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I. INTRODUCTION

This petition arises out of a case brought by Mr. Leitz, who wished to become an attorney through the Rule 6 program. There is almost no record since this case was not tried on the merits. This appeal arises out of the attempted settlement of the case and the litigation that followed.

Specifically, this appeal is strictly about Ms. Mindenbergs' attempts to collect "reasonable attorney fees of \$36,545.00" (CP 29) for a case where plaintiff was attempting to sue for \$14,000 and accepted a settlement offer of \$7,500 (CP 77-78). Hansen Law Office and Amy Hansen would like to make it clear what this case is not. This is not an employment law case.

What is not in dispute is that Mr. Leitz worked for a period of time for Ms. Hansen doing something and wanted to become a Rule 6 Attorney candidate. Mr. Leitz claims to have a contract, but no contract has been presented, nor is there any factual findings which would even support this case as a wage claim since it has not been tried. There is no finding that Mr. Leitz was an employee. There is no finding that Mr. Leitz was a General or Specialty Contractor although he cites RCW.18.27.040 in support of his brief. The only facts that are supported by the public record, and which can be taken under Judicial Notice is that Ms. Hansen declined to employ Mr. Leitz and wrote the Washington State Bar that she

would NOT be employing him.

Consequently Mr. Leitz's reliance on RCW's 49 et seq recovering attorney fees as being the prevailing party in a wage claim is flawed on two counts: there has been no showing of a wage loss or non-payment since this case has not been tried; and 2. The acceptance of an Offer of Settlement does not make Mr. Leitz an employee of Hansen Law Offices.

The underlying dispute arose when Ms. Hansen refused to sponsor Mr. Leitz for a Rule 6 program and discharged him from the occasional duties that he engaged in while working in some capacity for Ms. Hansen. Mr Leitz relies on his Complaint to establish himself as an "employee" of the Hansen Law Firm. Paul Lietz's Appellate Brief p. 2. The underlying case involved a claim by Mr. Leitz that he wasn't paid by Ms. Hansen (CP 1-6) and a counterclaim by Ms. Hansen denying any non-payment of wages or money for any services, and alleged that Mr. Leitz was pursuing frivolous litigation (CP 7-11). Plaintiff Leitz's Complaint, Defendant's Answer to Complaint. The case was not tried on the merits. No facts were established in any court regarding whether or not Mr. Leitz was an employee, whether or not he was owed any money or whether or not he engaged in the conduct that caused Ms. Hansen to reconsider her offer to employ Mr. Leitz as part of a Rule 6 program.

It is important to note that if Ms. Hansen paid Mr. Leitz's claims, her counterclaims would be void. She could not simultaneously pay Mr. Leitz and maintain a claim that his wage claim was non-existent.

This appeal arises out of Ms. Hansen's attempts to settle this vexatious litigation. Mr. Leitz originally sued for a total of \$14,000. Ms. Hansen extended an offer of settlement of \$7,500 to settle the claim of Mr. Leitz against defendants on April 19, 2007 (CP 77-78). Ms. Mindenbergs accepted on behalf of her client on April 28, 2007 in writing. Pierce County Trial Court Record, Leitz Petition for Discretionary Review Appx., Section F, exhibit 2. Ms. Mindenbergs then brought a Motion for Attorney fees of \$36,545, under Rule 68 on May 5, 2010 (CP 29). The trial court denied Ms. Mindenbergs' request. Ruling of Pierce County Court, The Honorable Ronald E. Culpepper, May 14, 2010. The Court then denied her Motion for Reconsideration on the same issue. Court Record Proceedings Friday, June 25, 2010 (CP 231-232). At all relevant times during the Court hearings Ms. Mindenbergs characterized the Settlement Offer proffered by Ms. Hansen as one which was unequivocally accepted. Court Record Proceedings Friday, June 25, 2010 p 5, 1-10. Ms. Mindenbergs now brings this appeal against Ms. Hansen and Hansen Law Offices.

II. ASSIGNMENT OF ERROR

Respondent Hansen does not assign any error to the Trial Court.

- A. The trial court was within its discretion when it declined to find a meeting of the minds sufficient to enforce the contractual settlement between the parties.

The trial court's decisions will be reviewed under an abuse of discretion. There has been no showing by Appellant or even a discussion by Appellants that the Court abused its discretion. Appellants merely state their belief that the Court was wrong. Appellant's Brief at 5.

- B. The trial court did not err when it did not grant appellant's motions for attorney fees pursuant to RCW 49.48.

RCW 49.48 et seq. are all related to the Payment of wages due to an employee. RCW 49.49.10 – RCW 49.48.900 all related to the wages due an employee (emphasis added). Mr. Leitz maintains that he was an employee of the Hansen Law Firm. Ms. Hansen disagreed and the court has not yet ruled on this issue. Mr. Leitz can not legitimately support an attorney fees provision from a statute that may or may not apply to him and in fact is an issue at the center of his original lawsuit, and one which would have to be decided by a trier of fact. Moreover, the Statutory Attorney fees were not pled in the Complaint. Leitz Complaint. (CP 1-6) Mr. Leitz would like to pluck this provision from the Revised Code, and

apply it here but there is no reason that he should be able to acquire attorney fees from a statute that does not cover his claim. Appellee's argue that if any fee's apply at all that they would be limited to RCW 4.83.015 where the plaintiff will be considered the prevailing party for the purpose of awarding costs, including a statutory attorney fee....RCW 4.84.015. However "This section may not be construed to (a)authorize an award of costs if the action is resolved by a *negotiated settlement*...(emphasis added).

III. STATEMENT OF THE CASE

The issues presented here are:

1. Whether of not the trial court erred in ruling that there was no "meeting of the minds" regarding Hansen's offer to settle the case for \$7,500 and consequently that the offer and acceptance were void; and
2. Whether or not the trial court erred in declining to award attorney's fees to Ms. Mindenbergs. Leitz's Petition for Discretionary Review, p.2.

IV. ARGUMENT

- A. The issue before this court has been decided.

The State Supreme Court in McGuire v. Bates, 165 Wn.2d 185, 234 P.3d 205 (July 1, 2010)., ruled on precisely the issue here, that an

offer to settle “all claims” includes the plaintiff’s claim for attorney fees. The Court concluded “There is only one reasonable meaning that can be ascribed to the words in their agreement to settle “all claims” “pursuant to RCW 4.84.250-280.” That meaning, we believe, is that all claims encompasses all claims, including claims for attorney fees.” McGuire v. Bates, *supra*. . Even assuming *arguendo* that the trial court erred in their ruling, the issue has been clarified by the McGuire case on precisely the same facts as the case presented here. Although Hansen does not ascribe any error to the trial court’s rulings McGuire has extinguished the argument made by Mr. Leitz in support of his request for attorney fees. While this Court may inquire further into the facts and conduct a *de novo* review of these issues, McGuire has effectively extinguished the need for the Court to conduct this inquiry.

Mr. Leitz through counsel, is now presenting, an argument that in accepting Ms. Hansen’s offer to settle the claim against defendants (CP 77-78) for one half of the amount that he was suing for, that he only intended to accept \$7,500 for his claim and would leave her claim for fraudulent billing and frivolous litigation against him open. It is unclear whether this argument put forth by counsel and certainly contrary to Mr. Leitz’s interests is understood by him or is an argument put forth by his

counsel for her benefit; it certainly would not be in his interests. This Request for Discretionary review and the argument that Appellant Leitz is willing to accept \$7,500 to settle his claim and be subject to litigation without a legal defense, appears to be nothing more than an attempt by counsel to collect a highly inflated figure for attorney fees while leaving open an illusory counterclaim. He also tries to distinguish this case on the basis that the amount of settlement relative to the amount in litigation was minimal. Appellant's Brief at 23. It is hard to conceive that an offer of exactly half of the total amount being sued for is a minimal settlement offer.

During oral argument and in her briefs Ms. Mindenbergs relied on the decision in Seaborn Pile Driving CO., Inc. v. Glew, 132 Wn.App.261, 131 P.3d 910 (2006). The first division Court of Appeals in Seaborn held that when an offer of settlement was made for a *partial settlement of claims* the court would not infer that the settlement offer included attorney fees. Seaborn Pile Driving Co., Inc. v. Glew, supra, (emphasis added). By contrast, the State Supreme Court in their July 1, 2010 opinion in McGuire v. Bates, supra, concluded that when an offer to settle was for "all claims" the court would confer the normal and ordinary meaning of those words and not entertain a separate motion for attorney's fees.

McGuire v. Bates, supra. . Ms. Mindenbergs' only argument to avoid the ruling in McGuire v. Bates, is to state that Hansen's counterclaim is still open, and even that argument fails due to the nature of the counterclaim. It is absurd to think that Mr. Leitz would accept an offer to settle his claim in the case while leaving himself open to Ms. Hansen's counterclaim. The reality is if even if the counterclaim in this case was left "unsettled", it would be effectively barred under principles of *res judicata* since it effectively serves to state that Mr. Leitz's entire lawsuit is without merit. This distinguishes it from Seaborn, where there were distinct and separate counterclaims that stood independently from the one proposed in the Seaborn settlement. Seaborn Pile Driving Co., Inc. v. Glew, supra. The only reason to retain this convoluted counterclaim reasoning is to allow the case at bar to fit within the perimeters of Seaborn's facts and to allow Ms. Mindenbergs an argument before this Court for her exorbitant and inflated fees. Mr. Leitz's reliance on Seaborn is misguided. In the first place there was no underlying statute specifically pled. Plaintiff's Complaint. (CP 1-6) Secondly, because this case was not heard on the merits, there is no determination regarding the status of Mr. Leitz in terms of contractor, employee, or other. There is no showing that Mr. Leitz was an employee pursuant to RCW 49.48 et seq.

Even if this court allowed the counterintuitive argument that Mr. Leitz's claim is closed, leaving Ms. Hansen's open, this would put Ms. Mindenbergs in as the real party in interest while subjugating her clients' interests to her own pecuniary desires. It should also be noted that Ms. Mindenbergs took this case on "a contingency basis" after "20 other lawyers turned the case down". Declaration of Susan Mindenbergs, in Response to Reply, Page 1, lines 20-22. (CP 221). Since Ms. Mindenbergs had a contingency fee agreement, it is somewhat inconceivable that she now wants to dip into contract law and create an attorney fee clause where no contract between the parties existed. Ms. Mindenbergs has effectively taken a simple case and built a mountain of attorney fees in the hopes of the Court granting a windfall. She has to rely on case law and interpretation for this reach, and she cannot do so without leaving her client open to on-going litigation after settlement of "a claim", or if the counterclaim is deemed to have been dispensed with under *res judicata*, leave open a fictional doorway for the counterclaim.

The issue of "reasonableness" with regard to attorney fees has not been addressed either. Ms. Mindenbergs presents the argument that any amount she charges is reasonable. Washington Courts have not held this approach in favor. In Scott Fetzer Co. v. Weeks, 122 Wn.2d 141 (1993),

the court made it clear that attorneys would be held responsible for their billing practices. The court stated at page 156:

"Over a decade ago, the United States Supreme Court exhorted attorneys to exercise "billing judgment" in fees requests so as to avoid a costly second major litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 76 L.Ed. 2d 40, 103 S.Ct. 1933 (1983).

Unfortunately this case demonstrates that the Court's words have not been uniformly heeded. This case began with an uncomplicated dispute over 120 vacuum cleaners worth less than \$20,000. The jurisdictional problems with the Washington case were manifest. Out of these simple facts, Dwight's attorneys have fashioned a claim for over \$200,000 in attorneys fees. As discussed above, a claim for over 10 times the amount in contention, in a run-of-the-mill commercial dispute, certainly gives rise to a suspicion of unreasonableness, and demonstrates little, if any, billing judgment. Finally, both Texas and Washington have ethical rules mandating that attorneys charge only a reasonable fee. Washington Rules of Professional Conduct Rule 1.5; Texas State Bar Rules, art.10 Sec 9, rule 1.04. We take this occasion to remind practitioners that such considerations apply whether one's fee is being paid by a client or the opposing party

This case would seem to be particularly relevant here when the Hansen Law Firm contends that not only was Mr. Leitz not owed any money, but that he in fact defrauded the Law Firm by his independent billing to clients, over billing, and general dishonest charges. Response to Plaintiff Motion for Entry of Judgment & Attorney Fees, p 1, exhibits 1 through 11. (CP 62-72)

The issue of attorney's fees under CR 68 is reviewed *de novo* while disputed factual findings concerning the circumstances under which

the offer was made are usually reviewed for clear error. Torgerson v. One Lincoln Tower, 166 Wn2d 510, 517, 210 P.3d 318 (2009) *cited with authority* by McGuire v Bates.

B. Prevailing Party

Mr. Leitz and Attorney Mindenbergs assert that they are the prevailing party under the meaning of CR 68, and are therefore entitled to attorney fees by statute. A party who accepts a settlement under Washington law is not deemed a prevailing party by McGuire v Bates. The Court found “merit in the Bates’ claim that a positive *settlement* for a plaintiff does not necessarily meant that a plaintiff prevailed.” McGuire v Bates *supra*. The Court does not reach the issue in their decision, but the dicta here suggests that they would be in disfavor of finding that settlements *per se* make a party a prevailing party for purposes of RCW 18.27.040(6). As a matter of legal efficiency it is hard to imagine a more nightmarish prospect than subjecting the courts to an endless stream of post-settlement motions regarding prevailing party attorney’s fees. If the Supreme Court had wanted to establish this as precedent they had an opportunity in McGuire and declined to do so as a matter of legal interpretation. McGuire v. Bates, *supra*.

The only reason Ms. Hansen made a settlement offer, let alone one

for half of the amount sued for is Ms. Hansen wanted to end this frivolous litigation and make the settlement offer high enough that should Mr. Leitz not accept the offer it would be highly unlikely that he would be awarded this amount at trial. This is not undue prejudice; it is simply the way the legal system works and is designed to encourage settlement and discourage the waste of scarce court resources by vexatious litigants. The Rule 68 offer of Settlement works both for and against both parties. If Mr. Leitz is convinced of the merits of his case and the value exceeding \$7,500 he should be able to go forward with trial and prevail on the facts of his claim. It is not prejudicial; it is simply the incentive to have a reasonable conclusion to cases and avoid flooding the overburdened court system.

C. Attorney Fees on Appeal

Appellant asked for attorney fees pursuant to RAP 18.1.

Until the trier of fact finds that Mr. Lietz was an employee protected by the labor laws there is no statutory basis for attorney fees. This has not been determined by the trial court, therefore appellant's request for attorney fees pursuant to 18.1 should be denied.

V. CONCLUSION

The trial court did not err, even under case law prior to the ruling in

McGuire. Once the Court squarely addressed the issues presented by Mr. Leitz in McGuire, the rationale for reviewing the trial courts' decision in this case are both moot and a unnecessary use of this Court's time. Mr. Leitz has built a mountain of legal bills for Ms. Hansen out of a frivolous claim and has tried to build a corresponding mountain of bills to penalize her as well. Ms. Hansen has endeavored to divest herself of Mr. Leitz and his vexatious use of the Courts, through every means possible. Ms. Hansen respectfully requests that this Court end this matter and deny review. Ms. Hansen also respectfully requests that this Court deny any attorney fees for this petition and review.

Dated this 18th day of January, 2011.

Respectfully submitted,



Geoffrey Cross, WSB #3089
Attorney for Respondents

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY [Signature]
CROSS

WASHINGTON STATE COURT OF APPEALS
DIVISION II

PAUL LIETZ,)	
)	
Appellant,)	NO. 40987-9
)	
vs)	DECLARATION OF DELIVERY
)	
HANSEN LAW OFFICE, PSC and)	
AMY HANSEN,)	
)	
<u>Respondents</u>)	

The undersigned that on the 19th day of January, 2011, your declarant deposited with ABC/Legal Messengers with a true and correct copy of the Reply Brief of Respondents in the above entitled matter to be delivered to Susan B. Mindenbergs, Attorney for appellant, at the address of 119 First Avenue S, Ste 200, Seattle, WA, to be delivered on January 19, 2011.

Pursuant to RCW 9A.72.085, I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 19th day of January, 2011, at Tacoma, WA

[Signature]
Diane Tylan