

NO. 44326-1

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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PETER and RACHAEL ATKINSON,  
husband and wife, and the  
marital community composed thereof

Appellants,

vs.

LES SCHWAB TIRE CENTERS OF WASHINGTON, INC.,

Respondent(s).

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APPEAL FROM THE  
SUPERIOR COURT FOR LEWIS COUNTY  
THE HONORABLE JAMES W. LAWLER

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APPELLANTS' AMENDED OPENING BRIEF

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TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ASSIGNMENTS OF ERROR.....	6
III.	ISSUES.....	7
IV.	APPELLANTS' STATEMENT OF THE CASE .....	8
A.	Facts Admitted By Les Schwab.....	8
B.	The Email Of July 10, 2006.....	11
C.	The Testimony Of Rory Cox.....	12
D.	The Testimony Of The Other Employees.....	16
E.	The Testimony Of Dr. Elena Robinson .....	20
F.	The Testimony Of Peter Atkinson .....	24
G.	The Testimony Of Les Schwab's Speaking Agent .....	28
V.	LAW AND ARGUMENT .....	31
A.	Les Schwab's Motion For Summary Judgment.....	31
B.	Les Schwab Failed To Carry Its Burden On Summary Judgment. ....	38
C.	The Atkinsons Met Their Burden Of Proof In Establishing The <i>Prima Facie</i> Elements Of Claim For Discrimination Under The WLAD. ....	39
1.	Les Schwab Discriminated On The Basis Of Disability .....	39
2.	Peter Atkinson Received Disparate Treatment.....	40
3.	Peter Atkinson's Accommodation Was Taken Without Notice .....	40
4.	Cox Retaliated Against Peter Atkinson .....	41
5.	Cox Created A Hostile Work Environment.....	41
D.	The Trial Court Abused Its Discretion By Denying Plaintiff's Second Motion For Sanctions, Thus Depriving The Plaintiffs Of The Ability To Defend Against The Motion For Summary Judgment; And Striking Entire Declarations When Only Portions Were Objectionable.....	42
VI.	CONCLUSION .....	44

## TABLE OF AUTHORITIES

### **Cases**

<u>Castro v. Stanwood School Dist. No. 401</u> , 151 Wn.2d 221, 86 P.3d 1166 (2004).....	38
<u>Cleveland v. Professional Management Services Corporation</u> , 526 U.S. 795 (1999).....	33, 34, 36, 37
<u>Davis v. Microsoft</u> , 149 Wn.2d 521, 532 (2003) .....	34, 35, 36, 37, 38
<u>Hoglund v. Meeks</u> , 139 Wn. App. 854, 875, 170 P.3d 37 (2007). .....	43
<u>Jane Doe v. The Boeing Co.</u> , 121 Wn.2d 8, 17, 846 P.2d 531 (1993). .....	40
<u>Johnson v. DSHS</u> 80 Wn.App. 212, 229 (1996). .....	39
<u>Jones v. Allstate Ins. Co.</u> , 146 Wn.2d 291, 45 P.3d 1068 (2002) .....	38
<u>Mayer v. Sto Indus., Inc.</u> , 156 Wn.2d 677, 684, 132 P.3d 115 (2006).....	43
<u>McClarty v. Totem Elec.</u> , 157 W.2d 214 (2006).....	37
<u>Pulcino v. Fed. Express Corp.</u> , 141 Wn.2d 629, 640, 9 P.3d 787 (2000) .....	40
<u>Pulcino v. Federal Express Corp.</u> , 141 Wn.2d 629 (1998) .....	40
<u>Riehl v. Foodmaker, Inc.</u> , 152 Wn.2d 138, 144 (2004). .....	39
<u>Robel v. Roundup Corp.</u> , 148 Wn.2d 35 (2002) .....	41

### **Statutes**

RCW 49.60.010.....	40
--------------------	----

### **Other Authorities**

Americans Disability Act (ADA).....	37,42
Family and Medical Leave Act (FMLA).....	33, 34
Washington Law Against Discrimination (WLAD).....	12,14,30,35,36,37,40,41,42

## I. INTRODUCTION

On March 6, 2009, Peter Atkinson was fired without warning by his Les Schwab store manager in Chehalis. This ended an exemplary sixteen-year career with the company. Peter's stepfather was a store manager and zone manager and the family knew Les Schwab personally. His mother was actively involved in her husband's career, as well as a leader for the wives of other Les Schwab managers. It was no surprise then that their son, Peter, wanted to go to work for Les Schwab, too. Becoming a manager at Les Schwab is very competitive and the work is demanding. For Peter, a successful career in Les Schwab management was even harder than it was for most others.

Peter Atkinson was born with a severe migraine condition which was diagnosed when he was four years old----the same time he began receiving medical treatment for this intermittent condition. Ninety percent of the time when he was growing up, Peter was normal---but the other ten percent of the time was a problem. Then, he was either trying to prevent a full-blown migraine attack, or when he was unsuccessful, he was completely disabled by pain and immobility. Peter's physician, a specialist in migraine syndromes who has treated him for years, testified that Peter's

case is among the worst she has treated. Despite his medical condition, Peter was able to do well in family, school and sports activities. This is because his parents, teachers and coaches provided modest flexibility in his schedule to accommodate his unpredictable migraine attacks.

Peter went to work for Les Schwab as soon as he could, in 1993 while he was still in high school. The company knew about Peter's disability and provided the same flexibility that his parents, teachers and coaches did: Peter was permitted to take short breaks the moment he felt a migraine attack coming on. He would then go to a quiet, dark space and sit alone for ten to twenty minutes. Most of the time this was all he needed to do to avert a much more serious attack, and then he went right back to work. When he could not stop a full attack, he would have to stop work and go home. Approximately six days a year Peter would stay home from work altogether. Peter always made up any time lost to his migraines by working on his days off.

Peter excelled at work, benefitting both himself and Les Schwab. For the first ten years of his employment, he consistently received excellent performance reviews, promotions and pay raises. In 2003, Peter was transferred to the Chehalis store and

promoted to second-assistant manager by the Store manager, Rory Cox. All or most Les Schwab managers usually work more than a forty-hour week. However, Rory Cox demanded that his assistant managers **work 70-80 hours per week on a regular basis, frequently without breaks or meals.** Cox was intolerant of those who could not meet his requirements and he fired employees indiscriminately.

Even though he promoted Peter twice and approved him for a third promotion to store manager, Cox came to resent the flexibility necessary to accommodate Peter's migraine condition. Cox believed that managers should be tougher than the company's wage-earning employees, like he was, and work exceptionally long and hard hours – like he did. In thirty years of work for Les Schwab, Cox claimed to have missed only one day of work because of illness. In mid-2006, Cox abruptly told Peter: “get [your] migraines under control or find work elsewhere.”

Peter was so concerned with Cox's threat that he wrote an email to two managers he used to work for, asking for advice. Both had been promoted to the company's corporate headquarters in Oregon. Peter reported Cox's directive about his migraines and asked for advice about what to do. Peter also implicated Cox's

brother, Doug Cox, in the email, who was a zone manager for Les Schwab and Rory Cox's immediate superior. One of the managers to whom Peter addressed the email responded and told Peter not to worry.

Within days Cox learned about the email when he was contacted directly by corporate officials in Oregon. Cox admitted fault in the entire episode. However, he was angered that Peter went over his head and he blamed Peter for being called out by his corporate superiors. Cox quickly turned on his own first assistant manager and demonstrated his animus first by taking away all flexibility in Peter's work schedule. Without the modest flexibility Peter had always received from Les Schwab, work became much harder for Peter. His migraine attacks became worse and more frequent. Cox also began to criticize and attack Peter in a series of confidential communications to his superiors. Cox also claimed that the store's rank and file employees had lost respect for Peter. Eventually, Cox achieved the pretext he needed to fire Peter: he claimed Peter's performance was sub-standard.

Cox finally fired Peter during a three-minute meeting on March 6 of 2009 with no warning. Peter was unceremoniously told to pack up his things and leave. His sixteen-year career with the

company was over in minutes. While driving home, Peter pulled over to the side of the road and cried.

A short time later, Peter and his wife were forced into bankruptcy and they lost most of their assets---including Peter's deferred income with Les Schwab. Now, four years later, Peter is a stay-at-home dad for his children and his wife works. A non-compete agreement with Les Schwab prohibits Peter from working in the only area he knows---automotive service and supplies.

Peter and Rachael Atkinson filed suit against Les Schwab in 2009, alleging wrongful termination and violations of laws which prohibit discrimination on the basis of a physical or mental disability. Les Schwab wrongfully resisted any meaningful discovery and was eventually sanctioned by the trial court for doing so. However, the trial court permitted Les Schwab's motion for summary judgment to proceed before the plaintiffs obtained the basic discovery they needed. Without meaningful discovery, the plaintiffs were prejudiced in defending themselves against Les Schwab's motion for summary judgment.

The trial court granted summary judgment on two grounds. First, Peter claimed he was totally disabled in a subsequent Social Security application, while simultaneously asserting that he was

able to work in his lawsuit against Les Schwab. The trial court found these conflicting claims to be fatal to the Atkinsons' suit against Les Schwab. Second, the trial court believed that Peter requested accommodations which were either unreasonable or greater than that required by law. However, there is no evidence that Peter ever requested an accommodation - this case is about a store manager **taking away** an accommodation.

The Atkinsons filed a motion for reconsideration in the trial court which was denied without argument. This appeal followed.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting the defendant's motion for summary judgment, dismissing all of the plaintiffs' claims with prejudice.
2. The trial court erred in denying the plaintiffs' second motion for sanctions against Les Schwab for its flagrant obstruction of basic discovery necessary for the plaintiffs to defend against the motion for summary judgment.
3. The trial court erred in ruling that portions of declaration testimony should be stricken, without specifying which portions were actually stricken, and which were not.

### III. ISSUES

1. Did Les Schwab sustain its burden of establishing the absence of material factual disputes?
2. Did the plaintiffs satisfy the *prima facie* elements of their WLAD claims against Les Schwab?
3. Is it a violation of the WLAD for an employer to fire a disabled employee after unilaterally taking away a long-standing, necessary and reasonable accommodation?
4. May an employer decide not to comply with the WLAD based on an employee's status as a manager?
5. Is it a violation of the WLAD for an employer in the automotive service and supply business, to claim that regular work of 70-80 hours per week, frequently without breaks or meals, are "essential functions" of the job?
6. Can an employer fire an employee for unsatisfactory performance, whose physical or mental disability is known to be aggravated by the employer's onerous working conditions, such as regularly working 70-80 hours a week, frequently without breaks or meals?
7. May a defendant benefit from its wrongful and consistent obstruction of proper discovery, by depriving a plaintiff of basic

discovery it needs to defend against the defendant's motion for summary judgment?

8. May a declaration be stricken in its entirety when a court sustains an objection to limited portions as hearsay?

#### **IV. APPELLANTS' STATEMENT OF THE CASE**

##### **A. Facts Admitted By Les Schwab**

In their motion for summary judgment, Les Schwab admitted many of the key facts upon which the plaintiffs based their WLAD claims (CP 22-29). For example:

Peter Atkinson "has had a chronic migraine condition since he was a child." CP 22. "In 1993, while in high school, Mr. Atkinson began working part-time at a Les Schwab store in Aberdeen. His stepfather [Jerry Arnson] was the store manager." (*Id.*) "In 1996, Peter was transferred to the Longview store as a full-time Sale and Service employee doing tire work." (*Id.*)

"In January 2003, Rory Cox hired Mr. Atkinson as the second assistant manager at the Chehalis store. . . Mr. Cox was the manager of the Chehalis store and Aaron Moore was the first assistant manager. . . They both knew about Mr. Atkinson's migraine condition before he was hired. . ." (*Id.*) "As reflected in his performance reviews, Mr. Atkinson has strengths . . ." (*Id.*) "In April

2006, Mr. Moore left the store and Mr. Cox promoted Mr. Atkinson to first assistant manager. . . Mr. Cox hoped and expected Mr. Atkinson would continue to grow as an assistant manager and meet the increased challenges and expectations of being the first rather than second assistant.” (*Id.*)

“[The store managers] regularly worked 70-80 hours per week.” (CP 23). “. . . the store had about 28-30 non-exempt employees. . . ” (*Id.*) “Although the hours were long and the work could be stressful, Mr. Atkinson was well-compensated for his efforts. As first assistant manager, he received a salary and shared in the store’s profits, earning about \$115,000 annually in salary and bonus his last two years of employment. . . He also received a full benefits package and generous retirement contribution. . . ” (*Id.*)

“On July 10, 1996, a few months after he was promoted to first assistant, Mr. Atkinson emailed John Britton and Ray Compton (his managers at the Longview store [who were now managers at corporate headquarters in Oregon]) asking for career advice after Cox suggested that his migraine condition might affect his career path with the company. . . In response, Mr. Britton called Mr. Atkinson and assured him his migraines would have no bearing on his future with Les Schwab.” (*Id.*)

“In December 2007, Mr. Atkinson wanted to get onto the store manager’s ‘list’ in order to be eligible to run for open manager positions. . . [Cox] wanted to support [Peter’s] effort to achieve his career goals and thus approved and supported his application. . . Getting on the list was highly competitive, however, and most assistant managers did not make it on the first try.” (CP 24-25).

“On March 6, 2009, Mr. Cox and Mr. [Greg] L’Hommedieu met with Mr. Atkinson again and. . . removed him from his position due to job performance. . . “(CP 27). “On March 9, 2009. . . Mr. Atkinson applied to SSA for total disability benefits. . . “(Id). “At about [June of 2009], SSA approved [Peter’s] total disability claim. He then began receiving over \$25,000 per year in benefits . . .” (CP 28).

“In December 2009, Mr. Atkinson filed this lawsuit. While claiming he was denied reasonable accommodation for his disability and wrongfully terminated based on disability, he continues to collect monthly SSA benefits due to total disability and being physically unable to work.” (CP 28-29).

## B. The Email Of July 10, 2006

The email which Peter sent to Britton and Compton, at corporate headquarters, is attached to the plaintiffs' complaint. CP

9. In the email, Peter Atkinson stated:

In a recent meeting with Rory [Cox] and Mike [Palin, the second assistant manager] discussing store procedures, *my condition of Severe Hereditary Migraines was brought up as something that may not allow me to continue my goals of Les Schwab store management.* In recent months I have juggled days off to coincide with work days missed due to the intensity of my migraines. I've never taken 'extra' time away from the store when the pain is so severe that I can't even walk and I miss work! . . . *I had never given any less than 100% to my goals in this company, it is what I know and all I know and have no other intentions than to continue a path into store management* and to offer others the same opportunity! . . . Now I have been advised to explore other career options, *whether something different in the company* or different altogether, if my migraine condition does not improve. . . Please let me know your viewpoints and standings on this because I am at a stalemate. . . Thanks for your time and I appreciate your feedback. Peter Atkinson

*Id.* (Emphasis added).

After Peter sent the email, John Britton called Mr. Atkinson and assured him that his migraine condition "will have no bearing on your future with the company or on you." CP 85 at 2-14. At the same time, Britton told Mr. Atkinson "that Ray Compton was

meeting with Rory that very same day and was having a discussion with him.” CP 85 at 15-18.

Peter Atkinson’s relationship with Cox began to deteriorate soon after this email was sent to corporate headquarters. Peter feels that since he went over “[Cox’s] head to people in our main office...[ Cox] felt like I was going after him and [he] wanted to get back at me for that.” CP 127 at 8-25. Peter testified:

I believe that [the email] was the final issue. It seemed like there was a lot of instances where there was just no leeway. It seemed like he would work things in a way that got the crew mad at me. He might ask me to do something or implement a certain kind of program and then have the other assistant manager disregard what I was doing and let the crew know that it wasn’t from him, it was something I was doing on my own. Just different situations like that.

CP 128 at 5-13.

### **C. The Testimony Of Rory Cox**

The entire deposition transcript of Peter’s store manager, Rory Cox, was provided to the trial court in opposition to Les Schwab’s motion for summary judgment. Cox made numerous admissions in his testimony which support Peter’s claims that Cox and Les Schwab both committed multiple violations of the WLAD.

Cox testified that he is in “excellent” health (CP 517 at 8/13) and has only missed one day in the 31 years he worked for Les

Schwab (CP 523 at 14-17). It was Rory Cox's idea to fire Peter. CP 519 at 13/2-3. Cox has fired approximately 100 people as a Les Schwab manager (CP 519 at 13/6), but only one---Peter Atkinson---was a manager (CP 521 at 21/8-13). Cox also works under a non-compete agreement with Les Schwab. CP 519 at 15/6. He is unaware of a single case where Les Schwab has waived the non-compete agreement for an employee. *Id* at 15/21. When asked if there might have been another way to "solve the problem" instead of firing Peter, Cox responded ". . . I don't have an answer for that." CP 521 at 22/5-9.

Peter's absences and attendance at the store were not recorded. CP 523 at 32/18. It is possible to work for Les Schwab as a first assistant manager and miss a day every other month. CP 523 at 32/24 to CP 524 at 33/6. It is actually possible to miss twice that much time and still work as a first or second assistant manager. *Id*. There is no limit on the number of sick days a salaried employee can take at Les Schwab. CP 542 at 105/21-23. Cox cannot say that Peter's medical condition did not affect his job performance. CP 523 at 29/18 to 30/8.

**Cox did not have any doubt about Peter's honesty or truthfulness in reporting his medical condition or illnesses.**

CP 524 at 34/17-20. Cox thought Peter was “an up guy” and “good with customers” and a “good salesman” and “honest” and “a good person.” CP 527 at 48/5-15. Cox did not investigate anything about the nature or extent of Peter’s medical condition, nor did he ask anyone at headquarters to look into that. CP 524 at 35/8-11. Cox also admitted a lack of knowledge concerning the WLAD, or an employer’s obligations respecting a disabled employee. CP 524 at 35/12 to 36/19.

Cox elaborated more by saying “. . . because the headaches were a medical issue that they were not to be brought up in the context of the job that that was something that we just need to work around and that we couldn’t---you know not to present headaches as a work-related issue.” (*Sic*). CP 525 at 38/15-19. Cox testified that Les Schwab did not do a good job of telling him about the WLAD or his obligations to employees under the WLAD. CP 530 at 59/15-19. **Cox testified that the only accommodation that Cox he provided to Peter, was letting him take up to two days off a month.** CP 526 at 44/25-45/3. Even then, Peter was required to make up sick days by working on his days off – unlike any other employee. See the July 10, 2006 email at CP 9. Cox did not discuss accommodations for Peter with anyone at corporate

headquarters. CP 530 at 59/1-3. **The store managers worked 70-80 hours per week at the Chehalis store.** CP 527 at 47/20-21. When asked if there was a maximum number of hours at Les Schwab that managers are permitted to work, Cox said “Not that I’m aware of.” CP 537 at 86/13-17. There are no requirements for breaks or lunches for managers either, although there are for the hourly-wage employees. CP 537 at 87/25-88/2.

Les Schwab claims that Cox told Peter that he could apply for an hourly-wage job again within 30 days of the date he was fired. Les Schwab therefore refers to Peter’s termination as merely a “step-down.” Regarding the “step-down” and whether another job in the company was offered to Peter when he was terminated, Cox testified: **“That’s not me offering that opportunity,** the company offers that opportunity.” CP 531 at 10-11. Cox was also asked whether he would have hired Peter for an hourly-wage position in the store if he had one open when he fired Peter. Cox answered “Probably not.” CP 531 at 63/6-9.

When asked about the email that Peter sent to corporate headquarters, Cox testified that he probably saw it two days after it was sent by Peter. CP 533 at 71/12. When asked if he had any reaction, Cox admitted that he was “at fault.” CP 533 at 72/2-12.

#### **D. The Testimony Of The Other Employees**

In their motion for summary judgment, Cox claimed that Peter did not have the respect, confidence, or support of the store's "crew," meaning the wage and hour employees. In opposition to this claim, the plaintiffs provided the testimony of Peter's former co-worker, Rob Rider. Mr. Rider testified that Peter Atkinson 1) was disabled; 2) that he was fired; 3 that he was doing satisfactory work at the time of his termination; and 4) that he was treated differently than other employees and he was fired for his medical condition. Mr. Rider's testimony establishes a material factual dispute for the trier of fact on all claims asserted by the plaintiffs. Mr. Rider's testimony alone should have been sufficient to preclude summary judgment. The relevant portions are therefore reproduced below:

Q Was there ever a time before Peter was fired that you worked under him or worked with him closely?

A Multiple times.

Q What did you think of him as a manager?

A I never had a problem.

Q Were there times when you thought that he wasn't working as hard as other people in the store?

A No.

Q You thought he worked just as hard as anybody else

in the store?

A Yes.

CP 413 at 8/13-25.

Q Did you ever hear Rory complain about Peter missing work or not working as hard as other people?

A No. I never heard Rory say that.

Q What is your understanding of why Peter was fired?

A Medical issues.

Q What are the medical issues that he was fired for?

A The headaches, I guess.

Q What do you know about his headaches?

A That they're really bad.

\* \* \*

Q How did you know that his medical problem involved headaches?

A Because I've seen him in the office with his head down before.

Q How long would that last?

A I don't know. I'd take off on a service call and then I would be gone the rest of the day.

Q Were there ever times that you'd see him in the office for more than an hour with his head down?

A No.

Q. Did you have any criticisms at all of Peter until he was fired?

A No, and I still don't.

CP 414 at 9/1 – 10/11

Other store employees besides Mr. Rider also asserted that Peter Atkinson was a good employee and a hard worker. For example, Manuel Mendez testified in his deposition at page 11:

Q Did you think [Peter Atkinson] was a good manager?

A I never had any problems with him.

CP 417 at 11/21 – 22.

Jesse Aumiller is another of Peter's co-workers at the Chehalis Les Schwab. Mr. Aumiller has an ax to grind against Peter because Peter was the only manager to discipline him. However, even Mr. Aumiller could not provide any testimony to support the defendant's claims that Peter was undependable. Mr. Aumiller states in his deposition at page 15:

Q Can you name a single name of anybody who told you that they couldn't count on Peter at the shop?

A No.

Q Can you name a single name of any of your co-workers that said, "You can't depend on Peter?"

A No.

CP 422 at 15/10 – 15.

William Stidham also worked at the Chehalis store under Cox at the same time Peter did. He was an hourly employee and had worked for Les Schwab for nearly fifteen (15) years when he was deposed in 2012. CP 510 at 5/6. As a wage-earning employee, Stidham could not recall ever having to work sixty (60) hours in a single week. *Id.* at 7/9-10.

Like Peter, Mr. Stidham was diagnosed with a migraine disorder which affects him “about every other week.” *Id.* at 8/11-24. They each last one or two days and “they’re not fun.” CP 511 at 9/1-2. Mr. Stidham testified:

...once they get to a certain point there’s nothing you can do to get rid of it or make it any better. If I get it during work I usually end up leaving. If I get it before work I usually call in.

*Id.* at 9/5-10.

Mr. Stidham also testified that he had migraines the whole time he worked for Les Schwab. *Id.* at 9/11-13. He never had any difficulty convincing Cox that he needed time off because of his migraines and he just took the time off. *Id.* at 9/18-23. Stidham knew that Peter had migraines “before he even told anyone” because:

I could just see the expression on his face, the way it kind of sagged down. His eye was half shut on one side. It's the exact same way that I feel and look when I get one.

CP 511 at 11/17-24.

Stidham also testified that Peter would “[go] in to the other room and shut the lights off” when he got a headache, which were more frequent than Stidham’s. *Id.* at 12/19-25. When Stidham’s headaches were severe, he couldn’t drive – he had to call someone to come to the store to pick him up. CP 511-512 at 12/25 – 13/5. Les Schwab has always accommodated Mr. Stidham’s migraine condition and let him “work around them.” CP 512 at 13/22-25. No one at Les Schwab ever objected or complained when Stidham needed to take time off for his migraine headaches. *Id.* at 15/3-6.

When asked how much of Peter’s work was affected by his migraines, Mr. Stidham replied “A lot.” CP 513 at 19/20.

#### **E. The Testimony Of Dr. Elena Robinson**

Dr. Elena Robinson is a Seattle Neurologist who has focused much of her practice on migraine patients like Peter Atkinson. She has treated Peter for years and has personal knowledge of his medical condition and specifically his migraines. Les Schwab provided five pages of Dr. Robinson’s deposition

transcript to its motion for summary judgment. CP 41. This limited portion is deceptive and does not reveal her true opinions. The plaintiffs therefore provided the trial court with her **entire transcript**. CP 497-507. She is the only physician who has testified in this lawsuit and her testimony is uncontroverted.

Migraine is Dr. Robinson's specialty in neurology. CP 504 at 29/3 – 7. Only a very few other doctors in the entire state have Dr. Robinson's level of experience with migraine patients. *Id.* At 29/8 – 25. More than half of the thousands of migraine patients that Dr. Robinson has treated, are gainfully employed. (30/9 – 17). Those who are provided with accommodations at their jobs are generally successful in remaining employed. *Id.* at 30/23 – 25.

Peter began seeing Dr. Robinson in 2005. CP 498 at 6/4 – 5. He was a very compliant patient. *Id.* at 6/9. He was referred to her by his primary care doctor. CP 502 at 24/1 – 3. He had no psychiatric illnesses or other disorders, besides migraine. CP 498 at 6/4 – 5. Dr. Robinson has seen thousands of migraine patients. CP 502 at 21/16. On a scale of 1 – 10, with 1 being very mild and 10 being as bad as it gets, Dr. Robinson believes that Peter is “probably a 9 to 10” in terms of severity. CP 502 at 21/17 – 23.

On or about May 12, 2009, Dr. Robinson recommended that Peter not return to work. CP 500 at 14/8 – 15, 16/10 – 14. However, she assumed that he was working a regular, forty-hour a week job when she made the recommendation. See discussion *infra*. Peter “didn’t ask for the disability. [Dr. Robinson] recommended it.” CP 502 at 21/8 – 9. Dr. Robinson believes Peter is “a very strong young man. And he was trying to do the duty of a strong young man, of a husband, of father . . . he always hoped, as I did, the we will find [a cure].” CP 500 at 16/5 – 8. He “has always been very compliant and very committed to his treatment.” *Id.* Dr. Robinson believes that Peter “fought very hard, harder than most migraine patients in his circumstances.” CP 502 at 24/22 – 23. It is not because of his lack of effort or commitment that he didn’t succeed. . .” CP 501 at 17/15 – 17.

Some migraine patients work and have a normal life. CP 501 at 18/16 – 19. When Dr. Robinson saw Peter in 2009, “his symptoms were getting worse and worse.” CP 501 at 18/22 – 23. “He often had to work and push through the migraine. But he was actually able to take his medication and not worry . . . the attacks were shorter and not as debilitating.” *Id.* at 19/18 – 21.

Dr. Robinson has had migraine patients that required an accommodation, such as a dark room. CP 502 at 23/1 – 3. Dr. Robinson would have provided a note for Peter requesting an accommodation for his Migraines if she was asked. CP 503 at 25/15 – 16.

All of the foregoing testimony was elicited by Ken Diamond, defense counsel for Les Schwab. During examination by the Atkinson's counsel, it became apparent that **Dr. Robinson believed that Peter had a regular 40-hour a week job when she recommended that he apply for disability.** CP 505 at 33/9 – 11. She had no idea of the strenuous conditions under which Peter was working for Rory Cox at the Les Schwab store in Chehalis.

When asked if a 70-hour work week would have any effect on the severity of Peter's Migraine headaches in terms of severity or frequency, Dr. Robinson testified "I can't conceive that he was able to work 70 hours per week. I never knew that of course. You know, it's terrible." CP 505 at 33/6 – 7.

Dr. Robinson also testified that "reducing anything from 70 hours would improve his symptoms to some extent." CP 503 at 27/7 – 8. Other factors that would aggravate his migraine condition

include irregular hours, dehydration, irregular meals, and physical exertion. *Id.* at 27/9 – 13. Any accommodations to prevent these aggravating factors would help improve his symptoms.

Migraine sufferers frequently need access to a quiet dark room at the onset of an attack, to help prevent it from getting worse. CP 504 at 31/19 – 32/11. A number of nurses at Dr. Robinson's hospital suffer from migraines and have access to such a room and their own medication. *Id.* Bright lights and heat can also aggravate migraine attacks. CP 504 at 32/16 – 21.

#### **F. The Testimony Of Peter Atkinson**

Peter testified that he would have been able to continue working with the accommodations that Les Schwab previously provided if he had not been fired. CP 66 at 12-14. He also testified that his medical condition requires some flexibility to accommodate his occasional migraine attacks. CP 66 at 21 to CP 67 at 1. When asked if he required any other accommodations, Peter testified “[n]ot a whole lot comes to mind right now. . .” CP 67 at 3.

Peter described the working conditions at Les Schwab:

I worked for 70 or 80 hours a week with no time to sit down. There were rare occasions where I even had time to sit down and eat a lunch, let alone take 10 or 15 minutes and try to relieve some stress in my body so my migraine condition didn't completely

take over and make me sick to where I could not stand up.

CP 67 at 6-11.

Peter also testified about his difficulty in seeing his doctors because of the lack of flexibility in his work under Cox:

And I saw the doctors regularly as I possibly could. It was difficult to take time from work, because if I'm sick and have to go home early, then I was asked to not take a day off. Or if I had called in sick, then I was asked to not take a day off. Which usually my day off were the days where I would see a doctor. So then my doctor appointment would have to be rescheduled for a different time.

CP 71 at 25 to CP 72 at 6.

Peter testified that he would call in sick three to five times a year, and that he made up that time by working on a scheduled day off. CP 72 at 8-12. He was able to perform his job as first assistant manager under Cox "80 to 90 percent of the time" without being affected by his migraine condition. CP 77 at 10-13. Ten to fifteen percent of the remaining time consisted of Peter continuing to work while afflicted with a migraine, although not at "the top of his game." CP 80 at 7-21. The remaining five to ten percent of the time he was either absent from work or had to take a ten or fifteen minute break while working, or on rare occasions, he had to leave work

early because of the onset of a migraine attack. CP 77 at 10 to CP 80 at 24.

Peter testified that he was able to fulfill all of the duties of a first assistant manager contained in Les Schwab's description of the job. CP 95 at 22 to CP 96 at 18; and CP 137-138. The accommodation that Peter required to do his job as first assistant manager was flexibility. He needed the ability to go to the break room for a ten or fifteen minute period at the onset of a migraine; he needed the ability to leave work early at the onset of a migraine (even if rarely); and he needed the ability to miss work two to five times per year when he was too sick to go to work (even though the time is made up from off-days). If Peter was afforded this flexibility, he could have continued to work as a first assistant manager for Les Schwab. CP 82 at 1-18.

Instead, Cox took away Peter's accommodation. On three or four occasions when Mr. Atkinson was first assistant manager, he asked Cox for a lunch break because of his migraines. CP 84 at 2-17. **Cox told him to continue working and "get [your] migraines under control or find work elsewhere."** CP 84 at 2-17. Peter had no other choice but "to work through the pain" instead of taking a break. *Id.*

Peter “felt there was so much animosity from [second assistant] Mike [Palin] and Rory [Cox] because of my condition, that even if Rory would ask me to do something, he would tell the crew something completely different.” CP 83 at 2-6. This “created more confusion and a hostile work environment.” *Id.* Co-workers made multiple negative comments to Peter about his migraine condition during this period. CP 97 at 3-6. Second assistant manager Mike Palin would say “Oh, he [Peter] got another *little headache*” or words to that effect. *Id.* at 9-14. (*Emphasis added*).

Peter was fired without warning on March 6, 2009. Peter was called into Rory Cox’s office with Greg L’Hommedieu and the meeting was “pretty short” and lasted just two or three minutes. CP 102 at 21 to CP 103 at 9. Greg told Peter that, “based on Rory’s evaluation of [Peter’s] job performance, there were stepping [Peter] down and that he did not have a job at the store anymore.”<sup>1</sup> This is consistent with a termination form used by the company which

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<sup>1</sup> Les Schwab’s counsel repeatedly referred to Peter’s termination as a “step-down” during Peter’s two depositions. Peter adopted the same phrase in his answers, even though it does not apply to the facts of his termination from the company. Peter was not informed that he could apply for an hourly job in the company for approximately one month after he was actually terminated. CP 131. This was coincidentally the exact period of time he could have theoretically applied for an hourly job.

indicates that Peter was involuntarily terminated for “unsatisfactory performance.” CP 222.

Despite his problems with Cox, Peter had no idea that he would be fired. CP 101 at 3-12. After the meeting, Peter packed up his belongings and started home. When he got about halfway there, he “pulled off to the side of the road and started to cry, then went home and told [his] wife that he didn’t have a job anymore.” CP 103 at 13-16. Later, Peter was surprised to learn that Cox told all of the employees in the store that he was going to fire Peter a month before he did so. CP 101 at 13-22.

Since being fired, Peter has “switched roles with [his] wife: she works and [he] is the homemaker, laundry, creating dinners, and coordinating getting kids to and from school.” CP 98 at 6-11. (*Sic.*) Peter still suffers from migraines and his wife accommodates this by arriving late at work or leaving early. CP 98 at 12-16. Many of the Atkinsons’ friends, including those at their church, were shocked at his termination and do not understand why it happened. CP 99 at 18-25.

#### **G. The Testimony Of Les Schwab’s Speaking Agent**

On September 24, 2012, Les Schwab’s attorney Ken Diamond (alone) responded to 127 Requests for Admissions. No

authorized representative signed off on the responses and dozens were not answered. This necessitated taking the deposition of Les Schwab's speaking agent.

Stacey Lynch was designated by Les Schwab as its speaking agent for purposes of the CR 30(b)(6) depositions noted by the plaintiffs. The first deposition occurred in Bend, Oregon on Wednesday, October 10, 2012. CP 561-580. **During the course of her deposition, Les Schwab's speaking agent was instructed not to answer 76 different questions by Les Schwab's attorney, Ken Diamond.** The full transcript appears at CP 561-580.

Examples of the questions Ms. Lynch was instructed **not to answer** included such matters as whether Les Schwab had any policies or procedures for the number of hours worked by its store managers; whether the company employed or consulted with an industrial hygienist; whether Les Schwab concerns itself with the working conditions of its managers; whether Les Schwab provides breaks or lunch breaks to its managers; record-keeping practices for managers; information relied upon in terminating Peter Atkinson; the person who actually fired Peter; whether the Human Resources department for the company had any role or knowledge regarding

Peter's termination; whether Ray Compton or John Britton (who received Peter's July 10, 2009 email) were still employed by the company; Peter Atkinson's salary and benefits on the date of his termination; company policies and procedures which were unique to managers, as opposed to hourly-wage employees; and information communicated to the stores by the corporate office concerning the WLAD. CP 550-552.

The court granted the plaintiffs' motion for sanctions in large part, for the first deposition of Les Schwab's speaking agent and ordered that the deposition be retaken (among other sanctions awarded). CP 600. The second deposition occurred on October 26, 2012, again in Bend, Oregon. This time, Ms. Lynch answered all of the questions – but **she answered "I don't know," or words to that effect, in response to 131 basic questions.** CP 677-716.

The plaintiffs again moved for sanctions because the questions related **directly** to Les Schwab's pending motion for summary judgment. CP 664-675. Lynch's entire transcript was provided to the court as well. This violation was even more egregious than the first because it was the second offense; it obstructed the same, basic discovery as it did in the first attempt; and all or most of the areas in which discovery was sought, were

directly material to the plaintiffs' defense of Les Schwab's motion for summary judgment. This time, however, the court **denied** the plaintiffs' motion and proceeded to hear argument on the motion for summary judgment at the same hearing.

## **V. LAW AND ARGUMENT**

### **A. Les Schwab's Motion For Summary Judgment**

Les Schwab filed its motion for summary judgment on September 28, 2012, seeking dismissal on numerous grounds, including ones completely lacking in factual or legal support. For example:

- 1) *Peter "never provided Les Schwab with a single note or certification from his doctor indicating he needed any particular accommodations to perform the essential functions of his job" (CP 21);*

This was never necessary because Les Schwab provided the accommodation of flexibility in Peter's work schedule when he started work for the company in 1993. Cox never told Peter he was taking away the accommodation – he just criticized Peter for his performance after he took away the accommodation.

- 2) *"the accommodations [Peter] now contends he needed are not reasonable" (id.); "he claims he is entitled to something the law neither expects nor requires" (id.);*

Even Cox admits that Peter never requested an accommodation (CP 530 at 58/5) – it was always provided to him. Neither Cox nor Les Schwab has ever articulated why or how the reasonable accommodation that it had provided to Peter since 1993, suddenly became unreasonable in the last three years that Peter worked for Les Schwab.

3) “[Peter] was removed from his position for performance reasons” (*id.*);

He was not; Peter was fired because his manager Rory Cox resented the flexibility that Peter required and in retaliation for his email of July 10, 2006.

4) [Peter] was “given 30 days to find an hourly position” within the company (*id.*);

Peter Atkinson was never offered another job with the company by Rory Cox when he was fired, and Cox would not have hired him again anyway. Mr. Atkinson testified that he was not told when he was fired that he “had 30 days to find a sales and service position” in the company. Instead, he received a letter from Les Schwab informing him of this after he was fired. CP 70 at 6-14; CP 73 at 15-18. Les Schwab sent a letter to Mr. Atkinson dated April 3, 2006, telling him he had thirty (30) days to find and apply for a wage-level job in the company. CP 73 at 19-21. Mr. Atkinson very

likely received this letter on or about the 30-day anniversary of his firing.

- 5) *Peter Atkinson filed for FMLA and SSA benefits and stated in each application that he was “completely unable to work due to his migraine condition” (id.);*

See discussion of Cleveland v. Professional Management Services, *infra*.

- 6) *“SSA granted [Peter’s] total disability claim and he has received monthly total disability benefits for the past three years” (id.);*

See discussion of Cleveland v. Professional Management Services, *infra*.

- 7) *“Mr. Atkinson’s doctor certified that he was entirely unable to work as of March 2009” (id.);*

As her testimony above reveals, Dr. Robinson told Peter that he was unable to work from the symptoms he described. She did not know that Peter worked 70 hours a week on a regular basis, instead of 40, and frequently without breaks or meals. **Dr. Robinson’s opinion was that Peter could not continue to work under Rory Cox’s onerous conditions; not that Peter could not work a 40 or a 50 or 60 hour week with reasonable accommodations.**

- 8) *Les Schwab implied that Peter Atkinson committed a “federal crime” because it is unlawful “to conceal a material fact or knowingly make a false statement in seeking such benefits.” (Id).*

Peter Atkinson has never committed a crime or been charged with a crime; nor did he commit any wrongful act in connection with his SSA disability benefits, as the Cleveland case holds.

After one continuance granted under CR 56(f), Judge James W. Lawler<sup>2</sup> heard oral argument on Les Schwabs' motion for summary judgment on Friday, November 10, 2012. Les Schwab argued:

The discrimination claim fails because, among other things, immediately after being removed from his position for performance reasons . . . Atkinson filed for Family and medical Leave Act (FMLA) leave and total disability benefits from the Social Security Administration (SSA). Both applications stated Mr. Atkinson was completely unable to work due to his migraine condition. SSA granted his total disability claim and he has received monthly total disability benefits for the past three years . . . In short, Les Schwab did not terminate Mr. Atkinson because of his migraines, but, regardless, he could not have worked in any event because, according to his own representations and SSA's finding, he was totally disabled. He cannot now legitimately contend otherwise.

CP 21 at 7-16.

However, Les Schwab conspicuously failed to cite any legal authority to support its argument for dismissal on this basis.

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<sup>2</sup> See CP 989 at 4-5.

Les Schwab also argued that Davis v. Microsoft, 149 Wn.2d 521, 532 (2003), required the dismissal of Peter's WLAD claim because his demands for an accommodation were unreasonable – even though **the defense conceded that no demand for accommodation was ever even made by Peter:**

Most important, as a matter of law, Mr. Atkinson was not entitled to the accommodation of his choosing and Les Schwab was not required to eliminate or modify essential functions of the job as an accommodation. [Citations omitted]. Yet, **the accommodations Mr. Atkinson never sought** but now insists he needed and should have received are just that – a request to fundamentally change his job duties. As first assistant manager, given the demands of the job, he could not be assured of an uninterrupted lunch or uninterrupted breaks whenever he wanted. Nor could he have the flexibility to arrive late or leave early at a moment's notice. He had a store to run. Most significantly, he could not transform his first assistant manager position into a 9-5 job. As explained above, this was a 70-80 hour a week job and he was compensated accordingly. Davis v. Microsoft Corp., 149 Wn.2d521, 532-535, 70 P.3d 126 (2003) (explaining that employee who could not work beyond 40 hours per week due to disability was not qualified to perform essential functions of job).

CP 30 at 17-CP 31 at 2. (**Emphasis added**).

After oral argument, Judge Lawler ruled from the bench that he was granting Les Schwab's motion on two grounds.<sup>3</sup> Judge Lawler relied primarily on Les Schwab's factual argument that Peter Atkinson's application and approval for disability benefits was fatally inconsistent with his WLAD suit against Les Schwab. The court reasoned that Peter could not claim he was totally disabled for purposes of applying for Social Security benefits, and simultaneously claim he was able to work (albeit with an accommodation) in his suit against Les Schwab.

To a much lesser extent the court relied on the holding in Davis v. Microsoft, in which the court apparently misapprehended that the plaintiff had requested accommodations which were unreasonable.

On November 13, 2012, (the Monday following the court's Friday ruling), the plaintiffs filed their motion for reconsideration. (CP 986-995). The plaintiffs briefed Cleveland v. Professional Management Services, 526 U.S. 795 (1999), in support of their argument that the court erred entirely in its analysis of Peter's

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<sup>3</sup> Although there is no report of proceedings, the court's decision from the bench is described in the plaintiffs' motion for reconsideration (CP 986-995), the defendant's opposition (CP 1014-1021), and the plaintiffs' reply (CP 1096-1105).

application for disability benefits. As the plaintiffs stated in their motion for reconsideration:

Cleveland v. Professional Management Services Corporation, 526 U.S. 795 (1999), was not cited by either party in pleadings or argument. The Cleveland decision preempts the defendant's entire argument concerning allegedly inconsistent positions taken by Peter Atkinson in various applications for government benefits after he was wrongfully fired by Les Schwab. The Cleveland Court held that such inconsistencies are not a basis for the CR 56 dismissal of a suit under the Americans with Disabilities Act (ADA), at least where the plaintiff has an explanation for the inconsistencies. Such an explanation creates an issue of fact for the jury and takes the case out of the ambit of CR 56. The holding in Cleveland would be adopted by our state courts here in Washington, which expressly look to federal authority in interpreting our ADA-counterpart, the WLAD. The plaintiffs are unable to find a single state court which has rejected Cleveland on identical facts, such as the instant case.

CP 991 at 3-16.

In a footnote, the plaintiffs cited several Washington cases which relied on the ADA to interpret the WLAD. For example, in McClarty v. Totem Elec., 157 W.2d 214 (2006), our State Supreme Court abandoned the long-time definition of "disability" under the WLAD, and adopted the definition in the Americans with Disabilities Act of 1990.

Regarding the trial court's citation to Davis v. Microsoft in its ruling from the bench, the plaintiffs stated in their motion for reconsideration:

The defense implicitly concedes that Peter Atkinson did not "request" any accommodation at any time before he was fired. Davis therefore has no application to the plaintiffs' action because Peter never requested any accommodations from his employer as the record proves; nor is there any indication in the record that Les Schwab believed the accommodations it provided to Peter for his entire career, were unreasonable. In fact, there is no evidence in the entire record of this case that Peter ever requested anything from Les Schwab. Instead, he reasonably believed that the company would simply continue to provide the same, modest accommodations that it always had. On the basis of the defendant's vigorous arguments, however, the Court cited Davis during its ruling from the bench on November 9, as a second basis for its dismissal of the case.

This case is not about Les Schwab's failure to provide a requested accommodation, but a rogue manager's arbitrary and capricious withdrawal of modest and reasonable accommodations that had always been provided to the plaintiff.

CP 992 at 9-CP 993 at 5. (Emphasis in original).

**B. Les Schwab Failed To Carry Its Burden On Summary Judgment.**

A trial court's ruling on a motion for summary judgment is reviewed *de novo*. Castro v. Stanwood School Dist. No. 401, 151 Wn.2d 221, 86 P.3d 1166 (2004); Jones v. Allstate Ins. Co., 146

Wn.2d 291, 45 P.3d 1068 (2002). Summary judgment is only proper if there are **no genuine issues of material fact** in dispute and the moving party is entitled to judgment as a matter of law. *Id.* When reviewing the evidence in the context of summary judgment, a reviewing court does so in the light most favorable to the nonmoving party. Jones, supra, 146 Wn.2d 300.

“[I]n employment discrimination cases, summary judgment in favor of the employer is seldom appropriate.” Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 144 (2004). This is true even where the employer articulates a legitimate, non-discriminatory reason for the challenged employment decision, thus shifting the burden to the plaintiff to prove the articulated reason is pretextual. Johnson v. DSHS, 80 Wn.App. 212, 229 (1996). This is because “the question of an employer’s intent to discriminate is ‘a pure question of fact.’ ” *Id.*

**C. The Atkinsons Met Their Burden Of Proof In Establishing The *Prima Facie* Elements Of Claim For Discrimination Under The WLAD.**

**1. Les Schwab Discriminated On The Basis Of Disability**

An employer commits an unfair practice if it refuses to hire, terminates, or otherwise discriminates based on “the presence of

any sensory, mental or physical disability.” RCW 49.60.010, .180(1)-(3).

## **2. Peter Atkinson Received Disparate Treatment**

Under the WLAD, “an employer who discharges, reassigns, or harasses for a discriminatory reason faces a disparate treatment claim; an employer who fails to accommodate the employee’s disability, faces an accommodation claim.” Pulcino v. Fed. Express Corp., 141 Wn.2d 629, 640, 9 P.3d 787 (2000); Jane Doe v. The Boeing Co., 121 Wn.2d 8, 17, 846 P.2d 531 (1993).

## **3. Peter Atkinson’s Accommodation Was Taken Away Without Notice**

The WLAD requires employers to reasonably accommodate a disabled employee. Pulcino v. Federal Express Corp., 141 Wn.2d 629 (1998). Even if an employer does not discriminate in hiring, promoting, or firing a disabled employee, the failure to provide an accommodation to a disabled employee constitutes a violation of the WALD. Peter was entitled to accommodation based on his disability which Les Schwab properly since it hired him. His store manager resented the accommodation which Les Schwab has always provided because he was ignorant of the nature and extent of Peter’s disability, and equally ignorant of his own obligations

under the WLAD. The accommodation was therefore gradually withdrawn.

#### **4. Cox Retaliated Against Peter Atkinson**

Peter repeatedly made requests to take breaks or time off as a result of his disability, which were denied by Cox. This likely occurred during the entire time that Peter Atkinson worked under Cox, but especially from 2006 to 2009. Thereafter, Cox developed an animus for Peter based on the July 10, 2006 email which caused him to 1) work Peter harder, 2) complain when Peter became affected by his disability, 3) overtly criticize Peter, 4) undermine his authority with the store employees, 5) all as a pretext for a wrongful termination. All or most of Cox's wrongful conduct after 2006 was in direct retaliation for the 2006 email which Peter sent to Cox's superiors, reporting his assertion to Peter: "

#### **5. Cox Created A Hostile Work Environment**

Both the ADA and the WLAD recognize a disability-based hostile work environment claim. See Robel v. Roundup Corp., 148 Wn.2d 35 (2002). The plaintiff must prove 1) that he is disabled within the meaning of the WLAD; 2) that the harassment was unwelcome; 3) that it was because of the disability; 4) that it

affected the terms and conditions of the employment; and 5) that it was imputable to the employer. *Id.* at 148 Wn.2d 45.

In order to impute the discrimination to the employer, the employee must show that the wrongful conduct was 1) committed by a manager, or 2) that the employer knew or should have known of the wrongful conduct and failed to take corrective action. *Id.* at 148 Wn.2d 44.

**D. The Trial Court Abused Its Discretion By Denying Plaintiff's Second Motion For Sanctions, Thus Depriving The Plaintiffs Of The Ability To Defend Against The Motion For Summary Judgment; And Striking Entire Declarations When Only Portions Were Objectionable**

The evasive answers by Les Schwab's lawyer to dozens of Requests for Admissions left the plaintiffs with no choice but to depose the defendant's speaking agent. CP 719-760. The first deposition resulted in 76 separate instructions not to answer a question by Les Schwab's lawyer. The trial court ordered a second deposition at the expense of Les Schwab, which produced even more obvious efforts to obstruct discovery. The speaking agent responded with "I don't know" or words to that effect, in response to 131 basic questions. All of the discovery sought by the plaintiffs was directly material to issues and arguments raised by Les Schwab in its motion for summary judgment. The plaintiffs were

prejudiced in their efforts to defend the motion by their inability to obtain this discovery.

Evidentiary rulings are reviewed for an abuse of discretion. Hoglund v. Meeks, 139 Wn.App. 854, 875, 170 P.3d 37 (2007). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or untenable reasons. Mayer v. Sto Industries, Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

The conduct of the defense in obstructing the discovery sought by the plaintiffs was so consistently improper, and so clearly prejudicial to the plaintiffs, that the court should not have hesitated to impose sufficient sanctions to compel the production of the necessary discovery. Instead, the court permitted the defendant to avoid producing discovery, which resulted in the loss of the motion for summary judgment.

The striking of the declarations of the plaintiffs' witnesses, on the claim that parts were based on hearsay, was also an abuse of discretion. (See Les Schwab's motion to strike at CP 795-802 and the Atkinson's opposition at CP 915-926). Even if portions of the declarations were inadmissible, the trial court's order should have stricken only those portions which were truly inadmissible. The

failure of defense counsel to obtain a more specific ruling, or a more specific order for the record, was also prejudicial to the plaintiffs. For these reasons, the ruling of the trial court should be reversed and the declarations considered.

## VI. CONCLUSION

For all of the foregoing reasons, the plaintiffs respectfully request that the Court reverse all adverse decisions of the trial court, as specified in the assignment of errors, and remand this case for trial.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of April, 2013.



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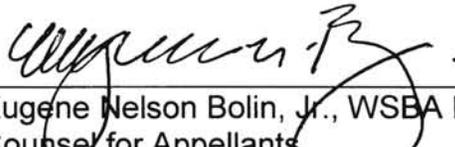
## DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the below date, I electronically transmitted a true and accurate copy of appellants' amended opening brief to counsel for respondent at the following addresses:

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