
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

John H. Wright, a married man,
Appellant,

v.

Dave Johnson Insurance, Inc., a Washington corporation, David L.
Johnson and Beverly M. Johnson, husband and wife, *Respondents.*

REPLY BRIEF OF APPELLANT

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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

COURT OF APPEALS
OF WASHINGTON

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1. Defendant is not asking this court to simply reweigh the evidence but rather is asking this court to correct clear errors of law and to vacate findings and conclusions that are completely unsupported by any evidence in the record.

The Respondents – who were Plaintiffs below and are hereinafter collectively referred to as “Plaintiffs” or at times individually as “Plaintiff David Johnson” or “the Corporate Plaintiff” as applicable – have suggested that Defendant Wright (Appellant herein) is simply asking this court to reweigh the evidence on appeal and overrule the trial court’s factual determinations that were based upon competing evidence. That is not at all what Defendant Wright is asking. On the contrary, Defendant Wright is asking this court to reverse the trial court’s decision to the extent it is completely unsupported under existing law and to vacate findings that are not supported by any evidence whatsoever in the record.

Defendant Wright agrees with Plaintiffs that the trial court’s factual determinations should be upheld if they are supported by substantial evidence, which is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise. A logical corollary is that the absence of evidence in support of a finding necessarily cannot be found to be a sufficient quantum of evidence and that findings supported by no evidence whatsoever cannot be upheld.

Furthermore, the trial court’s conclusions of law and judgment

cannot be upheld unless valid factual findings of the trial court “in turn support the trial court’s conclusions of law and judgment.” Ridgeview Properties v. Starbuck, 96 Wn.2d. 716, 719, 638 P.2d. 1231 (1982).

On the other hand, questions of law are reviewed by the appellate court *de novo* for legal error. Labriola v. Pollard Group, Inc., 152 Wn.2d. 828, 100 P.3d. 791 (2004).

2. Plaintiffs’ newly advanced claim of a “part oral” contract – advanced for the first time ever in its Brief of Respondents – was never before the trial court and is unsupportable in any event.

Plaintiffs stated in their Brief of Respondents for the first time ever in this litigation that their demand for the life insurance policies to be given to them and the trial court’s order requiring as much should be upheld under the theory that there was a “part oral” contract between the parties so providing. Plaintiffs’ position is untenable for two reasons.

One, Plaintiffs never presented the “part oral” contract theory or argument to the trial court, nor did the trial court ever reference a “part oral” contract as the basis of its decision. Parties cannot raise new claims for the first time on appeal. Nguyen v. Sacred Heart Medical Center, 97 Wn.App. 728, 987 P.2d. 634 (1999).

In their Complaint, Plaintiffs’ demands regarding the life insurance policies were limited to a demand for their “return” to “the Plaintiff

Corporation” under the “Employment Agreement” which allegedly required the return of corporate property upon the termination of Defendant Wright’s employment. The Complaint also referenced the “Buy and Sell Agreement.” CP 1-4. Nowhere in the Complaint is there any reference to a “part oral” contract or any type of oral contract or agreement at all. Id.

Likewise, in response to a motion for summary judgment filed by Defendant Wright, Plaintiffs argued that the “Employment Agreement” and/or the “Buy and Sell Agreement” required Defendant Wright to give the life insurance policies to Plaintiffs. CP 93-102. Plaintiffs made arguments and cited cases regarding how written contracts are to be interpreted. Id. Nowhere in their response to the motion for summary judgment did Plaintiffs assert that there was a “part oral” contract or any type of oral contract or agreement at all. Id. Similarly, Plaintiffs did not cite any of the cases they are now citing in support of their “part oral” contract theory. Id.

Plaintiffs made essentially the exact same arguments regarding the written agreements in their trial brief filed a few days before trial. CP 229-239. Again, no mention was made about any “part oral” contract or any type of oral agreement or contract. Id. Again, Plaintiffs did not cite any of the cases they are now citing in support of their “part oral” contract

theory. Id.

On the second day of trial, Plaintiffs' counsel acknowledged that "this case has been characterized, both at the summary judgment level and here at the trial level, as being wholly contractual." RP (Prante 11/4/09) 33:13-15. Plaintiffs' counsel then stated that after having done a little research the previous night (i.e., the evening after the first day of trial), that he felt their claims had "more elements of a constructive trust." Id. at 33:18-19. However, Plaintiffs' counsel even at that time made no mention of any type of "part oral" contract or any type of oral agreement or contract as any part of even their then eleventh-and-a-half hour reinvention of the basis of their claims.

In addition, Plaintiffs' counsel in his closing arguments at trial made no mention of the now newly asserted "part oral" contract theory. RP (Prante 11/5/09) 276:12-288:21). On the contrary, he argued the "relationship of the life insurance policies to the buy-and-sell-agreement" and that "this agreement has insurance stamped all over it." RP (Prante 11/5/09) 282:15-285:9. He also briefly argued his last-minute constructive trust theory in his rebuttal closing even though he never mentioned it in his initial closing. RP (Prante 11/5/09) 306:17-307:4.

Because Plaintiffs had not raised the constructive trust theory in their opening but waited until their rebuttal to mention it for the first time,

the trial court allowed defense counsel to address the newly asserted constructive trust theory after Plaintiffs' rebuttal. Defense counsel stated, "this lawsuit was filed over three years ago. The theories they stated were contract theories. They never moved to amend. They never mentioned a constructive trust theory until the second day of trial in a case that's been pending for three years. I don't think that's fair." RP (Prante 11/5/09) 307:5-18.

The trial court's Findings of Fact and Conclusions of Law also reference the written agreements and make absolutely no mention of a "part oral contract" or any type of oral agreement or contract. CP 274-280. Nor did the trial court mention a "part oral" contract at any time in its oral ruling after trial. RP (Prante 11/5/09) 309:7-315:12. Indeed, the court framed the issue as "whether or not this insurance policy was part of a buy-sale agreement." Id. at 309:9-10.

Plaintiffs filed a motion on the merits earlier in this appellate case. Interestingly, Plaintiffs did not mention or assert their "part oral" contract theory or cite any of their "part oral" contract theory cases anywhere in their papers pertaining to their motion on the merits. Their "part oral" contract theory is a totally new invention asserted for the first time in their Brief of Respondent and is even newly advanced and inconsistent with the position they have taken earlier in this appeal!

The second reason that the Plaintiffs' newly created "part oral" contract claim cannot be sustained is that it is legally and factually unsupportable.

As discussed in detail in Defendant Wright's Brief of Appellant, the Washington State Supreme Court in Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d. 493, 115 P.3d. 262 (2005), corrected some misconceptions lower courts apparently had about Washington law regarding the interpretation of contracts by emphasizing that courts are not to look outside the words of written contracts for any purpose other than determining the meaning of specific words used within those written contracts and are not to "interpret" into written contracts any intention not specifically noted in the applicable written contract. The Hearst court also emphasized that courts cannot use matters outside the actual language of a written contract to vary, contradict, or modify that written contract. Similarly, as also pointed out in the Brief of Appellant, the court in Oliver v. Flow Int'l. Corp., 137 Wn.App. 655, 155 P.3d. 140 (2006), relying on the Hearst case, explained that courts cannot use matters outside the actual language of a written contract to insert new obligations into the contract.

All of the cases cited by Plaintiffs in support of their newly asserted "part oral" contract theory were decided prior to the Washington State Supreme Court's decision in Hearst correcting the lower courts'

erroneous view of contract interpretation under Washington law. All of Plaintiffs' cited cases on the point were also decided prior to the decision in Oliver. The "part oral" contract theory as advanced by Plaintiffs would allow the court to look outside the actual language of the "Employment Agreement" and/or the "Buy and Sell Agreement" to vary, contradict, and/or modify those written agreements and to insert a new obligation into them, namely, an obligation to give the life insurance policies to one or more of the Plaintiffs upon the termination of Defendant Wright's employment. This is inconsistent with Hearst and Oliver, and to the extent the older cases that were cited by Plaintiffs conflict with these more recent decisions, those older cases relied upon by Plaintiffs must be disregarded.

In any event and most importantly, the "part oral" contract theory advanced by Plaintiffs is completely unsupportable on the record. Any assertion that the parties orally agreed that upon the termination of Defendant Wright's employment the life insurance policies had to be given to any of the plaintiffs or even anyone else for that matter is totally contradicted by the trial testimony of Plaintiff David Johnson himself.

Plaintiff David Johnston testified at trial as follows:

Q And, there is actually nothing written into this agreement that says that if John terminated his employment or decided not to exercise the option, he has to give the policies back to you, or the proceeds to Bev; is that correct?

A Never contemplated that he wouldn't buy the agency.

RP (Johnston 11/3/09) 114:16-21.

Plaintiff David Johnson also testified at trial as follows:

Q Did you and John discuss what would happen if he quit, with reference to these insurance policies?

A No. We were, what I thought, on very, very amicable terms at the time, with the way that this whole thing was structured and the stuff that I had given him and everything, it would have been absolutely ludicrous for him not to buy the agency, given the opportunity....

RP (Johnston 11/3/09) 83:12-18.

In other words, according to the trial testimony of Plaintiff Johnson himself, not only was there no oral agreement requiring the life insurance policies to be given to any of the Plaintiffs upon the termination of Defendant Wright's employment, that issue was never even discussed or contemplated by the parties! Thus, not only is the "part oral" contract theory untimely and legally unsupportable, it is completely baseless factually and utterly devoid of any merit in light of the trial testimony of the Plaintiff himself!

3. Plaintiffs have presented no legal authority that supports the trial court's refusal to abide by the interest rate statute.

Defendant Wright cited Washington State Supreme Court case law – Schrom v. Bd. For Volunteer Fire Fighters, 153 Wn.2d. 19, 100 P.3d.

814 (2004) – confirming what frankly appears fairly obvious in any event, specifically, that RCW 19.52.010, providing for interest at the rate of 12% where there is no written agreement as to an interest rate, applies in this case to the amount of interest to be assessed on the life insurance policy premiums paid by Defendant Wright.

Citing absolutely no statute, case law, or any other legal authority, Plaintiffs make the bald, unsupported, and incredible assertion that the trial court is nevertheless free to ignore the statute and the statutory interest rate. There is absolutely no legal authority whatsoever, and Plaintiffs have cited none, to support the trial court's refusal to abide by the statute, and the trial court's decision in that regard cannot stand.

Moreover, Plaintiffs' argument that the amount of interest approved by the trial court reflects a "real world" amount is contrived at best. The trial court simply adopted the figure presented by Plaintiffs. That figure was based solely upon the opinion of Plaintiffs' counsel, who presented nothing to the court to establish that he was a competent expert on the issue. Indeed, his reasoning clearly reflects at best a lack of understanding in the area. Plaintiffs' counsel asserted that a "real world" interest rate that a person such as Defendant Wright could expect to earn on his money would be a "blended rate" that somehow "blends" the "prime rate" and the "federal funds rate." However, the "federal funds

rate” is the rate at which banks lend to one another for overnight transactions to achieve a reserve level that complies with federal law. It is not a “real world” rate for transactions involving private individuals; it is a rate that applies to loans between banks. Furthermore, the “prime rate” is the rate at which banks typically lend to creditworthy parties and is derived by adding a set number of percentage points (usually about 3%) to the “federal funds rate.” Thus, the “prime rate” already includes as a component the “federal funds rate” and a further “blending” of those two rates would create an artificial reduction of the “prime rate” and is certainly not something any lender in any situation does in the “real world.”

There are two points raised by Plaintiffs in relation to the interest issue that appear to be part of their apparent strategy, utilized extensively in the trial court, of launching inflammatory personal attacks against the defense to distract the court from an honest application of the actual law that applies in this matter.

The first is the assertion at page 23 of the Brief of Respondents that “the Court was trying to restore the parties to the situation that it found was the intent of the parties; namely, if the Appellant Employee had not wrongfully retained the insurance policies and paid the premiums, what would his situation be?”

Plaintiffs evidently seek to cast Defendant Wright in a bad light by implying that the entire period during which he owned the life insurance policies and was paying the premiums he was acting in some wrongful manner. This ignores the fact that Defendant Wright first became the owner of the life insurance policies when they were given to him by Plaintiff Johnson while Defendant Wright was employed by the plaintiffs, and Defendant Wright paid the premiums for years while he owned the policies and was employed by the plaintiffs. Even under the plaintiffs' theory of the case, there was nothing wrongful about Defendant Wright's ownership of the policies, and certainly not his payment of the premiums, during the time period that he was employed by the plaintiffs.

The above-quoted statement also implies that it was wrongful for Defendant Wright to retain the policies when his employment terminated, even in light of Plaintiffs refusal at that time to reimburse him for the premiums he had paid. For the reasons discussed at length throughout this case, at the trial level and now on appeal, Defendant Wright was not required to give those policies to any of the Plaintiffs under the existing agreements or for any other reason. Furthermore, even the trial court agreed that it was completely inappropriate for Plaintiffs to insist on being given the policies without repaying the premiums that had been paid by Defendant Wright on them.

The second assertion by plaintiffs that appears to be part of its personal attack campaign is the implication that the defense committed some heinous crime with nefarious intent by not designating as part of the record on appeal an affidavit and letter from Plaintiffs' counsel to defense counsel that Plaintiffs presented to the trial court in connection with their interest figure argument. Frankly, the trial court index simply labeled this one document in a voluminous record as an affidavit and not including it in the designation was no more than an oversight at worst.

In addition, even on further reflection, the document in the defense's view is insignificant and probably should have been excluded under the encouragement in RAP 9.6(a) to limit the designated papers. It is nothing more than a letter from counsel stating his general opinion on his proffered interest figure with limited reasoning, no calculations, and no statement of any precise rate (other than a vague reference to a "blending" of the "prime rate" and "federal funds rate" with no numerical rates whatsoever identified for any of these rates). The content of the document is accurately reflected in Defendant Wright's reference to and description of what was presented to the trial court on the issue. In fact, Defendant Wright submits that the document actually demonstrates beyond a shadow of a doubt the complete baselessness of the interest figure adopted by the trial court. The figure adopted by the court was presented to it without

any calculation or explanation provided as to what the rates were, how they were applied or even how the end number was determined or calculated. In contrast, Defendant Wright presented a detailed chart to the trial court noting the dates and amounts of each premium payment (with a reference to the supporting trial exhibit), the exact numerical interest rate applied, the exact number of years and months to which the rate was applied, and precise calculations as to the overall interest figure. CP 272-273.

Furthermore, if Plaintiffs believed this seemingly insignificant document was so “critical,” they should have designated it themselves as part of the appellate record under RAP 9.6. Instead of simply designating what they claim is a “critical” document, Plaintiffs seemingly try to score some cheap points by turning their own neglect into a personal attack on the defense.

4. Plaintiffs have failed to rebut the obvious impropriety of the trial court’s award of attorney fees and costs under RCW 4.84.185.

Defendant Wright cited Biggs v. Vail, 119 Wn.2d. 129, 830 P.2d. 350 (1992), known as Biggs I, as well as a number of other cases, for the proposition that attorney fees cannot be awarded under RCW 4.84.185 unless a claim or defense is frivolous in its entirety and that if a party prevails on any aspect of its claim or defense it cannot be considered

frivolous within the meaning of that statute.

Plaintiffs imply that Defendant Wright somehow failed to fully advise the court on the state of the law regarding RCW 4.84.185 by citing “*Biggs I*” but not citing “*Biggs II* and the progeny of those two cases, the *Verharen* case.”¹ Plaintiffs then suggest that the Verharen case (and presumably the Biggs II case) somehow changed the law with respect to the application of the statute.

However, the Biggs II case is not an RCW 4.84.185 case at all. It is a CR 11 case. In referring to the Biggs I decision as it related to the RCW 4.84.185 issue, the Biggs II court summarized: “Following a bench trial, the court found in favor of Vail and against Biggs on his breach of contract claim, and found the other three claims to be frivolous. It also awarded Vail \$25,000 in attorney fees under the frivolous lawsuit statute, RCW 4.84.185. The Court of Appeals affirmed the judgment. However, this court reversed the award of attorney fees, finding the action as a whole must be frivolous in order for fees to be awarded under RCW 4.84.185.” Biggs II, at 124 Wn.2d. 193, 195-196. The Biggs II court did not comment further on that earlier decision or in any way change or criticize its earlier ruling with respect to the RCW 4.84.185 issue. All it

¹ “*Biggs II*” is Biggs v. Vail, 124 Wn.2d. 193, 876 P.2d. 448 (1994). “*Verharen*” is State ex.rel. Quick-Ruben v. Verharen, 136 Wn.2d. 888, 969 P.2d. 64 (1998). “*Biggs II*” is miscited by Plaintiffs as 124 Wn.2d. 201. Plaintiffs also miscited Diel v. Beekman, 1 Wn.App. 874, 465 P.2d. 212 (1970), citing it as 1 Wn.App. 465, P.2d. 212.

did was to consider the propriety of the trial court's later award of attorney fees under CR 11 after remand, ultimately finding errors even in the court's application of CR 11. In short, there was no reason to cite Biggs II because it is completely inapposite, is not an RCW 4.84.185 case, and does not in any way alter the rulings of Biggs I with respect to the application of RCW 4.84.185.

Furthermore, the Verharen court did not in any way change the standard set forth in the Biggs I case. In fact, it reaffirmed it. The Verharen court stated that Biggs I noted that RCW 4.84.185 "was intended to apply to 'actions which, as a whole, were spite, nuisance or harassment suits...'" Verharen, at 136 Wn.2d. 888, 903 (1998). The court went on to explain, "[T]he language and the history of the frivolous lawsuit statute (RCW 4.84.185) are clear. The lawsuit, as a whole, that is in its entirety, must be determined to be frivolous and to have been advanced without reasonable cause before an award of attorneys' fees may be made under the statute....In Biggs I, we reversed the trial court's award of fees under RCW 4.84.185 because the trial court found only three of the four claims asserted by Biggs to be frivolous. Because the fourth claim advanced to trial, the suit could not be considered frivolous in its entirety. Thus, fees under RCW 4.84.185 were not appropriate....Under Biggs I, if any claims advance to trial, a trial court's award of fees under RCW

4.84.185 cannot be sustained.” Id. The Verharen court then pointed out that in its case, “Unlike Biggs I, no claim survived to trial.” Id. at 904. On that basis it upheld the award under RCW 4.84.185. Nowhere in the Verharen opinion did the court suggest that it was in any way changing the standard or test under RCW 4.84.185 as Plaintiffs incorrectly assert.

Plaintiffs also suggest that the rule set forth in Biggs I and the other cases cited by Defendant Wright should be ignored because Defendant Wright allegedly prevailed on what Plaintiffs denominate as merely “peripheral issues.” Plaintiffs’ suggested “peripheral issues” exception to the rule of law set forth by Washington State’s Supreme Court in Biggs I and other cases does not appear in the statute or any case law. Certainly, Plaintiffs have cited no legal authority in support of such a proposition.

Furthermore, Plaintiffs’ “peripheral issues” label is a mischaracterization at best. Plaintiffs asserted four claims in their complaint. Defendant Wright prevailed completely on three of them, specifically, the claim that he stole artwork from the Plaintiff Corporation, the claim that he stole foreign language programs from the Plaintiff Corporation, and the claim that he improperly took a vacation after his resignation under a family vacation program that Plaintiff falsely claimed belonged to the Plaintiff Corporation.

As to the fourth claim, Defendant Wright obtained the alternative relief he requested in his answer to the complaint, namely, that if the court awarded the life insurance policies to the plaintiffs that they be required to reimburse Defendant Wright for the premiums he had paid on the policies.² If Defendant Wright had not defended this lawsuit, he would never have even been able to recover even the money he paid for the premiums on the policies. He would have been forced to give the policies to Plaintiffs after having spent over \$27,000 on premiums. Certainly, this was not an insignificant or “peripheral issue,” and Defendant Wright clearly prevailed on this issue.

Plaintiffs have argued that their complete failure to prevail on the three claims other than the claim seeking the life insurance policies is insignificant or should not be considered in the context of the statute and/or the rule set forth in Biggs I and similar cases because the claims were allegedly “resolved outside this lawsuit, and those claims are not before this Court.” The trial court entered findings of fact to that effect. CP 278, at Findings of Fact 11 and 12. Defendant Wright objected to and appealed those findings because not only is there absolutely nothing in the record to support the findings, the claim itself is completely false. CP 266.

² This request can be found in the answer to the complaint at CP 8. At the hearing on Plaintiffs’ motion on the merits, Plaintiffs’ counsel falsely claimed that Defendant Wright never requested a return of his premiums and the court simply elected to award that *sua sponte*. Obviously, that statement was completely untrue.

Plaintiffs have cited nothing from the record in support of any type of mutual resolution of those claims between the parties or any other resolution of the claims by the parties outside the lawsuit.

The fact of the matter is that, to Defendant Wright's surprise and pleasure, Plaintiffs simply abandoned those claims at the trial.³ This is likely because those claims were completely baseless and discovery in the case revealed as much.⁴

This does not, however, change the fact that Defendant Wright was forced to defend those claims for three years before they were abandoned and that Plaintiffs continued to assert them right up to the time of trial.

It also does not change the fact that if Defendant Wright had not defended those claims he would have been labeled by default in the public record a thief who stole from an employer. Indeed, Finding of Fact 12 as written clearly implies that Defendant Wright did in fact improperly use "corporate points" in a vacation program after his resignation even though

³ RP (Johnston 11/3/09) 35:8-15 and 54:11-18.

⁴ As to the claim that Defendant Wright stole valuable artwork from the Plaintiff Corporation, Plaintiff Johnson admitted that the artwork, which was evidently his personally and not the corporation's, was actually in his own home all along. CP 85. As to the claim that Defendant Wright stole foreign language programs from the Plaintiff Corporation, Plaintiff Johnson admitted that he had no idea if the corporation paid for the course and Defendant Wright thought he had paid for it himself. CP 85-86. As to the claim that Defendant Wright improperly took a vacation after his resignation using "corporate points" in a vacation program, Plaintiff Johnson admitted that he personally and not the corporation was the owner of the family vacation program. CP 45-46. Moreover, Defendant Wright testified that he never took a vacation after he resigned. CP 53-54. Plaintiff Johnson stated that he had proof that the vacation was taken, but he never presented any such proof. CP 87-88.

this is completely untrue and Plaintiffs offered no evidence whatsoever in support of this claim in the record at trial or at any other time. Moreover, this court can plainly see that Plaintiffs in their Brief of Respondent continue to falsely imply that Defendant Wright did take property from the Plaintiff Corporation and did improperly use points in the family vacation program after his resignation even though these claims are utterly baseless and completely unsupported and unsupportable in the record. See, Brief of Respondents at pages 3, 4, and 13. This also appears to be part of Plaintiffs' strategy of personally attacking Defendant Wright, regardless of the falsity of the claims, in an effort to distract the court from an honest application of the actual law that applies in this matter.

5. Plaintiffs fail to address the errors in and the relevance of the discovery order.

Defendant Wright addressed in detail the errors in the trial court's discovery order. Those arguments will not be restated in this reply brief, especially since Plaintiffs chose to respond almost entirely with non-substantive and inflammatory rhetoric and did not otherwise address the substance of the discovery issues other than to note that the trial court has some discretion. However, a couple points raised by Plaintiffs in their brief need to be addressed.

First, Plaintiffs suggest that the discovery order is a moot point

because it supposedly did not affect the outcome of the trial. However, Plaintiffs ignore the fact that the discovery order left open the issue of terms to be awarded pending the outcome of the case. As Defendant Wright noted in footnote 14 in his Brief of Appellant: “If this court does not reverse the award of all costs and attorney fees that were awarded below [under RCW 4.84.185], the issue may be moot since that award includes the costs and attorney fees that were connected to the motion to compel. On the other hand, if the court on this appeal does reverse the award by the trial court of all costs and attorney fees, what if any terms are appropriate could be an issue.”

Two, in furtherance of Plaintiffs’ personal attack strategy, they suggest that the trial judge “was forced to go through each interrogatory” in ruling on the motion and that this is evidence of “evading” and “frivolity” and “bad faith” on the part of the defense. As the transcript clearly reveals, the judge after hearing argument from both counsel simply decided on his own to go through each interrogatory that was at issue and give his ruling. In fact, in going through the interrogatories, the court realized that some modification was required as to at least one of them and further noted that documents that were work product did not have to be produced. RP (Johnston 10/15/09) 31:18-32:1 and 32:19-23.

6. Plaintiffs are attempting to distract this court from the true issues in this case by resorting to personal attacks and inflammatory rhetoric.

A few examples of Plaintiffs' efforts to distract the court from the true issues in this case by resorting to personal attacks and inflammatory rhetoric are referenced above. There are numerous other examples. For instance, with no citation to the record whatsoever, Plaintiffs state at page 3 of their Brief of Respondents that Defendant Wright was "a troublesome and difficult and unproductive employee." At page 5, Plaintiffs label the appeal "a sprawling, convoluted attack." Plaintiffs repeatedly claim throughout their brief, without any explanation or discussion, that virtually any and every argument asserted by Defendant Wright is "frivolous" or not made in good faith or with reasonable cause. Plaintiffs even label Defendant Wright's very act of defending himself and daring to appeal the trial court's rulings "full of 'deceitfulness' and 'dishonesty'"; "laughable"; "empty"; and "petty, vituperative, vindictive, spiteful, deceitful behavior."

Plaintiffs even make a false and outrageous and completely unexplained, unsupported, and unsupportable allegation at page 19 of their Brief of Respondents that "Appellant has mis-characterized the finding of the Trial Court" in arguing that it wrote into the parties' agreement the requirement to give the life insurance policies to Plaintiffs upon termination of Defendant Wright's employment. Incredibly, Plaintiffs

made this statement in connection with its new argument that there was a “part oral” contract that required as much. At page 43 of Plaintiffs’ Brief of Respondents, the accusation gets inflated into an accusation of an “outright mis-statement of facts and issues.”

Moreover, as they repeatedly did in the trial court, Plaintiffs in this appeal refer to irrelevant family issues, specifically, the allegation that Defendant Wright interfered with Plaintiff Johnson’s ability to see his daughter and grandchildren. The trial judge was virtually consumed with this allegation and gratuitously referenced it often, even at hearings after the close of trial. RP (Prante 3/1/10) 322:15-16; RP (Prante 3/29/10) 338:18-20. Defendant Wright attempted to keep these totally irrelevant family matters out of the trial. CP 257-258; RP (Johnston 11/3/09) 88:19-89:8. What Plaintiffs fail to mention is that Plaintiff Johnson’s daughter testified that Defendant Wright encouraged her to visit with her father after the breakdown in the employment relationship and she in fact did so. RP (Johnston 11/3/09) 191:21-192:7). Plaintiffs also fail to mention that Plaintiff Johnson spent extremely limited time with his daughter and grandchildren even prior to the employment fiasco. RP (Johnston 11/3/09) 189:5-190:2) They also fail to mention that Plaintiff Johnson’s daughter testified that she was already cautious about Plaintiff Johnson’s time with her children because of his drinking problem, including him

coming extremely visibly drunk to one of the children's birthday parties. RP (Johnston 11/3/09) 190:3-191:20. Plaintiffs also fail to mention that Plaintiff Johnson, by his own admission, drove drunk with one of his grandchildren in his vehicle. RP (Johnston 11/3/09) 134:9-17.

Unfortunately, the trial judge got caught up in the ugly personal attacks against Defendant Wright.⁵ The trial judge engaged in the same type of behavior as is clear from the record and Plaintiffs' brief. The trial judge made it very clear that he personally disliked Defendant Wright and wanted to punish him and did not even really want to make Plaintiffs even pay back the premiums that Defendant Wright had paid on the policies. RP (Prante 11/5/09) 316:7-16. As noted in the opening Brief of Appellant, the trial judge even threatened Defendant Wright with economic doom if he dared to appeal and threatened to throw him in jail in a week if he did not immediately transfer the life insurance policies or post an enormous bond even though Plaintiffs' counsel had agreed to and signed off on an order providing for a much more reasonable method of securing the trial court's judgment pending appeal.

⁵ The trial court also allowed Plaintiffs to waste several hours of trial trying to prove that Defendant Wright's tax returns included incorrect or questionable entries. RP (Prante 11/4/09) 48:22-61:16 and 94:2-106:21. Plaintiffs failed miserably in this attempt and all entries were proven to be accurate. *Id.* Plaintiffs also railed about Defendant Wright and his family incorporating a small family business in another state, implying some great evil in engaging in this completely legal and frankly fairly common practice. RP (Prante 11/4/09) 35:3-38:7; RP (Prante 11/5/09) 278:8-22.

Defendant Wright trusts that this court will see through and beyond the unfortunate tactic embraced by Plaintiffs of attempting to prevail not based on the legal issues and factual record but on their efforts to demonize Defendant Wright. There is much more that could be said about Plaintiffs' own character, some of which came out during discovery and the trial, but the defense chooses not to sink to that level.

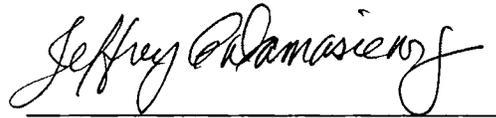
7. Plaintiffs' request for attorney fees and costs on appeal should be denied.

Plaintiffs request attorney fees on appeal based upon RCW 4.84.185. For the same reasons that the award of fees under that statute was inappropriate in the trial court, the award would be inappropriate here. The trial court clearly made errors of law and entered findings and conclusions that were completely unsupported by anything in the record before it.

It is noteworthy that Plaintiffs' motion on the merits was denied. Clearly, there are at least debatable issues raised in this appeal. It is absolutely not frivolous. Fees cannot be awarded to Plaintiffs under the statute.

Dated: March 23, 2011

Respectfully Submitted,

A handwritten signature in cursive script, reading "Jeffrey A. Damasiewicz". The signature is written in black ink and is positioned above a horizontal line.

Jeffrey A. Damasiewicz
WSBA #30036
Attorney for Appellant

COURT OF APPEALS
DIVISION II

11 MAR 24 PM 12:05

STATE OF WASHINGTON
BY _____
DEPUTY

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

JOHN H. WRIGHT, a married man,)	
Appellant,)	Court of Appeals Case No. 40531-8-II
v.)	Superior Ct. No. 06-2-01073-2
DAVE JOHNSON INSURANCE, INC., a)	PROOF OF SERVICE
Washington Corporation; DAVID L.)	
JOHNSON and BEVERLY M. JOHNSON,)	
husband and wife,)	
Respondents.)	

The undersigned declares under penalty of perjury, as follows:

I am over the age of majority and competent to testify as to the matters set forth herein;

I am an employee of Phillips, Krause & Brown, and not a party to this action;

That on March 23, 2011, I hand-delivered a true and correct copy of:

- REPLY BRIEF OF APPELLANT

To:

Thomas A. Brown
Brown, Lewis, Janhunen & Spencer
101 E. Market Street, Suite 501
Aberdeen, WA 98520

DATED: March 23, 2011


Molly Bates