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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION 1

PAMELA BIRIMISA, a single woman,

*Appellant*

v.

PILATES CENTER OF REDMOND, L.L.C.,  
a Washington limited liability company,  
and BRIAN HEBERLING and LARISSA WILSON HEBERLING,  
husband and wife, and the marital community composed thereof,

*Respondent*

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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Appeal from the Superior Court for King County

The Honorable Mary Yu

Cause No. 07-2-37547-3SEA

**BRIEF OF APPELLANT**

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ORIGINAL

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## **I. ASSIGNMENT OF ERROR**

The trial court erred in awarding attorneys' fees to Respondent Pilates Center of Redmond, LLC under RCW 49.48.030 and/or under paragraph 17.2 of the Pilates Center of Redmond, LLC Agreement.

## **II. STATEMENT OF ISSUES**

1. Is the Respondent employer Pilates Center of Redmond, LLC entitled to be awarded attorneys' fees under RCW 49.48.030?
2. Should the Respondent's award for attorneys' fees against Appellant Pamela Birimisa be reversed on the basis of not only the wage statute limiting attorneys' fees only to the successful employee but also because the LLC Agreement is not, and cannot be, the basis of Appellant's claim for unpaid wages?

## **III. STATEMENT OF THE CASE**

On November 28, 2007, Appellant Pamela Birimisa filed a Complaint in the King County Superior Court for damages for unpaid compensation under RCW 49.48.010, *et seq.* CP 1

On November 20, 2007, Respondent filed an Answer, Affirmative Defenses and Counterclaims. The Answer admitted that Appellant was employed by Respondent Pilates Center of Redmond, LLC as a Pilates instructor but denied the claim for unpaid wages. Respondent interposed counterclaims totaling approximately \$401,200 for:

- (a) breach of contract -- \$86,200
- (b) breach of fiduciary duties -- \$100,000
- (c) intentional interference with contractual relations -- \$100,000
- (d) interference with business expectancy -- \$100,000
- (e) conversion -- \$15,000 *CP 2*

After discovery, including six depositions, Requests For Production of Documents, numerous interrogatories and supplemental interrogatories, and well over 100 exhibits, the case was ultimately tried to the Court, the Honorable Mary Yu presiding, without a jury, on May 19, 2009 through May 21, 2009.

The Court awarded Appellant Pamela Birimisa \$3,760 in compensation for unpaid wages and unpaid medical insurance for teaching Pilates classes from October 15, 2007 through November 9, 2007. She dismissed two other of Appellant's claims for wages and compensation. *CP 41, CP 77 and CP 87.* <sup>1</sup>

The Court noted that Respondent had filed five counterclaims but

“after discovery and before trial commenced, all but one counterclaim was abandoned. Trial proceeded with one counterclaim” *CP 77*

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<sup>1</sup> Appellant would have liked to appeal the Court's dismissal of two of the remaining wage claims, but the cost of the transcript and fees has made it impossible for her to pursue the appeal for the errors committed in dismissing said claims, resulting in this appeal being limited to an appeal on the issues of attorneys' fees which do not require a transcript.

and as to that one counterclaim, the Court ruled that the Respondent did not have a claim for damages against Ms. Birimisa for lost revenue or other damages. *CP 77*

The Court, in conclusion of law 2.6, found:

Pursuant to RCW 49.48.030, Ms. Birimisa is entitled to an award of those attorneys' fees she incurred to bring her claim for wages and unpaid medical insurance for teaching classes from October 15, 2007 through November 9, 2007, which fees shall be segregated from the pursuit of her other claims. *CP 77*

The Court determined that Appellant Pamela Birimisa was entitled to 86% of her fees on the claim. *CP 77*

On the order awarding Respondent's attorneys' fees, entered August 28, 2009, the Court in paragraph 2 said:

Pursuant to RCW 49.48.030, Plaintiff should be awarded the reasonable attorneys' fees she incurred to preserve her claim for wages and unpaid medical insurance for teaching classes from October 15, 2007 through November 9, 2007. That amount is \$43,736.37. *CP 78*

The Court, under the "proportionality approach", awarded Respondent two-thirds of their attorneys' fees in the amount of \$43,376.33. *CP 78*

In paragraph 5 the Court said:

The amount of costs and fees awarded to Plaintiff should be offset against the amount of fees awarded to Defendants. *CP 78*

Based upon the Court's determination that the attorneys' fees of the Appellant should be offset against the attorneys' fees of the Respondent, the award of attorneys' fees to Appellant was \$360.04.

#### IV. ARGUMENT

(A) Respondents are not entitled to attorneys' fees under RCW 49.48.030.

RCW 49.48.030, "Attorneys' fees in action on wages", provides attorneys' fees only for the employee, not the employer. It states:

In any action in which any person is successful in recovering judgment for wages or salary owed to him, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer . . .

There is no provision that entitles an employer to attorneys' fees for its successful defense of any portion of a claim by an employee. In *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 961 P.2d 371 (1998) at page 159, the Court said:

By providing for costs and attorney fees, the Legislature has provided an effective mechanism for recovery even where wage amounts wrongfully withheld may be small.

It does not, on the contrary, allow the employer to recover attorneys' fees against the employee on a successful defense.

No case has been found by Appellant that would allow an employer's attorneys' fees under RCW 49.48.030. The Legislature

wanted to make certain that employees were able to retain counsel to pursue their claims. It would be contrary to that intent to award attorneys' fees to an employer who may be successful in defending one or more wage claims and would frustrate the purpose of the statute, which was designed to provide an employee a painless remedy to recover wages.

If the Legislature had intended an employer to recover attorneys' fees for the successful defense of any employee wage claims or to allow an offset, the Legislature would have included that in the statute.

(B) The proportionality approach is inapplicable under RCW 49.48.010.

*Marassi v. Lau*, 71 Wn. App. 912, 916-20, 859 P.2d 605 (1993) is the case most frequently cited supporting the "proportionality" rule. The proportionality rule as described in *Marassi* is designed to deal with the situation where "neither party wholly prevails." However, *Marassi* dealt with a purchase and sale agreement between the parties that provided for an award of attorneys' fees to the successful party in the dispute. (*Marassi* at pp. 914-15.) That is entirely unlike and distinguishable from the situation here where Appellant Pamela Birimisa's claims were made by statute which allows attorneys' fees to be awarded only to the employee under RCW 49.48.030. Therefore, "proportionality" can have

no application and this Court should correct the trial court's error by affirming the award of attorneys' fees to Appellant in the amount of \$43,736.37 and reversing and dismissing the award of attorneys' fees to Respondent.

*Marassi* dealt with a mutual obligation to pay attorneys' fees. The statute in the instant case, RCW 49.48.030, does not and limits attorneys' fees only to a successful employee.

(C) Respondents are not entitled to attorneys' fees under Section 17.2 of the Pilates Center of Redmond LLC Agreement.

Section 17.2 of the LLC Agreement entitled "Attorney Fees" provides as follows:

In the event any suit, action or other legal proceeding shall be instituted to declare or enforce any right created by this Agreement, or by reason of any breach of this Agreement, the prevailing party shall be entitled to recover reasonable attorney fees and costs, whether said fees and costs are incurred prior to or during trial, during appeal of any trial or court decision, in bankruptcy, or during any collection of any judgment hereon. *CP Exhibit 1*

The LLC Agreement did not create the employer/employee relationship between Pilates Center of Redmond, LLC and Pamela Birimisa. Section 1.16 of the LLC Agreement defines "Member" as a person who executes the LLC Agreement. Nothing is said about an employee relationship as creating membership status. Paragraph 1.17

defines "Membership Interest" as a "Member's share of the net profits, net losses and other tax items of the Company. . ." -- again, nothing about wages for employment by the LLC. The LLC Agreement provides for a "manager" who can serve with compensation. However, at no time was Pamela ever the manager of the LLC and none of her wage claims were based upon her acting as manager designated by the LLC Agreement.

As to Respondent's counterclaims under the LLC Agreement, Pamela Birimisa was the prevailing party. The Respondent, as noted by the Court, abandoned all but one of their counterclaims and on that one counterclaim the Court ruled that it was not meritorious, held in favor of Appellant and dismissed the claim, resulting in Appellant Pamela Birimisa being the prevailing party on all the counterclaims which were brought under the LLC Agreement.

## **V. CONCLUSION**

The purpose of the wage claim statute is to protect the employees from employers who force employees to sue for small wage claims by wrongfully denying wages owing. The reason the statute has a one-way attorneys' fee provision in it in favor of employees is to further this purpose. Employees typically would have small wage claims that

would not interest attorneys in pursuing without generous attorneys' fee awards being promised by the Legislature and the courts.

Employers, on the other hand, have every incentive to protract litigation at the expense of the employee and the attorney in order to wear them down. The intent and purpose of the statute would be undermined if an employer could be awarded attorneys' fees by offset or under the proportionality rule or at all.

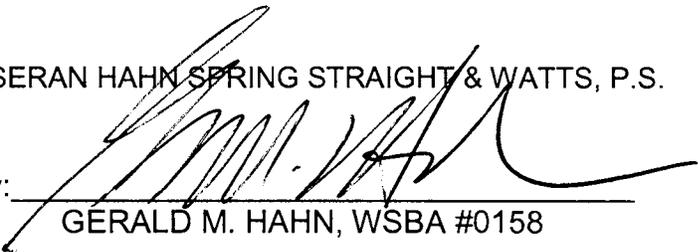
Appellant was successful on her principal claim for wages, she was the prevailing party on all claims brought by Respondent and their counterclaims under the LLC Agreement.

Consequently, Appellant Pamela Birimisa is entitled to attorneys' fees as awarded by the Court under RCW 49.48.030 in the amount of \$43,736.37 without any offsets or application of proportionality rule, and Respondents are not entitled to attorneys' fees under either the statute or the attorneys' fee provision of the LLC Agreement.

Appellant requests that the Court affirm the trial court's award of attorneys' fees to her and reverse and dismiss the trial court's award of attorneys' fees to Respondent.

RESPECTFULLY submitted this 27<sup>th</sup> day of January, 2010.

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**PROOF OF SERVICE**

TO: Clerk, Division One, Court of Appeals

AND TO: Respondents/Respondents

PLEASE TAKE NOTICE on the 27th day of January, 2010,

Appellant's Brief was served via messenger on the following:

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and pursuant to the Notice of Withdrawal, Appellant's Brief was  
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Dated this 27<sup>th</sup> day of January, 2010.

  
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Joy Griffin