

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DAVID PETERSON, as an individual and  
derivatively on behalf of VB ASSETS LLC,  
a Delaware limited liability company,

Appellant/ Cross-Respondent,

v.

MICHAEL KENNEWICK, an individual; and  
RICHARD KENNEWICK, an individual; and  
ROBERT KENNEWICK, an individual,

Defendants,

NUANCE COMMUNICATIONS, INC., a  
Delaware corporation; and VOICEBOX  
TECHNOLOGIES CORPORATION, a  
Delaware corporation,

Respondents/ Cross-Appellants.

No. 81065-1-I

DIVISION ONE

UNPUBLISHED OPINION

COBURN, J. — David Peterson appeals King County Superior Court’s order granting summary judgment to his former employers Voicebox Technology Corporation and Nuance Communications, Inc. He contends his employers miscalculated his severance pay. We determine the superior court properly granted Voicebox/Nuance summary judgment as to all of Peterson’s severance claims and properly denied Voicebox/Nuance’s request for attorney fees and costs. We affirm.

## FACTS

Peterson worked for Voicebox as the Vice President of Global Automotive Sales and Business Development. Beginning in 2013, Voicebox provided Peterson with a 2013 Sales Compensation Plan (2013 Plan) paying him a base salary plus commissions on sales at a rate of 1.85 percent.

In 2015, Voicebox and Peterson entered into a Severance and Change in Control Agreement (Severance Agreement) providing Peterson “with enhanced financial security and incentive and encouragement to remain with the Company.” The Severance Agreement provided that Peterson’s severance benefits included “a one-time ‘lump sum’ payment of severance pay (less applicable withholding taxes) in an amount equal to six (6) months of the current base salary, as then in effect, plus six (6) times the average monthly commission paid to Employee, as calculated the full prior fiscal year.”<sup>1</sup>

In 2017, Voicebox notified Peterson that it was reducing his commission rate on sales from its largest customer from 1.85 percent to 0.25 percent and increasing his commission rate on new business sales to 3 percent. Voicebox provided Peterson with a 2017 Sales Compensation Plan (2017 Plan) outlining the reduction and confirming the new rate would apply to commissions after May 31, 2017. Peterson refused to sign the 2017 Plan and disputed the amount of his 2017 commissions. Peterson also claimed Voicebox underpaid his commissions for 2015 and 2016 sales.

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<sup>1</sup> Voicebox’s fiscal year was the calendar year.

In early 2018, Voicebox was planning to sell its business to Nuance. Voicebox's Chief Executive Officer Michael Kennewick wanted to resolve Peterson's commission dispute before closing the sale. Voicebox agreed to settle the dispute by paying Peterson the difference between his current commission rate of 0.25 percent and his previous commission rate of 1.85 percent for June through December 2017 sales. Voicebox and Peterson signed an Employee Release Agreement (Release Agreement) stating:

The Company has paid the Employee a gross amount, including base salary and commissions, of \$242,156.54 for calendar year 2017 (the "2017 Compensation"). As a show of good will, the Company will provide a lump sum equal to \$227,019.23 (the "Consideration") to the Employee. Employee agrees and acknowledges that in no event will he receive more than aggregate of the 2017 Compensation and the Consideration from the Company for work performed, or commissions on amounts collected, in calendar year 2017.

After the parties signed the Release Agreement, Nuance paid Peterson \$227,019.23.

A little over a month later, on April 2, Nuance acquired Voicebox. Two days later, Nuance notified Peterson that it was terminating his employment. Peterson was concerned that Nuance would not include the \$227,019.23 as 2017 commissions in its calculation of his severance pay. Peterson calculated the amount he believed he was entitled to under the Severance Agreement as \$234,587.89 and emailed Kennewick as well as others at Voicebox and Nuance.

Nuance did not consider the \$227,019.23 as actual 2017 commissions as Peterson requested. On April 17, Nuance provided Peterson with a Separation

Agreement offering him \$121,505.36 in severance pay “based off[[f] his current base salary (6 months) and 6 times his commissions earned in FY17, as reported by the VBT finance team as actual commissions paid in that FY.” After unsuccessfully trying to persuade Nuance to change its offer, Peterson and Nuance entered into the Separation Agreement, which Peterson revoked six days later.

Peterson initiated a suit against Voicebox and Nuance.<sup>2</sup> Peterson asserted claims of breach of the Separation Agreement, withholding severance payment in violation of RCW 49.48.010, and willful withholding of wages in violation of RCW 49.52.050. Voicebox/Nuance asserted a counterclaim alleging Peterson breached the Release Agreement and requested attorney fees and costs under that Agreement. Voicebox/Nuance also asserted a counterclaim for declaratory relief as to whether Peterson was precluded from filing non-severance claims if the superior court found that Peterson was entitled to severance. Voicebox/Nuance moved for summary judgment, and Peterson moved for summary judgment on all claims and counterclaims regarding his severance pay.

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<sup>2</sup> Peterson also asserted claims for breach of fiduciary duties against Voicebox directors Michael, Robert, and Richard Kennewick. Those claims are not before us.

The superior court granted Voicebox/Nuance's motion for summary judgment but denied its request for attorney fees and costs.<sup>3</sup> Peterson appeals and Voicebox/Nuance cross appeals.

#### DISCUSSION

This court reviews a summary judgment order de novo. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 501, 115 P.3d 262 (2005). "Summary judgment is appropriate only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Pelly v. Panasyuk, 2 Wn. App. 2d 848, 864, 413 P.3d 619 (2018) (citing CR 56(c)). "We review the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." LaCoursiere v. CamWest Dev., Inc., 181 Wn.2d 734, 740, 339 P.3d 963 (2014). The parties stipulated and the superior court concluded there were no genuine disputes as to any material fact. The court did not enter any findings of fact and ruled as a matter of law.

" 'Absent disputed facts, the legal effect of a contract is a question of law that we review de novo.' " Rosen v. Ascentry Tech., Inc., 143 Wn. App. 364, 369, 177 P.3d 765 (2008) (quoting Keystone Masonry v. Garco Constr., 135 Wn. App. 927, 932, 147 P.3d 610 (2006)). "As part of an employment agreement, a severance pay plan is subject to the same rules of construction as are other

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<sup>3</sup> The superior court's final order was a second amended order to correct a scrivener's error.

contracts.” Barrett v. Weyerhaeuser Co. Severance Pay Plan, 40 Wn. App. 630, 634, 700 P.2d 338 (1985). “Severance benefits are payable, if at all, in accordance with the terms of the contract and intent of the parties.” Id. The parties do not dispute that based on the Severance Agreement, the calculation of Peterson’s severance should be partly based on his 2017 commissions.

#### 2017 Commissions/Severance

The parties agree that Voicebox’s \$227,019.23 payment to Peterson per the Release Agreement was a settlement. However, Peterson claims that payment was both a settlement and earned commissions on sales in 2017, and he claims Nuance should have included that amount in its calculation of severance. We disagree.

The rules of contract interpretation apply to the Release Agreement. “The purpose of contract interpretation is to ascertain the intent of the parties.” Kelley v. Tonda, 198 Wn. App. 303, 311, 393 P.3d 824 (2017). We follow the “objective manifestation theory” of contracts. Hearst Commc’ns, Inc., 154 Wn.2d at 503. Our goal is to determine the parties’ intent at the time they executed the contract rather than “the interpretations the parties are advocating at the time of the litigation.” Int’l Marine Underwriters v. ABCD Marine, LLC, 179 Wn.2d 274, 282, 313 P.3d 395 (2013). “Clear and unambiguous contracts are enforced as written.” Grey v. Leach, 158 Wn. App. 837, 850, 244 P.3d 970 (2010) (citing McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 733-34, 837 P.2d 1000 (1992)). We give “words in a contract their ordinary, usual, and popular meaning

unless the entirety of the agreement clearly demonstrates a contrary intent.” Hearst Commc'ns, Inc., 154 Wn.2d at 504. “Interpretations giving lawful effect to all the provisions in a contract are favored over those that render some of the language meaningless or ineffective.” Grey, 158 Wn. App. at 850. “[W]e view the contract as a whole, interpreting particular language in the context of other contract provisions.” Viking Bank v. Firgrove Commons 3, LLC, 183 Wn. App. 706, 713, 334 P.3d 116 (2014).

Peterson contends the plain language of the Release Agreement establishes the \$227,019.23 was additional compensation for commissions in calendar year 2017.

We first address the plain language of the Release Agreement. Peterson contends, “[p]aragraph 1(a) expressly provides the \$227,019.23 Consideration payment would be additional compensation to Peterson for 2017.” It does not. Paragraph 1(a) uses the term “compensation” to refer to the \$242,156.54 that Voicebox paid to Peterson in base salary and commissions in calendar year 2017. It referred to this payment as “2017 Compensation,” and it referred to the \$227,019.23 payment as “Consideration.” Furthermore, the paragraph acknowledges the two different payment amounts distinctly. “Employee agrees and acknowledges that in no event will he receive more than the aggregate of the 2017 Compensation and the Consideration from the Company for work performed, or commissions on amounts collected, in calendar year 2017.”

Peterson also cites to paragraph 2 of the Release Agreement as describing the consideration as “compensation.” It does not. Paragraph 2 of the Release Agreement states:

2. Payment of All Compensation. Employee acknowledges and represents that, other than the consideration set forth in this Agreement, the Company has paid or provided all salary, wages, bonuses, deferred compensation, commissions, stock, stock options, vesting, and any and all other benefits and compensation due to Employee, if any, through the Effective Date of this Agreement.

While the title of the paragraph refers to compensation, the text of the paragraph explicitly states, “other than the consideration set forth in this Agreement” to distinguish the various forms of compensation including commissions.

We now turn to Peterson’s reliance on extrinsic evidence. Peterson asserts that under the “context rule,” first articulated in Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990), this court “should consider extrinsic evidence of the surrounding circumstances to ascertain the intent of the parties,” and “the meaning of the words used,” “regardless of whether the language of the contract is ambiguous.” However, as our Supreme Court stated, “[s]ince *Berg*, we have explained that surrounding circumstances and other extrinsic evidence are to be used ‘to determine the meaning of *specific words and terms used*’ and not to ‘show an intention independent of the instrument’ or to ‘vary, contradict or modify the written word.’ ” Hearst Commc’ns, Inc., 154 Wn.2d at 503. “Extrinsic evidence is not admissible to show ‘a party’s unilateral or subjective intent as to the meaning of a contract word or term’; to show an intent ‘independent of the



instrument'; or to 'vary, contradict, or modify the written word.' ” Pelly, 2 Wn. App. 2d at 866 (quoting Hollis v. Garwall, Inc., 137 Wn.2d 683, 695, 974 P.2d 683 (1999)). In other words, “the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used.” Hearst Commc'ns, Inc., 154 Wn.2d at 504. The plain language of the Release Agreement provides the payment was consideration separate from the 2017 compensation that included commissions.

“Regardless of whether the language in the document is ambiguous,” we “*may* consider extrinsic evidence concerning (1) the subject matter and objective of the contract, (2) the circumstances surrounding the making of the contract, (3) the subsequent conduct of the parties to the contract, (4) the reasonableness of the parties’ respective interpretations, (5) statements made by the parties in preliminary negotiations, (6) usages of trade, and (7) the course of dealing between the parties.” Pelly, 2 Wn. App. 2d at 866 (citing Berg, 115 Wn.2d at 666-69; Hearst Commc'ns, Inc., 154 Wn.2d at 502) (emphasis added). Even considering extrinsic evidence, the \$227,019.23 was a settlement of the disputed commissions and not earned commissions.

Peterson argues the parties intended the \$227,019.23 to resolve the commission dispute, and Voicebox calculated the amount using Peterson’s 1.85 commission rate, so the payment is both a settlement and actual 2017 commissions. Peterson contends emails and text messages between him and Kennewick subsequent to executing the Release Agreement establish the

\$227,019.23 was for earned commissions. On April 23, 2018, Peterson sent Kennewick a text message that said, "I have a call on [W]ednesday with [N]uance about the severance payment. Since you won't be here can you write a statement in support of our view that the 2017 commissions should include the amount paid in 2018." Kennewick responded, "Sure. I can do that." On May 15, Kennewick e-mailed Peterson:

Dave, to be clear, I am making no legal interpretation of your agreement nor have I read it. I did tell you, when you asked me, that I agreed with you that our dispute and ultimate settlement for 2017 was for commissions against sales and that these amounts were consistent with what you received the previous years.

Kennewick and Voicebox/Nuance acknowledge they calculated the settlement amount by using the 2017 commissions at the 1.85 percent rate. They contend, however, the payment was a settlement for disputed claims and not earned commissions and that it "made the settlement offer it did, after months of unsuccessful discussions, only because Peterson's claims were a complication for the pending sale of Voicebox to Nuance."

The context does nothing more than illuminate the fact that Voicebox used Peterson's former commission rate to determine an amount that would settle the dispute about the commissions without conceding that the \$227,019.23 was actually what Peterson earned in 2017 commissions.

Because the consideration was not part of Peterson's earned 2017 commissions, we reject Peterson's claim that Nuance anticipatorily breached the

Severance Agreement by failing to include the \$227,019.23 consideration in its calculation of the severance offer.<sup>4</sup>

### Attorney Fees

Below, Voicebox/Nuance asserted a counterclaim arguing Peterson breached the Release Agreement when he asserted the claim for a higher severance amount. Voicebox/Nuance contends it is entitled to attorney fees and costs under the attorney fees provision of the Release Agreement. That provision provides,

In the event that either Party brings an action to enforce or effect its rights under this Agreement, the prevailing Party shall be entitled to recover its costs and expenses, including the costs of . . . litigation, court fees, and reasonable attorneys' fees incurred in connection with such an action.<sup>[5]</sup>

Voicebox/Nuance contends that it is entitled to attorney fees because the Release Agreement was central to Peterson's claims below. To support this contention, Voicebox/Nuance quotes Deep Water Brewing, LLC v. Fairway Res. Ltd., 152 Wn. App. 229, 278, 215 P.3d 990 (2009). "The court may award attorney fees for claims other than breach of contract when the contract is central

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<sup>4</sup> Because the \$227,019.23 consideration was not part of Peterson's 2017 commissions, which was the basis of Peterson's other claims, we need not address his contentions that Nuance willfully withheld wages in violation of RCW 49.52.050, that Peterson is entitled to double exemplary damages under RCW 49.52.070, and that Nuance failed to timely pay Peterson his wages in violation of RCW 49.48.010.

<sup>5</sup> Voicebox/Nuance incorrectly asserts that RCW 4.84.330 mandates the award of attorney fees under the Release Agreement. RCW 4.84.330 applies to contracts with unilateral attorney fee provisions; it does not control over the plain language of contracts containing a bilateral attorney fee clause. Kaintz v. PLG, Inc., 147 Wn. App. 782, 197 P.3d 710 (2008).

to the existence of the claims.” However, Voicebox/Nuance excludes the rest of that quote: “i.e., when the dispute actually arose from the agreements.” Id.

In Deep Water Brewing, the plaintiff based its tortious interference with contract claim on the contracts at issue. Id. at 279. We explained that “enforcement of the agreements and the claims that followed their breach is the essence of [the plaintiff’s] tortious interference with contract claim.” Id. Because the tort claim arose out of the contracts at issue, the trial court properly awarded fees based on the fee provisions in those contracts. Id. Unlike the claims in Deep Water Brewing, Peterson’s claims did not follow the enforcement of the Release Agreement, which had the attorney fee provision. Instead, Peterson used the Release Agreement as evidence to support his argument that he was entitled to a larger severance payment under the Severance Agreement. At issue was compliance with the Severance Agreement not the Release Agreement. The superior court correctly denied Voicebox/Nuance’s request for attorney fees. For the same reason, we deny Voicebox/Nuance’s request for appellate attorney fees.


Peterson requests attorney fees and expenses on appeal under RAP 18.1, RCW 49.48.030, and RCW 49.52.070. Because Peterson is not the prevailing party, he is not entitled to fees and costs.

#### CONCLUSION

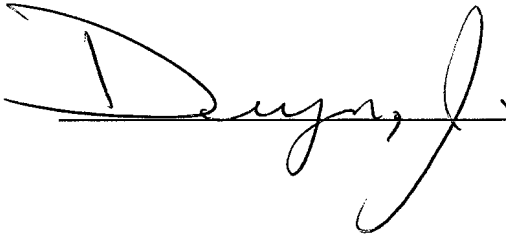
The superior court properly granted summary judgment to Voicebox/Nuance as to all of Peterson’s severance claims and properly denied

Voicebox/Nuance's request for attorney fees and costs. Because the parties failed to obtain a ruling from the superior court as to Voicebox/Nuance's counterclaims, we decline to address Peterson's contention that the superior court should have granted him summary judgment on the counterclaims.<sup>6</sup>

We affirm.

  
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WE CONCUR:

  
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<sup>6</sup> See Pascua v. Heil, 126 Wn. App. 520, 533, 108 P.3d 1253 (2005) (noting that this court generally does not review issues the lower court did not decide).