IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Beau MATHIS,
*Plaintiff-Appellant,*
*v.*
ST. HELENS AUTO CENTER, INC.,
a domestic corporation,
*Defendant-Respondent.*

Columbia County Circuit Court
14CV15683; A161404

En Banc

Ted E. Grove, Judge.

Argued and submitted July 12, 2017; resubmitted en banc February 14, 2019.

David A. Schuck argued the cause for appellant. Also on the briefs were Phil Goldsmith, Stephanie J. Brown, and Law Office of Phil Goldsmith Schuck Law, LLC.

Richard B. Myers argued the cause and filed the brief for respondent.

Before Egan, Chief Judge, and Armstrong, Ortega, Hadlock, DeVore, Lagesen, Tookey, DeHoog, Shorr, James, Aoyagi, Powers, and Mooney, Judges.

AOYAGI, J.

Affirmed.

Egan, C. J., dissenting.

**AOYAGI, J.**

After the termination of his employment, plaintiff brought a wage action against defendant employer, which was referred to the trial court's mandatory court-annexed arbitration program. The arbitrator awarded plaintiff $3.40 in unpaid wages and $1,383.96 in penalty wages. The arbitrator also awarded plaintiff $6,310 in attorney fees under ORS 652.200(2), which generally entitles a successful plaintiff on a wage claim to "a reasonable sum for attorney fees." Plaintiff had requested a substantially greater fee award, but the arbitrator denied that request, largely due to the application of ORCP 54 E. That general rule of civil procedure limits the amount of a statutory fee award when—as occurred in this case—the prevailing party recovers less than the other party had voluntarily offered to pay in a qualifying offer to allow judgment. Also relying on ORCP 54 E, the arbitrator awarded $238 to plaintiff for costs incurred prior to defendant's offer, and $300.52 to defendant for costs incurred after defendant's offer.

The trial court affirmed the arbitrator's award, over plaintiff's exceptions. On appeal of the resulting judgment, plaintiff argues that the trial court erred. Analogizing ORS 652.200(2) to the statues at issue in *Powers v. Quigley*, 345 Or 432, 198 P3d 919 (2008), and *Wilson v. Tri-Met*, 234 Or App 615, 228 P3d 1225, *rev den*, 348 Or 669 (2010), plaintiff argues that fee awards on wage claims are exempt from the application of ORCP 54 E. Plaintiff also challenges the trial court's allowance of an extraordinary fee to the arbitrator, arguing that the arbitrator's request for an extraordinary fee was untimely. For the reasons that follow, we affirm.

FACTS

Plaintiff worked as a service advisor at defendant's automotive dealership. Plaintiff's compensation included base pay, commissions, and bonuses. Defendant terminated plaintiff's employment in April 2014. On October 7, 2014, plaintiff's attorney sent a wage claim notice to defendant, which defendant received.[1] The notice asserted that plaintiff had worked an average of five hours of unpaid overtime each

[1] Plaintiff's attorney first tried to send the notice a week earlier, but, according to plaintiff's attorney fee statement, the first notice was returned.

week for two-and-a-half years, that plaintiff had not been timely paid all wages due at termination, and that defendant owed plaintiff unpaid wages and penalty wages in an unspecified amount.

On October 21, plaintiff filed a complaint in the trial court, asserting a claim for unpaid overtime and a claim for failure to pay all wages due at termination. On November 26, plaintiff filed an amended complaint, in which he dropped his overtime claim. Plaintiff continued to pursue his claim for failure to pay all wages due at termination, seeking "[u]npaid wages in an amount to be determined" and approximately $4,152 in penalty wages under ORS 652.150. In December 2014, the trial court referred the case to its mandatory court-annexed arbitration program.

On February 4, 2015, defendant offered to allow judgment for $2,000, exclusive of attorney fees and costs. That is, under ORCP 54 E, defendant offered to stipulate to a judgment in plaintiff's favor in the amount of $2,000, plus plaintiff's reasonable attorney fees and costs incurred to date. Plaintiff did not accept the offer.

An arbitration hearing was held on May 6, 2015. Thereafter, the arbitrator awarded plaintiff $3.40 of unpaid wages, based on a commission miscalculation, and $1,383.96 in penalty wages under ORS 652.150, based on defendant failing to pay plaintiff for unused vacation time until two weeks after his termination. As for attorney fees, plaintiff requested approximately $62,500, pursuant to ORS 652.200(2). The arbitrator awarded $6,310. Most of the difference between the requested and awarded amount of attorney fees was attributable to the arbitrator's application of ORCP 54 E. Applying that rule, the arbitrator limited plaintiff's award to fees incurred through February 4, 2015, because defendant had made an offer of judgment on that date in the amount of $2,000 (exclusive of fees and costs), which was more than the $1,387.36 (exclusive of fees and costs) that the arbitrator had subsequently awarded to plaintiff.[2] As for costs, the arbitrator also applied ORCP 54

[2] Based on his fee petition, plaintiff incurred more than $6,310 in attorney fees through February 4, 2015. In awarding $6,310, the arbitrator appears to have made some reductions unrelated to ORCP 54 E. Only the ORCP 54 E reduction is at issue.

E, awarding costs to plaintiff through February 4, 2015, later determined to be $238, and awarding costs to defendant after February 4, 2015, later determined to be $300.52.

The arbitrator then filed a motion with the trial court for an extraordinary arbitrator's fee of $2,500, based on Columbia County Circuit Court Supplemental Local Rule (SLR) 13.121. Plaintiff objected to the motion as untimely, arguing that SLR 13.121 provides for such a request to be made before commencement of the arbitration hearing. After hearing, the trial court granted the motion and allowed the extraordinary fee of $2,500.

In October 2015, the arbitrator filed the arbitration award with the trial court. That award reflected the arbitrator's decisions on the merits, attorney fees, and costs, and the trial court's ruling on the arbitrator's fee. Neither party requested trial *de novo*, as was available under ORS 36.425(2). However, plaintiff filed written exceptions to the attorney fee and cost awards, as permitted by ORS 36.425(6), challenging the arbitrator's application of ORCP 54 E. Twenty days later, the arbitrator's award was affirmed by operation of law. *See* ORS 36.425(6) ("If the judge fails to enter a decision on the award within 20 days after the filing of the exceptions, the award of attorney fees and costs shall be considered affirmed."). The trial court entered a general judgment, reflecting the principle award of $1,387.36 to plaintiff, an attorney fee award of $6,310 to plaintiff, a cost award of $238 to plaintiff, a cost award of $300.52 to defendant, and the division of the $2,500 arbitrator's fee between the two parties.

## PLAINTIFF'S APPEAL

Plaintiff appeals the general judgment, raising three assignments of error. In his first assignment of error, plaintiff argues that the trial court erred by denying his exception to the arbitrator's application of ORCP 54 E to limit plaintiff's award of attorney fees and costs to those incurred through February 4, 2015. In his second assignment of error, plaintiff argues that the trial court erred by denying his exception to the arbitrator's application of ORCP 54 E to award costs to defendant for the period after February 4, 2015. In his third assignment of error, plaintiff

argues that the trial court erred in granting the arbitrator's motion for an extraordinary fee.

ARBITRATOR'S FEE

We begin with plaintiff's third assignment of error, as our discussion of that assignment is brief. When an arbitration award is filed under ORS 36.425(1) and no one requests trial *de novo* under ORS 36.425(2)(a), the judgment entered by the trial court based on the arbitration award generally is not appealable. ORS 36.425(3). We have recognized an exception to that general rule. If a party does not request trial *de novo* but does file "written exceptions directed solely to the award or denial of attorney fees or costs," ORS 36.425(6), we have held that the party may appeal the judgment for the purpose of challenging the trial court's ruling on the exceptions, *Deacon v. Gilbert*, 164 Or App 724, 726, 995 P2d 557 (2000). The appeal is limited "solely to the court's disposition of the exception[s]." *Id.* at 731.

Here, plaintiff challenges the amount of the arbitrator's fee. An arbitrator's fee may be awarded as a "cost" in the arbitration award, pursuant to UTCR 13.120(6), and that is what occurred in this case. We therefore assume without deciding that, under ORS 36.425(6), plaintiff could have filed a written exception to that cost in the arbitration award and that, under *Deacon*, we could have reviewed a denial of that exception. But plaintiff did *not* file a written exception to that portion of the arbitration award. Plaintiff had opposed the arbitrator's original motion requesting an extraordinary fee; however, in his written exceptions to the arbitration award, he was silent regarding the arbitrator's fee. Although the former opposition may have satisfied preservation principles, a written exception was necessary for appealability under ORS 36.425(6). *See Deacon*, 164 Or App at 731 (limiting appeal under ORS 36.425(6) "solely to the court's disposition of the exceptions"). We therefore reject the third assignment of error.

ATTORNEY FEES AND COSTS

Plaintiff's first and second assignments of error both turn on the application of ORCP 54 E in awarding

attorney fees and costs under ORS 652.200(2), so we address those assignments together, which is also how the parties briefed them. As to both assignments, plaintiff argues that the trial court erred in denying his exceptions because the arbitrator should not have applied ORCP 54 E when awarding fees and costs under ORS 652.200(2). Relying on *Powers* and *Wilson*, plaintiff asserts that ORCP 54 E does not apply to fee awards on wage claims, because ORS 652.200(2) and ORCP 54 E are irreconcilable, the former is more specific, and the former therefore controls. Defendant counters that ORS 652.200(2) is different from the statutes at issue in *Powers* and *Wilson* and does not conflict with ORCP 54 E. Defendant argues that the arbitrator properly applied ORCP 54 E in awarding fees and costs under ORS 652.200(2) and that the trial court correctly rejected plaintiff's exceptions.

We review a trial court's judgment affirming an arbitrator's determination of attorney fees and costs for errors of law. *Rivera-Martinez v. Vu*, 245 Or App 422, 428, 263 P3d 1078, *rev den*, 351 Or 318 (2011). Whether ORS 652.200(2) and ORCP 54 E are in conflict, such that the latter does not apply in awarding fees and costs under the former, is a question of law.

The dispute in this case turns on the relationship between ORS 652.200(2) and ORCP 54 E. In construing statutes, "where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all." ORS 174.010; *see also McLain v. Lafferty*, 257 Or 553, 558, 480 P2d 430 (1971) (that is a "cardinal rule of statutory construction"). However, "if two statutes are inconsistent," such that it is not possible to give effect to both, "the more specific statute will control over the more general one." *Powers*, 345 Or at 438.

We begin our analysis with ORCP 54 E, a general rule of civil procedure. ORCP 54 E provides that, if a party against whom a claim is asserted makes an offer to allow judgment, the claimant does not accept that offer, and the claimant fails to obtain a judgment more favorable than the amount of the offer, the claimant "shall not recover costs, prevailing party fees, disbursements, or attorney fees incurred

after the date of the offer." ORCP 54 E(3). That principle has been part of our state law in some form for over 150 years. *See Powers*, 345 Or at 436, 443 (identifying *former* ORS 17.055 (1953), *repealed by* Or Laws 1979, ch 284, § 199, as the predecessor to ORCP 54 E); *Colby v. Larson*, 208 Or 121, 125, 297 P2d 1073 (1956) ("[ORS 17.055] has been a part of the law of this state since 1862." (Citing General Laws of Oregon, Civ Code, ch VI, title I, § 511, p 276 (Deady 1845-1864).)). The current iteration, ORCP 54 E(1), allows an offer of judgment to be made "at any time up to 14 days prior to trial." Prior versions have allowed offers of judgment to be made until 10 days before trial, until 3 days before trial, or at any time before trial. *See* ORCP 54 E(1) (2007) ("at any time up to 10 days prior to trial"); ORCP 54 E (1981) ("at any time up to three days prior to trial"); ORCP 54 E (1979) ("at any time prior to trial"); *Hammond v. N. P. R. R. Co.*, 23 Or 157, 158, 31 P 299 (1892) ("at any time before trial" under the Codes and General Laws of Oregon, ch VI, title I, § 520 (Hill 2d ed 1892)).

On its face, ORCP 54 E applies to all civil cases in which attorney fees are available to the prevailing party, *i.e.*, all cases involving a statutory or contractual right to attorney fees. In *Powers*, however, the Supreme Court recognized a situation in which ORCP 54 E does *not* apply to a statutory fee award: when the specific statute providing for attorney fees is in direct conflict with ORCP 54 E, such that applying ORCP 54 E would defeat the statute's core purpose. *Powers*, 345 Or at 443. Because plaintiff's first and second assignments of error depend entirely on analogizing this case to *Powers* and our subsequent decision in *Wilson*, we describe *Powers* and *Wilson* in some detail.

*Powers* involved an attorney fee award under ORS 20.080(1) (2005), *amended by* Or Laws 2009, ch 487, § 1, 3. That statute provided for a fee award to the plaintiff in a small-claims tort action if the plaintiff made a written demand on the defendant at least 10 days before commencing the action and the defendant did not offer to pay, prior to commencement of the action, an amount equal to or greater than the amount that the plaintiff was ultimately awarded. *Powers*, 345 Or at 437. Specifically, the statute stated:

> "In any action for damages for an injury or wrong to the person or property, or both, of another where the amount pleaded is $5,500 or less, and the plaintiff prevails in the action, there shall be taxed and allowed to the plaintiff, at trial and on appeal, a reasonable amount to be fixed by the court as attorney fees for the prosecution of the action, if the court finds that written demand for the payment of such claim was made on the defendant, not less than 10 days before the commencement of the action or the filing of a formal complaint under ORS 46.465, or not more than 10 days after the transfer of the action under ORS 46.461. However, no attorney fees shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff, prior to the commencement of the action or the filing of a formal complaint under ORS 46.465, or not more than 10 days after the transfer of the action under ORS 46.461, an amount not less than the damages awarded to the plaintiff."

ORS 20.080(1) (2005).[3]

The defendant in *Powers* made an offer to allow judgment that the plaintiff did not accept, and, when the plaintiff failed to beat that offer in arbitration, the arbitrator applied ORCP 54 E to limit the plaintiff's fee award to fees incurred through the offer date. *Powers*, 345 Or at 435. On review, the plaintiff argued that the trial court had erred because ORS 20.080 and ORCP 54 E were irreconcilable, such that the legislature could not have intended ORCP 54 E to apply to attorney fee awards under ORS 20.080. *Id.* at 436-37. After examining the text, context, and core purposes of ORS 20.080, the Supreme Court agreed. *Id.* at 437, 443.

The court recognized that, "when multiple statutory provisions are at issue," they must be construed, if

[3] ORS 20.080 has been amended since *Powers*, including to change the 10-day notice periods to 30 days, so we quote the version of the statute at issue in *Powers*, which appears to have been the 2005 version. All references to ORS 20.080 hereafter are to that version. Also, we note that, in *Powers*, the Supreme Court focused on the primary deadline in ORS 20.080(1), "the commencement of the action," and did not consider it necessary to discuss the alternative deadlines that apply if the defendant demands a jury trial (*see* ORS 46.465) or files a counterclaim exceeding a certain amount (*see* ORS 46.461). *See Powers*, 345 Or at 437. We discuss ORS 20.080(1) consistently with how the Supreme Court discussed it in *Powers*.

possible, "in a manner that will give effect to all." *Powers*, 345 Or at 438 (internal quotation marks omitted). However, "if two statutes are inconsistent," such that it is not possible to give effect to both, "the more specific statute will control over the more general one." *Id.* The court concluded that it was not possible to give effect to both ORS 20.080 and ORCP 54 E and that ORS 20.080, being more specific, therefore controlled. *Powers*, 345 Or at 443. The court reached that conclusion by examining the text of the two statutes—which evinced a conflict "apparent from their text"—and the core purpose of ORS 20.080—which would be defeated by the application of ORCP 54 E. *Powers*, 345 Or at 440-41. With respect to the latter, the court explained that the policies underlying ORS 20.080 are "to encourage settlement of small claims," to use the risk of attorney fees to "pressure" tortfeasors and insurance companies into paying "'just claims,'" and "'to discourage plaintiffs from inflating their claims.'" *Id.* at 439 (quoting *Fresk v. Kraemer*, 337 Or 513, 520, 99 P3d 282 (2004)). A "crucial feature" of the "pressure" that ORS 20.080 creates is the specific timeframe in which a defendant must offer to pay a valid claim to avoid attorney fees. *Id*. "[T]he legislature intended to provide an incentive to defendants to make those evaluations and offers *before the plaintiff files an action*, because that statute does not allow a defendant to limit the liability for attorney fees by making an offer to settle *after* the complaint is filed." *Powers*, 345 at 441 (emphases in original).

Thus, ORS 20.080 is not just a statute that provides for attorney fees on a particular type of claim—it is a statute that uses the risk of attorney fees as a means to an end. The "core purpose" of ORS 20.080 is to encourage prelitigation settlement of meritorious small tort claims. *Powers*, 345 Or at 439. That purpose is achieved by distributing the risk of paying the plaintiff's attorney fees in a purposeful way: the defendant bears the risk if the defendant receives written notice of a valid claim and chooses not to pay it before an action is filed, while the plaintiff bears the risk if the plaintiff inflates the claim and chooses to file an action rather than accepting a valid offer. *Id*. at 439, 441. Applying ORCP 54 E therefore "would undermine the core purpose of ORS 20.080(1)," because it would change the calculus by allowing

the defendant to make an offer of judgment until 10 days before trial. *Powers*, 345 Or at 440 (discussing 2005 version of ORCP 54 E). ORCP 54 E would give the defendant a "second chance" to avoid attorney fees, thereby eliminating or substantially diminishing the pressure that ORS 20.080 was intended to create. *See id*. at 443 ("The conflict that concerned this court in *Colby* was that, by allowing defendants a *second chance* to avoid attorney fees *after* the plaintiff had filed the action, *former* ORS 17.055 [(the precursor to ORCP 54 E)] eliminated a tortfeasor's incentive to settle *prior to the filing of the action*, which was the goal of ORS 20.080 [(1953)]."). In other words, with respect to small-claim tort actions, the legislature intended the settlement window in ORS 20.080 to apply *instead* of the settlement window in ORCP 54 E. As such, ORS 20.080 is exempt from the application of ORCP 54 E, and "an offer of judgment, made after a plaintiff has filed an action, will not serve to limit a plaintiff's entitlement to attorney fees under ORS 20.080(1)." *Powers*, 345 Or at 443.

A year after *Powers*, we decided *Wilson*, which involved an attorney fee award under ORS 742.061(1). That statute provides for a fee award to the insured in an action on an insurance policy if "settlement is not made within six months from the date proof of loss is filed with [the] insurer" and the insured recovers more in court than any tender the insurer had made. ORS 742.061(1). Specifically, ORS 742.061(1) provides, in relevant part:

> "Except as otherwise provided in subsections (2) and (3) of this section, if settlement is not made within six months from the date proof of loss is filed with an insurer and an action is brought in any court of this state upon any policy of insurance of any kind or nature, and the plaintiff's recovery exceeds the amount of any tender made by the defendant in such action, a reasonable amount to be fixed by the court as attorney fees shall be taxed as part of the costs of the action and any appeal thereon."

*See also* ORS 742.061(2) - (3) (limited exceptions for certain types of insurance).

In *Wilson*, we followed the same analytical path as the Supreme Court had in *Powers* to determine whether

the trial court erred in applying ORCP 54 E to a fee award under ORS 742.061(1). Based on the text of the statute and prior case law, we identified the purpose of ORS 742.061(1) as being "to expedite the processing of insurance claims and reduce litigation by providing an incentive for efficient claim resolution." *Wilson*, 234 Or App at 627. "To further that policy, ORS 742.061—like *former* ORS 20.080[4]—imposes a deadline on an insurer's tender of settlement." *Id*. That is, "[t]o defeat a plaintiff's entitlement to attorney fees under ORS 742.061, an insurer's tender must be made within six months of proof of loss." *Id.*

Given its similarities to ORS 20.080—a core purpose of incentivizing prompt settlement of meritorious claims and the imposition of a specific offer deadline to effectuate that purpose—we concluded that ORS 742.061(1), like ORS 20.080(1), was irreconcilable with ORCP 54 E and that the more specific statute therefore controlled. *See Wilson*, 234 Or App at 628. Like the situation in *Powers,* allowing the defendant a second chance to avoid attorney fees—after the six months provided by ORS 742.061(1) had passed—would have defeated the core purposes of the statute, which were achievable only by enforcing the six-month deadline. "[A]s in *Powers*, the core purposes of ORS 742.061 to reduce litigation and encourage efficient claims settlement would be defeated" by applying ORCP 54 E. *Wilson*, 234 Or App at 628.

With that understanding of *Powers* and *Wilson* in mind, we turn to the facts of this case. Plaintiff was awarded attorney fees under ORS 652.200(2), which generally entitles a successful plaintiff on a wage claim to "a reasonable sum for attorney fees."[5] ORS 652.200(2) provides:

> "In any action for the collection of wages, if it is shown that the wages were not paid for a period of 48 hours, excluding Saturdays, Sundays and holidays, after the wages

[4] ORS 20.080 remains in effect. The reference to "*former* ORS 20.080" appears to have been intended to refer to ORS 20.080 (1953). *See Wilson*, 234 Or App at 626-27.

[5] "The right to attorney fees in actions for wages dates from 1907." *Hekker v. Sabre Construction Co.*, 265 Or 552, 557, 510 P2d 347 (1973); *see also* Or Laws 1907, ch 163, § 3. Fee awards were initially discretionary but became mandatory in 1919. *See Hekker*, 265 Or at 557 (citing Or Laws 1919, ch 54).

> became due and payable, the court shall, upon entering judgment for the plaintiff, include in the judgment, in addition to the costs and disbursements otherwise prescribed by statute, a reasonable sum for attorney fees at trial and on appeal for prosecuting the action, unless it appears that the employee has willfully violated the contract of employment or unless the court finds that the plaintiff's attorney unreasonably failed to give written notice of the wage claim to the employer before filing the action."

Plaintiff argues that ORS 652.200(2) is akin to the statutes at issue in *Powers* and *Wilson*. That is, plaintiff argues that ORS 652.200(2) and ORCP 54 E are irreconcilable, that the former controls as the more specific statute, and that ORCP 54 E therefore does not apply to fee awards on wage claims. Defendant counters that ORS 652.200(2) is different from the statutes at issue in *Powers* and *Wilson* and that the trial court correctly rejected plaintiff's attempt to analogize ORS 652.200(2) to those statutes.

Like the Supreme Court in *Powers*, we begin by examining the text of ORS 652.200(2), which "is the starting point for interpretation and is the best evidence of the legislature's intent." *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). Doing so, we recognize several important differences between this statute and the statutes at issue in *Powers* (ORS 20.080(1)) and *Wilson* (ORS 742.061(1)).

The first critical difference is that both ORS 20.080(1) and ORS 742.061(1) are "beat the offer" statutes—just as ORCP 54 E is a "beat the offer" statute. That is, ORS 20.080(1) provides for an award of attorney fees to the successful plaintiff in a small-claim tort action, unless "the court finds that the defendant tendered to the plaintiff, prior to the commencement of the action or the filing of a formal complaint under ORS 46.465, or not more than 10 days after the transfer of the action under ORS 46.461, *an amount not less than the damages awarded to the plaintiff*." (Emphasis added.) Similarly, ORS 742.061(1) provides for an award of attorney fees to the successful plaintiff in an insurance action if the insurer did not settle the claim "within six months from the date proof of loss is filed with an insurer" and "*the plaintiff's recovery exceeds the amount*

*of any tender made by the defendant*." (Emphasis added.) Both statutes are thus structurally similar to ORCP 54 E, which limits the amount of an attorney fee award if a party "fails to obtain *a judgment more favorable*" than an offer to allow judgment that was timely made before trial. ORCP 54 E (emphasis added).

By contrast, ORS 652.200(2) does not contain any "beat the offer" language. Instead, it simply provides for attorney fees in a particular type of action, subject to a few conditions, none of which involve beating an offer. ORS 652.200(2) is therefore unlike ORS 20.080(1), ORS 742.061(1), or ORCP 54 E, each of which expressly provide for the court to compare any offer that the defendant made by a certain date—respectively, before commencement of the litigation, within six months of receiving proof of loss, or up to 14 days before trial—to the amount that the plaintiff was ultimately awarded, as part of determining whether to award fees and in what amount.[6]

A second important difference is that ORS 20.080(1), ORS 742.061(1), and ORCP 54 E each create a defined window of time in which a defendant can avoid attorney fee liability (altogether or going forward) by offering to pay the full value of the plaintiff's claim after receiving notice of the claim and investigating it. That window opens as soon as the defendant is put on notice of the claim and closes on a date specified in the statute. Specifically, under ORS 20.080, a would-be plaintiff is required to give detailed written notice of a small tort claim to the defendant, and, if the defendant determines that the claim is valid, the defendant has until "the commencement of the action or the filing of a formal complaint under ORS 46.465, or not more than 10 days after the transfer of the action under ORS 46.461," to offer to pay the true value of the claim and thereby avoid any attorney

[6] As the dissent notes, a defendant who does not make any offer is subject to attorney fees under ORS 20.080(1) or ORS 742.061(1), whereas ORCP 54 E assumes the existence of an offer. *See* 298 Or App at ___ (Egan, C. J., dissenting). But that difference in phrasing is due to the fact that ORS 20.080(1) and ORS 742.061(1) preclude any fee award if the plaintiff fails at trial to beat a timely offer, whereas ORCP 54 E only limits the amount of an attorney fee award (to fees incurred before the offer) and therefore necessarily refers to "the offer." A defendant who makes *no offer* will always be subject to paying a successful plaintiff's fees, if fees are available.

fee liability. ORS 20.080(1), (3)-(5). Under ORS 742.061(1), if an insured files proof of loss with the insurer, and the insurer determines that the claim is valid, the insurer has six months from the filing of proof of loss to offer to pay the true value of the claim and thereby avoid any attorney fee liability. *See Wilson*, 234 Or App at 627. And, under ORCP 54 E, the defendant is necessarily on notice of the action (having been served) and has until 14 days before trial to offer to pay the true value of the claim and thereby avoid ongoing attorney fee liability.[7]

By contrast, under ORS 652.200(2), the plaintiff's right to attorney fees automatically attaches 48 hours after wages become due and payable. *See* ORS 652.200(2) (excluding "Saturdays, Sundays and holidays"). The 48-hour grace period allows employers a small margin for error, such that they do not become liable for attorney fees the very instant that wages become overdue. However, it is not comparable to the settlement windows in ORS 20.080(1) and ORS 742.061(1), particularly because the 48 hours is not tethered in any way to the notice requirement and will almost certainly pass long before the employer knows that an employee is asserting a claim.

Successful wage claims do not require an employee to prove that the employer intentionally underpaid the employee's wages. *See* ORS 652.110 to 652.200 (imposing no state-of-mind requirement on a claim for unpaid wages). Even for penalty wages, which require "willfulness," ORS 652.150, the standard does "not necessarily imply anything blamable, or any malice or wrong toward the other party." *Wilson v. Smurfit Newsprint Corp.*, 197 Or App 648, 660, 107 P3d 61, *rev den*, 339 Or 407 (2005) (citation omitted). For example, in this case, there is no indication that defendant knew that it had miscalculated one of plaintiff's commissions and had underpaid him $3.40. Although employers are

[7] Notably, the length of the settlement window provided in each statute appears to have been attuned to the type of action. A relatively short window applies to small claims. A longer window applies to insurance claims, which may be more complicated and involve larger sums. The longest window is in ORCP 54 E, which applies to civil actions generally, although the length of that window is mitigated by the fact that ORCP 54 E cuts off only *post-offer* attorney fees and costs, rather than precluding an award altogether like ORS 20.080(1) and ORS 742.061(1).

required to keep records, *see* ORS 653.045(1)(b), nothing in the text, context, or legislative history of ORS 652.200(2) suggests that the legislature considered it unnecessary for employers to be notified of a claim as a predicate to trying to settle it. If the purpose of ORS 652.200(2) were to incentivize defendants to settle wage claims within 48 hours of learning of them—analogous to the purposes of ORS 20.080(1) and ORS 742.061(1)—the 48 hours would begin upon notice of the claim.

Indeed, in 2001, the legislature considered amending ORS 652.200(2) to create a settlement window tied to attorney fee liability. Under the proposed amendment, any employee asserting a wage claim would have had to give notice to the employer, at which point the employer would have had 10 days to pay the claim before attorney fee liability would attach. *See* HB 2500 (2001). That amendment would have made ORS 652.200(2) much more like ORS 20.080(1) and ORS 742.061(1). But the amendment met resistance, at least in part precisely because it would have given employers an opportunity to avoid attorney fee liability, and it was abandoned. *See* Testimony, House Committee on Business, Labor and Consumer Affairs, HB 2500, Feb 20, 2001, Ex D (statement of Oregon Law Center representative Michael Dale) (opposing bill because employers would be able to avoid attorney fee liability if they received notice and had 10 days to pay); Testimony, House Committee on Business, Labor and Consumer Affairs, HB 2500, Feb 20, 2001, Ex E (statement of SEIU Local 503 representative Rich Peppers) (similar).

Instead of creating a settlement window tied to attorney fees, the legislature ultimately added only a basic notice provision to ORS 652.200(2)—one that excuses a mandatory fee award if "the court finds that the plaintiff's attorney unreasonably failed to give written notice of the wage claim to the employer before filing the action"—and did not provide for any period to respond to the notice and thereby avoid attorney fee liability. *See* Or Laws 2001, ch 279, § 1. Given the concerns expressed about the rejected amendment, the legislature appears to have understood in adopting the basic notice provision that it would result in employers not receiving notice of wage claims until *after* attorney

fee liability attaches. That understanding reflects the real world. It would be virtually impossible for an employee to retain an attorney,[8] for the attorney to send a wage claim notice to the employer, for the employer to receive the notice, for the employer to investigate the claim alleged in the notice, and for the employer to make an offer to pay the claim if valid, all in the 48 hours immediately after wages becomes due and payable. For example, in this case, plaintiff's attorney gave notice of the wage claim five months after attorney fee liability attached and two weeks before filing the action.

Of course, even after attorney fee liability has attached, an employer who receives notice of a wage claim can try to settle the claim. The whole point of adding the notice provision in 2001 was to provide an opportunity to try to resolve wage claims before an action is filed. *Belknap v. U.S. Bank National Association*, 235 Or App 658, 671, 234 P3d 1041 (2010), *rev den*, 349 Or 654 (2011). But that purpose is unrelated to *attorney fee liability*. Because notice will inevitably be received after attorney fee liability attaches, an employer who offers to pay a valid wage claim in full upon receiving notice of the claim and determining its validity will *still* be liable for the plaintiff's attorney fees under ORS 652.200(2), if the plaintiff rejects the offer, regardless how much the plaintiff recovers at trial. It is only by application of ORCP 54 E that the employer's willingness to pay the claim voluntarily has any significance with respect to attorney fee liability. That is a critical distinction between ORS 652.200(2) and the statutes at issue in *Powers* and *Wilson*.[9]

There is a closely-related third difference between this statute and ORS 20.080(1) and ORS 742.061(1). Because ORS 20.080(1) and ORS 742.061(1) each create a settlement window—and use the risk of attorney fee liability to

[8] Retaining an attorney is a necessary step in the process because the notice provision only applies to employees who are represented by an attorney at the time of filing an action. *See* ORS 652.200(2) ("unless the court finds that *the plaintiff's attorney* unreasonably failed to give written notice of the wage claim to the employer before filing the action" (emphasis added)).

[9] It does not follow, as the dissent suggests, that the notice provision in ORS 652.200(2) is a "nullity." 298 Or App at ___ (Egan, C. J., dissenting). The notice provision provides an opportunity to settle a wage claim before litigation, exactly as it was intended to do. But it does not provide an opportunity to *avoid attorney fees* by offering to do so.

incentivize settlement during that window—the defendants in *Powers* and *Wilson* each had received notice of the plaintiff's claim, had an opportunity to investigate and pay the valid portion of the claim, and chose not to do so before the legislatively imposed end of the settlement window. In those circumstances, applying ORCP 54 E would have given the defendants a "second chance" to avoid attorney fees that the legislature did not intend. *Powers*, 345 Or at 443. That is not the case with respect to ORS 652.200(2). As already discussed, by the time an employer receives statutory notice of a wage claim, attorney fee liability will already have attached, so ORCP 54 E provides the *only* chance, not a second chance, to limit attorney fee liability.[10]

The dissent contests that point, asserting that "it would be absurd to assume that a court would not compare an amount of wages *tendered* by the defendant before the plaintiff filed suit" and that, "if no outstanding wages were due because the defendant tendered before the plaintiff filed suit, the plaintiff would have no claim to prevail on at trial, and would therefore have no attorney fees to recover." 298 Or App at ___ (Egan, C. J., dissenting) (emphasis in original). But there is no distinction between a "tender" and an "offer" for present purposes, *see Fresk v. Kraemer*, 185 Or App 582, 590, 60 P3d 1147 (2003) (noting that Oregon appellate courts have generally "equated 'tender' for purposes of ORS 20.080 with 'settlement offer' "), and the dissent fails to explain how an employer could force a former employee to accept payment on a disputed claim. If the employee *accepted* the offer and cashed the check, then, true, the employee likely would have no claim and would be in no position to demand attorney fees. Parties are generally not obligated to accept payment, however, on disputed claims. For example, the dissent does not explain how, in its view, defendant could have avoided paying plaintiff's attorney fees by simply offering plaintiff $2,000 during the two weeks between plaintiff sending notice of claim and filing a complaint—which occurred nearly six

[10] It is also important to note that ORCP 54 E only limits the *amount* of fees in such circumstances. Having lost the gamble of declining an offer and proceeding to trial, the plaintiff will not be able to recover post-offer fees and costs under ORCP 54 E but, as occurred in this case, will still be entitled to fees and costs incurred before the offer.

months after any wages came due—when, according to the dissent, defendant's offer of $2,000 a little over three months later did not even cut off fees. Whether defendant offered to pay six months after the wages came due (upon receipt of the notice) or nine months after the wages came due (when the case was put into arbitration), ORS 652.200(2) permitted plaintiff to reject or ignore the offer, proceed to trial, and obtain attorney fees, and only ORCP 54 E would affect the amount of the resulting fee award.

That brings us to a final difference between this statute and the statutes at issue in *Powers* and *Wilson*. Like ORCP 54 E, both ORS 20.080(1) and ORS 742.061(1) use the threat of attorney fees to incentivize defendants to offer to pay meritorious claims in a certain timeframe (or else risk paying plaintiffs' attorney fees), while simultaneously incentivizing plaintiffs not to inflate their claims and not to reject valid offers (or else risk paying their own fees). ORCP 54 E, ORS 20.080(1), and ORS 742.061(1) each strike a different balance in terms of the timeframe involved, but they all use the risk of attorney fees to incentivize *both* parties to reach an efficient settlement. *See Powers*, 345 Or at 439-41 (ORS 20.080(1) encourages settlement of small claims both by pressuring tortfeasors and insurers to pay just claims and by discouraging plaintiffs from inflating claims); *Elliot v. Progressive Halcyon Ins. Co.*, 222 Or App 586, 594, 194 P3d 828 (2008) (ORCP 54 E encourages settlement in part by "penaliz[ing] a plaintiff who takes a matter to trial and prevails, but ultimately recovers less than what, in retrospect, was a reasonable offer of settlement").

By contrast, because ORS 652.200(2) does not provide employers with any opportunity to avoid attorney fees by offering to pay a valid claim after receiving notice of it, construing ORS 652.200(2) as not subject to ORCP 54 E would discourage efficient settlement. A plaintiff with a valid claim would have little incentive to accept an offer. Instead, he or she would have good reason to continue litigating—either in the hopes of obtaining a larger award or, at least, driving up the settlement value—because, so long as a single dollar was ultimately awarded, the employer would be liable for all of plaintiff's fees and

costs.[11] This case is not the most extreme example, but it is an example. Plaintiff had a valid claim for $1,387.36. At a point in time when he had reasonably incurred $6,310 in attorney fees to pursue that claim, defendant offered to pay plaintiff $2,000, plus attorney fees and costs. Plaintiff rejected defendant's offer, incurred over $56,000 in additional fees to continue litigating, was awarded less than the amount that defendant had offered to pay voluntarily, and then filed a fee petition for $62,500 in attorney fees. We are unpersuaded that the legislature intended ORCP 54 E not to apply in such circumstances.

For all of the foregoing reasons, we do not view ORS 652.200(2) as analogous to the statutes at issue in *Powers* (ORS 20.080(1)) or *Wilson* (ORS 742.061(1)). Of course, given the default rule that all parties bear their own attorney fees in litigation (the so-called "American rule"), any statute that provides for attorney fees to the prevailing party on a particular type of claim is necessarily using attorney fees to encourage compliance with the law in that area, to increase access to attorneys for those type of claims, to incentivize settlement of those type of claims, or all of those things. That is true not only of ORS 652.200(2) but of all attorney fee statutes. Attorney fee statutes inherently incentivize defendants to quickly pay valid claims rather than face a fee award, or, even better, to never violate the law in the first place. However, if all that was necessary for an attorney fee statute to conflict with ORCP 54 E is that the statute provides for mandatory fees, and that ORCP 54 E would limit the amount of those fees, then every mandatory fee statute would conflict with ORCP 54 E. Similarly, although the attorney fee provision in ORS 652.200(2) helps to address disparities in economic power between employers and employees[12]—as the dissent correctly notes, 298 Or App

[11] Even if it were humanly possible for an attorney to get a wage claim notice to an employer less than 48 hours after a client's wages came due, the attorney would have good reason not to do so. Why would an attorney rush to do something entirely unnecessary and not statutorily required, when doing it in the normal course would ensure the client a right to attorney fees?

[12] *See Hekker*, 265 Or at 559 (recognizing the policy considerations that led the legislature to provide for attorney fees in certain types of actions, including wage actions and small-claim tort actions, that is, to aid plaintiffs in such actions in collecting amounts owed and to discourage defendants in such actions from

at ___ (Egan, C. J., dissenting)—many attorney fee statutes apply to types of conflicts that frequently involve disparities in economic power. *E.g.*, ORS 20.085 (providing for attorney fees to successful plaintiff for constitutional takings claim); ORS 20.107 (providing for attorney fees to successful plaintiff for unlawful discrimination claim); ORS 646.638 (providing for attorney fees to successful private-party plaintiff for unlawful trade practices claim); ORS 646A.476 (providing for attorney fees to successful plaintiff on warranty claim for assistive devices). We disagree with the dissent that, under *Powers*, any attorney fee statute that uses attorney fees to incentivize settlement or to recognize economic disparities is irreconcilably in conflict with ORCP 54 E.

Instead, both *Powers* and *Wilson* involved a particular type of statute—one that gives a defendant a particular period of time after receiving notice of a particular type of claim to investigate the claim and, if valid, offer to pay it, or else be liable for the plaintiff's attorney fees. Like ORCP 54 E itself, such statutes use the risk of attorney fees to facilitate efficient settlement of valid claims by incentivizing defendants to investigate and offer to pay valid claims and by incentivizing plaintiffs to accept valid offers. ORS 652.200(2) is not such a statute. We must construe ORS 652.200(2) and ORCP 54 E to give effect to both statutes if possible, *see* ORS 174.010, and, for the reasons discussed, do so. The trial court did not err in denying plaintiff's exceptions to the arbitrator's award regarding attorney fees and costs.

Affirmed.

**EGAN, C. J.,** dissenting.

Under the majority's reading of *Powers v. Quigley*, 345 Or 432, 198 P3d 919 (2008), a statute only conflicts with, and is therefore an exception to, ORCP 54 E, if the statute provides for an alternate, nearly identical procedure to facilitate settlement. The majority arrives at its conclusion purporting to apply the analysis set out by the *Powers* court: when "two statutes are inconsistent," such that it is

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using positions of economic superiority to discourage pursuit of claims); *State ex rel Nilsen v. Ore. Motor Ass'n*, 248 Or 133, 138, 432 P2d 512 (1967) (same).

not possible to give effect to both, "the more specific statute will control over the more general one." *Mathis v. St. Helen's Auto Center, Inc.*, 298 Or App 647, ___, ___ P3d ___ (2019). Rather than focusing on whether we can give full effect to both ORS 652.200(2) and ORCP 54 E, however, the majority engages in a detailed comparison of ORS 652.200(2) to ORS 20.080 and ORS 742.061—the two other statutes which have previously been construed as exceptions to ORCP 54 E. That comparison leads the majority to focus solely on whether, in enacting ORS 652.200(2), the legislature intended a replacement "settlement window" to apply rather than the window in ORCP 54 E. In focusing only on the legislative purpose of encouraging settlement, the majority ignores the other important legislative purposes behind ORS 652.200(2). In my view, pursuant to the *Powers* analysis, applying ORCP 54 E to limit an attorney fee award under ORS 652.200(2) would controvert the latter statute's core purpose of encouraging employers to pay employees promptly without the necessity of litigation. Therefore, I would hold that ORS 652.200(2) is an exception to ORCP 54 E.

I begin with the majority's read of *Powers* and the Oregon Supreme Court's holding that ORS 20.080 is an exception to ORCP 54 E. This is necessary before getting to the statute at issue in this case, because *Powers* built a framework to determine when a particular attorney fee statute *might* be exempt from application of ORCP 54 E. The majority begins with the correct explanation of the *Powers* exception: The court instructed that "when the specific statute providing for attorney fees is in direct conflict with ORCP 54 E, such that applying ORCP 54 E would defeat the statute's core purpose," ORCP 54 E does not apply. *Mathis*, 298 Or App at ___. The majority proceeds, however, to skirt over what the court identified as the "core purpose" of ORS 20.080. The majority identifies the "core purpose" as "to encourage prelitigation settlement of meritorious small tort claims." *Mathis*, 298 Or App at ___. But the *Powers* court identified a different core purpose: "to prevent tortfeasors and their insurers from refusing to pay just claims." 345 Or at 440-41.

Certainly, the majority is correct that encouraging prelitigation settlement was *a* statutory purpose that the

*Powers* court identified in determining whether it could give full effect to ORCP 54 E and ORS 20.080. But to the majority, promotion of settlement was the end goal of the statute, achieved by "distributing the risk of paying the plaintiff's attorney fees in a purposeful way: the defendant bears the risk if the defendant receives written notice of a valid claim and chooses not to pay it before an action is filed, while the plaintiff bears the risk if the plaintiff inflates the claim and chooses to file an action rather than accepting a valid offer." *Mathis*, 298 Or App at ___. Thus, the majority summarily concludes that, with ORS 20.080, the legislature merely intended to replace the "settlement window" of ORCP 54 E with a different "window."

The majority's portrayal of the policy behind ORS 20.080 implies that the court construed it as an exception to ORCP 54 E only because the legislature wanted to nudge tortfeasors and insurance companies to settle justified claims before litigation. In reality, however, the legislature's policy was more complex than a gentle nudge to settle. By allowing successful plaintiffs to recover attorney fees, the legislature incentivized insurers and tortfeasors to *respond* to meritorious claims before litigation. Indeed, the *Powers* court recognized that tortfeasors and insurers frequently rejected plaintiffs' claims, "knowing that the claimant would often consider it impractical to bring an action if he had to pay his own attorney's fees." 345 Or at 439 (quoting *Bivvins v. Unger*, 263 Or 239, 243, 501 P2d 1262 (1972)). ORS 20.080, the court explained, allows plaintiffs to hold tortfeasors liable for their attorney fees in order to "promote settlement in cases where the plaintiff otherwise might not be able to afford an attorney." *Id.* (quoting *Landers v. E. Texas Motor Frt. Lines*, 266 Or 473, 476-77, 513 P2d 1151 (1973)).

In my view, *Powers* acknowledged that ORS 20.080 promoted prelitigation settlement in order to force defendants to *acknowledge* plaintiffs' claims without plaintiffs having to file suit, or hire an attorney, at all. That goal was achieved by forcing defendants to either "evaluate" the plaintiff's case and choose to tender full payment to the plaintiff, or risk having to pay attorney fees should the plaintiff hire an attorney, take the case to trial, and prove that any tender

(or lack thereof) by the defendant was inadequate. *Powers*, 345 Or at 441. ORCP 54 E conflicted with ORS 20.080, because a defendant could use ORCP 54 E to *limit* its liability for a plaintiff's attorney fees. Limiting an award under the statute would undermine the statute's core purpose; it would allow defendants to ignore and undervalue plaintiffs' claims, knowing that they could later offer a reasonable settlement amount and avoid attorneys fees going forward should plaintiffs manage to take them to trial.

Additionally, the majority misses that the *Powers* court took into account the fact that the attorney fee provision in ORS 20.080 served to balance the frequent economic disparity between plaintiffs and defendants in small claims actions. Without ORS 20.080, defendants could lowball or completely ignore plaintiffs' claims, knowing that there would be little likelihood that plaintiffs would find it practical or possible to hire an attorney and file suit. By enacting ORS 20.080, the legislature prevented defendants from utilizing their superior economic position by holding defendants who ignore or fail to pay valid claims liable for plaintiffs' attorney fees. The majority is correct that the attorney fee provision in ORS 20.080 was "a means to an end;" that end, however, was simply *more* than encouraging prelitigation settlement. Therefore, I disagree with the majority's apparent conclusion that, to be an exception to ORCP 54 E, a statute must provide a "settlement window" akin to ORCP 54 E. In my view, the focus should remain on whether application of ORCP 54 E defeats a statute's "core purpose."

The majority's reading of *Powers* informs how it proceeds to analyze ORS 652.200(2), the attorney fee provision at issue in this case. Immediately after setting out the text of the statute, rather than engaging in an analysis of what the "core purpose" of ORS 652.200(2) is, and whether that purpose is undermined by the application of ORCP 54 E, the majority dissects ORS 652.200(2) in search of every characteristic that distinguishes it from ORS 20.080 and ORS 742.051 (the statute at issue in *Wilson v. Tri-Met*, 234 Or App 615, 228 P3d 1225, *rev den*, 348 Or 669 (2010)—the only other case in which we have construed a *Powers* exception to ORCP 54 E). Of course, it is helpful to analogize the

statute at issue in this case to the statutes that have previously been construed as exceptions. However, in dedicating its energies to matching the statutes up, the majority fails to grapple with the legislative intent of ORS 652.200(2) and whether that intent is undermined by the application of ORCP 54 E. Moreover, in pointing out every distinguishing factor of ORS 652.200(2), the majority ignores the fact that it is also similar to ORS 20.080 and ORS 742.051 in several important ways. *See Hekker v. Sabre Construction Co.*, 265 Or 552, 559, 510 P2d 347 (1973) (noting that ORS 652.200(2) "is based on similar policy considerations" to ORS 20.080 and "its language should be construed in the same spirit").

ORS 652.200(2) entitles a successful plaintiff on a wage claim to "a reasonable sum for attorney fees." *Mathis*, 298 Or App at ___. The policy behind that entitlement is "to aid an employe[e] in the prompt collection of compensation due him and to discourage an employer from using a position of economic superiority as a lever to dissuade an employe[e] from promptly collecting his agreed compensation." *State ex rel Nilsen v. Ore. Motor Ass'n*, 248 Or 133, 138, 432 P2d 512 (1967). By enacting ORS 652.200(2), the legislature intended to "encourage employers to pay owed wages without the necessity of litigation." *Belknap v. U. S. Bank National Association*, 235 Or App 658, 672, 243 P3d 1041 (2009), *rev den*, 349 Or 654 (2011).

ORS 652.200(2) plays an important role in effectuating the central purpose of the wage and hour statutory scheme as a whole, which is, namely, "assuring that one who works in a master and servant relationship, usually with a disparity of economic power existing between himself and his superior, shall be assured of prompt payment for his labors when the relationship is terminated." *Lamy v. Jack Jarvis & Company, Inc.*, 281 Or 307, 313, 574 P2d 1107 (1978). In general, the wage and hour statutes "place the burden on the employer to pay the wages, not on the employee to ask for them." *Wales v. Walt Stallcup Enterprises*, 167 Or App 212, 215, 2 P3d 944 (2000); *see also* ORS 653.045(1)(b) (employers must make and keep available records of "actual hours worked each week and each pay period by each employee"). Indeed, employers are statutorily required to furnish wages

within specific timelines. *See, e.g.*, ORS 652.140 (upon terminating an employee, an employer must pay all wages earned and unpaid "not later than the end of the first business day after the discharge or termination"). In the event that an employer fails to meet a statutory deadline to furnish wages, the employer is subject to the penalty wage provision in ORS 652.150: for each day outstanding wages are left unpaid, the employer is liable for penalty wages either until the wages are paid or for a maximum of 30 days.

The wage and hour statutory scheme makes it abundantly clear that the legislature intended to hold employers to a very strict standard when it comes to wages that employees have earned. It is within that context that we should construe the fee provision of ORS 652.200(2). In my view, that statute exists to encourage employers to respond promptly to wage and hour claims, and to incentivize them to tender any outstanding wages in a timely manner without the necessity of litigation. As I explain below, allowing employers to later use ORCP 54 E to cut off liability for attorney fees diminishes that incentive.

I turn now, however, to respond to the four "important differences" the majority finds between ORS 652.200(2) and the statutes at issue in *Powers* (ORS 20.080) and *Wilson* (ORS 742.061)).

First, the majority claims that the latter two statutes are "beat the offer" statutes akin to ORCP 54 E, and that ORS 652.200(2) is not. It is true that ORS 20.080 provides for attorney fees unless the court finds that the defendant tendered to the plaintiff an amount not less than what they recovered at trial, and ORS 742.071(1) provides for attorney fees unless the plaintiff's recovery does not exceed the amount of any tender made by the insurer during the six months after proof of loss. The majority's claim that these provisions are "structurally similar" to ORCP 54 E, though, is inaccurate. ORCP 54 E limits the amount of an attorney fee award when a party *rejects an offer* to allow judgment and then "fails to obtain a judgment more favorable than the offer to allow judgment." However, both ORS 20.080 and ORS 742.061 apply even if the defendant takes *no action* and makes *no offer*. In other words, they require an attorney fee

when the defendant *ignores* a plaintiff's claim completely. Thus, they are not a substitute for the beat-the-offer mechanism of ORCP 54 E; they encourage settlement in a different way: by allowing for attorney fees when the plaintiff has to take the defendant to court in order to get them to tender payment.

Additionally, the majority concludes that because ORS 652.200(2) contains no "beat the offer" language, it is simply a provision for attorney fees "in a particular type of action." *Mathis*, 298 Or App at ___. To be sure, ORS 652.200(2) does not direct the court to "compare" offers by the defendant. However, it would be absurd to assume that a court would not compare an amount of wages *tendered* by the defendant before the plaintiff filed suit. Indeed, if no outstanding wages were due because the defendant tendered before the plaintiff filed suit, the plaintiff would have no claim to prevail on at trial, and would therefore have no attorney fees to recover.[1]

Next, the majority claims that, unlike the *Powers* and *Wilson* statutes and ORCP 54 E, ORS 652.200(2) has no "defined window of time in which a defendant can avoid attorney fee liability (altogether or going forward) by offering to pay the full value of the plaintiff's claim after receiving notice of the claim an investigating it." *Mathis*, 298 Or App at ___. The majority concludes that, under ORS 652.200(2), "plaintiff's right to attorney fees attaches automatically 48 hours after wages become due and payable." The majority posits that the 48 hours "is not tethered in any way to the notice requirement and will almost certainly pass long before the employer knows that an employee is asserting a claim." *Id.* at ___.

I disagree with the majority's construction of the notice requirement in ORS 652.200(2). Again, ORS 652.200(2) provides:

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[1] I would also note that, because penalty wages are terminated after a maximum of 30 days, and because employers have a statutory duty to keep records of their employees' hours worked, the employer should be able to calculate the amount of wages they potentially owe a plaintiff, and thus be able to calculate a sufficient amount to tender. A compliant employer would not need additional information from the employee, and a compliant employer could easily identify meritless or inflated claims.

> "In any action for the collection of wages, if it is shown that the wages were not paid for a period of 48 hours, excluding Saturdays, Sundays and holidays, after the wages became due and payable, the court shall, upon entering judgment for the plaintiff, include in the judgment, in addition to costs and disbursements otherwise prescribed by statute, a reasonable sum for attorney fees at trial and on appeal for prosecuting the action, unless it appears that the employee has willfully violated the contract of employment or unless the court finds that the plaintiff's attorney unreasonably failed to give written notice of the wage claim to the employer before filing the action."

In my view, by the terms of the statute, attorney fee liability does not necessarily attach after the 48hour period. Rather, attorney fee liability attaches when a plaintiff files a claim that an employer failed to tender wages owed *and the plaintiff's attorney does not "unreasonably fail" to provide written notice to the employer*. In other words, the statute provides that notice is a condition precedent to attorney fee liability *unless* the plaintiff has a reasonable explanation for failing to provide notice.

The majority acknowledges that the "notice provision" was added in 2001 in order to "provide an opportunity to try to resolve wage claims before an action is filed." *Mathis*, 298 Or App at ___. Nevertheless, the majority concludes that "that purpose is unrelated to *attorney fee liability*." *Id.* (emphasis in original). As I read the statute, because attorney fees attach when a plaintiff—after not failing unreasonably to give notice—files suit, the notice provision is very much related to attorney fee liability.

The majority also admits that if the legislature had made the notice provision a 10-day period, that "would have made ORS 652.200(2) much more like ORS 20.080 and ORS 742.061(1)." *Mathis*, 298 Or App at ___. However, because the proposed 10-day period "met resistance" in the legislature, the majority proceeds to analyze the statute as if it had *no* notice requirement. *Id.* Besides the fact that the statute does contain a notice requirement, the majority also misapprehends much of the "resistance" that opponents expressed.

The notice provision was added to ORS 652.200(2) to put "another step in the process as far as an employer being informed of an action so that he has a chance to respond before the thing gets to court." Tape Recording, House Committee on Business, Labor, and Consumer Affairs, House Bill (HB) 2500, Feb 20, 2001, Tape 31, Side A (statement of Rep. Jeff Kruse). The original proposed version of the bill would have required plaintiffs to wait 10 days after issuing the written notice to file suit, allowing employers to tender payment during that time period and avoid liability for attorney fees. HB 2500 (Jan 11, 2001). The 10-day period did meet resistance from plaintiffs' lawyers, largely due to the fact that a central tenet of the wage and hour statutes is to allow employees to collect wages in a *timely* manner. *See* Testimony, House Committee on Business, Labor and Consumer Affairs, HB 2500, Feb 20, 2001, Ex D (statement of SEIU Local 503 representative Rich Peppers) ("HB 2500 has three components that are of concern to our organization, in that they each make it more difficult for an employee who is owed wages to collect on those wages in a timely fashion or at all."). Michael Dale testified on behalf of the Oregon Law Center that, although there was "no opposition to the general idea that there should be a written demand for payment, and an opportunity to pay, prior to filing a lawsuit," there was a concern that 10 days was just too long. Testimony, House Committee on Business, Labor and Consumer Affairs, HB 2500, Feb 20, 2001, Ex D (statement of Michael Dale). Dale explained:

> "[T]here is a reason that Oregon has long required that employers pay wages within a short period after termination of employment. Workers often may need to leave the area for other work. They may need to receive their last pay in order to meet expenses of travel, or to settle outstanding bills. Workers leaving one job may not yet have another, and need their wages in order to survive."

*Id.* Dale testified that forcing employees to wait 10 days before taking legal action against the employer would defeat the statutory purpose of requiring employers to *timely* pay wages owed. He noted that

> "unscrupulous employer[s] could ignore a worker's claim for wages until ten days after written notice and then pay the

> wages, knowing that the likelihood that the worker would be able to sue to collect penalties would be minimal, since attorneys' fees would not be available. Many workers would simply abandon the claim. Although my firm would continue to represent such workers, the resources available for free legal services are very limited, and many workers would fall through the cracks."

*Id.*

The history is unclear as to why the legislature ultimately went with a requirement that plaintiffs not "unreasonably fail" to give notice before filing rather than a requirement to give notice in some number fewer than ten days. However, since the notice requirement was added, we have applied a fact-intensive analysis to determine whether a *failure* to provide sufficient notice was unreasonable. *See Belknap*, 235 Or App at 671-72. ("concluding that plaintiffs' attorneys' failure to give written notice of the wage claim—including the name of the plaintiff or plaintiffs—was unreasonable.") It logically follows that a fact-intensive analysis is required to determine if the *timing* of a sufficient notice was reasonable. For example, depending on the circumstances surrounding an employee's termination, the size of the employer, and the content of the notice, the plaintiff's notice may or may not have been "reasonable."[2]

What is clear from the legislative history is that the notice requirement was intended to give employers an opportunity to cure any wage-related deficiencies without litigation. The majority's conclusion that attorney fees are triggered *before* the notice is given is contrary to that purpose, and it effectively renders the notice required a nullity. If the notice does not have anything to do with attorney fee liability, it serves no purpose and will therefore have no effect on the employer. That the notice must simply be given in a "reasonable" time period, and not within a "defined window of time," does not, in my view, prove that the legislature meant the notice to mean nothing.

The majority's next point is that, by using ORCP 54 E, the *Powers* and *Wilson* defendants were given a "second

[2] The arbitrator in this case engaged in a fact-specific analysis and determined that the content and timing of the notice were reasonable.

chance" to avoid attorney fees. Indeed, in *Powers*, the defendant used its "first chance" (before litigation) to offer to tender $3,200 in response to the plaintiff's written demand for $4,271, and later (after litigation was initiated) used ORCP 54 E to offer $3,636. 345 Or at 434. And in *Wilson*, the defendant used its "first chance" (before litigation) to deny the plaintiff's claim altogether, and later used ORCP 54 E (after litigation was initiated) to offer $10,000, inclusive of costs. 234 Or App at 617-18. In my view, those cases are indistinguishable from defendant's use of ORCP 54 E in this case. Defendant used its "first chance" (before litigation, namely, the two weeks between its receipt of plaintiff's notice and plaintiff filing his claim) to completely ignore plaintiff's claim, and then later used ORCP 54 E (after plaintiff filed suit) to offer $2,000.

As to the majority's final point, I do not dispute that ORS 20.080, ORS 742.061, and ORCP 54 E all—at least in part—encourage settlement. But the majority's assumption that my construction of ORS 652.200(2) would *discourage* settlement (1) again ignores the role that ORS 652.200(2)'s notice plays, and (2) assumes that plaintiffs with wage and hour claims are motivated to militantly litigate and drive settlement values so high as to be extortionary to employers. First, the notice requirement in ORS 652.200(2) gives employers the opportunity to pay meritorious claims and avoid litigation altogether. Second, the majority's fictional plaintiff is a character with whom many plaintiffs in wage and hour claims would be unfamiliar. The legislature has made clear that the wage and hour statutes are in place to protect employees, because employers are often in a position of "economic superiority." For employers, a few days or weeks of missed or late pay may seem trivial; but for an employee, those wages may be necessary for survival.

In sum, by enacting ORS 652.200(2) and the other wage and hour statutes, the legislature intended to balance employers' economically "superior" position by incentivizing employers to *promptly* pay all wages due. The majority's interpretation of ORS 652.200(2) as "discouraging" settlement is only true in that it discourages employers from refusing to engage in settlement of meritorious claims until *after* the employee has reasonably notified the employer

about the claim and filed suit. It *encourages* them to engage in settlement negotiations without a lawsuit.

Under my reading of *Powers*, to determine whether ORS 652.200(2) is an exception to ORCP 54 E, I would first ask whether ORCP 54 E defeats the "core purpose" of ORS 652.200(2). The "core purpose" of ORS 652.200(2) is to encourage employers to promptly pay owed wages without the necessity of litigation. That purpose is accomplished by allowing plaintiffs who use litigation as a necessary tool to collect wages they are owed—*i.e.*, those who file suit after giving the employer notice and an opportunity to respond—to recover attorney fees. Allowing employers to use ORCP 54 E to partially cut off that attorney fee award would diminish the legislature's "encouragement" substantially. Therefore, I would hold that ORS 652.200(2) conflicts with ORCP 54 E, and, as the former is more specific, that it functions as an exception to the latter.

In this case, the result of my holding would be that plaintiff is entitled to recover all of the reasonable fees and costs incurred in prosecuting his wage claim. Plaintiff notified the employer of his wage claims—including for unpaid commissions and unpaid penalty wages due to the employer's failure to pay all of his earned wages in the statutory time frame required upon termination—and the arbitrator determined that plaintiff's attorney did not act "unreasonably" in issuing that notice around two weeks before filing the claims. The employer did not respond—with a tender of outstanding wages or any other offer—to the notice before plaintiff filed suit. Ultimately, plaintiff was successful, as the arbitrator concluded that he was owed outstanding wages. Under my interpretation of ORS 652.200(2), the employer would not have been able to use ORCP 54 E to cut off its liability for attorney fees, because it failed to tender the wages before plaintiff filed suit. Therefore, I respectfully dissent with the majority's conclusion as to the attorney's fees and costs, but otherwise concur.

Hadlock, Lagesen, James, Powers, and Mooney, JJ., join in this dissent.