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NO. 52031-1-II

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

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CHRIS JONES and KATRINA JONES,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND  
INDUSTRIES,

Respondent.

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**BRIEF OF RESPONDENT,  
DEPARTMENT OF LABOR AND INDUSTRIES**

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## I. INTRODUCTION

The industrial insurance system depends on employers paying their tax obligations to fund the benefits that injured workers receive. For this reason, the Legislature requires employers to pay their taxes before appealing a tax assessment to superior court. But it allows employers to show that having to pay the taxes would cause undue hardship. Dream Team fails to show undue hardship under either the factors in GR 34 or any other criteria.

The superior court declined to find undue hardship and substantial evidence supports the court's finding. Dream Team argues that the trial court failed to consider Dream Team's financial hardship and looked only at whether Dream Team's customers or employers would face hardship if Dream Team had to pay its taxes. But the trial court did no such thing: it looked both at whether the employer qualified for relief under GR 34 *and* whether hardship would result to the employer's workers and customers. Looking at the workers and customers is appropriate because RCW 51.52.112 expressly applies to "employers," who typically have both workers and customers. Though Dream Team emphasizes the evidence of its financial problems, other evidence in the record shows that Dream Team could pay the assessed taxes. And no evidence suggests that Dream Team's customers or workers would face hardship. As substantial

evidence supports the trial court's refusal to find undue hardship, this Court should affirm.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. RCW 51.52.112 requires an employer to pay all assessed taxes before appealing the case to any court, unless the employer demonstrates undue hardship. GR 34 sets four criteria for a party seeking a waiver of filing fees. Dream Team conducted over \$400,000 in business from 2013 to 2014. Dream Team presented no evidence that its owners receive relief from a needs-based assistance program, that they are below 125 percent of the poverty line, that they are above 125 percent of the poverty line but have basic living expenses that render them unable to pay filing fees, or that they are represented by a qualified legal services provider under GR 34. Does substantial evidence support the superior court's finding that Dream Team had not established undue hardship?
2. Where a superior court fails to make a finding regarding a necessary issue, an appellate court remands the case to the superior court to make the finding. The Department contends that the trial court's findings considered GR 34, but Dream Team argues that it did not. If this Court concludes that the trial court's findings did not consider GR 34, should the case be remanded for further findings?
3. RAP 18.1 requires a party to provide authority for the appellate court to award attorney fees. Dream Team provides no authority for the Court to award fees. Should Dream Team receive a fee award if it prevails?

## **III. STATEMENT OF THE CASE**

### **A. Overview of Applicable Statutory Provisions**

When an employer has appealed a Board of Industrial Insurance Appeals (Board) decision that involves an issue of industrial insurance

taxes RCW 51.52.112 requires the employer to either pay the assessed taxes or obtain a court order finding undue hardship. *Ash v. Dep't of Labor & Indus.*, 173 Wn. App. 559, 562-63, 294 P.3d 834 (2013); *Probst v. Dep't of Labor & Indus.*, 155 Wn. App. 908, 910, 230 P.3d 271 (2010). The prepayment requirement of RCW 51.52.112 helps ensure that the Department's ability to collect industrial insurance taxes—which are necessary to fund the industrial insurance benefits that the Department provides to injured workers—is not disrupted because of the appellate process. *See State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 203, 117 P.1101 (1911) (stating that the industrial insurance taxes paid by employers fund the industrial insurance program, which is used to provide benefits to injured workers).

As the United States Supreme Court noted in the context of the federal tax system, which has a similar prepayment requirement in a suit involving a demand for a tax refund, “the Government has a substantial interest in protecting the public purse, an interest which would be substantially impaired if a taxpayer could sue in a District Court without paying [his or her] tax in full.” *Flora v. United States*, 362 U.S. 145, 175, 80 S. Ct. 630, 4 L. Ed. 2d 623 (1960). Furthermore, as the Washington courts have noted in the context of the excise tax law, the requirement to pay a tax in full before filing an appeal helps prevent the state's prompt

and orderly collection of taxes from being disrupted, which could have “catastrophic effects” on the state’s economy, and threaten “the solvency of the state government.” *See Booker Auction Co. v. Dep’t of Revenue*, 158 Wn. App. 84, 89, 241 P.3d 439 (2010) (quoting *Ziegler v. Indiana Dep’t of State Revenue*, 797 N.E.2d 881, 889 (Ind. Tax 2003)). Similarly, RCW 51.52.112 helps ensure that the Department’s collection of industrial insurance taxes from employers, which the Department uses to provide benefits to injured workers, is not disrupted.

**B. The Department Audited Dream Team’s Payment of Industrial Insurance Taxes for Three Quarters of 2013 and the First Quarter of 2014**

Dream Team Construction was a construction company owned by Chris Jones. AR 10/12/2016 at 7. It is not currently in business.

AR 10/12/2016 at 7. Dream Team’s business involved framing houses, building decks, and adding bedrooms and other rooms to stock houses.

AR 10/12/2016 at 7-8. Dream Team’s only client during the audit period was Freestone. AR 10/12/2016 at 8. As of 2016, Mr. Jones was a member of another construction company. AR 10/12/2016 at 53.

A Department inspector conducted a random inspection at a jobsite in Graham, Washington, and found Dream Team workers at the jobsite, including Chris Jones, his son, his daughter, and his future son-in-law. AR Ex 14 at 9. Dream Team had reported no workers work any hours

during the second and third quarter of 2013, 113 worker-hours during the fourth quarter of 2013, and 128 worker-hours during the first quarter of 2014. AR 10/12/2016 at 151.

Because Dream Team did not have records showing the actual hours worked by its employees, the Department conducted an audit using invoices from Freestone, who paid Dream Team to perform work, and estimating the number of hours that workers had worked for Dream Team based on those figures. AR 10/12/2016 at 151-54. The Department estimated the hours worked based on the invoices because the wage records Dream Team produced were insufficient given the volume of work Dream Team had performed. AR 10/12/2016 at 154-44. The invoices showed that Dream Team billed Freestone \$416,573.45 in labor during the entire audit period. AR Ex 17 at 52. The Department estimated the hours worked based on an hourly wage of \$25. AR Ex 17 at 16-17. The audit found that Dream Team should have reported 4,173 hours for the second quarter of 2013, 6,480 hours for the third quarter of 2013, 1,656 hours for the fourth quarter of 2013, and 4,271 hours for the first quarter of 2014. AR Ex 7 at 5. The Department assessed Dream Team \$100,321.78 in premiums, interest, and penalties. AR 54-55.

Dream Team appealed the assessment to the Board of Industrial Insurance Appeals.

**C. The Board Affirmed the Department's Assessment**

The Board affirmed the Department's assessment, finding that it was reasonable for the Department to estimate the number of hours that Dream Team had had workers work for it, given the lack of Dream Team's timekeeping records and given the substantial amount of labor costs that Dream Team had billed Freestone during the audit period. AR 25-34. The Board also found that the Department's estimate was reasonable based on the evidence presented, particularly given Dream Team's failure to offer an alternative estimate. *See* AR 30.

**D. Dream Team Appealed To Superior Court, but the Superior Court Dismissed the Appeal Because Dream Team Failed To Either Pay the Assessed Taxes or Show That It Should Receive a Finding of Undue Hardship**

Dream Team appealed the Board's decision to superior court in April 2017. CP 1-3. Under RCW 51.52.112, an employer who appeals a decision of the Board about an assessment of industrial insurance premiums must, before starting the appeal, either pay the assessed taxes or obtain a finding of undue hardship. Dream Team did not pay all the assessed taxes before starting its appeal. CP 1-18, 65-119. In its superior court notice of appeal, Dream Team requested a finding of undue hardship, stating that the Department had suspended Mr. Jones's

registration as a contractor<sup>1</sup> and that Dream Team therefore had had no current earnings and could not pay the assessed taxes, but Dream Team provided no declaration, affidavit, or other supporting documentation. *See* CP 4-5.

In July 2017, the Department moved to dismiss the appeal based on Dream Team's failure to pay the full amount of the assessed taxes or provide support for a finding of undue hardship. CP 36-44. The Department provided a declaration from one of its revenue agents showing that Dream Team had paid only \$21,742.87 of the over \$106,000 taxes due, that Katrina Jones had opened a new business in November 2015, Alder Express, LLC, as its 99 percent owner, and that pictures had been taken of Chris Jones working at a jobsite for HC Homes in October 2016. CP 46-48.

Dream Team responded with a motion for a finding of undue hardship, with declarations from Chris Jones and Katrina Jones. CP 65-119. Dream Team contended that 1) the Department had suspended Mr. Jones's contractor's registration in October 2015, preventing Mr. Jones from doing any further work, 2) Wells Fargo had closed

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<sup>1</sup> To perform contracting work, an individual must be registered as a contractor with the Department of Labor and Industries. RCW 18.27.020. The Department can suspend a contractor's registration for various reasons. RCW 18.27.030(3)(b), (c); RCW 18.27.050(2), .060.

Mr. Jones's bank account, 3) Mr. Jones is unemployed and is earning no income, 4) Katrina Jones had taken a part-time book-keeping job, 5) the Jones's home is in foreclosure, 6) the Internal Revenue Service had filed a tax lien of over \$186,000 against the Joneses, 7) the Joneses might be forced to move into a motor home if they lost their home, 8) the motorhome is owned by Chris Jones's mother, 9) Dream Team's tools are old and have no value, 10) the forklift Dream Team used in its business is owned by Chris Jones's brother, 11) the crane truck Dream Team had used does not run and needs extensive repairs, 12) Dream Team cannot afford to fix the motor home, crane truck, or forklift, 13) neither Katrina Jones nor Chris Jones ever worked for Alder Express, LLC or HC Homes.

CP 69-71. The Joneses asserted that Alder Express was a company started by their son, Kaleb Jones, and that Katrina Jones only became a member of Alder Express so that it could become licensed and bonded, and that she derived no income from Alder Express.<sup>2</sup> CP 78. Chris Jones stated that he applied for work at HC Homes but never obtained work from it. CP 79.

Dream Team attached a copy of the foreclosure notice for the Jones's

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<sup>2</sup> The Joneses did not explain how Katrina Jones lending her name to Alder Express would help it obtain a bond, given Dream Team's contention that neither Dream Team nor the Joneses had any income but that the Joneses had substantial financial liabilities. *See* CP 78. Dream Team also did not dispute that Katrina Jones was listed as the 99 percent owner of Alder Express, nor did it explain why she had that share of ownership if she received no income from the business. *See* CP 78.

home, which showed that the Joneses had missed several payments on the home from 2008 through 2017. CP 91.

The superior court conducted a hearing on the Department's motion in December 2017. The court observed that while both the Department and Dream Team had cited old case law discussing the standard to proceed in forma pauperis, "That's not the standard this Court applies. GR 34 has a different standard." RP 8.

The judge later commented that "[a]pplying the term 'hardship' to employers I think is a little different than just indigency, and I say that in the context of GR 34, which is the context that this Court typically looks into when waiving filing fees for a civil case, and also the case law regarding the waiver of filing fees." RP 22. The Court noted that the GR 34 standard does not include "an element of probable merit" and instead involves "just looking at the financial resources of the party, and so I looked to a different kind of standard." RP 22-23. The Court commented that "given this particular statute, hardship in this context . . . might actually apply a little differently. As an employer, hardship might be considered by the Legislature to be: Would other people be put out of work, what would the ramifications be to other people, that kind of hardship, are there clients of the employer that would be put in a difficult situation, those sorts of things that I think are different that just showing

indigency. I think that might be what the Legislature meant for this particular statute when I look at all of that context.” RP 23.

The Court ruled that Dream Team had not established undue hardship. RP 24. The Court explained:

[T]he Court is not making a determination of undue hardship to the employer. I don’t believe that there is a sufficient basis in the record for undue hardship. I understand there are contested issues as to whether the employer has sufficient funds to pay, but I think there are other questions that are unanswered by the Court in order to make a finding of undue hardship.

RP 24. The court gave Dream Team until January 10, 2018, to pay the assessed taxes. CP 122. When Dream Team did not pay the assessed taxes by January 10, 2018, the court dismissed the appeal. CP 127-130.

#### **IV. STANDARD OF REVIEW**

This Court reviews decisions of the Board in a premium assessment case under the judicial review provisions of the Administrative Procedures Act, RCW 34.05.510-.598. RCW 51.48.131; *R & G Probst v. Dep’t of Labor & Indus.*, 121 Wn. App. 288, 293, 88 P.3d 413 (2004). The party challenging the Board decision bears the burden of proof on appeal. RCW 51.48.131; RCW 34.05.570(1)(a); *R & G Probst*, 121 Wn. App. at 293. But here, Dream Team challenges the superior court’s finding that Dream Team did not establish that paying the filing fee would cause

undue hardship, not the merits of the Board's decision, so it is the superior court's decision that is before this Court. AB 2-3.

Under the ordinary civil standard, this Court's review of a superior court decision is limited to examining the record to see if substantial evidence supports the findings made after the trial court's de novo review, and if the court's conclusions of law flow from the findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986). This Court conducts a de novo review of questions of law that are raised by this appeal. *Macey v. Dep't of Emp't Sec.*, 110 Wn.2d 308, 313, 752 P.2d 372 (1988).

## V. ARGUMENT

Dream Team neither paid its assessed taxes in full nor received a finding of undue hardship from the trial court. Under the plain language of RCW 51.52.112, an employer who has appealed a decision of the Board to a superior court about an assessment of industrial insurance taxes must either pay the assessed taxes or obtain an undue hardship finding. In general, the court uses GR 34 to resolve questions about whether a party can pay filing fees. It is appropriate to use this standard, and specific

considerations under RCW 51.52.112, to resolve the question of undue financial hardship.

**A. The Superior Court Properly Dismissed Dream Team's Appeal Because Dream Team Failed To Comply With RCW 51.52.112**

The trial court used GR 34 and considerations specific to RCW 51.52.112 to resolve the question of undue financial hardship. Dream Team argues that the trial court rejected the use of GR 34 to guide the analysis of whether there is undue hardship, but the trial court did look to that rule for guidance while also acknowledging that in some cases a court might properly consider other factors when deciding whether undue hardship exists, such as harmful effects on workers or customers. AB 13-15; RP 8, 22-24. It was proper to look at potential effects on workers and customers and workers given that the statute is specific to employers and employers typically have both workers and customers. Substantial evidence supports the trial court's decision to deny Dream Team's request for a finding of undue hardship as the record shows that Dream Team does not qualify for relief under GR 34. And no evidence suggests that Dream Team's workers and customers would be harmed by requiring Dream Team to pay its taxes before pursuing its appeal. The superior court properly dismissed the appeal, and this Court should affirm.

**1. GR 34 and other factors determine undue financial hardship**

The superior court properly looked to GR 34 as a guideline to the undue-hardship analysis under RCW 51.52.112 but also properly concluded that that rule was not dispositive

RCW 51.52.112 authorizes a trial court to excuse an employer from paying its assessed taxes if the trial court finds that paying the taxes would cause undue hardship. As RCW 51.52.112 provides little guidance about when a trial court should find undue hardship, a trial court can properly look to GR 34 for guidance when deciding if undue hardship exists. *Cf. State v. Blazina*, 182 Wn.2d 827, 838-39, 344 P.3d 680 (2015) (noting that courts should look to GR 34 for guidance when deciding if defendants should be ordered to pay legal financial obligations (LFOs) under RCW 10.01.160(3) when convicted of crimes). But contrary to Dream Team's arguments (at AB 13-15), that is what the trial court did here: it noted that GR 34 is the standard the courts use when deciding indigency. RP 8. But the trial court also properly recognized that while GR 34 is relevant to the analysis, a trial court can also consider other factors when deciding if an employer would face undue hardship, such as whether requiring the employer to pay its taxes would harm the employer's workers or its customers. *See* RP 22-24.

The trial court noted that, while the parties had both cited old case law about the in forma pauperis standard in their trial court briefing, “[t]hat’s not the standard this Court applies. GR 34 has a different standard.” RP 8. The court explained that one difference between the two standards was that the pre-rule case law required a litigant to show “probable merit” to receive a waiver, while GR 34 has no such requirement. RP 22-23. The court then commented “given this particular statute, hardship in this context . . . might actually apply a little differently.” RP 23. The court then explained how the analysis differs:

As an employer, hardship might be considered by the Legislature to be: Would other people be put out of work, what would the ramifications be to other people, that kind of hardship, are there clients of the employer that would be put in a difficult situation, those sorts of things that I think are different that just showing indigency. I think that might be what the Legislature meant for this particular statute when I look at all of that context.

RP 23. Reading the court’s comments together, its approach involved looking at a combination of the GR 34 factors (which decide whether a party is indigent) and whether there is evidence of a different type of hardship given the party’s status as an employer. RP 8, 22-24.

Dream Team argues that the trial court rejected the use of GR 34 completely and that it concluded that undue hardship never exists unless hardship to an employer’s workers or customers is shown. AB at 13-15.

But this is an implausible and strained interpretation of the court's statements. The court commented that the analysis "might" work "a little differently" and recognized that there was more to the analysis than just showing indigency, but did not suggest that indigency was immaterial. *See* RP 22-24. And the court raised GR 34 in the first place: neither party mentioned it in their trial briefs. *See* RP 8. It would not make sense for the court to raise GR 34 sua sponte if it believed the rule had no application. Instead, the court recognized that the analysis involved more than just a look at whether the employer was indigent and also involved a look at whether other persons, such as the employer's customers or workers, would be affected. *See* RP 22-24. But nowhere did the court rule that impact on such persons was the only thing legally significant under the statute, nor is that a reasonable inference of what the court meant given what it ruled.

The Department agrees with Dream Team, however, that it is appropriate to use GR 34 as a guide to the undue hardship analysis under RCW 51.52.112. AB 13-15. In other contexts, the courts have similarly looked to GR 34 for guidance to interpreting broad language in statutes mentioning financial hardship or similar issues. *See Blazina*, 182 Wn.2d at 838-39 (indicating that courts should look to GR 34 when deciding whether to impose legal financial obligations, or LFOs, on criminal

defendants). But substantial evidence shows Dream Team meets none of the GR 34 factors.

**2. Substantial evidence shows Dream Team satisfies none of the GR 34 factors**

This Court should apply the ordinary civil standard of review to the issues raised by this appeal, which involves reviewing questions of law de novo, while reviewing questions of fact under the substantial evidence standard. *Ruse*, 138 Wn.2d at 5. *See also City of Richland v. Wakefield*, 186 Wn.2d 596, 605, 609-11, 380 P.3d 459 (2016) (reviewing district court’s findings, including findings about defendant’s ability to pay LFOs—which considers GR 34 factors—for substantial evidence). With regard to undue hardship, the legal issue is what an employer needs to show to demonstrate undue hardship, while the factual question is whether the record shows that the employer made the necessary showing. The primary issue here is factual, as the Department and Dream Team agree that a court should look to GR 34 when deciding whether the employer showed undue hardship, but disagree about whether the record supports the trial court’s finding.

GR 34 sets four criteria for a finding of indigency,<sup>3</sup> none of which Dream Team meets:

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<sup>3</sup> A party can also qualify for relief under GR 34 if the party is represented by a qualified legal services provider (a not-for-profit organization whose members are



above 125 percent of the federal poverty guideline but unable to pay its assessed taxes because of recurring basic living expenses as defined by RCW 10.101.010(4)(d). And nothing in the record would support a claim that any of the first three criteria are met.

Dream Team suggests, without expressly arguing, that it qualifies for relief under the “other compelling circumstances” provision in GR 34(a)(3)(D). *See* AB 15. But Dream Team does not explain how it satisfies this criterion. And substantial evidence supports a finding that Dream Team does not qualify for relief under this factor.

As a starting point, the doctrine of *eiusdem generis* establishes that where a rule sets some specific criteria and then uses more generalized language, the courts conclude that the general language’s meaning is similar and analogous to that of the more specific language. *Bowie v. Dep’t of Revenue*, 171 Wn.2d 1, 12, 248 P.3d 504 (2011); *Simpson Inv. Co. v. Dep’t of Revenue*, 141 Wn.2d 139, 151, 3 P.3d 741 (2000) (“[G]eneral terms, when used in conjunction with specific terms in a statute, should be deemed only to incorporate those things similar in nature or comparable to the specific terms.”). Here, GR 34(a)(3)(A), (B), and (C) have specific requirements: the party must either be receiving financial assistance, or be below the poverty line, or be struggling to pay basic living expenses as that term is defined in a specific statute. So

GR 34(a)(3)(D)'s reference to "other compelling circumstances" should be understood to require a party to make a similar showing: to not merely show that a party has financial problems, but to show that the party faces extreme poverty and cannot pay its legal expenses.

The record here amply supports a finding that Dream Team did not prove undue hardship. During the audit period alone (the second quarter of 2013 to the first quarter of 2014), Dream Team submitted invoices for over \$416,000 in labor, and this figure does not include any income Dream Team earned either before and after the audit period.<sup>4</sup> And though Dream Team insists Mr. Jones could no longer work after October 2015 because the Department suspended his contractor's license, that does not address Mr. Jones's ability to earn wages from the second quarter of 2014 through the suspension in October 2015. The Department also presented evidence that Mr. Jones did perform contracting work after his registration was suspended in October 2015 and that Ms. Jones opened a new company around that time. While the Joneses insist that Mr. Jones did not do contracting work after October 2015 and that Ms. Jones merely allowed

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<sup>4</sup> Dream Team alleged, without supporting documentation, that Freestone failed to pay \$75,000 of the \$416,000 it owed Dream Team based on the work performed during the audit period. CP 67, 75. But the trial court did not have to believe this assertion, and even if the trial court believed it, this would still show that Dream Team received substantial income from Freestone based on the work it performed during the audit period.

her name to be linked to a new business to help her son obtain a contractor's bond and did not earn any income from that company, a reasonable trier of fact could disbelieve these denials and find that the Joneses continued to earning money from contracting work after October 2015. And even if the Joneses earned no money after October 2015, that alone would not prove that they were unable to pay the assessed taxes.

Dream Team also points to two other financial hardships it alleges it suffered, but neither of them establish that it could not pay its assessed taxes. AB 7-8. Dream Team points to the notice of foreclosure of its home and to its receipt of federal tax liens. AB 7-8. But given the substantial earnings that Dream Team made during the audit period, and the substantial earnings it likely secured before and after the audit period, those liabilities do not prove that it could not pay its assessed taxes.

Viewing the record in the light most favorable to the Department, and making all supportable inferences in the Department's favor, a reasonable trier of fact could conclude that Dream Team did not establish that "other compelling circumstances" prevented it from paying its assessed taxes. Dream Team suggests that sufficient evidence existed to allow a trier of fact to find undue hardship (at AB 19), but this is immaterial: the issue is whether the trial court's finding that undue hardship was not proved is supported by substantial evidence, not whether

a different finding might have also had such support. *See Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 778, 275 P.3d 339 (2012) (explaining that appellate court accepts trial courts findings where a trial court bases its findings on conflicting evidence and substantial evidence supports the findings). Substantial evidence supports the trial court's finding here that Dream Team did not establish undue hardship under the criteria in GR 34.

**3. Dream Team presented no evidence that either its customers or its workers would face undue hardship**

The trial court's approach used GR 34 as a starting point, but also considered whether either an employer's customers or its workers would be disrupted if the employer had to pay the assessed taxes pending appeal. RP 8, 22-24. Dream Team presented no evidence that paying the assessed taxes would affect either a former customer or a former worker.

Dream Team argues that the court had no authority supporting its decision to consider whether either an employer's customers or workers would face hardship. AB 16. But RCW 51.52.112 references an *employer* showing that there was undue hardship, and a fundamental trait of being an employer is having at least one worker. And it is reasonable to infer, as the trial court did, that the Legislature would consider hardship to an employer's workers or customers as one way an employer could establish

that paying its assessed taxes would cause undue hardship. And Dream Team's objection to this ruling appears grounded in its mistaken belief that the trial court believed that it was *only* hardship to workers or customers that mattered under RCW 51.52.112, but the court's discussion is more reasonably viewed as conveying that those are *other ways* an employer could prove undue hardship, not the *only ways* it could do so. AB 14-15; RP 8, 22-24.

Dream Team suggests that it would be impractical for a struggling employer to present evidence about impact on its customers or workers. AB 17-18. This is not true. An employer could offer evidence about this issue by declaration or affidavit. Offering evidence about these issues need not be any more burdensome than presenting evidence about other sorts of hardship.

Dream Team also suggests that a defunct employer would never be able to prove hardship to its customers or workers. AB 16. But this is also not true. An employer who is no longer in business might owe unpaid wages to a worker. Requiring such an employer to pay its assessed taxes pending an appeal might prevent the employer from paying those unpaid wages. Similarly, a defunct employer might have outstanding debts or obligations to its former customers, and encumbering the employer by requiring it to pay taxes might make it impossible for the customers to be

made whole. But here, there is no evidence that Dream Team's former customers or former workers would be harmed if Dream Team had to pay its assessed taxes pending appeal.

**B. If This Court Holds That the Trial Court Failed To Make a Finding Regarding a Necessary Issue, It Should Remand the Case To Superior Court**

The Department contends that the trial court considered both whether Dream Team showed undue hardship by showing that it satisfied the criteria in GR 34 and that it also considered whether undue hardship would occur to Dream Team's customers and workers, and that the trial court declined to find undue hardship because it was not convinced by Dream Team's arguments about either issue. As substantial evidence supports those findings, this Court should affirm.

But if this Court holds that the trial court failed to make a finding about a necessary issue, such as whether any of the criteria under GR 34 were met, this Court should remand the case to superior court and direct it to make the necessary finding. *Cf. State v. Calvin*, 183 Wn.2d 1013, 353 P.3d 640 (2015) (remanding case to superior court to consider GR 34 factors before deciding whether to impose LFOs on criminal defendant, where superior court failed to consider those factors before imposing LFOs on defendant); *State v. Thompson*, 185 Wn.2d 1018, 369 P.3d 1292

(2016) (same); *State v. Christopher*, 185 Wn.2d 1001, 369 P.3d 149

(2016) (same).

The courts have ordered remands where a trial court should have, but did not, consider the GR 34 factors when making a ruling regarding a party's ability to pay statutory expenses. In *Blazina*, the Supreme Court decided that the factors in GR 34 should be considered when courts decide whether LFOs should be imposed on convicted criminal defendants.

*Blazina*, 182 Wn.2d at 830. In a series of cases where the lower court failed to consider the GR 34 factors before imposing LFOs on convicted criminal defendants, the Supreme Court remanded the case to the court and directed it to make findings about GR 34. *E.g.*, *Calvin*, 183 Wn.2d 1013; *Thompson*, 185 Wn.2d 1018; *Christopher*, 185 Wn.2d 1001. If this Court believes that the superior court improperly refused to consider the GR 34 factors, the same remedy is appropriate: a remand to superior court so that it can make findings about those factors.

**C. The Court Need Not Decide Whether the Department Waived a Procedural Argument Because the Department Is Not Making One**

The Department does not contend that Dream Team needed to file and note its own motion for a finding of undue hardship to receive a finding of undue hardship from the superior court. Since the Department does not make that argument, the Court need not consider whether

equitable estoppel would preclude it. The courts rarely decide purely academic, hypothetical questions and this Court should not do so here. *See Grays Harbor Paper Co. v. Grays Harbor Cty.*, 74 Wn.2d 70, 73, 442 P.2d 967 (1968).

**D. Dream Team Should Not Receive an Award of Fees**

Dream Team argues without citation to authority that, if it prevails on appeal, it should receive an award of attorney fees. AB 23. It is not entitled to such an award.

First, Dream Team should not prevail on appeal.

Second, Dream Team cites no statute or other authority supporting its request for an award. Washington courts award fees only if there is a contractual, statutory, or other recognized equitable basis for the award. *Interlake Sporting Ass'n, Inc. v. Washington State Boundary Review Bd. for King Cty.*, 158 Wn.2d 545, 560, 146 P.3d 904 (2006).

Third, to receive an award of fees, a party must devote a section of its brief to the fee request and include argument and citation to authority. *See Phillips Bldg. Co., Inc. v. An*, 81 Wn. App. 696, 704-05, 915 P.2d 1146 (1996); RAP 18.1(b). As *Phillips* explains, “[t]he rule requires more than a bald request for attorney fees on appeal. . . . Argument and citation to authority are required under the rule.” *Id.* at 705 (internal citations omitted). Dream Team presents no more than a bald request for fees so its

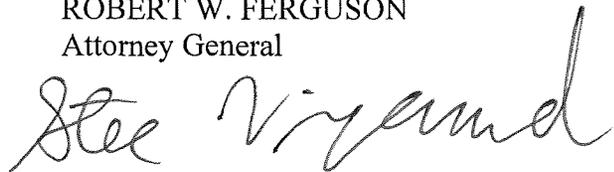
request for fees does not merit consideration. *See id.*; *see also Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). This Court should deny the request.

## VI. CONCLUSION

Dream Team failed to either pay the assessed taxes or obtain a finding of undue hardship as RCW 51.52.112 required it to do for its appeal to go forward. The trial court properly looked both to whether the employer would qualify for relief under GR 34 and to whether the appeal would prejudice Dream Team's customers or workers, and substantial evidence supports the trial court's finding that Dream Team did not establish undue hardship. The superior court properly dismissed its appeal, and this Court should affirm.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of September, 2018.

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NO. 52031-1-II

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

CHRIS JONES and KATRINA JONES,

Appellants,

v.

WASHINGTON STATE  
DEPARTMENT OF LABOR  
AND INDUSTRIES,

Respondent.

DECLARATION OF  
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Brief of Respondent, Department of Labor and Industries and this Declaration of Service in the below described manner:

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Derek Byrne  
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DATED this 20<sup>th</sup> day of September, 2018, at Tumwater, Washington.

  
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