

**FILED**

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 30245-8-III

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TORRY WEBB AND BRENDA WEBB, Appellants,

v.

JANEE WOLF, Respondent.

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**APPELLANT'S REPLY BRIEF**

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## I. INTRODUCTION

For brevity and clarity, in addition to the following, Appellant hereby reasserts and refers to the Introduction set forth in the original *Brief of Appellant*.<sup>1</sup>

### A. Summary of Key Issues

1. Award of Attorney's Fees: Did the trial court err in awarding attorney's fees in light applicable case law, RCW 49.48.030, lack of substantial evidence, findings of fact, and the trial court's decision.

2. Bona Fide Disputes: Do disputes over the *amount* of wages due, the *form* of wages due, and *employment status*, severally or collectively, constitute one or more bona-fide disputes thereby precluding a finding of willful withholding of wages.

3. Abuse of Discretion: Does a trial court's failure to issue an order releasing key witness depositions to a Pro Se Defendant, after being informed (at trial) that court approved third parties withheld certified copies of key witness depositions because Defendant "was not an attorney," constitute an abuse of discretion.

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<sup>1</sup> Submitted July 9, 2012

**B. Key Points of Appellant**

1. Award of Attorney's Fees: The Plaintiff's claim and suit were for \$60,000. The trial court found for Plaintiff \$30,000 (not the \$60,000 claimed). **The trial court's decision for \$30,000<sup>2</sup> was less than Plaintiff's claim of \$60,000.** Under applicable case law and the exception provided by RCW 49.48.030, attorney's fees are not appropriate if the recovery is an amount equal to or less than the amount originally offered and agreed to by the employer and claimed by the employee. (Emphasis added.)

2. Bona Fide Disputes

(a) *Amount of Wages*: Plaintiff claims defendant IDA owed her \$60,000, alleging an oral agreement with Defendant Webb to double the \$30,000 compensation due on her date of termination. The trial court rejected Plaintiff's contention that there was any agreement to double Wolf's compensation. Thus, is the dispute over the "amount of wages" a bona fide dispute?

(b) *Form of Wages*: Neither party disputes that Webb disputed the form of wages (cash vs. stock options). Thus, is a dispute over the "form of wages" a bona fide dispute?

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<sup>2</sup> The amount *agreed to* by Plaintiff and Defendants, and the amount Defendants *admitted owing* Plaintiff.

(c) *Employment Status*: Both parties disputed the employment status of Plaintiff from March 3, 2008 to September 1, 2008 (the “period in question”). Notwithstanding the fundamental dispute over the amount of wages due, that a majority of the testimony and trial was dedicated to this question illustrates *employment status* was the chief dispute between the parties.

### C. Key Points of Respondent

Notwithstanding the fact that Respondent **completely fails to address or acknowledge the most fundamental elements of wage complaints and disputes—the amount claimed**, and the fact that **Respondent admits IDA and Defendants Webb and Brunson disputed form of wages due at the time of trial** (as did the trial court), key points of the Respondent’s reply include (emphasis added):

1. Award of Attorney’s Fees: The Respondent asserts that various case laws directing liberal construction of relevant statutes and provisions, specifically RCW 49.48.030, coupled with the fact that Webb never stipulated the amount of compensation due Plaintiff was \$30,000 (cash), is sufficient for the trial court to ignore the plain text exception granted by RCW 49.48.030. Appellants disagree.

2. Willful Withholding of Wages: The Respondent essentially asserts that an informal ruling by L&I determining an employer/employee

relationship *and* an informal assessment to pay Plaintiff minimum wage, constitutes “willful withholding.” Appellants disagree.

## II. ARGUMENT

### A. Standard of Review

Appellant accepts Respondents argument regarding applicable standards of review.

### B. **The award of attorney’s fees pursuant to RCW 49.48.030 WAS IMPROPER because Defendants and Plaintiff agreed to wages of \$30,000 for services rendered (during the period in question) and Defendants did admit owing \$30,000 in wages to Plaintiff.**

Respondent states that Webb’s first assignment of error essentially assigns error to Conclusion of Law No. 8. This is incorrect.

Webb does assign error claiming the trial court awarded attorney’s fees in contravention of RCW 49.48.030, specifically the plain text exception granted thereby; however, Webb bases said claim on:

1. The Agreement between Wolf and Defendants was for \$5,000.00 cash<sup>3</sup> per month (Finding of Fact No. 4 – CP 296);
2. The finding of \$5,000.00 cash (Id. at CP 296) was for a total sum of \$30,000 for the six month period March 2008 to August 2008 (Finding of Fact No. 8 – CP 296);

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<sup>3</sup> The trial court found that Defendants did agree to pay “cash” to Plaintiff.

3. The finding that Webb “agreed ... to pay \$30,000.00 [cash] plus stock options ...” (Finding of Fact No. 9 – CP 297); Please Note: Finding of Fact No. 9, which finds stock options did exist (Id. “\$30,000 plus stock options”), completely contradicts Finding of Fact No. 6 (CP 296), finding that stock options “did not and still do not exist.”;

4. The finding that Wolf filed a complaint with Washington State Labor and Industries but voluntarily withdrew her claim because she “was not willing to accept less than the \$30,000 she was entitled” (Finding of Fact No. 10 – CP 297); and

5. The finding that Wolf was not paid for work from March 2008 to August 2008, “which was equal to 6 months pay or \$30,000 ...” (Finding of Fact No. 11 – CP 298).

Finally, respondent makes one final creative but inadequate attempt to reason that Webb and IDA never stipulated Defendants owed Wolf “cash” and therefore could not have “agreed” to \$30,000 cash, thereby justifying the award of attorney’s fees. (A tacit acknowledgement Defendants did “agree” to pay Wolf \$30,000, which would nullify any award of attorney’s fees.) Note: If accepted as true, the Respondent’s creative wording essentially makes for the Appellant, the Appellant’s case that a bona fide dispute did—and does—exit regarding the form of wages

agreed upon and to be paid Wolf—if it was not cash, it was in fact stock options.

Regardless, the aforementioned findings of fact and subsequent conclusions of law clearly show Wolf and Defendants agreed to sum wages of \$30,000 cash in February 2008 (conclusion of Law No. 1 – CP 298). Moreover, the trial judge stated in her final decision that \$30,000 is the amount Defendants admitted owing Wolf: “...*really, I don't see you as disputing that, Mr. Webb. You admit and agree that the company owes Janee Wolf \$30,000. That's not disputed. You admit that.*” RP 332, (emphasis added).

Thus, the award and judgment for \$30,000 was for (\$30,000) less than the \$60,000 claimed by Plaintiff *and* “equal to the amount Defendants admitted owing for said wages or salary” within the meaning of RCW 49.48.030’s exception for exemplary damages. Therefore, this court should reverse the award for attorney’s fees.

**C. Substantial evidence DOES NOT SUPPORT the trial court’s finding of willful withholding of wages.**

**1. Amount of Wages**

**Respondent fails to acknowledge or address the fact that the Plaintiff’s claim is for \$60,000** (emphasis added). Regardless of which allegation the courts accept as the basis for Plaintiff’s \$60,000 claim (i.e.

the \$60,000 promised by IDA President Scott Richey, or the doubling of \$30,000 per Plaintiff's termination meeting and subsequent promise by Webb to double said wages "because he felt bad"), the fact is the Plaintiff claimed she was owed \$60,000 (Exhibit 39, RP 44, 100).

Regarding Wolf's allegation to double said wages; the trial court found that Wolf's testimony was not credible and rejected her contention that an agreement was reached to double Wolf's compensation. (RP 333) The findings of fact further show that neither the Defendant nor Plaintiff agreed to \$60,000 for the six-month period in question. Specifically, the Agreement between Wolf and Defendants was for \$5,000.00 cash<sup>4</sup> per month (Finding of Fact No. 4 – CP 296) for a total sum of \$30,000 for the six-month period March 2008 to August 2008 (Finding of Fact No. 8 – CP 296).

"[L]ack of intent may be established either by a finding of carelessness or by the existence of a bona fide dispute." *Pope v. University of Wash.*, 121 Wash. 2d 479, 491, 852 P.2d 1055, 871 P.2d 590 (1993) "[A]n employer does not willfully withhold wages if there is a bona fide dispute as to the amount owed." *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 160, 961 P.2d 371 (1998).

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<sup>4</sup> The trial court found that Defendants did agree to pay "cash" to Plaintiff.

Substantial evidence, the facts of the case, and the record clearly illustrate a bona fide dispute over **the amount of wages**, establishing lack of intent. Thus, this court should reverse the finding of willful withholding.

## 2. Form of Wages

Neither Party disputes that Defendants disputed the form of compensation due Plaintiff. In fact, Respondent tries unconvincingly to use this fact as a means to say there was no “agreement” for wages because Defendants said wages were stock options. (Respondent’s Brief at 12). The trial judge further acknowledges the dispute over the form of wages to be paid: “*And again, it doesn't seem that, Mr. Webb, you really deny that the company owes Miss Wolf. It's just what is the form of compensation*” (RP 333).

Again, “[l]ack of intent may be established either by a finding of carelessness or by the existence of a bona fide dispute.” *Pope v. University of Wash.*, 121 Wash. 2d 479, 491, 852 P.2d 1055, 871 P.2d 590 (1993); “[A]n employer does not willfully withhold wages if there is a bona fide dispute as to the amount owed.” *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 160, 961 P.2d 371 (1998). and, “[i]f there is a bona fide dispute over the employee's entitlement to [the form of] the wages, the

refusal to pay is not willful.” *Moore v. Blue Frog Mobile, Inc.*, 153 Wn. App. 1, \_\_\_ P.3d \_\_\_ (2009).

Substantial evidence, the facts of the case, and the record clearly illustrate a bona fide dispute over **the form of wages**, establishing lack of intent. Thus, this court should reverse the finding of willful withholding.

### 3. **Employment Status**

Notwithstanding the fact that a substantial portion of the three-day trial was spent arguing the Plaintiff’s employment status (which cannot be characterized as anything other than a bona fide dispute between the parties), the Respondent attempts to rely solely on the Department of Labor and Industries (initial and informal) finding that an employee/employer relationship existed between the parties. The fact that L&I and the trial court disagreed with the Defendants’ position regarding Plaintiff’s employment status does not nullify or mean there was no *bona fide* dispute as to Wolf’s status as independent contractor or employee during the period in question. **The court cannot find a willful failure to pay if [1] the failure is the result of carelessness or error or [2] when a bona fide dispute exists as to the amount of wages owed or whether there was an employer/employee relationship.** *Schilling v. Radio*

*Holdings, Inc.*, 136 Wn.2d 152, 160, 961 P.2d 371 (1998) (emphasis added).

Respondent's chief contention for willful withholding is that L&I made Defendants aware of their (informal) assessment "that there was an employee/employer relationship obligating them to pay her in cash in June 2009" citing Finding of Fact No. 10 and RP 185-88. (Respondent's Brief at 17).

First, nowhere in Finding of Fact No. 10 or RP 185-88 does it state that L&I made Defendants aware of any cash award due Plaintiff other than an informal determination that "minimum wage" was due for the period in question.

Second, Respondent fails to acknowledge in their argument that L&I witness Ana Sanchez testified that Defendants WERE WILLING TO PAY MINIMUM WAGE (RP 188). (Emphasis added.) Respondent unsuccessfully attempts to insinuate that any informal notice from L&I refers to an assessment that L&I determined either \$60,000 or \$30,000 cash was due Plaintiff. In fact, nowhere in the entire record of the Verbatim Report (Volumes I or II) or the entire testimony of Sanchez is such a statement by L&I (RP 179-99). Furthermore, this court should note that even though Defendants agreed to and were willing to pay minimum

wage per the testimony of Sanchez (RP 188), Sanchez testified that she told Defendants that Wolf would not accept minimum wage (RP 199).

Last, Respondent argues, “Webb cannot argue that there was a bona fide dispute regarding an obligation to actual[ly] pay Ms. Wolf when he is also arguing that he agreed that IDA owed Janee wages and he stipulated that Ms. Wolf was entitled to \$30,000, regardless of the form.” (Respondent’s Brief at 18). Appellants disagree.

The record clearly establishes that the Defendants disputed the amount of the claim—\$60,000 vs. \$30,000 (see previous arguments above and Appellant’s Brief). Moreover, the undisputed record and the findings clearly demonstrate that Defendants disputed the form of wages to be paid or due Plaintiff (Finding of Fact No. 4 – CP 296; and RP 56, 264-66, and 333). Webb argued that Wolf was entitled to \$30,000 in stock options, not \$60,000 as claimed or \$30,000 in cash (citations omitted). Obviously, a clear dispute and one that Webb can argue (hence this appeal).

Substantial evidence, the facts of the case, and the record clearly illustrate a bona fide dispute over Wolf’s **employment status**, in addition to the fact that Defendants did accept the informal L&I assessment that Wolf was owed minimum wage for the period in question. That Wolf would not accept minimum wage and voluntarily withdrew her claim does not obviate the dispute over employment status or change the fact that

Defendants accepted and were willing to pay minimum wage to Wolf.

Notwithstanding the bona fide disputes over the amount and form of wages, this court should reverse the finding of willful withholding due to a bona fide dispute over the employment status of Wolf and the fact that Defendants accepted and were willing to pay minimum wage to Wolf.

**D. The trial court IMPROPERLY DENIED Defendant's request to enter at trial uncertified copy of deposition transcripts.**

Respondent notes that "...Webb proceeded to represent himself pro se, citing several cases that guide the courts to hold pro se litigants to assume the duties and responsibilities, and be accountable to the same standards of ethics and legal knowledge, of an attorney (Respondent's Brief at 19). We agree. Thus, any pro se litigant willing to assume the duties and responsibilities of an attorney, and be accountable to the same standards of ethics and legal knowledge, should be afforded the same opportunity and not denied any benefit of an attorney, simply because they are not an attorney.

Appellants suggest that Webb's notice to the trial judge of access to depositions being denied simply because he was not an attorney, does comply with the "exceptional circumstances" language requirement of CR 32(a)(3)(E). The trial judge, in the interest of justice, should have recognized the exceptional situation ordering release of the depositions.

This particular issue or question of abuse of discretion is not one of black and white in the sense that the trial court did or did not follow a rule or statute. Webb is not arguing that the trial court violated CR 32(a)(3). Webb argues that an experienced trial judge, in the interest of serving justice, failed to recognize an exceptional circumstance and take action accordingly, thus prejudicing the defense and abusing their discretion.

As explained in the Appellant's Brief, Webb attempted to enter a court copy of said depositions and the trial court denied that action. Consequently, we do not have key evidence and testimony, specifically Richey's testimony, which may have had a substantial material effect on the outcome of the trial. In fact, the trial judge noted this in her decision, stating: "*Obviously, we don't have Scott Richey present, so I don't know what Scott Richey might or might not have said. What I do have is the testimony of Janee Wolf regarding that conversation.*" RP 332.

A court may grant a motion for a new trial when important rights of the moving party are materially affected because substantial justice has not been done. CR 59(a). When the basis for granting a motion for a new trial is based on questions of fact, we will not disturb the ruling absent a manifest abuse of discretion. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). Discretion is abused when the decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable

reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Thus, this court should remand the case for retrial in light of the foregoing exceptional circumstances, including the clear contradiction to Wolf’s testimony and the findings of fact (CP 294-99) per Richey’s testimony as set forth on page two and three of Webb’s Motion for Partial Summary Judgment (CP 27-37). This court should further provide a court order or appropriate instruction to the trial court authorizing release of sealed copies of the Wolf and Richey depositions to Defendants Webb.

**E. The trial court DID ABUSE its discretion by refusing to review Defendants’ Motion for New Trial or Reconsideration.**

Regarding Webb’s Motion for New Trial or reconsideration, based upon the trial court’s abuse of discretion in failing to issue an order allowing Webb (pro se) access to depositions, which was denied because Webb was not an attorney, Respondent fails to acknowledge and address the fact that the trial judge notes in her denial letter, “*This is the first time I have been made of this allegation. Said allegation was never raised or addressed to me at trial when I could have heard or inquired of CDCR.*” As stated in the Appellant’s Brief, this is incorrect. Webb specifically informed the trial judge of this issue at trial, stating:

Mr. Webb: Side bar. “*We tried to obtain yesterday the depositions of the hearsay that he is claiming I’m saying is*

*in the depositions. The company that took the depositions will not release to us copies of those without a court order. And the copy that I have on file stamped with Josie Delvin, evidently we cannot enter because it's not certified. So we have tried to obtain Miss Wolf's and Mr. Richey's depositions which they took. But just so it's noted that I'm unable to obtain those.”* RP 263.

A court may grant a motion for a new trial when important rights of the moving party are materially affected because substantial justice has not been done. CR 59(a). When the basis for granting a motion for a new trial is based on questions of fact, we will not disturb the ruling absent a manifest abuse of discretion. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). Discretion is abused when the decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Appellants would suggest that Defendants “important rights” (access to evidence) was materially affected, the refusal of the trial judge to even review the entire motion was a manifest abuse of discretion, and the admission that the trial judge was completely unaware of an important and exceptional point, that was in fact brought to her attention at trial, was “manifestly unreasonable.”

This court should remand this case for retrial in light of the foregoing circumstances, providing a court order or appropriate instruction

to the trial court authorizing the release of sealed copies of the Wolf and Richey depositions to Defendants Webb.

**F. Attorney's Fees**

Wolf requests attorney's fees on the statutes underlying the original action. As demonstrated in the foregoing arguments, the trial court erred in awarding attorney's fees based upon the original action and this court should be reverse said fees.

Respondent further claims that Webb's appeal is frivolous. A judgment for \$100,000, \$60,000, or even \$30,000 is hardly frivolous. In any case, citing the same case law as the Respondent, a remand of this case or a reversal of the award and judgment, completely or in part, (specifically a reversal of willful withholding), should be grounds for Webb and all personal Defendants to recover attorney's fees expended for their "personal defense" during the original trial. Furthermore, this court should award to Appellant attorney's fees, costs, and expenses expended in this appeal. (Respondent's Brief at 24-5 as may be applicable.)

**III. CONCLUSION**

Notwithstanding a remand of this case for retrial per the applicable arguments set forth in the Appellant's Brief, the court should reverse the award of attorney's fees per the exception afforded Defendants under

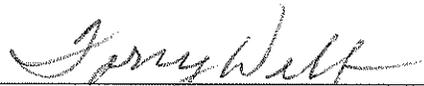
RCW 49.48.030. That Wolf ultimately recovered an amount equal to the amount Defendants agreed upon prior to her service and further admitted owing, renders the attorney fee award inapplicable.

Moreover, the record amply demonstrates the existence of multiple *bona fide* disputes between Wolf and the Defendants. The court should further reverse the trial court's decision of willful withholding and vacate the order holding Defendants personally liable in light of the bona fide disputes over the amount of wages owed, form of wages owed, and Wolf's employment status during the period in question. (Also grounds for reversing the original award of attorney's fees.)

This court should further award the recovery of attorney's fees in this appeal and the original action to the greatest extent possible.

Respectfully submitted this 9th day of September, 2012.

TORRY WEBB AND BRENDA WEBB



Torry Webb, Pro Se Defendant



Brenda Webb, Pro Se Defendant

## CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the Brief of Appellant upon the Court of Appeals and the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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

Signed this 9th day of September, 2012, in Richland, Washington.

  
Torry Webb