

FILED  
Court of Appeals  
Division II  
State of Washington  
11/20/2018 8:00 AM

NO. 52031-1-II

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COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON

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**CHRIS JONES and KATRINA JONES,**

Appellants,

v.

**DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE  
OF WASHINGTON,**

Respondent.

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**REPLY BRIEF OF APPELLANTS**

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**TABLE OF CONTENTS**

I. INTRODUCTION..... 1

II. ARGUMENT ..... 3

    A. The trial court did not consider evidence under GR 34.. ..... 3

    B. The Department erroneously argues that the evidence presented satisfies none of the GR 34 factors..... 4

    C. Department erroneously argues that Appellants could have presented evidence of hardship to its former customers or workers. .... 6

    D. Attorney Fees and Costs..... 7

III. CONCLUSION ..... 8

## TABLE OF AUTHORITIES

### Table of Cases

*Nor-Pac Enterprises, Inc. V Dep't of Licensing*, 129 Wn. App. 556, 571-72, 119 P.3d 889 (2005). 7-8

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*Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). 4

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### Statutes

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RCW 34.05.550 5

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RCW 51.52.112 1, 2, 3, 6, 7

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### Regulations and Rules

Washington State Court Rules, General Rule number 34 (GR 34) 1, 2, 3, 4, 5

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## I. INTRODUCTION

Contrary to the Department's position, the Appellants, Mr. and Mrs. Jones, did in fact present substantial evidence of indigency and inability to pay \$106,000 assessment. However, the trial court erroneously declined to find undue hardship pursuant to RCW 51.52.112.

The Appellants disagree with the Department's assertion that the trial court first considered the evidence presented under GR 34, rejected the evidence or found it insufficient, and only then articulated an additional standard of undue hardship to the employers, which, in the trial court's view, would require a showing of hardship to the Appellants' workers or customers.

The Department asserts that the trial court first considered whether the Appellants' evidence satisfied the standards of GR 34 and only then articulated the additional factors of hardship to the employer's workers and customers. The Department provided no citation to any part of the record where the trial court applied the evidence presented to GR 34.

In reality, the trial court compared GR 34 with RCW 51.52.112 in that GR 34 applies to individuals whereas RCW 51.52.112 applies to employers. The trial court opined that, since the individuals and the employers are different, the hardship standards should likewise be different.

Ultimately, the trial court did not rule on the sufficiency of the Appellants' evidence of hardship under GR 34.

Instead, the trial court articulated a completely new standard of hardship – a showing of hardship to an employer's workers and customers - that, in trial court's view, should apply to the Appellants under RCW 51.52.112. This entirely different type of evidence was not, and could not have been, in the record, since the Appellants have gone out of business. However, since none of the evidence of hardship to any third parties was in the record, the trial court declined to find undue hardship.

Thus, the interpretation and definition of the "undue hardship" standard under RCW 51.52.112 is the key issue of contention on this appeal.

The trial court's interpretation of the undue hardship standard under RCW 51.52.112 was erroneous and simply unworkable, especially for those appellants who are no longer in business, and thus have no employees or customers, at the time they appeal the Department's assessment.

The Department asserts that evidence in the record shows that Dream Team had the ability to pay the assessed taxes; however, the Department did not cite to any part of the record that would support this assertion.

The Appellants therefore disagree with the trial court's ruling.

## II. ARGUMENT

### **A. The trial court did not consider evidence presented under GR 34; instead, it created a new interpretation of the undue hardship standard, which, in trial court's view, should apply to the employers under RCW 51.52.11.**

The trial court did not apply any of the GR 34 standards to the evidence presented. The trial court made no finding of whether the Appellants' evidence constituted undue hardship under GR 34. Instead, the trial court focused on a completely new standard of undue hardship in the context of RCW 51.52.112:

Applying the term "hardship" to employers I think is a little different than just indigency, and I say that in the context of GR 34, which is the context that this the Court typically looks into when waiving filing fees for a civil case, and also the case law regarding the waiver of filing fees.

In particular, on thing I just wanted to state for the parties is that the standard cited by the parties that includes an element of probable merit on the claim has been overruled by *Jafar v. Webb*. That case specifically talks about just looking at the financial resources of the party, and so I looked to a different kind of standard. I think, given this particular statute, hardship in this context, . . . might actually apply a little differently. As an employer, hardship might be considered by the Legislature to be: Would other people be put out of work, what would the ramifications be to other people, that kind of hardship, are there clients of the employer that would be put in a difficult situation, those sorts of things that I think are different than just showing indigency. I think that might be what the legislature meant for this particular statute when I look at all of that context.

RP 22-23. Contrary to the Department's interpretation of this ruling, and reading the trial court's ruling as a whole, the trial court rejected the application of GR 34 indigency standard to the employers and instead created a new standard for the employers – a standard that would require a showing of hardship to the employers' workers or customers. Since the Appellants had no workers or customers when they filed their appeal, and since this newly created standard was not and could not have been known to the Appellants prior to the motion hearing, it was impossible for the Appellants to meet this new standard.

The Appellants agree with the Department that such an interpretation of the trial court's undue hardship standard is "implausible and strained." RB 15. However, given the fact that the trial court did not rule on the sufficiency or credibility of presented evidence in the context of GR 34, there is no other interpretation of the trial court's ruling in this case.

**B. The Department erroneously argues that the evidence presented satisfies none of the GR 34 factors.**

The Appellants agree with the Department in that this Court should review the questions of law de novo and the question of fact under the substantial evidence standard. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). This Court should therefore review whether substantial evidence supports the trial court's factual findings and then

review, de novo, whether the trial court's conclusions of law flow from the findings.

However, with regard to the application of the facts of this case to GR 34, the trial court made no factual findings; therefore, there are no trial court's findings to be reviewed for substantial evidence in the context of GR 34. The Department attempts to complete the task of the trial court, that is, apply the criteria of GR 34 to the evidence presented by the Appellants. RB 16-21. However, the trial court did not complete this analysis.

The Appellants disagree with the Department's position that Appellants' evidence is insufficient, under GR 34, to show that they are unable to pay \$106,000 before proceeding with the merits of their appeal. Mr. and Mrs. Jones presented compelling evidence that their sole proprietorship had gone out of business and they became indigent. CP 65-119. Nothing in the record supports the Department's assertion that Mr. and Mrs. Jones have a source of funds to allow them to pay \$106,000.

In fact, had the Department located such a source of funds, it would have levied those funds already, since the Appellants have not filed a motion, and thus have not been granted any stay of collection or any other temporary remedy under RCW 34.05.550.

These Appellants simply do not have access to \$106,000. The Department does not cite to any part of the records that would support its allegation that the Appellants “likely secured” some “substantial earnings” to prepay the Department’s assessment. RB 20. The Department’s assertion is thus nothing more than pure speculation.

**C. The Department erroneously argues that Appellants could have presented evidence of hardship to their former customers or workers.**

The Department correctly points out that the Appellants presented no evidence that paying the assessment would constitute undue hardship to their customers or workers. RB 21. The Department argues that, even though the Appellants have gone out of business and thus have no current workers or customers, Mr. and Mrs. Jones could have present evidence of hardship to their “former” workers or “former” customers. RB 21.

However, the trial court mentioned nothing about former customers or workers. Moreover, the trial court’s undue hardship standard was new; it was not articulated to the parties prior to the motion hearing. The Department may have been just as surprised as the Appellants were puzzled when the trial court articulated its new standard of hardship under RCW 51.52.112. The Department certainly did not argue in its motion brief or during an oral argument that the Appellants failed to meet this particular

standard of hardship; this is probably because the Department did not know of its existence until it heard the ruling of the trial court. RP 22-23.

Moreover, the Appellants fail to see, even in theory, why or how a former customer or a former employee would suffer hardship due to a former employer's or a former seller's payment of an assessment or tax. This argument makes no reasonable sense to the Appellants, and it is a stretch of the trial court's standard for the showing of undue hardship under RCW 51.52.112.

#### **D. Attorney Fees and Costs**

The relevant part of the Equal Access to Justice Act ("EAJA") states:

Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

RCW 4.84.350(1). Should this Court hold that the Appellants prevail in this action, the Appellants ask this Court to award them their expenses and fees incurred at this Court, to the maximum extent allowed under EAJA, RCW 4.84.350(2). *See Nor-Pac Enterprises, Inc. V Dep't of Licensing*, 129

Wn. App. 556, 571-72, 119 P.3d 889 (2005). The Appellants ask an award of fees and costs so that they are reimbursed for the expenses associated with having to bring this appeal.

### III. CONCLUSION

For the reasons stated herein, the trial court's order should be reversed and the order of the undue hardship should be entered.

RESPECTFULLY SUBMITTED this 20th day of November, 2018.



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**November 19, 2018 - 5:28 PM**

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**Appellate Court Case Number:** 52031-1  
**Appellate Court Case Title:** Chris Jones and Katrina Jones, Appellants v. Dept. of L&I, Respondent  
**Superior Court Case Number:** 17-2-02420-9

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DECLARATION OF SERVICE

I, Lana K. Rich, declare under penalty of perjury pursuant to the laws of the State of Washington that, on the below date, I served the Reply Brief of Appellants, Mr. and Mrs. Jones, and this Declaration of Service in the below described manner:

**E-Filing via Washington State Appellate Courts Portal:**

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Clerk/Administrator  
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**E-Mail via Washington State Appellate Courts Portal:**

Steve Vinyard, Assistant Attorney General  
[Stevev1@atg.wa.gov](mailto:Stevev1@atg.wa.gov)

DATED this 20th day of November, 2018, in Bellevue, Washington.



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