

FILED

AUG 10 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 302458

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

JANEE WOLF, Respondent,

v.

IDA MARKETING SERVICES, INC., ET AL, Appellants.

BRIEF OF RESPONDENT

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I. COUNTER STATEMENT OF THE CASE

IDA Marketing Services, Inc. was incorporated in 2004, and while not initially conducting business with the public, the corporate officers began preparations to launch their multi-level marketing product at least by 2006. *RP 149*. IDA started actively doing business in 2007 and began employing employees at that time. *RP 111*. Torry Webb, one of the incorporators, recruited Scott Richey to work with the company. *RP 258*. Mr. Richey was held out to the public and other employees of IDA as IDA's President. *RP 22*. The suggestion that Mr. Richey was only an independent contractor was a fact that was only known to Mr. Richey, Torry Webb and Justin Brunson. *RP 116*. Mr. Richey was designated as president of IDA on the company's website. *RP 120, 152*. Mr. Richey was given the designation as president of the company in mid-2007. *RP 27, 120*.

Mr. Webb and Mr. Brunson designated Mr. Richey as President to be the figurehead because they believed they needed him to lend credibility to the company and he was put in front of the investors and the general public to get that credibility. *RP 24, 154*. He was also listed as President on a conceptual organizational chart that was provided to the company employees and independent contractors at a pre-launch company event. *RP 24*.

Similar to the illusion that Scott Richey was the President of IDA, when according the Torry Webb and Justin Brunson he was not an officer of the company, IDA held out to the public that it had a Board of Directors with several influential business leaders on the board. *RP 153*. However, IDA never had a Board of Directors that was formally elected. *RP 59, 113*.

This case involves a dispute over compensation owed to Janeé Wolf for services she performed for IDA Marketing Services, Inc. from March 2008 through August 2008. *RP 43*. Defendants do not dispute that Janeé Wolf worked for IDA during the time period involved in this lawsuit. *RP 132, 134*. They do not even dispute that she is owed compensation valued at a minimum of \$5,000 a month during that time period, but claim they only owed that value in stock options which did not exist at that time and still to this day do not exist. *RP 114, 132*.

Janeé Wolf was approached by Scott Richey to come work for IDA. Janeé was promised by Scott Richey she would be paid a minimum of \$60,000 per year (which is \$5,000.00 per month) in cash for her services. *RP 25*. She believed Scott to be the President of IDA and therefore, had the authority to make such a binding decision. Based on that representation, Janeé began working for IDA beginning in March 2008. *RP 26*. At the time she was offered a job to work with IDA in the

end of February 2008, Janeé believed that the compensation she was offered (\$60,000 a year) would begin when she began work in March 2008. *RP 25-26*. Janeé was never offered stock options to begin working for IDA and has never received stock options. *RP 49*. When she did not receive a paycheck in April, 2008, after a month of working, she went to Scott Richey to discuss the issue and was informed that because the company had not officially launched yet and was striving to overcome an unexpected financial setback, she would have to wait until IDA's "launch" date to actually be paid. *RP 32-33*. Ms. Wolf agreed to wait for payment of her wages until the company "launched". *RP 33*. In March 2008, the "launch" date was anticipated to be in only a few months. *RP 33*. However, between March and September 2008, IDA was paying salaries to other IDA employees, including Justin Brunson and Torry Webb. *RP 111, 137, 150*. Additionally, Scott Richey was being paid cash as an "independent contractor" during that timeframe. *RP 34*.

The "launch" date was pushed back several times and eventually occurred on September 8, 2008. However, even that "launch" was then re-characterized as a "pre-launch" by IDA. Ms. Wolf was provided employment documentation several days before the September 8, 2008 launch. *RP 40*. She questioned the starting dates on the forms and was told they had to state she started in September 2008 because that was

when the “pre-launch” occurred. She began receiving a monthly salary of \$5,483.67 from that time until she was terminated in November, 2008. *RP 44.*

After September 2008, nothing materially changed with her job. *RP 40.* She continued on with the same tasks and worked on the same projects she had been working on since she started working in March 2008. She continued to work and was paid her monthly salary from September 2008 until November 24, 2008. On November 24, Janeé was informed that she was terminated due to lack of funding. *RP 44.* During the exit interview Torry Webb acknowledged that he owed Janeé 6 months of salary and because he “felt bad” he offered to make it a full year salary. *RP 44.* Even though Mr. Webb was asking Janeé to continue to delay receiving compensation owed to her, Torry Webb, Justin Brunson, Scott Richey and several other employees continued to be paid as employees after Janeé’s termination for “lack of funding”. *RP 111.*

All throughout the time that Janeé worked for IDA, she would ask when she was going to be paid her past due wages, and when she was put off, she would ask for something in writing from IDA showing their obligation to pay her. *RP 54-55.* However, IDA never produced anything in writing even though it was promised to her. *RP 55.* Janeé wanted to be a team player and believed that the company would be successful. She

was willing to delay compensation for a while so that the company had a chance to succeed. She was led to believe that other employees were “sacrificing” or deferring wages during the pre-launch period. However, after her termination, she began to lose faith in IDA’s promises to pay her. *RP 50.*

In April 2009, Janeé requested a meeting with CEO Torry Webb to discuss the outstanding wages that were owed to her. *RP 54.* In preparation for this meeting, Justin Brunson asked employee Cameron Hysjulien to compile a document setting forth how many hours Cameron estimated Janeé worked from March to the end of August 2008 based on when Cameron would see Janeé in the office. *RP 53.* Torry Webb participated in the April 2009 meeting, along with IDA employee Shelly Moos, who took minute notes of the meeting. *RP 52.* Janeé’s husband, Gerald Wolf also attended the meeting. *RP 52.* Shelly Moos drafted minute notes of the April 2009 which was supposed to reflect what was discussed at the meeting. However, the minute notes left out portions of the conversation that took place, such as Mr. Webb’s promise to double the amount owed to Plaintiff for her “pre-launch” services from \$30,000 to \$60,000 if she would continue to wait for the compensation until the company was profitable. *RP 57-58.* The minutes accurately reflected that Mr. Webb agreed to allow Ms. Wolf to take a portion of her compensation

in cash and a portion in stock option, which Janeé elected to take \$30,000 in cash and \$30,000 in stock options. *RP 58-59*. The minutes also added in information that was not discussed at the meeting, such as the cash election would only be paid out “at the discretion of the Board of Directors” and if the company was “in a position to do so.” *RP 59*.

When Janeé still had not received any compensation or a letter of assurance from IDA as agreed upon, she filed a complaint with the Department of Labor and Industries in May 2009. *RP 56*. IDA provided a response to L&I and took the position that Janeé was a “volunteer” for IDA between March 1, 2008-August 31, 2008. *RP 50, 62, 184*. IDA later informed L&I that they had in fact agreed to compensate her with stock options. *RP 63-64, 185*. Thus, they changed their story from volunteer to stock compensation. *RP 185*. This was the first time Janeé heard that IDA was claiming that the compensation for March-August 2008 was to be paid in the form of stock compensation. IDA fabricated this story only after L&I told IDA it was illegal to have volunteers working at a “for profit” company. *RP 185*. IDA also alleged, in their initial response to L&I that during their “pre-launch period”, IDA was not in a position to hire any employees. *RP 185*. This, however, was untrue because they had been paying salaries for at least four employees prior to March 2008 and even hired two other employees in the month of March 2008. *RP 111*. As

the investigation continued, IDA was faced with the realization that L&I had determined that an employer-employee relationship had existed between IDA and Janeé Wolf. *RP 61*. L & I attempted to collect all wages owed to Janeé. *RP 187*. However, Justin Brunson, acting on behalf of IDA, took the position that if Janeé Wolf did not accept minimum wage for the hours she work for IDA then she could sue them. *RP 188*. These actions demonstrate that Justin Brunson, an officer of IDA, knew IDA owed Janeé wages and willfully withheld payment of those wages.

Torry Webb and Justin Brunson are the co-founder and principal officers of IDA Marketing Services, Inc. *RP 27*. Justin Brunson is the Chief Operating Officer and Torry Webb is the Chief Executive Officer of the company. *RP 27*. Each had authority to make decisions on matters involving the payment of wages owed to employees during all of the relevant time periods. *RP 113-14*. Justin Brunson and Torry Webb were each married at all times relative to the matters at issue. At trial, Ms. Wolf sought lost wages from IDA and from Torry Webb and Justin Brunson as officers of IDA Marketing Services, Inc., at which times they were also employed by IDA Marketing Services. Inc. individually and in their marital capacity.

This matter went to trial before a trial judge on June 20, 2011 and completed on June 22, 2011. *CP 294*. Defendant IDA Marketing Service,

Inc. failed to appear at trial and an Order of Default was entered against that Defendant. Id. Defendant Justin Brunson failed to appear and defend at trial and failed to appear after proper service of a Notice to Attend Trial pursuant to CR 43(f)(1) and an order of default was entered against him, individually, and against the martial community of Justin Brunson and Christina Brunson based upon the conduct of Defendant Justin Brunson. Id. Torry Webb and Brenda Webb appeared at trial and defended themselves pro se. Id.

The trial court found in favor of the Janeé Wolf and found that she was owed \$30,000 cash for past wages. *CP 299*. The trial court also found that the withholding of wages was willful and that Ms. Wolf was entitled to double wages damages pursuant to RCW 49.52.070. Id. The court also awarded attorney fees based on RCW 49.52.070 and RCW 49.48.030. Id. The Judgment was entered against all Defendants except as the Defendant Christina Brunson in her individual capacity. Only Torry and Brenda Webb have filed an appeal.

II. ARGUMENT

A. Standard of Review

The court of appeals applies a two-step standard of review for trial court findings of facts and conclusions of law. The court first determines if the trial court findings of facts were supported by substantial evidence in

the record, and if so, the court next decides whether those findings of fact support the conclusions of law. Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999); Johnny's Seafood Co. v. City of Tacoma, 73 Wn. App. 415, 418, 869 P.2d 1097 (1994).). Substantial evidence exists in the findings of fact where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the findings. State v. Halstein, 122 Wn.2d 109, 129, 857 P.2d 270 (1993). Unchallenged findings of fact are verities on appeal. State v. Stenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997). The court reviews the trial court's conclusions of law de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996); Wallace Real Estate Inv., Inc. v. Groves, 72 Wn. App. 759, 766, 868 P.2d 149 (1994). Standard of review on trial court's ruling on admission of evidence for abuse of discretion. State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992).

Review of trial court's denial of a motion for reconsideration or new trial for an abuse of discretion. Aluminum Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

B. The award of attorney's fees pursuant to RCW 49.48.030 was proper because Defendants never admitted they owed Plaintiff wages in cash.

Mr. Webb's first assignment of error essentially assigns error to Conclusion of Law No. 8 based on the courts finding that Plaintiff was entitled to attorney's fees based on RCW 49.48.030. *CP 299*.¹

Unchallenged findings of fact are verities on Appeal. State v. Stenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997). Mr. Webb agrees that he disputed the form of the compensation due to Ms. Wolf. *CP 296*, Finding of Fact No. 4. Mr. Webb does not assign error to the finding of fact that the stock options, which he claims was to be Ms. Wolf's compensation, did not exist at the time of Ms. Wolf's employment and still did not exist at the time of trial. *CP 296*, Finding of Fact No. 6; *RP 114*.

RCW 49.48.030 took its current form in 1971. It states:

In any action in which any person is successful in recovering judgment for wages or salary owed to him, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer; PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.

RCW 49.48.030.

RCW 49.48.030 is a remedial statute, which should be construed liberally to effectuate its purpose. See Gaglidari v. Denny's Rests, Inc., 117 Wash. 2d 426, 450-51, 815 P.2d 1362 (1991) (recognizing statute's

remedial nature and liberal construction requirement); Naches Valley Sch. Dist. No. JT3 v. Cruzen, 54 Wash. App. 388, 399, 775 P.2d 960 (1989). A liberal construction requires that the coverage of the statute's provisions "be liberally construed [in favor of the employee] and that its exceptions be narrowly confined." " Peninsula Sch. Dist. No. 401 v. Pub. Sch. Employees, 130 Wash. 2d 401, 407, 924 P.2d 13 (1996).

The Legislature "evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive [statutory] scheme to ensure payments of wages." Schilling v. Radio Holdings, Inc., 136 Wash. 2d 152, 157, 961 P.2d 371 (1998) (referencing RCW 49.48.030).

"[A]ttorney fees are authorized under the remedial statutes to provide incentives for aggrieved employees to assert their statutory rights." Hume v. Am. Disposal Co., 124 Wash. 2d 656, 673, 880 P.2d 988 (1994).

Furthermore, remedial statutes "should be liberally construed to advance the Legislature's intent to protect employees' wages and assure payment." Ellerman v. Centerpoint Prepress, Inc., 143 Wash. 2d 514, 520, 22 P.3d 795 (2001). In light of the liberal construction doctrine, Washington courts have interpreted RCW 49.48.030 broadly.

The following are findings of facts that Mr. Webb has not appealed as error in his trial brief, which makes them verities:

4. ...IDA and Defendants Webb and Justin Brunson disputed the form of the compensation at the time of trial.

6. Even though stock options were offered to Janeé Wolf as part of her compensation, those stock options did not exist and still do not exist.

8. Torry Webb met with Janeé Wolf on November 26, 2008 to terminate her employment. While Janeé Wolf worked at IDA for the time period of March 1, 2008 until terminated on November 26, 2008, Janeé Wolf had not paid for her work from March-August, 2008, which equals 6 months of pay or \$30,000. At that meeting Torry Webb was made aware of IDA's obligation to pay Janeé Wolf, acknowledged the debt and agreed to document that obligation. Torry Webb failed to ever do this.

9. Torry Webb met with Janeé Wolf and her husband Gerald Wolf on April 9, 2009 for the purpose of reaching an agreement, including providing confirmation and documentation regarding compensation due to Plaintiff for the period of March-August, 2008 in which Janeé Wolf had not been paid. Torry Webb agreed in that meeting to pay Janeé Wolf the sum of \$30,000 plus stock options of equal value within 90-120 days of the meeting and to document this agreement. Torry Webb failed to ever do this.

RP 296-97.

In Matson v. City of Tacoma Civil Service Bd., 75 Wash. App. 370, 880 P.2d 43 (1994), an applicant for emergency medical services manager services position in the city fire department brought an action asking the court to direct the city to appoint him to a position and award him back pay and reasonable attorney fees. The trial court granted the requested relief. The trial court awarded attorney's fees on the authority of RCW 49.48.030. Id. at 378. The city argued that RCW 49.48.030 should not apply because it "never disputed the amount claimed by Mr.

Matson,” but rather “disputed ... Mr. Matson’s right to a writ and a judgment in their entirety.” *Id.* The court of appeals found the argument “meritless”. *Id.*

Here, Mr. Webb did not agree that Ms. Wolf was entitled to \$30,000 cash for wages while she worked at IDA. The conclusion of law that was determined by the trial court was that “Janeé Wolf ... was owed wages in cash” (*RP 298*, Finding of Fact 3), “Janeé Wolf is not entitled to stock options because they do not exist and have never existed” (*RP 298*, Finding of Fact 4; *RP 114*), and “Janeé Wolf is entitled to unpaid wages in the amount of \$30,000 pursuant to RCW 49.48.010 for wages ...” (*RP 299*, Finding of Fact 5). If Mr. Webb had agreed that Ms. Wolf was entitled to \$30,000 in cash and in fact paid that amount, there would not have been a need for a trial. The remedial nature of the statute is to encourage employers to pay amounts that are owed to employees without the need for going to trial on each and every wage dispute. Mr. Webb has not objected to the finding of fact or the conclusion of law that stock options did not exist, even at the time of trial. *RP 114*. Therefore, the legislative intent to the statute would not be met if an employer is able to assert that they agree with the value of what is owed to the employee but the employee can only be paid with something that is non-existent. Just as

was determined in *Matson*, Mr. Webb's assertion that he should not be held accountable for attorney's fees is without merit.

The ultimate finding of the court was that Ms. Wolf was awarded \$30,000 in cash for wages. Mr. Webb and IDA never stipulated that they owed Ms. Wolf \$30,000 in cash. Therefore, the award of attorney's fees based on RCW 49.48.030 was supported by the findings of facts and was proper based on the legislative intent of the statute.

C. The trial courts finding of willing withholding was supported by substantial evidence.

RCW 49.52.070 provides for double damages only for the willful withholding of wages. McAnulty v. Snohomish Sch. Dist. 201, 9 Wash. App. 834 515, P.2d 523 (1973). An employer's failure to pay wages due is willful if the employer knows what he or she is doing, intends to do it, and is a free agent. Schilling v. Radio Holdings, Inc., 136 Wash. 2d 152, 159-60, 961 P.2d 371 (1998). In *McAnulty* the court held an employer does not willfully withhold wages if a bona fide dispute exists as to obligation of payment. *McAnulty*, 9 Wash. App. 834. The nonpayment of wages is willful when it is the result of a knowing and intentional action and not the result of a bona fide dispute. Ebling v. Gove's Cove, Inc., 34 Wash. App. 495, 663 P.2d 132 (1983). *Ebling* held the determination of a bona fide dispute to be a question of fact and added that a reviewing court

will uphold the trier of fact when any reasonable view substantiates findings, even if there may be other reasonable findings. Ebling, 34 Wash. App. At 501; *see also* State v. O'Connell, 83 Wash. 2d 797, 839 523 P.2d 872 (1974).

Furthermore, financial inability to pay is not a defense to liability under the wrongful withholding statute. Morgan v. Kingen, 166 Wash. 2d 526, 210 P.3d 995 (2009) (citing Schilling, 136 Wash. 2d at 152). In *Morgan*, the Washington Supreme Court held that even though the corporation had filed for bankruptcy, the corporation's inability to pay was not a defense to liability under RCW 49.52.070. Morgan, 166 Wash. 2d at 537. The officers there continued to operate the company and made decisions as to payroll and handling other creditors. Id.

The following are findings of facts that have not been claimed as error by Mr. Webb in his trial brief, which makes them verities:

4. ...IDA and Defendants Webb and Justin Brunson disputed the form of the compensation at the time of trial.

6. Even though stock options were offered to Janeé Wolf as part of her compensation, those stock options did not exist and still do not exist.

8. Torry Webb met with Janeé Wolf on November 26, 2008 to terminate her employment. While Janeé Wolf worked at IDA for the time period of March 1, 2008 until terminated on November 26, 2008, Janeé Wolf had not paid for her work from March-August, 2008, which equals 6 months of pay or \$30,000. At that meeting Torry Webb was made aware

of IDA's obligation to pay Janeé Wolf, acknowledged the debt and agreed to document that obligation. Torry Webb failed to ever do this.

9. Torry Webb met with Janeé Wolf and her husband Gerald Wolf on April 9, 2009 for the purpose of reaching an agreement, including providing confirmation and documentation regarding compensation due to Plaintiff for the period of March-August, 2008 in which Janeé Wolf had not been paid. Torry Webb agreed in that meeting to pay Janeé Wolf the sum of \$30,000 plus stock options of equal value within 90-120 days of the meeting and to document this agreement. Torry Webb failed to ever do this.

10. In June, 2009, Janeé Wolf filed a complaint for unpaid wages with the Washington State Department of Labor and Industries. Anna Sanchez was assigned to investigate this claim on behalf of the Washington State Department of Labor and Industries. During the investigation IDA and Justin Brunson and Torry Webb took the position that Janeé Wolf was an owner in IDA, a volunteer or an independent contractor working for stock options from March-August, 2008 and was not entitled to monetary compensation. However, IDA and Justin Brunson and Torry Webb could not provide any documentation to support their allegation that Janeé Wolf was an owner, a volunteer or an independent contractor working for stock options from March-August, 2008 and were advised by Anna Sanchez that the Department of Labor and Industries found Janeé Wolf to meet the definition of an employee entitled to monetary compensation. ...

RP 296-97.

The trial court found that there was a willful withholding. There are findings of facts, to which Mr. Webb does not assign error, which supports this finding. Mr. Webb argued that there could be no willful withholding because there was a bona fide dispute as to the obligation to pay. However, the trial judge specifically addressed this argument in the oral findings of the court.

“With regards to the statute RCW 49.52, and I believe the doubling provision is .070, you argue, Mr. Webb, that you’re exempt from that doubling because this was a bona fide dispute and therefore, that the Court cannot find that there is a willful failure to pay.

From the Court’s perspective, of course, you were on notice from the department of Labor and Industries that Miss Wolf was in fact – that there was an employee/employer relationship. Once you were on notice with that, you were obligated to pay her wage and you failed to do so. ...”

RP 334, Ln. 8-19.

The court’s findings supports the conclusion of willful withholding because Mr. Webb acknowledged the obligation to pay Ms. Wolf on November 26, 2008 (Finding of Fact No. 8), he acknowledged the obligation and agreed to put the obligation in writing, which he never did, on April 9, 2009 (Finding of Fact No. 9; RP 52), and most importantly, was made aware of the fact that there was an employee/employer relationship which obligated them to pay her in cash in June 2009 (Finding of Fact No. 10; *RP 185-88*). Additionally, Webb paid himself and at least four other employees during the time period Janeé was not paid wages. *RP111, 137, 150*. Webb's election to pay himself and others and not Janeé Wolf also supports a finding of willful withholding. Therefore, the court’s oral findings show that it did consider Defendants’ argument there was a

bona fide dispute and disagreed with that argument. See Morgan, 166 Wash. 2d 526.

Mr. Webb cannot argue that there was a bona fide dispute regarding an obligation to actual pay Ms. Wolf when he is also arguing that he agreed that IDA owed Janeé wages and he stipulated that Ms. Wolf was entitled to \$30,000, regardless of the form.

The findings of facts which are not claimed as errors, as well as substantial evidence at trial (*RP 52, RP 185-88*), supports a finding of willful withholding of wages. Additionally, the court rejected Mr. Webb's argument that there was a bona fide dispute regarding the obligation to pay because he had been informed in April 2009 by the State of Washington that he had an obligation to pay Ms. Wolf in cash. Therefore, it was not error for the trial court to double the award of wages based on willful withholding by the employer pursuant to RCW 49.52.070.

Webb's first assignment of error assigns error to the award of attorney's fees based on RCW 49.48.030 only. However, the trial court's award of attorney's fees was based on RCW 49.48.030 and RCW 49.52.070. Therefore, even if the court finds error in an award of attorney's fees under RCW 49.48.030, Ms. Wolf is still entitled to attorney's fees under RCW 49.52.070 based on willful withholding.

D. The trial court properly denied Defendant’s request to enter an uncertified copy of a deposition transcript as evidence at trial.

A trial court’s ruling on the admissibility of evidence is for an abuse of discretion. State v. Ortiz, 119 Wash. 2d 294, 308, 831 P.2d 1060 (1992). The trial court abuses its discretion when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

During trial, Defendant Torry Webb proceeded to represent himself individually pro se. “In undertaking to role of a lawyer, he also assumes the duties and responsibilities and is accountable to the same standards of ethics and legal knowledge.” Batten v. Abrams, 28 Wash. App. 737, fn. 1, 626 P.2d 984 (1981) (*citing* Hecomovich v. Nielsen, 10 Wash. App. 563, 571-72, 518 P.2d 1081 (1974)).

Civil Rule 26 allows parties to obtain discovery by way of deposition upon oral examination. Scott Richey’s deposition was noted up as a discovery deposition. Civil Rule 43 provides that in part, “[i]n all trials the testimony of witnesses shall be taken orally in open court ...” Civil Rule 32 provides when a deposition may be used in a court proceeding.

The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness resides out of the county and more than 20 miles from the place of trial, unless it appears that the absence of the witness was procured by the party offering the deposition or unless the witness is an out-of-state expert subject to subsection (a)(5)(A) of this rule; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

CR 32(a)(3).

In this case, Torry Webb did not inform the court that any of the circumstances listed in CR 32(a)(3) applied so as to require him to need to use the deposition testimony of Scott Richey instead of having his live testimony before the court. Torry Webb simply could have subpoenaed Mr. Richey to call for his testimony in open court, as he did with the other four witnesses he called during the trial.

Even if Mr. Webb had alleged one of the reasons set forth in CR 32(a)(3) for using Mr. Richey's deposition transcript in court, Mr. Webb did not have an original deposition transcript to provide to the court to comply with ER 1002. Evidence Rule 1004 provides certain circumstances in which an original is not required, including the original being lost or

destroyed (not the case here), the original not being obtainable by any available judicial process or procedure (not the case here), or the original being solely in the possession or control of the opposing party (not the case here).

The brunt of Mr. Webb's complaints comes from the fact that he was unable to procure the original transcript from the court reporter without a court order. Mr. Webb was informed by the court on the first day of trial that he would need to the original transcript to publish a deposition for the trial. *RP 71*. Mr. Webb then cites this court to a brief exchange with the trial court on the second day of trial in which he informs the court that the court reporter would not give him an original of the transcript without a court order. *RP 263*. However, nowhere in the transcript will this court find that Mr. Webb made a motion or asked the court for an order directing the court reporter to provide an original to Mr. Webb. The appellate court may refuse to review any claim of error which was not raised in the trial court. *RAP 2.5*.

The trial court properly ruled that a copy of a transcript of a deposition was not admissible because it was not an original based on ER 1002. Mr. Webb cannot claim error to this court because he failed to request relief from the trial court by asking for an order releasing the original and because he did not subpoena the witness

for oral testimony at trial. Nor did Mr. Webb provide the trial court any evidence to demonstrate that the witness fell within the provisions of CR 32(a)(3).

Therefore, the trial court did not abuse its discretion by denying Defendant's request to enter an uncertified copy of a deposition transcript as evidence at trial.

E. The trial court's denial of Defendant's motion for new trial or reconsideration was not an abuse of discretion.

Review of trial court's denial of a motion for reconsideration or new trial for an abuse of discretion. Aluminum Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 537, 998 P.2d 856 (2000). An abuse of discretion is when the decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wash. 2d 12, 26, 482 P.2d 775 (1971).

Defendant Webb moved for a new trial or reconsideration based on Civil Rule 59. Civil Rule 59(a) sets forth eight causes for granting such a motion. Although Mr. Webb does not cite to the particular section of the rule in which he believed the court should grant such a motion, it is presumed he claimed "irregularity in the proceedings of the court, jury, or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial". CR 59(a)(1).

For the reasons listed above, the trial court's denial of entry of a copy of a deposition transcript was not an abuse of discretion, and was in compliance with the Civil Rules. The trial court also ruled that as a basis for denial of the motion for new trial was that Mr. Webb put forth a new theory or defense in this motion which was not presented at trial. The court properly ruled that the issue of whether Ms. Wolf was an employee under RCW 49.46.010 was never raised at trial and she properly declined to consider the new legal issue in the motion for a new trial. *See Riblet v. Ideal Cement Co.*, 57 Wash. 2d 619, 624, 358 P.2d 975 (1961) (an issue raised for the first time in a motion for new trial was not timely raised).

Based on the foregoing, the trial court's decision to deny the motion for new trial or reconsideration were based on Civil Rules and law and thus, was not an abuse of discretion.

F. Ms. Wolf is entitled to attorney's fees on Appeal pursuant to RAP

Rule of Appellate Procedure 18.1(a) allows the court of appeals to award attorney fees and costs on appeal "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses." In general, where a prevailing party is entitled to attorney fees below, they are entitled to attorney fees if they prevail on appeal. *Richter v. Trimberger*, 50 Wash. App. 780, 786, 750 P.2d 1279 (1988). In *Dice v.*

City of Montesano, 131 Wash. App. 675, 128 P.3d 1253 (2006), a city employee was successful in a claim for wages against his employer. The Court of Appeals stated that RCW 49.48.030 and/or RCW 49.52.070 granted attorney fees to an employee who is successful in a claim for wages against an employer and because the Plaintiff prevailed at the Court of Appeals, he was entitled to attorney fees on appeal upon compliance with RAP 18.1. Id. at 693.

In addition to the authority to grant attorney fees on appeal based on the statutes underlying the original action, Ms. Wolf requests attorney fees under RAP 18.9(a) based on Mr. Webb filing a frivolous appeal. An appeal is frivolous (and a recover of fees warranted) “ ‘if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists.’ “ Marriage of Greenlee, 65 Wash. App. 703, 710, 829 P.2d 1120 (1992) (quoting Chapman v. Perera, 41 Wash. App. 444, 455-56, 704 P.2d 1224 (1985)). In this case, Mr. Webb has continued to argue his same version of facts that were presented to the court at trial. Mr. Webb acknowledges that he just simply disagrees with the court’s decision, “That the trial court may not have agreed with IDA’s position does not preclude the existence of a bona fide dispute be it over wages, the form of wages, or in this example, employment status.” *See Brief of Appellant*, p. 29. The trial

court was the trier of fact and Mr. Webb should not be allowed to prolong this action because he simply disagrees with the trial court's decision. Each of Mr. Webb's claims of error by the trial court are just that, disagreements with the ultimate decision. There is substantial evidence and case law to support each of the conclusions of law that have been claimed as error. There are no debatable issues which have been presented by Mr. Webb upon which reasonable minds might differ, and the claims of error are so devoid of merit that no reasonable possibility of reversal exists.

Ms. Wolf is entitled to attorney fees and costs incurred on appeal because she was entitled to attorney fees at the trial court level based on RCW 49.48.030 and RCW 49.52.070 and based on the fact that this appeal was frivolous.

III. CONCLUSION

The entirety of Webb's brief is simply that they disagree with the trial court's conclusion of law. However, each and every finding of fact and conclusion of law is supported by substantial evidence and law. Webb's also take contradictory positions within their brief, as they did at trial, that the Defendants agree that Ms. Wolf was entitled to \$30,000 but then also claim there is a bona fide dispute as to whether there was an obligation to pay Ms. Wolf \$30,000. Based on the foregoing, each and

every conclusion of law is supported by facts which are not claimed as error. Therefore, each and every conclusion of law found by the trial court should be upheld.

Ms. Wolf should be awarded attorney's fees based on RCW 49.48.030 and RCW 49.52.070 and based on the fact that this is a frivolous appeal by Webbs.

DATED: August 8, 2012

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 8th day of August, 2012, I caused a true and correct copy of the foregoing document, "Brief of Respondent", to be mailed by United States mail postage prepaid to the following counsel of record:

Appellants-Defendants:

Pro-Se Appellants
Torry and Brenda Webb
1907 Orchard Way
Richland, WA 99352

DATED this 8th day of August, 2012, at Kennewick, Washington.


Lisa Sherman