99837-0

NO. 37510-2

WASHINGTON STATE SUPREME COURT

TIMOTHY REEVES

Appellant/Defendant,

v.

COMPUTER SOLUTIONS, et. al.

Respondent.

MOTION FOR DISCRETIONARY REVIEW

Treated as a Petition for Review

Drew D. Dalton, WSBA No. 39306
Of Attorneys for Appellant Timothy Reeves

FORD, DALTON & MORTENSEN, P.S.

320 S. Sullivan Rd.
Spokane Valley, WA 99037
Tel. 509.924.2400

FORD, DALTON & MORTENSEN, PS
320 S. Sullivan Rd
Spokane Valley, WA 99025
(509)-924-2400

TABLE OF CONTENTS

FORD, DALTON & MORTENSEN, PS
320 S. Sullivan Rd
Spokane Valley, WA 99025
(509)-924-2400

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

TREATISES

FORD, DALTON & MORTENSEN, PS
320 S. Sullivan Rd
Spokane Valley, WA 99025
(509)-924-2400

I. IDENTIFY OF PETITIONER

Timothy Reeves is the Plaintiff in this matter and the petition is being filed on his behalf by Drew D. Dalton of Ford, Dalton & Mortensen, PS.

II. PROCEDURAL

This case was denied on Summary Judgment Motion before Judge Clary in the Spokane County Superior Court. Claimant filed a timely appeal and sought review of the granting of the summary judgment motion.

The Court of Appeals in case no. 375102 affirmed the superior court decision on February 18, 2021. Mr. Reeves filed a petition for reconsideration that was denied on April 29, 2021.

III. ISSUES PRESENTED FOR REVIEW

Mr. Reeves asserts that a reasonable person could find that he was harmed by Computer Solutions actions. That he was damaged by their actions and that summary judgment was not proper in this matter.

As such we request the Unfair Business Practices Claim, the Tortious Interference of a Business Expectancy

FORD, DALTON & MORTENSEN, PS
320 S. Sullivan Rd
Spokane Valley, WA 99025
(509)-924-2400

claim, and the Negligence claim continue to trial.

IV. STATEMENT OF THE CASE

Mr. Reeves was injured on May 5, 2011 while working for Standard Heating and Plumbing. CP 43. As part of his injury he was found unable to return to the job of injury and it was deemed he would benefit from retraining. Mr. Reeves then attend a vocational retraining program arranged by VRC Sue Imholt. CP 45.

Mr. Reeves agreed to attend retraining with Computer Solutions, the defendant in this matter. CP 48. Computer Solutions was contracted to retrain him as a medical billing and coder specialist. *Id.*

Mr. Reeves did not believe he was employable and sought review at the Board and eventually superior court.

Mr. Reeves was found employable, based on an insufficient medical testimony on November 2, 2019 in Superior Court case 18-2-00500-5. CP 34-37. Mr. Reeves discontinued that avenue

FORD, DALTON & MORTENSEN, PS
320 S. Sullivan Rd
Spokane Valley, WA 99025
(509)-924-2400

of appeal and sought to hold the vocational school accountable for not retraining him.

A Complaint was filed in this case 19-2-001814-2. Depositions were taken of Mr. Kassandra Rocha, Mr. Timothy Reeves and Ms. Sue Imholt. Upon completion Mr. Jolley, counsel for defendant, filed a motion for Summary Judgment. CP 34-37.

The Motion for Summary Judgment alleged Mr. Reeves did not prove damages as no connection exists between L&I cutting of his benefits and Computer Solutions Negligence. Id. The superior court granted the Motion for Summary Judgment and Mr. Reeves appealed. CP 34-37. Mr. Reeves responded with declarations in support of his position. CP 20-26.

V. LEGAL STANDARD

This Court reviews orders of summary judgment de novo and engages in the same inquiry as the Trial Court: Heath v. Uraga, 106 Wn. App. 506, 512-513 (2001)

FORD, DALTON & MORTENSEN, PS
320 S. Sullivan Rd
Spokane Valley, WA 99025
(509)-924-2400

"This court will affirm summary judgment if no genuine issue of any material fact exists and the moving party is entitled to judgment as a matter of law." Mountain Park Homeowners Ass 'n v. Tydings, 125 Wn.2d 337,341, 883 P.2d 1383 (1994).

"All facts and reasonable inferences are considered in the light most favorable to the non-moving party, and all questions of law are reviewed de novo." Id. "Proximate cause is generally a fact question for the jury, but if reasonable minds could not differ, these factual questions may be determined as a matter of law." Meyers v. Ferndale School District, 197 Wash.2d 281, 287 (2021) (quoting Hertog v. City of Seattle, 138 Wn.2d 265, 275 (1999) "While the cause in fact inquiry focuses on a "but for" connection, legal cause is grounded in policy determinations as to how far the consequences of a defendant's acts should extend. Id., (Quoting Schooley v. Pinch's Deli Mkt., Inc., 134 Wn.2d 468, 478-79 (1998).

"Plaintiff is also responsible for presenting evidence that the

FORD, DALTON & MORTENSEN, PS
320 S. Sullivan Rd
Spokane Valley, WA 99025
(509)-924-2400

alleged breach of the duty of care damaged" Mr. Reeves. Arden v. Forsberg & Umlauf PS, 189 Wn.2d 315, 329 (2017). "To prevail in this negligence claim, Meyers "'must show (1) the existence of a duty to the plaintiff, (2) a breach of that duty, (3) a resulting injury, and (4) the breach as the proximate cause of the injury.'" Meyers v. Ferndale School District, 197 Wn.2nd 281, 287 (March 2021) quoting N.L. v. Bethel Sch. Dist., 186 Wn.2d 422, 429 (2016)

VI. ARGUMENT

In a summary judgment proceeding it is the trier of fact and reviewing bodies job to take all facts and all reasonable references in the light most favorable to the nonmoving party. Thoades v. City of Battle Ground, 115 Wn. App. 752, 758 (2002). The courts did not take all reasonable inferences from the facts in this case[1]. The lower courts failed to leave the cause in fact analysis to the jury. They focused on a medical

FORD, DALTON & MORTENSEN, PS
320 S. Sullivan Rd
Spokane Valley, WA 99025
(509)-924-2400

standard that was no the subject nor requirement for this appeal. They disregarded the causation analysis and damages shown to be possible at the summary judgment stage and therefore should be overturned.

Assignment of Error 1: Computer Solutions was the Proximat Cause of Mr. Reeves Harm

What is an individual's recourse when a fraud or misrepresentation is committed by a vocational school? The Court of Appeals would have you believe there is none. In its bid to prove Mr. Reeves has no cause of action it cites the Board of Industrial Insurance Appeals proceedings at CP 19 that there was "insufficient medical testimony" to establish a case of PPD. This case is **not** about the medical evidence. This case is about the misleading statements that led to Mr. Reeves position in the Board case. It is about him not being retrained, not having the skills to work in the general labor market, and/ alternatively not getting a pension.

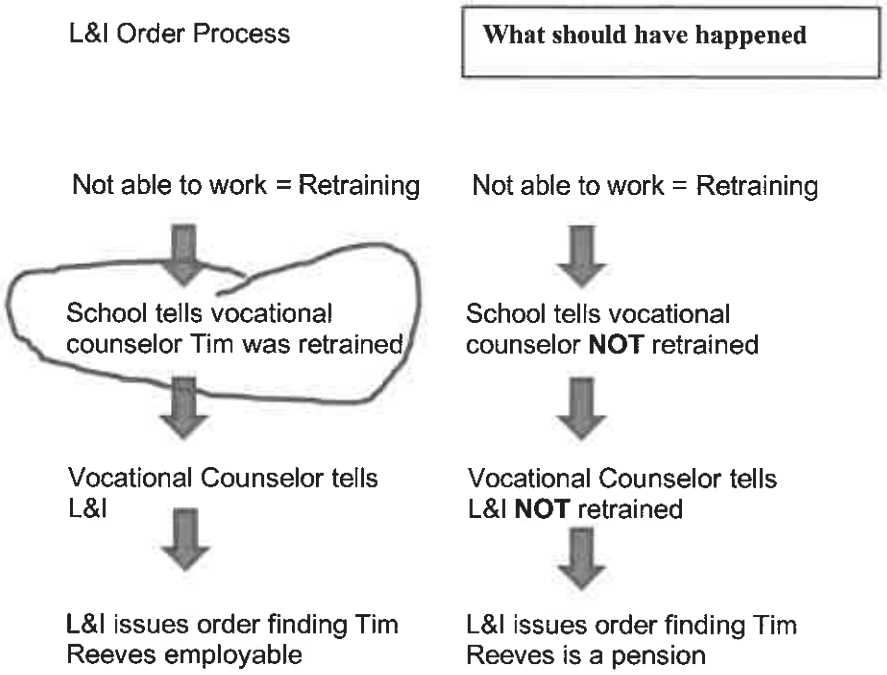
FORD, DALTON & MORTENSEN, PS
320 S. Sullivan Rd
Spokane Valley, WA 99025
(509)-924-2400

It appears to Mr. Reeves that the Court of Appeals rushed to affirm the Superior Court decision without walking through the causation analysis.

A. Causation Analysis

To prevail in this negligence claim, Mr. Reeves must show (1) the existence of a duty to the plaintiff, (2) a breach of that duty, (3) a resulting injury, and (4) the breach as the proximate cause of the injury. In his analysis section Mr. Reeves provided the following diagram to help illustrate the harm caused by the school.

FORD, DALTON & MORTENSEN, PS
320 S. Sullivan Rd
Spokane Valley, WA 99025
(509)-924-2400



The court of appeals took issue with this diagram because of the pension issue. However, the only purpose for this diagram was to show duty and potential for harm.

To rectify this issue, here is a simple bullet point below with sub points to show duty and potential harm caused by breach of Computer Solutions actions:

In sequence the events are as follows:

1. Mr. Reeves was injured, →
2. Mr. Reeves was treated under the claim until at MMI, →

FORD, DALTON & MORTENSEN, PS
320 S. Sullivan Rd
Spokane Valley, WA 99025
(509)-924-2400

3. Once at MMI he was not able to do Job of Injury (JOI) →

4. L&I Determined he needed to be retrained, →

5. Retraining took place, →

6. He either passed or did not pass retraining →

   a. If he failed, he would not get the job trained for which means options that (may include additional training, pension etc. but not employment at that time)

   b. If he passed, he would get the job trained for no damages.

7. If Computer Solutions misrepresented completion of classes, then:

a. Mr. Reeves would not be able to get the job for which he allegedly retrained; or

b. Mr. Reeves may also not get additional L&I benefits.

Computer Solutions had a duty to retrain Mr. Reeves and report his retraining accurately to L&I. The false report by Computer Solutions is what caused Mr. Reeves harm. This is

FORD, DALTON & MORTENSEN, PS
320 S. Sullivan Rd
Spokane Valley, WA 99025
(509)-924-2400

the alleged cause in fact that should be left to the jury. See Meyers, 197 Wash.2d at 287 (2021). There are two avenues of harm caused by the alleged breach. Mr. Reeves could either not get a job or not get a pension.

B. Facts in Support of Harm Caused by Computer Solutions

In Support of his position are the following facts that should be weighed in a light most favorable to Mr. Reeves. The facts are as follows: Mr. Reeves provided a declaration from Ms. Marilyn Korostoff Ed.D that sates Mr. Reeves was not retrained by Computer Solutions. CP 22-26. It is her opinion that based on the information provided "there is no evidence that Tim learned or demonstrated the proficiency to pass the course that he was enrolled in." Id. She stated the Computer Solutions provided no evidence to provide an "accurate representation of Tim's competency." Id. This opinion is unchallenged by Computer Solutions.

Based on these facts, a reasonable person can infer that Mr.

FORD, DALTON & MORTENSEN, PS
320 S. Sullivan Rd
Spokane Valley, WA 99025
(509)-924-2400

Reeves did not pass the class and did not have the skills to work in medical billing. A reasonable person could infer that if he did not have skills to work, he was harmed by Computer Solutions.

A reasonable person could infer he could not get a job as a medical billing specialist. This is further supported by his statement in his declaration that Ms. Rocha, representative of Computer Solutions, told him to lie about experience to get a job. CP 22-26. Based on this it is reasonable to conclude they did not train him; they were indifferent to the harm they caused Mr. Reeves.

In addition, Mr. Reeves provided a statement that he was not retrained, and that Computer Solutions did not report that information to L&I. CP 22-26. Included details about failings in the program, journal entries and mounds of data in support of his position. *Id.* This was reviewed and his declaration was and is supported by the declaration of Marilyn Korostoff. While Computer Solutions can and does allege, they retrained

FORD, DALTON & MORTENSEN, PS
320 S. Sullivan Rd
Spokane Valley, WA 99025
(509)-924-2400

him, whether they in fact did is an issue of fact for a jury.

The law provides that the initial party causing the harm is responsible for subsequent injuries because of the harm. RCW 4.22.070 (joint and several liability). The lower court misinterpreted the arguments of Mr. Reeves as he may have overstated the ultimate damages and effect for emphasis in the appeal. However, under the cases cited by the Court of Appeals, and in this brief Mr. Reeves must only prove a reasonable juror could find he was harmed. . He proved harm and causation.

Computer Solutions actions caused this harm and therefore, the claims of Negligence, CPA, and Tortious interference should stand, and they must proceed to the jury. Harm and causation were proven for purposes of summary judgment.

B. Damages On Summary Judgment

The courts have determined what level of damages on Summary Judgment must be proven and that loss is generally a question for a jury.

FORD, DALTON & MORTENSEN, PS
320 S. Sullivan Rd
Spokane Valley, WA 99025
(509)-924-2400

" ' It is often said that, once the buyer establishes the *fact* of loss with certainty (by a preponderance of the evidence), uncertainty regarding the *amount* of loss will not prevent recovery. Thus, a buyer will not be required to prove an exact amount of damages, and recovery will not be denied because damages are difficult to ascertain.' Columbia park Golf Course, Inc. v. City of Kennewick, 160 Wn.App.66, 87 (2011). (quoting "Lewis River Golf, Inc. v. O.M. Scott & Sons, 120 Wash.2d 712, 717-18, (1993)), (quoting Anderson, Incidental and Consequential Damages, 7 J.L. & Com. 327, 395-96 (1987) for this " accepted rule of law").

Mr. Reeves has proven loss. Economic harm to his potential to work full-time in the are he was retrained. Ms. Lenore Romney provided a declaration showing that Mr. Reeves would have damages at a **minimum** of $208,393.89. (emphasis added) CP 22-26. Ms. Romney declared that she had reviewed data with regards to his possible employment opportunities had he been retrained. *Id.* She emphasized the numbers provided were an initial breakdown not a complete analysis. While the numbers provided dealt with the pension her declaration did not state that his damages were only pension related. Her declaration provided that assuming he was not retrained his past

FORD, DALTON & MORTENSEN, PS
320 S. Sullivan Rd
Spokane Valley, WA 99025
(509)-924-2400

and future damages at a **minimum** would be $208,393.89. CP at 22-26.

A reasonable inference of her declaration is that damages caused by not being able to work were higher to Mr. Reeves than those of a pension as the minimum was based on the pension reserve numbers. This was not his exclusive avenue for damages. Another reasonable interpretation is that the number included inability to find work for failure to be retrained. The numbers were not challenged by any other expert. As such they should be sufficient to overcome the summary judgment standard and prove damages.

Mr. Reeves need not prove an actual amount, only that he would have damages. See Columbia Park Golf Course v. City of Kennewick, 160 Wn.App. 66, 87 (2011). He only need show that damages existed and the rest would be left to the jury.

Assignment of Error 2: Issue Preclusion

First, Mr. Reeves believes if the causation analysis is

FORD, DALTON & MORTENSEN, PS
320 S. Sullivan Rd
Spokane Valley, WA 99025
(509)-924-2400

followed issue preclusion becomes moot. The court of appeals cited the Board's findings at CP 19 that there was "insufficient medical testimony" to establish a case of PPD. Upon this ground they found issue preclusion against Mr. Reeves. However, that fact specifically points to medical insufficiency, not vocational sufficiency, or the employability of Mr. Reeves. This case is not about the medical ramifications of the L&I process. Mr. Reeves does not dispute that he has some physical capabilities, only that he cannot do what he was retrained to do as a failure of Computer Solutions retraining program, not medical evidence.

Mr. Reeves did respond with facts that showed Mr. Reeves would have had a different result but for the actions of Computer Solutions. The reliance on the previous superior court decision that dealt with the presence or absence of medical evidence, not vocational sufficiency is not germane to this appeal.

The issue of what Computer Solutions did to harm Mr.

FORD, DALTON & MORTENSEN, PS
320 S. Sullivan Rd
Spokane Valley, WA 99025
(509)-924-2400

Reeves may or may not be mitigated by what he does or does not do at the Board of Industrial Insurance Appeals. However, the issue of misrepresentation and holding an educational facility culpable for its failure was not before the Board. If it was not decided, Mr. Reeves cannot be precluded from bringing that case in this matter.

In addition, the restitution sought in this case under RCW 28C.10.110 (business practices act) would not be impacted by the issue preclusion above. Under the UBPA/CPA the petitioner has proven damages and harm. As issue preclusion does not apply, we ask the court to reconsider its decision.

Assignment of Error 3 Raised Issues

The court mentions in passing that we did not raise RCW 51.32 in the response to the Motion for Summary Judgment. Counsel argued the process outlined in the statute at RP 11, ln 3-14 but did not raise the statute specifically at that time.

VII. CONCLUSION

With this Reconsideration we request the lower court

FORD, DALTON & MORTENSEN, PS
320 S. Sullivan Rd
Spokane Valley, WA 99025
(509)-924-2400

decision be overturned and Mr. Reeves receive attorney fees and costs allowable under the law.

DATED: June 1, 2021

Drew D. Dalton, WSBA 39306
FORD, DALTON & MORTENSEN PS.

FORD, DALTON & MORTENSEN, PS
320 S. Sullivan Rd
Spokane Valley, WA 99025
(509)-924-2400

APPENDIX A

February 18, 2021 Decision of the Court of Appeals

April 29, 2021 Order Denying Review of the Decision

APPENDIX B

RCW 4.22.070

RCW 28C.10.110

RCW 51.32.095

FORD, DALTON & MORTENSEN, PS
320 S. Sullivan Rd
Spokane Valley, WA 99025
(509)-924-2400

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that I emailed the document to the Court of Appeals and mailed the document referenced below on June 1, 2021

Court of Appeals No : 35710
Spokane County No : 192001814
Document : **Motion For Discretionary Review**

COPY TO: **Steve Jolley**
Attorney for Defendants/Respondents
Herman & Jolley, P.S.
12340 E Valleyway Ave,
Spokane Valley, WA 99216
stevej@hermanjolley.lawyer

DATED: June 1, 2021

FORD, DALTON &
MORTENSEN, PS.

Ford, Dalton & Mortensen, PS
320 S. Sullivan Road
Spokane Valley, Washington 990
(509) 924-2400 / FAX: (509) 927-1

APPENDIX A

FILED
FEBRUARY 18, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

TIMOTHY REEVES, individually, Appellant, v. COMPUTER SOLUTIONS OF SPOKANE, INC., KASSANDRA ROCHA, and John/Jane DOES 1-10, Respondents.	)	No. 37510-2-III UNPUBLISHED OPINION

SIDDOWAY, J. — Timothy Reeves appeals the summary judgment dismissal of claims he brought against Computer Solutions of Spokane, which provided him with retraining under contract with the Department of Labor & Industries (L&I). He contends that Computer Solutions never effectively retrained him, and its false representation to L&I that it *had* retrained him caused him to lose worker compensation benefits. Because he fails to demonstrate facts in support of the required proof of causation and damages, we affirm.

FACTS AND PROCEDURAL BACKGROUND

In May 2011, Timothy Reeves was working as a service technician for a heating and air conditioning contractor when he suffered a workplace injury to his right arm and shoulder. Sometime after it was treated surgically, he met with a vocational rehabilitation counselor relied on by L&I to help him explore a different line of work. He told the counselor that work or training requiring activity over consecutive days would be a problem because of pain that would develop in his arm. The counselor eventually recommended that he enroll in a certified medical coding and billing program offered by Computer Solutions. He would be able to attend school from home on Mondays, Wednesdays, and Fridays. The program would be paid for by L&I, which would also pay Mr. Reeves a monthly stipend of $2,274 while he attended the program.

Mr. Reeves began attending the program in May 2015. Due to pain and discomfort related to his arm injuries, he missed the majority of his classes and lectures. He also failed to complete most of the homework assignments. He claims he informed his vocational counselor and a Computer Solutions employee that he was not understanding the material and that he was unable to complete assignments on a regular basis.

Despite Mr. Reeves not attending the majority of his classes, Computer Solutions credited him with 100 percent completion. He was encouraged to take a certification test, which he chose not to do, believing he would not be able to pass it.

After Mr. Reeves was finished with the course, L&I determined in March 2016 that he was able to work and terminated his time-loss compensation. In July 2016 it granted Mr. Reeves an award for permanent partial disability consistent with 26 percent of the amputation value of his right arm and closed his workers compensation claim. He appealed both decisions through L&I without success.

Mr. Reeves appealed to the Industrial Insurance Board (Board) and a hearing was held in August 2017, at which Mr. Reeves testified and called as a witness Daniel McKinney, a vocational rehabilitation counselor. The record of proceedings before the Board is not a part of our record. When deposed in the action below, however, Mr. Reeves acknowledged that he testified in the appeal hearing that he was unable to work as a result of the pain in his shoulder and about his inability to function on consecutive days. He testified that Mr. McKinney testified in the appeal hearing that Mr. Reeves should never have been in the type of program offered by Computer Solutions because he did not have the background for it and because of the amount of time and writing required. Mr. Reeves admitted that he presented no medical evidence in the appeal hearing.

In December 2017 the industrial appeals judge (IAJ) who heard Mr. Reeves's appeals issued a proposed decision and order dismissing his appeals for failure to present a prima facie case for relief. Mr. Reeves petitioned for review, which the Board denied, adopting the IAJ's proposed decision and order as its final order. Mr. Reeves appealed

the Board's decision to the superior court, which affirmed the Board's decision. The superior court adopted the Board's findings, including the finding that

> there is insufficient medical testimony to: establish a prima facie case that Mr. Reeves' . . . industrial injury was a proximate cause of any condition; and, establish that Mr. Reeves had any temporary or permanent total disability from any such condition.

Clerk's Papers (CP) at 19.

Mr. Reeves thereafter filed the action below. His amended complaint alleges that because Computer Solutions misrepresented that he had successfully completed the retraining program, he was denied further workers compensation benefits. He asserted four claims for relief: (1) negligence, (2) unfair business practices under the Consumer Protection Act (CPA), chapter 19.86 RCW, (3) tortious interference with business expectancy, and (4) outrage.

Computer Solutions eventually moved for summary judgment dismissal of his claims. It supported its motion with, among other evidence, the superior court's order affirming the Board's decision to deny his industrial insurance appeals. It argued that summary judgment was warranted "because: [1] no causal connection exists between the alleged causes of action and alleged damages; [2] Reeves has made no effort whatsoever to mitigate the damages he has, if any; [3] Reeves' alleged inability to work is res judicata; and [4] Reeves has no damages." CP at 4 (alterations in original).

In his opposition to the motion, Mr. Reeves argued that "[d]amages derive from the very fact that the Department of Labor and Industries denied his pension benefits, terminated his time loss and found him employable. . . . Had [Computer Solutions] told the truth, had they reported his inability to do the work, his lack of completed assignments etc. [t]here would be no damages." CP at 58-59. He did not support this with testimony from an L&I representative or evidence from the L&I proceedings.

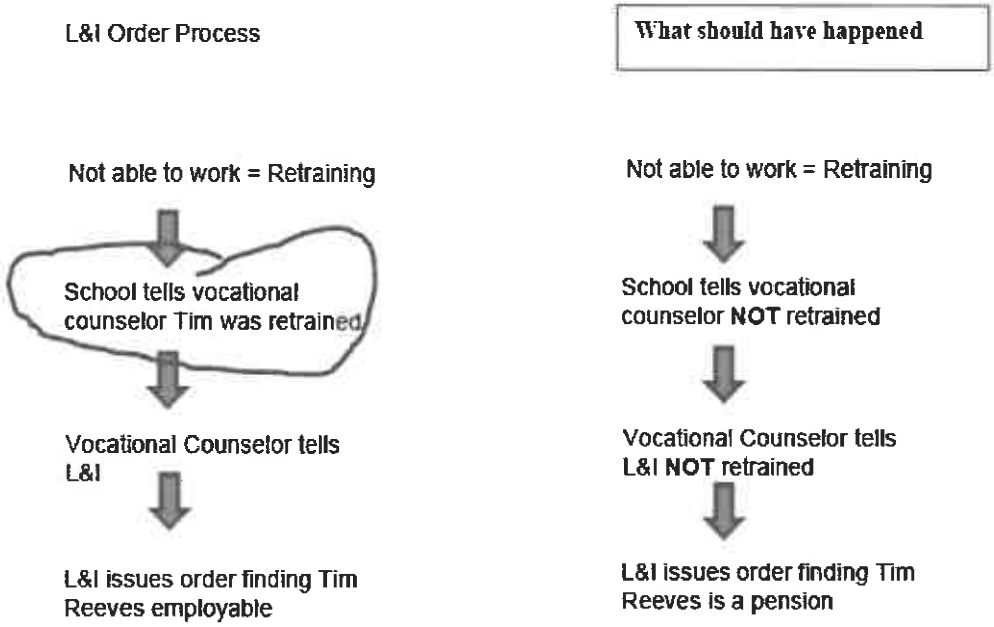
The trial court granted summary judgment and dismissed Mr. Reeves's claims with prejudice. Mr. Reeves timely appealed the superior court's dismissal of his claims for negligence, unfair business practices, and tortious interference with a business expectancy. He has abandoned his outrage claim.

ANALYSIS

When the issue on appeal is the entry of summary judgment, our review is de novo; we engage in the same inquiry as the trial court. *Grundy v. Thurston County*, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005). Summary judgment is appropriate if the pleadings demonstrate that there is no genuine issue as to any material fact. CR 56(c). We view all facts and all reasonable inferences in the light most favorable to the nonmoving party. *Rhoades v. City of Battle Ground*, 115 Wn. App. 752, 758, 63 P.3d 142 (2002). Summary judgment is proper only if reasonable persons could reach but one conclusion from all the evidence. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

Mr. Reeves's briefing contains a number of factual contentions that are unsupported by citation to relevant portions of the record. He also argues that the trial court did not understand Computer Solutions's responsibilities under chapter 51.32 RCW, yet nothing in the record indicates that Mr. Reeves ever relied on chapter 51.32 RCW in the trial court.

Most glaringly lacking is factual or legal support for Mr. Reeves's argument that but for Computer Solutions's report that he had completed its retraining program, L&I would have awarded him a pension. He attempted to illustrate this linchpin of his damage claim in a chart he created for the appeal:



Br. of Appellant at 13.

What is missing from his argument is the connection between the third and fourth steps of the "What should have happened" scenario. No explanation is offered as to why, if L&I was told that Mr. Reeves was not retrained, it would have awarded him a pension. The evidence shows, instead, that the IAJ heard and considered Mr. Reeves's own testimony and that of Mr. McKinney, but it was Mr. Reeves's failure to present any medical evidence that proved dispositive. When deposed in the action below, Mr. Reeves testified that he "[did not] think" any of the doctors who treated or reviewed his arm and shoulder injury ever rated him as 100 percent disabled. CP at 29.

Mr. Reeves argues that we should not rely on the record of the decisions in the industrial insurance appeals as "res judicata" (Computer Solutions refers to them as such) because while he was a party to the appeals, Computer Solutions was not. Looking to the substance of Computer Solutions's argument, it relies on the issue preclusion aspect of the broader concept of res judicata.

"The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as 'res judicata.'" *Taylor v. Sturgell*, 553 U.S. 880, 892, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008). As observed by Judge Morgan of this court in the 1997 decision in *Kelly-Hansen v. Kelly-Hansen*, "'[R]es judicata' is not a precise term." 87 Wn. App. 320, 327, 941 P.2d 1108 (quoting *Winchell's Donuts v. Quintana*, 65 Wn. App. 525, 529, 828 P.2d 1166 (1992)).

> The Washington Supreme Court has used res judicata to mean both claim preclusion and issue preclusion, saying, for example, that "[r]es judicata refers to 'the preclusive effect of judgments, including the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action.'"[17] On the other hand, the court has also used res judicata to mean claim preclusion only, saying, for example, that "[r]es judicata acts to prevent relitigation of claims that were or should have been decided among the parties in an earlier proceeding."[18]

---

[17] *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995) (quoting Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L. REV. 805 [(1985)]).

[18] *Norris v. Norris*, 95 Wn.2d 124, 130, 622 P.2d 816 (1980).

Id. at 328 (first and second alterations in original).

As Professor Trautman has observed, "claim preclusion" and "issue preclusion" is the more modern terminology. Trautman, *supra*, at 805. It is not *wrong* to characterize issue preclusion (aka collateral estoppel) as res judicata, however. And we can see from the record that Computer Solutions had issue preclusion in mind, since its lawyer argued to the trial court that the third element that must be met for "res judicata" to apply is

> the party that the claims of res judicata is being asserted against, were they a party to the action, the prior final judgment action[?] And Mr. Reeves, of course, was a party to that action."

Report of Proceedings at 5. Issue preclusion, or collateral estoppel, "requires: '(1) identical issues; (2) a final judgment on the merits; (3) *the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication*; and (4) application of the doctrine must not work an injustice on the party against whom

the doctrine is to be applied.'" *Hadley v. Maxwell*, 144 Wn.2d 306, 311-12, 27 P.3d 600 (2001) (emphasis added) (quoting *Southcenter Joint Venture v. Nat'l Democratic Pol'y Comm.*, 113 Wn.2d 413, 418, 780 P.2d 1282 (1989)). Mutuality is not required. *Lucas v. Velikanje*, 2 Wn. App. 888, 894-95, 471 P.2d 103 (1970).

The superior court order in the industrial insurance appeal can be used against Mr. Reeves as an issue-preclusive final judgment. Mr. Reeves did not respond with evidence of specific facts from which it could be inferred that the result of the appeal would have been different had Computer Solutions not characterized him as completing the retraining program. A party resisting summary judgment may not rely on speculation or argumentative assertions that unresolved factual issues remain. *Seven Gables Corp. v. MGM/UA Ent. Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

Each of the three claims for relief whose dismissal Mr. Reeves appeals requires proof of causation and injury or damages. *See, e.g.*, *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 219, 543 P.2d 338 (1975) (negligence; to establish a cause of action a plaintiff must have suffered "appreciable harm as a consequence"); *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009) (CPA claim; plaintiff must prove, among other elements, injury to a person's business or property, and causation); *Manna Funding, LLC v. Kittitas County*, 173 Wn. App. 879, 897, 295 P.3d 1197 (2013) (tortious interference with business expectancy; required elements include an intentional interference inducing or causing a breach or termination of a relationship or expectancy

and resultant damage). Because Mr. Reeves produced no evidence of causation and injury or damages, summary judgment was proper.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, A.C.J.

WE CONCUR:

Lawrence-Berrey, J.

Staab, J.

FILED
APRIL 29, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

TIMOTHY REEVES, individually, Appellant, v. COMPUTER SOLUTIONS OF SPOKANE, INC., KASSANDRA ROCHA, and John/Jane DOES 1-10, Respondents.	)	No. 37510-2-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered Appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of February18, 2021, is hereby denied.

PANEL: Judges Siddoway, Lawrence-Berrey, Staab

FOR THE COURT:

REBECCA L. PENNELL
Chief Judge

APPENDIX B

RCW 4.22.070

Percentage of fault—Determination—Exception—Limitations.

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title **51** RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title **51** RCW. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW **4.22.040**, **4.22.050**, and **4.22.060**.

(3)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

[1993 c 496 § 1; 1986 c 305 § 401.]

NOTES:

Effective date—1993 c 496: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1993." **[1993 c 496 § 3.]**

Application—1993 c 496: "This act applies to all causes of action that the parties have not settled or in which judgment has not been entered prior to July 1, 1993." **[1993 c 496 § 4.]**

Preamble—Report to legislature—Applicability—Severability—1986 c 305: See notes following RCW **4.16.160**.

RCW 28C.10.110

Unfair business practices.

(1) It is a violation of this chapter for an entity operating a private vocational school to engage in an unfair business practice. The agency may deny, revoke, or suspend the license of any entity that is found to have engaged in a substantial number of unfair business practices or that has engaged in significant unfair business practices.

(2) It is an unfair business practice for an entity operating a private vocational school or an agent employed by a private vocational school to:

(a) Fail to comply with the terms of a student enrollment contract or agreement;

(b) Use an enrollment contract form, catalog, brochure, or similar written material affecting the terms and conditions of student enrollment other than that previously submitted to the agency and authorized for use;

(c) Advertise in the help wanted section of a newspaper or otherwise represent falsely, directly or by implication, that the school is an employment agency, is making an offer of employment or otherwise is attempting to conceal the fact that what is being represented are course offerings of a school;

(d) Represent falsely, directly or by implication, that an educational program is approved by a particular industry or that successful completion of the program qualifies a student for admission to a labor union or similar organization or for the receipt of a state license in any business, occupation, or profession;

(e) Represent falsely, directly or by implication, that a student who successfully completes a course or program of instruction may transfer credit for the course or program to any institution of higher education;

(f) Represent falsely, directly or by implication, in advertising or in any other manner, the school's size, location, facilities, equipment, faculty qualifications, number of faculty, or the extent or nature of any approval received from an accrediting association;

(g) Represent that the school is approved, recommended, or endorsed by the state of Washington or by the agency, except the fact that the school is authorized to operate under this chapter may be stated;

(h) Provide prospective students with: Any testimonial, endorsement, or other information that a reasonable person would find likely to mislead or deceive prospective students or the public, including those regarding current practices of the school; information regarding rates of completion or postgraduation employment by industry, or its graduates' median hourly or annual earnings, that is not consistent with the presentation of data as established under RCW **28C.10.050**(2)(c); current conditions for employment opportunities; postgraduation employment by industry or probable earnings in the occupation for which the education was designed; total cost to obtain a diploma or certificate; the acceptance of a diploma or certificate by employers as a qualification for employment; the acceptance of courses, a diploma, or certificate by higher education institutions; the likelihood of obtaining financial aid or low-interest loans for tuition; and the ability of graduates to repay loans;

(i) Designate or refer to sales representatives as "counselors," "advisors," or similar terms which have the tendency to mislead or deceive prospective students or the public regarding the authority or qualifications of the sales representatives;

(j) Make or cause to be made any statement or representation in connection with the offering of education if the school or agent knows or reasonably should have known the statement or representation to be false, substantially inaccurate, or misleading;

(k) Engage in methods of advertising, sales, collection, credit, or other business practices which are false, deceptive, misleading, or unfair, as determined by the agency by rule;

(l) Attempt to recruit students in or within forty feet of a building that contains a welfare or unemployment office. Recruiting includes, but is not limited to canvassing and surveying. Recruiting does not include leaving materials at or near an office for a person to pick up of his or her own accord, or

handing a brochure or leaflet to a person provided that no attempt is made to obtain a name, address, telephone number, or other data, or to otherwise actively pursue the enrollment of the individual;

(m) Violate RCW **28C.10.050**(3) regarding the sale of, or inducing of students to obtain, specific consumer student loan products; or

(n) Use any official United States military logos in advertising or promotional materials.

[**2018 c 203 § 7; 2014 c 11 § 6; 2001 c 23 § 3; 1990 c 188 § 9; 1986 c 299 § 11.**]

NOTES:

Finding—Intent—2018 c 203: See note following RCW **28B.85.095**.

Severability—1990 c 188: See note following RCW **28C.10.020**.

RCW 51.32.095

Vocational rehabilitation services—Benefits—Priorities—Allowable costs—Performance criteria.

(1) One of the primary purposes of this title is to enable the injured worker to become employable at gainful employment. To this end, the department or self-insurers must utilize the services of individuals and organizations, public or private, whose experience, training, and interests in vocational rehabilitation and retraining qualify them to lend expert assistance to the supervisor of industrial insurance in such programs of vocational rehabilitation as may be reasonable to make the worker employable consistent with his or her physical and mental status. Where, after evaluation and recommendation by such individuals or organizations and prior to final evaluation of the worker's permanent disability and in the sole opinion of the supervisor or supervisor's designee, whether or not medical treatment has been concluded, vocational rehabilitation is both necessary and likely to enable the injured worker to become employable at gainful employment, the supervisor or supervisor's designee may, in his or her sole discretion, pay or, if the employer is a self-insurer, direct the self-insurer to pay the cost as provided in subsection (5) of this section or RCW **51.32.099**, as appropriate. An injured worker may not participate in vocational rehabilitation under this section or RCW **51.32.099** if such participation would result in a payment of benefits as described in RCW **51.32.240**(5), and any benefits so paid must be recovered according to the terms of that section.

(2) Vocational rehabilitation services may be provided to an injured worker when in the sole discretion of the supervisor or the supervisor's designee vocational rehabilitation is both necessary and likely to make the worker employable at gainful employment. In determining whether to provide vocational services and at what level, the following list must be used, in order of priority with the highest priority given to returning a worker to employment:

(a) Return to the previous job with the same employer;

(b) Modification of the previous job with the same employer including transitional return to work;

(c) A new job with the same employer in keeping with any limitations or restrictions;

(d) Modification of a new job with the same employer including transitional return to work;

(e) Modification of the previous job with a new employer;

(f) A new job with a new employer or self-employment based upon transferable skills;

(g) Modification of a new job with a new employer;

(h) A new job with a new employer or self-employment involving on-the-job training;

(i) Short-term retraining.

(3) Notwithstanding subsection (2) of this section, vocational services may be provided to an injured worker who has suffered the loss or complete use of both legs, or arms, or one leg and one arm, or total eyesight when, in the sole discretion of the supervisor or the supervisor's designee, these services will either substantially improve the worker's quality of life or substantially improve the worker's ability to function in an employment setting, regardless of whether or not these services are either necessary or reasonably likely to make the worker employable at any gainful employment. Vocational services must be completed prior to the commencement of the worker's entitlement to benefits under RCW **51.32.060**. However, workers who are eligible for vocational services under this subsection are not eligible for option 2 benefits, as provided in RCW **51.32.099**(4) and **51.32.096**.

(4) To encourage the employment of individuals who have suffered an injury or occupational disease resulting in permanent disability which may be a substantial obstacle to employment, the supervisor or supervisor's designee, in his or her sole discretion, may provide assistance including job placement services for eligible injured workers who are receiving vocational services under the return-to-work priorities listed in subsection (2)(b) through (i) of this section, except for self-employment, and to employers that employ them. The assistance listed in (a) through (f) of this subsection is only available in cases where the worker is employed:

(a) Reduction or elimination of premiums or assessments owed by employers for such workers;

(b) Reduction or elimination of charges against the employers in the event of further injury to such workers in their employ;

(c) Reimbursement of the injured worker's wages for light duty or transitional work consistent with the limitations in RCW **51.32.090**(4)(c);

(d) Reimbursement for the costs of clothing that is necessary to allow the worker to perform the offered work consistent with the limitations in RCW **51.32.090**(4)(e);

(e) Reimbursement for the costs of tools or equipment to allow the worker to perform the work consistent with the limitations in RCW **51.32.090**(4)(f);

(f) A one-time payment equal to the lesser of ten percent of the worker's wages including commissions and bonuses paid or ten thousand dollars for continuous employment without reduction in base wages for at least twelve months. The twelve months begin the first date of employment and the one-time payment is available at the sole discretion of the supervisor of industrial insurance;

(g) The benefits described in this section are available to a state fund employer without regard to whether the worker was employed by the state fund employer at the time of injury. The benefits are available to a self-insured employer only in cases where the worker was employed by a state fund employer at the time of injury or occupational disease manifestation;

(h) The benefits described in (a) through (f) of this subsection (4) are only available in instances where a vocational rehabilitation professional and the injured worker's health care provider have confirmed that the worker has returned to work that is consistent with the worker's limitations and physical restrictions.

(5)(a) Except as provided in (b) of this subsection, costs for vocational rehabilitation benefits allowed by the supervisor or supervisor's designee under subsection (1) of this section may include the cost of books, tuition, fees, supplies, equipment, transportation, child or dependent care, and other necessary expenses for any such worker in an amount not to exceed three thousand dollars in any fifty-two week period, and the cost of continuing the temporary total disability compensation under RCW **51.32.090** while the worker is actively and successfully undergoing a formal program of vocational rehabilitation.

(b) Beginning with vocational rehabilitation plans approved on or after July 1, 1999, through December 31, 2007, costs for vocational rehabilitation benefits allowed by the supervisor or supervisor's designee under subsection (1) of this section may include the cost of books, tuition, fees, supplies, equipment, child or dependent care, and other necessary expenses for any such worker in an amount not to exceed four thousand dollars in any fifty-two week period, and the cost of transportation and continuing the temporary total disability compensation under RCW **51.32.090** while the worker is actively and successfully undergoing a formal program of vocational rehabilitation.

(c) The expenses allowed under (a) or (b) of this subsection may include training fees for on-the-job training and the cost of furnishing tools and other equipment necessary for self-employment or reemployment. However, compensation or payment of retraining with job placement expenses under (a) or (b) of this subsection may not be authorized for a period of more than fifty-two weeks, except that such period may, in the sole discretion of the supervisor after his or her review, be extended for an additional fifty-two weeks or portion thereof by written order of the supervisor.

(d) In cases where the worker is required to reside away from his or her customary residence, the reasonable cost of board and lodging must also be paid.

(e) Costs paid under this subsection must be chargeable to the employer's cost experience or must be paid by the self-insurer as the case may be.

(6) In addition to the vocational rehabilitation expenditures provided for under subsection (5) of this section and RCW **51.32.099**, an additional five thousand dollars may, upon authorization of the supervisor or the supervisor's designee, be expended for: (a) Accommodations for an injured worker that are medically necessary for the worker to participate in an approved retraining plan; and (b) accommodations necessary to perform the essential functions of an occupation in which an injured worker is seeking employment, consistent with the retraining plan or the recommendations of a vocational evaluation. The injured worker's attending physician or licensed advanced registered nurse

practitioner must verify the necessity of the modifications or accommodations. The total expenditures authorized in this subsection and the expenditures authorized under RCW **51.32.250** may not exceed five thousand dollars.

(7)(a) When the department has approved a vocational plan for a worker prior to January 1, 2008, regardless of whether the worker has begun participating in the approved plan, costs for vocational rehabilitation benefits allowed by the supervisor or supervisor's designee under subsection (1) of this section are limited to those provided under subsections (5) and (6) of this section.

(b) For vocational plans approved for a worker between January 1, 2008, through July 31, 2015, total vocational costs allowed by the supervisor or supervisor's designee under subsection (1) of this section is limited to those provided under the pilot program established in RCW **51.32.099**, and vocational rehabilitation services must conform to the requirements in RCW **51.32.099**.

(8) The department must establish criteria to monitor the quality and effectiveness of rehabilitation services provided by the individuals and organizations. The state fund must make referrals for vocational rehabilitation services based on these performance criteria.

(9) The department must engage in, where feasible and cost-effective, a cooperative program with the state employment security department to provide job placement services under this section including participation by the department as a partner with WorkSource and with the private vocational rehabilitation community to refer workers to these vocational professionals for job search and job placement assistance. As a partner, the department must place vocational professional full-time employees at selected WorkSource locations who will work with employers to market the benefits of on-the-job training programs and preferred worker financial incentives as described in RCW **51.32.095**(4). For the purposes of this subsection, "WorkSource" means the established state system that administers the federal workforce investment act of 1998.

(10) The benefits in this section, RCW **51.32.099**, and **51.32.096** must be provided for the injured workers of self-insured employers. Self-insurers must report both benefits provided and benefits denied in the manner prescribed by the department by rule adopted under chapter **34.05** RCW. The director may, in his or her sole discretion and upon his or her own initiative or at any time that a dispute arises under this section, RCW **51.32.099**, or **51.32.096**, promptly make such inquiries as circumstances require and take such other action as he or she considers will properly determine the matter and protect the rights of the parties.

(11) Except as otherwise provided, the benefits provided for in this section, RCW **51.32.099**, and **51.32.096** are available to any otherwise eligible worker regardless of the date of industrial injury. However, claims may not be reopened solely for vocational rehabilitation purposes.

[**2018 c 22 § 13**. Prior: **2015 c 137 § 2**; **2013 c 331 § 1**; **2011 c 291 § 1**; (2007 c 72 § 1 expired June 30, 2016); **2004 c 65 § 10**; **1999 c 110 § 1**; prior: **1996 c 151 § 1**; **1996 c 59 § 1**; **1988 c 161 § 9**; **1985 c 339 § 2**; **1983 c 70 § 2**; **1982 c 63 § 11**; **1980 c 14 § 10**; prior: **1977 ex.s. c 350 § 48**; **1977 ex.s. c 323 § 16**; **1972 ex.s. c 43 § 23**; **1971 ex.s. c 289 § 12**.]

NOTES:

Explanatory statement—2018 c 22: See note following RCW **1.20.051**.

Application—2015 c 137 §§ 1, 2, and 6: See note following RCW **51.16.120**.

Rules—2015 c 137: See note following RCW **51.32.096**.

Effective date—2013 c 331: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 21, 2013]." [**2013 c 331 § 8**.]

Implementation—Effective date—Expiration date—2007 c 72: See notes following RCW **51.32.099**.

Report to legislature—Effective date—Severability—2004 c 65: See notes following RCW **51.04.030**.

Effective date—1999 c 110 § 1: "Section 1 of this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 1999." **[1999 c 110 § 3.]**

Legislative finding—1985 c 339: "The legislature finds that the vocational rehabilitation program created by chapter 63, Laws of 1982, has failed to assist injured workers to return to suitable gainful employment without undue loss of time from work and has increased costs of industrial insurance for employers and employees alike. The legislature further finds that the administrative structure established within the industrial insurance division of the department of labor and industries to develop and oversee the provision of vocational rehabilitation services has not provided efficient delivery of vocational rehabilitation services. The legislature finds that restructuring the state's vocational rehabilitation program under the department of labor and industries is necessary." **[1985 c 339 § 1.]**

Severability—1985 c 339: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." **[1985 c 339 § 6.]**

Severability—1983 c 70: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." **[1983 c 70 § 5.]**

Effective dates—Implementation—1982 c 63: "Section 4 of this act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately [March 26, 1982]. All other sections of this act shall take effect on January 1, 1983. The director of the department of labor and industries is authorized to immediately take such steps as are necessary to insure that this act is implemented on its effective dates." **[1982 c 63 § 26.]**

Severability—Effective date—1977 ex.s. c 323: See notes following RCW **51.04.040**.

FORD & DALTON

June 01, 2021 - 1:33 PM

Filing Motion for Discretionary Review of Court of Appeals

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Timothy Reeves v. Computer Solutions of Spokane, Inc., et al (375102)

The following documents have been uploaded:

- DCA_Motion_Discretionary_Rvw_of_COA_Plus_20210601133227SC716135_6910.pdf
  This File Contains:
  Certificate of Service
  Motion for Discretionary Review of Court of Appeals
  The Original File Name was ReevesMFDR.pdf

A copy of the uploaded files will be sent to:

- stevej@hermanjolley.lawyer

Comments:

Sender Name: Drew Dalton - Email: ddaltonlaw@gmail.com
Address:
320 S SULLIVAN RD
SPOKANE VALLEY, WA, 99037-8835
Phone: 509-924-2400

Note: The Filing Id is 20210601133227SC716135