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SUPREME COURT OF THE STATE OF WASHINGTON

SHAUN LACOURSIERE,

Plaintiff-Petitioner,

v.

CAMWEST DEVELOPMENT, INC., and ERIC CAMPBELL,

Defendants-Respondents.

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SUPREME COURT
STATE OF WASHINGTON

AMICUS CURIAE BRIEF OF WASHINGTON
EMPLOYMENT LAWYERS ASSOCIATION

LINDSAY L. HALM, WSBA #37141
SCHROETER, GOLDMARK &
BENDER
810 Third Avenue, #500
Seattle, Washington 98104
(206) 622-8000

ATTORNEYS FOR AMICUS
CURIAE

JOE SHAEFFER, WSBA #33273
MACDONALD HOAGUE &
BAYLESS
705 2nd Avenue, Suite 1500
Seattle, WA 98104
(206) 622-1604

ATTORNEYS FOR AMICUS
CURIAE

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I. INTEREST OF AMICUS CURIAE

The Washington Employment Lawyers Association (“WELA”) is an organization of lawyers licensed to practice law in the State of Washington devoted to protection of employee rights. *See* WELA Mot. (filed concurrently).

II. INTRODUCTION AND ARGUMENT SUMMARY

The wage-investment scheme in this case is no doubt unique, but the Court’s resolution of the parties’ dispute has the potential to affect everyday workers in every corner of Washington State. This case presents four central questions: (1) Is a bonus a “wage” once the employer awards it? (2) Does an employer run afoul of the Wage Rebate Act (“WRA”) when it forces an employee to forfeit wages on termination? (3) Does an agreement to forfeit wages constitute a “knowingly submission” to a wage violation where the employer retains exclusive control to cut off the right to such payment (e.g., by firing the employee)? (4) Can employers escape prevailing-plaintiff attorney fee statutes by drafting private contracts that contain mandatory “loser-pays” provisions?

The answer to the first question is decidedly yes. Once awarded, a bonus is payment “by reason of employment.” It is a “wage” – just as commissions, sick-pay, and pensions are, once paid. Nothing about this case concerns reliance on, or expectation of, *future* bonuses (discretionary

or otherwise) based on past pay practices. Mr. LaCoursiere seeks money CamWest awarded him “by reason of employment,” i.e., “wages,” as that term is broadly construed under Washington law.

Second, because the bonuses are wages, CamWest refusal to pay back Mr. LaCoursiere’s share on termination – whether under the guise of an investment scheme, or for any other reason – is a violation of the plain language of the Wage Rebate Act.

Third, there can be no “knowing submission” to a “violation” of the wage laws on the facts of this case, and such instances should be strictly construed to situations in which an employee is informed that he is waiving his rights to exemplary damages and attorneys’ fees, and costs, and where he affirmatively agrees to that waiver.

Finally, and regardless of its rulings on the WRA claim, the Court should reinstate the trial court’s decision denying CamWest’s attorney fees. Mr. LaCoursiere’s claim does not “arise under” CamWest’s Employment Agreement, and thus there is no contractual basis whatsoever for requiring Mr. LaCoursiere to pay CamWest’s legal fees; rather, Mr. LaCoursiere seeks to remedy an independent wrong under the WRA. Even if Mr. LaCoursiere’s wage claim sounds in contract (it does not), CamWest’s fee shifting provision is unenforceable in light of this Court’s decisions in *Brown v. MHN* and *Adler v. Fred Lind Manor*. Contractual

provisions that attempt to undo the fees and costs remedies available to workers under Title 49 are substantively unconscionable, and an affront to public policy. This State's long and proud history of protecting its workers depends on those workers standing up to enforce their nonnegotiable right to wages. The Wage Rebate Act's provision of attorneys' fees and costs to prevailing employees is an integral part of that enforcement regime.

III. STATEMENT OF THE CASE

WELA hereby incorporates the facts and procedural history in Plaintiff-Petitioner Shaun LaCoursiere's Petition for Review, filed January 2, 2013, and his Supplemental Brief, filed June August 9, 2013.

IV. ARGUMENT

A. Bonuses – Once Paid – Are “Wages”

The Court of Appeals misses the central issue in defining what constitutes a “wage” under Washington law. There must be a distinction between: (1) a situation (not present here) where payment of *past* bonuses create a *future* expectation of bonuses that can lead to a wrongful withholding under an implied contract theory as in *Byrne*, *Powell*, and *Simon*, and (2) a situation (like here) where a bonus has *already been awarded* and taxed as such.

The Court of Appeals incorrectly relies on a line of cases

addressing circumstances under which past practice of awarding bonuses creates a quasi-contractual obligation for future payment behavior. *See Byrne v. Courtesy Ford, Inc.*, 108 Wn. App. 683, 690-91, 32 P.3d 307 (2001), *Simon v. Riblet Tramway Co.*, 8 Wn.App. 289, 293, 505 P.2d 1291, 1293 (1973); *Powell v. Republic Creosoting Co.*, 172 Wash. 155, 19 P.2d 919 (1933). This is simply the wrong legal lens through which to view the facts of this case. CamWest relies upon these cases to establish that the bonus was entirely discretionary because the amounts paid were not uniform. But CamWest misses the point as does the court of appeals. But bonuses that have been actually paid are not discretionary regardless of whether they are uniform. Once awarded, as it was in this case, a bonus cannot be lawfully withheld without violating the WRA.

Instead, the holding in *Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13, 35, 111 P.3d 1192, 1203 (2005) is more applicable here. In *Flower*, an employee contracted for a signing and relocation bonus. When he arrived in town and started work, the employer fired him and refused to pay the bonus. The court held there was “no doubt that the bonus was to be paid ‘by reason of employment.’ It was therefore wages.” *Id.*

The same is true here. As in *Flower*, this case concerns an employee’s action to recover bonuses *already awarded* to him; it is therefore a suit for “wages.” Nothing about this case concerns an implied

contract theory for bonuses CamWest never paid. (Indeed, the company did not pay Mr. LaCoursiere a bonus in 2008 and he is *not seeking* to recover any theoretical amount he might be owed for that year). Rather, once awarded, Mr. LaCoursiere's bonus money is by definition "compensation due to an employee by reason of employment." See RCW 49.46.010(2). That is the whole purpose of a bonus. Indeed, CamWest awarded the bonuses for *good performance*, and then withheld taxes on those bonuses, and distributed the money in Mr. LaCoursiere's name. No matter how CamWest shuffled the money – the bonuses remain "wages" as that term is broadly construed by the courts. See *Bates v. City of Richland*, 112 Wn. App. 919, 940-41, 51 P.3d 816 (2002) (holding that underpaid pension amounts constitute wages).

B. Forfeiture of So-Called "Unvested" Portions of Wages Already Paid Because of an Employee's Poor Performance Constitutes Unlawful Withholding of Wages.

It is unlawful for any employer to "*collect or receive* from any employee a rebate *of any part of wages theretofore paid by such employer* to such employee." RCW 49.52.050 (emphasis added). Because CamWest collected and received a portion of Mr. LaCoursiere's bonuses and refused to provide him those wages upon his termination, it violated Washington's Wage Rebate Act. There is no other way to read the statute. Meanwhile, RCW 49.52.060 identifies situations in which it may be

acceptable to retain an employee's wages, but only when those deductions "accrue to the benefit of such employee." Moreover, the Wage Rebate Act expressly forbids the employer from deriving financial benefit from the deduction:

RCW 49.52.060 Authorized Withholding

The provision of RCW 49.52.050 shall not make it unlawful for an employer to withhold or divert any portion of an employee's wages when required or empowered so to do by state or federal law or when a deduction has been expressly authorized in writing in advance by the employee for a lawful purpose **accruing to the benefit of such employee** nor shall the provisions of RCW 49.52.050 make it unlawful for an employer to withhold deductions for medical, surgical, or hospital care or service, pursuant to any rule or regulation: **Provided, that the employer derives no financial benefit from such deduction** and the same is openly, clearly and in due course recorded in the employer's books.

RCW 49.52.060 (emphasis added).

Even where the employee has caused financial harm to the employer through his poor performance, such as equipment loss or breakage, the employer is not entitled to withhold wages unless it can show that the financial harm stems from "a dishonest or willful act of the employee." WAC 296-126-025(3)(c). The employer may, of course, terminate the employee for such poor performance, but cannot tax the employee for his negligence.

Here, CamWest claims to have terminated Mr. LaCoursiere's

employment because he failed to perform to its standards. Because he failed to perform at its standards, CamWest retained the so-called “unvested” portion¹ of Mr. LaCoursiere’s wages—to its own “financial benefit.” This is precisely what the statute prohibits. This is no different than an employer that withholds wages for equipment breakage or other negligence, and the law does not permit it.

The Court should hold that employer-forced forfeitures of employee wages violate the law, regardless of what the forfeiture process is called, i.e. “vesting.”

C. Unilateral, Take-It-Or-Leave-It Contracts are Not a “Knowing Submission” to a Violation of Wage Laws

Where an employer has withheld wages in violation of RCW 49.52.050, the employer is obligated to pay exemplary damages in an amount equal to the withheld wages, along with costs and attorneys’

¹ It is important to note that CamWest has chosen to use the term “vesting” in a highly unconventional way. Ordinarily, to “vest” means “[t]o confer ownership of (property) upon a person.” Black’s Law Dictionary 1557 (7th ed. 1999). Here, Mr. LaCoursiere had full ownership over his own bonus, which is why he was taxed on the full bonus amount. Nothing further was required for “vesting.” In the typical “vesting” scenario, an *employee’s* contribution is always 100% vested. The employer then matches a portion of the contribution, but that portion is not paid or taxed to the employee at the time, rather the employee only acquires ownership of (and is taxed on) that portion after a certain period of time. Upon termination of employment, the employee receives their own contribution *plus* whatever portion of the employer contribution is “vested.” None of the employee’s money is forfeited. The U.S. Department of Labor’s website refers to one such example of a bona fide vesting program: www.dol.gov/ebsa/publications/401kplans.html (last visited 1/8/14) (noting that an employee’s contributions or deferrals in 401(k) plans are always 100% vested).

fees, *unless* the employee has “knowingly submitted to such violations.” First and foremost, the employee is entitled to payment of his withheld wages *regardless of whether or not he knowingly submitted to the withholding*. A knowing submission to a violation merely alleviates the obligation to pay exemplary damages, costs, and attorney’s fees.

Second, there cannot be a “knowing submission to such violation” without evidence that the employee actually knew *that he was agreeing to a withholding that violates the law*. A “knowing submission” to a violation of wage laws is, in all practical effects, a waiver of an employee’s rights under RCW 49.52.070. Wage rights, including the right to recovery of attorney’s fees, can be waived, but only when the waiver is “clear, unmistakable, and knowingly made.” *Yakima Cnty. v. Yakima Cnty. Law Enforcement Officers Guild*, 157 Wn. App. 304, 344, 237 P.3d 316, 337 (2010) (citing *Pasco Police Officers’ Ass’n v. City of Pasco*, 132 Wn.2d 450, 462, 938 P.2d 827 (1997)). In other words, an employee must knowingly forgo the additional compensation and litigation costs and fees, which is all the protection an employee has against an unscrupulous employer. Without .070’s teeth, the employer can only ever be liable to pay the wages that they owed in the first place.

Finally, a holding in this case that the agreement was a “knowing submission to such violation” would render the Wage Rebate Act a dead

letter, and put Washington employees at risk of exploitation. Employers will simply include in their employment manuals “agreements” (signed by the employee, even) eliciting assent to wage rebates of all varieties, such as pay docks for broken equipment, accidents, or compensation for other employee negligence. All the employer would ever be liable for—if the unsuspecting employee both realizes that this violates the law and decides to contest it—would be the single value of the lost wages because the so-called “knowing submission” would absolve it of further consequences. As a practical matter, those cases would never be litigated, and the wage laws would never be enforced. It is only the prospect of double damages and payment of fees and costs that will keep unscrupulous employers in line.²

D. The Contractual Provision is Inapplicable and Invalid

If the Court determines that CamWest’s scheme runs afoul of the WRA, the parties’ dispute over fee shifting becomes moot. That is,

²Two cases make it very clear that agreement to *delay* or *defer* compensation to a later date is not a submission to a violation because there was always an expectation to be paid, albeit late. *Chelius v. Questar Microsystems, Inc.*, 107 Wash. App. 678, 682-83, 27 P.3d 681, 683 (2001) (holding no knowing submission where employee repeatedly asked for payment and employer said it would “catch him up when it received its next financing check”); *Durand v. HIMC Corp.*, 151 Wash. App. 818, 837, 214 P.3d 189, 199-200 (2009) (holding no knowing submission where the “agreement to defer his salary was temporary, lasting only until the companies were in better financial circumstances”; company “promised the back pay when the corporation was ‘financially able.’”). The employer must prove that the employee “deliberately and intentionally deferred to [the employer] the decision of whether [the employee] would *ever be paid*.” *Chelius v. Questar Microsystems, Inc.*, 107 Wn. App. 678, 682-83, 27 P.3d 681 (2001) (emphasis added). Here, even if Mr. LaCoursiere agreed to allow some of his wages to be used to contribute toward a capital contribution, the employer cannot show that he knowingly submitted to forfeiture, or that he appreciated that such forfeiture violated the law.

Mr. LaCoursiere (as the prevailing party) would be entitled to his fees, whether under the WRA, the parties' contract, or both. Even so, the Court should reach the issue and overturn the Court of Appeals' loser-pays fee decision on any one of three bases: (1) Mr. LaCoursiere's wage claim does not "arise under" the parties' contract; (2) the decision below conflicts with the Court's decisions in *Brown* and *Alder*; and (3) permitting employers to rewrite statutory fee provisions would strike a devastating blow to enforcement of Washington wage laws.

1. CamWest's Fee Provision Does Not Apply Because LaCoursiere's Claim Does not "Arise Under" the Agreement

CamWest's Employment Agreement states:

If either party brings an action *arising under this Agreement*, the prevailing party shall be entitled to recover its reasonable costs and attorney fees in connection therewith....

CP 449 (emphasis added).

Mr. LaCoursiere's wage claim does not "arise under" the Employment Agreement, so CamWest's contractual attorney fee provision does not apply. As CamWest puts it: "LaCoursiere has repeatedly characterized this lawsuit as a WRA case." Resp. Supp. Br. at 14. There is good reason Mr. LaCoursiere has "repeatedly" done so: the one and only cause of action listed in his Complaint is for CamWest's violation of the WRA. CP 1-10 (Compl. at ¶28 citing RCW 49.52.050(1), .050(2),

.050(3)). He does not allege a breach of contract under either the Employment Agreement or the LLC Agreements. *Id.* Indeed, it would have been illogical for him to do so: what Mr. LaCoursiere seeks (100% of his bonus award) is directly *contrary* to what the LLC Agreements provide him on termination (60% of his wage contribution). Said another way, Mr. LaCoursiere seeks recovery of wages in this matter *notwithstanding* what the LLC contract's "vesting" schedule says. To be sure, the contracts show the percentage of wages withheld (a 40% figure that, incidentally, nobody disputes), but the contracts do not (and cannot) determine whether CamWest's scheme itself violates the WRA.³

What CamWest implicitly argues is that the "arising under" language in the Employment Agreement should be broadly construed to encompass any statutory claim – even if such claim does not require interpretation of the contract's terms and even if the contract's terms

³ On this point, the Court of Appeal's string citation, pulled from the *Deep Water* case, is not particularly helpful. See *LaCoursiere*, 172 Wn. App. at 154 (citing e.g., *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 279 (2009) (citing cases)). The *Deep Water* cases simply demonstrate that courts are willing to look beyond the pleadings to the true nature of the claim at issue in order to determine whether, in reality, the dispute sounds in contract, thereby triggering a contractual fee provision. E.g., *Deep Water*, 152 Wn. App. at 279 (upholding contractual fee award for "tortious conduct *arising from the agreements.*") (emphasis added); *accord id.* at 280 (denying contractual fees where party's claim was "*not contractual in nature.*"); *Hill v. Cox*, 110 Wn. App. 394, 411 (2002) (upholding fee award for tort action because the claim "*arose out of the contract.*"). No *Deep Water* analysis is required here: Mr. LaCoursiere's WRA wage claim is not a contract claim in disguise, and no amount of contract construction will assist the Court in determining whether CamWest's scheme runs afoul of the WRA.

would violate other law. Washington and federal courts have conclusively rejected such arguments in analogous circumstances. See *Brundridge v. Fluor Federal Services, Inc.*, 109 Wn. App. 347, 356 (2001) (holding that wrongful discharge claim did not arise out of collective bargaining agreement); *Ervin v. Columbia Distrib., Inc.*, 84 Wn. App. 882, 891 (1997) (same for claim of overtime pay); *Bruce v. N.W. Metal Prods. Co.*, 79 Wn. App. 505, 513 (1995) (same as to statutory discrimination claims); cf. *Simms v. Allstate Ins. Co.*, 27 Wn. App. 872, 878 (1980) (holding that Consumer Protection Act claim was not a suit “on the [insurance] policy,” so contract’s one-year limitations period did not apply); *Tracer Research Corp. v. Nat’l Env’tl. Services Co.*, 42 F.3d 1292, 1293 (9th Cir. 1994) (holding that tort claims do not “arise under” licensing contract); *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1164 (9th Cir. 1983) (holding that conspiracy, quantum meruit, and conversion claims do not “arise under” contract’s arbitration clause).

In *Tracer*, for example, the Ninth Circuit held that a forum selection clause that limited disputes to those “arising out of” or “arising under” a licensing agreement did not apply to plaintiff’s independent tort claim for misappropriation of trade secrets. That the tort would not exist “but for” the existence of a contractual *relationship* was not controlling:

Our decision in *Mediterranean Enterprises, Inc. v.*

Ssangyong Corp., 708 F.2d 1458 (9th Cir.1983) narrowly circumscribes the interpretation to be given this [“arising out of”] clause. . . . The misappropriation of trade secrets count of Tracer’s complaint is a tort claim. . . .The fact that the tort claim would not have arisen “but for” the parties’ licensing agreement is not determinative. See *Armada Coal Export, Inc. v. Interbulk, Ltd.*, 726 F.2d 1566, 1568 (11th Cir.1984). If proven, Defendants’ continuing use of Tracer’s trade secrets would constitute an independent wrong from any breach of the licensing and nondisclosure agreements....

Id. (citations omitted).

Here, Mr. LaCoursiere’s claim for unlawful rebate of wages constitutes “an independent wrong” from any breach of contract. *Cf. Simms*, 27 Wn. App. at 878; *Tracer*, 42 F.3d at 1293. CamWest argues, without citation, that the contract controls because “were it not for the employment agreement, there could not have been alleged entitlement to wages or any alleged rebate.” CamWest is wrong: that the parties have a contractual relationship does not mean that every claim between them arises out of that contract. *Simms*, 27 Wn. App. at 877 (rejecting “but for” contractual relationship argument); *Tracer*, 42 F.3d at 1295 (same). Mr. LaCoursiere’s WRA claim does not require enforcement of the Employment Agreement – if anything, he seeks to *invalidate* a provision of another contract altogether: the LLC Agreement’s vesting schedule. His claim therefore does not “arise under” the parties’ Employment Agreement and is not subject to CamWest’s contractual attorney fee

provision. On this basis alone, the Court should deny fees to CamWest.

2. Employers Cannot Enforce Two-Way “Loser Pay” Fee-Shifting Provisions Against Employees in Wage Cases

Even if the Court determines that CamWest’s Employment Agreement somehow governs this wage dispute, the contract’s fee-shifting provision is substantively unconscionable and thus, unenforceable. The Court of Appeals decision upholding the provision is also directly at odds with this Court’s decisions in *Brown* and *Adler*.

The fees and costs remedy under RCW 49.52.070 (and others like it under Title 49) is available to *employees* who recover wages, and *not* to employers who defend against such claims. *See* RCW 49.48.030, 49.52.070, and 49.46.090. The clear legislative intent behind the provision is to encourage workers to vindicate their “nonnegotiable” right to payment of wages due. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159 (1998). Specifically, the one-way fees and costs remedy ensures that workers can find counsel willing to enforce wage and hour violations in court – even where the claims are small and the client unable to pay. *See id.* at 159 (citing *Brandt v. Impero*, 1 Wn. App. 678, 682 (1969)).

It follows that this Court has not once, but *twice* rejected employer attempts to contract around fee provisions contained in Title 49. *Brown v. MHN*, 178 Wn.2d 258 (2013) (claim for overtime pay under Minimum Wage Act, RCW 49.46); *Adler v. Fred Lind Manor*, 153 Wn. 2d 331, 355

(2004) (claim for disability and national origin discrimination under Washington Law Against Discrimination, RCW 49.60). In *Brown*, the Court held that “mandatory fee shifting provisions in arbitration agreements are substantively unconscionable where the Washington Minimum Wage Act provides that only a prevailing *employee* is entitled to recover costs and fees.” 178 Wn.2d at 275 (emphasis added); accord *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316, 321-22 (2009). The Court reasoned that the risk of having to pay a former employer’s legal fees would constitute a significant deterrent to employees contemplating a wage action. 178 Wn.2d at 274. Of significance in *Brown*, (and the *Walters* decision on which it relies) is the mandatory nature of the contractual fee shifting provision at issue that would *require* the employee to pay the employer’s legal fees if he is unsuccessful. *Id.* (distinguishing *Zuver v. Airtouch Commc’ns. Inc.*, 153 Wn. 2d 293, 310-311 (holding that fee shifting provision was not substantively unconscionable as agreement language was permissive, not mandatory)).

Going further, this Court has invalidated a contractual fee-shifting provision in an employment contract that required each party to bear their *own* fees and costs in a discrimination suit. *Adler v. Fred Lind Manor*, 153 Wn. 2d 331, 355 (2004). Notably, even though the employee bore no risk that he would have to pay *his opponent’s* legal fees, the Court struck

the provision down as substantively unconscionable because it undermined the WLAD's statutory fees and costs remedy. To hold otherwise, the Court reasoned, would "help the party with a substantially strong bargaining position and more resources, to the disadvantage of an employee needing to obtain legal assistance." *Id.* at 355 (citation omitted).

The holdings and rationale of *Brown* and *Adler* apply with equal force here. Like the MWA and the WLAD, the WRA is a remedial statute, liberally construed to advance the legislature's clear intent to protect Washington workers. See *Schilling Inc.*, 136 Wn.2d at 159 (discussing legislative intent behind wage and hour provisions);⁴ *Int'l Union of Op. Engineers v. Port of Seattle*, 176 Wn.2d 712, 720 (2013) (same as to WLAD). As under the MWA and the WLAD, fees and costs under the WRA can *only* be recovered by prevailing employees (not employers). And just like the unenforceable contractual fee provisions at issue in *Brown* and *Adler*, CamWest's Employment Agreement uses mandatory ("shall") language that turns the WRA's fee remedy on its head. As such, CamWest's Employment Agreement's fee provision is substantively unconscionable as a matter of law. *Brown*, 178 Wn.2d at 274; *Adler*, 153 Wn. 2d at 355; *cf. Gandee v. LDL Freedom Enterprises*,

⁴ In fact, the MWA and the WRA are considered to be part of the same statutory regime; the MWA sets forth, among other things, the floor for wages, while the WRA assures that employees receive the wages they earn. *Schilling*, 136 Wn.2d at 159.

Inc., 176 Wn. 2d 598, 606 (2013) (same in CPA action); *see also Backman v. Northwest Publishing Center*, 147 Wn. App. 791, 794 n.1, 197 P.3d 1187 (2008) (doubting that RCW 4.84.250-.300 would apply to wage claim given the strong public policy favoring employees' ability to litigate wage claims).

CamWest states, in conclusory fashion, that the *Walters* case (and presumably *Brown* decided after CamWest filed its brief) is “not applicable” because it concerns the “arbitration-specific” context. Resp. Supp. Br. at 18. This argument is nonsensical; a contract is a contract. There is no basis (legal or otherwise) to treat an attorney fee provision in one contract different from another, just because one exists alongside an arbitration clause, and the other does not.⁵ The *Walters* and *Brown* decisions invalidate “loser pays” provisions like the one at issue here. That CamWest’s Employment Agreement does not *also* deprive Mr. LaCoursiere of his right to a jury trial is beside the point.

Next, CamWest tries to distance this case from *Walters* by suggesting that the “holding” of *Torgerson v. One Lincoln Tower, LLC* is

⁵ If anything, provisions in arbitration agreements are *less* likely to be invalidated by the courts. *Zuver v. Airtouch Comm. Inc.*, 153 Wn.2d 293, 301-02 (2004) (noting that courts must indulge every presumption in favor of arbitration); *compare Perry v. Thomas*, 482 U.S. 491 (1987) (holding that FAA preempts state minimum wage law requiring a judicial forum for wage claims) *with Ervin v. Columbia Distrib.*, 84 Wn. App. 882, 891 (1997) (holding §301 of LMRA does *not* preempt state minimum wage law claims).

somehow “controlling.” Resp. Supp. Br. at 18-19 (citing 166 Wn 2d 510 (2009)). CamWest’s reliance on *Torgerson* – a case involving a failed real-estate transaction – is confused, at best. There, the sole dispute over the contractual fee provision concerned whether the defendant-seller was the prevailing party, 166 Wn. 2d at 525, *not* as CamWest suggests, whether the fee-shifting provision was invalid for unconscionability.⁶

What CamWest seeks is a rule that differentiates between fee-shifting provisions that apply to low-wage or “middle class plaintiffs” and those that apply to comparatively high-wage earners like Mr. LaCoursiere. This is not only a dangerous proposition; it is an unworkable one for the lower courts. A worker should never be required to make a showing of poverty before he is entitled to the remedy of fees and costs. Nor should an employee be required to prove he cannot afford to pay his opponent’s legal fees as a condition of striking down a contractual loser-pays fee provision. The plain language of the WRA makes the remedy available to *all* employees and only employees, advancing workers’ rights everywhere. The Court should reject CamWest’s attempt to carve out higher-wage

⁶ In fact, CamWest goes even further, and suggests that the Court in *Torgerson* rejected plaintiff’s unconscionability challenge to the fee-shifting provision because of the sophistication of the plaintiff-buyers. Resp. Supp. Br. at 19. (stating that “this Court rejected an [unconscionability] argument ... because the plaintiffs were trained, licensed real estate agents.”). No such challenge exists to the *fee-shifting* provision (let alone a “holding” on this point) at the pin cite provided by CamWest or anywhere else in the *Torgerson* decision. Rather, plaintiff-buyers challenged the *remedy-limiting* provision in the contract that confined their remedy to a return of the deposit. *Id.* at 513-515.

earners from the employee protections in *Brown, Adler, and Walters*.

3. Permitting Employers to Enact “Loser Pay” Fee-Shifting Provisions Defeats Legislative Intent

The legislature’s one-way attorney fees remedy is a necessary part of WRA’s enforcement mechanism, both to ensure that workers can find attorneys willing to take such cases, and to avoid the chilling effect of having to pay an employer’s fees and costs. CamWest’s unsubstantiated notion that contractual fee provisions are necessary to protect *employers* from “disgruntled employees” filing “meritless” claims is a policy argument that our legislature rejected when it enacted one-way fee provisions under the WRA and other remedial statutes like it. In any event, the civil rules (Rules 11 and 12, among others) protect employers from meritless claims, and employers who comply with wage and hour laws do not need such “protection” in the first place.

Minimum wage earners – now protected by the *Brown* decision from unconscionable loser-pays fee provisions – are just a fraction of this State’s workforce (less than 5%); the WRA protects the rest of us.⁷ If allowed to stand, the decision below would strike a tremendous blow to

⁷ There are approximately 300,000 workers earning at or below Washington’s minimum wage. <http://www.eoionline.org/blog/washingtons-2013-minimum-wage-paces-inflation-but-doesnt-meet-basic-expenses-for-most/>. According to the United State Bureau of Labor Statistics, the total of hourly workers in Washington state is 1.7 million, making minimum-wage workers (at Washington’s higher minimum wage) less than 2% of hourly workers. <http://www.bls.gov/cps/minwage2012tbls.htm#3> (last visited 1/9/14).

wage claim enforcement for all Washington workers. Employers will simply draft two-sentence “Employment Agreements” with loser-pays fee provisions that shift risk to workers, reinstating the imbalance of power that one-way fee shifting provisions were designed to correct. And this change in the legal landscape is not just a theoretical threat. In the short time since the decision in this case, at least one employment defense firm has already publicly advised employers to follow CamWest’s lead.⁸

As in *Brown, Adler and Gandee*, this Court should reject attempts to rewrite the law in ways that elevate the interests of the powerful to the detriment of public policy protecting individual wage earners.

V. CONCLUSION

For the reasons stated here, WELA respectfully requests that the Court reverse the judgment of the Court of Appeals in its entirety.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

By /s/ Joseph R. Shaeffer

Joseph R. Shaeffer, WSBA #33273

Lindsay Halm, WSBA #37141

⁸ Management-side employment law firm Miller Nash instructs employers that they have “nothing to lose” by adding attorney-fee clauses to “any employment agreement that controls an employee’s compensation.” *See* <http://www.millernash.com/employer-recovers-attorney-fees-from-fired-employee-who-lost-lawsuit-for-discretionary-bonus-01-18-2013/> (last visited 1/5/14)

CERTIFICATE OF SERVICE

I certify that on the date noted below I electronically filed this document entitled **AMICUS CURIAE BRIEF OF WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION** with the Clerk of the Court via email. By agreement, I am also serving the following counsel for the parties via email:

Counsel for Plaintiff/Appellant

D.R. (Rob) Case
105 North Third Street
PO Box 550
Yakima, WA 98907-0550
Phone: 509/457-1515
Fax: 509/457-1027
E-Mail: Rob@LBPlaw.com

Counsel for Plaintiff/Appellant

Toby Marshall
Terrell Marshall Daudt & Willie PLLC
936 N 34th Street, Suite 300
Seattle, WA 98103-8869
Phone: 206/816-6603
Tmarshall@tmdlaw.com

Counsel for Defendant/Respondent

James M. Shore
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101-4109
Phone: 206/386-7578
Fax: 206/386-7500
E-Mail: JMSHORE@stoel.com

DATED this 10th day of January, 2014, at Seattle, Washington.

/s/ Joseph R. Shaeffer
Joseph R. Shaeffer, WSBA #33273

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Please accept for filing, on behalf of the Washington Employment Lawyers Association, the following documents in the above referenced case:

Motion for Leave to Appear on Behalf of Amicus
Brief of Amicus Curiae

Case Number 88298-3
Case Name: LaCoursiere v. CamWest and Campbell

Joe Shaeffer, WSBA 33273

Joe Shaeffer | Attorney | **MacDonald Hoague & Bayless**
705 Second Avenue, Suite 1500 | Seattle, WA 98104
☎ 206.622.1604 | Fax 206.343.3961 | ✉ josephs@mhb.com | www.mhb.com