

74964-1

74964-1

No. 74964-1-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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REED JASSMANN

Appellant,

v.

NORTHWEST INTERIORS & DESIGN, LLC, a Washington  
limited liability company; RANDY LEE OLIVER and MARCIE  
OLIVER, husband and wife; and AMERICAN CONTRACTORS  
INDEMNITY COMPANY, Bond account no. 100238900,

Respondent.

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REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii

A. RESPONSE TO RESPONDENT’S STATEMENT OF  
THE CASE ..... 1

B. ARGUMENT ..... 5

    (1) No findings of fact on Jassmann’s employment claims are  
    necessary to award Jassmann attorney’s fees pursuant to  
    statute..... 5

    (2) Jassmann’s statutory rights to recover attorney’s fees are  
    not barred by Judicial Estoppel. .... 8

    (3) Jassmann did not waive his statutory right to attorney’s  
    fees for a future breach of the CR 2A agreement. .... 11

    (4) The Employer’s motive for settlement does not convert  
    Jassmann’s wage claims to some other character. .... 15

    (5) The Employer willfully refused to pay Jassmann the  
    promised \$15,000 payment in settlement of the wage claim,  
    so attorney’s fees should have been awarded under RCW  
    49.52.070. .... 18

    (6) Jassmann was entitled to a judgment against ACIC on  
    Jassmann’s unopposed motion pursuant to RCW 18.27.040.  
    ..... 20

    (7) Only Jassmann is entitled to attorney’s fees on appeal  
    pursuant to RAP 18.1. .... 23

C. CONCLUSION ..... 23

## TABLE OF AUTHORITIES

### Cases

<i>Anfinson v. FedEx Ground Package Sys., Inc.</i> , 159 Wn. App. 35, 74, 244 P.3d 32, 51, (2010) .....	5, 9
<i>Arkison v. Ethan Allen, Inc.</i> , 160 Wn.2d 535, 538, 160 P.3d 13 (2007).....	9
<i>Arnold v. City of Seattle</i> , 185 Wn.2d 510, 513, 374 P.3d 111, 112 (2016)	7
<i>Backman v. Nw. Publ'g Ctr., LLC</i> , 147 Wn. App. 791, 797, 197 P.3d 1187, 1190 (2008) .....	7, 16
<i>Brundridge v. Fluor Fed. Servs., Inc.</i> , 164 Wn.2d 432, 441, 191 P.3d 879, 886 (2008) .....	8
<i>Cont'l Ins. Co. v. PACCAR, Inc.</i> , 96 Wn.2d 160, 167, 634 P.2d 291 (1981) .....	13
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 809, 828 P.2d 549 (1992) .....	6, 16
<i>Emter v. Columbia Health Servs.</i> , 63 Wn. App. 378, 384, 819 P.2d 390 (1991).....	13
<i>Hawkins v. EmPres Healthcare Mgmt., LLC</i> , 193 Wn. App. 84, 93, 371 P.3d 84, 89 (2016).....	12
<i>Hume v. Am. Disposal Co.</i> , 124 Wash.2d 656, 673, 880 P.2d 988 (1994)	14
<i>Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett</i> , 146 Wash.2d 29, 35, 42 P.3d 1265 (2002) .....	14
<i>King County v. Vinci Construction Grands Projects</i> , 191 Wn.App. 142, 190, 364 P.3d 784 (2015) .....	21
<i>LaCoursiere v. CamWest Dev., Inc.</i> , 181 Wn.2d 734, 747, 339 P.3d 963 (2014).....	23
<i>Lietz v. Hansen Law Offices, PSC</i> , 166 Wn. App. 571, 593, 271 P.3d 899, 911 (2012) .....	7, 16
<i>McDonald v. Wockner</i> , 44 Wn.2d 261, 272, 267 P.2d 97 (1954) .....	14
<i>McGinnity v. AutoNation, Inc.</i> , 149 Wn.App. 277, 280, 202 P.3d 1009 (2009).....	18
<i>Merino v. State</i> , 179 Wn.App. 889, 907, 320 P.3d 153 (2014) .....	7
<i>Moore v. Blue Frog Mobile, Inc.</i> , 153 Wn. App. 1, 8, 221 P.3d 913 (2009) .....	19
<i>Morgan v. Kingen</i> , 166 Wn.2d 526, 539, 210 P.3d 995, 1000 (2009). 7, 19	
<i>New Hampshire v. Maine</i> , 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) .....	9
<i>Pierce County v. State</i> , 144 Wn. App. 783, 813, 185 P.3d 594 (2008).....	13
<i>Pillatos v. Hyde</i> , 11 Wn.2d 403, 407, 119 P.2d 323, 137 A.L.R. 839 (1941).....	13
<i>Seven Sales LLC v. Otterbein</i> , 189 Wn. App. 204, 208, 356 P.3d 248 (2015).....	4

<i>Sherrod v. Kidd</i> , 138 Wn. App. 73, 75, 155 P.3d 976 (2007) .....	12
<i>Snoqualmie Police Ass'n v. City of Snoqualmie</i> , 165 Wn. App. 895, 908, 273 P.3d 983 (2012) .....	19
<i>SPEEA v. Boeing Co.</i> , 92 Wn. App. 214, 220, 963 P.2d 204, 207-208, (1998).....	13
<i>Stottlemyre v. Reed</i> , 35 Wn. App. 169, 171, 665 P.2d 1383 (1983).....	12
<i>Walters v. A.A.A. Waterproofing, Inc.</i> , 151 Wn.App. 316, 322, 211 P.3d 454 (2009) .....	23
<i>Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.</i> , 175 Wn.2d 822, 834, 287 P.3d 516 (2012).....	20
<i>Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.</i> , 175 Wn.2d 822, 836, 287 P.3d 516, 522 (2012) .....	6
<b>Statutes</b>	
RCW 18.27.040 .....	21
RCW 49.46.090 .....	passim
RCW 49.48.030 .....	passim
RCW 49.52.050 .....	passim
RCW 49.52.070 .....	passim
<b>Rules</b>	
CR 68.....	16
RAP 10.3(a)(6).....	6, 15
RAP 10.3(b) .....	6, 15
RAP 18.1 .....	23, 24
RAP 2.5(a).....	8

A. RESPONSE TO RESPONDENT’S STATEMENT OF THE CASE

The Respondents did not dispute that this is an action by an employee, Reed Jassmann (“Jassmann”), against his former employer Northwest Interiors & Design, Randy Oliver and Marcie Oliver (collectively “Employer”) for wages.

The Employer did not dispute that on February 5, 2014, they made an offer to employ Jassmann (CP 347, ¶ 2, Ex. A), which offer included a base salary, a share of each project’s profit, and a commission (CP 347, ¶ 2, Ex. A).

The Employer did not dispute that they had orally promised employee benefits to Jassmann, including the use of a company vehicle (CP 348, ¶4) and reimbursement for expenses incurred on behalf of the Employer. (CP 348, ¶ 3).

The Employer did not dispute that during Jassmann’s employment, that Jassmann asked for but did not receive reports needed to calculate his profit share and commissions, that Employer refused to pay for promised medical insurance and that Employer refused provide a promised company vehicle CP 348, ¶4.

The Employer did not dispute that they never paid Jassmann any profit share CP 349, ¶ 13.

The Employer did not dispute that when Jassmann left

employment on June 12, 2014, the Employer owed Jassmann a paycheck for wages, including salary, commissions and reimbursements, by June 16, 2014. CP 348, ¶ 5.

The Employer did not dispute that they failed to pay Jassmann his last paycheck until September 9, 2014 (CP 348, ¶ 9, Ex. G and H), almost three months late, more than two months after a demand letter from Jassmann's lawyer (CP348, ¶ 7 and Ex. F) and more than one month after Jassmann had served the Summons and Complaint on the Employer on August 5, 2014 (CP 1 and 4).

On page 4 of their Brief, the Employer stated that they had asserted a Counterclaim against Jassmann on October 10, 2014 for fraud and unjust enrichment arising out of a contention that Jassmann was paid \$1500 for the purchase of "certain personal property." CP 12-14. While it is true that the Employer did assert that Counterclaim, the Employer failed to disclose that they withdrew that Counterclaim. On May 25, 2015, counsel for the Employer wrote a letter regarding that Counterclaim. CP 184. On page 2 of that letter, the Employer's counsel wrote that they could not find evidence to support that claim so "**the claim for \$1500 will be withdrawn.**" (emphasis in original) (CP 185).

On page 5 of their Brief, the Employer stated that in their Response to Plaintiff's Motion to Compel discovery responses, the

Employer had “argued that Jassmann was not owed any further wages” citing CP 199-200. However, those words were not used in their Response to Plaintiff’s Motion to Compel. Instead, the Employer only disputed the amount of Jassmann’s claim, stating “NWID disputes the amount of wages Plaintiff claims” (CP 199, ln. 17), and “NWID disputed the amount Plaintiff believed owed” for commissions (CP 199, ln 24).

In their Brief, the Employer did not dispute that in August and September 2015, the Employer finally produced reports needed for Jassmann to calculate his unpaid commissions and profit share (CP 350, ¶ 14) upon which Jassmann calculated that he was owed more than \$22,000, plus attorney’s fees (CP 350, ¶ 14, Ex. H; CP 273 ¶ 13).

In their Brief, the Employer did not dispute that on October 8, 2015, at 10:51 am, the Employer made a written offer to settle Jassmann’s claims against the Employer by payment of \$15,000. CP 395, FOF 1. The material terms of the offer by the Employer were (a) payment to Jassmann of \$15,000 within 30 days, (b) without admission to any allegations, and (c) the normal waiver of any and all claims. CP 395, FOF 4.

On pages 5 to 7 of their Brief, the Employer described their view of the facts leading to the formation of the CR 2A settlement agreement. Although the Employer disputed the enforceability of the CR 2A agreement, the trial court found on February 9, 2016 that a binding CR 2A

agreement was formed. CP 394. The Employer has not challenged the findings of fact by the trial court. The unchallenged findings of fact are verities on appeal. *Seven Sales LLC v. Otterbein*, 189 Wn. App. 204, 208, 356 P.3d 248 (2015).

On pages 8 and 9 of their Brief, the Employer referenced Mr. Oliver's declaration dated October 28, 2015 where he said he "did not think [Jassmann] was owed a cent." CP 322-323. However, Mr. Oliver's statement was a mere conclusory allegation and argumentative assertion, so it could not be relied upon in opposition to Jassmann's motions. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992). Moreover, the Employer did not present Mr. Oliver's declaration in opposition to Jassmann's Motion for Judgment filed on February 11, 2016.

In their Brief, the Employer did not dispute that in the Conclusions of Law, the court reserved ruling "whether the Plaintiff is entitled to an award of attorney's fees incurred after October 8, 2015 against the Employer pursuant to statute." CP 397, COL 4.

In their Brief, the Employer did not dispute that on February 11, 2016, Jassmann filed a Motion for Judgment (CP 398), requesting a judgment against the Employer for breach of the CR 2A agreement. In that Motion, Jassmann also requested a judgment against American Contractor's Indemnity Co (ACIC), the license bond surety for the

Employer. CP 398, ln 21 - 23.

In their Brief, the Employer did not dispute that on February 18, 2016, the Employer opposed Jassmann's request for attorney's fees (CP 434), but that the Employer failed to submit any evidence in opposition to Jassmann's Motion. ACIC did not dispute that they failed to file any opposition to Jassmann's motion for judgment.

B. ARGUMENT

(1) No findings of fact on Jassmann's employment claims are necessary to award Jassmann attorney's fees pursuant to statute.

No findings of fact are required for the court to award Jassmann attorney's fees pursuant to statute. At pages 17 to 19 of their Brief, the Employer argued that the trial court properly denied Jassmann's request for fees because the "trial court made no findings related to the claims or counterclaims of the parties." Again, at page 34 of their Brief, the Employer argued that the court in *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 74, 244 P.3d 32, 51, (2010) required the entry of findings of fact. In *Afinson*, however, the trial court's order was reversed and remanded for further proceedings, so "there has been no judgment for wages." *Id.* The appellate court denied the employees' attorney fee request "without prejudice to a future application for such fees" once a judgment had been entered. *Id.*

Other than their misplaced citation of *Afinson*, the Employer has provided no citation of authority for their argument. Under RAP 10.3(b), the brief of respondent should conform to RAP 10.3(a)(6) which requires argument to be supported by “citations to legal authority.” The Employer’s unsupported argument need not be considered by the court. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Even if the court did consider the Employer’s unsupported argument, nothing in RCW 49.48.030, RCW 49.52.070 and/or RCW 49.46.090 requires the entry of “findings of fact” for the court to award attorney’s fees to an employee. RCW 49.48.030 only requires a “judgment for wages or salary owed to him or her.” Similarly, neither RCW 49.52.070 nor RCW 49.46.090 mention a requirement for a finding of fact as a condition for the mandated award of attorney’s fees in the action for unpaid wages owed under those chapters.

Furthermore, numerous opinions have required the award of attorney’s fees to an employee under RCW 49.48.030, RCW 49.52.070 and/or RCW 49.46.090 even when there were no findings of fact. For example, in *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 836, 287 P.3d 516, 522 (2012), the court held that attorney’s fees must be awarded under RCW 49.48.030 and RCW 49.46.090 on a

summary judgment motion, where there were no findings of fact. See also, *Merino v. State*, 179 Wn.App. 889, 907, 320 P.3d 153 (2014) (holding that attorney's fees must be awarded to an employee under RCW 49.48.030 on summary judgment motions), *Morgan v. Kingen*, 166 Wn.2d 526, 539, 210 P.3d 995, 1000 (2009) (holding that attorney's fees must be awarded to an employee under RCW 49.52.070 on a motion for summary judgment, where there were no findings of fact), *Backman v. Nw. Publ'g Ctr., LLC*, 147 Wn. App. 791, 797, 197 P.3d 1187, 1190 (2008) (holding that an employee must be awarded attorney's fees under RCW 49.52.070 on cross motions for summary judgment (where there were no findings of fact), where by the time of motions the employer had paid the employee all commissions owed). In *Lietz v. Hansen Law Offices, PSC*, 166 Wn. App. 571, 593, 271 P.3d 899, 911 (2012), the court held that an employee must be awarded attorney's fees under RCW 49.48.030 on a motion for judgment on acceptance of a CR 68 offer of judgment, where there were no findings of fact. In *Arnold v. City of Seattle*, 185 Wn.2d 510, 513, 374 P.3d 111, 112 (2016), the court held that attorney's fees must be awarded under RCW 49.48.030 where an employee prevails in an administrative proceeding, where there are no findings of fact.

In this case, it is undisputed that Jassmann's complaint was for unpaid wages (CP 1), that Jassmann calculated more than \$22,000 in

unpaid wages (CP 350, ¶ 14, Ex. H; CP 273 ¶ 13), and that Jassmann recovered a judgment of \$15,000 against his Employer in his action for unpaid wages (CP 464).

Therefore, no findings of fact are necessary under RCW 49.48.030, RCW 49.52.070 and/or RCW 49.46.090 because Jassmann obtained a judgment in his action for unpaid wages.

(2) Jassmann's statutory rights to recover attorney's fees are not barred by Judicial Estoppel.

Jassmann's statutory rights to recover attorney fees are not barred by Judicial Estoppel. At pages 19 to 22 of the Employer's Brief, they argued that Jassmann's statutory rights to recover attorney's fees for breach of the CR 2A agreement are barred by judicial estoppel. That argument must be rejected.

The Employer did not raise this argument to the trial court, so it should not be considered by this court. Generally, a party who fails to raise an issue at trial waives the right to appeal that issue. *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879, 886 (2008). However, under RAP 2.5(a), a "party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." The Employer did not make a judicial estoppel argument to the trial court, so

the court should not consider this new argument on appeal.

Even if the court does consider this new argument, Jassmann's right to recover attorney's fees pursuant to statute is not barred by judicial estoppel. "Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 861, 281 P.3d 289 (2012) (quoting *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007)). The two primary purposes behind the doctrine are the preservation of respect for judicial proceedings and the avoidance of inconsistency, duplicity, and waste of time. *Id.* "[A] trial court's determination of whether to apply the judicial estoppel doctrine" is guided by three core factors: (1) whether the party's later position is "clearly inconsistent with its earlier position," (2) whether acceptance of the later inconsistent position "would create the perception that either the first or the second court was misled," and (3) whether the assertion of the inconsistent position would create an unfair advantage for the asserting party or an unfair detriment to the opposing party. *Id.* at 538-39 (internal quotation marks omitted) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)).

In this case, the Employer's judicial estoppel argument fails on all

three factors. Regarding the first factor, Jassmann made no “clearly inconsistent” position to the trial court. To the trial court, Jassmann argued that a CR 2A agreement was formed which included a waiver of claims on October 8, 2015 and that Jassmann was entitled to attorney’s fees for breach of the agreement. (See, e.g., CP 263, 341 and 398). Jassmann never argued that he had waived his statutory right to pursue future attorney’s fees for the Employer’s breach the CR 2A agreement.

Regarding the second factor, Jassmann never misled the court because Jassmann consistently requested an award of attorney’s fees pursuant to statute. When Jassmann first filed the motion to enforce the CR 2A agreement on October 21, 2015 (CP 263), Jassmann argued that that the CR 2A agreement must be enforced and that Jassmann must be awarded attorneys after October 8, 2015 pursuant to statute for breach of the CR 2A agreement (CP 270). When Jassmann filed to Motion for Judgment on the CR 2A Settlement on November 10, 2015, Jassmann again requested attorney’s fees pursuant to statute. CP 341, 345. When the court entered the Findings of Fact regarding the enforceability of the CR 2A agreement, the court specifically reserved Jassmann’s request for attorney’s fees pursuant to statute. CP 394. Jassmann then filed a motion requesting an award of those fees. CP 398. Thus, Jassmann repeatedly requested attorney’s fees pursuant to statute and never misled the court.

Regarding the third factor, Jassmann's pursuit of attorney's fees for breach of the CR 2A agreement did not lead to an unfair advantage. If the Employer had not breached their CR 2A agreement, then both the Employer and Jassmann would have avoided most of the attorney's fees they incurred after October 8, 2015.

Therefore, the Jassmann's statutory right to recover attorney's fees for breach of the CR 2A agreement was not barred by judicial estoppel.

(3) Jassmann did not waive his statutory right to attorney's fees for a future breach of the CR 2A agreement.

Jassmann did not waive his statutory rights to assert a future claim for breach of the CR 2A agreement. At pages 19 to 22, and 30 to 31, of the Employer's Brief, they appear to argue that when Jassmann agreed to the term "The normal waiver of any and all claims, known and unknown," that Jassmann implicitly waived his statutory rights for future attorneys in the event the Employer breached the CR 2A agreement. That argument must be rejected for several reasons.

First, by its terms, the waiver only applied to existing claims and did not apply to statutory rights or any future claims. Instead, the parties merely agreed to "the normal waiver of any and all claims." CP 395, FOF 4. The court will interpret settlement agreements under contract principles "in light of the language used and the circumstances surrounding their

making.”” *Sherrod v. Kidd*, 138 Wn. App. 73, 75, 155 P.3d 976 (2007) (quoting *Stottlemyre v. Reed*, 35 Wn. App. 169, 171, 665 P.2d 1383 (1983)); *Hawkins v. EmPres Healthcare Mgmt., LLC*, 193 Wn. App. 84, 93, 371 P.3d 84, 89 (2016). When Jassmann agreed to the settlement on October 8, 2015, he did so to avoid the necessity of preparing for trial then scheduled for October 19, 2015. CP 276, ¶ 25. When the Employer repudiated and breached the CR 2A settlement agreement, they forced Jassmann to incur attorney’s fees Jassmann to prepare for trial (CP 344, ln 4), to file motions to enforce the agreement (CP 263 and CR 341), to respond to Employer’s Motion for Reconsideration (CP 375), to make oral argument on the reconsideration motion (CP 380 ln 19), to attend an evidentiary hearing on January 22, 2016 (CP 394, ln 18), to prepare Findings of Fact and Conclusions of Law CP 394), and to file a Motion for Judgment (CP 398), among other actions. Had the Employer honored their CR 2A agreement, then all of the fees incurred by Jassmann for those actions would have been avoided. Since the waiver clause in the CR 2A agreement did not expressly waive statutory rights or future claims, Jassmann did not waive his right his statutory rights for future attorneys in the event the Employer breached the CR 2A agreement.

Second, the waiver language in the CR 2A agreement must be construed against the Employer, the drafter of the waiver language in the

CR 2A agreement. When an agreement is ambiguous, the court is required to construe the writing against the drafter, in this case the Employer. *Pierce County v. State*, 144 Wn. App. 783, 813, 185 P.3d 594 (2008) (ambiguous contracts are generally construed against the drafter); *Emter v. Columbia Health Servs.*, 63 Wn. App. 378, 384, 819 P.2d 390 (1991) (drafter cannot take advantage of ambiguities it could have prevented with greater diligence); *Cont'l Ins. Co. v. PACCAR, Inc.*, 96 Wn.2d 160, 167, 634 P.2d 291 (1981) (party who created the contract is in better position to prevent ambiguous language). Here, the Employer drafted the CR 2A offer (CP 395, FOF 1), but that offer did not expressly state that Jassmann waived his statutory rights for any future claims.

Third, even if the CR 2A agreement had expressly waived Jassmann's statutory employment rights, an attempt to waive a statutory right to the employee is void as against public policy. Where an employer and employee "attempt to make a contract of employment in violation of the clearly expressed provision of the statute, the natural right of the employer and the employee to contract between themselves must . . . yield to what the legislature has established as the law." *Pillatos v. Hyde*, 11 Wn.2d 403, 407, 119 P.2d 323, 137 A.L.R. 839 (1941); *SPEEA v. Boeing Co.*, 92 Wn. App. 214, 220, 963 P.2d 204, 207-208, (1998) (rescinding only those portions of the employment agreements to the extent they were

against public policy), see also *McDonald v. Wockner*, 44 Wn.2d 261, 272, 267 P.2d 97 (1954) (agreement to forgo compensation owing under a union contract is void as to public policy). As a result, the CR 2A agreement must be interpreted to preserve Jassmann's statutory rights, including Jassmann's right to recover attorney's fees for breach of the CR 2A agreement.

Fourth, in labor cases the attorney fee statutes are remedial, which statutes are to be liberally construed in favor of the employee. "[A]ttorney fees are authorized under the remedial statutes to provide incentives for aggrieved employees to assert their statutory rights." *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wash.2d 29, 35, 42 P.3d 1265 (2002) (alteration in original) (quoting *Hume v. Am. Disposal Co.*, 124 Wash.2d 656, 673, 880 P.2d 988 (1994)). According to the Washington Supreme Court, RCW 49.48.030 is a remedial statute that courts must construe broadly and liberally in favor of persons recovering unpaid wages. *Int'l Ass'n of Fire Fighters, Local 46*, 146 Wash.2d at 35, 42 P.3d 1265. As a result, the CR 2A agreement must be construed liberally to preserve Jassmann's statutory rights to attorney's fees for the Employer's breach of the CR 2A agreement.

Therefore, the Employer's vague waiver language in the CR 2A agreement did not clearly and unambiguously waive Jassmann's statutory

right to recover future attorney's fees in the event the Employer breached their CR 2A agreement in the future.

(4) The Employer's motive for settlement does not convert Jassmann's wage claims to some other character.

The Employer's motive for settling Jassman's wage claims does not change the character of Jassmann's wage claims. RCW 49.48.030 requires an award of attorney's fees when there is a "judgment for wages or salary owed to him or her." Similarly, RCW 49.52.070 and RCW 49.46.090 when there is a judgment for wage claims under those statutes. The Employer argues that because they were motivated to settle "to avoid trial" (page 22) and "to avoid trial and settle a lawsuit" (page 23), that their settlement motive converts Jassmann's wage claims to some character other than wage claims. The Employer made the same argument at pages 31 to 35 of their Brief, arguing that the "settlement payment does not fit the definition of compensation by reason of employment." The Employer's argument must be rejected for many reasons.

First, the Employer has cited no authority for their argument that their settlement motive converted Jassmann's wage claims to something other than wage claims. Under RAP 10.3(b), the brief of respondent should conform to RAP 10.3(a)(6) which requires argument to be supported by "citations to legal authority." The Employer's unsupported

argument need not be considered by the court. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Second, it is undisputed that Jassmann obtained a judgment (CP 464) on Jassmann's complaint against the Employer for "unpaid wages and commissions" (CP 2, ¶ 8) and that Jassmann calculated he was owed more than \$22,000 in unpaid wages and commissions (CP 350, ¶ 14, Ex. H; CP 273 ¶ 13). The Employer settled Jassmann's wage claims in exchange for a promised payment of \$15,000 (CP 395, FOF 4), which the Employer failed to pay, leading to a judgment against the Employer for \$15,000 on March 14, 2016. CP 464. Since Jassmann recovered a judgment on his complaint for unpaid wages against his Employer, Jassmann's \$15,000 judgment was for wages.

Third, a court must award attorney's fees to an employee pursuant to statute when the underlying wage claim has been settled, leaving only a claim for attorney's fees. In *Lietz v. Hansen Law Offices, PSC*, 166 Wn. App. 571, 593, 271 P.3d 899, 911 (2012), the defendant made a CR 68 offer of judgment to settle a wage claim. The employee accepted the CR 68 offer of judgment and then sought recovery of attorney's fees pursuant to statute. The court held that the employee must be awarded attorney's fees under RCW 49.48.030. Similarly, in *Backman v. Nw. Publ'g Ctr., LLC*, 147 Wn. App. 791, 797, 197 P.3d 1187, 1190 (2008), the court held

that an employee must be awarded attorney's fees under RCW 49.52.070 where, by the time of cross motions for summary judgment, the employer had finally settled and paid the employee all commissions owed to the employee. Even though the wage claims had been settled by the time of the motion, the court held that attorney's fees must be awarded to the employee.

Fourth, in response to Jassmann's Motion for Judgment requesting an award of attorney's fees (CP 398), the Employer failed to present any evidence (in the form of declarations or otherwise) disputing the facts supporting Jassmann's wage claim. Jassmann's motion was supported by the detailed declaration of Mr. Jassmann (CP 402, line 11: Evidence Relied Upon; CP 347). The trial court considered Jassmann's declaration about his wage claims when ruling on Jassmann's request for attorney's fees. CP 465, In. 6. Since the Employer failed to present any evidence controverting Jassmann's unpaid wage claim facts, the court should have granted Jassmann's motion requesting attorney's fees. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992).

Finally, even if the Employer's motive did change the character of Jassmann's wage claim, the Employer's CR 2A agreement was made by reason of employment, so it is a wage within the meaning of RCW 49.48.030. In *McGinnity v. AutoNation, Inc.*, 149 Wn.App. 277, 280, 202

P.3d 1009 (2009), the employer argued that a contractual obligation to pay vacation benefits were not “wages” but were instead a claim for breach of contract. The court rejected that argument, holding that awards for attorney fees under RCW 49.48.030 are not limited to judgments for wages earned for work performed, but are recoverable under RCW 49.48.030 whenever a judgment is obtained for any type of compensation due by reason of employment. Citing several cases, the court stated that those “cases support the rule that if the employee gets the money on account of having been employed, then the money is wages in the sense of ‘compensation by reason of employment.’” *Id.*

Therefore, the Employer’s motivation for settlement does not convert Jassmann’s complaint for unpaid wages to something other than for unpaid wages. The trial court should have awarded Jassmann attorneys under RCW 49.48.030, RCW 49.52.070 and/or RCW 49.46.090.

(5) The Employer willfully refused to pay Jassmann the promised \$15,000 payment in settlement of the wage claim, so attorney’s fees should have been awarded under RCW 49.52.070.

Jassmann has requested the award of attorney’s fees under three independent bases: RCW 49.48.030, RCW 49.52.070 and/or RCW 49.46.090. Regarding RCW 49.52.070, the Employer argued at pages 24 to 30 of their Brief that their failure to pay Jassmann the promised \$15,000 payment was “not willful” and was subject of a “bona fide dispute.” The

Employer's argument is without merit.

The Employer's failure to pay \$15,000 to Jassmann in settlement of the wage claims was willful. Under RCW 49.52.050(2), the test for a "willful" failure to pay is not stringent—the employer's failure to pay must simply be volitional. *Schilling v. Radio Holdings, Inc.*, 136 Wash.2d 152, 159, 961 P.2d 371 (1998). The word "willful" means that an act "is volitional." *Snoqualmie Police Ass'n v. City of Snoqualmie*, 165 Wn. App. 895, 908, 273 P.3d 983 (2012). An employer withholds wages willfully if "it is the result of knowing and intentional action rather than mere carelessness." *Moore v. Blue Frog Mobile, Inc.*, 153 Wn. App. 1, 8, 221 P.3d 913 (2009). Financial inability is not a defense to liability under the wrongful withholding statute. *Morgan v. Kingen*, 166 Wash.2d 526, 210 P.3d 995 (2009) (citing *Schilling v. Radio Holdings, Inc.*, 136 Wash.2d 152, 160, 961 P.2d 371 (1998)).

In this case, the Employer's failure to pay Jassmann of \$15,000 in settlement of the wage claims was willful. It was no accident. The trial court found that the Employer repudiated the CR 2A agreement because they had second thoughts about how much time they wanted before they would make full payment. CP 396, FOF 6. The Employer had asked to delay payment so "their last payment to the plaintiff would not occur until more than one year later." CP 396, FOF 6. Thus, the Employer's failure to

pay Jassmann was willful because the Employer was financially unable to pay the promised settlement amount.

The Employer's failure to pay Jassmann \$15,000 was not the subject of a bona fide dispute. The employer bears the burden of showing a bona fide dispute. *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 834, 287 P.3d 516 (2012) (quoting *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 161, 961 P.2d 371 (1998)). The trial court did not find that the Employer's failure to pay Jassmann was the subject of a bona fide dispute. Instead, the trial court found that the reason for the Employer's dispute was merely because they wanted more time to pay Jassmann. CP 396, FOF 6.

Therefore, Jassmann should have been awarded attorney's fees pursuant to RCW 49.52.070. Even if the failure to pay Jassmann was not willful, or was the result of a bona fide dispute, Jassmann must nonetheless be awarded attorney's fees under RCW 49.48.030 and/or RCW 49.46.090.

(6) Jassmann was entitled to a judgment against ACIC on Jassmann's unopposed motion pursuant to RCW 18.27.040.

Jassmann was a laborer who was entitled to recovery from the Employer's license bond issued by ACIC pursuant to Chapter 18.27 RCW. ACIC, however, made several baseless arguments that Jassmann was not

entitled to a judgment against ACIC.

First, ACIC argues that Jassmann did not have a claim for labor, but instead a claim for “enforcing a settlement contract.” This is a new argument raised for the first time on appeal, so it should not be considered. RAP 2.5(a). Even if it were considered, Jassmann’s complaint was for unpaid labor (CP 1), on which Jassmann obtained a \$15,000 judgment against his bonded employer (CP 464), so Jassmann should have been awarded a judgment against ACIC.

Second, ACIC argues, without any citation to the record, that a judgment against ACIC would result double payment. This makes no sense. The liability of ACIC is joint and several with the employer. *King County v. Vinci Construction Grands Projects*, 191 Wn.App. 142, 190, 364 P.3d 784 (2015). Upon reversal, a judgment should be entered against ACIC and the Employer for attorney’s fees on Jassmann’s labor claims.

Third, ACIC blames Jassmann for ACIC’s failure to present any evidence or argument opposing Jassmann’s motion for judgment against ACIC. This argument is without citation to authority and makes no sense. Jassmann did nothing to prevent ACIC from opposing Jassmann’s Motion for Judgment. CP 398. The Employer filed an opposition to Jassmann’s Motion (CP 434), but that opposition failed to include any evidence or argument regarding the liability of ACIC.

Fourth, ACIC argued that Jassmann waived his rights against ACIC. For reasons stated above, the Employer's and ACIC's waiver argument is without merit. Nothing in the CR 2A agreement stated that Jassmann waived his rights against ACIC if the Employer failed to make the promised \$15,000 payment.

Fifth, ACIC argued that Jassmann "did not ask the court for a judgment against ACIC." That assertion is false. On February 11, 2016, Jassmann filed a Motion for Judgment requesting that the "court enter judgment against defendants . . . and their surety American Contractor's Indemnity." CP 398, ln 21-23. Jassmann's motion was supported by Jassmann's declaration (CP 347) and a copy of ACIC's surety bond (CP 348, Ex. C). Jassmann's proposed Judgment included a section against ACIC, which the trial court struck. CP 465. Since ACIC failed to present any evidence or argument opposing Jassmann's motion for judgment against ACIC, the court should have granted Jassmann's motion against ACIC. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992).

Therefore, the trial court erred when it failed to enter judgment against ACIC.

(7) Only Jassmann is entitled to attorney's fees on appeal pursuant to RAP 18.1.

In page 38 of their Brief, the Employer requested that attorney's fees be awarded against Jassmann. That request is baseless. Under Washington law, only an employee who prevails on a wage claim is statutorily entitled to an award of reasonable attorney fees. See, e.g., RCW 49.46.090(1), RCW 49.48.030, and RCW 49.52.070. Although some statutes have reciprocal attorney fee provisions, the above-cited statutes do not. Those statutes are part of a comprehensive system of statutes with respect to wages, reflecting a strong legislative intent to assure payment to employees. See *Schilling v. Radio Holdings, Inc.*, 136 Wash.2d 152, 159, 961 P.2d 371 (1998). Those statutes are not reciprocal but provide for an award of attorney fees only for prevailing employees. *LaCoursiere v. CamWest Dev., Inc.*, 181 Wn.2d 734, 747, 339 P.3d 963 (2014); *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn.App. 316, 322, 211 P.3d 454 (2009).

#### C. CONCLUSION

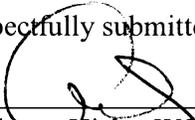
This Court should reverse the denial of Jassmann's request for an award of reasonable attorney's fees against the Employer and remand for determination of an award of attorney's fees incurred after the Employer breached the CR 2A agreement on October 8, 2015. This Court should also reverse the denial of Jassmann's request for judgment against ACIC

and remand for entry of judgment against ACIC. Jassmann should also be awarded attorney's fees under RAP 18.1.

DATED this 6<sup>th</sup> day of September, 2016.

Respectfully submitted,

/s/



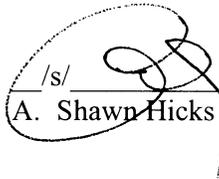
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I declare under penalty of perjury under the laws of the State of Washington that on September 6, 2016, I caused true copies of the attached Reply Brief of Appellant to be served upon the following persons by regular mail to:

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DATED at Seattle, Washington the 6<sup>th</sup> day of September, 2016.

  
/s/  
A. Shawn Hicks

2016 SEP -7 PM 2:43  
STATE OF WASHINGTON  
SUPERIOR COURT