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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

(Spokane County Superior Court No. 16-2-00616-1)

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

DAVID CEBERT,

Appellant.

vs.

PATRICK KENNEDY and JANE DOE KENNEDY, a martial community, JOHN KENNEDY and JANE DOE KENNEDY, a martial community, AXTEL SCIENTIFIC, INC., a Nevada corporation, and MITIGATION OF DISEASE, INC., a Delaware corporation

Respondents,

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

This appeal is about the summary judgment of Mr. Cebert's claims based on the statute of limitations. Mr. Cebert's claims are in two categories: (1) wage claims (employment/ contract/ quantum meruit), and (2) fraud. The trial court applied the wrong law to wage claims and then weighed facts against Mr. Cebert on fraud. It was this wrong law and weighing of facts that justified the trial court's summary judgment based on the statute of limitations; and it the reason this should be reversed. *CP 1310-1312*.

Statutory and common law wage claims begin to accrue when employment is terminated. This is because RCW 49.48.010 creates a duty to pay the employee all wages due when employment ceases. This is also because the Supreme Court in *Macchia v. Salvino*, 64 Wn.2d 951, 955, 395 P.2d 177, 179 (1964) stated a continuous service contract does not begin to accrue until it is terminated.

Contrary to clear law, the Kennedys argue the statute of limitations begins to accrue upon the first non-payment of wages. They provide no case law to support notion that non-payment of wages triggers the statute of limitations. Without basis, they just argue an employee should know they were harmed at that point.

Mr. Cebert has evidence of employment past February 17, 2013. This evidence includes two e-mails from John Kennedy (March 29, 2013, and April 10, 2013) asking for work and expecting work after February 17, 2013. This evidence includes deposition testimony about work done after that date. Since this was filed on February 16, 2016 and has a three-year statute of limitations, then this evidence of employment shows Mr. Cebert's statute of limitations did not run before filing.

Likewise, fraud only begins to run when it is discoverable. John Kennedy's e-mail shows that Mr. Cebert was being called a "governing force" in MODI and "president" at least as late as March 29, 2013. In May of 2017 John Kennedy stated that he never, even in March of 2013, had any intention of making Mr. Cebert president of MODI. This is a fraudulent promise that becomes actionable upon discovery.

In summary judgment, all facts and reasonable inferences must be viewed in the best light of the non-moving party, Mr. Cebert. The Kennedys' brief never acknowledges this well-known standard, and instead argues the later trial of the counter claims is the reason to rule in their favor.

The Kennedys' brief asks this Court to weigh and view the facts in the least favorable light of Mr. Cebert. The Kennedys rely on an unsworn Power Point presentation, and the Kennedys interpretation of other

documents to claim “sham affidavit” and other items. In contrast Mr. Cebert relied on deposition transcripts and the Kennedys’ e-mails taken in the light most favorable to Mr. Cebert.

John Kennedy’s e-mail on March 29, 2013 seals the question of employment and false representation of the presidency past February 17, 2013. While there are other facts of employment past February 17, 2013, that e-mail is enough since it is John Kennedy’s own words, and refers to MODI. The Kennedys’ brief argues about credibility and interpretation of the e-mail, but those are for the jury. This, along with the other facts in the record, must be viewed in the light most favorable for Mr. Cebert, and that is why the summary judgment was wrong.

The trial court acknowledged that Mr. Cebert’s claims were “intertwined” with the Kennedys’ counterclaims. It is clear the jury was only allowed to hear one side of this intertwined story, and fundamental fairness requires that all these claims should be tried together. The Kennedys spend a lot of pages attempting to justify their trial win, but that was only a minor piece of this appeal. The improper dismissal of Mr. Cebert’s claims, weeks before trial, is the main issue here. Mr. Cebert should have a chance to tell his full story to the jury, intertwined claims and all. Mr. Cebert asks this Court to reverse the improper grant of summary judgment, as well as the judgments, so they can all be tried

together.¹

II. ARGUMENT

A. Taking the Material Facts and Reasonable Inferences In The Best Light of Mr. Cebert Makes Summary Judgment Impossible Here

1. Washington Law Requires The Facts Be Seen In The Best Light of Mr. Cebert, and Facts Cannot Be Weighed In Summary Judgment.

“Summary judgment requires a legal certainty: the material facts must be undisputed, and one side wins as a matter of law.” *Davis v. Cox*, 183 Wn.2d 269, 281, 351 P.3d 862, 867 (2015), *abrogated on other matters by Maytown Sand & Gravel, LLC v. Thurston Cty.*, 191 Wn.2d 392, 423 P.3d 223 (2018), emphasis added. During a CR 56 hearing, facts and reasonable inferences must be viewed in the best light of the nonmoving party, Mr. Cebert. *Bishop v. Miche*, 137 Wn.2d 518, 523, 973 P.2d 465, 468 (1999); *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 58, 316 P.3d 1119, 1127 (2014). Courts have even declared this the “familiar standard.” *Id.*

The Kennedys completely ignore this “familiar standard.” They spend pages 23-25 of talking about the standard of review, but never once

¹ Mr. Cebert recognizes that Axtel has been federally stayed in bankruptcy and only brings these requests against the Kennedys and MODI at this time.

state the court cannot weigh facts and must take all facts and reasonable inferences of facts in the best light of Mr. Cebert. The Kennedys even go so far as to misuse the cases of *Club Envy*, and *Davis*, which are cited by Mr. Cebert, to imply such a standard does not exist. *Respondents' Brief* p. 31-32. The best light of the non-moving party standard is important because it protects Mr. Cebert's right to trial by jury, and it should not be shrugged off because a party finds it inconvenient to their case. *Davis*, 183 Wn.2d at 281.

It is also well-established law that weighing conflicting evidence is not allowed during a CR 56 motion. *Strauss v. Premera Blue Cross*, Cause 95449-6, Oct. 3, 2019, p. 9-10. (Wash. Supreme Ct.). The Supreme Court just reiterated this rule when a trial court and appellate court weighed the credibility of conflicting medical studies and expert testimony. *Id.* The majority in *Strauss* even rejected a federal court's weighing of evidence in a similar case, noting that was against Washington's law. *Id.* at 9.

The Kennedys only spend one paragraph to say the trial court did not weigh evidence. *Respondents' Brief* p. 29. They say the trial court took Mr. Cebert's testimony that he was orally offered the presidency on face value. The Kennedys then argue that the trial court also took Mr. Cebert's writings in September of 2012 on face value that he was not president. It is not the face value of those items that is the problem. The

problem is the complete ignoring of the March 29, 2013 e-mail where John Kennedy represents the presidency and asks for work.

John Kennedy sent the March 29, 2013 e-mail identifying Mr. Cebert as a “governing force” of MODI, and asking him to take further action as “president.” *CP 534*. Taken in the best light of Mr. Cebert this e-mail shows a false representation of the presidency position as late as March 29, 2013. Taken in the best light of Mr. Cebert it also shows employment as late as March 29, 2013. This e-mail alone creates issues of fact that fraud, statutory employment claims, employment contract, and quantum meruit did not begin to accrue until after February 17, 2013. With a three-year statute of limitations, that would make the filing on February 17, 2016 within the statute of limitations.

As the Kennedy’s arguments show, this e-mail can only be ignored if you weigh impeachment evidence of a “power point presentation” not given under oath. *Kennedys’ brief p. 28*. Or it can only be ignored if it is determined prior writings of Mr. Cebert somehow negated John Kennedy’s previous representations. Regardless of those arguments, this Court must view this e-mail and other evidence in the light most favorable to Mr. Cebert. Anything else is the weighing of evidence that invades Mr. Cebert’s rights to trial by jury.

2. The Material Fact For Wage Claims Is When Employment Ends and Not When Wages Are First Not Paid

There are three theories of recovery for wage claims, (a) RCW 49.28.010, (b) continuous service contract, and (c) quantum meruit. The statute and case law is clear that the first two only begin to accrue when employment terminates. Quantum meruit has no clear case law, but it has been analogized to employment claims so it should only accrue when employment ceases. That makes the material fact: when did employment terminate? The material fact is not when the Kennedys first failed to pay Mr. Cebert.

a. RCW 49.48.010 Only Accrues After Employment Ends.

“When any employee shall cease to work for an employer” the employer has a duty to pay the wages due on account of employment. RCW 49.48.010. The Supreme Court has stated this statute only becomes actionable when employment ceases. *Pope v. Univ. of Washington*, 121 Wn.2d 479, 489, 852 P.2d 1055, 1061 (1993), *amended*, 871 P.2d 590 (Wash. 1994).

The Kennedys do no statutory analysis and provide no case law that RCW 49.48.010 begins to run upon the first paycheck. Instead, the

Kennedys try to distinguish *Pope* and the federal case, *Escobar v. Baker*, 814 F. Supp. 1491, 1507 (W.D. Wash. 1993), as dealing with only partial paycheck cases. The Kennedys, though, provide no reason that this statute should address only a partial payment of wages, when the duty is to pay “the wages due” on account of employment. The statute does not limit it to only “part of the wages due.”

In contrast to the Kennedys’ arguments about *Pope* the Supreme Court in *Pope* stated non-payment of wages was not enough to create a claim under RCW 49.48.010. Rather the *Pope* court require ceasing work as necessary to start a claim under RCW 49.48.010. *Pope v. Univ. of Washington*, 121 Wn.2d at 489. *Pope* was a claim for less than full wages, which could have been remedied under RCW 49.48.010. It was the fact the employees had not ceased work that made RCW 49.48.010 non-actionable in *Pope*.

RCW 49.48.010 is part of the legislative’s protective measure for employees. *Allen v. Dameron*, 187 Wn.2d 692, 705, 389 P.3d 487, 493 (2017). The legislature created statutes, including RCW 49.48.010, to ensure the employee received the full amount of wages he/she is entitled to from the employer. *Id.* Creating an action with a three-year statute of limitations from the date employment ends is part of protecting employees. It stops employers from being immune for non-wage

payment, even eleven years prior, because the employee was too afraid to complain during employment.

Since the statute of limitations only begins to run once an action can be pursued, then RCW 49.48.010 can only run once Mr. Cebert ceased work. Since the statute of limitations is three years, then Mr. Cebert must have ceased working for the Kennedys before February 17, 2013 (the cause was filed February 17, 2016). The material fact under RCW 49.48.010 is when employment ceased, and not when the pay was first withheld.

b. The Contract Employment Claims Only Accrue After The Continuous Service Contract Ends

“[T]he statute of limitations on amounts due under a contract for continuous service does not begin to run until the contract is terminated.” *Macchia v. Salvino*, 64 Wn.2d 951, 955, 395 P.2d 177, 179 (1964). The Kennedys wrongly state *Macchia* says the statute begins to run when wages were first not paid. *Respondent's brief* p. 34. That is not true since *Macchia* was filed in March of 1962, but looked back to 1950 to evaluate the wage claim damages. *Macchia*, 64 Wn.2d at 955.

The Supreme Court ruled on the claim accruing at the end of the contract termination is in direct response to the trial court's ruling the

other way. The *Macchia* trial court ruled that the statute of limitations began to run upon the first non-payment, exactly how the Kennedys argue now. The Supreme Court reversed this and was clear: a continuous service contract only starts the statute of limitations upon termination of the contract. *Macchia*, 64 Wn.2d at 955

The material facts on Mr. Cebert's continuous service contract is when the contract is terminated, not when the Kennedys first chose not to pay him. The *Macchia* court found filing within 3 years of the termination of the contract was within the statute of limitations, and then looked back almost 11 years for damages. Evidence of employment past February 16, 2013, means the statute of limitations did not run prior to filing in February 16, 2016.

c. Quantum Meruit Claims Are Equitable Wage Claims and Therefore Run When Employment Ends

Quantum meruit is an equitable remedy based “on the principle that one who has accepted the benefit to the extent of the work performed is estopped to deny the liability.” *Union Sav. & Tr. Co. of Seattle v. Krumm*, 88 Wash. 20, 34, 152 P. 681, 687 (1915). It allows for recovery based on work performed. *French v. Sabey Corp.*, 85 Wn. App. 164, 170, 931 P.2d 204, 207 (1997), *aff'd*, 134 Wn.2d 547, 951 P.2d 260 (1998). It

is a subset of unjust enrichment, which is analogized to employment claims. *Young v. Young*, 164 Wn.2d 477, 486, 191 P.3d 1258, 1263 (2008); *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 837, 991 P.2d 1126, 1133 (2000), *opinion corrected on denial of reconsideration*, 1 P.3d 578 (Wash. 2000).

As an equitable doctrine based on pay for services, it would trigger wages due on account of employment under RCW 49.48.010. This means the claims here are also triggered when work ceases. That furthers the public policy of the legislature that ensures payment of wages and the equitable doctrines of quantum meruit.

The Kennedys cite *Eckert v Skagit Corp.* for the proposition that quantum meruit is three years from the first non-payment. *Respondent's brief p. 39*. This is a misinterpretation of the facts in *Eckert*. Eckert's claim was that he gave the defendant the machine 18 years prior to filing, and it was the giving of the machine that was unjust enrichment. *Eckert v. Skagit Corp.*, 20 Wn. App. 849, 851, 583 P.2d 1239, 1241 (1978). That is not the continuous service agreement we see in *Macchia*, nor a wage claim that we would see in RCW 49.48.010.

Washington has a strong policy of making sure employers pay wages. Under that policy and the equity principals of quantum meruit this claim should begin to accrue upon termination of employment. That

would accord with the statutory policy of RCW 49.48.010, and the common law continuous contract rule in *Macchia*.

d. The Facts Show Mr. Cebert Employed Past February 16, 2013

The March 29, 2013, e-mail shows John Kennedy acknowledging Mr. Cebert's employment on that date. *CP 534*. This e-mail calls Mr. Cebert part of the governing force of MODI, and asks him to do work as "president." While it may not state the day employment ceased, it proves employment past February 16, 2013. That alone is enough to create an issue of fact for the ceasing of employment and continuous service being raised within the statute of limitations date.

On April 10, 2013, John Kennedy said, "We need to look to look to David for direction and guidance in our future and would appreciate a grand plan on how we are going to manage one of the most important science of disease now known to man." *CP 536*. In John Kennedy's own words he is asking Mr. Cebert to do work for MODI on April 10, 2013.

Along with this, Mr. Cebert testified to other work he did past February 16, 2013. He made the labels in summer of 2013 for the jars of cream they were selling. *CP 248*. He also collected data for the Kennedys and sent it to them in August of 2014. *CP 253-254*. Mr. Cebert also

received the cream from MODI's patent and was supposed to be selling it. *CP 560*. Mr. Cebert resigned in September of 2014. *CP 246-247; 267*.

The Kennedys claim that this resignation only applies to Axtel, and not MODI. However, the evidence is that Axtel and MODI are "pretty much the same." *CP 561*. Apparently one was supposed to manufacture, and one was supposed to sell the product, but John Kennedy was not really sure of the difference. *CP 561*.

These facts show employment and the continuous service contract going past February 17, 2013. The Kennedys, who have the burden of proof on the statute of limitations, offer no evidence that the employment or service ended earlier than that. Instead they offer evidence that Mr. Cebert was not paid prior to February 17, 2013, but that is not evidence of employment termination.

Employment past February 17, 2013, means Mr. Cebert did not cease to work prior to that time, and the statute of limitations had not run prior to filing on February 17, 2016. The absolute evidence of employment for MODI is in John Kennedy's e-mails in March and April of 2013 where he asks Mr. Cebert to do work, even as the "president" of MODI.

3. There Are Material Facts that The Representations of

Fraud Continued After February 17, 2013, Thus Making The Statute of Limitations Not Running on February 17, 2013

A false representation is the key to fraud. However, fraud's statute of limitation only begins to run when the facts of fraud should have been discovered. *Young v. Savidge*, 155 Wn. App. 806, 823, 230 P.3d 222, 230 (2010). Mere suspicion of wrong is not discovery, but rather the discovery of the evidentiary facts leading to a belief in fraud starts the action accruing. *Id.* The timing of discovery is an issue of fact, and not of law. *Id.*

The false promise of the presidency and its benefits is the fraudulent representation in this matter. A promise is only fraud if at the time of making it there was no intention of performing on the promise. *Markov v. ABC Transfer & Storage Co.*, 76 Wn.2d 388, 396, 457 P.2d 535, 539 (1969) (“[I]f a promise is made for the purpose of deceiving and with no intention to perform, it constitutes such fraud as will support an action for deceit.”) Thus, the key for this case is at what times were the representations of the presidency made, and when did Mr. Cebert discover John Kennedy never had any intention of performing on the promise.

On March 29, 2013, John Kennedy called Mr. Cebert “president” of MODI, and named Mr. Cebert as part of MODI’s “governing force.” *CP 534*. While this promise may have started as early 2011, the false

representation of it continued past February 16, 2013. There is concrete evidence that John Kennedy was continuing the promise of the president position, with its attendant benefits into March 2013. John Kennedy was asking Mr. Cebert to do work based on the presidency promise, and that was the false representation.

The Kennedys argue against the e-mail by saying prior documents showed John Kennedy was president. They use an unsworn to Power Point presentation where Mr. Cebert said, “The assumption that David Cebert would, under the correct circumstances, assume the presidency of the company was confirmed by an email from John W Kennedy” to claim Mr. Cebert said he knew he would never be president. *Respondents brief p. 36, CP 275.* The document never says Mr. Cebert was not offered the presidency. The Kennedy’s representation of the document is self-serving, wrong and definitely not viewing it in the best light of Mr. Cebert.

In contrast, that document shows Mr. Cebert believed he was promised the presidency and with success he would get it. Mr. Cebert did not know that he would never get it, and John Kennedy had no intention of giving it to him. *CP 561-563; 568-569.* Finding the document to be anything else requires weighing facts and viewing them in the light least favorable to Mr. Cebert, which violates the summary judgment rules.

The Kennedy’s also argue that prior documents showing John

Kennedy was president meant that Mr. Cebert knew he would never be president. *Respondents' brief* p. 25. Those documents, though, show John Kennedy was president immediately prior to and after the merger, but then had power to appoint the appoint executive officers. *CP* 379. The document ends with Mr. Cebert in the role of President and John Kennedy as Chief Technical Officer. *CP* 443. These are the exact roles that John Kennedy then references in March 29, 2013, when he says "I am the scientist" and then refers to Mr. Cebert as "president."

The facts show John Kennedy promised Mr. Cebert the presidency of MODI and continued that promise and representation as a late as March 29, 2013. The facts show that Mr. Cebert only discovered John Kennedy had no intention of performing on the promise when John Kennedy testified he "never" intended to make Mr. Cebert president. These facts, and their reasonable inferences must be taken in the best light of Mr. Cebert. This shows the representation of the presidency continued past February 17, 2013, and the discovery of John Kennedy's fraud only fully occurred during his deposition.

To find the statute of limitations on fraud ran prior to February 17, 2016 would be to weigh facts and evidence, and take them in the light least favorable to Mr. Cebert. That violates the summary judgment rules.

4. The Kennedys Do Not Prove The Statute of Frauds

The statute of frauds is an affirmative defense, which the Kennedys have the burden to prove. CR 8(c). Without any citation to facts in the record, the Kennedys claim Mr. Cebert's employment contract is an alleged oral contract for a term over one year and barred by the statute of limitations. *Respondents' brief p. 41*. Employment contracts in Washington are presumed to be terminable at will and not fixed. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 223, 685 P.2d 1081, 1084 (1984). Contracts for an indefinite period of time are considered terminable at will and do not violate the statute of frauds. *Duckworth v. Langland*, 95 Wn. App. 1, 10, 988 P.2d 967, 971 (1998).

At the trial level, the Kennedys tried to argue that Mr. Cebert's increasing salary over a three year funding proposal was evidence of term. They also cite this Mr. Cebert's interrogatories, *CP 363*, in their statement of facts. However, an increasing salary agreement does prove a term of employment. It would not be uncommon to talk about wages rising over time. A term of employment requires the employee-employer agreement to be for a set term, and that is not what Mr. Cebert testified to. Viewing it as such would be taking the facts in the best light of the Kennedys, and that violates the summary judgment rules.

The evidence of John Kennedy is that any employment would have been at will, and not for a fixed term. John Kennedy testified that he believed the president position was terminable at will, since he would have fired Mr. Cebert “right there.” *CP 563*. Such an action is not necessarily in concert with a term of employment since it could have triggered an action for contract violation in the midst of a term contract.

Unlike *French v. Sabey Corp.*, 134 Wn.2d 547, 551, 951 P.2d 260, 262 (1998), the parties here have not agreed that this was an oral contract for a fixed term. Unlike *French*, Mr. Cebert has not made a claim for wages based on a term. Unlike *French*, Mr. Cebert has made not claims for wages beyond what he worked. Taking the evidence in the best light of the non-moving party, this is a non-fixed term contract that does not violate the statute of frauds.

Along with this though, Mr. Cebert would be allowed to collect his wages regardless of the statute of frauds. “Washington courts will allow recovery for the work already performed in quantum meruit, valued according to the terms of the agreement, but there can be no recovery for breach.” *French v. Sabey Corp.*, 85 Wn. App. 164, 170, 931 P.2d 204, 207 (1997), *aff’d*, 134 Wn.2d 547, 951 P.2d 260 (1998). Mr. Cebert is seeking payment for work already performed and not for the payment of a fixed term.

B. Mr. Cebert's Claims Should Be Retried With The Kennedy's Counterclaims²

1. Mr. Cebert's Claims Are Intertwined With The Kennedys and Should Not Be Separated

Separation of trials is not to be done liberally, but only with careful and cautious judicial discretion. *Brown v. Gen. Motors Corp.*, 67 Wn.2d 278, 282, 407 P.2d 461, 464 (1965). The trial court must decide the trial separation will manifestly promote convenience and/or avoid prejudice. *Id.*; CR 42. This is a discretionary standard, but the court must use discretion.

The Kennedys argue that the court can separate claims by erroneously granting a summary judgment on part of the claims. However, the Kennedys provide no law to support this. Instead the Kennedys boldly claim CR 42 does not govern this situation. *Respondents' Brief p. 47.* The Kennedys completely ignore the injustice such a bifurcation of compulsory counterclaims has.

As the trial court noted, Mr. Cebert's claims were so intertwined with the Kennedys' claims that they are part of the story. *RP 116.* The trial involved testimony that John Kennedy was looking to Mr. Cebert to

² Mr. Cebert acknowledges the Axtel claims are stayed and does not include those with this appeal due to the federal order.

provide scientific data to support MODI's patent. *RP 276-278; 357*. The trial involved Mr. Cebert creating marketing material on the Kennedys' product, along with spreadsheets. *RP 324-329; 754-754; RP 348-351*. This was all e-mailed to the Kennedys. The thing Mr. Cebert was not allowed to talk about was how these were part of Mr. Cebert's employment and his claims.

These intertwined claims were separated based on an erroneous summary judgment, not the discretion of the court. The rule is clear that separation of claims is only done to further justice and efficiency, not be mistake and error. Mr. Cebert should have a right to try his claims with the intertwined counter claims. A judgment by the jury, just hearing one side of the intertwined claims is prejudicial to Mr. Cebert.

2. The Jury Was Allowed To Speculate About the Claims, When Mr. Cebert Was Not Allowed To Discuss His Claims

The jury was shown a note where Mr. Cebert wrote "claim" and "750 million action" while talking with former counsel. *RP 487*. This was after the court ruled Mr. Cebert should not discuss his claims with the jury, and after Mr. Cebert had objected. *RP 209-216; RP 289-290*. The court even noted this put Mr. Cebert in a "Catch 22," but still allowed it.

RP 289. The Kennedys then used this note in their closing argument, claiming it somehow related to Mr. Cebert's claims to data, rather than employment and fraud. *RP 974.*

In response to this, the Kennedys argue that Mr. Cebert discussed this document, citing *RP 487.* The Kennedys are wrong about the record. Mr. Cebert objected to this document on its first use with a witness, identifying the error for the court. *RP 289-290.* *RP 487* then shows Kennedys' counsel using the document again, and Mr. Cebert's counsel renewing his objection. *RP 487, lines 22-25.* The Kennedys' counsel only asked Mr. Cebert about this document over the objection of Mr. Cebert's counsel.

The problem with this document is that it discusses Mr. Cebert's claims on employment and fraud. Those were intertwined with the data collection claims, but were not to be brought up at trial. This document, mentioning claims that could not be discussed is just one example of the fundamental unfairness of trying the counterclaims without Mr. Cebert's claims. Summary judgment should be reversed, and Mr. Cebert's claims should be tried with the Kennedys counterclaims.

3. Prevailing Party Argument Under RCW 19.108.040 Requires Trial Of Claims Versus Counterclaims.

RCW 19.108.040 allows a court to award “reasonable attorney fees to the prevailing party.” While a finding of bad faith, or wilful and malicious is a condition precedent to such authority to award attorney fees, the statute only allows them to a “prevailing party.”

The Kennedys provide no evidence of statutory construction that prevailing party is not required. They disregard the prevailing party mandate in the language, but then claim a right to attorney fees based on being a prevailing party under *Eagle Grp., Inc. v. Pullen*, 114 Wn. App. 409, 424, 58 P.3d 292, 301 (2002). *Respondent’s brief p. 49.*

Eagle Grp., Inc. only allowed fees to the “prevailing party.” In the Kennedys’ attorney fee request they ask for “prevailing party” based on responding to the employment claims, fraud claims, and new trial claims. They say the same brief would be required to prove prevailing party. *Respondent’s brief p. 49.* This contradicts any arguments the claims should not be re-tried against each other to determine a prevailing party for attorney fees.

Moritzky v. Heberlein, 40 Wn. App. 181, 183, 697 P.2d 1023, 1024–25 (1985) was interpreting a statute that a court to award prevailing party attorney fees. The *Moritzky* court held that the statutory language of “prevailing party” is based on the entire case being found in the party’s favor. It was not prevailing on just the statutory claim, but the outcome

was weighed against compulsory claims. *Id.*

Likewise, Mr. Cebert has a right to try his wage and fraud claims against the Kennedys' compulsory counterclaims. MODI was only a prevailing party because Mr. Cebert could not try his wages and fraud claims against it. Mr. Cebert should have an equal right to be found the prevailing party on the entire case.

If however attorney fees are awarded, they should be segmented since MODI is doing the brief for the Kennedy brothers. John Kennedy is individually liable for his fraud as late as March 29, 2013.. *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 400, 241 P.3d 1256, 1267 (2010). John Kennedy should not get a free ride in this appeal.

C. Other Errors Raised Are Left To The Opening Brief

The improper summary judgment of Mr. Cebert's claims was the crux of this appeal. Since a reversal on that would reverse the judgments and the compulsory counterclaims of the Kennedys, Mr. Cebert has chosen to address the most important items in this reply.

Mr. Cebert does not abandon the other errors raised in the opening brief, but rests on that brief for those arguments. The Kennedys are expected to claim those were abandoned, but that is not so. The summary judgment of Mr. Cebert's claims based on the statute of limitations is just

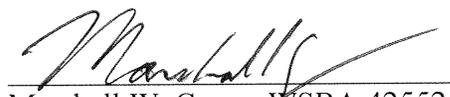
the most grievous wrong and deserves the largest reply.

CONCLUSION

Mr. Cebert was defrauded of his wages while working for MODI and the Kennedys. Only weeks before trial, the court incorrectly struck these claims based on the statute of limitations. Because of this the Kennedys were able to tell their story to the jury, but Mr. Cebert was not able to tell his. Mr. Cebert asks this court to reverse the incorrect summary judgment of his claims, and remand the judgments on the counterclaims for a new trial.

Respectfully submitted this 9 day of October, 2019

M Casey Law, PLLC

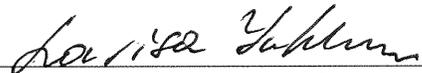

Marshall W. Casey, WSBA 42552
Attorney for Mr. Cebert

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 9th day of ~~August~~ October, 2019, I cause a true and correct copy of the foregoing document to be delivered in the manner indicated below to the following court reporters and counsels of record:

<u>Counsel for Respondent:</u> KSB Litigation, P.S. 221 N. Wall Street, Ste 210 Spokane, WA 99201	SENT VIA: <input type="checkbox"/> Fax <input checked="" type="checkbox"/> Hand delivered <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Email
<u>Counsel for Respondent:</u> Gregg Smith Paine Hamblen 717 W. Sprague Avenue, # 1200 Spokane, WA 99201	SENT VIA: <input type="checkbox"/> Fax <input checked="" type="checkbox"/> Hand delivered <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Email

Dated this on 9 of ~~August~~ October, 2019.



Larisa Yukhno-Legal Assistant
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