

65404-7

65404-7

WASHINGTON STATE COURT OF APPEALS  
DIVISION I

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65404-7-I

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DEBORAH COLE,

Respondent,

v.

HARVEYLAND, LLC, d/b/a, The Harvey Apartments Group,  
a Washington Corporation, MARWOOD, LLC, a Washington  
Corporation, and, DONALD HARVEY, a single man,  
and MICHELLE JEROME and JOHN DOE JEROME, and their  
marital community,

Appellants.

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RESPONDENT'S BRIEF

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~~FILED~~  
COURT OF APPEALS DIV. I  
STATE OF WASHINGTON  
2010 SEP 23 PM 1:20

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## I. INTRODUCTION

Plaintiff, Deborah Cole, brought suit against the Defendants alleging: 1) a violation of the Washington Law Against Discrimination (WLAD), RCW 49.60. *et seq.* for failure to accommodate her disability and intentional disability discrimination; 2) wrongful discharge in violation of public policy in retaliation for filing a workers compensation claim, and 3) violation of Seattle Landlord Tenant Act. Ms. Cole alleged that Donald Harvey and Michelle Jerome aided and abetted in violation of RCW 49.60.220. CP 1. Plaintiff named as Defendants Harveyland, LLC, Marwood Apartments, LLC, Donald Harvey and Michelle Jerome. Prior to trial, she voluntarily dismissed her claims for wrongful discharge in violation of public policy and the Landlord Tenant Act. RP Feb. 10- 13:13-15.

The jury returned a verdict in favor of the Plaintiff on the claims of failure to accommodate and intentional disability discrimination against all Defendants, except Marwood LLC, which was not included in the jury verdict. The jury awarded Plaintiff damages in the amount of \$385,000. CP 166. A total judgment in the amount of \$523,554.42 was entered against all three Defendants. CP 166. The Defendants filed no post trial motions under Washington Rule of Civil Procedure 50 or 59.

## II. STATEMENT OF ISSUES.

A. Has the numerosity requirement of eight employees under the WLAD

been waived because it is a non-jurisdictional requirement?

B. Is there substantial evidence to support a finding that Harveyland and Marwood were joint employers within the meaning of the WLAD?

C. Is there substantial evidence to support a finding that Harveyland and Marwood exercised common control over employment policy and personnel matters?

D. Defense counsel argued to the Court that both Michelle Jerome and Donald Harvey were acting as agents of Harveyland. Should the Defendants be judicially estopped from now arguing to the contrary?

E. Is there substantial evidence to support a finding that Harveyland employed ten employees?

F. Can Plaintiff succeed in proving a violation of the WLAD for failure to accommodate without proving discriminatory intent?

G. Is the discriminatory intent required to prove a violation of the WLAD for disparate treatment the intent to treat an employee differently because of a protected status?

H. Was the trial court correct in ruling that good faith is not a defense to a claim for disparate treatment under the WLAD?

I. The Court excluded evidence that the Defendant was allegedly told by the Department of Labor & Industries that it could terminate Plaintiff's employment if Plaintiff could not perform all the essential functions of the

- job. Was the Court's ruling within the limits of its discretion?
- J. Was the Court's ruling excluding the evidence referenced above as irrelevant under ER 401 within the limits of its discretion?
- K. Was the Court's ruling excluding the evidence referenced above under ER 403 within the limits of the its discretion?
- L. Are jury instructions to which there was no objection verities on appeal?
- M. Was there substantial evidence to support the jury finding of a violation of the WLAD?

### **III. SUMMARY OF ARGUMENT**

Deborah Cole is a 60 year old female. Ms. Cole worked for both Harveyland, as a Property Manager, and Marwood Apartments, as a Resident Manager. She also worked for Donald Harvey as a Personal Assistant. Ms. Cole was employed by the Defendants for approximately 16 years.

The Defendant, Donald Harvey, owns Harveyland, LLC, which owns and operates five apartment buildings in the City of Seattle. Marwood Apartments is one of the buildings owned and operated by Harveyland, and is a wholly owned subsidiary of Harveyland. Contrary to the representations of the Defendants, at all times Mr. Harvey continued to maintain a financial interest in the Marwood. Contrary to the representations of the Defendants, both Marwood and Harveyland maintained common control over employment policy and personnel matters. They are joint employers within

the meaning of the WLAD.

The Defendants do not challenge any of the Court's jury instructions, which are verities on appeal. The Defendants do not seriously dispute that there exists substantial evidence from which a jury could conclude that they failed to accommodate Ms. Cole's disability, or that there exists substantial evidence from which a jury could conclude that Ms. Cole's disability was a substantial factor in the decision to terminate her employment. The Defendants do not challenge the amount of damages awarded by the jury, the amount awarded for attorneys fees and costs, or the amount awarded for a tax adjustment related to receiving a lump sum recovery.

The Defendants raise two issues on appeal. First, that the Marwood Apartments employed less than eight employees, and that numerosity under the WLAD is a question of subject matter jurisdiction, which can be raised for the first time on appeal. It is not disputed that this issue was not raised previously. Second, that the trial court abused its discretion when it excluded Ms. Jerome's testimony that someone from the Department of Labor & Industries (L&I) told her that she could terminate an employee who could not perform all the essential job functions. These arguments are superficially without merit.

The issue of numerosity under the WLAD is not jurisdictional. Pursuant to Art. IV, Section 6 of the State Constitution, superior courts of this

state have general jurisdiction to decide any justiciable controversy so long as jurisdiction is not exclusively vested in another court. They have subject matter jurisdiction to hear and determine the type of case to which a particular case belongs. Washington courts narrowly construe legislative enactments purporting to limit the broad original jurisdiction of the Superior Court. A ruling that a Superior Court lacked subject matter jurisdiction requires “compelling circumstances.” The Superior Court has jurisdiction to hear cases arising under the WLAD, jurisdiction is not vested in any other court, and no compelling circumstances exist to deprive the Court of that jurisdiction.

The United States Supreme Court has ruled that the employee numerosity requirement under Title VII of the 1964 Civil Rights Act is not jurisdictional, and is waived if not raised at trial. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed2d 1097 (2006). The holding and reasoning of that Court should be followed in this case.

The Defendants have waived the numerosity issue by not raising it in the court below. The Defendants offer no excuse or reason for their failure to raise the numerosity issue in the court below. They have no excuse. The Defendants should not be allowed to hide in the weeds and, after losing at trial, raise the issue for the first time on appeal. By failing to raise this issue as an affirmative defense or otherwise, Plaintiff has been deprived of the

ability to effectively litigate the issue. Moreover, had Plaintiff known of a genuine dispute concerning the issue of numerosity, she would not have voluntarily dismissed the public policy wrongful discharge or landlord tenant claims. As an alternative, Plaintiff would have amended the Complaint to add a claim under the Seattle Human Rights Ordinance, which allows for a private cause of action against an employer with only one employee.

There exists evidence to support a finding that Marwood and Harveyland had common control over personnel matters. It is undisputed that Ms. Cole was working for both Harveyland and Marwood at the time of her termination from employment, and that she trained and oversaw the performance of the Resident Managers of the four other buildings owned by Harveyland. Ms. Jerome explicitly admitted that she terminated Ms. Cole's employment from Harveyland at the same time she terminated her employment from the Marwood Apartments. Mr. Harvey signed Plaintiff's last paycheck, for both Marwood and Harveyland. He also approved and signed a severance payment to Ms. Cole using a check from one of his other buildings. Mr. Harvey ratified Ms. Jerome's decision to terminate Ms. Cole from Harveyland. Moreover, defense counsel argued to the Court that Ms. Jerome and Mr. Harvey were acting as agents for Harveyland. They should be judicially estopped from now arguing to the contrary.

Mr. Harvey testified that he employed approximately ten employees

during Ms. Cole's employment. Viewing the evidence in a light most favorable to Plaintiff, this evidence is sufficient to satisfy the numerosity requirement - assuming that the issue has not been waived.

Ms. Jerome claims she was told by the Department of Labor & Industries (L&I) that she could terminate Ms. Cole if she was unable to perform all the essential functions of her job. The trial court excluded this testimony on the grounds that it was hearsay, irrelevant, and, even if relevant, that the potential for jury confusion outweighed the probative value. This ruling was not an abuse of discretion.

The Defendants argue that Ms. Jerome believed that she could lawfully terminate Ms. Cole from employment. This belief, even if honestly held, is neither an accurate understanding of the law nor a defense to claims brought under the WLAD.

The law is clear that discriminatory intent is not an element of a reasonable accommodation claim under the WLAD. Ms. Jerome's excluded testimony has no bearing on Plaintiff's claim for failure to accommodate under the WLAD.

The discriminatory intent required for disparate treatment is the intent to treat employees differently because of their protected status, not the specific intent to violate the law. Neither ignorance of the law nor good faith is a defense to a claim for reasonable accommodation or disparate treatment

under the WLAD. Moreover, the question before the jury was whether the Defendants violated the WLAD. Laws and regulations related to workers compensation were not at issue in this case. The Department of L&I has no expertise or authority concerning enforcement of the WLAD, the only claims at issue in this lawsuit.

The potential for the jury to confuse the legal issues related to the WLAD and the workers compensation scheme is obvious. Ms. Jerome's alleged good faith is not a defense, and irrelevant. The trial court did not abuse its discretion when it excluded this testimony as hearsay, irrelevant, and because the potential for confusion and prejudice far outweighed its probative value.

The jury was instructed on the elements of both the reasonable accommodation and disparate treatment claims without objection by the Defendants. The jury instructions are not challenged on appeal. There exists substantial evidence that Ms. Cole satisfied all the elements of both claims. The jury's verdict and the trial court's ruling should be affirmed.

#### **IV. STATEMENT OF THE CASE.**

##### **A. Procedural History.**

Ms. Cole filed suit alleging disability discrimination in violation of the Washington Law Against Discrimination (WLAD) 49.60 *et seq.* In particular, she alleged failure to accommodate and that a substantial factor in

the decision to terminate her employment was her disabling condition. She also alleged that both Michelle Jerome and Donald Harvey aided and abetted in violation of RCW 49.60.220. CP 1 (Complaint). Ms. Cole voluntarily dismissed her claim that a substantial factor in the decision to terminate her employment was the filing of a workers' compensation claim in violation of a clear mandate of public policy, and also dismissed her claim under the Seattle Landlord Tenant Ordinance. CP 56, Trial Brief at 2. In its Answer, the Defendant has not raised undue hardship as an affirmative defense. CP 16. It did not raise the issue of employee numerosity. *Id.*

No summary judgment motion was filed. The Defendants' filed a trial brief consisting of three pages. CP 124.

**1. The Court Excludes Ms. Jerome's Testimony That L&I Told Her That She Could Terminate Ms. Cole.**

On the first morning of trial, Plaintiff's counsel explained that it was anticipated that Ms. Jerome would testify that she called someone at L&I, without identifying who she contacted, and was told that she could terminate an employee who could not perform all the essential functions of her job.<sup>1</sup>

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<sup>1</sup> As the trial begun, Ms. Jerome could not remember the name of the Department of L&I official who provided that information. On Feb. 17, the second day of trial, she produced an email which came from the Department of L&I and which allegedly memorialized Ms. Jerome's conversation. Exhibit 54. The email is dated May 21, 2008, five days after Plaintiff's termination. The Defendants offered this email into evidence. Plaintiff objected to the evidence on the grounds that it had been not produced in discovery. The evidence was also excluded by the Court. RP Feb. 11-12:17-16:20. That ruling is not challenged in this appeal.

The record reflects that Plaintiff's counsel believed this testimony to be an admission of discriminatory intent, but because it was hearsay it should only be admitted for a limited purpose so that the jury would not be confused in believing that the alleged opinion of L&I was an accurate statement of the law. RP Feb. 10- 26:1-16. In response, the Court stated that she would give a limiting instruction, and whether to admit the testimony with a limiting instruction was an issue of "trial strategy" - "It's your problem to decide whether they're capable of doing that, so . . . ." RP Feb. 10- 26:17-25. Plaintiff's counsel further explained that ignorance of the law is not an excuse, Ms. Jerome's state of mind is not an issue, and expressed his concern that defense counsel would argue to the contrary. Plaintiff formally requested that the Court foreclose that argument because it invites jury nullification. RP Feb. 10- 28:15-29:17. The Court declined to rule on the motion to prevent the anticipated defense argument on the grounds that it was premature. *Id.* at 29:19-30:1.

In considering when to give a limiting instruction, Plaintiff's counsel again expressed his concern that the defendant would claim that Ms. Jerome's belief about the law would be the only defense, which would be wrong as a matter of law. RP Feb. 10- 31:25-32:1. In response defense counsel stated, "we're just going to mention it." "So, you know, we're just going to simply say she decided to terminate her based on job performance, you know. Out

abundance of caution, she contacted Labor & Industries to say there's a pending L&I claim, I intend to fire this employee, is that okay. She was told okay and she terminated. That's how we're going to present it . . . ." RP Feb. 10- 33:1-21. The Court then reserved the ruling concerning when a limiting instruction would be read. RP Feb. 10- 33:22-34:2.

The following morning Plaintiff's counsel moved to exclude any testimony from Ms. Jerome concerning what L&I may have told her, and that Plaintiff would not be offering that testimony. RP Feb. 11- 3:13-23. After hearing from defense counsel, the Court responded that: "proof of intent doesn't require proof of animus . . . . It requires intent to discriminate based on one of the protected classifications, in this case disability," and because there is no claim related to a workplace injury information from L&I was not relevant. *Id.* at 7:4-15. "Because your client's animus or lack of animus is not really an issue in this case, there's no claim for punitive damages in Washington." RP Feb. 11- 7:1-8:5. Defense counsel insisted Ms. Jerome didn't make the decision based upon a disability, but on work performance, and that Ms. Jerome should also be able to testify about the things she did not consider. RP Feb. 11- 8:1-9:6. The Court observed that L&I is not in the business of advising people on discrimination claims under the WLAD. RP Feb. 11- 9:10-15. The Court ruled: "Some advice from some unknown

person that isn't regarding the claims in this case, I believe, is not only irrelevant, if it has marginal relevance, it's the extent to which it would confuse the jury and would be unfairly prejudicial, outweighs any marginal relevance that it might have." *Id.* at 11:10-15. The Court further explained good faith was not relevant in the absence of a claim for punitive damages. RP Feb. 11- 11:5-24.

## **2. The Jury Was Instructed *Without Objection* by the Defendant.**

In relevant part, the jury was instructed on the law concerning principal and agents; that if either Ms. Jerome or Mr. Harvey is liable then Harveyland is also liable. CP 145, Instruction No. 3. The jury was instructed on the claim of disability discrimination, both disparate treatment<sup>2</sup> and failure to accommodate.<sup>3</sup> The jury was instructed that "[w]hen Plaintiff presented Defendants with a light duty restriction from her doctor, the defendants had

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<sup>2</sup> Ms. Cole must prove: 1) that she has a disability; 2) that she was capable of performing the essential functions of the job with reasonable accommodation; and 3) that her disability was a substantial factor in the decision to terminate. CP 145, Instruction No. 4. The jury was also instructed that a leave of absence is a reasonable accommodation. CP 145, Instructions 4, 9. In regard to a leave of absence, the Court also instructed the jury that "[a] disabled employee is not required to show that a leave of absence is certain or even likely to be successful to prove that it is a reasonable accommodation." CP 145, Instruction No. 10, 12.

<sup>3</sup> The jury was instructed that in order to prove failure to accommodate, Ms. Cole had to prove: 1) that she had a disability; 2) that either Mr. Harvey or Ms. Jerome was aware of the disability; 3) that the disability had a substantially limiting effect (more than trivial) on her ability to do the job; 4) that she was able to perform the essential functions of the job with reasonable accommodation; and 5) that Ms. Jerome failed to reasonably accommodate Ms. Cole's disability. CP 145, Instruction No. 6.

a duty to reasonably accommodate.” CP 145, Instruction No. 8. The jury was also instructed on the interactive process. CP 145A, Instruction No. 11.

The Defendant declined to object to any of the instructions given by the Court, RP Feb. 18- 3:4-4:11, and does not challenge any of the Court’s instructions on appeal. Instructions without objection are verities on appeal.

### **3. The Defendants Misrepresent Plaintiff’s Closing Argument.**

The Defendants object to portions of Plaintiff’s closing arguments. The Defendants assert that Plaintiff’s counsel argued that the Defendants made no effort to determine if reasonable accommodations were available. Contrary to the Defendants’ representations, that statement is true. Ms. Jerome’s inquiry to L&I had nothing to do with the subject of accommodations, nor could L&I possibly have shed light on that issue. She inquired about whether she could terminate Ms. Cole because she couldn’t perform her job. Def. Brief at 45. More significantly, the Defendants misrepresent the substance of Plaintiff’s closing argument. At the referenced pages, Plaintiff’s counsel actually argued the defendants failed to offer Ms. Cole a leave of absence or get a resident manager from another building to fill in for Ms. Cole, as they always do. Plaintiff’s counsel argued that there was no accommodation and no interactive process. RP Feb. 18, 51:15-52:8. Plaintiff’s counsel actually argued in reference to the interactive process and

to Instruction No. 11 that the Defendants “*just never bothered to figure out what she could do and what she couldn't do.*” Feb 18, 50:13-51:3 (emphasis added). The Defendants selectively quote from Plaintiff’s closing argument, excluding those parts which contradict their argument. Def. Brief at 20. The Department of Labor & Industries had no way of knowing what Plaintiff could or could not do. Plaintiff’s counsel’s argument was entirely proper.

**4. The Jury Returns a Verdict In Favor of Plaintiff and Against The Defendants on Both Claims.**

The jury found in favor of Plaintiff and against Harveyland, Ms. Jerome, and Mr. Harvey. They awarded damages of \$385,000. CP 166, Verdict Form. The amount of damages is not contested on appeal.

**5. The Court Awards Prejudgment Interest, Tax Adjustment and Reasonable Attorney Fees.**

The Court awarded prejudgment interest and a tax adjustment to compensate for the adverse effects of receiving a lump sum. CP 166. The Court also awarded reasonable attorney fees. CP 166. Total judgment in favor of Plaintiff was entered in the amount of \$523,554.42. CP 166.

**6. The Defendant Fails to File Post Trial Motion Under CR 50 or 51.**

The trial court set a schedule for filing post trial motions, including a motion for attorney fees and a tax adjustment to be followed by any

defense post trial motions. Neither a motion for new trial or judgment as a matter of law was filed. After all deadlines had past, and after receiving a Notice of Presentation of the Judgment, the Defendant filed a two page “Objection To Entry of Judgment” seeking an off set for the severance paid directly by Donald Harvey and the amount received by Ms. Cole from the Department of Labor & Industries. CP 164-165. Plaintiff filed a Response, listed in Plaintiff’s Cross Designation of Clerk’s Papers. The Judgment was entered for the amount requested.

**B. Statement of Facts.<sup>4</sup>**

**1. Background.**

The Plaintiff, Deborah Cole, was sixty years old at the time of trial. She is unmarried. She obtained a degree in hotel and resort management, and a separate degree in travel and tourism in 1990. At the time of trial, her mother had recently passed away, and she resided in Payson, Arizona with her father, who has Parkinsons disease. Her brother worked for the Defendants. RP Feb. 11- 59:2-60:21.

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<sup>4</sup> On February 12, 2008, Plaintiff read portions of Ms. Jerome’s deposition testimony to the jury. To facilitate that process, Plaintiff’s paralegal, Ms. Kathleen Kindberg, sat on the witness stand and read Ms. Jerome’s deposition answers after Plaintiff’s counsel read the question. The references in the record to Ms. Kindberg reflect the deposition testimony of Michelle Jerome read to the jury.

## **2. Plaintiff's Employment Duties As Property Manager and Resident Manager.**

Plaintiff in this case, Deborah Cole, was hired in 1992 as a Resident Manager for the Marwood Apartments. RP Feb. 11, 61:23-62:3. She was hired by Donald Harvey. *Id.* at 62:4-5. Ms. Cole was responsible for the collection of rents, cleaning the apartments to be rented, advertising vacancies, showing apartments, renting apartments, serving necessary notices, and maintaining the common areas. *Id.* at 62:20-25. Mr. Harvey also owns four other apartment buildings on Capitol Hill. RP Feb. 11- 63:3-15; Feb. 16- 122:21-24. As the Resident Manager of the Marwood, Ms. Cole also helped out the other managers of the buildings as needed. *Id.* at 63:16-22. She reported directly to Donald Harvey. *Id.* at 63:23-25.

In approximately 1993, Ms. Cole was hired into an additional capacity as the Property Manager and Assistant to Mr. Harvey in managing all of his properties. RP Feb. 16-127:20-128:1. In that capacity, she worked for Harveyland, LLC. Contrary to the representations of the Defendants, Ms. Cole was more than a bookkeeper. According to Mr. Harvey, Ms. Cole had the following responsibilities for all five buildings: 1) she would assist and oversee the Resident Managers of the five properties, 2) handle emergencies at the five properties when Mr. Harvey was out of town or unavailable; 3) remain current on the landlord-tenant laws in the city of Seattle and King

County and the State of Washington; 4) assist with the expenses and the billing for five properties; 5) maintain monthly spreadsheets and forecasting rents for all five properties; 6) collect the rents for the five properties, and made the deposits in the bank, 7) collect the coins from the laundry machines, and 8) review the time sheets and the monthly payroll for the resident managers for all five properties. RP Feb. 16- 127:20-130:7. Ms. Cole testified that she oversaw all duties performed by the Resident Managers for all five buildings. She assisted and trained Resident Managers, developed tenant information books, developed unified leases, and performed other administrative and organizational tasks. She also covered or arranged for coverage for the other Resident Managers when a manager was ill or on vacation. RP Feb. 11- 64:21-66:15; Exhibit 26.

Ms. Cole also worked as a personal assistant for Mr. Harvey. In that regard, she assisted him with his personal residence on Lake Washington, including landscaping and helping prepare for SeaFair parties. RP Feb. 11- 68:2-17; Feb. 16- 130:9-131:6. This duty was designated as a “special project.” Exhibit 26.

Donald Harvey was Ms. Cole’s supervisor for approximately sixteen years. During his deposition (which was read to the jury) and at trial he testified that Ms. Cole was satisfactorily performing the duties of her job. RP Feb. 16- 137:17-19. There exists not one document which would reflect that

Mr. Harvey was dissatisfied in any way with Ms. Cole's performance, *Id.* at 134:18-23, and there were no complaints from any tenants. *Id.* at 134:25-135:1.

**3. Corporate Structure - Mr. Harvey Maintained a Financial Interest in Marwood.**

The Defendant asserts that Mr. Harvey was not the owner of Marwood and had no financial interest after he gave operational control to his daughter. Def. Brief at 28. The evidence is to the contrary. Mr. Harvey testified that when Ms. Jerome assumed operational control, she, her sister and Mr. Harvey all had a financial interest in the Marwood. RP Feb. 17-36:25-37:8; Feb. 16-191:1-9. The Harveyland website advertises for all five building without distinction. RP Feb. 16- 14:17-15:1. Mr. Harvey concedes that even after he turned over operational control to his daughter he continued to do the book work and make collections. RP Feb. 16- 125:6-126:2.

In addition to employing Resident Managers at each of the five buildings, the Defendant employed a maintenance crew, which did maintenance work at all five buildings. The head of the crew was Terrance Jerome, who is the husband of Defendant, Michelle Jerome. RP Feb. 11-71:2-7; Feb. 16- 167:7-14.

After Plaintiff rested her case, the Defendant moved to dismiss Ms. Jerome and Mr. Harvey individually. Defense counsel stated: "My

understanding of the evidence, how the record stands at this point is that all actions which are the subject of the request for damages would have occurred when the Marwood was owned under the auspices of Harveyland, LLC.” RP Feb. 17- 56:12-17. According to defense counsel, both Ms. Jerome and Mr. Harvey “were acting only as agents of the corporation at the time that these acts occurred.” *Id.* at 56:23-24. The Defendant should be judicially estopped from arguing to the contrary.

**4. Marwood and Harveyland had Common Control Over Employment Policy and Personnel Matters.**

Michelle Jerome took over operational control of the Marwood in April, 2008. RP Feb. 16- 21:19-22:14. Ms. Jerome had no prior experience or training in property management. RP Feb. 16- 189:25-190:17. According to Mr. Harvey, Ms. Jerome had no prior involvement at the Marwood, and the only reason for giving her control was because she was old enough, and it was time for her to take over. It had nothing to do with the occupancy rate. RP Feb. 16-137:20-139:1. According to Mr. Harvey, Ms. Cole continued working for Harveyland even after his daughter assumed operational control of the building.

Q: And when your daughter took control over the Marwood, Ms. Cole was not only working for the Marwood, she was still working for you at Harveyland; isn't that right?

A. That's correct.

RP Feb. 16- 140:13-17. *See also* RP Feb. 16- 22:15-23:1; Feb. 16- 191:1-5.

Marwood and Harveyland exercised common control over employment policy and personnel matters. The most obvious example of this common control is the fact that Ms. Jerome terminated Ms. Cole from Harveyland at the same time she terminated her from Marwood. Ms. Jerome testified:

Q. When you terminated her from -- when you terminated her from employment, you terminated her not just from you, but you terminated her from Harveyland as well; is that right?

A: Yes.

RP Feb. 17- 37:19-23. *See also* RP Feb. 16- 189:8-24. Also in support of common control over personnel matters is the fact that as Property Manager Ms. Cole trained and oversaw Resident Managers for all of Harveyland's other buildings. Exhibit 26. She reviewed the time sheets for all the Resident Managers, and wrote the checks for each. RP Feb. 16.- 129:20-130:4. She also covered or arranged for coverage for the other Resident Managers when a manager was ill or on vacation. RP Feb. 11- 65:20-66:16; Feb. 16- 16:18-17:4; Feb. 16.- 127:23-128:6.

William Cole was Plaintiff's brother and Resident Manager at one of Harveyland's other buildings. According to Mr. Cole, all the Resident Managers for all of Harveyland's five buildings worked closely with one

another. RP Feb. 16- 161:22-162:13. They covered for each other when they needed help, were sick or on vacation. *Id.* at 163:17-164:5. According to Mr. Cole, it was a “team effort.” *Id.* at 164:6-165:8. Mr. Cole was never asked to fill in or cover for his sister after she was injured in April, 2008, which he easily could have done. *Id.* at 166:18-167:3.

Ms. Cole’s last paycheck was signed by Donald Harvey. The printed names of the maker of the check are Marwood Apartments and Donald Harvey. Exhibit 22. Mr. Harvey also signed a severance check for Ms. Cole in the amount of \$10,000. The printed names on that Check are La Veda Apartments (one of the other buildings owned by Harveyland) and Donald Harvey. Exhibit 23. In Plaintiff’s 2007 federal tax form W-2, Plaintiff’s employer is listed as “Donald R. Harvey.” Exhibit 27.

#### **5. Harveyland Employed 10 Employees.**

The Defendant asserts that “Plaintiff rested her case without asking any witness whether Marwood LLC, the company that employed her as a resident manager at the Marwood Apartments, had eight or more employees.” Def. Brief, at 14. While this issue, now raised for the first time on appeal, has been waived, the Defendant’s choice of language is intentionally misleading. There is no judgment against Marwood. Plaintiff was employed by both Marwood and by Harveyland. Ms. Jerome admitted that she

terminated Ms. Cole from both positions. RP Feb. 16- 189:8-24; Feb 17-37:19-23. Plaintiff asked the following questions to and received the following answers from Mr. Harvey:

“Q. Mr. Harvey, during the period of time when Ms. Cole worked for you, it's true that you had approximately 10 employees? Isn't that right, Mr. Harvey?

A. I'm sorry?

Q. You had approximately 10 employees; isn't that right?

A. It varied, but about that.

RP Feb. 17- 100:16-23. Mr. Harvey further admitted that he employed not only the five resident managers, but also the entire families of those resident managers, although not on a permanent basis. RP Feb. 17-60:25-61:16. It is undisputed that he employed his son-in-law and a maintenance crew. RP Feb. 11-71:2-7; Feb. 16- 167:7-14. This testimony, and all inferences, must be viewed in a light most favorable to Plaintiff and not the other way around.

**6. Defendants Have Notice That Plaintiff Injured Her Knee on April 25, 2008 .**

On April 27, 2008, Plaintiff fell and badly sprained her knee while performing maintenance in one of the apartment building units. Feb 16-31:17-32:25. For purposes of treatment, Plaintiff went to the County Doctor Health Clinic on April 28, 2008. RP Feb. 16- 33:7-16. Plaintiff informed

Michelle Jerome's husband, Terrance Jerome, of what happened, RP Feb. 16-35:8-15, and Mr. Jerome has confirmed that her husband informed her of Plaintiff's injury that day or shortly thereafter. RP Feb. 17- 13:5-14:5. In addition, Ms. Jerome went to see Plaintiff and has admitted that it was "obvious" that Plaintiff was injured. RP Feb. 17- 14:14-25. On April 30, Mr. Harvey came to Ms. Cole's apartment and she discussed her knee with him. RP Feb. 16 - 35:16-25; Feb. 16-140:18-141:9.

**7. Defendants Have Notice that Plaintiff is Restricted to Light Duty for Two Weeks.**

On or about May 1, 2008, Plaintiff received a note from the Country Doctor Clinic which restricted her to light duty for seven days. Exhibit 3; RP Feb. 16- 37:4-14; Ms. Jerome saw the note on May 3, 2008. RP Feb. 17-15:23-16:18; Feb. 16 - 38:20-39:4. According to Ms. Jerome, light duty included doing paperwork and showing apartments. *Id.* 16:23-17:6. She also discussed the light duty restriction with her father, Mr. Harvey. RP Feb. 16-143:22-145:8.

Ms. Jerome received another note from the Country Doctor Clinic, dated May 5, 2008, which excused Ms. Cole from work for two weeks, except for light duty. Exhibit 4; *Id.* at 17:7-18:17; Feb. 16- 40:4-12. "The patient may return to work on May 19, 2008" *Id.* Ms. Jerome testified that she received a copy of the medical note of May 5, 2008 on or before May 9,

2008. RP Feb. 17 - 19:17-20. Mr. Harvey acknowledges that he saw Ms. Cole's medical restriction dated May 5, 2008. RP Feb. 16- 145:20-147:1. As of May 9, 2008, Ms. Jerome assumed that Ms. Cole could still do paperwork, rent to tenants, do tenant notices and other related paperwork. *Id.* at 19:25-20:4. This is confirmed by Ms. Cole. RP Feb. 16- 37:25-38:19.

**8. The Defendants Made No Attempt At the interactive Process.**

Neither Ms. Jerome nor Mr. Harvey ever contacted Plaintiff's medical provider for any clarification on her restrictions. RP Feb. 16- 147:2-9; Feb. 17- 18:10-23; Feb. 17 43:2-16. Neither Jerome or Harvey asked Plaintiff about her physical limitations. Ms. Jerome testified: Q. And it's also true that you never really specifically asked Deborah Cole what she could do or what she couldn't do; isn't that right? A. I believe that's a fair assessment. Feb. 17- 20:5-8.

According to Ms. Cole, she was unable to do heavy lifting or cleaning. But she could show the apartments, advertise the apartments, check credit references, obtain signatures on the leases, and do all related paperwork. RP Feb. 16- 37:19-38:19. On May 6, Ms. Cole wrote to Ms. Jerome and explained that she had gone over the rent sheet with Mr. Harvey and described her continuing efforts to rent vacant apartments. RP Feb. 16- 43:5-44:25; Exhibit 19.

**9. Jerome Established New Performance Demands Not Required by Other Managers.**

At the time Ms. Jerome assumed operational control there were five vacancies at the Marwood. RP Feb.16-29:24-30:5; Feb. 17- 21:20-22.<sup>5</sup> Immediately after receiving Ms. Cole’s medical restriction, Ms. Jerome sent Ms. Cole an email stating new minimum expectations for Plaintiff’s job, which included “[h]aving the Marwood 100% rented for June is going to be a prerequisite for keeping your job with us.” Exhibit 16, 18; RP Feb. 16-45:22-46:3. Ms. Jerome testified that she was unaware of any other apartment manager for Harveyland with a 100% occupancy requirement. Q: Did you know if any other resident manager had a hundred percent occupancy requirement? A. I assume not. RP Feb. 17- 17:25-18:3. *See also* RP Feb. 16- 45:22-46:13; 192:17-195:7; Feb. 17- 36:15-24.

**10. The Defendants Failed to Reasonably Accommodate Plaintiff. No Leave of Absence. No Assistance From Other Resident Managers.**

Ms. Jerome admits quit frankly that prior to termination, she didn’t know that an employer had an obligation to offer a disabled employee a reasonable accommodation. RP Feb. 16- 190:18-25; Feb. 17- 35:8-11. At

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<sup>5</sup> Several of the apartments had been vacant for months due to the need for remodeling. Ms. Cole had no control over when the maintenance crew would finish the necessary repairs. RP Feb. 16- 29:24-30:22.

no time did Michelle Jerome attempt to reasonably accommodate the Plaintiff's disability by offering her a medical leave of absence.

It is undisputed that the resident managers of the other apartment buildings owned by Harveyland had filled in for other managers in the past in the event of vacation, illness and/or injury, by showing apartments, collecting rents and doing maintenance. It was a "team effort." RP Feb. 16-161:22-165:8. But Ms. Jerome acknowledges that she never asked any other resident manager to fill in for Ms. Cole. RP Feb. 17 - 20:11-14; *Id.* 44:5-45:5.

**11. Ms. Cole Was Terminated From Employment on May 16, 2008 - Three Days Before Her Restriction Expired and Before She Had an Opportunity to Achieve 100% Occupancy.**

Ms. Cole's injury prevented her from performing some of the physical tasks required of a resident property manager. She nevertheless continued to perform those duties unaffected by her disability. According to Ms. Jerome, Ms. Cole continued to rent units, write leases, and fill out checklists. RP Feb. 17-22:10-22. In a letter to Ms. Jerome dated May 11, Ms. Cole explains that she had apartment numbers 307 and 308 moving in on Monday, and was taking an application for number 206 which she hoped to rent in the near future. Exhibit 33; RP Feb. 16-47:19-48:19; Feb. 17-22:23-24:22. Ms. Cole succeeded in renting 4 out of 5 vacant apartment units. Feb 17 -21:14-22:7.

Nevertheless, on May 16, 2008, Ms. Jerome telephoned Plaintiff and

terminated her from employment, three days before the expiration of Plaintiff's medical restriction, and informed that she had two weeks to vacate her apartment of 16 years. RP Feb. 16-49:23-50:14. No other apartment manager had been required to vacate the unit in only two weeks. RP Feb. 16-170:23-171:13.

According to Ms. Jerome, if Ms. Cole had succeeded in renting one additional apartment by June 1, 2008, she would not have lost her job. But Ms. Jerome concedes that Ms. Cole was never given the chance.

Q. Is it true that if she succeeded in having a hundred percent occupancy by June 1st, you wouldn't have fired her?

A. I believe that's true.

Q. But she never got the chance, did she?

A. She did not have all the units rented at the point in time that I fired her.

Q. But you had --

A. And I fired her prior to June 1st.

RP Feb. 17 - 25:1-9. *See also* RP Feb. 17- 46:22-49:8.

**12. The Defendant, Ms. Jerome, Admits That Ms. Cole's Disability Was a Substantial Factor in the Decision to Terminate Employment.**

In response to a question from her attorney during her deposition, Ms. Jerome admitted that Plaintiff's injury was a factor in the decision to

terminate Plaintiff's employment. That portion of deposition was read to the jury without objection. RP Feb. 17- 46:21-47:5. Ms. Jerome also testified in Court that Ms. Cole's disability was a substantial factor in her decision to terminate Plaintiff. Q: At least one of the reasons why you terminated my client was because she was injured and unable to do the job; isn't that right? A. Yes. Q. Is that a yes? A. Yes. RP Feb. 17- 21:1-7.

**13. The Defendants' Other Reasons for Termination Are a Pretext or Are Unworthy of Belief.**

The Defendant argues that Plaintiff was terminated for poor performance; that Plaintiff resisted raising the rents, and because it appeared that Plaintiff was about to quit at a critical time. Def. Brief at 13. The Defendant simply ignores the evidence to the contrary, and in effect requests that this Court interpret the evidence in a light most favorable to them. The opposite standard applies.

The evidence is clear that whether to raise the rents and by how much was up to Mr. Harvey. RP Feb. 11- 68:18-69:2; Feb. 16- 13:7-25. Mr. Harvey acknowledged that Ms. Cole never refused to raise the rents when requested, 135:2-136:2, and that was Ms. Cole's testimony as well. RP Feb. 11- 69:3-10.

The Defendant argues that Ms. Cole told Mr. Harvey that she was going to move to Payson, Arizona after Ms. Jerome assumed control of the

Marwood. Def. Brief at 11. But Ms. Cole denied that she told Mr. Harvey that she intended to move to Payson, Arizona. RP Feb. 16- 73:9-14. The jury was entitled to believe Ms. Cole.

Mr. Harvey admits that Ms. Cole was doing an adequate job. RP Feb. 16-137:13-19. There was no documentation which would reflect that Mr. Harvey was dissatisfied and there were no complaints from tenants. RP Feb. 16- 134:18-135:1. Ms. Cole was never subjected to any discipline, never told she was not doing a good job, and never told that the occupancy rate was not high enough. RP Feb. 11- 69:11-70:5. Moreover, Ms. Cole was given a letter of reference by Mr. Harvey praising her abilities as an Apartment Manager. Exhibit 24.<sup>6</sup> Mr. Harvey acknowledged that he read the letter before he signed it. RP Feb. 16 - 153:11-21.

**14. Replacement Not Disabled and Not Required to Have 100% Occupancy.**

Ms. Jerome placed an ad on Craigslist to replace Ms. Cole. The ad specifically stated that the applicant “must be physically able and willing to work full-time.” RP Feb. 17- 25:21-26:13; Exhibit 9. Ms. Jerome concedes that the replacement was not disabled. *Id.* 26:14-21. Ms. Jerome also concedes that since the new manager began working there have been

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<sup>6</sup> Ms. Cole presented the letter for the first time on May 12, 2006. She requested the letter of reference because she believed that her job was at risk. RP Feb. 16 - 98:25-101:12.

vacancies at the Marwood; Ms. Jerome was uncertain of whether there were more than five at any time. *Id.* 26:22-28:1. Nevertheless, the replacement is still working at The Marwood. *Id.* 28:6-17.

**15. Donald Harvey Ratifies the Decision to Terminate From Harveyland.**

Ms. Cole discussed with Donald Harvey Ms. Jerome's decision to terminate her employment and evict her from her apartment. According to Ms. Cole, Mr. Harvey said that Ms. Cole had done nothing wrong, and that it was Ms. Jerome's decision. RP Feb. 16 - 51:10-25. According to Mr. Harvey, when questioned about Ms. Cole's termination he told her that he was going stand by whatever Ms. Jerome decided. RP Feb. 16- 153:3-10.

Mr. Harvey was aware that after her termination from employment Ms. Cole was living with her brother at one of the other buildings that he owned. He nevertheless didn't ask her to continue to do work for Harveyland. RP Feb. 16- 152:2-13. Donald Harvey ratified Ms. Jerome's decision.

**V. ARGUMENT OF COUNSEL**

**A. Standard of Review.**

Motions for judgments as a matter of law are reviewed de novo, applying the same legal standard as the trial court. *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 667, 88 P.2d. 988 (1994). But in this case there was

no motion for judgment as a matter of law under CR 50. There was no motion for a new trial under CR 59.

A challenge to the sufficiency of the evidence admits the truth of Plaintiff's evidence and any inference drawn therefrom and requires that the evidence be viewed in a light most favorable to Plaintiff. A reversal on that basis requires a conclusion that there is no evidence or inference derived therefrom by which this verdict can be sustained. *Bott v. Rockwell International*, 80 Wn. App. 326, 332, 908 P.2d 909 (1996), citing *Holland v. Columbia Irrigation Dist.*, 75 Wn. 2d 302, 304, 450 P.2d 488 (1969). "The credibility of witnesses and the weight of the evidence are issues for the jury that are generally not subject to appellate review." *Guy v. City of San Diego*, 608 F.3d 582, 585 (9<sup>th</sup> Cir. 2010), citing *Murray v. Laborers Union Local No. 324*, 55 F.3d 1445, 1452 (9<sup>th</sup> Cir. 1995). A jury may properly refuse to credit even uncontradicted testimony under the sufficiency of the evidence standard. *See Nat'l Labor Relations Bd. v. Howell Chevrolet Co.*, 204 F.2d 79, 86 (9<sup>th</sup> Cir. 1953) (referring to the proposition that a trier of fact must accept uncontradicted testimony as "an ancient fallacy").

**B. Numerosity is Not Jurisdictional and Has Been Waived.**

The Defendants argues correctly that the WLAD only applies to employers with eight or more employees. They now argue that although Plaintiff also worked for Harveyland as a Property Manager, Marwood

employed less than eight employees. They concede that this argument is made for the first time on appeal. They argue that the issue of numerosity can be considered for the first time on appeal because it is necessary to confer upon the court subject matter jurisdiction, which can be raised at any time. Numerosity is not necessary to establish subject matter jurisdiction under the WLAD.

**1. Washington State Law - Numerosity is Not Jurisdictional.**

The Superior Court is a court of general jurisdiction: “The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; . . . .” WASH. CONST., art. IV, § 6. *See also State v. Golden*, 112 Wn.App. 68, 73, 47 P.3d 587 (2002)(“The superior courts have broad residual jurisdiction to hear all causes and proceedings over which jurisdiction is not vested exclusively in some other court”), *citing* WASH. CONST. art. IV, § 6; RCW 2.08.010. “Subject matter jurisdiction is the authority to hear and determine the class of action to which a case belongs, . . . .” *Bour v. Johnson*, 80 Wn.App. 643, 647, 910 P.2d 548 (1996).<sup>7</sup> “We

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<sup>7</sup> *See also Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 315-16, 76 P.3d 1183 (2003) (subject matter jurisdiction is jurisdiction over the type of case); *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 538-39, 886 P.2d 189 (1994) (noting that a court has subject matter jurisdiction when the parties have submitted to the jurisdiction of the court and the court has jurisdiction over the type of controversy) (citing RESTATEMENT (SECOND) OF JUDGMENTS §§ 1, 11 (1982)).

narrowly construe legislative enactments purporting to limit this broad original jurisdiction of the superior court.” *Ledgerwood v. Lansdowne*, 120 Wn.App. 414, 419-20, 85 P. 3d 950 (2004), *citing Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 98-99, 864 P.2d 937 (1994). A ruling that a Superior Court lacked subject matter jurisdiction requires “compelling circumstances, such as when it is explicitly limited by the Legislature or Congress.” *Harting v. Barton*, 101 Wn.App. 954, 960, 6 P. 3d 91 (2000).

In this case, the Superior Court has been vested with subject matter jurisdiction to hear cases alleging violations of the WLAD, and jurisdiction is not vested in any other court. The legislature has merely defined employer as an entity that employed eight or more employees. RCW 49.60.040(11). The WLAD contains many definitions which limit the reach of the statute, including: 1) an aggrieved person, 2) any place of public resort, . . . .3) covered multi-family dwelling, 4) credit transaction, 5) disability, 6) dog guide, 7) dwelling, 8) employee, 9) employment agency, and many others. While Plaintiff, if challenged, must satisfy these definitions to prevail, it is simply impossible to believe that the legislature intended that satisfying them is required to confer subject matter jurisdiction. There is no logical difference between the definition of “employer” and the other definitions which Plaintiff must satisfy.

There is nothing in the statutory test which remotely suggests the

legislature's intent to treat numerosity as subject matter jurisdiction. To the contrary, the statute expressly states that nothing in this chapter shall be "construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his civil rights." RCW 49.60.020. There are no "compelling circumstances" that require the Court to limit the Superior Court's subject matter jurisdiction.

In support of their argument the Defendants rely upon a *dissenting opinion* in *Griffin v. Eller*, 130 Wn.2d 58, 922 P.3d 788 (1996). In *Griffin*, the Plaintiff argued that the employee numerical limitation contained in the WLAD was limited in its application to the Washington State Human Rights Commission. The majority of the Court disagreed. The Court ruled that the employee limitation created an "exemption." *Id.* at 63-64 (emphasis original), citing *Bennett v. Hardy*, 113 Wn.2d 912, 915, 784 P.2d 1258 (1990) and *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 807 P.2d 830 (1991). If the Court believed the numerical limitation to be jurisdictional, it would have said so explicitly.

The Defendant also relies on the title of WAC 162-16-220. But the title of the regulation is not controlling. The heading of the WAC is the work product of the Washington State Code Reviser, and not the Human Rights Commission. As such, it has little value. *Cf PICS v. Seattle School Dist. No. 1*, 149 Wn.2d 660, 684 n10, 72 P. 3d 151 (2003) ("Headings are added by the

code reviser subsequent to enactment, as part of codification. Citation omitted. They are of little use as a guide to the intent of the legislature”). The point of the administrative regulation is not to designate numerosity as jurisdictional, but to establish that the statute can only be enforced against an employer with eight or more employees. This a perfect example of what the U.S. Supreme Court has described as a “drive by jurisdictional reference” or the “profligate use” of the term “jurisdiction.” *See Arbaugh v. Y&H Corp.*, *infra* at 510.

The WLAD requires a liberal interpretation to further its remedial purpose. RCW 49.60.020. In many cases the requirement for a liberal interpretation has caused Washington courts to interpret the WLAD more broadly and favorably to employees than under federal law.<sup>8</sup> The Defendants in this case argue to the contrary that state law should be interpreted more narrowly than federal law. That argument is inconsistent with the legislative mandate for a liberal interpretation of the WLAD.

## **2. Federal Law - Numerosity is Not Jurisdictional.**

In *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed2d

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<sup>8</sup> *E.g.*, *Martini v. Boeing Co.*, 137 Wn. 2d 357, 971 P. 2d 45 (1999) (Constructive discharge not required under the WLAD); *MacKay v. Acorn Cabinetry, Inc.*, 127 Wash. 2d 302, 898 P. 2d 284 (1995)(same decision affirmative defense not applicable under Washington law); *Pulcino v. Federal Express, Inc.* 141 Wash. 2d 629, 9 P. 3d 787 (2000)(rejecting the ADA definition of disability); *Marquis v. City of Spokane*, 130 Wn. 2d 97, 922 P. 2d 43 (1996)(recognizing a claim by an independent contractor under WLAD).

1097 (2006), the plaintiff brought a claim under Title VII of the 1964 Civil Rights Act alleging that her employer sexually harassed her. *Id.* at 503-504. The case was tried to a jury, which returned a verdict for Arbaugh in the total amount of \$40,000. Two weeks after the trial court entered judgment on the jury verdict, the defendant moved to dismiss the entire action for want of federal subject-matter jurisdiction. For the first time in the litigation, the employer asserted that it had fewer than 15 employees on its payroll and therefore was not amenable to suit under Title VII. *Id.* at 508.

The trial court recognized that it was “unfair and a waste of judicial resources” to grant the motion to dismiss, but did so because it believed that the 15-or-more-employees requirement was jurisdictional. *Id.* at 508. The Supreme Court *reversed*.

The Court recognized that the term “jurisdiction” “is a word of many, too many, meanings,” and that courts have “been profligate in its use of the term.” *Id.* at 510. The Court reasoned:

“Subject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff’s need and ability to prove the defendant bound by the federal law asserted as the predicate for relief—a merits-related determination.” 2 J. Moore et al., *Moore’s Federal Practice* §12.30[1], p. 12–36.1 (3d ed. 2005) (hereinafter Moore). Judicial opinions, the Second Circuit incisively observed, “often obscure the issue by stating that the court is dismissing ‘for lack of jurisdiction’ when some threshold fact has not been established, without explicitly considering whether the

dismissal should be for lack of subject matter jurisdiction or for failure to state a claim.” Da Silva, 229 F. 3d, at 361. We have described such unrefined dispositions as “*drive-by jurisdictional rulings*” that should be accorded “no precedential effect” on the question whether the federal court had authority to adjudicate the claim in suit. Steel Co., 523 U. S., at 91.

*Id.* at 511 (emphasis added). “Given the unfair[ness] and waste of judicial resources,’ . . . entailed in tying the employee-numerosity requirement to subject-matter jurisdiction,” the Court ruled: “we hold that the threshold number of employees for application of Title VII is an element of a plaintiff’s claim for relief, not a jurisdictional issue.” *Id.* at 515. Washington Courts look to federal decisions interpreting a similar statute as a source of guidance. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 361-62, 753 P. 2d 517 (1988).

The Court’s reasoning in *Arbaugh* applies to this case. The “unfairness and waste of judicial resources” is no less applicable to the WLAD than it is to Title VII. In this case, the designation of the numerosity limitation as jurisdictional would be especially unfair since Plaintiff, in the name of simplifying the court’s instructions, dismissed claims which had no numerosity requirement. If the numerosity claims were timely raised,

Plaintiff would not have dismissed those claims.<sup>9</sup>

In *Arbaugh*, the Court decided that in the absence of clear legislative direction, the issue of numerosity should not be construed as jurisdictional. If the Washington State Legislature wants to make the numerosity limitation of the WLAD jurisdictional, it can clearly say so and “then courts and litigants will be duly instructed and will not be left to wrestle with the issue.” *Id.* at 515-16.<sup>10</sup>

**C. Joint Employers - Marwood and HarveyLand Were Managed in Common for the Purpose of Employment Policy and Personnel Management.**

Washington Administrative Code (WAC) 162-16-220(6) provides as follows:

Connected corporations. Corporations and other artificial

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<sup>9</sup> If the Defendant in this case had successfully raised the issue of numerosity under the WLAD, Plaintiff would have amended the Complaint to raise a violation of the Seattle Municipal Code. Seattle Municipal Code (SMC) 14.04.040 makes it an unfair employment practice to discriminate on the basis of a disability. The ordinance defines an employer as “any person who has one(1) or more employees, or the employer’s designee or any person acting in the interest of such employer.” SMC 14.04.040. The ordinance allows for the enforcement by a private party, SMC 14.04.185(A), and does not require the exhaustion of administrative remedies. SMC 14.04.185(B). *See also Roberts v. Dudley*, 140 Wn.2d 58, 66-70, 993 P.2d 901 (2000)(The Court relied upon the public policy reflected in the WLAD in order to support a claim for wrongful discharge with less than eight employees). The prejudice to Plaintiff by allowing this issue to be raised for the first time on appeal would be extreme.

<sup>10</sup> The Defendant attempts to distinguish *Arbaugh* on the grounds that a separate federal statute confers jurisdiction over all civil actions arising under federal laws, of which Title VII is one. Def. Brief at 36. Unlike Title VII, there is no monetary limit under the WLAD, so no independent jurisdictional conferring provision is required.

persons that are in common ownership or are in a parent-subsidary relationship will be treated as separate employers unless the entities are managed in common in the area of employment policy and personnel management. In determining whether there is management in common we will consider whether the same individual or individuals do the managing, whether employees are transferred from one entity to another, whether hiring is done centrally for all corporations, and similar evidence of common or separate management.

Federal law applies a consistent test.<sup>11</sup>

The Defendant admits that Marwood and Harveyland had a parent-subsidary relationship. Def. Brief at 28. In this case, the evidence is easily sufficient to establish that Harveyland and Marwood are joint employers. This evidence includes: 1) that Ms. Jerome terminated Ms. Cole from Haveyland at the same time she terminated her from Marwood, 2) that Resident Managers would fill in for each other when they were sick or on vacation - it was a “team effort;” 3) that Plaintiff, acting in her capacity as Property Manager, trained and oversaw the performance of all the property

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<sup>11</sup> See *E.E.O.C. v. Pacific Maritime Ass'n*, 351 F.3d 1270, 1275 (9<sup>th</sup> Cir. 2003)(“Two or more employers may be considered 'joint employers' if both employers control the terms and conditions of employment of the employee”); *Moreau v. Air France*, 356 F.3d 942, 946-47 (9<sup>th</sup> Cir 2003)(“In a FLSA case, . . . we noted that the joint employment determination required consideration of the total employment situation, but focused primarily on four factors: “whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of payment, (3) determined the rate and method of payment, and (4) maintained employment records”).

managers, and reviewed their time sheets; 4) Donald Harvey signed Plaintiff's last pay check on behalf of himself and Marwood; and 5) Mr. Harvey signed the severance check on behalf of himself, using a check from a different apartment building.

The jury was instructed without objection that the Defendants were sued as principal and agent, and that if either Ms. Jerome or Mr. Harvey is liable then Harveyland is also liable. CP 145, Instruction No. 3. In addition, defense counsel argued to the court that Ms. Jerome and Mr. Harvey should be dismissed because Harveyland was responsible for the wrongful acts of Ms. Jerome and Mr. Harvey. RP Feb 18-56:7-24. The Defendants should be judicially estopped from now arguing to the contrary.<sup>12</sup>

**D. The Evidence Satisfies the Numerosity Requirement.**

Mr. Harvey testified that Harveyland employed approximately 10 employees. He testified that Harveyland employed five Resident Managers, a maintenance head, and a maintenance crew. He also periodically employed family members of the Resident Managers, and others. Viewed in a light

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<sup>12</sup> "Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). The doctrine seeks "to preserve respect for judicial proceedings," and "to avoid inconsistency, duplicity, and . . . waste of time." *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 225, 108 P.3d 147 (2005) (alteration in original) (internal quotation marks omitted) (*quoting Johnson v. Si-Cor, Inc.*, 107 Wn.App. 902, 906, 28 P.3d 832 (2001)).

most favorable to Plaintiff, this evidence is sufficient to satisfy the numerosity requirement under the WLAD.

The Defendants now dispute whether Marwood employed more than eight employees. But whether Marwood employed more than eight employees is not the issue; there is no judgment against Marwood. Assuming that the issue has not been waived, the question is whether Harveyland employed more than eight employees. The U.S. Supreme Court has recognized that where there exists a genuine issue of fact about the issue of numerosity, that is a question for the jury. *Arbaugh*, 546 U.S. at 514. But the Defendant failed to object to the Court's instructions, and the instructions did not include the issue of numerosity as an element. This constitutes an additional basis for waiver.

**E. Ignorance of the Law is Not an Excuse - Good Faith Is Not A Defense.**

The Defendant, Ms. Jerome, would have testified that she called the Department of Labor & Industries to inquire about Ms. Cole, and was told that she could terminate Ms. Cole if she were unable to perform all essential job functions. The Defendants argue that this evidence should have been admitted because it reflects Ms. Jerome's state of mind, which in turn is relevant to the issue of discriminatory intent. The Defendant is wrong.

**1. Discriminatory Intent is Not An Element of Failure to Accommodate.**

Proof of discriminatory intent is not required to prove a reasonable accommodation claim.<sup>13</sup> Because discriminatory intent is not required to prove failure to accommodate, the Defendant's argument concerning the admissibility of Ms. Jerome's testimony does not affect the jury's verdict on the claim for failure to accommodate.

**2. Specific Intent to Violate the Law is Not Required. Neither Ignorance of the Law Nor Good Faith is a Defense.**

In *Kolstad v. American Dental Association*, 527 US 526 (1999), the Court considered under what circumstances punitive damages could be imputed to the employer. After discussing the applicable principles of agency, the Court recognized that "even an employer who makes every effort to comply with Title VII would be held liable for the discriminatory acts of agents acting in a "managerial capacity." *Id.* at 544. The Court

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<sup>13</sup> See *Goodman v. Boeing Co.*, 75 Wn.App. 60, 75, n7, 877 P.2d 703(1994)(Dicta) ("In any event, while no court had addressed the express issue of whether or not reasonable accommodation actions require intent, it appears that discrimination claims may be brought under various theories, of which only one requires intent. The theories are disparate treatment, disparate impact, reasonable accommodation or surmountable barrier, and insurmountable barrier theories, with only disparate treatment claims requiring proof of discriminatory intent")(Citations Omitted) *affirmed on other grounds* 127 Wn.2d 401 (1995); *Peebles v. Potter*, 354 F.3d 761, 767 (8th Cir. 2004)([I]t is not the employer's discriminatory intent in taking adverse employment action against a disabled individual that matters. Rather, discrimination occurs when the employer fails to abide by a legally imposed duty. The known disability triggers the duty to reasonably accommodate and, if the employer fails to fulfill that duty, we do not care if he was motivated by the disability"); *Bristol v. Board of County Commissioners of the County of Clear Creek*, 281 F.3d 1148, 1152 (10th Cir. 2002)("Third, we hold that the trial court was correct in ruling that Bristol could establish discrimination by showing that the County failed reasonably to accommodate him by reassigning him to a vacant position. Bristol is not required to establish separate proof of discriminatory intent").

distinguished, however, liability for ordinary damages from liability for punitive damages. [I]t is ‘improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously.’” *Id.*

The jury was not asked and did not return an award of punitive damages. Ms. Jerome’s *alleged* good faith belief that she could terminate Ms. Cole is irrelevant to the issue of liability. This was the exact reasoning of the trial court in this case. RP RP Feb. 17- 7:1-11:24.

In *Demers v. Adams Homes of Northwest Florida, Inc.*, 321 Fed.Appx. 847 (11th Cir. 2009), the Plaintiff alleged a violation of the Family Medical Leave Act and Title VII of the 1964 Civil Rights Act. The Plaintiff won after a jury trial and the Defendant appealed. In relevant part, the Defendant argued that the trial court had erred when it ruled that he was an employee and not an independent contractor. The Defendant argued that “the court abused its discretion by denying admission of evidence of its good faith belief that Demers was an independent contractor and not an employee.” *Id.* at 853. The Court rejected this argument: “Where a plaintiff establishes a prima facie claim of retaliation under Title VII, the burden shifts to the defendant to present a ‘legitimate, nondiscriminatory business reason’ for the employment decision. Citation omitted. A good faith belief that Demers was an independent contractor is not a ‘legitimate, non- discriminatory business

reason' for terminating her." *Id.* The Court concluded that in regards to Title VII, it "is well-established, ignorance of the law is not a defense." *Id.*<sup>14</sup>

Likewise, Ms. Jerome's alleged good faith belief that she could terminate Plaintiff is not a defense - ignorance of the law is not a defense.<sup>15</sup>

Even assuming the truth of Ms. Jerome's proffered testimony, that is not a defense to liability for disparate treatment under the WLAD. In order to succeed under the WLAD, Plaintiff need only show that her disability was a substantial factor in the decision to terminate her employment. *MacKay v.*

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<sup>14</sup> *Demers v. Adams Homes of Northwest*, 321 Fed.Appx. 847 (11<sup>th</sup> Cir. 2009) is an unpublished decision. The Eleventh Circuit Court of Appeals Rule, Cir.R. 36-2 provides: "Unpublished Opinions. An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority. If the text of an unpublished opinion is not available on the internet, a copy of the unpublished opinion must be attached to or incorporated within the brief, petition, motion or response in which such citation is made." Consistent with GR 14.1(b), the Court may consider this decision. Plaintiff has attached a copy of the decision to this brief.

<sup>15</sup> *See also Ellison v. Brady*, 924 F.2d 872, 880 (9<sup>th</sup> Cir.1991)("Title VII is not a fault-based tort scheme. Title VII is aimed at the consequences or effects of an employment practice and not at the ... motivation of co-workers or employers"); *Equal Employment Opportunity Commission v. National Education Association*, 422 F.3d 840, 844-45 (9<sup>th</sup> Cir. 2005)(Same - citing *Ellison v. Brady*); *Pederson v. Louisiana State University*, 201 F.3d 388, 880 (5<sup>th</sup> Cir. 2000)(In reference to a claim brought under Title IX - "Appellees' alleged ignorance of the law does not preclude our finding that LSU acted intentionally"); *United States v. Balistreri*, 981 F.2d 916, 936 (7<sup>th</sup> Cir. 1992) (holding that a defendant need not actually know that he is violating the Fair Housing Act in order to be found to have discriminated); *Chandler v. Johnson*, 515 F.2d 251, 254 (9<sup>th</sup> Cir. 1975)(Plaintiff asserting race and sex discrimination "is also correct in her assertion that she was under no duty to prove a specific intent to discriminate against her"); *Bilow v. Much Shelist Freed Denenberg Ament & Rubenstein, P.C.*, 277 F.3d 882, 892 (7<sup>th</sup> Cir. 2001)("The most important of these [differences between Title VII and ERISA] is the fact that, unlike a Title VII retaliation plaintiff, an ERISA retaliation plaintiff must demonstrate that the employer had the specific intent to violate the statute and to interfere with an employee's ERISA rights").

*Acorn Custom Cabinetry Inc.*, 127 Wn. 2d 302, 898 P.2d 284 (1995). Ms. Jerome has admitted Ms. Cole’s disability was a substantial factor, and circumstantial evidence also supports that finding. Whether Ms. Jerome intended to violate the law is irrelevant.<sup>16</sup>

**F. The Court Did Not Abuse Its Discretion In Excluding the Testimony of Ms. Jerome.**

Appellate courts review a trial court's decisions as to the admissibility of evidence under an abuse of discretion standard. *E.g.*, *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), *cert. denied*, \_\_\_ U.S. \_\_\_, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996).<sup>17</sup> The abuse of discretion standard also applies to the balancing of evidence under ER 403.<sup>18</sup>

In this case, the Court ruled that Ms. Jerome’s testimony was not

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<sup>16</sup> If a private attorney had advised Ms. Jerome that she could terminate Ms. Cole without fear of liability under the WLAD, Ms. Jerome may have had a claim for legal malpractice. But that advice of counsel would not be a defense to an alleged violation of the statute. In this case, Ms. Jerome had no information at all about potential liability under the WLAD. The erroneous information she may have received on an unrelated statute is not a defense.

<sup>17</sup> *See also State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) (this court will not disturb a trial court's rulings on a motion in limine or the admissibility of evidence absent an abuse of the court's discretion). When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists. *Powell*, 126 Wn.2d at 258, 893 P.2d 615.

<sup>18</sup> *See State v. Luvene*, 127 Wn. 2d 690, 706-07, 903 P. 2d 960 (1995) (“We review a trial court's evaluation of relevance under ER 401 and its balancing of probative value against its prejudicial effect or potential to mislead under ER 403 with a great deal of deference, using a ‘manifest abuse of discretion’ standard of review”) *citing State v. Russell*, 125 Wash.2d 24, 78, 882 P.2d 747 (1994).

relevant under ER 401, and even if it had some marginal relevance, that relevance would be outweighed by the prejudicial effect and potential for jury confusion of the issues applying ER 403. The Court acknowledged that retaliation for having filed a workers compensation claim was not at issue in this lawsuit, and that L&I was not in the business of giving opinions about the WLAD. The Court further acknowledged that good faith was only a defense to a claim for punitive damages, but that Plaintiff was not making such a claim in this case. For these reasons, the Court correctly ruled that the information allegedly learned by Ms. Jerome from the Department of L&I was not relevant. The Court further ruled that for these reasons the proffered evidence could only serve to confuse the jury, and that the prejudicial effect would outweigh its probative value. These rulings were not an abuse of discretion.

The Defendants continue to argue that Ms. Jerome believed that she could lawfully terminate Ms. Cole under the workers compensation statute, and therefore Ms. Cole's termination under the WLAD was lawful. Def. Brief at 44. This argument perfectly illustrates the confusion which the information would have created with the jury.<sup>19</sup> The workers compensation

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<sup>19</sup> The Defendants argue that the information Ms. Jerome allegedly received from the Department of L&I was correct. Not surprisingly, they cite no authority in support of this position. If this position were correct than an employer could, with impunity, fire any worker who filed a workers compensation claim. The correctness of this alleged information is nevertheless irrelevant; illegal retaliation for filing a workers compensation claim has nothing

statute is not at issue in this lawsuit, and Ms. Jerome's alleged good faith is not a defense. The Defendants argue that the opinion of the Department of Labor & Industries somehow trumps the Court's Instructions to the jury. No limiting instruction could have over come that false argument. This is the very confusion which the trial court understandably wanted to avoid.

**G. Plaintiff's Closing Argument Was Proper.**

Plaintiff's counsel argued to the jury the Defendants failed to engage in the interactive process; that they made no effort to determine in what way her injury interfered with her ability to perform essential job functions and whether there existed reasonable accommodations. The evidence amply supported this argument. The Department of L&I had no knowledge about the nature and extent of Ms. Coles' injury or the job that she was performing. It was therefore impossible for it to offer a judgment about the nature of any accommodations, if any. The evidence proffered by the Defendants had nothing to do with possible accommodations. It related only to whether Ms. Jerome could terminate Ms. Cole's employment if she could not perform all the essential function of her job. Plaintiff's counsel's closing argument was entirely proper.

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whatever to do with failure to accommodate or disparate treatment under the WLAD.

## **H. Substantial Evidence Supports a Violation of the WLAD.**

### **1. Substantial Evidence Supports a Finding That the Defendants Failed to Engaged in the Interactive Process or Accommodate Ms. Cole.**

Plaintiff offered substantial evidence to satisfy all the elements of Jury Instructions No. 6, 8, 11. It is undisputed that 1) Ms. Cole was disabled within the meaning of the WLAD; 2) she received medical attention at the Country Doctor Heath Clinic; 3) her medical provider required light duty for two weeks until May 19, 2006; and 4) Ms. Jerome and Mr. Harvey had knowledge of Ms. Cole's injury and the medical restrictions. The Defendants admit that they made no effort to communicate with Plaintiff's medical providers at all, and no effort to discuss with Ms. Cole her physical limitations.

The Defendants failed to offer Plaintiff a leave or absence and failed to allow other Resident Managers to fill in as had routinely been done in the past. Indeed, Ms. Jerome freely admitted that she was unaware of any obligation to offer Ms. Cole a reasonable accommodation.

During her deposition and at trial, Jerome concedes that Ms. Cole's medical restrictions would have expired on May 19, 2009, and that it was unclear about whether Ms. Cole would have been able to return to work without restriction thereafter. RP Feb. 17- 20:5-25. Unable or unwilling to wait an additional *three days* to find out the status of Ms. Cole's medical

condition, she terminated her employment instead on May 16, 2008. Jerome admitted she did not consider whether Plaintiff would recover adequately in a very short time and would then be able to perform 100 percent of her job duties. RP Feb. 17- 45:13-46:5.

**2. Substantial Evidence Supports a Finding that Plaintiff's Disability Was a Substantial Factor in the Decision to Terminate Her Employment.**

Plaintiff offered substantial evidence to satisfy all the elements of Instruction No. 4. On or about April, 2006, Mr. Harvey's daughter, Michelle Jerome, assumed operational control of the Marwood Apartments, and thus became Ms. Cole's immediate supervisor. Prior to that time, Ms. Cole reported exclusively to Mr. Harvey. While working under his supervision, Mr. Harvey explicitly admitted that Ms. Cole was satisfactorily performing her job duties.

Ms. Jerome explicitly admitted both during her deposition (which was read to the jury) and during trial that Ms. Cole's disability was a substantial factor in the decision to terminate Ms. Cole's employment. This is direct evidence of discriminatory intent.

After Ms. Cole's injury, Ms. Jerome required Ms. Cole to achieve 100% occupancy at the Marwood Apartments by June 1, 2006. It was admitted by Mr. Jerome that no other resident manager had a similar restriction, including the Resident Manager who replaced Ms. Cole, who was

not disabled. The Resident Manager who replaced Ms. Cole had numerous vacancies, yet remained employed.

After this condition was imposed, Ms. Cole had succeeded in renting four out of five vacant apartments. On May 16, 2008, Ms. Cole was nevertheless terminated from employment before she had an opportunity to achieve 100% occupancy. The termination occurred just three days before Ms. Cole's two week light duty restriction was scheduled to expire.

At the time of her termination from employment, unlike other Resident Managers, Ms. Cole was given two weeks to vacate her home of 16 years.

All of these facts are easily sufficient to sustain the jury's verdict.

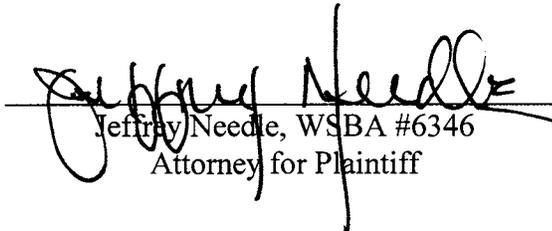
**I. The Court Should Award Reasonable Attorney Fees on Appeal.**

RCW 49.60.030 provides that a prevailing plaintiff should be awarded reasonable attorney fees. The Court should award Plaintiff attorney fees on appeal. RAP 18.1.

**VI. CONCLUSION**

The decision of the jury and trial court should be AFFIRMED.

Respectfully submitted this 22<sup>nd</sup> day of September, 2010.

  
Jeffrey Needle, WSBA #6346  
Attorney for Plaintiff

# APPENDIX A

Westlaw.

Page 1

321 Fed.Appx. 847, 2009 WL 724033 (C.A.11 (Fla.))  
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**H**

Briefs and Other Related Documents

Judges and Attorneys

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Eleventh Circuit Rules 36-2, 36-3. (Find CTA11 Rule 36-2 and Find CTA11 Rule 36-3)

United States Court of Appeals,  
 Eleventh Circuit.  
 Colleen DEMERS, Plaintiff-Appellant Cross-Appellee,

v.

ADAMS HOMES OF NORTHWEST FLORIDA,  
 INC., A Florida corporation, Defendant-Appellee  
 Cross-Appellant,  
 Matthew Malone, individually, Defendant.  
 No. 08-13044.

March 20, 2009.

**Background:** Employee brought action against employer, alleging violation of the Family and Medical Leave Act (FMLA) and Title VII. The United States District Court for the Middle District of Florida, Gregory A. Presnell, J., entered partial judgment, upon a jury verdict, in favor of employee, granted employer's post-verdict motion to vacate the punitive damages award, and, 2008 WL 2413934, awarded reduced amount of attorney fees. Employee and employer cross-appealed.

**Holdings:** The Court of Appeals held that:

- (1) employee could not prevail in FMLA claim;
- (2) evidence supported punitive damages award;
- (3) reduced award of attorney fees was warranted;
- (4) salesperson was employee within meaning of FMLA;

- (5) employee engaged in Title VII protected activity;
- (6) evidence regarding the employer's reason for denying request for maternity leave was irrelevant, in Title VII retaliation claim; and
- (7) testimony of three former employees regarding employer's discriminatory actions against them was admissible, as prior bad acts evidence.

Affirmed in part and reversed in part.

West Headnotes

**[1] Labor and Employment 231H ↻393(3)**

231H Labor and Employment

231HVI Time Off; Leave

231Hk381 Actions

231Hk393 Monetary Relief

231Hk393(3) k. Grounds and Subjects.

Most Cited Cases

Employee was not entitled to recover damages for employer's violation of the FMLA by denying her leave, where she failed to show that she sustained any harm suffered from the violation. Family and Medical Leave Act of 1993, § 107(a)(1)(B), 29 U.S.C.A. § 2617(a)(1)(B).

**[2] Labor and Employment 231H ↻393(7)**

231H Labor and Employment

231HVI Time Off; Leave

231Hk381 Actions

231Hk393 Monetary Relief

231Hk393(7) k. Exemplary or Punitive

Damages. Most Cited Cases

Evidence was sufficient to show that employer acted with malice, as required to support punitive damages award, based on employer's denial of employee's request for maternity leave, in violation of the FMLA; testimony showed that employer knew of the FMLA, but failed to adopt its provisions. Family and Medical Leave Act of 1993, § 107(a)(1)(B), 29 U.S.C.A. § 2617(a)(1)(B).

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**[3] Civil Rights 78 ↪ 1594**

78 Civil Rights  
 78IV Remedies Under Federal Employment Discrimination Statutes  
 78k1585 Attorney Fees  
 78k1594 k. Amount and Computation.  
 Most Cited Cases

**Civil Rights 78 ↪ 1595**

78 Civil Rights  
 78IV Remedies Under Federal Employment Discrimination Statutes  
 78k1585 Attorney Fees  
 78k1595 k. Time Expended; Hourly Rates. Most Cited Cases  
 Reduced award of attorney fees was warranted for employee who prevailed on Title VII claim; employee failed to present any evidence to support claimed hourly rate, employee succeeded on just one of four counts in the lawsuit, and recovered only \$95,000 of the \$1.5 million in damages she originally sought. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

**[4] Labor and Employment 231H ↪ 339**

231H Labor and Employment  
 231HVI Time Off; Leave  
 231Hk337 Eligible Employees  
 231Hk339 k. Existence of Employment Relationship. Most Cited Cases  
 Salesperson was "employee," not independent contractor, for FMLA purposes; salesperson was required to staff the office a minimum of five days per week, including weekends, she had to provide ample notice before taking vacation, she could not sell products other than employer's products, she had to attend weekly sales meetings, she had to submit weekly reports, employer provided instruction on language for salesperson to use during sales pitches, employer provided salesperson with supplies, promotional materials, business cards, and salesperson received memos addressed to all employees. Civil Rights Act of 1964, § 701(f), 42

U.S.C.A. § 2000e(f).

**[5] Civil Rights 78 ↪ 1244**

78 Civil Rights  
 78II Employment Practices  
 78k1241 Retaliation for Exercise of Rights  
 78k1244 k. Activities Protected. Most Cited Cases  
 Employee engaged in Title VII protected activity by opposing supervisor's discrimination against her on the basis of her pregnancy, as required to support Title VII retaliation claim; during a meeting, supervisor informed her that employer would deny her request for maternity leave, supervisor relayed other manager's openly discriminatory statement that pregnant women might not come back to work after having the baby, and employee expressed her intent to speak with manager to oppose the denial of maternity leave. Civil Rights Act of 1964, §§ 701(k), 704(a), 42 U.S.C.A. §§ 2000e(k), 2000e-3(a).

**[6] Civil Rights 78 ↪ 1542**

78 Civil Rights  
 78IV Remedies Under Federal Employment Discrimination Statutes  
 78k1542 k. Admissibility of Evidence; Statistical Evidence. Most Cited Cases  
 Evidence regarding the employer's reason for denying employee's request for maternity leave was irrelevant, in employee's Title VII retaliation claim, based on retaliation for employee's expressed opposition to employer's denial of her leave request; the truth or falsity of the alleged discrimination did not tend to prove or disprove the fact of subsequent retaliation. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

**[7] Evidence 157 ↪ 134**

157 Evidence  
 157IV Admissibility in General  
 157IV(C) Similar Facts and Transactions  
 157k133 Showing Intent or Malice or

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#### Motive

157k134 k. In General. Most Cited Cases Testimony of three former employees regarding employer's discriminatory actions against them was admissible, as prior bad acts evidence, in employee's Title VII retaliation action; evidence was probative of retaliatory intent, and it tended to prove contested issue. Civil Rights Act of 1964, § 701(k), 42 U.S.C.A. § 2000e(k); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

\*848 Daniel Arturo Perez, Bogin, Munns & Munns, Melbourne, FL, for Plaintiff-Appellant Cross-Appellee.

Joyce Ackerbaum Cox, Kevin W. Shaughnessy, Baker & Hostetler, LLP, Orlando, FL, for Defendant-Appellee Cross-Appellant.

Appeals from the United States District Court for the Middle District of Florida. Docket No. 06-01235-CV-ORL-31-KRS.

Before BARKETT, PRYOR and \*849 FARRIS,  
 FN\* Circuit Judges.

FN\* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

#### PER CURIAM:

\*\*1 Colleen Demers appeals following a jury trial, verdict, and final judgment in an action under the Family Medical Leave Act and Title VII of the Civil Rights Act of 1964. Defendant Adams Homes cross-appeals.

### APPEAL

#### I. Summary judgment on Count 1 was proper.

“We review a district court's grant of summary

judgment de novo, applying the same legal standards that controlled the district court's decision” and “with all evidence and reasonable factual inferences viewed in the light most favorable to the nonmoving party.” *Levinson v. Reliance Standard Life Ins. Co.*, 245 F.3d 1321, 1326 (11th Cir.2001); *Rodgers v. Singletary*, 142 F.3d 1252, 1253 (11th Cir.1998).

Demers argues that summary judgment on Count 1 was predicated on the district court's erroneous beliefs that monetary damages are necessary to sustain a cause of action under the FMLA and that it had discretion to deny equitable relief.

[1] The FMLA's “ § 2617 provides no relief unless the employee has been prejudiced by the violation” in some way. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89, 122 S.Ct. 1155, 152 L.Ed.2d 167 (2002). The district court did not hold that Demers had to prove monetary damages, but rather that she had to prove some damages. Adams Homes violated the FMLA by denying her leave, but Demers cannot articulate any harm suffered from this denial. Plaintiffs may not recover for “technical infractions under the FMLA ... in the absence of damages.” *Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274, 1284 (11th Cir.1999). The judgment was appropriate.

The district court had discretion to deny equitable relief. Under the applicable language of the FMLA, “[a]ny employer who violates section 2615 of this title shall be liable to any eligible employee affected for such equitable relief as may be appropriate.” 29 U.S.C. § 2617(a)(1)(B) (emphasis added). Demers argues that the “shall” indicates that equitable relief was not discretionary. However, the “may” clause indicates the contrary; equitable relief may or may not be appropriate. As the Supreme Court has explained, “[t]he remedy is tailored to the harm suffered.” *Ragsdale*, 535 U.S. at 89, 122 S.Ct. 1155. The question of appropriateness is left to the trial court's discretion.

#### II. The court did not err in instructing the jury

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**or in denying Demers' motion for judgment as a matter of law with respect to Count 2.**

We reverse a denial of a motion for judgment as a matter of law “only if the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict.” *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1276 (11th Cir.2008).

The facts do not point overwhelmingly in favor of either party. There was evidence that other women received maternity leave, and that Adams Homes was a family friendly company. Upon this record, a jury could have reasonably found that Demers did not complain about the denial of her leave request, or that she did complain,\*850 but was terminated for a different reason.

**III. The court erred in vacating the jury verdict for \$5,000 in punitive damages.**

\*\*2 We “review[ ] the award of damages in a Title VII case for an abuse of discretion,” but “review[ ] de novo all underlying questions of law.” *EEOC v. W & O, Inc., d.b.a. Rustic Inn*, 213 F.3d 600, 610 (11th Cir.2000).

A plaintiff may recover punitive damages under Title VII if the defendant “engaged in a discriminatory practice ... with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” 42 U.S.C. § 1981a(b)(1). “Malice means ‘an intent to harm’ and recklessness means ‘serious disregard for the consequences of [one’s] actions.’ ” *Rustic Inn*, 213 F.3d at 611 (citations omitted).

The jury awarded Demers \$5,000 in punitive damages. The district court granted a motion to vacate the award, on the theory that Adams Homes acted in “a good faith mistaken belief based on incorrect legal advice” and without malice or reckless indifference.

[2] In *Rustic Inn*, we upheld punitive damages

against a restaurant defendant that forbade women from acting as servers after five months of pregnancy. 213 F.3d at 612. Even though the restaurant purportedly designed the policy to protect pregnant women from the dangers of carrying trays, and even though the restaurant contacted the Department of Labor for advice and examined the pregnancy policies of other restaurants, a finding of malice or reckless indifference was not unreasonable. *Id.* at 610. Evidence permitting the inference of malice or indifference included testimony that the defendant knew of the FMLA yet failed to draft its policy according to the FMLA model. There were also comments by managers suggesting they were “from the ‘old school’ and believed that a pregnant woman who was showing should not wait tables.” *Id.* at 607, 612.

Demers presented similar evidence. Testimony showed that Adams Homes knew of the FMLA, yet failed to adopt the FMLA model. Demers alleged that Malone made discriminatory comments about pregnant women similar to the comments in *Rustic Inn*. Other evidence could be deemed by a trier fact to raise a question regarding Adam Homes' good faith belief that Demers was an independent contractor. She received an employee discount that was unavailable to contractors such as plumbers, and she along with other salespeople received company memoranda circulated to “All Employees.”

A reasonable trier of fact could find that Adams Homes acted with malice or reckless indifference, and thereby justify punitive damages. Vacating the punitive award was error.

**IV. The district court did not err when it reduced Demers's demand for attorneys fees and costs.**

We “review the district court's award of attorneys' fees and costs for abuse of discretion.” *Atlanta Journal & Constitution v. City of Atlanta Dep't of Aviation*, 442 F.3d 1283, 1287 (11th Cir.2006).

321 Fed.Appx. 847, 2009 WL 724033 (C.A.11 (Fla.))  
 (Not Selected for publication in the Federal Reporter)  
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[3] The trial court cited its reasons for reducing Demers's attorneys' fees and costs. First, Demers had the opportunity to submit expert opinion on market rates, but failed to do so. Second, Demers presented no evidence as to what rates would be reasonable. Third, most of Demers's claims were unsuccessful. Where a plaintiff succeeds on only some of her claims, fees expended on "discrete and unsuccessful\*851 claims" should be deducted. *Duckworth v. Whisenant*, 97 F.3d 1393, 1397 (11th Cir.1996). "The district court may attempt to identify certain hours that should be eliminated, or it may simply reduce the award to account for the limited success." *Hensley v. Eckerhart*, 461 U.S. 424, 436-37, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Demers succeeded on just one of four counts, and recovered \$95,000 of the \$1.5 million she originally sought. The reduction was not an abuse of discretion.

### CROSS APPEAL

#### I. The district court did not err by issuing a partial summary judgment holding that Demers was an employee and not an independent contractor.

\*\*3 Adams Homes argues that the district court erred when it issued a partial summary judgment finding that, for purposes of both the FMLA and Title VII, Demers was an employee, not an independent contractor.

Adams Homes succeeded on both FMLA counts. To the extent the partial summary judgment defined Demers's status under the FMLA, the appeal is moot.

Title VII unhelpfully defines an "employee" as "an individual employed by an employer..." 42 U.S.C.A. § 2000e(f). Since Congress did not define the term more specifically, we "may well assume that Congress intended the term 'employee' to be given its common, everyday meaning." *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 340 (11th Cir.1982). We construe "employee" "in light of general common law concepts" taking into account the "the

economic realities of the relationship." *Id.* The determinative factors are "common law principles of agency and the right of the employer to control the employee." *Id.* at 341.

[4] Adams Homes argues that summary judgment was inappropriate since material facts regarding control were in dispute. However, the purported disputes are mostly semantic distinctions. Viewed in the light most favorable to Adams Homes, the facts demonstrate that Adams Homes exerted significant control over Demers. Adams Homes claims it did not *require* professional dress, but merely *asked* for professional dress, allowing salespeople to wear what they pleased, "subject" to guidelines. The other purported distinctions are similarly unavailing. Adams Homes argues it permitted salespeople to set their own schedule, "as long as they follow [Adams Homes'] parameters." Yet the parameters were stringent: Demers had to staff the office "a minimum of 5 days per week, including Saturday and Sunday." She was limited to two weeks vacation per year. She had to provide "ample notice" before taking vacation. She could not take her two weeks consecutively. She could not take vacation more than one weekend a month.

Other undisputed evidence further demonstrates Adams Homes' significant control over Demers. Demers could not sell homes other than those of Adams Homes. She had to attend weekly sales meetings. She had to call, meet, and invite to lunch realtors a minimum number of times per month. She had to submit weekly reports. She had to submit substitute staffing for approval. She received instruction on language to use in sales pitches.

There were also undisputed indications that Adams Homes perceived Demers as an employee. Adams Homes provided Demers with supplies and promotional materials, paying for salespeople's pagers, sales office phones, contracts, promotional brochures, and business cards. Demers \*852 received memos addressed to "all employees." She purchased a home at an "employee discount" that was unavailable to contractors such as plumbers.

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Adams Homes is correct that some material issues were in dispute, such as whether it told Demers where to park her car, to what extent Demers is a skilled professional, and to what extent Demers was reimbursed for certain business related expenses. There were also disputed issues regarding Demers' income tax treatment. Yet viewing these disputed facts in the light most favorable to Adams Homes, Demers was an employee. Summary judgment was proper.

**II. A reasonable juror could conclude that Demers engaged in a Title VII protected activity by opposing Malone's discrimination against her on the basis of pregnancy.**

**\*\*4** [5] Title VII's retaliation provision makes it unlawful "to discriminate against any individual ... because [s]he has opposed any practice made an unlawful employment practice by" the Act. 42 U.S.C. § 2000e-3(a). It is unlawful under the Act to discriminate on the basis of pregnancy. *See* 42 U.S.C. § 2000e-(k). Thus, to sustain a retaliation claim, Demers had to prove that Adams Homes discriminated against her because she opposed the discriminatory treatment of her pregnancy. Adams Homes argues that she did not present evidence sufficient for a reasonable trier of fact to conclude she "opposed" any discrimination.

The Supreme Court has held that the term "oppose" in this context takes its ordinary meaning: "to resist or antagonize ...; to contend against; to confront; resist; withstand." *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, --- U.S. ---, 129 S.Ct. 846, 850, 172 L.Ed.2d 650 (2009). In *Crawford*, an employee engaged in protected activity where she disclosed discrimination not on her own initiative, but in response to an internal investigation. *Id.*

Even after *Crawford*, to engage in protected activity, the employee must still, "at the very least, communicate her belief that discrimination is occurring to the employer," and cannot rely on the employer

to "infer that discrimination has occurred." *Webb v. R & B Holding Co., Inc.*, 992 F.Supp. 1382, 1390 (S.D.Fla.1998). A simple request for maternity leave would not suffice, because it alone would not announce opposition to the discriminatory basis for its denial. *See McCormick v. Allegheny Valley Sch.*, 2008 WL 355617, \* 17 (E.D.Pa.2008).

Demers testified that during a January 9, 2006 meeting, Porter informed her that Adams Homes would deny her request for maternity leave. To explain, Porter relayed Malone's openly discriminatory statement: "The problem with pregnant women is that you don't know if they'll come back to work after having the baby."

Demers testified that, in response, "I asked [Porter] if I could [contact Malone], and she said I could." In this context, expressing an intent to speak with Malone also expressed her resistance to or antagonism toward the substance of his statement. A reasonable juror could infer that Demers's expressed intent was an announcement of her opposition.

Porter testified: "I also explained to [Demers] at that time it was just as if a man went out on back surgery." A reasonable juror could conclude that Porter's explanation was a response to Demers's assertion that her request was being denied on a discriminatory basis.

**\*853 III. The court did not abuse its discretion when it instructed the jury on Demers's employee status, excluded independent contractor evidence, and admitted "me too" evidence.**

Adams Homes argues that the trial court abused its discretion with respect to three evidentiary rulings and that the cumulative impact of these rulings was prejudicial. "We review a district court's rulings on the admissibility of evidence for abuse of discretion and will reverse only if the moving party establishes a substantial prejudicial effect." *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1281 n. 75 (11th Cir.2008). Adams Homes' argument fails.

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None of the evidentiary rulings was an abuse of discretion.

### 1. Jury instruction regarding Demers's employee status

**\*\*5** Adams Homes twice suggests that the trial court abused its discretion by issuing its preliminary jury instruction that Demers was an employee rather than an independent contractor. Adams Homes failed to make the argument in its briefs. The argument is waived. *See McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1263 (11th Cir.2004).

### 2. Independent contractor evidence

Adams Homes argues that the court abused its discretion by denying admission of evidence of its good faith belief that Demers was an independent contractor and not an employee. Where a plaintiff establishes a prima facie claim of retaliation under Title VII, the burden shifts to the defendant to present a "legitimate, nondiscriminatory business reason" for the employment decision. *Silvera v. Orange County Sch. Bd.*, 244 F.3d 1253, 1258 (11th Cir.2001). A good faith belief that Demers was an independent contractor is not a "legitimate, nondiscriminatory business reason" for terminating her. The evidence would tend to prove merely that Adams Homes did not believe that Demers was protected by Title VII. As is well-established, ignorance of the law is not a defense. *See U.S. v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563, 91 S.Ct. 1697, 29 L.Ed.2d 178 (1971).

[6] On appeal, Adams Homes argues that it sought to introduce the evidence to provide context for its decision to refuse Demers's maternity leave request. However, such context is irrelevant to Count 4. Count 4 is a retaliation cause of action and therefore concerns Demers's termination following her opposition to discrimination, not the incident giving rise to her opposition. Evidence regarding the reason for denying leave is irrelevant, as the truth or falsehood of the alleged discrimination does not

tend to prove or disprove the fact of subsequent retaliation. *See* F.R.E. 401.

### 3. "Me too" evidence

[7] Adams Homes argues that the testimony of three former employees regarding Malone's discriminatory actions was inadmissible under F.R.E. 404(b). Under F.R.E. 404(b), "[e]vidence of other crimes, wrongs, or acts ... may ... be admissible for ... purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." F.R.E. 404(b). The Supreme Court has held that wide evidentiary latitude must be granted to those attempting to prove discriminatory intent and that "the trier of fact should consider all the evidence." *U.S. Postal Serv. v. Aikens*, 460 U.S. 711, 714 n. 3, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). Those discriminated against will often not be able to rebut a plausible cover-up with direct evidence, as "[t]here will seldom be 'eyewitness' testimony as to the employer's mental \*854 processes." *Id.* at 716, 103 S.Ct. 1478. Thus, discriminatory intent may be proven by direct or circumstantial evidence, such as that admitted under 404(b). *Vance, v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1503, 1511 (11th Cir.1989).

We have approved the use of "me too" evidence under F.R.E. 404(b) in discrimination and retaliation cases. *See Bagby*, 513 F.3d at 1285. In *Bagby*, a Title VII and civil rights statute racial discrimination and retaliation suit, the trial court admitted "me too" evidence from four employees, each of whom was discharged in circumstances very different from the plaintiff's. Their testimony was admissible under Rule 404(b) in order to, among other things, demonstrate the racial intent of a common decision-maker. *Id.* at 1286.

**\*\*6** Adams Homes argues that there was no common decisionmaker here, because Porter gave un rebutted testimony that she-and not Malone-decided to fire Demers. This argument fails to recognize that the "me too" testimony was circumstantial

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evidence that rebuts Porter's assertion. It tended to prove that Malone was a common decisionmaker and was probative of his discriminatory intent.

#### IV. Demers's attorneys' fees award should not be reduced.

Adams Homes suggests that Demers's attorneys' fees award should be further reduced. It does not properly raise the issue on cross-appeal. The argument is waived. See *McFarlin*, 381 F.3d at 1263.

#### CONCLUSION

We affirm, except that we reinstate the jury's award of \$5,000 in punitive damages.

**AFFIRMED** in part; **REVERSED** in part.

C.A.11 (Fla.),2009.

Demers v. Adams Homes of Northwest Florida, Inc.  
 321 Fed.Appx. 847, 2009 WL 724033 (C.A.11 (Fla.))

Briefs and Other Related Documents (Back to top)

- 2009 WL 898390 (Appellate Brief) Appellee/Cross-Appellnt's Reply Brief (Jan. 5, 2009) Original Image of this Document (PDF)
- 2008 WL 5785760 (Appellate Brief) Plaintiff-Appellant's Answer Brief & Reply Brief (Nov. 25, 2008) Original Image of this Document (PDF)
- 2008 WL 5785759 (Appellate Brief) Cross-Appellant's Initial Brief/Appellee's Answer Brief (Oct. 4, 2008) Original Image of this Document (PDF)
- 08-13044 (Docket) (May 29, 2008)
- 2008 WL 5785758 (Appellate Brief) Initial Brief of the Appellant (2008) Original Image of this Document (PDF)

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Judges and Attorneys(Back to top)

Judges | Attorneys

Judges

• **Barkett, Hon. Rosemary**  
 United States Court of Appeals, Eleventh Circuit  
 Georgia  
[Litigation History Report](#) | [Judicial Reversal Report](#)  
[Judicial Expert Challenge Report](#) | [Profiler](#)

• **Farris, Hon. Joseph Jerome**  
 United States Court of Appeals, Ninth Circuit  
 Washington  
[Litigation History Report](#) | [Judicial Reversal Report](#)  
[Judicial Expert Challenge Report](#) | [Profiler](#)

• **Presnell, Hon. Gregory A.**  
 United States District Court, Middle Florida  
 Florida  
[Litigation History Report](#) | [Judicial Motion Report](#) |  
[Judicial Reversal Report](#) | [Judicial Expert Challenge Report](#)  
[Profiler](#)

• **Pryor, Hon. William H. Jr.**  
 United States Court of Appeals, Eleventh Circuit  
 Georgia  
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END OF DOCUMENT

# APPENDIX B

**FILED**  
KING COUNTY, WASHINGTON

FEB 19 2010

SUPERIOR COURT CLERK  
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DEPUTY

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## LIST OF EXHIBITS

(EXLST)

CAUSE NO. 08-2-28039-0 SEA

CAPTION:

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Deborah Cole

Plaintiff / Petitioner

VS.

---

Harveyland, LLC, dba; et al

Defendant / Respondent

---

LEGEND:

Π= Plaintiff/Petitioner  
Δ= Defendant/Respondent  
A = Admitted  
AN = Admitted but not to go to jury  
R = Refused  
Re-O&A = Re-offered and Admitted  
ID = For Identification Only  
Rtn'd = Returned

CODES:

Cause No. 08-2-28039-0 SEACaption: Deborah Cole vs. Harveyland, LLC, dba: et al

No.	Π	Δ	Description	A AN R	Date	Re-O & A	I D	R e t	EXHIBIT ROOM USE ONLY
1	X		4/29/08 – Medical Record				X		
2	X		4/29/08 – Report of Industrial Injury				X		
3	X		5/01/08 – Medical Note re return to work	<b>A</b>	2/16/10				
4	X		5/05/08 – Medical Note re return to work	<b>A</b>	2/16/10				
5	X		5/05/08 – Referral to Radiology at Swedish Medical Center				X		
6	X		<del>5/05/08</del> <sup>12</sup> – Referral to PT at Central Physical Therapy and Fitness	<b>A</b>	2/16/10				
7	X		Undated instruction sheet re "Patellofemoral Pain"				X		
8	X		5/20/08 – Release to Light Duty from medical provider				X		
9	X		5/21/08 – Job Posting, Craigslist	<b>A</b>	2/17/10				
10	X		5/30/08 – Employer Report of Industrial Injury / Occupational Disease				X		
11	X		6/03/08 – Notice of Abandonment RCW 59.18.310	<b>A</b>	2/16/10				
12	X		6/11/08 – Letter to Division of Industrial Insurance re: Medical Diagnosis				X		

Cause No. 08-2-28039-0 SEACaption: Deborah Cole vs. Harveyland, LLC, dba: et al

No.	Π	Δ	Description	A AN R	Date	Re-O & A	I D	R e t	EXHIBIT ROOM USE ONLY
13	X		3/09/09 – Bill for medical treatment rendered				X		
14	X		Undated list – "Priority Items 1 – 3" etc, from Michelle Jerome to Deborah Cole	<b>A</b>	2/16/10				
15	X		4/29/08 – "Notes for Deb" from Michelle Jerome to Deborah Cole	<b>A</b>	2/16/10				
16	X		Undated memo, Michelle Jerome to Deborah Cole	<b>A</b>	2/16/10				
17	X		4/24/08 – email from Michelle Jerome to Deborah Cole re Our meeting on Saturday / rents	<b>A</b>	2/17/10				
18	X		<del>5/5/08</del> - email from Michelle Jerome to Deborah Cole re: 3 things	<b>A</b>	2/16/10				
19	X		5/06/08 – Handwritten note from Deborah Cole to Michelle Jerome	<b>A</b>	2/16/10				
20	X		5/08/08 – email from Michelle Jerome to Deborah Cole re: Marwood files	<b>A</b>	2/17/10				
21	X		5/22/08 – Letter from Michelle Jerome to Deborah Cole	<b>A</b>	2/17/10				
22	X		6/06/08 – Check, Pay to the Order of Deborah Cole, \$1785.43, written by Donald Harvey	<b>A</b>	2/16/10				

Cause No. 08-2-28039-0 SEACaption: Deborah Cole vs. Harveyland, LLC, dba; et al

No.	Π	Δ	Description	A AN R	Date	Re-O & A	I D	R e t	EXHIBIT ROOM USE ONLY
23	X		6/12/08 - Check, Pay to the Order of Deborah Cole, \$10,000.00, written by Donald Harvey	<b>A</b>	2/16/10				
24	X		5/12/08 - Memo re: Employees reference, for Deborah Cole written by Donald Harvey	<b>A</b>	2/16/10				
25	X		6/21/08 - Letter from Allen Johnson to Whom It May Concern re: procedures followed	<b>A</b>	2/16/10				
26	X		Undated job description for Deborah Cole	<b>A</b>	2/11/10				
27	X		2007 W-2 Form, Deborah Cole	<b>A</b>	2/16/10				
28	X		4/29/08 - Memo to Marwood residents re: Rent Increases				X		
29	X		Undated card from Michelle & Kristy re: thank you Debra				X		
30	X		5/05/08 - email from Deborah Cole to Michelle Jerome re: Harvey Apartments website				X		
31	X		5/08/08 - email from Deborah Cole to Michelle Jerome re: Marwood files	<b>A</b>	2/17/10				
32	X		5/11/08 - email from Michelle Jerome to Deborah Cole re: Marwood files	<b>A</b>	2/17/10				

Cause No. 08-2-28039-0 SEA

Caption: Deborah Cole vs. Harveyland, LLC, dba: et al

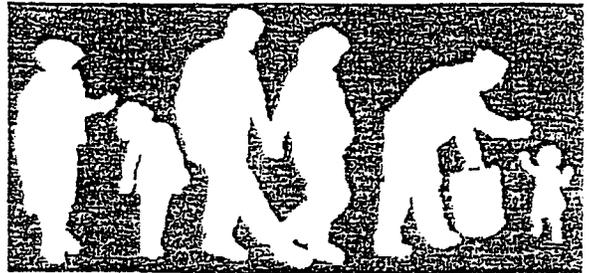
No.	Π	Δ	Description	A AN R	Date	Re-O & A	I D	R e t	EXHIBIT ROOM USE ONLY
33	X		5/11/08 – email from Deborah Cole to Michelle Jerome re: Congrats & Monday	<b>A</b>	2/16/10				
34	X		5/12/08 - email from Michelle Jerome to Deborah Cole re: #109, 107	<b>A</b>	2/17/10				
35	X		5/14/08 - email from Michelle Jerome to Deborah Cole re: Manager's job description with email attachment	<b>A</b>	2/17/10				
36	X		5/14/08 – letter from Deborah Cole to Michelle Jerome re: following conditions				X		
37	X		5/19/08 – email chain from Michelle Jerome to Deborah Cole re: letting go	<b>A</b>	2/16/10				
38	X		6/05/08 - letter from Deborah Cole to Michelle Jerome & Terrace re: 30 day notice	<b>A</b>	2/17/10				
39	X		Notice of Estate Sale for Saturday, May 31 <sup>st</sup> at 531 Bellevue Ave. East				X		
40	X		5/28/08 – bill from Public Storage - <del>\$</del> 41.93				X		
41	X		6/09/08 – In-Kind Donation receipt, Seattle's Union Gospel Mission				X		
42	X		6/26/08 – email chain, Deborah Cole to Sandra Kurjiaka re: help				X		

Cause No. 08-2-28039-0 SEA

Caption: Deborah Cole vs. Harveyland, LLC, dba: et al

No.	II	Δ	Description	A AN R	Date	Re-O & A	I D	R e t	EXHIBIT ROOM USE ONLY
43	X		5/22/09 – Letter from Cami Cole, WA State Dept. of L & I to Deborah Cole re: Establishment of wages				X		
44		X	Medical records of Deborah Cole – Country Doctor Community Clinic	<b>A</b>	2/16/10				
45		X	5/07/08 - MRI Radiology Results for Deborah Cole	<b>A</b>	2/16/10				
46		X	6/05/08 - letter from Deborah Cole to Michelle Jerome & Terrace re: 30 day notice w/attachment				X		
47		X	5/12/08- email from Deborah Cole to Michelle Jerome re Sunday May 11th				X		
48	✓	X	11/24/08 - letter from Deborah Cole to Cami Cole, State of WA Dept. of L & I			NOT USED			
49		X	5/22/08 - letter from Michelle Jerome to Deborah Cole				X		
50		X	4/26/08 - email from Michelle Jerome to Deborah Cole re: Marwood list				X		
51		X	Undated memo from Michelle Jerome to Deborah Cole				X		
52		X	Spreadsheet re Revenue / Costs 2002 - 2007				X		
53		X	Spreadsheet re vacant units at Marwood 2002 - 2009				X		





Country Doctor Community Clinic  
Phone: (206)299-1600 Fax: (206)299-1608

05/01/2008

To Whom It May Concern:

Deborah Cole is currently under my medical care and may not return to work at this time.

Please excuse for 7 day(s).

The patient may return on 05/05/2008.

Activity is restricted as follows: light duty, no lifting.

If you require additional information please contact the office.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Fisse". The signature is fluid and cursive, with a long horizontal stroke at the end.

Robert Fisse PAC  
Country Doctor Community Clinic  
500 19th Ave. E.  
Seattle, WA 98112  
(206) 299-1600

**Exhibit 3**

000166



Country Doctor Community Clinic  
Phone: (206)299-1600 Fax: (206)299-1608

05/05/2008

To Whom It May Concern:

Deborah Cole is currently under my medical care and may not return to work at this time.

Please excuse for 2 week(s).

The patient may return on 05/19/2008.

Activity is restricted as follows: light duty

If you require additional information please contact the office.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Fisse", written in a cursive style.

Robert Fisse PAC  
Country Doctor Community Clinic  
500 19th Ave. E.  
Seattle, WA 98112  
(206) 299-1600

**Exhibit 4**

000119

Avoid scams and fraud by dealing locally! Beware any deal involving Western Union, Moneygram, wire transfer, cashier check, money order, shipping, escrow, or any promise of transaction protection/certification/guarantee. [More info](#)

please [flag](#) with care:

[miscategorized](#)

[prohibited](#)

[spam/overpost](#)

[best of craigslist](#)

## Resident Apartment Manager (Capitol Hill / Seattle)

---

Reply to: [job-689376182@craigslist.org](mailto:job-689376182@craigslist.org)

Date: 2008-05-21, 8:27AM PDT

Resident Apartment Manager for a 29 unit building on Capitol Hill.

**\*\*\*This is a fabulous opportunity in a highly sought after neighborhood\*\***

This is a full-time position available immediately. We are looking for someone with previous manager experience, but not necessarily apartment manager experience. We want someone with a strong background in customer service/sales. The most important part of the job is keeping the building rented and our tenants happy. We are looking for someone who can make a 3 to 5 year commitment. We are just beginning the process of upgrading the building over the next few years. So this is a full time job.

Maintenance skills are a plus, but not required. However a willingness to learn is. We can teach just about anything to someone who is ready to learn!!! You will work with our maintenance "crew" of two men, who are excellent at what they do and very capable of training. They are shared amongst four other buildings. So, sometimes you will be working side by side and other times independently.

Base pay includes a 1 bedroom apartment plus utilities, basic phone and basic cable. In exchange you show units, collect rents, handle paperwork, manage tenants and keep the building clean. We pay hourly for unit cleaning/turnover and all maintenance work. You must be physically able and willing to work full-time.

You get to live and work in a fabulous 1930's Vintage Brick Building in the Heart of Capitol Hill. The building has been well maintained, but is ready for some improvements.

EMAIL YOUR RESUME TO: [marwood@harveyapts.com](mailto:marwood@harveyapts.com)

See more information at: <http://www.harveyapts.com/marwood.html>

- Location: Capitol Hill / Seattle
- Compensation: 1 bedroom apt, utilities, basic phone and basic cable. Hourly pay for maintenance. Principals only. Recruiters, please don't contact this job poster.
- Please, no phone calls about this job!
- Please do not contact job poster about other services, products or commercial interests.

# Exhibit 9

To: Deb Cole, Manager Marwood Apartments

by  
FM SJ 9  
10:30 AM

I wanted to put some things into writing just so that we are totally clear.

Please sign and return one copy with Terrace and keep the other copy for yourself.

I am making some clarifications and changes.

1. Having the Marwood 100% rented for June 1<sup>st</sup> is going to be a prerequisite for you keeping your job with us, per my email dated 5/5. I know we have discussed the prime importance of keeping the Marwood fully rented. Given the turnover that we are anticipating in the upcoming months, I need to know that you are able to handle current vacancies as an indicator of your future performance.
2. Effective from June 1<sup>st</sup> forward, I am discontinuing the \$500 stipend. To balance that change, you will then be paid \$15 per hour for work done at the Marwood, just the same as the work you do for Harveyland. Hours will still be reported separately.
3. Time spent interacting with landlord (myself) or tenants is considered part of your regular duties that are paid through a manager's free rent. This work is not paid by the hour.
4. When the opportunity arises, we will be moving you out of unit #305. Ultimately you are to occupy unit #107, which will then perpetually be the manager's unit. Until #107 is available, I will be moving you into another apartment. I will let you know exactly when and which one after an appropriate one becomes vacant.
5. Before you leave town this month, I want to review your timesheet for May. I need to see a greater level of detail on your timesheet than what you had for last month (which we discussed.) This will be a good time, rather than waiting for the very end of the month.
6. Copies of the new timesheet are enclosed.
7. On the 6<sup>th</sup> of each month, you are to report the amount of collected and uncollected rents, plus notices issued. Please email that information for May.
8. On the 11<sup>th</sup> of each month, you are to report the tenants that have given notice.

---

Signature

Date & Time

**Exhibit 16**

43

000037

5/6

Michelle:

I went over first  
Sheet w/ your Dad 25  
to late rents + monies  
still coming in this  
week for him to collect.  
I am updating you +  
sent copies of notices,  
Plus because Brian was  
delayed and did not send  
Security I re-rented  
#106 to merged Better,  
#306 is still to arrive  
they are all paid up.  
#308 will be arriving  
+ when he signs lease  
he will pay 1st + parking  
to get keys - He paid his  
Security.

Also included is new  
note + MRI order from

Clinic - your Dad  
has copies.  
I am also including  
Security Fee refund  
for #206 if Neil  
had been a real tenant  
he would not get any  
money back but because  
his moving is between  
Terrace & him. You  
need to decide & send  
him a check on your  
Dad by May 14th.

Your Dad & I spoke about  
the garage & construction  
re: parking spaces. He  
said he would work it  
out with you.

Think that's all paper  
work for today!

Thank you!  
DL

Marwood Apartments  
Donald Harvey  
2411 - 60th SE 232-6833  
Mercer Island, WA 98040

5338

Date 6/6/08

18-2/1250 WA  
42705

Pay to the Order of Deborah Cole \$ 1,785.<sup>43</sup>

ONE THOUSAND SEVEN HUNDRED EIGHTY FIVE AND 43/100 DOLLARS

**Bank of America**

Mercer Island 042705  
Washington

For mgr pay 5/08 Donald Harvey

⑆ 25000024⑆ 5384 300⑈ 5338

GUARDIAN SAFETY BLUE PAPER

**Exhibit 22**

000067

~~BOA~~  
DEB

La Veda Apartments Donald R. Harvey 2411 - 60th Ave. SE Mercer Island, WA 98040-2414 206-232-6833	4403
	10-2/1260 WA 42706
Pay to the Order of <u>DEBORAH COLE</u>	<u>6/12/08</u> Date
<u>TEN THOUSAND DOLLARS + 00</u>	\$ <u>10,000.00</u>
<b>Bank of America</b>	Dollars <input type="checkbox"/> Security Features Details on Back
Mercer Island 042705 Washington	
For <u>GOOD LOCK</u>	<u>Donald R. Harvey</u>
⑆ 25000024⑆ 5332 0021⑆	4403

Exhibit 23

000096

*the harvey apartments group*

in Seattle's Capitol Hill and Queen Anne neighborhoods

May 12, 2008

To: Whom it may concern

RE: Deborah Cole  
Employee Reference

For: Marwood Apartments, Seattle; Resident Manager, 1992 - Present  
Property Manager, Harvey Apartments, 1994 - Present

Carlyle Apartments  
Delmont Apartments  
La Veda Apartments  
Marwood Apartments  
Paramount  
Apartments

I am writing on behalf of Deborah Cole, who has been Resident Manager for Marwood Apartments, as well as serving as general Property Manager for all of my buildings.

The Marwood has a total of 29 units, and Deborah lives on-site. As Resident Manager she is responsible for: collection of rents, leasing of apartments, tenant disputes, turn over of vacancies, cost of living increases, compliance notices, scheduling of repair personnel and general appearance/upkeep of the building and grounds.

At a time of my own personal need fourteen years ago, I asked Deborah and another Resident Manager (William) to oversee the management of all 5 of my buildings, and to perform the administrative and organizational tasks that my wife and I had been responsible for. They graciously did so. During those years, they created our website, developed information books for each building, unified the leases, rules and regulations, all current forms, and made the information available online to all of the managers, as well as for tenants. They created a team of Managers with effective communication and coordination.

Deborah stepped forward as an administrator and work crew coordinator. As an Administrator Deborah has over seen the management, collection of rents, deposits, monthly spreadsheets and bookkeeping for all 5 buildings. She has hired and trained Resident Managers and in the past 5 years has stepped in as Resident Manager for 4 buildings at one time. She remains committed to keeping current on landlord/tenant laws, processes and procedures. It's important to note, however, that during her years at the Marwood, her building has only required one eviction. This says much for her instinct in selecting appropriate tenants. As work crew coordinator she has overseen the crew scheduling of projects including remodeling of units, building repairs, roofing, tuck pointing of brick, window replacement and painting of the buildings.

Please consider this a glowing recommendation. I am aware that my buildings on Capitol Hill are highly sought-after residences because of the professional, comfortable and well-run reputation they have, which is largely due to Deborah's commitment to excellence.

After all of this time, I consider Deborah to be an honest, consistent, personable, and reliable employee. Whoever hires her will be glad that they did.

Sincerely,

  
Donald R. Harvey, Owner  
Harvey Apartments

EX: 11  
WR: Harvey  
Date: 6-16-09  
MILLS & LESSARD  
(206) 292-9073

2411 60<sup>th</sup> SE

Mercer Island WA

98040  
**Exhibit 24**

000050

Deborah Cole  
531 Bellevue Ave. E #305  
Seattle, WA 98102  
206-323-5138

Assistant to Mr. Harvey  
Hourly: \$15.00

**Duties:**

Assist, train and oversee Resident Manager of 5 properties  
Handle emergencies at all 5 properties. on call 24 hours when Mr. Harvey is out of town.  
Cover management of any property when the Resident Manager is out of town.  
Advise and assist Resident Managers with any tenant problems, current forms, renting of apartments, current Landlord/Tenant Laws of the City of Seattle, King County and the State of Washington, repair and maintenance of buildings.  
Facilitate communication between Resident Managers and Mr. Harvey at 5 properties.  
Assist Mr. Harvey with expenses and billing for 5 properties.

**Responsibilities:**

Maintain current Monthly Spread Sheets and forecasting Rents of 5 properties.  
Collection of Rents for 5 properties.  
Collection of Late Rents and Non-Sufficient Funds for 5 properties.  
Collection of money from Laundry Machines for 5 properties.  
Reviewing of Time Sheets and monthly payroll of Resident Managers for 5 properties.  
Reviewing of Petty Cash and Expenses of Resident Managers at 5 properties.

Special Projects: Landscaping at Mr. Harvey's residence.

**Exhibit 26**

000095

# Exhibit 27

OMB No. 1545-0048

This information is being furnished to the Internal Revenue Service. If you are required to file a tax return, a negligence penalty or other sanction may be imposed on you if this income is taxable and you fail to report it.

Employee's social security number [REDACTED]		11 Wages, tips, other compensation 32,611		21 Federal income tax withheld 2,100.00	
Employer identification number (EIN) [REDACTED]		3 Social security wages 32,611		4 Social security tax withheld 1,956.66	
Employer's name, address, and ZIP code MERCER ISLAND, WA 98040		5 Medicare wages and tips 32,611		6 Medicare tax withheld 1,917.07	
Control number		7 Social security tips		8 Allocated tips	
Employee's first name and initial [REDACTED]		9 Advance EIC payment		10 Dependent care benefits	
Employee's address and ZIP code 521 BELLEVUE AVE # 205 [REDACTED]		11 Nonqualified plans		12a See instructions for box 12	
Employee's state ID number		13 Statutory employee <input type="checkbox"/> Retirement plan <input type="checkbox"/> Third-party sick pay <input type="checkbox"/>		12b See instructions for box 12	
16 State wages, tips, etc.		17 State income tax		18 Local wages, tips, etc.	
19 Local income tax		20 Locality name			

**W-2 Wage and Tax Statement**  
 For EMPLOYEE'S RECORDS (See Notice to Employee on the back of Copy B.)

**2007**



From: Deborah Cole <princess@cablespeed.com>  
Subject: **Re: Congrats & Monday**  
Date: May 11, 2008 8:58:50 PM PDT  
To: Michelle Jerome <thepinkpearl@comcast.net>



Michelle: Both Monday and Tuesday of this week are already booked for me. I am hoping for MRI report and because I go to the Clinic I have to be available when they can get-me-in. I have #306 and #307 both loading in on Monday.

#307 signed papers and received his keys this afternoon.

I have rented #308 for June 1st and sent you copy of application & check for Security.

I have one person who took application and is to give me his answer by Monday 10 a.m. re: #206. I have continued to talk to people and show the apt. but most responses have been that it is too much rent as people are looking for under \$1,000.

I have Marwood keys for you..... I am giving you the original keys your Dad gave to me; along with copies of any new keys (i.e. Entry, Garage and Dumpster, Southgate, etc.)

#105 did pay his rent and late fees on Friday evening and I have called your Dad to pick up Late Rents plus any monies collected for new apts.

It has been a long week and another long day here at the Marwood, so between my knee and shingles I am now exhausted and ready for sleep.

Also I am obviously not going to AZ as the meeting re; garage is Thurs. 15th and I need the results of MRI  
On May 10, 2008, at 12:03 PM, Michelle Jerome wrote:

Hi Deb,

First, huge congratulations on getting #108 rented/re-rented! I think you made a great decision not waiting around for Brian and the new tenant's references looked really solid.

Second, I want to meet with you Monday morning at 10am, will you be available? It will give you the weekend to think about the information you received yesterday. And, we can discuss your signature, communication, the future, etc. I don't think it should take us long. Also, I should get keys from you to make copies, so that I have proper access to the building.

Third, I received the packet in the mail from you yesterday afternoon. I reviewed the information on unit #206 and I want to look at it (again) on Monday. I did discuss it already with Terrace and he intends to get the rest of the work completed, hopefully on Monday.

Forth, Cristy is going to be in town next week at some point. Are you going to be here?

I await your replies.

Cheers,

Michelle

**Exhibit 33**

000044

WASHINGTON STATE COURT OF APPEALS  
DIVISION I

DEBORAH COLE, )  
 ) NO. ~~465401-7-1~~ <sup>65404-7</sup>  
 )  
 Plaintiff/Appellee )  
 )  
 v. ) DECLARATION  
 ) OF SERVICE  
 HARVEYLAND, LLC, d/b/a )  
 The Harvey Apartments Group, )  
 a Washington Corporation, )  
 MARWOOD, LLC, a Washington )  
 Corporation, and, )  
 DONALD HARVEY, a single man, )  
 and MICHELLE JEROME and )  
 JOHN DOE JEROME, and their )  
 marital community, )  
 )  
 Defendants/Appellants. )  
 \_\_\_\_\_ )

FILED  
COURT OF APPEALS DIV. I  
STATE OF WASHINGTON  
2010 SEP 23 PM 1:21

THE UNDERSIGNED, under penalty of perjury, under the laws of  
the State of Washington, does hereby declare as follows:

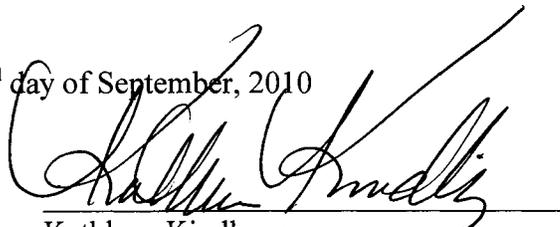
1. That the undersigned is now and, at all times herein  
mentioned, a citizen of the United States and a resident of the State of  
Washington, over the age of eighteen, not a party to nor interested in the

above-entitled action, and is competent to be a witness therein.

2. That on the 22<sup>nd</sup> day of September, 2010, this declarant duly sent via Legal Messengers Service, a copy of the Respondent's Reply in the above captioned case, delivering a true and correct copy thereof to the following:

Katherine George  
Harrison, Benis & Spence LLP  
2101 Fourth Ave Suite 1900  
Seattle, WA 98121  
(425) 802-1052

DATED THIS 22<sup>nd</sup> day of September, 2010



Kathleen Kindberg  
Law Offices of Jeffrey Needle

# Law Offices of Jeffrey L. Needle

119 First Avenue South • Maynard Building  
Suite 200 • Seattle, Washington • 98104  
Tel. (206) 447-1560 • Fax. (206) 447-1523  
[jneedlel@wolfenet.com](mailto:jneedlel@wolfenet.com)

Jeffrey L. Needle  
Kathleen Kindberg  
Legal Assistant

September 22, 2010

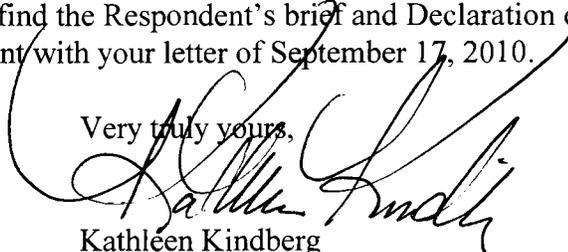
Richard D. Johnson  
Court Administrator/Clerk  
State of WA Court of Appeals - Division I  
600 University St - One Union Square  
Seattle, WA 98101- 4170

RE: Case No. 65404-7-I  
*Cole v. Harveyland, LLC et al*

Dear Mr. Johnson:

Enclosed herein please find the Respondent's brief and Declaration of Service in the above referenced case, consistent with your letter of September 17, 2010.

Very truly yours,

  
Kathleen Kindberg

KK:kk  
enclosure  
cc: Katherine George, Attorney for Appellant

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 SEP 23 PM 1:20