

74964-1

74964-1

No. 74964-1-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

REED JASSMANN

Appellant,

v.

NORTHWEST INTERIORS & DESIGN, LLC, a Washington
limited liability company; RANDY LEE OLIVER and MARCIE
OLIVER, husband and wife; and AMERICAN CONTRACTORS
INDEMNITY COMPANY, Bond account no. 100238900,

Respondent.

BRIEF OF APPELLANT

A. Shawn Hicks
WSBA #14734
Attorney at Law
800 Fifth Avenue, Suite 3825
Seattle, WA 98104
(206) 812-1414

Attorneys for Appellant Reed Jassmann

2016 JUL 29 AM 11:08
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

A. ASSIGNMENTS OF ERROR..... 1

B. INTRODUCTION..... 3

C. STATEMENT OF THE CASE 4

D. ARGUMENT..... 11

(1) Jassmann Must Be Awarded His Attorney’s Fees Against his Employer Pursuant to RCW 49.48.030, RCW 49.52.070 and/or RCW 49.46.090..... 11

a. RCW 49.48.030 Required an Award of Attorney’s Fees 11

b. RCW 49.52.070 Required an Award of Attorney’s Fees 13

c. RCW 49.46.090 Required an Award of Attorney’s Fees 16

(2) Jassmann did not withdraw his claim for wages merely because NWID promised to pay Jassmann \$15,000 “without admission [by NWID] to any allegations.”..... 17

(3) Jassmann was entitled to a judgment against American Contractor’s Indemnity on Jassmann’s unopposed motion pursuant to under RCW 18.27.040 and for breach the settlement agreement..... 21

(4) Jassmann’s request for attorney’s fees and expenses on appeal pursuant to RAP 18.1. 24

E. CONCLUSION 24

TABLE OF AUTHORITIES

Cases

<i>Alaska Cascade Fin. Servs. v. Doors Northwest</i> , 52 Wn. App. 588, 590, 762 P.2d 362, 363 (1988).....	26
<i>Backman v. Northwest Publishing Center</i> , 174 Wn.App. 791, 796, 197 P.3d 1187 (2008).....	18
<i>Champagne v. Thurston County</i> , 163 Wn.2d 69, 89, 178 P.3d 936 (2008)	18
<i>Cont'l Ins. Co. v. PACCAR, Inc.</i> , 96 Wn.2d 160, 167, 634 P.2d 291 (1981)	24
<i>Emter v. Columbia Health Servs.</i> , 63 Wn. App. 378, 384, 819 P.2d 390 (1991)	24
<i>Hayes v. Trulock</i> , 51 Wn.App. 795, 805-806, 755 P.2d 830 (1988) ..	13, 14
<i>Hume v. Am. Disposal Co.</i> , 124 Wash.2d 656, 673, 880 P.2d 988 (1994)	12
<i>Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett</i> , 146 Wash.2d 29, 35, 42 P.3d 1265 (2002).....	12, 13
<i>Las v. Yellow Front Stores, Inc.</i> , 66 Wn. App. 196, 198, 831 P.2d 744 (1992)	22, 28
<i>McConnell v. Mothers Work, Inc.</i> , 131 Wn.App. 525, 128 P.3d 128 (2006)	19
<i>McGinnity v. AutoNation, Inc.</i> , 149 Wn. App. 277, 202 P.3d 1009 (2009)	13
<i>McKasson v. Johnson</i> , 178 Wn. App. 422, 429-430, 315 P.3d 1138 (2013)	24
<i>Merino v. State</i> , 179 Wn. App. 889, 906, 320 P.3d 153, 162 (2014)	14
<i>Moore v. Blue Frog Mobile, Inc.</i> , 153 Wn. App. 1, 8, 221 P.3d 913 (2009)	17
<i>Morgan v. Kingen</i> , 166 Wash.2d 526, 210 P.3d 995 (2009)	18
<i>Naches Valley Sch. Dist. No. JT3 v. Cruzen</i> , 54 Wn. App. 388, 398-99, 775 P.2d 960 (1989).....	14
<i>Painters Trust v. T.R. Coffee & Assocs.</i> , 53 Wn. App. 59, 60, 765 P.2d 352, 353 (1988).....	27
<i>Pierce County v. State</i> , 144 Wn. App. 783, 813, 185 P.3d 594 (2008)	23
<i>Rose v. Department of Labor & Indus.</i> , 57 Wn. App. 751, 758, 790 P.2d 201 (1990)	14
<i>Schilling v. Radio Holdings, Inc.</i> , 136 Wash.2d 152, 157, 961 P.2d 371 (1998)	12, 16, 17, 25
<i>Snoqualmie Police Ass'n v. City of Snoqualmie</i> , 165 Wn. App. 895, 908, 273 P.3d 983 (2012).....	16

<i>Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.</i> , 175 Wn.2d 822, 834, 287 P.3d 516 (2012)	17
--	----

Statutes

18.27 RCW	27
RCW 18.27.040	26
RCW 49.46.010	13
RCW 49.46.010(7).....	13
RCW 49.46.090	11, 19, 20, 29
RCW 49.48.030	passim
RCW 49.52.050	17, 18
RCW 49.52.050(2).....	16, 18
RCW 49.52.070	passim

Rules

RAP 18.1.....	28, 29
---------------	--------

A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in entering the order of February 23, 2016 denying Jassmann's request for an order of attorney's fees against NWID.
2. The trial court erred in entering the order of March 14, 2016 denying Jassmann's request for entry of a judgment for attorney's fees against NWID.
3. The trial court erred in entering the order of March 14, 2016 denying Jassmann's request for entry of a judgment against American Contractor's Indemnity, the surety for NWID.

Issues Pertaining to Assignments of Error

1. Does RCW 49.48.030 require the court to award attorney's fees against an employer in an action for wages, when that statute mandates the award of attorney's fees in an action for recovery of wages, and the employer breached and delayed a promised payment of \$15,000 in settlement of a wage claim. (Assignment of Error 1 and 2.)

2. Does RCW 49.52.070 require the court to award attorney's fees against an employer in an action for wages, when that statute mandates the award of attorney's fees in an action where the payment of wages has been withheld or delayed, and the employer willfully withheld and delayed a promised payment of \$15,000 in settlement of a wage claim. (Assignment of Error 1 and 2.)

3. Does RCW 49.46.090 require the court to award attorney's fees against an employer in an action for wages, when the statute mandates the award of attorney's fees in an action for nonpayment of minimum wages, part of the promised \$15,000 settlement payment was for nonpayment of wages. (Assignment of Error 1 and 2.)

4. Must a judgment be entered made the surety bond issued pursuant to RCW 18.27.040 in an action by an employee for a labor claim against the bonded contractor when (a) the court enters judgment against the bonded employer for claims arising out of a claim for labor, (b) the surety does not oppose the motion for judgment against the surety bond, and (c) the unchallenged Findings of Fact recite that the settlement agreement was also made and breached by the surety bond company. (Assignment of Error 3.)

B. INTRODUCTION

This is an action by Reed Jassmann (“Jassmann”), an employee, against his former employer for wages owed by defendants Northwest Interiors & Design, Randy Oliver and Marcie Oliver (collectively “NWID”), and their license bonding company American Contractors Indemnity (all defendants collectively “Defendants”).

On October 8, 2015, the Defendants promised to pay Jassmann \$15,000 by November 9, 2015 in settlement of Jassman’s wage claim. The Defendants breached that settlement agreement, requiring hearings with the court regarding that settlement agreement.

On February 9, 2016, the trial court entered unchallenged Findings of Fact and Conclusions of Law that the parties had reached an enforceable settlement requiring payment of \$15,000 by the Defendants to Jassmann, reserving a ruling for attorney’s fees pursuant to statute against the Defendants. CP 394.

On March 14, 2016, the trial court entered a judgment against NWID, but it erred when it failed to award Jassmann attorney’s fees. CP 464. Attorney’s fees should have been awarded under RCW 49.46.090, RCW 49.52.070 and RCW 49.48.030 because the Defendants had promised to pay Jassmann \$15,000 in settlement of Jassmann’s wage

claim, and the Defendants' breached their promise to pay Jassmann that \$15,000 payment.

On March 14, 2016, the trial court also erred when it failed to enter a judgment against NWID's contractor's license bond issued by American Contractors Indemnity. CP 464. Judgment should have been entered against the bond on Jassmann's unopposed motion pursuant RCW 18.24.040 and the court's unchallenged Findings of Fact.

C. STATEMENT OF THE CASE

This is an action by an employee, Jassmann, against his former employer for wages owed by NWID.

On February 5, 2014, NWID made a written offer to employ Jassmann. CP 347, ¶ 2, Ex. A. The written offer included a base salary, a 5% share of each project's profit, and a 2.5% commission. CP 347, ¶ 2, Ex. A. Jassmann accepted that offer in writing. CP 347, ¶ 2 Ex. B.

NWID orally promised employee benefits to Jassmann, including medical insurance and the use of a company vehicle. CP 348, ¶4. NWID also promised to reimburse Jassmann for expenses incurred on behalf of NWID. CP 348, ¶ 3.

During Jassmann's employment, he believed that NWID equivocated on their promise to pay Jassmann the promised sales

commission. CP 348, ¶4. During Jassmann's employment, he asked for but did not receive reports needed to calculate his profit share and commissions. CP 348, ¶4. During Jassmann's employment, NWID refused to pay for promised medical insurance or provide a promised company vehicle. CP 348, ¶4. When NWID breached their promise to provide the promised medical insurance benefits, Jassmann was forced to purchase his own medical insurance. CP 349, ¶ 12. Even though NWID had promised to pay Jassmann a 5% profit share on each project, NWID never paid Jassmann the promised profit share. CP 349, ¶ 13.

On June 12, 2014, Jassmann terminated his employment with the NWID. CP 348, ¶ 5 and Ex. D.

When Jassmann left employment on June 12, 2014, NWID owed Jassmann a paycheck for wages, including salary, commissions and reimbursements, by June 16, 2014. CP 348, ¶ 5.

On June 16, 2014, NWID's bookkeeper sent Jassmann an email stating that NWID had prepared Jassman's paycheck. CP 348, ¶ 6 and Ex E. NWID never sent that paycheck to Jassmann. CP 348, ¶ 6.

On July 22, 2014, Jassmann sent NWID a letter demanding payment of his unpaid wages, then long overdue. CP 348, ¶ 7 and Ex F.

On August 5, 2014, Jassmann served a summons and complaint on NWID. CP 1 and 4.

On September 9, 2014, after the action was commenced, NWID finally delivered two checks to Jassmann, one for Jassmann's salary and another as payment toward commissions. CP 348, ¶ 9, Ex. G and H. The checks identified Jassmann as their "employee," and they referred to NWID's payments as "Salary," "Commission," and "Wages."

On October 10, 2014, NWID filed their Answer. CP 7. In their Answer, NWID admitted that "Jassmann performed work for NWID in 2014 and NWID paid Jassman wages and commissions." CP 8, ¶ 5. NWID denied that NWID had ever "promised" to pay Jassmann any "wages or commissions." CP 8, ¶ 5. NWID denied that Jassmann was entitled to relief for "unpaid wages and commissions." CP 8, ¶ 14.

On October 14, 2014, Jassmann served discovery on NWID. CP 31, ¶ 5, Ex. 2 and 3. Jassmann needed discovery responses so he could calculate the promised but unpaid commissions and profit share. CP 31, ¶ 7 and CP 274, ¶ 10.

From November 2014 to July 2015, NWID delayed complying with their discovery obligations. CP 29-34, ¶ 6 to ¶ 24, Ex.4 to 24. As a result, on July 24, 2015, Jassmann filed a Motion to Compel against NWID. CP 11. On August 3, 2015, NWID filed an opposition to Jassmann's Motion to Compel. CP 198.

On August 6, 2015, the court entered an Order requiring NWID to provide full and complete responses to Jassmann's discovery. CP 261.

In August and September 2015, NWID finally produced reports needed for Jassmann to calculate his unpaid commissions and profit share. CP 350, ¶ 14. Relying on NWID's documents, Jassmann calculated that he was owed more than \$22,000, plus attorney's fees. CP 350, ¶ 14, Ex. H; CP 273 ¶ 13.

In September 2015, Jassmann learned that NWID was in terrible financial condition. CP 350, ¶ 15; CP 273, ¶ 14. NWID's financial troubles caused Jassmann to worry that NWID did not have the ability to pay Jassmann upon prevailing at trial. CP 273, ¶ 14.

On October 8, 2015, at 10:51 am, the Defendants made a written offer to settle Jassmann's claims against the Defendants by payment of \$15,000. CP 395, FOF 1. The material terms of the offer by the Defendants were (a) payment to Plaintiff of \$15,000 within 30 days, (b) without admission to any allegations, and (c) the normal waiver of any and all claims. CP 395, FOF 4.

On October 8, 2015 at 11:59 AM, Jassmann accepted the Defendants' offer of settlement. CP 395, FOF 2. An enforceable settlement agreement was formed between Jassmann and the Defendants

when Jassmann accepted the Defendants' offer of settlement. CP 395, FOF 4.

On October 8, 2015, after 1:09 PM, the Defendants had second thoughts about how much time they needed to pay Jassmann \$15,000. CP 395, FOF 6. When Defendants had their second thoughts, the Defendants then "disputed the existence of an enforceable settlement agreement with Plaintiff." CP 395, FOF 6.

When the Defendants' disputed the existence of an enforceable settlement agreement, that forced Jassmann to prepare for trial, then scheduled for October 19, 2015. CP 276, ¶ 25.

On October 21, 2015, Jassmann filed a Motion to Enforce CR 2A Settlement, to enforce the promised \$15,000 settlement agreement. CP 263. NWID opposed the motion. CP 287.

On November 3, 2015, the trial court entered an order ruling that "Plaintiff reached an enforceable CR 2A settlement with Defendants on October 8, 2015 at 11:59 am when Plaintiff accepted the defendants offer of settlement." CP 326.

On November 9, 2015, the Defendants filed a Motion for Reconsideration. CP 328. The Defendant's Motion for Reconsideration forced Jassmann to incur more attorney's fees.

On December 4, 2015, the court heard oral argument on the Motion for Reconsideration, and on December 11, 2015 the court entered an Order. CP 380. In that Order, the court ruled that an evidentiary hearing was necessary regarding the enforceability of the settlement agreement.

On January 22, 2016, the court conducted an evidentiary hearing regarding the settlement agreement. That hearing forced Jassmann to incur even more attorney's fees.

On February 9, 2016, the court entered Findings of Fact and Conclusions of Law regarding the evidentiary hearing. CP 394. In the unchallenged Findings of Fact, the court found that on October 8, 2014, the Defendants made an offer to Jassmann, which Jassmann accepted. CP 395, FOF 1 and 2. The court also found that after Jassmann accepted the offer, the "Defendants had second thoughts about how much time the Defendants wanted before they would make full payment of the settlement amount to Plaintiff." CP 396, FOF 6. When NWID wanted more time to pay Jassmann, the "Defendants disputed the existence of an enforceable settlement agreement with the Plaintiff." FOF 6.

In the Conclusions of Law, the court reserved ruling "whether the Plaintiff is entitled to an award of attorney's fees incurred after October 8, 2015 against the Defendant pursuant to statute." CP 397, COL 4.

On February 11, 2016, Jassmann filed a Motion for Judgment. CP 398. In the Motion for Judgment, Jassmann requested a judgment against NWID for breach of the settlement plus attorney's fees pursuant to statute and against American Contractor's Indemnity, the license bond surety for NWID. CP 398.

On February 18, 2016, the Defendants only opposed Jassmann's request for attorney's fees pursuant to statute, arguing that the term "no admission to any allegations" in the settlement agreement precluded Jassmann's recovery for attorneys. CP 434. The Defendants' did not file any evidence or argument in opposition to Jassmann's motion for judgment American Contractor's Indemnity, the license bond surety for NWID.

On February 19, 2016, the court denied Jassmann's request for attorney's fees pursuant to statute, but the order was silent regarding entry of a judgment against American Contractor's Indemnity. CP 461.

On March 14, 2016, the court entered a Judgment against NWID for \$15,000, plus interest. CP 464. However, the court denied entry of judgment against NWID for attorney's fees, and the court denied entry of judgment against American Contractor's Indemnity, the license bond surety for NWID. CP 464.

On March 28, 2016, Jassmann timely filed a Notice of Appeal.

D. ARGUMENT

(1) Jassmann Must Be Awarded His Attorney's Fees Against his Employer Pursuant to RCW 49.48.030, RCW 49.52.070 and/or RCW 49.46.090.

When NWID breached the settlement agreement, the trial court should have awarded Jassmann his attorney's fees pursuant to RCW 49.48.030, RCW 49.52.070 and/or RCW 49.46.090. When NWID breached their settlement agreement with Jassmann, an award of attorney's fees against NWID was mandatory, and not discretionary.

a. RCW 49.48.030 Required an Award of Attorney's Fees

Jassmann should have been awarded attorney's fees under RCW 49.48.030 which 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.

The legislature has "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 Title 49.48 RCW which provides both criminal and civil penalties. *Schilling v. Radio Holdings, Inc.*, 136 Wash.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 Wash.2d 29, 35, 42 P.3d 1265 (2002) (alteration in original) (quoting *Hume v. Am. Disposal Co.*, 124 Wash.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 Wash.2d at 35, 42 P.3d 1265.

NWID’s promise to pay Jassmann \$15,000 is a “wage” because the promised payment arose “by reason of employment” of Jassmann by the NWID. The definition of a “wage” is set forth in RCW 49.46.010(7), as “compensation due to an employee by reason of employment.” Our courts have defined a wide variety of claims by employees as “wages” because they are “compensation due to an employee by way of employment.” *Hayes v. Trulock*, 51 Wn.App. 795, 805-806, 755 P.2d 830 (1988) (holding that both back pay and front pay are wages). Vacation pay is a wage. *McGinnity v. AutoNation, Inc.*, 149 Wn. App. 277, 202 P.3d 1009 (2009). Disability benefits are wages under RCW 49.46.010. *Merino v. State*, 179 Wn. App. 889, 906, 320 P.3d 153, 162 (2014). Post termination commissions are also a wage because they arise by reason of employment. *Hayes v. Trulock*, 51 Wn. App. 795, 806, 755 P.2d 830 (1988); see also

Naches Valley Sch. Dist. No. JT3 v. Cruzen, 54 Wn. App. 388, 398-99, 775 P.2d 960 (1989). Similarly, the term “wage,” as used in RCW 51.08.178(4), includes “any and all forms of consideration received by the employee from the employer in exchange for work performed.” *Rose v. Department of Labor & Indus.*, 57 Wn. App. 751, 758, 790 P.2d 201 (1990). Jassmann’s claims against NWID for late and unpaid salary, unpaid vacation pay, unpaid commissions, and withheld employee benefits, were all claims for wages. CP 350, ¶ 14, Ex. H.

NWID cannot argue that the exception for recovery of attorney’s fees in RCW 49.48.030 applies, namely that attorneys fee shall be denied where the recovery is “less than or equal to the amount admitted by” NWID. Here, NWID denied that they owed Jassmann any unpaid wages, but Jassmann nonetheless obtained a judgment against NWID for \$15,000. Despite NWID’s promised \$15,000 payment, NWID continued to deny owing Jassmann anything in NWID’s “no admission to any allegations” clause in the settlement agreement. As a result, RCW 49.48.030 mandated an award of attorneys fees against NWID.

b. RCW 49.52.070 Required an Award of Attorney’s Fees

NWID is also liable for Jassmann’s attorney’s fees under RCW 49.52.070, which provides:

Any employer and any officer, vice principal or agent of any employer **who shall violate** any of the provisions of RCW **49.52.050 (1) and (2) shall be liable** in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and **a reasonable sum for attorney's fees**: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

RCW 49.52.050(2) provides that it is unlawful to for an employer to “(2) Wilfully 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.**”

Under this statute, the test for a “willful” failure to pay is not stringent—the employer's failure to pay must simply be volitional. *Schilling v. Radio Holdings, Inc.*, 136 Wash.2d 152, 159, 961 P.2d 371 (1998). The word “willful” means that an act “is volitional.” *Snoqualmie Police Ass'n v. City of Snoqualmie*, 165 Wn. App. 895, 908, 273 P.3d 983 (2012). An employer withholds wages willfully if “it is the result of knowing and intentional action rather than mere carelessness.” *Moore v. Blue Frog Mobile, Inc.*, 153 Wn. App. 1, 8, 221 P.3d 913 (2009). “But a ‘bona fide’ dispute between the employer and employee regarding the wages can negate a finding of willfulness.” *Moore*, 153 Wn. App. at 8. The employer bears the burden of showing a bona fine dispute. *Wash.*

State Nurses Ass'n v. Sacred Heart Med. Ctr., 175 Wn.2d 822, 834, 287 P.3d 516 (2012) (quoting *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 161, 961 P.2d 371 (1998)). A “delayed payment of wages...does give rise to employer liability under RCW 49.52.050...where such delay is willful.” *Backman v. Northwest Publishing Center*, 174 Wn.App. 791, 796, 197 P.3d 1187 (2008) (quoting *Champagne v. Thurston County*, 163 Wn.2d 69, 89, 178 P.3d 936 (2008)). In *Backman*, the court determined that there was no dispute that the employer paid the employee his wages five weeks, a month, and two weeks late, respectively, and therefore violated RCW 49.52.050(2). See also, *Champagne v. Thurston County*, 163 Wn.2d 69, 89, 178 P.3d 936 (2008) (holding that a delayed payment of wages gives rise to employer liability under RCW 49.52.050). NWID’s financial inability is not a defense to liability under the wrongful withholding statute. *Morgan v. Kingen*, 166 Wash.2d 526, 210 P.3d 995 (2009).

Here, NWID twice willfully withheld Jassmann’s wages. First, NWID withheld Jassmann’s wages from June 16, 2014 when they were due (CP 348, ¶ 5) until September 9, 2014 (CP 348, ¶ 9, Ex. G and H.). Second, NWID promised to pay Jassmann \$15,000 in settlement of Jassmann’s wage claim by November 9, 2015 (CP 396, FOF 4), but NWID willfully withheld that payment, resulting in a judgment against

NWID on March 14, 2016 (CP 464). In opposition to Jassmann's motion, NWID failed to present evidence or argument that its willful withholding of Jassmann's \$15,000 wage claim settlement was the product of a bona fide dispute. Having willfully delayed payment of Jassmann's \$15,000 wage claim settlement, NWID is liable for attorney's fees under RCW 49.52.070.

c. RCW 49.46.090 Also Required an Award of Attorney's Fees

Likewise, under RCW 49.46.090 an employee's attorney's fees shall be awarded in an action to recover unpaid wages. *McConnell v. Mothers Work, Inc.*, 131 Wn.App. 525, 128 P.3d 128 (2006). RCW 49.46.090 (1) provides that if any employer pays any employee "less than wages to which such employee is entitled under or by virtue of this chapter," then the employer "shall be liable" shall be liable for the full amount of such wage rate "and for costs and such reasonable attorney's fees as may be allowed by the court."

Here, a portion of Jassmann's action was for the recovery of a minimum wage, his last paycheck, that had been unpaid by NWID until more than one month after Jassmann commenced the action against NWID. As a result, RCW 49.46.090 also requires that Jassmann be awarded attorney's fees.

Since Jassmann prevailed on a wage claim for \$15,000 against his

employer, and NWID breached their promise to pay Jassmann \$15,000 by November 9, 2015, Jassmann should have been awarded attorney's fees against NWID under RCW 49.48.030, RCW 49.52.070 and/or RCW 49.46.090. The trial court erred when it denied Jassmann's request for an award of attorney's fees and expenses pursuant to statute.

(2) Jassmann did not withdraw his claim for wages merely because NWID promised to pay Jassmann \$15,000 "without admission [by NWID] to any allegations."

In NWID's opposition to Jassmann's motion for attorney's fees pursuant to statute, NWID argued that no statutory right to attorney's fees existed because the settlement allowed NWID to make the promised payment to Jassmann with "no admission to any allegations." NWID argued that the "no admission to any allegations" clause supposedly meant that Jassmann had admitted he was not owed wages by NWID. CP 434, 440. NWID's argument must be rejected for many reasons.

First, Jassmann did not agree that no wages were owed by NWID. The clause did not say that Jassmann admitted no wages were owed to him. Instead, NWID's vague "no admission to any allegations" clause only meant that NWID did not admit to Jassmann's allegations. In particular, NWID did not admit owing Jassmann \$15,000 on his wage claim, even though NWID agreed to pay Jassmann \$15,000. Nothing in the settlement agreement precluded Jassmann from contending that he was

owed wages by NWID. Moreover, NWID did not dispute that Jassmann was NWID's employee who sued NWID for wages. For example, NWID did not dispute that on February 5, 2014, NWID made a written offer to employ Jassmann. CP 347 and 351. NWID did not dispute that when Jassmann left employment on June 12, 2014, that NWID owed, but failed to pay, Jassmann's last paycheck and some of his commissions. CP 355, 356, 357 and 358. NWID did not dispute that on September 9, 2014, after the action was commenced, NWID delivered two checks to Jassmann as payment toward Jassmann's unpaid salary and commissions. CP 348, 357, 358. NWID did not dispute that those paychecks identified Jassmann as their "employee," and that the paychecks referred the payments to Jassmann as "Salary," "Commission," and "Wages." CP 357 and 358. In NWID's Answer to Jassmann's complaint, admitted that "Jassmann performed work for NWID in 2014 and NWID paid Jassman wages and commissions." CP 8. NWID did not dispute that Jassmann claimed NWID owed Jassmann more than \$22,000 by reason of employment. CP 350, ¶ 14; CP 359, Ex. H; CP 273 ¶ 13. What NWID did dispute was whether NWID owed Jassmann any of those sums claimed by Jassmann.

Second, NWID failed to present evidence that NWID's promised \$15,000 payment did not arise out of Jassmann's wage claims against NWID. In Jassmann's Motion for Judgment for attorney's fees pursuant to

statute, Jassmann presented evidence that he was an employee suing NWID for wages by reason of employment (CP 403, 347), and as a result attorney's fees were owed pursuant to statute. In response to that motion, NWID, the nonmoving party, had the duty to set forth specific facts by affidavit or otherwise that show a genuine issue exists. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992). When opposing Jassmann's motion, NWID could not merely not rely on the allegations in the pleadings. *Id.*

Here, NWID failed to present any evidence disputing that Jassmann was a former employee or disputing that Jassmann sued NWID on Jassmann's wage claims. Just because NWID's settlement offer had a vague "no admission to any allegations" clause, that clause is not evidence that Jassmann was not an employee of NWID or that Jassmann was not suing NWID for wages. Since NWID failed to present any evidence in opposition to Jassmann's motion, the trial court erred when it denied Jassmann's motion for attorney's fees pursuant to statute.

Third, even if the court could rely on NWID's "no admission to any allegations" clause as some evidence in opposition to Jassmann's motion, that clause was ambiguous, and that ambiguity must be construed against NWID, the drafter of that clause. When an agreement is ambiguous, the court is required to construe written contracts against the

drafter of the settlement offer. See *Pierce County v. State*, 144 Wn. App. 783, 813, 185 P.3d 594 (2008) (ambiguous contracts are generally construed against the drafter); *Emter v. Columbia Health Servs.*, 63 Wn. App. 378, 384, 819 P.2d 390 (1991) (drafter cannot take advantage of ambiguities it could have prevented with greater diligence); *Cont'l Ins. Co. v. PACCAR, Inc.*, 96 Wn.2d 160, 167, 634 P.2d 291 (1981) (party who created the contract is in better position to prevent ambiguous language or mistakes); *McKasson v. Johnson*, 178 Wn. App. 422, 429-430, 315 P.3d 1138 (2013) (in an action by an employee, the agreement was to be construed against the drafter, the employer).

Here, NWID drafted the “no admission to any allegations” clause. However, in that clause Jassmann did not deny that he was an employee or that Jassmann had sued NWID for wages. In NWID’s vague “no admission to any allegations” clause, Jassmann did not waive his right to attorney’s fees pursuant to statute should NWID fail to pay Jassmann as promised in the settlement. Although NWID included a “no admission to any allegations” clause, NWID agreed to pay Jassmann \$15,000 in settlement of Jassmann’s wage claims. Thus, even if the court could rely on NWID’s “no admission to any allegations” as some evidence in opposition to Jassmann’s motion, the clause was ambiguous because Jassmann did not agree that no wages had been owed to him by NWID.

Fourth, NWID's vague "no admission to any allegations" clause must be construed in light of Washington's "strong policy in favor of payment of wages due employees by enacting a comprehensive [statutory] scheme to ensure payment of wages." *Schilling v. Radio Holdings, Inc.*, 136 Wash.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."

Therefore, the trial court erred when it failed to award Jassmann attorney's fees pursuant to statute when NWID beached the settlement agreement after October 8, 2015.

(3) Jassmann was entitled to a judgment against American Contractor's Indemnity on Jassmann's unopposed motion pursuant to under RCW 18.27.040 and for breach the settlement agreement.

Jassmann was a laborer who was entitled to recovery from NWID's license bond issued by American Contractors Indemnity pursuant to Chapter 18.27 RCW. RCW 18.27.040(1) provides that:

. . . **The bond** shall be conditioned that the applicant **will pay all persons performing labor, including employee benefits**, for the contractor, will pay all taxes and contributions due to the state of Washington, and will pay all persons furnishing material or renting or supplying equipment to the contractor and will pay all amounts that may be adjudged against the contractor by reason of breach of contract including improper work in the conduct of the contracting business.

Under RCW 18.27.040, persons supplying off-site labor to a licensed contractor are entitled to equal priority as those who supply on-site labor. *Alaska Cascade Fin. Servs. v. Doors Northwest*, 52 Wn. App. 588, 590, 762 P.2d 362, 363 (1988). With respect to claims for labor, the bonds issued under Chapter 18.27 RCW are also liable for unpaid contributions, liquidated damages and attorney fees by reason of the labor claim. *Painters Trust v. T.R. Coffee & Assocs.*, 53 Wn. App. 59, 60, 765 P.2d 352, 353 (1988)

In this case, American Contractors Indemnity issued a bond pursuant to Chapter 18.27 RCW, naming NWID as principal. CP 348, Ex. C. Jassmann's claims against NWID all arose out of his claim for unpaid labor. NWID admitted in their Answer that American Contractors Indemnity issued a statutory contractors registration bond naming NWID as principal. CP 8, ¶ 4.

Cecilia Cordova filed an Answer for both NWID and American Contractors Indemnity, the Defendants. CP 7 and 16. According to the unchallenged Findings of Fact and Conclusions of Law, on October 8, 2015 "the Defendants made an offer of settlement to Plaintiff." CP 392, FOF 1. In those unchallenged Findings of Fact and Conclusions of Law, the "Defendants" were defined to include both NWID and American Contractors Indemnity. CP 391. In the unchallenged Findings of Fact, the

c 2

court found that an enforceable settlement agreement was formed “between the plaintiff and Defendants.” CP 392, FOF 4. The Conclusions of Law also stated that an enforceable settlement was formed “by the parties on October 8, 2015.” CP 393, COL 1.

On February 11, 2016, Jassmann filed a Motion for Judgment based on the court’s findings. CP 398. In the Motion for Judgment, Jassmann also requested a judgment against American Contractor’s Indemnity, the license bond surety for NWID. CP 398.

On February 18, 2016, the Defendants only opposed Jassmann’s request for attorney’s fees pursuant to statute. CP 434. The Defendants’ did not oppose Jassmann’s motion for judgment American Contractor’s Indemnity, the license bond surety for NWID. Having failed to present any evidence or argument against Jassmann’s motion, the court should have granted Jassmann’s motion against American Contractor’s Indemnity to the extent of the bond amount. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992).

On March 14, 2016, the court entered a Judgment against NWID for \$15,000, but the court denied entry of judgment against American Contractor’s Indemnity, the license bond surety for NWID. CP 464.

The trial court erred when it failed to enter judgment against American Contractor’s Indemnity.

(4) Jassmann's request for attorney's fees and expenses on appeal pursuant to RAP 18.1.

Pursuant to RAP 18.1, RCW 49.48.030, RCW 49.52.070 and RCW 49.46.090, Jassmann requests an award of reasonable attorney's fees and expenses be made against Defendants on this appeal.

E. CONCLUSION

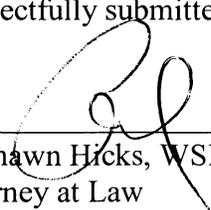
This Court should reverse the denial of Jassmann's request for an award of reasonable attorney's fees against NWID pursuant to statute and remand for determination of an award of attorneys fees incurred after NWID breached the settlement agreement on October 8, 2015.

This Court should also reverse the denial of Jassmann's request for judgment against American Contractor's Indemnity and remand for entry of judgment against American Contractor's Indemnity on the license bond.

DATED this 27th day of July, 2016.

Respectfully submitted,

/s/


A. Shawn Hicks, WSBA #14734
Attorney at Law
800 Fifth Avenue, Suite 3825
Seattle, WA 98104
(206) 812-1414
Attorneys for Appellant, Jassmann

