

FILED

JUL 10 2012

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

JANEE WOLF, Respondent,

v.

IDA MARKETING SERVICES, INC., ET AL., Appellants

BRIEF OF APPELLANT

Torry Webb and Brenda Webb
Pro Se Appellants
1907 Orchard Way
Richland, WA 99352
Telephone: (509) 378-9494
Fax: (509) 737-0944

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I. INTRODUCTION

Torry Webb appeals from the judgment of the trial court awarding double damages, costs and attorney fees to Wolf based on its holding that Webb willfully withheld wages from Wolf for work performed from March 1, 2008, to August 31, 2008.

Under applicable case law and statutes, including RCW 49.48.030, the award is not appropriate if there is a bona fide dispute and 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.

Here, Wolf claims corporate defendant IDA owes her \$60,000 cash for work she performed, alleging an oral agreement to double the amount of compensation due was entered on the date of her termination. Webb disputed this claim and the trial court specifically found that no agreement was entered into to double Wolf's compensation. Webb admitted that the agreed compensation for Wolf's services was \$30,000 but contended that the form of compensation was to be stock options, not cash, and further contended that Wolf was retained as an independent contractor rather than an employee. Because the trial court only awarded Wolf the \$30,000 compensation that Webb admitted was the amount owed, Wolf's recovery was less than the amount she claimed and the plain language of RCW

49.48.030 precludes the award of double damages, costs and attorney fees. Moreover, the existence of a bona fide dispute as to the form of Wolf's compensation and her relationship to IDA further precludes the award.

Because the trial court's award is contrary to the applicable legal standard, the award of double damages, costs and attorney fees should be reversed.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in awarding attorney's fees to Wolf when the recovery amount was equal to or less than the amount Defendants admitted owing for said wages or salary, in contravention to the exception granted by RCW 49.48.030.
2. The trial court erred by finding Defendant Officers personally liable under RCW 49.52.070 without finding sufficient evidence of an intent to willfully withhold wages as required by RCW 49.52.050 and RCW 49.48.082.
3. The trial court erred in finding Defendant Officers personally liable for willfully withholding wages in light of a bona fide dispute over the form of wages owed.
4. The trial court erred in finding Defendant Officers personally liable for willfully withholding wages in light of a bona fide dispute over whether an employment relationship existed.
5. The trial court erred and abused its discretion by not allowing Defendants to enter a certified court copy of key witness depositions in light of extenuating circumstances.
6. The trial court erred and abused its discretion refusing to review Defendants' Motion for New Trial or Reconsideration in light of extenuating circumstances.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in awarding attorney's fees to Wolf, in contravention to the exception granted by RCW 49.48.030, when the recovery amount was equal to or less than (1) the amount the parties agreed to and (2) Defendants admitted owing for said wages or salary?
2. Did the trial court err in finding Defendant Officers personal liable for willfully withholding wages in light of bona fide disputes over (1) the amount of wages due (2) the form of wages due, and (3) Wolf's employment status during the period in question?
3. Did the trial court abuse its discretion by not issuing a court order affording Webb an opportunity to obtain and attempt to enter as evidence certified and sealed copies of key witness depositions in light of extenuating circumstances?
4. Did the trial court abuse its discretion by refusing to review Webb's motion for a new trial or reconsideration in light of testimony and extenuating circumstances?

IV. STATEMENT OF THE CASE

On September 2, 2008, corporate defendant IDA Marketing Services, Inc. (“IDA”) hired Janee Wolf (“Wolf”) as Vice President of its Awards, Incentives, Recognition and Events (“AIRE”) Division. RP 85. *See* Exhibits 11, 12, 13, 37 and 38. On November 26, 2008, IDA Chief Executive Officer Torry Webb (“Webb”) terminated Wolf’s employment. RP 44. *See* Exhibit 15. The parties do not dispute the aforementioned hiring, termination, or wages due and paid for the period September 2, 2008, to November 26, 2008. RP 192. The basis for this case is Wolf’s alleged employment for the six-month period immediately preceding the aforementioned hiring date, March 3, 2008 to September 1, 2008 (the “period in question”). RP 192.

Prior to September 2008, IDA was a pre-revenue startup company. RP 259. IDA was preparing to market a new service invented by Webb. RP 256. IDA intended to use a network marketing distribution model (e.g. Avon, Amway, pre-paid legal, etc.) to build its initial sales force and gain market share. RP 257. On October 1, 2007, IDA retained Scott Richey (“Richey”) based upon Richey’s past success in the networking industry. IDA retained Richey to lead and build its network marketing division. RP 257-58.

About mid February 2008, Richey introduced Wolf to Webb. RP 259. Richey had known Wolf for a number of years through college and through working together in a successful network marketing business. RP 16, 18. Wolf was a successful “network marketer” in Shaperight having won every award, every bit of recognition, every prize, and every incentive in a five or six year period. RP 18. Richey suggested that Wolf would be an ideal candidate to oversee the company’s AIRE Division. However, throughout the majority of 2008, IDA was in a pre-launch status with its only source of income coming from financing activities (i.e. selling stock to investors via a private placement). RP 259.

More than a year prior to Webb’s introduction to Wolf, IDA had retained Curtis Smith (“Smith”) as an independent editor and compliance officer per a verbal agreement between Webb and Smith. Smith agreed to provide services to IDA for stock options. RP 264, 275. Smith was providing services to IDA when Webb met Wolf. Under a similar agreement, Webb authorized IDA to retain Wolf during the period in question—forming the foundation of Wolf’s complaint. RP 277-80.

Following the period in question, on September 2, 2008, IDA hired Wolf. IDA began recruiting distributors and selling its new service nationwide on September 8, 2008, the same month Lehman Brothers filed for bankruptcy protection—considered by many to be the public trigger of

the 2008 financial crisis. RP 259, 261, 267. IDA did well during its first two months following its launch but began to struggle with recruiting and sales in November 2008. RP 168. Unable to continue raising adequate capital with the new economic and market challenges, IDA terminated Wolf's employment on November 26, 2008. RP 44.

On June 4, 2009, approximately six months after her termination, Wolf filed a wage claim with Washington Labor & Industries ("L&I") claiming she was an "employee" during the period in question. RP 98-9. Wolf claims Richey made a verbal offer for employment agreeing to pay her \$5,000 per month plus stock options. However, Wolf's L&I claim was for \$60,000 for services rendered during the six-month period in question. *See Exhibit 39.*

Shortly thereafter, IDA received notification of the wage claim from L&I. Webb and then IDA Chief Operating Officer, Justin Brunson ("Brunson"), immediately disputed Wolf's claim via written response, disputing:

(1) the amount of Wolf's wage claim (contending the gross compensation due for the period in question was \$30,000—not \$60,000);

(2) the form of compensation (contending the parties mutually agreed to "nonqualified" stock options at a value of \$5,000 per month at

\$0.50 per option—or 10,000 options per month for a total of 60,000 options for six months valued at \$30,000); and

(3) Wolf's employment status during the period in question.

The agreed upon compensation of \$5,000 per month for services performed during the period in question is not in dispute. However, both parties dispute the form of compensation (Wolf says it was cash—Webb says it was stock options). RP 324, 326, 332. The parties also disputed Wolf's claim of \$60,000 cash due for services rendered during the period in question. Wolf alleges that during her termination meeting on November 26, 2008, Webb made a promise to “double” her agreed upon compensation of \$30,000 to \$60,000 for services rendered during the period in question. RP 44, 59, 100. This alleged agreement was not reflected in any signed agreement or other written documentation.

Shortly after Wolf filed her claim, L&I contacted IDA telephonically speaking several times with Brunson. Based upon initial conversations with Brunson, L&I determined an employer-employee relationship existed between Wolf and IDA, however, Wolf was unable to provide L&I any records or proof substantiating her claim that \$60,000 was due for services rendered during the period in question. RP 188. As a result, L&I determined IDA would be liable to Wolf for minimum wages during the period in question. RP 188. Webb and Brunson disputed the

initial L&I assessment, however, did agree to pay minimum wage per L&I's informal finding. RP 188, 192.

Shortly thereafter, prior to IDA issuing payment to Wolf for minimum wage, prior to L&I completing a formal investigation, and prior to L&I issuing any written assessment, citation, or notice to IDA, Wolf chose to voluntarily withdraw her wage claim and pursue her claim privately, and this lawsuit commenced. RP 190.

At trial, Webb argued *pro se*, that Wolf was an independent contractor during the period in question via a verbal agreement between Wolf and Richey (as authorized by Webb). Webb further argued Wolf mutually agreed to provide services during the period in question for the sole consideration of non-qualified stock options in anticipation of IDA hiring Wolf as Vice President of the company's AIRE division later that fall. RP 264.

Webb admitted at trial that he agreed to pay Wolf \$30,000 in the form of stock options. RP 324. However, Webb adamantly disputes that he or any other person made any commitment to pay Wolf \$60,000 cash for any service at any time. Notwithstanding the obvious disputes over Wolf's employment status during the period in question and the amount of wages owed, Webb further disputes the form of compensation due Wolf. RP 324.

Based solely upon Wolf's testimony of an alleged verbal offer of employment from Richey, it was determined at trial that Wolf was an employee entitled to the mutually agreed upon amount of \$30,000 cash. RP 331-32. However, the trial judge further determined Webb did not agree to double Wolf's salary per Wolf's claim and was not entitled to \$60,000 cash. RP 334. In spite of the findings and decision regarding the amount and form of wages, and the dispute as to Wolf's employment status during the period in question, the trial judge found no bona fide disputes existed regarding any of the aforementioned issues. Consequently, the trial judge found that IDA, Webb and Brunson willfully withheld wages and thereby awarded double damages and attorney's fees to Wolf.

Defendants appeal the decision of the trial judge and subsequent award of exemplary damages and attorney's fees claiming several errors at law as set forth herein.

IV. ARGUMENT

- A. The trial court erred in awarding attorney's fees when the recovery amount was equal to or less than the amount Defendants agreed to and admitted owing for said wages or salary.**

The trial court erred in awarding attorney's fees to Wolf when the judgment of \$30,000 was less than the amount claimed and equal to the amount Wolf and Defendants verbally agreed to for services rendered during the period in question. RP 324. Moreover, in her final decision the trial judge stated that \$30,000 is the amount Webb admitted owing Wolf, he simply disputed the form of compensation. RP 332.

RCW 49.48.030 provides for the award of attorney fees under some circumstances when a person is successful in recovering judgment for wages or salary owed:

In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer: PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary. (Emphasis added.)

In awarding attorneys' fees, the trial court failed to apply the explicit and unambiguous plain text exception granted by and required of RCW 49.48.030.

This provision is a remedial statute that must be construed liberally in favor of the employee. *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 34, 42 P.3d 1265 (2002). At the same time, “[a] court’s objective in construing a statute is to determine the legislature’s intent,” and if “the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007). *See also State v. Bostrom*, 127 Wn.2d 580, 596-87, 902 P.2d 157 (1995) (when the language of a statute is unambiguous, courts may not alter the statute’s plain meaning by construction).

In *Fire Fighters*, 146 Wn.2d at 43-44, the Supreme Court reiterates that RCW 49.48.030 requires a court to award attorney fees in any action where an employee receives wages or salary owed, as long as those wages are more than the employer offered. In this case, the trial judge did not find that Wolf established \$60,000 was due, stating in her final decision, *“I am finding that the form of the compensation is \$30,000 cash. I do not find that it's been established that you agreed to double that in the termination meeting that you had with Miss Wolf.”* RP 333 (emphasis

added). 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 \$30,000 award and subsequent judgment was for an amount Defendants IDA and Webb agreed to and admitted owing Wolf. Accordingly, the award was “less than or equal to the amount admitted by the employer to be owing for said wages or salary” within the meaning of RCW 49.48.030's exception for exemplary damages.

In light of the Supreme Court ruling and guidance in *Fire Fighters*, coupled with the plain meaning of the exception set forth in RCW 49.48.030, the trial court erred in its decision to award attorneys fees and the judgment should be reversed.

B. The trial court erred in finding Defendant Officers personally liable for willfully withholding wages in light of bona fide disputes over the amount of wages owed, the form of wages owed, and the employment status of Wolf.

Prior Washington cases indicate two instances when an employer's failure to pay wages is not willful: (1) the employer was careless or erred in failing to pay, or (2) a “bona fide” dispute existed between the employer and employee regarding the payment of wages. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 160, 961 P.2d 371 (1998). Furthermore,

“[I]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 wages, the refusal to pay is not willful.” *Moore v. Blue Frog Mobile, Inc.*, 153 Wn. App. 1, ___ P.3d ___ (2009).

1. Bona Fide Dispute over the Amount of Wages Due

Wolf claims IDA owes \$60,000 “cash wages” for services rendered during the period in question. Wolf bases said claim upon alleged verbal commitments by Webb at (1) Wolf’s termination meeting (whereby Webb allegedly agreed to “double” the \$30,000 due Wolf to \$60,000 cash), and (2) a follow-up meeting between Wolf and Webb on April 9, 2009. RP 44, 57. [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). Whether there is a bona fide dispute as to a certain amount of money is separate from the underlying question of liability under breach of contract.

On April 9, 2009, nearly five months after Plaintiff's November 2008 termination, Wolf met with Webb at IDA headquarters. Also in attendance were Wolf's husband, Gerald Wolf, and then IDA executive assistant Shelly Moos ("Moos"). RP 52. The purpose of the meeting was to discuss compensation due for services rendered during the period in question and, per Wolf's request, memorialize the meeting and compensation due Wolf. RP 51.

Wolf testified that during the April 9, 2009 meeting, prior to any L&I claim, Webb offered Wolf the option to take said compensation in any combination of cash or stock. Specifically, Wolf testified: *"I said how will you pay me? He said, what do you want? Do you want cash? Any percentage that you want -- cash or stock and you pick it. Send him an e-mail, let him know what I picked and he will take care of it."* RP 54. Wolf further testified that on April 10, 2009, she sent follow-up letter to Webb stating: *"You and I agreed to a \$60,000 total to be divided 50-50 between stock and cash compensation."* RP 57. And, on redirect, Wolf's husband testified for Wolf that it was his understanding \$60,000 was the sum value of the compensation due for the period in question. RP 237. However, under cross-examination by Webb, Wolf stated she never actually heard Webb say she was entitled to "sixty thousand dollars" (\$60,000). RP 101. And, upon further questioning by Webb regarding the April 9, 2009

meeting, Wolf's husband testified he did not remember the figure "sixty thousand dollars" (\$60,000) said at any time. RP 235. Finally, defense witness and IDA Executive Assistant Shelly Moos testified that at no time during the April 9 meeting, did Webb ever say Wolf was entitled to "sixty thousand dollars" (\$60,000). RP 304.

According to the testimony, a meeting occurred on April 9, 2009 between Webb, Wolf, Wolf's husband, and IDA Executive Assistant Moos, with all parties testifying that no party mentioned or heard the sum or figure of sixty thousand "dollars." Yet, Wolf believes she is entitled to \$60,000 cash and further believes she is electing to take 50% of her alleged entitlement in stock options and the other 50% in cash. At the same time, Webb believes Wolf is electing to take 50% of her \$30,000 in stock options (or 60,000 stock options at a value of \$0.50 each), in 50% cash and 50% stock options. RP 235-37. The testimony evinces a genuine misunderstanding and fundamental dispute between the parties as to the amount (and form) of compensation agreed upon.

If there is a bona fide dispute over the employee's entitlement to wages, the refusal to pay is not willful. *Blue Frog Mobile, Inc.*, 153 Wn. App. at _____. If the refusal to pay is not willful, there is no legal authority to impose exemplary damages.

On June 4, 2009, almost two months after the April 9, 2009 meeting, Wolf filed a Worker Rights Complaint with L&I. *See* Exhibit 39. Exhibit 39 consists of four pages including a two-page cover letter and the actual two-page Workers Right Complaint.

The first page of Exhibit 39 consists of a cover letter from L&I to Webb and IDA Marketing Services, Inc., and states, “*Ms. Wolf alleges she was hired by Scott Richey at a rate of \$60,000 for that period of time.*” Under cross-examination by Webb, Wolf testified that the statement above, as set forth in the cover letter from L&I, was not an accurate statement. RP 99. Regarding the inaccuracy of the statement, Wolf further testified: “*And the reason that it’s 60 for that period was because you [Torry Webb] agreed to double it in November of 2008.*” RP 100. Moreover, page three of Exhibit 39, (which is page one of the two-page Workers Rights Complaint Form, Section C – Wage Complaint Information), states in pertinent part: “*I have a verbal agreement to the amount of \$60,000 by Torry Webb...*” The alleged verbal agreement Wolf refers to arises from Wolf’s November 2008 termination meeting between Wolf and Webb. Wolf stated in testimony that Webb agreed to double her alleged cash compensation and salary of \$30,000 for the period in question because “he felt bad.” Specifically, Wolf testified:

It was Thanksgiving, I was getting ready to leave town and Torry called me in the office. And he was emotional. I want to say tearful. He said that they were not receiving the revenue that they anticipated. They were not able to continue to pay me and keep the people -- keep people on board. As far as I know, I was the only one that was getting laid off. But, umm, he felt bad or badly, I guess. And said he knew that he owed me money and that he would make it a full year. He said I'll make it a full year.

RP 44.

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. It is certainly questionable what the consideration for such an agreement would have been, in any event.

A failure to pay wages is not willful where it is based on a genuine and reasonable belief that the wages in question are not due. *Moore v. Blue Frog Mobile, Inc.*, 153 Wn. App. 1, 3, 221 P.3d 913 (2009). Whether an employer acts "[w]ilfully and with intent" is a question of fact reviewed under the substantial evidence standard). *Lillig v. Becton-Dickinson*. 102 Wn.2d 1023, ___, ___ P.2d ___ (1984). Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise. *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, ___ P.2d ___ (1982). If there is a bona fide dispute over the employee's entitlement to the wages, the refusal to pay is not willful. *Blue Frog Mobile, Inc.*, 153 Wn. App. at ___.

In this case, Webb has consistently disputed Wolf was due \$60,000 in cash wages at any time. The decision of the trial judge regarding Wolf's claim for \$60,000, based upon Webb's alleged commitment to double said wages at Wolf's termination meeting, acknowledges the existence of a dispute—a fairly debatable, *bona fide* dispute—between Wolf and Webb. The trial judge specifically stated in her final decision: "*I am finding that the form of the compensation is \$30,000 cash. I do not find that it's been established that you agreed to double that in the termination meeting that you had with Miss Wolf.*" RP 333. Thus, the trial judge confirms a "fairly debatable" dispute over wages did exist—i.e., the doubling of the \$30,000 to \$60,000 per an alleged (and rejected) verbal commitment by Webb at Wolf's November 2008 termination meeting as claimed by Wolf. In order for a dispute to be "bona fide," it must be a "fairly debatable" dispute as to whether the wages in dispute must be paid. *Brandt v. Impero*, 1 Wn. App. 678, 680-81, 463 P.2d 197 (1969). Consequently, there is insufficient evidence to support the trial court's finding that the withholding of compensation was willful.

The trial judge erred in imposing exemplary damages and personal liability under RCW 49.52.070 finding Defendant Officers Webb and Brunson guilty of willful withholding of wages under RCW 49.52.050(2) in light of a bona fide dispute over the amount of wages owed or due

Wolf. Coupled with the trial judge's final decision and acknowledgement that Wolf failed to establish that Webb agreed to "double" Wolf's agreed upon compensation of \$30,000¹ to \$60,000 cash, the decision to award exemplary damages and subsequent judgment should be reversed.

2. Bona Fide Dispute over the Form of Wages Due

Wolf claims that compensation due for services rendered during the period in question was cash plus stock options. RP 56. Webb disputed Wolf's claim, stating Wolf agreed to compensation in the form of stock options at a value of \$5,000 per month for services rendered from March 2008 to August 2008 (a sum value of \$30,000 or 60,000 stock options at \$0.50 per option). RP 264-66. The trial judge acknowledged Webb's contention: *"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.

As case law is limited at best regarding the "form" of wages in wage claim disputes, a review of RCW 23B.06.210 and RCW 23B.06.240 indicates that shares of capital stock and stock options can be issued for services in kind (i.e., work performed or to be performed). Specifically, RCW 23B.06.240 states:

¹ Notwithstanding the bona fide dispute over the form of the originally agreed upon \$30,000 which Defendants do contend, and have always contended, was \$30,000 in stock options.

(1) [A] corporation may issue rights, options, or warrants for the purchase of shares of the corporation. The board of directors shall determine the terms upon which the rights, options, or warrants are issued, their form and content, and the terms and conditions relating to their exercise, including the time or times, the conditions precedent, and the consideration for which and the holders by whom the rights, options, or warrants may be exercised.”

(2) Facts ascertainable outside the documents evidencing them or outside the resolution or resolutions adopted by the board of directors creating such rights, options, or warrants includes, but is not limited to, the existence of any condition or the occurrence of any event, including, without limitation, a determination or action by any person or body, including the corporation, its board of directors, or an officer, employee, or agent of the corporation.

Similarly, RCW 23B.06.210(2) establishes the authority of the board of directors to issue shares “*for consideration consisting of any tangible or intangible property or benefit to the corporation, including . . . services performed [or] contracts for services to be performed.*” Simply put, the sole director of a closely held corporation, in this case Webb, can issue “non-qualified” stock options in any form, dictating the content, terms and conditions thereof. This is precisely what Webb authorized IDA to do with Wolf. It is clear from a statutory point of view that, among other things, stock and stock options can be consideration for services performed and therefore, equal to or the equivalent of cash wages or salary as may be applicable.

However, Wolf was not the only person who performed services for IDA in this regard. Curtis Smith, witness for the defense, performed services for stock options under a similar verbal agreement with

Defendants IDA and Webb. RP 275. Smith's testimony also provides insight into why Wolf, as well as Smith himself, agreed to perform services in kind for IDA. Based upon Smith's personal conversations with Wolf, he and Wolf were both working for the same reasons (i.e., chasing the bigger dream, working towards a common goal, eye on the prize, etc.). RP 279.

Wolf testified that during the April 9, 2012 meeting, prior to any claim being filed with L&I, Webb offered Wolf the option to take compensation due in any combination of cash or stock. Specifically, Wolf testified: *"I said how will you pay me? He said, what do you want? Do you want cash? Any percentage that you want -- cash or stock and you pick it. Send him an e-mail, let him know what I picked and he will take care of it."* RP 54. This exchange as reported by Wolf demonstrates the existence of a dispute over the form of the payment. Had Wolf expected her compensation in cash, regardless of whether her expectation was for \$30,000 or \$60,000, why would there be a question of "how" IDA would pay Wolf? At the very least, it demonstrates a level of uncertainty or a question in the mind of Wolf. Furthermore, an ability or opportunity to take said compensation in any combination of cash or stock options should lead a reasonable mind to conclude, "Why would the parties discuss any options other than a cash payment?" The very questions "how will you

pay me” and “do you want cash” imply that, at the time of the question, something other than cash was expected or possible. Reasonable minds should conclude more than one option was available for payment of said compensation—which, evinced by the trial itself, is in dispute.

Wolf further testified that on April 10, 2009, she sent a follow-up letter to Webb. Quoting from the follow-up letter, Wolf states: “*You and I agreed to a \$60,000 total to be divided 50-50 between stock and cash compensation.*” RP 57.²

Although simple in concept, the dispute over the form of said wages, i.e. cash or stock options, has substantial impact to the payer and payee. A non-cash outlay is material—and optimal—to a startup business; hence, the reason a startup business—in this case, a pre-revenue startup business—would agree to such an arrangement. The dispute in this case regarding the wage claim is simple. Wolf claims \$60,000 cash is due for services rendered during the period in question. Webb claims Wolf is due \$30,000 in stock options and, based upon the April 9, 2009 meeting, Wolf elected to take said compensation in 50% cash and 50% stock. RP 100.

Perhaps Defendants IDA and Webb were remiss in failing to document the terms of the verbal agreement with Wolf for services rendered during the period in question. However, the lack of a formal

² To the extent applicable to this argument regarding, Webb hereby reasserts all applicable cases, statutes and rules set forth in the previous arguments.

document or written contract does not eliminate the ability of IDA or Webb, as the sole director of IDA, to authorize and agree to provide stock options—specifically nonqualified stock options—under RCW 23B.06.210 and RCW 23B.06.240.

As discussed in the previous argument, if there is a bona fide dispute over the employee's entitlement to wages, the refusal to pay is not willful and failure to pay wages is not willful where it is based on a genuine and reasonable belief that the wages in question are not due. *Blue Frog Mobile, Inc.*, 153 Wn. App. at 3. Thus, where the employer believes wages are not due and that belief is “fairly debatable,” a bona fide dispute exists precluding a finding of willfulness, regardless of whether the belief was correct. *Id.* at 8. These are, of course, questions of fact. *Id.* In order for a dispute to be “bona fide,” it must be a “fairly debatable” dispute as to whether the wages in dispute must be paid. *Brandt v. Impero*, 1 Wn. App. 678, 680-81, 463 P.2d 197 (1969).

The trial court erred when it failed to recognize and find a fundamental and bona fide dispute existed over the form of wages owed in light of the substantial weight of the testimony and evidence. Coupled with the acknowledgement of the trial judge that Webb agreed on the amount of wages due—but disputed the form—the decision to award exemplary damages and subsequent judgment should be reversed.

3. Bona Fide Dispute over Employment Status

The trial court accepted Wolf's testimony over the evidence presented by the Defendants concluding that Wolf was an employee rather than an independent contractor, stating:

The testimony that I heard was that Scott Richey, who held himself out and was held out by IDA as the president, recruited Janee Wolf. From the testimony that I find that was presented, only those two were present during this conversation when Janee Wolf was recruited to work for IDA. 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. However, the fact that the trial court disagreed with the Defendants' position does not mean there was no *bona fide* dispute as to Wolf's status as independent contractor or employee.

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).

Where the trial court has weighed the evidence, we ask whether substantial evidence supports its findings and, if so, whether those findings support the trial court's conclusions of law and judgment. *Ridgeview Props. v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982).

Substantial evidence is that which is sufficient “to persuade a fair-minded person of the truth of the declared premise.” *Ridgeview*, 96 Wn.2d at 719.

The evidence and testimony in this case is certainly sufficient to persuade a fair-minded person that, at the very least, a bona fide dispute and questions exist regarding Wolf’s employment status during the period in question. Specifically, five witnesses for the defense including Cameron Hysjulien (former General Manager of IDA); Curtis Smith (an independent contractor performing services for stock options for IDA during the period in question); Robert Schmitt (former Chief Information Officer of IDA); Michelle Moos (former IDA Executive Assistant); and Amanda Blankenship (former Administrative Assistant to Wolf) all testified that Wolf was not an employee of IDA.

Hysjulien testified to her knowledge, Wolf was not an employee prior to September 2, 2008. She further states IDA never held Wolf out to be an employee to anyone, internally or externally. RP 221.

Smith states he was working for stock options and that he does not recall Webb or Richey ever representing that Wolf was an employee during the period in question. RP 275, 277. Smith further testified that, based upon his personal conversations with Wolf, they were both there

working for the same reasons (i.e., chasing the bigger dream, working towards a common goal, eye on the prize, etc.). RP 279.

Schmitt states that as the Information Technology administrator, he set up many “IDA” email accounts for personnel who were not employees of IDA, including an account for Wolf. RP 296. (This is relevant as Wolf claims having an “IDA” email account is paramount to being an employee of IDA.)

Moos confirmed the meeting minutes regarding Wolf’s request for a copy of IDA’s commitment to compensate Wolf for her time prior to employment. *See* Exhibit 1. Moos’ testimony also confirms Wolf’s election to take 50% of compensation due for service prior to employment in cash and 50% in stock options. RP 301-03.

Blankenship (who was interviewed and referred to IDA by Wolf – RP 306-7.) states that in June of 2008—during the period in question—Wolf told Blankenship, over a dinner meeting, she was not being paid and that she would be getting stock options for her time. RP 307.

In summary, we have five (of five) witnesses providing testimony contrary to Wolf’s testimony.

Submitted evidence also includes an application for employment completed by Wolf on September 2, 2008 (see Exhibit 37); supplemental employment documents completed on September 2, 2008 (e.g. IRS Form

I-9, Form W-2, payroll deposit forms, etc., etc.) (see Exhibit 38); an employment offer letter from IDA and Brunson, dated August 26, 2008 (see Exhibit 11); and an email from Richey to Brunson, dated August 26, 2008 (with Richey asking if he can deliver the offer letter³ to Wolf).

Although we do not have Richey's testimony or deposition, we do have an email from Richey to Brunson and Webb illustrating his understanding and belief that Wolf was not an employee prior to September 2, 2008. See Exhibit 51. Sent August 26, 2008, Richey states:

"Torry and Justin, in the interest of professionalism and consideration, I would like to propose that we deliver an official offer letter to Janee and Amanda this week. As previously discussed, Janee will be coming on board 9-2-2008. Torry, after receiving a clean bill of health from Grant Thornton⁴ last week, I liked your recommendation of bringing Amanda on October 1st. It would be very efficient and prudent to have Amanda at the Portland event and have her in training the first ten days of October. Thanks guys, Scott Richey."

A trial court's decision will not be overturned "unless the record indicates the ruling was clearly erroneous or against the overwhelming weight of the evidence." *Thorson v. State*, 721 So. 2d 590, 593 (Miss. 1998) (quoting *Lockett v. State*, 517 So. 2d 1346, 1350 (Miss. 1987)).

The aforementioned testimony and evidence should have been sufficient to persuade a fair-minded person there is a basis for a *bona fide*

³ See Exhibit 11.

⁴ Grant Thornton LLP is the U.S. member firm of Grant Thornton International Ltd, one of the six global audit, tax and advisory organizations.

dispute between the parties as to Wolf's employment status during the period in question—regardless of the Court's ultimate decision as to Wolf's employment status. Moreover, the overwhelming weight of the testimony and evidence of record does not support the trial court's findings of fact that no *bona fide* dispute existed between Defendants and Wolf as to Wolf's employment status.

That the trial court may not have agreed with IDA's position does not preclude the existence of a bona fide dispute be it over wages, the form of wages, or in this example, employment status. Although the trial court has discretion to resolve disputed facts as to what Wolf's status was, the trial court erred in finding individual defendants personally liable and awarding exemplary damages and attorney's fees to Wolf when a *bona fide* dispute existed as to her status. Subsequently the trial court erred in its decision to award exemplary damages and the judgment should be reversed.

C. The trial court erred and abused its discretion in not allowing Defendants to enter a copy of key witness depositions in light of extenuating circumstances.

The trial was conducted on June 20-22, 2011, in the Superior Court of Benton County. CP 282-92. The original trial date was March 21, 2011. Prior to the week of March 14, 2011, Defendant IDA and Defendants Webb and Brunson had been and were represented by counsel; Stephen

Kennedy of Ater Wynne represented IDA and Tonya Meehan-Corsi of Fidelity Legal Services represented Webb and Brunson. On March 16 and 18, 2011, less than one week before the scheduled trial, Kennedy and Corsi each filed Motions to Withdraw over mounting legal costs and expenses, leaving all Defendants without counsel. IDA did not have counsel at trial and, as a result, a default judgment was entered against IDA. Webb proceeded to argue his case *pro se*.

On October 27, 2010, Wolf and Richey were deposed. CP 38-134. (See court copies of Wolf and Richey depositions included therein.) Webb did not have copies of said depositions. Webb attempted to enter at trial copies of said depositions previously filed with the court clerk. RP 71. The trial judge said that “[Webb] would need the original deposition for it to be opened and published and used in the courtroom.” RP 71. During trial, immediately upon the trial court’s notice that Webb could not enter a copy obtained from the court clerk, Brenda Webb called the applicable court reporters in possession of or who could provide Webb sealed copies of the Wolf and Richey depositions. Brenda Webb arranged to pay for and receive said depositions. However, upon learning Brenda and Torry Webb were not attorneys, the court reporter refused to release said depositions to without a court order. Webb conveyed this unusual and extenuating circumstance to the trial judge in a side bar conversation:

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.

After making reasonable and diligent efforts to obtain sealed copies of the depositions in questions, access to the depositions was denied simply because Torry and Brenda Webb were not attorneys. Rule 1004 states, in pertinent part:

“[An] original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if: ... (b) Original Not Obtainable. No original can be obtained by any available judicial process or procedure[.]”

Webb was severely prejudiced in his efforts to try his case in that the trial judge chose not to provide a court order releasing the depositions after Webb informed the trial judge a “court order” was required to obtain copies of said depositions. That the trial court further chose not to allow a court copy of the depositions to be entered—or attempted to be entered—by Webb as relevant evidence, further impaired the defense. ER 401 defines relevant evidence as: *“[any] evidence having any tendency to make the existence of any fact that is of consequence to the determination*

of the action more probable or less probable than it would be without the evidence.”

If the pro se defense cannot obtain sealed copies of depositions without a court order, and the trial court in its discretion deems it unnecessary to provide such an order, then duplicate copies (Rule 1001) should be admissible under ER 904, specifically (in pertinent part):

(a) Certain Documents Admissible. In a civil case, any of the following documents proposed as exhibits in accordance with section (b) of this rule shall be deemed admissible unless objection is made under section (c) of this rule:

(6) A document not specifically covered by any of the foregoing provisions but relating to a material fact and having equivalent circumstantial guaranties of trustworthiness, the admission of which would serve the interests of justice.

The Washington Rules of Evidence defines a “duplicate” as: *[a] counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.* Rule 1001. Rule 1003 says a duplicate should *“[be] admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.”* In this case, Wolf’s counsel was present at Wolf’s deposition.

Both Wolf and counsel were present at Richey's deposition. Therefore, no genuine issue of authenticity can be raised. It would certainly be fair—in the interest of best serving justice—to allow the defense to admit duplicate copies of said depositions in light of the extenuating and anomalous circumstances surrounding the attempts to secure “sealed” copies from the court reporter.

At trial, Webb only had two options: obtain and enter—or attempt to enter—as evidence, copies of the Wolf and Richey depositions by way of court order, or enter duplicate copies in accordance with applicable rules. The trial court denied both options.

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). And, [g]reater deference is owed to a trial court's decision to grant a new trial than a decision to deny one. *State v. Cummings*, 31 Wn. App. 427, 430, 642 P.2d 415 (1982). “The grant of a motion for a new trial is appropriate if, viewing the evidence in the light most favorable to the nonmoving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain the verdict for the nonmoving party.” *Kohfeld v. United Pac. Ins. Co.*, 85 Wn. App. 34, 41, 931 P.2d 911 (1997) (citing *Hizey v. Carpenter*, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992)).

This court should remand this case for retrial in light of the foregoing 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 the release of sealed copies of the Wolf and Richey depositions to Defendants Webb.

D. The trial court erred and abused its discretion in refusing to review Defendants' Motion for New Trial or Reconsideration.

On August 4, 2011, Webb timely filed a Motion for New Trail or Reconsideration. CP 303-04; CP 305-410. The trial judge denied Webb's motion. CP 413-16. Webb included in his motion an explanation of the aforementioned extenuating circumstances surrounding the Webb's attempt to secure sealed copies of the Wolf and Richey depositions. The trial judge notes in her decision: "*...a copy of the deposition was apparently already in existence in the court file (attached as an exhibit and supported by declaration of Defendants' former counsel for purposes of a summary judgment motion)...*" CP 413-16. The trial judge further notes in her denial letter, in reference to the court reporter denying Webb access to said depositions without a court order: "*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.*" This is incorrect. As asserted above in subsection C, Webb specifically informed the trial judge of this issue, 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.

The trial judge notes that even if she accepted Webb’s allegation as true and Defendants had a certified copy of Richey’s deposition, “[*it*] does not mean it would have been admissible at trial.” Regardless of the likelihood that Webb would or would not have been able to admit (or use) said deposition, it does not mean it *would not* have been admitted. We simply don’t know because Webb was never given the opportunity.

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). And, [g]reater deference is owed to a trial court's decision to grant a new trial than a decision to deny one. *State v. Cummings*, 31 Wn. App. 427, 430, 642 P.2d 415 (1982). “The grant of a motion for a new trial is appropriate if, viewing the evidence in the light most favorable to the nonmoving party, the court can say, as a matter of law, that there is no

substantial evidence or reasonable inferences to sustain the verdict for the nonmoving party.” *Kohfeld v. United Pac. Ins. Co.*, 85 Wn. App. 34, 41, 931 P.2d 911 (1997) (citing *Hizey v. Carpenter*, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992)).

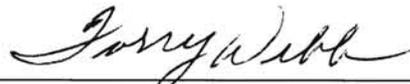
This court should remand this case for retrial in light of the foregoing circumstances, providing a court order or appropriate instruction to the trial court authorizing the release of sealed copies of the Wolf and Richey depositions to Defendants Webb.

VI. CONCLUSION

Notwithstanding remanding this case for retrial per the applicable arguments herein, 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 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.

Respectfully submitted this 9th day of July, 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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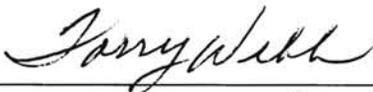
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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



Torry Webb