IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GLOBAL HORIZONS, INC., Respondent/ Cross-Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON AND EMPLOYMENT SECURITY DEPARTMENT, Appellants/ Cross-Respondents.	No. 38211-3-II UNPUBLISHED OPINION

Bridgewater, P.J. — The Department of Labor and Industries (L&I) and the Employment Security Department (ESD) (collectively Departments) challenge a grant of summary judgment in favor of Global Horizons, Inc. (Global) in which the trial court concluded that a settlement agreement (the agreement) between Global and the Departments included a two-week notice and cure provision, that L&I breached the two-week notice and cure provision, and that the notice and cure provision applied to ESD. Global cross-appeals, challenging the trial court's order that the Departments' breach of the notice and cure provision of the agreement was not material. We hold that there are genuine issues of material fact regarding whether (1) the agreement contained

a two-week notice and cure provision before L&I could revoke Global's farm labor contractor's license (FLC license); (2) L&I breached the notice and cure provision; and (3) the breach, if any, was material. We reverse and remand for trial.

FACTS

Global provides temporary agricultural workers to growers under the federal H-2A visa program. Global uses the services of ESD, which determines whether H-2A workers are needed. If needed, ESD notifies Global, who places the workers.

Global is subject to the "Farm Labor Contractors Act" (FLCA)[1]. The FLCA, which L&I administers, regulates farm labor contractors and requires them to obtain an FLC license. *See* RCW 19.30.020.[2]

In 2004, Global began operating in Washington as a farm labor contractor. In 2005, the Departments issued Global several citations for various work-related practices. Global challenged those citations but before the scheduled hearing, Global reached an agreement with the Departments on September 22, 2005.

The agreement provided Global with "a limited opportunity . . . to operate as a licensed farm labor contractor in the State of Washington." CP at 21. Sections I through III of the agreement required Global to immediately meet certain obligations, including paying penalties and taxes, signing stipulations, and paying certain costs and wages. The agreement also required

[1] Ch. 19.30 RCW.

[2] RCW 19.30.020 states in pertinent part:

> No person shall act as a farm labor contractor until a license to do so has been issued to him or her by the director [of L&I], and unless such license is in full force and effect and is in the contractor's possession.

Global to meet several requirements, on an ongoing basis, regarding workers' housing and conditions. Section IV of the agreement required Global to pay for independent quarterly audits of premiums and wages.

Also under section IV, L&I could summarily revoke Global's FLC license if, within "its sole discretion," L&I determined that Global breached the agreement's conditions or otherwise violated the law. CP at 30. Section IV.L.2 states:

> If either . . . ESD, or L&I issue a determination alleging a violation of law or breach of this Agreement, L&I may, in its sole discretion, *immediately revoke* Global's license as a farm labor contractor, and ESD may, in its sole discretion, immediately discontinue recruitment and referral services to Global.

CP at 30 (emphasis added). Under this provision, L&I could revoke Global's FLC license without Global first having a hearing. Although the agreement did not require a hearing, before L&I could revoke Global's FLC license, section IV.L.5 required L&I to give Global two-weeks' notice:

> L&I agrees that it will notify Global at least two weeks *prior to revoking* Global's farm labor contractor license. By providing notice, Global agrees that L&I is not required to provide a hearing or an opportunity for Global to be heard prior to the revocation. After receiving notice of revocation, Global may not undertake new farm labor contracts or extend any existing contracts unless L&I's revocation decision is reversed or expires.

CP at 30 (emphasis added).

Finally, the agreement provided that if L&I revoked Global's FLC license or Global otherwise violated the agreement, ESD could immediately cease providing referral services:

> In the event of a breach of this Settlement Agreement, notification shall be provided in writing. However, this notification process shall not disrupt immediate discontinuation of ESD services or immediate revocation of the farm labor contractor license.

CP at 31.

Despite Global's effort to comply with the agreement, it did not meet some of its deadlines. On December 20, 2005, the Departments sent Global a letter requiring it to cure six alleged violations of the agreement, listing five cures. Global had until 3:00 pm on December 30 to cure; otherwise, ESD would immediately discontinue recruitment and referral services to Global, and L&I would revoke Global's FLC license.

By December 30, Global had done all that the Departments required except filing a certified audit report. In response, on December 30, after the deadline elapsed, the Departments sent Global a letter with notice that because it failed to submit a certified audit report, ESD had immediately discontinued recruitment services and L&I had revoked its FLC license. The Departments' December 30 letter informed Global that it could appeal the revocation decision within 30 days.

After New Year's Day, the Departments sent several e-mails to state and federal employees, among others, notifying them that effective December 30, 2005, L&I had revoked Global's FLC license and that ESD had discontinued its services. The Departments attached the December 30 letter to the e-mails. The Departments also issued a press release with the same information.

On January 3, 2006, Global applied to L&I to renew its annual FLC license. Two days later, on January 5, L& I responded with a letter that stated in part:

> Under the settlement agreement L&I agreed to provide 14 days notice prior to revoking Global's farm labor contractor license. Under RCW 19.30.081, Global's farm labor contractor license automatically expired on December 31, 2005.

> Although the revocation is technically effective on January 13, 2006, Global does not have a valid 2006 Washington state farm labor contractor license. Accordingly, effective immediately, Global is no longer licensed to operate as a farm labor contractor in the State of Washington.
>
> Yesterday L&I received a farm labor contractor application, dated January 3, 2006, from Global for 2006. As a preliminary matter, the application is not complete. Global did not submit the required tax compliance forms from Employment Security, Department of Revenue, and the IRS. Regardless, under RCW 19.30.050(2), an application for a farm labor contractor license shall be denied when the farm labor contractor's license has been revoked within three years.

CP at 65. L&I closed the letter by informing Global that it could appeal the revocation decision within 30 days of January 5.

On January 27, Global's counsel sent a letter to L&I detailing Global's efforts to cure the five violations that the Departments listed in their December 20 letter and urging the Departments to reconsider their decisions detailed in the December 30 letter. On February 23, L&I responded with a letter that referred to the December 30 letter as the "revocation letter." CP at 68. The director reiterated that L&I had revoked Global's FLC license on December 30 because Global had failed to cure the list of violations first detailed in the December 20 letter.

Global first appealed to the Office of Administrative Hearings (OAH), which stayed the administrative proceedings until after a trial court interpreted the agreement. At trial, Global filed a motion for summary judgment, arguing that the agreement contained a provision that gave Global two weeks' notice to cure any alleged breach before the Departments could summarily revoke its FLC license. The Departments filed a motion to dismiss Global's declaratory judgment claim, a cross-motion for partial summary judgment, and a response to Global's summary

judgment motion. The Departments alleged that the agreement did not provide Global an opportunity to cure; that the December 30 letter was the actual notice date; that the license revocation was technically effective on January 13, 2006; and that the Departments had not breached the agreement's two-week notice provision.

The trial court entered a declaratory judgment and summary judgment. It found that the agreement gave Global two weeks' notice to cure and that the Departments had breached the agreement in only giving Global 10-days' notice and an opportunity to cure between December 20 and December 30. Nonetheless, the trial court found that the Departments' breach was not material and dismissed Global's declaratory judgment and breach of contract complaint with an order that the matter be returned to the administrative forum.

ANALYSIS

In reviewing a grant of summary judgment, we engage in the same inquiry as the trial court. *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993). Summary judgment is proper only when the trial court finds that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Scott Galvanizing*, 120 Wn.2d at 580. We consider all the facts and all reasonable inferences drawn from the facts in the light most favorable to the nonmoving party. *Scott Galvanizing*, 120 Wn.2d at 580.

The outcome of this case hinges on interpreting the agreement's section IV.L.5. Washington courts recognize settlement agreements, such as the agreement here, as contracts and thus apply general principles of contract law. *Trotzer v. Vig*, 149 Wn. App. 594, 605, 203 P.3d

1056, *review denied*, 166 Wn.2d 1023 (2009). When construing a written contract we have consistently applied the following rules: (1) the intent of the parties control, (2) we ascertain that intent from reading the contract as a whole, and (3) we do not read ambiguity into the contract. *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995). A contract is ambiguous if its terms are uncertain or they are subject to more than one meaning. *Mayer*, 80 Wn. App. at 421. But words and provisions in a contract are not ambiguous simply because parties suggest opposing meanings. *Mayer*, 80 Wn. App. at 421.

In determining the parties' intent, we also view "'the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.'" *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) (quoting *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973)). Extrinsic evidence may be used to interpret a contract regardless of whether the contract language is ambiguous. *Berg*, 115 Wn.2d at 669. When extrinsic evidence is used to interpret a contract, summary judgment is appropriate only if a sole reasonable inference can be drawn from the extrinsic evidence. *Scott Galvanizing*, 120 Wn.2d at 582.

Material issues of fact exist about whether the Departments could immediately revoke Global's FLC license or, put differently, whether the parties intended the agreement to include a two-week period for Global to cure any deficiencies. The Departments maintain that upon determining that Global breached the agreement, L&I had authority to "immediately revoke" Global's FLC license and that the two-weeks' notice was for winding down. CP at 30. Global

counters that extrinsic evidence shows that the agreement gave it two-weeks' notice to cure alleged deficiencies and that the final decision is to be made at the end of the notice period. Whether the Departments and Global intended the agreement to give Global time to cure or time to wind down is a question of fact.

The agreement's plain language indicates that L&I must give Global notice before revoking its FLC license: "L&I agrees that it will *notify Global at least two weeks prior to revoking Global's farm labor contractor license*." CP at 30. Although this language is clear to the extent that L&I must give Global at least two-weeks' notice, the language is not clear about the purpose of such two-weeks' notice. Global maintains that the two-weeks' notice was an opportunity to cure—which in this case was to provide a certified audit among other things—whereas the Departments contend that the two-weeks' notice was for winding down, such as terminating rental agreements, terminating employees, and canceling contracts.

The agreement does not indicate whether the two-weeks' notice was for an opportunity to cure or for winding down. The distinction is an important one because, if the intent was to give time to cure, the decision to revoke the FLC permit would not actually be made until the end of the two weeks. In contrast, if the intent was to give time to wind down, the decision to revoke the permit would be immediate and would *technically* go into effect at the end of the two weeks.

Extrinsic evidence supports the Departments' understanding that L&I could immediately revoke Global's FLC license and that the actual revocation merely went into effect two weeks later. First, the Departments' December 30, 2005, letter clearly states that "ESD has immediately *discontinued* recruitment and referral services to Global and L&I has *revoked* Global Horizon's

farm labor contractor license." CP at 61 (emphasis added). Second, the Departments' January 5, 2006, letter stated that the revocation was "*technically* effective on January 13, 2006," or two weeks after December 30. CP at 65. Third, the Departments' counsel stated in deposition that although the two-weeks' notice may include time to cure, the two-weeks' notice "did not affect whether the [D]epartments still had the right to exercise discretion to revoke." CP at 599.

On the other hand, extrinsic evidence supports Global's understanding that it had two weeks to cure before the Departments made a final decision. On December 20, 2005, the Departments wrote Global a letter giving it 10 days to "cure." CP at 57. Further, Global aggressively negotiated for a notice and cure provision. While negotiating, Global's former attorney was particularly concerned that the agreement had a cure provision, and, in an exchange for a cure provision, he conceded that the Departments could revoke Global's FLC license and discontinue ESD services without first having a hearing. Indeed, in one letter, Global's former counsel requested 28 days to cure any alleged deficiencies before the Departments took regulatory action.

The foregoing evidence is subject to several interpretations, which are questions of fact. We hold that although the agreement's plain language indicates that the Departments must provide Global with two-weeks' notice, a genuine issue of material fact remains about the notice provision's purpose.

Determining the notice provision's purpose ultimately dictates whether the Departments breached the agreement in failing to provide two weeks to cure. If the two weeks were to cure, the Department breached the agreement either in the December 20 letter when it only gave Global

10 days or in the December 30 letter when it immediately revoked the permit. If the two weeks were to wind down, the Department may still have breached the agreement if the December 20 letter was notice to revoke the permit (only gave 10 days) but did not breach the agreement if the December 30 letter was notice to revoke. Thus, a material issue of fact also remains about whether the Departments breached the agreement.

We further hold that a material issue of fact remains about whether the Departments' breach, if any, was material. Whether a party's breach was material is generally a question of fact. *Bailie Commc'ns, Ltd. v. Trend Bus. Sys.*, 53 Wn. App. 77, 82, 765 P.2d 339 (1988), *review denied*, 113 Wn.2d 1025 (1989). To determine if a breach was material, we consider: (1) whether the breach deprives the injured party of a benefit that he reasonably expected, (2) whether the injured party can be adequately compensated for the benefit he lost, (3) whether the breaching party will suffer a forfeiture by the injured party's withholding performance, (4) whether the breaching party is likely to cure his breach, and (5) whether the breach comports with good faith and fair dealing. *Bailie Commc'ns*, 53 Wn. App. at 83; Restatement (Second) of Contracts § 241(a)-(e) (1981). If a breach is material, the aggrieved party may cancel the contract. *Jacks v. Blazer*, 39 Wn.2d 277, 285, 235 P.2d 187 (1951).

Here, when the trial court found that the Departments' breach in giving Global only 10 days to cure was not material, it relied on the fact that Global did not complete an audit report until January 24, 2006. Significantly, during the summary judgment proceedings below, the parties neither briefed nor argued whether the Department's breach was material. As such, the record contains little evidence about whether Global would have nonetheless delayed submitting

an audit report absent the Departments' decision to immediately revoke Global's FLC license on December 30, 2005. Whether Global's delay in providing the audit report rendered the Departments' breach, if any, immaterial is a question of fact.

Reversed and remanded for trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, P.J.

I concur:

Armstrong, J.

Quinn-Brintnall, J. (dissenting) — Because the Department of Labor and Industries (L&I) gave Global Horizons, Inc. 30 days to cure its Settlement Agreement[3] (Agreement) violations prior to revoking Global's license, I respectfully dissent.

The Agreement required Global to submit to L&I, the Employment Security Department (ESD), and the Department of Revenue (DOR) (collectively "the Departments") quarterly certified audit reports for industrial insurance premiums, unemployment taxes, and business and occupation taxes, respectively. In 2005, Global violated the Agreement by failing to submit the required reports by the November 30 due date. L&I extended the due date to December 15, 2005, but Global again failed to submit the required reports.

Assuming the Agreement gave Global a two-week "cure" period, as the trial court found, the record shows there is no breach here, material or otherwise. Global was first given 15 days to cure its violation of the Agreement—failure to submit the required certified audit report. Having failed to cure, L&I sent a letter, dated December 20, 2005, offering an additional 10 days to come into compliance. L&I warned Global that continued noncompliance would result in the revocation of its license. And yet Global still did not cure. L&I revoked Global's license 30 days after the company violated the terms of the Agreement. Moreover, though it received an application packet from L&I months earlier, Global also failed to timely apply for its annual

[3] The Agreement provides, "If either DOR, ESD, or L&I issue a determination alleging a violation of law or breach of this Agreement, L&I may, in its sole discretion, immediately revoke Global's license . . . and ESD may, in its sole discretion, immediately discontinue recruitment and referral services to Global." Clerk's Papers (CP) at 30. The Agreement further provides, "L&I agrees that it will notify Global at least two weeks prior to revoking Global's farm labor contractor license." CP at 30.

license renewal. Thus, Global's license was either revoked effective December 30, 2005,[4] for noncompliance with the Agreement or expired on December 31, 2005, due to its own separate delay in applying for annual renewal.

The Departments fulfilled all the notice and opportunity to cure requirements imposed on them by the Agreement and Global had more than twice the time to which it was entitled in order to cure its violations. Accordingly, L&I's breach, if any, was not material and I would affirm.

QUINN-BRINTNALL, J.

[4] Later modified by the Departments to January 13, 2006.