

No. 61817-2-I

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON,  
DIVISION ONE**

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MICHAEL J. CIOCCO and KAREN T. CIOCCO,  
husband and wife, and the marital  
community composed thereof, Appellant.

v.

FUMIO DOUGLAS IKEGAMI and PATRICIA IKEGAMI,  
husband and wife, and the marital community  
composed thereof, and ADZAM, INC., a Washington  
Corporation d/b/a Doug's Lynnwood Mazda, Respondent

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**REPLY BRIEF OF APPELLANT**

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## INTRODUCTION

“A frivolous action is one that cannot be supported by any rational argument on the law or facts.” Rhinehart v. Seattle Times, 59 Wn. App. 332, 340, 798 P.2d 1155 (1990). The standard is not that a party’s claims *as alleged* are frivolous, but rather that no rational argument of any kind supports the lawsuit. In their 50 pages of briefing, respondents Fumio “Doug” Ikegami, Patricia Ikegami, and Adzam, Inc., do not address this standard. Instead, they argue that plaintiff Michael Ciocco’s view of the facts was wrong.

Ciocco claimed at trial that he was owed 100 percent of the buy fees...It is this claim and testimony that the trial court found frivolous based on the entire record.

(Response Brief at 33) (emphasis original). This proves only that Ciocco made a losing argument, not a frivolous one. Doug Ikegami’s testimony established that Ciocco had a contractual right to 30% of the buy-fees. There was arguable merit in the claim.

This alone requires reversal of the trial court. The fact that evidence at trial did not support all of Ciocco’s claims does not render the entire lawsuit frivolous. Ciocco’s complaint presented three alternative claims to compensation: (1) breach of partnership; (2) unjust enrichment; or (3) breach of employment agreement.

(Complaint; CP 3026-3034). The civil rules expressly permit claims in the alternative. CR 8(e)(2) (“a party may...state as many separate claims...as he has regardless of consistency”). A necessary consequence of these inconsistent claims is that they cannot all be correct. The ultimate outcome depends on the evidence produced at trial. Here, the evidence supported Ciocco’s entitlement to a percentage of the buy-fees.

Respondents assert repeatedly that “Ciocco argues only that one aspect of one “tag along” claim was not frivolous, yet the claim he describes on appeal is not the claim he pressed at trial.” (Respondents’ Brief at 29) (emphasis original). This statement blurs the distinction between losing at trial and filing a frivolous lawsuit. At the end of Ciocco’s case, he lost – he failed to present credible prima facie evidence of his claims. But a rational argument on the law or facts supported his filing the lawsuit. Doug Ikegami had promised him a percentage of the buy-fees, and for five years he did not receive them.

**I. EVIDENCE, NOT ALLEGATIONS, DETERMINES FRIVOLOUSNESS**

A frivolous action is one with no merit whatsoever.

A lawsuit is frivolous when it cannot be supported by a rational argument on the law or facts. The statute also requires the action be frivolous in its entirety, i.e.,

if any of the claims asserted are not frivolous, then the action is not frivolous.

Forster v. Pierce County, 99 Wn. App. 168, 184, 991 P.2d 687 (2000). The Court judges frivolousness by the evidence introduced, not solely by what a party alleges.

The frivolous lawsuit statute has a very particular purpose: that purpose is to discourage frivolous lawsuits and to compensate the targets of such lawsuits for fees and expenses incurred in fighting *meritless* cases. The statute is not to be used in lieu of more appropriate pretrial motions, CR 11 sanctions or complaints to the bar association.

Biggs v. Vail, 119 Wn.2d 129, 137, 830 P.2d 350 (1992) (emphasis added).

As detailed in Mr. Ciocco's opening brief, undisputed evidence proved that his employer promised him 30% of the buy fees from May 1996 until May 2001. (3/11/08 VRP 55) ("30 percent before and 40 percent later") (Opening Brief at 10-15). Even if Ciocco ultimately lost his case, his claim to buy fees had a reasonable basis.

Respondents argue that because Ciocco claimed 100% of the buy fees, not 30%, his claim was frivolous. (Response Brief at 32). But respondents provide no authority that Washington courts determine frivolousness based on what a party *alleged*, rather than

what the evidence established. In fact, courts view the entire record to see if any evidence supports a claim, even if it may not be exactly what the party asserted.

In Déjà vu-Everett-Federal Way, Inc. v. City of Federal Way, 96 Wn. App. 255, 979 P.2d 464 (1999), this Court reversed a trial court and imposed fees for a frivolous lawsuit. After reviewing the entire record, this Court ruled an earlier Supreme Court opinion rendered the entire lawsuit meritless.

Considering the entire record and resolving all doubts in favor of Déjà Vu, we find the present action is not supported by any rational argument based on the law or the facts. See Layne v. Hyde, 54 Wn. App. at 135, 773 P.2d 83. It is frivolous to argue that our Supreme Court intended to breathe life into further challenges. Relitigation of the four-foot rule is a waste of time. We remand for an award of attorney fees in favor of Federal Way for having to defend this suit below and on appeal.

Deja Vu-Everett-Federal Way, 96 Wn. App. at 264. The Court reviewed the entire record to see if a rational argument supported Déjà Vu's claim. It was not review to catalogue why the party lost, but rather to see whether anything in the record supported filing the lawsuit in the first place.

No evidence could have proven Déjà Vu's case. Here, in contrast, undisputed evidence from respondent Doug Ikegami

established the agreement to 30% of the buy fees. Had the trial court weighed the testimony differently, it reasonably could have concluded that an agreement existed. A rational argument supported Ciocco's claim to buy fees; the trial judge simply did not accept it.

**II. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE TRIAL COURT'S SPECIFIC FINDING ON FRIVOLOUSNESS**

The trial court made one finding on whether Ciocco's claim for buy fees was frivolous. "Plaintiffs' breach of employment contract claim was frivolous and advanced without reasonable cause." (6/9/08 Order Granting Motion for Fees and Expenses; CP 3164-3166). Substantial evidence must support this finding to withstand an appeal. "Before awarding attorney fees under RCW 4.84.185, the court must make written findings that the lawsuit in its entirety is frivolous and advanced without reasonable cause." North Coast Elec. Co. v. Selig 136 Wn. App. 636, 650, 151 P.3d 211 (2007). Because under North Coast a bare finding of frivolousness is insufficient, respondents draw in trial court's findings and conclusions at trial to justify the fee award. (Response Brief at 33).

The problem with respondents' argument is that the trial court's findings and conclusions explain who won at trial, not whether a rational argument on the facts or law supported Ciocco's claims. Stating that substantial evidence supports these findings merely proves what is not in dispute – Ciocco lost. To use the findings to prove frivolousness, respondents must not only show that substantial evidence supports the findings, but also that the findings necessarily imply that Ciocco had no rational argument to make. The findings and conclusions do not stretch that far.

Respondents contend that five findings by the trial judge at the close of Ciocco's case also prove frivolousness: (1) the exact terms of the buy fees agreement were in dispute until 2001; (2) Ciocco received all the compensation he was entitled to; (3) Ciocco had no evidence of damages; (4) the statute of limitations ran on Ciocco's claim; and (5) Ciocco's testimony was not credible. The trial court made these findings on the merits after trial and not for the specific purpose of whether the lawsuit was frivolous. None of these findings necessarily prove that Ciocco lacked a rational basis for his lawsuit.

First, a rational argument supports Ciocco's claim to buy fees. When employer and employee differ on the percentage of

compensation, 30 percent or 100 percent, the correct answer is rarely zero. Respondents argue there was no meeting of the minds and therefore no agreement on the percentage of buy fees before 2001. (Response Brief at 36). But the essential term of the agreement was including buy fees in Ciocco's compensation. The only question was the correct percentage. Ikegami did not testify that he had no agreement on buy fees, but rather that it was 30 percent and that Ciocco either received it or benefited from it.

Second, a rational argument supports Ciocco's claim that he did not receive his buy fee compensation. At trial, Ikegami and his bookkeeper could not account for the buy fees from May 1996 until 2001. (Opening Brief at 16-17). On appeal, respondents imply that Ciocco waived his claim to buy fees by acquiescing "to the compensation plan the Ikegamis had instituted." (Response Brief at 37). But the trial court did not find that Ciocco acquiesced or waived his claim. Instead, the court found that he received all the compensation he was entitled to.

Third, a rational argument supports Ciocco's claim that he suffered monetary damages. Respondents take issue with Ciocco's calculation of his damages, claiming he had no basis for giving the number he did. The question is not whether Ciocco had

sufficient evidence to win with his calculations, but rather whether he had a rational argument for damages. According to two of the cases respondents cite, Ciocco had a sufficient argument.

In Escude ex rel. Escude v. King County Public Hosp. Dist. No. 2, 117 Wn. App. 183, 69 P.3d 895 (2003), this court found a lack of expert testimony fatal to a tort plaintiff's claim for damages.

At the time the action was initially filed, Anderson believed he had an expert to testify that the soil in the area he was working was sufficiently contaminated to cause injury. However, by the time of argument on any of the motions before the court in these cases, the declaration and potential testimony of Davis had been expunged. There was nothing left of either Anderson's or Fleming's case due to the specter of the statute of limitations. At this time Hart Crowser and Lease Crutcher offered to let the Anderson and Fleming cases be dismissed without fees or costs, with the demand that the actions be dismissed with prejudice. Counsel for Anderson and Fleming decided to press on. In light of the circumstances of this case, the trial court did not abuse its discretion in imposing sanctions. The fees and costs awarded to Lease Crutcher below were proper.

Escude, 117 Wn. App. at 194. The plaintiffs could not prove the existence of damages without expert opinion. Because they went forward without an expert, the court sanctioned plaintiffs with an award of fees.

Next, in Koch v. Mutual of Enumclaw Ins. Co., 108 Wn. App. 500, 503, 31 P.3d 698 (2001), also a tort case, the court found that

plaintiff Alberta Koch could not prove the existence of damages from a doctor's independent medical review of her records.

In order to establish that Dr. McDermott acted dishonestly or in bad faith, Koch relied on the fact that he had a financial interest in providing independent medical evaluations, a circumstance characterized as "immaterial" by Comment C to Restatement § 772. But Koch cited no relevant authority to support this argument. Moreover, Koch's own physician provided no support for her claim that Dr. McDermott's medical conclusion was completely unfounded. Under the circumstances, a determination that Koch's claims were not supported by rational argument on the law or facts was not manifestly unreasonable. The trial court did not abuse its discretion in concluding that Koch's claims were frivolous.

Koch v. Mutual of Enumclaw Ins. Co., 108 Wn. App. at 510. As in Escude, the court in Koch found no rational argument that damages *existed*.

In contrast, Ciocco's damages flowed directly from a breach of contract. The only issue, which does not require expert testimony, is how to calculate the dollar amount of damages. As detailed in the Opening Brief, Ciocco had an accountant ready to testify to the appropriate calculation of damages. (Opening Brief at 17). In addition, Ciocco testified about his calculation of the unpaid buy fees. A rational argument supported Ciocco's claim to damages and its amount.

Fourth, a rational argument supported Ciocco's claim that the statute of limitations did not expire. Respondents devote three pages of legal argument to assert that the continuous employee doctrine in Macchia v. Salvino, 64 Wn.2d 951, 395 P.2d 177 (1964) does not apply here. (Response Brief at 40-43). That alone is sufficient proof that reasonable minds can disagree on this legal issue. Furthermore, respondents do not acknowledge, let alone contradict, Judge Allendorf's legal ruling before trial that the statute of limitations did not expire. (2/22/08 Minute Entry; CP 3144).

Fifth, Ciocco's lack of credibility does not prove frivolousness. Respondents argue that Ciocco's testimony regarding buy fees was the only evidence supporting his claim. (Response Brief at 43). Yet respondent Ikegami testified that a percentage of buy fees was *always* part of Ciocco's compensation. (3/11/08 VRP 54-55). Ciocco's credibility may have lost his case, but it did not render his lawsuit frivolous.

As a catch-all, respondents also argue that the trial court reviewed the record and "found the buy-fee claim frivolous based on the totality of the facts and circumstances – including the credibility of the witnesses, the exhibits that were and were not admitted at trial, the pleadings on file and, of course, the findings

and conclusions that ultimately disposed of Ciocco's claims." (Response Brief at 33). Other than this general argument, respondents do not specify what additional evidence proves frivolousness. Instead, they urge deference to "the unique perspective of the judge who tried this case." (Response Brief at 34).

If Ciocco's and Ikegami's testimony conflicted on all points, credibility and contradictory exhibits matter. But the testimony agreed on a key point – Ciocco and Ikegami both testified that payment of buy fees was part of Ciocco's compensation. The only dispute was over the percentage of fees and whether respondents improperly accounted for them. Ciocco lost both arguments for the reasons given in the Response Brief – credibility, evidence, and the trial court's findings. Yet reasonable, credible evidence supported a claim to buy fees. Doug Ikegami's testimony provided it. And that is the difference between losing a case and filing a frivolous lawsuit.

Respondents imply that a claim is frivolous whenever a judge or jury rejects a party's allegations. The evidence introduced at trial, rather than how a party pled legal claims, determines whether a lawsuit as a whole lacks merit. No dispute should exist

that if the trial judge ordered Ikegami to pay Ciocco 30 percent of the buy fees, this lawsuit would not be frivolous. State ex rel. Quick-Ruben v. Verharen, 136 Wn.2d 888, 904, 969 P.2d 64 (1998) (“if any claims advance to trial, a trial court's award of fees under RCW 4.84.185 cannot be sustained”). Ciocco lost his argument for 100 percent of the buy fees, but the claim in his complaint – that his employer did not pay him all the buy fees – had evidentiary support.

### **III. RESPONDENTS SHOULD NOT RECEIVE ATTORNEYS' FEES ON APPEAL**

The standard for awarding attorneys fees on appeal differs from that in the trial court.

In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Streater v. White, 26 Wn. App. 430, 434-435, 613 P.2d 187 (1980).

Respondents do not satisfy this high standard of proof.

Ciocco has a right to appeal the substantial attorneys' fees award against him, and as his briefs in this Court demonstrate, the trial court abused its discretion by finding no rational argument in favor of his claims. The trial judge and respondents on appeal blended the reasons for Ciocco's loss at trial with the grounds for attorneys' fees under RCW 4.84.185. This presents a debatable issue on appeal with a more than reasonable possibility of reversal.

Furthermore, awarding fees on appeal will make lawyers wary of taking cases on the legal standard for frivolous cases. Caselaw exists on the scope and limits to RCW 4.84.185 because losing parties like Ciocco are willing to challenge the fee award on appeal. No compelling reason exists to award fees on appeal.

### **CONCLUSION**

Filing a losing case does not automatically equate to filing a frivolous one. Although he did not make winning arguments at trial, appellant Michael Ciocco had rational arguments on the law and facts supporting his claims. The trial court was upset with Mr. Ciocco, and ruled accordingly. But the court abused its discretion when it concluded that Ciocco's claim for buy fees was frivolous and advanced without reasonable cause. Appellant Ciocco

respectfully requests this Court to vacate the trial court's award of reasonable attorneys' fees under RCW 4.84.185.

DATED this 22<sup>nd</sup> day of July, 2009.

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#### DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of this Reply Brief of Appellant to:

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DATED this 22<sup>nd</sup> day of July, 2009.

  
Heidi Main