

74964-1

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NO. 74964-1-1

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

REED JASSMANN

Appellant/Plaintiff,

v.

NORTHWEST INTERIORS & DESIGN, LLC, a Washington limited liability company; RANDY LEE OLIVER and MARCIE OLIVER, husband and wife; and AMERICAN CONTRACTORS INDEMNITY COMPANY, Bond account no. 100238900.

Respondents/Defendants,

Brief of Respondent/Defendants

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A. STATEMENT OF THE CASE

- 1) Under RCW 49.48.030, was the trial court correct in denying Jassmann an award of attorney's fees because (a) Jassmann waived all claims, including claims for attorneys fees, in the CR2A; (b) Jassman agreed there were no admissions to any allegations, which includes no allegations that wages were owed; and (c) there were no findings and no determination that Jassmann was entitled to compensation by reason of employment? Yes.
- 2) Under RCW 49.52.050, was the trial court correct in denying plaintiff an award of attorney's fee because (a) Jassmann waived all claims, including claims for attorneys fees, in the CR2A; (b) Jassman agreed there were no admissions to any allegations, which includes no allegations that wages were owed; and (c) the requisite element of willfulness was not met, due to NWID's bona fide dispute that it owed Jassmann money? Yes.
- 3) Under RCW 49.46.090, was the trial court correct in denying plaintiff an award of attorney's fees because (a) Jassmann waived all claims, including claims for attorneys fees, in the CR2A; and (b) Jassman agreed there were no admissions to any allegations, which includes no allegations that wages were owed; and (c) there

was no determination that NWID had paid Jassmann less than the wages that were due? Yes.

- 4) Under RCW 18.27.040, was the trial court correct in denying Jassmann a judgment against the American Contractors Indemnity Company (“ACIC”) because a) Jassmann waived his claims against ACIC in the CR2A and b) a judgment on a settlement agreement does not fall within the statutory context of RCW 18.27? Yes.

B. DECISION BELOW

On March 14, 2016, the superior court issued an that:

- 1) Granted judgment against NWID, Randy Oliver and Marci Oliver in the principal amount of \$15,000;
- 2) Denied Jassmann’s motion for Judgment requesting an award of attorney’s fees under RCW 49.48.030 and/or RCW 49.46.090.
- 3) Denied judgment against NWID’s bond by American Contractors Indemnity Company.

C. STATEMENT OF FACTS

On **September 8, 2014**, Jassmann filed claims against NWID and the Olivers for: 1) Breach of Contract for unpaid wages and commissions, plus interest and attorneys' fees; 2) Employer Liability pursuant to RCW 49.52.070, including exemplary damages and attorney's fees; 3) Double Damages pursuant to RCW 49.52.070; 4) a Claim against American Contractors Indemnity Company for all amounts adjudged against NWID.
CP 1-3

On **October 10, 2014**, NWID and the Olivers filed their Answer, and admitted that Jassmann performed work for NWID in 2014 and that NWID paid Jassman wages and commissions. CP 8, ¶ 5. NWID denied that it was liable for judgment under RCW 49.52.070. CP 8, ¶ 10. NWID denied that it was liable for double damages under RCW 49.52.070. CP 8, ¶ 12. NWID denied that Jassman was entitled to relief or judgment for unpaid wages and commissions and denied that Jassman was entitled to judgment against ACIC. CP 8 ¶ 14. NWID denied that Jassman was entitled to relief for interest, attorneys' fees or any other relief. CP 8 ¶ 14.

NWID stated twenty-three (23) separate defenses to Jassman's claims, all disputing that Jassmann was entitled to further payment for

wages, commissions or reimbursement for alleged NWID expenses. CP 8-12.

Furthermore, NWID counterclaimed against Jassmann for: 1) Fraudulent Misrepresentation and Unjust Enrichment. CP 12-14. Both counterclaims were premised on the two following: 1) NWID and the Oliver's believed that Jassmann fraudulently represented that the President of NWID, Randy Oliver, agreed to purchase certain personal property from Jassmann for \$1500; and 2) Based on Jassmann's fraudulent representations, Marci Oliver instructed the bookkeeper to issue Jassmann a check in the amount of \$1500, which Jassmann received and cashed. CP12-14.

On **May 26, 2015**, in a letter to Jassmann's attorney, NWID disputed that Jassmann had a right to participate in NWID's profits, especially because Jassmann had worked for NWID less than ninety (90) days. Jassmann demanded that NWID produce all general ledgers for the years 2013 and 2014, to evaluate NWID's gross sales, expenses, overhead, and business taxes. NWID responded that this request was beyond the scope and simply an attempt by Jassmann to gain proprietary information to gain an unfair advantage. NWID responded that "Jassmann was employed for less than ninety (90) days and did not participate as an

employee on every project NWID [performed] in the year 2014 or even during the brief time he was employed.” CP 187.

August 3, 2015, filed its Opposition Response, CP 198 – 211, to Jassmann’s Motion to Compel a Discovery Response, and its Amended Response, CP 213 – 225. NWID disputed Jassmann’s need for the requested information.. NWID argued that Jassmann was not owed any further wages, stating that for the approximately ninety days Jassmann worked, NWID paid him \$22,019.68, and disputed owing Jassmann an additional \$17,808.55 as he claimed. CP 199 – 200.

On **October 7, 2015**, Jassmann’s counsel emailed NWID’s counsel, “if you would tell your client they ought to pay \$15,000, then I will tell Reed [Jassmann} that he needs to accept \$15,000.” CP 306.

On **October 8, 2015**, NWID’s counsel emailed back, “If you can assure me that Reed will accept \$15,000, I have been authorized by NWID to agree to a settlement for \$15k. The normal waiver of any and all claims, known or unknown, the parties enter into this to settle the dispute without admission to any allegations, payment in thirty days.” CP 307.

Thursday, **October 8, 2015, 12:41 pm**, NWID’s counsel emailed Jassmann’s counsel, “ Can you send me the details that you are thinking of? I have begun to draft the settlement agreement and will send it to you for review and comments in tracked changes...” CP 309 - 310.

At **12:56pm, October 8, 2015**, Jassmann's counsel emailed NWID's counsel, with a proposal he had drafted, "Here is my draft." CP 310.

At **1:00pm, October 8, 2015**, NWID's counsel emailed Jassmann's counsel back before reading all of Jassmann's proposed terms seeing that Jassmann shortened the payment time by ten days, "I haven't even made it down to the bottom of the page and already it will not work. You said yesterday 30 days...." CP 314.

At **1:01 pm, October 28, 2015**, Jassmann's counsel emailed back, "OK, November 9." CP 316.

At **1:08 pm, October 8, 2015**, NWID's counsel emailed back, "I had put November 9th, but then received an email from Marcie stating they may not be able to make the payment by then. I am awaiting her email back. In the meantime, can you have discussions with your client about a longer timeline for payment." CP 316.

The attorneys went back and forth on the payment dates and whether or not the agreement was binding. CP 314 - 317. NWID's counsel argued that when Jassmann shortened the payment time in the proposed settlement draft, this was a changed term that was a counter to the agreement. CP 318. "Since it is construed to be a counter... So, we can interpret that written settlement agreement that you agreed then

changed your mind.” CP 318. NWID’s counsel and that the parties needed to work out the details of the settlement agreement for a plan that was acceptable and manageable. CP 318.

The attorneys continued to discuss the settlement terms over emails, NWID tried to negotiate payment terms that were workable for NWID, Jassmann’s attorney continued to push for payment in thirty (30) days. CP 316 - 321.

On **October 21, 2015**, Jassmann filed a Motion to Enforce CR2A Settlement. CP 263 - 269. Jassmann argued that since he sued for unpaid wages, then he must be awarded his attorney fees against NWID after October 8, 2015, when NWID repudiated the CR2A agreement pursuant to RCW 49.48.030, RCW 49.46.090. CP 269.

On **October 28, 2015**, NWID and the Olivers filed their opposition Response to Jassmann’s Motion to Compel. CP 287 – 297. They asked the court not to enforce the CR2A because Jassmann sought to enforce an agreement he rejected and countered. CP 287. They argued that Jassmann could not prove the existence of an enforceable agreement under CR2A nor satisfy the elements to enforce a contract under the general principles of contract law. CP 287; CP 296-297. Additionally, NWID argued that the CR 2A should not be enforced for the following reasons: No intent to be bound without a formal agreement signed by the parties CP 293;

Material terms were not agreed to, CP 293 – 294; Jassmann sought to enforce an agreement he repudiated and countered, CP 294 – 296; Jassmann could not satisfy the essential elements of a contract. CP 296 – 297.

On **October 28, 2015**, NWID and the Olivers' continued to dispute Jassmann's allegations that NWID owed him for wages. Randy Oliver stated in his Declaration, "On October 8, 2015 I told our attorney that we did not think [Jassmann] was owed a cent. However to get the lawsuit settled and avoid trial NWID would agree to a fifteen thousand dollar payment..." CP 322 – 323, ¶4. "However, I was very clear that under no circumstances would we settle or even agree to settle unless the agreement clearly reflected that we were not admitting that anything Reed had alleged he was owed was something NWID or my wife or I owed. I was very clear that we would only agree to settle if there was absolutely no admission of guilt on our part or that made it look like we owed Reed a cent." CP 323 ¶5.

Randy Oliver addressed the enforceability of the CR2A, "Of course, I expected that my wife and I would have the opportunity to review the exact terms of the settlement together, to make sure it reflected terms that we could live with. I did not expect that emails between the attorneys would be a binding agreement.... Of course we would want to

see the final agreement and discuss it together before we signed it and made it binding against NWID or ourselves.” CP 323, ¶7.

Randy Oliver wanted to be clear that there would be no settlement unless the agreement clearly reflected that NWID and the Olivers “were not admitting that anything Reed had alleged he was owed was something” that NWID or the Olivers owed. CP 323 ¶5. He continued, “I was very clear that we would only agree to settle if there was absolutely no admission of guilt on our part or that made it look like we owed Reed a cent.” CP 323 ¶5.

Mr. Oliver stated that Jassmann, in his proposed settlement agreement, “tried to make it look like we were paying him for damages, like his cell phone and car expenses and other damages he now claims we owe him. We would never agree to that. We don’t owe him a cent and we wouldn’t have agreed to anything unless it clearly stated we don’t admit to anything and we don’t agree that he is owed damages.” CP 323 ¶8.

On **November 3, 2015**, the judge signed Jassmann’s order on Plaintiff’s Motion to Enforce CR2A and Striking the Trial Date. CP 326 – 327. However, the court denied Plaintiff’s request to submit his application for attorney’s fees incurred after the repudiation of the CR2A, crossing this language from the prepared order. CP 327.

On **November 9, 2015**, NWID and the Olivers filed a Motion for Reconsideration of the court's October 8, 2015 Opinion, arguing that there were genuine disputes about the material terms of the agreement. CP 328 - 339.

On **November 10, 2015**, Jassmann filed a Motion for Judgment on the CR2A Settlement. CP 341 - 345. Jassmann, again, recited allegations that NWID owed him for wages. CP 342. Nonetheless, Jassmann, also argued that on October 8, 2015 NWID offered payment of \$15,000, with a condition of the normal waiver of any and all claims, known or unknown, and that the parties enter into the agreement to settle the dispute without admission to any allegations. CP 343. Again, Jassmann argued that pursuant to 49.48.030 and RCW 49.46.090, he should be awarded attorneys' fees for recovery of unpaid wages. CP 344 – 345.

November 30, 2015, Jassmann filed his Opposition to the Motion for Reconsideration. CP 375 - 378 Jassmann argued that “[t]he evidence actually demonstrates that Jassmann twice accepted all three terms of Defendant's offer before the Defendant repudiated the settlement agreement. CP 375, lines 21 – 22. He further argued, “[s]econd, if that assurance was given, then it made an offer which identified three terms, namely (1) the “normal waiver of all claims, known or unknown, “ (2) that it was “without admission to any allegations” and (3) that Defendant's

payment of \$15,000 to Jassmann would be in “thirty days.” CP 375, lines 8 – 11.

Jassmann further argued that [on October 8, 2015] “[a]t 12:56 pm, Jassmann sent a draft settlement agreement. Paragraph 2 of the draft document stated that no party admits the truth of any allegation by any other party, and “no party admits any liability to the other,” so Jassmann accepted Defendants’ second settlement term.” CP 377, lines 3 – 7.

Jassmann then cited the Morris case, “[i]t is well established that “[i]f the subject-matter is not in dispute, the terms are agreed upon, and the intention of the parties plain, then a contract exists between them by virtue of the informal writings, even though they may contemplate that a more formal contract shall be subsequently executed and delivered.” Morris v. Maks, 69 Wn.App. 865, 872, 850 P.2d 1357, 1360 (1993).” CP 377, lines 10 – 19.

Jassmann, again, acknowledged that one of Defendants’ settlement terms was the “normal waiver of all claims, known or unknown” and that the agreement to settle was “without admission to any allegations.” CP 376, lines 9 - 10. Jassmann argued that he broadly accepted all of Defendants’ terms. CP 376, line 14. Further, Jassmann argued that

“[h]ere, as required by the court in Ferree¹, there is “no genuine dispute as to the existence and terms” in Defendants’ offer or Jassmann’s acceptance. CP 377, lines 20 – 21. Jassmann concluded that the court “correctly found an agreement had been formed.” CP 378, line 10.

On **December 11, 2015**, the court granted NWID and the Olivers’ Motion for Reconsideration. CP 380 – 387. The court found that the primary question for the court to answer was whether the parties’ communications resulted in an enforceable agreement.” CP 384, lines 2-3. The court determined that because NWID and the Olivers’ demonstrated the existence of genuine factual issues regarding the material terms of the agreement, an evidentiary hearing was required. CP 387, lines 3 – 4. The court granted NWID’s Motion for Reconsideration and denied Jassmann’s Motion to enforce the settlement agreement. CP 387, lines 5 – 7.

February 9, 2016: The Trial Court entered the Findings of Facts and Conclusions of Law (“FOF”), which was drafted by Jassmann’s legal counsel. CP 394 – 397. The FOF noted that an evidentiary hearing occurred before the Trial Court on **January 22, 2016**, and that NWID, the Olivers and ACIC (collectively “Defendants”) appeared through legal counsel Cecilia Cordova. CP 394, lines 16 – 22.

¹ In re Marriage of Ferree, 71 Wn.App 35, 41, 856 P.2d 706 (1993).

- 1) FOF #1. On October 8, 2014, Defendants made an offer to Jassmann, which Jassmann accepted, including the normal waiver of any and all claims, known or unknown, the parties enter into this to settle the dispute without admission to any allegations. CP 395, lines 2 – 5, FOF #1.
- 2) FOF #2. “On October 8, 2015... the Plaintiff accepted the Defendants’ offer of settlement stating “so the offer is accepted.” CP 395, lines 6 – 7.
- 3) FOF #4: The court found that an enforceable settlement agreement was formed between the plaintiff and defendants, and the material terms were (a) payment to plaintiff of \$15,000 within 30 days, which turned out to be November 9, 2015, (b) without any admission to any allegations, and (c) the normal waiver of any and all claims. CP 395, lines 12 – 16.
- 4) FOF #5: “On October 8, 2015 at 12:57 pm, the Plaintiff sent a draft settlement agreement to the Defendants.... and the draft also included two possible additional terms, specifically, an allocation of payments ... and an attorneys fee clause. The allocation of payments and attorneys fee clauses were not material to the settlement agreement, and those two possible additional terms did not form a part of the settlement agreement.” CP 395, lines 17–22.

- 5) From the Findings of Fact, the Court made the following
Conclusions of Law: “[a]n enforceable settlement agreement was formed by the parties on October 8, 2015, requiring payment by the Defendants of \$15,000 to the Plaintiff ... without admission to any allegations, and with the normal waiver of any and all claims.” CP 396, lines 10 - 13.
- 6) Further, the court made the additional Conclusion of Law that “[n]either party is entitled to an award of attorneys fees under the draft settlement agreement because the attorney fee clause in the draft settlement agreement was not a material term of the settlement, and the parties did not agree on that term.” CP 396, lines 17 - 19.
- 7) The court, further, reserved ruling on whether attorneys fees should be awarded against Defendant pursuant to statute. CP 396, lines 20 – 21.

On **February 11, 2016**, Jassmann filed a Motion for Judgment, requesting a judgment against the defendants for breach of the settlement agreement and an award of attorneys’ fees. CP 398 – 403. Jassmann argued, “The Defendants’ promised payment of \$15,000 to Jassmann was also a “wage.” The Defendants promised to pay Jassmann \$15,000 by reason of Jassmann’s claims, all of which arose from his employment.

Although the Defendants denied that they owed Jassmann wages, the Defendants nonetheless agreed to pay Jassmann \$15,000.” CP 403, lines 10 -13. Jassmann further argued, “Jassmann must be awarded attorneys fees under RCW 49.48.030 and/or RCW 49.46.090.” CP 403, lines 17–18.

On **February 18, 2016**, Defendants’ filed their Opposition to Plaintiff’s Motion for Judgment regarding attorneys’ fees. CP 434 -440. Defendants argued, “[c]onsequently, Plaintiff may not now characterize this settlement agreement to mean a “recovery judgment for wages or salary.” Otherwise, all of Plaintiff’s testimony and court filings to enforce the CR2A is contradicted and discredits Plaintiff’s credibility, as well as call into question the truth of Plaintiff’s argument underlying why the CR2A should be enforced against the Defendants. If this Court is to agree with Plaintiff that judgment is owed for wages or salary owed to him, then the findings of this court to enforce the CR2A are in error. Plaintiff cannot now argue the opposite of what he argued to enforce the CR2A, in order to fit within a statute for attorney’s fees.” CP 439, lines 16 -26.

February 19, 2016, Jassmann filed his Reply in Support of Motion for Judgment and argued the court must award him attorneys fees under RCW 49.46.090 and RCW 49.48.030. CP 455, line 19. He further argued, “[u]nder those statutes, attorneys fees must be awarded to a

prevailing employee when the employee recovers wages.” CP 455, line 21 – 23.

On **February 22, 2016**, the superior court issued an order denying Plaintiffs motion for Judgment requesting an award of attorney’s fees under RCW 49.48.030 and/or RCW 49.46.090. CP 461 – 462.

On **March 14, 2016**, the court held that “having conducted an evidentiary hearing on January 22, 2016 and having entered Findings of Fact and Conclusions of Law on February 9, 2016” and having considered the Parties’ motion, declarations, Defendants’ Memorandum in Opposition, and Plaintiff’s Reply, the court ordered that Jassmann was granted judgment against NWID and the Olivers in the principal amount of \$15,000 with interest at 12% from and after November 9, 2015. CP 465, lines 3 – 13. The court further denied Jassmann’s request for attorneys’ fees against NWID and the Olivers, as well as his request for judgment against ACIC’s bond. CP 465, lines 14 -21.

D. ARGUMENT

1. THE RECORD EVIDENCES THAT THERE IS NO BASIS IN LAW OR IN FACT TO DETERMINE THE TRIAL COURT ERRED

[A] decision is clearly erroneous if, ‘although there is evidence to support it, the reviewing court on the record is left with the definite and

firm conviction that a mistake has been committed.” *Klineburger v. King County Dep't of Dev. & Env'tl. Servs., Bldg. & Fire Servs. Div., Code Enforcement Section*, 189 Wn. App. 153, 164, 356 P.3d 223, 228 (Wash. Ct. App. 2015). Viewing the evidence in the record, it is evident that the Trial Court’s decisions were not in error.

2. THE TRIAL COURT PROPERLY DENIED

JASSMANN’S REQUEST FOR ATTORNEYS’ FEES UNDER THE WAGE STATUTES

a. No findings or determinations that any wage statutes were violated

The trial court made no findings related to the claims or counterclaims of the parties. All findings of the court were related to whether the CR2A was enforceable.

The relevant Findings of Fact, drafted by Jassmann through his legal counsel, are as follows: Jassmann accepted NWID’s settlement offer, including the normal waiver of any and all claims, known or unknown, the parties enter into this to settle the dispute without admission to any allegations. CP 395, lines 2 – 5, FOF #1; CP 395, lines 6 – 7, FOF #2; That an enforceable settlement agreement was formed between the plaintiff and defendants, and the material terms were (a) payment to plaintiff of \$15,000 within 30 days, which turned out to be November 9,

2015, (b) without any admission to any allegations, and (c) the normal waiver of any and all claims. CP 395, lines 12 – 16, FOF #4; “On October 8, 2015 at 12:57 pm, the Jassmann sent a draft settlement agreement to the Defendants.... and the draft also included two possible additional terms, specifically, an allocation of payments ... and an attorneys fee clause. The allocation of payments and attorneys fee clauses were not material to the settlement agreement, and those two possible additional terms did not form a part of the settlement agreement.” CP 395, lines 17 – 22, FOF #5.

From the Findings of Fact, the Court made the following Conclusions of Law: “[a]n enforceable settlement agreement was formed by the parties on October 8, 2015, requiring payment by the Defendants of \$15,000 to the Plaintiff ... without admission to any allegations, and with the normal waiver of any and all claims.” CP 396, lines 10 – 13; and “[n]either party is entitled to an award of attorneys fees under the draft settlement agreement because the attorney fee clause in the draft settlement agreement was not a material term of the settlement, and the parties did not agree on that term.” CP 396, lines 17 - 19.

There were no findings that NWID violated the Minimum Wage Statute, nor did Jassmann make a claim under the Minimum Wage Statute. The court did not determine that Jassmann was the prevailing party on any of his wage claims. There were no findings that NWID withheld wages

thus, no findings of willfulness in withholding wages under RCW 49.52. There were no findings that Jassmann was entitled to payment for unpaid wages or commissions under any statute or common law. Consequently, the Trial Court was correct in denying Jassmann's request for attorneys' fees under the wage statutes and denying judgment against NWID's bond.

3. JASSMANN'S CR2A WAIVER OF HIS WAGE CLAIMS, ESTOPS HIM FROM PURSUING ATTORNEYS' FEES UNDER THE WAGE STATUTES

Jassman made admissions, statements, and arguments to obtain enforcement of the CR2A that are inconsistent with his admissions, statements, and arguments made to obtain an award of attorney's fees. The court should apply Judicial Estoppel and preclude his new admissions, statements, and arguments in his appeal.

“Estoppel requires (1) an admission, statement, or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act.” *Wagner v. Wagner*, 95 Wn.2d 94, 102 (Wash. 1980).

Judicial estoppel is an equitable doctrine that “precludes a party from asserting one position in a court proceeding and later seeking an

advantage by taking a clearly inconsistent position.” *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 61 (Wash. Ct. App. 2010). Judicial estoppel requires the court to analyze three questions: (1) whether a party's current position is inconsistent with an earlier position, (2) whether judicial acceptance of an inconsistent position in the later proceeding will create the perception that the party misled either the first or second court, and (3) whether the party asserting the inconsistent position will obtain an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 61-62 (Wash. Ct. App. 2010).

Jassmann is inconsistent in arguing that he did not agree that no wages were owed by NWID. App.Br. 17. In arguing that the court should enforce the CR2A, Jassmann consistently argued that he agreed to waive any and all claims. CP 267, CP 274 ¶ 17, CP377.

“Waiver is the intentional relinquishment of a known right. It is necessary that the person against whom waiver is claimed have intended to relinquish the right, advantage, or benefit and his action must be inconsistent with any other intent than to waive it. Further, to constitute a waiver, other than by express agreement, there must be unequivocal acts or conduct evincing an intent to waive. *Wagner v. Wagner*, 95 Wn.2d 94, 102 (Wash. 1980).

Here, Jassmann argued in his Motion to Enforce the CR2A that he waived any and all claims. CP 265-268. However, inconsistently with this argument of waiver made to the Trial Court, Jassman now argues to the Appeals Court he never waived the claim to attorney's fees.

Based on Jassmann's repeated representation to the court that the CR2A should be enforced, because he agreed to the terms of waiving any and all claims and no admission to any allegation, the Trial Court held that the CR2A was enforceable. On November 3, 2015, the judge signed the order that Jassmann presented with his Motion to Enforce CR2A and Striking the Trial Date. CP 326 – 327. Since Jassmann's first three claims included a claim for attorneys' fees or damages, then, "the objective manifestations of the parties plainly show that they intended to settle all claims, including attorney fees." *McGuire v. Bates*, 169 Wn.2d 185, 191, 234 P.3d 205, 207(Wash. 2010). If the Appeals Court accepts the argument from Jassman and awards attorney's fees, it would appear Jassman misled the Trial Court as to his waiver of any additional claims, including any claim for attorney's fees. Additionally, any such award of attorney's fees would impose an unfair detriment on the defendants by obligating them to pay an additional amount over the agreed upon settlement, which was supposed to settle all claims, including any claims for attorney's fees. Therefore the court should apply the doctrine of

judicial estoppel and accept Jassman's original argument to the Trial Court of the waiver of all claims under the CR2A and deny his request for any additional relief on the waived claims.

Additionally, if this court agrees with Jassmann that the judgment was for wages owed to Jassman, then the findings and the holding of the Trial Court to enforce the CR2A are in error. Further, a holding that the payment was for wages owed will, in effect, reverse the trial court's determination that the CR2A was enforceable and the parties should proceed to trial to allow all claims to be determined on the merits.

4. JASSMANN MISCHARACTERIZED THE SETTLEMENT PAYMENT AS WAGES

“Wages are defined as compensation due to an employee by reason of employment. RCW 49.46.010(2).” Hisle v. Todd Pac. Shipyards, 151 Wn.2d 853, 861, 93 P.3d 108, 112 (Wash. 2004). Jassmann mischaracterizes NWID's promise to pay Jassmann as a wage, because he argues it arose out of employment. This is incorrect, the settlement payment arose to get the lawsuit settled and avoid trial. CP322, ¶4.

Jassmann is correct that our courts have defined wages broadly, because they are “compensation due to an employee by reason of employment.” RCW 49.46.010(7); BrApp pg. 12. However, he did not

cite to a case that defines wages as a settlement payment to avoid trial and settle a lawsuit.

Jassmann further cites to RCW 51.08.178(4), which defines wages to include “any and all forms of consideration received by the employee from the employer in exchange for work performed.” BrApp pg 13. It is, also, true that Jassmann’s claims against NWID were claims for wages. Id. However, it does not logically follow that because Jassmann’s claims were for wages, then the settlement payment was in exchange for work performed. Based on the evidence, the settlement payment was in exchange for a “settlement of the lawsuit” and “not proceeding to trial.” Randy’s Declaration CP 322, ¶ 4

Jassmann cites Rose v. Dept. of Labor & Indust to support his argument that the settlement agreement payment are wages. However, the Rose court was interpreting RCW 51.08.178, so is irrelevant for our analysis interpreting § 49.52 and § 49.48.030. Rose v. Dep't of Labor & Indus., 57 Wn. App. 751 (Wash. Ct. App. 1990).

Nonetheless, NWID does not argue that attorneys fees under § 49.48.030 should be denied because recovery is less than or equal to the amount admitted by NWID. Br.App. at 13. First, NWID does not admit any amounts are owed to Jassmann. “On October 8, 2015 I told our attorney that we did not think the Plaintiff was owed a cent...I was very

clear that we would only agree to settle if there was absolutely no admission of guilt on our part or that made it look like we owed Reed a cent.” CP 322, ¶ 4 Second, NWID argues that attorney fees should be denied under §49.48.030 because the court did not find that NWID violated the Minimum Wage Statute and the payment of \$15,000 per the settlement agreement is not a wage by reason of employment.

5. COURT WAS CORRECT IN DENYING ATTORNEYS FEES UNDER RCW 49.52.050 and RCW 49.52.070

RCW 49.52.070 creates civil liability for violation of RCW 49.52.050, including double damages, costs, and attorney fees. Pope v. Univ. of Wash., 121 Wn.2d 479, 489, 852 P.2d 1055, 1061 (Wash. 1993).

By their own terms, sections 49.52.050(2) and 49.52.070 of the Revised Code of Washington apply only where the nonpayment of wages is conducted "wilfully and with intent to deprive the employee of any part of his wages." Wash. Rev. Code § 49.52.050(2) (1990). Therefore, the nonpayment must be the result of knowing and intentional action by the employer, rather than of a bona fide dispute as to the obligation of payment.” Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1050 (9th Cir. Wash. 1995). There is no evidence in the record to support that NWID willfully intended to deprive Jassmann of wages.

a. RCW 49.52.050 requires that the defendant willfully

intended to deprive plaintiff of his wages.

RCW 49.52.050 “applies only where the nonpayment of wages is the result of knowing and intentional actions by the employer, rather than of a bona fide dispute as to the obligation of payment.” Brinson v. Linda Rose Joint Venture, 53 F.3d 1044 (9th Cir. Wash. 1995).

“Plaintiff also sought judgment for twice the amount of wages withheld, costs of suit, and reasonable attorney's fees, pursuant to RCW 49.52.050 (2) and .070, alleging defendant willfully withheld his wages. The trial court denied plaintiff's claim upon the basis that defendant did not willfully intend to deprive plaintiff of his wages. Simon v. Riblet Tramway Co., 8 Wn. App. 289, 293, 505 P.2d 1291, 1293 (Wash. Ct. App. 1973). There was no finding of fact that NWID willfully deprived plaintiff of wages.

“Dismissal of such claims on summary judgment is permitted when there is no evidence that the employer acted wilfully.” Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1050 (9th Cir. Wash. 1995).

b. Conclusory statements are not evidence of willful behavior for liability pursuant to RCW 49.52.050

Like the plaintiff in Brinson, Jassmann “makes a number of "conclusory" statements regarding [NWID's] allegedly willful

withholding of wages, yet presents no evidence that NWID wilfully set about to deprive him of wages. Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1050 (9th Cir. Wash. 1995).

c. Affirmative Evidence is necessary to find intent under RCW 49.52.050

“[W]hether an employer acts “[w]ilfully and with intent” is a question of fact reviewed under the substantial evidence standard.” Pope v. Univ. of Wash., 121 Wn.2d 479, 490, 852 P.2d 1055, 1062 (Wash. 1993). Jassmann must show affirmative evidence of NWID’s intent to deprive him of wages, to establish liability under RCW 49.52.050. Pope at 491. Jassmann has not and cannot provide such affirmative evidence of intent.

d. A bona fide dispute regarding wages evidences no intentional deprivation of wages, fatal to liability under RCW 49.52

“Lack of intent may be established either by a finding of carelessness or by the existence of a bona fide dispute.” Pope at 491. While the court did not make a finding of carelessness, a bona fide dispute existed. Randy Oliver stated, “On October 8, 2015 I told our attorney that we did not think the Plaintiff was owed a cent...I was very clear that we would only agree to settle if there was absolutely no admission of guilt on

our part or that made it look like we owed Reed a cent.” *CP 323 ¶5s*. In addition, Jassmann’s Motion for Judgment, recited four separate times that NWID disputed owing Jassmann any money. *CP 399*. In its Answer, NWID stated twenty-three (23) separate defenses, all disputing Jassmann’s claim he was entitled to payment for wages, commissions or reimbursement. *CP 419 – 423*. Also, NWID had made plausible legal arguments and raised factual disputes as to the existence and amount of any obligation to pay Jassmann any additional wages, which were not adjudicated because of order to enforce the CR2A.

§ 49.52.050 “does not apply where a bona fide disagreement over amount of compensation exists between the employer and employee.” *Simon v. Riblet Tramway Co.*, 8 Wn. App. 289, 505 P.2d 1291 (Wash. Ct. App.), cert. denied, 414 U.S. 975, 94 S. Ct. 289 (U.S. 1973); *Yates v. State Bd. for Community College Educ.*, 54 Wn. App. 170, 773 P.2d 89 (Wash. Ct. App. 1989).

“RCW 49.52.050 (2) and .070 are not meant to apply” when “there was a bona fide disagreement between employer and employee with regard to...wages. This situation evidences no intentional deprivation of wages as required to sustain a claim under RCW 49.52.050.” *Simon*, at 293; Rev. Code Wash. (ARCW) § 49.52.050 (Applicability).

“[I]n order for the penalty provisions of RCW 49.52.070 to come

into effect, there must not be a bona fide dispute as to the amount owing, and that the trier of fact should determine whether such a dispute existed.” Lillig v. Becton-Dickinson, 105 Wn.2d 653, 661, 717 P.2d 1371, 1376 (Wash. 1986).

e. Trial Court did not make a finding that NWID acted willfully or with the intent to deprive Jassmann of wages

There is no evidence in the record to support a finding that a withholding of wages was intentional. Where there is no substantial evidence in the record to support a conclusion that an employer acted willfully with the intent to deprive an employee of his wages, then liability cannot be established under RCW 49.52.050. Pope, at 479. “Where the record was devoid of testimony to indicate the employer did not genuinely believe the employee had been legitimately discharged and his wages properly discontinued, then an employer did not willfully withhold wages within the meaning of RCW 49.52.070, because employer had a bona fide belief there was no obligation to pay wages.” State ex rel. Nilsen v. Lee, 251 Ore. 284, 444 P.2d 548 (1968).

f. Whether there was a bona fide dispute is a question of fact.

“Whether Gove's had a genuine belief was a question of fact requiring the

trial judge to weigh the credibility of the evidence.” Ebling v. Gove's Cove, 34 Wn. App. 495, 501, 663 P.2d 132, 136 (Wash. Ct. App. 1983). Here, the trial judge did not have to look far to weigh the credibility of evidence of a bona fide dispute to determine that NWID did not act willfully. In Jassmann’s Motion for Judgment, his recital of the facts notes four separate times that NWID disputed owing Jassmann any money. CP 399. “On October 10, 2014, the Defendants admitted that Jassmann was their employee, but they denied owing Jassmann unpaid wages.” CP 399, lines 10-11. “Deny that NWID promised to pay Jassman wages or commissions.” CP 399, line 13. “Although the Defendants agreed to pay Jassmann \$15,000, the Defendants denied they ow[ed] Jassmann any money...” CP 399, lines 16-17. “As Mr. Oliver explained at the evidentiary hearing, and in ¶ 5 of his Declaration dated 10/28/2015, that the settlement agreement was to reflect “that we were not admitting that anything Reed [Jassmann] had alleged he was owed was something NWID or my wife or I owed.” Although the Defendants denied owing money to their former employee.” CP 399, lines 21-23, CP 400, lines 1-2. There is no willful wrongdoing because NWID had a bona fide belief it had no obligation to pay Jassmann additional wages and Jassmann conceded this fact. Thus, RCW 49.52.070 does not apply. McAnulty v. Snohomish Sch. Dist., 9 Wn. App. 834, 838, 515 P.2d

523, 526 (Wash. Ct. App. 1973). Accordingly, since Jassmann conceded that NWID disputed owing any money for wages, the Trial Court was correct in denying attorneys' fees under §§ 49.52.050 and 49.52.070.

g. The court correctly denied attorneys fees pursuant to RCW 49.48.030.

Attorney fees under RCW 49.48.030 are awarded when the plaintiff prevailed in their claim for wages or salary owed." Here, Jassmann did not prevail in any of his claims for wages. Instead, Jassmann waived any and all claims, including claims for wages and/or attorneys fees, in exchange for enforcement of a CR2A entitling him to a payment for settlement.

h. The intent of the CR2A Contract was to prevent further litigation and to waive any and all claims.

"In construing a written contract, the basic principles require that (1) the intent of the parties controls; (2) the court ascertains the intent from reading the contract as a whole; and (3) a court will not read an ambiguity into a contract that is otherwise clear and unambiguous." Dice v. City of Montesano, 131 Wn. App. 675, 683-684 (Wash. Ct. App. 2006). Here, there were three straightforward agreement terms, fifteen thousand dollar payment, waiver of any and all known or unknown claims, and no

admission of any allegation. CP 395, lines 12 – 16. “A provision is not ambiguous simply because the parties suggest opposing meanings. Interpretation of an unambiguous contract is a question of law.” Dice at 684. Since the contract terms were unambiguous, the Trial Court was correct in interpreting the terms as a matter of law, denying attorney fees and denying judgment against the surety bond.

i. The settlement payment does not fit within the definition of compensation due by reason of employment

Washington courts find that attorney fees under the statute are recoverable for any type of compensation due by reason of employment. Dice at 689. Here, the settlement payment does not fit within the definition of compensation due “by reason of employment” under Washington law.

Lost wages have been found to be damages in lieu of compensation for services. Gaglidari v. Denny's Rests., 117 Wn.2d 426, 450 (Wash. 1991). Lost wages represent wages that the plaintiff would have received had she not been discharged, thus attorney fees under RCW 49.48.030 are recoverable in actions for lost wages for breach of employment contract. Id.; Fraser v. Edmonds Cmty. Coll., 136 Wn. App. 51, 57 (Wash. Ct. App. 2006).

Back pay and front pay fit within “wages or salary owed, for money due by reason of employment. An employee who “recovered wages for a greater number of days lost because of his suspension ... satisfied the standard required under RCW 49.48.030 and, thus, [was] accorded his reasonable attorney fees.” Hanson v. Tacoma, 105 Wn.2d 864, 872 (Wash. 1986). The court held that the phrase “wages or salary owed” included “back pay,” which was money due “by reason of employment.” Id. The Hanson court affirmed the judgment with respect to back pay and front pay awards and granted attorneys’ fees based on RCW 49.48.030. Id. Similarly, in Hayes, the court construed the construction of the phrase “wages or salary owed,” under RCW 49.46.010(2), to include back pay and front pay awards. Hayes v. Trulock, 51 Wn. App. 795, 806 (Wash. Ct. App. 1988).

The Washington string of wrongful discharge cases, cited above, found damages for lost wages, back wages, front pay and back pay, to fit within the phrase “wages or salary owed” for moneys due “by reason of employment.” However, this is not a case of wrongful discharge and the judgment to enforce the settlement agreement does not fit within the phrase wages or salary owed for moneys due by reason of employment, under the string of wrongful discharge cases. The Trial Court was correct in denying attorney fees.

The court found that an employment contract “clearly stated that the bonus is to compensate Mr. Flower for signing on with the company. His act of taking the job entitled him to the bonus.” *Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13, 35-37 (Wash. Ct. App. 2005). The *Flower* court found a vested right to a bonus, entitled the employee to attorney fees under RCW 49.48.030. *Id.* However, discretionary bonuses are considered gratuities, not wages. The *La Coursiere* court distinguished *Flowers* from a claim for attorneys’ fees due to his claim for a discretionary bonus. “[W]e held only that Flower was entitled to the bonus because he had performed under the terms of the contract by signing with Huntwood. We did not hold, as *LaCoursiere* contends, that Flower was entitled to the bonus simply by reason of his employment with Huntwood.” *LaCoursiere v. CamWest Dev., Inc.*, 172 Wn. App. 142, 150 (Wash. Ct. App. 2012).

j. Findings of Fact to support an award of attorneys’ fees

The *Flowers* court made findings of fact that 1) employment contract terms clearly stated that the bonus was to compensate Mr. Flower for “signing on with the company,” and 2) “[*Flowers*’] act of taking the job entitled him to the bonus.” *Flower*, at 36. In contrast, here, the trial court made no similar findings regarding *Jassmann*’s payment of settlement being compensation, the terms of his employment or whether

Jassmann was entitled to a bonus, wages or any other form of compensation. So, the Trial Court correctly denied attorney fees.

“Pursuant to RCW 49.48.030, a party who successfully recovers judgment for wages or salary owed is entitled to reasonable attorney fees assessed against the employer.” Brundridge v. Fluor Fed. Servs., Inc., 109 Wn. App. 347, 361, 35 P.3d 389, 397 (Wash. Ct. App. 2001). The Brundridge court denied attorney fees, because the pipe fitters had not yet obtained a judgment for owed wages Id. Similarly here, Jassmann did not obtain a judgment for wages owed, so he is not entitled to attorneys’ fees under RCW 49.48.030. See, Cohn v. Dep’t of Corr., 78 Wn. App. 63, 70, 895 P.2d 857 (1995). Consequently, the request for attorney fees was correctly denied.

k. Where there is no judgment for wages, then no attorney fees available under Minimum Wage Act, §49.46.090

Similarly, the court in Anfinson denied attorney fees under §49.46.090, because “there has been no judgment for wages under the Minimum Wage Act. Likewise, there has been no determination that FedEx has paid less than the wages that are due. Accordingly, a fee award on the basis of either statute is premature.” Anfinson v. FedEx Ground Package Sys., Inc., 159 Wn. App. 35, 74 (Wash. Ct. App. 2010). Here, the Trial Court made no determination that NWID paid less than the wages

than were due to Jassmann. Thus, the Trial Court was correct in denying Jassmann attorneys' fees under §49.46.090.

6. JASSMANN IS NOT ENTITLED TO JUDGMENT UNDER §18.27 BECAUSE THERE ARE NO OUTSTANDING JUDGMENTS AGAINST NWID

The surety upon the bond is liable to a prevailing party in an action filed under this section 18.27 for the performance or payment owed by NWID. RCW 18.27.040.

“While contractor registration in general, and bond requirements in particular, are obviously intended to protect the public from irresponsible contractors, this purpose should not necessarily be used to extend the protections beyond the mechanisms expressly provided for in the relevant statute.” *Cosmopolitan*, at 302. The surety bond is meant to ensure payment on a breach of contract, for claimed labor performed, material and equipment furnished or claimed contract work under a construction contract. ¶ 18.27.040(3). Here, the court was enforcing a settlement contract, but not a contract contemplated under §18.27. The Trial Court did not err in denying judgment against ACIC for the purpose of attorneys' fees.

Furthermore, Jassmann's claim against ACIC stated in relevant part, “Pursuant to the provisions of RCW 18.27 et. seq., Jassmann is

entitled to judgment against American Contractors Indemnity Company for all amounts adjudged against NWID.” CP 3. However, NWID paid Jassmann in full for the judgment amount. Since Jassmann has been paid the settlement amount in full, then the surety bond is no longer needed to ensure NWID’s obligation is paid. Moreover, Jassmann’s request for judgment against ACIC for amounts adjudged against NWID, would allow Jassmann to be paid twice for the same settlement agreement, since NWID has already paid Jassmann in full.

Additionally, Jassmann prepared and presented the court with a proposed order to strike the trial, and succeeded in getting his order signed striking the trial. CP 326 – 327. Jassmann, persuading the court to strike the trial, thereby prevented NWID, the Olivers and ACIC from presenting their case and giving the court an opportunity to decide for them on the merits. Jassmann cannot now argue he is entitled to an entry of judgment against them for failure to defend.

Nonetheless, Jassmann repeatedly represented to the Trial Court that he had waived any and all claims. This waiver means that Jassmann waived his fourth claim, which was the claim against ACIC. Jassman’s continued pursuit of a claim against ACIC is a breach of the CR2A.

Additionally, Jassmann argues that on February 18, 2016, Defendants did not oppose Jassmann's motion for judgment against ACIC. Br.App. at 23. However, Jassmann did not ask the court for a judgment against ACIC. Instead, Jassmann requested "that the court enter judgment against defendants for breach of the settlement agreement." CP 399. Jassman's argued for a judgment for \$15,000, CP 401, which the court granted and that NWID subsequently paid in full with interest. Jassmann filed this appeal after receiving payment in full with interest. Thus, if there can be found that the Trial Court erred in not granting a judgment against ACIC, such an error was harmless since he received the relief Jassmann sought through a judgment, payment for the \$15,000 under the settlement agreement. Furthermore, ACIC was not a party to the CR2A, so the Trial Court correctly granted a judgment against NWID and the Olivers, and correctly denied a judgment against ACIC.

Jassmann cited a case that is silent on judgment against a bond or attorney fees. Las v. Yellow Front Stores, 66 Wn. App. 196, 198, 831 P.2d 744, 745 (Wash. Ct. App. 1992). It is a case regarding an absence of evidence, thus unable to satisfy the elements in support of a summary judgment." Id. However, it may be appropriate to take this case as further indication that Jassmann lacks requisite evidence. Following the analysis

in Jassmann's sole cited case, he is unable to support the requisite elements to support his claims for attorneys fees or award against ACIC.

7. ATTORNEY FEES

a. Attorney fees are properly denied under RAP 18.1 for the same reasons they should be denied under the wage statutes.

Jassmann's request for attorneys' fees under RAP 18.1 should be denied for the same reasons argued above that attorney fees should be denied under §§ 49.52.050, 49.52.070 and 49.46.090, 49.48.030.

NWID, the Olivers and ACIC respectfully request attorneys fees. "In Washington, a prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties. If such fees are allowable at trial, the prevailing party may recover fees on appeal as well." Landberg v. Carlson, 108 Wn. App. 749, 758, 33 P.3d 406, 410-411 (Wash. Ct. App. 2001); RAP 18.1.

b. Attorney fees may be recovered for defending against a frivolous appeal.

NWID requests fees on appeal for having to defend against a frivolous appeal. RAP 18.9(a). Here, Jassmann knew or should have known that he was unable to satisfy the requirements to prevail in this appeal. This court is permitted to award a party attorney fees when the opposing party files a frivolous appellate action. RAP 18.1.

E. CONCLUSION

For the foregoing reasons, the Court should affirm the denial of Jassmann's request for an award of reasonable attorney's fees against NWID pursuant to statute and affirm the denial of Jassmann's request for judgment against American Contractor's Indemnity. .

RESPECTFULLY SUBMITTED this 29th day of August 2016.

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