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NO. 51996-8-II

Pierce County Superior Court Case No. 16-2-05677-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAY WRIGHT,

Appellant,

v.

MATTHEW DAVID FERGUSON,

Appellee

REPLY BRIEF OF APPELLANT

SEBRIS BUSTO JAMES

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I. INTRODUCTION

The fee shifting portion of the Long-Arm Statute was designed to protect successful, out-of-state defendants who are hauled into Washington Courts from incurring unfair incremental expenses and costs. *Scott Fetzer Co. V. Weeks*, 114 Wn.2d 109, 120, 786 P.2d 265 (1990). Ferguson’s Brief (“Resp. Br.”) urges the Court to affirm a denial of an award of fees pursuant the Long-Arm Statute and CR 11 to an out-of-state defendant, Jay Wright, even though the record clearly establishes that Wright, the prevailing party in the litigation, incurred a substantial amount of legal fees in excess of those he would have incurred in his home state of Maryland defending the claims, frivolous and unmeritorious claims, brought against him by Ferguson here in Washington. Wright is precisely the defendant that the fee shifting section of the Long-Arm Statute was designed to protect.

As explained in greater detail below, Ferguson does not even attempt to rebut the key points of Wright’s appeal:

- Wright incurred incremental costs and fees solely based on travel. Instead, Ferguson incorrectly argues that these fees and costs are not recoverable. *See* Resp. Br. 12-16.
- Wright incurred substantial costs and fees defending a claim of wrongful discharge in violation of public policy (which could not have been brought in Maryland) even though Wright was not Ferguson’s employer and did not discharge Ferguson from employment as required by the law. Instead, Ferguson claims that Wright did not raise a frivolous choice of law objection,

which is not relevant to the issues of this appeal. *See* Resp. Br. 16-17.

- Wright would have prevailed on summary judgment in Maryland and saved over 90% of the fees he incurred in this case. Ferguson’s citation to an outdated and superseded 1980 Maryland case is incorrect.
- Wright could have represented himself pro se in Maryland, his home state, but could not have done so thousands of miles from his home. *Compare* App. Br. 17-21 *with* Resp. Br. 23-27.
- CR 11 sanctions are proper as Ferguson had no evidence to support his claim that Wright had wrongfully discharged him and maintained that claim for over 17 months driving up Wright’s attorneys’ fees. *See* Resp. Br. 27-32.

In short, Ferguson fails to refute Wright’s core points. Instead, he tries to muddy the issues by “re-litigating” his failed case before the jury and obfuscating by discussing irrelevant facts, and attempts to discredit Wright’s brief by inaccurately alleging that it is not supported by evidence. Wright requests that the Court reverse the trial court’s order denying his legal fees, award Wright the additional \$380,431.92 he incurred in legal fees defending the action in Washington plus the costs of this appeal, and deny Ferguson’s request for fees incurred on appeal.

II. REPLY ARGUMENT

The Long-Arm Statute’s purpose is to recompense an out-of-state defendant for his reasonable efforts while also encouraging the full exercise of state jurisdiction. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149, 859

P.2d 1210 (1993). Its purpose is not to simply punish frivolous litigation or encourage meritorious litigation; it is to compensate a prevailing out-of-state defendant. *Id.* Wright was the prevailing out-of-state defendant and should have been awarded attorneys fees. Courts have not yet established a foolproof formula to calculate the fees to be awarded to a prevailing out-of-state defendant; however, a trial court abuses its discretion if its finding is not supported by any evidence. *See e.g., Folwiler Chiropractic, PS v. Fair Health, Inc.*, No. 75864-1-I, 20-21, 2018 Wash. App. LEXIS 1266, 20-21 (Ct. App. 2018) published at 4 Wn. App. 2d 1001 (2018) (holding that a court abused its discretion when it found that it would not have been more expensive for defendant to litigate in Washington versus its home state without evidence to substantiate that finding). The trial court in this case had substantial evidence that it was more expensive for Wright to litigate in Washington than it would have been in his home state of Maryland, but abused its discretion by ignoring it.

A. Wright's Costs and Fees are Recoverable under RCW 4.28.185(5).

i. Wright's Costs and Fees for Travel.

Ferguson claims that Wright is not permitted to recover costs for travel and associated expenses. *See* Resp. Br. 12-16. This is incorrect. Under the Long-Arm Statute, RCW 4.28.185(5), Wright may recover for

the “burden and inconvenience which would have been avoided had the trial been conducted at the place of his domicile,” Maryland. *Chem. Bank v. Wash. Public Power Supply Sys.*, 104 Wn.2d 98, 102, 702 P.2d 128 (1985).

The burden and inconvenience of having to attend a two week trial on the opposite coast from his home, though relatively inconsequential in the grand scheme of things, is substantial when evaluated by itself. Wright was forced to travel, pay for a hotel, and not engage in his regular business providing consulting services and teaching for two weeks. CP 1493:1-8. Ferguson does not dispute this. The trial court failed to consider these added burdens and inconveniences and instead based its decision on the fact that there were witnesses residing in Washington. CP 1650:4-8. That point is irrelevant as not a single non-party witness appeared for trial. The only trial witnesses lived outside of Washington. CP 1493:12-15. All three of the individual defendants resided on the East Coast. CP 1488:16-18. Even Ferguson lives on the East Coast. *Id.* The cost of the litigation was higher in Washington than in Maryland.

The fact that no one resided in Washington should have been factored into calculating the recoverable costs under the Long-Arm Statue. Ferguson does not and cannot dispute that Wright incurred an increased amount in costs and fees defending against this action in Washington due to his travel and lodging. Wright requests that this Court reverse the trial

court's ruling and award him the costs he incurred for travel to and lodging in Washington for purposes of this litigation.

ii. Defending the Wrongful Discharge Claim.

From the inception, Wright has fought Ferguson's claim of wrongful discharge as it (1) was frivolous and lacked any evidentiary support and (2) could not be maintained under Maryland law where the alleged tort of wrongful termination would have supposedly happened under Ferguson's narrative.¹ Ferguson claims that Wright cannot recover his fees for defending the wrongful discharge claim because Maryland law would not have applied to the claim and because Wright did not raise choice of law issues with the trial court.² *See* Resp. Br. 16-17. Both arguments fail.

Ferguson has claimed that Wright defended Ferguson's allegations too zealously, unnecessarily driving up the cost of this litigation. *See* Resp. Br. 26-27. Now Ferguson claims that Wright should have litigated more; specifically, the issue of choice of law by demanding that a Washington

¹This issue was fully briefed to the trial court in December 2016 where Wright demonstrated that in most, if not all, states outside of Washington Ferguson's claim for wrongful discharge would fail. *See* CP 12-13.

²Wright did raise the choice of law issue with the trial court. In his motion for attorney's fees, Wright briefed the applicability of Maryland law to Ferguson's claims. CP 1491. Wright also briefed the due process issue which Ferguson claims was not brought up before the trial court. CP 1618. Wright had raised early and often his Maryland domicile and the non-existence of Ferguson's claims under non-Washington law.

court apply Maryland law even though a Washington court would not have applied Maryland law, thus the briefing would have been a waste of efforts.

Ferguson, himself, placed the alleged tort in Maryland. He claimed that his termination occurred at the time that Wright, the supposed “tortfeasor,” allegedly instructed that his separation letter be drafted. CP 282:19-20; CP 282:19-283:4. Wright was in Maryland at all relevant times. *Id.* Maryland’s choice of law for torts, such as wrongful discharge, is *lex loci delicti* or the place of the tort. *Hauch v Connor*, 295 Md. 120, 124-125, 453 A.2d 1207 (1983). Under *lex loci delicti*, where damage may occur or where notice of the tort’s occurrence is given is irrelevant. *Id.* at 125. The applicable tort law is that where the incidents of the act giving rise to the injury occur. *Id.* And, where the tort allegedly occurred determines the substantive law of the case. *Id.*; *see also White v. King*, 244 Md. 348, 352, 223 A.2d 763 (1966). Ferguson claims the “tort” happened in Maryland when Wright allegedly terminated him and memorialized said termination in a letter that Wright allegedly had sent. Had Ferguson brought his claims in Maryland, the Maryland court would have applied Maryland, not Washington, law to that claim.

Recognizing that Maryland law might in fact apply to his wrongful termination claim, Ferguson argues that such a claim may be maintained in Maryland against an individual. *See Resp. Br. 19.* This is true only in

certain limited circumstances that are not applicable here. Maryland law allows such a cause of action only against someone or an entity that can be said to have discharged the former employee – *i.e.*, the employer. *Adler v. Am. Standard Corp.*, 291 Md. 31, 47, 432 A.2d 464 (1981). Ferguson cites two cases in support of his argument; however, those cases confirm the fact that no wrongful discharge claim could be maintained against Wright. First, in *Moniodis*, the court explicitly stated that there is no “additional cause of action for wrongfully discharged employees against an individual officer of a corporation, at least where the evidence does not show that the officer was clothed with the essential attributes of an employer.” *Moniodis v. Cook*, 64 Md. App. 1, 13, 494 A.2d 212 (1985) (holding no liability for defendant). Further, the *Moniodis* court looks to only that officer which “*primarily* formulates the corporation’s decision to fire a particular employee...” *Id.* at 14 (emphasis supplied). Second, in *Bleich*, though the court found individual liability, the individual was the CEO, like defendant CEO Sackler was in this case, and had the ultimate authority to fire the Plaintiff. *Bleich v. Florence Crittenton Servs.*, 98 Md. App. 123, 144-145, 632 A.2d 463 (1993).

Wright was not Ferguson’s employer. CP 3:13-20. Silverbow was. Wright was not even his supervisor. *Id.* Defendant CEO Sackler was. Wright did not terminate Ferguson’s employment – Ferguson testified as

such. CP 1489:10-12. Despite his own testimony that Wright did not terminate his employment and was therefore not the person who “primarily” decided to fire Ferguson, Ferguson still maintained the wrongful discharge claim against Wright.³

The trial court found that there was no evidence that Ferguson reported any alleged misconduct to Wright. CP 1524:16-1525:4; CP 1630:16-21. Thus, even if Wright had terminated Ferguson’s employment, which he had not, he could not have done so wrongfully as he did not know that Ferguson reported any alleged misconduct.

Lastly, Ferguson does not contest that pursuant to *Parks v. Alharma*, an allegation of an employer violation of a consumer protection statute does not qualify for a claim of wrongful discharge in violation of public policy. *Id.*, 421 Md. 59, 82-83, 25 A.3d 200 (2011). Ferguson’s allegation of being instructed to violate a consumer protection statute is akin to the argument made in *Parks* which the Maryland court explicitly rejected. *Id.* at 87. The real cost to filing in Washington is that Wright would not

³Ferguson’s own sworn declarations state that Sackler was the person who terminated his employment. *See e.g.*, CP 242. His testimony confirms that Wright was not responsible for the termination, much less primarily responsible. The trial court, too, recognized that Sackler was the person primarily responsible: “the action by Silverbow Honey Company and by CEO Sackler, certainly, was willful as that term is defined by case law.” 2/24 RP 10:17-20.

have had to defend this claim in Maryland, his home state, and should recover all fees related to the defense of the wrongful termination claim.

iii. Defending the Wage Withholding Claim.

Ferguson cannot rebut the fact that Wright would have prevailed on a motion for summary judgment in Maryland even if a Maryland court would have applied Washington substantive law on the wage withholding claim. Unlike in Maryland, Washington allows leniency to survive a motion for summary judgment. *See Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 256-57, 616 P.2d 644 (1980). The cases that Ferguson cites explicitly stand for the proposition that Maryland has no such leniency as in Washington. “[W]hen there is no dispute of material fact, a trial court does not have any discretionary power when granting summary judgment ...” *Dashiell v. Meeks*, 396 Md. 149, 164, 913 A.2d 10, 19 (2006). Under Maryland procedural law, a judge may only consider actual submitted evidence, affidavits and other facts in the record, when ruling on a motion for summary judgment. Maryland Civil Rule 2-501(a).⁴

⁴Importantly, Ferguson’s brief incorrectly relies on an outdated 1980 case, *Metropolitan Mortgage Fund v. Basiliko*, when analyzing Maryland’s summary judgment standard. Resp. Br. 22. *Metropolitan Mortgage Fund* predates the adoption of the current Maryland Civil Rule 2-501(a) and the key trilogy of U.S. Supreme Court decisions in 1986 interpreting the federal analogue of Maryland’s summary judgment standard. 288 Md. 25, 415 A.2d 582 (1980); *Celotex v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986).

Wright’s Motion for Summary Judgment was denied based on a hypothetical set of facts not supported by the evidence. Upon then counsel’s argument that Ferguson’s own admissions and lack of real evidence required a dismissal of the case, the trial court ruled that what Ferguson actually said did not matter – that hypothetically something else could have happened – but such evidence never existed. CP 564:21-565:1. With the facts in evidence submitted by Ferguson, that, “[defendant CEO] Sackler voiced his position that no wages would be paid...,” Wright would have succeeded on a motion for summary judgment. CP 284:8-10.⁵ Sackler terminated Ferguson’s employment and made the relevant wage decision, not Wright. There was no evidence in the record to hold Wright individually liable.⁶

Maryland looks to the federal rules for interpretative guidance. *Frush v. Brooks*, 204 Md. 315, 320-321, 104 A.2d 624 (1954). The rules today are different than they were in 1980 and Ferguson’s reliance on outdated case law is misplaced.

⁵For Wright to be held liable for Ferguson’s alleged withheld wages, Wright would have had to have authority to exercise control over the direct payment of the funds and have acted pursuant to that authority. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 521-22, 22 P.3d 795 (2001). There was never any evidence of either proposition (much less both) outside of a hypothetical set of facts. The jury ruled accordingly.

⁶The trial court recognized the lack of real evidence: “Isn’t that a problem? I mean, what you are saying is, look, we don’t know whether or not Mr. Wright knew about any of these. We can’t prove it.” 1/13 RP 34:20-23. Nevertheless, the trial court, on the basis of hypothetical evidence, rejected Wright’s motion for summary judgment.

But for Ferguson filing suit in Washington and being able to use hypothetical evidence to survive summary judgment, Wright would not have incurred the substantial legal fees defending the wage withholding claim through trial.

iv. Wright Could Not Have Reasonably Represented Himself Pro Se In Washington.

Ferguson argues that Wright did not challenge the court's finding that he presented no evidence to support the position that defense of this case in Washington was more costly for him than in Maryland. *See* Resp. Br. 23. Wright challenged this finding as he presented evidence showing that he would have been able to represent himself pro se in Maryland. CP 1493:1-8. The trial court ignored this evidence and ruled that Wright could have similarly represented himself pro se in Washington.

In his home state of Maryland, Wright would not have to travel great distances and could talk with local lawyers he knows to give him tips on handling the litigation. CP 1492:23-28. In Washington such an opportunity was unavailable. Wright had no connections in Washington. He had never visited Tacoma. He has a family and business obligations in Maryland.

Ferguson attempts to discredit this point by stating that Wright could have handled the entire litigation from his home in Maryland because the time difference would have allowed "for the hearings to be conducted over

the lunch hour.” *See* Resp. Br. 24. Ferguson expected Wright to litigate a million dollar case during the lunch hour on a speaker phone with no other preparation, no face time with the judge deciding the motions, and with no familiarity with Washington. *Id.* Coincidentally, Ferguson does not attempt to rebut the fact that Wright would have been substantially prejudiced if he appeared for hearings via telephone. *Id.* Wright could not have effectively defended himself if he were only “present” in the courtroom by speaker phone with no lawyer in the room on his behalf.⁷ By suing in Washington and asserting jurisdiction under the Long Arm Statute, Ferguson inevitably made defending the case more expensive than if Wright had been sued in Maryland.

Wright had to hire Washington counsel. Despite Ferguson’s efforts to now diminish the magnitude of his own claim, Wright was facing the potential of a large judgment against him and exposure to a misdemeanor criminal charge.⁸ Ferguson’s claims were not limited to the \$70,000 wage

⁷Ferguson points to no statute or case law precedent that requires a person to represent himself to be eligible for relief under the Long-Arm statute. It does not exist. Wright as the prevailing defendant is eligible to recover his additional expense of defending a suit brought in Washington, not his home state of Maryland, regardless of his decision to hire counsel in Washington.

⁸The Washington wage statute is a criminal statute and when Ferguson brought the case the 1-year statute of limitations had not run for a criminal action to be brought. Wash. Criminal Code Section 9A.04.080(1)(k). A verdict that Wright had violated Washington law would have haunted Wright for the rest of his life and could have affected his ability to hold public service jobs, board positions, and other roles where a person must be beyond reproach to be considered.

withholding claim. Ferguson's first demand was \$246,300. CP 1643. This demand was prior to the potential for hundreds of thousands of dollars of Ferguson's legal fees, higher compensatory damages than initially demanded, and a potential multiplier on attorneys' fees as permitted under Washington law. *See Morgan v. Kingen*, 141 Wn. App. 143, 165-166, 169 P.3d 487 (2007). If Wright had lost at trial, he would have faced a potential \$1 million judgment.

Ferguson's strategic choices – *e.g.*, asserting individual liability claims for wrongful termination and for unpaid wages without actual evidence – unfairly increased the costs for Wright. Wright was forced to try and prove a negative – fortunately he succeeded. The trial court arbitrarily ruled that Wright did not incur any additional fees by having to hire counsel in Washington when he could have represented himself *pro se* in Maryland.⁹

There is no exact number that can be provided for how much defense of these claims would have cost in Maryland – the claims were not litigated there. The trial court should have used a reasonableness test under *Fetzer* to calculate this number. Wright argued below and submits to this court

⁹The trial court admitted that Mr. Wright's legal fees were reasonable and not excessive. "[W]hile not submitted, the Court suspects that Plaintiff's attorneys' fees were similar to those incurred by Defendant." CP 1649:22-23.

that using a 15% number as a deduction for the amount of fees he would have incurred in Maryland proceeding pro se is reasonable and therefore requests \$380,431.92 of fees plus the costs of this appeal pursuant to Rule 18.1. CP 1493:18-20.

B. Wright is Entitled to Fees Pursuant to Civil Rule 11.

Washington Civil Rule 11 (“CR 11”) should deter baseless filings and curb abuses of the judicial system. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). Thus, a pre-filing investigation is required by the parties to ensure that sufficient evidence to bring or maintain a claim exists. *Id.*; see *Lee v. Jasman*, 183 Wn. App. 27, 71, 332 P.3d 1106 (2014). Its underlying public policy is to protect defendants, especially those from out-of-state, from meritless claims and protect the judicial system from needlessly expending its resources.

Ferguson does not dispute that he never had any evidence implicating Wright in the wrongful discharge claim, yet he maintained this claim as leverage and unnecessarily drove up Wright’s fees. Not only did Ferguson not present any evidence to bring this claim, he himself admitted that defendant CEO Sackler, not Wright, fired him. CP 1489:10-12. Ferguson’s counsel admitted at oral argument that there was no evidence to support his claim and further stated she did not believe that there would ever be any evidence tying Wright to the allegation. CP 1524:16-1525:4; CP

1525:16-21. Even during his deposition, Ferguson admitted there was no evidence to support the claim of wrongful discharge against Wright. CP 1535:8-15. Despite this, Ferguson maintained the claim only to dismiss it in the eleventh hour before trial. Wright was forced to defend this frivolous claim solely because Ferguson continued to pursue it.

There is no “wisdom of hindsight” at issue here because sanctions are proper not solely because Wright prevailed in the action, but because Ferguson repeatedly admitted to not having any evidence to support his claim for wrongful discharge against Wright, yet he maintained it. Ferguson admits that a case not “well grounded in fact” is a basis for a CR 11 award. *See* Resp. Br. 28. Admitting that he had no evidence, as Ferguson did, is the most conclusive way to determine that a claim is not well grounded in fact. The purpose behind CR 11 should be upheld thereby reversing the trial court’s decision to not grant Wright legal fees for defending the hypothetical wrongful termination claim.

C. Ferguson is Not Entitled to Fees Incurred on Appeal.

“An appeal is frivolous only when there are no debatable issues which reasonable minds could differ and when the appeal is so totally devoid of merit that there was no reasonable possibility of reversal.” *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691-92, 732 P.2d 510 (1987). In this analysis, the *Mahoney* court examines the record as a whole and doubts

are resolved in favor of the appellant. *Id.* An appeal that is affirmed simply because the arguments are rejected is not frivolous. *Id.*

Here, Wright appeals the trial court's decision denying his award for attorney's fees because it abused its discretion when it did not take into consideration any of the evidence Wright presented in support of his motion for fees. Wright lives in Maryland, was forced to litigate in Washington under the Long Arm Statute, and successfully defended all of Ferguson's claims to verdict. He lost two weeks living in hotel over 2,000 miles from his home. Relevant case law under *Fetzer* requires a court to compare the costs of what were actually incurred versus what would have been incurred in Wright's home state of Maryland.¹⁰ The trial court made no attempt to compare fees; instead, it issued a summary denial of the Long-Arm claim and refused to even hear oral argument on the CR 11 claim. The finding that Wright did not incur any additional fees in defending this claim in Washington as opposed to Maryland, where he lives, is meritless and

¹⁰*Fetzer* looks solely at the prevailing defendant's fees and costs in Washington versus what they would have been in Maryland. *Id.*, 122 Wn.2d at 149-150. Other issues that Ferguson raises to attempt to diminish the significance of Wright's incurred expenses, such as analysis of Ferguson's potential costs in Maryland, are explicitly not part of the *Fetzer* framework. *Id.* Nevertheless, Ferguson's fees and costs too would have been less in Maryland because he could not have brought the wrongful discharge claim and because Maryland would have dismissed the wage withholding claim at summary judgment.

Ferguson's claim that Wright's appeal is frivolous cannot stand and his request for fees should be denied.

III. CONCLUSION

For the foregoing reasons, Wright requests that this court reverse the trial court's order denying his legal fees and award \$380,431.92 for legal fees and costs pursuant to RCW 4.28.185 and Civil Rule 11 plus the costs of this appeal and deny Ferguson's request for fees on appeal.

Dated this 13th day of December, 2018.

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CERTIFICATE OF SERVICE

I, Nani Vo, certify under penalty of perjury under the laws of the United States and of the State of Washington that on December 13, 2018, I caused to be served the document to which this is attached to the parties listed below in the manner shown next to their names:

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