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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JACK WALTER and VIVIAN WALTER, husband and wife,

Respondents,

v.

ALICE A. BAUER,

Appellant.

OPENING BRIEF OF APPELLANT ALICE A. BAUER

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ORIGINAL

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in its Order Regarding Discovery when it deemed Alice Bauer had made certain admissions.
2. The trial court erred in granting summary judgment to Jack and Vivian Walter based on Alice Bauer's deemed admissions.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion by deeming that Alice Bauer made certain admissions when only one set of the Requests for Admission was served on two separate individual defendants who did not form a marital community?
2. Did the trial court abuse its discretion by allowing Jack and Vivian Walter to use the Requests for Admission to ask Alice Bauer to admit that she should lose the lawsuit?
3. Did the trial court abuse its discretion by not allowing Alice Bauer additional time to respond to the Requests for Admission when an extension would cause no prejudice to Jack and Vivian Walter, and the denial of the extension caused grave prejudice to Alice Bauer?
4. Did the trial court err by treating a deemed admission that the records of the Secretary of State of Arizona show Alice Bauer to be the registered owner of the Wholesale Tool Outlet as equivalent to an admission that Alice Bauer is in fact the owner of the Wholesale Tool Outlet?

5. Did the trial court err by deciding on summary judgment that Alice Bauer is the owner of the Wholesale Tool Outlet and therefore responsible as an undisclosed principle for an unpaid lease entered into by her son Scott Bauer, doing business as the Wholesale Tool Outlet, when the evidence shows there is a genuine issue of material fact as to whether Alice Bauer owns the Wholesale Tool Outlet?

III. STATEMENT OF THE CASE

A. Overview.

This case arises from a default on a commercial lease which was not executed by Alice Bauer, in the name of Alice Bauer, or on behalf of Alice Bauer. The lessee on the lease in question was Scott Bauer, doing business as the Wholesale Tool Outlet. Scott Bauer is one of Alice Bauer's adult sons. Prior to executing the lease, Scott Bauer had purchased the assets of the Wholesale Tool Outlet from his parents' Arizona LLC of the same name. The lessors, Jack and Vivian Walter (the "Walters"), did not rely in any way on Alice Bauer being a party to the lease at the time the lease was executed. It was only after Scott Bauer defaulted on the lease that the Walters came to believe that Alice Bauer was Scott Bauer's undisclosed principal.

In their Amended Complaint, the Walters alleged that Scott Bauer entered into the lease as his mother's agent. CP 34, at ¶ 3. The defendants explicitly denied this allegation in their Answer. CP 68, at ¶ 3. Then, in September, 2006, the Walters served one copy of their Requests for

Admission on the attorney serving at the time as counsel for both Scott Bauer and Alice Bauer. The Requests for Admission included a request that the defendants admit that "Alice A. Bauer is shown by the records of the Arizona Secretary of State . . . to be the owner of the business known as Wholesale Tool Outlet." CP 76. Defendant's counsel did not inform Alice Bauer of the existence of the Requests for Admission, but he did submit an untimely response thereto. The trial court deemed the Request for Admissions to have been admitted, and proceeded to grant the Walters summary judgment for the unpaid rent against both Scott Bauer and Alice Bauer. The trial court subsequently denied a Motion to Vacate Judgment filed by new counsel for Alice Bauer.

B. Statement of Facts.

On or about July 1, 2004, Scott Bauer entered into a lease agreement with Jack and Vivian Walter (the "Walters") to lease a commercial property in Puyallup, Washington. The lease had a three year term and provided for an initial rent of \$8,983.33 per month. Scott Bauer executed the lease in his own name, and doing business as the Wholesale Tool Outlet. Although the lease contained a pre-printed line with a blank to be filled in by a lessee agent to identify his or her principal, this line was crossed out in the executed copy of the lease. CP 8 -26.

Scott Bauer had purchased the assets of the Wholesale Tool Outlet from his parents, Kenneth A. Bauer and Alice Bauer, in May of 2002. CP 253 at ¶ 4, 241 at ¶ 4. Kenneth A. Bauer and Alice Bauer, husband and wife, are residents of Arizona, and had operated a proprietorship there

under the trade name Wholesale Tool Outlet from 1990 to 1999. CP 252-53. In June, 1999, Kenneth A. Bauer, Alice Bauer, and their son Kenneth H. Bauer formed the Wholesale Tool Outlet, LLC (the “LLC”) as an Arizona limited liability company. CP 252-53, 241. After the formation of the LLC, all of Kenneth A. Bauer’s and Alice Bauer’s business activities related to the Wholesale Tool Outlet were done through the LLC. CP 253 at ¶ 3. When the LLC sold its assets, including the right to use the name “Wholesale Tool Outlet,” to Scott Bauer in May, 2002, Kenneth A. Bauer and Alice Bauer ceased their involvement in the wholesale tool business. CP 253 at ¶ 4, 241 at ¶ 5.

When Scott Bauer negotiated the lease with the Walters in the summer of 2004, he informed them that Wholesale Tool Outlet was his personal business. CP 220 at ¶ 4. He signed the lease in his personal capacity, and expressly denied being an agent of any third party. CP 233. There is no evidence that the Walters knew of the LLC prior to the execution of the lease. Likewise, there is no evidence that the Walters relied on the credit of Alice Bauer or even were aware of her existence prior to the execution of the lease.

In December, 2004, Scott Bauer failed to make a full monthly lease payment and subsequently abandoned the leased premises. On February 8, 2006, the Walters responded to Scott Bauer’s default by filing a Complaint in Pierce County Superior Court. The original Complaint names only Scott and “Jane Doe” Bauer, husband and wife, d/b/a Wholesale Tool Outlet, as defendants. CP 3. At some point after filing

the initial Complaint the Walters conducted a registered trade name search on the web site of the Arizona Secretary of State and discovered that the name “Wholesale Tool Outlet” was registered to Alice A. Bauer as owner. CP 103. In fact, Alice Bauer had applied to the Arizona Secretary of State to register the trade name “Wholesale Tool Outlet” in November 1996, prior to the formation of the LLC. CP 254-55. Alice Bauer renewed her registration of the trade name in 2001, but by that time there was only one Arizona business entity with the name Wholesale Tool Outlet—the LLC.¹ CP 254 at ¶ 8.

After discovering that Alice Bauer was the registered owner of the name Wholesale Tool Outlet, the Walters filed an Amended Complaint on May 4, 2006. The Amended Complaint names Alice Bauer as a defendant, and seeks judgment against her as Scott Bauer’s principal. CP 33-36. In particular, paragraph III of the Amended Complaint alleges in pertinent part as follows:

Alice A. Bauer is a resident of the State of Arizona, and according to the records of the office of the Secretary of State for Arizona, is the owner of the business known as Wholesale Tool Outlet. All actions set forth in this complaint by defendant Scott Bauer were . . . on behalf of Alice A. Bauer and as an agent for Alice A. Bauer, as the owner of the business known as Wholesale Tool Outlet.

¹ Alice Bauer has never had separate ownership of a business entity called Wholesale Tool Outlet. Between 1990 and 1999, she and her husband were co-owners of a proprietorship with that name. From 1999 to 2002, she and her husband conducted business as members of the LLC. The LLC continues to exist with Alice Bauer and Kenneth A. Bauer as members, but has ceased to engage in the wholesale tool business. CP 252-54.

CP 34.

On June 5, 2006, attorney Brian D. Lane accepted service of the Amended Complaint on behalf of both Scott Bauer and Alice Bauer. CP 59. The Answer prepared and filed by defendant's counsel on August 14, 2006 responds to the allegations in paragraph III as follows:

Answering paragraph III, defendants admit that Alice A. Bauer is a resident of Arizona. The paragraph is otherwise denied.

CP 68.

The Walters submitted Requests for Admission to attorney Lane on or about September 8, 2006. At the time the Requests for Admission were filed, trial was scheduled for January 10, 2007 and the discovery cutoff was almost two months away. CP 60. The Requests for Admission were formatted as a single document addressed to both Scott and Alice Bauer, and provided space for both defendants to sign the same response.

CP 75-77. Request for Admission No. 2 states as follows:

You are requested to admit that Alice A. Bauer is shown by the records of the Arizona Secretary of State and registered with the Secretary of State to be the owner of the business known as Wholesale Tool Outlet.

CP 76.²

² In fact, the only "record" of the Arizona Secretary of State attached as an exhibit to the Walters' Requests for Admission shows that Alice A. Bauer is the owner of the trade name "Wholesale Tool Outlet," not that she is the owner of a business called Wholesale Tool Outlet. CP 79. Alice Bauer's initial application for Registration of Trade Name is at CP 255.

Lane did not inform either Alice Bauer or her Arizona attorney T. Gerald Chilton that he had received the Requests for Admission. CP 313, 315. Lane also failed to submit a timely response to the Requests, and as a consequence, counsel for plaintiffs filed a Motion to Compel Discovery. After the Motion to Compel had been filed and served, Lane prepared and signed Defendants' Answers to Plaintiffs First Requests for Admission. CP 186-189. These Answers were provided to counsel for the Walters on or around November 10, 2006. CP 184.³ Regarding Request for Admission No. 2, the unverified answers state that:

Defendants admit that Alice A. Bauer is listed as owner of Wholesale Tool Outlet, LLC, an Arizona Limited Liability Company. The request is otherwise denied.

CP 187. Despite preparing these answers, Lane did not file any written opposition to the Motion to Compel.

The trial court granted the Motion to Compel after a hearing at which Lane appeared telephonically. CP 218, 263. The Order Regarding Discovery found that defendants had failed to submit a timely response to the Requests for Admission, and held that "those matters set forth in plaintiffs' requests for admissions . . . are deemed admitted." CP 263-64.

Shortly after filing their Motion to Compel, the Walters also filed for summary judgment. CP 183. Defendants submitted an Opposition to Summary Judgment and Cross-Motion for Summary Judgment, supported

³ Defendants' Answers to Plaintiff's First Requests for Admissions were not expressly dated by Lane, but bear the fax date of November 10, 2006 in the upper right corner of each page. CP 186-89.

by the declarations of Alice Bauer, Scott Bauer, and T. Gerald Chilton. CP 256, 252, 219, 240. Each of the declarations presented evidence supporting Alice Bauer's denial that she was an undisclosed principal with respect to Scott Bauer's execution of the lease, and each avowed that the LLC had sold its assets to Scott Bauer prior to the execution of the lease. In reply, the Walters emphasized that the deemed "admissions conclusively establish [] that Alice Bauer is the owner of the owner of a business known as Wholesale Tool Outlet." CP 267. Apart from the deemed admissions, the Walters presented no evidence that Alice Bauer was Scott Bauer's undisclosed principal. The trial court granted the Walters' motion, and entered judgment against Scott Bauer and Alice Bauer, jointly and severally, in the principal amount of \$54,274.08, plus interest and fees. CP 305. The trial court subsequently denied a Motion to Vacate brought by new counsel for Alice Bauer.

IV. SUMMARY OF ARGUMENT

The trial court abused its discretion by deeming Alice Bauer to have made certain admissions when 1) the Requests for Admission were not properly served, 2) the deemed admissions were interpreted by the court to pertain to a critical disputed question of fact, and 3) the Walters would not have been prejudiced if the court had not made the deemed admissions. Without the deemed admissions, no reasonable finder of fact could conclude that Alice Bauer was Scott Bauer's undisclosed principal, and the Walters' motion for summary judgment as against Alice Bauer necessarily fails.

Even if the trial court did not abuse its discretion by deeming Alice Bauer to have made admissions, it nonetheless erred in granting the Walters summary judgment. Properly understood, an admission that the records of the Secretary of State of Arizona show that Alice Bauer is the owner of Wholesale Tool Outlet is not tantamount to an admission that Alice Bauer owns the Wholesale Tool Outlet, especially not a proprietorship doing business under that name in Washington. By misconstruing the admissions and ignoring declarations establishing the existence of a genuine issue of material fact concerning whether Alice Bauer was Scott Bauer's principal, the trial court committed reversible error.

V. ARGUMENT

A. **The trial court abused its discretion in making the deemed admissions**

1. Standard of review for discovery rulings

A trial court's rulings pertaining to discovery are reviewed for abuse of discretion. *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 777, 819 P.2d 370 (1991). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The Court of Appeals will not disturb a trial court's ruling on a discovery matter without a showing of prejudice to the party seeking review. *Doe*, 117 Wn.2d at 772.

Rulings on admissions under CR 36 are broadly related to discovery, and hence are subject to abuse-of-discretion review. *Santos v. Dean*, 96 Wn. App. 849, 857-58, 982 P.2d 632 (1999). In *Santos*, the Court of Appeals analyzed whether a trial court erred by granting an extension of time with which to respond to requests for admission. As part of its analysis, the Court of Appeals articulated a general framework relevant for “deciding an[y] abuse of discretion question” relating to CR 36:

[an] admission that otherwise would result from a failure to make timely answer should be avoided when to do so will aid in the presentation of the merits of the action and will not prejudice the party who made the request. Under this test, the court answers two questions: (1) whether permitting the extension subserves the presentation of the merits of the case; and (2) whether the extension will prejudice the opposing party

Santos, 96 Wn. App. at 858-59 (internal citations omitted) (deducing two-part test from the language of CR 36(b)). Application of this test and its underlying rationale, as well as the more general abuse of discretion standard to the facts of this case demonstrates that the trial court erred by deeming Alice Bauer to have made the requested admissions.

2. The Requests for Admission were not properly served

As a preliminary matter, in order for requests for admission to be deemed admitted, they must first be properly served. 7 *Moore’s Federal Practice 3d*, §36.03(1); *Freed v. Plastic Packaging Materials, Inc.*, 66

F.R.D. 550 (E.D. Pa. 1975).⁴ Here, a single set of requests for admission was addressed to both Scott Bauer and his co-defendant Alice Bauer. There is no indication in the record that anything other than a single set of these requests was served on Alice Bauer's former attorney. Discovery requests are required to be served upon each of the parties. CR 5(a). A deemed admission by a co-defendant does not bind the other defendants. *Vecerra v. Asher*, 921 F. Supp. 1538, 1544 (S.D. Tex. 1999). While this is a technical requirement, it should be strictly followed by a plaintiff seeking to rely on the harsh remedy of deeming essential matters admitted due to an opposing attorney's neglect.

3. Making the deemed admissions prevented resolving the case on its merits.

The purpose of CR 36 is to “obtain admissions of facts as to which there is no real dispute and which the adverse party can admit cleanly, without qualifications.” *Reid Sand & Gravel Inc. v. Bellevue Properties*, 7 Wn. App. 701, 704, 502 P.2d 480 (1972) (citing *Weyerhaeuser Sales Co. v. Holden*, 32 Wn.2d 714, 726, 203 P.2d 685 (1949)). “It is not a proper use of CR 36 to request an adversary to admit, in effect, the truth of the assertion that he should lose the lawsuit.” *Id.* Since “requests for admissions as to central facts in dispute are beyond the proper scope of the

⁴ “Where a state rule parallels a federal rule, analysis of the federal rule may be looked to for guidance, though such analysis will be followed only if the reasoning is found to be persuasive.” *Santos*, 96 Wn. App. at 859. Fed. R. Civ. P. 36 and CR 36 are substantially identical.

rule,” a ruling that such requests be deemed admitted does not properly respect the importance of resolving cases on their merits. *Id.*

On its face, the Walters’ request to Alice Bauer that she admit she is “shown by the records of the Arizona Secretary of State . . . to be the owner of business known as Wholesale Tool Outlet” (Request for Admission No. 2) is not equivalent to asking her “to admit . . . the truth of the assertion that [s]he should lose the lawsuit.” *Reid*, 7 Wn. App. at 704. As explained below in Section V.B.2, admitting that one is shown to be a certain thing in official records is not the same as admitting that one is in fact a certain thing. However, the trial court implicitly treated the deemed admission as concerning Alice Bauer’s actual status as owner of Wholesale Tool Outlet. Had it not done so, there would have been no basis for its judgment that Alice Bauer was Scott Bauer’s undisclosed principal. Accordingly, the trial court effectively required Alice Bauer to admit the assertion that she should lose the lawsuit by deeming her to have admitted that she is in fact the owner of the Wholesale Tool Outlet. This ruling improperly disregarded the purpose of CR 36.

4. The Walters could show no prejudice from allowing a late response to their Request for Admissions.

Counsel for the Walters apparently received Defendants’ Answers to Plaintiffs’ First Requests for Admissions on or around November 10, 2006, but in no event later than November 20, 2006. CP 184, 186-89. This late submission was in effect a request for an extension of the original deadline for the response, which was October 11, 2006 (thirty

days after date of service) CP 74. The Walters can not show that there would have been any prejudice to themselves had the trial court granted this extension.

Washington courts have adopted a standard for prejudice regarding admissions that was first articulated by federal courts interpreting Fed. R. Civ. Pro. 36(b). *See, e.g., Santos*, 96 Wn. App. at 859 (citing to *F.D.I.C. v. Prusia*, 18 F.3d 637, 640 (8th Cir. 1994)). Under this standard,

[t]he prejudice contemplated by Rule 36(b) relates to the difficulty a party may face in proving its case because of the sudden need to obtain evidence required to prove the matter that had been admitted. The necessity of having to convince the trier of fact of the truth of a matter erroneously admitted is not sufficient. Likewise, preparing a summary judgment motion in reliance upon an erroneous admission does not constitute prejudice.

Santos, 96 Wn. App. at 859 (emphasis added). The one-month to six-week delay experienced by the Walters, occurring as it did before the discovery deadline of November 29, 2006, cannot meet this standard. CP 60. There is simply no evidence to support a claim that the delay made it more difficult for the Walters to prove their case. It follows that there would have been no prejudice to the Walters from allowing Defendants to submit their Answers to Plaintiffs' First Requests for Admissions on or around November 10, 2006.

On the other hand, the trial court's decision to make the deemed admissions—combined with the court's interpretation of the weight of the admissions—was highly prejudicial to Alice Bauer. By denying defendants an extension to submit their answers, and by treating the

resulting deemed admissions as determinative of Alice Bauer's status as Scott Bauer's principal, the trial court effectively doomed Alice Bauer to lose her lawsuit.

5. The trial court abused its discretion by making the deemed admissions, and consequently improperly granted summary judgment.

By not insisting on proper service of the Requests for Admission, by allowing and construing the Requests for Admission to go to the heart of the dispute in this lawsuit in so far as it concerns Alice Bauer, and by deeming the Requests for Admission to have been admitted despite the lack of prejudice to the Walters from allowing an extension for Alice Bauer to respond (and despite the grave prejudice to Alice Bauer from denying the extension), the trial court abused its discretion. If this abuse of discretion is reversed, the trial court's Order on Motion for Summary Judgment also falls in so far as it pertains to Alice Bauer, because the deemed admissions are the only evidentiary basis for the conclusion that Alice Bauer is responsible as an undisclosed principal for Scott Bauer's default on the lease.

B. The trial court erred in granting summary judgment

1. Standard of Review of Order Granting Summary Judgment.

Appellate court review of a summary judgment order is de novo. *Morton v. McFall*, 128 Wn. App. 245, 252, 115 P.3d 1023 (2005). When reviewing an order granting summary judgment, this Court engages in the same inquiry as the trial court. *Des Moines Marina Ass'n v. City of Des Moines*, 124 Wn. App. 282, 291, 100 P.3d 310 (2004), *review denied*, 154

Wn.2d 1018 (2005). Summary judgment is properly granted only where the pleadings and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). When considering a motion for summary judgment, the Court must view the evidence and the reasonable inferences from the evidence in the light most favorable to the non-moving party. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

2. The Trial Court erred in granting the Walters summary judgment based on the deemed admissions.

The Declarations of Alice Bauer, Scott Bauer and T. Gerald Chilton, Jr. submitted in opposition to Plaintiffs' Motion for Summary Judgment directly contested the Walters' assertion that Alice Bauer was Scott Bauer's undisclosed principal in his lease with the Walters. CP 252-55, 219-39, 240-51. This creates an issue of fact as to whether Alice Bauer was liable on the lease. In order to reach the conclusion that there was no genuine issue of material fact, the trial court had to ignore this evidence in reliance on the deemed admissions. Even if the trial court's Order Regarding Discovery was not an abuse of discretion, the trial court erred in holding that there was no genuine issue of material fact concerning Alice Bauer's relationship to Scott Bauer and his d/b/a "Wholesale Tool Outlet."

The critical request for admission is Request for Admission No. 2 which states as follows:

You are requested to admit that Alice A. Bauer is shown by the records of the Arizona Secretary of State and registered with the Secretary of State to be the owner of the business known as Wholesale Tool Outlet.

CP 76. This request for admission, even if deemed admitted, is only conclusive as to what is shown by the records of the Arizona Secretary of State. It is not conclusive as to the underlying contested issue of Alice Bauer's ownership of "Wholesale Tool Outlet" doing business in Washington.

The Washington State Supreme Court addressed a similar circumstance in *Salvino v. Aetna Life Ins. Co.*, 64 Wn.2d 795 (1964). In *Salvino*, a request for admission was made "[t]hat the plaintiff, in making application for total disability benefits, *stated* that his claimed permanent total disability commenced on April 24, 1961" (emphasis in original). The plaintiff neglected to answer the requests for admission and they were deemed admitted. In spite of an opposing affidavit from the plaintiff indicating that he had become disabled prior to that date, the trial court granted the defendant a summary judgment relying on the deemed admission as having established the first date of disability as April 24, 1961. In reversing the summary judgment, the Washington Supreme Court reasoned as follows:

The answer to defendant's contention is found in *Phillips v. Richmond*, 59 Wn.2d 571, 369 P.2d 299 (1962). Under circumstances similar to those of the instant case, the court said:

'It is obvious . . . that the only facts to be deemed admitted were that certain out-of-court admissions had been made by respondent. An admission that such statements had been made would *not* be an admission that those statements were

true. . . . Under Rule 36, as long as the party who is deemed to have admitted making such statements has, by his answer, denied the *truth* of such statements, a material issue as to the facts contained in such statements remains. When a material fact is in issue, it is improper to grant summary judgment, because the party is entitled to a trial to determine what the truth is with regard to such factual issue.'

Plaintiff admitted he made out-of-court admissions. He did not admit that the facts contained in those admissions were true. Therefore, a genuine issue as to this material fact exists.

Salvino, supra, at 797.

Here, the deemed admission was on its face an admission as to what was reflected in the records of the Arizona Secretary of State. There was no request for admission that Alice Bauer was in fact the owner of Wholesale Tool Outlet doing business in Washington. As a result, the issue of Alice Bauer's ownership interest was not conclusively established by the admission. In fact, Defendants' Answer to the Amended Complaint expressly denies that Alice Bauer "is the owner of the business known as Wholesale Tool Outlet." CP 68. This denial is reiterated in Defendants' Answers to Plaintiffs' First Requests for Admissions, which state in pertinent part that "[a]t all times relevant to this action, Scott Bauer acted on his own behalf as a sole proprietor. He is the sole owner of his business, Wholesale Tool Outlet." CP 188, Answer to RFA No. 5. In addition, the Declarations of Alice Bauer, T. Gerald Chilton, and Scott Bauer submitted in opposition to the Motion for Summary Judgment all contain basically the same denial. CP 252-55, 219-39, 240-51.

Under *Salvino* and *Phillips*, the evidence showing that Alice Bauer was not in fact the owner of Scott Bauer's Wholesale Tool Outlet creates a genuine issue of fact about her ownership status, even if she is deemed to have admitted that she is "shown . . . to be the owner of the business known as Wholesale Tool Outlet." CP 76. This factual dispute is clearly material, because Alice Bauer could not be liable for Scott Bauer's actions unless she actually was his undisclosed principal. *See, e.g., Matsumura v. Eilert*, 74 Wn.2d 362, 363, 444 P.2d 806 (1968) (noting that "[b]efore the sins of an agent can be visited upon his principal, the agency must first be established"). The existence of a genuine issue of material fact renders summary judgment against Alice Bauer inappropriate.

VI. REQUEST FOR ATTORNEYS FEES

Under the terms of the lease, in the event of any court action between the lessor and lessee concerning money due, the losing party must pay the prevailing party a reasonable sum for attorneys fees. CP 15, ¶ 26. If Alice Bauer prevails on this appeal, she should be awarded her reasonable attorneys fees incurred on appeal as provided by Paragraph 26 of the lease. An award of fees will be proper even if Alice Bauer prevails by raising a genuine issue of material fact as to whether she was a party to the lease. *See, e.g., Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004) (noting that "[a]ttorneys fees and costs are awarded

to the prevailing party even when the contract containing the attorneys fee provision is invalidated”).

VII. CONCLUSION

The trial court abused its discretion by deeming Alice Bauer to have admitted that she was the owner of Wholesale Tool Outlet. Without this deemed admission no reasonable finder of fact could conclude that Alice Bauer was Scott Bauer’s undisclosed principal when he signed the lease with the Walters. As a result, the Walters’ motion for summary judgment as against Alice Bauer fails if the admissions are withdrawn.

Even if the trial court did not abuse its discretion by deeming Alice Bauer to have made admissions, it nonetheless erred in granting the Walters summary judgment. An admission that certain records show that Alice Bauer is the owner of Wholesale Tool Outlet is not the equivalent of an admission that Alice Bauer in fact owns the Wholesale Tool Outlet. This later conclusion is denied in Defendants’ Answer to the Amended Complaint, in their Answers to Plaintiffs’ First Requests for Admissions, and in the Declarations of Alice Bauer, Scott Bauer, and T. Gerald Chilton submitted in opposition to the Walters’ Motion for Summary Judgment. Under controlling Washington precedent, these denials create a genuine issue of material fact concerning Alice Bauer’s ownership of Wholesale Tool outlet that requires reversal of the trial court’s grant of summary judgment as against Alice Bauer. As the prevailing party on this appeal, Alice Bauer will be entitled to her reasonable attorneys fees under the terms of the lease.

RESPECTFULLY SUBMITTED this 12th day of April, 2007.

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BY
OFFICER

ALLICA A. BAUER,
Appellant,
v.
JACK WALTER and VIVIAN
WALTER,
Respondent.

NO. 35885-9-II
CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of April, 2007, I caused all parties hereto to be served with the *Opening Brief of Appellant Alice A. Bauer* and this *Certificate of Service* by directing delivery to the following persons by the means stated:

By ABC Legal Messenger for delivery on or before April 13, 2007, to Attorney for Respondents:
Ronald S. Ripley
Lozier & Ripley, P.S.
1111 S. Fawcett Ste. 102
Tacoma Washington 98402

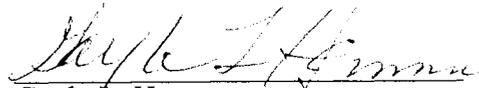
By Federal Express overnight mail for delivery on April 13, 2007, to Attorney for Scott Bauer:
Bryan D. Lane
Lane Law Firm, PLLC
114 W. Magnolia 4th Floor
Bellingham Washington 98225

By ABC Legal Messenger for delivery on April 12, 2007, to:
Clerk of the Court
Washington State Court of Appeals, Division II
950 Broadway, #300
Tacoma, WA 98402

ORIGINAL

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

DATED this 12th day of April, 2007, at Tacoma, Washington.


Gayle L. Herrmann

CERTIFICATE OF SERVICE - 2