IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ISAIAS RAMIREZ and MARIO HERNANDEZ, on behalf of themselves and all others similarly situated, Respondents, v. PRECISION DRYWALL, INC., a Washington corporation, Defendant, JAMES LEA, individually, and the marital community of JAMES LEA and JANE DOE LEA; DENNIS LEA, individually, and the marital community of DENNIS LEA and JANE DOE LEA; and KELLY WASKIEWICZ, individually, and the marital community of KELLY WASKIEWICZ and JOHN DOE WASKIEWICZ, Appellants.	)	DIVISION ONE No. 65453-5-I UNPUBLISHED OPINION FILED: October 31, 2011

Dwyer, C.J. — James Lea, Dennis Lea, and Kelly Waskiewicz appeal from the judgment entered on jury verdicts finding that they, officers of Precision Drywall, Inc., are liable for violations of certain wage and hour laws. They additionally appeal from the trial court's grant of partial summary judgment in favor of the Precision Drywall workers who brought this class action lawsuit.

Because the trial court applied an incorrect definition of "employer" in determining on partial summary judgment that James Lea, Dennis Lea, and Kelly Waskiewicz are individually liable for improper deductions from employee wages, we vacate the portion of the subsequently-entered judgment awarding damages based upon the unlawful wage deductions. However, we determine that the other claims of error asserted on appeal are without merit. Accordingly, we affirm the remainder of the judgment.[1]

I

This case involves egregious violations of our state's overtime compensation and wage deduction laws for which a jury awarded more than $4.1 million to an aggrieved class of drywall construction workers. The class includes more than 300 current and former employees of Precision Drywall, Inc. The trial court entered the $4.1 million judgment on the jury's verdicts against Precision Drywall and three of its corporate officers, James Lea, Dennis Lea, and Kelly Waskiewicz.

Brothers James Lea and Dennis Lea are the sole owners of Precision Drywall, Inc., each owning 50 percent of the corporation's stock.[2] During the relevant period, James Lea acted as the corporation's president and was "responsible for running Precision Drywall's business." Report of Proceedings

[1] Precision Drywall does not appeal from either the trial court's order on partial summary judgment or the judgment entered on the jury verdicts. Thus, Precision Drywall is not a party to this appeal and, notwithstanding our resolution of the issues on appeal, the full amount of the judgment against Precision Drywall stands.

[2] We refer herein to James Lea and Dennis Lea collectively as "the Lea brothers."

(RP) at 1576. He managed the corporation's finances and determined its compensation policies, including the policy whereby Precision Drywall workers were paid based only on the square footage of drywall installed and finished, rather than on the number of hours that they worked. Dennis Lea acted as the corporation's vice president and "help[ed] run the business," including by managing the finances and determining how workers were paid. RP at 1680. He knew that the workers were paid by square footage of drywall installed and that the hours that they worked were not tracked.

Waskiewicz, James Lea's daughter, acted as the corporate secretary and treasurer until late 2008, after this lawsuit was filed. She was then removed from her position as an officer of the corporation because James Lea "said it was best," though none of her duties changed. RP at 1214. Waskiewicz was the primary personnel official, as she was responsible for maintaining the employment records, processing payroll, signing payroll checks, and handling payroll deductions. She "touch[ed] every one of the timecards that [came] into the office, for purposes of payroll processing." RP at 1550. Only Waskiewicz and the Lea brothers had authority to sign checks on behalf of the corporation. She was also responsible for signing a variety of official documents on the corporation's behalf.

The case commenced on August 1, 2008, when Isaias Ramirez and Mario Hernandez filed a proposed class action lawsuit on behalf of a class of drywall

construction workers (referred to herein as the workers) against Precision Drywall, the Lea brothers, and Waskiewicz, alleging that the defendants had failed to record and pay employees for overtime work, failed to provide employees with rest and meal breaks, and made unlawful deductions from employee wages.

On October 23, 2009, the workers filed a motion for partial summary judgment, seeking an order establishing that the defendants had violated certain wage and hour laws. They alleged, among other such violations, violations for unlawful deductions from their wages for tool expenses.[3] Specifically, the workers alleged that Precision Drywall, the Lea brothers, and Waskiewicz were liable for violations of Washington Administrative Code (WAC) 296-126-028, which limits an employer's authority to make wage deductions from an employee's wages.[4] They contended that the Lea brothers and Waskiewicz were individually liable for the violations because they meet the definition of "employer" set forth in the Washington Minimum Wage Act (MWA), chapter

[3] Because the tool deduction violations are the only violations alleged on summary judgment which subsequently resulted in a judgment awarding damages to the workers—and, thus, are the only violations alleged on summary judgment based upon which the Lea brothers and Waskiewicz could now be aggrieved—we do not address the other violations alleged in the workers' motion and found by the trial court on summary judgment.

[4] The sections of the Code provision relevant to the workers' claim are set forth in WAC 296-126-028(2), (3), and (5). These sections provide: "During an on-going employment relationship, an employer may deduct wages when the employee expressly authorizes the deduction in writing and in advance for a lawful purpose for the benefit of the employee. These deductions may reduce the employee's gross wages below the state minimum wage." WAC 296-126-028(2). "Neither the employer nor any person acting in the interest of the employer can derive any financial profit or benefit from any of the deductions under this regulation." WAC 296-126-028(3). "The employer must identify and record all wage deductions openly and clearly in employee payroll records." WAC 296-126-028(5).

49.46 RCW, which provides that "employer" includes "any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee." RCW 49.46.010(4).[5]

The trial court granted the workers' motion in part. The court ruled that the Lea brothers and Waskiewicz were individually liable "as employers and officers of a closely held corporation" for the violations found by the court "because they each acted directly or indirectly in the interest of employer . . . Precision

Drywall . . . in relation to the [workers]." Clerk's Papers (CP) at 575. The trial court further found that the defendants had violated WAC 296-126-028 by "deducting from the wages of [the workers] the costs of tools without advance written authorization, for deriving a financial benefit from those deductions, and for failing to furnish [the workers] with statements itemizing those deductions openly and clearly." CP at 575. Although the workers had additionally sought an order that the violations alleged had been committed willfully—thus establishing that they were entitled to exemplary damages pursuant to RCW 49.52.050 and RCW 49.52.070[6]—the trial court determined that material facts

[5] RCW 49.46.010(4) provides: "'Employer' includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee."

[6] RCW 49.52.050 provides, in pertinent part:

> Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who . . . (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 . . . [s]hall be guilty of a misdemeanor.

RCW 49.52.070 creates civil liability for certain violations of RCW 49.52.050. It provides:

were in dispute regarding the willfulness of the violations found. Thus, the court reserved for trial the issue of damages, including whether exemplary damages were warranted due to willful commission of the violations.

The case thereafter proceeded to trial during a five-week period in March and April 2010. The workers presented to the jury issues beyond those set forth in their prior motion for partial summary judgment. In addition to the claim for unlawful tool deductions, the workers asserted, pursuant to the MWA, a claim for failure to pay overtime wages and, pursuant to the industrial welfare act (IWA), chapter 49.12 RCW, a claim for failure to provide rest breaks. The workers also alleged that the defendants—Precision Drywall, James Lea, Dennis Lea, and Kelly Waskiewicz—had committed the alleged violations willfully, thus warranting the imposition of exemplary damages pursuant to RCW 49.52.070.

At the close of the evidence, the jury was instructed as to the trial court's ruling on partial summary judgment that the Lea brothers and Waskiewicz were individually liable for the tool deduction violations and that Precision Drywall was also so liable. The jury was further instructed that it was required to accept that ruling as true. Because, with regard to the workers' wage deduction claim, the trial court reserved for trial only the issue of willfulness and damages, the jury

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> 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.

was asked, as to that claim, only whether the defendants had "violate[d] Washington law by *willfully* deducting tool expenses from the wages of [the workers]." CP at 584 (emphasis added).

Because the overtime wage claim and the rest period claim were not before the trial court on partial summary judgment—and, thus, no preliminary ruling as to liability for such violations had been made—the jury was asked, as to each defendant, both whether the defendant was liable for the violation and whether the defendant had committed the violation willfully, thus entitling the workers to exemplary damages. For instance, with regard to the overtime wage claim, the jury was first asked, "Did [the defendant] violate Washington's overtime compensation laws with respect to the Class members?" CP at 580-81. Then, the jury was asked, again as to each defendant individually, "Did [that defendant] willfully fail to pay overtime compensation to Class members?" CP at 580-81. The jury was instructed to answer the second question as to each claim only if it had answered the first question in the affirmative. In order to determine that any defendant had committed either violation, the jury was additionally instructed that it must find that the defendant was an "employer" of the workers.

After deliberating, the jury found that Precision Drywall and the Lea brothers had, in violation of our state's overtime compensation law, willfully failed to pay overtime compensation to the workers. Although the jury found that Waskiewicz had violated the overtime compensation law, it found that she had

not done so willfully. Because the trial court had ruled on partial summary judgment that all of the defendants were liable for violating the wage deduction law, the only question before the jury with regard to that claim was whether they had done so willfully. The jury found that Precision Drywall and the Lea brothers had willfully made the unlawful wage deductions, but it found that Waskiewicz had not. Finally, the jury found in favor of all defendants on the rest period violation claim.

The jury's verdicts determined the workers' damages to be $1,036,143.83 for unpaid overtime wages and $14,493.45 for unlawful wage deductions. The trial court subsequently entered a judgment on the verdicts, awarding to the workers: (1) the actual damages found by the jury for the overtime and wage deduction claims; (2) exemplary damages in that same amount based on the jury verdicts that the violations had been committed willfully; (3) prejudgment interest; and (4) attorney fees and costs. The total award exceeded $4.1 million. Because the jury did not find that Waskiewicz had willfully committed any violation, the trial court ordered that she was liable for the amount of the judgment excluding exemplary damages. Judgment was entered in the full amount against Precision Drywall, James Lea, and Dennis Lea.

The defendants thereafter moved for a new trial, challenging certain jury instructions and alleging that opposing counsel had engaged in misconduct during closing argument. The trial court denied the motion.

The Lea brothers and Waskiewicz appeal from both the trial court's partial summary judgment order and the judgment entered on the jury verdicts finding them liable for the overtime compensation and wage deduction violations.[7]

II

The Lea brothers and Waskiewicz first contend that the trial court, in granting the workers' motion for partial summary judgment, erred by determining that they are each individually liable as "employers" for the tool deduction violation found by the court.[8] Because the trial court applied the incorrect statutory definition of "employer" in making this determination, we vacate that portion of the subsequently-entered judgment that is contingent upon the trial court's partial summary judgment ruling.

In their motion for partial summary judgment, the workers alleged that the defendants had violated WAC 296-126-028, which prohibits employers from making deductions from employees' wages without first receiving the employees' authorization in writing, from deriving financial benefit from such deductions, and from making such deductions without identifying them "openly and clearly" in

[7] The attorney who initially represented the Lea brothers and Waskiewicz on appeal—the same attorney who represented all of the defendants at trial—withdrew from representation of all of the appellants subsequent to filing the briefs on appeal but prior to oral argument. The attorney thereafter reappeared on behalf of Waskiewicz alone. Thus, the Lea brothers are currently pro se. Because they did not appear at oral argument, we resolve this case as to the Lea brothers based solely upon the briefing on appeal. See RAP 11.4(e).

[8] As noted above, the only wage and hour violation found by the trial court on partial summary judgment for which the jury subsequently awarded damages is the wage deduction violation. This violation, therefore, is the only violation found by the court on summary judgment pursuant to which the Lea brothers and Waskiewicz may be aggrieved. Thus, we address this claim of error in the context of that violation alone and do not address the other violations found by the trial court on partial summary judgment.

payroll records. WAC 296-126-001 provides that the rules set forth in that chapter of the administrative code "apply to employers and employees in the state as defined in RCW 49.12.005(3) and (4)."[9] Thus, the statutory definition of "employer" set forth in the IWA, chapter 49.12 RCW, dictates whether the Lea brothers and Waskiewicz may be individually liable for the wage deduction violation found by the trial court.

The trial court, however, premised the Lea brothers' and Waskiewicz's liability upon the definition of "employer" set forth in the MWA—the court ruled that they were liable, for purposes of the wage violations found by the court, "as employers and officers of a closely held corporation . . . because they each acted directly or indirectly in the interest of [the] employer." CP at 575; see RCW 49.46.010(4) (defining "employer" for purposes of the MWA as "any individual, partnership, association, corporation, business trust, *or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee*" (emphasis added)). Because the statutory definition of "employer" which applies to the wage deduction violation alleged by the workers on partial summary judgment is set forth in the IWA, the trial court's reliance upon the MWA definition was improper.[10]

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[9] Pursuant to RCW 49.12.005, "employer" and employee" as defined, as relevant here, provide as follows:

> [(3)](b) On and after May 20, 2003, "employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees . . . .
>
> (4) "Employee" means an employee who is employed in the business of the employee's employer whether by way of manual labor or otherwise.

Moreover, pursuant to the applicable definition, as set forth in the IWA, the Lea brothers and Waskiewicz are not "employers" and, thus, are not subject to individual liability for the wage deduction violation. The IWA definition provides that, for purposes of that chapter, "'employer' means any person, firm, corporation, partnership, business trust, legal representative, or other business entity *which engages in any business*, industry, profession, or activity in this state *and employs one or more employees*." RCW 49.12.005(3)(b) (emphasis added). This statutory definition does not preclude an individual from being held liable for violations of the IWA where that individual engages in business and employs employees. Here, however, it was the corporate entity, Precision Drywall, Inc.—not the Lea brothers or Waskiewicz—that "engage[d] in . . . business" and "employ[ed] one or more employees." RCW 49.12.005(3)(b). Thus, the Lea brothers and Waskiewicz do not fall within the IWA definition of "employer"—the definition that applies to the wage deduction claim alleged by the workers on summary judgment. Hence, they cannot be individually liable for the violation proved.[11]

Because the trial court applied the incorrect statutory definition of

[10] We note that the parties' briefing to the trial court with regard to the applicable statutory definition was convoluted at best. However, although the defendants did not coherently argue that the statutory definition of "employer" set forth in the IWA applied to the violations alleged, they did cite to the appropriate statute within their briefing. Thus, we deem the issue preserved for appeal.

[11] We do not preclude the possibility that the Lea brothers and Waskiewicz may be individually liable for the wage deduction violation based upon some theory other than liability as "employers" pursuant to the IWA. However, no other such theory was presented either to the trial court or on appeal.

"employer" in imposing upon the Lea brothers and Waskiewicz individual liability for unlawful wage deductions, and because these individuals are not "employers" pursuant to the applicable statutory definition, we vacate that portion of the subsequently-entered judgment imposing liability upon them for the wage deduction violations.[12] The jury awarded to the workers $14,493.45 for unlawful wage deductions, and the trial court doubled that amount in entering judgment against Precision Drywall and the Lea brothers, based upon the jury finding of willfulness as to those parties. Thus, we vacate this aspect of the judgment against the Lea brothers and Waskiewicz and remand the cause to the trial court for further proceedings on this claim.[13]

III

The Lea brothers and Waskiewicz set forth a single assignment of error related to the judgment entered on the jury verdicts finding that they violated our state's overtime compensation law. In this claim of error, they contend that the trial court erroneously instructed the jury with regard to the definition of "employer." We disagree.

[12] Because Precision Drywall does not appeal, and because the claim of error asserted does not affect its liability, the judgment stands as to Precision Drywall.

[13] The Lea brothers and Waskiewicz additionally contend that the instruction to the jury indicating that the court had already determined that they were "employers" because they "acted directly or indirectly in the interest of [Precision Drywall] in relation to the [workers]," CP at 575, was "a de facto direction to the jury that [they] were the 'employer' for all claims." Appellant's Br. at 16. This is so, they contend, because the jury was also instructed that an "employer," for purposes of the other claims, is one who "acts directly or indirectly in the interest of the employer." Appellant's Br. at 16. However, the trial court instructed the jury that the Lea brothers and Waskiewicz had been determined to be employers pursuant to that definition only as to those violations that were found by the court on summary judgment. Thus, the jury was not, in fact, instructed that it was required to find the individuals to be "employers" for the overtime and rest period claims asserted at trial.

Jury instructions are sufficient if they permit each party to argue its theory of the case, are not misleading, and, when read as a whole, properly inform the jury of the applicable law. Leeper v. Dep't of Labor & Indus., 123 Wn.2d 803, 809, 872 P.2d 507 (1994). "'No more is required.'" Leeper, 123 Wn.2d at 809 (quoting Douglas v. Freeman, 117 Wn.2d 242, 257, 814 P.2d 1160 (1991)). Purported errors of law in jury instructions are reviewed de novo on appeal. Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995). "[A]n instruction's erroneous statement of the applicable law is reversible error where it prejudices a party." Hue, 127 Wn.2d at 92.

The MWA provides that

> no employer shall employ any of his or her employees for a work week longer than forty hours unless such employee receives compensation for his or her employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he or she is employed.

RCW 49.46.130. Here, the jury found that the Lea brothers and Waskiewicz were individually liable as employers who violated this overtime compensation provision of the MWA.

The court's instruction to the jury defining "employer" provided:

> When used in these instructions, the term "employer" means any person, corporation, partnership, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees. The term "employer" includes any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee. For example, the owners and corporate officers of a company (including officers who lack an ownership interest) will fall within the definition of "employer" if they are engaged in running

> the company's business, are engaged in managing the company's finances, are responsible for maintaining the company's employment records, are authorized to issue payroll checks on behalf of the company, determine the company's employment practices, or exercise control over how the company's employees are paid. In these instances, the owners and corporate officers are acting directly or indirectly in the interest of the company in relation to the company's employees. Thus, like the company, they are also considered to be employers of the employees.

CP at 601 (Instruction 12). The first sentence of the instruction quotes the definition of "employer" set forth in the IWA. See RCW 49.12.005(3)(b). The second sentence quotes the MWA definition of "employer." See RCW 49.46.010(4). The remainder of the instruction is based upon case law interpreting the definition of "employer" set forth in the federal Fair Labor Standards Act (FLSA), which is identical to the MWA definition in all relevant respects. See 29 U.S.C.A. § 203(d) (defining "employer," in part, as "any person acting directly or indirectly in the interest of an employer in relation to an employee").[14]

The Lea brothers and Waskiewicz first assert that the instruction is misleading, despite the fact that it accurately quotes the MWA definition of "employer," "because it allowed the jury to infer and conclude that individuals can also be the employer, in addition to the business entity." Appellant's Br. at 17. However, because individuals may indeed be liable as employers for

[14] The complete definition of "employer" for purposes of the FLSA provides: "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization. 29 U.S.C.A. § 203(d).

violations of the MWA, this claim of error is unavailing.[15]

"Employer," for purposes of the MWA, "includes any individual, partnership, association, corporation, business trust, or *any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee*." RCW 49.46.010(4) (emphasis added). We review de novo questions of statutory interpretation. Happy Bunch, LLC v. Grandview N., LLC, 142 Wn. App. 81, 88, 173 P.3d 959 (2007). In interpreting a statute, our primary duty is to discern and implement legislative intent. Johnson v. Recreational Equip., Inc., 159 Wn. App. 939, 946, 247 P.3d 19, review denied, 259 P.3d 1108 (2011). Where the statute is unambiguous, we derive the meaning of the statute from its plain language. Johnson, 159 Wn. App. at 946.

Here, the plain language of the statute indicates that individuals such as the Lea brothers and Waskiewicz may be employers for purposes of the MWA. As we explained when interpreting virtually identical language in the Washington Law Against Discrimination (WLAD), see RCW 49.60.040(11),[16] "[w]e can conceive of no reason why the Legislature would have included 'any person acting in the interest of an employer, directly or indirectly,' in its definition of 'employer' if it had not intended to extend liability to such 'person.'" Brown v. Scott Paper Worldwide Co., 98 Wn. App. 349, 356, 989 P.2d 1187 (1999), aff'd,

[15] The Lea brothers and Waskiewicz do not contend that the evidence presented at trial was insufficient for the jury to determine that they are "employers" pursuant to the MWA.

[16] Pursuant to the WLAD, an "employer" "includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit." RCW 49.60.040(11).

143 Wn.2d 349, 361, 20 P.3d 921 (2001). Thus, there, we rejected the contention that managers and other individual employees cannot be "employers" pursuant to that statutory definition. Brown, 98 Wn. App. at 356. Our Supreme Court agreed that the WLAD provides for individual liability, holding that the statutory definition of "employer" set forth therein, "by its very terms, encompasses individual supervisors and managers who discriminate in employment." Brown, 143 Wn.2d at 361. Similarly, here, the plain language of the MWA definition of "employer" provides for individual liability where an individual "act[s] directly or indirectly in the interest of an employer in relation to an employee." RCW 49.46.010(4).

Moreover, the FLSA, which sets forth a definition of "employer" substantially identical to that in the MWA, see 29 U.S.C.A. § 203(d), provides for the individual liability of those meeting its definition of "employer." See, e.g., Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962 (6th Cir. 1991); Digiore v. State of Ill., 962 F. Supp. 1064 (N.D. Ill. 1997). Such an interpretation is consistent with the remedial purposes of the FLSA, which "'require the courts to define 'employer' more broadly than the term would be interpreted in traditional common law applications.'" Dole, 942 F.2d at 965 (quoting McLaughlin v. Seafood, Inc., 867 F.2d 875, 877 (5th Cir. 1989)). The MWA, including its definitions, is patterned on the FLSA. Stahl v. Delicor of Puget Sound, Inc., 148 Wn.2d 876, 885, 64 P.3d 10 (2003). Thus, interpretations of comparable

provisions of the FLSA are persuasive authority when construing the MWA. Innis v. Tandy Corp., 141 Wn.2d 517, 524, 7 P.3d 807 (2000). Additionally, given that, like the FLSA, the MWA is remedial legislation, the MWA should also be liberally construed so as to achieve the legislature's broad public policy objectives. McConnell v. Mothers Work, Inc., 131 Wn. App. 525, 532, 128 P.3d 128 (2006).

The Lea brothers and Waskiewicz further assert that the portion of the instruction based upon interpretations of the FLSA did not accurately inform the jury of the legal test for determining employer status pursuant to that statute. However, although they objected to the instruction at trial, they failed to propose an alternative instruction defining "employer."[17]

> If a party is dissatisfied with an instruction, it is that party's duty to propose an appropriate instruction and, if the court fails to give the instruction, take exception to that failure. If a party does not propose an appropriate instruction, it cannot complain about the court's failure to give it.

Hoglund v. Raymark Indus., Inc., 50 Wn. App. 360, 368, 749 P.2d 164 (1987); accord Goodman v. Boeing Co., 75 Wn. App. 60, 75, 877 P.2d 703 (1994), aff'd, 127 Wn.2d 401, 899 P.2d 1265 (1995). Thus, this claim of error has not been preserved for appellate review.

The Lea brothers and Waskiewicz are incorrect that, as a matter of law, individuals may not be held liable for violations of the MWA. They have not

[17] In their briefing, the Lea brothers and Waskiewicz do not point to any alternative instruction for the definition of "employer" that they proposed to the trial court. Moreover, our independent review of the proposed instructions included within the record on appeal reveals no such proposed instruction.

established any entitlement to appellate relief stemming from this claim of instructional error.

IV

The Lea brothers next assert two claims of error relating to that portion of the judgment imposing upon them exemplary damages for willfully violating our state's overtime compensation law.[18] They aver that two instructions given to the jury—an instruction defining "willfulness" and an instruction providing that exemplary damages are not available to an employee who knowingly submits to a violation—were erroneous. We disagree as to both claims of error.

Pursuant to RCW 49.52.050(2), "[a]ny employer or officer, vice principal or agent of any employer . . . who . . . [w]ilfully 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" is guilty of a misdemeanor. RCW 49.52.070 creates civil liability, including double damages, costs, and attorney fees, for violations of RCW 49.52.050. Here, the jury determined that Precision Drywall and the Lea brothers had willfully failed to pay to the workers the wages that they were owed pursuant to our state's overtime compensation law.[19] Thus, the judgment entered on the jury verdicts imposed exemplary damages upon those parties for

[18] The jury did not find that Waskiewicz had willfully committed any violations. Thus, she has not been aggrieved by any purportedly erroneous jury instructions related solely to this issue.

[19] The jury also determined that Precision Drywall and the Lea brothers willfully made unlawful deductions from the workers' wages. Because we vacate that portion of the judgment for reasons explained above, we address the claims of error related to the jury's willfulness findings solely in terms of the overtime compensation claim.

that violation.

We first note that—regardless of which definition of "employer" is applicable to RCW 49.52.050 and .070—the Lea brothers may be held individually liable pursuant to those statutes, as they were both officers of Precision Drywall.[20]

> The legislature intended, under RCW 49.52.070, to impose personal liability on the officers in cases like this because the officers control the financial decisions of the corporation. There are many examples that highlight the need for such risk of personal liability. The officers decide whether to pay one debt over another (e.g., wages). The officers have the choice to file bankruptcy or, say, close the business and pay its debts (including wages). The officers decide whether to continue running an inadequately capitalized corporation while hoping for a change in financial position. In other words, the officers control the choices over how the corporation's money is used, and (in cases of unpaid wage claims) RCW 49.52.070 imposes personal liability when the officers choose not to pay wages owed. Such a choice is willful and intentional.

Morgan v. Kingen, 166 Wn.2d 526, 536-37, 210 P.3d 995 (2009).

Thus, the Lea brothers—who own 100 percent of the corporation's stock, made all decisions with regard to corporate finances, and determined the compensation policies whereby all of the employees were paid—are precisely the type of corporate officers upon whom our legislature intended to impose liability for willful failure pay to their employees the wages that they are owed.

[20] At oral argument, counsel for Waskiewicz, who had previously represented the Lea brothers as well, appeared to be asserting that those parties are not "employers" pursuant to RCW 49.52.050 and RCW 49.52.070. For reasons set forth herein, whether the Lea brothers—the only parties who both appeal and are subject to exemplary damages based upon the judgment entered—constitute "employers" for purposes of those statutes is not determinative of their liability thereunder.

The Lea brothers, therefore, are subject to RCW 49.52.050 and RCW 49.52.070 not because they are "employers" pursuant to those statutes, but because they are corporate officers who "control[led] the choices over how the corporation's money [was] used" and "[chose] not to pay wages owed." Morgan, 166 Wn.2d at 536-37. The uncontroverted testimony inexorably leads to the conclusion that the Lea brothers may be subject to liability for willful failure to pay wages owed, and no instruction which properly states the law could lead a reasonable jury to determine otherwise.[21] Thus, to the extent that the Lea brothers contend that they cannot be held individually liable for violations of RCW 49.52.050 and RCW 49.52.070, they are profoundly mistaken.

The Lea brothers assert that the instruction defining "willfulness," for purposes of the imposition of exemplary damages, improperly states the law because it does not contain both the word "willfully" and the phrase "with intent to deprive." The trial court instructed the jury:

> When an employer or officer, vice principal, or agent of an employer willfully fails to pay wages owed to employees, the employees are entitled to recover twice the amount of wages owed. The term "willfully" means that the person knows what he or she is doing, intends to do what he or she is doing, and is a free agent.
>
> The failure to pay wages is not willful if it is due to a legitimate error or if a bona fide dispute existed between the employer and employee regarding the payment of wages. The term "legitimate error" means an error that is accidental or the result of carelessness. The term "bona fide dispute" means a fairly debatable dispute over whether an employment relationship exists or whether all or a portion of the wages must be paid. An

[21] Jury Instruction 12, which informed the jurors that certain corporate officers could be treated as an "employer" in determining individual liability, was in no way unfairly prejudicial to the Lea brothers. To the contrary, it was entirely consistent with Morgan, 166 Wn.2d 526.

> employer's failure to keep adequate and proper records of wages owed does not create a bona fide dispute.
>
> Deductions are not "willful" if an employee knowingly submitted to any withholding of wages. To meet this exception, an employer must prove that employees deliberately and intentionally deferred to the employer the decision of whether they would ever be paid the wages owed.

CP at 622 (Instruction 33).

Our Supreme Court has succinctly interpreted the willfulness standard: "An employer or agent of an employer who fails to pay an employee's wages withholds such employee's wages 'willfully and with intent to deprive' if the employer volitionally fails to pay the employee." Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 165, 961 P.2d 371 (1998). The court explained that

> [t]he critical determination in a case under RCW 49.52.070 for double damages is whether the employer's failure to pay wages was "willful." In the past, our test for "willful" failure to pay has not been stringent: the employer's refusal to pay must be volitional. Willful means "merely that the 'person knows what he is doing, intends to do what he is doing, and is a free agent.'"

Schilling, 136 Wn.2d at 159-60 (quoting Brandt v. Imperio, 1 Wn. App. 678, 681, 463 P.2d 197 (1969)). However, the failure to pay wages is "not willful" where "the employer was careless or erred in failing to pay, or a 'bona fide' dispute existed between the employer and employee regarding the payment of wages." Schilling, 136 Wn.2d at 160 (citing Pope v. Univ. of Wash., 121 Wn.2d 479, 491 n.4, 852 P.2d 1055, 871 P.2d 590 (1993) ("Lack of intent may be established either by a finding of carelessness or by the existence of a bona fide dispute.")).

Here, the challenged instruction accurately provides the standard, as set

forth by our Supreme Court, for determining whether a withholding of wages was done "willfully and with intent to deprive"—the standard is met where the employer "'knows what he is doing, intends to do what he is doing, and is a free agent.'" Schilling, 136 Wn.2d at 159-60 (quoting Brandt, 1 Wn. App. at 681); see CP 622 (Instruction 33). Moreover, our Supreme Court's explication of this standard has not differentiated between the two terms that the Lea brothers assert must both be included in the instruction—indicating that the jury instruction here did not omit any part of the "willfulness" standard. See, e.g., Morgan, 166 Wn.2d at 533-35; Schilling, 136 Wn.2d at 159-60; Pope, 121 Wn.2d at 490 (noting that "whether an employer acts '[w]ilfully and with intent' is a question of fact reviewed under the substantial evidence standard" (emphasis added) (citing Lillig v. Becton-Dickinson, 105 Wn.2d 653, 660, 717 P.2d 1371 (1986))). Rather, in addressing RCW 49.52.050(2), the cases discuss the standard set forth therein as a single, unified standard—*not* as two separate standards which must both be met in order for exemplary damages to be awarded. Thus, although RCW 49.52.050 includes the word "wilfully" and the phrase "with intent to deprive," the instruction here did not improperly state the law by not setting forth the entirety of the statutory language. See State v. Reay, 61 Wn. App. 141, 147, 810 P.2d 512 (1991); Lindsey v. Elkins, 154 Wash. 588, 607, 283 P. 447 (1929) (holding that, although the trial court may instruct in the language of a statute, it is not required to do so).

Furthermore, the two defenses to a finding of "willfulness"—that the defendant carelessly failed to pay the wages owed and that a bona fide dispute existed as to whether the wages were owed—relate, respectively, to the statutory language of "wilfully" and "with intent to deprive." In other words, a defendant does not willfully fail to pay wages where he or she carelessly does so; and a defendant does not fail to pay wages with intent to deprive the employee of those wages where a bona fide dispute exists regarding whether the wages are owed. Here, the jury was instructed as to both defenses, indicating that, even were the instruction deficient for failure to include the phrase "with intent to deprive"—which we determine is not so—the jury was nevertheless required to determine that those related defenses did not apply prior to finding that exemplary damages were warranted.

Finally, we note that another instruction to the jury included both the statutory term "wilfully" and the phrase "with intent to deprive." Jury instructions are sufficient if, *when read as a whole*, they properly inform the jury of the applicable law. Leeper, 123 Wn.2d at 809. Here, the instructions did so.[22]

The jury instruction herein challenged accurately stated the law and allowed the individual defendants to argue their theory of the case—that they had not intentionally failed to pay the wages owed. Thus, the trial court did not

[22] We additionally note that, with regard to the finding of willfulness for the wage deduction claim, the trial court's order on partial summary judgment explicitly reserved for trial only the question of "willfulness"—the order did not reserve for trial the issue of whether wages were deducted "within intent to deprive" the workers of those wages. The Lea brothers did not assign error to this determination and are not aggrieved by the trial judge permitting them to present evidence regarding their lack of intent to deprive the workers of wages.

err by issuing this instruction.[23]

The Lea brothers additionally assign error to the instruction informing the jurors that exemplary damages are not available to an employee who knowingly submits to a withholding of his or her wages. The jury was instructed that "[d]eductions are not 'willful' if an employee knowingly submitted to any withholding of wages. To meet this exception, an employer must prove that employees deliberately and intentionally deferred to the employer the decision of whether they would ever be paid the wages owed." CP at 622 (Instruction 33); see also CP at 613) (Instruction 24); CP at 619 (Instruction 30).[24]

The Lea brothers fail to demonstrate, however, how they were prejudiced by this instruction. See Cox v. Spangler, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000) (recognizing that "an instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party"). They cursorily aver that the instruction imposed upon them a higher burden by

[23] The Lea brothers additionally contend that the trial court erred by submitting to the jury the question of whether they willfully deprived the workers of wages owed by making deductions from those wages for tool expenses. Although we vacate that portion of the judgment relating to wage deductions based on other grounds, we nonetheless note that this claim of error is unmeritorious. The Lea brothers appear to be asserting not that any such violation was not willful but, rather, that no wages that they were obligated to pay were unlawfully withheld because the deductions for tool expenses were lawful. However, the trial court determined on summary judgment that the defendants were, indeed, liable for wrongfully withholding those wages. The Lea brothers did not assign error to the summary judgment order on that basis, and they cannot now assert that the trial court's ruling was incorrect.

[24] Exemplary damages awarded pursuant to RCW 49.52.070 are not available "to any employee who has knowingly submitted to such violations." RCW 49.52.070. We have previously held that, where employees had agreed to defer payment of their wages for a specified period of time, "to have 'knowingly submitted' to the unlawful withholding of wages, the employees must have deliberately and intentionally deferred to [the employer] the decision of whether they would ever be paid." Chelius v. Questar Microsystems, Inc., 107 Wn. App. 678, 682, 27 P.3d 681 (2001).

requiring a showing that the workers' submission to the violations was "deliberate and intentional" rather than merely "knowing." However, the Lea brothers provide no further argument articulating the manner in which this language imposed such a purportedly "higher burden." Moreover, the common meaning of "knowingly"—"in a knowing manner, esp. with awareness, deliberateness, or intention," Webster's Third New International Dictionary 1252 (2002)—indicates that the jury was unlikely to have imposed a "higher burden" based on the instructional language. The Lea brothers have failed to demonstrate that the instruction was prejudicial; thus, the error, if any, is not one warranting appellate relief.

That portion of the judgment imposing exemplary damages upon Precision Drywall and the Lea brothers is affirmed.

V

The Lea brothers and Waskiewicz additionally contend that the trial court abused its discretion by denying their motion for a new trial due to purported misconduct by opposing counsel during closing argument. We disagree.

The trial court may grant a new trial due to misconduct of the prevailing party where such misconduct materially affects the substantial rights of the moving party. CR 59(a)(2).[25] "'An order denying a new trial will not be reversed

[25] The Lea brothers and Waskiewicz also cite CR 60(b)(4) as authorizing relief from the trial court's judgment due to the purported misconduct of opposing counsel. However, they cite to no authority for their contention that CR 60(b)(4) applies to alleged misconduct of counsel during closing argument. Because, in order to obtain relief from judgment pursuant to CR 60(b)(4), the moving party must show that it was "prevented from fully and fairly presenting its case or defense," Lindgren v. Lindgren, 58 Wn. App. 588, 596, 794 P.2d 526 (1990), the rule

except for abuse of discretion.'" Aluminum Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wn. 2d 517, 537, 998 P.2d 856 (2000) (quoting Moore v. Smith, 89 Wn.2d 932, 942, 578 P.2d 26 (1978)).

The Lea brothers and Waskiewicz assert that the workers' counsel misbehaved in closing argument by referring to the financial condition of the parties and by suggesting that the defendants had not called a particular witness to testify because that witness's testimony would have been adverse to the defendants. However, at trial, they objected to only one of the statements that, in their motion for a new trial, they asserted constituted misconduct. The trial court sustained that objection, and no curative instruction was requested. RP at 3185.

"To preserve an error relating to misconduct of counsel, a party should object to the statement, seek a curative instruction, and move for a mistrial or new trial." City of Bellevue v. Kravik, 69 Wn. App. 735, 743, 850 P.2d 559 (1993). "If misconduct occurs, the trial court must be promptly asked to correct it. Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960). Here, the defendants "did not move for a mistrial but were willing to wait and gamble on a favorable verdict and then, for the first time, when the verdict was adverse, they claimed error." Nelson v. Martinson, 52 Wn.2d 684,

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clearly does not apply to such a claim of misconduct.

689, 328 P.2d 703 (1958). "Directing the trial court's attention to the alleged misconduct, without asking for relief of any kind, does not, under the circumstances of this case, preserve the error for one who takes the calculated risk of permitting the case to go to the jury." Casey v. Williams, 47 Wn.2d 255, 257, 287 P.2d 343 (1955).

By failing to object and to request a curative instruction at trial, the Lea brothers and Waskiewicz waived any claim of error premised upon opposing counsel's purported misconduct. The trial court did not err by denying their motion for a new trial.

VI

The workers were awarded attorney fees and costs in the trial court and request such an award on appeal.[26] Because RCW 49.48.030 and RCW 49.52.070 authorize such an award, we grant the workers' request. Although we vacate that portion of the trial court's judgment based upon the wage deduction violation found by the trial court, we nonetheless grant to the workers the full amount of attorney fees and costs incurred on appeal. Because we affirm the vast majority of the judgment, an award for the full amount is warranted.

RCW 49.48.030 provides that "[i]n any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees, in an amount to be determined by the court, shall be

[26] The Lea brothers and Waskiewicz also request an award of attorney fees and costs on appeal. Because they are not substantially prevailing parties on appeal, they are not entitled to such an award.

assessed against said employer or former employer." Because the statute is remedial, it must be liberally construed in favor of the employee in order to effectuate its purpose. Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett, 146 Wn.2d 29, 34, 42 P.3d 1265 (2002). "'[A]ttorney fees are authorized under the remedial statutes to provide incentives for aggrieved employees to assert their statutory rights.'" Int'l Ass'n of Fire Fighters, 146 Wn.2d at 35 (alteration in original) (quoting Hume v. Am. Disposal Co., 124 Wn.2d 656, 673, 880 P.2d 988 (1994)). RCW 49.52.070 also provides for an award of attorney fees and costs where an employer "[w]ilfully 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.

"Given that attorney fee statutes may serve different purposes, it is important to evaluate the purpose of the specific attorney fees provision and to apply the statute in accordance with that purpose." Brand v. Dep't of Labor & Indus., 139 Wn.2d 659, 667, 989 P.2d 1111 (1999). Thus, our Supreme Court has determined that, where the plain language of a statute authorizing an award of attorney fees does not suggest that the fee award is dependent upon the worker's overall success on appeal, the fee award should not be limited to only those claims upon which the worker was successful. Brand, 139 Wn.2d at 669-73. Moreover, when dealing with remedial legislation, "[t]he essential goal in

shifting fees (to either party) is to do rough justice, not to achieve auditing perfection." Fox v. Vice, ___ U.S. ___, 131 S. Ct. 2205, 2216, 180 L. Ed. 2d 45 (2011). "[T]he determination of fees 'should not result in a second major litigation.'" Fox, 131 S. Ct. at 2216 (quoting Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)). Here, we affirm over 99 percent of the underlying judgment amount.[27]

Where remedial social legislation is at issue and the overwhelming majority of the underlying judgment is affirmed on appeal, as is the case here, the purpose of the statute authorizing a fee award is best effectuated by permitting the party that is asserting its statutory rights to recover the full amount of attorney fees and costs on appeal.[28] Thus, we grant the workers' request for an award of attorney fees and costs. Our commissioner will determine the amount of the appropriate award.[29]

As to the Lea brothers and Waskiewicz, that portion of the trial court's judgment predicated upon the wage deduction claim is vacated and the case is remanded on that claim. The remainder of the judgment is affirmed.

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[27] The portion of the judgment that we vacate—that based upon the wage deduction violation found by the trial court—is $28,986.90 as to the Lea brothers and $14,493.45 as to Waskiewicz—$14,493.45 in damages found by the jury, doubled by the trial court, as to Precision Drywall and the Lea brothers, based upon the jury finding of willfulness. The full amount of the judgment entered was $4,174,710.20 with post-judgment interest at 12 percent.

[28] For this same reason, there is no need for the trial court to revisit its determination of attorney fees and costs.

[29] The workers must continue to comply with RAP 18.1 to facilitate the commissioner's decision.

Dwyer, C.J.

We concur:

Spearman, J.

Schindler, J.