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SUPREME COURT
OF THE STATE OF WASHINGTON

RONALD CLIPSE

Petitioner,

v.

COMMERCIAL DRIVER SERVICES, INC. AND LEE BRUNK

Respondents.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF THE CASE.....	2
	A. Overview	2
	B. The Trial Court Properly Dismissed Clipse’s Claim for Double Damages Under RCW 49.52.050 and .070 and the Appellate Court’s Ruling on Appeal Was Proper.....	5
	C. The Motion to Strike the Untimely Filed Motion for Attorneys’ Fees Was Properly Granted and the Appellate Court’s Ruling on Appeal Was Proper	6
III.	PETITIONER’S ASSERTED ISSUES FOR REVIEW	7
IV.	ARGUMENT	8
	A. The Requirements of RAP 13.4(b) Are Note Met	8
	B. The Appellate Rulings Which Petitioner Seeks to Appeal Are in Accord with Existing Law and Present No Issue Satisfying RAP 13.4.....	8
	1. The Appellate Court’s Denial of Double Damages Under RCW 49.52.050 and .070 Is in Accord with the Law.....	8
	2. The Appellate Court Properly Found that the Trial Court Did Not Abuse Its Discretion in Striking Clipse’s Motion for Fees and RAP 13.4 is Not Implicated by the Court’s Ruling.....	11
V.	CONCLUSION.....	16

TABLE OF AUTHORITIES

State Cases

<u>Allstot v. Edwards</u> , 114 Wash.App. 625, 60 P.3d 601 (2002).....	9,10
<u>Clipse v. Commercial Driver Services, Inc.</u> , 2015 WL 502338 (Div. II, Aug. 25, 2015)	1,2,4,6,7,11,14
<u>Cohen v. Stingl</u> , 51 Wn.2d 866, 322 P.2d 873 (1958).....	12
<u>Davies v. Holy Family Hospital</u> , 144 Wn.App. 483, 183 P.3d 283 (2008).....	11
<u>Hemmings v. Tidyman’s Inc.</u> , 285 F.3d 1174 (9 th Cir. 2002)	8,9
<u>Pybas v. Paolino</u> , 73 Wn.App. 393, 869 P.2d 427 (1994)	13
<u>Salas v. Hi-Tech Erectors</u> , 168 Wn.2d 664, 230 P.3d 583 (2010).....	11,15
<u>Schilling v. Radio Holdings, Inc.</u> , 136 Wash.2d 152, 961 P.2d 371 (1998).....	9
<u>State v. Cline</u> , 21 Wn.App 720, 586 P.2d 545 (1978)	13

Court Rules

CR 6(b).....	14
CR 6(b)(2)	12
CR 50	5
CR 54(d)(2).....	2,4,11,12,15
RAP 8.1	14
RAP 8.1(b).....	13

RAP 8.1(c)	14
RAP 13.4.....	1,2,8,11,14,15
RAP 13.4(b)	8

Statutes

Ch. 49.52 RCW.....	4,5,9,11
RCW 49.52.050	1,4,5,8,9
RCW 49.52.070	1,4,5,8,9,10
Ch. 49.60 RCW.....	2,10

I. INTRODUCTION

Petitioner, Ronald Clipse (“Clipse”)¹ seeks Supreme Court review of four issues arising from the Division II decision (Clipse v. Commercial Driver Services, Inc., 2015 WL 502338 (Div. II, Aug. 25, 2015)). Pursuant to RAP 13.4, the measure of whether Supreme Court review will be granted is whether the rulings are in accord with existing law, there is a conflict in the lower courts, or the public interest is implicated. For the reasons outlined herein, none of these criteria are met in this case.

At trial, Clipse sought to double the jury’s award pursuant to RCW 49.52.050 and .070, arguing that Commercial Driver Services, Inc. (“CDS”) wrongfully withheld wages. This claim was dismissed at the close of Clipse’s case in chief. The trial court and the appellate court found the doubling was inappropriate as a matter of law because there could be no “willful” withholding of wages where the obligation to pay wages to Clipse for any work never arose. (RP August 26, 2013 pp. 15, 17-18, 30 and Clipse v. Commercial Driver Services, Inc., at pp. 5-7, 2015 WL 502338 (Div. II, Aug. 25, 2015)). This was because Clipse never actually began working for CDS and it was undisputed that Clipse never worked a single minute at CDS. (RP August 22, 2013 p. 76:2-6).

¹ For clarity Ronald Clipse will be referred to as “Clipse” and Lee Brunk will be referred to as “Brunk”. Respondents intend no disrespect by utilizing last names in their briefing and does so merely as a convenience as such designations are consistent with briefing submitted to the trial and appellate courts and assist in following the posture of the case.

At trial, Clipse also moved for attorneys' fees pursuant to Ch. 49.60 RCW. However, such motion was filed untimely in violation of CR 54(d)(2). After an extended colloquy with counsel, which included inquiry into the circumstances of the untimely filing, aspects of prejudice to CDS, and was in accord with the sound discretion vested in the trial court, the trial judge found that no excusable neglect was present and struck the motion for attorneys' fees. (RP September 20, 2013 pp. 19-22, 26). Upon appeal, the appellate court upheld the decision of the trial court, finding no abuse of discretion occurred. (Clipse v. Commercial Driver Services, Inc., at pp. 7-10, 2015 WL 502338 (Div. II, Aug. 25, 2015)).

For the reasons set forth herein, the stated basis for review do not satisfy RAP 13.4 and the Petition for Supreme Court review should not be granted.

II. STATEMENT OF THE CASE

A. Overview

Petitioner and plaintiff below, Clipse, interviewed for a job with CDS as a commercial truck driver instructor. (RP August 20, 2013 p 9:1-17; August 22, 2013 pp. 66-68). CDS operates a school that teaches students to drive commercial motor vehicles such as double and quadruple axle trucks, which Clipse, as an instructor, would have been required to

drive and control and hold a commercial driver's license to operate. (RP August 22, 2013 pp. 5:17-25, 6:1-5). Following the interview, Lee Brunk ("Brunk"), the owner of CDS at the time, conditionally offered Clipse a job, conditioned on him taking a Department of Transportation ("DOT") physical and, based on the physical, obtaining a two-year Commercial Driver's License ("CDL"). (RP August 22, 2013 pp. 6:11-13, 7:21-25, 8:1-3). Clipse alleged he quit his existing job within a day or two of his initial interview, but before submitting to a DOT physical and knowing the results of the physical. (RP August 22, 2013 p. 10:1-19). From the information provided through the DOT physical process, CDS learned that Clipse was regularly taking a narcotic pain killer, Methadone. (RP August 20, 2013 pp. 22, 30). CDS believed that use of the narcotic Methadone was a violation of CDS's policies and of the commercial driver permitting requirements of the Federal Motor Carrier Safety Administration ("FMCSA") and refused to hire Clipse. (RP August 20, 2013 pp. 25:7-11, 29:6-11; August 21, 2013 pp. 24-26). Clipse then sued Brunk and CDS in the Superior Court of the State of Washington for Pierce County.² (CP 1-7). Among other claims, Clipse alleged that CDS's refusal to hire him amounted to disability discrimination under Washington's Law Against Discrimination ("WLAD") and the federal Americans With Disabilities

² Respondent Brunk and CDS will henceforth be referred to jointly as "CDS."

Act (“ADA”). (CP 1-7). Double damages were also requested pursuant to RCW 49.52.050 and RCW 49.52.070. (CP 1-7).

The jury returned a verdict in favor of Clipse in the amount of \$85,000. (CP 472-74). After trial, an untimely request for attorneys’ fees and costs was filed by Clipse and dismissed pursuant to CR 54(d)(2). (CP 781-82). Clipse subsequently filed for appeal and CDS filed a timely cross appeal. (CP 783-87; 986-90). Prior to the jury trial, Clipse’s claim for double damages pursuant to RCW 49.52.050 and RCW 49.52.070 were dismissed on CDS’s motion. (CP 421-22, CP 952; RP August 26, 2013 pp. 17-18).

On appeal, the appellate court made the following holdings: 1) the claim for double damages pursuant to Ch. 49.52 RCW was properly dismissed, 2) that the trial court should have dismissed the claim for promissory estoppel, 3) the jury’s verdict finding discrimination and awarding damages was upheld, 4) the trial court’s dismissal of Clipse’s untimely filed fee motion was found not to be an abuse of discretion and was upheld, and 5) attorneys’ fees and costs were awarded to neither party. (Clipse v. Commercial Driver Services, Inc., 2015 WL 502338 (Div. II, Aug. 25, 2015)).

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Clipse seeks review of the holding related to doubling damages pursuant to Ch. 49.52 and the dismissal of his motion for attorneys' fees on various grounds. (Petition for Review at p. 5).

B. The Trial Court Properly Dismissed Clipse's Claim for Double Damages Under RCW 49.52.050 and .070 and the Appellate Court's Ruling on Appeal Was Proper.

On CDS's motion, Clipse's claim for wrongful withholding of wages was dismissed on the basis that the willful element could not be established in a case where the obligation to pay any wages was contingent upon the jury's determination of discrimination holding, "I read the cases absolutely to be that you do not have a 49.52 case unless there is something pre-jury verdict that shows that the employer believes they might have been liable and therefore they are willfully withholding those wages." (CP 421-22, CP 952; RP August 26, 2013 pp. 17-18). At the close of Clipse's case in chief, the trial court granted CDS's motion for judgment as a matter of law, under CR 50, regarding Clipse's Ch. 49.52 RCW claims. (RP August 26, 2013 pp. 18, 30).

It is uncontroverted that Clipse did not perform any services or labor for CDS because he never worked at CDS at all. (RP August 21, 2013 pp. 24-26; 82:20-84:9). Additionally, it is clear that there was a bona fide dispute regarding Clipse's ability to drive as a commercial truck driver given his use of Methadone and federal regulation that appeared to Brunk to bar

him from driving while taking Methadone. (RP August 20, 2013 p. 31:3-23; August 21, 2013 pp. 24-26; Trial Ex. 14A). After hearing argument, the trial court found that the record lacked sufficient evidence that CDS had acted willfully to deprive Clipse of a wage. (RP August 26, 2013 pp. 17-18). The appellate court reviewed the trial court's decision de novo and reached the same ruling. (Clipse v. Commercial Driver Services, Inc., at pp. 5-7, 2015 WL 502338 (Div. II, Aug. 25, 2015)).

C. The Motion to Strike the Untimely Filed Motion for Attorneys' Fees Was Properly Granted and the Appellate Court's Ruling on Appeal Was Proper.

Judgment was entered in the trial court on August 28, 2013 and filed the same day, this was the same day as the jury verdict was announced. (CP 474). The first section of the Judgment is titled, Judgment Summary, and identifies the judgment creditor, judgment debtors, principal judgment amount, and the rate of post judgment interest. Id. There is also a line that reads: "Statutory and RCW 49.60 Costs and Fees: Reserved." Clipse did not file his motion for costs and fees under CR 54 until September 11, 2013. (CP 476). The trial court struck Clipse's motion as untimely and found that Clipse had not shown excusable neglect for the late filing. (RP September 20, 2013 pp. 19-22, 26). The trial court's record reflects detailed consideration by the trial court of the law and Clipse's counsel's arguments with respect to a showing of excusable neglect. (RP September 20, 2013 pp.

19-22). Based on this, the appellate court found that the trial court did not abuse its discretion in striking Clipse's motion for attorneys' fees as untimely. (Clipse v. Commercial Driver Services, Inc., at pp. 7-10, 2015 WL 502338 (Div. II, Aug. 25, 2015)).

III. PETITIONER'S ASSERTED ISSUES FOR REVIEW

Petitioner Clipse seeks Supreme Court review of two rulings made by Division Two of the appellate court and breaks them into four asserted basis for review. A summary of the alleged issues with Division II's rulings are as follows:

- A. *Did the appellate court properly determine, in accord with the law, that RCW 49.52 did not apply where the obligation to pay wages to Clipse never arose, because Clipse never began work, and as such, could not have been "willfully" withheld as required by RCW 49.52.050?*
- B. *Did the appellate court properly uphold the trial court's striking of Clipse's untimely fee motion where there is no evidence that the trial court abused its discretion, where excusable neglect was not shown, and where all other requirements of the law were examined by the trial court in a proper exercise of discretion?*
- C. *Did the appellate court properly uphold the trial court's exercise of discretion in finding of no excusable neglect?*
- D. *Did the appellate court properly uphold dismissal of Clipse's motion for fees where the trial court considered briefing and argument relative to the question of prejudice?*

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IV. ARGUMENT

A. The Requirements of RAP 13.4(b) Are Not Met.

Review by the Supreme Court is discretionary and only appropriate if one of the criteria set forth in RAP 13.4(b) are met. For the reasons set forth herein, none of the considerations governing acceptance of review are present in this case regarding those issues Petitioner raises in his Petition for Review.

B. The Appellate Rulings Which Petitioner Seeks to Appeal Are in Accord with Existing Law and Present No Issue Satisfying RAP 13.4.

1. The Appellate Court's Denial of Double Damages Under RCW 49.52.050 and .070 Is in Accord with the Law.

RCW 49.52.050 establishes liability on the part of an employer who fails to pay a wage they are obligated to pay an employee. Washington courts have previously examined when the obligation to pay a wage arises for purposes of awarding double damages pursuant to RCW 49.52.070. Once the obligation to pay can be shown, the next inquiry is whether the employer willfully failed to fulfill the obligation. As in Hemmings v. Tidyman's Inc., the ninth circuit held that the term obligation reflected an obligation to pay wages which preceded a jury verdict. Hemmings, 285 F.3d 1174, 1203 (9th Cir. 2002). For example, an individual working nine hours while being paid for eight would be entitled to payment for the

additional hour worked under RCW 49.52.050 and, assuming the employer was aware of the obligation which it willfully failed to fulfill, double damages pursuant to RCW 49.52.070.

Though counsel argues that Allstot provides for a different result, the opinion's holding is mischaracterized. Allstot v. Edwards, 114 Wn.App. 625, 60 P.3d 601 (2002). In Allstot, the employee had actually worked for the employer and the verdict potentially contained wages owed which accrued during the employee's employment as well as damages awarded under Washington's Law Against Discrimination. The trial and appellate courts' holding in this case is in accord with Hemming and Allstot as it is undisputed that Clipse never commenced working for CDS. (RP August 21, 2013 pp. 24-26; 82:20-84:9). Shilling provides no additional support for Petitioner's position. Shilling v. Radio Holdings Inc., 136 Wn.2d 152, 961 P.2d 371 (1998). Shilling reiterates the policy articulated in Allstot and Hemming, stating that Ch. 49.52 RCW, "indicates a strong legislative intent to assure payment to employees of wages they have *earned*." Shilling, 136 Wn.2d at 159 (emphasis supplied). Here, Clipse did not *earn* any wages that could be withheld (wrongfully or otherwise) because he never worked for CDS for a single second.

The appellate court's holding also makes sense from a policy perspective. Litigants who recover under RCW 49.52.070 have shown that the employer willfully paid them less than the wages they were owed. An employer in such a situation is aware of the obligation to pay because the employee is actually working, but ignores or otherwise fails to fulfill the obligation to pay its employee wages. Under Ch. 49.60 RCW, the obligation to pay back wages does not arise until the jury reaches a verdict. Consequently, from the inception of the act giving rise to the suit until the jury's verdict, the employer could not possibly be willfully withholding wages they are obligated to pay as there is *no obligation* until the jury reaches a verdict. Allstot v. Edwards, 114 Wn.App. 625, 60 P.3d 601 (2002). It would not make sense to permit additional damages in a scenario where the employer is powerless to correct the double damages wage aspect of the claim prior to the jury's verdict.

Further illustrating the absurdity of this position is attempting to analyze a method by which an employer could eliminate double damages under RCW 49.52.070 by fulfilling the alleged obligation to pay where the sole basis for the back pay was Ch. 49.60 RCW. It is obvious there is no way for an employer in such a circumstance to comply with the as yet unknown mandate of the jury prior to trial. This also demonstrates that the

position advocated by Petitioner is not in accord with the policy underpinning Ch. 49.52 RCW.

2. The Appellate Court Properly Found that the Trial Court Did Not Abuse Its Discretion in Striking Clipse's Motion for Fees and RAP 13.4 is Not Implicated by the Court's Ruling.

Clipse petitions this court on various grounds to reverse the appellate court's ruling upholding the striking of his fee motion by the trial court. The standard of review for this decision is abuse of discretion. Davies v. Holy Family Hosp., 144 Wn.App. 483, 499, 183 P.3d 283 (2008). As the appellate court acknowledges, the trial court's ruling was not legally or factually flawed and is not one that no responsible person would make. Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 669, 230 P.3d 583 (2010). As such the ruling should stand and does not meet the criteria for Supreme Court review outlined in RAP 13.4.

The appellate court, as did the trial court, considered Clipse's basis for his late filing and held that it failed to amount to excusable neglect. (Clipse v. Commercial Driver Services, Inc., at pp. 7-10, 2015 WL 502338 (Div. II, Aug. 25, 2015)). Attorney's fees and expenses may be requested under CR 54(d)(2) which provides:

Claims for attorneys' fees and expenses, other than costs and disbursement, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of

damages to be proved at trial. Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.

CR 54(d)(2). Accordingly, under CR 54(d)(2), a motion for attorney's fees and expenses was timely filed only if it was filed on or before September 9, 2013 (the tenth day following entry of judgment fell on a Saturday, therefore, Clipse had until the following Monday to timely file the motion); the motion was not filed until September 11, 2013. (CP 474).

The colloquy at the time the judgment was discussed in detail by the trial court when evaluating the motion to strike and is devoid of any discussion regarding extension of time to file a fee motion. (RP September 20, 2013 pp. 8:9-19; 9:4-11; 19-22). Essentially, Clipse's argument is that CDS (and the Court) acquiesced to some indeterminate timeline for filing the motion for fees as a result of the amount of costs and attorney's fees being "reserved" in the judgment. (CP 474). As the trial court correctly noted, there was no discussion of any alteration of time for filing any motion and no subsequent motion made to extend the time for filing. (RP September 20, 2013 pp. 8:9-19; 9:4-11; 19-22). Arguably, the trial court, in its discretion, could accept a late filing based upon a showing of excusable neglect. Cohen v. Stingl, 51 Wn.2d 866, 868, 322 P.2d 873 (1958); CR 6(b)(2).

The trial court and the appellate court had available briefing which addressed the issue of prejudice, among other issues presented by the late filing by Clipse. Washington courts have noted that refusal to accept late filings have occurred where the showing of prejudice was slight or non-existent, “the responding party [to an assertion of excusable neglect] can rarely show actual prejudice because the prejudice is to the system and an extension of time undermines the finality of the judgment.” Pybas v. Paolino, 73 Wn.App. 393, 403, 869 P.2d 427 (1994). Despite the fact that Clipse argued this was the primary aspect of CDS’s prejudice, the trial court nonetheless did not find excusable neglect. Id. The case of State v. Cline, 21 Wn.App. 720, 586 P.2d 545 (1978) is instructive. In Cline, the defense inadvertently “forgot” to note the time for appeal after trial and filed the notice of appeal late. As a result, the appeal (which was filed one date late) was dismissed. Id. at 721. As these cases reflecting dismissals or refusals to accept late filings show, the trial court’s ruling was clearly within the discretion of the trial court and in accord with Washington’s case law. In this case, CDS also argued that there was prejudice relating to the possibility of an appeal.³ Should a litigant appeal, frequently a stay is sought which must be secured by cash on deposit with the court or a

³ At the time of the motion to strike no appeal had yet been filed; however, ultimately, an appeal was filed which did in fact result in a deposit into the registry of the trial court of an amount in excess of the judgment. Had the fee motion been heard, the amount of the deposit would have incorporated the amount of any fees and costs awarded. RAP 8.1(b).

bond. RAP 8.1. The amount of such a bond takes into account the principal of the judgment. Anticipated fees on appeal are also part of the analysis, which will also be informed by a party's fee petition. RAP 8.1(c). Meaningful arrangements for a bond necessarily depend upon the amount of money involved. RAP 8.1(c). Thus, the delay in filing does prejudice CDS and its ability to make such arrangements to the satisfaction of the court under RAP 8.1.

Clipse attempts to bolster his appeal by stating that the appellate court failed to consider prejudice when upholding the trial court's decision. However, the appellate court's decision is not worthy of review pursuant to RAP 13.4 simply because the appellate court failed to reiterate the exact analysis of the trial court. Under the abuse of discretion standard, the question is whether the trial court conducted the analysis required under the law. As the appellate court decision reflects, the trial court did conduct the proper legal and factual analysis, "The trial court did not abuse its discretion by denying Clipse's motion to enlarge time under CR 6(b). The trial court's decision was not legally or factually flawed, nor was it one that no reasonable person would take." (Clipse v. Commercial Driver Services, Inc., at p. 10, 2015 WL 502338 (Div. II, Aug. 25, 2015)). Unlike, *de novo* review, the appellate court does not review the decision as if the trial court's ruling did not exist, but to determine whether the trial

court's decision met the abuse of discretion standard. Consequently, the appellate court's reasoning is not flawed merely because the appellate court did not review the trial court's decision *de novo*. This is essentially what Petitioner requests, which is not the applicable standard of review. Salas, 168 Wn.2d at 669. Consequently, no issue is presented by the trial court or appellate court's analysis which satisfies RAP 13.4.

The record below reflects that the trial court considered the law, assertions of prejudice, counsel's admission that he was aware of the time requirements under CR 54(d)(2), and Clipse's repeated assertions that the late filing occurred because the court and opposing counsel failed to understand what was unilaterally intended by "reserved". (RP September 20, 2013 pp. 19:18-25, 20:1-24, 22:12-22). The trial court clearly did not abuse its discretion in striking Clipse's motion for costs and fees based on its review of the hearing, counsel's arguments, and the trial court's repeated invitations to counsel to explore the parameters of Clipse's alleged showing of excusable neglect. (RP September 20, 2013 pp. 19:18-25, 20:1-24, 22:12-22). Nor should the decision of the appellate court be subject to further review because the appellate court, properly, did not conduct a *de novo* review where the standard of review is abuse of discretion.

V. CONCLUSION

The appellate court ruled properly on the issues before it which Petitioner seeks to review. The appellate court decision is in accord with and does not conflict with the existing case law in any respect. Further, no significant question of law is raised by the Petition. Finally, no issue of substantial public interest is implicated because the ruling is in accord with established and existing case law. This Court should not accept the Petition for Discretionary Review as the criteria set forth by RAP 13.4(b) are not met.

DATED this 22nd day of October 2015.

MCGAVICK GRAVES, P.S.

By:



Lori M. Bemis, WSBA #32921
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CERTIFICATE OF SERVICE

The undersigned certifies declares under the penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served via ABC Legal Messengers by October 22, 2015, a true and accurate copy of the ANSWER TO PETITION FOR DISCRETIONARY REVIEW to:

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Signed at Tacoma, Washington this 22nd day of October 2015.

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Clipse v. CDS, et al.
No. 92299-3

Attached please find the Answer to Petition for Discretionary Review for filing. The Certificate of Service is the last page of the document.

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