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63379-1

NO. 63379-1

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

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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STATE OF WASHINGTON
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APPELLANTS' REPLY BRIEF

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I. REPLY

Byrd contends there is ample evidence to support the trial court's order granting her summary judgment. The record and Byrd's declarations demonstrate otherwise.

There are issues of fact regarding Byrd's claim that Barmore willfully withheld a total of \$18,000.00 in base salary and commissions for February, March and April 2007. There are also no findings of fact or conclusions of law to support the trial court's attorney fee award. This Court should reverse the trial court's order granting summary judgment and remand this matter for a trial on the merits.

A. Byrd's complaint is not evidence that she was owed \$18,000.00 in compensation.

Byrd relies on her complaint as "ample unrefuted evidence" that Barmore willfully withheld \$18,000.00 in base salary and commissions.¹ Allegations in a complaint are not evidence if they are denied: "Averments in a pleading to which a responsive pleading is required are admitted when not denied."²

In its answer, Barmore denied the allegations in Byrd's complaint that it willfully withheld a total of \$18,000.00 in base salary for April

¹ Respondent's Brief, at 12.

² CR 8(d) (emphasis added).

2007 and commissions for February, March and April 2007.³ The controverted allegations contained in Byrd's complaint do not constitute admissible "evidence" the trial court could consider in support of her claim.⁴

B. Byrd's declarations confirm that she was not owed \$18,000.00 in unpaid compensation.

In resolving a motion for summary judgment, the court must consider all facts submitted and make all reasonable inferences from the facts in the light most favorable to the nonmoving party.⁵ In reviewing a grant of summary judgment, the appellate court engages in the same inquiry as the trial court.⁶ Here, viewing the record and Byrd's declarations in a light most favorable to Barmore demonstrates that the trial court erred in granting her summary judgment.

In a September 8, 2008 declaration filed in support of her summary judgment motion, Byrd claimed she was owed a total of \$18,000.00 in base salary for April 2007 and commissions for February, March and

³ CP 105-108.

⁴ On a motion for summary judgment, the trial court can only consider admissible evidence. *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 306, 151 P.3d 201 (2006) (citations omitted).

⁵ *Scott Galvanizing v. Northwest Enviroservices*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993).

⁶ *Id.*

April 2007 when she terminated her employment with Barmore:

I terminated my employment with Barmore on April 20, 2007. Upon 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 \$18,000.00.⁷

In opposition to Byrd's motion, Barmore submitted evidence showing that it paid Byrd's April 2007 base salary in the amount of \$3,461.54.⁸ Barmore also submitted evidence that it paid Byrd \$8,020.44 in November 2007.⁹ In reply to Barmore's opposition, Byrd changed her story regarding what Barmore had paid her.

Byrd did not dispute that Barmore paid her base salary for April 2007 and in a November 2, 2008 declaration, admitted that Barmore paid her February 2007 commission in full:

Carol Barmore sent me a check in November 2007 for \$7,406.87 (gross \$8,020.44 less taxes). This was the check that I should have received on April 20, 2007 for my February commissions. That check was not accompanied by a breakdown of how they arrived at those numbers, but they were consistent with my calculations. I was given the explanation that I wasn't paid on April 20th because the customers had not paid. However, I contacted each account before I left Barmore and they each told me they had already paid their February 2007 invoices.¹⁰

⁷ CP 15.

⁸ CP 34. (Byrd received her base salary for April 2007 in two checks for \$1,730.77 each on April 6, 2007 and April 20, 2007).

⁹ CP 26, 34, 47.

¹⁰ CP 47.

Despite Byrd's admission that she received her February 2007 commission in full, and was paid her base salary for April 2007, the trial court awarded her \$18,000.00 in unpaid compensation. This is clearly an error.

By her own admission, Byrd received \$8,020.44 for her February 2007 commissions.¹¹ Byrd also received \$3,461.54 for her April 2007 base salary.¹² Viewed in the light most favorable to Barmore, after subtracting these payments from the \$18,000.00 she claimed she was owed in base salary for April 2007 and commissions for February, March and April 2007, Byrd was owed at most \$6,518.02.

C. There is no evidence that Barmore willfully withheld Byrd's compensation.

The question of whether the employer willfully withheld wages is a question of fact.¹³ Moreover, an employer does not willfully withhold wages if a bona fide dispute exists regarding the amount of wages.¹⁴ A

¹¹ *Id.*

¹² CP 47.

¹³ 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."

¹⁴ *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 282, 300, 745 P.2d 1 (1987) holding that "It is a question of fact if there is a bona fide dispute [regarding wages]."

bona fide dispute is a fairly debatable disagreement over whether all or a portion of the wages must be paid.¹⁵

Barmore cannot willfully withhold compensation that Byrd was not entitled to receive. Barmore justifiably debated Byrd's claim that she was owed \$18,000.00. As discussed above, Byrd's own testimony shows that she was owed at most \$6,518.02 in unpaid compensation. The trial court erred in finding that Barmore willfully withheld \$18,000.00 in compensation.

Byrd's purported evidence of willful intent also falls well short. In her complaint and in support of her motion for summary judgment, Byrd claimed that her commissions were due regardless of when her customers paid Barmore.¹⁶ Barmore disagreed and submitted evidence that "Ms. Byrd's commission payments were expressly contingent upon the customer actually paying Barmore" and that at the time she quit, not all of Byrd's customers had paid Barmore.¹⁷ Byrd's employment contract does not state when her commissions were due.¹⁸ However, the parties' practice was to pay Byrd's commissions after her customer's paid

¹⁵ *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 161, 961 P.2d 371 (1998).

¹⁶ CP 15.

¹⁷ CP 26, 82.

¹⁸ CP 76-79.

Barmore.¹⁹ Determining when Byrd's commissions were due is necessary to determine whether Barmore willfully withheld those commissions.

Byrd claims that at the time she quit Barmore she was owed commissions on five accounts for February, March and April 2007. She further states in her declaration that she "knew [Barmore] had received the monies [from those accounts] because she had contacted those five accounts and been informed that they had paid [Barmore]."²⁰

Byrd's declaration contains inadmissible hearsay, which the trial court should not have considered on summary judgment:

Moreover, like the trial court, in deciding whether summary judgment was proper, we consider only admissible evidence. We review de novo whether a statement was inadmissible hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Hearsay is inadmissible unless it fits within an exception.²¹

There are no hearsay exceptions that apply to Byrd's declaration and the trial court erred in considering it. Nonetheless, Byrd's declaration also states that her accounts had only paid their February 2007 invoices and not their March and April 2007 invoices:

¹⁹ CP 26.

²⁰ CP 47.

²¹ *Lynn*, 136 Wn. App. at 306 (citations omitted).

. . . I contacted each account before I left Barmore and they each told me they had already paid their February 2007 invoices.²²

Barmore submitted evidence that not all of Byrd's customers had paid Barmore at the time Byrd quit.²³ Accordingly, the record does not support the trial court's finding that Barmore willfully withheld \$18,000.00 in commissions from Byrd that were due on the day she quit. A question of fact exists regarding when Byrd's commissions were to be paid and whether Barmore willfully withheld those commissions.

D. Byrd refused to accept payment of anything less than \$18,000.00.

When she quit in April 2007, Byrd demanded a total \$18,000.00 in base salary for April 2007 plus commissions for February, March and April 2007.²⁴ Barmore paid Byrd \$3,461.54 for her April 2007 base salary.²⁵ Barmore also paid Byrd \$8,020.44, which Byrd admitted after filing suit covered her February 2007 commissions.²⁶ Subtracting these payments from Byrd's \$18,000.00 claim means she was owed at most \$6,518.02.

²² CP 47.

²³ CP 82-84.

²⁴ CP 4-5, 15.

²⁵ CP 34.

²⁶ CP 47.

Despite receiving these payments, Byrd continued to demand that Barmore pay her \$18,000.00.²⁷ Barmore disputed the amount Byrd claimed and offered to pay her \$8,000.00, which is actually more than she was owed according to her own calculations.²⁸ However, Byrd refused to accept payment of anything less than exactly \$18,000.00.²⁹

Given her unsubstantiated demand, Barmore asked Byrd to explain her calculations or produce documents that supported her claim.³⁰ Byrd acknowledged that she “kept track of [her] commissions on a spreadsheet on Barmore’s computer regarding all personnel (temp’s) working accounts [she] generated and serviced.”³¹ In fact, Byrd used her spreadsheet months after she quit Barmore to verify that her February 2007 commission check was consistent with her calculations:

Carol Barmore sent me a check in November 2007 for \$7,406.87 (gross \$8,020.44 less taxes). . . That check was not accompanied by a breakdown of how they arrived at those numbers, but they were consistent with my calculations.³²

²⁷ CP 84, 99, 103.

²⁸ CP 99.

²⁹ CP 84, 103.

³⁰ CP 85-87.

³¹ CP 46.

³² CP 47.

Rather than produce any evidence whatsoever supporting her claim, Byrd's response was that Barmore has all the records it needed regarding her commissions and that she was not required to produce anything.³³

Byrd makes the same argument to this Court and claims that under *Brandt*, an employer's uncertainty as to how much compensation it owes an employee is insufficient to counter a claim of willful intent.³⁴ However, the *Brandt* court found that the employer was much more than simply "uncertain" about the wages it owed its employee:

. . . defendants filed false and erroneous W-2 forms by overstating plaintiff's wages paid during the years 1964 and 1965. Indeed, the evidence warranted a finding that there was never any real controversy as to the amounts due except as to the sum of \$218 in 1961.³⁵

Barmore knew that it did not owe Byrd \$18,000.00 in salary and commissions for February, March and April 2007.³⁶ However, when Barmore offered to pay Byrd what it believed she was owed, Byrd refused to accept payment and continued to demand \$18,000.00.³⁷

³³ CP 64-68.

³⁴ Respondents Brief, at 7-8.

³⁵ *Brandt v. Impero*, 1 Wn. App. 678, 680-681, 463 P.2d 197 (1969).

³⁶ CP 25-28.

³⁷ CP 82-84, 103.

Byrd's refusal to accept payment of anything less than \$18,000.00 prompted Barmore to request documentation supporting her claim.³⁸ Although she said this information would be forthcoming, she never provided it, even in support of her motion for summary judgment.³⁹

E. The trial court erred in awarding Byrd \$13,937.75 in attorneys' fees without entering findings of fact conclusions of law to support the award.

The trial court awarded Byrd \$13,937.75 in attorneys' fees.⁴⁰ However, there are no declarations, findings of fact or conclusions of law to support the award.

This Court reviews the reasonableness of attorney fees awards under an abuse of discretion standard.⁴¹ Although fee decisions are entrusted to the discretion of the trial court, the appellate courts will exercise their supervisory role to ensure that the discretion is exercised on articulable grounds.⁴² Appellate courts have overturned attorney fees awards when the record fails to state a basis supporting the award.⁴³

³⁸ *Id.*, CP 85-87.

³⁹ CP 85-87.

⁴⁰ CP 128, 144-45.

⁴¹ *Boeing Co. v. Heidy*, 147 Wn.2d 78, 90, 51 P.3d 793 (2002); *Zink v. City of Mesa*, 137 Wn. App. 271, 277, 152 P.3d 1044 (2007).

⁴² *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998); *Peterson v. Koester*, 122 Wn. App. 351, 363-364, 92 P.3d 780 (2004).

Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record.⁴⁴ To withstand appeal, a fee award must be accompanied by findings of fact and conclusions of law to establish a record adequate for review.⁴⁵ Without such findings, the reviewing court is unable to determine whether the exercise of the trial court's discretion was manifestly unreasonable or based upon untenable grounds.⁴⁶ Thus, findings of fact and conclusions of law were required to support the trial court's award of attorneys' fees:

Not only do we reaffirm the rule regarding an adequate record on review to support a fee award, we hold findings of fact and conclusions of law are required to establish such a record.⁴⁷

⁴³ *Brand v. Department of Labor & Indus.*, 139 Wn.2d 659, 665, 989 P.2d 1111 (1999); *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987).

⁴⁴ *Mahler*, 135 Wn.2d at 435; *Peterson*, 122 Wn. App. at 363-364.

⁴⁵ *In re Estate of Jones*, 152 Wn.2d 1, 21, 93 P.3d 147 (2004) ("We remand for a calculation of these fees and remind the trial court to substantiate its award with the appropriate findings of fact and conclusions of law."); *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 146-147, 144 P.3d 1185 (2006) ("The trial court must provide articulable grounds for its fee award."); *In re Marriage of Bobbitt*, 135 Wn. App. 8, 30, 144 P.3d 406 (2006) ("The trial court must provide sufficient findings of fact and conclusions of law to develop an adequate record for appellate review of a fee award.")

⁴⁶ *Brand*, 139 Wn.2d at 674; *Banuelos v. TSA Wash., Inc.*, 134 Wn. App. 603, 616, 140 P.3d 652 (2006).

⁴⁷ *Mahler*, 135 Wn.2d at 435 (emphasis added).

In our present case, the trial court did not enter findings of fact or conclusions of law to support its award of attorneys' fees.⁴⁸ Even if the Court determines that there is a statutory basis to support the award of attorneys' fees against Barmore, it should still reverse the trial court's award of fees and remand this matter with directions that the trial court develop a record adequate for review.

II. CONCLUSION

The standard for the moving party on summary judgment is the same regardless of the parties or the circumstances. As the moving party, Byrd had the initial burden of producing evidence establishing that there was no issue of fact on her claim:

In analyzing orders on summary judgment, this court has traditionally noted that a moving party under CR 56 bears the initial burden of demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law.⁴⁹

Byrd did not meet her initial burden. She submitted two conflicting declarations and relies on her complaint as "ample evidence" to support her motion. Conflicting testimony and Byrd's complaint are insufficient to eliminate the factual issues in this case. Accordingly, this

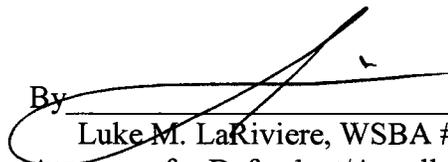
⁴⁸ CP 128, 144-45.

⁴⁹ *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995); citing *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

Court should reverse the trial court's order granting summary judgment and remand this matter for a trial on the merits.

DATED this 13 day of October, 2009.

YOUNG deNORMANDIE, P.C.

By 

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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.

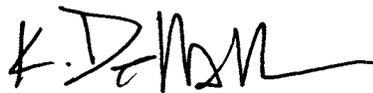
On October 14, 2009 I caused a copy of the following to be served on the following recipient via the method indicated:

1. Appellants' Reply Brief.

Robie G. Russell
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Mail Legal Messenger
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DATED this 14th day of October, 2009.



KARRIE R. DEWALL