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NO. 355276

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III**

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J. H. Properties, Appellant,

v.

Billy E. Thompson, et al., Respondent.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

Northwest Justice Project (“NJP”), substituted as Respondent on appeal for Billy E. Thompson, obtained an award of reasonable attorney fees and costs for successfully defending an eviction action brought by Appellant against Mr. Thompson. The reasonable attorney fees and costs in question total \$5467.25. When the trial court entered the Order for an Award of Attorney’s Fees and Costs and Judgment (“Order for Attorney Fees”), Appellant did not object to the reasonableness of the award and approved as to the form of the Order for Attorney Fees.

Approximately three weeks after the trial court entered the Order for Attorney Fees, Mr. Thompson unexpectedly passed away. That same day, Appellant filed this appeal. Now for the first time on appeal, Appellant argues there was not a legal basis for awarding attorney fees and costs and the amount of the award was unreasonable. Appellant’s remaining arguments are predicated on Mr. Thompson’s untimely passing, are not supported by the record or citation, contain misrepresentations of fact, and were previously rejected by this Court to which Appellant did not seek review by the Supreme Court. In short, this appeal and the arguments made are frivolous and advanced without cause. For these reasons and the reasons set forth below, NJP respectfully requests this Court affirm the trial court’s ruling.

## II. COUNTERSTATEMENT OF THE ISSUES

- No. 1. Whether the Appellant can raise new issues on appeal that were not raised in the trial court? No.
- No. 2. Whether the trial court had authority to award attorney fees and costs? Yes.
- No. 3. Whether the trial court abused its discretion by finding \$5467.25 represented a reasonable attorney fee and cost? No.
- No. 4. Whether the trial court abused its discretion by naming Northwest Justice Project as the Judgment Creditor for the Order for Attorney Fees? No.

## III. STATEMENT OF THE CASE

The Appellant has not challenged or assigned error to any of the findings of fact made by the trial court, thus the findings are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). The unchallenged findings are at CP 86-90, 117-118.

### A. The unlawful detainer action

Billy E. Thompson was a veteran and a recipient of veterans housing assistance administered by the Walla Walla Housing Authority (WWHA). CP 87. Mr. Thompson had several disabilities and used marijuana to help him with anxiety, pain, and PTSD. RP 83. On February 6, 2017, Mr. Thompson and Appellant entered into a six-month lease agreement. CP 7-8, 87. Appellant was aware that Mr. Thompson smoked marijuana, and informed him if he smoked off property, it would not be a problem. RP 52.

On February 21, 2017, Appellant issued 10-day Notice to Comply or Vacate to Mr. Thompson for allegedly smoking marijuana in his unit. CP 87. On April 10, 2017, Appellant served Mr. Thompson with a 20-day Notice to terminate his tenancy, effective April 30, 2017. CP 87. On April 25, 2017, Appellant served Mr. Thompson with a 3-day Notice to quit and vacate due to nuisance. CP 87. On April 27, 2017, Mr. Thompson gave a letter disputing the allegations, the validity of the notices, and notifying Appellant he would defend any eviction action filed against him. CP 26.

On May 1, 2017, Appellant accepted a partial rent payment from the WWHA. CP 87. On or about May 3, 2017, Appellant cashed a check from Comprehensive Mental Health, covering the remainder of Mr. Thompson's May rent. CP 87. Eight days later, Appellant filed an eviction action against Mr. Thompson premised on the three aforementioned notices. CP 4-6, 87. A show cause hearing was held on May 30, 2017, and Appellant's counsel requested a continuance to determine whether Appellant had accepted rent payments, and if so, whether the acceptance of rent would constitute waiver. CP 88; RP 04. Rent for June was again paid by the WWHA and a check from Comprehensive Mental Health, with the check being cashed by Appellant on June 2, 2017. CP 88.

On June 5, 2017, Appellant filed a *Declaration of Mark Hardy*, which stated the check "was returned to Comprehensive Mental Health."

CP 52, 88. At the June 5, 2017, show cause hearing, Judge Lohrmann orally ruled Appellant's acceptance of rent did not constitute waiver, and set the matter for trial. CP 88; RP 10-11. Judge Lohrmann also invited the parties to submit supplemental briefing on whether smoking marijuana could constitute a nuisance. CP 88; RP 11-12. On June 12, 2017, Judge Lohrmann issued a letter indicating smoking marijuana could potentially be a nuisance, and that the matter should proceed to trial. CP 79-80, 89. The June 12, 2017, letter from Judge Lohrmann did not discuss the issue of waiver. CP 79-80.

On June 15, 2017, the court conducted a half-day bench trial. CP 83-85, 89. After Appellant rested their case, counsel for Mr. Thompson renewed a motion to dismiss based on the affirmative defenses of waiver and/or improper notice. CP 89; RP 73-82. The trial court took the motion under advisement, and at the conclusion of the trial, granted the motion to dismiss based on waiver. CP 85; RP 82, 115-119. The trial court ruled Appellant's acceptance of rent, with knowledge of prior breaches, constituted a waiver of the right to terminate Mr. Thompson's tenancy. CP 89. On June 28, 2017, the trial court entered the Order for Dismissal, while reserving ruling on the request for reasonable attorney's fees and costs for a supplemental proceeding. CP 86-90.

**B. Motion for attorney fees and costs**

On July 7, 2017, counsel for Mr. Thompson submitted a Motion and Memorandum for an award of attorney's fees, along with a declaration from counsel, and noted the motion for hearing. CP 91-105, 117. On July 24, 2017, Appellant filed a response objecting to the request and arguing that "the principles of equity" favored a denial of fees. CP 110-111.

On August 1, 2017, the court heard argument on the motion for fees. CP 120. Again, Appellant's argument against the award was limited to the theory of a "balance of equities." RP 122-123. After hearing argument the trial court concluded the request was reasonable and entered the Order for Attorney Fees. CP 116-120; RP 123-124. The trial court specifically found the rate of \$150 per hour was reasonable, a reasonable amount of time was 30.4 hours, and the costs incurred while defending the action was \$907.25. CP 117-118. The trial court ruled attorney fees were provided by the residential lease as made reciprocal by RCW 4.84.330, and by RCW 59.18.290(2). CP 118. Finally, the trial court ordered the fees be paid directly to NJP, as requested by Mr. Thompson's proposed order. CP 118. Counsel for Appellant signed the Order for Attorney Fees, approved as to its form, and verbally indicated she "already reviewed it" prior to signing it. CP 119; RP 124.

C. The appeal

Sadly, on or about August 22, 2017, Mr. Thompson passed away unexpectedly. *See Declaration of Tyler Graber* ¶5. That same day, Appellant filed this appeal. *See Notice of Appeal*. Upon learning of Mr. Thompson's passing, NJP moved for substitution as Respondent in the appeal. *See Motion for Substitution*. NJP is the Judgment Creditor for the order on appeal, as well as the assignee of Mr. Thompson's interest in the recovery of attorney fees and costs pursuant to their signed retainer agreement. CP 116; App. B1 – B3. Appellant opposed the Motion for Substitution, and argued NJP was an improper party on appeal and should be required to file a probate action before it could proceed with the appeal. *See Objection to Substitution of Parties*.

On November 1, 2017, Commissioner Wasson granted NJP's Motion for Substitution finding "[t]he Order clearly reflects Northwest Justice Project is the respondent in fact, which only involves J. H. Properties' appeal of the attorney fees and costs." *See Commissioner's Ruling*. Commissioner Wasson found there was no reason for NJP to file a claim in probate. *Id.*

On November 30, 2017, Appellant moved for modification of Commissioner Wasson's ruling. *See Motion and Memorandum to Modify Commissioner's Ruling Dated November 1, 2017*. On January 25, 2018, a

panel of this Court denied Appellant's motion to modify Commissioner Wasson's ruling. *See Order Denying Motion to Modify Commissioner's Ruling*. Appellant did not seek discretionary review in the Supreme Court of the panel's decision.

#### IV. ARGUMENT

A. **The Appellant may not raise new issues for the first time on appeal**

A fundamental principal of appellate review is the appellate court generally will not review any claim of error not raised in the trial court. RAP 2.5(a); *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); *State v. Torres*, 198 Wn. App. 864, 876, 397 P.3d 900 (2017). The term *claim of error* includes issues and theories. *See, e.g., Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 290, 840 P.2d 860 (1992). The reasoning for this rule is to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials. *Shannon*, 100 Wn.2d at 37 (citing *Estate of Ryder v. Kelly-Springfield Tire Co.*, 91 Wn.2d 111, 114, 587 P.2d 160 (1978)). A timely objection promotes judicial economy, facilitates appellate review, and prevents adversarial unfairness. *Torres*, 198 Wn. App. at 876 (citations omitted).

The majority of Appellant's arguments are issues and theories not raised in the trial court. This Court should decline to consider any new

argument now presented. The only written arguments in the trial court against the issuance of the Order for Attorney Fees were as follows:

[The] principles of equity support denying an award of attorney fees to Mr. Thompson;

Principles of Equity in this case also favor denying Defendant's motion for an award of fees; and

In the interest of judgment, this Court should deny Defendant's motion where Defendant was in breach of his lease, regardless of whether he was the prevailing party.

CP 110-11. At the August 1, 2017, motion hearing, the only argument raised was premised on "the balance of equities." RP 123. Based on the foregoing, this Court should limit the issues and legal theories on appeal to those involving "the principles of equity."

Appellant's failure to raise any other argument in the trial court precludes it from now inventing new legal theories to challenge the result below. These new legal theories are in direct contrast to the purpose of RAP 2.5(a). First the trial court was not given an opportunity to hear, decide, and correct any alleged errors. If given the opportunity, it could have negated the need for this entire appeal. Second, judicial economy is not served by this unnecessary appeal. Third, the lack of any substantive objection against the award of fees in the trial court has caused confusion of what records were needed to facilitate appellate review as evidenced by the numerous supplemental filings in this appeal.

Finally, it would be unfair to allow new issues and theories on appeal the trial court did not get to hear. The Order for Attorney Fees was entered on August 1, 2017. CP 116-119. On or shortly before August 22, 2017, Mr. Thompson passed away. *See Declaration of Tyler Graber* at ¶5. That same day, Appellant filed this appeal. *See Notice of Appeal*. Had Appellant previously raised any of the arguments it now makes, any alleged errors could have been addressed prior to Mr. Thompson's death. Attempting to gain a procedural advantage because of Mr. Thompson's death is unfair and is an attempt to avoid paying reasonable attorney fees. For these reasons, this Court should limit review to the issues and legal theories Appellant raised in the trial court.

**B. The trial court's decision to award attorney fees and costs is supported by law**

Washington follows the rule that neither party can recover attorney's fees unless authorized by statute, contract, or a recognized ground of equity. *Pub. Util. Dist. 1 v. Kottsick*, 86 Wn.2d 388, 389, 545 P.2d 1 (1976). Determining whether a particular statute or contractual provision authorizes an award of attorney fees, is a question of law, necessitating *de novo* review. *Bank of New York v. Hooper*, 164 Wn. App. 295, 303, 263 P.3d 1263 (2011). Here, there is both a contractual basis and a statutory basis for awarding attorney fees.

**1. The award of attorney fees and costs was authorized by the residential lease**

The residential lease contains a provision indicating the tenant is responsible for all costs, expenses, collection and attorney fees incurred by the owner/manager due to any breach or default of the lease. CP 8, 117-118. Because the lease clause is a unilateral fee and cost provision, RCW 4.84.330 applies to make the fee and cost provision bilateral. Appellant acknowledges this clause, and by extension RCW 4.84.330, applied to Mr. Thompson. *See Appellant's Brief* at 9-10.

Because Mr. Thompson was the prevailing party in the unlawful detainer action and the lease contained a unilateral fee provision, RCW 4.84.330 mandates an award of fees and costs. *See Quality Food Centers v. Mary Jewell T, LLC*, 134 Wn. App. 814, 818, 142 P.3d 206 (2006). The trial court did not err when it ruled the residential lease authorized an award of attorney fees and costs.

**2. The award of attorney fees and costs was authorized by RCW 59.18.290(2)**

The prevailing party in an unlawful detainer action is entitled to recover reasonable attorney fees and costs. RCW 59.18.290(2). A prevailing party may be either the landlord or the tenant. *See, e.g., Council House, Inc. v. Hawk*, 136 Wn. App 153, 147 P.3d 1305 (2006); *Soper v. Clibborn*, 31 Wn. App. 767, 644 P.2d 738 (1982). "In order to be awarded

fees and costs as the prevailing party, a tenant must prove either that the lease was not terminated, or that the tenant held over under a valid court order.” *Hous. Auth. of City of Everett v. Terry*, 114 Wn.2d 558, 570-571, 789 P.2d 745 (1990).

Contrary to Appellant’s analysis, *Terry* does not hold that “because the trial court lacked jurisdiction, it could not rule on the issue of attorney fees.” *Appellant’s Brief* at 7-8. Nowhere in *Terry* does the court make such a holding. In *Terry*, the court decided whether Terry should be awarded fees when he successfully challenged on appeal the sufficiency of the statutory notice used by the landlord to terminate his tenancy. *Terry*, 114 Wn.2d at 562-563, 570-571. The court denied Terry’s request because he did not meet the statutory requirements for attorney fees and costs under RCW 59.18.290(2) or RCW 49.60.030(2), not because of a lack of jurisdiction. *Id.* at 571.

Appellant’s analysis of *Terry* is also inconsistent with recent Washington opinions regarding jurisdiction. *See, e.g., Hall v. Feigenbaum*, 178 Wn. App. 811, 818-819, 319 P.3d 61 (2014). It is not a party’s actions, but rather the Washington Constitution that vests the superior court jurisdiction to hear unlawful detainer actions. WASH. CONST. art IV, §6 (“The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property...”). Appellant’s

waiver by accepting rent did not deprive the trial court of its constitutionally vested jurisdiction.

As indicated in the trial court's findings of facts, Mr. Thompson was the prevailing party and his lease had not been terminated when the unlawful detainer action was initiated. CP 117. Appellant has conceded that Mr. Thompson was the prevailing party. *See Appellant's Brief* at 10. This finding and concession authorize an award of attorney fees and costs pursuant to RCW 59.18.290(2). The trial court did not err when it ruled RCW 59.18.290(2) authorized an award of attorney fees and costs.

**3. The principles of equity do not support denying the right to attorney fees and costs**

Appellant argues there is no basis in law for the trial court's decision to award attorney fees and costs because doing so violated the principles of equity. CP 110. In essence, Appellant is arguing for an equitable remedy that is contrary to the residential lease, RCW 4.84.330, and RCW 59.18.290(2). Appellant's argument runs into several problems.

Equitable remedies are extraordinary forms of relief, available solely when an aggrieved party lacks an adequate remedy at law. *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006). Further, "equitable principals cannot be asserted to establish equitable relief in derogation of statutory mandates." *Rhoad v. McLean Trucking Co., Inc.*, 102 Wn.2d

422, 427, 686 P.2d 483 (1984) (quoting *Dep't of Labor & Indus. v. Dillon*, 28 Wn. App. 853, 855, 626 P.2d 1004 (1981)). A court should not create an equitable remedy that contradicts a statutory mandate. *See, e.g., Fid. Mut. Sav. Bank v. Mark*, 112 Wn.2d 47, 55, 767 P.2d 1382 (1989) (“The rights established by the Legislature must remain exclusive if they are to remain reliable.”).

The equitable relief Appellant seeks is for the court to create a reasonableness test in determining whether a prevailing party is entitled to attorney fees. *See Appellant's Brief, Assignment of Error 1. Right to Recover Attorney Fees* (“The trial court erred in awarding fees because no basis exists for the award, and the award was unjust and unreasonable given the trial court’s prior letter ruling.”).<sup>1</sup> Despite the request for such relief, Appellant does not provide any authority, or even argument, as to why such extraordinary relief should be granted to them. The Court should not consider an assignment of error which is unsupported by facts and argument, and this failure deems the assignment of error abandoned. *See State ex rel. Helms v. Rasch*, 40 Wn. App. 241, 248, 698 P.2d 559 (1985) (citations omitted).

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<sup>1</sup> After including the issue in *Assignment of Error 1*, Appellant seemingly abandoned the argument. Instead, the argument appears to manifest itself in the discussion of the reasonableness of the amount of the fee award (*Assignment of Error 2*). Respondent will nonetheless address each argument in turn.

Even if this Court were to consider Appellant's unsupported argument, such equitable relief runs counter to the statutory purpose of mandating an award of attorney fees to the prevailing party when a contract contains a unilateral provision. RCW 4.84.330 ensures a party will not be deterred from litigating for fear of triggering a one-sided fee provision in a lease. *See Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 489, 200 P.3d 683 (2009). RCW 4.84.330 and RCW 59.18.290(2) protect tenants from landlords capitalizing on one-sided fee provisions who know they would have little to lose if they are unsuccessful in an unlawful detainer action. Potentially being liable for a tenant's attorney fees increases the likelihood of meritorious actions, protects tenants who enforce their statutory rights, and prevents one-sided litigation where landlords often have an upper hand. Appellant's equitable argument contradicts these statutory mandates. The trial court's determination that attorney fees were allowed should be affirmed, and Appellant's request for extraordinary relief denied.

**C. The amount of the attorney fees and costs awarded was reasonable**

The reasonableness of an award for attorney fees is reviewed for an abuse of discretion. *See Morgan v. Kingen*, 166 Wn.2d 526, 539, 210 P.3d 995 (2009). On August 1, 2017, the trial court found the rate of \$150

an hour and 30.4 hours spent to be reasonable. CP 117-118. The court also found the costs incurred to defend the action were \$907.25. CP 117-118. The record supported the trial court's findings. CP 97-103; RP 123-124. Appellant has not challenged these findings of fact, and they are now verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

For the first time on appeal, Appellant now claims the amount of the award was unreasonable. No objection or argument in the trial court was made about the rate or time spent as unreasonable. As mentioned above, Appellant cannot raise new issues for the first time on appeal.

Even if this Court forgave the failure to object, Appellant's brief fails to argue how the fees were excessive or unreasonable. Instead of arguing against the hourly rate or the time spent, Appellant instead turns its attention to blaming Judge Lohrmann for its own mistakes. *See Appellant's Brief* at 12-13. Appellant hangs its hat on the theory that if Judge Lohrmann had ruled against them in the June 12, 2017, letter, this case would have been dismissed before proceeding to trial, decreasing the amount of fees they would be responsible for. Put another way, Appellant is arguing the trial court committed reversible error because the trial court incorrectly agreed with the argument presented by the Appellant. This argument is frivolous for several reasons.

First, Appellant was the one who provided Judge Lohrmann with incorrect information regarding whether they accepted the rent payment. CP 38, 52. On May 30, 2017, Appellant was given a continuance to determine whether rent was accepted, and if so, whether acceptance would constitute waiver. CP 88. In order to survive dismissal, Appellant provided a declaration attesting the May rent check was returned. CP 52. This would later prove to be false. RP 52-53. Appellant cannot provide the trial court with misinformation and then complain when the trial court accepts it as the truth.

Second, and more importantly, the June 12, 2017, letter has nothing to do with waiver as Appellant asserts. CP 79-80. Even giving Appellant the benefit of the doubt that they *meant* to reference Judge Lohrmann's statements made at the June 5, 2017, show cause hearing, they still misrepresent what the court ruled. At no time did the trial court ever hold "there was no waiver based upon the non-waiver language contained in the notices." *Appellant's Brief* at 12; *cf.* RP 10-11. Even if the June 12 letter was what Appellant claims, letters and oral rulings have no final and binding effect unless incorporated into the findings, conclusions, and judgment. *See, e.g., In re Marriage of Tahat*, 182 Wn. App. 655, 334 P.3d 1131 (2014) (letter rulings); *Ferree v. Doric Co.*, 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963) (oral rulings). Until a formal order is rendered, a

trial court has the inherent authority to change its mind or prior rulings. *See, e.g., Fogelquist v. Meyer*, 142 Wash. 478, 253 P. 794 (1927). The trial court was within its discretion to make a final determination after all the facts of the case had been presented, even if the decision was inconsistent with a prior ruling.

Appellant's final argument is because NJP "is a pro-bono public funded legal aid program . . . such a large fee award is unreasonable and unjust, given the trial court's reversal and the fact that Billy Thompson was not required to pay for any attorney fees or costs." *Appellant's Brief* at 14. This argument neglects to mention any case law or statute stating the opposite. Absent a statute expressly prohibiting fees to *pro bono* attorneys, it is an abuse of discretion for a trial court to deny fees because the lawyer provided *pro bono* legal services. *See Council House*, 136 Wn. App. at 160. When awarding fees to a *pro bono* attorney, "[t]he court is to consider 'the fee customarily charged in the locality for similar legal services,' not the amount actually charged." *Id.* (quoting RCW 59.18.030(23)). This is what the trial court did and it determined the fees were reasonable. RP 123-124.

Finally, the "principles of equity" do not favor Appellant. "[A] court of equity will deny relief to a party who, to the injury of another, has misrepresented facts connected with the relief sought, whether the

misrepresentations were made with intent to defraud or were made in the honest belief that they were true, so long as the person making them retains the benefits flowing therefrom.” *Walsh v. Westcoatt*, 131 Wash. 314, 319, 230 P. 160 (1924). If a party who seeks equity has misrepresented facts, “they will be left where they are found.” *Id.* at 316.

Throughout the unlawful detainer action and this appeal, Appellant has misrepresented facts to the court. Appellant submitted a declaration attesting to returning a rent check for the purposes of surviving dismissal, and it did in fact temporarily avoid such fate. CP 36-39, 49-52; RP 4-6. The declarant later recanted his prior false statement during deposition and again on cross-examination. RP 52-53. Appellant also claimed Mr. Thompson was a month-to-month tenant when his lease term did not end until July 31, 2017. CP 04, 07. Such claim, if left unchallenged, would have alleviated the need to demonstrate the eviction was for cause. *See* RCW 59.12.030(2). These are just two examples of material misrepresentations made by Appellant. For these reasons and more, the “principles of equity” do not support reversing the trial court’s decision regarding the reasonableness of the attorney fees and costs.

**D. It was not error naming Northwest Justice Project as the Judgment Creditor**

The trial court was within its discretion to name NJP as the Judgment Creditor for the Order for Attorney Fees. NJP, as the assignee of Mr. Thompson's interest in the recovery of attorney fees and costs, was authorized to seek the Order for Attorney Fees. App. B1-B3. The sole amount awarded was for the payment of attorney fees and costs directly to NJP. CP 116-119. For the first time on appeal, Appellant now claims naming NJP as the Judgment Creditor was reversible error. For the reasons set forth below, the trial court's ruling should be affirmed.

**1. Appellant did not object to naming Northwest Justice Project as the Judgment Creditor when the Order for Attorney Fees was entered by the trial court**

When the trial court entered the Order for Attorney Fees, Appellant did not make any objection about naming NJP the Judgment Creditor. Prior to entry, counsel for Appellant indicated she "already reviewed it" and signed it approving to it "as to form." CP 119; RP 124.

Approval of an order "as to form" means the approval of the structure of the order, not the substance. *See Guillen v. Pierce Cty.*, 127 Wn. App. 278, 287, 110 P.3d 1184 (2005). "While approval of a judgment as to form does not prevent an aggrieved party from appealing, it does preclude basing the appeal upon the wording of the judgment since the trial court must be afforded an opportunity to rule upon the question

before it can be presented to us upon appeal.” *Lake Air, Inc. v. Duffy*, 42 Wn.2d 478, 482, 256 P.2d 301 (1953).

Approving the Order for Attorney Fees as to form would not prevent Appellant from challenging the substance of the order (i.e. whether the law authorized the award or the amount awarded was reasonable). However, naming NJP as the Judgment Creditor goes to the structure, not the substance. Appellant could have taken issue with this wording, which would have allowed the trial court the opportunity to resolve the question. It did not, and Appellant should now be precluded from raising the argument on appeal.

**2. Naming Northwest Justice Project as the Judgment Creditor does not aggrieve Appellant**

Pursuant to RAP 3.1, “[o]nly an aggrieved party may seek review by the appellate court.” “An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected.” *Cooper v. City of Tacoma*, 47 Wn. App. 315, 316, 734 P.2d 541 (1987) (citations omitted). “The mere fact that one may be hurt in his feelings, or be disappointed over a certain result . . . does not entitle him to appeal.” *Sheets v. Benevolent Protective Order of Keglars*, 34 Wn.2d 851, 855, 210 P.2d 690 (1949). “He must be ‘aggrieved’ in a legal sense.” *Id.* (citations omitted).

It is unclear how naming NJP as the Judgment Creditor instead of Mr. Thompson has aggrieved Appellant. Naming NJP as the Judgment Creditor instead of Mr. Thompson does not affect Appellant's proprietary, pecuniary, or personal rights. The present situation is similar to one the court of appeals addressed in *Cooper*. 47 Wn. App 315.

In *Cooper*, an injured fire fighter (Cooper) sought judicial review of an administrative decision that his injuries were nonduty-related. 47 Wn. App. at 316-317. The trial court agreed with Cooper and found his injuries were duty-related. *Id.* The City appealed the trial court's finding, but the court of appeals dismissed the appeal on the basis that the city was not an aggrieved party. *Id.* The court reasoned the City was not an aggrieved party because the distinction of non-duty or on-duty made no difference, because the City was required to disburse the same amount of money either way. *Id.* Therefore, the City had no pecuniary interest in the outcome of the appeal, nor was the City's personal or proprietary rights substantially affected by the order. *Id.* This very same reasoning should be applied to the present set of facts.

Just like the City in *Cooper*, the Appellant owes the same amount of money regardless of who the named Judgment Creditor is. Whether the Judgment Creditor is NJP or Mr. Thompson does not change this fact. Appellant does not have a pecuniary interest regarding this argument on

appeal, and their personal or proprietary rights were not substantially affected by naming NJP as the Judgment Creditor. Naming NJP as the Judgment Creditor has not aggrieved Appellant.

**3. Appellant does not have standing to raise issues on behalf of Mr. Thompson**

Appellant does not have standing to challenge the validity of the retainer agreement entered between Mr. Thompson and NJP. *See Appellant's Brief* at 10-11. Absent standing, Appellant cannot raise issues on behalf of Mr. Thompson or his estate. The assignment of Mr. Thompson's interest in the recovery of attorney fees and costs was an agreement between Mr. Thompson and NJP. App. B1-B3. Appellant was not a party to this agreement and does not have third party standing to challenge the validity of this assignment.

To determine whether a party has third party standing, Washington courts apply three factors: (1) the litigant has suffered an injury-in-fact, giving him a sufficiently concrete interest in the outcome of the disputed issue; (2) the litigant has a close relationship to the third party; and (3) there exists some hindrance to the third party's ability to protect his or her own interests. *In re Custody of S.R.*, 183 Wn. App. 803, 809, 334 P.3d 1190 (2014) (citations omitted).

Applying the three factors to the present situation demonstrates Appellant's lack of third party standing. First, Appellant has not suffered an injury in fact because of the assignment. The trial court determined that Mr. Thompson was the prevailing party, and per Mr. Thompson's proposed order, the fees and costs were ordered to be paid directly to NJP. CP 117-118. As discussed above, it does not matter who the named Judgment Creditor is, Appellant has to pay the same amount regardless. They have not suffered an injury in fact. Second, Appellant does not have a close relation with Mr. Thompson. The right to collect attorney fees and costs against each other meant their relationship would be adversarial. Finally, there is not a hindrance to Appellant's ability to protect their interest because of the assignment. Appellant was a party to the unlawful detainer action, and are a party on appeal. Appellant can make arguments on their own behalf without asserting arguments on behalf of Mr. Thompson. Appellant does not have third party standing to raise issues on behalf of Mr. Thompson regarding Mr. Thompson's agreement with NJP.

**4. It was within the trial court's discretion to name Northwest Justice Project as the Judgment Creditor**

A trial courts abuses judicial discretion only when no reasonable person would have taken the action of the trial court. *State v. Pascal*, 108 Wn.2d 125, 139, 736 P.2d 1065 (1987). Naming NJP as the Judgment

Creditor for the Order for Attorney Fees, which only covered costs and fees, was reasonable and within the trial court's discretion. There is no prohibition against an attorney being a Judgment Creditor. *See, e.g., Aaseby v. Vue*, 189 Wn. App. 1053, 2015 WL 5167428 \*6 (2015) (This case has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate. GR 14.1(a) (“[b]oth the Aasebys and [their attorney] are judgment creditors.”)).

Awards of attorney fees and costs are not meant to create a windfall for the parties involved, but rather to pay for legal expenses incurred. Mr. Thompson, as someone who did not pay any attorney fees or advance any costs, would not be entitled to receive any amount that was awarded in attorney fees and costs. Instead, this amount would be, and was, awarded to NJP. Further, as a recipient of LSC funding, NJP is prohibited from seeking and allocating awards for attorney fees to anyone but itself. *See* 45 CFR §1609.4. Thus, any amount of attorney fees awarded is required under federal regulations to be retained by NJP. Given the Order for Attorney Fees only awards fees and costs, all of which would go to NJP, the trial court was within its discretion to name NJP as the Judgment Creditor.

**E. Northwest Justice Project is the proper party on appeal**

Inexplicably, Appellant is rearguing whether NJP is the proper party on appeal. This issue was decided by Commissioner Wasson's November 1, 2017, ruling. *See Commissioner's Ruling*. Appellant moved to modify the Commissioner's decision and a panel of this Court denied its motion. *See Order Denying Motion to Modify Commissioner's Ruling*. Appellant did not seek review by the Supreme Court. This issue has been resolved and there is no basis in law or fact for Appellant to raise the argument again when it failed to seek further review.

As the named Judgment Creditor, NJP has an interest in protecting its award of attorney fees and costs. NJP is the respondent in fact to this appeal, which only involves the appeal of the attorney fees and costs. Commissioner Wasson found that no reason exists for NJP to file a claim in a probate action. *See Commissioner's Ruling*. Despite this, Appellant continues to argue issues already ruled on. Appellant's third assignment of error should be denied and sanctions assessed pursuant to RAP 18.9.

**F. Northwest Justice Project should be awarded attorney fees and costs on appeal**

Pursuant to RAP 18.1, NJP makes a request for attorney fees and expenses. NJP is requesting attorney fees and expenses on two different bases. First, this Court should award NJP attorney fees and expenses for the same reasons they were allowed in the trial court. "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 (2001) (citing RAP 18.1). Based on the lease agreement entered between Mr. Thompson and Appellant, or alternatively, RCW 59.18.290(2), as the prevailing party Mr. Thompson was entitled to recover fees and costs. CP 118. Pursuant to the retainer agreement entered between Mr. Thompson and NJP, Mr. Thompson assigned his interest in the recovery of attorney fees and costs to NJP. App. B1-B3. Based on this assignment, NJP recovered attorney fees and costs. CP 116-119. Since the only issues on appeal pertain to the Order for Attorney Fees, which were allowed at trial, NJP should be awarded attorney fees and expenses for having to defend against this appeal.

Second, pursuant to RAP 18.9, this Court may award attorney fees and expenses when a party files a frivolous appeal. An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of reversal. *Green River Cmty. Coll., Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 443, 730 P.2d 653 (1986) (citations omitted). Even taking into account arguments Appellant has raised for the first time on appeal, there are no debatable issues.

The Appellant has not raised any debatable issues regarding whether the trial court had a legal basis for awarding attorney fees. *See* § B. Appellant has not provided any authority or argument challenging the rate and time spent to attack the reasonableness of the award. *See* § C. The Appellant has also not provided any authority for how the trial court abused its discretion by naming NJP as the Judgment Creditor. *See* § D.

Further, sanctions pursuant to RAP 18.9 are appropriate given Appellant's repeated conduct on appeal of including in its filings numerous misrepresentations of fact,<sup>2</sup> failing to cite to the record in its briefing, and attempting to reargue the merits of the underlying unlawful detainer action and NJP's Motion for Substitution. Respondent had to spend a considerable amount of time responding to these meritless arguments and assertions, which warrants the imposition of sanctions. *See Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 313-314, 151 P.3d 201 (2006), *as amended*, (Jan. 17, 2007) *and as amended*, (Feb. 6, 2007). For these reasons, attorney fees and expenses should be awarded to NJP.

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<sup>2</sup>Appellant also made several misrepresentations in its *Objection to Substitution of Parties* at 2 ("Northwest Justice Project, counsel for Respondent, waited more than 30 days from the date of the evidentiary hearing, and then filed a motion for attorney fees and costs ...") *cf.* Respondent's *Reply to J.H. Properties' Objection to Substitution of Parties* at 1-3.

## V. CONCLUSION

The Appellant has not presented any debatable issues on appeal for why the trial court committed error by granting the Order for Attorney Fees. The lease agreement and statute authorized the award. The hourly rate and time spent were reasonable. The trial court was within its discretion to name NJP as the Judgment Creditor. The Appellant failed to object to these issues in the trial court and this Court should decline review on the issues now. Appellant has not met its burden of showing the trial court used its discretion in an untenable and manifestly unreasonable manner. For these reasons and the reasons above, this Court should affirm the trial court's ruling and grant NJP attorney fees and expenses on appeal.

Respectfully submitted,

Dated this 13<sup>th</sup> of April, 2018

NORTHWEST JUSTICE PROJECT



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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this 13<sup>th</sup> day of April 2018, I caused to be E-served via the Washington State Appellate Courts' Portal, a true a correct copy of this BRIEF OF RESPONDENT, addressed to the following:

Mona Geidl, WSBA 42455  
Minnick-Hayner, P.S.  
Attorney for Appellant  
249 W. Alder Street  
Walla Walla, WA 99362  
(509) 527-3500

SIGNED at Walla Walla, WA, this 13<sup>th</sup> day of April 2018.



David Surratt  
Legal Assistant to Tyler Graber

**VI. APPENDIX**

App. A1 – A2	Relevant Statutes
App. B1 – B3	Ex. C, to the <i>Second Declaration of Tyler Graber</i>

## APPENDIX A

### RCW 4.84.330

#### **Actions on contract or lease which provides that attorneys' fees and costs incurred to enforce provisions be awarded to one of parties— Prevailing party entitled to attorneys' fees—Waiver prohibited.**

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

Attorneys' fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorneys' fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

### RCW 59.18.030

#### **Definitions.**

(23) "Reasonable attorneys' fees," where authorized in this chapter, means an amount to be determined including the following factors: The time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly, the fee customarily charged in the locality for similar legal services, the amount involved and the results obtained, and the experience, reputation and ability of the lawyer or lawyers performing the services.

## APPENDIX A

### RCW 59.18.290

#### **Removal or exclusion of tenant from premises—Holding over or excluding landlord from premises after termination date.**

(2) It shall be unlawful for the tenant to hold over in the premises or exclude the landlord therefrom after the termination of the rental agreement except under a valid court order so authorizing. Any landlord so deprived of possession of premises in violation of this section may recover possession of the property and damages sustained by him or her, and the prevailing party may recover his or her costs of suit or arbitration and reasonable attorney's fees.

# **Exhibit C**

**to the Second Declaration of Tyler Graber**

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APPENDIX B

NORTHWEST JUSTICE PROJECT  
ATTORNEY-CLIENT RETAINER AGREEMENT

The Northwest Justice Project (NJP) and I (Client) agree as follows:

**Redacted**

**Redacted**

**Redacted**

2. **Attorney fees:** I will not be charged for my attorney's time. In some cases a court can require the opposing party to pay attorney fees. NJP may claim and retain an award of attorney fees from the opposing party to the extent allowed by law.

3. **Litigation or case costs:** There may be costs required to effectively handle my case and I will be responsible for payment of those costs; including costs advanced by NJP. "Costs" refers to money paid to third parties either as ordered by a court or to advance my case goals. I authorize NJP to advance reasonable costs for my case. Any extraordinary costs will be discussed with me. If my case is filed in court, NJP can try to collect from the opposing party the amount of costs advanced by NJP. When my case is done, NJP will tell me in writing the amount of costs expended on my behalf and what, if any, have been reimbursed by the opposing party.

**Redacted**

APPENDIX B

**Redacted**

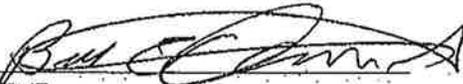
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I understand and agree to NJP's help under these terms.

  
\_\_\_\_\_  
CLIENT

  
\_\_\_\_\_  
ATTORNEY/PARALEGAL  
NORTHWEST JUSTICE PROJECT

Date: 5-22-17

Date: 5-22-17

Revised 07/11

# NORTHWEST JUSTICE PROJECT - WALLA WALLA

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**Appellate Court Case Title:** J. H. Properties v. Billy E. Thompson, et al  
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