

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

Case No. 66754-8-1

ROBERT BRANTING and THERESA SWEETON

Appellants,

v.

POULBO RV,

Respondent.

OPENING BRIEF OF APPELLANTS

Nigel Malden, WSBA # 15643
Nigel Malden Law, PLLC
711 Court A, Suite 114
Tacoma, WA 9840

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A. ASSIGNMENTS OF ERROR

Error 1

The trial court erred by summarily dismissing Sweeton's claim for wrongful termination in violation of public policy.

Error 2

The trial court erred by summarily the dismissing Sweeton and Branting claims for breach of fiduciary duty.

Error 3

The trial court erred by summarily dismissing the Sweeton and Branting claims for negligent and intentional misrepresentation.

Error 4

The trial court erred by summarily dismissing the Sweeton and Branting claims for wrongful withholding of pay.

Error 5

The trial court erred by summarily dismissing the Sweeton and Branting claims for breach of contract.

Error 6

The trial court erred by summarily dismissing the Sweeton and Branting demand for an accounting of sales commissions.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Sweeton was constructively discharged from employment a genuine issue of fact for the jury?
2. Whether Sweeton's constructive discharge violated public policy is an issue for trial?
3. Whether Sweeton's constructive discharge from employment in violation of public policy proximately caused damages is a genuine issue of fact for the jury?
4. Whether PRV breached its fiduciary duties to Sweeton and Branting by failing to disclose its calculation of "gross profit" and sales commissions is a genuine and disputed issue of fact for the jury?

5. Whether PRV's breach of fiduciary duty to Sweeton and Branting proximately caused damage is a genuine issue of fact for the jury?
6. Whether PRV breached its fiduciary duty by failing to provide Sweeton and Branting with an accounting is a genuine issue of fact for the jury?
7. Whether PRV misrepresented its pay is a genuine issue of fact for the jury?

C. STANDARD OF APPELLATE REVIEW

When an appellate court reviews a trial court's entry of summary judgment, the appellate court engages in the same inquiry as the trial court: view all facts and evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party, and affirm only if, from all the evidence, reasonable persons could reach but one conclusion. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 811, (1992); *Trimble v. Washington State Univ.*, 140 Wn.2d 88,93 (2000); *U.S. Credit Life Ins. Co.*, 129 Wn.2d 565, 569 (1996); *Roger Crane & Associates, Inc.*

v. Felice, 74 Wash. App. 769 (1994). Summary judgment may be granted only where the moving party proves that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). Any doubt as to the existence of a genuine issue of material fact should be resolved against the moving party and in favor of allowing the case to go to trial. Tegland, Karl B., Ende, Douglas J., WASHINGTON HANDBOOK ON CIVIL PROCEDURE, Sec. 69.14, 552-554 (2009-2010 ed.), *citing Ely v. Hall's Motor Transit Co.*, 590 F.2d 62 (3rd Cir. 1978).

D. STATEMENT OF THE CASE

1. SUMMARY OF FACTS

Appellants Robert Branting (Branting) and Theresa Sweeton (Sweeton), sold new and used recreational vehicles for Poulsbo RV (PRV) located in King County, Washington. Sweeton worked for PRV for more than fifteen years. CP, Pg. 73, Lines 7-24. She was one of PRV's best sales performers for ten years. CP, Pg. 74, Lines 1-3. Branting worked at PRV from 1998 to September 2004 and then returned in January 2006.

CP, pg. 88, Lines 3-10 PRV promised to pay Branting and Sweeton 25% of gross profit on the sales of every vehicle. CP, Pg. 75, Lines 8-10. The promise was oral; it was not put into writing until 2007. CP, Pg. 75, Lines 21-25.

Sweeton and Branting understood “gross profit” to mean vehicle sale price less dealer cost.¹ This understanding was based on PRV’s statements, the parties’ course of dealing, and industry custom and practice.²

For ten years, Sweeton was satisfied that PRV was adequately disclosing its calculation of sales commissions and applied a consistent definition of “gross profit.” But, PRV later grew secretive and sales commissions became inconsistent. CP, Pg. 91, Lines 18-25; Pg. 92, Lines 1-3 PRV stopped disclosing gross profits and commission calculations. This required Sweeton and Branting to work “blind,”³ i.e. they had to trust PRV to honestly and accurately record true dealer cost and to calculate the

¹ CP, Pg. 159; Branting Depos., Pg. 40, Lines 22-25; Pg. 41, Lines 1-11

² CP, Pg. 123; Sweeton Depos., Pg. 29, Lines 1-14.

³ CP, Pg. 123; Sweeton Depos., Pg. 29, Lines 11-14.

correct “gross profit” and their sales commission. Branting and Sweeton had to rely on PRV because PRV had sole control of the relevant books and records.

Branting and Sweeton noticed irregularities in their paychecks and developed some suspicions that PRV was shorting their commissions.⁴ They complained and asked questions but received no satisfactory answers. Sweeton and Branting’s suspicions were confirmed, however, when they were asked to sign a written Pay Plan in 2007.⁵

This was PRV’s *first* ever written Pay Plan.⁶ It was PRV’s *first* written disclosure of the multiple costs, fees, charges, and packs that it had already been using to calculate gross profits” and commissions on a case

⁴ CP, Pg. 128; Sweeton Depos., Pg. 51, Lines 1-25.

⁵ PRV’s argument, that Branting already knew everything disclosed in the Pay Plan, is based on a gross distortion of his deposition testimony. Branting said he read a memo suggesting PRV was considering additional packs. CP, Pg. 164; Branting Depos., Pg. 60, Lines 3-23; Pg. 61, Lines 4-17. But he also said he was surprised PRV followed through because PRV rarely did. CP, Pg. 164; Branting Depos., Pg. 60, Lines 14-23. When he saw the Pay Plan which he was pressured to sign, Branting concluded PRV was showing him what PRV had taken and trying to make it legal so PRV did not get into trouble. CP, Pg. 165; Branting Depos., Pg. 61, Lines 4-17.

⁶ CP, Pg. 18, Lines 7-9.

by case basis for a long time.⁷ PRV's purpose was "to explain how gross profits would be calculated *going forward*."⁸ PRV's VP Operations, Steve Perry, testified that PRV "realized (it) was standard business and wanted to step up and fulfill that obligation of being specific about the pay plan. CP Pg. 101, lines 18-23. The Pay Plan showed that PRV was not calculating commissions under a consistent, objective formula and commission percentages were shrinking. CP Pg. 9-21. The Pay Plan made it clear that PRV was calculating and paying commissions on a case by case basis anyway it wanted at its sole discretion.

At a Superior Court trial in 2008 to determine the enforceability of an arbitration clause in the Pay Plan, PRV General Sales Manager, Stan Tacazon, said the purpose of the document was to ensure the salespeople knew how they were getting paid:

What did you say at that (2007) meeting about the commission agreements when you handed them out?

⁷ See Mike Pewitt testimony. Heinz Declaration.

⁸ CP 39-41; Declaration of PRV Assistant General Manager, Joy Heinz, Pg. 3 Lines 4-6. This begs the question: how did PRV's employees know if they were being paid correctly before 2007?

8 A I told them that the commission agreements
9 were the corporate's desire to have it all in
10 writing, so that they had -- they knew what they
11 were getting paid, that structure did not change,
12 that there was -- their signatures needed to be
13 handed on it, and that's all that was said.

Branting and Sweeton refused to sign the Pay Plan until PRV threatened to withhold their paychecks. CP, Pgs. 79-82; 90-96. Sweeton could not afford to miss her paycheck for work already performed, however, so she signed the agreement under protest. Tacazon subsequently retaliated against Sweeton by changing her regular work

schedule and making threatening, offensive remarks. CP, Pgs.83-86; 137-138; Sweeton Depos., Pg. 88, lines 1-13. The conditions at work grew so intolerable that Sweeton was forced to quit giving rise to her claim for constructive discharge in violation of public policy. Id.

2. PROCEDURAL HISTORY

In 2008, PRV moved to stay the King County Superior Court action and to compel Sweeton and Branting to resolve all their claims in mandatory, private, binding arbitration. PRV's motion was based upon language in its 2007 Pay Plan which included the waiver of right to jury trial of any employment related claim. Sweeton and Branting opposed the motion to compel arbitration. They argued that they did not sign the agreement voluntarily, that they were forced to sign the Pay Plan under duress, thus rendering the agreement void and unenforceable.

A special trial was conducted in King County Superior Court by the Honorable Julie Spector solely on the issue of contract enforceability under Washington state law, on October 21, 2008. Several witnesses testified including Sweeton, Branting, Tacazon, and Haidecheck.

Following trial, the court found by clear, cogent and convincing evidence that Sweeton and Branting were forced to sign the Pay Plan under duress making the mandatory arbitration clause void and unenforceable. CP, Pg. 110, Lines 23-25; Pg. 111, Lines 1-13. The court explained its decision:

The Court heard testimony from approximately six witnesses, seven witnesses, and I will go through the testimony in short order. The Court heard testimony from the two plaintiffs, and that's Ms. Sweeton and Mr. Branting. Likewise, the Court heard testimony by telephone from Steve Perry, by agreement of the parties, as well Stan Tacazon and Joy Haiducek and Michael Pewitt, and then in rebuttal the Court heard testimony from Mr. Hackman, Leroy William Hackman. And the Court had a narrow issue to decide here today, which dealt with the Salesperson Commission Policy Agreement, and I say it that way is the first letter of each word should be capitalized because it's plaintiffs'

exhibits 1 and 2, where each plaintiff was asked to sign this Salesperson Commission Policy Agreement in the early part of 2007. And I think it's undisputed that neither plaintiff wanted to sign this agreement.

It is all – also undisputed that both plaintiffs had tremendous concerns about the ramifications of signing what appeared to be or what was explained to them to be a formal memorialization of a fee structure for commission compensation that had been in place but was to only put what had been in place on paper.

Both plaintiffs testified that the agreement was far from what they had experienced prior to the date of being offered to sign this. There was no question that if they did not sign this, there would be serious consequences. Defendant Poulsbo RV contests that they were threatened with having their paychecks withheld specifically. It is unclear, based on defendant's

testimony, what ramification or consequences would have flowed had Ms. Sweeton or Mr. Branting refused to sign the Salesperson Commission Policy Agreement. But it is clear, and there is no doubt for the Court whatsoever, that neither person wanted to memorialize this document by putting their signature on the form.

The only issue the Court has to decide is whether they signed the document under duress. The Court finds by clear, cogent, and convincing evidence that they did sign the document under duress. Both of these individuals are hard workers. They came into this litigation reluctantly. They testified -- Ms. Sweeton testified that she had worked for yours, for 16 years for Poulsbo RV, and until December of '07 had been employed, was one of their top salespersons. That remains unrefuted before the Court. And that she was a very successful salesperson and but for the situation she

probably would still be working there. It is with no question that this arbitration clause cannot be upheld; it cannot be enforced.”

The case was then sent back to the Honorable Jay White for trial on the merits. Just before trial, however, Judge White granted the defendants’ motion for summary judgment and dismissed all claims asserted by both plaintiffs. During the hearing, Judge White did not ask a single question regarding Sweeton’s wrongful discharge claim. He declined to explain why Sweeton’s wrongful discharge claim, was dismissed.

E. LEGAL ARGUMENT

1. SWEETON’S CLAIM FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY RAISES GENUINE ISSUES OF MATERIAL FACT THAT REQUIRE TRIAL BY JURY

The tort of wrongful discharge in violation of public policy is an exception to the at-will employment doctrine in the State of Washington.

Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 231-33 (1984). The four elements of the cause of action are: (1) the existence of a clear public policy (the clarity element), (2) discouraging the employees conduct will jeopardize the public policy (the jeopardy element), (3) the employee's public policy related conduct caused the dismissal (the causation element) and (4) the defendant cannot prove an overriding justification for the dismissal (the absence of justification element). *Brundridge v. Flour Fed. Servrs.*, 164 Wn.2d 432, 440 (2008) citing *Gardner v. Loomis Armor, Inc.*, 128 Wn.2d 931, 941 (1996). The tort of wrongful discharge "operates to vindicate the public interest in prohibiting employers from acting in a manner contrary to fundamental public policy." *Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 807 (2000). Some examples of wrongful termination in violation of public policy recognized by Washington courts include: (1) employee fired for refusing to commit illegal act; (2) employee fired for performing public duty or obligation such as jury duty; (3) employee fired for exercising a legal right or privilege; (4) employee fired in retaliation for reporting employer misconduct; or (5) employee

fired for missing work due to domestic violence. *See e.g. Gardner v. Lewis Armor, Inc.*, 128 Wn.2d 931 (1996); *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219 (1984); *Danny v. Laidlaw Transit Services*, 165 Wn.2d 200 (2008).

A. Whether Sweeton was Forced to Resign or Constructively Discharged by Intolerable Working Conditions is an Issue of Fact for the Jury.

A cause of action for wrongful discharge in violation of public policy may be based on either express or constructive discharge. *Korlund v. DynCorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 177 fn. 1 (2005); *Wahl v. Dash Point Family Dental Clinic, Inc.*, 144 Wn. App. 34, 43-44 (2008). Constructive discharge occurs where an employer deliberately makes an employee's working conditions so difficult, unpleasant or intolerable, that "a reasonable person in the employee's shoes would have felt compelled to resign". *Stork v. International Bazaar, Inc.*, 54 Wn. App. 274, 287 (1989), quoting *Nolan v. Cleland*, 686 F.2d 806, 813 (9th Cir. 1982). *See also, Micone v. Town of Steilacoom Civil Service*

Commission, 44 Wn. App. 636, 643 (1978). The plaintiff is not required to prove that the employer deliberately intended to drive the employee from the workplace. *Pennsylvania State Police v. Sliders*, 124 S. Ct. 2342 (2004). Instead, it is enough for the employee to prove that the work environment had become so intolerable that the employee's resignation was a fitting response. *Id.* See also: *Bulaich v. AT&T Info. Sys.*, 113 Wn.2d 254, 261 (1989) ("deliberate act" means a deliberate act of the employer, it does not refer to specific mental intent); *Wahl v. Dash Point Family Dental Clinic, Inc.*, 144 Wn. App. 34 (2008) ("It is the act, not the result, that must be deliberate").

In this case, Sweeton testified that she felt compelled to resign her position as PRV sales person because of intolerable working conditions created by:

1. PRV's threat to hold her paycheck;

2. PRV's change of Sweeton's work schedule in apparent retaliation for her pay complaints⁹;
3. PRV's refusal to respond to reasonable requests for information relating to the calculation of costs, profits and commissions while controlling access to all relevant books and records.¹⁰

Whether a reasonable person would have found these conditions intolerable is a question of fact that should have been left to a jury.¹¹

B. Sweeton's Constructive Discharge Violated Public Policy as a Matter of Law

⁹ Sweeton testified that the work schedule she had for 4 years was suddenly changed for no apparent reason other than her pay complaints. When she asked her Manager for explanation, "he absolutely exploded...he began screaming and yelling in my face...(he said) you are going to do what I say...(he said he was) sick of everything I had done...(and) screw your days off..." CP, Pg. 137; Sweeton Depos., Pg. 85, Lines 2-25.

¹⁰ Sweeton testified that she went to Mr. Tacazon many times with pay questions but he rudely refused to answer and "blew her off." CP, Pg. 128; Sweeton Depos., Pg. 51, Lines 1-8.

¹¹ Sweeton's testimony alone should have been sufficient to take the issue to a jury but she actually had more, the corroborating testimony of a co-worker, Leroy Hackman. Mr. Hackman testified that he saw Sweeton emerge from a private meeting with Mr. Tacazon, and that Sweeton appeared very upset. Mr. Hackman heard Sweeton utter excitedly that PRV was threatening her paycheck. This testimony corroborates Sweeton's claim that she was very upset by PRV's threats and coercion over pay. It also impeaches the credibility of Tacazon's testimony, that no such meeting or discussion with Sweeton ever took place.

In order to determine whether an express or constructive discharge from employment violates a clear mandate of public policy, the court must inquire “whether the employer’s conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Prior judicial decisions may also establish the relevant public policy.” *Thompson v. St. Regis Paper Co.*, 102 Wn. 2d 219, 232 (1984). In this case, the court gave no hint or indication that it completed any such inquiry before dismissing the case as a matter of law.

Washington has enacted many laws, rules and regulations designed to protect an employee’s wages.¹² Washington has a specific statute that prohibits employers from discriminating against an employee who makes a pay complaint.¹³ They are deemed remedial statutes that should be liberally construed to effectuate their purpose.

The trial court summarily dismissed Sweeton’s wrongful discharge claims with no comment, discussion or explanation on the record. This

¹² See, e.g., RCW 49.48 et. seq.; RCW 49.52 et. seq.; and RCW 49.46.100.

¹³ RCW 49.46.100

was an error of law because Sweeton's testimony and the other evidence in the record created genuine issues of material fact that could not be properly determined by a trial court under CR 56.

2. **THE BREACH OF FIDUCIARY DUTY CLAIMS RAISE GENUINE ISSUES OF MATERIAL FACT THAT PRECLUDE SUMMARY JUDGMENT AS A MATTER OF LAW**

A claim for breach of a fiduciary duty imposes liability in tort. Restatement (Second) of Contracts § 193 (1981); *Tedvest Agrinomics VI v. Tedmon Properties V*, 49 Wn. App. 605, 607, 744 P. 2d 648 (1987). The elements of the claim are: (1) the existence of a duty (2) a breach of the duty (3) proximately cause and (4) damage. *Hansen v. Hansen*, at 479. Where the facts are not in dispute, once it is determined that a duty is owed to the plaintiff, the court then determines whether the facts qualify as that defined duty, whether there was a breach. See *Interstate Prod. Credit Ass'n v. MacHugh*, 61 Wn. App. 403, 411, 810P. 2d 535 (1991). Under Washington law, a special or quasi-fiduciary relationship may arise

when one party holds out his *superior* or *peculiar* knowledge of facts in order to induce the other's reliance:

“A fiduciary relationship arises as a matter of law in certain contexts such as attorney and client, doctor and patient, trustee and beneficiary, principal and agent, and partner and partner. But a fiduciary relationship can arise in fact regardless of the relationship between the parties...for example, acting as an adviser may contribute to the establishment of a fiduciary relationship.” *Micro Enhancement Int'l., Inc. v. Coopers & Lybrand*, 110 Wn. App. 412, 433-34 (2002). See, also: *Oates v. Taylor*, 31 Wn. 2d 898 (1948); *Salter v Heiser*, 36 Wn. 2d 536 (1950); *Liebersgell v. Evans*, 93 Wn 2d. 881, 889-90 (1980) and *Boonstra v. Stevens-Norton, Inc.*, 64 Wn. 2d 621, 625 (1964).

A. **PRV created a quasi-fiduciary relationship with Branting and Sweeton by promising to calculate their sales commissions while controlling access to the financial books and records is an issue of fact for the jury.**

Sweeton and Branting had no choice but to trust PRV to accurately calculate and pay their commissions in accordance with the agreed formula. They could not independently check PRV's calculations because they had no access to the "deal jackets" or to other relevant books and records.¹⁴ Sweeton and Branting were dependent on PRV's superior knowledge and access to information.¹⁵ These are special facts and circumstances that created the quasi-fiduciary relationship alleged in the plaintiffs' complaint.¹⁶

B. Whether PRV Breached its Fiduciary Duties to Branting and Sweeton is an issue of fact for the jury.

¹⁴ The "deal jacket" includes documentary proof of the dealer's cost, sale price, profit and commission on every sales transaction.

¹⁵ Sweeton and Branting had no way to verify if their commissions were calculated correctly because the deal jackets and other records "were kept under lock and key in a closet." CP, Pg. 145; Sweeton Depos., Pg. 119, Lines 6-13.

¹⁶ The appellants' breach of fiduciary claims are also supported by *Gauthier v. Dickerson*, 41 Wn. 2d 419 (1952). According to *Gauthier*, if the employer agrees to keep books and records in order to accurately calculate profits and sales commissions, then the relationship has a "fiduciary character" and the employer is obliged to render an accounting. In this case, PRV refused to render any accounting and therefore breached its quasi-fiduciary duties to the appellants.

As a fiduciary or quasi-fiduciary, PRV owed Sweeton and Branting the highest duties of candor, honesty and utmost fair dealing. *See, e.g., Bovy v. Graham, Cohen & Wampold*, 17 Wn. App. 567 (1977). PRV had the affirmative legal duty to accurately disclose all material facts relating to the calculation of costs, profits and commissions. *Id.*; See also *Karle v. Seder*, 35 Wn. 2d 542 (1950). “Many forms of conduct permissible in a workday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior.” *Id.*, quoting Justice Cardozo’s opinion in *Meinhard v. Salmon*, 249 N.Y.458, 463-64, 164 N.E. 545, 546 (1928).

PRV breached its fiduciary duty by failing to timely and accurately disclose in writing its definition of gross profits and all facts material to the calculation of commissions, before 2007.¹⁷

¹⁷ PRV Asst.GM, Joy Heinz, states in her Declaration that the Pay Plan was distributed in writing to its employees “to explain how gross profits would be calculated *going*

PRV engaged in practices that are deemed per se deceptive in the context of advertising motor vehicles for sale to the public. RCW 46.70.180 (1)(d); WAC 308-66-152 (4)(m)(i)-(iii). Specifically, Washington law prohibits vehicle dealers like PRV from advertising that a new vehicle will be sold for a certain amount above or below invoice or cost without disclosing:

- the actual dollar amount being referred to as “invoice”
- the actual cost to the dealer to get each vehicle from the manufacturer

Under WAC 308-66-152 (4)(m)(iii), the vehicle dealer may calculate “invoice” to include the actual cost of transportation of the vehicle from the manufacturer to the dealer, but must “*exclude* dealer

forward.” CP Pg. 41, lines 4-6. This is misleading, however, because PRV admits in its brief that the Pay Plan also explained how plaintiffs had been paid *in the past*. CP, Pg. 18, lines 7-9.. This was something the plaintiffs found disturbing. See, e.g., CP, Pg. 165; Branting Depos., Pg. 61, Line 13-17.

holdbacks,¹⁸ other manufacturer incentives, optional advertising fees, dealer overhead expenses, and other similar expenses (emphasis added).”

PRV admits it did the exact opposite when calculating Sweeton and Branting’s sales commissions. PRV admits that it *included* holdbacks and advertising as costs when calculating sales person’s commissions.¹⁹ The practice is deemed deceptive and misleading *as a matter of law* in the context of a third party vehicle sale. Whether the practice is deceptive and misleading in the context of a quasi-fiduciary relationship involving employment sales commissions surely raises a triable issue of fact for the jury.

In summary, Sweeton and Branting’s claims for breach of fiduciary duty are based on the following:

- PRV’s failure to pay commissions as agreed

¹⁸ A “holdback” is a percentage of “dealer invoice” that is returned by the vehicle manufacturer to the dealer. A customer who looks at the “dealer invoice” alone is therefore not seeing the dealer’s actual cost.

¹⁹ CP, pg. 40, lines 10-17.

- PRV's failure to timely disclose material facts regarding costs, fees, charges and packs that altered commissions
- PRV's failure to timely disclose changes to the commission structure and to obtain plaintiffs' consent²⁰
- PRV's failure to disclose an inherent conflict of interest
- PRV's failure to provide an accounting²¹
- PRV's illegal coercion to sign the pay agreement²²
- PRV's illegal discrimination against appellants for raising a pay complaint in violation of RCW 49.46.100
- PRV's wrongful constructive termination of Sweeton in violation of public policy

²⁰ PRV had no legal right to unilaterally modify the terms of the plaintiffs' commission agreements without their knowledge and consent. *Ebling v. Gove's Cove*, 34 Wn. App. 495 (1983); *Warner v. Channel Chemical Co.*, 121 Wash. 237 (1922).

²¹ *Gauthier v. Dickerson*, 41 Wn. 419 (1952)

²² PRV threatened to hold both Branting's and Sweeton's paychecks unless they signed the new Pay Plan in 2007. CP, Pg. 164; Branting Depos., Pg. 59, Lines 7-17. The trial court concluded this was illegal duress that voided the Pay Plan under state contract law. CP, Pg. 110, Lines 23-25; Pg. 92, Lines 1-2.

Sweeton and Branting had the right to take these issues to a jury. The trial court's summary dismissal of all claims should be reversed on appeal and the case remanded for trial.

3. **WHETHER PRV WILLFULLY WITHHELD WAGES IS AN ISSUE OF FACT FOR THE JURY**

The appellants are alleging that PRV willfully withheld their pay giving rise to a double damage claim under RCW 49.52.070 as well as attorneys fees under RCW 49.48.030.²³ PRV asks the court to dismiss the claims because Sweeton and Branting never had any contract with PRV. First, as argued above, Sweeton and Branting have provided enough evidence of a contract (express or implied) to survive summary judgment. Second, whether PRV's failure to pay proper wages was "willful" is a genuine issue of material fact that cannot be decided by summary judgment. Nonpayment of wages is deemed willful when it is knowing and intentional versus careless or the result of a "bona fide dispute."

²³ RCW 49.52.050 bars employers from "willfully" paying employee less wages than they are due. RCW 49.52.070 permits prevailing plaintiffs in a wage case to recover double damages if the employer violated RCW 49.52.050.

Ebling v. Gove's Cove, Inc. 34 Wash. App. 495 (1983); *Chelan County Deputy Sheriffs' Ass'n. v. Chelan County*, 109 Wash. 2d 282 (1987).

Whether a pay dispute was bona fide, or willful misconduct, is an issue of fact for the jury. *Id.*

4. **WHETHER PRV INTENTIONALLY OR NEGLIGENTLY MISREPRESENTED FACTS ARE DISPUTED GENUINE ISSUES OF MATERIAL FACT THAT PRECLUDE SUMMARY JUDGMENT AS A MATTER OF LAW**

The law of negligent misrepresentation is as follows:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, *Micro Enhancement v. Coopers & Lybrnad*, 110 Wn App 412 (2002) restatement (Second) of Torts § 552(1) (1977); see *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 826, 959 P.2d 651 (1998). The plaintiff must prove each statement of the claim by clear,

cogent, and convincing evidence. *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 181, 876 P.2d 435 (1994).

In this case, Sweeton and Branting claim what they were originally told about their commission formula was false and deceptive. The written pay plan suddenly distributed by PRV in 2007 made that clear. The pay plan states that PRV may calculate gross profits anyway it wants at its sole discretion. PRV admitted that had always been the case it had just never been disclosed before.

5. THE BREACH OF CONTRACT CLAIMS RAISE GENUINE ISSUES OF MATERIAL FACT THAT PRECLUDE SUMMARY JUDGMENT AS A MATTER OF LAW

In this case, the parties are disputing the existence and terms of an oral agreement for the calculation and payment of commissions. This type of dispute cannot usually be resolved by summary judgment. See, e.g., *Crown Plaza Corp. v. Synapse Software Systems, Inc.*, 87 Wash. App. 495 (1997). Summary judgment is seldom appropriate when claims and issues in dispute involve states of mind, *Haubry v. Snow*, 106 Wash. App. 666

(2001), or witness credibility. *Riley v. Andres*, 107 Wash. App. 391 (2001); *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wash. 2d 874 (1967).

Sweeton and Branting testified that PRV promised to pay them "25% of gross profit" from the sale of every vehicle. PRV denies making any enforceable agreement to pay its salespeople anything. PRV claims it had the right to calculate and pay sales commissions in accordance with any formula it chose to apply at its sole discretion.

Sweeton testified that she understood the pay formula to be: "25% of gross profits." Sweeton.Depos. Pg. 28, lines 17-24. She was familiar with the terminology based on her *10 year course of dealing* with PRV. Sweeton Depos. Pg. 29, lines 1-14. Surely, this creates an issue of fact for the jury to decide at trial.

PRV also argues that Branting had no pay contract either, because, at one point in his deposition, Branting said he had no verbal agreement. But PRV omits Branting's very next comment, that his understanding of the pay plan, was based *on what he was told by PRV when he was hired*. Branting Depos., Pg. 72, Lines 21-25; pg. 73, Lines 1-4. This shows

Branting did not understand the first question as it was phrased.²⁴ Of course he thought he had a contract. Why else would he agree to perform work and make profit for PRV?

Sweeton and Branting have submitted sufficient evidence of the following facts to defeat summary judgment:

- they agreed to a specific commission formula when they started at PRV;
- they were not aware that the commission structure had changed until PRV asked them to sign a written pay plan in 2007;
- the new plan disclosed several fees, costs and charges that materially changed the their commission structure;
- they never agreed to change the terms of their original commission structure²⁵;

²⁴ Branting had the specific understanding that "gross profit meant gross sales price less actual costs minus a pack of 6% on new and 12% on used. Branting, Depos., Pg. 40, Lines 22-25; Pg. 41, Lines 1-11.

➤ they were illegally coerced into signing the 2007 Pay Plan.

6. **BRANTING AND SWEETON'S DAMAGE CLAIMS RAISE GENUINE ISSUES OF MATERIAL FACT THAT PRECLUDE SUMMARY JUDGMENT AS A MATTER OF LAW**

PRV has or should have all of the original “deal jackets” documenting all of the appellant’s sales along with cost, profit, and commission calculations. For unknown reasons, PRV has refused to provide access to the deal jackets or to provide a proper accounting. After intentionally withholding all of the deal jackets, PRV now argues their former employers cannot prove damages because they had no access to the deal jackets.

First, PRV’s refusal to permit inspection of the deal jackets, breaches its fiduciary duty to disclose all material facts and to provide an accounting. Second, Sweeton and Branting detailed some specific

²⁵ PRV’s effort to unilaterally modify the commission structure without the plaintiffs’ knowledge and consent was null and void. See, e.g., *Ebling v. Gove’s Cove*, 34 Wn. App. 495 (1983); *Warner v. Channel Chemical Co.*, 121 Wash. 237 (1922).

transactions where they were not paid correctly based on their recollection of events and limited records at their disposal.²⁶ Third, the appellants developed an alternative means to estimate damages that does not require the use of documents controlled by PRV. The methodology was explained by Sweeton and Branting in their interrogatory answers and at deposition.²⁷

As previously discussed, PRV's 2007 Pay Plan disclosed PRV's definition of "gross profit" and the various fees, charges, packs, and expenses that PRV used to reduce commission payments without their employees knowledge or consent. Sweeton and Branting can therefore estimate their damages by multiplying the fees, charges, and packs disclosed in the Pay Plan by their total number of vehicle sales. The formula may not be perfect but perfection is not required to prove damages in the special circumstances of this case.

²⁶ For example, Branting made \$18,000 gross profit on the sale of a "diesel pusher" but was only paid a \$2,000.00 commission. Branting Depos., Pg. 79, Lines 11-18

²⁷ See, Branting Depos., Pg. 52, Lines 7-25; Pg. 53, Lines 1-20 and plaintiffs' interrogatory answers attached as exhibits to Nigel Malden Declaration.

“When damages are not susceptible of exact measurement, absolute certainty is not a bar to recovery. The trier of fact must exercise a large measure of responsible discretion.” *Reynolds Metals v. Elec. Smith Constr.*, 4 Wn. App. 695, 704 (1971). If a plaintiff has produced the best evidence available and if it is sufficient to afford a reasonable basis for estimating his loss, then he cannot be denied a substantial recovery just because damages cannot be measured exactly. *Dunseath v. Hallauer*, 41 Wn. 895, 902 (1953). Once the fact and cause of damage is established, then recovery shall not be denied just because ascertaining the extent or amount of damage requires the trier of fact to make reasonable inferences. *Alpine Industries, Inc., v. Gohl*, 30 Wn. App. 750 (1981).

For all of these reasons, the Appellant’s damage claims are supported by sufficient evidence to warrant trial by jury.

7. **The Trial Court Erred by Summarily Dismissing Appellants’ Demand for an Accounting of Their Earned Sales Commissions**

As discussed above, the defendant had a fiduciary or quasi-fiduciary duty to Sweeton and Branting to properly disclose facts relating to the calculation and payment of “gross profits” and commissions. The court should not have dismissed the accounting action before hearing from a single witness at trial.

F. CONCLUSION

For all of the foregoing reasons, appellants Sweeton and Branting, ask this court to reverse the trial court’s summary dismissal of all claims and remand the case for jury trial.

DATED: This 28 day of November, 2011.



NIGEL S. MALDEN WSBA #15643

Attorney for Appellants, Sweeton and
Branting

CERTIFICATE OF SERVICE

I hereby certify that the Opening Brief of Appellants was served on this 28th day of November, 2011, on the following persons in the following way:

Stephanie R. Alexander X Regular U.S. Mail
Michael & Alexander PLLC X ABC Legal Services
701 Pike St., Ste. 1150 X FAX
Seattle, WA 98101-3946
Fax: 206-442-9699
Stephanie@michaelandalexander.com

Matthew J. Macario
Michael & Alexander PLLC
701 Pike St., Ste. 1150
Seattle, WA 98101-3946
Fax: 206-442-9699
matt@michaelandalexander.com

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

DATED: this 28th day of November, 2011



Nigel S. Malden

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