

70741-8

70741-8

70741-8

COURT OF APPEALS NO. ~~70741-9-1~~

WASHINGTON STATE COURT OF APPEALS
DIVISION ONE AT SEATTLE

MANUEL CRUZ, GILBERTO RAMIREZ, and
EPIFANIO RIOS

Respondents

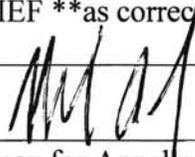
v.

ABEL CHAVEZ and JANE DOE CHAVEZ,
and the marital community thereof; and
CHAVEZ LANDSCAPING, LLC, a limited liability company;

Appellant/Petitioners

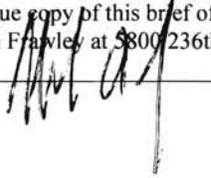
CHAVEZ' REPLY BRIEF ****as corrected****

Dated: 18 July 2014



Attorney for Appellant Chavez
MICHAEL A. JACOBSON
WSBA No. 13135
119 First Avenue, Suite 200
Seattle, WA 98104
(206) 447-1560
Fax: (206) 447- 1523
mike@mikejacobsonlaw.com

CERTIFICATE OF SERVICE. I certify that a true copy of this brief of appellant was served by ABC
Legal messenger upon attorney for plaintiffs John Frawley at 5800 236th St SW in Mountlake Terrace,
WA 98043 this 18 day of Jul 2014



RECEIVED
COURT OF APPEALS
DIVISION ONE
JUL 21 2014

2A. CONTENTS LIST

Section	Content	page
2A	Table of Contents	1
2B	Table of Authorities	1
5	Reply to the Facts asserted in the brief of Respondents	3
6	Issues in Reply	15
7	Argument in Reply	15
8	Conclusion	27

2B. TABLE OF AUTHORITIES

STATE CASES	Page
<u>Arkison v. Ethan Allen, Inc.</u> , 160 Wn.2d 535, 160 P.3d 13(2007)	26
<u>Baird v. Baird</u> , 6 Wn. App. 587, 494 P.2d 1387 (1999)	17
<u>Barry v. USAA</u> , 98 Wn. App. 199, 989 P.2d 1172 (1999)	26
<u>Brinkerhoff v. Campbell</u> , 99 Wn. App. 692, 994 P.2d 911 (2000)	19, 22
<u>In re Carmick</u> 146 Wn.2d 582, 48 P.3d 311 (2002)	24
<u>Engstrom v. Goodman</u> 166 Wn. App. 905, 271 P.3d 959 (2012)	24
<u>In re Ferree</u> , 71 Wn. App. 35, 856 P.2d 706 (1993)	22-23
<u>Firth v. Juanita Country Club Condo Owners Assn</u> 2011 Wash. App. LEXIS 2418	17
<u>Habib v. Emerald Coin Vending</u> , 2009 Wash. App. LEXIS 3166	16
<u>Hillis v. State, DOE</u> , 131 Wn.2d 373, 932 P.2d 193 (1997)	20
<u>Lavigne v. Green</u> , 106 Wn. App. 12, 23 P.3d 515 (2001).	19
<u>Nationwide Mutual v. Watson</u> , 120 Wn.2d 178, 840 P.2d 851 (1992)	25
<u>In re Patterson v. Taylor</u> , 93 Wn. App. 579, 969 P.2d 1106 (1999)	15-16, 20
<u>Roger Crane & Assocs v. Felice</u> , 74 Wn. App. 769, 875 P.2d 705 (1994)	19
<u>Rosen v. Ascentry Technologies, Inc.</u> , 143 Wn. App. 364, 177 P.3d 765 (2008)	25
<u>Schneider v. Seattle</u> , 24 Wn. App. 251, 600 P.2d 666 (1979)	17, 23, 26-27
<u>State Ex. Rel. Carrol v. Junker</u> , 79 Wn.2d 12, 482 P.2d 775 (1971)	20
<u>Sweek v. Metro Seattle</u> , 45 Wn. App. 479, 726 P.2d 37 (1986)	17
<u>Veith v. Xterra Wetsuits, LLC</u> , 144 Wn. App. 362, 183 P.3d 334 (2008)	19
<u>White v. Kent Medical Center</u> , 61 Wn. App. 163, 810 P.2d 4 (1991)	18, 20
<u>Witzel v. Tena</u> , 48 Wn.2d 628, 295 P.2d 1115 (1956)	26

FEDERAL CASES	
Guzman v. De Arellano De Villoldo, 245 F. Supp. 2d 388 (D.P.R. 2003)	18
New Hampshire v. Maine, 121 S Ct 1808; 532 US 742; 149 L. Ed. 2d 968 (2001)	26
Niebel v. Trans World Assur Co. 108 F.3d 1123 (9 th Cir. 1997)	26
COURT RULES	
CR 2A	10-12, 16-19, 22-23, 25-26
CR 26	25, 27
CR 26(b)	9
CR 30	9
CR 32(a)(2)	9
CR 43(f)	4, 9
CR 45	9
CR 56	8, 19
CR 56(d)	18, 21, 27
CR 56(e)	22, 23
CR 59	9, 26-27
CR 59(a)	19, 26-27
CR 59(a)(4)	26-27
CR 59(a)(8)	15, 26-27
ER 602	3-5, 8, 12, 22
ER 801(d)	3, 7-8, 23
ER 802	3, 8, 14
GR 14.1	17
RPC 1.2(a)	18
RPC 4.2	6, 15, 17, 21, 24-25
RPC 4.2 Cmt. 4	21, 24-25
RPC 8.4	17
STATUTES	
RCW 7.07.030	5
RCW 7.07.060	5
RCW 9A.72.085	3, 4

5. Reply to the Facts Asserted in Respondent's Brief.

Cruz affidavit evidence of a materially disputed Ramirez/Chavez agreement.

Respondents Ramirez and Rios ("the workers") assert that Cruz enumerated in his affidavit the "settlement agreement facts." (Brief of Respondents, pages 8, 13, 24) (hereafter "R- Brief p 8, 13, 24") [citing CP 261]. Though Cruz does not claim to have witnessed the Ramirez/Chavez negotiation, Cruz asserts:

A. Cruz' ER 602 guess what must have been imparted as directives by Chavez to Ramirez during Chavez' private one-on-one interactions with Ramirez. [CP 261]

B. What Cruz learned from Ramirez' ER 802 out of court statements characterizing how Chavez behaved during the Ramirez/Chavez negotiation. [CP 261]

C. Ramirez' ER 801(d) admissions that his last reported communication to his attorney were explicit instructions that he refused to discuss with his lawyer any further participation in the lawsuit, having signed a paper with Chavez. [CP 261]

D. Chavez' 801(d) admissions to Cruz describing Chavez' recent experience negotiating a successful compromise with Ramirez without engaging his or Ramirez' lawyer to do it. [CP 261]

The workers' brief asserts a legitimate inference arising from Cruz' evidence that Chavez (1) must have had an attorney/client interaction in private which (2) transmitted corrupt attorney instructions to Chavez to (3) use some type of coercive or corrupt method to control Ramirez to "end run" around plaintiff's counsel. (R-Brief p. 24)

Frawley affidavit evidence of a disputed Chavez/Ramirez Agreement.

The workers assert that attorney for plaintiff John Frawley ("Frawley" hereafter) enumerated in his declaration, sworn to pursuant to RCW 9A.72.085, additional

“settlement agreement facts”. (R- Brief p 8-9,13, 21)

E. ER 602 speculation that “defendants counsel contacted one of my clients, Gilberto Ramirez, directly and without notice to me.” [CP 271]

F. ER 602 speculation that encouragement was given to Ramirez not to communicate with his own attorney. [CP 272]

G. ER 602 speculation that Chavez’ counsel engaged in after-the-fact concealment¹ of the

1

INADMISSIBLE AND MATERIALLY MISLEADING “CONCEALMENT.” The Declaration of Frawley dated 8 Feb 2013 [CP 216, 58] swore pursuant to RCW 9A.72.085 that opposing counsel “concealed” the settlement from the court when the court needed to know about it during January 2013 proceedings adjudicating Frawley’s motion to withdraw. [CP 216-17, 58] A material omission--Frawley never served opposing counsel with notice of hearing on his motion to withdraw. [CP 159, 125]. Also, Frawley filed conflicting and self-contradictory sworn assertions about his withdrawal as counsel. Frawley’s 8 Feb 2013 sworn statement claims “concealment” by Chavez interfered with his attorney client communication relations with **Ramirez**—“I have been unable to speak with plaintiff Ramirez since the defendants contacted him directly and reached a settlement with him.” [CP 216-17, 58]

Frawley’s 17 Jan 2013 sworn statement had instead blamed Ramirez **and Rios and Cruz and their chosen translator** –but not Chavez– for making effective representation “impossible”.

In the Summer/Fall of 2012 (translator) Gwordske’s husband returned from service in Afghanistan. Apparently, Ms. Gwordske has now encountered a mountain of personal problems and family issues which make her unavailable...
...(I)n the fall of 2012...I was unable to even reach the plaintiffs to assist in that process. I have had no communication from any of the plaintiffs for more than four months...When as here the plaintiffs have made it impossible for me to effectively represent them, I do not believe that I should be required to remain a part of this case. [CP 227, 69] (emp added)

The Declaration of Frawley also asserts that opposing counsel “concealed” the settlement from the court, in October 2012, [CP 272] when Chavez secured the 12 October Order which denied plaintiff’s motion to strike the trial de novo. [CP 727-729] But the certificate of translator Dopps creating the English translation of the Ramirez/Chavez agreement did not come into existence for another week--18 October 2012.[CP 627]So there was nothing yet admissible in evidence which a party could “conceal.” The Declaration of Frawley contends that “concealment” from the court happened when Chavez failed to introduce the Ramirez settlement at the 23 October 2012 continuance hearing and served instead a CR 43(f) notice for trial addressed to Ramirez. [CP 273] But Chavez opposed continuance--he wanted Ramirez to come to Court to

Chavez/Ramirez agreement. [CP 272]

H. ER 602 speculation and misrepresentation that Chavez' counsel engaged in a history of sanctionable "discovery violations" [CP 271] and bad acts "misleading the Court" [CP 273]² by Chavez' counsel

admit that his signature on the settlement check and settlement agreement were genuine. And he didn't believe that his legal theories and mental processes were exposed to an advance study by his adversary:

Mr. Jacobson: Judge if I may explain. The translation of the settlement ...states...that it is signed by "Illegible." [See CP 624-625] That is the evidence that we can present. There is a factual showing that we need to make in front of some judicial officer that the signatures by Mr. Ramirez are the same signatures on every...paycheck. And until I had some hearing time, I did not have the ability to perfect, as I understood it, this settlement agreement. And so I was coming to court in order to produce the evidence to some judicial officer that this is in fact a settlement signed by Gilberto Ramirez, who is the plaintiff in this case.

THE COURT: So you need an evidentiary hearing?

MR. JACOBSON: Either that or a motion hearing. Or I needed counsel's consent. Which after I showed him all of this material on Thursday, he withheld. [CP 160-161]

The Brief of Respondent (R-Brief p 7-8) [citing sworn Declaration of Frawley; CP 273] also asserts that misconduct occurred during confidential settlement negotiations with a mediator, though all such communications are inadmissible. RCW 7.07.030, 060

2

INADMISSIBLE AND MATERIALLY MISLEADING CLAIMS OF "BAD ACTS"
The Declaration of Frawley 17 June [CP 271](R-Brief p 6) asserts immaterial and baseless bad acts impeachment that opposing counsel routinely refused to comply with discovery orders at the trial court. There are no such orders. While in June 2012 a court commissioner did, **sua sponte**, impose an unexplained \$500 sanction against the defendant in the context of defendant moving to amend the Answer, the commissioner was constrained by the facts and the law to **grant** defendants motion [CP 355] in spite of apparent displeasure with defendants papers. Next, the workers (R-Brief p 8-9) ask the Court to infer from Frawley's sworn testimony in 2013 that defendants counsel "contacted client Gilberto Ramirez directly and without notice..." [CP 271] and encouraged Ramirez to end-run or terminate contact with his own lawyer [CP 271] and never denied it and tacitly acknowledge that it happened. (R-Brief p 8-9)

This is an affront and a **preposterous affront**. Even if Jacobson had possessed a self-destructive wish to violate the ethics rules, he was unable to communicate with Ramirez. [CP 124 ¶4] Jacobson and Ramirez do not share a common language. [Id.] Chavez—the sole participant other than Ramirez in a private, one-on-one negotiation with Ramirez furnished sworn, admissible, firsthand testimony that his meeting with Ramirez was one-on-one [CP 30 ¶6] and that he recalls his first contact with counsel about the

showing a propensity to subvert the administration of justice.

Like Cruz, Frawley does not assert personal knowledge or experience in connection with the Ramirez/Chavez negotiation. Frawley's personal knowledge was even more comprehensively impaired; Frawley swore in January 2013, to ER 801(d) admissions that, for lack of a translator, he had not spoken to Ramirez (or

Ramirez "desistir" agreement to occur after it was signed. [CP 30] Chavez is a landscaper, not a lawyer subject to regulation by RPC 4.2 [CP 156] Jacobson is studious in his observance of RPC 4.2. [CP 156] The denial of any prohibited lawyer contact with Frawley's client was plain and comprehensive:

There was no communication by me (attorney Jacobson) to Ramirez. Period.
...The fact that I assisted him (Chavez) **after the fact** to arrange translations and secure bank records isn't even within the zone of a communication to Ramirez.
This motion has been baseless since inception. [CP 129-30 ¶13](emp added)

Next, the workers assert-- without an anchor in the factual record- Frawley's sworn accusation that Chavez exploited and underpaid Ramirez and Rios each by "literally tens of thousands of dollars." (R-Brief p 5)[CP 270-71] The Sealed and inadmissible-for-any-purpose and ex-parte Arbitrators' Award and discussion of the evidence are nonetheless cited by and presented by the workers as if evidence. (R-Brief Apdx 1) But this immaterial and baseless assertion is contradicted by the admissions of Rios, who was caught by the trial court trying to perpetrate a fraud. Chavez showed the trial court [CP 746] that Rios swore falsely, claiming that Chavez owed him unpaid 2008 wages for work at Chavez' Snohomish County landscaping operation **every month from March to November 2008**. [CP 759] But for the 16 weeks preceeding March 31 and September 30th and December 31st that year, Rios earned wages paid by the AgriMACS farm [CP 210-11; 112].-- an operation situated across the mountains [210-11, 112] **more than 200 miles** distant from Chavez' Snohomish operation. Similarly, plaintiff Ramirez had executed a written and a deposition admission asserting "I was always paid for my regular hours..." [CP 30¶4; CP 446] Accordingly, Ramirez accepted a nominal \$4000 settlement payment. [CP 624, 629] Cruz and Rios, under the guidance of Frawley, each accepted a four-figure net client settlement, [plus an additional four-figure settlement for their counsel's attorneys' fee] in the aggregate amount of \$20,000 [CP 244].

Next, the workers citing Frawley's sworn testimony (R-Brief p 8) [citing CP 273] falsely assert that Presiding Judge Downes had **denied** the motion to enforce settlement once already; when Chavez brought it on the motions calendar. The Court record contradicts Frawley. It reads: "...The court strikes the trial date and orders the matter set for a motion hearing". [CP 313] What Judge Downes said to Mr. Frawley was "Motions to dismiss belong before the civil motions judge. But I said I would keep it on the calendar to see what's up." [CP 54]

any other plaintiff) for more than 4 months in the lead-up to trial. [CP 227, (see CP 180); CP 68-69; 71-72; 75-76]³ These ER 801(d) admissions contained Frawley's accusation that Ramirez and the other plaintiffs made it unreasonably difficult to conduct any trial preparations. [Id.] Frawley filed contradictory ER 801(d) sworn admissions with the court, one month later, asserting that he blamed Chavez instead of his translator or Cruz or Rios for his difficulties maintaining contact with Ramirez. [CP 159] (See Note 1, *infra*) Frawley also swore in his ER 801(d) admissions one day before the parties' trial that he still hadn't spoken to Ramirez since the fall and that he "had no authority" to act on behalf of Ramirez in connection with the Ramirez settlement agreement. [CP 159]

There is no hint in the Frawley papers how Frawley overcame his communications blackout to acquire personal knowledge or other admissible evidence that Chavez' lawyer directly contacted Ramirez or encouraged Ramirez (or told Ramirez through surrogates) to ignore his own lawyer. How Frawley acquired client authorization to disavow Ramirez' signed settlement remains unanswered. Frawley's admitted lack of authority to act for Ramirez [CP 159] and Cruz' report of Ramirez' ER 801(d) admission [CP 261], was to the contrary– that Ramirez' last instructions to his lawyer was that he had signed a paper and wanted nothing further to do with the lawsuit against Chavez.

Undisputed Settlement Facts. The workers assert that the settlement

3

Frawley's admissions about this communications blackout are quoted at note 1 *infra*.

agreement facts presented by attorney Frawley and plaintiff Cruz are “undisputed facts” for the purposes of granting the workers CR 56 relief. (R- Brief p 21) But the workers’ ER 602 and ER 802 settlement “facts” are disputed by admissible evidence:

1. That Ramirez executed by his signature two writings asserting his intention to take a \$4000 settlement payment and desist from and cancel and release his known and unknown claims against Chavez Landscaping LLC and Chavez’ marital community (collectively, “Chavez” hereafter) [CP 624-625; 629]

2. That Ramirez has never participated in his lawyers decision to disavow this written settlement and return the \$4000 consideration. Ramirez’ last contact with his lawyer in February 2013 was to specifically **refuse to discuss participating any further** in the litigation. [CP 261] Frawley then filed papers to invalidate Ramirez’ settlement [CP 607] admitting his own lack of authority or client consent:

I feel uncomfortable signing off on any order since Mr. Ramirez terminated his communication with me I guess, following his settlement of the claim. And **I don’t think I have authority** to do that. **I don’t think the court ought to enforce this agreement.** [CP 159] (emp added)

3. That Chavez handled the Ramirez settlement one-on-one with Ramirez, conversing in Spanish, and prepared the “Desistir” settlement agreement using an archived file as a template; using an LLC office manager as translator; [CP 30-31 ¶5,6][CP 27-28] and contacting his lawyer about it for the first time after the “Desistir” agreement had already been signed by Ramirez. [CP 30]

4. That Attorney Frawley made ER 801(d) written representative admissions that he was repeatedly reminded by Chavez’ attorney that it would be good business to organize his clients to attend mediation in October, [CP 609] with reminders in November, [CP 610] December, [CP 611] and January [CP 612].

5. That Chavez’ lawyer possessed a CR 26(b) right to plan in secret which trial admissions or evidentiary proceedings would be sought from Ramirez [CP 160-61] in order to prove that Ramirez’ “illegible signature” [CP 625] was Ramirez’ actual signature. [CP 160-61] [Compare CP 629, 630-633] The trial court

comprehended the need for trial admissions for this purpose. [CP 161]⁴

Rios Release Agreement. The workers (R-Brief p 32) assert that Rios had carefully drawn a limited release in settling his claims against Chavez in order to preserve his rights to bring attorneys' fees claims for discovery sanctions. To the contrary, Rios' executed release **agreements** express the broadest possible concept of release: A commitment to "release all claims in existence on 7 Feb 2013" [CP 607] and "all claims in existence this day" [CP 86-87] signed on 7 Feb 2013 [CP 86-87] What's more, an arbitrator ordered Rios to "release all claims in existence on 7 Feb 2013" [CP 6-7] as a result of agreements reached at mediation. One claim existing on on 7 Feb 2013 was the record compiled and studied by Rios' lawyer on 30 January 2013 [CP 266] of what Rios' lawyer perceived to be CR 30 discovery violation and CR 45 notice violations harming Rios during 2012.

The workers urge the Court to foreclose consideration of the Rios settlement and release agreement because "at no time up to the hearing" on sanctions had defendants introduced their settlement agreement with Rios. (R-Brief p 18) This is false. Chavez filed with the trial court in June 2013 a copy of the 7 February 2013 release and dismissal agreement [CP 242-245], along with Chavez' motion to dismiss Rios pursuant to settlement. [CP 722-726] The motion asserted that Rios had executed a mediated settlement and release of all claims in existence

4

If, in the end, the lawyer for plaintiff disputed the genuineness of signature without producing Ramirez for hearing, Chavez was required to exhaust rule 43(f) efforts to summon Ramirez to trial, in order to read from his deposition the CR 32(a)(2) admissions which implicated Cruz in making fraudulent claims. [CP 158]

in Feb 2013 [725-726] and attached a copy of the executed 7 Feb 2013 agreement. [CP 242-249] But Rios, through counsel, demanded that the Rios release agreement be removed from trial court consideration and obstructed enforcement of the Rios release in the trial court, asserting in numerous pleadings

The Court has no authority to enforce the agreement.

...

This is not an award this court has any authority to enforce [CP 693]

Also, Rios argued:

Until the releases which were ordered by Judge Scott have been reviewed and approved by the plaintiffs, no order of dismissal is to be entered.

...

It is the law of the case that releases must be approved by plaintiff and signed before dismissal may be entered. [CP 657]

Even after Chavez withdrew from trial court consideration his motion to dismiss Rios [CP 725-726] and secured in arbitration the 16 July final and binding Arbitration Award ordering Rios' signature affixed to stipulated dismissal and release of all claims existing on 7 Feb 2013, [CP 6-8] Rios sought and acquired two further Orders from the trial court, immunizing Rios from compliance with the arbitration award and mandatory release of claims: The 20 Sept 2013 Order asserted

The Court is not taking any action today....Any disputes remaining involving the CR 2A agreement of the parties or implementation of that agreement are to be referred to judge Scott. [CP 649-650]

The 12 Aug 2013 Order asserted:

If there is a remaining dispute it shall be submitted to J. Scott for a final decision....The court is making no ruling on the merits of the defendants motions... [CP 615-16]

During this entire interval, Chavez was obliged to pay and did faithfully pay a stream

of monthly settlement payments to Rios and Cruz. [CP 244 ¶1] The workers acknowledged that “all payments are made that were required” and “Chavez has fully satisfied his obligation under the (Rios) CR 2A agreement.” [CP 641] Judge Dingley was fully informed prior to the Order on Appeal that Rios had obstructed Chavez from receiving the promised dismissal and release despite payments and security in March 2013. [CP 212-13; See Index at CP 180] Chavez was obstructed by Rios again in April 2013. [CP 92-93; See Index at CP 22] Rios continued to obstruct Chavez during May to July, 2013. [CP 640, 642-644] Judge Dingley was informed in a CR 59 proceeding that Rios and his lawyer had signed a prior agreement to release all claims existing on 7 Feb 2013. [CP 13; CP 86-87][see also “index”; CP 22, 114-116] Judge Dingley was informed in a supplemental CR 59 proceeding that Rios had been ordered in arbitration to release all claims existing on 7 Feb 2013. [CP 3-9]

Amidst Rios' calculated acts to obstruct an adjudication of his agreed dismissal and release, Rios brought on the motion for discovery sanctions. [CP 300] The Court issued its 3 July Order on Appeal in this interval. [CP 117-120] But Rios' discovery accusations had been documented by his counsel nearly 6 months before, in January 2013. [CP 270] These known claims were extinguished when Rios and his lawyer signed the CR 2A agreement in February. [CP 87, 245, 607]

Now, for the first time in the Court of Appeals, Rios has changed course and asserts that Chavez sat on his rights too long as “this issue was not raised by the appellants in their argument to Judge Dingley. “ (R-Brief p 32) This revisionist

argument flies in the face of all the Rios pleadings filed below and all the Orders secured by Rios in the trial court asserting that Chavez was barred by the Arbitration Act from introducing into evidence the release agreement and the Court was barred by arbitration from construing the Rios release.

Lawful Access to Evidence. Respondents contend that the behavior of appellants counsel towards Rios can only be characterized as significant ethical violations. (R- Brief p 15) The workers cite to a proposed subpoena for Rios' records which was signed by Chavez' attorney with the incorrect designation "attorney for plaintiff" [See CP 192-193] without prior notice served upon Rios' attorney. (R-brief p 17) This inflammatory claim is materially misleading and wrong. It demands a response; even though the law of settlement and release precludes this claim as a matter of law.

Whether a conscious and deliberate choice to mislead the Court or through ER 602 lack of personal knowledge by a qualified custodian, the sworn testimony of attorney Frawley furnished the lone assertion of personal knowledge that what Frawley attached to the declaration of witness McLaughlin were "*limited records maintained by him* (McLaughlin)" [CP 276] purporting to represent "what was sent" to McLaughlin by Chavez' attorney (CP 263). Rios' attorney then proceeded to cherry pick selections from McLaughlin's complete file so as to **exclude** from the court file the email communications stored on McLaughlin's computer sent between McLaughlin and Jacobson which identifies the transmittal to McLaughlin of "**a letter**" and "**a subpoena.**" [CP 195] Frawley's certification to the trial court was that

McLaughlin's "limited file" consisted of the electronic file of the subpoena [CP 192-93] attached to the Jacobson/McLaughlin email [CP 195] but not the electronic file of the cover letter explaining the subpoena. [CP 191] Both were transmitted to McLaughlin's email account simultaneously in the same electronic file. [CP 195] The **missing** email attachment [CP 191, 195], which Rios stripped out of the witness' email archive, contradicts the sworn testimony of Frawley that he had attached "McLaughlin's file" as opposed to an ersatz "file" of Frawley's own creation.

The record which Rios' lawyer stripped from the witness' email archive asserts in pertinent part:

A **proposed subpoena** duces tecum s attached for your review...I **represent the defendant Chavez Landscaping. Mr. Rios is a former employee of yours and the plaintiff...** [CP 191] (emp added)

...

.. I would be **happy to serve this subpoena** to you by messenger. I will need to impose upon you to tell me at what location it would be convenient for you to receive our messenger...You should **discuss with your counsel**...questions which you have about this routine operation... Very Truly Yours, Michael A Jacobson. [CP 191](emp added) [See CP 195 CP 199 ¶¶6,7]

The 8 August email and **cover letter and proposed** subpoena set a date for hearing 14 days into the future, with more than adequate lead time to give advance notice to Rios' counsel once the details of effecting service were worked out with the witness or witness' counsel and a final date was established. [CP 191-193, 195] However, McLaughlin, decided he preferred to avoid formal proceedings and elected to mail the records without awaiting formal service. [CP 195-196] McLaughlin had in fact announced this decision to volunteer the records a month

prior to 8 August, having agreed with defendants' private investigator Kindberg to volunteer the records. [CP 199] Frawley's hearsay embellishments⁵ without a foundation in personal knowledge contradict McLaughlin's admissions about interacting with law firm agent Kindberg and contradict Kindberg's explanation that McLaughlin agreed to deliver records after finding common ground with Kindberg that both Chavez and AgriMACS were **Rios' former employers**. [CP 199 ¶¶6-9] Jacobson's error in signing computer-stored documents asserting "attorney for plaintiff" after 25 years of prior legal practice as attorney for plaintiff, without proofreading the stored document [CP 175], is an embarrassment and flat-footed blunder. But the file for which Frawley vouched hid from the trial court the evidence of Jacobson's **full disclosure** to McLaughlin and that contacts about the unserved subpoena were **preliminary**.

Frawley's sworn testimony that one can only infer ethics violations from these interactions (R-Brief p 15)[citing CP 275] also ignored, without comment, the context provided by the Court's Order, dated September 2012, concluding that

5

Rios' attorney falsely embellished the record, asserting that he "first learned... in January 2013" [CP 276] about the AgriMACS contact by Chavez' counsel, asserting McLaughlin made ER 802 hearsay assertions in 2013 critical of Chavez' lawyer. [CP 276] The trial court record contradicts this embellishment, showing that Rios' attorney had been served **in Sept. 2012** with the data retrieved from AgriMACS' archive, including AgriMACS' Form W-2 report for Rios and payroll records. [CP 739] Frawley's sworn ER 802 embellishment of McLaughlin's actual testimony contains significant additional distortions. Frawley swore that ER 802 statements by McLaughlin left "no doubt" that Jacobson had "told McLaughlin that Jacobson represented plaintiff Rios." [CP 276] When McLaughlin spoke for himself, McLaughlin's assertions were significantly more limited and cagey— that the defense legal team made "**contact;**" "**intimated**" facts all "**consistent with**" the signature line on the subpoena duces tecum with the incorrect designation "attorney for plaintiff - Michael Jacobson" [CP 263, describing CP 193] Further contradicting Frawley's rank hearsay, are written historical records residing in McLaughlin's email archive asserting that Jacobson introduced himself as attorney for Chavez defending against Rios.

Rios' interest in the confidentiality of his wage history was overridden by the need for evidence ⁶ in this legal proceeding. [CP 208-209] McLaughlin's disclosure was neither material nor necessary—ESD having furnished to Chavez pursuant to court Order the quarter-by-quarter record of wages paid by AgriMACS to Rios during the disputed period. [CP 110-112, CP 52-53]

6. ISSUES IN REPLY

1. ERROR AS A MATTER OF LAW IN REFUSING TO ENFORCE THE RAMIREZ AGREEMENT

- A. Is Patterson the controlling precedent for agreements signed by Ramirez?
- B. Must the trial court's protection of "non-native speaker" Ramirez be reversed?
- C. Did the trial court misapply the RPC 4.2 rule authorizing Chavez to be advised about lawful methods by which he could negotiate directly with Ramirez?

2. ERROR AS A MATTER OF LAW TO ADJUDICATE RIOS' SANCTIONS CLAIM

- D. Was it contrary to law to award damage upon Rios' extinguished claims?
- E. Is Rios judicially estopped to argue Chavez delayed too long in bringing CR 59(a)(8) errors of law to the trial court's attention?

7. REPLY ARGUMENT

1. LEGAL ERRORS AS TO THE ORDER REFUSING ENFORCEMENT OF RAMIREZ' SETTLEMENT

A. Patterson is the controlling precedent for agreements signed by a party.

The workers argue that the rule enforcing signed party settlements in Patterson is confined to its facts and therefore inapplicable absent indicia of reliability. (R-Brief p

6

The need for evidence and Rios' fraud upon the court is discussed in note 2, *infra*.

27-28) But the rule in Patterson does not premise enforcement on surrounding circumstances. Patterson relies on the text of the rule:

"No agreement or consent between parties or attorneys . . ." The rule clearly anticipates that parties may directly enter into settlements. Moreover, an attorney is only an agent. A party may settle a case with or without an attorney. When the party undertakes a settlement directly with the other party, reduces it to writing, and signs it, as in this case, the requirements of CR 2A are met just as if the attorney had participated. It would be unfair to the other party to hold otherwise.

Patterson, 93 Wn App at 585. Patterson's mediator interaction is a distinction without a difference. The rule in Patterson hinges on the text of CR 2A, not surrounding circumstances: See, CR 2A ("No agreement or **consent between parties** or attorneys... the purport of **which is disputed** will be regarded by the court.... ") (Emp added) A consent signed by the party to be charged is undisputed– it is signed. Just like attorney approval is immaterial to proving an agreement's existence once a party affixes signature, so too is mediator approval.

Taking respondent's point for the sake of argument that a party resisting enforcement creates a materially disputed agreement by pointing out lack of mediator approval, a party's signature explicitly overrides that consideration.

When a genuine dispute over the existence of the agreement or of a material term is established by the party resisting enforcement, the moving party may prevail either by showing the disputed agreement was made on the record or by showing it was reduced to writing and signed by the party... denying the agreement.

Patterson, 93 Wn App at 589. Every party-to-party signed consent litigated since Patterson has cited Patterson as the controlling precedent for this rule.⁷ Holding that

7

Habib v. Emerald Coin Vending, 2009 Wash App. LEXIS 3166 *13, 29; ("See, in Re Patterson, 93 Wn App at 582 (CR 2A only precludes enforcement of a disputed settlement

Ramirez' consent in the absence of attorney approval violated CR 2A [CP 119], the trial court explicitly misstated and misapplied the governing law.⁸ This error of law was shown to the trial court. [CP 14]

Misapplying the applicable law is an inherently prejudicial error. Though there was no factual basis to infer a wrongful concealment of the Ramirez settlement, (See Note 1, *infra*) the trial court was likely misled by its misunderstanding of CR 2A into believing that Frawley's failure to discover the Ramirez agreement proved his adversary's guilty knowledge. Similarly, although there was no factual basis to infer Jacobson communicated with Ramirez directly or indirectly through preparation of a settlement agreement,⁹ the trial court was likely misled by its misunderstanding of CR 2A into believing that Ramirez required special protection against giving up an

agreement if it is not made in writing or put on the record") Firth v. Juanita Country Club Condo Owners Assn 2011 Wash App LEXIS 2418 *30 (citing Patterson) Pursuant to G.R. 14.1, these unpublished decisions are not cited as independent authority for the rule enforcing party-to-party signed writings, but for their independent significance. Each unpublished opinion identified Patterson as the controlling authority and was recognized to have no precedential value of its own.

8

Respondent's brief (R-Brief p 26) asserts that Baird v. Baird, 6 Wn App 587, 494 P.2d 1387 (1999) affords a trial court discretion to determine "voluntariness" and "knowingness" of an **in court** stipulated settlement made in the presence of the court. Baird, 6 Wn App at 590. On its face, Baird has no application to the Chavez/Ramirez agreement negotiated in an Everett public square distant from the courtroom. Also, Baird "discretion" has no application whatever here, where the court wrongly decided an issue of law. "An issue of law...we review for error only, as no discretion inures in (such)...decision." Schneider v. Seattle, 24 Wn App 251, 256, 600 P.2d 666 (1979); accord, Sweek v. Metro Seattle, 45 Wn. App. 479, 481-82, 726 P.2d 37 (1986) (reconsideration for an error of law, "is predicated upon rulings of law (where) no element of discretion is involved.")

9

It is difficult to infer a RPC 4.2 or RPC 8.4 violation from the lawful and socially useful activity of preparing a client settlement agreement to be used **prospectively** in the event of a party to party negotiation, even if this circumstance were to have occurred, which it did not. [CP 130; CP 188]. This circumstance was brought to the attention of the trial court. [CP 16]

improperly procured agreement when the other party was “coached.” [See CP 118 ¶¶11.1b] The judgment and order on appeal must be reversed for this highly prejudicial error. The undifferentiated sanctions awarded to Ramirez for non disclosure [CP 120 ¶ 4] must be reversed with it.

Disavowing the Patterson rule because Ramirez’ lawyer disagreed with the client decision to accept a \$4000 settlement payment would waste the Court’s resources¹⁰ and produce bizarre results. A ruling approving counsel’s abrogation of settlement would turn on its head client Ramirez’ RPC 1.2(a) ownership of his claim and right to settle his lawsuit in spite of and over the objections of his own lawyer. The workers’ contrary interpretation of law is without merit for this added reason.

Further, the reviewing Court stands in the shoes of the trial court, in ascertaining de novo the CR 56d undisputed facts which appear on the record. See, Guzman v. De Arellano De Villoldo, 245 F. Supp. 2d 388, 393 (D. P.R. 2003) (“The opinion and order ... granting partial summary judgment constitutes the **law of the case**... (rendering) presentation of evidence with respect to liability ...precluded”)(emp added) In its remand order, the Court should instruct the trial court that the CR 56d undisputed facts establish the **law of the case**¹¹ to be that Ramirez’ signed

10

Disavowing Ramirez’ release obligation will spawn a satellite litigation and wastefully consume trial court resources. If the court disavows the rule in Patterson, Ramirez would be forced to defend a new claim in the trial court for the return of the \$4000 consideration he took in exchange for the promise which his attorney and the trial court asserted Ramirez may disavow.

11

The workers assert that White v. Kent Medical Center, 51 Wn App 163 (1991) prohibits a litigant to remain silent regarding claimed procedural error in short-circuiting a full CR 56 record and later raise the issue on appeal without giving the trial court the opportunity to correct the error. (R-Brief p 21) The court was furnished a CR 59a reconsideration explicitly asking the court to hold a proper CR 56 hearing on proper CR 56 18-day notice. [CP 114-116 ¶1 ¶3 ¶4]

agreement is an agreement whose existence and meaning is undisputed and in conformity with CR 2A.

B. “Non-native speaker” confusion is a phantom, without an anchor in the factual record

The workers (R-Brief p 27) assert that Judge Dingley issued “findings” that technical legalese terminology in the Ramirez/Chavez agreement would be “difficult for a non-native speaker to understand.” [CP 118 ¶¶1.1a] The workers are twice wrong. First, the recitations in a CR 56 Order are not factual “findings.” Second, the asserted “non-native speaker” concerns have no anchor in the evidentiary record.

The court reviews **de novo** a grant or denial of CR 56 applying legal analysis to determine the existence or not of disputed material facts. Roger Crane v. Felice, 74 Wn. App. 769 (1994). The summary judgment standard of review will apply to the review of disputed purport of a CR 2A agreement. Brinkerhoff v. Campbell, 99 Wn. App. 682, 697 (2000) Likewise, the application of the rules of contract formation to a party’s signed agreement is reviewed de novo. Veith v. Xterra Wetsuits, LLC, 144 Wn. App. 362, 368 (2008); Lavigne v. Green, 106 Wn. App. 12, 16 (2001). “Finding” the existence or not of material facts in dispute meeting the CR 56 standard is a legal determination applying law to facts, no matter how it is labeled by the trial court.

Worse yet, there is no anchor in the factual record to support the existence of any material fact illustrating Ramirez to experience a **non-native speaker** difficulty or handicap or misunderstanding of the terms used to express the Ramirez “Deistir” agreement. Ramirez is a **native speaker** of Spanish [CP 30 ¶5]—the language of the “Desistir” agreement to which he affixed his signature. [CP 620-621]

We impute to a person an intention corresponding to the reasonable meaning of his words and acts. Unexpressed intentions are nugatory when the problem is to ascertain the legal relations...between two parties.

Patterson, 93 Wn. App. at 588. The reviewing Court must step into the shoes of the trial court and reverse and hold for naught the phantom finding that Ramirez' produced material evidence of a non-native speaker deficit when he signed a written commitment in Spanish to "voluntarily waive all claims known or unknown." [CP 625] Further, Ramirez exhibited his full understanding twice— signing both the back of Chavez' settlement check and the "Desistir" agreement.

This paragraph of the Order on appeal was a clear, flat-footed, blunder by the trial court.¹² The trial court was informed that its stated concern had no basis in the facts. [CP 14-15] This error, too, was inherently prejudicial. The trial court was likely misled to evaluate complex litigation terms like "waiver" and "desist" against the standard of what a non-native, non-English-speaking individual would comprehend when reading technical terms.. The Judgment and Order on appeal should be reversed and held for naught as to the Ramirez agreement and the Ramirez sanction, for this added reason.

What is more, Judge Dingley's observations about complex English syntax or unclear English word choice apply only to the twice re-translated "Dopps"

12

The resulting error is the same whether the court reviews a phantom fact under the de novo standard or applies a substantial evidence review for abuse of discretion. A court abuses its discretion where evidentiary choices are "taken without regard to the attending facts or circumstances" Hillis v. State, DOE, 131 Wn.2d 373, 383 (1997) or where conclusion are not "drawn from objective criteria." State ex. Rel. Carrol v. Junker, 79 Wn.2d 12, 25-26 (1971). Inventing the facts to be that Ramirez was a non-native Spanish speaker when comprehending and affixing signature to the "Desistir" agreement, the trial court invented a non-existent fact and abused its discretion.

(English) version she saw . [CP 623-626] But, Ramirez had reviewed only the “Gabby” (Spanish) version of the agreement.¹³ Because Judge Dingledy had no basis to evaluate the Spanish version shown to the witness, the Court should reverse and hold for naught the Judgement and Order on Appeal as to Ramirez.

In its remand order, the Court, standing in the shoes of the trial court, should issue CR 56d instructions that the undisputed facts establish the “Desistir” agreement exhibited to Ramirez its undisputed purport or meaning as “a voluntary waiver of known and unknown claims” [CP 625] presented in Ramirez’ native language, to which Ramirez affixed his genuine signature [See signature examplars at CP 621, 629-633].

C. Misstated, misapplied RPC 4.2 (comment 4) client coaching rules

The workers (R-Brief p 23) assert that a material consideration in evaluating disputed purport within the Ramirez agreement was coercive action in violation of RPC 4.2. The workers assert a further material consideration to be

Jacobson...for his part asserted that ...RPC 4.2 authorized his conduct in creating a contract for his client to take to an adverse party and.....in suggesting that the adverse party should not contact counsel thereafter.

...

A lawyer may not “coach a client” as an end run around counsel¹⁴ for a

13

Ramirez signed the “Desistir” agreement on 4 September. [CP 621]The Dopps translation was certified 40 days later on 18 October [CP 627] The two versions reflect the work of different translators. (Gabby) created the “Desistir” agreement by translating the 2011 English “Ortiz” [CP 29 ¶3] agreement into Spanish. [CP 30 ¶5] Translator Dopps, then translated the Spanish back into English. [CP 627] When Ramirez had it, the “Desistir” agreement exhibited just one translator’s perspective and word usages.

14

The record is devoid of evidence that Ramirez was improperly coerced or pressured to end run around his own counsel. Cruz nonetheless contends Chavez improperly pressured Cruz or interfered with Cruz’ attorney arrangements. But interference with Cruz is without an anchor in the admissible evidence either. Frawley’s 4-month communication “blackout” with Ramirez was lawyer Frawley’s own doing, wholly

represented party. (R-Brief p 23-24)

This ER 602 speculation about what must have been said to Chavez by his lawyer in a private consultation and which Chavez must have repeated to Ramirez when the two men met in private has no anchor in the evidentiary record and exerts no probative force in CR 2A proceedings.

The summary judgment standard of review will apply to the review of disputed purport of a CR 2A agreement. Brinkerhoff v. Campbell, 99 Wn. App. 682, 697 (2000). One such governing doctrine is CR 56e which provides:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein.An adverse party (resisting summary judgment) by affidavits or as otherwise provided in this rule must set foht specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate shall be entered against him.

CR 56e ¹⁵ The Ferree Court illustrates the application of the rule.

between Frawley and Frawley’s translator, and Frawley’s office practices, which did not involve Chavez or Chavez’ counsel. Jacobson contacted Frawley four times during his client communications blackout in the lead-up to trial in October and November and December and January, encouraging the plaintiffs with their lawyer to attend mediation because it would be good business for all litigants.[CP 609-612] Cruz and Rios in the end were influenced by lawful inducements– a payment of funds not otherwise owed– to sign their own CR 2A agreement in the presence of a mediator and with the approval of legal counsel Frawley as a result of this lawyer-to-lawyer collaboration. [CP 86-87]

15

The resisting party and court are bound to apply the governing rule in CR 56e regardless which defects defendant pointed out to the trial court. The workers assert that White v. Kent Medical Center, 51 Wn. App. 163 (1991) prohibits a litigant to remain silent regarding claimed objectionable hearsay and speculation supplied by the party resisting summary judgment and later raise the issue on appeal without giving the trial court the opportunity to correct the error. (R-Brief p 30) But it is the burden of the party resisting summary judgment to set forth “facts admissible in evidence” and “on personal knowledge” (CR 56e) and the court’s obligation to grant summary judgment where the party resisting summary judgment fails to “set forth by affidavit or as otherwise provided by this rule, specific facts.” (CR 56e) Testing the resisting party’s burden to produce

Evidence presented to the Ferree court consisted of declarations from the moving party stating that a divorce settlement had been reached by a husband and a wife at a settlement conference and describing several material terms. The moving party also submitted a copy of proposed findings and conclusions that the nonmoving party's former attorney had drafted after their settlement conference. Before the hearing, the husband obtained new counsel, who argued that no settlement had occurred. But **the new attorney lacked personal knowledge** of this assertion and he **presented no sworn statements to this effect**. Taking the sworn testimony in the light most favorable to the nonmoving party, the court concluded that the moving party had carried her burden and that the agreement was enforceable.

Ferree, 71 Wn. App. at 45 (emp added). Our facts are like the facts in Ferree. Neither attorney Frawley nor Cruz possessed personal knowledge or admissible evidence about the conduct of Chavez during the Chavez/Ramirez private negotiations or the attorney/client guidance delivered to Chavez in private. The meaning of Ramirez' CR 2A signed agreement is undisputed. Ramirez signed it; Chavez saw him sign it; Ramirez then signed Chavez' check and kept a payment Chavez was not otherwise obliged to pay him. Afterwards, Ramirez made ER 801(d) admissions that he wanted nothing further to do with Frawley's case. The terms of agreement are routine, non-coercive, and unexceptional. The trial court was afforded no discretion to misapply the governing legal doctrine. Schneider, 24 Wn. App. at 256. The Order and Judgment denying enforcement of the Ramirez settlement and imposing resultant penal sanctions must be reversed and held for naught for this legal error.

The trial court asserted, nonetheless, that a troubling feature of the Ramirez settlement was Jacobson's assertion in oral argument that a client is entitled to "coaching" from his lawyer in effecting party to party negotiations. [CP 118, ¶1b] This uncontroversial statement is paraphrased directly from the text of

admissible CR 2A evidence is a necessity. Ferree, 71 Wn. App. at 45.

RPC 4.2 (comment 4):

Parties to a matter may communicate directly with each other and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled¹⁶ to make.

RPC 4.2 (comment 4). Taking the trial court's concern for the sake of argument, the end product of any client coaching assumed by the trial court resulted in Chavez' lawful conduct, paying Ramirez a check for funds not otherwise owed in exchange for Ramirez' signed undertaking to cancel his lawsuit and waive all known and unknown claims. If any of the Chavez/Jacobson interactions in evidence constitute "coaching," they resulted in Chavez' lawful conduct compliant with Comment 4. The trial court here appears to have misapplied the rule in RPC 4.2 to suggest that Chavez' lawyer was barred from guiding a client in his lawful conduct, no matter how indirect the guidance. This is a misapplication of the rule. A court is not afforded discretion to misapply the governing legal standards. And this misapplication of law, too, has been inherently prejudicial. Even if it did occur, (But See note 1 *infra*) **post-agreement** wrongful concealment or non disclosure of the CR 2A agreement is not a material fact disputing the formation or enforce-ability of the contract. The trial

16

Cases cited by respondent which hinge upon a lawyer's face-to-face interactions with a represented party have no bearing on this dispute. *See, eg. Engstrom* 166 Wn. App. 913-914 (Opposing counsel "Williams communicated directly with (defendant) Hardesten") Cases which hinge on lying about acquiring permission for direct contact have no bearing on this dispute. *See, Carmick* 145 Wn. 2d 582, 596 (Attorney "Butler had never spoken with (attorney) Carmick and had never given Carmick express authorization to deal directly with (client) McCracken") Jacobson did not interact with Ramirez and could not have done so, sharing with Ramirez no common language. Chavez who did speak with Ramirez, is not a lawyer bound by the RPCs and is authorized under RPC 4.2 comment 4 to enjoy the advice of his counsel about how to lawfully acquire a release of claims from an opposing party-even if, for argument's sake, the court believed that Chavez was "advised" in 2012.

court was likely misled by its misunderstanding of RPC 4.2 to equate attorney Frawley's ignorance of his client's settlement with guilty knowledge of some kind of wrongdoing. The reviewing Court should step into the shoes of the trial court, apply the governing legal standard, and reverse the Order on Appeal as to the Ramirez settlement and the Ramirez penal sanctions.

2. ERRONEOUS AWARD TO RIOS AS A MATTER OF LAW

D. Awarding damage upon Rios' extinguished claims is contrary to law

The workers contend that Rios signed an agreement to extinguish all claims in existence on 7 Feb 2013, while meaning to extinguish all claims except CR 26 sanctions. "Extrinsic evidence of a parties' unilateral and subjective beliefs about the impact of a written contract do not constitute evidence of the parties' intent." Nationwide Mutual v. Watson, 120 Wn.2d 178 at 189, 840 P.2d 851 (1992). Rios' CR 26 sanctions claim arising in 2012 was extinguished as a matter of law. "Washington courts favor amicable settlement of disputes and are inclined to view settlements with finality. Rosen v. Ascentry Technologies, Inc., 143 Wn. App. 364,372, 117 P.3d 765 (2008). There is no justification which would exempt Rios from the application of this sound social policy. The sanctions award to Rios had been extinguished by settlement and release and must be held for naught.

E. Judicial Estoppel precludes the workers from relying on Chavez delay in transmitting the Rios Settlement to Court.

The workers contend for the first time on appeal that Chavez failed to raise the Rios settlement during proceedings in the trial court. The workers cannot be permitted to argue in the reviewing Court that Chavez waited too long for a final and binding arbitration Award requiring Rios to release all claims existing on 7 Feb 2013, when, in the trial court, Rios urged that the trial court must postpone or refuse consideration of Rios' release agreement until adjudicated by Arbitrator Scott. Judicial estoppel prohibits a party from gaining an advantage by litigation on one

theory, and then seeking an inconsistent advantage by pursuing an incompatible theory New Hampshire v. Maine, 121 S Ct 1808; 532 US 742; 149 L. Ed. 2d 968 (2001); Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 539 (2007)

Three core factors guide a trial court's determination of whether to apply the judicial estoppel doctrine: (1) whether "a party's later position" is "clearly inconsistent" with its earlier position"; (2) whether "judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled'"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Arkison 160 Wn.2d at 539. These elements were applied in Witzel v. Tena, 48 Wn.2d 628, 633 (1956) (We hold that... appellant, although vested with an undivided one-half interest in the farm at the time of the divorce, is now estopped to assert her title.") See also Niebel v. Trans World Assur Co. 108 F.3d 1123, 1130 (9th 1997) ("Transworld successfully argued at trial that Mutual acted independently and it is bound by that success" to abandon the inconsistent claim) Having enjoyed the fruits of delaying Chavez motions to dismiss Rios; (CP 725-726) having acquired two further Orders delaying implementation of the Rios CR 2A agreement, (CP 627; CP 649-650) the workers are bound by that success to acquiesce to the delayed admission of CR 59(a)(4) newly discovered evidence and CR 59(a)(8) argument raising the issue. No timeliness objection to CR 59(a) proceedings should be allowed on this record.

Chavez' CR 59 motion brought to the trial court appendix 17--Rios signed CR 2A agreement(See, CP 22, 86-87) and pointed out the law of settlement and release. [CP 13] No discretion is afforded to the trial court to misapply the law of settlement and release. Schneider, 24 Wn. App. at 256. The sanctions award to Rios was conclusively settled and released and must be reversed and held for naught.

"Nothing in CR 59 leads this court to declare a one-reconsideration limit for trial court decisions" Barry v. USAA, 98 Wn. App. 199, 203, 989 P.2d 1172 (1999) Chavez' supplemental CR 59(a)(4,8) motion brought to the trial court appendix

24—Judge Scott's Award in Arbitration ordering Rios to execute a release of all claims in existence on 7 Feb 2013. [CP 3, 6-8] Yet the trial court never ruled on the supplemental CR 59a papers. A refusal to exercise discretion as to newly discovered evidence of settlement and release is its own abuse of discretion. And the trial court is afforded no discretion to misapply the law of settlement and release. Schneider, 24 Wn. App. at 256. The Court must reverse the Rios judgment and award and sanctions order for this additional reason. The court should find and declare the facts undisputed and that it is the CR 56d law of the case that Rios extinguished his CR 26 sanctions claims and all claims existing as of 7 Feb 2013.

8. CONCLUSION. The judgment and order on appeal must be reversed and held for naught with instructions to extinguish all Ramirez claims in existence on 4 September 2012 and all Rios' claim in existence on 7 Feb 2013. Because plaintiff Cruz was previously dismissed, the Order on Remand should instruct the trial court to dismiss all parties and all claims and to dismiss the case.

A trial court Order authorized and receipted payment of Chavez' cash bond superceding judgment. [CP 693] Upon dismissal of the action, the cash bond should be ordered returned to Chavez.