

COURT OF APPEALS  
DIVISION II  
10/17/15  
STATE OF WASHINGTON  
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No. 40516-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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UNITED PARCEL SERVICE, *Appellant*,

v.

KEITH HUDSON, *Respondent*.

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APPEAL FROM THE SUPERIOR COURT FOR KITSAP COUNTY  
HONORABLE RUSSELL HARTMAN

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**REPLY BRIEF OF APPELLANT  
TO RESPONSE OF THE DEPARTMENT OF LABOR & INDUSTRIES**

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## I. REPLY ARGUMENT

### Reply Argument On Assignment of Error No. 1

Appellant agrees with the arguments of the Respondent, Department of Labor and Industries (the Department), under this assignment of error in its Response to Appellant's Opening Brief. Appellant does wish to address, by amplification, the issue raised in the Department's Response at pages 9 and 10. That issue concerns Appellant's Assignment of Error No. 1—"Did the trial court error [*sic*] when it found there was a material issue of fact that Mr. Hudson's wages should be calculated pursuant to RCW 51.08.178(1) or (2)?" The Department notes that the denial of the Appellant's motion for summary judgment would not be appealable as being an interlocutory order, citing to *Johnson v. Rothstein*, 52 Wn. App. 303, 304, 759 P.2d 471 (1988) (Division I). See also *Adcox v. Children's Orthopedic Hospital & Medical Center*, 123 Wn.2d 15, 35, n.9, 864 P.2d 921 (1993).

The Department further notes that although Court does not typically review unassigned errors pursuant to RAP 10.3(g), it may consider issues when the nature of the challenge is clear in the brief, citing to *State v. Breitung*, 155 Wn. App. 606, 619, 230 P.3d 614 (2010) and RAP 1.2(c).

In *Bullo v. City of Fife*, 50 Wn. App. 602, 603, n.1, 749 P.2d 749 (1988) (Division II), this Court noted as follows:

Generally, a denial of a motion for summary judgment is not appealable. See *Sea-Pac Co. v. United Food & Comm'l Workers, Local 44*, 103 Wn.2d 800, 801-02, 699 P.2d 217 (1985). A denial of a motion for summary judgment may be reviewed, however, after a final judgment has been entered. *Rodin v. O'Beirn*, 3 Wn. App. 327, 332, 474 P.2d 903, review denied, 78 Wn.2d 996 (1970). \*\*\*

In the case at bar, Appellant failed to move, under CR 50, for a judgment as a matter of law either before or after this matter was submitted to a jury. Appellant did move, however, for summary judgment before the matter was submitted to a jury. In the ordinary case, although the movant moved for summary judgment before the jury considered the evidence, the movant's subsequent failure to move for a judgment as a matter of law would constitute a waiver of the appellant's right to have the Court assess on appeal the sufficiency of the evidence on which the jury verdict rests. The reasons for that rule would be those stated in *Johnson*:

Two independent grounds are normally given for this ruling. The first is based on policy considerations. We find particularly persuasive the Idaho court's rationale:

The final judgment in a case can be tested upon the record made at trial, not the record made at the time summary judgment was denied. Any legal rulings made by the trial court affecting that final

judgment can be reviewed at that time in light of the full record. This will prevent a litigant who loses a case, after a full and fair trial, from having an appellate court go back to the time when the litigant had moved for summary judgment to view the relative strengths and weakness of the litigants at that earlier stage. Were we to hold otherwise, one who had sustained his position after a fair hearing of the whole case might nevertheless lose, because he had failed to prove his case fully on an interlocutory motion.

*Evans v. Jensen, 103 Idaho 937, 942, 655 P.2d 454, 459 (Ct. App. 1982).*

As another court has reasoned:

To deny a review seems to be unjust. But to grant it . . . would be unjust to the party that was victorious at the trial, which won judgment after the evidence was more completely presented, where cross-examination played its part and where witnesses were seen and appraised.

The greater injustice would be to the party which would be deprived of the jury verdict. Otherwise, a decision based on less evidence would prevail over a verdict reached on more evidence and judgment would be taken away from the victor and given to the loser despite the victor having the greater weight of evidence. This would defeat the fundamental purpose of judicial inquiry.

*Home Indem. Co., at 366.*

The second ground for refusing review is related to the purpose and nature of summary judgment proceedings. The primary purpose of a summary judgment procedure is to avoid a useless trial. *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980); *Ryder v. Port of Seattle*, 50 Wn. App. 144, 148, 748 P.2d 243 (1987). Once a trial on the merits is had, review of a denial of a motion for summary judgment would do nothing to further this purpose. Moreover, the nature of a summary judgment is such that once the issues have been tried to a finder of fact, the summary judgment procedure to determine the presence of genuine, material issues of fact has no further relevance. \*\*\*

*Johnson*, 52 Wn. App. at 306-307.

As described, these reasons apply in non-industrial insurance cases where witnesses are called to testify in court before the jury after the motion for summary judgment is denied.

In this case, however, the Superior Court record (the Certified Appellate Board Record or CABR) was fixed at the level of the Board of Industrial Insurance before the appeal to Superior Court. So the record which the Superior Court reviewed for purposes of the motion for summary judgment is the same record that it would review at trial for purposes of a motion for judgment as a matter of law, had such a motion been filed. The standard of review for both would be the same. The fact is, in an industrial insurance appeal, there is no substantive distinction between a motion for summary judgment and a motion for a judgment as a

matter of law. This is a nuance not considered in *Johnson*. As a result, *Johnson* (and other cases predicated on its rationale) should not apply to prevent the Appellant from raising and having the Court in this appeal decide the issue of the sufficiency of the evidence for the verdict. As the Court of Appeals stated in *State v. Olson*, 74 Wn. App. 126, 872 P.2d 64 (1994) (Division I):

Generally, issues are not considered on appeal unless raised by an assignment of error. *State v. Fortun*, 94 Wn.2d 754, 756, 626 P.2d 504 (1981). However, a "technical violation of the rules will not ordinarily bar appellate review, where justice is to be served by such review. . . . [W]here the nature of the challenge is perfectly clear, and the challenged finding is set forth in the appellate brief, [we] will consider the merits of the challenge." *State v. Williams*, 96 Wn.2d 215, 220, 634 P.2d 868 (1981) (quoting *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 710, 592 P.2d 631 (1979)).

The Court of Appeals also held in *McGovern v. Smith*, 59 Wn. App. 721, 734, 801 P.3d 250 (1990) (Division I) that the Court can review a denial of a motion for summary judgment on substantive legal issues.<sup>1</sup> As the Court held:

The Marinos first reply that Smith's assignment of error to the denial of his motion for summary judgment is improper. \*\*\*

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<sup>1</sup> If the court finds no issues of fact but denies the motion for summary judgment on the basis of a legal analysis that is allegedly incorrect.

The Marinos are correct that Smith has technically failed to make a proper assignment of error. His correct procedural route would have been to assign error to that portion of the trial court's final judgment in which it declined to modify the prior denial of Smith's motion for summary judgment. That would have permitted this court to review not only the final judgment but also the prior summary judgment motion denial, since under *RAP 2.4(a)* and *(b)*, the scope of appellate review includes "the decision or parts of the decision designated in the notice of appeal" and any earlier ruling if it "prejudicially affects the decision designated in the notice". See *Fox v. Sunmaster Prods., Inc.*, 115 Wn.2d 498, 505, 798 P.2d 808 (1990). *Fox* is consistent with earlier decisions of this court holding that denial of a summary judgment motion may be reviewed after entry of final judgment. See, e.g., *Bullo v. Fife*, 50 Wn. App. 602, 603 n.1, 749 P.2d 749 (1988).<sup>3</sup>

3 We distinguish in this regard *Johnson v. Rothstein*, 52 Wn. App. 303, 759 P.2d 471 (1988), which held that denial of a summary judgment was not reviewable following trial if the denial was based on a determination that there were disputed issues of material fact. *Johnson* specifically reserved the issue of whether denial of summary judgment on a substantive legal issue, which this case presents, is also not reviewable. See *Johnson*, 52 Wn. App. at 305 n.4.

However, Smith's failure to assign error to the final judgment will not deprive this court of its prerogative to review the cross appeal on its merits. Our rules of appellate procedure "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits." *RAP 1.2(a)*. Where the nature of the challenge is perfectly clear,

we will consider the merits of the challenge. See *Green River Comm'ty College Dist. 10 v. Higher Educ. Personnel Bd.*, 107 Wn.2d 427, 431, 730 P.2d 653 (1986). We therefore will consider the legal issue of whether separate borrowers to a single loan transaction could have different purposes in the context of *RCW 19.52.080*.

In the case at bar, the trial court denied Appellant's motion for summary on the purportedly on the following basis:

“[T]here is, in my humble opinion, a material dispute of fact with respect to whether Mr. Hudson was a seasonal or part-time worker. I believe the Department's position is that he was a temporary, full-time worker in light of the average out of his wage hours. However, I believe that Mr. Hudson's testimony that he would call in, that his badge said seasonal, that he was told he was a seasonal worker injects a material issue of fact into this proceeding.” [CP—Verbatim Report of Proceedings on Motion for Summary Judgment on September 18, 2009 at page 26, lines 6-18 ].

What is apparent from this trial court ruling is that the trial court predicated its belief that an issue of material fact existed based on a failed understanding of the law. The trial judge would have granted the motion for summary of judgment had it properly understood that a worker's employment pattern is not *exclusively* seasonal employment as contemplated under *RCW 51.08.178(2)(a)* where the worker has off season employment or seasonal employment in other activities beyond the activities of the seasonal job of injury, making the worker a normally

employed worker under RCW 51.08.178(1). There was no issue of fact that Respondent had off season employment. Accordingly, this Court should accept review under Assignment of Error No. 1.

**Reply Argument On Assignment of Error No. 2**

Appellant agrees with the arguments of the Respondent, Department of Labor and Industries (the Department), under this assignment of error in its Response to Appellant's Opening Brief.

**Reply Argument On Assignment of Error No. 4**

Appellant agrees with the arguments of the Respondent, Department of Labor and Industries (the Department), under this assignment of error in its Response to Appellant's Opening Brief.

**Reply Argument On Assignment of Error No. 5**

Appellant agrees with the arguments of the Respondent, Department of Labor and Industries (the Department), under this assignment of error in its Response to Appellant's Opening Brief.

**Reply Argument On Assignment of Error No. 6**

Appellant agrees with the arguments of the Respondent, Department of Labor and Industries (the Department), under this assignment of error in its Response to Appellant's Opening Brief.

**Reply Argument On Assignment of Error No. 7**

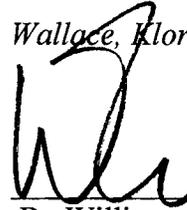
Appellant agrees with the arguments of the Respondent, Department of Labor and Industries (the Department), under this assignment of error in its Response to Appellant's Opening Brief.

**II. CONCLUSION**

For the preceding reasons, this court should reverse the rulings of the trial court, vacate the judgment entered in favor of respondent and enter judgment in favor of appellant.

Respectfully submitted this 4<sup>th</sup> day of November 2010.

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**DECLARATION OF SERVICE OF  
APPELLANT'S REPLY BRIEF**

I hereby certify under penalty of perjury under the laws of the State of Washington that I caused the REPLY BRIEF OF APPELLANT TO THE RESPONSE OF THE DEPARTMENT OF LABOR & INDUSTRIES to be served on the following via U.S. Mail:

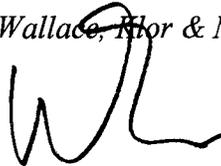
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