Supreme Court No. 97519-1
Court of Appeals Cause No. 78014-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DAVID ESSIG,

Plaintiff and Respondent,

v.

MICHAEL LAI AND VEENY VAN, et al.

Appellants and Petitioners.

PETITION FOR REVIEW

Randy Baker, WSBA# 27421
Attorney at Law
2719 E. Madison St., Suite 304
Seattle WA, 98112
Tel. 206-325-3995
FAX 206-681-9991
Email bakerlaw@drizzle.com
Attorney for Appellants and
Petitioners Michael Lai, et al.

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I. IDENTITY OF PETITIONERS

Petitioners are the defendants against whom judgment in the amount of $555,861 was entered on January 24, 2018, and which judgment was affirmed by the Court of Appeals on July 8, 2019.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the Washington Court of Appeals, Division I Opinion dated July 8, 2019 denying his appeal.[1] A copy of the decision is in the Appendix at pages 1-11.

III. ISSUE PRESENTED FOR REVIEW

1. Does the Wage Rebate Act, RCW 49.52.050, apply to an employer breach of a bilateral contract for compensation to an employee, where the obligation for payment is not predicated on the employee having worked?

IV. STATEMENT OF THE CASE

A. Procedural History

On April 1, 2016 Plaintiff David Essig filed a complaint alleging 1) wrongful withholding of wages in violation of RCW 49.52.050(2); 2) breach of contract, 3) negligent misrepresentation and 4) fraud[2] against, *inter alia*, Defendants Michael Lai and Veeny Van individually and the

1. On August 7, 2019 this Court stated that it would rule on petitioners' August 7, 2019 Motion to Extend Time for Petition for Review after the petition is submitted, if the petition is submitted by September 20, 2019.
2. The complaint also alleged unjust enrichment and failure to pay the minimum wage. CP 7-8. However, those claims were not litigated.

marital community of Mr. Lai and Ms. Van.[3] CP 1-15. On January 24, 2018, following a bench trial, the court found Defendants Mr. Lai, the marital community of Mr. Lai and Ms. Van, and ML Companies, LLC, USASIA Pacific, Inc., Realty Network Team, Inc., PT Holding, LLC, and Seattle Modern Living on 35th liable to Plaintiff Essig for breach of contract and wrongful withholding of wages. CP 427-428, 431-433. The court found Plaintiff Essig had failed to prove the claims of fraud and negligent misrepresentation. CP 433.

Judgment as to these parties reflecting these determinations was entered on January 24, 2018. CP 435-438. Pursuant to the judgment, the defendants were held jointly and severally liable to Plaintiff Essig due to the breach of contract for two years salary totaling $228,000 and $13,263 for health benefits and due to the wrongful withholding of wages, exemplary damages of $228,000, $85,890 in attorney fees and $ 708.28 in

3. Also named as defendants were MML Companies, LLC, Mr. Lai, d/b/a/ ML companies, Inc., USASIA Pacific, Inc., PT Holding, LLC, Realty Network Team, Inc., Seattle Modern Living, LLC, Seattle Modern Living on 35th, LLC, John Doe Corporations 1-5, Michael Lai and Veeny Van, husband and wife, Mr. Lai as Founder, President and Chairman of defendant corporate and limited liability companies, Ms. Van as Vice President/Secretary of USASIA Pacific, Inc., and Realty Network Team, Inc., Mr. Lai and Ms. Van as members of ML companies, Inc., PT Holding, LLC, Seattle Modern Living, LLC, and Seattle Modern Living on 35th, LLC. CP 1-15.

costs. CP 432-433, 437. The total judgment was for $555,861.28. CP 438.

Defendants filed a timely notice of appeal on February 6, 2018 and a corrected notice of appeal on February 21, 2018. CP 442, 447. The Court of Appeals affirmed the judgment on July 8, 2019. Appendix at 11.

B. Statement of Facts

Defendant Michael Lai immigrated to the United States as a political refugee from Vietnam via China and the Philippines in 1993 at age 18. RP 283-284. After working during the day and attending night school, he earned an associate degree from South Seattle Community College. RP 284. He began working in real estate and in 2005 Lai moved to a firm serving principally the Vietnamese community; that year he also established his own real estate business.[4] RP 285. He has employed over 100 agents, all of whom work as independent contractors; the only employees of Lai's businesses are himself and one office worker. RP 286-288, 290-291, 298.

4. Lai speaks Vietnamese and Cantonese. RP 282. While he conducts many activities in English, which he began to learn when he arrived in the United States in 1993, he has had problems functioning in English and was assisted at trial by a Vietnamese translator. RP 13-15, 283-284, 310-312.

Plaintiff Essig met Lai while Essig was working at the Rainier Valley Community Development Fund (CDF). RP 58-59. CDF had been created to mitigate the impact of light rail in Seattle's Rainier Valley by supporting development in the area. RP 51, 54. Essig managed commercial real estate loans there to capitalize the fund by investing in real estate in cooperation with developers. RP 54.

By 2015 Essig had over 30 years experience in real estate management and finance; he held a B.A. in economics from Washington and Lee University and an M.B.A. from Pennsylvania State University. Plaintiff's Exhibit 59. In 2015 CDF was paying Essig an annual salary of $100,000, plus benefits and annual bonuses. RP 56-57.

Essig testified that he had several business contacts involving his work at CDF with Lai and Veeny Van, whom he understood to have been Lai's wife and business partner. RP 58-59, 63-66.

In May 2015 Lai asked Essig to draft a proposal under which he could join Lai's organization. RP 74. Following negotiations and changes inserted by Lai to the document Essig had drafted, Lai and Essig both signed the agreement on May 29, 2015 in Lai's office. RP 78-85; Plaintiff's Exhibit 3. Under the agreement Essig was to work as Development Director for Lai, ML Companies (owned entirely by Lai)

and affiliated companies from July 13, 2015 to June 30, 2017, and he would be paid a salary of $114,000 annually, plus benefits. Plaintiff's Exhibit 3; RP 228-229. After the agreement was signed, Lai presented Essig a $5,000 check as a signing bonus.[5] RP 86.

Lai testified prior to signing the contract he had consumed several beers at a nearby restaurant, that he trusted Essig and that he just signed the agreement without looking at it carefully or fully understanding it. RP 258-259, 268-269, 313-314. He said Essig had pressured him to sign, because Essig was working on several loans on Lai's behalf, including one at CDF. RP 259, 295, 340-341. Essig denied that he was involved with the consideration of any loans for Lai by CDF. RP 357-359.

Essig said that on July 13th he appeared for work at Lai's new offices. RP 98. Lai showed Essig around, told him there was no room yet for him, but that he was negotiating for additional space. RP 99.

Essig testified that Lai never provided him with office space, nor a cubicle, nor a desk nor a computer and that Lai never introduced him as his employee. RP 360. From July 13th through August 18th, Essig said he worked independently by familiarizing himself with Lai's projects,

5. Lai testified that he wrote Essig a bonus check with the expectation he first would work, and then cash the check. RP 264. In his deposition Lai stated he had given Essig the check without intending that he would pay him the money in the check. RP 264.

visiting some of Lai's project sites, reviewing several emails from Lai meeting a couple times with him, researching possible new sites for Lai to develop and researching the availability of permits and ownership issues. RP 100-106. Essig testified that he had memorialized none of the results of his site visits. RP 188.

Lai maintained he had provided Essig a place to work, that he never had seen him show up at work, and that Essig never had worked for him. RP 273-274, 300-301.

Following Essig's repeated efforts to meet with Lai, Lai met with him on August 22, 2015. RP 108, 110, 114, 116-119. Essig proposed to revise the date of the commencement of his employment contract from July 13, 2015 to August 17, 2015 in light of the "slow start" of their working arrangement, and to reduce his compensation to $6,000 for that period. RP 119-120. Expressing concerns about cash flow, Lai rejected the proposal and on August 24th countered by proposing that Essig work as a contractor for $6,000 per month.[6] RP 121, 124.

6. Lai testified that his financial status had weakened considerably that summer, because several of the business loans for which he had applied were denied. RP 303. As a result, he lost ownership of the largest project he had been developing. RP 304. In addition, one of his fellow investors in the project fell into financial difficulty, which required Lai travel abroad to raise funds. RP 304.

Essig and Lai continued to present each other with counter-proposals through August 25, 2015. RP 123-129, 130-131. On August 27th, Essig notified Lai that he was in breach, and that Essig no longer would be working for him. RP 135.

Essig attempted unsuccessfully to find substitute employment after declaring Lai in breach. RP 146-158. Lai has not hired any other individual as an employee since August 2015. RP 308.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. DEFINING "WAGE" UNDER RCW 49.52.050 TO ENCOMPASS COMPENSATION NOT PREDICATED ON WORK PERFORMED IS IRRECONCILABLE WITH THIS COURT'S DECISIONS AND IS ECONOMICALLY IRRATIONAL

The Court of Appeals's published decision holds for the first time that the 1939 Wage Rebate Act, RCW 49.52.050 (hereinafter "WRA"), which is a punitive and indeed criminal statute, applies not only to an employer's willful failure to fully pay an employee for work he or she has performed, but also to an employer's willful failure to pay a salary owed pursuant to a bilateral contract, even if the employee performed no work. Appendix at 5-6, 8. This decision requires review for several reasons.[7]

7. Whether money owed by an employer to an employee constitutes wages under the WRA is a question of law, which is reviewed de novo. *See Arzola v. Name Intelligence, Inc.*, 172 Wn.App. 51, 57, 288 P.3d 1154 (2012).

First, it is irreconcilable with this Court's decision in *LaCoursiere v. Camwest Development, Inc.,* 181 Wn.2d 734, 741-744, 339 P.3d 963 (2014) adopting the definition of wage employed in the Minimum Wage Act (hereinafter MWA) and thereby holding a bonus to have been a wage, because it had been paid for "work performed." Second, it contravenes this Court's determination in *Ford v. Trendwest Resorts, Inc.,* 146 Wn.2d 146, 155, 43 P.3d 1223 (2002) that the breach of an employment contract warrants neither punishment nor deterrence. Third, and relatedly, it will reduce economic activity, by increasing both the risk and cost of doing business. *See Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 447, 815 P.2d 1362 (1991); *Folely v. Interactive Data Corp.*, 47 Cal.3d 654, 664 n. 3, 765 P.3d 373 (1988).

1. This Court's Decisions Compel the Conclusion that the Wage Rebate Act Applies Only to Consideration Owed to Employees Due to Their Work

An employer violates the WRA if he or she ""[w]ilfully 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…." RCW 49.52.050 (2). An employer who commits such a violation "shall be liable in a civil action by the aggrieved employee … to judgment for twice the

amount on the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney fees." RCW 49.52.070. Violation of the Act also can carry a criminal penalty. *See* RCW 49.52.050.

The legislature enacted these provisions in 1939 as "Anti-Kickback statutes." *Jumamil v. Lakeside Casino, LLC.*, 179 Wn.App. 665, 682, 319 P.3d 868 (2014). Their fundamental purpose "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." *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159, 961 P.2d 371 (1998) (internal quote and citation omitted). The WRA thereby reflects "a strong legislative intent to assure payment to employees of **wages they have earned**." *Id*. at 158; *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 656, 336 P.3d 1112 (2014) (WRA expresses "legislature's strong policy in favor of ensuring the payment of **wages earned**") (internal quote and citation omitted); *Morgan v. Klingen*, 166 Wn.2d 526, 538, 210 P.3d 995 (2009) (WRA evidences "a strong policy in favor of ensuring payment of the full amount of **wages earned**")(emphases added).

The WRA itself, however, does not contain a definition of wage. *LaCoursiere v. Camwest Development, Inc., supra,* 181 Wn.2d at 741.

Accordingly, in 2014 this Court resolved the meaning of wage under the WRA:

> To give undefined terms meaning, this court may look to dictionary definitions and related statutes. Ultimately, in resolving a question of statutory construction, this court will adopt the interpretation which best advances the legislative purpose. While the WRA does not define "wage," another related statute, the Minimum Wage Act, chapter 49.46 RCW, broadly defines "wage" as "compensation due to an employee by reason of employment." Similarly, *Webster's* defines "wage" as "a pledge or payment of usu. monetary renumeration by an employer esp. for labor or services…"
>
> *Id*. at 741-742 (internal citations omitted).

Applying the Minimum Wage Act (MWA) definition of wage the *LaCoursiere* court held that a bonus, once paid for "work performed," constitutes a wage. *Id*. at 741. *LaCoursiere* thereby showed, as this Court's dictum in prior cases indicated, that "wages" under the WRA refers to compensation due to an employee in consideration for work.

This Court's holding in *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 861-863, 93 P.3d 108 (2004), which also turned on the meaning of "wage" in the MWA, confirms this construction. In *Hisle* employees claimed their collective bargaining agreement, which included

retroactive compensation for hours worked prior to the effective date of the agreement, entitled them to overtime pay under the MWA for hours worked that constituted overtime under the Act. *Id*. at 859-860. Management, in contrast, maintained that the retroactive compensation was an inducement to ratify the contract, and therefore was not covered by the Act. *Ibid*. Citing the linkage of the payment to "hours worked," the *Hisle* court held the payment was covered by the MWA.[8] *Id*. at 862-863.

The factor distinguishing earned wages from other consideration for which an employer might be obligated to pay an employee is that earned wages are, in substance, property. *See Navlet v. Port of Seattle*, 164 Wn.2d 818, 828 n. 5, 194 P.3d 221 (2008) ("an employee who renders a service in exchange for compensation has a vested right to receive such compensation…. [u]pon vesting, such a right becomes a proprietary interest"); *see also Harrell v. U.S.*, 13 F.3d 232, 234 (7th Cir. 1993); 19 Williston on Contracts § 54:35 (4th ed.) (May 2018 update).

The importance of this distinction was illustrated by the California Supreme Court in *Cortez v. Purolator Filtration Products Co.*, 23 Cal.4th 163, 999 P.2d 706 (2000). Applying California's law of unfair

8. Alternatively, the Court held that, under the facts of the case, the employer's characterization of the payment as a ratification inducement did not suffice to exclude it from the provisions of the MWA. *See id.* at 863.

competition, which authorized the equitable remedy of restitution, but not damages, to an employee's claim for recovery of wages for which she had worked, the *Cortez* court explained:

> The commonly understood meaning of "restore" includes a return of property to a person from whom it was acquired, but earned wages that are due and payable pursuant to section 200 et seq. of the Labor Code[9] are as much the property of the employee who has given his or her labor to the employer in exchange for that property as is property a person surrenders through an unfair business practice. An order that earned wages be paid is therefore a restitutionary remedy… The order is not one for payment of damages.
>
> *Id.* at 169, 178 (internal citations omitted).

Thus, in wilfully refusing to pay wages an employee has earned, the employer in substance engages in a form of theft. Theft, of course, can constitute a crime. *See, e.g.,* RCW 9A.50.030(1)(b). Indeed, in addition to authorizing exemplary damages, violations of the WRA can amount to a crime punishable by a loss of liberty. *See* RCW 9A.20.021(3), 49.52.050; *see also Allen v. Dameron*, 187 Wn.2d 692, 713, 389 P.3d 487 (2017) ("RCW 49.52.050(2) is a penal statute") (McCloud, J., concurring).

9. California Labor Code § 200 states "'Wages' includes all amounts for labor performed by employees of every description…"

Conversely, this Court has determined that the damages for breach of an employment contract not involving the willful failure to pay compensation to which the employee is entitled by virtue of her work is limited to expectation damages. *See Gaglidari v. Denny's Restaurants, Inc.*, *supra*, 117 Wn.2d at 445-448. The reason is that the simple breach of an employment contract "is neither immoral nor wrongful; it is simply a broken promise …. Punishment of a promisor for having broken his promise has no justification on either economic or other grounds…" *Ford v. Trendwest Resorts, Inc., supra*, 146 Wn.2d at 155.

In this case, defendants' liability to plaintiff for $228,000, i.e. two years of plaintiff's $114,000 annual salary, turned on the trial court's finding Mr. Lai had promised to pay Mr. Essig for two years, but had not done so. Specifically, the court cited the document executed by Essig and Lai on May 29, 2015 stating Essig would be employed by the defendants from July 13, 2015 through June 30, 2017 at that salary. CP 431-431; Plaintiff's Exhibit 3.

There was no finding plaintiff had worked those two years nor for any significant portion of that time.[10] Indeed, the trial court alluded to the

10. To the contrary, the court expressly found Essig performed no work for defendants after August 26, 2015, the day before he declared defendants in breach. CP 429-430.

fact the obligation in issue did not involve earned compensation in distinguishing what it found to be Plaintiff Essig's meritorious contract claim from what it found to be his unproven claim for fraud:

> What this case is about is a contract, an employment contract, whether it was duly formed and whether it was breached. What we see with claims of fraud certainly is that there's a fraud that has been used to improperly and illegally extract something from an innocent party. There was nothing extracted here but arguably one month of employment.[11]
>
> RP 402.

Where the trial court went astray was in finding this simple breach of contract amounted to the retention of wages in violation of the WRA, simply because the breach was found to be willful; the court's own finding showed the monies owed were not due to Mr. Essig for having worked, and thus were not property that had been taken from him. RP 404.

Relying principally on *Gaglidari v. Denny's Restaurants, Inc.*, *supra*, 117 Wn.2d at 448-450, a case involving neither the WRA nor the MWA, but rather the RCW 49.48.030, the "Attorney's fee in action on wages -- Exception," the Court of Appeals held that regardless of whether an employee has performed work, compensation owed by an employer to

11. In fact it was questionable that Mr. Essig had worked even one month for Mr. Lai. Essig identified no specific work Lai had assigned him nor did he, a highly experienced executive, present any documentation of any work he claimed to have performed for Mr. Lai on his own initiative.

an employee as a result of employment constitutes "wages" under the WRA. Appendix at 6-8. The Opinion asserted construing the WRA based on the Attorney's fee in action on wages statute was warranted, "[b]ecause both statutes must be liberally construed and share essentially the same purpose, there is no reason to define wage differently in each statute." Appendix at 7.

This holding is unsound for several reasons. First, it is irreconcilable with this Court's express holding in *LaCoursiere:* "[w]e hold that bonuses, once **paid for work performed**, are wages." (emphasis added).[12] *LaCoursiere v. Camwest Development, Inc., supra*, 181 Wn.2d at 741. Second, it disregards that in adopting the definition of wage employed in the MWA, *LaCoursiere* thereby adopted the definition of wage it had applied in *Hisle*, which also construed wage as compensation for work. *See Hisle v. Todd Pacific Shipyards Corp.*, *supra*, 151 Wn.2d at 862-863.

Third, it disregards that the WRA's purpose is **not** "essentially the same" as that of the Attorney Fee in action on wages statute. The WRA is a penal statute, which also authorizes exemplary damages in civil

12. In fact the consideration the employee in *Gaglidari* had provided for receipt of the benefits she was owed was not a promise, but rather, as this Court explained "actually working for the defendant." *Gaglidari*, *supra*, 117 Wn.2d at 433-434.

litigation. Thus, the purpose of the WRA includes deterrence and punishment. *See In re Young*, 122 Wn.2d 1, 22, 857 P.2d 989 (1983) ("goals of criminal law are retribution and deterrence"); *Morgan v. Kingen*, 141 Wn.App. 143, 161-162, 169 P.3d 487 (2007) ("exemplary damages… are intended to punish and deter blameworthy conduct"). The Attorney's fee in wage action statute intends neither.[13]

Fourth it disregards that the deterrent and punitive purposes of the WRA reflect the fact that willfully failing to pay compensation an employee has earned through work amounts to a species of theft, which the law recognizes as blameworthy and criminal, while the law treats the simple breach of an employment contract as neither criminal nor morally blameworthy. *See Ford v. Trendwest Resorts, Inc., supra*, 146 Wn.2d 155.

The Court of Appeals' opinion also cites *Allstot v. Edwards,* 114 Wn.App. 625, 633-635, 60 P.3d 601 (2002), which held the backpay to which an unlawfully terminated public employee was entitled constituted

13. In contrast to the WRA, whose object is limited to wages, RCW 49.48.030 authorizes attorney fee awards for the recovery of **salary** and wages. While the terms can be synonymous, at the time of the enactment of the WRA in 1939, it is virtually certain the legislature considered wages to be compensation paid hourly, and that it did not intend persons paid salaries to be covered by its provisions. *See, e.g., In re Estey*, 6 F. Supp. 570, 571 (S.D.N.Y. 1934). Since Mr. Essig's claim manifestly was for salary, rather than hourly wages, for this reason also the Court of Appeals' reliance on RCW 49.48.030 to construe the WRA was mistaken.

a wage under the WRA. Appendix at 8. *Allstot* is inapposite for several reasons. First, the employee's entitlement to backpay in *Allstot* was predicated on his having earned, **through work**, continued employment absent just cause. *See Allstot v. Edwards, supra,* 114 Wn.App. at 633-634. Second, it is this Court's 2014 decision in *LaCoursiere*, not *Allstot*, a 2002 decision of an intermediate Court of Appeals, which is controlling; as noted, the Court of Appeals' decision in this case is irreconcilable with *LaCoursiere.*

2. Subjecting Businesses to Exemplary Damages and Criminal Liability for Simple Breach of an Employment Contract Will Unreasonably Curtail Economic Activity

As explained, the Court of Appeals' construction of the WRA authorizes punishment, including possible criminal liability, as a consequence for a simple beach of an employment contract. In so doing, it introduces enormous potential uncertainty into the employment relationship. Accordingly, this Court's explanation of its rejection of the introduction of tort remedies into such cases is even more compelling here, in light of the additional potential for criminal liability:

> [P]redictability of the consequences of actions related to employment contracts is important to commercial stability. In order to achieve such stability, it is also important that employers not be unduly deprived of

> discretion to dismiss an employee by fear that doing so will give rise to a potential tort recovery in every case.
>
> *Gaglidari*, *supra*, 117 Wn.2d at 447 (quoting *Folely v. Interactive Data Corp.*, *supra*, 47 Cal.3d at 696).

Indeed, not only does the unpredictability such penalties create for businesses undermine their efficiency, but the penalties also impose a drag on economic activity by increasing costs in cases in which breach otherwise would be economically efficient. *See Folely v. Interactive Data Corp.*, *supra*, 47 Cal.3d at 664 n. 3 ("a breach of contract will result in a gain in 'economic efficiency' if the party contemplating breach evaluates his gains at a higher figure than the value the other party puts on his losses, and this will be so if the party contemplating breach will gain enough from the breach to have a net benefit even though he compensates the other party for his resulting loss") (internal quotes and citation omitted).

That these serious and socially useless injuries to business and economic activity flow from the Court of Appeals' holding underlines the need for this Court to review this decision.

VI. CONCLUSION

For the reasons stated above, this Court should grant this petition.

Dated: September 20, 2019

Randy Baker /s/, WSBA# 27421
Attorney at Law
2719 E. Madison St., Suite 304
Seattle WA, 98112
Tel. 206-325-3995
FAX 206-681-9991
Email bakerlaw@drizzle.com

DECLARATION OF SERVICE

Essig v. Lai et al., Supreme Court No. 97519-1; Court of Appeals No. 78014-0-I

I, Randy Baker, declare, I am above 18 years of age and not a party to the above titled suit. My business address is 2719 E. Madison St., Suite 304, Seattle, WA 98112.

On September 20, 2019 I served a copy of the attached Petition for Review on Respondent's counsel, Brian K. Keeley, through this court's electronic filing system.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Seattle, Washington on this 20th day of September 2019.

Randy Baker /s/

APPENDIX

FILED
7/8/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DAVID GEORGE ESSIG, Respondent, v. MICHAEL LAI AND VEENY VAN, individually and the marital community comprise thereof; MICHAEL LAI d/b/a ML COMPANIES, INC., ML COMPANIES, LLC, a Washington limited liability company; USASIA PACIFIC INC., a Washington corporation ; PT HOLDING LLC, a Washington limited liability company; REALITY NETWORK TEAM, INC., a Washington corporation; SEATTLE MODERIN LIVING, LLC, a Washington limited liability company; SEATTLE MODERN LIVING ON 35TH LLC, a Washington limited liability company; and JOHN DOE COMPANIES, INC. 1-5, Appellants.	)	No. 78014-0-I DIVISION ONE PUBLISHED OPINION FILED: July 8, 2019

HAZELRIGG-HERNANDEZ, J. — This case requires us to decide whether the wage rebate act (WRA)[1], authorizes exemplary damages against an employer who fails to pay wages pursuant to a contract when the employee has not performed the actual work. David G. Essig stopped working for Michael Lai when Lai failed to pay him as required in their employment contract. Because the WRA is construed liberally to protect workers, the pay to which Essig was entitled under

[1] Chapter 49.52 RCW

the contract constituted wages. We hold Essig is entitled to exemplary damages. Affirmed.

FACTS

David Essig began working for the Rainier Valley Community Development Fund (CDF) in 2006. Essig managed the real estate investment portion of the fund to create revolving loans and attract development and funds to the Rainier Valley. Through his work with the CDF, Essig met Michael Lai. Lai managed a real estate brokerage. Essig worked with Lai's firm on two successful loan transactions. From the first time they met, Lai periodically approached Essig about working for him. Initially, Lai spoke to Essig about becoming a real estate agent, but Essig was not interested.

In the fall of 2014, Essig and Lai began to talk about Essig working for Lai in a development capacity. Lai wanted to know if Essig would be willing to partner with him on the developments, but Essig did not have the financial capacity to partner on large scale developments. Lai then asked Essig to consider working as a consultant or independent contractor, but Essig was not interested in working as an independent contractor. Essig stated that his interest was in working as a key employee to build the development organization. Lai asked Essig to draft a proposal for Essig to begin working for him.

On May 29, 2015, Essig entered into an employment agreement with Lai and a number of business entities under Lai's control. Lai agreed to employ Essig for a minimum of two years, with an annual salary of $114,000, health and dental benefits for Essig and his spouse, an expense account, office space, office

support, and a $5,000 signing bonus. Lai gave Essig a $5,000 check, which Essig successfully deposited. Essig was to start work on July 13, 2015. He resigned from the Rainier Valley Community Development Fund in reliance on the employment agreement.

Essig began performing his duties under the employment agreement on July 13, 2015. Over several weeks, he worked in the field reviewing projects, attending meetings and site visits with Lai, meeting with Lai, and engaging in phone, email, and text message communication with Lai regarding the business. At no point did Lai indicate that Essig was not employed by Lai.

On July 30, Essig emailed Lai requesting medical insurance and benefits for Essig and his wife, as provided in the employment agreement. On August 18, Essig sent Lai a letter demanding payment of his wages and benefits to that date. Essig continued to work for Lai until August 26.

Throughout August, Lai suggested changes to the employment agreement, but did not deny the existence of the employment agreement or employment relationship. Lai continued to involve Essig in meetings, phone calls, and communications regarding the business.

On August 27, Essig notified Lai that he considered Lai in breach, he was stopping work on Lai's behalf, and would seek other employment. Lai sent the following text message on August 28: "I can take care $120,000.000 per year next 12 months. Then become employees after that." Essig interpreted that message as an offer to work as an independent contractor. Essig engaged in efforts to find

comparable replacement employment, searching in Seattle, Oklahoma City, and other locations nationwide. Essig filed suit.

The court found Lai in breach of contract, and awarded Essig lost wages of $228,000, exemplary damages of $228,000 under the WRA, $13,263 in medical benefits, attorney fees of $85,890, and $708.28 in costs. Lai appeals the award of exemplary damages and the court's finding that Essig reasonably mitigated his damages.

DISCUSSION

I. Lai is liable for exemplary damages under the WRA

Under RCW 49.52.050 and .070, employers who pay any employee a lower wage than the employer is obligated to pay, are liable for exemplary damages equal to the unpaid wages. Hill v. Garda CL NW, Inc., 191 Wn.2d 553, 561, 424 P.3d 207 (2018). The employer must withhold the wages willfully, intend to deprive the employee of his or her wages, and the employee must not knowingly submit to the violations. Id. at 561.

The trial court found for Essig on each factor. Lai does not challenge those findings of fact. Instead, Lai challenges whether the money owed to Essig counts as a wage under the statute, and whether he proved a bona fide dispute regarding his obligation to pay those wages.

A. Money owed under an employment contract is wage for purposes of the WRA

Questions of statutory interpretation are reviewed de novo. Id. at 573. The goal of statutory interpretation is to give effect to the legislature's intent. Columbia

Riverkeeper v. Port of Vancouver USA, 188 Wn.2d 421, 435, 395 P.3d 1031 (2017). We begin with the plain meaning of the statute, which includes the text of the provision, the context of the statute, related provisions, and the statutory scheme as a whole. Id. at 435.

The purpose of the WRA is to "protect the wages of an employee against any diminution or deduction." Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 159, 961 P.2d 371 (1998) (quoting State v. Carter, 18 Wn.2d 590, 621, 140 P.2d 298 (1943)) (emphasis omitted). The WRA must be liberally construed to protect employee wages and assure payment. Id. at 159.

The WRA does not define wage, but a related statute, the Washington Minimum Wage Act (MWA)[2], defines wage as "'compensation due to an employee by reason of employment.'" LaCoursiere v. Camwest Dev. Inc., 181 Wn.2d 734, 742, 399 P.3d 963 (2014) (quoting RCW 49.46.010(7)). The plain language of RCW 49.52.050, authorizes liability against an employer that pays less than the "employer is obligated to pay. . . by any statute, ordinance or contract[.]"

The trial court found an employment contract between Essig and Lai. That contract entitled Essig to payment. Lai argues that those payments are not wages under the statute because Essig did not actually perform work to earn the wages. He relies on LaCoursiere, where the court held that bonuses paid for "work performed" constituted wages. Id. at 741. LaCoursiere, the plaintiff, received a discretionary bonus based on work performance criteria, some of which was distributed to an LLC owned by the plaintiff and his employer. Id. at 738-39. In

[2] Chapter 49.46 RCW

order to determine whether or not the money distributed to the LLC was an unlawful rebate, the court first had to determine whether the bonuses were wages. Id. at 741. The court considered the definition of wage used in the MWA, "compensation due to an employee by reason of employment," and the definition found in Webster's, "a pledge or payment of usu. monetary remuneration by an employer esp. for labor or services . . . often including bonuses." Id. at 741-42 (quoting RCW 49.46; WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2568 (2002)). After also considering cases where bonuses were paid for reasons other than employment and cases where future bonuses were promised, the court determined that the bonuses paid to the plaintiff "were due by reason of employment" and therefore wages. Id. at 743.

Lai argues that because LaCoursiere held that bonuses paid for work performed were wages, it suggests that payments unrelated to work performed are not wages. But LaCoursiere did not consider that question, and Lai's reading contradicts the "by reason of employment" language used to describe wages in LaCoursiere. Id. at 742. It also contradicts the plain language of the statute: the WRA refers to the employer's obligation to pay, not the employee's obligation to work. The salary Lai was obligated to pay to Essig was by reason of his employment.

In Gaglidari v. Denny's Restaurants, Inc., our Supreme Court rejected a similar argument regarding the meaning of the term wages in a related statute, RCW 49.48.030. 117 Wn.2d 426, 448, 815 P.2d 1362 (1991). RCW 49.48.030 provides for a plaintiff's recovery of attorney fees in a successful action to recover

wages or salary. The court held Gaglidari was employed based on a contract. Id. at 433. Gaglidari alleged that she was terminated in breach of her employment contract. Id. at 430. While the court remanded the case for resolution, it held that Gaglidari could recover attorney fees if she recovered back pay from the time she was terminated. Id. at 451. Denny's argued that "back wages" were not "wages owed" because they were not for work actually performed. Id. at 448-49. The court held that "[l]ost wages damages [were] in lieu of compensation for services[,]" the statute included not only wages for work actually performed but also "money due by reason of employment[,]" and attorney fees were recoverable under the statute in actions for breach of employment contracts. Id. at 449-50.

Lai attempts to distinguish Gaglidari's interpretation of RCW 49.48.030. Lai argues that RCW 49.48.030 is a remedial statute. On the other hand, because RCW 49.52.050 could result in a misdemeanor charge, he argues the WRA is a punitive statute, and should be construed more narrowly. The Supreme Court has held that RCW 49.48.030 is a remedial statute, meant to be construed liberally for the purpose of protecting employees' rights. Arnold v. City of Seattle, 185 Wn.2d 510, 521, 374 P.3d 111 (2016) (citing Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett, 146 Wn.2d 29, 34, 42 P.3d 1265 (2002) (collecting cases)). But the court has also held that the WRA must be liberally construed to protect employee wages and assure payment. Schilling, 136 Wn.2d at 159. Because both statutes must be construed liberally and share essentially the same purpose, there is no reason to define wage differently in each statute.

Finally, in Allstot v. Edwards, Division III of this court considered a similar question regarding the meaning of wages in RCW 49.52.050. 114 Wn. App. 625, 60 P.3d 601 (2002). In that case, after a police officer had been wrongfully terminated from his job and reinstated, the town failed to pay him for the time he was terminated. Id. at 629-30. The trial court ruled that exemplary damages under the WRA did not apply to back pay because the officer did not actually perform work while he was wrongfully terminated. Id. at 632-33. Division III held that wages included back pay because the language of RCW 49.52.050 did not contain any such limit on wages, the statute must be construed to protect employee wages, and other cases, including Gaglidari, had construed wages to include back pay. Id. at 633. Lai's argument is similarly based on the fact that Essig did not perform the work. We reject his argument on the same basis.

Essig's circumstances are analogous to the wrongful termination in Allstot. Essig had a right to employment and pay under the contract. Lai failed to pay him. Based on the language of RCW 49.52.050, the purpose of the statute, the definition of wage in the MWA, and the above precedents, we hold that pay under an employment contract constitute wages for the purpose of the WRA and affirm the award of exemplary damages.

B. Lai failed to establish the statutory bona fide dispute defense.

An employer can defeat a showing of willfulness by demonstrating a bona fide dispute regarding whether the wages were due. Hill, 191 Wn.2d at 561 (citing Schilling, 136 Wn.2d at 160). The employer bears the burden of proof regarding the bona fide dispute. Id. at 562.

The bona fide dispute defense requires the employer to have a genuine belief in the dispute and for the dispute to be objectively reasonable. Id. at 562. The subjective, genuine belief component is a question of fact, reviewed for substantial evidence. Id. at 562. The objective reasonableness of the argument is a legal question reviewed de novo. Id. at 562.

We affirm because Lai failed to show a subjective belief in a genuine dispute. The absence of a finding of fact is equivalent to a finding of its absence. Garcia v. Henley, 190 Wn.2d 539, 545, 415 P.3d 241 (2018). While the trial court does not explicitly find that Lai lacked a subjective belief in the dispute, the court found Lai failed to meet his burden of proof and lacked credibility. Lai understood that the contract obligated him to pay Essig wages. While Lai testified that he signed the contract under the influence of alcohol and under pressure from Essig, the trial court did not find him credible. Given the findings, the absence of an affirmative finding that Lai had a subjective belief in the dispute, and Lai's burden of proof, we affirm the trial court's implicit finding that Lai failed to establish a subjective belief in the dispute.

II. Lai did not demonstrate that Essig failed to take reasonable steps to mitigate his damages

The burden of proving a failure to mitigate damages is on the defendant. Kloss v. Honeywell, Inc., 77 Wn. App. 294, 301, 890 P.2d 480 (1995) (quoting Burnside v. Simpson Paper Co., 66 Wn. App. 510, 529-30, 832 P.2d 537 (1992)). Where an employee has been unlawfully discharged he must be "reasonably diligent in seeking and accepting . . . substantially equivalent [employment]." Id. at

302 (quoting Brady v. Thurston Motor Lines, Inc., 753 F.2d 1269, 1273-78 (4th Cir. 1985)). Essig testified that on August 28, 2015, Lai offered for him to work for Lai as an independent contractor for one year at a salary of $120,000. Lai argues that Essig was obligated to accept his offer and because Essig did not accept that offer, Essig failed to mitigate his damages by $120,000. The actual text of the message from Lai read "I can take care $120,000.000 per year next 12 months. Then become employees after that." The trial court did not find Lai credible at trial, and the oral ruling suggests that the court did not find his offer to be credible, either. The trial court found Essig was not offered employment between August 27, 2015 and June 30, 2017. To the extent that Lai's message constituted an offer, we do not find it comparable to the position described in the contract, and affirm the judgment of the trial court.

This court may affirm the judgment of the trial court on any theory established by the pleadings and supported by the proof. State v. Smith, 177 Wn.2d 533, 540-41, 303 P.3d 1047 (2013). Here, substantial evidence shows that the new position was not equivalent to the position Lai and Essig agreed to in the previous contract. While Lai argues that $120,000 per year is roughly equivalent to $114,000 per year plus benefits, he ignores the difference between status as an independent contractor and status as an employee. We can see how important that distinction was to Essig, because significant testimony shows that he bargained for employee status, even though Lai attempted multiple times to hire him as an independent contractor. It also ignores factors like providing Essig with

office space, office support, expenses, vacation, or an opportunity for bonuses, all of which were present in the original agreement.

Because substantial evidence shows the offer was not a similar position, Lai did not demonstrate that Essig failed to mitigate his damages.

Affirmed.

WE CONCUR:

September 20, 2019 - 9:23 AM

Filing Petition for Review

Transmittal Information

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