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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

Appeal from the Superior Court for King County

The Honorable Mary Yu

Cause No. 07-2-37547-3SEA

BRIEF OF RESPONDENT

Brian Heberling
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A. Introduction

Respondent, Brian Heberling, appears pro se and advises the Court that he has retained counsel and begun the process of filing Chapter 7 Bankruptcy proceedings. The necessity for filing bankruptcy was due, in no small part, to the acts of Appellant, Pamela Birimisa.

Mr. Heberling has been advised by his bankruptcy attorney that any resulting judgment from this action would be dismissed as part of the bankruptcy proceedings. Mr. Heberling advised Mr. Hahn of this fact in an attempt to convince him that this proceeding was futile, but Mr. Hahn was unwilling to abandon this action.

Regardless, this appeal fails on its merits as the trial court properly awarded attorney's fees for the prevailing party.

B. Statement of the Case

The parties entered into an LLC agreement (forming Pilates Center of Redmond (PCR) with Appellant Pamela Birimisa as a minority owner (20%) and Respondents owning the remaining 80% interest. Appellant made no monetary contribution to the LLC while Respondents initially paid \$20,000 and made significant additional contributions to the LLC to keep it afloat.

The business ultimately failed and Appellant filed her complaint. In her Request for Relief, plaintiff requested payment for:

- “her services as a day-to-day manager at the rate of \$28 per hour for all time spent during a 40 hour work week and for time and a half for all overtime hours beyond 40 hours per week, or *quantum meruit* for the period of time from 2003 through the termination of her employment in November 2007”; and
- “\$2,600 for ...her services as a pilates instructor for the period October 15, 2007 through October 31, 2007 and \$265 for the medical insurance”.

On April 28, 2009, Respondents submitted an Offer of Judgment for \$4,000.00.

In her trial brief filed with the Court on May 11, 2009, Appellant sought \$45,862 plus attorneys’ fees and costs. This amount was calculated as follows:

\$10,747 for her share of the Power Pilates income

\$8,424 for her “non-teaching hours”;

\$3,760 for hourly compensation and medical insurance; and

\$22,931 in exemplary damages.

Respondents dropped the majority of its counterclaims and the only counterclaim asserted in its trial brief was for the damages Ms. Birimisa caused when she abruptly left in late 2007 and opened a competing studio.

The trial court awarded Appellant the \$3,760 in hourly compensation, and all other claims were dismissed. In its Summary Decision the court held as follows:

“The court agrees with Plaintiff that one can be, both legally and factually, an owner of a business and an employee of that same business. Moreover, ownership of a business does not exclude an obligation to pay wages to an owner(s) for work performed if there is an understanding among the owners of such an arrangement. As defendant pointed out, compensation to the owner(s) of a small business is often accomplished through draws or as profits at the end of the fiscal year. Absent an agreement the law does not create an automatic entitlement for payment of statutory wages as argued by Plaintiff to an owner for work performed in running his/her own business. The Limited Liability Company Agreement (“Agreement”) executed by all three owners does not create the right to receive compensation for

management functions absent Members approval. The provisions in the Agreement related to Ms. Birimisa reflect her sweat equity contribution and key role as trainer in the development of the business. All of the testimony supported the fact that Ms. Birimisa was the expert in Pilates and that she was given an ownership in the business in order to develop the business and as a way to secure her interest in what everyone thought would be a money-making venture. The testimony and the Agreement support the court finding that she was an employee only when she was involved in training activities. There was no credible evidence that would permit the court to set aside the Agreement or to construe it as a general employment contract with statutory rights to wages for work other than training.”

The LLC Agreement the trial court references contained a standard attorney fee provision awarding fees and costs to the prevailing party. The trial court awarded Appellant \$43,736.37 in attorney’s fees and Respondent \$43,376.33 in attorney’s fees.

C. Argument

Appellant argues that the trial court erred by awarding Respondent attorney’s fees for successfully defending against the

vast majority of Appellants' claims. Appellant's argument focuses on RCW 49.48.030 which allows an employee to receive "reasonable" attorney's fees and claims there is no provision for attorneys' fees for the successful defense of the wage claim.

However, appellant ignores the fact that the vast majority of Appellant's claims were bound by the LLC Agreement (as noted by the trial court judge) and Respondent was appropriately awarded attorneys' fees for successfully defending against those claims.

D. Conclusion

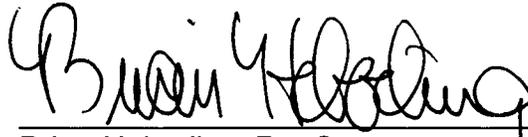
The attorney's fee provision in the wage claim statute should not be used as both a shield and a sword. Appellant's claim that the intent of the statute awarding attorney's fees to a prevailing party was to insure that employees with small wage claims could pursue those claims. But that should not permit a party to pursue additional claims - under the guise of a wage claim - and then seek attorneys' fees for everything, regardless of their success.

Appellant was offered an amount in excess of the wage claim she was awarded and rejected that offer. She did not prevail on the remainder of her claims, which the court found were precluded by the LLC Agreement.

Appellant's appeal should be dismissed and the trial court's ruling affirmed.

Dated: May 7, 2010

Respectfully submitted,



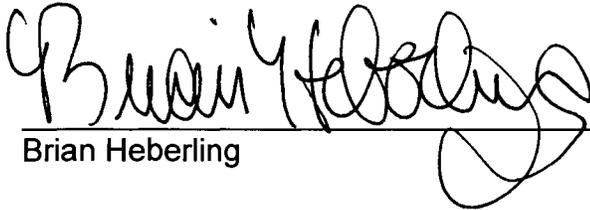
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PROOF OF SERVICE

BRIAN HEBERLING declares under penalty of perjury under the laws of the State of Washington, that on the 7th day of May, 2010, he served the attached Brief of Respondent on the following by depositing the same in the United States mail postage prepaid and faxing a copy:

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Brian Heberling