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CERTIFICATION FROM UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
IN

MICHAEL ALLEN,

Appellant,

v.

ZECHARIAH CLIFTON DAMERON IV and DANIEL STANDEN,

Respondents.

REPLY BRIEF OF APPELLANT MICHAEL ALLEN

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 ORIGINAL

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I. INTRODUCTION

Morgan v. Kingen, 166 Wn.2d 526, 210 P.3d 995 (2009), holds that the individuals with authority over an employer's payment of wages are personally liable for the wages that the company indisputably owes to an employee regardless of whether the pay day for those wages is before, on, or after date the employer files for Chapter 7 bankruptcy protection. Defendants erroneously assert that *Morgan* does not apply here because they resigned their positions as the directors and *de facto* officers of Advanced Interactive System, Inc. ("AIS Inc.") before the pay days for wages the company owed to plaintiff Michael Allen as a direct result of defendants' own business decisions. Defendants ask this Court to rip a giant hole in the fabric of RCW 49.52. Far from being distinguishable, the rationale of *Morgan* applies *a fortiori* to this case.

There is no basis for defendants' claim that RCW 49.52 does not apply to them because they had the title of "director" rather than "officer". Both here and in the related case of *Kalmanovitz v. Dameron* the district court found that defendants had the power to control the payment of employee wages prior to AIS Inc.'s bankruptcy. Defendants are estopped from arguing otherwise. Moreover, every appellate decision analyzing the scope of personal liability under RCW 49.52 has turned on the defendant's actual role with respect to the employer, not his or her formal title.

Defendants put AIS Inc. into Chapter 7 bankruptcy knowing that their action would both trigger termination payments contractually due to Allen and prevent the company from honoring those obligations (and paying salary he had earned on account of work already performed). Under defendants' interpretation of RCW 49.52, *no one* is personally liable for the compensation that AIS Inc. owes to Allen. This Court should reaffirm the liberal and practical interpretation it gave to RCW 49.52 in *Morgan* and answer the certified questions so as to make clear that defendants' refusal to pay Allen all of the compensation due to him by reason of his AIS Inc. employment violated RCW 49.52.

II. ARGUMENT

A. This Court Should Reject Defendants' Interpretation of RCW 49.52 under Which *No One* is Individually Liable for the Compensation AIS Inc. Owes to Allen.

Defendants argue that *no one* functioned as an "officer, vice-principal, or agent" of AIS Inc. during the time period relevant to Allen's RCW 49.52 claim. Defendants further argue that *no one* withheld the more than \$83,000 in unpaid compensation that AIS Inc. owes to Allen because neither they nor anyone else was running the company on the pay days for the wages due. Defendants argue (and the district court initially agreed) that an unlawful "withholding" of wages in violation of RCW 49.52.050 occurs only when an officer, vice-principal, or agent refuses to pay an

employee the wages he has already earned—on or after the pay day for those wages. Under that interpretation of RCW 49.52 the people who make the very business decisions that cause the employer to incur the unpaid wage obligations to the employee can escape individual liability simply by resigning their positions within the company before the pay day(s) for the wages the employee has earned.

“In interpreting a statute, the primary objective of the court is to ascertain and carry out the intent and purpose of the Legislature in creating it.” *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002). A court should not narrowly construe a statute so as to defeat the intent of the Legislature. *E.g.*, *State v. Carter*, 89 Wn.2d 236, 242, 570 P.2d 1218 (1977). That rule applies with extra force where, as here, the statute at issue has a mandate of liberal construction. *Shoreline Community College Dist. 7 v. Employment Sec. Dep’t*, 120 Wn.2d 394, 406, 842 P.2d 938 (1992); *Silver Firs Town Homes, Inc. v. Silver Lake Water Dist.*, 103 Wn. App. 411, 419, 12 P.3d 1022 (2000), *abrogated on other grounds*, *Fisk v. City of Kirkland*, 164 Wn.2d 891, 194 P.3d 984 (2008).

The purpose of RCW 49.52 is to “assure payment” of all employee wages. *Schilling v. Radio Holdings Inc.*, 136 Wn.2d 152, 159, 961 P.2d 371 (1998). Defendants nevertheless assert (and the district court

originally held) that the literal language of RCW 49.52 exonerates them from individual liability for any of Allen's unpaid wages. Defendants are wrong. They made a volitional decision to put AIS Inc. into Chapter 7 bankruptcy that was legally tantamount to a refusal to pay Allen the wages that the company was contractually and statutorily obligated to pay him. See App. Op. Br. at 30, 34. By doing so, defendants "withheld" wages under the literal language of RCW 49.52.070.

Even if that were not the case, "the court will avoid literal reading of a statute which would result in unlikely, absurd, or strained consequences." *Tingley v. Haisch*, 159 Wn.2d 652, 663-64, 152 P.3d 1020 (2007) (internal quotation omitted). "A reading that produces absurd results must be avoided because it will not be presumed that the legislature intended absurd results." *Id.* at 664 (internal quotation omitted). "The spirit or purpose of an enactment should prevail over express but inept wording." *Fraternal Order of Eagles*, 148 Wn.2d at 239 (internal quotation omitted).

An interpretation of the word "withheld" as used in RCW 49.52.070 that absolves from personal liability the very individuals who made the business decisions that both created the employer's wage obligations and prevented the company from honoring them produces an absurd result. This Court need not plough any new ground to avoid such a

strained and unlikely consequence with respect to the “comprehensive scheme” the Legislature has enacted to “ensure payment of wages.” *Schilling*, 136 Wn.2d at 157. This Court need only reaffirm the liberal and practical interpretation of RCW 49.52 that it adopted in *Morgan*.

B. *Morgan* Controls the Answers to the Certified Questions and Stare Decisis Bars Defendants’ Argument that it be Overruled.

Defendants vacillate between arguing that *Morgan* doesn’t address whether an individual defendant can be liable for the willful withholding of wages with pay days on or after the employer’s Chapter 7 bankruptcy and arguing that this Court should overrule *Morgan*. The Court should reject the former argument as incorrect and the second as unpersuasive.

Only by ignoring the facts of *Morgan* can defendants claim that case addressed a “different issue” than the one presented here. Resp. Br. at 31. *Morgan* involved a total of \$179,000 in unpaid wages, of which \$156,500 had a pay day after the bankruptcy court’s conversion of the case from Chapter 11 to Chapter 7. With respect to that \$156,500, the *Morgan* defendants made *exactly* the same argument that defendants make here: they had no personal liability under RCW 49.52 for those wages because they had no control over the employer’s payment of wages on the date the employer’s obligation to pay the wages at issue came due. Both the court of appeals and this Court rejected the defendants’ argument.

Defendants here dismiss *Morgan*'s resolution of the very issue now before the Court as "dicta" (p. 32) and "afterthoughts" (p. 34). It was neither. Opinion language is dicta only where "it had no bearing on the decision that was rendered." *In re Marriage of Rideout*, 150 Wn.2d 337, 354, 77 P.3d 1174 (2003). Had *Morgan* accepted the argument that a defendant as a matter of law cannot willfully withhold wages with pay days after he lost control over the employer's payment of wages, this Court would have affirmed the judgment only with respect to the \$22,500 in wages with a pay day *before* the conversion of the bankruptcy case to Chapter 7. Nor was this Court's decision to affirm the lower courts' judgment in favor of the employees for more than \$312,000 (representing twice the amount owed) with respect to the wages with a pay day *after* the Chapter 7 bankruptcy conversion an "afterthought[]" taken with "little to nothing in the way of consideration or analysis." Resp. Br. at 34. Defendants' contention is an insult to this Court's deliberative process.

Defendants nowhere dispute that, just as in *Morgan*, all of the wages at issue here (including Allen's termination payments) had been earned prior to the Chapter 7 bankruptcy. Defendants do not dispute that, just as in *Morgan*, when the Chapter 7 bankruptcy was filed AIS Inc. lacked adequate cash to pay the wages earned by Allen and all of the other employees. See Resp. Br. at 35. Defendants also do not dispute that, just

as in *Morgan*, they had personally made business decisions that left the company unable to pay its employee wage obligations. *Id.* Defendants instead ask this Court to overrule *Morgan* by supplanting the majority opinion in that case with the dissent. Resp. Br. at 35-36. Like defendants here, Resp. Br. at 27-28, 35-36, the *Morgan* dissenters claimed the majority's decision contradicted the plain language of RCW 49.52 because following the conversion to a Chapter 7 bankruptcy the defendants "could not pay their employees even if they had wanted to pay them." 166 Wn.2d at 542 (Sanders, J., dissenting). Six Justices thought otherwise.

"The doctrine of stare decisis requires a clear showing than an established rule is incorrect and harmful before it is abandoned." *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (internal quotation omitted). Defendants have not met that burden. "Further, the Legislature is presumed to be aware of judicial interpretation of its enactments, and where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language." *Id.* (internal quotation omitted). This Court decided *Morgan* in July 2009. If the Legislature agreed with defendants that *Morgan* "cannot be squared with the plain language and meaning of the text of RCW 49.52," Resp. Br. at 35, the Legislature would have overturned this Court's decision in the intervening seven years.

Champagne v. Thurston County, 163 Wn.2d 69, 178 P.3d 936 (2008), demonstrates this Court's repeated refusal to adopt a mechanistic interpretation of the kind that defendants advance here to defeat the remedial purposes of RCW 49.52. In that case the plaintiffs brought a class action alleging that the County was violating the law by paying their wages in the month following the month in which the compensation was earned. The court of appeals ruled that the employees failed to state a claim under RCW 49.52 because the literal language of the statute provided for "damages only where an employer has paid *no* compensation to an employee." 163 Wn.2d at 75 (emphasis in original). This Court affirmed the dismissal of the plaintiffs' claims but repudiated the court of appeals' overly technical interpretation of the statute: "We agree with Champagne that the Court of Appeals decision would allow an employer to 'indefinitely delay paying its employees the wages the employees have earned' as long as the wages are eventually paid." 163 Wn.2d at 84 n.13.

LaCoursiere v. Camwest Dev. Inc., 181 Wn.2d 734, 339 P.3d 963 (2014), is of no assistance to defendants. *LaCoursiere* held that an employer did not violate the wage rebate provisions of RCW 49.52 when it terminated an employee for misconduct and thereby caused him to forfeit *unvested* ownership interests in a related LLC that would have vested in the future as compensation for continued employment. 181

Wn.2d at 746-747. Contrary to what defendants suggest, Resp. Br. at 30, the reason there was no violation of RCW 49.52 in *LaCoursiere* as to the *unvested* 40% LLC ownership interest was because the employee had not yet earned that interest at the time of his termination. 181 Wn.2d at 746-747. At the time of his termination, *LaCoursiere* had achieved only 60% vested LCC ownership. His remaining 40% unvested ownership interest represented unearned, future compensation. It was for this reason the Court held that “[n]othing was ‘rebated’ when *LaCoursiere* forfeited the *unvested* portion (40 percent) of his investment at his termination.” 181 Wn.2d at 746 (emphasis in original). By contrast, by the time of Allen’s termination he had already earned all of the wages at issue in this case. See App. Op. Br. at 31-33. *Morgan* controls here, not *LaCoursiere*.

Allen agrees with defendants that “[a]t its heart, *Morgan* is not in conflict with *Ellerman* [*v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 22 P.3d 795 (2001)].” Resp. Br. at 31. Indeed, *Morgan* directly rejected defendants’ argument that a ruling in favor of the employees there would contradict *Ellerman*. 166 Wn.2d at 535-36. *Ellerman* holds that it is not enough for individual liability under RCW 49.52 if a manager makes “decisions [that] may affect the company’s financial ability to pay wages.” *Id.* at 521-22. In order to be liable under RCW 49.52, the manager must also have some authority or control over the payment of employee wages.

Id. at 522-23; *Morgan*, 166 Wn.2d at 536. Until AIS Inc.'s Chapter 7 bankruptcy on March 14, 2013, defendants had that authority.

Defendants claim that they lost their authority over the payment of AIS Inc. employee wages not by operation of law from the Chapter 7 bankruptcy filing but rather through their decisions to resign as directors coincident with the bankruptcy filing. Resp. Br. at 1, 14 & n. 54. If true, that makes defendants' actions even more obviously volitional and their legal argument more breathtaking. Defendants effectively ask this Court to hold that any corporate officer or managing agent with authority over the payment of wages can escape liability under RCW 49.52 simply by resigning before the established pay day for the wages due to the company's employees.

Contrary to what defendants argue, this Court's adoption of *their* position "would foster 'a rush for the exits'" environment among the employer's controlling agents. Resp. Br. at 38. As even defendants seem to recognize, the rule this Court adopted in *Morgan* imposing individually liable under RCW 49.52 for management decisions that deprive employees of compensation due by reason of employment—regardless of the pay day for such compensation—actually increases corporate managerial stability. Resp. Br. at 38. There is no reason why this Court should adopt an interpretation of RCW 49.52 that encourages the officers

and managers with the authority for the payment of employee wages to “cut and run” when the employer lacks the funds to pay those wages, and numerous reasons why the Court should not do so.

Defendants’ assertion that they are not individually liable for Allen’s wages under RCW 49.52 because the Legislature has created a separate statutory preference for wages under RCW 49.56 when the employer becomes insolvent is a *non-sequitur*. See Resp. Br. at 37. As this Court recognized in *Schilling v. Radio Holdings Inc.*, both RCW 49.56.010 and RCW 49.52 are both part of the Legislature’s “comprehensive scheme to ensure the payment of wages. . . .” 136 Wn.2d 152, 157-58, 961 P.2d 371 (1998). The former does not diminish the importance of a liberal construction of the latter in order to implement the “strong policy in favor of ensuring the payment of the *full amount* of wages earned.” *Morgan*, 166 Wn.2d at 538 (emphasis supplied).

Morgan directly refutes defendants’ argument that

under the plain language of RCW 49.52.050, they were incapable of violating the statute because the obligation to pay had yet to mature during their tenure as directors, and by the time the mandatory “obligated to pay” element of the statute was satisfied, Respondents were no longer directors and, therefore, outside the scope of the statute.

Resp. Br. at 28; see also *id.* at 2. In answer to the district court's certified questions this Court should reaffirm *Morgan* and rule that defendants are liable for all of the wages AIS Inc. owed Allen by reason of employment.

C. The District Court Correctly Ruled that Dameron and Standen are Proper RCW 49.52 Defendants because they Had Authority Over the Payment of Wages Prior to AIS Inc.'s Bankruptcy and Defendants May Not Re-Litigate that Issue.

Dameron and Standen spend much of their brief arguing that they are not proper defendants under RCW 49.52 because they were members of the AIS Inc. Board of Directors. See Resp. Br. at 20-27. This Court should reject their argument for several reasons.

First, the district court's certified questions presume that Dameron and Standen were officers, vice-principals, and/or agents of AIS Inc. prior to its bankruptcy filing. See Resp. Br. at 2.

Second, in the related case of *Kalmanovitz v. Dameron*, the district court expressly found that, prior to AIS Inc.'s bankruptcy, defendants Dameron and Standen functioned as AIS Inc.'s "officers, vice principals, and/or agents" within the meaning of RCW 49.52. *Kalmanovitz v. Dameron*, No. C14-1224RSL, 2015 WL 9273611 *2-4 (W.D. Wash. 12/21/15) (S.J. Order I); *Kalmanovitz v. Dameron*, No. C14-1224RSL, 2016 WL 827145 *3 (W.D. Wash. 3/3/16) (S.J. Order II).¹ The doctrine of

¹ Both opinions are attached as an appendix hereto.

collateral estoppel precludes defendants from re-litigating the district court's finding. *See, e.g., Parklane Hosiery v. Shore*, 439 U.S. 322, 331 (1979). All of the elements for application of offensive, non-mutual collateral estoppel exist here: (1) defendants were afforded a full and fair opportunity to litigate the relevant issue; (2) the issue was actually litigated and necessary to support the judgment in the prior proceeding; (3) the issue was decided against defendants in the prior proceeding; and (4) defendants were parties to the prior proceeding. *Resolution Trust Corp. v. Keating*, 186 F.3d 1110, 1114 (9th Cir. 1999). Defendants are therefore estopped from re-litigating the fact that prior to AIS Inc.'s bankruptcy they were officers, vice-principals, and/or agents under RCW 49.52.

In any event, defendants' arguments to the contrary are without merit. Everyone agrees that RCW 49.52.050 does not contain the word "director." See Resp. Br. at 4, 20-23. Defendants, however, cite no legal authority for the proposition that individual liability under RCW 49.52 depends on a person's formal title rather than his or her actual function within the employer. As the district court correctly recognized, Standen and Dameron are liable under RCW 49.52 not because they had the title of "director" but because they functioned as the *de facto* officers and managing agents of AIS Inc. with control over the payment of wages. *Kalmanovitz* S.J. Order II at *3. AIS Inc.'s Bylaws provided that the

Board the "shall manage the Corporation." The Board assumed an even greater management role than it had already been performing after KAMP seized AIS Inc.'s bank accounts on February 14, 2013. App. Op. Br. at 6-10. Following the resignation of AIS Inc. President and CEO David McGrane on March 5, 2013, the three remaining Board members performed all executive functions for the company and, in particular, approved the payment of *all* wages and expenses. See Resp. Br. at 13; App. Op. Br. at 10-15.

Furthermore, defendants were not just any two Board members. They represented Sciens on the Board. Sciens was the majority shareholder of AIS Inc. and controlled 63% of the company's equity. Sciens was also AIS Inc.'s primary investor and financial sponsor. Defendants Dameron and Standen were both Sciens employees. The only reason defendants Standen and Dameron served on the AIS Inc. Board was because Sciens had appointed them. After early February 2013, Sciens employees constituted a majority of the AIS Inc. Board for all but a few days. In short, defendants Standen and Dameron effectively controlled all of the financial decisions of AIS Inc., including the payment of wages, during the entire time period relevant to Allen's legal claim.

AIS Inc. did not appoint anyone to replace CEO and President McGrane after he resigned on March 4, 2013. Acceptance of defendants'

arguments would mean that a Washington employer could subvert the individual liability provisions of RCW 49.52 merely by delegating control over the payment of employee wages to the corporation's Board of Directors. One must ask why the Washington Legislature would enact a "comprehensive scheme to ensure payment of wages," *Schilling v. Radio Holdings Inc.*, 136 Wn.2d 152, 157, 961 P.2d 371 (1998), that could be so easily defeated. The answer, of course, is that it didn't. This Court should reject defendants' argument that they are not liable to Allen under RCW 49.52 because they controlled the payment of AIS Inc. employee wages while holding the title of "director."

Moreover, every appellate decision analyzing the scope of personal liability under RCW 49.52 has turned on the defendant's actual role with respect to the employer, not his or her formal title. The *Morgan* defendants were individually liable under RCW 49.52 not because they had the title of "officer" but because they controlled all of the financial decisions of the employer including whether to pay employees their wages. 166 Wn.2d at 536-37. In *Jumamil v. Lakeside Casino LLP*, the court of appeals held the LLC manager personally liable for willful withholding of wages under RCW 49.52.070 not based on his title but because he "like the officers in *Morgan*, had authority over the financial decisions of the [company] and the payment of wages." 179 Wn. App. 665, 685, 319 P.3d 868 (2014). By

contrast in *Ellerman*, this Court held that the employer's "business manager" was not subject to individual liability under RCW 49.52 based on her actual function within the company. 143 Wn.2d at 523-24. In short, having the title of "director" does not constitute a "get out of jail free" card with respect to individual liability under RCW 49.52 for someone who controls the financial decisions of the employer.²

Defendants' reliance on *Rekhter v. Dep't of Soc. & Health Serv.*, 180 Wn.2d 102, 123, 323 P.3d 1036 (2014), is unavailing. The RCW 49.52 issue in *Rekhter* was whether the Washington Department of Social and Health Services ("DSHS") qualified as an agent for the clients of the plaintiff homecare providers. The Washington Legislature has declared that the clients, rather than the State, are the employers of the providers except for the purposes of collective bargaining. RCW 74.39A.270(1). The *Rekhter* plurality opinion held that DSHS was not liable under either RCW 49.52 or RCW 49.46 for any of the unpaid wages claimed by the providers because the Department's statutory role as the payor of the federal Medicare funds that compensated the providers did not create a

² *Coley v. Vanguard Urban Improvement Ass'n Inc.*, No. 12-CV-5565 (PKC), 2014 WL 4793835 (E.D.N.Y. 9/24/2014), analyzed "the economic realities" of whether a defendant board member had operational control over the corporation in determining whether the board member qualified as an "employer" under the federal Fair Labor Standards Act. See Resp. Br. at 25. *Coley* therefore supports Allen's argument that the individual liability of a corporate board member turns on his actual function within the company and not on his formal title. See 2014 WL 479385 at *6.

common law agency relationship between DSHS and the client-employers. 180 Wn.2d at 123-24.

However, the undisputed facts in this case establish that defendants functioned as the *de facto* officers and managing agents of AIS Inc. at all times relevant to Allen's legal claim. While it is true that an individual's position as a director of a business does not *as such* make him an agent of the corporation, see Resp. Br. at 23 (citing Restatement 2d of Agency § 14C (1958)), defendants' own actions and the AIS Inc. corporate bylaws created such an agency relationship here, as the district court found.

Defendants concede that they decided whether AIS Inc. should or should not shut down its operations. Resp. Br. at 11. Defendants concede that they decided on March 3, 2013, to terminate most of AIS Inc.'s employees. Resp. Br. at 13. Defendants concede that they made the decision that AIS Inc. should prepare a Chapter 7 bankruptcy filing. *Id.* Defendants concede that they made the decision to file the bankruptcy petition on March 14, 2013. *Id.* at 14. Defendants do not dispute that in March 2013 they made the decisions as to which AIS Inc. employees to pay and how much. See App. Op. Br. at 12-15. In short, in contrast to DSHS in *Rekhter*, defendants both were common law agents of AIS Inc. and had control over the payment of employee wages.

Defendants vainly argue that because the AIS Inc. Board of Directors made decisions as a collective body they have personal immunity under RCW 49.52. Resp. Br. at 24-26. The district court rejected this exact argument. *Kalmanovitz* S.J. Order II at *3. Washington courts have likewise rejected the claim that principles of corporate law determine whether someone is individually liable under RCW 49.52. In *Durand v. HIMC Corp.*, the defendant corporate officers argued that their individual liability under RCW 49.52 depended on whether the plaintiff could “pierce the corporate veil” under Washington corporate law. 151 Wn. App. 818, 835, 214 P.3d 189 (2009). The court of appeals disagreed. It ruled whether an individual has personal liability under RCW 49.52 is separate and distinct from whether he has individual liability under principles of corporate law. *Id. Accord Dickens v. Alliance Analytical Labs.*, 127 Wn. App. 433, 440-442, 111 P.3d 889 (2005). Similarly, whether Standen and Dameron would face individual liability for their non-payment of employee wages under principles of corporate law is not germane to whether they have liability under RCW 49.52.

RCW 49.52 does not allow a corporation to absolve the individuals who run its financial affairs from personal liability for willfully withholding employee wages by creating a committee. Under defendants’ argument, an employer who forms a three-person “Executive Committee”

to run the company would thereby exempt *all* of the individuals who served on it from personal liability under RCW 49.52 if the company provided the Committee could only act collectively. If Standen and Dameron had dissented from the Board actions that caused the non-payment of Allen's wages, there would be a serious question about their individual liability under RCW 49.52. But far from opposing those Board decisions, Standen and Dameron spearheaded them.

The district court's ruling that Standen and Dameron are proper RCW 49.52 defendants despite having the title of "director" will not have far-reaching legal consequences. In most cases corporate directors will not face individual liability under RCW 49.52 for the withholding of employee wages. That's because in most cases corporate directors do not personally decide whether the company should pay its employees their earned wages. But in this case, because Standen and Dameron were the *de facto* officers and managing agents of AIS Inc. with control over the payment of employee wages, they are proper RCW 49.52 defendants.

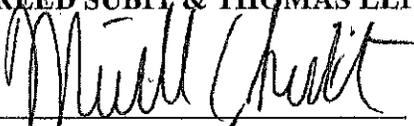
III. CONCLUSION

This Court should reject any interpretation of RCW 49.52 that leads to the absurd result that no one is individually liable for the unpaid compensation that AIS Inc. indisputably owes to Allen. Defendants Standen and Dameron knew that their direction that AIS Inc. file for

Chapter 7 bankruptcy would cause the company to incur total wage obligations of more than \$83,000 to Allen. In answer to the district court's certified questions, this Court should rule that RCW 49.52 holds *de facto* corporate officers such as defendants personally liable for their refusal to pay an employee all of the compensation he is due by reason of employment regardless of whether the pay days for those wages occur before, on, or after the employer's Chapter 7 bankruptcy.

RESPECTFULLY SUBMITTED this 30th day of June 2016.

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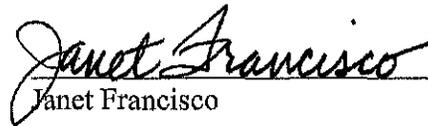
CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2016, I emailed a copy of
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I hereby declare under the penalty of perjury of the laws of the
State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington on this 30th day of June 2016.


Janet Francisco

APPENDIX

2015 WL 9273611

Only the Westlaw citation is currently available.

United States District Court,
W.D. Washington,
at Seattle.

Steven Kalmanovitz, Plaintiff,

v.

Daniel Standen, et al., Defendants.

No. C14-1224RSL

|

Signed 12/21/2015

Attorneys and Law Firms

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**ORDER REGARDING SCIENS DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

Robert S. Lasnik, United States District Judge

*1 This matter comes before the Court on the "Motion for Summary Judgment by Defendants Standen, Rigas and Dameron." Dkt. # 40. Plaintiff alleges that he was owed back wages, benefits, and reimbursable expenses at the time his employer, Advanced Interactive Systems, Inc. ("AIS"), filed for Chapter 7 bankruptcy protection. He has asserted a breach of contract and a Washington Rebate Act claim against four former officers/directors of AIS seeking to recover the principal amount of \$332,108.32 plus exemplary damages, costs, fees, and interest. Defendants Daniel Standen, John Rigas, and Zechariah Clifton Dameron IV were members of AIS' Board of Directors during most, if not all, of the relevant period. These three defendants were also affiliated with Sciens Capital Management LLC, a private equity firm that was heavily invested in AIS. The Sciens defendants seek dismissal of all of plaintiff's claims against them.

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact that would preclude the entry of judgment as a matter of law. The party seeking summary dismissal of the case "bears the initial responsibility of informing the district court of the basis for its motion" (Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)) and "citing to particular parts of materials in the record" that show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)). Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to designate "specific facts showing that there is a genuine issue for trial." Celotex Corp., 477 U.S. at 324. The Court will "view the evidence in the light most favorable to the nonmoving party... and draw all reasonable inferences in that party's favor." Krechman v. County of Riverside, 723 F.3d 1104, 1109 (9th Cir. 2013). Although the Court must reserve for the trier of fact genuine issues regarding credibility, the weight of the evidence, and legitimate inferences, the "mere existence of a scintilla of evidence in support of the non-moving party's position will be insufficient" to avoid judgment. City of Pomona v. SOM N. Am. Corp., 750 F.3d 1036, 1049 (9th Cir. 2014); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Factual disputes whose resolution would not affect the outcome of the suit are irrelevant to the consideration of a motion for summary judgment. S. Cal. Darts Ass'n v. Zaffina, 762 F.3d 921, 925 (9th Cir. 2014). In other words, summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable fact finder could return a verdict in its favor. FreecycleSunnyvale v. Freecycle Network, 626 F.3d 509, 514 (9th Cir. 2010).

*2 Having reviewed the memoranda, declarations, and exhibits submitted by the parties and taking the evidence in the light most favorable to the non-moving party, the Court finds as follows:

Plaintiff ran AIS until he was replaced as CEO and President by defendant David McGrane on May 15, 2012. Plaintiff's annual salary had been \$350,000 a year, but when AIS ran into financial difficulties in 2009, plaintiff agreed to defer portions of his salary until AIS was stable again.¹ None of the defendants was involved in the negotiation or execution of any employment contract or compensation agreement between AIS and plaintiff. The Sciens defendants were, however, apprised of the

deferrals and allowed them to take place as a means of capitalizing AIS when money ran short. Upon his ouster as President and CEO, plaintiff requested that AIS pay the back wages it owed. The Board of Directors – not including plaintiff – authorized payments to the other executives who had deferred compensation² but declined to pay plaintiff because of objections from Sciens and AIS' secured lender, Kayne Anderson Mezzanine Partners ("KAMP"). The Sciens defendants were unwilling to cross the lender who could – at any time – cut off access to AIS' funds.

Two of the Sciens defendants, Standen and Dameron, were authorized to negotiate a separation agreement with plaintiff that would resolve the claim for back wages. An agreement in principle was reached in February 2013, but it was not reduced to writing before KAMP seized control of AIS' bank accounts (as it had a contractual right to do). For approximately eight days, AIS could no longer pay anyone's wages, much less a severance package for plaintiff. One day after its accounts were frozen, the Board of Directors wrote to KAMP requesting that payroll funds be released and notifying the lender that if funds were not made available, the Board would have to terminate the company's employees. KAMP granted AIS access to over \$300,000, which the Board used to pay the employees. On February 22, 2013, KAMP released its exclusive control over AIS' accounts, returning some authority to AIS.

Believing that KAMP would continue to provide financing, the Board – including plaintiff – decided to continue operations and held off on terminating AIS' employees. Nevertheless, at the end of February the Board unanimously voted to prepare AIS for a Chapter 7 bankruptcy filing. The Board requested additional financing from KAMP, setting forth strategic options for maximizing AIS' value for shareholders. On March 1, 2013, KAMP refused. Two days later, defendant Rigas' resignation from the Board was announced, effective February 27, 2013, and the remaining Board members resolved to discontinue AIS' operations and terminate all employees who were not involved in the Chapter 7 filing. Defendant McGrane resigned from the Board shortly thereafter. The Board, now consisting of only Standen, Dameron, and plaintiff, continued meeting and, on March 14, 2013, allocated AIS' last dollars to payroll expenses, less vacation and holiday time. Plaintiff did not receive any part of this allocation.

*3 The Sciens defendants seek dismissal of plaintiff's claims on the grounds that (a) they were not contractually bound to pay plaintiff's wages, (b) "directors" cannot be held personally liable under the Washington Rebate Act ("WRA"), (c) individual members of a Board of Directors cannot be held liable for collective decisions, (d) reimbursable business expenses are not "wages" for purposes of RCW 49.52.050, (e) the anti-kickback provisions of the WRA do not protect decision-makers such as plaintiff, (f) plaintiff's deferral converted his wages into a loan to which the WRA does not apply, (g) the Sciens defendants did not have control over AIS' funds or the decision to withhold payment of plaintiff's wages, (h) plaintiff "knowingly submitted" to the alleged violations of the WRA, (i) plaintiff's claim for vacation pay accrued after the Sciens defendants had resigned from the Board, and (j) claims for wages and expenses that should have been paid before July 14, 2011, are time-barred. Each argument is considered below.

A. Breach of Contract

Plaintiff has not provided any evidence of a contract between him and the Sciens defendants and has not responded to their request for judgment on that claim. Summary judgment on the breach of contract claim is therefore appropriate.

B. Personal Liability of "Directors"

Under Washington law, "[a]ny...officer, vice principal or agent of any employer... who...[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" "shall be liable in a civil action by the aggrieved employee...for twice the amount of the wages unlawfully...withheld...together with costs of suit and a reasonable sum for attorney's fees..." RCW 49.52.050 and RCW 49.52.070. The Sciens defendants argue that, because "directors" are not specifically listed in RCW 49.52.050, they cannot be held personally liable under the WRA.

The Sciens defendants make no effort to show that they are not vice principals and/or agents of AIS, however. Neither term is defined in the statute, raising a presumption that the legislature intended to use their common law meanings. *State v. Pacheco*, 125 Wn.2d 150, 154 (1994). Under the common law, an employee who

has the authority to manage the employer's business and/or supervise and direct other employees is considered a vice-principal. Ellerman v. Centerpoint Prepress, Inc., 143 Wn.2d 514, 520-21 (2001). One who is authorized by the employer to act for it is an agent. Id., at 522 (citing BLACK'S LAW DICTIONARY 85 (4th ed. 1951)). AIS, through its bylaws, authorized the directors to act on its behalf and to control the corporation's business affairs. The omission of the word "directors" from the list of liable persons is immaterial where defendants fall within the scope of the other terms used in the

statute.³

C. Individual Liability for Collective Decisions

The Sciens defendants argue that they cannot be held individually liable for the collective decisions of the Board of Directors merely by virtue of their status as members. The Court agrees that simply showing that the Board wilfully and intentionally deprived plaintiff of wages would not automatically impose liability on the voting members. Individual board members may, however, be held responsible if they commit or condone wrongful acts in the course of carrying out their duties (State v. Ralph Williams' Nw. Chrysler Plymouth, Inc., 87 Wn.2d 298, 322 (1976); Schwarzmann v. Assoc. of Apartment Owners of Bridgehaven, 33 Wn. App. 397 (1982)), and that is exactly what plaintiff has alleged. It will be plaintiff's burden to show that the individual defendants --not the non-defendant Board -- "[w]ilfully and with intent to deprive the employee of any part of his...wages" refused to pay plaintiff what he was owed in violation of RCW 49.52.050. If each named defendant directly supervised or controlled the refusal to pay his wages, a wilful withholding and personal liability under the WRA may be established and any protections offered by the business judgment rule would be negated. Ellerman, 143 Wn.2d at 521-22; Fielder v. Sterling Park Homeowners Ass'n, 914 F. Supp.2d 1222, 1228 (W.D. Wash. 2012).

*4 For purposes of this summary judgment motion, the question is whether plaintiff has raised a genuine issue of fact regarding the Sciens defendants' personal liability under RCW 49.52.050. There is evidence in the record showing that the Sciens defendants, acting in a range of capacities including as the representatives of the majority shareholders in AIS, took steps to ensure that plaintiff went unpaid even as others received their

deferred compensation packages. A reasonable fact finder could conclude that each Sciens defendant, upon receipt of plaintiff's demand for payment, chose not to pay the wages owed, instead preferring to avoid conflicts with KAMP and to safeguard cash reserves for the equity investors. This is exactly the type of decision-making that the legislature sought to influence when it imposed personal liability on all officers, vice principals, and agents who exercise control over the payment of funds and act pursuant to that authority. Ellerman, 143 Wn.2d at 521-22

[T]he officers control the financial decisions of the corporation....The officers decide whether to pay one debt over another (i.e., wages). The officers have the choice to file bankruptcy or, say, close the business and pay its debts (including wages). The officers decide whether to continue running an inadequately capitalized corporation while hoping for a change in financial position. In other words, the officers control the choices over how the corporation's money is used, and (in cases of unpaid wage claims) RCW 49.52.070 imposes personal liability when the officers choose not to pay wages owed.

Morgan v. Kingen, 166 Wn.2d 526, 536-37 (2009). The choices defendants made here were wilful and intentional for purposes of establishing personal liability under the WRA. Id., at 537; Jumamil v. Lakeside Casino, LLC, 179 Wn. App. 665, 685 (2014). A reasonable fact finder could also find that, despite the overlay of a collective body, the individual decisions caused the non-payment and justify personal liability under RCW 49.52.070.

D. Claim for Reimbursement of Expenses

The Sciens defendants seek judgment in their favor on plaintiff's claim for the reimbursement of business expenses plaintiff incurred on behalf of AIS. RCW 49.52.050 precludes the withholding of any "wages" the "employer is obligated to pay [the] employee by any statute, ordinance, or contract." Defendants argue that the business expenses are not "wages" for purposes of the

WRA, citing an administrative policy of the Washington Department of Labor & Industries for the proposition that reimbursements of business expenses are not part of the employee's "regular rate of pay." L&I Admin. Policy No. ES.A.8.1 (rev. July 15, 2014). The cited policy provides advice regarding the employer's duty to compensate employees at an overtime rate of at least one and one-half times the employee's "regular rate of pay" for all hours in excess of forty in a seven-day workweek. The fact that a certain type of payment is not "regular" enough to be factored into the computation of an employee's overtime rate does not necessarily mean the payment is not "wages." The Court does not find ES.A.8.1 particularly persuasive on the issue at hand.⁴

The Supreme Court of Washington was recently asked to determine whether discretionary bonuses paid to an employee were "wages" under the WRA. LaCoursiere v. CamWest Dev., Inc., 181 Wn.2d 723 (2014). The court referred to the definition of wage contained in the Washington Minimum Wage Act and reviewed prior case law, concluding that payments that were due and owing to an employee as a matter of right and "by reason of employment" were wages. Id. at 742-44. Simply paying a bonus to an employee that is unrelated to employment is not enough, nor is the mere possibility that the employee will receive a discretionary bonus. Byrne v. Courtesy Ford, Inc., 108 Wn. App. 683, 691-92 (2001) (holding that a television unexpectedly won in a raffle by employer and given to employee was not "wages" because it was not given as compensation for work); LaCoursiere, 181 Wn.2d at 743 (once employer made the discretionary decision to award a bonus based on the work performed, the "bonus became a wage that [the employee] was entitled to receive from his employer, and which the employer is obligated to pay.") (quoting State v. Carter, 18 Wn.2d 590, 621 (1943)).

*5 Plaintiff's claim for reimbursement of business expenses turns on the meaning of "by reason of employment." A simple "but for" relationship between employment and the payment is not sufficient; otherwise, any payment made by an employer to an employee would be considered wages because the payment would not have been made "but for" the employment relationship. That is clearly not the law in Washington. See Byrne, 108 Wn. App. at 691-92. "By reason of employment" does not, however, mean that the payment must be tied to the number of hours worked or the results obtained.

In Flower v. T.R.A. Indus., Inc., 127 Wn. App. 13, 35 (2005), the court found that a signing bonus negotiated as part of a new employee's employment contract was undoubtedly "to be paid 'by reason of employment'" and was therefore wages despite the fact that no hours or performance were required in exchange. See also Durand v. HIMC Corp., 151 Wn. App. 818, 831-32 (2009) (the \$20,000 negotiated to cover relocation costs and a signing bonus were treated as wages when employee filed a claim under the WRA). Only one court has dealt with a WRA claim that involved business expenses, and it ruled in favor of plaintiffs without any analysis; the defendants in that case did not contest the amounts or categories of withheld wages claimed by the plaintiffs. Chelius v. Questar Microsystems, Inc., 107 Wn. App. 678, 681 (2001).

Having reviewed the relevant case law, the intent of the legislature, and the facts of this case, the Court finds that allowable business expenses are to be paid "by reason of employment" and are therefore "wages" for purposes of the WRA. Defendants do not dispute that plaintiff made the expenditures on behalf of AIS and within the scope of the parties' employment agreement. These are not gratuitous gifts or payments wholly within the discretion of the employer, but rather monies owed to the employee to offset expenses incurred during his employment and for the benefit of the employer. The common sense meaning of "by reason of employment" is satisfied. Policy justifications also support the conclusion that reimbursable business expenses are "wages." AIS could have funded its operations up front, either with a pre-paid expense account or a company credit card, but chose instead to have its employee pay for the expenses and seek reimbursement. In essence, by agreement of the parties, the employee takes some of the wages he earned and uses them to reduce the employer's operating expenses with the understanding that he will be reimbursed. If defendants' were correct and an employee's conversion of wages into operating expenses excludes the debt from the protections of the WRA, the legislative intent of protecting wages (LaCoursiere, 181 Wn.2d at 741) could be easily thwarted. Failure to pay the full amount of wages owed under a statute, ordinance, or contract is against the public policy of this state, and RCW 49.52.070 imposes significant penalties against the wrongdoer. Under defendants' interpretation of the word "wages," an unscrupulous employer could pay the wages owed in full, thereby avoiding the teeth provided by RCW

49.52.070, but require the employee to fund the company's operations out of those wages. This would be exactly the kind of rebate or kickback forbidden by the WRA and yet, because the debt is now characterized as unpaid business expenses instead of unpaid wages, the employee would be left with only a contract claim against the employer if the debt were not paid. The employer would have engineered a rebate of wages while avoiding double damages and attorney's fees. Plaintiff's interpretation of "wages" as including monies owed to the employee as reimbursement for allowable business expenses not only comports with the plain meaning of "by reason of employment," but also reduces the opportunities for gamesmanship and gives effect to the legislature's intent.

E. Plaintiff Caused His Own Non-Payment

*6 Defendants' argue that the WRA does not protect individuals like plaintiff who themselves had authority to make decisions regarding the payment or withholding of wages. Defendants offer no legal framework for this argument: the WRA is designed to protect the wages of all employees unless they knowingly submit to the violation. While it is undisputed that plaintiff agreed to defer his wages, it is not the deferral that constitutes a violation of the WRA. Rather, any violation arose when defendants wilfully and intentionally decided to withhold payment after plaintiff requested his wages. In addition, defendants ignore the fact that plaintiff's authority changed over time. Plaintiff was not in a position to authorize the payment of his deferred compensation after May 15, 2012, when he requested the funds. Plaintiff's power and authority during prior periods hardly suggests that he controlled a later decision to withhold payment.

F. Deferred Compensation is Actually a Loan to the Employer

Neither plaintiff nor AIS characterized the deferred compensation as a "loan" at any point leading up to this litigation or otherwise suggested that the unpaid wages fell outside the scope of the WRA simply because they were not paid on the due date.⁵ The parties agreed that plaintiff's compensation would be paid at a later date to improve AIS' liquidity. Regardless of whether such an arrangement has certain characteristics of a loan, deferred compensation agreements are not unusual and have been the subject of WRA claims in the past. See Durand, 151 Wn. App. 824 (plaintiff awarded double damages and attorney's fees for deferred wages); Chelius, 107 Wn. App.

at 680 (same). The Court will, as the parties had before it, treat the unpaid wages as deferred compensation subject to the protections of the WRA.

G. Lack of Control

The Sciens defendants argue that they cannot be personally liable for the failure to pay plaintiff's wages because AIS' secured lender was "adamantly opposed to paying" plaintiff. Dkt. # 40 at 23. There is evidence from which one could conclude that plaintiff requested payment of his wages in May 2012, long before KAMP flexed its financial muscle to keep plaintiff from being paid. To the extent the Sciens defendants are arguing that it would have been impossible for them to pay plaintiff because KAMP would have cut off AIS' financing going forward, the assertion does not excuse the wilful and intentional failure to pay wages. The WRA evinces "a strong legislative intent to assure payment to employees of wages they have earned." Shilling v. Radio Holdings, Inc., 136 Wn.2d 152, 159 (1998). Taking the evidence in the light most favorable to plaintiff, one could conclude that defendants made no effort to pay the employee, instead choosing to mollify a secured creditor to avoid jeopardizing the company's financing. This is exactly the type of choice for which the legislature provided a remedy of exemplary damages plus fees and costs. Morgan, 166 Wn.2d at 536-37. The Sciens defendants made a choice, and a reasonable fact finder could conclude that the choice was wilful and intentional.

H. "Knowingly Submitted"

A defendant who wilfully deprives an employee of his wages is not liable in a civil action if the employee has "knowingly submitted" to the deprivation. RCW 49.52.070. The Sciens defendants offer no legal authority for the proposition that an agreement to defer compensation is a knowing submission to a later non-payment. A person knowingly submits to the withholding of wages when he or she "deliberately and intentionally deferred to [the employer] the decision of whether [the wages] would ever be paid." Chelius, 107 Wn. App. at 682. Here, there is evidence that plaintiff agreed to defer his salary only until AIS' finances stabilized, that he never waived his right to payment, that he expected to be paid his full salary eventually, and that AIS was aware of the deferred compensation obligation and plaintiff's expectations. In such circumstances, there is at least an issue of fact regarding whether plaintiff knowingly

submitted to the non-payment. Durand, 151 Wn. App. at 837.

I. Accrual of Vacation Pay Claim

*7 The Sciens defendants argue that, pursuant to company policy, plaintiff had no right to cash out unused vacation days until his employment with AIS terminated. Such payment would not be due until the next regular payday after termination. RCW 49.48.010. It is undisputed that by the time the wages came due and owing, the Sciens defendants had resigned from the AIS Board. Because AIS did not owe plaintiff payment for the vacation days until after plaintiff's employment terminated, the Sciens defendants could not have unlawfully withheld that which was not yet due. Summary judgment on plaintiff's claim for vacation pay is appropriate.⁶

J. Statute of Limitation

The Sciens defendants maintain that all claims for wages earned prior to July 14, 2011, are barred by the three-year statute of limitations because plaintiff's claim accrued anew each time plaintiff received less than was his due in his paycheck. The parties agreed, however, to defer payment of part of plaintiff's wages for a period of time. Those amounts were not due as they were earned, and their recovery is not time-barred.

For all of the foregoing reasons, the Sciens defendants' motion for summary judgment (Dkt. # 40) is GRANTED in part. Plaintiff's breach of contract claim and claim for vacation pay are DISMISSED and his claim for wages and business expenses against defendant Rigas is temporally limited. The motion for summary judgment regarding all other aspects of the WRA claim is DENIED.

Dated this 21st day of December, 2015.

All Citations

Slip Copy, 2015 WL 9273611

Footnotes

- 1 In 2010, plaintiff's salary was reduced to \$250,000. After he was replaced as President and CEO, plaintiff was paid \$50,000 per year for his service on AIS' Board of Directors.
- 2 Pursuant to AIS' bylaws, the Board of Directors had the power to control the activities of AIS' President and CEO through its orders and resolutions. Dkt. # 28-5 at 4.
- 3 In reply, defendants appear to concede that they may be agents or vice-principals, but argue that personal liability still does not attach because the Sciens defendants did not have individual control or supervision over the payment of wages. Dkt. # 69 at 5-6. This argument was raised for the first time in reply and has not been considered beyond the analysis set forth below.
- 4 Of more relevance is L&I's definition of "wage." Admin. Policy No. ES.A.2 states that "[w]age means compensation due to an employee as a result of employment" that is paid in legal tender (as opposed to payment in kind, such as the provision of meals or lodging). Defendants do not contend that AIS reimbursed business expenses in anything other than legal tender. As discussed more fully in the text, the issue seems to be whether the business expenses are sufficiently related to the employment to be considered "wages" rather than some other form of compensation.
- 5 Defendants' reliance on WAC 296-128-035 is misplaced. A violation of the WRA is not excused simply because the employer also violated the regulation that establishes the payment interval.
- 6 For much the same reason, defendants who left the Board before plaintiff's entitlement to wages for his final pay period or periods accrued cannot be held liable for an unlawful withholding as to those amounts.

2016 WL 827145

Only the Westlaw citation is currently available.

United States District Court,
W.D. Washington,
at Seattle.

Steven Kalmanovitz, Plaintiff,

v.

Daniel Standen, et al., Defendants.

No. C14-1224RSL

Signed 03/03/2016

ORDER GRANTING IN PART PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

Robert S. Lasnik, United States District Judge

*1 This matter comes before the Court on "Plaintiff's Motion for Summary Judgment." Dkt. # 37. Plaintiff alleges that he was owed back wages, benefits, and reimbursable expenses at the time his employer, Advanced Interactive Systems, Inc. ("AIS"), filed for Chapter 7 bankruptcy protection. He seeks summary judgment on his Washington Rebate Act claim against four former officers/directors of AIS in the principal amount of \$291,450.01 plus exemplary damages, costs, fees, and interest.

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact that would preclude the entry of judgment as a matter of law. The party seeking summary dismissal of the case "bears the initial responsibility of informing the district court of the basis for its motion" (Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)) and "citing to particular parts of materials in the record" that show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)). Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to designate "specific facts showing that there is a genuine issue for trial." Celotex Corp., 477 U.S. at 324. The Court will "view the evidence in the light most favorable to the nonmoving party... and draw all reasonable inferences in that party's favor." Krechman v. County of Riverside, 723 F.3d 1104, 1109 (9th Cir. 2013). Although the Court

must reserve for the trier of fact genuine issues regarding credibility, the weight of the evidence, and legitimate inferences, the "mere existence of a scintilla of evidence in support of the non-moving party's position will be insufficient" to avoid judgment. City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1049 (9th Cir. 2014); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Factual disputes whose resolution would not affect the outcome of the suit are irrelevant to the consideration of a motion for summary judgment. S. Cal. Darts Ass'n v. Zaffina, 762 F.3d 921, 925 (9th Cir. 2014). In other words, summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable fact finder could return a verdict in its favor. FreecycleSunnyvale v. Freecycle Network, 626 F.3d 509, 514 (9th Cir. 2010).

Having reviewed the memoranda, declarations, and exhibits submitted by the parties and taking the evidence in the light most favorable to defendants, the Court finds as follows:

A. Statement of Facts

Plaintiff ran AIS until he was replaced as CEO and President by defendant David McGrane on May 15, 2012. Plaintiff's annual salary had been \$350,000 a year, but when AIS ran into financial difficulties in 2009, plaintiff took a pay cut and agreed to defer portions of his salary.¹ Shortly after his ouster, plaintiff requested that AIS pay the back wages it owed. At the time, AIS had secured an additional multi-million dollar investment from its secured lender, Kayne Anderson Mezzanine Partners ("KAMP"), which was more than enough to resolve all outstanding payroll demands. Defendants, all of whom were members of AIS' Board of Directors, were apprised of the deferrals and the demand. Neither they nor AIS disputed plaintiff's claim. Defendants were concerned, however, that KAMP, which believed that plaintiff was responsible for AIS' financial problems, would object to a payment to plaintiff.

*2 Despite repeated demands for payment, none was forthcoming. Instead, the Board authorized defendants Daniel Standen and Zechariah Clifton Dameron IV to negotiate a separation agreement to resolve the claim for back wages. In December 2012, AIS collected on certain outstanding accounts. Michael Allen, the CFO, notified defendant McGrane that:

I think that we should be looking to address not only all of the outstanding expenses, but also all of the deferred payroll.

We have the funds to pay these items at the moment and whilst it is absolutely the right of Sciens² and Kayne to choose to reject offers to buy the company and to pursue better offers, I do not believe that they have the right to fund the company whilst doing this by holding back employees' pay without their consent.

Decl. of Mario Bianchi (Dkt. # 39), Ex. I. McGrane directed Allen to put aside the money necessary to pay all deferred compensation claims, including plaintiff's. During January and February 2013, the Board considered the deferred payroll issues and – having excluded plaintiff from the discussion – ultimately decided to pay everyone but plaintiff. Although McGrane hoped a negotiated resolution of plaintiff's claim could be achieved and continued to sequester funds for that purpose, all four individual defendants voted in favor of not paying plaintiff his wages.

AIS' finances continued to deteriorate. Neither Sciens nor KAMP appeared willing to inject additional capital in the company. Although plaintiff, Standen, and Dameron reached an agreement in principle to resolve plaintiff's deferred compensation claim, it was not reduced to writing before KAMP declared AIS in default and seized control of AIS' bank accounts. For approximately eight days, AIS could no longer pay anyone's wages, much less deferred compensation or a severance package for plaintiff. One day after its accounts were frozen, the Board of Directors wrote to KAMP requesting that payroll funds be released and notifying the lender that if funds were not made available, the Board would have to terminate the company's employees. By the time KAMP authorized payroll payments and released its exclusive control over AIS' accounts, there were competing wage claims and the money that had been set aside to pay plaintiff's deferred compensation claim was used to make payroll.

Still believing that KAMP could be forced to provide additional financing in order to safeguard its investment, the Board – including plaintiff – decided to continue operations and did not immediately terminate AIS' employees. Nevertheless, at the end of February the Board unanimously voted to prepare AIS for a Chapter 7 bankruptcy filing. The Board requested additional

financing from KAMP, setting forth strategic options for maximizing AIS' value for shareholders. On March 1, 2013, KAMP refused. Two days later, defendant John Rigas' resignation from the Board was announced, effective February 27, 2013. The remaining Board members resolved to discontinue AIS' operations and terminate all employees who were not involved in the Chapter 7 filing. Defendant McGrane resigned from the Board after the meeting on March 3, 2013.

The Board, now consisting of only Standen, Dameron, and plaintiff, continued meeting and, on March 14, 2013, allocated AIS' last dollars to payroll expenses, less vacation and holiday time. Plaintiff did not receive any part of this allocation. The last remaining Board members resigned. On March 16, 2013, Allen, as part of the "Clean-up Team," sent plaintiff an accounting of amounts due (\$244,855.72 in deferred compensation, \$6,393.47 in unpaid wages, and \$39,141.58 in unreimbursed business expenses) and a termination letter. The latter was dated March 4, 2013, and noted that plaintiff's final paycheck was due on March 15, 2013.

B. Conclusions of Law

*3 Under Washington law, "[a]ny...officer, vice principal or agent of any employer... who...[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" "shall be liable in a civil action by the aggrieved employee...for twice the amount of the wages unlawfully...withheld...together with costs of suit and a reasonable sum for attorney's fees...." RCW 49.52.050 and RCW 49.52.070. As more fully discussed in the "Order Regarding McGrane's Motion for Summary Judgment" (Dkt. # 74) and/or the "Order Regarding Sciens Defendants' Motion for Summary Judgment" (Dkt. # 75), the Court finds that defendants are officers, vice principals and/or agents of AIS for purposes of the Wage Rebate Act ("WRA"), "wages" recoverable under the WRA include monies owed to the employee as reimbursement for allowable business expenses, plaintiff has not waived or otherwise released his claim for wages, each defendant is liable for the failure to pay amounts that were due and owing to plaintiff at the time the defendant resigned from AIS, and plaintiff's claims are not barred by the statute of limitations. The Court also finds that there is no genuine dispute regarding the following facts:

- the named defendants had the power to and actually controlled the decision to withhold plaintiff's wages;
- the decision to withhold plaintiff's wages was wilful and intentional;
- defendants are individually liable for their wilful and intentional conduct despite the fact that the failure to pay wages was achieved through collective Board action;
- plaintiff did not deliberately or intentionally defer to the employer the decision of whether his deferred compensation would ever be paid and did not otherwise knowingly submit to the wage deprivation; and
- plaintiff was damaged by the nonpayment of wages, there being no evidence that the trustee would have exercised his discretion to avoid a transfer to plaintiff.

C. Damages

Pursuant to company policy and RCW 49.48.010, plaintiff had no right to cash out unused vacation days or to wages for his final pay period until the next regular pay date after termination. The evidence shows that those wages became due and owing on March 15, 2013, by which time all of the defendants had resigned from AIS. Defendants could not have unlawfully withheld that which was not yet due: none of them, therefore, has any liability for plaintiff's vacation compensation or wages accrued during the final pay period.

With regards to defendants Rigas and McGrane, their liability for on-going wage accrual ended on February 27, 2013, and March 3, 2013, respectively. It is not entirely clear from the record whether there were any unpaid wages prior to the final pay period or whether plaintiff was paid on a monthly or bi-weekly schedule as a member of the Board of Directors. Regardless, Rigas and McGrane can be liable for unpaid wages only through the last pay date before their resignations.

There is no genuine dispute regarding the amount of deferred compensation (\$244,855.72) or unreimbursed business expenses (\$39,141.58). Failla v. FixtureOne Corp., 181 Wn.2d 642, 656-57 (2014).

D. Prejudgment Interest

Defendants cite three Washington Court of Appeals cases for the proposition that pre-judgment interest is not recoverable where a statute provides for punitive or exemplary damages. Morbeck v. Kirlan Venture Capital, 2003 WL 21689988, at * 12-13 (Wn. App. July 21, 2003); JDFJ Corp. v. Int'l Raceway, Inc., 97 Wn. App. 1, 10 (1999); Ventoza v. Anderson, 14 Wn. App. 882, 897 (1976). Morbeck and JDFJ rely on Ventoza, which in turn relies on the Washington Supreme Court's analysis in Blake v. Grant, 65 Wn.2d 410 (1964).

In Blake, the trial court allowed prejudgment interest in a timber removal case on both the compensatory and punitive portions of the damage award. Defendants appealed. The Supreme Court noted that the rationale for awarding prejudgment interest is to compensate plaintiff for the deprivation of the use of or proceeds from his property and that "we have consistently allowed the recovery of interest where it was asked..." 65 Wn.2d at 412-13. Where statutory or exemplary damages are awarded, however, the compensatory goal is missing: "interest is generally disallowed on punitive claims." 65 Wn.2d at 13. Appellants' counsel had assigned error to the award of interest in its entirety and had not attempted to distinguish between the interest allowed on the compensatory award and the interest allowed on the punitive portion of the award. In light of that failure and the fact that "the amount involved is very small," the Supreme Court simply affirmed the award of prejudgment interest. 65 Wn.2d at 13.

*4 A federal court sitting in diversity begins with the pronouncements of the state's highest court, which are binding. McKown v. Simon Prop. Group, Inc., 689 F.3d 1086, 1091 (9th Cir. 2012). The Blake court affirmed the award of prejudgment interest in a case, such as this, involving both compensatory and punitive components of the award.³ Nevertheless, it made clear that – had the issue been properly presented – it would have overturned that portion of the award that served no compensatory purpose, namely the interest awarded on the punitive damage award. Thus, the Court finds that plaintiff is entitled to prejudgment interest under Washington law only on the compensatory half of the damage award.

For all of the foregoing reasons, plaintiff's motion for summary judgment (Dkt. # 40) is GRANTED in

part. Defendants are jointly and severally liable for deferred compensation in the amount of \$244,855.72, unreimbursed business expenses in the amount of \$39,141.58, and unpaid wages (if any) through the last pay date prior to February 27, 2013. Because plaintiff's claim for unpaid wages is temporally limited, the parties shall meet and confer to determine whether there are any unpaid wages for which one or more of the defendants is liable under the analysis set forth in Section C and the amount thereof. Defendants are also liable for pre-judgment interest on the compensatory portion of the award, plus exemplary damages of twice the amount of

wages withheld. The parties shall present an agreed form of judgment (or further briefing regarding the unpaid wages calculation) within twenty one days of the date of this Order. Plaintiff's claim for unused vacation pay is DISMISSED.

Dated this 3rd day of March, 2016.

All Citations

Slip Copy, 2016 WL 827145

Footnotes

- 1 In 2010, plaintiff's salary was reduced to \$250,000. After plaintiff was replaced as President and CEO, he was paid \$50,000 per year for his service on AIS' Board of Directors.
- 2 Sciens Capital Management LLC was AIS' largest private equity investor.
- 3 The Yentoza court failed to acknowledge or appreciate this fact, instead latching onto the statement that "interest is generally disallowed on punitive claims" and barring an award of interest on both compensatory and punitive damages.

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Dear Clerk:

Please file the attached Reply Brief of Appellant Michael Allen. Thank you.

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