

No. 66752-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

GUSTAVO NELSON ARZOLA, MICHAEL KLATT, and
SUSAN PROSSER

Respondents/Cross-Appellants,

v.

NAME INTELLIGENCE, INC. and JAY WESTERDAL

Cross-Respondents./Appellants

REPLY BRIEF
OF CROSS-APPELLANTS

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 DEC 28 PM 4:00

Joseph A. Grube, WSBA #26476
Karen Orehoski, WSBA#35855
Ricci Grube Breneman, PLLC
Attorneys for Respondents/Cross-Appellants
1200 Fifth Avenue, Suite 625
(206) 624-5975

RECEIVED
COURT OF APPEALS
DIVISION ONE

DEC 28 2011

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. REPLY 1

A. CROSS-APPELLANTS HAVE ADEQUATELY CHALLENGED THE TRIAL COURT’S CONCLUSION THAT WESTERDAL’S REFUSAL TO PAY COMPENSATION FOR TWENTY TWO DAYS WAS NOT “WILLFUL WITHHOLDING.” 1

B. WHEN THE UNDERLYING FACTS ARE NOT DISPUTED, WHETHER THOSE FACTS CONSTITUTE WILLFUL WITHHOLDING IS A QUESTION OF LAW..... 2

C. IT IS UNDISPUTED THAT THE APPELLANTS DID NOT UNCONDITIONALLY TENDER THE AMOUNTS DUE UNTIL TWENTY TWO DAYS AFTER THE PAYMENT DATE, AND THIS WAS AN INTENTIONAL ACT. 3

D. CROSS-APPELLANTS ARE ENTITLED TO ATTORNEY FEES ON APPEAL BASED ON RCW 49.48.030, RCW 49.52.070, AND *LABRIOLA V. POLLARD GROUP*. 4

III. CONCLUSION 5

CASES

Backman v. Northwest Pub. Ctr, 147 Wn.App. 791 (2008) 2, 4
Champagne v. Thurston County, 163 Wn.2d 69, 81 (2008)..... 3
Labriola v. Pollard Group, Inc. 152 Wn.2d 828, 839 (2004) 5
Lillig v. Becton-Dickinson, 105 Wn.2d 653, 660 (1986)2, 3
Martin v. Johnson, 141 Wn.App. 611, 623 (2007)..... 5
Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 160 (1998)3

STATUTES

RCW 49.48.030..... 4
RCW 49.52.070..... 4
RCW 49.52..... 3

RULES

RAP 10.3(g) 2

I. INTRODUCTION

Jay Westerdal and Name Intelligence's intentional refusal to unconditionally tender \$145,007 constituted willful withholding as a matter of law. Cross-Appellants have sufficiently challenged the trial courts' legally erroneous failure to award double damages.

The parties have never disputed the tender was twenty two days late, or that it was the result of intentional acts on the part of the Appellants. Rather, the crux of the Appellants' position has always been that the delay was the result of a *bona fide* dispute. The trial court did not find a bona fide dispute as to the \$145,007, and that failure to find has not been challenged on appeal.

II. REPLY

A. Cross-Appellants have adequately challenged the trial court's conclusion that Westerdal's refusal to pay compensation for twenty two days was not "willful withholding."

Cross-Appellants' challenge to the trial court's finding that there was no "willful withholding" has been properly preserved. The Cross-Appellants specifically identified FFCL 4.5, 4.6, 4.7, and 5.3 in their Assignments of Error on Cross Appeal. See *Response Brief and Opening Cross-Appeal Brief of Cross-Appellants* at p. 3.

Furthermore, the issue of whether the underlying facts (which are not, generally disputed) constitute “willful withholding” is clearly discussed and argued in the brief. To the extent this is considered a challenge to finding of fact, the challenge is “clearly disclosed in the associated issue(s) pertaining thereto” in compliance with RAP 10.3(g).

B. When the underlying facts are not disputed, whether those facts constitute willful withholding is a question of law.

Appellants cite *Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 660 for the proposition that the issue of willful withholding is a question of fact. This is incorrect when the underlying facts are not in dispute. See *Backman v. Northwest Pub. Center*, 147 Wn.App. 791, 797-798 (Div. 1 2008)(finding willful holding as a matter of law):

Here, the material facts are not in dispute....
The company acted with knowledge and intent when it failed to adhere to the payment schedule established by the contract. Its actions were willful. [The employer] violated RCW 49.52.050(2).

See also *Champagne v. Thurston County*, 163 Wn.2d 69, 81 (2008)(“where no dispute exists as the material facts [surrounding willfulness], the court may dispose of such questions [as a matter of

law]); *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 160 (1998)(question of law regarding willfulness when facts not in dispute).

Additionally, in *Lillig*, the trial court made oral findings that the underlying payments were subject to a bona fide dispute. *Id.* No such findings were made in this case (with respect to the collective payment of \$145,007), and the Appellants have not challenged the trial courts' refusal to make those findings.

Rather, the trial Court made and relied on the (erroneous) legal conclusion that the "making [of] a payment twenty two days after the deadline is not 'willful withholding' under RCW 49.52." FFCL 4.6. This stated principle is the claimed basis for its findings, is clearly a legal conclusion, and is the crux of Cross-Appellants' claimed error on appeal.

C. It is undisputed that the Appellants did not unconditionally tender the amounts due until twenty two days after the payment date, and this was an intentional act.

The following facts have not been challenged by Appellants, and are therefore verities on appeal:

- (1) the "final installment payment to Plaintiffs was due on May 2, 2010."

- FFCL 4.3;
- (2) the Appellants “did not make the payment on May 2, 2010.” FFCL 4.4; and
- (3) the first “unconditional tender of the third payment” was made on May 24, 2010, twenty two days after the payment was due. FFCL 4.5

The key issue, as set forth in the Cross-Appellants’ opening brief, is whether intentionally withholding payment for twenty two days is “willful” under RCW 49.52 as a matter of law, when no bona fide dispute has been found. Under *Backman v. Northwest Pub. Ctr*, 147 Wn.App. 791 (2008)(finding a delay of two weeks “willful”), it is.

D. Cross-Appellants are entitled to attorney fees on appeal based on RCW 49.48.030, RCW 49.52.070, and *Labriola v. Pollard Group*.

To the extent Cross-Appellants prevail on their wage claim, they are entitled to attorney fees both in the trial court as well as on appeal. RAP 18.1. *Martin v. Johnson*, 141 Wn.App. 611, 623 (2007).

Additionally, Cross Appellants are entitled to their attorney fees even if this Court rules the payments are not wages. Defendants asserted, as their central defense to the plaintiffs’ breach of contract claims, the terms of the Security Exchange

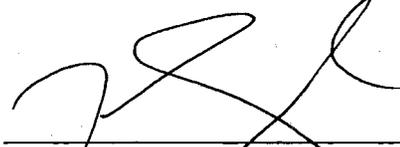
Agreement and the argument that those terms were incorporated in (and therefore controlled) the SRC agreements. See e.g. *Answer to Complaint* ¶ 2.10 (CP 5) and *Defendants' Opposition to Motion for Partial Summary Judgment* at pp. 3, 5, 9, 10 and 14 (CP 139, 141, 145, 146 and 150). The Security Exchange Agreement contains a prevailing party attorney fees clause at ¶ 7.12 (CP 75).

As the applicability of the Security Exchange Agreement was central to the dispute (insofar as it constituted the majority of the Appellants' claimed defenses), Cross-Appellants are entitled to prevailing party attorney fees for prevailing on their breach of contract claims – even though the Appellants denied the applicability of the contract. *Labriola v. Pollard Group, Inc.* 152 Wn.2d 828, 839 (2004).

III. CONCLUSION

The central issue in Cross-Appellants' appeal is whether or not twenty two days of volitional withholding constitutes willfulness as a matter of law. It does. This Court should reverse in part and remand the matter for entry of a judgment of double damages on the May 2010 payment (\$145,007). This Court should also reject Appellants' appeal.

RESPECTFULLY SUBMITTED this 28th day of December 2011.

A handwritten signature in black ink, appearing to be 'JAG', written over a horizontal line.

Joseph A. Grube, WSBA #26476
Karen K. Orehoski, WSBA #35855
Ricci Grube Breneman, PLLC
Attorney for Appellants

CERTIFICATE OF SERVICE

I, Joseph A. Grube, certify that all at times mentioned herein I was and now am a citizen of the U.S. and a resident of the State of Washington, over the age of 18 years, not a party to this proceeding or interested therein, and competent to be a witness therein. My business address is that of Ricci Grube Breneman PLLC, 1200 Fifth Avenue, Suite 625, Seattle, Washington 98101. On December 28, 2011, I caused a copy of the foregoing BRIEF to be served on the following parties:

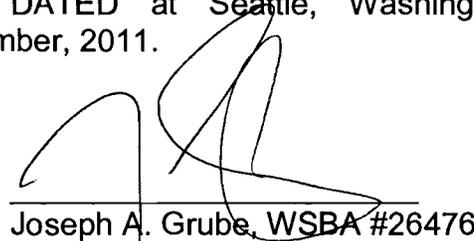
Via MAIL

Smith Goodfriend, P.S.
Howard M. Goodfriend
1109 First Avenue, Suite 500
Seattle, WA 98101-2988

Hamilton Gardiner
Holmquist & Gardiner, PLLC
1000 2nd Avenue, Suite 1770
Seattle, WA 98104

I DECLARE UNDER PENALTY OF PERJURY UNDER WASHINGTON LAW THAT I HAVE READ THIS DECLARATION, KNOW ITS CONTENTS, AND I BELIEVE THE DECLARATION IS TRUE.

DATED at Seattle, Washington this 28th day of December, 2011.



Joseph A. Grube, WSBA #26476