions. CP 68. Appellant Arbeeney expressed uncertainty as to Respondent Zimmerman's abilities over the long-term, but suggested that W8Less hire Respondent Zimmerman as a consultant for the two trade shows. CP 37.

On or about January 15, 2008, Mr. Jolley retained Respondent Zimmerman, to perform marketing services for W8Less. CP 68. Respondent Zimmerman commenced work on January 15, 2008 and worked through February 5, 2008. CP 68-69. During that time, Respondent Zimmerman prepared for and traveled to Cincinnati, Ohio to attend the V-Twin Expo trade show on February 2 – 4, 2008, attended

W8Less board meetings, and developed executive strategies and plans to guide the company over the upcoming months. CP 30-31; 41, 45-46, 52-55, 47.

On January 26, 2008, Mr. Jolley forwarded a “Business Plan Addendum” to Appellant Arbeeny, which included a section on Financials, and delineated the monthly salary for the VP of Marketing/Business Development as \$12,500. CP 44. When Mr. Jolley received concerns regarding Respondent Zimmerman’s salary of \$150,000 per year, on January 27, 2008, Mr. Jolley presented Appellant Arbeeny and William Whelan, an investor, with his analysis that Respondent Zimmerman’s salary was reasonable as it was in the bottom quartile for the industry. CP 42-43.

The next day, on January 28, 2008, W8Less held a Board of Directors Meeting. CP 45. Appellant Arbeeny was appointed as Chairman of the Board and was granted the power to hire and terminate executive staff. CP 45. Thereafter, Mr. Jolley formally introduced Respondent Zimmerman to the Board. CP 45. Pursuant to motion and unanimous approval by the Board, Respondent Zimmerman was then accepted as the Vice President of Marketing / Business Development. CP 45.

Respondent Zimmerman had been informed that he would receive his first paycheck on Friday, February 1, 2008, for work performed during the last two weeks in January 2008. CP 13. Accordingly, Respondent Zimmerman provided his bank account information to Mr. Jolley so that his pay could be deposited directly into his account, since he was in the process of traveling to the trade show in Cincinnati. CP 51.

On or about February 1, 2008, Mr. Jolley presented Respondent Zimmerman with a formal offer letter outlining the compensation, initial stock grant, and terms and conditions of his employment. CP 47-50. The terms were consistent with those that Respondent Zimmerman and Mr. Jolley had previously discussed and agreed upon. CP 31-32.

While Respondent Zimmerman and Mr. Jolley were attending the trade show, Mr. Whelan, the investor, communicated his concerns that payment of a salary in January 2008 would “violate the spirit of the bridge loan, which is to fund hard core Company operations starting on Feb. 1, i.e., loan funding could be consumed by history rather than contributing to progress.” CP 58-59.

W8Less held its next Board Meeting on February 5, 2008. CP 63. The term sheet clause, which limited the use of the funds provided in the bridge loan, was discussed. CP 63. Mr. Richard Stevens, a board member, motioned to have Respondent Zimmerman retroactively paid for

the work he performed in January 2008. Mr. Jolley seconded the motion. CP 63. Appellant Arbeeny and Appellant Rau voted against payment to Respondent Zimmerman at that time. CP 63. The motion was “defeated 2-2.” The board then discussed the mechanism for compensating Respondent Zimmerman and agreed upon a “deferred compensation” schedule in which investor monies, anticipated to be received in April 2008, would be utilized to pay Respondent Zimmerman. CP 63.

On February 6, 2008, Appellant Arbeeny and Appellant Rau took action to terminate Mr. Jolley’s position as “CEO” and for Appellant Arbeeny to take over in that capacity. CP 65. Appellant Arbeeny also stated, “Mr. Zimmerman will not be hired in any capacity by W8less LLC and we will consult independent legal council [sic] about our obligation to pay him for any work ostensibly done on behalf of W8less LLC.” CP 66.

Only after employing Zimmerman, W8Less decided it would be more beneficial to change the character of his employment to that of an independent contractor in order to avoid payroll tax penalties:

Unfortunately Mr. Jolly failed to pay over \$61,000 in withholding and SSN taxes and it was decided during a membership board meeting post February 2008 that all “employees” would in fact be hired as independent contractors, each with their own contracts and non-disclosure agreements. (CP 79).

On February 15, 2008, Mr. Jolley wrote to Appellant Arbeeney to outline Respondent Zimmerman's claim for compensation and the legal ramifications that could result should W8Less continue to refuse to remit payment to Respondent Zimmerman. CP 67-69. Respondent Zimmerman also submitted a demand for payment of wages. CP 33. Yet, to date, Respondent Zimmerman has received nothing as compensation for his work performed at the behest and for the benefit of W8Less Products, LLC. CP 33.

IV. ARGUMENT

A. Standard of Review for Summary Judgment is De Novo

This Court is well aware of the standard of review of an order of summary judgment. "The standard of review of an order of summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is appropriate only if the pleadings and the evidence show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The court may not weigh the evidence, find facts, or decide credibility; it must view all facts and inferences in the light most favorable to the non-moving party. *Atherton Condominium Apartment Owners Ass'n Bd. Of Dirs. v.*

Blume Dev. Co., 115 Wn.2d 506, 515-516, 799 P.2d 250 (1990). Any doubts are resolved against the moving party. If reasonable minds could differ, summary judgment is not proper. *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 30, 959 P.2d 1104 (1998).

Taking inferences from the undisputed facts in the light most favorable to the non-moving party, Appellants, the only conclusion that could be reached is that as a matter of law, an employer's officer who has control over the employer's funds, and who exercises that control by voting not to remit payment to an employee, is personally liable under Washington law.

B. Given the strong legislative policy to protect workers' rights, the express language of RCW 49.52.070, and the explicit prior holding of this Court, the trial court did not err in holding Appellants John Arbeeny and Charles Rau personally liable.

RCW 49.48.010 provides, "When any employee shall cease to work for an employer, whether by discharge or by voluntary withdrawal, the wages due him on account of his employment shall be paid to him at the end of the established pay period..."

The Legislature has evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive scheme to ensure payment of wages, including the statutes at issue here which provide both criminal and civil penalties for the willful failure of an employer to pay wages. *See United Food & Commercial*

Workers Union Local 1001 v. Mutual Benefit Life Ins. Co., 84 Wash.App. 47, 51-52, 925 P.2d 212 (1996) (citing from RCW Chapters 49.46, 49.48, and noting RCW 49.52.050 in discussing the statutory scheme of state laws granting employees nonnegotiable, substantive rights regarding minimum standards for working conditions, wages, and the payment of wages).

Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 157, 961 P.2d 371

(1998). These statutes must be liberally construed to advance the Legislature's intent to protect employee wages and assure payment. *Id.* at 159.

RCW 49.52.070, "Civil liability for double damages," provides in pertinent part:

Any employer **and any officer**, vice principal or agent of any employer who shall violate any of the provisions of subdivisions (1) and (2) of RCW 49.52.050 **shall be liable in a civil action by the aggrieved employee** or his assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees...

(emphasis added).

Washington law does not shield management from liability for willful failure to pay wages under the theory that management is an agent who acts on behalf of a corporate entity; no "corporate veil" exists.

The law curbs employers and certain employees with positions of financial authority, namely officers, vice

principals or other employer agents, from willfully and intentionally depriving employees of wages. RCW 49.52.050(2). Courts liberally construe the anti-kickback statute. *Schilling*, 136 Wash.2d at 159, 961 P.2d 371.

An employer can be found liable under the statute. RCW 49.52.050. Employers include "every person, firm, partnership, corporation, the state of Washington, and all municipal corporations." RCW 49.48.115. Our courts broadly apply liability to persons who could be considered an employer under the statute. *See Schilling*, 136 Wash.2d 152, 961 P.2d 371; *see also Ellerman*, 143 Wash.2d 514, 22 P.3d 795.

Dickens v. Alliance Analytical Laboratories, LLC, 127 Wn. App. 433, 439-40, 111 P.3d 889 (2005).

Appellants John Arbeeny and Charles Rau, as officers, vice principals, and/or agents of the Respondent's employer, W8Less Products, LLC, are not exempt from this statutory provision. RCW 49.52.070 does not require the employee to pierce the corporate veil in order to hold officers personally liable when they control the employer's funds. Appellant Arbeeny affirmatively stated his authority regarding payment of funds. CP 54. (Oddly, Appellant Rau never submitted any declarations or evidence in opposition to Respondent's Motion for Partial Summary Judgment.)

This Court recently held that a person who exercises control over payment of funds, and acts under that authority, will be held personally liable. *Durand v. HIMC Corp.*, 151 Wn. App. 818, 835, 214 P.3d 189

(2009). “And liability under RCW 49.52.070 does not turn on piercing the corporate veil.” *Id.* The facts in *Durand v. HIMC Corp*, supra, are strikingly similar to the facts in our case. In that case, Durand, an employee, was recruited by HIMC at an annual salary of \$150,000, but quickly asked to accept a cut in pay because of the company’s deteriorating financial situation. *Id.* at 824. Soon thereafter, HIMC terminated Durand and failed to pay back wages. *Id.* A new board of directors was elected a few weeks later, which included Johnston and Cornwell. *Id.* Durand never received his earned compensation and sued the employer, along with Johnston and Cornwell. *Id.* at 825. The individual defendants claimed that they could not remit compensation to Durand because the corporation had insufficient funds. *Id.* at 833. This Court rejected that argument and held, “HMIC/ITI’s claimed inability to pay does not preclude a finding that the employers willfully failed to pay.” *Id.* at 834. This Court also liberally construed the wrongful withholding statute in holding that the individual defendants were personally liable because of their exercise of control over the payment of funds. *Id.* at 835.

Consequently, just as in *Durand*, this Court should again hold that Appellants John Arbeeny and Charles Rau, agents of the employer who exercised control over the payment of compensation to Respondent

Zimmerman, a former employee, are subject to personal liability for refusal to remit compensation. Just as in *Durand*, this Court should again reject the argument that piercing the corporate veil is a prerequisite to holding agents of a company personally liable for failing to remit wages to a former employee.

- C. Given the express language of RCW 49.52.050, the strong legislative policy to protect workers' rights, and the explicit holding of this Court, the trial court did not err in holding Appellants John Arbeeny and Charles Rau willfully deprived Respondent of his wages.**

The Washington Legislature established a remedy of exemplary damages when an employer willfully refuses to pay wages. RCW 49.52.050, "Rebates of wages— False records— Penalty," provides in pertinent part:

Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who

...

(2) Wilfully [sic] and with intent to deprive the employee of any part of his wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract...

The Washington Supreme Court's test for "willful" is simple: "the employer's refusal to pay must be volitional. Willful means merely that the person knows what he is doing, intends to do what he is doing, and is a

free agent.” *Schilling* at 159-160 (internal citations and quotation omitted).

Appellants disregard Washington Courts’ embrace of the strong legislative policy favoring paying employee wages and the accompanying low burden of proof to show willful intent for failure to pay employee wages. Washington law provides broad protection to employees.

[The Washington State Supreme Court] has described Washington as a " 'pioneer' " in assuring payment of wages due an employee. *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wash.2d 29, 35, 42 P.3d 1265 (2002) (quoting *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wash.2d 291, 300, 996 P.2d 582 (2000)). Toward that end, three wage statutes penalize an employer who willfully withholds wages (WRA), fails to pay the statutory minimum wage (MWA), or fails to pay wages due upon termination of employment (WPA). The court is tasked with construing these laws " 'liberally' " in light of the strong public policy to protect workers' rights. *Id.* at 35, 42 P.3d 1265 (quoting *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wash.2d 514, 520, 22 P.3d 795 (2001)).

Champagne v. Thurston County, 163 Wn.2d 69, 76, 178 P.3d 936 (2008).

Significantly, the standard of proving “willful” withholding of payment of wages is extremely low. “If an employer **knows** that he is not paying wages when due, and **intends such conduct**, then the action is willful.” *Chelius v. Questar Microsystems, Inc.*, 107 Wn. App. 678, 683-84, 27 P.3d 681 (2001) (emphasis added) *citing Schilling* at 159-60.

Appellants were all very well-aware that Respondent Zimmerman commenced work on its behalf in mid-January 2008, that Respondent was W8Less' Vice President, and that Respondent traveled and attended the trade show to promote W8Less products. CP 37, 41, 45, 52-54, 57. Although they may have been displeased about Respondent's salary, benefits, and stock grants as negotiated by CEO Jolley, Appellants were also very well-aware of those terms. CP 42-44, 62. Although unnecessary to create a legal obligation to pay wages to an employee, the Board even ratified the hiring decision during its Board meeting on January 28, 2008. CP 45. Only after a rift developed between the Board and CEO Jolley did the Appellants decide take the position that it should not have to compensate Respondent for his work. CP 65-66.

On February 5, 2008, during a W8Less Board meeting, Appellants Arbeeny and Rau affirmatively voted not to remit compensation to Respondent Zimmerman for his work, although there was sufficient money in its bank account at the time. CP 63, 76-77. In voting against payment of wages, which prevented the company from remitting payment to Respondent, these individuals controlled the payment of wages for which personal liability can be found. Significantly, Appellant Arbeeny expressly stated in his February 6, 2008 memo after taking over management of the company, "Mr. Zimmerman will not be hired in any

capacity by W8less LLC and we will consult independent legal council [sic] about our obligation to pay him for any work ostensibly done on behalf of W8less LLC.” CP 66.

This is not a situation in which the employer, or its board members were careless, or committed an error, or asserted a genuine “bona fide” dispute in failing to pay wages. The Appellants, and all of them, acted knowingly, willfully and wrongfully to withhold wages. Just as in *Durand*, this Court should hold that Appellant Arbeeney and Rau’s exercising control over payment of funds by voting against remitting any payment to Respondent, despite the fact that W8Less had sufficient funds at the time, and despite the fact that the other board members voted to remit payment, constitutes a willful act.

D. Given the express language of RCW 49.52.070, strong legislative policy to protect workers’ rights, and the holdings of Washington Courts, the trial court did not err in permitting a civil suit to be brought for willful withholding of wages.

Appellant asserts that because RCW 49.52.050 is a criminal statute, no civil liability exists absent proof of one of the criminal acts. Even if Appellant’s argument was viable, Respondent has satisfied the requirement to present proof that Appellants Arbeeney and Rau willfully “paid” Respondent a lower wage than they were obligated to pay.
(Nothing.)

The fact that Appellants Arbeeny and Rau could be successfully prosecuted for a misdemeanor does not undermine the ability of Respondent to bring a civil action. RCW 49.52.050 parallels the civil action permitted by RCW 49.52.070.

[O]ther courts have labeled courts have labeled civil suits as arising under RCW 49.52.050. *See, e.g., Pope v. University of Washington*, 121 Wash.2d 479,, 852 P.2d 1055 (1993), and cases cited therein at 489-90, 852 P.2d 1055, *cert. denied*, 510 U.S. 1115, 114 S.Ct. 1061, 127 L.Ed.2d 381, *and corrected*, 871 P.2d 590 (1994).

Keenan v. Allan, 889 F.Supp. 1320, 1378, n. 80 (E.D.Wash. 1995) *aff'd* 91 F.3d 1275 (9th Cir. 1996) *aff'd* 91 F.3d 1275 (9th Cir. 1996).

The express language of RCW 49.52.070 permits an employee to file a civil suit based upon failure to pay wages as set forth in RCW 49.52.050. “All provisions should be harmonized whenever possible, and an interpretation which gives effect to both provisions is the preferred interpretation.” *Emright v. King County*, 96 Wn.2d 538, 637 P.2d 656 (1981). Appellants’ argument to require a higher burden of proof, in order sustain a finding of criminal act as a prerequisite to filing a civil suit, would completely undermine the clear legislative intent to permit employees an legal avenue to recover wages improperly withheld.

E. Given the strong legislative policy to protect workers’ rights, and the holdings of Washington Courts, the trial court did not err in holding that failure to make *any* payment of wages constituted

payment of a “lower wage” than Respondent was entitled to receive.

Appellants argue that RCW 49.52.050(2) does not apply if there is a dispute regarding the amount of compensation owed to an employee. Notably, Appellants ignored the obligation to pay Respondent in any amount whatsoever. When *nothing* is paid to Respondent, there can be no question that Respondent was paid a “lower wage” to provide a basis for double damages in accordance with the non-discretionary language of RCW 49.52.070. If Appellants had paid Respondent anything, then this might be a relevant point of discussion. However, Appellants paid Respondent nothing; the decision to award double damages is very compelling and is not truly debatable - **as a result of Appellants’ own words and actions.**

Appellants cite *Allstot v. Edwards* for the proposition that double damages are legally applicable only after a jury verdict is obtained. 114 Wn. App. 625, 60 P.3d 601 (2002). However, it is misleading to exclude the facts of the *Allstot* case from the analysis. Allstot was a police officer who appealed the decision to terminate his civil service employment based upon civil rights violations and wrongful termination. After three years, Allstot prevailed and the Court ordered reinstatement of his position, with back pay. Allstot asserted that he should be entitled

to double damages for the willful refusal to pay back wages during several years of litigation proceedings. “Mr. Allstot's proposed instruction on double damages for willful nonpayment of wages was rejected by the trial court as inapplicable to back wages.” *Id.* at 603-04. The *Allstot* appellate court, however, reversed the trial court because the obligation to pay back wages was based upon statute, which did invoke double damages:

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. **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.**

In short, we find substantial evidence in the record to support a jury instruction on double damages under RCW 49.52.070.

Id. at 634-635 (internal citation omitted). Despite the Appellants' argument to the contrary, the *Allstot* case supports a finding of double damages in our case, as delaying payment of wages during litigation, even if the precise amount is disputed, constitutes a “willful” withholding under RCW 49.52.070.

Appellants also reference *Allstot's* citation to the concurring opinion in *Hemmings v. Tidy Man's, Inc.* for the same proposition that a jury verdict must be obtained prior to awarding double damages. 285 F.3d 1174 (9th Cir. 2002). The facts in *Hemmings* are also crucial to our analysis as that case was based upon gender discrimination in the form of unequal pay, not wages based upon contract:

Washington courts have not extended RCW § 49.52.050 to situations where employers violate anti-discrimination statutes. Rather, violations of § 49.52.050 have been upheld where an employer consciously withholds a quantifiable and undisputed amount of accrued pay. *See, e.g., Ellerman*, 22 P.3d at 798 (failure to pay wages); *Schilling v. Radio Holdings, Inc.*, 136 Wash.2d 152, 961 P.2d 371, 377 (1998) (failure to issue regular paychecks).

The language of the statute does not support the expansive interpretation urged by the Plaintiffs. In ascertaining legislative intent, “the language at issue must be evaluated in the context of the entire statute.” *Ellerman*, 22 P.3d at 798. **The key word in the statute is “obligated.”** If the Washington legislature intended for the provision to apply to a situation such as Plaintiffs', it could have stated that any employer who violates any statute is subject to double damages. The insertion of the word “obligated” indicates a pre-existing duty imposed by contract or statute 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. It did not stem from a “statute, ordinance, or contract;” rather, it resulted from a retrospective jury verdict.

Hemmings at 1203 (concurring opinion, emphasis added).

There is no requirement that the Respondent must first obtain a jury verdict in order to establish that the Appellants’ withholding of wages is willful. Respondent was entitled to payment of wages for employment in January and February 2008. The February 5, 2008 board meeting minutes specifically reference the obligation to Respondent: “Discussion ensued on how to compensate work predating 1 February 2008 and it was agreed that such **obligations** would be carried forward...” (emphasis added). Nevertheless, over two years have passed since that date. Rather than remitting compensation to Respondent, the Appellants have decided to pay Respondent nothing and have proceeded to vigorously defend this action, exposing themselves to double damages and attorneys’ fees, which will far exceed the amount of wages. Their actions demonstrate precisely the type of willful withholding of wages Washington law prohibits.

Finally, Appellants argue that double damages should not apply because the *amount* of compensation was not agreed upon. However, just as held in *Hemmings*, supra, a dispute regarding the *amount* of

wages does not provide an open license to completely withhold wages. This Court held that a genuine issue of material fact precluded a finding of the *amount* of wages due to the Respondent. RCW 49.52.050 simply provides that it is a violation of law for an employer / officer to pay a “lower wage” than that which it is obligated to pay. In this case, the e-mail from CEO Dallas Jolley to Appellant Arbeeney dated January 27, 2008, described the basis for reaching Respondent’s salary. CP 42. The very next day, as reflected in the board meeting minutes of January 28, 2008, Respondent was unanimously and “accepted for the executive position of Vice President of Marketing / Business Development.” CP 45. The “Board Approved Budget” and “30 Day Bridge Loan Budget” both reflect a monthly salary level of \$12,500 for the “VP Marketing/BisDev” position. CP 44. CEO Dallas Jolley subsequently confirmed that the board had approved “...the investor six month budget wherein it listed [Respondent’s] position as paying \$12,500 per month plus benefits for which [Respondent] was just hired...”, and cited Respondent’s reliance on the board’s approval in continuing his work for the Appellants. CP 68.

However, during the next board meeting of the company, held on February 5, 2008, the individual Appellants voted not to pay Respondent for the work Respondent had already performed. CP 63. Because the

motion to pay Respondent for his work in January 2008 had been defeated, the executive members then decided to wait until additional funding was received in April 2008 before the company would pay Respondent. Significantly, the very next day, Appellant Arbeeny took over as the new CEO and decided that Respondent would not be hired in any capacity and that he would consult with legal counsel about "...our **obligation** to pay him..." CP 66.

Thereafter, the Appellants ignored the obligation to pay Respondent, in any amount whatsoever. When *nothing* is paid to Respondent, there can be no question that Respondent was paid a "lower wage" to provide a basis for double damages in accordance with the non-discretionary language of RCW 49.52.070. If Appellants had paid Respondent anything, then this might be a relevant point of discussion. However, Appellants paid Respondent nothing; the decision to award double damages is very compelling and is not truly debatable - **as a result of Appellants' own words and actions.**

F. Given the express statutory language, strong legislative policy to protect workers' rights, and the holdings of Washington Courts, the trial court did not err in striking the Appellants' affirmative defense for CR 11 sanctions.

1. Standard of Review for Denial of CR 11 Sanctions is Abuse of Discretion

Respondent moved to strike the CR 11 affirmative defense raised in Appellants' Answer. Even after losing on Summary Judgment, Appellant apparently continues to submit that Respondent's claims against Appellant Arbeeny and Appellant Rau are so frivolous in fact and in law that CR 11 sanctions are warranted. "A trial court's decision to impose or deny CR 11 sanctions is reviewed for abuse of discretion." *Brin v. Stutzman*, 89 Wn. App. 809, 827, 951 P.2d 291 (1998).

2. Appellant Cites Nothing in the Record to Support its Contention that the trial court Abused its Discretion in denying CR 11 sanctions

In this case, Appellant does not even assert that the trial court abused its discretion in denying CR 11 sanctions by striking Appellant's affirmative defense, much less argue and articulate its theory. The Supreme Court of Washington stated, "...it can safely be said that abuse of judicial discretion is not shown unless the discretion has been exercised upon grounds, or to an extent, clearly untenable or manifestly unreasonable. *State ex rel. Beffa v. Superior Court for Whatcom County*, 3 Wn.2d 184, 190, 100 P.2d 6 (1940).

Given the clear statutory language of the Washington legislative, and the clear holdings of Washington Courts, the trial court did not abuse its discretion in striking CR 11 as a viable affirmative defense.

G. Appellants Fail to Submit Argument Regarding the Trial Court's Denial of Appellants' Motion for Reconsideration

1. Standard of Review for Denial of Motion for Reconsideration is Abuse of Discretion

Motions for reconsideration under CR 59 are reviewed for an abuse of discretion. *Holaday v. Merceri*, 49 Wash.App. 321, 324, 742 P.2d 127 (1987). In this case, Appellant again fails to assert that the trial court abused its discretion in denying its motion for reconsideration, much less argue and articulate its theory.

2. Appellants Fail to Submit Arguments to Support its Assignment of Error that the Trial Court Erred in Denying Appellants' Motion for Reconsideration

Although Assignment of Error "C" relates to the trial court's denial of Appellants' Motion for Reconsideration, that Order was not appealed, nor do Appellants brief the issue. Consequently, there is no argument to which Respondent can rebut; the issue is waived.

Under the Rules of Appellate Procedure, an appellant's brief must include arguments supporting the issues presented for review and citations to legal authority. Without supporting argument or authority, an appellant waives an assignment of error; and [w]e need not consider arguments that are not developed in the briefs for which a party has not cited authority. Thus, because Defendants failed to develop or to support their argument on this point, we need not consider it further.

Collins v. Clark County Fire Dist. No. 5, ___ P.3d ___, 2010 WL 820029 (March 15, 2010) (internal quotations and citations omitted).

V. *RESPONDENT REQUESTS ATTORNEYS FEES ON APPEAL*

Pursuant to RAP 18.1 and upon equitable principles, Respondent Zimmerman requests attorneys' fees on appeal. RAP 18.1 provides: "If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule..." Respondent Zimmerman should prevail, and will comply with RAP 18.1. This Court should award fees on appeal to Respondent Zimmerman.

VI. *CONCLUSION*

Appellants failed to raise any issue of material fact to preclude summary judgment on the issue of whether they, as officers of an employer company, W8less, can be held personally liable when they affirmatively acted to prevent payment of wages to Respondent. Appellants failed to show that the trial court erred in granting Respondent's Motion for Partial Summary Judgment, or abused its

discretion in dismissing Appellants' affirmative defense of CR 11, or in denying Appellants' Motion for Reconsideration.

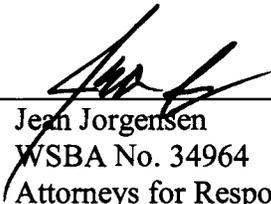
Respondent respectfully requests that this Court affirm the trial court's rulings and the Judgment entered pursuant to MAR 6.3.

Dated this 22nd day of April, 2010.

Respectfully submitted,

SINGLETON & JORGENSEN, INC., PS

By



Jean Jorgensen
WSBA No. 34964
Attorneys for Respondent
Zimmerman

DECLARATION OF SERVICE

I declare that on this date I have caused to be delivered via e-mail and by messenger, one true copy of RESPONDENT'S BRIEF, to the following counsel or court:

Thomas G. Krilich
Krilich, La Porte, West & Lockner, PS
524 Tacoma Avenue South
Tacoma, WA 98402
krilich@524law.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 22nd day of April, 2010.



Jamie Brazier, Legal Assistant

FILED
COURT OF APPEALS
10 APR 22 PM 2:49
STATE OF WASHINGTON
BY _____
DEPUTY