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No. 66752-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

GUSTAVO NELSON ARZOLA, MICHAEL KLATT, and
SUSAN PROSSER

Respondents/Cross-Appellants,

v.

NAME INTELLIGENCE, INC. and JAY WESTERDAL

Cross-Respondents./Appellants

RESPONSE BRIEF AND OPENING CROSS-APPEAL BRIEF
OF CROSS-APPELLANTS

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I. INTRODUCTION

Closely held defendant Name Intelligence, Inc. ("NI") received sixteen million dollars (\$16,000,000) in cash plus millions more in stock through the sale of its assets to another corporation in May 2008. That transaction could not have closed unless the employees in this case (key employees) executed agreements (the "SRC Agreements") changing the form of their compensation from stock rights to specific amounts of cash - which they did. Despite receiving this impressive amount of cash compensation, NI and its CEO Jay Westerdal forced the commencement and continuation of this wage litigation by their (now former) employees when they continually refused to pay the employees what they had been promised.

NI and Westerdal do not deny that they breached the contracts with their employees. Rather, they dispute that the compensation is "wages" pursuant to RCW 49.48 and 49.52 entitling the employees to exemplary damages and attorney fees. For the reasons set forth below, NI and Westerdal's appeal must fail, and the employees' cross-appeal should be granted.

II. ISSUES RELATED TO NAME INTELLIGENCE AND WESTERDAL'S APPEAL

1. Are the non-discretionary cash payments owing to the employees under the SRC Agreements, and intentionally withheld by the employer, "compensation arising out of the employment relationship" thereby entitling the employees double damages and attorneys' fees pursuant to RCW 49.48 and 49.52 et seq?

2. Are the employees entitled to attorneys' fees on an alternative basis because they are the prevailing parties and the appellant-employer unsuccessfully asserted, as a defense, an agreement containing a prevailing party attorneys' fees clause?

3. Are the employees entitled to litigation costs and expenses?

III. ASSIGNMENTS OF ERROR ON CROSS APPEAL

Cross-Appellants assign error to the following actions by the trial court:

1. The trial court erred by refusing to enter a summary judgment awarding double damages for the May 2010 payment against NI and Jay Westerdal because there were no material facts in dispute and the appellants intentionally withheld \$145,007 in

employment compensation when they volitionally failed to unconditionally pay plaintiffs for twenty two days. (CP 455-456, RP 1/26 RP 32)

2. The trial court erred by refusing to enter a judgment awarding double damages against the appellants for the May 2010 payment because the appellants intentionally withheld \$145,007 in employment compensation when they volitionally failed to unconditionally pay plaintiffs for twenty two days. (FFCL 4.5, 4.6, 4.7 and 5.3)

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ON CROSS APPEAL

1. Does an intentional refusal to unconditionally tender employment compensation for twenty two days constitute “willful withholding” as a matter of law under RCW 49.52.050? (FFCL 4.5, 4.6, 4.7, 5.3) (Assignments of Error Nos. 1 and 2)

V. STATEMENT OF THE CASE

A. THE EMPLOYMENT RELATIONSHIP AND THE STOCK RIGHT CANCELLATION AGREEMENTS

Susan Prosser, Gustavo Arzola, and Michael Klatt (the Respondents/Cross-Appellants, hereinafter the “employees”) were each at one time employees of appellant Name Intelligence, Inc.

("NI"). (FFCL 2.1)¹ Jay Westerdal ("Westerdal") is and was the President and CEO of NI. (FFCL 2.2) Prior to April of 2008, and as part of their employment compensation, each employee was promised by NI various amounts of stock rights in NI. (FFCL 2.3) No plaintiff ever received actual stock in NI. (FFCL 2.3)

In April of 2008, Westerdal informed the employees that he intended to sell the company. (FFCL 2.4) The agreement to sell the company is reflected in a document titled "Securities Exchange Agreement." (FFCL 2.4; Tr. Ex. 101) In April 2008, while still employees of NI, and at the request of Westerdal and NI, each of the employees executed documents titled "Stock Right Cancellation Agreement" ("SRC Agreements")(FFCL 2.5; Tr. Exs. 2-4)

Each SRC Agreement provided for three cash payments to each employee in specific amounts at specific times. (FFCL 2.6) In addition to the initial 2008 payment (which is not in dispute), the SRC Agreement signed by Michael Klatt provided for a cash payment of \$76,415 on May 2, 2009 and an additional \$76,415 on May 2, 2010. (FFCL 2.7) The SRC Agreement signed by Gustavo

1 Unless otherwise noted, all Findings of Fact and Conclusions of Law cited herein have not been assigned as error and are therefore verities on appeal. *Harris v. Urell*, 133 Wn.App. 130, 137 (2006).

Nelson Arzola (Tr. Ex. 3) provided for a cash payment of \$47,759 on May 2, 2009, and an additional \$47,759 on May 2, 2010. (FFCL 2.8) The SRC Agreement signed by Susan Prosser (Tr. Ex. 4) provided for a cash payment of \$20,833 on May 2, 2009, and an additional \$20,833 on May 2, 2010. (FFCL 2.9) Each SRC Agreement cancelled any rights the employees had in NI. (FFCL. 2.11)

The SRC Agreements were offered to the employees because Defendant NI entered into a Securities Exchange Agreement with a company called Thought Convergence Inc. ("TCI") and its subsidiary TrafficZ, Inc. (two entities not a party to this lawsuit). (FFCL 2.10) TrafficZ, Inc. and Thought Convergence were purchasing substantially all of NI's assets pursuant to the Securities Exchange Agreement. (FFCL 2.10) The purchase price was \$16,000,000 in cash, as well as 22,927,989 shares of TCI common stock. (FFCL 2.10)

B. THE FIRST PAYMENT IS MADE UNDER THE SRC AGREEMENTS, AND NI WITHHOLDS TAXES AND TREATS THE PAYMENT AS WAGES.

In May of 2008, NI made the first payment pursuant to the

SRC Agreements. (FFCL 2.15)² That payment appeared on the Plaintiffs' W2s as wages for the year 2008. (FFCL 2.15) The employees paid federal income tax (FICA), Social Security, and Medicare tax on the full amount of the payments under the SRC Agreements. (FFCL 2.15)³

On May 1, 2009, TCI filed litigation against Jay Westerdal, Ray Bero, Cameron Jones, and Per Westerdal (Jay Westerdal's father) in California. (FFCL 3.1) The litigation asserted, among other things, that Jay Westerdal had violated his non-compete, had breached his fiduciary duty, and paid himself an improper salary. (FFCL 3.1) NI was not named as a defendant in the initial lawsuit. No prayer for rescission was made in the lawsuit. (FFCL 3.1)

By the end of May 2009, NI had received the full amount of

2 Appellants have challenged FFCL 2.15, but it appears appellants are not challenging the first or second sentence of this paragraph. Rather they are challenging the court's conclusion that the "cash payments under the SRC Agreements were 'wages' as that term is defined in RCW 49.48 et seq. and RCW 49.52 et seq. because it is compensation arising out of the employment relationship." Regardless, the first two sentences of FFCL 2.15 should be treated as "verities on appeal" because appellants do not cite to the record in support of the challenges. *In re Estate of Pflagher*, 35 Wn.App. 844, 845 n.1 (1983).

3 Appellants now submit testimony adduced at trial to claim the withholding was a "mistake." Appellants' Brief at p. 6. This testimony should be disregarded because it was not before the trial court on summary judgment. RAP 9.12.

the first Post Closing Payment identified in Article I, para. 1.2(b) of the Securities Exchange Agreement. (FFCL 3.3) No adjustments were made to that Post Closing Payment. (FFCL 3.4)

C. NI REFUSES TO MAKE THE SECOND PAYMENT, NECESSITATING THIS LAWSUIT.

On August 4, 2009, plaintiffs commenced this lawsuit. (FFCL 4.1) In late 2009 the Plaintiffs brought a motion for partial summary judgment. (CP 15-24) Defendants responded that summary judgment was improper, because then pending California litigation between NI and Thought Convergence Inc. might require a "Post-Closing Adjustment" which would change the amounts owing to Plaintiffs. (FFCL 4.2; CP 137-151) On December 17, 2009, the trial court rejected that argument. (FFCL 4.2) On March 8, 2010, pursuant to CR 54(b), the trial court entered a partial summary judgment on the May 2009 installment payment. (FFCL 4.2) The judgment amount was for the full amount of the May 2009 installment payment. (FFCL 4.2) The judgment was paid on March 11, 2010. (FFCL 4.2)

D. NI REFUSES TO MAKE THE THIRD (MAY 2010) PAYMENT.

The final installment payment to the employees was due on

May 2, 2010. (FFCL 4.3) By that time, all litigation had been resolved between NI, Westerdal, and TCI. (FFCL 4.3) As a result of the settlement, the only adjustment to the Post Closing Payments was a reduction in the amount TCI paid NI for the second Post-Closing Payment (i.e. the third payment under the Exchange Agreement). (FFCL 4.3) Instead of TCI paying \$5,000,000 in cash, NI and TCI agreed that the payment would be reduced downward to \$4,875,000. (Tr. Ex 107) This reduction resulted in an adjustment of -\$125,000 from the gross payment amount of \$5,000,000. \$125,000 is .025% of \$5,000,000. (FFCL 4.3)

Appellants did not make the payment on May 2, 2010. (FFCL 4.4) Rather, on May 7, 2010 Plaintiffs received a check for less than the amount owed with an explanation from counsel that a \$400,000 "Post Closing Adjustment" had resulted in a *pro rata* \$14,046.00 reduction in the amount collectively owing plaintiffs. (FFCL 4.4) The check was tendered as "full settlement of the pending dispute."⁴ (FFCL 4.4)

The employees rejected the check because it was not

⁴ At the time, Carl Taylor was a plaintiff in the action and the total payment owing to the plaintiffs for the May 2010 payment was \$175,573. \$14,406 is eight percent (.08%) of \$175,573.

unconditional and attempted to change the terms of the SRC Agreements; it contained the language "Final Payment & Full Settlement" on the memo line. (FFCL 4.5) Subsequently, on May 24, 2010, twenty two days after the payment was due, Plaintiffs received another check from NI (for \$134,000) identified as a "Good Faith Partial Payment rest to be determined by court."⁵ (FFCL 4.5) This was the first unconditional tender of the third payment. (FFCL 4.5) The difference between the amount tendered and the amount owing was \$11,007.

E. THE TRIAL COURT ENTERS SUMMARY JUDGMENT TO THE EMPLOYEES ON THE BREACH OF CONTRACT CLAIM FOR THE THIRD PAYMENT.

In December 2010 the trial court entered summary judgment in favor of the employees, finding that Name Intelligence was not entitled to withhold any sums from the amounts specified in the SRC Agreements and awarding the difference (\$11,007) based on the doctrine of *res judicata*. (CP 412-14)

⁵ Carl Taylor ceased to be a plaintiff between the May 7, 2010 conditional tender and the May 24, 2010 partial tender. \$11,007 is (.076%) of \$145,007.

F. THE TRIAL COURT FINDS THAT FAILING TO PAY THE THIRD PAYMENT FOR 22 DAYS IS NOT "WILLFUL WITHHOLDING".

At the close of the appellants' case the plaintiff employees moved for judgment as a matter of law on the issue of willful withholding. (RP 1/31 p. 297-299) The trial court denied the motion. After closing arguments, the trial court found that a 22 day delay in making the third payment was not "willful withholding". (FFCL 4.6) The trial court found that \$11,007 of the third payment was willfully withheld when it was not tendered with the May 24, 2010 payment and awarded exemplary damages on \$7,381.82 of that amount.⁶

VI. ARGUMENT FOR ANSWERING BRIEF

A. The payments owing to the employees pursuant to the SRC Agreements are "wages" under RCW 49.48 et seq. and RCW 49.52 as a matter of law.

- i. Washington courts interpret RCW 49.48.030 broadly to define wage as any type of compensation which is a byproduct of the employment relationship.

The purpose of the wage statutes is to see that employees are paid the full amount of the wages to which they are entitled, and

⁶ The trial court also found that \$3,625.18 of the \$145,007 was subject to a bona fide dispute. Although cross-appellants disagree with this finding based on principles of *res judicata* briefed at the trial court, they are not pursuing affirmative relief on this issue on appeal.

the statutes are liberally construed to advance the legislature's intent to protect employee wages and ensure payment. *Dice v. City of Montesano*, 131 Wn.App. 675, 689, 128 P.3d 1253, 1260 (2006); *Bates v. City of Redmond*, 112 Wn.App. 919, 939, 51 P.3d 816, 827 (2002); *Morgan v. Kingen*, 141 Wn.App. 143, 152, 169 P.3d 487, 492 (2007).

RCW 49.46.010 provides that "wage" means "compensation due to an employee by reason of employment, payable in legal tender..." RCW 49.46.010(2).⁷ Washington courts "have treated compensation as wages in a number of contexts requiring that the term [wages] be construed broadly." *McGinnity v. AutoNation, Inc.*, 149 Wn.App. 277, 284 (Div. 3 2009). The term "wages" is not limited to mean merely wages or salary for work performed but also includes any type of compensation due by reason of employment. *Bates* at 940.

Washington courts have interpreted RCW 49.48.030 broadly....these cases demonstrate that awards for attorney fees under RCW 49.48.030 are not limited to judgments for wages or salary earned for work performed, but, rather, that attorney fees are recoverable...whenever a judgment is obtained

⁷ RCW 49.48.082(10) adopts this definition of wage: "'Wage' has the meaning provided in RCW 49.46.010."

for any type of compensation due by reason of employment.

Id. (citations omitted, emphasis added). “[C]ompensation...applies to any form of compensation that is a byproduct of the employment relationship.” *Durand v. HIMC Corp.*, 151 Wn.App. 818,831 (Div. 2 2009) *citing Dice v. City of Montesano*, 131 Wn.App. at 689. [T]he rule [is] 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.’”. *Mcginnity, supra*, 149 Wn.App. at 284. There is no dispute that the employees were entitled to the payments under the SRC Agreements on account of having been employed by NI; but for their employment they never would have been offered or signed the Agreements.

Appellants have taken the position (without citation to Washington authority) that “stock options” are not “wages” under Washington law. This argument (1) ignores clear Washington precedent construing the definition of “wages” broadly; and (2) more importantly, ignores the fact that Plaintiffs were not claiming a right

to “stock options”, but rather cash compensation identified and owing under the SRC Agreements.⁸

When the employer and the employees executed the SRC Agreements, the employees obtained a right to installment payments of definite sums of money, on specific dates. This was “compensation” that was a byproduct of the employment relationship – no different than a deferred compensation or commission agreement which provides for payments in the future. As the Court ruled in a final, certified judgment under CR 54(b), the payments were unconditional.

⁸ Appellants repeatedly mischaracterize the trial courts’ holding by stating that it held that “stock rights themselves were not ‘wages.’” See e.g. Appellants’ Opening Brief at p. 19. This is incorrect. The Court held that stock *options* are not wages, but found that that the compensation at issue in this case *is* wages. (FF 2.15: “The court found that stock options are not wages but that the cash payments under the SRC Agreements were ‘wages’”...) The implied holding, therefore, is that the compensation at issue in this case was not in the form of stock options.

However, even if this Court were to consider the characterization of stock options under the wage statutes it should find they constitute wages. See e.g. *New Jersey Ass’n of School Adm’rs v. Shundler*, 999 A.2d 535, 546 (N.J. 2010)(“An employee’s compensation includes...**stock option plans**...”); see also *Shacter v. Citi Citigroup, Inc.*, 218 P.3d 262, 268 (Cal. 2009)(restricted stock constituted a “wage” within meaning of wage statute); *Kim v. Citigroup, Inc.* 856 N.E.2d 639,646 (Ill.App.3d 2006)(“restricted stock constituted “compensation” within the Wage Act).

- ii. It is undisputed that the payments under the SRC Agreements were a byproduct of the employment relationship, were not discretionary, and were for fixed sums due on particular dates.

Appellants spend a great deal of time explaining why stock rights and discretionary payments are not wages. This is a red herring, as the employees never claimed a right to delivery of stock or stock rights from their employer, and there is nothing discretionary about the amounts or dates the cash payments were due. Rather, each SRC Agreement provides for a specific amount of cash (not based on any type of valuation) on a specific date. (See SRC Agreements, Tr. Exs. 3, 4, 5 at p. 2). Appellants point to no provision or term of any SRC Agreement that makes such a payment discretionary. To the contrary, the trial Court's grant of partial summary judgment in December 2009, and CR 54(b) certification of such judgment in February of 2010, expressly rejected the Appellants' claims that they had discretion to withhold payment. (CP 235-237, 241-242).

- iii. The parties treated the payments under the agreement as taxable wages for purposes of FICA, and the employees paid the employee share of Medicare and Social Security Tax.

Additionally, NI treated the payments under the agreement as taxable wages for purposes of FICA. It is undisputed that the employees paid the employee share of Medicare tax (withheld by the Appellants) on the entire amount of their income for 2008 – including the payments under the SRC Agreements. (CP 293, 308, 318). 26 U.S.C. § 3101 provides as follows:

In addition to the tax imposed by the preceding subsection [Social Security taxes], there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment...(6) with respect to wages received after December 31, 1985, the rate shall be **1.45 percent**.

26 U.S.C. § 3101 (b) (emphasis added).

NI, through its corporate representative, conceded that Medicare withholdings are applied to wages, not stock:

Q: When you say it was for stock, why would it – what's the significance of the fact that it was for stock in your mind?

A: **Well, stock is much different from salary and is taxed differently, much differently.**

Q: How is it taxed differently?

A: There is a lot of other taxes you pay on wages.

Q: Well, like what?

A: Social security.

Q: What else?

A. Medicare. There are other federal withholdings.

(CP 273) The tax treatment of the 2008 SRC Agreement payment as wages is *additional* evidence of the treatment of the amounts owing as wages.

iv. The cases cited by Appellants are distinguishable and do not limit Washington's broad interpretation of the definition of wage.

Appellants, without citation to any authority or evidence in the record, continually assert that the payments under the SRC Agreements were "based on the value of NI". This is incorrect and without support. The payments owing were simply defined sums on defined dates and were agreed to in advance. Because the employees never claimed stock rights or options as wages, the cases cited by appellants are inapposite. *Guiry v. Goldman, Sachs & Co*, 31 A.D.3d 70, 73, 814 N.Y.S.2d 617, 619 (2006) was a dispute over the right to receive stock and options. The court held

that unvested rights do not constitute wages. In so holding, the New York court relied on a New York state statute that defined “wages” as “the earnings of an employee for labor or services rendered...”. Cf. RCW 49.46.010 (“wage” means “compensation due to an employee by reason of employment, payable in legal tender...”)

Similarly, *IBM v. Bajorek*, 191 F.3d 1033 (9th Cir. 1999) holds that stock options are not wages. This holding is based directly on the wording of the California wage statute, Cal. Lab. Code § 200 (1989) which provides that wages are “all *amounts* for labor performed by employees...” *Bajorek*, 191 F.3d at 1039 (emphasis added). The *Bajorek* court explains: “Stock options are not ‘amounts.’ They are not money at all.” *Id.* In this case, however, the payments under the SRC Agreements were for specific amounts of *money*, not options.

Likewise, *Coulombe v. Total Renal Care Holdings, Inc.*, 2007 WL 1367601 (W.D. Wash. 2007) did not involve an agreement by an employer to pay a specific amount of cash compensation. Rather, it involved the earlier return of stock options, without further consideration, to an employer. In this case, the employer and employees agreed to change the *form* of compensation from stock

rights to cash. Once that agreement was made, it was not discretionary.

B. The Trial Court did not Err in Awarding Attorney Fees and Litigation Expenses under RCW 49.48.030 and RCW 49.52.070; additionally attorney fees were appropriate under *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 839 (2004).

- i. The prevailing employees are entitled to attorney fees and litigation expenses pursuant to the wage claim statutes.

Appellants apparently concede (as they must) that to the extent the compensation at issue in this case is “wages”, attorney fees are appropriate pursuant to RCW 49.48.030.

In addition to the provision for reasonable attorneys’ fees, RCW 49.52.070 provides recovery for costs of suit. See RCW 49.52.070 (“shall be liable... [for the] costs of suit”); see also RCW 49.46.090(1). “Costs of suit” includes more than just statutory costs. See e.g. *Panorama Vill. Condo. Owners Ass’n Bd. Of Dirs. V. Allstate Ins. Co.* 144 Wn.2d 130, 144 (2001)(discussing the definition of “reasonable attorneys fee” when fees are awarded based on a public policy to make the prevailing litigant whole):

It is the purpose of the Olympic Steamship exception to make an insured whole when he is forced to bring a lawsuit...[to make such

plaintiffs whole, “reasonable attorney fees” must, by necessity, contemplate expenses other than merely the hours billed by an attorney. [The plaintiff] must therefore be compensated for all of the expenses necessary [to prevail] as part of those attorney fees which are reasonable. Failure to reimburse expenses would often eat up whatever benefits the litigation might produce and additionally impose a backbreaking burden upon the small, but justified litigants.

Similarly, RCW 49.48.030 and 49.52.070 are remedial in nature, and must be liberally construed in favor the employees.

- ii. The prevailing employees are entitled to attorney fees and litigation expenses pursuant to the wage claim statutes.

What Appellants fail to address is that even assuming *arguendo* that the compensation is not “wages” under RCW 49.48 et seq.; the employees are contractually entitled to their attorney fees as the prevailing parties.

Appellants asserted the Security Exchange Agreement as a defense to the employees’ breach of contract claim, arguing that the terms in Exchange Agreement relating to “post-closing adjustments” served as a complete defense to the employees’ lawsuit. In their Answer, appellants pleaded that the employees’ claims were:

subject to the Securities Exchange Agreement and outcome of the lawsuit filed by Thought Convergence, Inc. and Name Intelligence, LLC against NI, Inc. and Westerdal in the United States District Court, Central District of California, Case No. CV 03088-R (AJWx).

(CP 8-14 at ¶ 2.10). In response to the employees' first Motion for Partial Summary Judgment, appellants again made this argument:

Additionally, the Exchange Agreement is the central focus of an ongoing separate lawsuit in the Central District of California. **As such, the amount of payment, if any, to the Plaintiffs under the SRC Agreements will be impacted by the judgment rendered in that California case and remains a genuine issue of material fact. Therefore, payment, if any, to the Plaintiffs under the SRC Agreements is not due at this time and the Defendants have not breached the SRC Agreements.**

(CP 146). This argument was rejected by the trial court on December 17, 2009:

The Motion is granted in part as to partial breach of the SRC Agreements. The motion is denied in part as to claims under RCW 49.52 *et seq.* and RCW 49.48 *et seq.* as issues of fact remain.

(CP 276). On February 16, 2010 the trial court further decreed that Name Intelligence, Inc. "breached the SRCs [*sic*] Agreements by

failing to pay the Plaintiffs the payment due on May 2, 2009.” (CP 279).

The Securities Exchange Agreement contains a prevailing party attorney fee clause that reads in part:

Recovery of Fees by Prevailing Party. If any legal action...is brought relating to this Agreement or the breach or alleged breach hereof, the prevailing party in any final judgment...shall be entitled to the full amount of all reasonable expenses, including all court costs...and actual attorneys' fees paid or incurred.

(CP 184). Attorney fees and costs are awarded to a prevailing party even when the contract containing the attorney fees provision is held (as it was in this case) inapplicable to the party, if the contract is central to the losing party's defense. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 839 (2004).

VII. ARGUMENT FOR CROSS APPEAL

THE TRIAL COURT ERRED WHEN IT (1) REFUSED TO ENTER SUMMARY JUDGMENT THAT THE MAY 2010 PAYMENT UNDER THE SRC AGREEMENTS WAS INTENTIONALLY WITHHELD AND (2) CONCLUDED THAT A 22 DAY DELAY IS NOT “WILLFUL WITHHOLDING” AS A MATTER OF LAW.

RCW 49.52.070 provides that any employer and any officer of

any employer who violates RCW 49.52.050(1) or (2) shall be liable for “twice the amount of the wages unlawfully...withheld” plus costs of suit and attorney’s fees. RCW 49.52.050(2) is violated if an employer pays an employee a lower compensation than the employee is entitled to by contract. These statutes reflect a strong policy in favor of ensuring that employees receive the full amount of compensation to which they are entitled. *Morgan v. Kingen*, 141 Wn.App. 143, 152 (2007)

An employer’s or agent’s act is willful and double damages are recoverable if it is volitional, that is, he knows what he is doing, intends to do what he is doing and is a free agent. *Morgan* at 152-153. There is no dispute that NI and Jay Westerdal intentionally failed to pay the Plaintiffs.⁹

Prior to trial, the plaintiff-employees moved the trial court for an Order of Summary Judgment on the issue of willful withholding for the May 2010 payment as well. (CP 243, 250) The trial court denied the plaintiff-employees’ Motion for Summary Judgment on

⁹ Defendant Jay Westerdal is personally liable to the cross-appellants because, as provided for in RCW 49.52.050(2), he is an officer and agent of NI and he personally caused the withholding of the wages.

the issue of willful withholding. (1/26 RP p. 32).¹⁰ After trial, the court found that “making a payment twenty two days after the deadline is not “willful withholding” under RCW 49.52. (RP 1/31 p. 336; FFCL 4.6).

This Court has discretion to review the denial of a motion for summary judgment where there are no genuine issues of material fact. *S & K Motors, Inc. v. Harco Nat. Ins. Co.* 151 WN.App. 633, 639 (Div. 1 2009). This Court reviews a trial court’s conclusions of law de novo. *Sunnyside Valley Irrigation Dist. V. Dickie*, 149 Wn.2d 873, 880 (2003). Under either analysis the same legal issue is presented.

The May 2010 payment was due on May 2, 2010. This was almost two months after the Court had entered a CR 54(b) final judgment rejecting NI’s argument that the Security Exchange Agreement was a defense to full payment of the amounts in the SRC Agreements. The judgment had not been appealed – and in fact had been paid. Nonetheless, NI and Westerdal did not honor the Court’s final ruling. Rather than unconditionally tendering the amounts owed under the agreement on May 2nd, 2010, they

¹⁰ Technically the trial court “reserved ruling” on this issue.

tendered a check for less than the full amount, conditioned on "Final Payment & Full Settlement" on May 7, 2010. This term does not exist in the SRC Agreement, and was not required to be accepted by the Plaintiffs.

It was only on May 24, 2010 that an unconditional tender of the partial payment under the SRC Agreements was made – and this was still for less than the undisputed amounts set forth in the Agreements. (FFCL 4.5)

As of March 8, 2010, the law of the case was that NI was not permitted to offset "Post-Closing Adjustments" against payments owing under the SRC Agreements. Reasonable minds cannot differ that failure to make a complete and unconditional payment on time (which was the subject of extensive litigation including a partial judgment on the same issue entered only months before) constitutes willfulness, entitling the employees to double the amount of the wages due at the time. See *e.g. Backman v. Northwest Pub. Center*, 147 Wn.App. 791, 797-798 (Div. 1 2008):

Here, the material facts are not in dispute. Applying the terms of the contract, [the employer] Northwest paid [the former employee] the second half of his October commissions five weeks late, his November

commissions a month late, and some of his December commissions two weeks late. [The employer] argues its actions were not willful because the timing of payments was the subject of a bona fide dispute. According to [The employer], once [the employee] quit, Northwest could not recover commissions if advertisers failed to pay by withholding the amount from future commission payments, and the "only reasonable way" the publisher could enforce the recovery term of the contract was to defer paying [the employee's] commissions until payments were received from advertisers.

But Northwest wrote the contract, which fails to account for the circumstances of termination of employment, and the company offers no authority suggesting it may unilaterally change the payment terms once the employment relationship ends. **Northwest's decision to alter the contract and the parties' past practice to its own benefit does not create a fairly debatable dispute. The company acted with knowledge and intent when it failed to adhere to the payment schedule established by the contract. Its actions were willful. [The employer] violated RCW 49.52.050(2). [The employee] is therefore entitled to twice the amount of wages unlawfully withheld, costs, and reasonable attorney fees. RCW 49.52.070.**

The facts of the instant case are even more egregious than the facts of *Backman*. The employer in *Backman* had not already had its reasons for delay in payment rejected by a court. In this case NI and Westerdal had already lost their argument relating to "Post-Closing

Adjustments” when they brazenly withheld payment *again*, audaciously deducting amounts which the Court has already ruled inappropriate.

In *Backman*, the Court found a delay in payment of only two weeks was sufficient to invoke double damages. In this case NI (and Westerdal) delayed the first payment by over ten months, and then delayed the second payment twenty two days (three weeks) after the payment was due. The employees are entitled to twice the amount of compensation unlawfully withheld on May 2, 2010 (\$145,007) as a matter of law.

VIII. ATTORNEYS’ FEES ON APPEAL

Pursuant to RAP 18.1, the cross-appellants request that this Court award them attorneys’ fees on appeal. “In general, a prevailing party who is entitled to attorney fees below is entitled to attorney fees if he prevails on appeal.” *Martin v. Johnson*, 141 Wn.App. 611, 623 (2007). Because the cross-appellants were entitled to attorneys’ fees in the trial court for the reasons given above, they should also receive fees for the cross-appeal.

IX. CONCLUSION

Washington law protects employees from employers who

delay or refuse the payment of wages. The cash payments identified in the SRC Agreements were nondiscretionary compensation arising out of the employment relationship, and are therefore wages. The trial court's ruling regarding wages should be affirmed.

The trial court erred in failing to award exemplary damages on the amounts wrongfully withheld for 22 days for the May 2010 payment. This Court should reverse in part, and remand the matter for entry of a judgment of double damages on the May 2010 payment.

RESPECTFULLY SUBMITTED this 12th day of September 2011.



Joseph A. Grube, WSBA #26476
Karen K. Orehoski, WSBA #35855
Ricci Grube Breneman, PLLC
Attorney for Appellants

CERTIFICATE OF SERVICE

I, Joseph A. Grube, certify that all at times mentioned herein I was and now am a citizen of the U.S. and a resident of the State of Washington, over the age of 18 years, not a party to this proceeding or interested therein, and competent to be a witness therein. My business address is that of Ricci Grube Breneman PLLC, 1200 Fifth Avenue, Suite 625, Seattle, Washington 98101. On September 12, 2011, I caused a copy of the foregoing BRIEF to be served on the following parties:

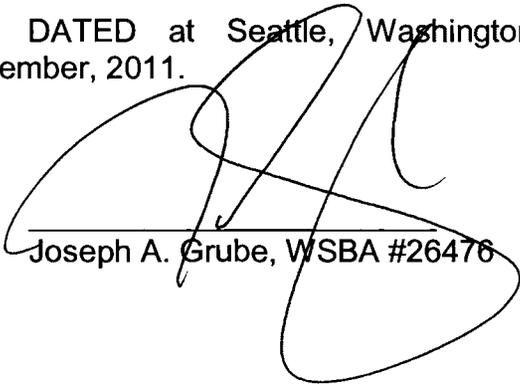
Via LEGAL MESSENGER:

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I DECLARE UNDER PENALTY OF PERJURY UNDER WASHINGTON LAW THAT I HAVE READ THIS DECLARATION, KNOW ITS CONTENTS, AND I BELIEVE THE DECLARATION IS TRUE.

DATED at Seattle, Washington this 12th day of September, 2011.



Joseph A. Grube, WSBA #26476