

**FILED**

No. 30514-7-III

DEC 30 2013

COURT OF APPEALS OF THE  
STATE OF WASHINGTON, DIVISION III

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

---

JAY P. MEHRING, a single person,

Plaintiff/Respondent/Cross-Appellant,

v.

CITY OF SPOKANE, a municipal corporation in and for the State  
of Washington; and ANNE KIRKPATRICK, a single person,

Defendant/Appellant/Cross-Respondent.

---

APPEAL FROM SPOKANE COUNTY SUPERIOR COURT  
CAUSE NO. 09-2-05647-6

---

**RESPONDENT MEHRING'S REPLY TO CROSS-APPEAL**

---

ROBERT A. DUNN  
SUSAN C. NELSON  
DUNN BLACK & ROBERTS, P.S.  
111 North Post, Suite 300  
Spokane, WA 99201  
(509) 455-8711  
Attorneys for Respondent/Cross-  
Appellant Mehring

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
I. INTRODUCTION .....	1
II. ARGUMENT .....	3
A. Wrongful Withholding Of Wages.....	3
B. Judgment Summary. ....	10
C. Incorrect Interest Rate.....	11
III. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS .....	12
IV. CONCLUSION.....	12

## TABLE OF AUTHORITIES

	<u>Page</u>
<u><i>Cases</i></u>	
<u>Baumgartner v. State Dept. of Corrections,</u> 124 Wn. App. 738 (2004).....	6
<u>Korssjoen, Inc. v. Heiman,</u> 52 Wn. App. 843 (1988).....	10
<u>Leschner v. Dept. of Labor and Indus.,</u> 27 Wn.2d 911 (1947) .....	3
<u>Mega v. Whitworth College,</u> 138 Wn. App. 661 (2007).....	4, 7
<u>Schilling v. Radio Holdings, Inc.,</u> 136 Wn.2d 152 (1998) .....	7
<u><i>Statutes</i></u>	
RCW 4.56.110.....	11
RCW 4.56.110(3)(b) .....	11
RCW 4.64.030(2)(a) .....	11
RCW 4.96.041.....	11
RCW 4.96.041(4).....	12
RCW 49.48.010.....	3, 7
RCW 49.52.050.....	9
RCW 49.52.070.....	4, 9
<u><i>Rules</i></u>	
RAP 18.1 .....	12

## I. INTRODUCTION

This matter is centered upon a jury's unanimous verdict finding that Appellants City and Kirkpatrick willfully failed and/or refused to follow applicable policies, procedures, and rules; subjected Detective Mehring to the deprivation of his constitutional right to procedural due process; retaliated against Detective Mehring via numerous adverse employment actions after he filed suit and spoke on matters of public concern; intentionally and/or recklessly caused Detective Mehring to suffer emotional distress; Kirkpatrick engaged in extreme and outrageous conduct which caused Detective Mehring to suffer severe emotional distress; and the jury's unanimous assessment of punitive damages directly against Kirkpatrick to punish and/or deter her and others from committing similar acts in the future. See CP 2681-83; 2691-92; 2695-99; 2703.

Yet, despite the jury verdict and the Trial Court's refusal to vacate, Appellants have continued in their blatant disregard of policies, procedures, and rules. Indeed, twice now Appellants have been ordered to re-write their appellate briefs. See **Appendix J** and **K** hereto the January 8, 2013 Commissioner's Ruling and October 2,

2013 notation ruling. In disregard of these Orders, and the applicable appellate rules, Appellants have again submitted a brief wherein they fail to cite to the underlying record in support of their factual assertions, rely upon misstatements of fact, and support their contentions with arguments never raised below.<sup>1</sup>

Despite Appellants' refusal to follow applicable appellate rules, it is irrefutable that substantial evidence was provided to support the jury's unanimous verdict. Substantial evidence existed to hold Appellants City and Kirkpatrick liable for their willful misconduct. Finally, substantial evidence existed evidencing that Appellants intentionally and willfully placed Detective Mehring on unpaid layoff in violation of City policies, procedures, and rules, thus subjecting them to Washington State's wrongful withholding of

---

<sup>1</sup> Appellants' Response/Reply Brief contains numerous factual assertions without citation to the record. See for example p. 10 "*The Guild was apparently not interested in grieving such an obvious case.*" Additionally, there are numerous arguments made for the first time in the Reply. See for example p. 11, wherein Appellants argue Detective Mehring did not address "*disciplinary suspensions*" and the Guild could not be forced to accept a "*management rights*" clause precluding usual disciplinary procedures. See also p. 15, wherein Appellants argue for the first time that the Guild is responsible for the damages Mehring suffered. Finally, Appellants misstate the facts at issue in this matter. See, for example, p. 17, wherein Appellants erroneously assert there has been "*improper focus on state procedures.*" This matter has never involved "*state procedures.*" See also p. 19, wherein Appellants erroneously claim Detective Mehring amended his Complaint on "*the eve of trial.*"

wages statute and the result of now having to pay double damages.

See RCW 49.48.010.

The Trial Court erred in dismissing Detective Mehring's wrongful withholding of wages claim, in failing to list Kirkpatrick as a Judgment Debtor, and in failing to utilize the correct post-judgment interest rate. Detective Mehring respectfully asks this Court to reverse these holdings, to award him \$127,945.51 in back wages, to correct the Judgment, to modify the applicable interest rate, and to award Detective Mehring all permissible attorney fees and costs.

## II. ARGUMENT

### A. Wrongful Withholding Of Wages.

It is a "*universal maxim that ignorance of the law excuses no one.*" Leschner v. Dept. of Labor and Indus., 27 Wn.2d 911, 927 (1947). Accordingly, Appellants' assertion that ignorance of their own policies and procedures should excuse them from liability must fail. See Def. Resp./Reply Brief, pp. 72-74.

Moreover, Appellants have ignored the relevant case law in arguing a failure to follow applicable suspension policies and

procedures is “*outside the purview of the controlling*” wage statutes. See Def. Resp./Reply Brief, p. 78. Indeed, Mega v. Whitworth College, 138 Wn. App. 661 (2007) is on point here. It is irrelevant that Mega involved an individual contract as opposed to a group contract. The legal analysis and principles at play are the same and quite applicable here.

In Mega, the court found that Dr. Mega had been entitled to suspension procedures detailed in the faculty handbook and that the college’s failure to follow those procedures, due to the incorrect belief that the president’s letter complied with the University’s policy, constituted a wrongful withholding of wages pursuant to RCW 49.52.070 upon his termination. Id. at 673. Here, as in Mega, the employer held an incorrect belief that it had complied with all requisite policies and procedures when placing its employee on unpaid layoff. Just as in Mega, the Appellants’ incorrect belief that they could place Detective Mehring on unpaid layoff for 569 days without first complying with all applicable policies, procedures, and rules constituted a wrongful withholding of wages pursuant to RCW 49.52.070.

Here, the relevant facts are as follows: Detective Mehring was placed on unpaid layoff (suspended) for a period of time, 569 days, far exceeding that which Civil Service Rule IX, Section 4 permits. “[A]ny employee may be suspended for a period of not more than sixty days for cause and with loss of salary.” See Appendix B to Detective Mehring’s Response/Cross Appeal Brief, Ex. 10, Rule IX Section 4 (“**Appendix B**”).

Detective Mehring was not suspended for cause pursuant to the Civil Service Rules. RP 1020, 735; **Appendix B**, Ex. 10, Rule IX Section 5.

Detective Mehring’s unpaid layoff was effectuated in violation of the Appellant City’s Felony Layoff Policy. See Appendix A to Detective Mehring’s Response/Cross Appeal Brief, Ex. 8 (“**Appendix A**”).

Detective Mehring was placed on unpaid layoff by order of Appellant Kirkpatrick, not the Mayor as mandated by the Felony Layoff Policy. RP 1020; **Appendix A**, Ex. 8; **Appendix B**, Ex. 10.

Appellant Kirkpatrick believed unpaid layoff of Detective Mehring was her decision. “[D]ifferent chiefs do it differently. It is

*my choice.... I have the authority to set that standard and I have set that standard.”* RP 682, 703-5, 1336-7, 1456-8.

Appellant Kirkpatrick admitted she could have left Detective Mehring on paid status, but she chose not to. RP 1476-77.

The Felony Layoff Policy contained mandatory provisions for notice, ad hoc committee review, and an opportunity to be heard prior to job deprivation, none of which Detective Mehring received. RP 1033-4; **Appendix A**, Ex. 8.

Appellants never advised Detective Mehring of his rights pursuant to the Felony Layoff Policy. RP 1033-4; **Appendix A**, Ex. 8.

The Spokane Police Department Administrative Panel Review Memorandum confirmed that, “*The internal investigation was suspended until the outcome of the criminal case was determined.*” See CP 342.

Appellants’ reliance upon Baumgartner v. State Dept. of Corrections, 124 Wn. App. 738, 746 (2004) is misplaced. In Baumgartner, current and retired lieutenants of the Department of Corrections argued they were entitled to unpaid wages due to an

incorrect rating that placed them in a lower salary category. Id. at 742. Upon review, the court found that RCW 49.48.010 applies to claims for wrongful withholding of wages “*not to a claim of salary misclassification.*” Id. Here, Detective Mehring is not arguing he was subject to a salary misclassification. He is arguing pursuant to Mega that Appellants’ incorrect belief that they could place him on unpaid layoff without adhering to applicable policies and procedures resulted in the wrongful withholding of his wages.

Appellants’ argument that it engaged in excusable carelessness or inadvertence also fails. “*The concept of carelessness or inadvertence suggests errors in bookkeeping or other conduct of an accidental character.*” Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 161 (1998). Appellants’ argument invoking “carelessness” carelessness/inadvertence as the reason for not paying Detective Mehring’s wages for 569 days is implausible and unsupported. Here, there is no evidence that Appellants committed “errors” in bookkeeping or “accidentally” placed Detective Mehring on unpaid leave.

First, even if Appellants were truly unaware of the procedures mandated in the “Felony Layoff Policy” as now suggested, they were admittedly aware of the procedures mandated in the applicable Civil Service Rule, Rule IX. See Ex. 10. Thus, Appellants are still nonetheless liable for the wrongful withholding of Detective Mehring’s wages in violation of Rule IX.

Second, it is clear from the record that Appellants made a conscious and intentionally punitive decision to place Detective Mehring on unpaid leave. RP 682, 703-5, 1336-7, 1456-8, 1476-77. Moreover, the record reflects that both his Internal Affairs investigation and the Loudermill hearing were postponed to allow Appellant Kirkpatrick to obtain an anticipated verdict from Detective Mehring’s criminal trial prior to finalizing discipline. Ex. 19 (attached hereto as **Appendix L**); CP 342.

This was a strategic decision made as a gamble that Detective Mehring would be found guilty. Id. The fact is Appellant Kirkpatrick intended that Detective Mehring not receive pay while his criminal trial was pending. RP 682, 703-5, 1336-7, 1456-8, 1476-77. This was in direct contravention of Appellant City’s policy

and procedures! See Exs. 8 and 10. Appellants' actions do not reflect mere carelessness or inadvertence; they evidence malice, forethought, and vindictive intent as supported by the jury's unanimous verdict assessing punitive damages against Appellant Kirkpatrick.

Accordingly, just as the Defendant in Mega was found to have wrongfully withheld wages, Appellants are likewise responsible for wrongfully withholding wages from Detective Mehring. Appellants violated the "Felony Layoff Policy" as well as the Civil Service Rules, specifically Rule IX, in placing Detective Mehring on unpaid status for longer than 60 days without cause and without the Deputy Mayor's input or the Mayor's input as required. See Exs. 8 and 10. Accordingly, Appellants are liable for the consequence as contemplated by RCW 49.52.070.

The Trial Court here erred when it decided as a matter of fact and law that Appellants were not liable for the wrongful and willful withholding of \$127,945.51 of Mehring's wages in violation of RCW 49.52.050. The legislature intended that there would be consequences for such wrongful conduct which the Trial Court

chose to ignore. Accordingly, Mehring requests that this Court reverse the Trial Court's dismissal of his wage claim and award him twice the undisputed amount of his withheld wages as damages pursuant to the statute.

**B. Judgment Summary.**

Appellants incorrectly assert Detective Mehring failed to present or argue this matter below. See Def. Resp/Reply Brief, p. 81. The fact is, in response to Defendants' Objection to Judgment against Defendant Kirkpatrick, Detective Mehring strenuously argued against Appellants' attempts to remove Appellant Kirkpatrick from the Judgment Summary. CP 3313, 3325-3335; 3353-54; 3846-55 (Plaintiff's Response to Defendants' Objection to Judgment against Defendant Kirkpatrick Individually and Motion to Set Aside Same).

It is uncontested that a Judgment must reflect what the jury has rendered. See Korssjoen, Inc. v. Heiman, 52 Wn. App. 843, 847 (1988). By refusing to list Appellant Kirkpatrick as a Judgment Debtor, the Trial Court refused to accept the jury's findings, specifically that Appellant Kirkpatrick was liable for \$250,000 in

punitive damages. Moreover, by refusing to name Appellant Kirkpatrick as a Judgment Debtor, the Trial Court failed to abide by the legislature's mandate that a succinct information summary appear on the first page of each Judgment. See RCW 4.64.030(2)(a).

Mehring respectfully requests this Court enter an appropriate Judgment naming Kirkpatrick as a Judgment Debtor.

**C. Incorrect Interest Rate.**

Pursuant to RCW 4.56.110, the appropriate rate of interest applicable to the punitive damages awarded against Kirkpatrick is 5.26%. RCW 4.56.110(3)(b) provides "*judgments founded on the tortious conduct of individuals or other entities, whether acting in their personal or representative capacities, shall bear interest from the date of entry at two percentage points above the prime rate....*" Id. Thus, the rate of 5.26% was the appropriate rate of interest applicable to the \$250,000 punitive damages award, yet the Court applied a lesser rate. 12/16/11 RP 81-86.

In arguing RCW 4.96.041 mandates the Judgment in this matter be tendered solely by Appellant City, Appellants failed to advise this Court that RCW 4.96.041 does not require local

governments to indemnify officials from punitive damages. Instead, RCW 4.96.041(4) specifically states a local government may agree to pay an award for punitive damages but the statute does not preempt those damages from becoming a lien upon the officer's property. RCW 4.96.041(4).

Accordingly, Appellants are incorrect when asserting "by law" the Judgment at issue can only be collected from the Appellant City.

### **III. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS**

Based on RAP 18.1, as well as the argument set forth in Mehring's Response/Cross Appeal, Mehring respectfully requests an award of reasonable attorney fees and costs incurred on appeal.

### **IV. CONCLUSION**

Based upon the foregoing, Respondent Mehring respectfully requests that the jury verdict against Appellants be upheld and affirmed in all respects; that Respondent's fees and costs awarded by the Trial Court be upheld and affirmed; that the Trial Court's dismissal of Respondent Mehring's wrongful withholding of wages claim be reversed and that such undisputed wages – \$127,945.51, as

a matter of law, be awarded in twice the amount wrongfully withheld; that the Trial Court's errors in refusing to correctly identify Kirkpatrick as a Judgment Debtor and to apply the appropriate interest rate be reversed and remanded for entry of an Amended Judgment; and for an award of reasonable costs and attorney fees with a multiplier of 1.25 on appeal.

DATED this 30 day of December, 2013.

DUNN BLACK & ROBERTS, P.S.



---

ROBERT A. DUNN, WSBA #12089  
SUSAN C. NELSON, WSBA #35637  
Attorneys for Respondent/Cross-  
Appellant Mehring

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 30 day of December, 2013, I caused to be served a true and correct copy of the foregoing document to the following:

- HAND DELIVERY Milton G. Rowland
- U.S. MAIL Foster Pepper, PLLC
- OVERNIGHT MAIL 422 W. Riverside, Suite 1310
- FAX TRANSMISSION Spokane, WA 99201
- EMAIL

- HAND DELIVERY Carl E. Hueber
- U.S. MAIL Winston & Cashatt
- OVERNIGHT MAIL 601 W. Riverside Ave.
- FAX TRANSMISSION Suite 1900
- EMAIL Spokane, WA 99201



SUSAN C. NELSON

# APPENDIX J

The Court of Appeals  
of the  
State of Washington  
Division III

FILED

JAN - 7 2013

RECEIVED

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

JAN 08 2013

DUNN & BLACK

JAY P. MEHRING,	)	No. 30514-7-III
	)	
Respondent,	)	
	)	
v.	)	COMMISSIONER'S RULING
	)	
CITY OF SPOKANE,	)	
	)	
Appellant.	)	
_____	)	

The City has appealed the Spokane County Superior Court's November 21, 2011 judgment on a jury verdict in favor of Jay P. Mehring. Mr. Mehring now moves to strike the City's brief, based on the following arguments:

**A. The Brief does not Comply with RAP 10.3 and 10.4.**

(1) *Certain of the City's Citations to the Record do not Support the Factual Assertions in the City's Brief.* (The respondent has highlighted those citations in the brief in yellow.)

(a) "[T]he Mehrings had an explosive public argument . . . (RP 992-94)"  
Brief at 7. This Court finds that the cited pages support the statement.

- (b) “After the wrestling match, Lisa Mehring left with her young sons who were also very upset. (RP 1352)” Brief at 7. The cited page does not support this statement.
- (c) “Later that evening, Lisa Mehring talked with a family friend, SPD Sergeant Troy Teigen. (RP 1349) Lisa told him that she had gotten into an argument with her husband, that Detective Mehring was extremely angry and had threatened “to destroy” her and said that he would “burn her down” or “burn the house down with her and the kids in it. (RP 1349)” Brief at 7.

“On March 26, 2007, another family friend, SPD Sergeant David Overhoff, ran into Detective Mehring and his sons at a gym. (RP 1349) Detective Mehring was again extremely angry, and stated to Sergeant Overhoff that ‘I’m going to burn that bitch and her house to the ground. . . . I’m going to destroy that bitch and everything she owns’ and ‘I have nothing to lose and a piece of paper isn’t going to stop me either.’ (RP 1349)” Brief at 7.

“Both Sergeant Overhoff and Sergeant Tiegen documented their contacts with the Mehrings in separate memos to their superiors. (RP 1349)” Brief at 7.

The cited page does not support these statements.

- (d) “Based on these reports, SPD Administration opened an Internal Affairs investigation into the situation. (RP 999)” Brief at 7. The cited page does not support that statement.
- (e) The respondents have highlighted additional material in yellow at pages 8, 9, 11, 12, 13, 14, 15, 17 of the appellant’s opening brief.

Given the fact that a review of the citations on page 7 of the brief, as set forth above, bear out the respondent’s argument, this Court directs the appellant to check its citations and, if they are not accurate, to either remove the statements or provide accurate

citations for them. The appellant shall do the same for the statements identified in (a) through (d).

(2) *Certain Factual Statements in the City's Brief are not Supported with any Citation to the Record.* (The respondent has highlighted in green those statements in the City's brief.)

The City shall either provide a correct citation from the record, or remove from its brief, the statements highlighted in green at pages 7-17, 23-25, 28-29, 31, 38-40, 43-44, 47-49, 52, and 54.

**B. The Brief does not Comply with RAP 10.3.** (The respondent has highlighted unsupported argument in orange.)

This Court has reviewed the material highlighted in orange and concludes that they constitute argument based on the case it cites in a preceding statement. If the respondent disagrees with the City's interpretation of the case, it can do so in the argument portion of its respondent's brief.

**C. The Brief does not Identify the Standard of Review.**

While an appellate brief, as a matter of good practice, should identify the standard of review, the respondent has not cited any case or rule that requires such. Nor is this Court aware of any.

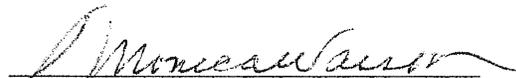
**D. The Respondent asks this Court to Impose Sanctions against the City for its Violation of RAP 10.3 and 10.4**

This Court declines to award sanctions at this time.

No. 30514-7-III

Accordingly, IT IS ORDERED, the respondent's motion to strike the brief in its entirety is denied. However, the Court shall return the appellant's brief to the appellant with a copy of this ruling and direct the appellant to take the steps set forth in this ruling. The appellant shall refile its amended brief within 10 days from the date of this ruling.

January 7, 2013

  
\_\_\_\_\_  
Monica Wasson  
Commissioner

# APPENDIX K

Renee S. Townsley  
Clerk/Administrator

(509) 456-3082  
TDD #1-800-833-6388

*The Court of Appeals  
of the  
State of Washington  
Division III*



October 2, 2013

500 N Cedar ST  
Spokane, WA 99201-1905

Fax (509) 456-4288  
<http://www.courts.wa.gov/courts>

Carl Edward Hueber  
Winston & Cashatt  
601 W Riverside Ave Ste 1900  
Spokane, WA 99201-0695

Milton G. Rowland  
Foster Pepper PLLC  
422 W Riverside Ave Ste 1310  
Spokane, WA 99201-0302  
rowlm@foster.com

RECEIVED  
OCT 02 2013  
DUNN, BLACK  
& ROBERTS

CASE # 305147  
Jay P. Mehring v. City of Spokane, et al  
SPOKANE COUNTY SUPERIOR COURT No. 092056476

Counsel:

Pursuant to the motion to file over-length brief, the following notation ruling was entered:

**October 1, 2013**  
**The Motion for Filing Overlength Brief is granted in part.**  
**Given the objection filed and the length of the prior briefs**  
**filed on the case, the brief is limited to 87 pages.**

**Renee S. Townsley**  
**Clerk**

The amended Appellant/Cross-Respondent's Reply Brief is now due within 10-days from the date of this letter, by October 14, 2013.

Sincerely,

RENEE S. TOWNSLEY  
Clerk/Administrator

Joyce A. Roberts, Case Manager

RST:jr

c: Ms Susan C Nelson  
Dunn Black & Roberts, P.S.  
111 N Post St Ste 300  
Spokane, WA 99201-4911  
snelson@dunnandblack.com

Robert Allan Dunn  
Dunn Black & Roberts, P.S.  
111 N Post St Ste 300  
Spokane, WA 99201-4911  
bdunn@dunnandblack.com

# APPENDIX L

---

**From:** Griffiths, Mark  
**At:** Monday, June 04, 2007 3:22 PM  
**To:** Stamatoplos, Carla  
**Subject:** FW: Mehring DV Arrest-2.doc

Hi Carla,

I talked to Jay Mehring today. His trial is set from Monday 7-9 and should take most of that week. We many want to avoid having the Loudermill that week and schedule it for the following week so the chief will have the results of the criminal trial before his Loudermill.

---

**From:** Nicks, Jim  
**Sent:** Sunday, June 03, 2007 9:35 AM  
**To:** Cavanaugh, Christine; Stephens, Scott; Griffiths, Mark; Stamatoplos, Carla  
**Subject:** Mehring DV Arrest-2.doc

Please schedule the Loudermill Hearing.



Mehring DV  
Arrest-2.doc

SPOKANE CO. NO. #09-2-05647-6

Mehring vs. City of Spokane

P-19

Disposition: \_\_\_\_\_