

63379-1

63379-1

NO. 63379-1

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

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MARY BYRD,

Plaintiff/Respondent,

v.

BARMOR TEMPORARIES, INC., a Washington corporation, d/b/a  
BARMORE PERSONNEL, and CAROL BARMORE and JOHN DOE  
BARMORE, wife and husband, and the marital community thereof,

Defendants/Appellants.

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**APPELLANTS' OPENING BRIEF**

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## **I. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The trial court erred in granting Respondent Mary Byrd's (hereinafter "Byrd") Motion for Summary Judgment entered on December 16, 2008.

2. The trial court erred in denying Appellant Barmore Temporaries, Inc.'s and Carol Barmore's (collectively referred to as "Barmore") Motion for Reconsideration of Order Granting Respondent's Motion for Summary Judgment entered on January 20, 2009.

### **B. Issues Pertaining to Assignments of Error**

1. The trial court determined on Byrd's Motion for Summary Judgment that Barmore willfully withheld her commission payments when she resigned from Barmore on April 20, 2007. The question of whether the employer willfully withheld wages is a question of fact. Moreover, an employer does not willfully withhold wages if a bona fide dispute exists regarding the amount of wages. Barmore and Byrd disputed the amount of her commission at the time of her resignation and disputed when her commission payments were due. Byrd claimed that she was owed exactly \$18,000 in unpaid commissions and would not accept payment of anything less than that amount. She further claimed that her commissions were due regardless of when her customers paid Barmore. Barmore's

records showed that Byrd was owed much less than \$18,000 in commissions. Barmore also contends that Byrd's commissions were not due until her customers paid Barmore and that not all of her customers had paid at the time of her resignation. Is there a question of fact as to whether Barmore willfully withheld Byrd's commission payments?

2. The trial court determined on Byrd's Motion for Summary Judgment that she was entitled to \$18,000 in unpaid commissions and an additional \$18,000 in double damages. Byrd presented no evidence that she was owed \$18,000 in unpaid commission. Barmore presented evidence that Byrd was owed less than \$18,000 in commission payments. Is there a question of fact as to the amount of Byrd's claimed unpaid commissions?

## **II. STATEMENT OF FACTS**

Barmore provides temporary and permanent staffing services to business throughout western Washington. It matches employers to employees in a variety of industries, including office support, warehouse support, light industrial and construction.<sup>1</sup>

In February 2006, Byrd signed an employment contract to act as a sales representative for Barmore and remained in that position until her

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<sup>1</sup> CP 25.

resignation on April 20, 2007. Under the terms of her employment contract, Barmore paid Byrd a base salary, plus a commission on the customers she secured for Barmore.<sup>2</sup> Byrd's base salary was the same each pay period (\$1,730.77 per 80 hours of work).<sup>3</sup> Unlike her base salary, Byrd's commission payments varied each month and were calculated using a complicated commission structure that is set forth in her employment contract.<sup>4</sup>

Under the terms of her employment contract, Byrd's commissions were based on Barmore's gross profit margin, which is calculated by taking the gross sales minus the cost of the sale. The cost of the sale is calculated by multiplying the base pay by the burden (*i.e.*, the cost for employee background checks, drug tests, etc.) and adding workman's compensation costs. The gross profit is the difference between the burden and the cost of the sale.<sup>5</sup> Finally, the commissions range from 15% to 35% based on the amount of the gross profit.<sup>6</sup> During the period of her relevant employment with Barmore, Byrd's commission was 15% of the

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<sup>2</sup> CP 17-20.

<sup>3</sup> CP 34.

<sup>4</sup> CP 20.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

gross profit.<sup>7</sup> For instance, the gross profit for the month of January 2007 was \$44,275.71 and therefore, Byrd's commission payment was \$6,641.36.<sup>8</sup>

Barmore and Byrd disagreed over when her commission payments were due.<sup>9</sup> Byrd claims that: "[her] commissions were based on sales to accounts [she] procured and/or serviced regardless of when the receipts for those sales were received."<sup>10</sup> Barmore claims Byrd's commissions were "expressly contingent upon the customer actually paying Barmore."<sup>11</sup> Byrd's employment contract is silent as to when her commission payments are due.<sup>12</sup> This contributed to Barmore and Byrd's disagreement over her commissions following her resignation in April 2007 because at the time Byrd resigned, not all of her customers had paid Barmore.<sup>13</sup>

Prior to her resignation and during the first quarter of 2007, Barmore paid Byrd her base salary, plus \$10,767.49 in commissions in

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<sup>7</sup> CP 56-63.

<sup>8</sup> CP 62.

<sup>9</sup> CP 20.

<sup>10</sup> CP 15.

<sup>11</sup> CP 26.

<sup>12</sup> CP 30-32.

<sup>13</sup> *Id.*, CP 82-84.

February 2007 and \$8,372.23 in commissions in March 2007.<sup>14</sup> The commission payments were for commissions earned in December 2006 and January 2007.<sup>15</sup> In April 2007, Barmore paid Byrd her base salary. Byrd resigned from Barmore on April 20, 2007.<sup>16</sup>

After her resignation, Byrd claimed she was not paid her full January 2007 commission, and that she was entitled to an additional \$18,000 in unpaid commissions for 2007.<sup>17</sup> Barmore disagreed with Byrd's claim, explained that it was still waiting on payments from some of her customers and contends that it was not required to pay Byrd a commission until it received payment from her customers.<sup>18</sup>

In April 2007, Barmore sent Byrd an additional commission check in the amount of \$7,171.01.<sup>19</sup> Byrd again claimed that she was owed an additional \$18,000.<sup>20</sup> However, Barmore was again still waiting on payments from Byrd's customers.

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<sup>14</sup> CP 34 & 46 (Representing gross commissions).

<sup>15</sup> *Id.*

<sup>16</sup> CP 34.

<sup>17</sup> CP 82 & 83.

<sup>18</sup> CP 26, 46-47 & 82-84.

<sup>19</sup> CP 35.

<sup>20</sup> CP 46 & 47.

By November 2007, Byrd's costumers had paid Barmor and Barmore sent Byrd a check in the amount of \$8,020.44 for her 2007 commissions.<sup>21</sup>

After receiving the November 2007 check, Byrd insisted that she was still owed an additional \$18,000 in commissions.<sup>22</sup> Barmore agreed that Byrd was owed additional commissions, but according to its records believed she was owed \$13,564.21.<sup>23</sup> Barmore made several offers to pay Byrd what it believed she was owed, but Byrd refused to accept payment of anything less than exactly \$18,000.<sup>24</sup>

Unable to agree on her commissions, Byrd hired counsel and Barmore did the same.

To resolve their dispute, Barmore's counsel, John Young, had at least three conversions with Byrd's counsel, Robie Russell, regarding Byrd's claim that she was entitled to \$18,000 in commissions.<sup>25</sup> During the first conversation in June of 2008, Mr. Young told Mr. Russell that

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<sup>21</sup> CP 26, 34-35 & 82-84.

<sup>22</sup> CP 47.

<sup>23</sup> CP 26. In arriving at \$13,564.21, Barmore added the total of Byrd's 2007 commissions, which it calculated at \$28,755.36 and subtracted the April 2007 commission of \$7,171.01, and the November 2007 commission of \$8,020.44, for a remaining amount of \$13,564.21.

<sup>24</sup> CP 84 & 103.

<sup>25</sup> CP 85-87.

Barmore's records did not reflect that Byrd was owed \$18,000 and asked Mr. Russell to explain how Byrd arrived at that amount. Mr. Young also told Mr. Russell that Barmore wanted to pay Byrd what she was due, but that it would help considerably if he could provide an accounting of what she felt she was due so that Barmore could verify and pay the proper amount. During the conversation it was noted that Byrd was paid on a commission basis so calculating the amount due necessarily required her input to describe the transactions on which she felt she was due a commission. Mr. Russell told Mr. Young that he would obtain the requested information and provide it to him.<sup>26</sup>

Shortly after Mr. Young's conversation with Mr. Russell, Barmore sent Mr. Young a check for \$13,564.21, which stated on its face that it "covered all commissions owed."<sup>27</sup> As the check purported to represent payment in full and was approximately \$5,500 less than the amount Byrd claimed she was owed, Mr. Young held it pending receipt of the documentation promised by Mr. Russell. If Mr. Russell provided the

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*, CP 37.

documentation showing that Byrd was entitled to \$18,000 in commissions, the check would have to be returned and reissued for the greater amount.<sup>28</sup>

Mr. Russell and Mr. Young had a second conversation several weeks later. Mr. Young reminded Mr. Russell that Barmore wanted to pay Byrd and that it was only waiting on the documentation Mr. Russell said he would produce to resolve the matter. Mr. Young told Mr. Russell that Barmore felt a lesser amount was due and that it was not willing to pay more than its records indicated was due without further substantiation from Byrd. Mr. Russell again said that he would obtain the necessary information and get back to Mr. Young. Mr. Young was still waiting on the information from Mr. Russell when he filed for summary judgment.<sup>29</sup>

On October 15, 2008, Mr. Russell called Mr. Young to discuss the matter again. He left a message, but when Mr. Young returned his call Mr. Russell said that he was too busy to talk at that moment and would call back when he was free. He never did call back.<sup>30</sup>

When Barmore received the motion for summary judgment without further word from Mr. Russell, Mr. Young assumed that he did

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<sup>28</sup> CP 85-87.

<sup>29</sup> *Id.*, CP 37.

<sup>30</sup> CP 85-87.

not intend to ever provide substantiation for the \$18,000 claimed by Byrd and so Mr. Young sent him Barmore's check for \$13,564.21.<sup>31</sup>

### **III. AUTHORITY AND ARGUMENT**

#### **A. There are issues of fact regarding Byrd's commissions, which precluded entry of summary judgment.**

An employer is liable for damages under RCW 49.52.050 and double damages under RCW 49.52.070 if the employer willfully withholds the employee's wages. The question of whether the employer willfully withheld wages is a question of fact.<sup>32</sup> Moreover, an employer does not willfully withhold wages if a bona fide dispute exists regarding the amount of wages. Under Washington law, it is a question of fact if there is a bona fide dispute regarding wages:

The critical determination in a case for exemplary damages is whether the employer's failure to pay wages was willful. The nonpayment of wages is willful when it is the result of a knowing and intentional action and not the result of a bona fide dispute. A bona fide dispute is one that is fairly debatable. An employer's genuine belief that he is not obligated to pay certain wages precludes the withholding of wages from falling within the operation of RCW 49.52.050(2) and 49.52.070. Ordinarily, the issue of whether an employer acts 'willfully' for the purposes of RCW 49.52.070 is a question of fact.<sup>33</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> See *Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 660, 717 P.2d 1371 (1986) holding that: "the question of whether the employer willfully withheld money owed, however, is a question of fact."

<sup>33</sup> *Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn.App. 52, 78-79, 199 P.3d 991 (2008). See also, *Chelan County Deputy Sheriffs' Ass'n v. County of Chelan*, 109 Wn.2d

In *Lillig v. Becton-Dickinson*,<sup>34</sup> an employee who worked as a salesman was asked to resign. He agreed, provided that he would still receive his bonus for the year, which the employer's sales manager promised to him in writing. The employee resigned but did not receive his expected bonus. He filed suit for breach of contract and defamation.

The trial court found the promise to pay the bonus was enforceable and the jury awarded the employee damages for the bonus and his libel claim. However, the employee's motions for exemplary damages under RCW 49.52.070 and for attorney fees were denied because there was a bona fide dispute regarding the employee's wages:

**Plaintiff argues this court cannot refuse the statutory remedy of RCW 49.52.070 if an employer refuses to pay money it admittedly owes to an employee. The question of whether the employer willfully withheld money owed, however, is a question of fact; our review is limited to whether there was substantial evidence to uphold the court's decision. We find the evidence sufficient to uphold the decision.**<sup>35</sup>

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282, 300, 745 P.2d 1 (1987) holding that: "It is a question of fact if there is a bona fide dispute [regarding wages]."

<sup>34</sup> *Lillig, supra*.

<sup>35</sup> *Id.*, at 660 (emphasis added and citations omitted.) See also *Ebling v. Gove's Cove, Inc.* 34 Wn. App. 495, 500-01, 663 P.2d 132 (1983) holding that: "An employer does not willfully withhold wages within the meaning of RCW 49.52.070 where he has a bona fide belief that he is not obligated to pay them. Whether Gove's had a genuine belief was a question of fact requiring the trial judge to weigh the credibility of the evidence."

In *Chelan County Deputy Sheriffs' Ass'n v. County of Chelan*,<sup>36</sup> the court reversed the award of double damages because the parties' conflicting testimony regarding wages constituted a bona fide dispute:

Goff contends that the jury's finding that the City did not honestly believe that he had been paid all compensation to which he was legally entitled was supported by testimony. Specifically, two individuals in City government during Goff's employment, Mayor Robert Bundy and City Council Member Cathy Teague, testified that they believed that Goff should have been paid overtime.

This testimony, however, constitutes nothing more than a statement of personal opinion. The City Council, as a body, had the authority to determine how much compensation employees would receive. There is no evidence in the record whatsoever that while Goff was employed, the City Council reached a consensus that he had not been paid all the compensation to which he was legally entitled. Two other individuals who served as city council members during Goff's employment, Joseph Martella and Vern Patton, testified that they did not think that Goff was entitled to overtime compensation. If anything, this testimony coupled with that discussed above, would support a finding that there was indeed a bona fide dispute over Goff's compensation.<sup>37</sup>

Barmore did not willfully withhold Byrd's commissions. There was a bona fide dispute over the amount she claimed she was owed and a dispute as to when her payments were due. Byrd claims her commission payments were due regardless of when her customers paid. Barmore contends they were not due until after her customers paid. Additionally,

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<sup>36</sup> *Chelan County Deputy Sheriffs' Ass'n, supra*.

<sup>37</sup> *Id.*, at 302.

Mr. Russell told Mr. Young repeatedly that that he was sending information supporting Byrd's claim that she was owed \$18,000. Mr. Young relied on Mr. Russell's representations and was waiting on the information he said he was sending. That information has never been produced, even in support of Byrd's motion for summary judgment.<sup>38</sup>

It was Byrd's burden on summary judgment to prove that Barmore willfully withheld her commissions.<sup>39</sup> She did not meet her burden. She claimed that she was owed \$18,000 and would not accept payment of less than \$18,000.<sup>40</sup> She said that he would provide information that supported her claim. Barmore was waiting for the information, when Byrd filed for summary judgment.

There is a factual dispute over the amount of Byrd's commissions and therefore, a question of fact as to whether Barmore willfully withheld her commissions. The Court should have denied Byrd's motion for summary judgment.

**B. Byrd failed to submit any evidence that she was owed \$18,000 in commissions.**

There is nothing in the record to support the trial court's finding

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<sup>38</sup> CP 85-87.

<sup>39</sup> *Duncan*, 148 Wn.App. at 60; *Hash v. Children's Orthopedic Hosp. & Medical Ctr.*, 49 Wn. App. 130, 132, 741 P.2d 584 (1987).

that Byrd is entitled to \$18,000 in commissions. Byrd did not submit *any* evidence supporting her claim for \$18,000 in unpaid commissions. She simply states in her first declaration that: “[u]pon termination, I was owed my base salary for April, 2007, plus my commissions for the months of February, March, and April, 2007, for a total of \$18,000.00.”<sup>41</sup> She cites no factual basis for her claim; does not explain her calculation or provide any documentation to support her claim. It is well settled that: “[u]nsupported conclusional statements alone are insufficient to prove the existence or nonexistence of issues of fact.”<sup>42</sup>

Byrd’s second declaration is also conclusory and offers no further support for her claim. Byrd states in her second declaration that: “[her] running spreadsheet indicated that I was to receive \$8,000.00 for February commissions, which should have been paid to me on April 20, 2007, but was not. I should have also received \$9,000.00 in commission for March, 2008 and \$9,000.00 in commissions for April, 2008.”<sup>43</sup>

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<sup>40</sup> CP 82-84.

<sup>41</sup> CP 15. Barmore disputes that all of Byrd’s commissions were due upon her resignation. As discussed above, Barmore contends it was not required to pay Byrd her commissions until it received payment from her customers. Not all of Byrd’s customers had paid Barmore at the time of her resignation.

<sup>42</sup> *Hash*, 49 Wn. App. at 132. See *Marks v. Benson*, 62 Wn. App. 178, 182, 813 P.2d 180 (1991); *Brown v. Child*, 3 Wn. App. 342, 343, 474 P.2d 908 (1970).

<sup>43</sup> CP 46-47.

Although Byrd states that she kept a spreadsheet identifying her commissions, she never produced it or described what was on it, *i.e.* the identity of her customers, the amount they paid and the dates they paid. Byrd also states that she emailed commission numbers to Carol Barmore, Sagiv Barmore and Isaac Barmore.<sup>44</sup> However, she never produced the emails or described the content of the emails.

The only purported evidence Byrd submitted in support of her claim are two declarations that essentially repeat the allegations in her complaint. She concludes that she is owed \$18,000 in commissions without any factual support. This is insufficient to establish that she is entitled to judgment in that amount as a matter of law:

We have repeatedly warned summary judgment exists to examine the sufficiency of legal claims and narrow issues, not as an unfair substitute for trial. As such summary judgment is plainly inappropriate unless the moving party meets its initial burden to show there is no genuine issue of material fact and it is entitled to judgment as a matter of law.<sup>45</sup>

Byrd's unsupported conclusory statements do not support a summary judgment award in the amount of \$18,000. Moreover, although not required, Barmore submitted evidence disputing Byrd's claim that she

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<sup>44</sup> CP 46.

<sup>45</sup> *Police Guild v. City of Seattle*, 151 Wn.2d 823, 847, 92 P.3d 243 (2004) (citations omitted.); *See also Graves v. P. J. Taggares Co.*, 94 Wn.2d 298, 302, 616 P.2d 1223 (1980 holding that: "...if the moving party does not sustain that burden, summary

is entitled to \$18,000 in unpaid commissions.<sup>46</sup> Accordingly, summary judgment in the amount of \$18,000 should not have been entered.

#### IV. CONCLUSION

There is a bona fide dispute between the parties regarding the amount of Byrd's commissions and therefore, a question of fact as to whether Barmore willfully withheld Byrd's wages. Moreover, Byrd did not present any evidence that she is entitled to \$18,000 in commissions – only her conclusory statements which are insufficient to support summary judgment. For the above reasons, Barmore submits the trial court erred in granting Byrd's motion for summary judgment. Barmore requests this Court to reverse the trial court's order of summary judgment and remand this matter with directions that this case be tried.

DATED this 13<sup>th</sup> day of July, 2009.

YOUNG deNORMANDIE, P.C.

By   
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Luke M. EaRiviere, WSBA #32039  
Attorneys for Defendant/Appellants

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judgment should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials.”

<sup>46</sup> CP 25-37, 82-84.

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BARMORE PERSONNEL, and CAROL BARMORE and JOHN DOE  
BARMORE, wife and husband, and the marital community thereof,

Defendants/Appellants

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**CERTIFICATE OF SERVICE**

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**ORIGINAL**

I, Karrie R. DeWall, certify under penalty of perjury according to the laws of the state of Washington, that the following is true and correct.

I am a paralegal at Young deNormandie, P.C., counsel to Defendants/Appellants. I am over the age of eighteen years old and competent to testify to all matters herein.

On July 13, 2009 I caused a copy of the following to be served on the following recipient via the method indicated:

1. Appellants' Opening Brief.

Robie G. Russell  
76 South Main Street  
Seattle, WA 98104-2514  
*Attorney for Plaintiff/Respondent*

Mail       Legal Messenger  
 Fax       Federal Express

DATED this 13<sup>th</sup> day of July, 2009.

  
\_\_\_\_\_  
KARRIE R. DEWALL