

**FILED
Court of Appeals
Division III
State of Washington
5/23/2019 1:20 PM
No. 362914-III**

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

MICHAEL F. CRONIN,

Respondent,

vs.

CENTRAL VALLEY SCHOOL DISTRICT,

Appellant.

REPLY BRIEF OF RESPONDENT/ CROSS APPELLANT

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I. ARGUMENT

a. Cronin is Entitled to Double Damages for the District's Intentional Withholding of Pay After December 31, 2011.

The District argues that it should not be liable for double damages on intentionally withheld wages because it “genuinely believed that Mr. Cronin was not entitled to any wages because he failed to properly and timely request a statutory hearing.” (Appellant’s Reply Brief, p. 26). This argument fails for several reasons. First, the District never argued before now the objective and subjective prongs of double damages. It is improperly raised for the first time on appeal. Second, Cronin timely requested a statutory hearing. It was the District who took the uncategorical position and ignored Cronin’s request. Third, the District stopped paying Cronin on December 31, 2011, before he even received his notice of discharge and nonrenewal, and before he was even required to request a statutory hearing.

The burden is on the employer to show both a subjective and objective bona fide dispute existed as to whether an employment relationship existed, or whether all or a portion of the wages must be paid. *Shilling v. Radio Holdings, Inc.*, 136 Wn.2d. 152, 160 (1998). The District failed to meet this burden before the trial court and, as discussed below, fails to meet this burden now. As a matter of law, Cronin is entitled to double damages on the wages owed.

An argument raised for the first time on appeal on review of a summary judgment order is not considered by the reviewing Court. *Johnson v. Lake Cushman Maintenance Co.*, 5 Wn. App.2d 765, 780 (2018) (on review of a

summary judgment order, the appellate court will not consider arguments that were neither plead nor argued to the superior court on summary judgment as such arguments cannot be raised for the first time on appeal). As discussed in Cronin's Response/Cross Appeal Brief, the burden shifts to the District once Cronin has demonstrated wages were intentionally withheld, or, not withheld as a result of "carelessness or error". *Hill v. Garda CL Northwest, Inc.* 191 Wn. 2d 553, 561 (2018). It is the District's obligation to show a bona fide dispute existed subjectively and objectively when it withheld Cronin's wages. *Id.* at 562.

In Cronin's Memorandum in Support of his motion for summary judgment filed on June 26, 2017, Cronin requested and argued that he was entitled to double damages on the back wages that have been wrongfully and intentionally withheld by the District. (CP 785-86; 799-801). The District's response ignored the burden shifting nature of a double damages claim. At summary judgment, the District simply asserted that 1) because Cronin did not timely request a hearing for his discharge, and, 2) the District did not believe he requested a hearing, he was not entitled to double damages. *Id.* at 947-49; *see also Id.* at 1027-29. This is the District's position but only *after* this Court issued its mandate holding that Cronin did in fact timely and properly appeal with a request for a statutory hearing on his discharge and nonrenewal. *See Id.*; CP 606-638. The District "concluded" without any support or evidence that it had a genuine belief that a bona fide dispute existed as to whether Cronin timely and properly requested a hearing. *Id.* at 947-49, 1027-29. Further, the District's assertion was conclusory, without any factual basis to support it. *Id.* The District has yet to

brief the objective prong. The District is trying to manufacture a bona fide dispute alleging it “genuinely believed” Cronin did not request a hearing, that payments were made for the purpose of securing mediation, and that Cronin was placed on unpaid leave on December 31, 2011. These are all new arguments by the District. These arguments in the District’s reply brief are too little too late as they were never raised before the Trial Court and should not be considered now by this Court.

The District is trying to demonstrate that it genuinely did not believe Cronin was owed any wages for the 2011-2012 school year by stating it made a payment to Cronin to entice mediation in May, 2012. (Appellant Reply Brief, p. 29-30). That argument contradicts its position taken in this matter that Cronin at a minimum was owed pay and benefits through the end of his teaching contract, August 31, 2012. (CP 1000-1002)(Rowell Decl. stating Cronin was paid “his compensation through April 2012[,]” and “The District will issue payment to Mr. Cronin for **the remainder of what he was owed under his 2011-2012 contract, including wages and benefits**”)(emphasis added). The payment was not made to entice mediation. If the District made a payment to entice Cronin to mediate the matter, then it didn’t make the payment because it believed there was a bona fide dispute of whether wages were owed to him. If payment were made to entice Cronin to mediate, how is it an enticement for him to receive payment for an amount the District already acknowledged was owed?

Cronin does not deny that the payment for four months of wages was made and the parties participated in mediation. (CP 1574-75). However, the District

completely ignores the fact that it made a second payment *five (5) years later*, on July 31, 2017, for the remaining four months of pay Cronin was already entitled to for the remainder of the 2011-2012 academic year. (CP 1574-77). It is understandable why the District does not address the July 31, 2017, payment in its brief. It totally undercuts and contradicts its position that Cronin was not entitled to any wages or benefits after December 31, 2011. It also completely conflicts with the District's "new" position that Cronin was placed on unpaid leave as of December 31, 2011, a position that is unsupported in the record and not previously argued until now. It is undisputed that Cronin should have been paid through August 31, 2012. He was not. He was paid four months in June 2012, and the remaining four months five years later when the District finally realized that it couldn't very well take the position that Cronin was owed nothing after December 31, 2011, when they are trying to take the position on appeal that he was owed nothing after August 31, 2012. (CP 1024-27) ("Mr. Cronin has no Right to Wages Beyond the End of His 2011-2012 Contract Term."). The July 31, 2017, payment is undisputed and was an attempt to pay Cronin the wages the District willfully withheld from him. (CP 1574-77).

The District now argues for the first time on appeal and without factual support in the record that Cronin's pay was cut off on December 31, 2011, because Cronin was placed on unpaid leave while he was serving his jail sentence. (Appellant's Reply Brief, p. 27). That is untrue. Cronin was on paid administrative leave beginning the 2011-2012 academic school year and was never removed from that status until he was terminated. The District never

placed him on unpaid leave before then. (See CP 699, 702). Moreover, the District didn't even issue its Notice of Probable Cause until January 5, 2012. Cronin assumed that with an appeal and request for statutory hearing, his pay would continue until a hearing on the merits of the District's termination. (CP 14-15). It was not until January 31, 2012, that Cronin realized that his pay had been cut off when he never received his January 2012 paycheck after appealing his termination and requesting a statutory hearing. (CP 24).

The District intentionally and unlawfully began withholding his wages on December 31, 2011. They hadn't placed him on unpaid leave. None of the citations to the record in the District's brief support such a contention. (See Appellant Reply Brief, pg. 27). If it were true that the District placed Cronin on unpaid leave, why did the District fail to raise it before? Or why did it concede and pay Cronin wages owed from December 31, 2011, through August 31, 2012? Cronin's counsel sent a letter to the District's counsel indicating that Cronin hadn't been paid in January after appealing and requesting a statutory hearing. (CP 24). It was met with the Superintendent's letter to Cronin's union representative Sally McNair, that she could not appeal the matter on his behalf because she was not the District's employee and only he could sign the request for hearing. (CP 26). As a consequence, the District considered Cronin terminated. That is why his pay was cut off as of December 31, 2011, not because he was placed on unpaid leave. So not only is the District's new argument factually incorrect, but claiming Cronin was on unpaid leave is an issue that has never been raised previously and is improper on review.

Second, the District's position essentially boils down to the argument that there must have been a bona fide dispute as a matter of law because two trial court rulings found in the District's favor, although both were subsequently overturned by this Court.¹ The District's "genuine belief" that Cronin was not an employee because he failed to appeal and request a statutory hearing has no basis in law or fact. The District's "genuine belief" was objectively wrong. The District fails to meet this objective prong. The fact that it subjectively "genuinely believed" what was later determined to be factually and legally incorrect does not create a bona fide dispute: that is why there is an objective prong to the analysis. The District cannot escape liability as the law does not permit misunderstanding, misapplying and/or ignoring the law as sufficient evidence to constitute a "bona fide dispute." There is no presumption or other supporting case law that stands for the proposition that a bona fide dispute automatically exists by virtue of a trial court having ruled in favor of the District, only to be overturned by the Court of Appeals. In fact, the opposite is true. A wrongly decided case *does not give rise* to a bona fide dispute. *Dep't of Labor and Industries v. Overnite Trans. Co.*, 67 Wn. App. 24, 34-36, 39-40 (1992) (an employer relied on a Second Circuit U.S. Court of Appeals decision to argue a bona fide dispute existed regarding overtime payments to employees. However, the Washington Appellate Court held that the Second Circuit decision was wrongly decided and did not give rise

¹ The District's position is much like pointing to a half-time basketball score and arguing that the team winning at half time won the basketball game, regardless of the final score. This Court has found specifically that Cronin requested a statutory hearing and that his due process rights to a hearing were denied to him by the District. CP 606-638.

to a bona fide dispute to relieve employer of any liability).

It is the District's position that since two separate trial court's affirmed its legally incorrect position, then a bona fide dispute must have inherently existed resulting in no liability to the District for withholding Cronin's wages. There is no law to support this position. The District also completely ignores the fact that it did not have the lower courts' decisions to rely upon when it made the intentional decision on December 31, 2011, to stop paying Cronin his wages. The District does not now get to retroactively apply its wrongly held position of the existence of a legal dispute to justify the day it first intentionally withheld wages from Cronin.

There were no rulings or findings regarding or relating to double damages or back wages in the first two trips through the lower courts. A courts' incorrect application of the law does not create a bona fide dispute out of thin air, and it does not make the District's actions any less of a violation of Cronin's due process rights. It simply demonstrates that the District's untenable position that Cronin never timely requested a statutory hearing has been legally incorrect from the beginning. The District wants this Court to focus on the wrong issue. The issue is not whether there was a bona fide dispute as to whether Cronin had adequately requested a statutory hearing on his discharge and nonrenewal. Rather, the issue is whether on December 31, 2011, there was a bona fide dispute as to the existence of an employment relationship between the District and Cronin, or whether wages were still owed to Cronin. There was no bona fide dispute that an employment relationship existed and wages were still owed to

Cronin after December 31, 2011.

A critical detail which should not be lost in all of this is the fact that the District began intentionally withholding Cronin's wages on December 31, 2011, which was five days *before* the District wrote the Notice of Probable Cause, six days *before* Cronin even received the notice, and sixteen (16) days *before* a timely request for a statutory hearing was ever required by law. CP 15-16; *see also* RCW 28A.405.210 and .300. The District withheld wages before it ever even gave Cronin the Notice of Probable Cause and then ignored his request for a hearing. This is in clear violation of RCW 49.52.050 and .070, and the District "shall be liable" for double damages.

In conclusion, there was no bona fide dispute whether an employment relationship existed between the District and Cronin: it did. And there was no bona fide dispute whether a portion of his wages must be paid until a hearing on the merits could take place: they must. Taking a position contrary to the laws of the State of Washington does not make either of these statements less true. Nor does it create a bona fide dispute. Accordingly, Cronin is entitled to double damages as a matter of law.

In the alternative, this matter could be remanded to the trial court as, "ordinarily, the issue of whether an employer acts 'willfully' for purposes of RCW 49.52.070 is a question of fact." *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d, 152 160 (1998); *citing Pope v. Univ. of Wash.*, 121 Wn.2d 479, 490 (1993).

b. The Trial Court has Equitable Powers to Award Cronin Tax Consequences due to the Protracted Nature of this Litigation

In *Sears*, the Court looked to equity, not the statutory language of Title VII to order an additional award for tax consequences. *Sears v. Atchison Topeka and Santa Fe Ry Co.*, 749 F.2d 1451, 1456-57 (1984). The *Sears* Court noted that the trial court has wide discretion in fashioning remedies and that a tax component may not be appropriate in a typical Title VII case, but that this case presented “special circumstances in view of the protracted nature of the litigation” and a tax component was appropriate. *Id.* Previous Courts looked to Title VII for authority to award a tax component, but it had been previously denied *Id.* at 1456 citing *Blim v. Western Electric Co.*, 731 F.2d 1473, 1480 (10th Cir, 1984). In *Sears*, it was an analysis based in equity due to the protracted nature of the litigation and delays in receipt of payment, not a Title VII analysis, that resulted in the lower court’s appropriate exercise of discretion to award tax consequences. *Id.*

Likewise, in *Blaney*, the litigation was protracted and the award was for 6 years of past wages and an additional award for future wages. *Blaney v. Int’l Assoc. of Machinists and Aerospace Workers Dist No 1.*, 151 Wn. 2d 203, 208 (2004). The District argues that under *Blaney*, any tax consequence award must be authorized or based on a statute. (Appellant Reply Brief, pgs. 33-34). However, the *Blaney* Court did not state that awards in equity, such as a tax gross up, *must* be grounded in statute. That position is wholly unsupported by *Blaney*. Nor does *Pieffer v. Pro-Cut Concrete Cutting and Breaking Inc.*, support such a conclusion. 6 Wn. App. 2d 803 (2018). *Pieffer* is neither persuasive nor

controlling here as it dealt with a request for an award of tax consequences as a “wage” under Title 49 RCW, not in equity as Cronin seeks and plead here. *Id.* at 826-27. Rather, the *Blaney* Court found that Courts were granted authority by the legislature under the Washington Laws Against Discrimination to award tax consequences. Unlike *Sears*, the *Blaney* Court never reached the question as to whether the Court had equitable authority to make such an award. *Id.* at 215-216 (“we hold that WLAD allows offsets for additional federal income tax consequences.”).

And outside any statutory framework, tax consequences have also been awarded in contract cases. *Oddi v. Ayco Corp.*, 947 F.2d 257, 267 (7th Cir, 1991)(the prevailing party would incur a new tax on the damages award, one that never would have existed but for the other party’s mistake; therefore, the prevailing party was entitled to the new taxes imposed as the result of the employer’s mistake).

Tax consequences or “gross-ups” are awarded primarily in employment discrimination cases, not simply because of the broad authority of the Courts to fashion awards in order to eradicate discrimination, but because these are the types of cases with wage claims that constitute more than one year’s wages. *See generally, Sears*, 749 F.2d 1451. It makes sense that the legislature did not address this issue in RCW 28A, as the legislature intended expedited statutory hearings take place and not the protracted delay that occurred in this case. RCW 28A.405.310.

Also, some courts, including *Sears*, view an award for tax consequences

based on the same underlying principles as an award for prejudgment interest. Such an award serves to compensate a plaintiff and make them whole for their loss. *Arneson v. Callahan*, 128 F.3d 1243, 1247 (8th Cir. 1997). The practical impact of wages being paid in one lump sum in an award by the court results in the prevailing party not being made whole, as they must now share a large portion of their award with the Internal Revenue Service that they would not have otherwise had to share but for the bad act by the non-prevailing party. *See Ferrante v. Sciaretta*, 365 N.J. Super. 601, 606 (2003).

The District recognizes that the Trial Court has broad equitable powers. (CP 1529-30). Courts “have broad discretionary power to fashion equitable remedies... when there is a showing that a party is entitled to a remedy and the remedy at law is inadequate.” *Sorenson v. Pyeatt*, 158 Wn.2d 523, 532 (2006). Cronin’s award without a gross up for tax consequences does not make him whole. He will have to pay a substantial amount more in taxes because the District violated his due process rights and failed to agree to a statutory hearing over seven years ago. (CP 1204-06). For these reasons, Cronin requests an award in equity for the negative tax consequences he will have for any back pay award.

c. The Trial Court Abused Its Discretion when It Reduced Cronin’s Attorney’s Fees without Sufficient Findings.

It was error for the Trial Court to reduce Cronin’s attorney’s hourly rate on the basis of a failure to segregate, when the hours spent were found by the Trial Court to be reasonable. Further, the Trial Court failed to adequately explain how

he arrived at the figure of \$250 as a “reasonable hourly rate” for Cronin’s attorney. The lodestar method for awarding attorney fees in the State of Washington is determined by multiplying a reasonable hourly rate by the number of hours reasonably expended on the matter. *Peiffer*, 6 Wn. App. at 834. The courts limit the number of hours to those reasonably expended, including unsuccessful claims or otherwise unproductive time. *Id.* The Court can *then*, adjust the award up or down, but must do so by a reasoned evaluation. *Id.* A trial court cannot reduce a lodestar figure without an explanation of something more than it found the amount “reasonable”. *Id.* That is what the trial court did here. (RP 43:9-46:20, Aug. 3, 2019). The Trial Court identified the factors considered, then awarded an amount and deemed it “reasonable”. (*Id.* at 45:7-13). The mere conclusion of reasonableness and a recitation of considerations are insufficient under the law. Considering the only controverting evidence of a multiplier was the District’s counsel’s own belief, the evidence before the Court of the hourly rate and a multiplier was substantial and should have been allowed. (CP 1207-1225, 1275-1389).

When a trial court awards significantly less attorney fees than requested, the trial court “should *at least* indicate what part of the lawyer’s work the court discounted as unnecessary or unreasonable, how much the lawyer’s hourly fee the court found excessive, or the manner by which the court reduced.” *PAWS v. Univ. of Wash.*, 54 Wn. App. 180, 187 (1989)(emphasis added). Otherwise, without adequate explanation as to *how* the court came to the reduced lodestar amount, not just *why*, the reviewing court cannot review whether the Trial Court

abused its discretion and the matter must be remanded. *See Peiffer*, 6 Wn. App. at 835.

The District is correct that the Trial Court made a number of considerations when awarding attorney's fees and costs to Cronin (Appellant Reply Brief, p. 40; (RP 43-46, August 3, 2018). However, we only know what the Court considered; we do not know by reasoned evaluation *how* the Court went from \$300 an hour, which the Court commented was a "low" hourly rate for Cronin's counsel, to establishing the amount of \$250 an hour as the reasonable hourly rate. (RP 46:2-3, Aug. 3, 2018). The Court found there was no dispute as to the number of hours billed. *Id.* at 44:8-9. Yet, the reason for reducing the *hourly rate* was the failure to segregate claims and for hours spent on unsuccessful claims. *Id.* at 45:14-17; 46:8-13. To find the hourly rate not excessive, but low, and the number of hours undisputed and reasonable, and then reduce the *hourly rate* based on a failure to segregate claims is perplexing. It is unclear exactly *how* the Court arrived at \$250 as an hourly rate which is over a 15% reduction of the award, when the requested hourly rate was not found to be excessive, and the evidence overwhelmingly supported a multiplier. (RP 44-46, Aug. 3, 2018). It is also unclear why the trial court reduced the hourly rate and not the hours expended when the reduction was ostensibly based on what the Court perceived was Cronin's unsuccessful claims.

However, a review of the record does not support a reduction for unsuccessful claims. All of the claims asserted by Cronin were based on the same facts. A reduction for unsuccessful claims is not warranted considering the

underlying facts and time spent were the same for all claims and it is impossible to segregate time for any unsuccessful claim. *King Cty v. Vinci Construction Grands Projects, et.al.*, 188 Wn.2d 618, 632 (2017) (segregation of fees is not necessary where the claims are so related no reasonable segregation can be made). Besides, when the claims are based on the same facts, segregation of time on unsuccessful claims is not warranted. *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, FN 7 (2007) citing *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct 1933 (1983)(where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have their attorney's fee reduced simply because the district court did not adopt each contention raised).

The Trial Court's award and reasoning for attorney's fees was without a reasoned evaluation explaining how the reduction was calculated. It was done so in error. For that reason, Cronin asks this Court to award the requested amounts and the requested rate and time, plus a multiplier, or in the alternative, remand this matter for further findings.

d. Cronin is Entitled to Attorney's Fees and Costs for Defending Motions brought by the District in Bad Faith

The District's entire argument under Section "H" of their brief relating to Cronin's claim for attorney's fees for having to respond to the District's prior motions is legally and factually inaccurate. The District argues that their Motion to Stay and Motion to Modify Commissioner's Ruling became moot following the Statutory Hearing Officer's decision on December 21, 2018. The problem is the District's Motion to Modify the Commissioner's Ruling Denying a Stay was

filed one week *later* on December 28, 2018. So the District now admits that it filed a brief on a “moot” issue after the fact, that Cronin was required to brief and defend.

Or in the alternative, if the issue wasn’t “moot” after the Hearing Officer’s decision, then the District abandoned and waived all arguments raised in its motion briefs to justify a stay and to reverse the Commissioner’s ruling denying the stay. The entire rationale by the District to entice this Court to enter a stay was the contention that it would argue and “flush out” during its opening brief here the details of the debatable issues it claimed would support a stay of Cronin’s pay. Again, these were motions Cronin had to brief and defend. Either way, Cronin should not have had to bear the burden and cost of repeatedly responding to the District’s motions which now appear to have been brought in bad faith.

The Courts have inherent equitable powers to authorize the award of attorney fees in cases of bad faith. *Burt v. Wash. State Dept. of Corr.*, 191 Wn. App. 194, 210 (2015) citing *In re Recall of Pearsall-Stipek*, 136 Wn. 2d 255, 266-67 (1998). This Court should exercise its equitable powers to authorize the award of attorney’s fees on the District’s Motion For Stay and Motion to Revise Commissioner’s Ruling.

e. The School District Improperly Raises New Arguments in its Reply Brief

Appellate courts do not consider issues argued for the first time in a reply brief. *Grange Ins. Ass’n v. Roberts*, 179 Wn. App. 739, 771 (2013) citing *In re Marriage of Sacco*, 114 Wn.2d 1, 5 (1990). A reply brief is limited to a response

to the issues in the responding brief and to address issues argued for the first time in a reply brief is unfair and inconsistent with the rules on appeal. *Grange Ins. Ass'n*, 179 Wn. App. at 771 *citing* RAP 10.3(c); *State v. Hudson*, 124 Wn.2d 107, 120 (1994).

The District raises several new arguments for the first time in their reply brief which is inappropriate under the rules on appeal, unfair to Cronin, and consequently, should not be considered by this Court. The District makes new arguments in its Reply on: 1) page 10 regarding a “normal” nonrenewal hearing and new allegations that teacher’s will be “incentivized to drag out statutory hearings; 2) page 14 regarding an new approach to determining whether a statutory hearing is “timely” given; 3) pages 16-19 where the District raises new arguments that Cronin “in equity” is precluded from recovering back wages.

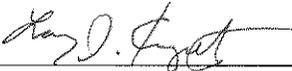
As these arguments are being raised in a reply brief which Cronin has no opportunity to dispute or respond to, the arguments should be struck and not considered by this Court.

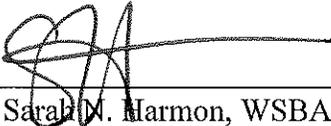
II. CONCLUSION

For the reasons stated and argued above, Cronin respectfully requests this Court reverse the Trial Court and enter an order awarding Cronin double damages, tax consequences, costs, attorney’s fees at a hourly rate of \$300 plus a multiplier, and award attorney’s fees and costs on appeal for having to defend the District’s motions for stay and to modify the Commissioner’s ruling.

Respectfully submitted this 23rd day of May, 2019.

POWELL, KUZNETZ & PARKER, P.S.

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Certificate of Service

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Appellate Court Case Number: 36291-4
Appellate Court Case Title: Michael F. Cronin v. Central Valley School District
Superior Court Case Number: 12-2-01155-3

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