

No. 43620-5-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

RUBY JUMAMIL, Appellant,

vs.

NOEL COON and DOUGLAS WEST, Respondents

AMENDED BRIEF OF RESPONDENT NOEL COON

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I. SUMMARY OF ARGUMENT

This is an appeal arising from an order on summary judgment, dismissing plaintiff Jumamil's de minimis claims against Mr. Noel Coon individually for alleged wage withholding and wage rebating she also asserted against her employer, Lakeside Casino, L.L.C. d/b/a Freddie's Casino.¹ In Mr. Coon's motion for summary judgment, Mr. Coon set forth specific facts showing that he had no knowledge or involvement of any kind in the activities underlying Ms. Jumamil's claims. Nowhere in Ms. Jumamil's appellant's brief does she argue that she established any questions of material fact on summary judgment that was granted by the trial court on January 13, 2012, that Mr. Coon had any knowledge or involvement in the facts or events underlying her claims.

Instead, Ms. Jumamil argues that Washington's wage claim statutes, RCW 49.52.050 and RCW 49.52.070 should be construed beyond the plain language of the statutes, to provide for strict liability without any proof of culpability. This argument is not supported by the statutes

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It was only after some discovery that it was learned that Ms. Jumamil's claimed unpaid wages totaled approximately \$278. CP124-125; CP 86. At the time of summary judgment, Ms. Jumamil described her wage rebating claim was a "small percentage" of \$2300. CP 120. As Ms. Jumamil testified in her deposition, "I don't know if it's 0.1; I don't know if it's 8 percent. . . ." Id.

themselves, and has been flatly rejected by our Supreme Court. Pope v. Univ. of Wash., 121 Wn.2d 479, 491 n.4, 852 P.2d 1055 (1994)(The ... argument that RCW 49.52.050 establishes liability without fault is not persuasive. . . .Affirmative evidence of intent to deprive an employee of wages, however, is necessary to establish liability under RCW 49.52.050.”).

Subsequent to the dismissal of Mr. Coon from this case, Ms. Jumamil filed a second lawsuit in 2012 against Freddie’s Casino manager, Jack Newton, alleging the very same wage claims she asserts Mr. Coon is liable for on this appeal.² Mr. Newton tendered the amount of Ms. Jumamil’s claimed wages, which tender was accepted. Mr. Newton was then dismissed from Ms. Jumamil’s second lawsuit, with prejudice.

II. STATEMENT OF THE CASE

Ms. Jumamil was terminated from job as a poker dealer at Feddie’s Casino in Fife, Washington , on or about August 17, 2010. CP 81-82. Freddie’s Casino is a d/b/a of Lakeside Casino, L.L.C., a Washington limited liability company. Thereafter, Ms. Jumamil filed a complaint

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As set forth below, Commissioner Schimdt entered a January 9, 2013, order allowing evidence of the second lawsuit the tender of wages, and the dismissal of Mr. Newton to supplement the record on review. CP 638.

herein in October 2010, alleging the following seven (7) causes of action: (1) minimum wage act violations; (2) rebating of wages; (3) consumer protection act violations; (4) wrongful discharge in violation of public policy; (5) defamation; (6) negligent infliction of emotional distress; and (7) outrage. CP 1-7. During discovery, it was learned that Ms. Jumamil's sole cause of action against Noel Coon was Ms. Jumamil's second cause of action under the wage claim statute found at RCW 49.52.070. CP 100. Under that statute, an officer, vice principal or agent of an L.L.C. employer can only be personally liable if they collect or receive a rebate of an employee's wages or if they "wilfully and with intent to deprive the employee of any part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract." RCW 49.52.050; RCW 49.52.070 (1) and (2). Copies of RCW 49.52.050 and RCW 49.52.070 are attached hereto in Appendix A.

On December 16, 2011, Mr. Coon filed a motion for summary judgment on the basis that he had not willfully or intentionally deprived the Ms. Jumamil of any wages she might be due, nor had he received any rebate of Ms. Jumamil's wages. CP 81-92.

By way of background, Noel Coon had only been a part owner of Ms. Jumamil's employer, Lakeside Casino, L.L.C., since 2007. CP 93. Mr. Coon was not one of founding members of defendant Lakeside Casino, L.L.C. and had never intended to get into the casino business. Id. In fact, Mr. Coon only acquired a fifty-one percent (51%) part ownership of the Lakeside Casino, L.L.C., as a result of tragic circumstances when one of Lakeside Casino, L.L.C.'s owners, Eugene Mudarri, died in January 2007. Id. Eugene Mudarri had owned Lakeside Casino, L.L.C. jointly with his wife, Susan Mudarri, who later became a named defendant in this case. Id.; CP 1-2. In order to assist Susan Mudarri, Mr. Coon agreed to purchase a 51% interest in Lakeside Casino, L.L.C. CP 93-94.

Although Mr. Coon has been a part owner of Lakeside Casino, L.L.C., since 2007, he did not manage the business. CP 94. In addition to the fact that Mr. Coon resides in Texas instead of Washington where the casino was located, Mr. Coon's primary business is an underground utility and pipeline construction business that does most of its work in Canada. Id. Mr. Coon rarely even visited Freddie's Casino. Id. Even then, when Mr. Coon did visit Freddie's Casino, it was generally just to say hello to the managers, and to maybe have lunch in the casino's restaurant. Id. The casino managers were the persons who ran Lakeside Casino, L.L.C. with

virtually no involvement from Mr. Coon. Id.

The fact that Mr. Coon did not actively manage or run the casino, and the fact that he had absolutely no involvement in any alleged wage withholding or wage rebating is borne out by the following undisputed facts, none of which were contested by Ms. Jumamil in her response to Mr. Coon's motion for summary judgment.³

1. Mr. Coon had never even written a check on behalf of Lakeside Casino, L.L.C., let alone any payroll checks, CP 94;
2. Mr. Coon had not set any employee wages, Id.;
3. Mr. Coon had not made any decisions regarding the payment or non-payment of wages to casino employees, Id.;
4. Mr. Coon had not set any employee work shifts or schedules, Id.;
5. Mr. Coon was not aware of employee policies or procedures that had been developed or implemented that govern the employer/ employee relationship with casino employees, Id.;
6. Mr. Coon was not consulted or informed when new employee policies or procedures were implemented or old policies or procedures were changed, Id.;
7. Mr. Coon had not made any decisions regarding the hiring or firing of employees, Id.;

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See Ms. Jumamil's January 5, 2012, response to Mr. Coon's Motion for Summary Judgment, CP 619-629.

8. Mr. Coon wholly relied on the casino management of Lakeside Casino, L.L.C. to run Freddie's Casino, and to make all decisions regarding the hiring and firing of employees and the payment of their wages, and to develop and implement policies and procedures for the management of the casino employees, Id.;
9. Mr. Coon had never even met the Plaintiff or even met most of the employees at Freddie's Casino, Id.;
10. Mr. Coon did not receive a rebate of Plaintiff's wages, and had not even received a salary or owner distributions from Lakeside Casino, L.L.C. since acquiring an ownership interest in 2007, CP 94-95; CP 84;
11. Prior to the Plaintiff's termination and her subsequent claim for damages, Mr. Coon was unaware of any policies in place at the Casino whereby poker dealers providing "dealer support"⁴ would be given consideration in determining who would be sent home when the casino got slow, CP 94; and
12. Mr. Coon was unaware that a poker dealer's amount of "dealer support" was being tracked by the casino managers and was unaware of whether those dealers who provided "dealer support" during hours other than their regular shift

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"Dealer Support" refers to a practice whereby poker dealers who are not dealing poker will sit down and play poker at another poker dealer's table to keep the game from ending due to a lack of other poker players. In that way, the poker dealer can continue to earn tips, which comprise the majority of a poker dealer's earnings. CP 106-107; CP 104. Ms. Jumamil provided "dealer support" prior to April 2010, when she claimed such a practice was voluntary. Likewise, other dealers provided her dealer support. CP 107. After April 2010, Ms. Jumamil claimed that providing 6 hours of dealer support was mandatory. CP 3. Sometimes she provided dealer support "on the clock" while getting paid. CP 108-109. After April 2010, Ms. Jumamil did put in dealer support for a few weeks. CP109-110. After she decided she could no longer provide dealer support, her schedule did not change. CP 110. After she ceased providing dealer support, she believes that she was sent home from work early on only 3-4 occasions. CP110.

would be paid or not. CP 94.
CP 378-379.

At the hearing on Mr. Coon's Motion for Summary Judgment, when the trial court asked Ms. Jumamil's counsel to respond to Mr. Coon's arguments, Ms. Jumamil's counsel began by conceding that none of the above facts were contested, claiming that the facts were "not relevant", stating as follows:

MR. GILMAN: Very briefly, Your Honor. The facts that we didn't contest, we didn't contest because they're not relevant here. The inference is reasonable. Mr. Coon signed documents that say he is the manager, that he has exclusive control over the company and that he has control over the agents who he hires.

See January 13, 2012, Report of Proceedings at RP 37, lines 19-24.

Indeed, Ms. Jumamil's own sworn deposition testimony established on summary judgment that Ms. Jumamil had no evidence that Mr. Coon had done anything willfully or intentionally to deprive her of her wages as follows⁵:

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16 Q Well, I'll do my best to rephrase it, Ms. Jumamil, but
17 it's a little difficult, because we're dealing with a
18 claim under our wage-claim statutes and I'm trying to be

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During Ms. Jumamil's four years of employment at Freddie's Casino, she believed that she saw Mr. Coon one time, having lunch, but she never met him nor would she know what he looked like is she saw him. CP 102-103.

19 precise here. Otherwise I'll get objections from your
20 attorney that he objects to the form of the question.
21 So the statute says that a owner basically -- in
22 essence, the owner of a company can be liable for
23 underpayment of wages if they "willfully and with an
24 intent to deprive" an employee of their wages, pays them a
25 lower amount than they're due. So my question goes to the

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1 willfulness element. Are you aware of anything Mr. Coon
2 did willfully to not pay you the amount that you listed in
3 answer to Interrogatory No. 6 on Exhibit 14?

4 A No.

5 Q Okay. Are you aware of any intent on the part of Mr. Coon
6 to not pay you the amounts listed in Interrogatory No. 6
7 on Exhibit 14?

8 A No.

CP 115.

Ms. Jumamil also testified that, during her tenure at Freddie's Casino, persons other than Mr. Coon managed the casino. While Ms. Jumamil worked at Freddie's Casino, Doug West was one of the poker room supervisors. CP101. "Ben" was the poker room manager. CP101-102. Ms. Jumamil further understood that Jack Newton was the manager of the entire casino, CP 102, and that Mr. Newton, rather than Mr. Coon, was the only one at the casino to make any final decisions regarding the operation of the casino as follows:

16 Q So as far as you knew during the time you worked at the

17 casino from 2006 through the summer of 2010, did you ever
18 know anyone other than Mr. Newton to make the final
19 decisions at the casino?

20 A No.

21 Q So he was the only person you knew to be in charge of the
22 casino.

23 MR. GILMAN: Object to the form.

24 A Yes

CP 114; see also CP 102 (“Jack Newton is the one that runs the whole,
entire place.”)

However, instead of filing suit against Mr. Newton whom Ms. Jumamil knew made all final decisions at Freddie’s Casino, Ms. Jumamil chose to name both Mr. Coon and Susan Mudarri individually as the co-owners of Lakeside Casino, L.L.C., despite having no facts to indicate either Mr. Coon or Ms. Mudarri had any knowledge or involvement in the actions underlying her wage claims. CP 102-103; CP 115.

When faced with Mr. Coon’s motion for summary judgment that sought to dismiss the wage claims asserted against him individually, rather than attempt to rebut any of the facts set forth above, Ms. Jumamil argued that Mr. Coon is liable to her, without any measure of culpability, under the wage claim statutes, simply because he is listed as the managing member of Lakeside Casino, L.L.C. This argument-- that Mr. Coon is essentially strictly liable because he has the potential ability to manage the Lakeside Casino, L.L.C. under the terms of its Operating Agreement-- is

simply not supported by the wage claim statutes or the cases interpreting those statutes. Consequently, the trial court ruled as follows:

As to the dismissal of Mr. Coon in terms of personal liability, I'm going to grant your partial motion for summary judgment. I just don't see a nexus between this gentleman and what was going on at the casino. Again, I don't think he should be held personally responsible for a policy that at least there's indication that he had no knowledge of or control over. I think it would be -- I don't think there's a material issue of fact that he should be -- not be held personally responsible in regards to those actions based on his lack of any real active management or participation in the corporation and/or the casino. I just think the title alone does not automatically include him to be responsible.

That will be the ruling of the Court.

See January 13, 2012, Report of Proceedings at RP 42, lines 5-19.

Summary judgment under these undisputed facts was proper.

Nonetheless, Ms. Jumamil filed the instant appeal June 19, 2012.

Thirteen days later, on July 2, 2012, Ms. Jumamil filed a second lawsuit under Pierce County Cause No. 12-2-10502-8, alleging the very same wage claims that she asserts Mr. Coon and Mr. West are liable for on this appeal, against Freddie's Casino's manager, Jack Newton. CP 640-653.

On January 9, 2013, Commissioner Schmidt entered an order granting respondents' West and Coon's motion to supplement the record on review, allowing additional evidence that may change the result on

appeal. CP 638. That additional evidence includes the following: (1) Ms. Jumamil's July 2012 complaint alleging the exact same wage claims at issue in this appeal against casino manager, Jack Newton, CP 640-653; (2) Mr. Newton's tender of wages to Ms. Jumamil (double the amount claimed, plus interest), CP 655-657; (3) Ms. Jumamil's endorsement of the tendered check, CP 663; and (4) an order dismissing Mr. Newton with prejudice. CP 660-661.

Thus, Ms. Jumamil has been paid the exact same wages she continues to assert that Mr. Coon and Mr. West should be liable for on this appeal.

III. ARGUMENT

1. **The Court of Appeals applies a de novo standard of review regarding an order granting summary judgment.**

On appeal from an order granting summary judgment, the Court of Appeals engages in a de novo review, conducting the same inquiry as the trial court. Hodge v. Raab, 151 Wn.2d 351, 354, 88 P.3d 959 (2004). Summary judgment motions require the court to make its own decision on a factual issue where there is only one reasonable view of the evidence in the record at the time summary judgment is sought. Peterson v. Kitsap Community Federal Credit Union, ___ Wn. App. ___ 287 P.3d 27, 33 (Div.

2, Oct. 23, 2012); CR 56. Whether there may be a future jury trial is of no consequence to the standard on summary judgment. Either the non-moving party creates a question of fact with admissible evidence at the time of summary judgment, or she loses on summary judgment. “The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits considered at face value.” Hoff v. Mountain Const., Inc., 124 Wn. App. 538, 544, 102 P.3d 816 (2004)(citing Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986)). Instead, CR 56(e) specifically requires the following:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.
CR 56(e).

Moreover, as our Supreme Court stated in the case of Howell v. Blood Bank, 117 Wn.2d 619, 626-627 (quoting from Amend v. Bell, 89 Wash.2d 124, 129, 570 P.2d 138 (1977)):

A party may not preclude summary judgment by merely raising argument and inference on collateral matters:

[T]he party opposing summary judgment must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion. . . .

Accordingly, on summary judgment, Ms. Jumamil had an affirmative duty to establish that a question of fact existed regarding Mr. Coon's knowledge of or involvement in the payment or non-payment of her wages, or that he collected or received a rebate of her wages such that he might be found liable to her. Ms. Jumamil wholly failed in this regard. Summary judgment was appropriately granted.

2. The Court should disregard and/or strike all of Ms. Jumamil's arguments and evidence raised or occurring after the Court's January 13, 2012, Order Granting Summary Judgment.

On appeal from an order granting summary judgment, the Court of Appeals engages in the same inquiry as the trial court. Hodge v. Raab, 151 Wn.2d 351, 354, 88 P.3d 959 (2004). Consequently, the Court only considers the evidence and the issues raised below. Douglas v. Jepson, 88 Wn. App. 342, 347, 945 P.2d 244 (1997)(citing Wash. Fed'n of State Employees v. Office of Financial Management, 121 Wn.2d 152, 156-57, 849 P.2d 1201 (1993) and RAP 9.12.)

RAP 9.12, the rule governing the scope of review specifically for summary judgement rulings, clearly states as follows:

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.

The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel.

RAP 9.12 (emphasis added).

Accordingly, in this appeal, this Court of Appeals should only review the same evidence that was before the trial court at the time of the summary judgment hearing on January 13, 2012. Unfortunately, Ms. Jumamil's Appellant's Brief is replete with facts and assertions that were not part of the summary judgment motion before the trial court, and are therefore improperly raised before the Court of Appeals.

- a. **The Court should either strike or disregard facts or assertions that were not before the trial court on the summary judgment motion on January 13, 2012.**

The case law is somewhat unclear as to whether a motion to strike extraneous evidence not before the trial court on summary judgment is the appropriate procedure, or whether the respondent should just alert the Court to the extraneous materials that should not be considered in the appellant's brief. For example, in the recent decision in Engstrom v.

Goodman, 166 Wn. App. 905, 909, n.2, 271 P.3d 959 (2012), the Court of

Appeals stated as follows:

[A] motion to strike is typically not necessary to point out evidence and issues a litigant believes this court should not consider. No one at the Court of Appeals goes through the record or the briefs with a stamp or scissors to prevent the judges who are hearing the case from seeing material deemed irrelevant or prejudicial. So long as there is an opportunity (as there was here) to include argument in the party's brief, the brief is the appropriate vehicle for pointing out allegedly extraneous materials not a separate motion to strike.

However, in the case of Beaupre v. Pierce County, 161 Wn.2d 568, 576, n.3, 166 P.3d 712 (2007), our Supreme Court granted Pierce County's motion to strike discovery requests and responses that were submitted to the Court of Appeals but were not before the trial court on summary judgment. In ruling that the documents should be stricken, the Court further noted that the plaintiff made no attempt to follow the procedures in RAP 9.10 to supplement the record at the appellate level. Id.

Thus, under the holdings of Engstrom and Beaupre, supra, the Court should either strike or decline to consider argument and evidence that was not considered by the trial court on summary judgment.

- b. The following facts and assertions were not before the trial court at the time of the January 13, 2012, motion for summary judgment.**

In the case at bar, as set forth in the order granting Mr. Coon's motion for summary judgment, the following materials were considered by the trial court:

1. Defendants Coons' Motion for Summary Judgment;
2. Declaration of Thomas F. Gallagher in Support of Defendant's Motion for Summary Judgment;
3. Declaration of Noel Coon;
4. Plaintiff's Response to Defendants Coons' Motion for Summary Judgment;
5. Declaration of Eric Gilman in Response to Defendants' Respective Motions for Summary Judgment; and
6. Defendants Coons' Reply Memorandum re Motion for Summary Judgment.

CP 387-388.

However, on appeal, Ms. Jumamil's appellant's brief ("App. Br.") makes reference to the following facts that were outside the trial court's purview on summary judgment on January 13, 2012:

- a. The results of a jury trial months later (App. Br. p.2);
- b. The results of the later jury trial, other defenses that were raised at trial, and whether the Lakeside Casino, L.L.C., the limited liability company that did proceed to trial, appealed the jury verdict (App. Br. p. 4-5);
- c. Whether records had been disposed of at the casino, what jury instructions were given, and what findings the jury ultimately made (App. Br. p. 8, footnote 2);
- d. Whether Susan Mudarri, the 49% member of Lakeside Casino, L.L.C. filed bankruptcy before Ms. Jumamil's claims arose (App. Br. p. 9);

- e. Whether Mr. Coon's company, Hana Hou Wailea, L.L.C. owned the land and building where the casino was located (App. Br. p. 10);
- f. The entirety of the page eleven of Ms. Jumamil's appellant's brief, with the exception of the date the instant appeal was timely filed (App. Br. p. 11);
- g. The value of the real estate where Lakeside Casino, L.L.C. operated and whether Mr. Coon is "well-heeled" so that he could pay Ms. Jumamil's wages (App. Br. at 17);
- h. Whether Ms. Jumamil made claims against Lakeside Casino, L.L.C. in bankruptcy, and whether Ms. Jumamil has filed a separate "alter ego" lawsuit (App. Br. at 22);
- i. Whether a jury found Lakeside Casino acted willfully in withholding wages (App. Br. at 23); and
- j. Whether Mr. Coon is the sole, non-bankrupt member of Lakeside Casino, L.L.C. (App. Br. at 35).

Because all of these facts and assertions were not before the trial court on summary judgment, they should either be stricken by the Court of Appeals or simply not considered on appeal.

3. Ms. Jumamil's wage claims are barred by mootness and/or res judicata when Ms. Jumamil filed a separate lawsuit for the very same wage claims, accepted payment for her wage claims from Freddie's Casino's manager, Jack Newton, and then dismissed Mr. Newton from that with prejudice.

a. Ms. Jumamil's wage claim is moot.

Following a trial and the entry of a final judgment in the case at bar, including judgment on Ms. Jumamil's de minimis wage claims

against her employer, Lakeside Casino, L.L.C., Ms. Jumamil filed a second lawsuit on July 2, 2012, under Pierce County Superior Court Cause No. 12-2-10502-8, alleging the very same wage claims she asserts Mr. Coon should be liable for on this appeal, against Freddie's Casino's manager, Jack Newton. CP 640-653. Rather than seeking a dismissal on Ms. Jumamil's de minimis claims, Mr. Newton simply tendered to Ms. Jumamil double the amount of her claimed wages, plus interest. CP 655-657. Ms. Jumamil accepted the tender and cashed the check. CP 663. Mr. Newton was then dismissed from the second lawsuit, with prejudice. CP 660-661.

Ms. Jumamil's acceptance of payment for her wage claim renders this appeal moot. Simply put, even if this Court determines that Ms. Jumamil had created a question of material fact at the time of summary judgment regarding Mr. Coon's potential culpability for her wage claims, there is no need to remand this matter back to the trial court to determine whether Mr. Coon willfully deprived the plaintiff of her wages so that he may be personally liable under RCW 49.52.050 and 070, as Ms. Jumamil has already been paid those very wages.

- b. In the event that this Court overturns the dismissal of Mr. Coon on Summary Judgment, Ms. Jumamil's wage claim should still be barred by res judicata.**

Washington law prohibits the filing two separate lawsuits based on the same event, which is known as “claim splitting.” Ensley v. Pitcher, 152 Wn. App. 891, 898, 222 P.3d 99 (2009). Res judicata bars such claim splitting if the claims are based upon the same cause of action. Id. at 899 (citing 14A Karl B. Tegland, Washington Practice: Civil Procedure § 35.33, at 479 (1st ed.2007) (distinguishing collateral estoppel's requirement that the issue be actually litigated from res judicata's more lenient standard where issues that could have been litigated and resolved are barred)).

Res judicata acts to bar duplicative litigation, where the subsequent action⁶ is identical with a prior action in four respects: “(1) persons and parties; (2) causes of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made.” Id. at 902. Different defendants in separate suits are the same party for res judicata purposes as long as they are in privity. Kuhlman v. Thomas, 78 Wn. App. 115, 121, 897 P.2d 365 (1995).

In Kuhlman v. Thomas, the plaintiff first filed suit against his

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While res judicata is typically employed to bar subsequent actions, the principle of avoiding duplicative actions still applies when Ms. Jumamil seeks to recover the very same damages from Respondents Coon and West should this case be remanded to the trial court, even though she has already been paid for her damages in a later action.

employer, the Seattle Housing Authority, alleging various claims arising out of the employer/ employee relationship. After the first lawsuit was dismissed on summary judgment, the plaintiff filed a second lawsuit against individual officers and employees whom he blamed for the employment claims. In holding that the second lawsuit was barred by res judicata, the Kulman court held that the employer/employee relationship is sufficient to establish privity for res judicata. Kuhlman, 78 Wn. App at 121–22 (holding that where the ultimate issue of whether the employer had violated the plaintiff's rights turned on the propriety of its employees conduct, the parties must be viewed as sufficiently the same, “if not identical”).

In the instant case on appeal, Ms. Jumamil previously alleged wage claims against her employer, Lakeside Casino, L.L.C. , one of its owners, Respondent Coon, and one of her supervisors, Respondent West. Following a final judgment in this case, she filed the identical wage claims against Lakeside Casino, L.L.C.’s manager, Jack Newton. For purposes of res judicata, Ms. Jumamil’s employer, Lakeside Casino, L.L.C. and its agents, Respondents Coon and West, as well as the casino’s former manager, Jack Newton, are identical. It is undisputed that Ms. Jumamil accepted payment for her claimed wages from Mr. Newton, and dismissed

him with prejudice. Thus, even if this Court reverses the trial court's grant of summary judgment dismissing Mr. Coon, for purposes of res judicata, the payment of Ms. Jumamil's wage claims by Mr. Newton, and the Order of Dismissal of Mr. Newton on those claims should bar re-litigating those identical claims against Mr. Coon.

4. The undisputed facts on summary judgment showed that Mr. Coon had no involvement with the payment or non-payment of Ms. Jumamil's wages or the wages of anyone else at Freddie's Casino.

Ms. Jumamil's only claims against Mr. Coon stem from her allegations that she was not paid all of her wages and that some of her wages were rebated, and therefore, despite his lack of involvement, under Washington's wage claim statutes, Mr. Coon should be found personally liable.

RCW 49.52.050, which serves as part of the statutory basis for Plaintiff's claim, states in material part, as follows:

Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who

(1) Shall collect or receive from any employee a rebate of any part of wages theretofore paid by such employer to such employee; or

(2) Wilfully and with intent to deprive the employee of any

part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract; or

...

Shall be guilty of a misdemeanor.

Thus, RCW 49.52.050 provides for criminal liability on the part of persons who collect rebates of wages or who willfully refuse to pay an employee's wages. Thereafter, RCW 49.52.070 then goes on to establish civil liability for persons who collect rebates of wages or willfully refuse to pay an employee's wages as follows:

Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of RCW 49.52.050 (1) and (2) shall be liable in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees:

PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

RCW 49.52.070.

Thus, under this statutory scheme, persons who commit a misdemeanor crime by violating the provisions of RCW 49.52.050(1) or (2) are civilly liable under RCW 49.52.070.

Washington law is clear that damages pursuant to RCW 49.52.070

are only available "for the willful withholding of wages." Lillig v. Becton-Dickinson, 105 Wn.2d 653, 659, 717 P.2d 1371 (1986). "The non-payment of wages is willful when it is the result of a knowing and intentional action. . . ." Lillig, 105 Wn.2d at 659; see also Chelan County Deputy Sheriffs' Ass'n v. County of Chelan, 109 Wn.2d 282, 300, 745 P.2d 1 (1987). To prove a violation of RCW 49.52.050, the employee must provide affirmative evidence of intent to deprive an employee of wages. Pope v. Univ. of Wash., 121 Wn.2d 479, 491 n.4, 852 P.2d 1055 (1994). Because RCW 49.52.050 includes the element of willfulness, in order to find personal liability on the part of an officer, vice principal or agent of any employer for the non-payment of wages under RCW 49.52.070, a claimant must prove that the officer, vice principal or agent willfully exercised control over the non-payment of wages. See e.g. Ellerman v. Centerpoint Prepress, Inc., 143 Wn.2d 514, 22 P.2d 795 (2001); see also Pope v. Univ. of Wash., supra, 121 Wn.2d 479, 491 n.4 ("The ... argument that RCW 49.52.050 establishes liability without fault is not persuasive.").

In the case at bar, Ms. Jumamil failed to come forward with any evidence at the time of summary judgment that Mr. Coon knowingly and willfully exercised control over the non-payment of wages. Consequently, summary judgment was appropriate.

- a. **Only persons who have control over the payment of wages, and who act pursuant to that authority, may be found liable under the wage claim statutes.**

In Ellerman v. Centerpoint Prepress, Inc., 143 Wn.2d 514, 22 P.2d 795 (2001), our Supreme Court addressed the issue of who may be personally liable under the wage claim statutes found in RCW 49.52.050 and RCW 49.52.070. There, Betty Handly was the manager of Centerpoint Prepress, Inc. In her job as manager, Betty Handly oversaw the corporation's business affairs. Id. at 517. However, she had no authority to write checks. Instead, Rosemary Widener, the corporation's president, was the only person who actually signed checks on behalf of the corporation. Id. When an employee, Ellerman, did not receive his full pay, he filed suit against Ms. Handly, Ms. Widener and Centerpoint Prepress, Inc. Id. Ms. Widener and Centerpoint Prepress, Inc. settled with Ellerman, leaving only Betty Handly as a defendant at trial. Id.

At trial, the court determined that manager Betty Handly had no liability for unpaid wages on the basis that she was not an "employer" liable for wages and she had not violated any statutory provisions. Id. at 517-518. Ellerman appealed.

On appeal, the Court of Appeals affirmed the judgment in favor of

Betty Handly, concluding that Betty Handly was not personally liable because she was not “an officer, vice principal or agent” of her employer responsible for the payment of wages. Id. at 518. Our Supreme Court later affirmed the Court of Appeals.

There, our Supreme Court stated as follows:

It does not, however, follow that Handly is personally liable for the wages that were not paid to Ellerman or for exemplary damages. We say that because, in our view, the statute requires more than a finding that the putative vice principal is managing the employer's business. It requires the vice principal to withhold wages [w]ilfully and with intent to deprive the employee of his wages. RCW 49.52.050(2). **Thus, we conclude that a vice principal cannot be said to have willfully withheld wages unless he or she exercised control over the direct payment of the funds and acted pursuant to that authority.** Although the dissent suggests that our determination is inconsistent with the common law definition of vice principal, we are satisfied that it accords with a sensible interpretation of the meaning of the statutes in question. If we reached the conclusion advanced by Ellerman, then any supervisor or manager of an employee might have personal liability if the company did not pay the employee, regardless of whether the manager or supervisor had any control over how and when the company paid its employees. Such a result would be inconsistent with the plain language of the above mentioned statutes.

Ellerman, 143 Wn.2d at 521. (emphasis added).

Thus, the Court in Ellerman announce the rule that only persons who have control over the payment of wages, and who act pursuant to that authority, may be found liable under the wage claim statutes. Because it

was Rosemary Widener, rather than Betty Handly, who had authority to sign checks and was the only person who did so, Betty Handly was not liable for Ellerman's wage claim. Id. at 523.

In Morgan v. Kingen, 141 Wn. App. 143, 157 P.3d 487 (2007), affirmed 166 Wn.2d 526 (2009), the issue before the Court of Appeals was whether corporate officers were personally liable for the non-payment of wages. There, the corporate officers were found to be liable, when "[t]hey made decisions about payroll, controlling payments to employees and other creditors based on their decisions about which [of the corporation's] competing creditors would be paid." Id. at 156-157. Thus, consistent with the rule announced in Ellerman, personal liability attached where the corporate officers "exercised control over the direct payment of the funds and acted pursuant to that authority." Ellerman, supra, 143 Wn.2d at 521.

b. On summary judgment, Ms. Jumamil presented no facts to show that Mr. Coon had any knowledge or involvement in the nonpayment of her wages.

At the outset, it is important to note that it is undisputed that Ms. Jumamil's employer was Lakeside Casino, L.L.C., d/b/a Freddie's Casino. Mr. Coon is but one of two members of that L.L.C. During her deposition, Ms. Jumamil conceded that she was unaware of any facts that Mr. Coon

had any involvement in the nonpayment of the wages she claimed in this case as follows:

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16 Q Well, I'll do my best to rephrase it, Ms. Jumamil, but
17 it's a little difficult, because we're dealing with a
18 claim under our wage-claim statutes and I'm trying to
be
19 precise here. Otherwise I'll get objections from your
20 attorney that he objects to the form of the question.
21 So the statute says that a owner basically -- in
22 essence, the owner of a company can be liable for
23 underpayment of wages if they "willfully and with an
24 intent to deprive" an employee of their wages, pays
them a
25 lower amount than they're due. So my question goes
to the

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1 willfulness element. Are you aware of anything Mr.
Coon
2 did willfully to not pay you the amount that you listed
in
3 answer to Interrogatory No. 6 on Exhibit 14?
4 A No.
5 Q Okay. Are you aware of any intent on the part of Mr.
Coon
6 to not pay you the amounts listed in Interrogatory No.
6
7 on Exhibit 14?
8 A No.
9 Q Do you have an understanding of where Mr. Coon
lives?
10 A Uh, Texas? I don't know; that's what I heard of.
11 Q And are you aware of how often Mr. Coon even
visits the
12 Lakeside Casino?
13 A No.

14 Q You only saw him one time in four years; is that right?

15 A Yes.

CP 115.

In the case at bar, the trial court correctly determined that Mr. Coon is not liable for any damages Ms. Jumamil has asserted under RCW 49.52.050 and RCW 49.52.070 when he had no involvement in the payment or non-payment of Ms. Jumamil's wages. As a resident of Texas and an absentee part owner of Lakeside Casino, L.L.C., Mr. Coon was not involved in any of the day to day management of the casino business. CP 93-94. Mr. Coon had never written any checks, payroll or otherwise, on behalf of the business. CP 94. Mr. Coon had never scheduled employees to work, set work hours, or set any policies or procedures regarding the casino employees or casino operations. Id. To Mr. Coon's knowledge, he had never even met Ms. Jumamil. Id. Under these facts, and the holding of Ellerman, because Mr. Coon did not exercise any control over the payment of wages or otherwise oversee the payment or non-payment of wages, Mr. Coon is not personally liable to Ms. Jumamil. Summary judgment was appropriate.

5. **Ms. Jumamil's reliance on the case of Dickens v. Alliance Analytical Laboratories, L.L.C. is entirely misplaced when the Dickens court specifically declined to determine what level of**

management authority and what willful and intentional actions are necessary to create personal liability under the wage claim statutes.

Ms. Jumamil asserts that the case of Dickens v. Alliance Analytical Laboratories, L.L.C., 127 Wn. App. 433, 111 P.3d 889 (2005), supports a finding that Mr. Coon may be liable for her wage claims simply because of Mr. Coon's position as a member/manager of Lakeside Casino, L.L.C. However, the Court of Appeals's entire holding in that case was to affirm the trial court's denial of cross motions for summary judgment. Dickens, 127 Wn. App. at 433.

The Dickens case made its way to the Court of Appeals on a motion for discretionary review to answer four questions certified by the trial court regarding whether, under the holding of Ellerman v. Centerpoint Prepress, Inc., 143 Wn.2d 514, 22 P.2d 795 (2001), an agent of an entity can be liable under the wage claim statute, RCW 49.52.070, simply because an agent has certain authority, or whether it is necessary that the agent actually exercise that authority. Id. at 437.

The four questions certified by the trial court were as follows:

1. What is the definition of an "agent" under RCW 49.52.050, and what does a plaintiff have to prove in order to hold a defendant personally liable as an agent of an employer?

2. Is it enough that the purported agent have some power and authority to make decisions regarding the payment of wages, or must the purported agent have actually exercised such authority?

3. If actual exercise of authority is not required, what else, if anything must the plaintiff prove?

4. Does the summary judgment record allow either party to prevail as a matter of law on the certified issues?

Id. at 436.

However, the Court of Appeals declined to answer any of the four certified questions, stating that it would not provide any advisory opinions.

Id. at 437. Instead, the Court of Appeals confined review to “the narrow context of whether the trial court erred in denying the cross-motions for summary judgment on the issue of [one defendant’s] personal liability.”

Id.

In ruling that the trial court properly denied the cross motions for summary judgment, the Court of Appeals noted that there was a continued dispute as to the agent’s “management role and his knowledge of payroll matters.” Id. at 441. The Court further noted that the parties had an ongoing dispute as to the agent’s alleged “willful and intentional actions” that were “surrounded by material facts precluding summary judgment.”

Id. Thus, the Court of Appeals remanded the matter for further

development of the facts. Id. at 443. The Court of Appeals left intact the rule announced in Ellerman v. Centerpoint Prepress, Inc., 143 Wn.2d 514, 22 P.2d 795 (2001), that, to be liable under the wage claim statutes, a person must not only have the authority over the payment of wages, but that person must act pursuant to that authority.

Consequently, the case of Dickens does not preclude summary judgment in this case, where the Ms. Jumamil failed to come forward with any facts that Mr. Coon had any knowledge of payroll matters or that he committed any willful or intentional actions relating to the payment of her wages.

6. Ms. Jumamil failed to establish any question of material fact that Mr. Coon had ever received a rebate of Plaintiff's wages.

Plaintiff claims that her wages were rebated, based upon a “dealer support” policy that was briefly in place for a few months in 2010. In a nutshell, “dealer support” is the practice of a poker dealer sitting down and playing poker at another dealer’s table to keep the poker game going. CP 84, n. 1. Mr. Coon was unaware of the policy that was implemented at Freddie’s Casino briefly in 2010 whereby poker dealers who provided dealer support to other dealers would be given consideration in determining who to send home when the casino got slow. CP 84; CP 94.

However, in her deposition, the Plaintiff conceded that the poker losses she suffered while providing dealer support went to the other poker players at the table, and not to Freddie's Casino.

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- 8 Q (By Mr. Gallagher) I presume that while you were
doing
9 dealer support, you played some hands. Is that right?
10 A Right.
11 Q And some of the hands you lost; is that right?
12 A Right.
13 Q Okay. Other than the rake, where \$3 would go
towards the
14 house and \$2 would go to the jackpot, where did the
money
15 you lost go?
16 A To the other players.
17 Q And those were not casino employees; is that right?
18 A Uh, some of them are casino employees that sit on my
19 table; some of them are players.
20 Q But those casino employees, they were fellow dealers; is
21 that right?
22 A Yes.
23 Q So they didn't take money they won from you and hand it
24 back to the casino. They would keep it for themselves; is
25 that right?

191

- 1 A Yes.
2 Q Just like you would do if you won. You would keep money
3 from your fellow dealers for yourself.
4 A Yes.
CP 116-117.

Instead, as Ms. Jumamil concedes, only a very small percentage of her

gambling losses would have gone to Freddie's in the form of a \$3 "rake" taken for the casino's share of each game of poker and \$0.20 jackpot administration fee collected for each game of poker.⁷ CP 116-119.

Ms. Jumamil acknowledged that only a very small part of any gambling losses went to the Casino in the following testimony:

7 Q I'm not asking for a number. I'm asking if you agree with

8 me that only a very small amount of your money out of any

9 total hand that you played in went to the casino.

10 A I think so.

CP 118.

291

2 Q All right. So hypothetically, if we assume that your
3 gambling losses that you've listed in your
interrogatory

4 answers are accurate -- even though you claim they're
5 estimates, we have around \$2,300 worth of gambling
losses

6 -- you can't tell me how much of that money would
have

7 gone to the casino in the form of the rake or in the
form

8 of any money taken out of the jackpot.

9 A No, I don't.

7

The \$3 rake and a \$0.20 jackpot administration fee that went to the Casino would necessarily be comprised of the combined funds of the other poker players who wagered in the game, the poker players who placed the "big blind" and "small blind" forced bets, and plaintiff's wagers, if any. Thus, the fractional percentage of the \$3 "rake" and \$0.20 administration fee that is attributable to Plaintiff cannot be determined unless the number of players wagering in a particular hand is known, the amount of each player's wagers is known, and the amount wagered by Plaintiff is known. CP 88.

10 Q So you would agree, based on your testimony last
time,

11 that it would be a small percentage of that.

12 A Yes, it's a small -- I don't know if it's 0.1; I don't
13 know if it's 8 percent. The fact that he still got some
14 of that amount.

CP 120.

Ms. Jumamil contended because providing dealer support would mean that some small percentage of Ms. Jumamil's \$2300 in gambling losses made their way back to the casino, that Noel Coon was personally liable under her wage rebating claim. However, in responding to Mr. Coon's motion for summary judgment, Ms. Jumamil wholly failed to submit any evidence that Mr. Coon collected or received any rebate of her wages.

RCW 49.52.050, states in material part, as follows:

Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who

(1) Shall **collect or receive** from any employee a rebate of any part of wages theretofore paid by such employer to such employee; or

Shall be guilty of a misdemeanor.

RCW 49.52.050 (emphasis added). RCW 49.52.070 then goes on to establish civil liability for certain wage claim violations as follows:

Any employer and any officer, vice principal or agent of

any employer who shall violate any of the provisions of RCW 49.52.050 (1) and (2) shall be liable in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

RCW 49.52.070.

In the case at bar, Ms. Jumamil failed to present the trial court with any evidence at the time of summary judgment that Mr. Coon ever “collected” or “received” any part of Ms. Jumamil’s wages as required to establish liability under RCW 49.52.050.

Instead, the facts submitted at summary judgment showed that Mr. Coon had no involvement with any alleged wage rebating. Mr. Coon did not recall ever meeting Ms. Jumamil. Mr. Coon was likewise unaware of any “dealer support” policy that was in place at Freddie’s prior to Ms. Jumamil’s termination of employment. Moreover, Mr. Coon had not received any salary or owner distributions since he acquired a part ownership of Lakeside Casino, L.L.C., let alone any portion of Ms. Jumamil’s wages. CP 95. Thus, Ms. Jumamil wholly failed to establish that Mr. Coon collected or received any monies from her, which is fatal to

her wage rebating claim she asserted.

In short, Ms. Jumamil's claim that Mr. Coon is individually liable for a wage rebating claim, when there was no evidence that Mr. Coon had done absolutely nothing wrong vis-a-vis Ms. Jumamil, was properly dismissed on summary judgment.

7. As the Court of Appeals is free to affirm the trial court on any grounds, as Mr. Coon argued on summary judgment, no rebating of wages has even occurred under these facts.

An appellate court can sustain the trial court's ruling on summary judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it. Kinney v. Cook, 150 Wn. App. 187, 192, 208 P.3d 1 (2009). Here, this Court can sustain the dismissal of Ms. Jumamil's claims on the basis that no wage rebating has occurred.

The Washington Legislature enacted the "anti-kickback" statute, RCW § 49.52.050(1), in 1939 "to prevent abuses by employers in a labor-management setting, e.g., coercing rebates from employees in order to circumvent collective bargaining agreements." Ellerman v. Centerpoint Prepress, Inc., 143 Wn.2d 514, 519, 520, 22 P.3d 795 (2001). To violate subsection (1) of RCW 49.52.050, an employer must "collect or receive" a

"rebate" of wages "theretofore paid". The term "rebate" is not defined in the statute. Therefore, the term is given its plain and ordinary meaning as defined in a standard dictionary. State v. Marohl, 170 Wn.2d 691, 699, 246 P.3d 177(2010). "Rebate" is defined as "a retroactive abatement, credit, discount, or refund" Webster's Third New International Dictionary p. 1892 (1993).

The rebating of wages portion of RCW 49.52.050 has rarely been applied or interpreted since the "anti-kickback" statute was enacted in 1939. In the case of McDonald v. Wockner, 44 Wn.2d 261, 267 P.2d 97 (1954), our Supreme Court affirmed a trial court's finding that an employer had rebated wages from one of his employees. In McDonald, the employee worked as a car salesman at an automobile dealership. The salespersons were employed under a collective bargaining agreement and were paid commissions for car sales. Shortly after each payday, the employee would go into the employer's office where, with the blinds down, he would pay his employer in cash the amount by which his sales commissions exceeded the sum of three hundred fifty dollars. Id. at 263. Not too surprisingly, under these facts where the employee was required to directly repay his wages to his employer, our Supreme Court affirmed the finding that the employee's wages had been rebated.

Just because a portion of an employee's wages may later be applied for the benefit of an employer does not mean that RCW 49.52.050 has been violated. In State v. Carter, 18 Wn.2d 590, 615, 142 P.2d 403 (1943), Carroll Carter, the King County Clerk, successfully ran for and was elected as the King County Treasurer. During the course of the campaign, Carter incurred some unpaid campaign debts totaling \$3500. Id. Following the election, Carter gave the employees of the treasurer's office pay raises, and elevated one employee to the position of chief clerk with an accompanying pay raise of over 30%. Id. Upon the chief clerk learning that Carter had incurred \$3500 in unpaid campaign debts, the chief clerk scheduled a meeting of the treasurer's office as follows:

At that meeting, which was attended by all of the appointive office employees, [the chief clerk] opened the discussion by stating that their 'new boss,' the defendant, had taken steps to see that they were well treated, and that they should all feel satisfied to work for 'a man like that.' Then, after explaining that the defendant had contracted a 'political debt' of about thirty-five hundred dollars, [the chief clerk] stated that the meeting had been called to ascertain the opinion of those present 'as to liquidating the debt for Mr. Carter.' After some general discussion, it was suggested that the amount be raised by contributions from the employees in proportion to their respective salaries. The suggestion was adopted and [the chief clerk] agreed to compute the amount of each employee's proposed contribution and make the collections accordingly.

...

Pursuant to the understanding previously had, [the chief clerk] computed the amounts of the expected contributions on the basis of a sum equivalent to ten per cent of each employee's salary during each of the next three months. . . . Some of the employees, however, being or becoming dissatisfied with the proposed arrangement for contribution, declined thereafter to take part, and later voluntarily resigned their positions.

Id. at 616-617.

Later, one of the treasurer's office employees made a complaint to the chief deputy prosecuting attorney that the employees in the office of the treasurer were rebating a portion of their wages to Carter. Id. at 617.

Carter was charged, and later convicted of 8 counts under the "anti-kickback" statute for receiving a rebate of his employee's wages. Id. at 618.

On appeal, our Supreme Court reversed the convictions that Carter had received a rebate of his employees' wages. There, our Supreme Court reasoned "[h]aving once received his wages in full, the employee is at liberty to do what he will with his earnings, so long as he does not violate some positive rule of law governing his action. He may keep the money in his pocket, invest it, spend it, or give it away." Id. at 622. If the contribution is voluntary, it does not necessarily constitute a rebate of wages merely because it moves to, or for the benefit of, the employer. Id.

at 623. In concluding that Carter had not received a rebate of his employees' wages, the Court stated "[i]f an employee exercises his free choice in making a contribution, even though in response to a request [on behalf of the employer], his act does not amount to a rebate of his wages within the meaning of the [anti-kickback] statute. . . ." Id. (emphasis added).

Ms. Jumamil unequivocally stated in her deposition that the Dealer Support policy was not mandatory as follows:

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20 Q Okay. Did anybody ever say you would be fired if you

21 didn't do it?

22 A No.

23 Q Did you ever read anywhere that you would be fired if you

24 didn't do it?

25 A No.

CP 108⁸

107

4 Q Okay. Now, were you able to put in your six -- After this

5 vote --

6 A Yes.

7 Q -- happened, were you able to put in your six hours per

8

Later, in the same deposition, Ms. Jumamil inexplicably recanted her earlier statement and claimed that she was told that she would no longer have a job if she did not provide dealer support. CP 263.

8 week?

9 A Yes, for a few weeks.

10 Q Okay. Did your schedule at all change for those few
11 weeks?

12 A No.

107

22 Q Okay. So let me go back. So you did it for a few
weeks.

23 After that you decided you couldn't do it any longer.

24 A Yes.

25 Q Okay. Did your schedule change?

108

1 A No.

CP 110.

In the case at bar, Ms. Jumamil elected to play poker for 6 hours a week at the beginning of the dealer support policy, and a few weeks later chose not to play poker for 6 hours a week. Thus, Ms. Jumamil's own actions show that she understood the dealer support policy to be voluntary. Because the Dealer Support policy was voluntary, under the holding of State v. Carter, supra, the fact that a miniscule portion of amounts wagered by Ms. Jumamil under this policy may have made its way to the casino in the form of the \$3 rake and \$0.20 jackpot administration fee from each poker game, does not constitute a rebating of Ms. Jumamil's wages.

Consequently, under these facts, the Court of Appeals should affirm the trial court's grant of summary judgment on the alternate basis

that no wage rebating has occurred.

8. Ms. Jumamil's claim that Mr. Coon should be liable for failing to monitor the persons who are actually managing Lakeside Casino, L.L.C. is without merit.

In Ms. Jumamil's appellant's brief, she argues that Mr. Coon should not be able to escape personal liability if he failed to supervise those persons who manage, operate and make payroll decisions for the Lakeside Casino, L.L.C. She also asks the Court to re-write the liability portions of RCW 49.52.070 to find a "controlling owner" liable if they delegate authority to employees, and then fail to supervise the employees. See Appellant's Brief at p. 20. However, this unsupported argument fails for several reasons. First, RCW 25.15.125 broadly protects members and managers of a limited liability company from personal liability for obligations of the limited liability company as follows:

- (1) Except as otherwise provided by this chapter, the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations, and liabilities of the limited liability company; and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation, or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.
- (2) A member or manager of a limited liability company is personally liable for his or her own torts.

RCW 25.15.125.⁹

Thus, Mr. Coon is protected from liability under the limited liability statutes, except for his own torts.

Second, as stated above, while RCW 49.52.070 can impose personal liability on a company's officer for the failure of a company to pay wages, only if there is "knowing and intentional" action of the officer leading to the non-payment of wages. Lillig v. Becton-Dickinson, 105 Wn.2d 653, 659, 717 P.2d 1371 (1986). However, under well settled authority, an employer will not be liable under RCW 49.52.070 for the willful withholding of wages if the employer was careless in failing to pay the employee wages due. Morrison v. Basin Asphalt Co., 131 Wn. App. 158, 163, 127 P.3d 1 (2005)(citing Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 160, 961 P.2d 371 (1998)); see also Pope v. Univ. of Wash., 121 Wn.2d 479, 491 n.4, 852 P.2d 1055 (1994)(a lack of intent to deprive an employee of wages may be established either by a finding of carelessness).

In the case at bar, Ms. Jumamil does not dispute that Mr. Coon was unaware of the facts underlying his wage claim. Thus, she came forward

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Members of an L.L.C. can be liable under circumstances that would warrant the piercing of the corporate veil for a corporation. RCW 25.15.060.

with no evidence of any intent on the part of Mr. Coon to deprive her of any wages. Instead, she argues that Mr. Coon did a poor job in managing the Lakeside Casino, L.L.C. However, under Morrison v. Basin Asphalt Co., supra, Schilling, supra, and Pope, supra, such carelessness in the management of the limited liability company specifically negates any finding of an intentional withholding of wages.

Thus, Ms. Jumamil's argument that Mr. Coon should be liable for the failure to manage Lakeside Casino, L.L.C fails when Mr. Coon is specifically protected by the limited liability company statute, RCW 25.15.125, and when any failure to manage the L.L.C. is mere carelessness, which negates any finding of willful action necessary to establish liability under RCW 49.52.070. Ms. Jumamil's arguments that liability should be imposed for failure to manage the L.L.C. are not well taken.

9. Ms. Jumamil should be denied any attorney's fees for this appeal.

Ms. Jumamil has requested attorney's fees should she prevail on this appeal. However, if this Court were to find that Ms. Jumamil had created a question of material fact at the time of Mr. Coon's January 13, 2012, summary judgment hearing, then this matter should be remanded to the trial court so that Mr. Coon can have his day in court regarding the willfulness of his actions or whether he actually collected or received wage

rebates. Accordingly, the issue of whether Ms. Jumamil is entitled to any attorney's fees should either be denied if the trial court is affirmed, or it should abide the final decision in the trial court.

IV. CONCLUSION

Based on the foregoing argument, Mr. Coon respectfully requests that the Court affirm the trial courts grant of summary judgment on January 13, 2012, dismissing Mr. Coon as a party defendant.

DATED this 22nd day of January, 2013.

**THE LAW OFFICES OF
WATSON & GALLAGHER, P.S.**



Thomas F. Gallagher, #24199
Attorney for Noel Coon

APPENDIX A

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[RCWs](#) > [Title 49](#) > [Chapter 49.52](#) > [Section 49.52.050](#)

[49.52.040](#) << [49.52.050](#) >> [49.52.060](#)

RCW 49.52.050

Rebates of wages — False records — Penalty.

Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who

(1) Shall collect or receive from any employee a rebate of any part of wages theretofore paid by such employer to such employee; or

(2) Wilfully and with intent to deprive the employee of any part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract; or

(3) Shall wilfully make or cause another to make any false entry in any employer's books or records purporting to show the payment of more wages to an employee than such employee received; or

(4) Being an employer or a person charged with the duty of keeping any employer's books or records shall wilfully fail or cause another to fail to show openly and clearly in due course in such employer's books and records any rebate of or deduction from any employee's wages; or

(5) Shall wilfully receive or accept from any employee any false receipt for wages;

Shall be guilty of a misdemeanor.

[2010 c 8 § 12055; 1941 c 72 § 1; 1939 c 195 § 1; Rem. Supp. 1941 § 7612-21.]

Notes:

Severability -- 1939 c 195: "If any section, subsection, sentence or clause of this act shall be adjudged unconstitutional, such adjudication shall not affect the validity of the act as a whole or of any section, subsection, sentence or clause thereof not adjudged unconstitutional." [1939 c 195 § 5; RRS § 7612-25.] This applies to RCW [49.52.050](#) through [49.52.080](#).



[RCWs](#) > [Title 49](#) > [Chapter 49.52](#) > [Section 49.52.070](#)

[49.52.060](#) << [49.52.070](#) >> [49.52.080](#)

RCW 49.52.070

Civil liability for double damages.

Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of RCW 49.52.050 (1) and (2) shall be liable in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

[2010 c 8 § 12056; 1939 c 195 § 3; RRS § 7612-23.]

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

RUBY JUMAMIL,
Appellant,
v.
NOEL COON, et. vir,
Respondents.

NO. 43620-5-II

DECLARATION OF MAILING

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COURT OF APPEALS
DIVISION II
2013 JAN 22 PM 4:57
STATE OF WASHINGTON
BY _____
DEPUTY

Marie Ekstrand hereby declares and states as follows:

On January 22, 2013, I deposited into the U.S. Mail, postage prepaid, true and correct copies of the following documents in the above-captioned matter:

- 1. AMENDED BRIEF OF RESPONDENT NOEL COON

to be served on the following in the manner indicated below:

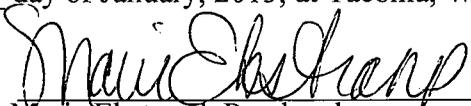
Counsel for Plaintiff/Appellant: Eric D. Gilman Stephanie Bloomfield 1201 Pacific Ave., Ste. 2100 Tacoma, WA 98402	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> _____
Washington State Court of Appeals Division Two 950 Broadway, Suite 300 Tacoma, WA 98402-4454	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Via E-mail: coa2filings@courts.wa.gov

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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 22 day of January, 2013, at Tacoma, Washington.



Marie Ekstrand, Paralegal