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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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No. 40987-9

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

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PAUL LIETZ,

*Petitioner/Appellant,*

v.

HANSEN LAW OFFICES, P.S.C., and AMY HANSEN,

*Defendants/Respondents.*

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**APPELLANT'S REPLY BRIEF**

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Susan B. Mindenbergs  
WSBA No. 20545  
Attorney for Appellant Paul Lietz

119 First Avenue South, Suite 200  
Seattle, Washington 98104  
Phone: (206) 447-1560  
Fax: (205) 447-1523  
Email: smindenbergslaw@juno.com

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## I. INTRODUCTION

### A. Respondents appear to misunderstand the nature of the appeal.

Respondents' responsive brief is a somewhat muddled and confusing array of arguments, most of which miss the point of the legal arguments on appeal. The issues to be resolved are twofold: 1) whether the CR 68 offer of judgment should be enforced, and 2) whether Mr. Lietz is entitled to reasonable attorney fees because his underlying claim is for lost wages and the applicable statutes provide for recovery of reasonable attorney fees.

Issues pertaining to whether Mr. Lietz was employed by Respondents and whether the underlying case is an employment case may be relevant at some level of this litigation, but they are not issues to be resolved on appeal. Respondents' objection to RCW 18.27.040 is particularly puzzling inasmuch as Mr. Lietz mentioned that statute only by way of explaining the holding in *McGuire v. Bates*, --- Wn. 2d --- , 234 P.3d 205 (2010).

### B. Respondents rebut their own argument about the nature of Mr. Lietz's employment.

Respondent Hansen is an attorney practicing in Washington—mostly in Pierce County and King County. CP 2 and CP 8. Mr. Lietz worked as a paralegal and an investigator for Respondents. In response to

Mr. Lietz's appeal, Respondents appear to argue that Mr. Lietz is not entitled to protection under RCW 49.48.030 because Ms. Hansen did not employ him. Yet, in answer to Mr. Lietz's Complaint for Damages in which he alleged that Respondents employed him, they admitted as much and further admitted that they agreed to pay Mr. Lietz \$15 per hour for work he performed on Ms. Hansen's cases. CP 2 and CP 8. Respondents' brief further confuses the issue by making the conflicting arguments that Mr. Lietz was not employed by Respondents, and that he worked for Ms. Hansen and she later discharged him. Response Br. pp. 2-3.

Under any scenario, Mr. Lietz brought the underlying action against Respondents for failure to pay wages owed to him by Respondent Hansen and her firm. Mr. Lietz sought damages under RCW 49.52.070, which provides for damages for unpaid wages and for reasonable attorney fees. He also sought recovery of his reasonable attorney fees under RCW 49.48.030. About two weeks before the trial date, Respondents served a CR 68 offer of judgment on Mr. Lietz in the amount of \$7,500. Respondents' offer failed to mention anything about attorney fees. CP 222. Mr. Lietz unequivocally accepted the offer. CP 185. Within a week of accepting Respondents' offer of judgment, Mr. Lietz moved the trial court for an entry of judgment and an award of reasonable attorney fees. CP 29-37.

## II. ASSIGNMENT OF ERROR

### A. Respondents state an incorrect standard of review.

Respondents complain that Mr. Lietz does not address how the trial court abused its discretion. Resp. Br. p. 4. Mr. Lietz does not discuss abuse of discretion because the standard here is *de novo* review. “Issues involving construction of Rule 68 are reviewed *de novo* . . .” *Seaborn Pile Driving Co. v. Glew*, 132 Wn. App. 261, 266, 131 P.3d 910 (2006) quoting *Herrington v. County of Sonoma*, 12 F.3d 901, 906 (9th Cir. 1993). The trial court made a ruling of law regarding the contractual construction of the CR 68 offer of judgment. The trial court’s ruling is reviewed by this Court *de novo*.

### B. RCW 49.48.030 allows any person who is successful in recovering a judgment for wages or salary to also recover reasonable attorney fees.

RCW 49.48.030 is a remedial statute that should be construed liberally with regard to protecting wages and assuring payment. *International Association of Fire Fighters, Local 46 v. City of Everett*, 146 Wn. 2d 29, 34-35, 42 P.3d 1265 (2002). The statute authorizes attorney fees to “provide incentives” for persons to assert their statutory rights. *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 88 (1994).

Respondents misquote RCW 49.48.030 by claiming that the protection is provided only to employees, when the statute explicitly states

that it applies to “any person” without regard for the employment status.

RCW 49.48.030 states as follows:

In any action in which any person is successful in recovering judgment for wages or salary owed to him, reasonable attorney’s fees, in an amount to be determined by the court, shall be assessed against said employer or former employer.

Washington courts have interpreted this statute to apply equally to employees and independent contractors. *Wise v. City of Chelan*, 133 Wn. App. 167, 174 (2006) (court rejected City of Chelan’s argument that RCW 49.48.030 applied only to employees). Mr. Lietz brought this action seeking unpaid wages. As a “person” recovering unpaid wages, Mr. Lietz is entitled to recover his reasonable attorney fees.

### III. ARGUMENT

#### **A. Respondents misapprehend the holding in *McGuire v. Bates*.**

The recent Supreme Court ruling in *McGuire v. Bates* does not resolve the issue in dispute for Respondents Hansen and Hansen Law Offices. In *McGuire*, the court found that because the defendant offered to settle all claims, the plural nature of the offer covered plaintiff’s claim for attorney fees.

Respondents imply that because the counterclaim is “illusory,” Mr. Lietz cannot distinguish his facts from those in *McGuire v. Bates*. Respondents appear to fundamentally misunderstand Mr. Lietz’s argument

regarding how Respondents' counterclaim affects the case. Resp. Br. p. 7. The counterclaim is simply another issue unresolved by the singular nature of Respondents' offer to settle "the claim" against them.

In *McGuire*, the Court found that because Ms. McGuire agreed to settle "all claims," she could not recover attorney fees as the prevailing party under RCW 18.27.040, which allows for recovery of fees to the prevailing party. The Court reasoned that the plural nature of the offer made it clear that the defendant offered to settle everything in dispute—the underlying claim and Ms. McGuire's claim for attorney fees. By contrast, Respondents offered to settle "the claim" against Defendants. CP 183. Since Mr. Lietz had multiple claims, including his underlying statutory and contract wage claims, his claim for attorney fees under RCW 49.52.040 and RCW 48.48.030, and a counterclaim, the singular nature of Respondents' offer to settle "the claim" distinguishes their offer from the plural offer in *McGuire*.<sup>1</sup>

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<sup>1</sup> Mr. Lietz also raises the issue of Respondents' counterclaim to show the similarity between the nature of his case and that in *Seaborn v. Glew*, 132 Wn. App. 261, 270, 131 P.3d 910 (2006) (extrinsic evidence the court considered in determining that the CR 68 offer of judgment did not include attorney fees are the following: 1) the low amount of the offer; 2) the lack of any language indicating that attorney fees were included; 3) that the offer did not dismiss the matter entirely—only the counterclaim; 4) no subsequent action was taken by Seaborn to clarify, revisit, or modify the offer until it was faced with a motion for attorney fees; and 5) a clear line of case law governing CR 68 offers and the issue of attorney fee

**B. An award of fees under RCW 49.48.030 is not discretionary.**

Respondents argue that Mr. Lietz pled no statute that provides for reasonable attorney fees. Perhaps Respondents make that argument with tongue in cheek, but whatever the motivation, the argument is fallacious. Mr. Lietz's complaint clearly articulates a claim for relief for reasonable attorney fees under RCW 49.52.070 and RCW 49.48.030. CP 5.

In a breach of contract action against the City of Chelan, former municipal judge Jill Wise sought and obtained summary judgment. *Wise*, 133 Wn. App. at 170, 135 P.3d 951. When Ms. Wise sought attorney fees pursuant to RCW 49.48.030, the trial court rejected her claim. *Id.* at 171. On appeal, the court found that the language of the statute is plain and that the award of attorney fees is not discretionary. "The court 'shall' award reasonable fees to 'any person' who prevails in an action for wages or salary owed." *Id.* at 174. Once the CR 68 judgment is entered in favor of Mr. Lietz, the trial court shall award reasonable attorney fees to him. The trial court erred by failing to enter the CR 68 judgment and denying his motion for fees.

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provisions.) The facts in Mr. Lietz's case are strikingly similar to those in *Seaborn*.

**C. Contract law is an appropriate area of discussion.**

Respondents' complaint about the discussion of contract law is equally confusing. Resp. Br. 9. The trial court found there was no "meeting of the minds," which is a fundamental concept of contract law. The modern term is 'mutual assent.' Mutual assent was satisfied when Mr. Lietz unequivocally accepted Respondents' offer. See *Multicare Medical Center v. State, Department of Social and Health Services*, 114 Wn.2d 572, 598, n. 24, 790 P.2d 124 (1990). Mr. Lietz's discourse on contract law does not concern whether he had signed a contract with Respondents, but rather addresses the nature of contract formation for the purpose of analyzing the CR 68 offer.

**D. Mr. Lietz is entitled to fees because he seeks unpaid wages and because the offer of judgment was silent on fees.**

Respondents argue that Mr. Lietz is not the prevailing party and is therefore not entitled to his reasonable attorney fees.<sup>2</sup> Respondents' fundamental misunderstanding of Mr. Lietz's argument after nearly a year of briefing and several oral arguments is stunning. Mr. Lietz is entitled to his reasonable attorney fees because the underlying statute he pled (RCW

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<sup>2</sup> Respondents argue vigorously that Mr. Lietz's attorney fee request is not "reasonable." In this appeal, Mr. Lietz asks that the appellate court find he is entitled to attorney fees and remand back to the trial court for a determination about the reasonableness of his request. Therefore, no reply is necessary on the issue of reasonableness.

49.48.030) provides for reasonable attorney fees and because the CR 68 offer of judgment to settle “the claim” against Respondent Hansen and her firm was silent on the issue of fees. See *Seaborn v. Glew*, 132 Wn. App. at 268, 131 P.3d 910.

**E. Mr. Lietz is entitled to fees on appeal pursuant to RAP 18.1.**

Where a person successfully establishes his right to recover lost wages, he is entitled to recover attorney fees on appeal when he complies with the provisions delineated in RAP 18.1. *McIntyre v. State of Washington*, 135 Wn. App. 594, 605, 141 P.3d 75 (2006) (summary dismissal denying attorney fees reversed and remanded for a determination of reasonable fees where state patrol officer successfully sought and was awarded reinstatement in her job.)

Respondents mistakenly argue that Mr. Lietz is not entitled to fees on appeal because no “trier of fact” has determined whether he was employed by Respondents. Mr. Lietz will be entitled to fees on appeal if his appeal is successful because his underlying cause of action is to recover unpaid wages. See also *Hayes v. Trulock*, 51 Wn. App. 765, 805, 755 P.2d 830 (1988) (where underlying statute pled entitled appellant to attorney fees, he was entitled to fees on appeal); RAP 18.1.

**F. Respondents' mistake does not insulate them from the imposition of an award of reasonable attorney fees.**

What Respondents fail to address in their responsive brief is their historical argument that they just made a mistake in drafting the CR 68 offer of judgment. At oral argument on May 14, 2010, Respondents' counsel argued that he made a "scrivener's error" when he drafted the CR 68 offer. CP 248. In subsequent briefing for the trial court, Respondents characterized their alleged error as a "unilateral mistake." CP 203. Later, Respondents' counsel inexplicably argued that the offer was "unambiguous." If the offer was both a mistake and unambiguous, the only conclusion can be that the offer to settle the claim against defendants referred to the wage claim and that Respondents mistakenly failed to mention attorney fees.

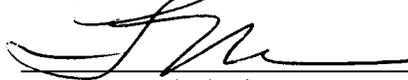
A CR 68 offeror has an obligation to clearly lay out the terms of their offer. "[I]t is incumbent on the defendant" making the offer of judgment "to state clearly that attorney fees are included as part of the total sum for which judgment may be entered if defendant wishes to avoid exposure to attorney fees in addition to the sum offered." *Seaborn*, 132 Wn. App. at 272, 131 P. 3d 910 quoting *Nusom v. Comh Woodburn, Inc.*, 122 F.3d 830, 834 (9th Cir.1997).

#### IV. CONCLUSION

Mr. Lietz asks this Court to enforce the CR 68 offer of judgment made to him on April 10, 2010 by Respondents Amy Hansen and Hansen Law Offices in the amount of \$7,500. He further asks that this Court find that he is entitled to reasonable attorney fees because he sought lost wages under RCW 49.52.020, reasonable attorney fees under RCW 49.48.030, and because the offer of judgment was silent on the issue of fees. He asks that this Court remand the case back to the trial court for a determination of the amount of those attorney fees. Finally, Mr. Lietz asks this Court to award him fees on appeal pursuant to RAP 18.1.

Dated this 7th of February, 2011.

Respectfully submitted,



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Susan B. Mindenbergs, WSBA No. 20545  
Attorney for Appellant Paul Lietz

**CERTIFICATE OF SERVICE**

I, Irene Calvo, am a citizen of the United States and a resident of the State of Washington. I am over the age of twenty-one years, am not a party to this action, and am competent to testify to the following:

On February 7, 2011, I caused the foregoing original and one copy of Appellant's Reply Brief to be filed with the Clerk of the Court of Washington State Court of Appeals, Division II, via legal messenger and to be served on counsel for Respondents, Geoffrey C. Cross, via legal messenger, to 1902 – 64th Ave. W, Suite B, Tacoma, WA 98466.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 7th day of February, 2011.

  
\_\_\_\_\_  
Irene Calvo

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