

Court of Appeals No. 67034-4-I

Supreme Court No. 88298-3

FILED

JAN 14 2013

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

IN THE SUPREME COURT
STATE OF WASHINGTON

SHAUN LaCOURSIERE, a single individual,

Petitioner,

v.

CAMWEST DEVELOPMENT, INC., a corporation organized under
Washington law, and ERIC H. CAMPBELL, an individual,

Respondents.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The petitioner is Shaun LaCoursiere, appellant in the Court of Appeals and the plaintiff in the King County Superior Court proceeding.

II. CITATION TO COURT OF APPEALS DECISION

Mr. LaCoursiere seeks review of the published decision in *LaCoursiere v. CamWest Dev., Inc.*, Case No. 67034-4-I, filed December 3, 2012, by Division One of the Court of Appeals, and as clarified by the Court of Appeals' December 20, 2012 order on Respondents/Cross-Appellants' motion for clarification. The decision is published at 289 P.3d 683 (2012) and a copy is attached hereto as Appendix A. A copy of the Order on Motion for Clarification is attached hereto as Appendix B.

III. ISSUES PRESENTED FOR REVIEW

1. Whether this Court should accept review of the Court of Appeals decision reversing the Superior Court's order denying Respondents/Cross Appellants' motion for attorneys' fees and costs because:
 - a. Pursuant to RAP 13.4(b)(1), the Court of Appeals decision conflicts with this Court's well-established liberal construction of Washington's wage statutes; and because
 - b. Pursuant to RAP 13.4(b)(2), the Court of Appeals decision conflicts with another decision of the Court of Appeals; and because

c. Pursuant to RAP 13.4(b)(4), the Court of Appeals decision involves an issue of substantial public interest that should be determined by this Court.

2. Whether this Court should accept review of the Court of Appeals decision affirming the Superior Court's dismissal of Mr. Coursiere's claim for violation of the Wage Rebate Act, RCW 49.52 *et seq.* ("WRA")¹ because pursuant to RAP 13.4(b)(1), the Court of Appeals decision conflicts with this Court's prior decisions.

IV. STATEMENT OF THE CASE

A. Factual Background

1. Mr. LaCoursiere's Employment with CamWest and the Terms of His Compensation

CamWest Development, Inc. ("CamWest") is a construction company specializing in residential construction. CP 159. Eric Campbell is the company's president.² *Id.* Mr. Campbell is also the manager of CamWest Managers, LLC (the "LLC"). *Id.* The sole business of the LLC is to loan money to the corporation (CamWest). CP 346. The LLC's exclusive source of funds is contributions from its members, all of whom are CamWest employees. CP 347, 340.

Mr. LaCoursiere began full-time employment at CamWest as an

¹ A copy of the WRA is attached hereto as Appendix C.

² Mr. Campbell was named as a defendant in Mr. LaCoursiere's complaint and, with CamWest, is a respondent/cross-appellant in this appeal. For purposes of this Petition, Mr. LaCoursiere refers to CamWest and Mr. Campbell collectively as "CamWest."

Assistant Project Manager in May 2003. CP 265, 161. On January 1, 2005, CamWest promoted Mr. LaCoursiere to a Project Manager position. CP 161. Upon his promotion, he was asked to sign an employment agreement (the "Employment Agreement"). CP 161-62. The Employment Agreement set forth Mr. LaCoursiere's eligibility for CamWest's bonus program. CP 102-103.

Under the Employment Agreement, CamWest retained discretion as to whether, and when, to award bonuses. CP 102. When the company made the decision to award a bonus, however, the Employment Agreement dictated how his bonuses were to be calculated and paid. CP 102-103. CamWest rated Mr. LaCoursiere's performance based on a set list of criteria and then credited him with a percentage of the net profits generated by the projects he managed. *Id.*

The Employment Agreement provides that Mr. LaCoursiere's bonuses would be distributed as follows:

2.2.5.1 Forty-four percent (44%) shall be distributed directly to [Mr. LaCoursiere], less all applicable required withholding; and

2.2.5.2 Fifty-six percent (56%) shall be contributed to [Mr. LaCoursiere's] capital account in [the LLC].

CP 103. The distribution of a percentage of his earned bonus to the LLC made Mr. LaCoursiere a member of the LLC, contingent on his continued employment by CamWest. CP 340, 347. Despite the fact that he would

become a member of the LLC, the Employment Agreement permitted CamWest to terminate Mr. LaCoursiere without cause. CP 104. The Employment Agreement also provided that the prevailing party in “an action arising under this Agreement” would be awarded its “reasonable costs and attorney fees[.]” *Id.*

2. Mr. LaCoursiere Received Bonuses, But CamWest Paid Only a Portion of the Bonuses Directly to Him

Mr. LaCoursiere was awarded bonuses in 2005, 2006 and 2007. CP 162-63. The bonuses for each year were paid in March of the following year, e.g., Mr. LaCoursiere’s bonus for 2005 was paid in March 2006. *Id.* CamWest withheld payroll taxes, including Medicare and Social Security, from the direct bonus payments to Mr. LaCoursiere as well as from the contributions to his LLC capital account. CP 322, 344. As a result, Mr. LaCoursiere paid taxes on bonuses he never received. *Id.*

With respect to the portion of the bonuses contributed to Mr. LaCoursiere’s LLC capital account, those funds were immediately transferred back to CamWest to be used as operating capital. CP 345. CamWest took tax deductions against 100 percent of these bonus payments. *Id.*

As an LLC member, Mr. LaCoursiere was to receive one “Unit” for each dollar of capital contributed to the LLC. CP 176. When he ceased to be a member of the LLC — for example, if CamWest terminated him, with or without cause — CamWest would purchase his Units. CP

195. Pursuant to a vesting schedule in the LLC agreement, the purchase price would vary based on how long Mr. LaCoursiere had been a member of the LLC; to receive 100 percent of the Units' value, the purchase and sale would have to occur after the fourth anniversary of his membership in the LLC. CP 195-96. The purchase price of a Unit was calculated based on the fair market value of the LLC divided by the number of Units held by members as of the date the price was determined. CP 195. In other words, the vesting schedule did not apply to the amount of the employee's bonuses paid into his LLC capital account, but rather, to his share of the value of the LLC. *Id.*

3. CamWest Terminated Mr. LaCoursiere But Failed to Pay Him All of the Bonuses He Had Earned

Mr. LaCoursiere was terminated by CamWest on March 6, 2009, just nine days shy of his third anniversary of membership in the LLC. CP 74. Because he had not been a member of the LLC for at least four years, CamWest refused to pay Mr. LaCoursiere for the full amount of the previously-earned bonuses that had been deposited to his LLC capital account. CP 341. Those payments (before withholding) totaled \$161,693.57. CP 239, 322-24, 317-19. After withholding, the total was \$107,021.12. *Id.* Thus, Mr. LaCoursiere paid \$54,672.45 for payroll taxes on compensation he did not receive. Mr. LaCoursiere only received an aggregate refund of 60 percent of the amount of his previously-earned bonus which was deposited in his LLC capital account, as well as small

“interest payments” on the total amount of his capital account.

CP 245-46; 318-21.

B. Procedural Background

1. Proceedings in the Superior Court

On May 13, 2009, Mr. LaCoursiere filed a lawsuit against CamWest and Mr. Campbell. CP 3-10. Alleging CamWest’s bonus payment scheme violated the WRA, Mr. LaCoursiere asked the Superior Court for an award of damages, including exemplary damages and for his costs and attorneys’ fees. CP 9. The WRA claim was the only cause of action alleged in Mr. LaCoursiere’s complaint. CP 3-10.

CamWest filed a summary judgment motion. CP 17-44. Mr. LaCoursiere responded to CamWest’s motion and filed his own cross-motion for summary judgment. CP 388-409; 235-259. As the Court of Appeals decision explains, the “threshold question” presented by the parties’ summary judgment motions was “whether the bonus structure described in the [Employment Agreement] amounted to ‘wages’ under chapter 49.52 RCW[,]” the WRA. *LaCoursiere*, 289 P.3d at 687. CamWest took the position that because the bonuses were “completely discretionary,” they could not give rise to a WRA claim. CP 39-41. CamWest also argued that even if the bonuses were “wages” for purposes of the WRA, Mr. LaCoursiere had “consented” to CamWest’s bonus structure because he signed the Employment Agreement and that his WRA

claim was barred by the doctrines of waiver and estoppel. CP 35-39, 363-368. Mr. LaCoursiere argued that his bonuses were “wages” and that whether he signed the Employment Agreement was immaterial to whether CamWest’s bonus system violated the WRA. CP 385-389.

The Superior Court granted CamWest’s summary judgment motion, denied Mr. LaCoursiere’s summary judgment motion, and dismissed Mr. LaCoursiere’s complaint. CP 431-33. The Superior Court’s form order does not include any findings of fact or conclusions of law, or any other indication of the basis for the court’s decision. *Id.*

CamWest then moved for an award of attorneys’ fees and costs based on the prevailing party fee provision in the Employment Agreement, characterizing Mr. LaCoursiere’s WRA claim as a claim “on a contract” rather than as a violation of CamWest’s statutory duties under the WRA. CP 498-507. CamWest sought a total of \$92,306.97 in attorneys’ fees and costs, including statutory costs of \$857.22. CP 503-06. Mr. LaCoursiere opposed CamWest’s motion (except for the request for its statutory costs), noting that CamWest “has not and cannot cite a single WRA case wherein the worker was forced to pay costs and fees” to a prevailing defendant. CP 512-17.

The Superior Court denied CamWest’s motion for fees and costs without prejudice to CamWest’s presentation of a cost bill for statutory costs and attorneys’ fees. CP 525-26. In handwritten interlineations to the

order, the Superior Court noted that Mr. LaCoursiere's complaint "alleg[ed] only a violation of [the] Wage Rebate Act[.]" CP 525.

2. The Court of Appeals Decision

Mr. LaCoursiere appealed the Superior Court's dismissal of his complaint. CP 434-39. CamWest cross-appealed the denial of its motion for attorneys' fees and costs. CP 531-35. On December 3, 2012, the Court of Appeals affirmed the Superior Court's dismissal of Mr. LaCoursiere's claims, reversed the Superior Court's denial of CamWest's motion for fees and costs, and remanded for further proceedings. *LaCoursiere*, 289 P.3d at 689-90.

The Court of Appeals decision to affirm the dismissal of Mr. LaCoursiere's WRA claim was based on three grounds. First, relying on *Byrne v. Courtesy Ford, Inc.*, the Court of Appeals explained that "[d]iscretionary bonuses are generally considered gratuities and not wages." *LaCoursiere*, 289 P.3d at 688 (citing *Byrne*, 108 Wn. App. 683, 690-91, 32 P.3d 307 (2001)). The Court of Appeals noted that "[only] if the bonus is given regularly so as to create an expectation that it will continue, then it may be considered a wage under an implied contract." *Id.* (quoting *Byrne*, 108 Wn. App. at 691). The Court of Appeals concluded that even though Mr. LaCoursiere's received a bonus in each of the first three years he was eligible, his bonuses "were not given regularly, did not create an implied contract that he would be paid every year, and

[he] could not have relied upon them, given he knew CamWest had no obligation to provide them.” *LaCoursiere*, 289 P.3d at 688.

Second, the Court of Appeals held that even if Mr. LaCoursiere had satisfied the threshold element of his WRA claim — that the bonus payments were wages — there was no “rebate” of wages to CamWest. *LaCoursiere*, 289 P.3d at 688. This holding was based on the conclusion that Mr. LaCoursiere was paid “just as he agreed to be paid” under the Employment Agreement. *Id.* at 688-689.

Finally, the Court of Appeals noted that “even if the LLC bonus structure amounts to a prohibited rebate of wages, [Mr.] LaCoursiere knowingly submitted to the violation” because he “voluntarily entered into the employment and LLC agreements.” *LaCoursiere*, 289 P.3d at 689.

Ignoring the express language of the WRA and the public policy underlying Washington’s wage statutes, the Court of Appeals reversed the Superior Court and concluded that CamWest is entitled to fees and costs under the Employment Agreement’s prevailing party fee provision. Though CamWest did not bring a breach of contract claim, the Court of Appeals reasoned that “the terms and proper enforcement of the employment agreement [are] central to [Mr.] LaCoursiere’s WRA claim” and remanded for further proceedings. *LaCoursiere*, 289 P.3d at 690. In a subsequent order, the Court of Appeals held “determination of CamWest’s attorney fees on appeal is within the scope of remand in this matter.” *See*

App. B.

V. ARGUMENT

A. Summary of Argument

1. The Court Should Accept Review of the Court of Appeals Decision on Fees

Whether CamWest is entitled to recover its attorneys' fees and costs is reviewed de novo. *See Sanders v. State*, 169 Wn.2d 827, 866, 240 P.3d 120 (2010). Here, Mr. LaCoursiere's Petition for Review presents an issue of first impression for this Court's de novo review: whether a prevailing party fee provision in an employment contract is enforceable against an employee who has sued to recover wages under a Washington statute.

On several occasions, this Court has affirmed the strong public policy underlying Washington's wage statutes. *See, e.g., Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000) (noting Washington has a "long and proud history of being a pioneer in the protection of employee rights" and that "[n]umerous statutory provisions exemplify this long and proud history[,]” including RCW 49.52 *et seq.*); *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157, 961 P.2d 371 (1998) (explaining the Legislature has “evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive statutory scheme to ensure payment of wages”). Washington's wage statutes are “liberally construed to advance the Legislature's intent to

protect employee wages and assure payment.” *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 520, 22 P.3d 795 (2001). The WRA specifically “establishes a strong policy in favor of ensuring the payment of the full amount of wages earned[.]” *Morgan v. Kingen*, 166 Wn.2d 526, 538, 210 P.3d 995 (2009). The Legislature’s decision to enact both civil and criminal penalties for WRA violations “evidences that strong policy.” *Id.* As this Court explained in *Schilling*, “[b]y providing for costs and attorney fees, the Legislature has provided an effective mechanism for recovery even where wage amounts wrongfully withheld may be small.” 136 Wn.2d at 159.

Review of the Court of Appeals decision on fees is warranted under RAP 13.4(b)(1) because the decision conflicts with this Court’s precedent confirming the strong pro-employee policy underlying Washington’s wage statutes, including the WRA. By ignoring this policy and this Court’s prior interpretations of the WRA, the Court of Appeals erred when it reversed the Superior Court’s denial of CamWest’s fee and cost request.

Review is also appropriate under RAP 13.4(b)(2) because the Court of Appeals decision conflicts with another decision of the Court of Appeals, that holds “a reciprocal attorney fees provision [in an employment contract] is unconscionable and, therefore, unenforceable” in suits to recover wages allegedly owed. *See Walters v. A.A.A.*

Waterproofing, Inc., 151 Wn. App. 316, 324-25, 211 P.3d 454 (2009), *rev. denied*, 167 Wn.2d 1019, 224 P.3d 773 (2010).

Review of the Court of Appeals' conclusion that CamWest is entitled to recover its fees and costs is also appropriate under RAP 13.4(b)(4) because this Petition involves an issue of substantial public interest that should be determined by this Court. As detailed below, the implications of the Court of Appeals decision are serious, not only for Mr. LaCoursiere but for all Washington employees whom the Legislature intended to protect when it enacted the WRA as part of Washington's comprehensive statutory scheme to protect the rights of Washington workers. Contrary to this statutory mandate, the published decision will make it more difficult for countless Washington employees to avail themselves of the WRA's protections.

2. The Court Should Accept Review of the Court of Appeals Decision Affirming Dismissal of Mr. LaCoursiere's WRA Claim

Review of the Court of Appeals decision affirming the Superior Court's dismissal is warranted under RAP 13.4(b)(1). This Court has never considered when an employee bonus is considered "wages" for purposes of the WRA.³ The Court of Appeals' distinction between a "bonus" and a "gratuity" relied solely on prior Court of Appeals decisions that gave a mere nod to this Court's well-established body of law

³ The Court's 1933 decision in *Powell v. Republic Creosoting Co.*, 172 Wash. 155, 19 P.2d 919 (1933), cited by the Court of Appeals, predates enactment of the WRA.

interpreting the WRA liberally to protect employees. *See LaCoursiere*, 289 P.3d at 688 (citing *Byrne and Simon v. Riblet Tramway Co.*, 8 Wn. App. 289, 505 P.2d 1291 (1973)). Furthermore, the Court of Appeals erred when it held there was no rebate of the earned bonuses: Mr. LaCoursiere earned compensation, he was taxed on it, but was never paid the full amount. Nor did Mr. LaCoursiere “knowingly submit” to this WRA violation by merely signing the Employment Agreement and LLC agreement and agreeing to the vesting schedule. The latter makes clear that the vesting schedule applies to the employee’s share of the fair market value of the LLC, not to the amount of his bonuses allocated to his LLC capital account.

B. This Court Should Accept Review of the Court of Appeals Decision Holding CamWest Is Entitled to Attorney Fees and Costs

1. The Court of Appeals Decision on Fees Conflicts With This Court’s Long-Standing Liberal Construction of Washington’s Wage Statutes

The WRA was enacted in 1939. *Ellerman*, 143 Wn.2d at 519. As this Court explained in *Schilling*, the “fundamental purpose” of the WRA “is to protect the wages of an employee against any diminution or deduction therefrom by rebating, underpayment, or false showing of overpayment of any part of such wages.” 136 Wn.2d at 159 (internal citation and marks omitted). For this reason, the WRA “is thus primarily a protective measure, rather than a strictly corrupt practices statute.” *Id.* In *Ellerman*, this Court confirmed that the WRA and other Washington wage

statutes “should be liberally construed to advance the Legislature’s intent to protect employee wages and assure payment.” 143 Wn.2d at 520.

The remedies available under the WRA confirm its remedial purpose. The statute provides, in pertinent part, that it is unlawful for an employer or “officer, vice principal or agent of any employer” to “collect or receive from any employee a rebate of any part of wages theretofore paid by such employer to such employee[.]” RCW 49.52.050(1). As a civil penalty for such a violation, RCW 49.52.070 makes an “employer and any officer, vice principal or agent of any employer” liable for “twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney’s fees.” RCW 49.52.070. The WRA’s fee shifting provision is not reciprocal, however. *See id.* It does not permit a prevailing employer to recover its fees under the WRA.

None of the cases relied upon by the Court of Appeals concern a WRA claim and none discuss when, and whether, a prevailing party fee provision in a contract permits a fee award to a prevailing defendant where the plaintiff’s claim is for violation of a wage statute with a one-way fee shifting provision. *See Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 855, 942 P.2d 1072 (1997) (upholding fee award to plaintiff who sued real estate agent for breach of fiduciary duty; plaintiff’s claims “arose directly out of duties” created by the parties’ agreements,

not by statute); *Hill v. Cox*, 110 Wn. App. 394, 411-12, 41 P.3d 495 (2002) (plaintiff awarded fees in timber trespass case based on contractual fee provision; court did not have to consider whether such a fee award was contrary to a statute giving rise to the plaintiff's claim); *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 277-78, 215 P.3d 990 (2009) (awarding fees to plaintiff prevailing on tortious interference claim based on contractual prevailing party fee provision; no statutory claim at issue). The Court of Appeals cited only one decision of this Court to support its conclusion that the Superior Court erred in denying CamWest's motion for fees and costs. *See LaCoursiere*, 289 P.3d at 689-90 (citing *Seattle First Nat'l Bank v. Wash. Ins. Guaranty Ass'n*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991)). The issue before the Court in *Seattle First Nat'l Bank*, however, was not whether a contractual fee provision was enforceable in a suit for wages allegedly owed under a Washington statute like the WRA; rather, the issue was "whether the trial court properly characterized residual value insurance as surety insurance that is not protected by the Washington Insurance Guaranty Association Act, RCW 48.32" (which is not a fee shifting statute), and whether the prevailing party should recover its fees under a contractual fee provision. *Seattle First Nat'l Bank*, 116 Wn.2d at 400. Noting that "whether the agreements constitute credit or surety insurance, one must look at their provisions and the risks they insure[.]" the Court concluded the case was

“an action on the contract” and that the plaintiff bank was entitled to its attorney fees. *Id.* at 413.

The Court of Appeals decision effectively undermines the Legislature’s choice to include a one-way fee shifting provision in the WRA by holding that a prevailing party provision in an employment agreement is enforceable in suits brought under Washington’s wage statutes. By ignoring the Legislature’s intent — repeatedly confirmed by this Court — the Court of Appeals decision conflicts with this Court’s precedent and review is warranted under RAP 13.4(b)(1).

2. The Court of Appeals Decision on Fees Conflicts With The Court of Appeals’ Decision in *Walters*

As noted above, the Court of Appeals has held that a prevailing party fee provision in an employment contract is unconscionable and thus unenforceable against an employee who has brought a statutory claim to recover wages allegedly owed. *See Walters*, 151 Wn. App. at 324-25. In *Walters*, the plaintiff sued his employer for overtime pay “in violation of the wage, hour, and labor laws of the State of Washington.” 151 Wn. App. at 321. The employer moved to compel arbitration based on an arbitration clause in the plaintiff’s employment agreement, which also included a provision allowing for a fee and cost award to the prevailing party. *Id.* at 320.

At issue before the *Walters* court was whether an employer could enforce a contractual prevailing party fee provision against an employee

who brought a suit to recover overtime wages under the “labor laws of the State of Washington.” 151 Wn. App. at 321. Explaining that “the risk that if [the plaintiff/employee] loses, he will have to pay [the defendant/employer’s] expenses and legal fees...is an enormous deterrent to an employee contemplating a suit to vindicate the right to overtime pay[.]” the court held that “in the context of an employee’s suit where the governing statutes provide that only a prevailing employee will be entitled to recover fees and costs, a reciprocal attorney fees provision is unconscionable and, therefore, unenforceable.” *Id.* at 324-25.

The analysis in *Walters* does not apply solely to arbitration, and it does not derive meaning from the fact that an arbitration agreement is at issue. The general principle set forth by the Court of Appeals in *Walters* is equally applicable here. The Court should accept review under RAP 13.4(b)(2) to resolve the conflict between *Walters* and the Court of Appeals decision holding CamWest is entitled to recover its fees and costs.

3. The Court of Appeals Decision on Fees Involves an Issue of Substantial Public Interest that Has Significant Implications for All Employees in the State of Washington

“The legislative purpose of fee shifting is to provide an incentive for private enforcement of congressional statutory policy.” *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 376, 798 P.2d 799 (1990). As this Court explained in *Fisher Properties*, “[i]f successful

plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest[.]” *Id.* (quoting *Copeland v. Marshall*, 641 F.2d 880, 889 (D.C. Cir. 1980) (internal citation omitted)). Awards to plaintiffs bringing claims under fee shifting statutes “encourage attorneys to take potentially risky cases with clients who frequently cannot afford to pay an attorney.” *Id.*

This Court's precedent makes clear that the purpose of the WRA's fee shifting provision is to encourage employees to pursue their statutory right to be paid all compensation due by reason of employment. *See Schilling*, 136 Wn.2d at 159. The Court of Appeals' conclusion that CamWest is entitled to attorney fees and costs completely defeats this goal. When employees risk paying for employers' attorneys fees and decide not to pursue their statutory rights, victims of wage abuses suffer. The Court of Appeals decision will ultimately preclude plaintiffs from bringing statutory wage claims because of the fear that they will be required to pay the employer's attorneys fees if they do not prevail. As the *Walters* court aptly put it, such a result is “unconscionable.” 151 Wn. App. at 322.

Punishing Mr. LaCoursiere for bringing suit by enforcing an unconscionable fee provision in the Employment Agreement does not serve the public policy giving rise to the WRA and will have a chilling

effect on employees' ability to vindicate their nonnegotiable statutory rights. For these reasons, review is appropriate under RAP 13(b)(4).

C. This Court Should Accept Review of the Court of Appeals Decision Affirming Dismissal of Mr. LaCoursiere's WRA Claim Because It Conflicts With This Court's Precedent

For the purpose of Washington's wage statutes, "wage" is broadly defined to mean "compensation due to an employee by reason of employment." RCW 49.46.010(2). The term embraces "any form of compensation that is a byproduct of the employment relationship." *Durand v. HIMC Corp.*, 151 Wn. App. 818, 831, 214 P.3d 189 (2009).

As noted above, this Court has never ruled on whether, and when, an employee bonus is "wages" for purposes of Washington's wage statutes. In holding Mr. LaCoursiere's bonuses were not "wages," the Court of Appeals relied on *Byrne*, but failed to distinguish that case. Unlike the "bonus" at issue in *Byrne* — a television the employee won at an auction where he was purchasing cars for his employer — CamWest paid the bonuses, and did so for three years in a row. Moreover, CamWest took payroll taxes from the earned bonuses paid into the LLC capital account, which further underscores that these monies were compensation owed by reason of employment. This Court should accept review to confirm the appropriate criteria to use when determining whether an employee bonus is "wages."

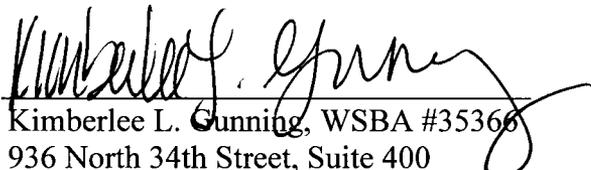
With respect to the alleged rebate of Mr. LaCoursiere's wages, he never received payment of all wages allocated to the LLC capital account, despite CamWest's tax treatment of that portion of his earned bonuses. In sum, Mr. LaCoursiere earned bonuses, CamWest taxed him on the entire bonus amount, but then refused to pay his previously earned wages in full when it terminated him. Because Mr. LaCoursiere could be terminated at any time, CamWest retained sole discretion as to whether the percentage of the bonus allocated to his LLC capital account would ever be paid to him. Instead, the LLC loaned these funds to CamWest, retaining the benefit for itself. Nor did Mr. LaCoursiere "knowingly submit" to CamWest's unlawful rebate. The LLC agreement he signed makes clear the vesting schedule applied to his share of the fair market value of the LLC, not to payment of the bonuses he earned as compensation, from which CamWest withdrew all payroll taxes, including Medicare and Social Security. The Court of Appeals should accept review to correct these errors.

VI. CONCLUSION

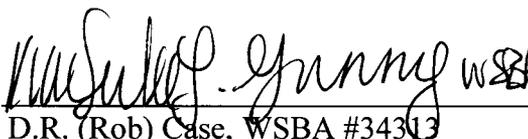
For the aforementioned reasons, Petitioner Shaun LaCoursiere respectfully requests that this Court accept review of the decision in *LaCoursiere v. CamWest Dev., Inc.*, Case No. 67034-4-I, on either or both issues raised in this Petition.

RESPECTFULLY SUBMITTED AND DATED this 2nd day of
January, 2013.

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CERTIFICATE OF SERVICE

I certify that on January 2, 2013, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

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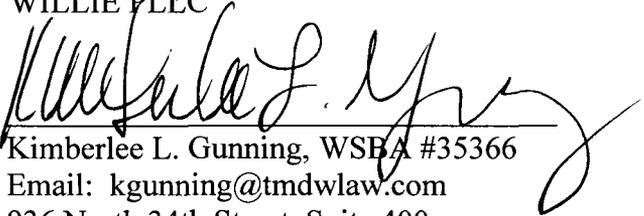
- U.S. Mail, postage prepaid
- Hand Delivered via Messenger Service
- Overnight Courier
- Facsimile
- Electronic Service

Attorney for Respondents

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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— APPENDIX A —

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H

Court of Appeals of Washington,
 Division I.
 Shaun LACOURSIERE, Appel-
 lant/Cross-Respondent,
 v.
 CAMWEST DEVELOPMENT, INC., a Washington
 corporation, and Eric H. Campbell, an individual,
 Respondents/Cross-Appellants.

No. 67034-4-I.
 Dec. 3, 2012.

Background: Former employee brought action against former employer, which was a limited liability company (LLC), and its president, claiming he was entitled to reimbursement for the full amount of his capital contribution to employer and for violations of the Wage Rebate Act (WRA). The Superior Court, King County, Palmer Robinson, J., entered summary judgment in favor of former employer, but denied former employer's motion for fees. Former employee appealed and former employer cross-appealed.

Holdings: The Court of Appeals, Spearman, A.C.J., held that:

(1) former employer could withhold the unvested portion of former employee's bonus, and
 (2) action arose under the parties' employment agreement as required for trial court to award former employer attorney fees.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Labor and Employment 231H 1103

231H Labor and Employment
231HXII Labor Relations
231HXII(C) Collective Bargaining
231Hk1101 Constitutional and Statutory
 Provisions
231Hk1103 k. Purpose. Most Cited
 Cases

Labor and Employment 231H 2173(2)

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231Hk2171 Constitutional and Statutory
 Provisions
231Hk2173 Purpose
231Hk2173(2) k. Payment of wages.
Most Cited Cases

The Legislature enacted the Wage Rebate Act (WRA) as an anti-kickback statute in 1939 to prevent abuses by employers in a labor-management setting, e.g., coercing rebates from employees in order to circumvent collective bargaining agreements. West's RCWA 49. 52. 050(1).

[2] Labor and Employment 231H 2173(2)

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231Hk2171 Constitutional and Statutory
 Provisions
231Hk2173 Purpose
231Hk2173(2) k. Payment of wages.
Most Cited Cases

The fundamental purpose of the Wage Rebate Act (WRA), as expressed in both the title and body of the Act, is to protect the wages of an employee against any diminution or deduction therefrom by rebating, underpayment, or false showing of overpayment of any part of such wages. West's RCWA 49. 52. 050(1).

[3] Labor and Employment 231H 175

231H Labor and Employment
231HIV Compensation and Benefits
231HIV(A) In General
231Hk175 k. Bonus. Most Cited Cases

Discretionary bonuses are generally considered “gratuities” and not “wages”; but, if the bonus is given

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regularly so as to create an expectation that it will continue, then it may be considered a wage under an implied contract.

[4] Labor and Employment 231H ⚡175

231H Labor and Employment
231HIV Compensation and Benefits
231HIV(A) In General
231HK175 k. Bonus. Most Cited Cases

To be considered “compensation,” a discretionary bonus must be given regularly to create an implied contract and reliance; otherwise it is a mere “gratuity.”

[5] Labor and Employment 231H ⚡2181

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231HK2179 Time of Payment
231HK2181 k. What are wages. Most Cited Cases

Labor and Employment 231H ⚡2187

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231HK2186 Deduction and Forfeiture
231HK2187 k. In general. Most Cited Cases

Former employee's bonuses were mere “gratuities,” rather than “wages” under anti-kickback statute, the Wage Rebate Act (WRA), and, thus, former employer could withhold the unvested portion of former employee's bonus which was deposited in former employer's capital account, where employee did not receive a bonus in one of the four years he worked for former employer, his bonus decreased each year, employment contract stated that former employer could provide a bonus in its sole discretion, and former employee admitted that he was never told that he would receive a bonus every year. West's RCWA 49.52.050(1).

[6] Labor and Employment 231H ⚡2187

231H Labor and Employment

231HXIII Wages and Hours
231HXIII(A) In General
231HK2186 Deduction and Forfeiture
231HK2187 k. In general. Most Cited Cases

Even if former employer's bonus structure amounted to a prohibited rebate of wages under the Wage Rebate Act (WRA), former employee knowingly submitted to the violation, and, thus, provision of WRA prohibited him from receiving its benefits, where former employee entered into employment limited liability company (LLC) agreements, which made it clear that the bonuses were entirely discretionary, the purpose of capital accounts was to provide former employer with capital, and that the capital account funds were subject to a vesting and forfeiture schedule. West's RCWA 49.52.070.

[7] Costs 102 ⚡194.32

102 Costs
102VIII Attorney Fees
102k194.24 Particular Actions or Proceedings
102k194.32 k. Contracts. Most Cited Cases

A court may award attorney fees in litigation on the contract 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.

[8] Labor and Employment 231H ⚡2204

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231HK2192 Actions
231HK2204 k. Costs and attorney fees. Most Cited Cases

Former employee's action against former employer, in which he alleged that he was entitled to reimbursement for the full amount of his capital contribution to employer and for violations of the Wage Rebate Act (WRA), arose out of employment agreement between former employee and employer as required for trial court to award attorney fees under the agreement.

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*685 Daniel R. Case, Larson Berg & Perkins PLLC, Yakima, WA, for Appellant.

James M. Shore, Karin D. Jones, Stoel Rives, Seattle, WA, for Respondent.

SPEARMAN, A.C.J.

¶ 1 To be considered compensation protected by the provisions of Washington's anti-kickback statute, chapter 49.52 RCW (the Wage Rebate Act or WRA), a bonus that is discretionary must be given regularly to create an implied contract and reliance, otherwise it is a mere gratuity. Additionally, the Wage Rebate Act is violated only where an employer collects a "rebate" of wages already paid.

¶ 2 Here, the discretionary bonuses provided to Shaun LaCoursiere by his employer CamWest Development were not given regularly, did not create an implied contract that they would be paid every year, and LaCoursiere could not have relied upon them, given he knew CamWest had no obligation to provide them. Moreover, even if the bonuses amount to wages, the record here shows there was no rebate to CamWest, and that instead, CamWest paid LaCoursiere precisely as he agreed to be paid under the employment contract. As such, the trial court properly dismissed LaCoursiere's WRA claim, and we affirm that order.

¶ 3 We reverse, however, the court's order denying CamWest's motion for attorney fees. A trial 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. Here, LaCoursiere's claim arose out of the parties' employment agreement and that agreement was central to the dispute.

¶ 4 Affirmed in part, reversed in part, and remanded for further proceedings.

FACTS

¶ 5 CamWest Development, Inc. ("CamWest") is in the business of building of new homes in King and Snohomish Counties. Eric Campbell is president of CamWest. Shaun LaCoursiere started working at CamWest in May 2003. On January 1, 2005, CamWest promoted LaCoursiere to the position of project manager, entering into a written employment agreement with LaCoursiere.

¶ 6 Under the employment agreement, LaCoursiere agreed to participate in a discretionary bonus structure ("the LLC Bonus Structure") associated with membership in CamWest Managers, LLC ("the LLC"). The LLC is a separate entity from CamWest. Its primary purposes are to loan money to CamWest for real estate investment and to provide a return to its members. The LLC's members consist primarily of CamWest management employees who have chosen to acquire membership interests in the LLC.

¶ 7 The LLC Bonus Structure involves the payment of a discretionary bonus to CamWest's project managers, the amount of which is based upon employee performance and CamWest's construction profits. If CamWest exercises its discretion and issues a bonus to a project manager, 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% *686 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.

Clerk's Papers (CP) 102-03, 160.

¶ 8 Once a project manager makes his first capital contribution to the LLC, he acquires a membership interest in the LLC. That interest is subject to a vesting schedule set forth in the LLC Agreement. A new

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member's membership interest in the LLC is 20 percent vested upon the member's first capital contribution. After the first anniversary of membership in the LLC, the individual's membership interest is 40 percent vested and thereafter vests an additional 20 percent annually. The above-described LLC Bonus Structure is voluntary, and some CamWest employees opt out of the LLC Bonus Structure, choosing to instead receive a pure percentage-of-salary bonus. Participation in the LLC Bonus Structure and membership in the LLC are not requirements of employment with CamWest.

¶ 9 When he was promoted, LaCoursiere reviewed and voluntarily signed the Employment Agreement. He testified that he did not need more time to review it, and that he did not sign it under threat of any kind. LaCoursiere received bonuses for three years: 2005, 2006, and 2007. For 2005, LaCoursiere's total bonus amount was \$121,021.00. Of that amount, CamWest issued \$49,961.80 (41.28 percent) as a contribution on behalf of LaCoursiere to the LLC. CamWest paid LaCoursiere directly in the amount of \$30,255.25 (the remaining 58.72 percent of the bonus minus tax withholdings).

¶ 10 For 2006, LaCoursiere's total bonus amount was \$98,690.00. Of that amount, CamWest issued \$40,348.96 (40.88 percent) as a capital contribution on behalf of LaCoursiere to the LLC. CamWest paid LaCoursiere directly in the amount of \$24,672.50 (the remaining 59.12 percent of the bonus minus tax withholdings).

¶ 11 For 2007, LaCoursiere's total bonus amount dropped to \$31,745.00. Of that amount, CamWest issued \$16,710.36 (52.64 percent) as a contribution on behalf of LaCoursiere to the LLC. CamWest paid LaCoursiere directly in the amount of \$4,444.30 (the remaining 47.36 percent of the bonus minus tax withholdings).

¶ 12 Due to the economic downturn, CamWest did not pay any discretionary bonuses for work performed in 2008. LaCoursiere does not claim that he was entitled to any bonus for that year. In fact, he acknowledges that he was never told by CamWest management that he would "receive a bonus every year." CP at 56.

¶ 13 Because of reduced business in 2008,

CamWest's need for project managers declined. 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 leave if they did not want to accept the change in position. CamWest initiated two rounds of transfers and layoffs of project managers, ultimately reducing the number of project managers from approximately 27 to 12. LaCoursiere was one of the project managers affected by the second round. LaCoursiere chose to accept the transfer to senior laborer, rather than ending his employment with CamWest. According to CamWest, following his transfer to senior laborer, LaCoursiere demonstrated a pattern of poor attendance and punctuality. CamWest fired LaCoursiere on March 6, 2009.

¶ 14 According to the LLC Agreement, when a member of the LLC leaves CamWest, that individual must sell his membership interest to Eric Campbell, CamWest, or the remaining LLC members. 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 at 196. "[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 he was fired, LaCoursiere's membership interest in the LLC was 60 percent vested. LaCoursiere does not appear to dispute that he received payment for his 60 percent vested membership interest.

*687 ¶ 15 LaCoursiere sued CamWest and Campbell, arguing he was entitled to reimbursement for the full amount of his capital contributions to the LLC, and that those contributions amounted to violations of the WRA. CamWest moved for summary judgment, arguing the discretionary bonuses were not "wages" subject to the WRA. CamWest also sought prevailing party attorney fees under the employment agreement. The trial court granted the motion for summary judgment, but denied CamWest's motion for fees. LaCoursiere appeals dismissal of his case, and CamWest cross-appeals the order on its motion for fees.

DISCUSSION

Discretionary Bonuses as Wages

¶ 16 LaCoursiere argues the bonus structure set

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forth in CamWest Managers' LLC agreement violates the prohibition against rebate of wages in Washington's Anti-Kickback statute, the Wage Rebate Act. We disagree.

[1][2] ¶ 17 The criminal provision of the WRA bars the rebate of wages back to employers:

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 theretofore paid by such employer to such employee;

....

Shall be guilty of a misdemeanor.

RCW 49.52.050(1). The Washington Legislature enacted the WRA as an Anti-Kickback statute in 1939 “to prevent abuses by employers in a labor-management setting, e.g., coercing rebates from employees in order to circumvent collective bargaining agreements.” *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wash.2d 514, 519, 20, 22 P.3d 795 (2001). The “fundamental purpose of the legislation, as expressed in both the title and body of the act, is to protect the wages of an employee against any diminution or deduction therefrom by rebating, underpayment, or false showing of overpayment of any part of such wages.” *Id.*

¶ 18 LaCoursiere contends the percentage of the bonuses (56%) that went into project managers' capital accounts in CamWest Managers, LLC amount to prohibited wage rebates under RCW 49.52.050(1). A threshold question we must answer is whether the bonus structure described in the employment contract amounted to “wages” under chapter 49.52 RCW. LaCoursiere argues the bonuses are wages. He asserts that under *Flower v. T.R.A. Industries, Inc.*, 127 Wash.App. 13, 34, 111 P.3d 1192 (2005), wages are simply anything that is paid “by reason of employment,” (quoting *Hayes v. Trulock*, 51 Wash.App. 795, 806, 755 P.2d 830 (1988)). LaCoursiere misreads *Flower*, and moreover, the facts of that case are significantly different than those at issue here.

¶ 19 In *Flower*, an employer in Washington State, Huntwood, heavily recruited Wesley Flower, who lived with his family in Alabama. To entice Flower to accept its job offer, Huntwood offered him a \$20,000 “moving allowance” consisting of \$10,000 to cover moving expenses and a \$10,000 signing bonus. The agreement further provided that all moving expenses over \$10,000 reduced the signing bonus and that if Flower left the company within one year of employment, he agreed to repay the moving expenses. Flower accepted the job, sold his house, and relocated to Washington. His moving expenses were well under \$10,000. Very shortly after his arrival, Huntwood fired Flower and did not pay the bonus. Flower sued, and the trial court granted summary judgment in favor of Huntwood. This court reversed. Huntwood argued it was not obligated to pay the bonus because it was intended merely an “expense” for Flower's relocation and further, that Flower was not entitled to it because he left the company within a year of being hired. *Flower*, 127 Wash.App. at 33, 111 P.3d 1192. We rejected Huntwood's argument, not because all bonuses amount to wages; but rather, because “[t]he terms of the contract clearly state that the bonus is to compensate Mr. Flower for signing on with the company. His act of taking the job entitled him to the bonus.” *Flower*, 127 Wash.App. at 36, 111 P.3d 1192. Thus, we *688 held only that Flower was entitled to the bonus because he had performed under the terms of the contract by signing with Huntwood. We did not hold, as LaCoursiere contends, that Flower was entitled to the bonus simply by reason of his employment with Huntwood.

[3][4] ¶ 20 It is undisputed that the bonuses at issue here are discretionary. Discretionary bonuses are generally considered gratuities and not wages. *Byrne v. Courtesy Ford, Inc.*, 108 Wash.App. 683, 690–91, 32 P.3d 307 (2001). But if the bonus is given regularly so as to create an expectation that it will continue, then it may be considered a wage under an implied contract. *Id.* “[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.” *Id.* at 691, 32 P.3d 307. In *Byrne*, we held that an employee's bonus, which was a single television given to the employee one year, did not establish reliance or an implied contract to include televisions as wages. *Id.* at 690–91, 32 P.3d 307. As such, the television was nothing more than a gratuity. *Id.*¹⁵¹

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FNI. LaCoursiere claims *Byrne* holds that discretionary bonuses are gratuities only if the bonuses are “unrelated to performance” of the job. But this holding is nowhere in *Byrne*.

¶ 21 *Byrne* relied on two cases: *Simon v. Riblet Tramway Co.*, 8 Wash.App. 289, 505 P.2d 1291 (1973) and *Powell v. Republic Creosoting Co.*, 172 Wash. 155, 19 P.2d 919 (1933). In *Simon*, this court found an implied contract where the plaintiff received a bonus in each of the 10 years he was employed before leaving, and where his bonuses had increased or remained the same each year. *Simon*, 8 Wash.App. at 290-91, 505 P.2d 1291. Likewise, in *Powell*, the court found bonuses amounted to wages where the employee received bonuses that increased in amount every year from 1916 until 1929. *Powell*, 172 Wash. at 156, 19 P.2d 919.

[5] ¶ 22 While the facts in this case are not as clear cut as those in *Byrne*, they are clearly distinguishable from those in *Simon* and *Powell*. Unlike the employees in *Simon* and *Powell*, LaCoursiere did not receive ever-increasing bonuses for more than a decade. Instead, he received bonuses in three of the four years he worked at CamWest: 2005, 2006, and 2007. As LaCoursiere admits, he received no bonus in 2008, and the three bonuses he did receive decreased each year. Moreover, LaCoursiere signed an employment contract in this case. That contract was remarkably clear regarding the nature of LaCoursiere's bonuses. CamWest could provide a bonus “in its sole discretion and determination[.]” CP at 102. Indeed, LaCoursiere acknowledged to the superior court that CamWest was not obligated to give him a bonus every year: “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 at 394. Moreover, LaCoursiere admitted he was never told by CamWest that he would receive a bonus every year. Under these circumstances, the bonuses were mere gratuities: they were not given regularly, did not create an implied contract that they would be paid every year, and LaCoursiere could not have relied upon them, given he knew CamWest had no obligation to provide them. *Byrne*, 108 Wash.App. at 689, 691, 32 P.3d 307.

¶ 23 LaCoursiere also argues that even although CamWest had the discretion to pay no bonus at all,

once it exercised its discretion and decided to pay a bonus, that bonus qualified as wages under the WRA, and as such, the percentage of the bonus that was directed into his project manager capital account was a prohibited rebate. But even if the bonus did amount to wages, we reject LaCoursiere's argument. To violate subsection (1) of RCW 49.52.050, an employer must collect or receive a “rebate” of wages already paid. Here, there was no rebate to CamWest. Although LaCoursiere characterizes the capital account funds as having been “diverted” from him, they were not. Indeed, CamWest paid LaCoursiere just as he agreed to be paid under the employment contract, i.e., 44 percent of his bonus (less withholding) being paid directly to him, and 56 percent being paid into his own capital account with the LLC.

*689 ¶ 24 LaCoursiere implies the funds in the capital account were not truly his because he did not actively manage how those funds were used or invested. See Reply Brief at 8. But again, LaCoursiere agreed in writing that the funds in the capital account would be used “for loans to CamWest for its use as working capital.” CP at 178. LaCoursiere also appears to argue CamWest received a rebate in that it distributed only 60 percent of the funds in his capital account at the time he left the company. See Reply Brief at 11 (“they *still* possess 40% of that sum and refuse to disgorge it”). This argument ignores the plain language of the LLC agreement, which contains a vesting schedule for capital account funds. Given LaCoursiere left when his capital account funds were only 60 percent vested, he received precisely the funds he agreed to receive when he signed the LLC agreement.

[6] ¶ 25 Thus, even if the LLC bonus structure amounts to a prohibited rebate of wages, LaCoursiere knowingly submitted to the violation, and under the WRA, he cannot receive the benefits of the WRA:

... 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. LaCoursiere claims this provision applies only if the employee knows about the rebates *and* also knows the rebates are illegal under chapter 49.52 RCW. We reject this argument. LaCoursiere cites no authority for his proposition, and it is contrary to caselaw on the issue, which holds the requisite knowledge is not potential illegality under

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the WRA, but is instead the employee's knowledge that he is deferring payment decisions to the employer. See *Chelius v. Questar Microsystems, Inc.*, 107 Wash.App. 678, 682, 27 P.3d 681 (2001) (knowing submission requires deliberately and intentionally deferring to employer's decision on payment).

¶ 26 Here, as is described above, LaCoursiere voluntarily entered into the employment and LLC agreements. These agreements made it clear that the bonuses were entirely discretionary; that the purpose of the capital accounts was to provide the LLC with capital; and that the capital account funds were subject to a vesting and forfeiture schedule. Under these circumstances, we conclude LaCoursiere “knowingly submitted” to any violation.^{FN2}

FN2. LaCoursiere also cites *Champagne v. Thurston County*, 163 Wash.2d 69, 77, n. 6, 178 P.3d 936 (2008) for the proposition that the WRA cannot be negated by contract. LaCoursiere does not explain this argument, and a review of *Champagne* makes it clear it has no application here. There, the court simply made the rather unremarkable observation that provisions in a collective bargaining agreement cannot supersede a Washington Administrative Code. *Id.* at 77, n. 6, 178 P.3d 936.

¶ 27 We affirm the order granting CamWest's motion for summary judgment.

Attorney Fees

¶ 28 On cross-appeal, CamWest argues that the trial court erred by denying its motion for attorney fees under the employment agreement, which provides for prevailing party fees in the event of an action arising under the agreement. CamWest notes that the trial court interlineated in its order denying the motion for fees that the complaint alleged “only a violation of the Wage Rebate Act” and not breach of contract claims. CP at 525. CamWest contends this is an erroneous interpretation of the law, because although LaCoursiere did include a breach of contract claim in its complaint, the action here arose out of the employment agreement and that agreement was central to the dispute. LaCoursiere does not respond to this argument. Instead, he asserts that “employers are never entitled to fees under the WRA” without acknowledging CamWest's argument.

[7] ¶ 29 We agree with CamWest on this issue. A 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, LLC v. Fairway Resources, Ltd.*, 152 Wash.App. 229, 278, 215 P.3d 990 (2009) (citing *Hemenway v. Miller*, 116 Wash.2d 725, 742-43, 807 P.2d 863 (1991) and *690 *Seattle First Nat'l Bank v. Wash. Ins. Guar. Ass'n*, 116 Wash.2d 398, 413, 804 P.2d 1263 (1991)); see also *Hill v. Cox*, 110 Wash.App. 394, 411-12, 41 P.3d 495 (2002) (contractual fees awarded when prevailing party elected to proceed on statutory tort claim rather than contract); *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wash.App. 834, 855-56, 942 P.2d 1072 (1997) (contract-based fees awarded for negligence claim when duty breached was created by parties' agreement); 25 David K. DeWolf et al., WASHINGTON PRACTICE: CONTRACT LAW AND PRACTICE § 14:18, at 357 (2d ed. 2007) (even in cases where plaintiff's claims are founded in tort or another legal theory, award of contract attorney fees may be appropriate).

[8] ¶ 30 Here, the terms and proper enforcement of the employment agreement is central to LaCoursiere's WRA claim. In other words, this action arose out of the parties' employment agreement and that agreement was central to the dispute. As such, the trial court erred in denying CamWest's motion for attorney fees, and we therefore reverse that order and remand for further proceedings.^{FN3}

FN3. In his reply brief, LaCoursiere suggests counsel for CamWest should be sanctioned “for violating ER 408 by improperly mentioning settlement discussions” in the response brief. See Reply Brief at 2-3. We decline to impose sanctions. ER 408 does not prohibit any mention of settlement negotiations or render them privileged. Rather, the rule simply prohibits admission of settlement negotiations into evidence for the purpose of proving liability or amount of damages.

¶ 31 We affirm the order dismissing LaCoursiere's claims against CamWest, but reverse the order denying CamWest's motion for fees, and remand for further proceedings.

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WE CONCUR: DWYER and SCHINDLER, JJ.

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LaCoursiere v. CamWest Development, Inc.
289 P.3d 683

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— **APPENDIX B** —

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

SHAUN LACOURSIERE,

Appellant/Cross-Respondent,

v.

CAMWEST DEVELOPMENT, INC., a
Washington corporation, and ERIC H.
CAMPBELL, an individual,

Respondents/Cross-Appellants.

No. 67034-4-1

DIVISION ONE

ORDER ON MOTION FOR
CLARIFICATION

SPEARMAN, A.C.J. — In our December 3, 2012 opinion in this matter, we reversed the trial court's order denying CamWest Development Inc. and Eric Campbell's (CamWest) motion for attorney fees and remanded for further proceedings.

CamWest has moved for clarification, seeking an order that determination of their attorney fees on appeal is also within the scope of the remand ordered by our opinion.

We grant the motion for clarification. It is hereby:

ORDERED that determination of CamWest's attorney fees on appeal is within the scope of remand in this matter.

Done this 20th day of December, 2012.

Spearman, A.C.J.

WE CONCUR:

Dryden, J.

Delvigne, J.

— APPENDIX C —

Chapter 49.52 RCW
WAGES — DEDUCTIONS — CONTRIBUTIONS — REBATES

RCW Sections

- 49.52.010 Employees' benefit deductions and employer contributions are trust funds -- Enforcement.
- 49.52.020 Lien of party rendering service.
- 49.52.030 Deductions in extrahazardous employment -- Medical aid fund deductions excluded.
- 49.52.040 Actions to recover for service -- Lien -- Priority.
- 49.52.050 Rebates of wages -- False records -- Penalty.
- 49.52.060 Authorized withholding.
- 49.52.070 Civil liability for double damages.
- 49.52.080 Presumption as to intent.
- 49.52.090 Rebates of wages on public works -- Penalty.

Notes:

Chattel liens: Chapter 60.08 RCW.

Mechanics' and materialmen's liens: Chapter 60.04 RCW.

Mutual savings bank employees, pension, retirement, or health insurance benefits: RCW 32.04.082.

Public employees, payroll deductions: RCW 41.04.020, 41.04.030, 41.04.035, and 41.04.036.

49.52.010

Employees' benefit deductions and employer contributions are trust funds — Enforcement.

All moneys collected by any employer from his or her or its employees and all money to be paid by any employer as his or her contribution for furnishing, either directly, or through contract, or arrangement with a hospital association, corporation, firm, or individual, of medicine, medical or surgical treatment, nursing, hospital service, ambulance service, dental service, burial service, or any or all of the above enumerated services, or any other necessary service, contingent upon sickness, accident, or death, are hereby declared to be a trust fund for the purposes for which the same are collected. The trustees (or their administrator, representative, or agent under direction of the trustees) of such fund are authorized to take such action as is deemed necessary to ensure that the employer contributions are made including, but not limited to filing actions at law, and filing liens against moneys due to the employer from the performance of labor or furnishing of materials to which the employees contributed their services. Such trust fund is subject to the provisions of *chapter

48.52 RCW.

[2010 c 8 § 12053; 1975 c 34 § 1; 1927 c 307 § 1; RRS § 7614-1.]

Notes:

***Reviser's note:** Chapter 48.52 RCW was repealed by 1979 ex.s. c 34 § 1.

49.52.020

Lien of party rendering service.

In case any employer collecting moneys from his or her employees or making contributions to any type of benefit plan for any or all of the purposes specified in RCW

49.52.010, shall enter into a contract or arrangement with any hospital association, corporation, firm, or individual, to furnish any such service to its employees, the association, corporation, firm, or individual contracting to furnish such services, shall have a lien upon such trust fund prior to all other liens except taxes. The lien hereby created shall attach from the date of the arrangement or contract to furnish such services and may be foreclosed in the manner provided by law for the foreclosure of other liens on personal property.

[2010 c 8 § 12054; 1975 c 34 § 2; 1927 c 307 § 2; RRS § 7614-2.]

49.52.030

Deductions in extrahazardous employment — Medical aid fund deductions excluded.

All moneys realized by any employer from the employer's employees either by collection or by deduction from the wages or pay of employees intended or to be used for the furnishing to workers engaged in extrahazardous work, their families or dependents, of medical, surgical or hospital care and treatment, or for nursing, ambulance service, burial or any or all of the above enumerated services, or any service incidental to or furnished or rendered because of sickness, disease, accident or death, and all moneys owing by any employer therefor, shall be and remain a fund for the purposes for which such moneys are intended to be used, and shall not constitute or become any part of the assets of the employer making such collections or deductions: PROVIDED, HOWEVER, That RCW

49.52.030 and 49.52.040 shall not apply to moneys collected or deducted as aforesaid for, or owing by employers to the state medical aid fund. Such moneys shall be paid over promptly to the physician or surgeon or hospital association or other parties to which such moneys are due and for the purposes for which such collections or deductions were made.

[1989 c 12 § 16; 1929 c 136 § 1; RRS § 7713-1.]

49.52.040

Actions to recover for service — Lien — Priority.

If any such employer shall default in any such payment to any physician, surgeon, hospital, hospital association or any other parties to whom any such payment is due, the sum so due may be collected by an action at law in the name of the physician, surgeon, hospital, hospital association or any other party to whom such payment is owing, or their assigns and against such defaulting employer, and in addition to such action, such claims shall have the same priority and lien rights as granted to the state for claims due the accident and medical aid funds by section 7682 of Remington's Compiled Statutes of Washington, 1922 [RCW

51.16.150 through 51.16.170], and acts amendatory thereto, which priority and lien rights shall be enforced in the same manner and under the same conditions as provided in said section 7682 [RCW 51.16.150 through 51.16.170]: PROVIDED, HOWEVER, That the said claims for physicians, surgeons, hospitals and hospital associations and others shall be secondary and inferior to any claims of the state and to any claims for labor. Such right of action shall be in addition to any other right of action or remedy.

[1929 c 136 § 2; RRS § 7713-2.]

49.52.050

Rebates of wages — False records — Penalty.

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 theretofore paid by such employer to such employee; or
- (2) Wilfully and with intent to deprive the employee of any part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract; or
- (3) Shall wilfully make or cause another to make any false entry in any employer's books or records purporting to show the payment of more wages to an employee than such employee received; or
- (4) Being an employer or a person charged with the duty of keeping any employer's books or records shall wilfully fail or cause another to fail to show openly and clearly in due course in such employer's books and records any rebate of or deduction from any employee's wages; or
- (5) Shall wilfully receive or accept from any employee any false receipt for wages;

Shall be guilty of a misdemeanor.

[2010 c 8 § 12055; 1941 c 72 § 1; 1939 c 195 § 1; Rem. Supp. 1941 § 7612-21.]

Notes:

Severability -- 1939 c 195: "If any section, subsection, sentence or clause of this act shall be adjudged unconstitutional, such adjudication shall not affect the validity of the act as a whole or of any section, subsection, sentence or clause thereof not adjudged unconstitutional." [1939 c 195 § 5; RRS § 7612-25.] This applies to RCW 49.52.050 through 49.52.080.

49.52.060

Authorized withholding.

The provisions of RCW

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

[1939 c 195 § 2; RRS § 7612-22.]

Notes:

Penalty for coercion as to purchase of goods, meals, etc.: RCW 49.48.020.

Public employment, payroll deductions: RCW 41.04.020, 41.04.030, 41.04.035, and 41.04.036.

Wages to be paid in lawful money or negotiable order, penalty: RCW 49.48.010.

49.52.070

Civil liability for double damages.

Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of RCW

49.52.050 (1) and (2) shall be liable in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a 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.

[2010 c 8 § 12056; 1939 c 195 § 3; RRS § 7612-23.]

49.52.080

Presumption as to intent.

The violations by an employer or any officer, vice principal, or agent of any employer of any of the provisions of subdivisions (3), (4), and (5) of RCW

49.52.050 shall raise a presumption that any deduction from or underpayment of any employee's wages connected with such violation was wilful.

[1939 c 195 § 4; RRS § 7612-24.]

49.52.090

Rebates of wages on public works — Penalty.

Every person, whether as a representative of an awarding or public body or officer, or as a contractor or subcontractor doing public work, or agent or officer thereof, who takes or receives, or conspires with another to take or receive, for his or her own use or the use of any other person acting with him or her any part or portion of the wages paid to any laborer, worker, or mechanic, including a piece worker and working subcontractor, in connection with services rendered upon any public work within this state, whether such work is done directly for the state, or public body or officer thereof, or county, city and county, city, town, township, district or other political subdivision of the said state or for any contractor or subcontractor engaged in such public work for such an awarding or public body or officer, shall be guilty of a gross misdemeanor.

[2010 c 8 § 12057; 1935 c 29 § 1; RRS § 10320-1.]

Notes:

Prevailing wages must be paid on public works: RCW 39.12.020.