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NO. 67879-5-I

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

WASHINGTON GREENSVIEW APARTMENT ASSOCIATES,
a California Limited Partnership,

Appellant,

v.

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA
(f/k/a THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS), a
foreign insurance company, TRAVELERS EXCESS AND SURPLUS
LINES COMPANY, a foreign insurance company,

Respondents.

BRIEF OF APPELLANT

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 ORIGINAL

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I. INTRODUCTION

According to Seaborn Pile Driving Co. v. Glew, 132 Wn. App. 261, 131 P.3d 910 (2006), *rev. denied*, 158 Wn.2d 1027, 152 P.3d 347 (2007), if a CR 68 offer of judgment does not expressly state that it includes the offeree's attorney fees, then an offeree can recover its reasonable attorney fees *in addition to* the offer of judgment amount—if the substantive law that provides the right to attorney fees does not define them as a type of “cost.”

In this case, Respondents (“Travelers”) served a CR 68 offer of judgment on Appellant Greensview that did not address Greensview's attorney fees. Greensview accepted the offer, then moved for an award of reasonable attorney fees. The authority that provided for that fee award—Olympic Steamship Co., Inc. v. Centennial Ins. Co., 117 Wn.2d 37, 52, 811 P.2d 673 (1991)—does not define attorney fees as a type of “cost.” *See* Panorama Village Condo. Owners Ass'n Bd. of Directors v. Allstate Ins. Co., 144 Wn.2d 130, 142, 26 P.3d 910 (2001) (citing “difference between an entitlement to collect ‘reasonable attorney fees’ [under Olympic Steamship] and an entitlement to collect those statutory ‘costs’ enumerated in RCW 4.84.010”). Thus, because Travelers' CR 68 offer did not address Greensview's attorney fees, and because Greensview was entitled to recover its fees in addition to its “costs,” the trial court was

required to award Greensview its fees in addition to the offer of judgment amount. The trial court's refusal to do that is reversible error.

II. ASSIGNMENT OF ERROR

The trial court erred in refusing to grant Greensview's motion for an award of attorney fees.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether a policyholder who accepts a CR 68 offer of judgment that does not address attorney fees is entitled to recover its "Olympic Steamship fees" in addition to the offer of judgment amount.

IV. STATEMENT OF THE CASE

In January 2010, Greensview sued Travelers and two other insurance companies in Snohomish County Superior Court. Among other things, Greensview sued for a declaration that the insurers' policies covered certain damage to Greensview's apartment building.

On October 11, 2011, Travelers served Greensview with a CR 68 offer of judgment. The offer did not mention Greensview's attorney fees:

Pursuant to CR 68, defendants Travelers Property Casualty Company of America and Travelers Indemnity Company Of Illinois offer to have judgment entered against the two of them for a total judgment amount of \$30,000 plus costs then accrued. This means a single \$30,000 payment on behalf of both defendants, not two \$30,000 payments. The term "costs" is defined in the same manner as in RCW 4.84.010.

CP 144-45.

On October 20, 2011, Greensview's counsel sent a letter to Travelers' counsel accepting the offer of judgment: "Plaintiff accepts your clients' Offer of Judgment in the above-captioned matter, dated and delivered on October 11, 2011" CP 148. Greensview then moved for entry of judgment and an award of reasonable attorney fees under Olympic Steamship. Greensview explained in its motion that because Panorama Village characterizes "Olympic Steamship fees" as distinct from "costs," and because Travelers' offer was silent as to attorney fees, Greensview was entitled to an award of its reasonable attorney fees in addition to the judgment amount.

Travelers opposed the motion, claiming in its opposition brief that it did not intend to be liable for attorney fees in addition to the offer of judgment amount (*i.e.*, Travelers intended the \$30,000 to include any claim for Greensview's reasonable attorney fees). CP 25-85. Travelers submitted two declarations in support of its opposition brief. Neither declaration actually said that Travelers intended the \$30,000 to be inclusive of reasonable attorney fees, nor did the declarations say anyone from Travelers ever conveyed that alleged intent to Greensview or its counsel. *See* CP 23-24; CP 86-136.

On November 7, 2011, the trial court granted in part and denied in part Greensview's motion. CP 8-11. The court concluded—apparently

based upon oral argument from Travelers' counsel and the statements in Travelers' brief—that Travelers intended its \$30,000 offer to be inclusive of reasonable attorney fees. As a result, the court decided that the parties had no “meeting of the minds,” and Greensview’s acceptance was therefore unenforceable:

My view, quite candidly, was there seems not to have been a meeting of minds as to whether or not attorney fees were intended to be included or intended not to be included in the offer of judgment.

VRP 13. The trial court then issued a written order granting Greensview’s request for a judgment against Travelers, but denying Greensview’s motion for attorney fees. CP 8-11. Because Greensview’s claims against the non-Travelers insurers were still pending, the trial court included in its order CR 54(b) findings and conclusions. Id. Greensview timely appealed. CP 1-7.

V. ARGUMENT

A. **STANDARD OF REVIEW**

“Issues involving construction of CR 68 offers are reviewed de novo, while disputed factual findings concerning the circumstances under which the offer was made are usually reviewed for clear error.” Seaborn, 132 Wn. App. at 266.

B. SEABORN REQUIRED THE TRIAL COURT TO AWARD GREENSVIEW ITS ATTORNEY FEES

If a CR 68 offer of judgment does not expressly state that the offer includes attorney fees, and if the substantive law that allows for attorney fees defines them as distinct from “costs,” then the party who accepts the CR 68 offer of judgment is entitled to an award of reasonable attorney fees in addition to the offer of judgment amount. *See, e.g., Seaborn*, 132 Wn. App. 261; Lietz v. Hansen Law Offices, PSC, - Wn. App. -, 2012 Wash. App. LEXIS 285 (Feb. 7, 2012).¹

In Seaborn, a contractor (Seaborn) served a \$4,500 offer of judgment on the opposing party (the Glews). Like here, the offer was silent as to whether it included the Glews’ attorney fees:

Seaborn Pile Driving, Inc., as the party defending the counterclaims of defendants Glew, submits this offer to have judgment be taken against it for the sum of Four Thousand Five Hundred Dollars (\$4,500), and tenders payment of said sum contemporaneous with this offer. This offer is made pursuant to Superior Court Rule 68.

Seaborn, 123 Wn. App. at 265.

The contract over which the Glews were suing had two distinct attorney fee provisions: “(1) a collection clause that define[d] attorney fees as part of costs and (2) a litigation clause that define[d] them as separate from costs.” Seaborn, 123 Wn. App. at 266. The Glews accepted

¹ The Lietz decision is attached as Appendix A.

Seaborn's offer, then moved for an award of attorney fees in addition to the \$4,500 judgment. The trial court granted the motion, and Seaborn appealed.

This Court affirmed. It held that if a CR 68 offer does not expressly state that the offer includes attorney fees, then a trial court *must* award fees in addition to the judgment amount—if the authority that provides for attorney fees defines them separately from “costs”:

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 [that provides a right to attorney fees]. If the statute or contract defines fees as part of costs, then the offer of judgment is inclusive of attorney's fees even though they are not mentioned. ***If attorney fees are defined as separate from costs under the statute or contract,² then the court must award those fees in addition to the amount of the offer.***

Seaborn, 123 Wn. App. at 267 (emphasis added).

Because the “litigation” clause in the Seaborn contract did not define attorney fees as a type of cost, this Court held that the trial judge properly awarded attorney fees in addition to the \$4,500 judgment amount: “The court correctly applied the litigation clause to the [Glews'] counterclaims. The litigation clause defines attorney fees as separate from

² Although Seaborn refers to “statute or contract,” the “American rule” exception also applies to equitable authority like Olympic Steamship. See, e.g., Gossett v. Farmers Ins. Co., 133 Wn.2d 954, 977, 948 P.2d 1264 (1997) (citing “American rule on attorney fees, *i.e.*, that each party bears its own attorney fees absent a recognized basis in contract, statute, *or equity* for requiring that attorney fees be paid by the other party”) (emphasis added).

costs; therefore Seaborn's offer of judgment did not include attorney fees." Seaborn, 132 Wn. App. at 268.

Seaborn in turn relied on Nusom v. Comh Woodburn, Inc., 122 F.3d 830 (9th Cir. 1997).³ In that case, the defendant made an offer of judgment for a particular dollar amount "together with costs accrued to the date of this offer." Nusom, 122 F.3d at 832. The plaintiffs accepted the offer, then moved for an award of attorney fees. The trial court denied the motion, and the plaintiffs appealed.

The Ninth Circuit reversed. The court reasoned that the substantive laws that authorized the plaintiffs to recover their attorney fees (two Federal statutes) defined attorney fees separately from "costs." Thus, the court held, accepting the offer did not preclude the plaintiffs from also recovering their attorney fees:

We conclude that, in this case, the judgment does not foreclose the Nusoms from seeking attorney fees because it does not clearly and unambiguously waive or limit them.

....

We are not persuaded by [the offeror's] argument that its offer of \$15,000 plus costs necessarily excludes attorney fees because [the authority allowing the plaintiffs to recover their fees] treats attorney fees separately from costs . . . it does not follow that an offer to have judgment entered for a sum 'together with costs' has the same effect

³ Because CR 68 is essentially identical to Fed. R. Civ. P. 68, federal cases are persuasive in construing CR 68. See Lietz, Slip Op., at 7; Beal v. City of Seattle, 134 Wn.2d 769, 777, 954 P.2d 237 (1998) ("Where a state rule parallels a federal rule, analysis of the federal rule may be looked to for guidance . . .").

of being a lump-sum settlement, precluding attorney fees, when the underlying [authority] does not make attorney fees a part of costs.

Nusom, 122 F.3d at 833-34; *see also* Lietz, Slip Op., at 23 (“[W]here . . . a CR 68 offer of judgment is silent on the issue of attorney fees, and the [underlying authority] does not define attorney fees as ‘costs,’ a trial court must award attorney fees in addition to the offer of judgment amount.”).

The upshot of Seaborn, Nusom, and Lietz is the same: if a CR 68 offer does not address attorney fees, and the substantive law that allows a plaintiff to recover those fees defines them as distinct from “costs,” then the offer does not preclude the offeree from recovering its attorney fees in addition to the judgment amount:

[A]lthough a CR 68 offer need not be a laundry list of everything that the offer includes, a wise offeror will expressly state that the offer includes attorney fees. ***If not, and if the underlying statute or contract does not define attorney fees as part of the costs, the offeree can seek those fees in addition to the amount of the offer.***

Seaborn, 132 Wn. App. at 272 (emphasis added).

As the Nusom court recognized, this is not an unreasonable burden—particularly given the offeror’s “power of the pen”:

[I]t is incumbent on the defendant making a Rule 68 offer to state clearly that attorney fees are included as part of the total sum for which judgment may be entered if the defendant wishes to avoid exposure to attorney fees in addition to the sum offered plus costs.

We do not think this is an unreasonable burden, for it is within the defendant's power to make an offer to allow judgment to be taken against it to the effect specified in the offer.

Nusom, 122 F.3d at 834 (citation omitted).

Here, the trial court erred in refusing to award Greensview its attorney fees because (a) Travelers' CR 68 offer did not state (expressly or otherwise) that it included Greensview's reasonable attorney fees; (b) as the prevailing party in a lawsuit to establish insurance coverage, Greensview was entitled to an award of reasonable attorney fees⁴; and (c) the substantive authorities that provide for such a fee award—Olympic Steamship and Panorama Village—do not define attorney fees as a type of "costs":

It must be noted that there is a difference between an entitlement to collect "reasonable attorney fees" [under Olympic Steamship] and an entitlement to collect those statutory "costs" enumerated in RCW 4.84.010.

Panorama Village, 144 Wn.2d at 142. Thus, Travelers' CR 68 offer did not preclude Greensview from recovering its Olympic Steamship fees in

⁴ A policyholder who receives an affirmative judgment in a lawsuit to establish insurance coverage is entitled to an award of attorney fees. See Olympic Steamship, 117 Wn.2d at 54 ("An insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees . . ."); Northwestern Mut. Life Ins. Co. v. Koch, 2010 U.S. Dist. LEXIS 18016 at *9 (W.D. Wash. 2010) ("Olympic Steamship fees are only available to the prevailing party. The prevailing party is the party who receives an affirmative judgment in their favor.").

addition to the \$30,000 judgment amount. To the contrary, Seaborn mandated such a fee award.⁵

C. THE TRIAL COURT’S “MEETING OF THE MINDS” REASONING WAS UNSOUND

Notwithstanding Seaborn’s clear mandate, the trial court apparently reasoned that because Travelers *argued* its offer was inclusive of Greensview’s reasonable attorney fees, the parties had no “meeting of the minds,” and the acceptance was therefore unenforceable. That reasoning is flawed for at least two reasons.

First, the trial court had no *evidence* that Travelers intended its offer to include reasonable attorney fees. Travelers’ lawyer *argued* that he intended the offer to include attorney fees. *See, e.g.*, VRP 14-15 (TRAVELERS’ COUNSEL: “[A]t least subjectively, when this offer was made, there was absolutely no intent to pay reasonable attorney’s fees . . . on top of a \$30,000 judgment.”). But neither of Travelers’ supporting declarations actually said that. And it is well settled that “counsel’s

⁵ In contrast to Olympic Steamship, the Consumer Protection Act *does* define attorney fees as a type of “cost.” *See* RCW 19.86.090 (allowing for “*costs* of the suit, including a reasonable *attorney’s fee*”) (emphasis added). Because of that distinction, Greensview asked the trial court to only award the attorney fees that Greensview incurred in pursuing its insurance coverage claim, as opposed to its CPA claim. *Cf. Hodge v. Development Services of America*, 65 Wn. App. 576, 583, 828 P.2d 1175 (1992) (“Here, the action is based on two statutes that both allow an award of attorney’s fees, but one statute includes attorney’s fees as costs (RCW 49.60.030) and one statute does not include attorney’s fees as costs (RCW 49.48.030). The court, where appropriate, would make an allocation between the work attributable to the respective causes of action and award fees only for that part of the litigation required by RCW 49.48.”).

argument is not evidence.” State v. Frost, 160 Wn.2d 765, 782, 161 P.3d 361 (2007).⁶

Second, even if Travelers had submitted evidence to support its subjective intent, that evidence would have been irrelevant because Travelers’ offer did not *manifest* that intent. As this Court made clear in Seaborn, the rule of “mutual assent” does not mean a court must consider a party’s *unexpressed* intentions:

Seaborn next contends that the offer of judgment is void, because Seaborn intended its offer to include attorney fees, and therefore there was no mutual assent. . . .

. . . .

Seaborn ignores a basic contractual interpretation rule. A court can consider extrinsic evidence as an aid to interpretation of the words of a contract, ***but it cannot import an unexpressed intention of one of the parties into the writing.*** . . . The only “evidence” Seaborn offered to the trial court was its insistence that it intended attorney fees to be included. The trial court concluded that although Seaborn may have intended the offer to include attorney fees, ***that intention was not expressed in the contract as written.*** The court interpreted the contract correctly.

Seaborn, 132 Wn. App. at 268-271 (emphasis added).

⁶ Travelers’ lawyer did claim he intended to “limit[] costs to statutory attorney fees.” CP 93 (emphasis added). But that intent—even if Travelers’ offer had manifested it—is irrelevant because Olympic Steamship fees are *never* a type of “cost.” Thus, how Travelers’ lawyer supposedly intended to define “costs” says nothing about attorney fees that are *not* a type of “cost.”

Put another way, the only relevant “mutual assent” is that reflected in the parties’ *written* offer and acceptance; the rule does not require the court (or offeree) to guess what the offeror *subjectively* intended:

Even though opinions regarding the law of contracts often use the phrase “meeting of the minds,” contract formation has never been a matter of telepathy. There must be communication. Contract law does not rely on the intentions of the parties, rather it looks to the *manifestations* of intent that the parties convey to one another.

....

When defendants approach Rule 68, they best tread with caution. Because a defendant has the opportunity to draft an offer of judgment, thereby forcing the plaintiff to make a crucial decision in ten short days, the defendant has an obligation to make that offer of judgment as clear and unambiguous as possible. Although some courts have been lenient toward a defendant who initially drafted a vague offer of judgment, the prevailing trend is for courts to enforce an accepted offer of judgment against the defendant who drafted the offer.

Kirkland v. Sunrise Opportunities, 200 F.R.D. 159, 161, 163 (D. Me. 2001).

Division Two recently addressed this precise “meeting of the minds” issue in a case with essentially identical facts. Like here, the defendant in Lietz served the plaintiff with a CR 68 offer of judgment (for \$7,500) that did not address the plaintiff’s attorney fees. Lietz, Slip Op., at 3. The plaintiff (Lietz) accepted the offer, then moved for entry of judgment, plus \$36,545 in attorney fees. Lietz, Slip Op., at 4. The

defendant (Hansen) opposed the motion, claiming she intended the \$7,500 offer to resolve all the claims against her, including any claim for fees. Like here, the trial judge accepted that argument, finding the parties had no “meeting of the minds”:

Well, I guess I’m kind of torn here. On the one hand, it’s very possible [defendant] never intended to offer any more than [\$7,500]; on the other hand . . . [Defendant’s counsel] says it’s under Rule 68 and [is] now trying to avoid 68, and in the [Seaborn v. Glew] case, so . . . I’m not going to enforce the agreement. There appears to me that there was not a meeting of the minds.

Lietz, Slip Op., at 5 n.9. Lietz moved for discretionary review, and Division Two reversed.

Citing this Court’s decision in Seaborn, the Lietz court expressly rejected Hansen’s “meeting of the minds” argument. The Court reasoned that because Hansen’s offer did not unambiguously say it included attorney fees, and because Lietz unequivocally accepted the offer, the parties’ *objective* manifestations did demonstrate mutual assent— notwithstanding what Hansen claimed she intended:

As we have previously noted, a court must construe any ambiguities in the CR 68 offer of judgment against Hansen, the drafter. Seaborn, 132 Wn. App. at 272. In denying Lietz’s motion for reconsideration, however, the trial court appears to have considered Hansen’s unexpressed subjective intentions and Hansen’s attorney’s acknowledgment that he had made a mistake in drafting the offer of judgment. The trial court erred when it applied these factors to determine that the parties lacked mutual

assent. As we note above, *a court must look at the parties' objective manifestations for contract formation, not their unexpressed subjective intentions, when interpreting an ambiguous contract or a CR 68 offer of judgment.* Similarly, Hansen's unilateral mistake in drafting the CR 68 offer cannot serve as a ground for voiding the CR 68 judgment under a lack-of-mutual-assent theory. Therefore, the trial court erred in ruling that the CR 68 offer of judgment failed for lack of mutual assent.

Lietz, Slip Op., at 13-14 (emphasis added).

Here, as in Lietz, Travelers' subjective intent is irrelevant in determining whether the parties had a "meeting of the minds." Travelers served an offer that did not unambiguously say it included Greensview's reasonable attorney fees. Greensview then unequivocally accepted that offer. Thus, the parties' *objective* manifestations of intent did demonstrate a "meeting of the minds." And under Seaborn, the terms of that resulting agreement entitle Greensview to recover its attorney fees.

D. THIS COURT SHOULD AWARD GREENSVIEW ITS ATTORNEY FEES ON APPEAL

Pursuant to RAP 18.1 and Olympic Steamship, Greensview requests an award of attorney fees on appeal. *See, e.g., Butzberger v. Foster*, 151 Wn.2d 396, 413-14, 89 P.3d 689 (2004) (awarding attorney fees on appeal under RAP 18.1 and Olympic Steamship).

VI. CONCLUSION

According to Seaborn, if a CR 68 offer of judgment fails to address the offeree's attorney fees, and the authority for a fee award defines

attorney fees as distinct from costs, then the trial court *must* award the offeree its attorney fees in addition to the judgment amount. Travelers' offer did not unambiguously state it included attorney fees. As the party in whose favor judgment was entered, Greensview was entitled to an award of fees under Olympic Steamship. According to Panorama Village, those fees are not a type of cost. Thus, Seaborn required the trial court to award Greensview its attorney fees in addition to the \$30,000 offer of judgment amount. The trial court's failure to do that constitutes reversible error.

DATED this 14th day of February, 2012.

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PAUL LIETZ,

Appellant,

v.

Hansen Law Offices, P.S.C., Amy Hansen
(Personally and in her official capacity),

Respondents.

No. 40987-9-II

PUBLISHED OPINION

Hunt, P.J. — Paul Lietz appeals the trial court’s (1) refusal to enter a CR 68 offer of judgment, which Hansen Law Offices, PSC, and Amy Hansen (collectively, Hansen) extended before trial and Lietz claims he unconditionally accepted; and (2) refusal to award attorney fees under RCW 49.48.030¹. Lietz argues that the trial court erred in (1) finding no “meeting of the minds”² about whether the offer of judgment included attorney fees; (2) ruling the offer of judgment agreement invalid, despite Hansen’s offer and Lietz’s unconditional acceptance having satisfied the doctrine of mutual assent (formerly known as “meeting of the minds”)³; and (3)

¹ RCW 49.48.030 was amended in 2010 to add gender neutral language; this change does not affect our analysis here. We will be referring to the current version of the statute throughout the opinion.

² Verbatim Report of Proceedings (May 14, 2010) at 15.

³ *Swanson v. Holmquist*, 13 Wn. App. 939, 942, 539 P.2d 104 (1975) (“Mutual assent is the

denying him reasonable attorney fees, to which RCW 49.48.030 and Washington case law entitled him. Bypassing Lietz's mutual assent argument, Hansen responds that *McGuire v. Bates*, 169 Wn.2d 185, 234 P.3d 205 (2010), fully resolves the issue in her favor. We reverse and remand to the trial court to enter the CR 68 offer of judgment agreement and to award reasonable attorney fees to Lietz. We also award Lietz attorney fees on appeal.

FACTS

From approximately January 5, 2006, to June 13, 2007, Paul Lietz worked as a paralegal and investigator for Hansen. Lietz planned to become an attorney through Washington's Rule 6 Law Clerk Program; and Hansen had agreed to serve as his Rule 6 sponsor while he worked for her law firm. Hansen agreed to pay Lietz \$15.00 per hour to work as an investigator on her personal injury cases. The parties dispute whether Hansen also agreed to pay Lietz \$250 a week to work as a paralegal on Thursdays and Fridays. On June 13, 2007, Hansen terminated Lietz's working relationship with her firm.⁴ Eventually, she also ended her Rule 6 sponsorship of him.

On June 18, 2008, Lietz sued Hansen for breach of employment contract and failure to pay \$14,483.47 in wages for work he had performed for her as a paralegal and as an investigator. He sought economic damages, double damages, costs, and reasonable attorney fees under RCW 49.48.030.⁵ Hansen filed a counterclaim, apparently asserting that Lietz's lawsuit was frivolous.

modern expression for the concept of 'meeting of the minds.'").

⁴ The parties dispute whether Lietz was an "employee" or an "independent contractor" of Hansen. See Reply Br. of Resp't at 1, 8; Clerk's Papers (CP) at 18. They also disagree about the rate and/or basis for his wages. This distinction, however, is irrelevant to the issues in this appeal.

⁵ Lietz originally requested attorney fees under RCW 49.52.070 as well; but he appears to have dropped this claim. On appeal, he seeks attorney fees under only RCW 49.48.030.

⁶ Trial was set for May 3, 2010.

I. Settlement Offers

In early October 2009, Hansen submitted a CR 68 offer of judgment to Lietz for \$2,500,⁷ which Lietz rejected. In mid-October, the parties held a settlement conference with a Pierce County Superior Court judge. Hansen orally offered to settle for \$7,500, which offer Lietz rejected.⁸

On April 20, 2010, Hansen served Lietz with a second document dated April 19 and entitled “Offer of Judgment,” which she purportedly made “pursuant to RCW 4.84.185 and 4.84.280 and CR 68.” Clerk’s Papers (CP) at 43. In the bottom left-hand side of the footer of the document, Hansen also referred to the document as an “Offer of Settlement.” CP at 43. This second “Offer of Judgment” stated:

Defendants wish to bring this matter to a quick and amicable disposition; and, therefore, offers to settle *the claim against defendants* at the present time in the amount of \$7,500.00.

⁶ The precise nature of Hansen’s counterclaim is unclear from the record before us on appeal. At various times in her trial memoranda and in her Reply Brief of Respondent, Hansen characterized her counterclaim as for “overpayment” or “fraudulent billing” practices, which terms do not appear in the counterclaim. *See e.g.*, Reply Br. of Resp’t at 6; CP at 77. In his answer to Hansen’s counterclaim, Lietz asserted that the counterclaim failed to state a claim upon which relief may be granted; but the record before us does not indicate whether Lietz ever moved to dismiss the counterclaim or if the trial court ruled on such motion.

⁷ Neither party submitted this offer of judgment as part of the trial record. Therefore, it is not in the record on appeal.

⁸ According to Lietz, he rejected the offer because it was less than a quarter of the attorney fees and costs that he had incurred in pursuing his lawsuit.

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CP at 43 (emphasis added). This offer did not mention attorney fees or Hansen's counterclaim.

On April 28, Lietz accepted this offer in writing as follows:

[Lietz] accepts Defendants' offer of judgment dated April 19, 2010 in the amount of seven thousand five hundred dollars (\$7,500).

CP at 45. Similar to Hansen's offer, Lietz's acceptance did not mention attorney fees or Hansen's counterclaim.

On April 29, Hansen filed a Notice of Settlement, stating, "[A]ll claims against all parties in this action have been resolved," and she asked the trial court to remove the case from the trial calendar. CP at 26 (emphasis added). On April 30, Hansen mailed Lietz a check for \$7,500 and an Agreed Order of Dismissal. Lietz returned the check and the Agreed Order of Dismissal to Hansen the same day and advised her that he would move for entry of judgment and seek attorney fees. CP at 147.

II. Motion for Entry of Judgment under CR 68; Attorney Fee Dispute

On May 6, Lietz moved for entry of judgment under CR 68 and for attorney fees under RCW 49.48.030. He proposed entry of a judgment for \$44,045, which comprised the \$7,500 agreed upon in the April 19, 2010 offer of judgment and \$36,545 in attorney fees under RCW 49.48.030. Hansen opposed the addition of attorney fees, contending that she had offered the \$7,500 to settle all of Lietz's claims, including any attorney fees.

Lietz responded that *Seaborn Pile Driving Co. v. Glew*, 132 Wn. App. 261, 267, 131 P.3d 910 (2006), *review denied*, 158 Wn.2d 1027 (2007), requires the trial court to award attorney fees, in addition to the offer of judgment amount, where a CR 68 offer of judgment is silent on

attorney fees and the attorney fees are not defined as “costs” under the relevant attorney fee statute. CP at 159. He argued that (1) the statute awarding attorney fees for recovering unpaid wages, RCW 49.48.030, does not define attorney fees as “costs”; and (2) therefore, the trial court must award him attorney fees in addition to the \$7,500 agreed upon when he accepted Hansen’s offer of judgment. CP at 159.

Hansen argued to the trial court that her offer of judgment was “unambiguous,” claiming that it clearly expressed her intent to resolve all claims against her because it deviated from the standard CR 68 language and used the words “settle” and “settlement.” Verbatim Report of Proceedings (VRP) (May 14, 2010) at 8. When pressed further by the court about why the document did not specify that it included attorney fees if her intent was to settle the entire case for \$7,500, Hansen responded that it was “scrivener’s error” and “maybe there’s no meeting of the minds.” VRP (May 14, 2010) at 11.

Finding that there was no “meeting of the minds” about whether the offer of judgment included attorney fees, the trial court refused to enter the April 19, 2010 offer of judgment.⁹ VRP (May 14, 2010) at 15. The trial court also suggested that Lietz had an obligation to clarify any ambiguity with Hansen, or at least to put Hansen on notice that he intended to seek attorney fees, before accepting the offer.

⁹ The trial court orally ruled:

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 [\$7,500]; on the other hand . . . [Hansen’s counsel] says it’s under Rule 68 and [is] now trying to avoid 68, and in the [*Seaborn v. Glew*] case, so . . . I’m not going to enforce the agreement. There appears to me that there was not a meeting of the minds.

VRP (May 14, 2010) at 15.

III. Motions for Reconsideration and Discretionary Review

Lietz moved for reconsideration, briefing the issue of mutual assent, and arguing that the trial court should construe any ambiguity in the offer of judgment against Hansen because she had drafted the document. Hansen did not specifically allege lack of mutual assent in her response. Instead, she argued that her attorney had made a “unilateral mistake” in drafting the April 19, 2010 offer of judgment and that the trial court should not enforce the CR 68 judgment under the “snap up” doctrine.¹⁰ CP at 201. The trial court denied Lietz’s motion for reconsideration,¹¹ and set a trial date for the underlying wage claim.

Lietz moved for discretionary review. Ruling that the trial court had committed probable error that substantially alters the status quo, a commissioner of our court granted review. We set the case for oral argument before a panel of judges.

¹⁰ Under the so-called “snap up” doctrine, a court may decide not to enforce a contract where a party made a unilateral mistake in entering the contract and the other party knew of the other party’s mistake at the time of acceptance and unfairly exploited the mistaken party’s error. *See Clover Park Sch. Dist. No. 400 v. Consol. Dairy Products Co.*, 15 Wn. App. 429, 434, 550 P.2d 47 (1976). Such does not appear to have been the case here, however.

¹¹ The trial court reasoned:

[Lietz’s counsel] makes a good point. [Hansen’s counsel] is the one who drafts [the offer of judgment], so if there is ambiguity, I should probably construe it against [Hansen]. 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 to reconsider over the objection of [the] plaintiff.

Transcript of Proceedings (TP) (June 25, 2010) at 37-38.

ANALYSIS

I. Refusal To Enter CR 68 Offer of Judgment

Lietz argues that the trial court erred by refusing to enter the parties' April 19, 2010 offer of judgment based on lack of mutual assent, because the trial court erroneously evaluated Hanson's unexpressed, subjective intentions rather than her objective manifestations as case law requires. We agree.

A. Standard of Review

We review issues involving construction of CR 68 offers of judgment de novo; and we review for clear error disputed factual findings concerning the circumstances under which the defendant made the offer. *Seaborn*, 132 Wn. App. at 266 (quoting *Herrington v. County of Sonoma*, 12 F.3d 901, 906 (9th Cir. 1993)). Washington's CR 68 is virtually identical to Federal Rule of Civil Procedure 68. *Hodge v. Dev. Servs. of Am.*, 65 Wn. App. 576, 579, 828 P.2d 1175 (1992). Thus, in the absence of state authority, Washington courts look to federal interpretation of the equivalent rule. *Hodge*, 65 Wn. App at 580. In addition, courts must construe ambiguities in an offer of judgment against the drafter. *Seaborn*, 132 Wn. App. at 272 (citing *Nusom v. Comh Woodburn, Inc.*, 122 F.3d 830, 833 (9th Cir. 1997)).

B. CR 68 Offers of Judgment; Default Rule

CR 68 sets forth a procedure for defendants to offer to settle cases before trial. The rule aims to encourage parties to reach settlement agreements and to avoid lengthy litigation. *Dussault v. Seattle Pub. Sch.*, 69 Wn. App. 728, 732, 850 P.2d 581 (1993), *review denied*, 123 Wn.2d 1004 (1994). The rule achieves this objective by shifting any post-offer of judgment costs

of litigation to a plaintiff who rejects a defendant's CR 68 offer and does not achieve a more favorable result at trial. *Seaborn* calls this cost-shifting provision the "CR 68 default rule." *Seaborn*, 132 Wn. App. at 272.

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 property or to the effect specified in his offer, *with costs then accrued*. If within 10 days after the service of the offer 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. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

(Emphasis added).

CR 68's use of the term "costs," accrued before and after the offer of judgment, may or may not include attorney fees depending on the underlying statute. *Hodge*, 65 Wn. App. at 580. 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. *Seaborn*, 132 Wn. App. at 267. If the statute or contract provision defines "attorney fees" as "costs," then the court reads the offer of judgment as including attorney fees even though the offer of judgment does not expressly mention them. *Seaborn*, 132 Wn. App. at 267 (citing *Marek v. Chesny*, 473 U.S. 1, 9, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985)). If, however, the statute or contract defines "attorney fees" as *separate* from "costs," then the court must separately award attorney fees in addition to the offer of judgment amount. *Seaborn*, 132 Wn. App. at 267 (citing *Marek*, 473 U.S. at 7). Under *Seaborn's* articulation of the "default rule," CR 68 offers of judgment that are silent on attorney fees may

trap an unwary plaintiff *or* defendant, depending on the language of the applicable underlying statute.¹²

As Division One has carefully explained in *Seaborn*:

The cases that follow *Marek* make one principle abundantly clear: [A]lthough a CR 68 offer need not be a laundry list of everything that the offer includes, a wise offeror will expressly state that the offer includes attorney fees. If not, and if the underlying statute or contract does not define attorney fees as part of the costs, the offeree can seek those fees in addition to the amount of the offer. *Seaborn*, as the maker of the offer [of judgment here], should have availed itself of the chance to contravene the CR 68 default rule. Any ambiguity in the lump sum offer of judgment is construed against *Seaborn*.

Seaborn, 132 Wn. App. at 272 (citations omitted).

Hansen's offer of judgment did not mention attorney fees. Thus, under *Seaborn*, we construe against her, any ambiguity in her lump sum offer of judgment, including whether the lump sum encompassed attorney fees; in so doing, we look to the underlying statute or contract for guidance. Hansen's claim that she intended her offer to include attorney fees does not prevail anymore than did *Seaborn's* similar claim:

. . . The only "evidence" *Seaborn* offered to the trial court was its insistence that it intended attorney fees to be included. The trial court concluded that although *Seaborn* may have intended the offer to include attorney fees, that intention was not expressed in the [offer of judgment] as written. The court interpreted the [offer of judgment] correctly.

Seaborn, 132 Wn. App. at 270-71.

¹² For example, *compare Seaborn*, 132 Wn. App. at 272 (holding defendant liable for attorney fees where its offer of judgment did not mention attorney fees and underlying statute did not define "attorney fees" as "costs"), *with Hodge*, 65 Wn. App. at 584 (noting defendants should be clear whether their offer of judgment includes attorney fees, in fairness to plaintiffs who may be caught off-guard if the underlying statute defines "attorney fees" as part of "costs").

Just as Division One read the defendant's offer of judgment in *Seaborn*, we read Hansen's offer of judgment as "silent" on attorney fees, and we look instead to the language of the underlying statute, RCW 49.48.030, to determine whether it defines "attorney fees" separately from "costs." Although RCW 49.48.030 generally requires an employer to pay a successful wage-claim litigant's attorney fees, the statute neither mentions the word "costs" nor specifically states whether attorney fees are defined or included as "costs" under this statute or elsewhere.¹³ As Division One has previously held in *Hodge*, however, RCW 49.48.030's silence is "precisely the dispositive point" of CR 68 offer-of-judgment case law, under both our state law and analogous federal precedent. *Hodge*, 65 Wn. App. at 583. In the absence of a statutory definition that includes attorney fees as part of "costs," we do not read attorney fees as "costs" for purposes of a CR 68 offer of judgment unless the offer of judgment expressly states that it includes attorney fees. *Hodge*, 65 Wn. App. at 583-84.¹⁴

¹³ RCW 49.48.030 provides:

In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, *reasonable attorney's fees*, in an amount to be determined by the court, *shall be assessed against said employer* or former employer: PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.

(Emphasis added.)

¹⁴ We further note that, although ultimately decided on other grounds, *Hodge* suggests that RCW 49.48.030 does not define attorney fees as "costs" under CR 68's default rules. *Hodge*, 65 Wn. App. at 583-84. As we discuss later in this opinion, the *Hodge* court held that the parties did not have a valid offer and acceptance, so it did not need to reach the merits of whether the plaintiff could recover attorney fees under RCW 49.48.030 when the defendant's offer of judgment was silent on attorney fees. See *Hodge*, 65 Wn. App. at 583-84 (contrasting RCW 49.48.030 with RCW 49.60.030, a statute which explicitly includes attorney fees as part of costs).

We hold, therefore, that because RCW 49.48.030 does not expressly provide that attorney fees are “costs” and because Hansen’s offer of judgment did not specifically state that her CR 68 offer of judgment included attorney fees, Lietz is entitled to recover attorney fees from Hansen in addition to the judgment amount specified in her offer of judgment.

C. Mutual Assent

Lietz argues that the trial court erred in refusing to enter Hansen’s April 19, 2010 offer of judgment based on its conclusion that the parties lacked mutual assent about whether Hansen’s offer of judgment included Lietz’s attorney fees. Lietz lists the following indicia of mutual assent: (1) As expressed in the language of her offer, Hansen’s objective manifestations conveyed her intent to settle “*the claim*”¹⁵ against her (highlighting the singular article in the offer); and (2) he (Lietz) unequivocally and unconditionally accepted Hansen’s offer.¹⁶ Lietz also argues that the court must construe any ambiguity in the offer’s language against Hansen because she drafted the document. We agree.

1. “Objective manifestation” theory of contract formation

The “usual rules of contract construction” apply to offers of judgment. *Nusom*, 122 F.3d at 833 (quoting *Guerrero v. Cummings*, 70 F.3d 1111, 1113 (9th Cir. 1995)); *see also McGuire*, 169 Wn.2d at 188-89 (applying contract principles to settlement agreements generally). A valid contract requires mutual assent, which generally takes the form of offer and acceptance. *Yakima*

¹⁵ Br. of Appellant at 21.

¹⁶ Without specifically addressing “mutual assent,” Hansen baldly states that the trial court did not abuse its discretion. *See Reply Br. of Resp’t* at 4.

County (W. Valley) Fire Prot. Dist. No. 12 v. Yakima, 122 Wn.2d 371, 388-89, 858 P.2d 245 (1993). Washington follows the “objective manifestation test” for contract formation. *Wilson Court Ltd. P’ship v. Tony Maroni’s, Inc.*, 134 Wn.2d 692, 699, 952 P.2d 590 (1998).

Applying this “objective manifestation test,” a court determines the parties’ intent by focusing on their objective manifestations as expressed in the agreement.¹⁷ *McGuire*, 169 Wn.2d at 189 (citing *Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005)). A court may consider extrinsic evidence as an aid in interpreting a contract’s words, but it cannot import one party’s unexpressed, subjective intentions into the writing. *Seaborn*, 132 Wn. App. at 270 (citing *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990)).

Hansen’s offer of judgment did not specifically mention attorney fees or purport to resolve her counterclaim for frivolous litigation. Her offer stated merely, “[Defendant Hansen] offers to settle the claim against defendants at the present time in the amount of \$7,500.00.” CP at 43. Lietz responded nine days later, “[Lietz] accepts Defendants’ offer of judgment . . . in the amount of seven thousand five hundred dollars (\$7,500).” CP at 45. As *McGuire* notes, under an “objective manifestation” theory of contract formation, we look primarily at the parties’ words as expressed in the agreement (here, Hansen’s offer and Lietz’s acceptance).¹⁸ The parties’ writings objectively manifested their intent to settle “the claim” that was made “against defendants.” CP at 43.

¹⁷ The parties’ subjective intent is generally irrelevant if the court can impute an intention corresponding to the reasonable meaning of the actual words used. *McGuire*, 169 Wn.2d at 189.

¹⁸ Although a court may also look at extrinsic evidence to aid interpretation, the trial court here did not take oral testimony or conduct a factual hearing on the issue of mutual assent.

Hansen's use of the article "the" suggests that the parties agreed to settle one claim, namely Lietz's unpaid wage claim against Hansen. Clearly, the phrase "against defendants" shows that the agreement did not cover Hansen's counterclaim, a claim that defendant Hansen brought against plaintiff Lietz, not a claim brought "against" defendant Hansen, as required for a CR 68 offer of judgment. Although Hansen's offer of judgment¹⁹ included references to RCW 4.84.185²⁰ and RCW 4.84.280,²¹ neither of these statutes applies here. Thus, at best, the language of Hansen's offer of judgment is ambiguous.

As we have previously noted, a court must construe any ambiguities in the CR 68 offer of judgment against Hansen, the drafter. *Seaborn*, 132 Wn. App. at 272. In denying Lietz's motion for reconsideration, however, the trial court appears to have considered Hansen's unexpressed subjective intentions and Hansen's attorney's acknowledgment that he had made a mistake in drafting the offer of judgment.²² The trial court erred when it applied these factors to determine

¹⁹ At oral argument, Hansen claimed that she had drafted her offer of judgment by modifying a standard form for use in connection with CR 68. *See also* CP at 149 (apparently citing section 68.21 Washington Practice guide).

²⁰ RCW 4.84.185 addresses awarding reasonable attorneys fees to a party who prevails in an action opposing a frivolous lawsuit. It is not clear why Hansen brought her offer of judgment under RCW 4.84.185. Even if mentioning this statute could be said to evince her intent to waive attorney fees in her frivolous lawsuit counterclaim against Lietz, if Lietz agreed to settle his wage claim against her, such unexpressed intent of Hansen has no apparent bearing on Lietz's argument here that the parties objectively manifested mutual assent and that he is entitled to attorney fees under RCW 49.48.030.

²¹ RCW 4.84.280 sets out the procedure and timeframe for serving an offer of settlement on an adverse party in a case where the plaintiff originally pleaded \$10,000 or less in damages. Again, this statute has no apparent relevance here because Lietz originally pleaded \$14,483.47 in economic damages, in excess of this statute's \$10,000 limit.

²² For example, the trial court stated:

that the parties lacked mutual assent. As we note above, a court must look at the parties' objective manifestations for contract formation, not their unexpressed subjective intentions, when interpreting an ambiguous contract or a CR 68 offer of judgment. Similarly, Hansen's unilateral mistake in drafting the CR 68 offer cannot serve as a ground for voiding the CR 68 judgment under a lack-of-mutual-assent theory.²³ Therefore, the trial court erred in ruling that the CR 68 offer of judgment failed for lack of mutual assent.

2. *Seaborn and Hodge*

Division One addressed a similar dispute over a CR 68 offer of judgment in *Seaborn*. Seaborn contracted to build a 70-foot pier for the Glews. When the Glews did not pay, Seaborn sued to collect \$1,824.48 owing. *Seaborn*, 132 Wn. App. at 264-65. Denying that they owed Seaborn money, the Glews counterclaimed for breach of contract, negligent misrepresentation, and violation of the Consumer Protection Act.²⁴ *Seaborn*, 132 Wn. App. at 265. Seaborn made a CR 68 offer of judgment for \$4,500 in exchange for the Glews' dismissal of their counterclaims²⁵;

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 to reconsider over the objection of [the] plaintiff.
TP (June 25, 2010) at 37-38.

²³ As we note in footnote 10, a court may refuse to enforce a contract based on one party's unilateral mistake if the other party knew about the mistake at the time of contract formation and unfairly exploited the mistake. Here, however, Hansen has neither alleged such facts nor appealed on these grounds. Thus, we do not further address such argument.

²⁴ Ch. 19.86 RCW.

²⁵ Although Seaborn was the plaintiff in the underlying lawsuit, it was the defendant in the Glews' counterclaims. Thus, Seaborn could make a CR 68 offer of judgment to the Glews to settle their counterclaims.

but, as here, Seaborn's offer of judgment did not expressly mention attorney fees or address its original collection claim for the pier construction. *Seaborn*, 132 Wn. App. at 265. Without modification or reservation, the Glews accepted Seaborn's offer and moved separately for attorney fees, which the trial court granted. *Seaborn*, 132 Wn. App. at 266.

On appeal, Seaborn tried to void its offer of judgment, arguing that there had been no "mutual assent" between the parties because it had intended its offer of judgment to include attorney fees. *Seaborn*, 132 Wn. App. at 268. Division One flatly rejected Seaborn's argument, holding that an offeror's subjective intent does not override its offer of judgment's express language. *Seaborn*, 132 Wn. App. at 269-70. In essence, the appellate court concluded that the Glews satisfied the mutual assent requirement because they accepted defendant Seaborn's offer verbatim without modifying or qualifying their acceptance to include attorney fees. *See Seaborn*, 132 Wn. App. at 266, 270. Construing the offer's ambiguous language against Seaborn, the drafter, Division One affirmed the trial court's ruling, which enforced Seaborn's offer of judgment and held Seaborn liable for the Glews' attorney fees.²⁶ *Seaborn*, 132 Wn. App. at 272.

Division One, however, reached a different conclusion in *Hodge*, where a defendant's offer of judgment stated that it included "all costs and expenses" but did not specifically mention attorney fees. *Hodge*, 65 Wn. App. at 578. Unlike Lietz, the plaintiff in *Hodge* expressly qualified her acceptance of the defendant's offer of judgment by stating: She "hereby accepts" the

²⁶ Federal courts have reached similar conclusions. *See, e.g., Hennessy v. Daniel Law Office*, 270 F.3d 551, 553-54 (8th Cir. 2001) (holding defendant's offer ambiguous because the word "judgment" was unclear; nevertheless, the agreement was still enforceable because the plaintiff unambiguously accepted it, without question or qualification).

defendant's offer of judgment, but it "shall *not* include plaintiff's actual attorneys' fees."²⁷ *Hodge*, 65 Wn. App. at 578 (emphasis added). The defendant, in turn, claimed that its original offer included attorney fees. Holding the defendant's offer of judgment void, Division One held that, under contract law, the plaintiff's qualified "acceptance," with its mention that the settlement did not include attorney fees, amounted to a counteroffer and a rejection of the defendant's offer of judgment.²⁸ *Hodge*, 65 Wn. App. at 582. Although the opinion did not use such terms, *Hodge* essentially ruled that the parties' objective manifestations showed they lacked mutual assent; and thus, the parties did not form a valid contract when the plaintiff qualified her acceptance of the defendant's offer of judgment to include attorney fees.

²⁷ *Hodge* addressed two statutes: RCW 49.60.030(2) and RCW 49.48.030. Because RCW 49.60.030(2) defines attorney fees as "costs," attorney fees were automatically included in the defendant's CR 68 offer of judgment under the default rule, even though the offer did not mention attorney fees. The court did not address the plaintiff's recovery of attorney fees under RCW 49.48.030, the statute under which Lietz sued here, because it found there was not a valid acceptance. *Hodge*, 65 Wn. App. at 584.

²⁸ Federal courts have reached similar conclusions. *See, e.g., Radecki v. Amco Oil Co.*, 858 F.2d 397, 403 (8th Cir. 1988) (invalid acceptance and, consequently no mutual assent, where plaintiff received *two* offers of judgment from defendant before accepting either and the second offer of judgment expressly clarified that the first offer included attorney fees); *Stewart v. Prof'l Computer Ctrs., Inc.*, 148 F.3d 937, 938 (8th Cir. 1998) (no mutual assent where plaintiff asked defendant to clarify what the offer included, defendant responded that offer included all "counts," which encompassed attorney fees, and plaintiff purported to accept original offer without attorney fees). These cases indicate that a court may invalidate a CR 68 judgment based on lack of mutual assent when a plaintiff expressly qualifies his acceptance to exclude attorney fees from the judgment amount or otherwise has actual knowledge that he is accepting an offer materially different from the offer the defendant made. Neither of these scenarios applies here.

3. *McGuire*

Hansen relies almost exclusively on *McGuire*, in which, she contends, the Washington Supreme Court ruled on “precisely the issue here.”²⁹ Reply Br. of Resp’t at 5. This argument fails. First, we note that *McGuire* addresses RCW 4.84.250,³⁰ a different settlement statute than the one at issue here. *McGuire*, 169 Wn.2d at 187. *McGuire* also does not disturb the clear line of cases permitting a plaintiff to seek attorney fees where a defendant’s CR 68 offer of judgment is silent on attorney fees and the applicable underlying statute does not define “attorney fees” as “costs.” In *McGuire*, the defendant made three offers of settlement; the plaintiff accepted the third offer, which purportedly settled “all claims” for \$2,180 under RCW 4.84.250-.280, but did not explicitly state whether it included attorney fees. *McGuire*, 169 Wn.2d at 188. The plaintiff moved for entry of judgment and an award of attorney fees and costs under RCW 18.27.040(6)³¹, the relevant attorney fee statute. *McGuire*, 169 Wn.2d at 188. The trial court entered judgment for the settlement amount and awarded the plaintiff attorney fees; Division One affirmed.

²⁹ In the trial court, Hansen also argued against enforcing the offer of judgment as not including attorney fees based on scrivener’s error and unilateral mistake. But she does not raise or argue these issues on appeal.

³⁰ RCW 4.84.250 has generated its own line of case law, distinct from case law addressing CR 68 offers of judgment. RCW 4.84.250 provides:

Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys’ fees. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

³¹ RCW 18.27.040(6) is not at issue here.

McGuire, 169 Wn.2d at 188.

Division One analogized settlement offers under RCW 4.84 to CR 68 offers of judgment and held that the plaintiff was entitled to additional attorney fees because, under *Seaborn*, the defendant's offer did not specify that it included attorney fees and the underlying statute allowed the plaintiff to recover attorney fees. *McGuire v. Bates*, 147 Wn. App. 751, 755-56, 198 P.3d 1038 (2008), *rev'd*, 169 Wn.2d 185, 234 P.3d 205 (2010). Noting that the Court of Appeals had "misapplied *Seaborn*," however, the Washington Supreme Court reversed, holding:

We say that because the settlement offer that was accepted by McGuire settled "all claims" and one of the claims was for attorney fees[, t]he settlement offer, thus, was not silent regarding attorney fees.

...

There is only one reasonable meaning that can be ascribed to the words in their agreement to settle "all claims" "pursuant to RCW 4.84.250-.280." That meaning, we believe, is that all claims encompasses all claims, including claims for attorney fees.

McGuire, 169 Wn.2d at 190-91 (emphasis added). Based on the parties' objective manifestations, the Supreme Court concluded that the settlement offer included attorney fees. *McGuire*, 169 Wn.2d at 191. Nevertheless, *McGuire* neither overruled *Seaborn* nor held that *Seaborn* should not inform how a court construes settlement offers or CR 68 offers of judgment. *McGuire*, 169 Wn.2d at 190-91. Rather, *McGuire* appears to underscore that when a settlement offer explicitly states that it settles "all claims," it means precisely what it says: The settlement agreement extinguishes all claims relating to the underlying dispute, including any related claims for attorney fees.

Hansen attempts to read her offer of judgment like the settlement agreement in *McGuire*,

apparently because she used the words “settle” and “settlement” in her CR 68 offer of judgment. *See Reply Br. of Resp’t* at 5-8. Even assuming, without deciding, that we were to read Hansen’s offer of judgment as an “offer of settlement” under chapter 4.84 RCW, her argument fails because the statutory provisions in RCW 4.84.250-.280 apply to settlement offers where a plaintiff originally pleaded \$10,000 or less in damages, which is not the case here. In addition, Hansen’s argument overlooks that her offer specifically stated that it would settle “*the claim against defendants,*” language that objectively manifested that she was offering to settle only a *portion* of the litigants’ entire dispute; thus, Hansen’s offer did not state or imply that it would settle “*all claims*” relating to the underlying dispute as did the offer at issue in *McGuire*.

We hold that Hansen’s offer of judgment was ambiguous at best. Construing any ambiguity against Hansen as the drafter, we further hold that Hansen’s offer of judgment did not include attorney fees, that there are sufficient indicia of mutual assent to enforce the offer of judgment, and that Lietz is entitled to an award of attorney fees in addition to the \$7,500 CR 68 judgment amount.

II. RCW 49.48.030 Attorney Fees

A. Trial

Lietz argues that the trial court erred in failing to award him reasonable attorney fees, in essence, as a result of its refusal to enter the parties’ CR 68 judgment based on the trial court’s finding “no meeting of the minds.” *Br. of Appellant* at 11. More specifically, Lietz argues that he is entitled to attorney fees below because (1) Hansen’s offer of judgment did not mention attorney fees and RCW 49.48.030 does not define “attorney fees” as “costs”³²; and (2) therefore, under

Seaborn and the CR 68 cost-shifting rules discussed above, the trial court was *required* to award him attorney fees in addition to the judgment amount. We agree.

We review questions of statutory interpretation de novo; we interpret statutes to give effect to the legislature’s intentions. *State v. Bunker*, 169 Wn.2d 571, 577-78, 238 P.3d 487 (2010). We begin by examining the statute’s plain language. *Bunker*, 169 Wn.2d at 578. When a statute is ambiguous, we resort to principles of statutory construction, legislative history, and relevant case law to assist in interpretation. *Yousoufian v. Office of King County Executive*, 152 Wn.2d 421, 434, 98 P.3d 463 (2004) (quoting *State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d 66 (2002)). “[A] statute is ambiguous if it can be reasonably interpreted in more than one way.” *Yousoufian*, 152 Wn.2d at 433-34 (quoting *Vashon Island Comm. for Self-Gov’t v. Wash. State Boundary Review Bd.*, 127 Wn.2d 759, 771, 903 P.2d 953 (1995)).

The parties do not argue that either CR 68 or RCW 49.48.030, the attorney fee statute under which Lietz sued, is ambiguous. Instead, Lietz argues that the trial court erred in failing to award him attorney fees under *Seaborn* and similar case law because Hansen’s offer of judgment was silent on attorney fees and RCW 49.48.030 does not define attorney fees as costs. The trial court did not reach the merits of Lietz’s attorney fee argument because it determined that the parties did not have a “meeting of the minds,” and, thus, the CR 68 offer of judgment was invalid.

VRP (May 14, 2010) at 15.

CR 68 provides, in relevant part:

If within 10 days after the service of the offer 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*

³² Br. of Appellant at 17.

enter judgment.

(Emphasis added). The plain language of CR 68 states the court “shall” enter judgment upon notice of service and acceptance of an offer of judgment.

In addition, RCW 49.48.030, under which Lietz brought his attorney fee claim, states that the court “shall” award reasonable attorney fees to “any person” who is “successful” in recovering a “judgment” for wages or salary.³³ As a matter of statutory interpretation, the word “shall” in a statute is presumptively imperative, and it imposes a mandatory requirement unless a contrary legislative intent is apparent. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (quoting *Erection Co. v. Dep’t. of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993)). In determining the meaning of the word “shall,” Washington courts have traditionally considered legislative intent as evidenced by all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished, and the consequences that would result from construing the particular statute in one way or another. *Krall*, 125 Wn.2d at 148 (quoting *State v. Huntzinger*, 92 Wn.2d 128, 133, 594 P.2d 917 (1979)).

The legislature “evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive [statutory] scheme to ensure payment of wages,” including the statute

³³ RCW 49.48.030 provides:

In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney’s fees, in an amount to be determined by the court, *shall be assessed against said employer or former employer*; PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.

(Emphasis added.)

here, which provides both criminal and civil penalties. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157, 961 P.2d 371 (1998) (referencing RCW 49.48.030). “[A]ttorney fees are authorized under the remedial statutes to provide incentives for aggrieved employees to assert their statutory rights.” *Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002) (alteration in original) (quoting *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994)). According to the Washington Supreme Court, RCW 49.48.030 is a remedial statute that courts must construe broadly and liberally in favor of persons recovering unpaid wages. *Int’l Ass’n of Fire Fighters, Local 46*, 146 Wn.2d at 35.

Attorney fees are recoverable under RCW 49.48.030 for breach of an employment contract and for breach of labor contract.³⁴ Courts have construed the phrase “wages or salary” owed in RCW 49.48.030 to include back pay,³⁵ front pay,³⁶ sick leave reimbursement,³⁷ and commissions.³⁸ Given this broad construction and that RCW 49.48.030 is a remedial statute, which aims to deter employers from withholding wages, it appears that the legislature used the word “shall” to make mandatory the employer’s payment of a successful wage-claiming

³⁴ *Gaglidari v. Denny’s Rest.*, 117 Wn.2d 426, 450, 815 P.2d 1362 (1991); *Kohn v. Georgia-Pac. Corp.*, 69 Wn. App. 709, 727-28, 850 P.2d 517 (1993); *Naches Valley Sch. Dist. No. JT3 v. Cruzen*, 54 Wn. App. 388, 399, 775 P.2d 960 (1989).

³⁵ *Gaglidari*, 117 Wn.2d at 449-50.

³⁶ *Hayes v. Trulock*, 51 Wn. App. 795, 802, 806, 755 P.2d 830 (1988) (“Front pay” compensates an employee for lost future earnings, representing the difference between what the employee would have earned from his former employer and the amount, if any, he may expect to earn from his new employer).

³⁷ *Naches Valley*, 54 Wn. App. at 398-99.

³⁸ *Dautel v. Heritage Home Ctr., Inc.*, 89 Wn. App. 148, 153, 948 P.2d 397 (1997).

employee's attorney fees: When "any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees . . . shall be assessed against said employer or former employer." RCW 49.48.030.

As we have already discussed, state and federal case law is clear that, where, as here, a CR 68 offer of judgment is silent on the issue of attorney fees, and the underling statute does not define attorney fees as "costs," a trial court must award attorney fees in addition to the offer of judgment amount. *Seaborn*, 132 Wn. App. at 267. Because Hansen's offer of judgment was silent on the issue of attorney fees and RCW 49.48.030 does not define attorney fees as costs, Lietz was entitled to reasonable attorney fees in addition to the amount specified in Hansen's April 19, 2010 offer of judgment. We further hold that the word "shall" in CR 68 and RCW 49.48.030 imposes a mandatory requirement on the trial court, and we remand the case to the trial court for a determination of reasonable attorney fees in Lietz's favor.

B. Appeal

Lietz also requests attorney fees on appeal, independent of his claim for attorney fees under *Seaborn* and the parties' CR 68 judgment. RAP 18.1 allows us to award reasonable attorney fees where, as here, a statute provides for such fees and the party requests the fees in his opening brief. RAP 18.1(a)-(b); *Dice v. City of Montesano*, 131 Wn. App. 675, 693, 128 P.3d 1253 (2006). RCW 49.48.030 grants attorney fees to an employee who is successful in a wages claim against his employer. RCW 49.48.030; *see also Dice*, 131 Wn. App. at 693 (employee entitled to attorney fees on appeal where he sued under RCW 49.48.030). Because employee Lietz prevails on appeal against his former employer, Hansen, he is entitled to attorney fees on

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appeal in an amount that our court commissioner will determine when Lietz complies with RAP

18.1.

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We reverse the trial court's ruling on mutual assent and remand to the trial court to enter the CR 68 judgment offer and to award reasonable attorney fees to Lietz.

Hunt, P.J.

We concur:

Van Deren, J.

Johanson, J.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

NO. 67879-5-I 2012 FEB 14 PM 3: 12

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

WASHINGTON GREENSVIEW APARTMENT ASSOCIATES,
a California Limited Partnership,

Appellant,

v.

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA
(f/k/a THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS), a
foreign insurance company, TRAVELERS EXCESS AND SURPLUS
LINES COMPANY, a foreign insurance company, NATIONAL SURETY
CORPORATION, a foreign insurance company, and THE AMERICAN
INSURANCE COMPANY, a foreign insurance company,

Respondents.

CERTIFICATE OF SERVICE

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 ORIGINAL

The undersigned certifies that on Tuesday, February 14, 2012, I caused a true and correct copy of each of the **Brief of Appellant** to be delivered in the manner indicated to the following counsel of record:

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

DATED this 14th day of February 2012 in Seattle, Washington.



Victoria Heindel