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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.

REPLY 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

Respondents/Cross-Appellants CamWest Development, Inc. (“CamWest”) and Eric H. Campbell respectfully request that this Court reverse the Superior Court’s denial of their Motion for Costs and Attorneys’ Fees. The Reply Brief of Appellant Shaun LaCoursiere offers minimal argument on this issue and fails to address the basis for Respondents’ request: the contractual fee-shifting provision agreed upon by the parties. As discussed below, the fee-shifting provision supports Mr. Campbell’s and CamWest’s entitlement to costs and attorneys’ fees, both before the Superior Court and on appeal.

II. ARGUMENT

As a result of their successful defense of this case, Mr. Campbell and CamWest are entitled to an award of reasonable costs and attorneys’ fees pursuant to a fee-shifting provision contained in the Employment Agreement entered into between LaCoursiere and CamWest. CP 449 (§ 8.6). Specifically, the parties agreed:

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.

Id.

LaCoursiere's argument in rebuttal of Mr. Campbell's and CamWest's cross-appeal on the issue of attorneys' fees is so minimal that it is cited in full, for ease of reference, as follows:

Finally, the defendants' [sic] spends [sic] 8 pages trying to convert the one-way, employee-oriented attorneys' fees standard of the WRA into a two-way, employer-oriented rule. *See Brief of Respondents*, pp. 42-50. But they don't offer any actual WRA authority on the issue, which is telling. The plaintiff's only claim is for violation of the WRA; he did not sue for breach of contract. The Legislature contemplated that there might be an underlying contract between the parties. *See* RCW 49.52.050(2) (referring to "any statute, ordinance, or contract", underscore added). Yet, as to attorneys' fees, the Legislature enacted a one-way rule. *See* RCW 49.52.070. It's as simple as that. The WRA is a remedial statute for workers, and there has never been a WRA case wherein the employers recovered attorneys' fees.

Reply Brief of Appellant, pp. 24-25 (emphasis in original). LaCoursiere's argument misses its mark, focusing on the incorrect basis for an award of costs and fees under these circumstances.

A. Mr. Campbell's and CamWest's Motion for Costs and Attorneys' Fees is Not Based Upon the Wage Rebate Act

As quoted above, LaCoursiere's argument against an award of costs and attorneys' fees to Mr. Campbell and CamWest rests solely upon the assertion that employers are never entitled to an award of attorneys' fees pursuant to the Wage Rebate Act. *Id.* On that point, he is correct. The Wage Rebate Act itself does not provide a basis for a prevailing defendant/employer to recover attorneys' fees. *See* RCW 49.52.070. However, contrary to LaCoursiere's declaration that "[i]t's as simple as that," the argument does not end there. Reply Brief of Appellant, p. 25.

"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) (emphasis added). Thus, a party can assert either contractual, statutory, or equitable grounds for a requested award of attorneys' fees. *Id.* Mr. Campbell and CamWest have not based their request for attorneys' fees on the Wage Rebate Act. Although the Wage Rebate Act does not provide for attorneys' fees in this instance, "a private agreement" between the parties serves as the legal basis for Mr. Campbell and CamWest to collect their reasonable costs and fees. *Id.*

LaCoursiere implies that a contractual fee-shifting provision cannot be applied to a claim to recover wages. His only claimed authority for this suggestion is the fact that RCW 49.52.050(2) contemplates that an employee may bring a claim for wages due under a contract, but that the Wage Rebate Act affirmatively provides only for attorneys' fees for the plaintiff/employee. Reply Brief of Appellant, pp. 24-25; RCW 49.52.070. LaCoursiere cites to no authority, however, for the proposition that simply because a claim involves the recovery of wages, it is somehow exempted from an otherwise applicable contractual fee-shifting provision.

There is no prohibition in the Wage Rebate Act against a prevailing defendant relying upon a separate source as the basis for an award of costs and fees. The fact that the Wage Rebate Act contains a mechanism for prevailing plaintiffs to recover their costs and attorneys' fees does not preclude prevailing defendants from relying on an alternate basis for recovering their costs and fees.¹ In this case, that alternate source

¹ RCW 49.52.070 provides: "An employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of 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 wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees." This affirmative provision for an award of costs and fees to a prevailing plaintiff does not include any prohibition on recovery of costs and fees by a prevailing defendant. It simply means that the prevailing defendant's legal basis for such an award must be founded upon a different statute, contract, or equitable ground. *See Deep Water Brewing, LLC*, 152 Wn. App. at 277.

is the contractual provision contained in the Employment Agreement. CP 449 (§ 8.6).

In addition, the mere fact that an employer may owe wages to the employee under a contract does not necessarily mean that the same contract contains a fee-shifting provision. Thus, many contractual wage claims may not bring into play a contractual fee-shifting provision. In that respect, it is not all that surprising if, as LaCoursiere rushes to point out, there are not yet any Wage Rebate Act cases in which an employer has recovered attorneys' fees. Neither is there authority supporting LaCoursiere's insinuation that a prevailing defendant is barred from invoking alternate legal grounds for recovery of costs and attorneys' fees simply because the case involves Wage Rebate Act claims. •

B. The Employment Agreement's Fee-Shifting Provision Applies to this Litigation

The fee-shifting provision contained in the Employment Agreement is applicable to this lawsuit. As noted above, the 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) (emphasis added).

LaCoursiere argues only that “[t]he plaintiff’s only claim is for violation of the WRA; he did not sue for breach of contract.” Reply Brief of Appellant, p. 24 (emphasis in original). A claim “arising under the Agreement” is not limited to a claim for breach of contract, as LaCoursiere suggests. In fact, LaCoursiere’s own previous briefing contradicts his current position. In his Motion and Memorandum of Points and Authorities on Cross-Motions for Summary Judgment, LaCoursiere argued that the six-year statute of limitations set forth in RCW 4.16.040, applicable to contract claims, was the appropriate limitation period for his claims in this case. CP 251. In so arguing, LaCoursiere stated: “In the instant case, the dispute concerns the plaintiff’s bonuses, and those bonuses explicitly arose under the written Employment Agreement. Thus, although the plaintiff is not specifically suing for breach of contract, the six-year limitation period is, nevertheless, applicable.” *Id.* (emphasis added). LaCoursiere’s claims in this litigation flowed from bonuses that he himself has acknowledged “explicitly arose under the written Employment Agreement,” sought to enforce what LaCoursiere believed to be the terms of the Agreement, and rendered the Agreement central to the dispute.

Cases interpreting situations in which an action is brought “on a contract” for purposes of RCW 4.84.330 are very informative in interpreting the types of claims that can “arise under an agreement.” RCW 4.84.330 provides a statutory basis for a party to collect attorneys’ fees under a contract even where the fee-shifting provision is unilateral.² In other words, if a contract provides that the employee can collect attorneys’ fees if he brings an action to enforce the provisions of that contract, RCW 4.84.330 transforms the parties’ unilateral fee-shifting provision into a bilateral provision, providing a statutory basis for the employer to collect fees, as well.

The Agreement in this case already contains a bilateral fee-shifting provision. CP 449 (§ 8.6). The plain language of the Agreement thus provides the contractual basis for Mr. Campbell’s and CamWest’s request for costs and fees. *Cornish College of the Arts v. 1000 Virginia Ltd. P’ship*, 158 Wn. App. 203, 231, 242 P.3d 1 (2010) (“When a contract includes a bilateral attorney fees provision, ‘it is the terms of the contract to which the trial court should look to determine if such an award is

² 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 other disbursements.”

warranted.”), quoting *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 785, 197 P.3d 710 (2008). “Where the terms of a contract are plain and unambiguous, the intention of the parties shall be ascertained from the language employed.” *Id.*, quoting *Marine Enters., Inc. v. Sec. Pac. Trading Corp.*, 50 Wn. App. 768, 773, 750 P.2d 1290 (1988).

In those cases in which a party has sought to transform a unilateral contract provision to a bilateral provision under RCW 4.84.330, the Washington courts have consistently held that a case is brought “on a contract,” implicating a contract’s fee-shifting provision, “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). “[T]he 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 (emphasis added); *see also Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 692 P.2d 867 (1984) (holding that a claim “on a contract” “encompasses any action in which it is alleged that a person is liable on a contract.”)

Thus, the courts have clarified that a claim need not be framed as a breach of contract claim in order to arise from the underlying agreement.

Deep Water Brewing, 152 Wn. App. at 278; *Miller v. Badgley*, 51 Wn. App. 285, 297, 753 P.2d 530 (1988) (claims stemming from implied terms not contained in a contract nevertheless implicated the contract’s fee-shifting provision because the contract was central to the dispute). Nor does the fact that a claim sounds in tort, rather than contract, preclude the finding that the claim arose under a contract where the contract is central to the dispute.³ *See id.*; *Brown*, 109 Wn. App. at 58-59; *Ethridge v. Hwang*, 105 Wn. App. 447, 460, 20 P.3d 958 (2001); *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). A contract is central to a dispute where “[t]he contract cannot be overlooked in the analysis of the[] circumstances.” *Western Stud Welding, Inc. v. Omark Indus., Inc.*, 43 Wn. App. 293, 299, 716 P.2d 959 (1986).

LaCoursiere did not bring breach of contract claims, but the Employment Agreement was at the core of the claims he did raise, and his claims depended on it. The Agreement is central to the dispute between the parties and cannot be overlooked in the courts’ analysis. Absent the Employment Agreement, LaCoursiere’s claims would have been non-existent, as he contends that the bonus structure established therein

³ For a more detailed discussion of this issue, please refer to pages 43-49 of the Brief of Respondents/Cross-Appellants. *See also* CP 498-511, 518-24.

entitled him to the sums at issue. LaCoursiere has repeatedly asserted throughout this litigation that Mr. Campbell and CamWest violated the terms of the Employment Agreement through the manner in which they issued bonuses and has emphasized that his Wage Rebate Act claims flow from what he believed to be Mr. Campbell's and CamWest's actions and obligations under the Agreement.

In his briefing before the Superior Court, LaCoursiere asserted that “the defendants simply did not adhere to the contract. . . . As a direct result, the plaintiff received less wages than his contract required,” and that “[t]he plaintiff did not receive all wages that he was entitled to under the Employment Agreement.” CP 253 (emphasis added). At oral argument on the parties' cross-motions for summary judgment, LaCoursiere's counsel continued to emphasize the centrality of the Agreement to the dispute, making statements that included the following:

The contract explained that he was going to be eligible for bonuses.

RP 3, ll. 2-3 (emphasis added).

Here, we have a written contract . . . This case is all about past bonuses, whether they were rebated and whether they were paid correctly. . . . He [LaCoursiere] relied upon the defendants following their own written promises. . . . He's suing because they violated the rebate provisions [in the

Agreement]. They also violated the percentages.⁴

RP 17, l. 18 – 18, l. 13 (emphasis added).

Here, they violated the contract. The contract plainly spelled out the percentages. It said 44 percent shall be distributed directly to employee, less the taxes. That's not at all what they did.

RP 22, ll. 12-16 (emphasis added).

[W]hy does some of the money come out of the 56 percent share? There's nothing in the contract that authorizes that.

RP 23, ll. 8-10 (emphasis added).

It's not a question of did they follow tax law. It's a question of did they follow their promises about taxes. . . . Number one, it [the Agreement] mentions taxes only as applicable to the 44 percent share, not to the whole 100 percent. That's what it says in plain English.

RP 25, ll. 12-18 (emphasis added).

In hindsight, I don't think there's any way to look at this whole scheme, these two contracts⁵ and what they were doing, as anything other than an attempt to skirt the Wage Rebate Act.

RP 35, ll. 17-20 (emphasis added).

⁴ The reference to "the percentages" relates to Section 2.2.5 of the Agreement. See CP, p. 446 (§ 2.2.5).

⁵ The second contract refers to the Limited Liability Company Agreement referenced in the Employment Agreement.

On appeal, LaCoursiere has abandoned for the first time his claims that Mr. Campbell and CamWest unlawfully withheld wages by allegedly failing to adhere to the percentages and taxation requirements delineated in the Agreement.⁶ *See* Brief of Appellant, p. 3. As is demonstrated from the selected examples above, those arguments were at the core of LaCoursiere's claims below; his decision to abandon them at this stage does not diminish their centrality to this litigation. Regardless, LaCoursiere has continued to emphasize the Employment Agreement's role on appeal, including devoting four pages of his appellate brief to a description of the Agreement's applicable terms. *Id.* at 3-7.

The Employment Agreement is central to the dispute at issue for the following fundamental reasons:

- The Employment Agreement set forth the terms of the LLC Bonus Structure. CP 445-46 (§ 2.2). This included the criteria for issuance of the discretionary bonuses; the percentage of each bonus that would be allocated to the LLC versus directly to the employee; the taxation of bonuses; and reference to the LLC. *Id.*

⁶ Nevertheless, LaCoursiere still discusses the alleged failure to adhere to the Agreement's specified percentages and taxation requirements in his appellate briefs. *See* Brief of Appellant, p. 9 and n. 5; Reply Brief of Appellant, pp. 6-7.

- The bonuses issued to LaCoursiere were done so pursuant to the terms of the Employment Agreement. *See, e.g.*, CP 26-28, 162-63.
- LaCoursiere claimed before the Superior Court that Mr. Campbell and CamWest violated the terms of the Agreement by failing to pay the requisite percentage of each bonus directly to LaCoursiere. *See* CP 446 (§ 2.2.5); CP 247 (“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.”); CP 254 (“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.”); *see also* CP 238-42, 253, 256, 395-99.
- LaCoursiere claimed before the Superior Court that Mr. Campbell and CamWest violated the terms of the Agreement by withholding taxes from the portions of the bonuses paid directly to LaCoursiere. *See* CP 446 (§2.2.5); CP 254 (“[T]he defendants applied and deducted taxes from both shares, which was a further deviation from the mandatory terms of the contract.”); *see also* CP 241, 247, 253, 395, 397.

- LaCoursiere claims that he was contractually entitled to the full amount of the bonuses issued pursuant to the Employment Agreement, arguing that because of the contract, the bonuses issued by Mr. Campbell and CamWest were not discretionary for purposes of the Wage Rebate Act. *See* CP 417 (“Once each yearly bonus was declared, no further discretion existed under the contract.”); CP 396 (“Once each bonus was declared . . . , that ended all discretion. Thenceforth, the mandatory terms of the Employment Agreement were operative.”); *see also* CP 251, 394, 396.
- LaCoursiere claims that the allocation of portions of the bonuses to the LLC, in accordance with the Employment Agreement, were unlawful rebates and that the Agreement was consequently illegal. *See* CP 254 (“[N]ot 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 394 (“[A]n actual written contract exists in the instant case (although that contract is illegal because it contravenes the WRA).”); *see also* CP 252-53, 255-56.

- A primary defense of Mr. Campbell and CamWest to LaCoursiere's Wage Rebate Act claims is that LaCoursiere signed the Employment Agreement, agreeing to the terms of the LLC Bonus Structure detailed therein. *See* CP 35-36, 246, 366-69, 412-13.

In sum, LaCoursiere has asserted entitlement to specific sums pursuant to a contract, has alleged that Mr. Campbell and CamWest violated the terms of that contract with respect to those sums, and has challenged the legality of the bonus structure delineated in that contract. The Employment Agreement is central to the parties' dispute. LaCoursiere's repeated assertions that the bonuses at issue "triggered the mandatory terms of the contract," that the contract "cannot be ignored," and that "[t]he defense cannot pick -and-choose only the provisions that suit its argument" are equally applicable to LaCoursiere. CP 395. The Employment Agreement is central to this lawsuit, and its fee-shifting provision cannot be ignored by a plaintiff who relies so heavily on the same contract's other provisions in support of his claims. LaCoursiere's own admission provides an apt summary of why it is appropriate to conclude that his claims arose under the Agreement: "In the instant case, the dispute concerns the plaintiff's bonuses, and those bonuses explicitly

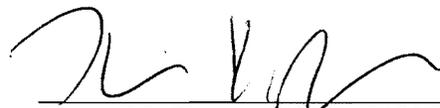
arose under the written Employment Agreement.” CP 251, ll. 27-28. This litigation arose under the Agreement, entitling Mr. Campbell and CamWest to their reasonable costs and attorneys’ fees, including their costs and fees on appeal. CP 449 (§ 8.6) (providing for attorneys’ fees on appeal); *Reeves v. 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.).

III. CONCLUSION

For the foregoing reasons, as well as the arguments set forth in the Brief of Respondents/Cross-Appellants, Mr. Campbell and CamWest respectfully request that this Court reverse the Superior Court’s Order Denying Defendants’ Motion for Costs and Attorneys’ Fees.

DATED: October 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

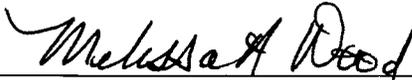
CERTIFICATE OF SERVICE

I, Melissa Wood, certify under penalty of perjury under the laws of the State of Washington that, on October 21, 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 21st day of October, 2011, at Seattle, Washington.



Melissa Wood, Legal Secretary