

67034-4

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No. 67034-4-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SHAUN LACOURSIERE, a single individual,
Plaintiff/Appellant/Cross-Respondent,
v.

CAMWEST DEVELOPMENT, INC., a corporation organized under
Washington law, and ERIC H. CAMPBELL, an individual,
Defendants/Respondents/Cross-Appellants.

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

James M. Shore, WSBA #28095
Karin D. Jones, WSBA #42406
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
(206) 624-0900

Attorneys for
Defendants/Respondents/Cross-
Appellants CamWest
Development, Inc. and
Eric H. Campbell

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I. INTRODUCTION

Plaintiff/Appellant/Cross-Respondent Shaun LaCoursiere (“LaCoursiere”) claims that his former employer, Defendant/Respondent/Cross-Appellant CamWest Development, Inc. (“CamWest”) and its President, Eric Campbell (collectively, “Defendants”), violated Washington’s Wage Rebate Act, RCW 49.52 *et seq.*, with respect to certain discretionary bonuses issued to LaCoursiere. The parties agree that this case presents no genuine issues of material fact, representing a pure issue of law for the Court’s review. The Superior Court correctly determined, as a matter of law, that CamWest and Mr. Campbell did not violate the Act.

CamWest and Mr. Campbell respectfully request that this Court affirm the Superior Court’s dismissal of LaCoursiere’s claims. As discussed below, the bonuses at issue in this litigation did not involve the type of compensation the Wage Rebate Act was crafted to address, but instead constituted mere gratuities outside the scope of the Act. In addition, LaCoursiere entered into a written employment agreement (“Employment Agreement”) with CamWest, which included provisions governing the manner in which the bonuses were issued. LaCoursiere voluntarily agreed to these terms through the Employment Agreement and

accepted the benefits of the Agreement without protest over the course of several years. LaCoursiere's knowing submission to the actions of which he now complains bars his claims under the Wage Rebate Act.

CamWest and Mr. Campbell cross-appeal the Superior Court's denial of their Motion for Costs and Attorneys' Fees pursuant to the Employment Agreement's fee-shifting provision. LaCoursiere's characterization of this lawsuit as a Wage Rebate Act case does not alter the fact that the Employment Agreement was central to the parties' dispute, triggering the Agreement's fee-shifting provision. Therefore, CamWest and Mr. Campbell seek reversal of the Superior Court's denial of its Motion and remand for the determination of an appropriate award of contractual costs and attorneys' fees.

II. ASSIGNMENT OF ERROR

The Superior Court should not have denied Defendants' Motion for Costs and Attorneys' Fees. As the prevailing parties, CamWest and Mr. Campbell are entitled to their reasonable costs and attorneys' fees pursuant to LaCoursiere's contractual agreement with CamWest.

III. STATEMENT OF THE CASE

CamWest specializes in the construction of new homes in King and Snohomish Counties, with Mr. Campbell serving as its President. CP

159 (¶ 1). LaCoursiere commenced his employment as an Assistant Project Manager with CamWest in approximately May 2003. CP 52 (16:10-12), 161 (¶ 5). On January 1, 2005, CamWest promoted LaCoursiere to the position of Project Manager, entering into the written Employment Agreement with LaCoursiere that governed his new terms of employment. CP 97 (¶ 3), 102-09, 161-62 (¶ 6).

A. The LLC Bonus Structure

Pursuant to Section 2.2 of the Employment Agreement, LaCoursiere agreed to participate in and benefit from a discretionary bonus structure (“the LLC Bonus Structure”) associated with membership in CamWest Managers, LLC (“the LLC”). CP 102-03 (§ 2.2). The LLC is a separate entity from CamWest. CP 4 (¶¶ 4-5), 159-60 (¶ 2). Its primary purposes are to loan money to CamWest for real estate investment and to provide a return to its members. CP 159-60 (¶ 2), 177-78 (§§ 2.2, 3.3). The LLC’s members consist of CamWest employees (primarily management employees) who have chosen to acquire membership interests in the LLC. CP 159-60 (¶ 2).

The LLC Bonus Structure in which LaCoursiere agreed to participate involves the payment of a discretionary bonus to CamWest’s Project Managers based upon employee performance and CamWest’s

construction profits. CP 102-03 (§ 2.2), 160 (¶ 3). If CamWest exercises its discretion and decides to issue a bonus to a Project Manager under the LLC Bonus Structure, the bonus is calculated and paid as follows:

- The Project Manager's performance for the year is rated on the basis of several criteria, and the Project Manager is assigned a score based upon that performance rating;
- CamWest credits the Project Manager with a percentage of the net profits generated by projects managed by the Project Manager that year;
- CamWest credits a percentage of the same net profits to a "pool" of funds;
- The Project Manager is credited with a pro rata share of the "Project Manager pool," based upon his performance rating for the year;
- CamWest distributes the resulting bonus amount to the Project Manager, with 44% of the bonus issued as a direct payment to the employee;
- The remaining 56% of the bonus is contributed to the Project Manager's capital account in the LLC.

CP 102-03 (§ 2.2), 160 (¶ 3). Although the LLC Bonus Structure calls for a 44%/56% split of distribution between direct payment to the employee and capital contribution to the LLC, Mr. Campbell has often directed, at his discretion, that a percentage of the total bonus amount greater than 44% be paid directly to the Project Manager in order to provide the

employee with a larger cash payment. CP 160-63 (¶¶ 3, 7, 9, 10), 214-16, 220-22, 226-28.

Once the Project Manager makes his first capital contribution to the LLC, as described above, he acquires a membership interest in the LLC. CP 160-62 (¶¶ 3, 8), 169-208. That interest is subject to a vesting schedule set forth in the Limited Liability Company Agreement of CamWest Managers, LLC (“the LLC Agreement”). CP 160-61 (¶ 3), 195-96 (§ 12.4). A new member’s membership interest in the LLC is 20% vested upon the member’s first capital contribution. CP 160-61 (¶ 3), 195 (§ 12.4.1). After the first anniversary of membership in the LLC, the individual’s membership interest is 40% vested and thereafter vests an additional 20% annually. CP 160-61 (¶ 3), 195-96 (§ 12.4.2-.5).

The above-described LLC Bonus Structure is the standard bonus program offered to Project Managers. CP 161 (¶ 4). However, it is wholly voluntary, and some CamWest employees opt out of the LLC Bonus Structure, choosing to instead receive a pure percentage-of-salary bonus. CP 384-85 (¶ 2), 161 (¶ 4). Participation in the LLC Bonus Structure and membership in the LLC are not requirements of employment with CamWest. CP 384-85 (¶ 2), 161 (¶ 4).

Mr. Campbell initiated the LLC Bonus Structure as a way to provide CamWest employees, who voluntarily elected to participate, with an opportunity to share in hoped-for financial successes. CP 384-85 (¶ 2). The Bonus Structure allowed participants more generous bonuses during successful years than would have been possible under alternate bonus programs, such as percentage-of-salary bonuses. *Id.* Because a percentage of each bonus was invested by the participating employee as a membership interest in the LLC, which thereafter loaned money to CamWest and enabled it to purchase additional real estate for the business, CamWest was financially capable of issuing generous bonuses to its Project Managers. *Id.* Absent the LLC investment component of the bonuses, CamWest would not have issued direct payments in such sizeable amounts to its employees; instead, any discretionary bonuses paid directly to the employees would have been markedly smaller. *Id.*

B. The Employment Agreement

Senior Project Manager Kelley Moldstad met with LaCoursiere to provide him the Employment Agreement associated with his January 2005 promotion to a Project Manager position. CP 54 (23:5-10) 97 (¶ 3). At that time, Mr. Moldstad discussed with LaCoursiere the LLC Bonus Structure set forth in Section 2.2 of the Employment Agreement, including

the vesting schedule and the percentages allocated between direct bonus payments and LLC contributions. CP 60 (47:13-20), 61 (50:1-4), 97 (¶ 3). LaCoursiere did not raise any objections to the Bonus Structure at that time, nor did he request to opt out of the Bonus Structure. CP 57 (33:19-21, 35:19-21), 60 (47:25-48:6), 97-98 (¶¶ 3, 7). At his deposition in this matter, LaCoursiere acknowledged that Mr. Moldstad would have taken time to answer any questions LaCoursiere had regarding the Employment Agreement. CP 55 (25:21-24); *see also* CP 97-98 (¶¶ 3, 7).

LaCoursiere reviewed and voluntarily signed the Employment Agreement. CP 54 (23:16-17), 55 (5:11-12), 59 (44:4-9), 97 (¶ 3), 107-09. He testified that he did not need more time to review it, and he “was never threatened [in] any way to sign.” CP 58 (37:25-38:1), 60 (48:9-10); *see also* CP 97 (¶ 3). LaCoursiere’s counsel admitted to the Superior Court that LaCoursiere “didn’t have to sign the employment agreement.” RP 44:3-4. LaCoursiere acknowledges that he “was interested in receiving bonuses” when he signed the Employment Agreement. CP 54 (24:19-21).

Q: Had you not been in the LLC as a member, do you feel you would have received these bonuses?

A: It was my understanding I had to be a member of the LLC.

Q: So that was something that appealed to you, correct, being a member of the LLC and being more highly compensated?

A: By being a member of the LLC, you received profit-sharing bonuses off homes closed.

Q: Was that something you wanted?

A: Yes, I would like to receive bonuses. I worked very hard there, and that was part of our reason for working hard.

CP 65 (65:8-19) (emphases added).

Q: Why did you sign your employment contract? . . . When you became Project Manager.

A: I was encouraged to sign that employment contract to become project manager at CamWest Development.

Q: Was that something you wanted to do?

A: I wanted to become, you know, a higher up in the company, yes.

Q: Okay. And were those the same reasons why you signed on to the LLC agreement?

A: Yeah, for the most part.

CP 70 (86:14-24) (emphases added).

By entering into the Employment Agreement, LaCoursiere acknowledges that he agreed to the LLC Bonus Structure, including the

distribution of a percentage of the discretionary bonus to the LLC as a capital contribution. CP 57-58 (33:9-21, 36:21-37:3), 63 (57:17-23).

C. Discretionary Bonuses Issued to LaCoursiere

On March 15, 2006, CamWest issued a discretionary bonus to LaCoursiere for work performed in the year 2005, pursuant to the LLC Bonus Structure to which LaCoursiere had agreed. CP 58 (39:17-18), 162 (¶ 7), 212, 214-16. The total bonus amount before federal income tax withholdings was \$121,021.00. CP 6 (¶ 16), 58 (39:17-18), 162 (¶ 7), 212, 214-16. Of that amount, CamWest issued \$49,961.80 (41.28%) as a contribution on behalf of LaCoursiere to the LLC. *Id.* CamWest paid LaCoursiere directly in the amount of \$30,255.25 (the remaining 58.72% of the bonus minus tax withholdings). *Id.*

Because LaCoursiere's initial capital contribution to the LLC occurred on March 15, 2006, that is the date he first acquired a membership interest in the LLC. CP 162 (¶ 8), 169-208, 212, 214-16; Brief of Appellant, at p. 11. Mr. Moldstad also provided LaCoursiere with the opportunity to review the LLC Agreement at that time, and LaCoursiere signed an Appendix to the LLC Agreement, representing that he had reviewed the Agreement in its entirety. CP 97-98 (¶ 5), 208. LaCoursiere's consent to the terms of the LLC Agreement was a further

prerequisite to his acquisition of a membership interest in the LLC; an individual cannot be a member of the LLC until he or she has become a party to the LLC Agreement by signing the Agreement as reflected in an Appendix. CP 179 (§ 4.2), 183 (§ 6.8).

On March 15, 2007, CamWest issued a discretionary bonus to LaCoursiere for work performed in the year 2006. CP 162-63 (¶ 9), 218, 220-22. The total bonus amount before tax withholdings was \$98,690.00. CP 6 (¶ 17), 162-63 (¶ 9), 218, 220-22. Of that amount, CamWest issued \$40,348.96 (40.88%) as a capital contribution on behalf of LaCoursiere to the LLC. *Id.* CamWest paid LaCoursiere directly in the amount of \$24,672.50 (the remaining 59.12% of the bonus minus tax withholdings). *Id.* In addition, LaCoursiere received payment in the amount of \$3,749.00 for interest accrued on his contributions to the LLC in 2006. *Id.*

In connection with the 2006 and 2007 bonus payments set forth above, Mr. Moldstad met with LaCoursiere to discuss the bonus distributions in detail, including reviewing the paperwork that demonstrated in detail the calculation of the bonuses and their allocation between direct payments and capital contributions to the LLC. CP 61 (51:2-6), 62 (53:17-18), 64 (62:3-17), 97-98 (¶¶ 4, 6). Mr. Moldstad provided LaCoursiere with the checks constituting the direct payments for

his bonuses and additionally provided LaCoursiere copies of the checks representing LaCoursiere's capital contributions to the LLC. CP 62 (56:3-19), 97-98 (¶¶ 4, 6), 11-13, 156-58. LaCoursiere did not raise any objections or concerns regarding his bonuses during these meetings with Mr. Moldstad. CP 61 (51:10-15), 62 (56:20-25), 63 (58:9-59:6), 98 (¶ 7). In fact, LaCoursiere has testified that he "had no reason to object to receiving my bonus" and that he "was happy with receiving a nice bonus." CP 63 (58:12, 58:25-59:1).

Similarly, on March 15, 2008, CamWest issued another discretionary bonus to LaCoursiere for work performed in the year 2007. CP 163 (¶ 10), 224, 226-28. The total bonus amount before tax withholdings was \$31,745.00. CP 6 (¶ 18), 163 (¶ 10), 224, 226-28. Of that amount, CamWest issued \$16,710.36 (52.64%) as a contribution on behalf of LaCoursiere to the LLC. *Id.* CamWest paid LaCoursiere directly in the amount of \$4,444.30 (the remaining 47.36% of the bonus minus tax withholdings). *Id.* LaCoursiere also received a payment of \$7,033.00 for the interest accrued on his capital contributions to the LLC during the year 2007. *Id.* Senior Project Manager J.J. Whorley met with LaCoursiere to review his 2007 bonus, just as Mr. Moldstad had done in the previous two years. CP 63 (59:11-18), 64 (62:3-21), 72-73 (¶ 3).

Again, LaCoursiere did not raise any objections or concerns with respect to his bonus. CP 73 (¶ 4).

Due to the economic downturn, CamWest did not pay any discretionary bonuses pursuant to the LLC Bonus Structure for work performed in the year 2008. CP 66 (71:13-17), 163-64 (¶ 12). LaCoursiere acknowledges that he was never told by CamWest management that he would “receive a bonus every year.” CP 56 (30:18-19). LaCoursiere did receive an interest payment in the amount of \$5,686.00 for interest accrued in the year 2008 on his capital contributions to the LLC. CP 64 (61:20-22), 163-64 (¶ 12), 230.

D. LaCoursiere’s Voluntary Consent to the LLC Bonus Structure

LaCoursiere never complained to anyone at CamWest about the LLC Bonus Structure during the course of his employment. CP 57 (35:19-21), 70 (87:17-20), 73 (¶ 4), 98 (¶ 7), 163 (¶ 11). In fact, when asked at his deposition if he ever made “any complaint to anyone in management at CamWest about anything having to do with [his] employment” prior to his dismissal, LaCoursiere testified: “I don’t believe there was [sic] any significant complaints.” CP 70 (87:17-20). When questioned whether he could have discussed concerns with supervisors at CamWest, LaCoursiere testified: “If I needed to talk to somebody, they

could make themselves available,” referring to his “immediate managers or the appropriate person I needed to talk to.” CP 53 (19:10-19).

LaCoursiere confirmed that Mr. Campbell, as well as LaCoursiere’s immediate supervisors, “would have made time” to speak with him about any problems or concerns if he had requested they do so. CP 53-54 (20:16-21:24); *see also* CP 73 (¶ 4), 98 (¶ 7).

In addition to meeting with a Senior Project Manager to review the details of each bonus payment in detail, LaCoursiere received an annual IRS Form 1065 (“K-1 form”) from CamWest, reflecting income tax withheld with respect to his capital contributions to the LLC. CP 60 (45:7-10), 65 (67:18-68:5), 164 (¶ 14), 232-34. CamWest’s Chief Financial Officer explained the purpose of the K-1 forms and was available to answer any questions regarding the forms. CP 65 (67:18-68:5). LaCoursiere prepared his own tax returns every year during his employment with CamWest. CP 59 (41:7-12), 60 (47:5-10).

LaCoursiere has significant experience in the construction industry and is familiar with contracts. Prior to working for CamWest, LaCoursiere worked for his father, who is a construction contractor, throughout high school and college. CP 51 (11:10-22), 52 (13:8-14). His father was available to provide him with advice regarding the industry.

CP 51 (11:23-25). LaCoursiere also previously worked for Walsh Construction in Seattle. CP 52 (13:19-22). One of LaCoursiere's job responsibilities as a Project Manager for CamWest was to review "many contracts" related to the projects he managed and to handle change orders (amendments to the construction contracts). CP 54 (22:6-18), 55 (26:16-23). In addition, he owns a rental property and prepared the lease agreement himself. CP 58 (38:13-39:3).

E. LaCoursiere's Transfer, Dismissal, and Sale of His Membership Interest

In 2008, the construction industry in the Seattle area severely contracted as a result of the economic recession. CP 66 (69:13-15), 164 (¶ 15). Because of reduced business, CamWest's need for Project Managers declined. CP 164 (¶ 15). Mr. Campbell held a series of meetings with the Senior Project Managers to determine which Project Managers should be retained in their positions. *Id.* They based their determination on the individuals' past job performance and skill sets, with the goal to retain the Project Managers who could be the most successful and adaptive to the radically changing construction industry. *Id.*

Rather than immediately laying off the Project Managers, CamWest chose to transfer the affected employees to Senior Laborer positions, providing them with the option to terminate their employment if

they did not want to accept the change in position. CP 73 (¶ 5), 164 (¶ 16). CamWest initiated two rounds of transfers/layoffs of Project Managers, ultimately reducing the number of Project Managers from approximately 27 to 12. *Id.* LaCoursiere was one of the Project Managers affected by the second round. CP 73 (¶ 5), 165 (¶ 17).

On December 12, 2008, LaCoursiere's supervisor, Mr. Whorley, informed him of the transfer decision. CP 66-67 (71:25-73:1), 73 (¶ 6), 82. LaCoursiere chose to accept the transfer to the Senior Laborer position, rather than ending his employment with CamWest. CP 67 (73:8-10, 74:1-2), 73 (¶ 6). Despite no longer holding a management position, CamWest allowed LaCoursiere to remain a member of the LLC. CP 67 (74:3-6), 165 (¶ 17). As such, he continued to accrue interest on his prior capital contributions and to vest at the specified dates in accordance with the LLC Agreement. *Id.*

However, following his transfer to the position of Senior Laborer, LaCoursiere demonstrated an unacceptable pattern of attendance and punctuality issues. CP 73-74 (¶ 7), 165 (¶ 18). For example, on March 2, 2009, LaCoursiere arrived to work three hours late, despite having been repeatedly counseled by his supervisor on the issue of his reliability. *Id.*

Given LaCoursiere's failure to improve in this area, CamWest terminated his employment on March 6, 2009. CP 73-74 (¶¶ 7-8), 84-90, 165 (¶ 18).

In accordance with the LLC Agreement, when a member of the LLC separates from employment with CamWest, that individual must sell his membership interest to Mr. Campbell, CamWest, or the remaining LLC members. CP 5 (¶ 9), 159-60 (¶ 2), 179 (§ 4.1), 193-200 (§ 12). For purposes of determining the individual's vested membership interest in the LLC, "the purchase and sale [of the membership interest] shall be deemed to have occurred upon the date of the event triggering the purchase and sale." CP 196 (§ 12.4.6). "[I]n the event of the termination of a Member's employment with CamWest [the triggering event] shall be the date of such termination." *Id.* On the date of his termination, March 6, 2009, LaCoursiere's membership interest in the LLC was 60% vested, as "the purchase and sale occur[ed] after the second anniversary, but [shortly] prior to the third anniversary of [LaCoursiere's] date of Membership."¹ CP 195 (§ 12.4.3). Two schedules for payment to a former CamWest employee of the purchase price of the individual's LLC

¹ As discussed previously, LaCoursiere first acquired a membership interest in the LLC when he made his first capital contribution and signed the Appendix to the LLC Agreement on March 15, 2006. CP 162 (¶ 8); Brief of Appellant, at p. 11. CamWest offered LaCoursiere a severance package that would have treated his membership interest as 80% vested, rather than 60% vested. CP 68 (79:20-80:11), 74 (¶ 8), 84-87. However, LaCoursiere rejected that offer. CP 68 (79:12-15), 74-75 (¶ 9).

membership interest are available under the LLC Agreement; Defendants chose to pay LaCoursiere according to the more expedited schedule, even though LaCoursiere was terminated for cause and therefore not entitled to benefit from the accelerated schedule. CP 70 (85:9-11), 165 (¶ 19), 196-98 (§ 12.6), 385-86 (¶ 5). LaCoursiere has received full payment for his 60% vested membership interest. CP 69-70 (84:25-85:15), 165 (¶ 19), 196-98 (§ 12.6), 385-86 (¶ 5).

LaCoursiere did not raise any complaints or concerns about the LLC Bonus structure until after his dismissal from CamWest. CP 57 (35:19-21), 70 (87:17-20), 73 (¶ 4), 98 (¶ 7), 163 (¶ 11). Nor did any of CamWest's other Project Managers raise any complaints regarding the Bonus Structure, including LaCoursiere's own roommate. *See* CP 57 (36:1-13), 165-66 (¶ 20). This was the case even though other Project Managers besides LaCoursiere were let go from their employment prior to the full vesting of their LLC membership interests and were paid out in accordance with the LLC Agreement's vesting schedule. CP 165-66.

F. The Proceedings Before the Superior Court

On May 13, 2009, LaCoursiere filed his Complaint, claiming entitlement to reimbursement for the full amount of his capital contributions to the LLC, claiming that those capital contributions

constituted rebates in violation of the Wage Rebate Act. CP 7-9 (¶¶ 24-30). The parties filed cross-motions for summary judgment on January 21, 2011, with oral argument held before the Superior Court on March 16, 2011. *See* CP 17-44, 235-59, RP 1-70. On March 21, 2011, the Superior Court issued its Order granting Defendants' Motion for Summary Judgment and denying LaCoursiere's Motion for Summary Judgment, dismissing LaCoursiere's case in full. CP 431-33.

In entering into the Employment Agreement, LaCoursiere agreed to the following fee-shifting provision:

If either party brings an action arising under this Agreement, the prevailing party shall be entitled to recover its reasonable costs and attorney fees incurred in connection therewith, whether at arbitration, trial or any appeal therefrom.

CP 106 (§ 8.6). As the prevailing parties, CamWest and Mr. Campbell filed a Motion for Costs and Attorneys' Fees, seeking an award of reasonable costs and fees pursuant to LaCoursiere's contractual agreement with CamWest. CP 498-511. The Superior Court denied the Motion on April 12, 2011. CP 525-26.

LaCoursiere appealed the Superior Court's summary judgment order to this Court, and CamWest and Mr. Campbell filed a timely cross-

appeal of the Superior Court’s denial of their Motion for Costs and Attorneys’ Fees. CP 434-35, 531-32.

IV. ARGUMENT

A. **The Court Properly Granted Defendants’ Motion for Summary Judgment and Denied LaCoursiere’s Motion for Summary Judgment**

The Superior Court correctly determined, as a matter of law, that the LLC Bonus Structure to which LaCoursiere voluntarily agreed did not involve unlawful wage rebates. LaCoursiere appeals only a portion of the Superior Court’s decision, arguing that the Bonus Structure violated subsection (1) of the Wage Rebate Act: RCW 49.52.050(1).² As discussed in detail below, the Superior Court’s decision was correct and should be affirmed by this Court.

1. **Standard of Review**

“When reviewing an order of summary judgment, an appellate court must engage in the same inquiry as the trial court.” *Sun Mountain Prods. v. Pierre*, 84 Wn. App. 608, 616, 929 P.2d 494 (1997) (citing *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990)). “After the moving party shows the absence of material facts, the inquiry

² LaCoursiere has abandoned his argument that the LLC Bonus Structure violated subsections (2) and (3) of the Act. RCW 49.52.050(2), (3); Brief of Appellant, p. 3.

shifts to the party with the burden of proof at trial, the plaintiff.” *Id.*
(citing *Young v. Key Pharms.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989)).
“If the plaintiff then fails to establish the existence of an element essential
to the party’s case, the moving party is entitled to summary judgment as a
matter of law.” *Id.* (citing *Young*, 112 Wn.2d at 225).

In the case at hand, LaCoursiere has acknowledged that “the
material facts seem undisputed,” and that judgment as a matter of law is
appropriate.³ Brief of Appellant, p. 3. The inquiry therefore shifts to
LaCoursiere, who bears the burden of proof at trial, to establish the
existence of all elements essential to his case. *Id.* He has failed to do so.

2. The Wage Rebate Act

The Wage Rebate Act provides, in relevant part:

Any employer or officer, vice principal or
agent of any employer, whether said
employer be in private business or an
elected public official, who

(1) Shall collect or receive from any
employee a rebate of any part of wages

³ The parties dispute certain non-material facts. For example, LaCoursiere incorrectly contends that there is no evidence to support Defendants’ basis for his dismissal from his employment with CamWest in March 2009. Brief of Appellant, p. 19; *but see* CP 73-74 (¶¶ 7-8), 84-90, 165 (¶ 18). However, as LaCoursiere admits: “[T]he reason for the termination is of little import, because this isn’t a wrongful termination case.” Brief of Appellant, p. 19. As LaCoursiere himself points out, these factual disputes are not central to the legal issues presented to this Court. *Id.* at p. 3. There is no genuine issue of material fact precluding judgment as a matter of law.

therefore paid by such employer to such employee

....

Shall be guilty of a misdemeanor.

RCW 49.52.050(1) (emphasis added).

An employee may bring a civil action regarding the above prohibition:

Any employer and officer, vice principal or agent of any employer who shall violate any of the provisions of RCW 49.52.050(1) . . . shall be liable in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of wages unlawfully rebated . . . by way of exemplary damages, together with costs of suit and reasonable sum for attorney's fees: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

RCW 49.52.070 (emphasis added).

3. The LLC Bonus Structure Did Not Involve Unlawful Rebates

The LLC Bonus Structure did not involve unlawful rebates under the Wage Rebate Act for two primary reasons. First, the bonuses did not involve “wages” governed by the Act, due to their discretionary, gratuitous nature. Second, LaCoursiere’s knowing submission to the

terms of the LLC Bonus Structure precludes his recovery of damages for acts to which he readily consented.

Before discussing these two primary issues, however, LaCoursiere's repeated mischaracterization of the LLC Bonus Structure must be addressed. Throughout his appellate brief, LaCoursiere attempts to paint a picture of a nefarious and secretive "scheme" hatched by Defendants to defraud unwitting CamWest employees, which he has dubbed a "smoke-and-mirrors" plot intended to "camouflage" the loans made by the LLC to CamWest. *See* Brief of Appellant, pp. 33-34. LaCoursiere complains that the Employment Agreement and LLC Agreement did not include "any warnings akin to truth-in-lending. There wasn't explanation that the worker wouldn't have any security or collateral, or that he wouldn't actually be a party to the loan transactions" between the LLC and CamWest. *Id.* at pp. 35-36. He further complains that he lost "his" money "and he was left with worthless IOUs. . . . [W]hen the real estate market collapsed, [Defendants] sent the plaintiff packing and refused to give him a full refund. . . . The plaintiff had no security or collateral. He was forced to be an involuntary, unsecured creditor to his own employers." *Id.* at p. 33.

A close examination of the LLC Bonus Structure, the undisputed terms of which are set forth in the record before this Court, reveals that these assertions simply do not reflect reality or the record. There was nothing “hidden” about the LLC’s central purpose: to loan money to CamWest for the purpose of purchasing additional real estate for use in the business. CP 15-60 (¶ 2). This purpose is clearly set forth in the LLC Agreement, which states: “It is understood by all Members that a primary use of the Company’s available capital shall be for loans to CamWest for its use as working capital.” CP 302 (§ 3.3). If this primary purpose was somehow intended to be camouflaged by “smoke-and-mirrors,” rather than to be openly disclosed as the legitimate and above-board business operation that it actually was, it is difficult to understand why this alleged underground “scheme” was plainly spelled out for all to see. CamWest and Mr. Campbell never intended to hide the LLC’s loans to CamWest from LaCoursiere or any other member of the LLC, as there was no reason to do so. Those who voluntarily elected to participate in the LLC Bonus Structure and thus to become members of the LLC, including LaCoursiere, were made fully aware of the purpose of the LLC and the terms of membership – terms to which the participants consented. *Id.* Indeed, at his deposition, LaCoursiere expressed his understanding that the capital

contribution aspect of the Bonus Structure “was a way to help reinvest in the company . . . and stay in business,” which benefitted all CamWest employees. CP 60 (47:11-48:6), 70 (87:9-16) (emphasis added).

LaCoursiere did not have any objections to this concept at the time he agreed to the Bonus Structure. *Id.* This was the case even though LaCoursiere was aware from the beginning of his employment that he was an at-will employee, who “was always at risk of being let go from a job,” something that could occur before his membership interest in the LLC was 100% vested. CP 53 (18:6-19:2), 161, 210.

LaCoursiere’s insinuation that he gained no benefit from the percentage of the bonuses allocated as capital contributions to the LLC is similarly unsupported by the record, as is his suggestion that he lost money because of loans made by the LLC to CamWest. *See, e.g.*, Brief of Appellant, pp. 15, 33-37. LaCoursiere acquired a membership interest in the LLC as a result of his capital contributions. CP 160-62 (¶¶ 3, 8), 169-208. He received annual interest payments on the contributions, and his membership interest vested in a manner explicitly delineated in the LLC Agreement. CP 169-208, 218, 224, 230. Upon the termination of his employment with CamWest, LaCoursiere was reimbursed in full for his 60% vested membership interest, in complete accordance with the terms

of the LLC Agreement. CP 169-208, 384-85 (¶ 2). The LLC, not LaCoursiere, loaned money to CamWest. CP 178 (§ 3.3). LaCoursiere's reimbursement for his vested membership interest was not directly linked to the LLC's loans. *See* CP 185 (§ 8.4.1), 195-97. In other words, LaCoursiere was entitled to, and did, receive reimbursement for his contributions regardless of whether the LLC's loans to CamWest had been repaid. CP 384-85 (¶ 2). It is immaterial under these circumstances whether LaCoursiere himself had any security or collateral for loans that the LLC made to CamWest. LaCoursiere's "loss" of 40% of the capital contributions made on his behalf to the LLC was due to the vesting schedule of his membership interest, as clearly set forth in the LLC Agreement, and had absolutely no relation to loans not yet repaid to the LLC. CP 195-97. This vesting schedule was one of the explicit terms to which LaCoursiere consented when he became a participant in the LLC Bonus Structure. *Id.*

LaCoursiere also misconstrues the underlying purpose of the LLC Bonus Structure. The Bonus Structure was a wholly voluntary program created to benefit those CamWest employees who chose to participate in it by allowing for much more substantial bonuses than would have otherwise been made available to the participants, including LaCoursiere. CP

384-85 (¶ 2). LaCoursiere's arguments before the Superior Court underscore his lack of understanding of this key point, as LaCoursiere asserted that "[h]e had no option under these two contracts to say give me all of my money, I don't want to invest this year. . . . So he couldn't have each year said I opt out or give me my money back." RP 44:18-19, 45:2-3 (emphases added). LaCoursiere actually could have opted out of the LLC Bonus Structure at any time, but he then would have ceased receiving the bonuses issued thereunder. RP 48:1-5. LaCoursiere fails to grasp the critical issue that the money would not have been "his" money if he had chosen not to invest a percentage as a capital contribution to the LLC. The only way CamWest could afford to give its employees the extremely generous bonuses at issue was by allocating a percentage of the sums as capital contributions to the LLC on the employees' behalf. CP 384-85 (¶ 2). LaCoursiere explicitly and voluntarily agreed to the structure of the Bonus Program. He cannot now cherry-pick the portions of the Bonus Structure that favor him and reject the portions to which he has developed retrospective regret.

A careful review of the undisputed record before this Court confirms that the LLC Bonus Structure was far from the alleged scheme belatedly envisioned by LaCoursiere, but instead provided him with

benefits that he gladly accepted during the course of his employment with CamWest.

4. The Sums at Issue Were Not Subject to the Wage Rebate Act

A crucial threshold issue LaCoursiere attempts to circumvent is the fact that the sums at issue were not subject to the Wage Rebate Act, as they were wholly discretionary bonuses that constituted mere gratuities.⁴ LaCoursiere correctly argues that certain discretionary bonuses can fall under the provisions of the Act. Brief of Appellant, p. 28. But the bonuses in this case do not.

As this Court held in *Byrne v. Courtesy Ford, Inc.*: “[T]o be considered compensation, a discretionary bonus must be given regularly to create an implied contract and reliance, otherwise it is a mere gratuity.”

108 Wn. App. 683, 691, 32 P.3d 307 (2001) (emphasis added).

LaCoursiere ignores *Byrne*’s requirement of an implied contract and reliance, instead attempting to apply an entirely new requirement not articulated in *Byrne* or elsewhere in Washington case law. *See id.*

LaCoursiere asserts: “The critical inquiry is whether the bonus is an unexpected ‘gratuity’ unrelated to performance, or, conversely, whether

⁴ See CP 39-41, 363-66, and 411-12 for Defendants’ additional briefing on this issue before the Superior Court.

the bonus is given ‘consistently and repeatedly’ and is based upon performance.” Brief of Appellant, pp. 28-29 (emphasis added). Indeed, LaCoursiere places great emphasis on whether the bonuses he received from CamWest “were based on performance.” *Id.* at p. 29. Defendants have never contended in this litigation that the bonuses lacked a link to LaCoursiere’s performance. That issue, however, is not dispositive, as LaCoursiere claims.⁵ Instead, as *Byrne* clearly articulated, the relevant inquiry is whether the bonuses “created an implied contract and reliance.” *Byrne*, 108 Wn. App. at 691. A discretionary bonus that does not meet this requirement “is a mere gratuity” and is not subject to the Act. *Id.*

The bonuses at issue in this case were just such “a mere gratuity,” as LaCoursiere’s own admissions demonstrate. *Id.* LaCoursiere has repeatedly acknowledged that the issue of whether the bonuses would be paid at all was completely discretionary, admitting: “The defendants had discretion as to whether and when (*i.e.* ‘if’) a bonus would be declared;” “As the corporate President, Mr. Campbell decided whether any bonuses would be given and for how much;” and “The company retained the

⁵ LaCoursiere additionally places undue emphasis on the fact that the bonuses he received were “paid by reason of employment.” Brief of Appellant, pp. 26-27. Again, this is not the critical inquiry regarding the issue of whether a sum is a gratuity or is subject to the Wage Rebate Act. *See Byrne*, 108 Wn. App. at 691.

discretion as to whether and when to award bonuses.” CP 236, 251.

LaCoursiere confirmed that if Defendants had chosen not to declare any bonuses at all, “[t]hat would’ve been their prerogative (or ‘discretion’).” CP 395.

Indeed, payment of bonuses by CamWest was wholly discretionary. *See* CP 160 (¶ 3). The Employment Agreement states: “Provided that Employee is an employee of CamWest at the time of its calculation, if CamWest, in its sole discretion and determination, concludes that such is warranted, in addition to the monthly salary payable to Employee, CamWest shall pay Employee a share of CamWest’s net construction profits” CP 291 (§ 2.2) (emphasis added). The discretionary nature of the bonuses is further demonstrated by CamWest’s decision not to pay any bonuses to its employees for work performed in the year 2008, during the time period LaCoursiere still worked for CamWest. CP 163-64 (¶ 12). Significantly, LaCoursiere explicitly admitted before the Superior Court: “[T]he plaintiff is not seeking a fourth bonus (for 2008 or beyond). The plaintiff is not arguing that an implied contract somehow obligates the defendants to pay him a fourth bonus (either in full, or in a pro rata amount).” CP 394 (some emphasis added); *see also* CP 396 (“The plaintiff isn’t arguing that additional bonuses

should've been declared, nor is he arguing that the gross value of his bonuses should've been higher.”). It is undisputed that CamWest had full discretion to determine whether to pay any bonuses at all and that LaCoursiere did not, in fact, expect to be paid a bonus every year or rely upon an implied contract to that effect. *See* CP 56 (30:18-19), 160, 163, 236, 251, 291, 394-96.

LaCoursiere attempts to evade his clear admissions that no implied contract existed with respect to CamWest’s decision whether to issue bonuses, arguing that “[a]ny extent of discretion ceased once each gross bonus was declared.” Brief of Appellant, p. 29, n.14. LaCoursiere’s assertion that “[w]hether some degree of discretion existed earlier in the chain of events is beside the point” completely ignores *Byrne*’s holding. *Id.* at pp. 30-31, n.14. If there is no actual or implied contract entitling an employee to a particular sum, then the sum is not subject to the Wage Rebate Act. Under LaCoursiere’s reasoning, a sum would be transformed from a gratuity to compensation subject to the Act the moment that the employer made the discretionary decision to give the gratuity to the employee. This would completely nullify the *Byrne* exception. No payment actually made to an employee could ever be determined to be a gratuity, because the employer would first have to make the decision to

issue the payment. This is not what *Byrne* held, nor is it logical. *Byrne* appropriately stands for the proposition that an employer is not subject to civil liability under the Wage Rebate Act when it withholds or retakes gratuities it was never obligated to pay the employee in the first place, either pursuant to an actual contract or an implied contract. Indeed, as the Washington courts have long held, the central theme underlying liability under the Wage Rebate Act is an actual obligation to pay the employee:

[T]he aim or purpose of the act is to see that the employee shall realize the full amount of the wages which by statute, ordinance or contract he is entitled to receive from his employer, and which the employer is obligated to pay, and, further, to see that the employee is not deprived of such right, nor the employer permitted to evade his obligation, by a withholding of a part of the wages, or by a device calculated to effect a rebate of part of them . . .

State v. Carter, 18 Wn.2d 590, 621, 142 P.2d 403 (1943) (emphases added).

LaCoursiere has readily acknowledged that his Employment Agreement with CamWest did not obligate CamWest and Mr. Campbell to pay him bonuses and has rejected the argument that an implied contract created any such obligation. The bonuses at issue are not the type of “wages” the Wage Rebate Act was crafted to address. *See id.*

Accordingly, the Superior Court's dismissal of LaCoursiere's claims as a matter of law was appropriate and should be affirmed.

5. LaCoursiere Knowingly Submitted to the LLC Bonus Structure

In addition to the fact that the bonuses at issue were gratuities outside the scope of the Wage Rebate Act, LaCoursiere is precluded from recovering damages under the Act due to his knowing submission to the terms of the LLC Bonus Structure.⁶ As previously noted, an employee may bring a civil action with respect to certain violations of the Wage Rebate Act, but "any employee who has knowingly submitted to such violations" cannot recover damages under the Act. RCW 49.52.070.

As the Washington Supreme Court has clarified, an employee's knowing choice to return wages to his employer does not violate the Wage Rebate Act even where those wages are donated to the employer:

If the contribution be in fact a voluntary donation, it does not necessarily constitute a rebate of wages merely because it moves to, or for the benefit of, the employer.

. . . If an employee exercises his free choice in making a contribution, even though in response to a request, his act does not

⁶ See CP 35-39, 366-69, and 412-13 for Defendants' additional briefing on this issue before the Superior Court.

amount to a rebate of his wages within the statute

Carter, 18 Wn.2d at 623 (emphases added); *see also Coulombe v. Total Renal Care Holdings, Inc.*, 298 F. App'x. 617, 619 (9th Cir. 2008) (unpublished)⁷ (holding that an employee's voluntary relinquishment of employer-provided stock options did not violate the Wage Rebate Act).

CamWest and Mr. Campbell deny that the LLC Bonus Structure involved any violation of the Act. Regardless, however, LaCoursiere knowingly submitted to the terms of the Bonus Structure, including the investment of a percentage of his bonuses in the LLC. LaCoursiere knowingly and voluntarily entered into the Employment Agreement, which incorporated the LLC Bonus Structure. He was not forced to sign the Employment Agreement or to participate in the Bonus Structure. CP 60 (48:9-10), RP 44:3-4. In fact, LaCoursiere had the choice to opt out of the LLC Bonus Structure if he had instead preferred to accept smaller bonuses pursuant to a different bonus program, as others with the company had done. CP 54 (24:19-21), 65 (65:8-19), 70 (86: 14-24), 161

⁷ Pursuant to GR 14.1(b), “[a] party may cite as an authority an opinion designated ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like that has been issued by any court from a jurisdiction other than Washington state, only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court.” Federal Rule of Appellate Procedure 32.1(a) permits the citation of an unpublished judicial opinion issued after January 1, 2007.

(¶ 4). The Employment Agreement specifically incorporated the terms of the LLC Bonus Structure, including the designation of a percentage of each discretionary bonus to the LLC. CP 103 (§ 2.2.5). LaCoursiere was in a position to comprehend the terms of the LLC Bonus Structure; he was an experienced professional in the construction industry, and his position with CamWest required him to review and enter into contracts on a regular basis. CP 51 (11:10-22), 52 (13:8-22), 54 (22:6-18), 55 (26:16-23), 58 (38:1-39:3). Upon entering into the Employment Agreement, he reviewed the terms of the Bonus Structure and discussed them with his supervisor. CP 60 (47:13-20), 61 (50:1-4), 97 (¶ 3). As LaCoursiere has acknowledged, his supervisors would have answered any questions if he had a need for clarification, but LaCoursiere did not feel the need to question the terms of the Employment Agreement or take additional time to review those terms. CP 55 (25:21-24), 58 (37:25-38:1), 60 (48:9-10).

Not only did LaCoursiere knowingly agree to the terms of the LLC Bonus Structure when he first signed the Employment Agreement, but he knowingly continued to accept those terms without protest throughout his employment with CamWest. Not once did LaCoursiere voice any concerns with CamWest or question his supervisors regarding the Bonus Structure in the ensuing four years, during which time he accepted the

benefits of participation in the Bonus Structure: substantial direct bonus payments, annual interest payments on his capital contributions to the LLC, and an increasingly vested membership interest in the LLC. CP 57 (33:19-21, 35:19-21), 60 (47:25-48:6), 70 (87:17-20), 97-98 (¶¶ 4-7), 163 (¶ 11). During that time period, LaCoursiere was repeatedly reminded of the manner in which his bonuses were distributed. His supervisors reviewed the allocation of each bonus with him in detail. CP 72-73 (¶¶ 3-4), 97-98 (¶¶ 4-7). In addition, LaCoursiere's receipt of interest payments regarding his capital contributions to the LLC served as a perennial reminder of the fact that his bonuses were allocated, in part, as capital contributions to the LLC. CP 64 (61:20-22), 98 (¶ 6), 161-63 (¶¶ 9-10, 12), 218, 224, 230. Similarly, LaCoursiere received annual tax forms reflecting the taxes withheld on his LLC contributions, and he prepared his own tax returns in reliance upon those forms. CP 59 (41:17-20), 60 (45: 7-10), 65 (67:18-68:5), 164 (¶ 14), 232-34.

The undisputed facts support the conclusion that LaCoursiere was well aware of the terms of the LLC Bonus Structure and that he knowingly submitted to those terms, not just with his initial signature to the Employment Agreement, but also through his continuing acquiescence to the manner in which the Bonus Structure was put into practice during

LaCoursiere's employment. Indeed, doing so materially benefitted LaCoursiere. He chose to participate in the LLC Bonus Structure because it provided him with the opportunity to receive a "nice bonus" that he otherwise could not have received. CP 54 (24:19-21), 65 (65:8-19), 70 (86: 14-24), 384-85 (¶ 2).

Following years of silent acceptance of the substantial benefits of the LLC Bonus Structure when it served his purpose, LaCoursiere now attempts to conveniently ignore his past agreement to the terms of the Bonus Structure because it no longer benefits him. LaCoursiere does not dispute that he entered into the Employment Agreement, which set forth the terms of the LLC Bonus Structure. Nor can he dispute that he continued to knowingly accept the benefits of the Bonus Structure over the following years. Even if the allocation of a percentage of LaCoursiere's bonuses as contributions on his behalf to the LLC had violated the Wage Rebate Act, which Defendants deny, it is undisputed that LaCoursiere knowingly submitted to that allocation.

LaCoursiere attempts to sidestep his knowing submission to the terms of the LLC Bonus Structure with two novel and unsupported arguments. First he argues that he should be able to recover under the Wage Rebate Act because he did not know that the Bonus Structure

purportedly violated the Act. Brief of Appellant, pp. 30-32. Second, he argues that his consent to the Bonus Structure through the Employment Agreement should be ignored because it was contained in a contract and involved advance consent. *Id.* at pp. 25-26.

With respect to his assertion that knowledge of illegality under the Wage Rebate Act is necessary, LaCoursiere has failed to cite to any legal authority requiring this additional level of knowledge. The Act appropriately provides that damages are not warranted where an employee knowingly submitted to a rebate; it does not require that the employee knowingly submitted to a rebate and that the employee knew that the rebate to which he submitted was unlawful under the Wage Rebate Act.⁸ RCW 49.52.070.

The Wage Rebate Act recognizes the inequity of allowing an employee to recover damages for certain actions when the employee previously agreed to those very same acts, regardless of whether either of the parties to the agreement believed such acts to be subject to the Wage

⁸ LaCoursiere attempts to distinguish between his “voluntary” agreement to the LLC Bonus Structure and “knowing” submission. *See* Brief of Appellant, p. 30. To the extent there is a substantive difference between voluntarily agreeing versus knowingly submitting to an act, Defendants suggest that knowing submission involves a lower threshold than voluntary agreement. In the case at hand, LaCoursiere not only knew that he was submitting to the terms of the LLC Bonus Structure, but he also affirmatively and voluntarily consented to that submission.

Rebate Act. *Id.* Contrary to LaCoursiere’s unsupported explanation of “knowing submission,” the cases that have addressed the issue have held that employees’ knowing submission to a violation under the Act involves “deliberately and intentionally defer[ring] to [the employer] the decision of whether they would ever be paid.” *Chelius v. Questar Microsys., Inc.*, 107 Wn. App. 678, 682, 27 P.3d 681 (2001); *see also Durand v. HIMC Corp.*, 151 Wn. App. 818, 836-37, 214 P.3d 189 (2009). Thus, the requisite knowledge is the employee’s knowledge that he is deferring payment decisions to the employer, not, as LaCoursiere suggests, knowledge of the intricacies or potential application of the Wage Rebate Act. *Id.* As previously discussed, LaCoursiere has admitted that he agreed to a Bonus Structure in which the decision of whether he would receive bonuses was at the discretion of – or deferred to – CamWest. It is undisputed that LaCoursiere knowingly submitted to this deferral.

LaCoursiere additionally argues that his consent to the terms of the LLC Bonus Structure should be ignored because, according to him, “an employer cannot circumvent the WRA ‘by drafting a conflicting contract provision.’” Brief of Appellant, p. 25 (quoting *Champagne v. Thurston Cnty.*, 163 Wn.2d 69, 77 n.6, 178 P.2d 936 (2008)). This quote from the *Champagne* case is taken out of context. The *Champagne* case held, in a

footnote, that “RCW 49.52.050(2) does not relieve an employee of abiding by agency regulation by drafting a conflicting contract provision.”

Champagne, 163 Wn.2d at 77 n.6. This statement bore no relation to the question of an employee’s knowing submission to the employer’s actions, but instead dealt with the narrow issue of whether the employer in that case owed overtime wages at the time set forth in an Administrative Code provision versus the time set forth in the applicable collective bargaining agreement. *Id.* The Court did not hold, as LaCoursiere implies, that an individual written contract could not constitute a knowing submission to violations of the Wage Rebate Act. *See id.*

Neither is the *Champagne* court’s indication that “no Washington court has found that a plaintiff knowingly submitted to a willful violation of the WRA based upon the existence of a collective bargaining agreement” applicable to this case. *See* Brief of Appellant, p. 26 (quoting *Champagne*, 163 Wn.2d at 81 n.10 (emphasis added)). A collective bargaining agreement is a generally applicable document, the terms of which are negotiated by the employees’ labor union, rather than the individual employee. Thus, a collective bargaining agreement does not reflect an individual employee’s personal choices. In contrast, an individual employment contract directly involves the employee, permitting

him to individually accept – or reject – the terms of the agreement. It is not surprising that no Washington court has found knowing submission based upon the existence of a collective bargaining agreement, but that point is immaterial to the circumstances presented here.

If LaCoursiere’s reasoning were accepted, then an employee who knowingly submits to a violation of the Wage Rebate Act will be precluded from recovering under the Act unless he signs a contract to that effect. This would be an absurd result. An employee’s written agreement authorizing the actions of the employer constitutes the best evidence of the employee’s knowing submission to those actions. The employer does not automatically lose the protections under the Act simply because the parties memorialize their agreement in writing.

Along similar lines, LaCoursiere asserts that his consent to the terms of the Bonus Structure should be ignored because the Employment Agreement provided advance consent to allocate funds as capital contributions to the LLC, rather than affording him the opportunity to consent each time a new bonus was issued. *See* Brief of Appellant, pp. 34-35. At oral argument before the Superior Court, LaCoursiere’s counsel argued at length on this subject, representing his position that an unlawful rebate would not have occurred if a “2-step process” had instead been

employed (*i.e.* if CamWest had provided LaCoursiere with a check and then LaCoursiere had immediately written a check to the LLC, rather than CamWest directly depositing the very same money in the LLC). *See* RP 37-44. LaCoursiere’s only support for this argument is the case of *State v. Carter, supra*, which held:

Having once received his wages in full, the employee is at liberty to do what he will with his earnings He may keep the money in his pocket, invest it, spend it, or give it away If the contribution be in fact a voluntary donation, it does not necessarily constitute a rebate of wages merely because it moves to, or for the benefit of, the employer.

Carter, 18 Wn.2d at 622-23. LaCoursiere has taken this holding to a new level, arguing “that the money has to first hit his pocket. He has to have first received his wages in full. That’s what *State v. Carter* teaches us.”⁹ RP 39:14-17.

⁹ In fact, LaCoursiere’s argument that the funds at issue here never “hit his pocket” undermines his characterization of the circumstances as a rebate. He claims that the money invested in the LLC on his behalf constituted “phantom wages,” stating that he “never possessed those funds.” CP 241. “Accepting the common use of the word ‘rebate – to draw back,’ one cannot draw back something which he never put forward.” *Carter*, 18 Wn.2d at 592 (quoting *Savage-Scofield Co. v. Tacoma*, 56 Wash. 457, 105 P. 1032 (1909)); *see* Black’s Law Dictionary 1295 (8th ed. 2004) (defining “rebate” as “[a] return of part of a payment” (emphasis added)); *see id.* at 886 (defining “kickback” as “[a] return of a portion of a monetary sum received, esp. as a result of coercion or a secret agreement” (emphasis added)).

Carter merely holds that an employee who has received his wages in full can voluntarily return them to his employer without a violation of the Wage Rebate Act occurring. *Carter*, 18 Wn.2d at 622-23. The *Carter* decision is silent on the issue present in this case; *Carter* does not preclude an employee from providing advance consent to his employer to take a particular action with respect to sums issued by the employer.¹⁰

LaCoursiere's attempts to downplay the significance of his willing acceptance of the terms of the LLC Bonus Structure, through his signature on the Employment Agreement and his subsequent conduct, are to no avail. The undisputed facts support the conclusion that LaCoursiere knowingly submitted to the very terms he now protests, precluding his belated claims that those terms violate the Wage Rebate Act. RCW 49.52.070.

B. Defendants Are Entitled to Costs and Attorneys' Fees, Pursuant to the Employment Agreement

1. Standard of Review

“When reviewing an award of attorney fees, the relevant inquiry is first, whether the prevailing party was entitled to attorney fees, and

¹⁰ Application of LaCoursiere's reasoning would prohibit as unlawful rebates such common agreements as capital partnership agreements in law firms and agreements to make contributions to a retirement pension. *See* RP 41:16 - 43:23, 66:16 - 68:18. This would be an unprecedented extension of the Wage Rebate Act, as the Superior Court appears to have recognized. *See id.*

second, whether the award of fees is reasonable” if awarded. *Ethridge v. Hwang*, 105 Wn. App. 447, 459-60, 20 P.3d 958 (2001) (citing *Pub. Util. Dist. No. 1 v. Int’l Ins. Co.*, 124 Wn.2d 789, 814, 881 P.2d 1020 (1994)). Whether a party is entitled to attorney fees is an issue of law which is reviewed de novo. *Ethridge*, 105 Wn. App. at 459-60.

2. CamWest and Mr. Campbell Are Entitled to Contractual Costs and Fees

The Superior Court denied Defendants’ Motion for an award of costs and attorneys’ fees, despite the fact that Section 8.6 of the Employment Agreement provides:

If either party brings an action arising under this Agreement, the prevailing party shall be entitled to recover its reasonable costs and attorney fees incurred in connection therewith, whether at arbitration, trial or any appeal therefrom.

CP 449 (§ 8.6).

“In Washington, attorney fees may be awarded when authorized by a private agreement, a statute, or a recognized ground in equity.” *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 277, 215 P.3d 990 (2009). RCW 4.84.330 provides:

In any action on a contract . . . where such contract . . . specifically provides that attorney’s fees and costs, which are incurred to enforce the provisions of such contract . .

. shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract . . . or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

In denying Defendants' Motion for Costs and Attorneys' Fees, the Superior Court commented only that LaCoursiere's Complaint "allege[ed] only a violation of Wage Rebate Act." CP 525. The mere fact that this case was brought under the Wage Rebate Act is not dispositive to the issue of whether the lawsuit was brought "on a contract": the same contract containing the relevant fee-shifting provision.

"An action is 'on a contract' if (a) the action arose out of the contract; and (b) the contract is central to the dispute." *Brown v. Johnson*, 109 Wn. App. 56, 58, 34 P.3d 1233 (2001). The underlying claims are not limited to claims for breach of contract. In fact, "the court may award attorney fees for claims other than breach of contract when the contract is central to the existence of the claims, i.e., when the dispute actually arose from the agreements." *Deep Water Brewing*, 152 Wn. App. at 278; *see also Brown*, 109 Wn. App. at 58-59 (contractual provision for attorneys' fees was applicable to plaintiff's tort claim of misrepresentation, where "the purchase and sale agreement was central to her claims").

In the present case, LaCoursiere's claims arose out of his Employment Agreement with CamWest, and the Employment Agreement was central to the dispute. In fact, although the causes of action raised in LaCoursiere's Complaint for Damages were brought under the Wage Rebate Act, the factual allegations set forth in the Complaint indicate that his claims stem directly from the LLC Bonus Structure set forth in the Employment Agreement. CP 3-8. In his Complaint, LaCoursiere specifically focused on the terms of Section 2.2.5 of the Employment Agreement, complaining of the allocation of a portion of his bonuses to the LLC and the withholding of taxes with respect to those bonuses. *Id.*

In his subsequent briefing on the parties' cross-motions for summary judgment, LaCoursiere repeatedly emphasized the terms of Section 2.2.5 of the Employment Agreement. LaCoursiere asserted: "[T]his case is about the taxing and distribution of bonuses . . . declared by the defendants." CP 396. Section 2.2 of the Employment Agreement governed the taxing and distribution of those bonuses. CP 446 (§ 2.2.5).

Although LaCoursiere crafted his claims under the Wage Rebate Act, his two primary arguments flowed directly from the Employment Agreement, to wit: (1) he claimed that the Employment Agreement was illegal under the Wage Rebate Act because of the LLC Bonus Structure

established in the Employment Agreement; and (2) he claimed that he did not receive wages promised pursuant to Section 2.2 of the Employment Agreement. On appeal, LaCoursiere has abandoned the latter argument, but it was central to his litigation of this case below. *See* Brief of Appellant, p. 9, n.5 (“Below, the plaintiff argued that the split [of the bonus] was miscalculated -- that the actual figures weren’t 44% and 56%. . . . The plaintiff still has that belief, but the issue is not germane to this appeal.”); *see also, e.g.*, CP 253-54.

LaCoursiere’s repeated assertions throughout his briefing underscore the fact that the Employment Agreement was central to the dispute. For example, LaCoursiere claimed:

Contrary to the terms of the ‘Employment Agreement,’ the defendants did not adhere to the mandatory split of 44% and 56%, which resulted in less money going to the plaintiff. Likewise, the defendants applied withholdings against both shares, which was also contrary to the terms of the contract and injurious to the plaintiff.

. . . [T]he defendants simply did not adhere to the contract. . . . As a direct result, the plaintiff received less wages than his contract required.

. . . The defendants breached the contract in two related ways. First . . . they deviated from the mandatory split of 44% and 56%. As a result, the plaintiff received less than

he should have. Second, the defendants applied and deducted taxes from both shares, which was a further deviation from the mandatory terms of the contract. . . . Thus, not only did the defendants create an illegal scheme; they also materially breached that scheme and violated [the Wage Rebate Act] in the process. The plaintiff did not receive all wages that he was entitled to under the Employment Agreement.

CP 247, 253-54 (emphases added).¹¹ In LaCoursiere’s own words: “The dispute centers on how the bonuses were allocated and taxed, which was governed by paragraph 2.2.5 (and its subparts) of the Employment Agreement.” CP 237. LaCoursiere would not have received the bonuses at issue absent the Employment Agreement, and a percentage of his bonuses would not have been designated as LLC capital contributions, had LaCoursiere not agreed to such actions in the Employment Agreement. Without the Employment Agreement, this case would not exist.

LaCoursiere’s claims, while brought pursuant to the Wage Rebate Act, were “on a contract’ [as] (a) the action arose out of the contract; and (b) the contract is central to the dispute.” *Brown*, 109 Wn. App. at 58. This case is akin to the many Washington cases holding that a statutory or

¹¹ The quotes above are merely a small sample of LaCoursiere’s arguments included in his briefing directly pertaining to the Employment Agreement. *See* CP 235-59, 388-409, 417-22.

tort claim can nevertheless give rise to contractual attorneys' fees where the requisite link to the contract exists. *See id.* at 58-59; *Deep Water Brewing*, 152 Wn. App. at 278; *Ethridge*, 105 Wn. App. at 460; *Hill v. Cox*, 110 Wn. App. 394, 412, 41 P.3d 495 (2002); *Edmonds v. John L. Scott Real Estate Inc.*, 87 Wn. App. 834, 855, 942 P.2d 1072 (1997). In *Ethridge*, the plaintiff sued her landlady, alleging violation of the Mobile Home Landlord-Tenant Act and the Consumer Protection Act due to the landlady's unreasonable refusal to approve the plaintiff's lease transfer. The court held that an attorneys' fees provision in the lease between the plaintiff and landlady applied to the plaintiff's statutory claims:

The lease provided that the prevailing party in any action arising out of the lease would be entitled to attorney's fees and costs. . . . *Ethridge's* claims arose out of her inability to assign her lease under the lease agreement, and so her claims arose under the lease.

Ethridge, 105 Wn. App. at 460. Similarly, in *Hill*, the court held that a contractual attorneys' fees provision applied to a statutory tort claim:

Here there would not have been a timber trespass if the parties had not contracted that the trees within 100 feet of the cabin were not to be cut. Hence, Mr. Hill's action arose out of the contract and the contract was central to the dispute. Therefore, Mr. Hill, as the prevailing party is entitled to attorney fees"

110 Wn. App. at 412.

LaCoursiere's claims were rife with specific, repeated allegations that Defendants violated the Employment Agreement. Accordingly, those claims were "on the contract," including its fee-shifting provision. Absent the Employment Agreement's terms, LaCoursiere's statutory claims would have been non-existent. Consequently, his "action arose out of the contract and the contract was central to the dispute." *Id.*

Accordingly, CamWest and Mr. Campbell respectfully request that they be awarded reasonable costs and attorneys' fees pursuant to Section 8.6 of the Employment Agreement.

3. CamWest and Mr. Campbell Are Entitled to Costs and Fees on Appeal

Defendants' contractual right to costs and attorneys' fees extends to the right to collect such costs and fees incurred on appeal. The contract provision at issue specifically provides that the prevailing party "shall be entitled to recover its reasonable costs and attorney fees incurred in connection therewith, whether at . . . trial or any appeal therefrom." CP 449 (§ 8.6) (emphasis added); *see also Reeves v. McClain*, 56 Wn. App. 301, 311, 783 P.2d 606 (1989) (contract provision for an award of attorney fees at trial supports an award on appeal.).

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court (1) affirm the Superior Court's Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment; and (2) reverse the Superior Court's Order Denying Defendants' Motion for Costs and Attorneys' Fees.

DATED: August 21, 2011.

STOEL RIVES LLP



James M. Shore, WSBA #28095
Karin D. Jones, WSBA #42406
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
(206) 624-0900
*Attorneys for
Defendants/Respondents/ Cross-
Appellants*

CERTIFICATE OF SERVICE

I, Jamie Dombek, certify under penalty of perjury under the laws of the State of Washington that, on August 22, 2011, I caused the foregoing document to be served on the person listed below in the manner shown:

D.R. (Rob) Case
Larson Berg & Perkins PLLC
105 N. 3rd St.
P.O. Box 550
Yakima, WA 98907-0550
Telephone: (509) 457-1515
Facsimile: (509) 457-1027
Email: Rob@LBPLaw.com
Counsel for Plaintiff/Appellant/Cross-Respondent

- hand delivery
- facsimile transmission
- overnight delivery
- first class mail
- e-mail delivery

Dated this 22nd day of August, 2011, at Seattle, Washington.

Jamie Dombek
Jamie Dombek, Legal Secretary

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