

No. 40987-9

**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON**

PAUL LIETZ,

Petitioner/Appellant,

v.

HANSEN LAW OFFICES, P.S.C., and AMY HANSEN,

Defendants/Respondents.

STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The issues on appeal are two-fold: 1) when must a trial court enforce a Washington State Superior Court Civil Rule 68 offer of judgment and 2) when is the offeree entitled to attorney fees when the CR 68 offer of judgment is silent on fees. Appellant Paul Lietz argues the trial court erred by failing to enforce a CR 68 offer of judgment when he unequivocally accepted Respondents' offer dated April 10, 2010 in the amount of \$7,500. He further argues the trial court erred by failing to order the Respondents to pay reasonable attorney fees when the offer was silent on fees and the underlying statute pled in Mr. Lietz's complaint does not define attorney fees as part of costs.

Mr. Lietz brought suit against Respondents seeking compensation for unpaid wages under RCW 49.48.030, a statute that provides for reasonable attorney fees. After accepting Respondents' offer of judgment, on May 14, 2010 Mr. Lietz moved for Entry of Judgment and award of attorney fees. The trial court denied his motion but agreed to reconsider calling it a "close question." CP 252. The trial court then denied Mr. Lietz's motion for reconsideration and set the trial date in the underlying wage claim. Mr. Lietz timely sought Discretionary Review, which was granted on September 27, 2010. Mr. Lietz now seeks reversal of the trial court's denial of his Motion for Entry of Judgment and remand back to the

trial court for a determination of his reasonable attorney fees. He also seeks attorney fees on appeal pursuant to RAP 18.1(a).

A. Mr. Lietz's underlying claim is for unpaid wages.

Mr. Lietz's suit arose from his employment as a paralegal and investigator with Respondents' law firm from early 2006 to 2007. Respondents failed to pay Mr. Lietz his wages for work he performed. Mr. Lietz brought a complaint against Respondents on June 18, 2008 seeking compensation for unpaid wages. He alleged breach of an employment contract and violation of RCW 49.52.050 and other relevant portions of RCW 49.52 *et seq.* Mr. Lietz sought attorney fees pursuant to RCW 49.48.030—a statute that does not define fees as “costs.”¹

At all relevant times, Mr. Lietz was an employee of Respondents.² During his period of employment, the parties agreed that Respondents would pay Mr. Lietz \$250.00 per week to work as a part time paralegal. In addition, the parties agreed that Respondents would pay Mr. Lietz \$15.00 per hour for work he performed as an investigator for Respondents. CP 2-3.

¹ Mr. Lietz also sought attorney fees under RCW 49.52.070.

² Respondents admit that Defendant Hansen terminated Mr. Lietz's employment on or about June 13, 2007. CP 3.

During Mr. Lietz's period of employment with Respondents, Respondents only sporadically paid Mr. Lietz the \$250.00 weekly amount for his paralegal work. Likewise, Respondents only paid Mr. Lietz for some of the investigative work he performed. CP 4.

B. The attorney fees required to prosecute Mr. Lietz's unpaid wage claim case were reasonable.

During the course of this litigation, Mr. Lietz's counsel incurred substantial attorney fees to prosecute the case. CP 182. By the time the Respondents made the offer of judgment—approximately two weeks before trial was scheduled to begin on May 3, 2010—Mr. Lietz's counsel had conducted discovery and was then preparing for trial, including filing motions in limine, preparing witnesses, drafting jury instructions and a trial brief, preparing an opening statement, and the direct and cross examination questions for trial witnesses. CP 180-181. In addition, during the discovery process, Respondents unnecessarily complicated this litigation by failing to comply with discovery rules. CP 181. Respondents' failure necessitated Mr. Lietz's counsel to move to compel discovery from Respondents on two separate occasions. CP 181.

Both of Mr. Lietz's motions were granted and sanctions were imposed on Respondents for the failure to comply with discovery rules.³ CP 181.

C. Trial court's actions constitute error.

Appellant seeks reversal of the trial court's May 14, 2010 oral decision and June 25, 2010 order. In the oral ruling and written order, the trial court denied Appellant's Motion for Entry of Judgment and for Attorney fees that he filed and served on May 6, 2010. In the oral decision on May 14, 2010, the trial court ruled that it would not enforce a CR 68 offer of judgment even though Appellant unequivocally accepted Respondents' offer of judgment finding that there was no "meeting of the minds." CP 252. On June 25, 2010, the trial court denied Appellant's motion for reconsideration. CP 231. The trial court then set the matter for trial. Because a trial was pending, Appellant sought discretionary review. Review was granted and this appeal followed.

II. ASSIGNMENTS OF ERROR

A. The trial court erred when it declined to grant Appellant's motion for entry of judgment and for attorney fees by deciding not to enforce Respondents' CR 68 offer of judgment where Appellant unequivocally accepted the offer.

Issue Pertaining to First Assignment of Error: Was the doctrine of mutual assent satisfied such that a trial court must enter judgment under

³ Respondents paid \$1,400.00 in discovery sanctions. That amount has been deducted from Mr. Lietz's fee request. CP 181.

CR 68 where Respondents served upon Appellant an offer to allow judgment to be taken against Respondents to the effect specified in the offer and Appellant timely and unequivocally accepted the offer?

Issue Pertaining to First Assignment of Error: Is Appellant entitled to entry of judgment when he unequivocally accepted Respondents' CR 68 Offer of Judgment?

B. The trial court erred when it did not grant Appellant's motion for attorney fees — ruling on May 14, 2010 that the trial court would not enforce Respondents' offer of judgment pursuant to CR 68 even though the underlying statute provided for the award of attorney fees that were not defined as costs.

Issue Pertaining to Second Assignment of Error: Is Appellant entitled to attorney fees, pursuant to RCW 49.48.030—a statute that does not define attorney fees as “costs”—where Respondents' offer of judgment under CR 68 was silent on the issue of attorney fees and the offer was unequivocally accepted by the Appellant?

III. STATEMENT OF THE CASE

On June 18, 2008, Appellant Paul Lietz (“Mr. Lietz”) brought suit seeking compensation for unpaid wages due to him from Respondents Hansen Law Offices, P.S.C. and Amy Hansen (“Respondents”) arising from his employment with Respondents' law firm from 2006 to 2007. Mr. Lietz alleged breach of an employment contract and violation of RCW 49.52.050 and other relevant portions of RCW 49.52 *et seq.* Mr. Lietz

sought attorney fees pursuant to RCW 49.48.030.⁴ CP 5. Respondents answered and brought a counterclaim against Mr. Lietz. CP 10-22. On or about October 9, 2009, Respondents submitted an “Offer of Judgment” to Mr. Lietz. He did not accept Respondents’ first offer of judgment offer. CP 223.

On April 20, 2010, Mr. Lietz received another “Offer of Judgment” from Respondents, pursuant to CR 68.⁵ CP 222. The CR 68 offer stated, in relevant part, that Respondents offered to “*settle the claim* against Defendants at the present time in the amount of \$7,500.00.” (emphasis added) CP 183. The CR 68 offer was silent on the issue of attorney fees. The CR 68 offer also did not address Respondents’ counterclaim against Mr. Lietz. On April 28, 2010, Mr. Lietz timely and unequivocally submitted his acceptance of Respondents’ CR 68 offer in writing, stating that Mr. Lietz “accepts Defendants’ offer of judgment dated April 19, 2010 in the amount of seven thousand five hundred dollars (\$7,500).” CP 185.

⁴ Mr. Lietz also sought attorney fees under RCW 49.52.070.

⁵ Respondents’ offer was also purportedly made pursuant to two statutes under Chapter 4.84 RCW (RCW 4.84.185 and 4.84.280). CP 183.

On April 29, 2010, Respondents filed a notice with trial court alleging that a settlement of “all claims against all parties” had been reached. CP 26.

On May 6, 2010, Mr. Lietz moved the trial court to enter an order of judgment pursuant to the CR 68 offer and award Mr. Lietz reasonable attorney fees pursuant to RCW 49.48.030. CP 29-37. Relying on *Seaborn Pile Driving Co., Inc. v. Glew*, 132 Wn. App. 261, 131 P.3d 910 (2006), Mr. Lietz argued that where, as here, a CR 68 offer is silent on the issue of attorney fees, those fees are awardable under RCW 49.48.030, in addition to the judgment resulting from the CR 68 offer, because RCW 49.48.030 does not define attorney fees as “costs.” CP 32-34.

Objecting to the entry of judgment, Respondents proffered, in part, an argument conceding that the CR 68 offer here was silent on the issue attorney fees. Respondents also concede -- albeit somewhat confusingly -- that the statute Mr. Lietz pled does not define fees as “costs.”⁶ CP 65.

⁶ Respondents wrote in their response brief:

If a CR 68 offer of judgment is silent on the issue of attorney fees, then the court must look to the underlying statute or contract provision. If the statute or contract defines attorney fees as part of costs, then the offer of judgment is inclusive of attorney fees even though they are not mentioned. *Seaborn Pile Driving Co. v. Glew*, 132 Wn. App. 261, 131 P.3d 910. In the case at hand, there is no applicable statute pled in this case defining attorney fees as part of costs. Plaintiff states that they are not bringing attorney fees under

Respondents also argued in their response that the “settlement agreement” should be enforced in the amount of \$7,500. CP 71.

On May 14, 2010, counsel for each party offered oral argument on Mr. Lietz’s motion for Entry of Judgment. CP 238-253. As part of Respondents’ argument, Respondents’ counsel Geoffrey Cross mentioned for the first time the possibility of “scrivener’s error” or lack of mutual assent in this matter. CP 248.

At the conclusion of oral argument on May 14, 2010, the trial court orally ruled as follows:

Well, I guess I’m kind of torn here. On the one hand, it’s very possible Ms. Hansen never intended to offer any more than 7500; on the other hand, Mr. Cross – I don’t know. He says it’s under Rule 68 and now trying to avoid 68, and in the Seaborn v. Glew case, so what I’m going to do, I’m not going to enforce the agreement. *There appears to me that there was not a meeting of the minds about this*, so I think this is – we’re going to have to go back to square one, set a trial date, and attorney fees, I’m sure, will pile up even more. (emphasis added)

CP 252. The trial court gave approval to Mr. Lietz’s counsel to make a reconsideration request and stated, “It’s a close question.” *Id.*

On May 21, 2010, Mr. Lietz requested reconsideration of the trial court’s ruling. CP 172-177. Mr. Lietz argued that mutual assent (“meeting of the minds”) was satisfied, pursuant to *Seaborn*, because Mr. Lietz

RCW 49.52.050 and .070, which was pled as the underlying cause of action. The complaint also pled a breach of employment contract; no contract exists to examine. CP 65 (footnote omitted).

unequivocally accepted the Respondents' CR 68 offer. CP 180-181. Mr. Lietz also pointed out that Respondents were now apparently relying on a "scrivener's error" argument, which was necessarily premised on the fact that attorney fees were *omitted* from the CR 68 offer. CP 181. Mr. Lietz argued that if Respondents' failure to include attorney fees in their CR 68 offer was a mistake, such a mistake was Respondents' unilateral mistake and did not form the basis for the relief they sought—avoidance of attorney fees. CP 179, 180-182.

In response, Respondents proffered an argument comprised of bits of the mutual assent doctrine and bits of "mistake" defenses. Respondents claimed, in relevant part, that (1) both Mr. Lietz and Respondents allegedly manifested an intent that Respondents' offer was for a "full and final settlement of the case"; (2) Mr. Lietz then allegedly allowed the trial court and Respondents to believe that the matter had been "settled;" and finally; and (3) after Respondents submitted to Mr. Lietz payments and documentation for a stipulated dismissal, Mr. Lietz, acting contrary to his earlier alleged behavior, sought to "snap up" a "scrivener's error." CP 203-205. Respondents also simultaneously (rather than alternatively) characterized the alleged error as a "unilateral mistake." CP 181.⁷

⁷ Respondents also sought to distinguish *Seaborn* from this case by asserting that Respondents' CR 68 offer settled all claims of all parties,

On June 25, 2010, at oral argument on Mr. Lietz's reconsideration motion, Mr. Lietz's counsel Susan Mindenbergs argued, in part, that mutual assent was satisfied pursuant to *Seaborn* and that Respondents' "mistake" defense should be rejected. CP 258-266. Respondents' counsel Mr. Cross then argued, in relevant part, that Respondents' CR 68 offer was an unambiguous "offer of settlement." CP 266-267. Mr. Cross did not mention Respondents' scrivener's error/unilateral mistake defense again, nor did he allege a lack of mutual assent.

At oral argument on June 25, 2010, the trial court decided:

Well, I'm going to deny the motion to reconsider. Ms. Mindenbergs makes a good point. Mr. Cross is the one who drafts this, so if there's ambiguity, I should probably construe it against him. But my understanding is the total claim here was \$14,000. They offered to settle 50 percent of that.

I'm sure Ms. Hansen didn't realize she might be stuck with \$35,000 in attorney fees. Now, maybe her attorney should have known better, but she's the one that might have to pay. So I'm going to deny the motion for reconsideration over the objection of plaintiff.

CP 267-268. The trial court entered an order denying Mr. Lietz's motion for reconsideration on June 25, 2010. CP 231-232. Mr. Lietz then timely filed notice of discretionary review, which was granted on September 27, 2010.

allegedly unlike *Seaborn*, (which dealt with a CR 68 offer on a counterclaim but did not address the claim of the other party). CP 63. Respondents' argument was contrary to the facts, since Respondents' CR 68 offer *did not address their counterclaim*.

IV. ARGUMENT

- A. The trial court erred when it declined to grant Appellant’s motion for entry of judgment on Respondents’ CR 68 offer of judgment when Appellant unequivocally accepted the offer.**

CR 68 provides, in relevant part:

If within 10 days after the service of the offer [of judgment by a party] the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and *thereupon the court shall enter judgment.*

CR 68 (emphasis added).

Here, Mr. Lietz accepted Respondents’ offer of judgment, in accordance with CR 68. Neither party disputes this. CP 181, 63. In fact, even Respondents initially requested that the trial court enforce the “agreement” in this matter. CP 71. Yet, the trial court declined to enter the judgment finding that there was no “meeting of the minds.” CP 252.

- 1. The doctrine of mutual assent (formerly “meeting of the minds”) was satisfied where there was an offer and unequivocal acceptance of that offer.**

Mutual assent was satisfied when Mr. Lietz unequivocally accepted Respondents’ CR 68 offer. In denying Mr. Lietz’s motion, the trial court used the term “meeting of the minds.” “Mutual assent” is a modern expression for the term “meeting of the minds,” both of which are contract formation concepts. See *Multicare Medical Center v. State, Dept. of Social and Health Services*, 114 Wn.2d 572, 598, n. 24, 790 P.2d 124

(1990). Mutual assent generally takes the form of an offer and acceptance. *Yakima County (West Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388-89, 858 P.2d 245 (1993). Washington courts follow the objective manifestation theory under which a court will impute to a person an intention corresponding to the reasonable meaning of his words and acts. *Olson v. The Bon, Inc.*, 144 Wn. App. 627, 633-34, 183 P.3d 359 (2008) (citing *Morris v. Maks*, 69 Wn. App. 865, 871, 850 P.2d 1357 (1993)). Under this theory, the subjective intention of the parties is irrelevant. Instead, the mutual assent of the parties must be gathered from their outward manifestations—not from an unexpressed intention. *City of Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981).

The analysis in *Seaborn* is directly on point here. In *Seaborn*, the maker of a CR 68 offer failed to include attorney fees in the offer, despite an assertion that that the maker meant to do so. The maker argued that its offer was void because it intended to include attorney fees, and therefore there was no mutual assent. *Seaborn*, 132 Wn. App. at 268, 131 P.3d 910. The *Seaborn* court rejected the CR 68 maker's mutual assent argument, finding that the offer of judgment was valid because the offer was unequivocally accepted by the other party.⁸

⁸ By way of contrast, in *Hodge v. Development Services of America*, the plaintiff accepted an offer of judgment, but the acceptance was

Here, Mr. Lietz unequivocally accepted Respondents' CR 68 offer. CP 185. It was not a conditional acceptance or a counteroffer. The fact that Mr. Lietz later moved for his attorney fees *in addition* to a judgment under the CR 68 offer did not render his acceptance conditional—just as it did not render the *Seaborn* offeree's acceptance conditional. *Seaborn*, 132 Wn. App. at 269, 131 P.3d 910 (Defendant Glew accepted the offer of judgment, with no “modifications or reservations.”)

Respondents never articulated a mutual assent argument (although they vaguely stated that this case “classically illustrates the necessity of a ‘meeting of the minds’”). What Respondents actually argued is that the outward manifestation of intent of both Respondents and Mr. Lietz was *identical* until Mr. Lietz allegedly acted contrary to his alleged prior manifestation of intent *when he moved for entry of judgment*. CP 203-205. However, Respondents' argument ignores the fact that by the time Mr. Lietz moved for entry of judgment, Mr. Lietz *had already accepted the CR 68 offer*. Whatever the merits of Respondents' argument (addressed below), it was not a *mutual assent* argument.

conditioned on her receipt of attorney fees under RCW 49.60 and RCW 49.48.030. *Hodge v. Development Services*, 65 Wn. App. at 578, 828 P.2d 1175. The court held that settlements are a form of contract and proceedings under CR 68 are essentially contractual in nature. In contract terms Ms. Hodge's “acceptance” was conditional and amounted to a counter offer and a rejection of Development Services' offer. *Id.*, 65 Wn. App. 581-82.

2. Respondents' alleged mistake in failing to mention attorney fees in the CR 68 offer is construed against them.

Respondents alternatively argue that they committed a “scrivener’s error” or that they committed a “unilateral mistake” in the drafting of the terms of their CR 68 offer and therefore should be relieved of any obligation under the court rule. Both arguments fail. No relief may be afforded if the mistaken party bears the risk of their mistake. *See, e.g., Gill v. Waggoner*, 65 Wn. App. 272, 278-79, 828 P.2d 55 (1992) (discussing Restatement (Second) of Contracts section 153), Restatement (Second) of Contracts section 154. Here, Respondents bore such risk; they had a responsibility to lay out the terms of their offer. “[I]t is incumbent on the defendant” making the offer of judgment “to state clearly that attorney fees are included as part of the total sum for which judgment may be entered if defendant wishes to avoid exposure to attorney fees in addition to the sum offered[.]” *Seaborn*, 132 Wn. App. at 272, 131 P.3d 910 (quoting *Nusom v. Comh Woodburn, Inc.*, 122 F.3d 830, 834 (9th Cir. 1997)) (internal quote marks omitted). *See also, e.g., Burrell v. G.M.F., Inc.*, 225 F.3d 661 (9th Cir. 2000) (“[G]overning Ninth Circuit case law holds that any ambiguity or mistake in a Federal Rule 68 offer regarding attorneys’ fees does not void the agreement *but is instead construed against the drafter.*”) (emphasis added). Further, Mr. Lietz did

not know of and had no reason to know of any alleged mistake. If the Respondents had a different intent than what the CR 68 offer stated, that intent remained unexpressed.

While the trial court did not explicitly rule on Respondents' "mistake" defense, such a defense does not form the basis of relief for Respondents. But Respondents' "mistake" defense illustrates that Respondents concede that their CR 68 offer was not inclusive of attorney fees. While Respondents' description of their alleged "mistake" was strangely vague, under the circumstances of this case the alleged "mistake" could only be that Respondents' CR 68 offer was *mistakenly* not made inclusive of attorney fees. Mr. Lietz noted this fact to the trial court, stating in his Motion for Reconsideration that Respondents' argument (then described by Respondents as a scrivener's error argument—the unilateral mistake argument was added later) was necessarily premised on the fact that the CR 68 offer was not made inclusive of fees. CP 172, 175. In their response, Respondents did not dispute Mr. Lietz's characterization of their position. Instead, in relevant part, Respondents continued to pursue and expand upon their mistake argument. CP 201-205.

Respondents' mistake argument has no merit. Mr. Lietz does not dispute the fact Respondents' CR 68 offer was not made inclusive of fees.

But Respondents proffered no evidence to show that this fact was due to mistake. Further, even if a mistake occurred, Respondents' mistake was unilateral and does not form the basis of relief here.⁹ *See Seaborn*, 132 Wn. App. at 272, 131 P.3d 910; *Nusom*, 122 F.3d at 830.

B. Appellant Lietz is entitled to reasonable attorney fees pursuant to RCW 49.48.030 where the CR 68 offer of judgment was silent on the issue of attorney fees.

1. A CR 68 offer includes costs accrued to the date of the offer.

CR 68 provides, in relevant part:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or

⁹ No "scrivener's error" occurred. A scrivener's error is akin to a mutual mistake. It occurs when the intention of both parties is identical at the time of the transaction, but the written agreement does not express that intention because of the error. *See Estate v. Harford*, 86 Wn. App. 259, 263-64, 936 P.2d 48 (1997) (no scrivener's error was found where finding of requisite intention was made with respect to only one party to settlement). Here, Respondents do not and cannot prove that *Mr. Lietz* intended that Respondents' CR 68 offer include attorney fees. In fact, Mr. Lietz had no control over the Respondents' offer—he had no knowledge of the offer until it was made. At the time it was made, he had two options—accept the offer or decline it. He could not negotiate the offer or seek any type of modification of the offer. Any negotiation effort or modification of the offer would be construed as a counteroffer. *See Hodge*, 65 Wn. App. 576, 580-583, 828 P.2d 1175 (1992).

property or to the effect specified in his offer, *with costs then accrued.* (emphasis added)

Where the CR 68 offer is silent on fees, the issue of whether costs as provided for in CR 68, include attorney fees depends on the underlying statute or contract in dispute. *Hodge*, 65 Wn. App. at 580, 828 P.2d 1175. Where the underlying statute does not define fees as costs, reasonable fees may be awarded in addition to the underlying judgment pursuant to CR 68. *Id.*, 65 Wn. App. at 583-84, 828 P.2d 1175.

The controlling case in Washington on a CR 68 offer of judgment dispute where the underlying statute defines attorney fees separate from costs is *Seaborn Pile Driving Co. v. Glew*, 132 Wn. App. 261, 131 P.3d 910 (2006). In *Seaborn*, the court squarely held:

If a CR 68 offer of judgment is silent on the issue of attorney fees, then the court must look to the underlying statute or contract provision. If the statute or contract defines attorney fees as part of costs, then the offer of judgment is inclusive of attorney fees even though they are not mentioned. If attorney fees are defined as separate from costs under the statute or contract, *then the court must award those fees in addition to the amount of the offer.*

Seaborn, 132 Wn. App. at 267, 131 P.3d 910 (emphasis added).

No Washington court has changed the requirement that fees must be awarded as the court did in *Seaborn* where the acceptance of a CR 68 offer was unequivocal, the offer was silent on the issue of attorney fees, and the underlying statute pled did not define attorney fees as part of costs.

Mr. Lietz, after unequivocally accepting Respondents' CR 68 offer of judgment in the amount of \$7,500, an offer that was silent on fees, sought an award of his reasonable attorney fees under RCW 49.48.030—a statute that does not define attorney fees as costs.

2. RCW 49.48.030 does not define attorney fees as costs.

Mr. Lietz's Complaint for Damages sought compensation for unpaid wages and recovery of reasonable attorney fees. RCW 49.48.030, the statute underlying Mr. Lietz's request for reasonable attorney fees, stated, in relevant part:

In any action in which any person is successful in recovering judgment for wages or salary owed to him, reasonable attorney's fees, in an amount to be determined by the court, *shall be assessed against said employer or former employer*[.] (emphasis added)

Where, as here, a CR 68 offer of judgment is silent on the issue of attorney fees, a court must look to the underlying statute under which attorney fees are sought. If the underlying statute defines the attorney fees as part of costs, then the judgment is inclusive of attorney fees even though they are not mentioned. But if attorney fees are defined as separate from costs under the statute, as they are in RCW 49.48.030, then the court *must award those fees in addition to the amount of the offer*. *Seaborn*, 132 Wn. App. at 267, 131 P.3d 910. *See also Hodge*, 65 Wn. App. at 580-83, 828 P.2d 1175 (when underlying statute does not define costs as including

attorney fees, those fees are separate and in addition to the costs referred to in CR 68); *Nusom*, 122 F.3d at 833 (examining Federal Rule of Civil Procedure 68; held that an offeree may seek attorney fees where the underlying statute does not define attorney fees as costs and the offer of judgment did not specify that attorney fees were included).¹⁰

Attorney fees should be awarded in this case. Under the attorney fee statute at issue here, RCW 49.48.030, attorney fees are not defined as “costs.” *See Hodge*, 65 Wn. App. at 583, 828 P.2d 1175. Further, the CR 68 offer here was not inclusive of attorney fees. Respondents’ conceded this point with their argument that they just made a “mistake” in the drafting of their CR 68 offer of judgment.¹¹ Respondents are responsible

¹⁰ By way of contrast to RCW 49.48.030, the Washington Law Against Discrimination remedial statute, RCW 49.60.030(2) clearly defines attorney fees as part of costs. The statute states, in relevant part:

(2) Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, *together with the cost of suit including reasonable attorneys' fees* or any other appropriate remedy authorized by this chapter

¹¹ Respondents argued in their opposition to Mr. Lietz’s initial motion for entry of judgment and for fees, “If a CR 68 offer of judgment is *silent on the issue of attorney fees*, then the court must look to the underlying statute or contract provision” and that no contract exists to examine. CP 65. It is notable that Respondents’ legal argument is backwards (Under case law, attorney fees are awardable to Mr. Lietz precisely because he pled a fee statute that *did not* define attorney fees as “costs.”). Regardless,

for any “mistake,” not Mr. Lietz. In sum, since Mr. Lietz accepted Respondents’ CR 68 offer, he is entitled to reasonable attorney fees under 49.48.030 in addition to the judgment under the CR 68 offer.

3. The recent *McGuire v. Bates* decision is inapposite to the issues in this case.

In opposition to Appellant’s Motion for Discretionary Review, Respondents argued that the recent Supreme Court decision in *McGuire v. Bates* supports their argument that Mr. Lietz is not entitled to attorney fees. Respondents’ reliance on the Court’s holding in *McGuire v. Bates* is misplaced. In *McGuire v. Bates*, the issue was whether a settlement offer to settle “*all claims*” made under RCW 4.84.250 included attorney fees in the offer. *McGuire v. Bates*, ---Wn.2d--, 234 P.3d 205 (July 10, 2010), No. 82659-5. In *McGuire*, the plaintiff sued a contractor who refused to pay for defective work that plaintiff had repaired for damages in the amount of \$2,166. In her lawsuit, McGuire included a claim for attorney fees pursuant to RCW 18.27.040(6), a statute that allows recovery of fees by the “prevailing party” on an action on a contractor’s bond. Defendant Bates made an offer to settle “all claims” for \$2180” “pursuant to RCW 4.84.250-280” thirteen days before the case was to be heard in a

whatever the merits of Respondents’ argument, it was premised on the fact that the CR 68 offer *was silent on the issue of attorney fees*.

mandatory arbitration proceeding. *Id.* at 206. Ms. McGuire accepted the offer and then moved for fees under the prevailing party provision of the construction statute, RCW 18.27.040 . When the arbitrator denied fees to Ms. McGuire, she sought a *de novo* review. The trial court granted her fees and the award was affirmed by the Court of Appeals. *McGuire*, 147 Wn. App. 751, 757, 198 P.3d 1038 (2008). The Supreme Court reversed finding that because McGuire agreed to the settlement offer to “settle all claims” that phrase included attorney fees.

The holding in *McGuire* is distinguishable. The settlement offer in *McGuire* specifically stated that it was intended to settle “all claims.” McGuire pled one cause of action and sought attorney fees under a statute that allowed fees to the prevailing party on an action on a contractor’s bond and there was no counterclaim to be resolved. *McGuire*, ---Wn.2d at ---, 234 P.3d at 207. The Court found that McGuire was precluded from asserting an additional claim for attorney fees pursuant to RCW 18.27.040(6) because she unequivocally had agreed to settle “all claims.” *Id.* The Court found the plural language of the offer covered both the underlying single claim and the claim for attorney fees. *Id.*

Respondents [Defendants Hansen and Hansen Law Office] only offered to settle “the claim” against Mr. Lietz. CP 183, CR 68 Offer of Judgment (“Defendants . . . offers [sic] to settle the claim against

defendants at the present time in the amount of \$7500.”) Mr. Lietz brought his wage claim under RCW 49.52.070 seeking compensation for his damages and exemplary damages as allowed by the statute. Respondents’ CR 68 offer of judgment was accepted to settle Mr. Lietz’s statutory wage claim. In addition to the wage claim, Mr. Lietz sought attorney fees under both RCW 49.52.070 and RCW 49.48.030. CP 5. Then, in response to his complaint, Respondents asserted a counterclaim. CP 10-11. It is undisputed that there are multiple claims in this case that the Respondents’ CR 68 offer of judgment “to settle the claim against defendants” did not address—neither the attorney fee issue nor the counterclaim were addressed by the Respondents’ offer of judgment.

Unlike the language in the *McGuire* settlement offer in which the defendant offered to settle *all claims*, Respondents’ CR 68 offer of judgment dated April 19, 2010 failed to address Appellant Lietz’s attorney fees demand under either or both the statutes he pled or Respondents’ counterclaim.¹²

In *Seaborn*, the court noted that in contract interpretation a court may consider extrinsic evidence as an aid to that interpretation, but it

¹² Respondents’ describe their counterclaim as “illusory.” See Response to Motion for Discretionary Review, p. 4. While that may be true, it does not change the fact that the counterclaim was not resolved by the CR 68 offer of judgment.

“cannot import an unexpressed intention of one of the parties into the writing.” *Seaborn*, 132 Wn. App. at 270, 131 P.3d 910. In its review of the extrinsic evidence, the *Seaborn* court concluded that the CR 68 offer of judgment did not include attorney fees. *Id.* The extrinsic evidence the *Seaborn* court considered included 1) the low amount of the offer; 2) the lack of any language indicating that attorney fees were included; 3) the offer did not dismiss the entire matter, but only Glew’s counterclaims; 4) no subsequent attempt made by *Seaborn* to clarify, revisit, or modify the offer until it was faced with a motion for attorney fees; and 5) a clear line of case law governing CR 68 offers and the issue of attorney fee provisions. *Id.*

Appellant Lietz offers identical extrinsic evidence. Respondents’ CR 68 offer of judgment was low; the offer was silent on attorney fees; out of his multiple claims, only the wage claim was dismissed by the offer leaving the counterclaim; Respondents made no attempt to clarify, revisit, or modify the offer until faced with a motion for attorney fees. Moreover, Respondents concede their offer did not include attorney fees when they argued their offer was a “mistake.” Here, all extrinsic evidence makes clear that Respondents’ CR 68 offer of judgment in the amount of \$7,500 did not include attorney fees.

C. Appellant Lietz is entitled to his reasonable attorney fees on appeal pursuant to RAP 18.1(a).

RAP 18.1 provides that if “applicable law grants to a party the right to recover reasonable attorney fees . . . on review,” if the party requests the fees and produces the requisite affidavit of fees and expenses, the Court may award the fees requested.

In *Hayes v. Trulock*, the Court analyzed whether the plaintiff was entitled to fees on appeal where the underlying statutory claim was for wages under RCW 49.48.030. *Hayes v. Trulock*, 51 Wn. App. 795, 805, 755 P.2d 830 (1988). An attorney fees award is appropriate when there are “wages or salary owed.” *Id.* The courts construe this remedial statute broadly to include wages owed and back and front pay. *Id.* The *Hayes* court held that inasmuch as the underlying statute claimed by the plaintiff entitled him to reasonable attorney fees, he was entitled to fees on appeal pursuant to RAP 18.1. *Id.*, 51 Wn. App. 805-06, 755 P.2d 830.

Here, like the plaintiff in *Hayes*, Appellant Lietz sought wages owed under RCW 49.52.050 and RCW 49.48.030. As such, he is entitled to fees on appeal pursuant to RAP 18.1.

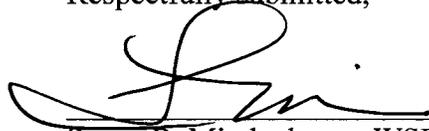
V. CONCLUSION

This court should reverse the decision of the trial court and for the reasons indicated and (1) enter judgment against Respondents for

\$7,500.00 under the CR 68 offer and (2) rule that attorney fees should be awarded to Mr. Lietz pursuant to RCW 49.48.030 and remand this case back to the trial court for determination of the amount of reasonable fees. Mr. Lietz further requests that he be awarded attorney fees for his efforts on appeal pursuant to RAP 18.1(a).

Dated this 16th of December, 2010.

Respectfully submitted,



Susan B. Mindenbergs, WSBA No. 20545
Attorney for Appellant Paul Lietz

CERTIFICATE OF SERVICE

I, Irene Calvo, am a citizen of the United States and a resident of the State of Washington. I am over the age of twenty-one years, am not a party to this action, and am competent to testify to the following:

On December 17, 2010, I caused the foregoing original and one copy of Appellant’s Opening Brief to be filed with the Clerk of the Court of Washington State Court of Appeals, Division II via legal messenger and to be served on counsel for Respondents, Geoffrey C. Cross, via legal messenger, to 1902 – 64th Ave. W, Suite B, Tacoma, WA 98466.

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

DATED this 17th day of December, 2010.



Irene Calvo

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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY